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COMMENT

Dignitas Connubii: Greater Fairness in Declarations of Nullity?

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Shattered Faith[1] is the story of Sheila Rauch Kennedy's marriage and divorce from Congressman Joe Kennedy, a member of one of the best known families in the United States of America. Married in 1979 in a Catholic Church, Mr Kennedy was a Catholic while Mrs Kennedy remained an Episcopalian. Twin sons were born in 1980 and baptised as Catholics, with godparents from both Christian churches. The marriage began to unravel when Mr Kennedy was elected to Congress. Separation in 1989 was followed by divorce because of 'irreconcilable differences'. In 1993, Mrs Kennedy received notification from the Metropolitan Tribunal of the Archdiocese of Boston, informing her of the petition lodged by her former husband to have the marriage declared null on the grounds of lack of due discretion of judgement (though whose lack of due discretion is not made clear). Shocked, and while willing to acknowledge that the marriage had failed (evidenced in a divorce), she could not accept that it had never existed as a sacrament.

The book is her story of the annulment process as she experienced it, while also relating stories of other women who had felt betrayed because their marriages had been declared null. Acknowledging that the marriage had failed was one thing, she said, but insisting that it had never existed from the start was another. In contesting the process, she also raised a number of questions about the issue of annulment itself. After an affirmative judgment given by the Boston tribunal, Mrs Kennedy appealed directly to the Roman Rota. After some years, and for reasons that are not yet clear, they returned a negative judgment in June 2007.

The 'instruction',[2] *Dignitas Connubii*, was issued in 2005 by the Pontifical Council for the Interpretation of Legislative Texts.[3] Addressed to all tribunals

1 SR Kennedy, *Shattered Faith* (Dublin, 1997), p 11.
2 See the 1983 Code of Canon Law, Canon 34, for the definition and force of an 'instruction'.
3 The document was requested by papal mandate and prepared in collaboration with a number of Roman dicasteries, following consultation with the Conferences of Bishops, which affords it considerable weight.

handling marriage cases, it tackles a number of issues in the nullity process, and indirectly deals with some of the concerns mentioned by Mrs Kennedy in her book. This paper considers some of these issues.

THE TRIBUNAL

Having been married in, and still both resident within, the Archdiocese of Boston, the competent forum was the Archdiocesan tribunal (c 1673). Even though assured of fairness of treatment, it is clear from her narrative that Mrs Kennedy was not convinced that anyone judging the case would necessarily be unbiased because of the high profile held by Mr Kennedy and his family. She recalls her thoughts on first visiting the tribunal offices: 'I'm doomed before I start'.[4] Canon 1448 is relevant here, which says that 'a judge is not to undertake the hearing of a case in which any personal interest may be involved by reason of . . . close acquaintanceship or marked hostility, or possible financial gain'. This refers not simply to one judge but to all in the collegiate tribunal.

Dignitas Connubii, Article 67(1) rewords this to read: '*or in which any other sort of founded suspicion of favouritism could fall upon him*' [italics added]. Two notions are at play: the idea of voluntary abstention where the judge withdraws from the case of his own accord, and recusal, when an official is asked to withdraw voluntarily. Lüdicke and Jenkins note that this addition to the Canon:

> constitutes a general prohibition resting on the principle that a judge or other official who might influence the outcome of a cause should never be partial to one of the parties lest the outcome of the cause be a result of the favouritism. The official is suspect even though the personal interest is directed not at his own gain or avoidance of loss, but to the benefit of the one to whom the official is partial.[5]

Given the high public profile, and within the Catholic community, of both Mr Kennedy and his family, it could be argued that this addition to the Canon might have caused Mrs Kennedy to recuse the judge (or any other official) due to suspicion of bias, under Canon 1449. This would have helped to address the concerns that she raised above.

PROOF OF BOND

The narrative in the book relates that Fr O'Connor, the judge in the case, told Mrs Kennedy that 'an advocate who was an expert in canon law would be appointed

4 Kennedy, *Shattered Faith*, p 15.
5 K Lüdicke and RE Jenkins, *Dignitas Connubii: norms and commentary* (Washington, DC, 2005), p 130.

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to help me prepare my case'.[6] So, at the beginning of the process, Mrs Kennedy met with Fr Lory, her advocate (legal adviser). There are a number of Canons in the Code relating to this role. The advocate must be of good repute and have reached his majority (Canon 1483); a party can freely appoint an advocate herself (Canon 1481 § 1); several advocates can be appointed together (Canon 1482 § 3); an advocate can be dismissed, removed or suspended (Canons 1486 § 1, 1487, 1488, 1489); and advocates are bound to confidentiality (Canon 1455 § 3). The definition of an advocate is 'a person approved by ecclesiastical authority who safeguards the rights of a party in a canonical process by arguments regarding the law and the facts'. As Pius XII stated, the advocate's role is 'the discovery, the ascertainment, the legal affirmation of the truth of the objective fact'.[7]

Mrs Kennedy relates that, in her conversation with Fr Lory, he appeared to take as his starting point the idea that the marriage might be null because it did not last.[8] If this is the case, then this contradicts Canon 1060, which states that 'marriage enjoys the favour of law' and that validity is upheld until the contrary is proven. The fact that the marriage failed does not prove that it was never a marriage in the first place. Both Canon 1585 and Article 215 in *Dignitas Connubii* say that a person with a presumption of law in their favour (that the marriage is valid) is relieved of the burden of proof. In other words, Mr Kennedy must overthrow the presumption of validity, whereas Mrs Kennedy, who wished to maintain the validity, needed to prove nothing. Mrs Kennedy's advocate seemed to reverse this starting point.

As above, it might be argued that Mrs Kennedy's advocate was biased (albeit unconsciously) towards Mr Kennedy, and the addition to this Canon by *Dignitas Connubii* possibly provides a remedy. Further, it might be argued that Fr Lory was not as well qualified (Canon 1483) or 'truly expert' (*Dignitas Connubii*, Article 105) as he needed to be, given his ignorance of basic tenets of canon law. The narrative of Mrs Kennedy's text indicates that she was not aware that she could have freely appointed an advocate for herself (Canon 1481 § 1) or, as *Dignitas Connubii*, Article 108 makes explicit, that, having done so, she could have removed him at any time.

THE GROUNDS

'From what I'd found out so far, the American Catholic Church has interpreted "lack of due discretion" far more liberally than its counterparts in other parts of the world.'[9] Mrs Kennedy goes on to suggest that this term might applied

6 Kennedy, *Shattered Faith*, p 9.
7 Quoted in JP Beal, JA Coriden and TJ Green (eds), *New Commentary on the Code of Canon Law* (New York, NY, 2000), p 1646.
8 Kennedy, *Shattered Faith*, p 24.
9 Ibid, p 18.

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to a range of circumstances such as 'bad temper, overdependence, an inability to treat one's partner as an equal, difficulty in accepting adult responsibilities, addiction, or growing up in a dysfunctional family'.[10]

The grounds of the Kennedy petition were given as lack of due discretion of judgement at the time of the marriage. Canon 1095 § 2 says that 'those who suffer from a grave lack of discretion of judgement concerning the essential matrimonial rights and obligations to be mutually given and accepted' are incapable of contracting marriage. What constitutes 'grave lack of discretion' has been the subject of numerous articles, and of papal concern as evidenced over the years in the annual allocutions to the Roman Rota. The concern that the opinion of experts has been rooted in a false anthropology, or that the 'grave lack' has been interpreted too liberally, finds expression in *Dignitas Connubii*, Article 56 § 4, which expands the role of the Defender of the Bond to ensure that an expert is asked clear and relevant questions, that the expert is competent, and to ensure that expert opinions are based on a Christian anthropology. Does this answer Mrs Kennedy's concern?

DEFENDER OF THE BOND

In her perception of the role of the Defender of the Bond, Mrs Kennedy is clear that this person is to have certain characteristics,[11] and is appointed in the diocese to deal with cases of nullity or dissolution of marriage.[12] However, she misunderstands the role of the Defender as one who would represent her point of view.[13] Rather, that role is to 'to present and expound all that can reasonably be argued against the nullity or dissolution'.[14] To the extent that Mrs Kennedy was opposed to the nullity, we can see why the misunderstanding might arise. Nevertheless, it is the bond which is the purpose of the defence, and not the interests of a particular party. Mrs Kennedy also objected to the fact that she would be defended on paper by someone (the Defender) whom she would never be allowed to meet.[15] In response to this, it could be argued that the Code already gives assurance that the role of the Defender is taken seriously and that the Defender's rights are safeguarded, and therefore that everything would be done to protect the bond as she hoped.[16] However, the

10 Ibid, p 18.
11 See Canon 1435, which says that a Defender is to be a cleric or a person of good repute, with a qualification in canon law (doctorate or licentiate), and 'of proven prudence and zeal for justice'.
12 Canon 1432.
13 Kennedy, *Shattered Faith*, p 24.
14 Canon 1432.
15 Kennedy, *Shattered Faith*, p 121.
16 Canon 1434 says that the Defender's submission has equal weight with other submissions; assurance is given on impartiality, in that the Defender can never be the promoter of justice in the same case (Canon 1436); one with a personal interest in the case can be ruled out (Canons 1448, 1449); the Defender has the right to submit propositions upon which the party is to be questioned (Canon

fact that the pope devoted most of his 1988 address to the Roman Rota to a consideration of this particular role indicates that there is a point at issue. The address notes the tendency of reducing the Defender's role to an insignificant formality, or confusing it with other roles. The result is that 'this eliminates from the procedural dialogue the intervention of the person qualified really to investigate, propose, and clarify all that could reasonably be cited against nullity with serious damage to the impartial administration of justice'.[17] Stankiewicz is in no doubt that the formulation in *Dignitas Connubii* is to ensure that the tendencies noted by John Paul II are overcome.[18] The idea that the Defender has the obligation, rather than an option, to defend is seen by comparing the 1983 Code of Canon Law and *Dignitas Connubii*.

CODE OF CANON LAW 1983	*DIGNITAS CONNUBII*
Canon 1432: A Defender of the bond is to be appointed in the diocese for cases which deal with the nullity of ordination or the nullity or dissolution of marriage. The Defender of the Bond is bound by ofce to present and expound all that can reasonably be argued against the nullity or dissolution.	Article 56 § 1. In causes of the nullity of marriage, the presence of the Defender of the bond is always required. § 2. The Defender must participate from the beginning of the process and during its course, in accordance with the law. § 3. In every grade of trial, the Defender is bound by the obligation to propose any kind of proofs, responses and exceptions that, without prejudice to the truth of the matter, contribute to the protection of the bond.

Firstly, we can see that *Dignitas Connubii* is more forceful in its requirement that a Defender is required; appointment is not an option but a necessity. Secondly, the Defender is present throughout (something that is not made explicit in the Canon). Thirdly, the substitution of 'obligation' for 'office' appears to be influenced by the 1988 allocution, which speaks of Defenders themselves having an obligation, not an option, to carry out their specific task in a serious manner. Finally, *Dignitas Connubii* makes it clear that the Defender's task is a positive protection of the bond by proposing 'all that can reasonably be argued' (as the Canon says), elucidated in Article 56 as 'any kind of proofs, responses and exceptions'.

1533), and can ask questions through the judge (Canon 1561); the report of experts may be communicated to the Defender (Canon 1579); the Defender has the right to be present at the examination of parties (Canon 1678), and has the right to respond to every reply of the parties (Canon 1603).

17 Allocution, 1988.

18 A Stankiewicz, 'Some indications about Canon 1095 in the instruction *Dignitas Connubii*' in PM Dugan and L Navarro (eds), *Studies on the Instruction Dignitas Connubii* (Montreal, 2006), p 39.

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EXPERTS

One further concern raised by Mrs Kennedy is the Church's 'growing reliance on mental health professionals for annulment' because 'psychology and psychiatry rest on a very different premise than Catholic teachings'.[19] The Canons tell us that the services of experts are to be used whenever their opinion is required to establish some fact (Canon 1574); the judge appoints experts or receives reports from them (Canon 1575), and defines the terms of reference. The expert is to be given the acts of the case (Canon 1577), and is to complete a report and indicate how they arrived at conclusions (Canon 1578). The judge weighs the conclusions of the reports and other circumstances (Canon 1579). Parties can designate their own experts (Canon 1581), which Mrs Kennedy did.

Following Canon 1680, Article 203 in *Dignitas Connubii* makes explicit that experts are to be used in cases concerning Canon 1095. Experts are to be 'outstanding for their knowledge and experience' (Article 205 § 1) and, in relation to Canon 1095, 'special care is to be taken that experts are chosen who adhere to the principles of Christian anthropology (Article 205 § 2). This inclusion in *Dignitas Connubii* suggests that there is a desire to overcome the issue that Mrs Kennedy mentions in the quotation above.

Mrs Kennedy questioned the expertise of the expert employed by the tribunal when she found out that he was a social worker, described as a 'psychological consultant'. She says: 'professional qualifications are relevant only because the Church implies that there are psychological grounds to justify its actions and it is questionable if social workers are licensed to do professional psychological evaluations'.[20] Could Mrs Kennedy have objected formally to this expert? Canon 1576 says that experts can be excluded or objected to for the same reason as witnesses, and Canon 1555 says that witnesses can be excluded for a 'just reason'. While a party could object to a witness, it is up to the judge to decide on competence (as he has the right to appoint experts). Therefore, in this case, Mrs Kennedy was reliant on the judge choosing experts who had the necessary knowledge and experience.

CONCLUSION

Does the publication of *Dignitas Connubii* give any more confidence in the process for declarations of nullity in terms of the points raised by Sheila Rauch Kennedy? We could answer a guarded 'yes' to this. Clearly, processes involving Canon 1095 have come under some scrutiny from Rome, and there are questions raised as to whether this Canon is being used too often, too

19 Kennedy, *Shattered Faith*, p 71.
20 Ibid, p 185.

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freely and too loosely. That *Dignitas Connubii* enjoins the use of experts particularly for cases of this kind could give some assurance that there might be a stricter interpretation of 'grave lack of discretionary judgement', and answer Mrs Kennedy's concern on this point. That certain aspects of the Code have been made more explicit in *Dignitas Connubii*, such as the right to appoint or dismiss one's own advocate, gives the hope that the problems that Mrs Kennedy raised in terms of the starting point of the process have been somewhat addressed. Finally, from the Articles in *Dignitas Connubii*, we can see that the crucial role of the Defender of the Bond has been highlighted, as has the fact that any Defender is required to take his or her role very seriously indeed. *Dignitas Connubii* does not address Mrs Kennedy's concern on the whole process per se, but that is a subject for a further discussion.

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And Then There Was One: Freedom of Religion in Canada – the Incredible Shrinking Concept

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Defining religion for the purposes of constitutional or human rights protection is a challenge shared by UK and Canadian courts in this era after the enactment of the Human Rights Act 1988[1] and the Canadian Charter of Rights and Freedoms 1985,[2] respectively: neither defines what is to be protected. Canadian courts have been impressed with this task since 1982 and, unsurprisingly, the Supreme Court of Canada (SCC) has considered the content and scope of section 2(a), the fundamental right to freedom of conscience and religion, on a number of occasions,[3] most recently in *Syndicat Northcrest v Amselem*.[4] The outcome in *Amselem* is a salutary reminder that, for post-modern courts, religion can be whatever they want it to be,[5] and, indeed, be nothing in particular, which merits protection or not at the whim of these courts. In *Amselem*, a 5–4 majority

1 Human Rights Act 1998, Sch 1, incorporating European Convention on Human Rights, Article 9.
2 RSC 1985, App II, no 44.
3 *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (SCC); *R v Edwards Books & Art Ltd* (1986) 35 DLR (4th) 1 (SCC); *R v Jones* (1986) 31 DLR (4th) 569 (SCC); *Ross v New Brunswick School District No 15* (1996) 133 DLR (4th) 1 (SCC); *Trinity Western University v BCCT* (2001) 199 DLR (4th) 1 (SCC).
4 (2005) 241 DLR (4th) 1 (SCC).
5 With apologies to Lewis Carroll, *Through the Looking Glass*, ch 6.