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**THE ROLE OF THE DEFENDER OF THE BOND IN THE MATRIMONIAL
PROCESSES**

BOOKLET OF THESIS

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The office of defender of the bond is particularly important in present times because of growing acceptance of easy civil divorce and remarriage as a way of life. This phenomenon has its effects on Catholics, who live in civil society, particularly when they see the Church's courts declaring the nullity of marriage at an unprecedented rate, and on grounds which, however well based on modern science, were unheard of a few years ago.

Over the years the Church has defined and modified the duties and prerogatives of the defender of the bond.

The important question will be whether the defender of the bond can still be effective in the defense of the institution and sacrament.

The first chapter

This dissertation starts with the brief historical presentation of the office of the defender of the bond and discusses the norms that are presently in force. Pope Benedict XIV within fifteen months of becoming pope set out reforms to the marriage laws of the Church which have lasted to this day. Among the reforms in his bull *Dei Misericordiae* of November 3, 1741, the first was the establishment of the office of „defender of marriages” in each diocese. The defender of the bond was to participate in all marriage trials, to defend the validity of the marriages, and to bring out everything he judged necessary to this end. Almost a hundred years later, in 1840, the Sacred Congregation of the Council spelled out in more specific terms the details of how the defender was to participate in trials. In 1883 the same congregation added more of these specifics. The Code of Canon Law of 1917 incorporated the legislation of 1741, 1840, and 1883 but amplified the powers of the defender and spelled out even more details on the manner of this participation in trials.

Popes have given guidance about the role of the defender of the bond (Pius XII, in 1944; Pope John XXIII in 1961, Paul VI in 1963, John Paul II in 1980).

The office, now known as the defender of the bond, continues in the 1983 Code of Canon Law but with some significant changes, particularly in the manner of performing the office. The *Dignitas connubii* is similar to 1983 Code of Canon Law.

That examination necessitated an analysis of the task of the promoter of justice as both offices are related.

From the comparison of the 1983 code with its predecessors, some conclusions can be drawn:

1. The diocesan bishop has been given more freedom in appointing and removing defenders of the bond.
2. The office of defender of the bond is now open to lay persons, male or female.
3. The academic qualifications required of the defender of the bond have been lowered, but at the same time are more strictly required.
4. The basic task of the defender of the bond is the same as before.
5. The general obligations and rights of the defender of the bond are same as before.
6. The procedural demands on the defender of the bond are less stringent and detailed.
7. The defender of the bond is seen as being a less active participant in the examination of parties, witnesses, and experts.
8. The right of the defender of the bond to appeal is preserved, but his obligation to appeal all first instance sentences of nullity has been removed.

I deal with the regulations of the instruction *Dignitas Connubii* (2005) issued by the Pontifical Council for Legislative Texts. DC describes the main tasks of the defender of the bond, who is an indispensable and close collaborator of the judge.

The second chapter

I deal with the Canon 1432 – A defender of the bond is to be appointed in a diocese for cases concerning the nullity of sacred ordination or the nullity or dissolution of a marriage; the defender of the bond is bound by office to propose and explain everything which reasonably can be brought forth against nullity or dissolution.

The defender of the bond is the member of an ecclesiastical matrimonial court whose duty is to uphold the validity of a disputed marriage until sufficient evidence is given to prove its nullity. If he is not satisfied with the court's ruling, he must appeal to a higher tribunal.

The 1983 code provides that „It is the task of the bishop to name the promoter of justice and defender of the bond.” (c. 1435). As the position of the defender of the bond is an „ecclesiastical office” as defined in canon 145, the appointment should be made in writing (c. 156). The

defender of the bond can be appointed for all cases or for particular cases (c.1436, §). The appointment of a defender of the bond appears to be for an indeterminate period, with the possibility of removal by the bishop „for a just reason” (c. 1436, § 2).

Like the promoter, a particular defender may be appointed either permanently or on an ad hoc basis (c. 1436, § 2), but canon 1432 indicates that there should be a defender in every diocese.

The qualifications required for a defender of the bond are significantly different in two respects in the 1983 code. The 1917 code required him to be a cleric, therefore, also male. The 1983 code states that defenders may be clerics or lay persons, and therefore male or female. The 1917 code required that a defender of the bond must have a doctorate in canon law or similar expertise (c.1589); the 1983 code prescribes a doctorate or licentiate in canon law, but does not allow for equivalent expertise (c. 1435). A good reputation, proven prudence, and zeal for justice are required now as before.

I deal with Canon 1433 – If the promoter of justice or defender of the bond was not cited in cases which require their presence, the acts are invalid unless they actually took part even if not cited or, after they have inspected the acts, at least were able to fulfill their function before the sentence.

The third chapter

The round out this study of the defender of the bond as seen in the 1917 and 1983 codes, a small and non-scientific survey of the current practice in tribunals in Australia, Canada and the United States was carried out. Through interviews with practitioners in tribunals, information was obtained for six tribunals in three countries. Considerable variety in some matters but some consistency in others were found. The results with respect to different aspects of the defender of the bond may be worth describing, under some of the headings used above. *A. Status and Qualifications* All but the smallest tribunal had more than one defender of the bond, with twelve being the highest number of the defenders in a tribunal, and a mixture of full-time and part-time defenders being used. Appointments have been made, the requirements of the 1917 code that defenders of the bond be doctors of canon law have similar expertise has been met in some cases

by a broad interpretation of „similar” expertise with more reliance being placed on experience than on academic qualifications

Although this canon indicates that the rights of the promoter and defender are somewhat akin to those of the parties, there is, of course, a difference since the parties are protecting a private interest whereas the promoter and defender are providing for the public good.”

The fourth chapter

Since unity involves the marriage of one man and one woman, marriage is monogamous. For instance, any form of polygamy is excluded from being considered as marriage, as it is devoid of the essential of unity. Polygamy has various forms: one man with several women (polygyny), one woman with several husbands (polyandry) or several men with several women (group marriages). Each of these instances would stand in direct contradiction to the will of God that marriage is monogamous.

In 1950, the divorce rate in the United States was 2.5 for every 1000 population (Kain, 1990); by 1980 the rate was at an all-time high— 5.2 percent 1000 population (Zim and Eitzen, 1999). In the 1990s, although divorces were occurring less frequently, they still remained very high. Figures currently indicate that approximately 43 percent of all first marriages in the United States end in divorce (Benokraitis, 1999).

During the last three decades of the twentieth century in the United States, more than thirty percent of children were born to single mothers; almost seventy percent of the young persons convicted of serious felonies were raised in single or non-parents homes; and over twenty percent of pregnancies ended in abortion.

Although more than 21 percent of Catholics have been divorced and another 23 percent are separated from their spouses (Kosmin and Lachman, 1993), the Church has not relented in its views on divorce.

Catholic lawyers should not contribute to the culture of divorce. The pope chose Sacred Scripture as the starting point of analysis. Matthew 19:3-9 contains a somewhat unambiguous condemnation of divorce: >>>Some Pharisees approached him and tested him saying, „Have you not read that from the beginning the Creator ’made them male and female’ and said, for this reason a man shall leave his father and mother and be joined to his wife, and the two shall

become one flesh? So they are no longer two, but one flesh. Therefore, what God has joined together, no human being must separate.” They said to him, „Then why did Moses command that the man give the woman a bill of divorce and dismiss (her)?” He said to them, „Because of the hardness of your hearts Moses allowed you to divorce your wives, but from the beginning it was not so. I say to you, whoever divorces his wife (unless the marriage is unlawful) and marries another commits adultery. << Matthew’s account of the prohibition one divorce is a doublet to a pericope that occurs in a different form and wording in Mark’s Gospel. (Mark 10: 2-12; Matthew 5: 32; Luke 6: 18; cf 1. Corinthians 7: 10-11.)”

The office of the bond postdates that of the promoter of justice, and some authors regard the defender as a species of promoter.

The fifth chapter

Every trial must be opened by the petition introducing the suit. The defender of the bond does not appear now to have any specific duties at the stage. However the higher tribunal was required to consult the defender of the bond before deciding the question of the rejection (c.1709, § 3, 1917 code). The 1983 code provides for recourse against rejection of a petition, but makes no provision for necessary consultation with the defender of the bond.

The „citation” is to be made of the defender of the bond as one of the parties. In the 1983 code, canon 1433 states that the acts of a case are invalid if the defender of the bond is not summoned. But this does not apply if although not summoned, the defender was in fact present or, having studied the acts, is able to fulfill the defender’s role at least before judgment.

In the next stage of the trial, there is no specific requirement that the defender of the bond participate, which seems reasonable, since even if the respondent agrees with the plaintiff of the proposed cause of nullity the defender is bound to contest the case. The Sacred Roman Rota is to cite the defender of the bond for the *concordatio dubii*. However, it appears to be left up to the defender of the bond to decide whether or not to attend. In the probatory stage of the trial the 1983 code differs from the 1917 code in respect to specific duties of the defender of the bond. The 1983 code states simply that the defender of the bond has the right to be present at the examination of the parties, witnesses and experts, to see the judicial acts, and to inspect documents produced by the parties (c. 1678). Not longer in the 1983 code are the requirements of

the 1917 code that the defender of the bond be present at the examination of the parties, witnesses, and experts; present to the judge the sealed interrogatories. These changes do not seem to mean that the role of the defender of the bond has been reduced significantly. The defender of the bond still is „to propose and calrify everything which can be reasonably adduced against the nullity or dissolution” (c. 1432). One also gets the impression that the defender of the bond is playing a less active role at the probatory stage of trial than did the code of 1917. But the onus is placed on the judge to deal with paries witnesses, and experts, without always „having consulted the defender of the bond.”

I dealt with the appeals. The duties of the defender of the bond with respect to appeals are changed by the 1983 code. The 1917 code required the defender of the bond to appeal to the superior court from a first sentence which declared the nullity of a marriage (c. 1986 of 1917 code). Now, in the 1983 code, the court (not the defender of the bond) of first instance has the duty of sending its affirmative judgment, with the appeals, if any, and the judicial acts to the appeal tribunal for review and either ratification or re-examination of the case (c. 1682).

The defender of the bond has the general right to be present at the examination of parties, witnesses and experts, and to see all the judicial acts and documents (c.1678). The defender of the bond has the right to be heard whether the law directs the judge to hear the parties or to decide some matter at the submission of a party (c.1434).

The sixth chapter

The defender of the bond is a necessary party in all trials or cases which deal with the nullity of ordination, or the nullity or dissolution of marriage (c.1432).

The defender of the bond’s participation is required in:

1. formal trials concerning the declaration of nullity of marriage (c.1678) or ordination (c.1432);
2. cases in which the documentary process is used to establish the nullity of marriage (c.1686);
3. process for the dispensation from a ratified and non-consummated marriage (c.1701);
4. processes leading to dissolution of the marriage bond in privilege of the faith cases (c. 1142).

The task of the defender of the bond is the same in both the 1983 and 1917 codes in the documentary process.

The 1983 code states that „The defender of the bond must always intervene in the „Ratum et non-Consummatum” Process.(c. 1701, § 1). In these processes the defender of the bond behaved in much the same fashion in each diocese as he did in the ordinary judicial process.

The role of the defender of the bond, as canon 1432 points out, is to propose and clarify everything which can be reasonably adduced against nullity or dissolution. In those cases where, in the judgment of the defender, nothing can be reasonably adduced against nullity, the defender may not speak in favor of nullity but may entrust the decision to the wisdom and justice of the tribunal.