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# THE ROLE OF THE DEFENDER OF THE MARRIAGE BOND

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THE DEFENDER OF THE MARRIAGE BOND is peculiar to canon law and is not found in other legal systems. The part and purpose of this unique canonical position can best be explained by its historical origin in ecclesiastical matrimonial procedures. Pope Benedict XIV, in 1741, insisted that every diocesan tribunal should establish the office of the Defender of the Marriage Bond.<sup>1</sup> He had been shocked to discover deplorable abuses in the Church's judicial system, whereby many marriages were being declared invalid by unlearned, careless, and even malicious judges, and through collusion at the trial by the spouses. Accordingly, the position of the Defender of the Marriage Bond was innovated in the eighteenth century to help safeguard the indissolubility of matrimony and it has, for over two hundred years, been successful in achieving this laudable goal. The present day Code of Canon Law,<sup>2</sup> particularly as exposed and implemented in 1936 by the detailed instruction *Provida Mater* of the Sacred Congregation of the Sacraments,<sup>3</sup> has retained and even strengthened the role of the Defender of the Bond.

The intervention of the Defender of the Marriage Bond is now necessary in all judicial processes, both formal<sup>4</sup> and summary,<sup>5</sup> and in the quasi-judicial procedures for non-consummation<sup>6</sup> and Petrine or Helena petitions.<sup>7</sup> His intervention, however, is not required in cases of simple lack of form<sup>8</sup> or in those invoking the Pauline Privilege.<sup>9</sup>

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<sup>1</sup> Constitution, *Dei Miseratione*, Nov. 3, 1741; I CODICIS IURIS CANONICI FONTES 695 n.341.

<sup>2</sup> Canons 1586; 1587; 1967; 1968; 1969.

<sup>3</sup> II BOUSCAREN, CANON LAW DIGEST 471-530.

<sup>4</sup> Instruction, *Provida Mater*, art. 15.

<sup>5</sup> Canon 1990.

<sup>6</sup> I BOUSCAREN, *op. cit. supra* note 3, at 769.

<sup>7</sup> II DOHENY, CANONICAL PROCEDURE IN MATRIMONIAL CASES 503 (1938).

<sup>8</sup> Instruction, *Provida Mater*, art. 231.

<sup>9</sup> Canon 1123.

The Defender of the Bond may be permanently appointed by the Bishop for all the marriage cases of the diocese, or he may be specially designated by the Bishop for an individual case.<sup>10</sup> The Defender must be a priest, not a layman. The Code of Canon Law recommends, as it does for judges and Advocates, that he possess a Doctorate of Canon Law or at least have a profound, skilled knowledge of that subject. The Code also significantly adds that he should be a prudent and just person.<sup>11</sup>

The Defender's task is to uphold the validity of the marriage that is allegedly null, and to argue for the continuing binding force of the marital bond where a dissolution is sought. He must endeavor to see to it that the substantive and procedural law regarding the sacrament and contract of matrimony is observed and that false or erroneous evidence is not submitted. Nonetheless, his defense should not be at the expense of objective truth. This was stressed by Pope Pius XII in an allocution delivered in 1944 to the Sacred Roman Rota.<sup>12</sup> The Holy Father stated on that occasion:

The Defender of the Bond must work toward the common end inasmuch as he seeks out, exposes and clarifies everything which can weigh in favor of the bond.

In order that he . . . may effectively perform his duty, the procedural order gives him particular rights and assigns him definite duties. . . . It would be inconsistent with the importance of his office and the careful and conscientious fulfillment

of his duty were he to content himself with a perfunctory review of the record and a few superficial remarks.

On the other hand, it is not to be expected that the Defender of the Bond shall elaborate and make up at all costs, an artificial defense without concern as to whether or not his statements have a serious foundation. Such a requirement would be contrary to sound reasoning; it would burden him with a useless and meaningless task; it would not clarify but rather, confuse the question; it would do harm by dragging out the trial to intolerable lengths. In the interest of truth, itself, and for the dignity of his office, therefore, it should be acknowledged as a maxim for the Defender of the Bond that, in a proper case, he has the right to declare that after a careful, thorough and conscientious examination of the record, he has found no reasonable objections to propose against the petition of the plaintiff or petitioner.

Pope Pius XII of happy memory spoke of definite *duties* and particular *rights* that are legally assigned to the Defender of the Marriage Bond. First of all, let us mention some of the major obligations that the law prescribes that he should perform, especially in *formal* cases.<sup>13</sup> First, the Defender must be present at the examination of the parties, the witnesses and the experts; he must give to the judge the closed and sealed interrogatories that are to be opened by the judge at the time of the examination and that are then to be proposed to the parties or witnesses; he must suggest to the judge new questions that may arise during the course of the examination. Secondly, the Defender must evaluate the items of testimony proposed by the parties and contradict them if necessary; in addition, he must scrutinize

<sup>10</sup> Canon 1588; Instruction, *Provida Mater*, art. 15.

<sup>11</sup> Canon 1589.

<sup>12</sup> III BOUSCAREN, *op. cit. supra* note 3, at 612-16.

<sup>13</sup> Canon 1968; Instruction, *Provida Mater*, art. 70.

the documents presented by the parties. Thirdly, the Defender must write and propose his observations against the nullity of the marriage and his proofs for its validity; he must also adduce whatever he considers useful for the defense of the marriage bond. Fourthly, the Defender must request information, if the case demands, from the Defender of the Marriage Bond in the diocese where the marriage under attack was contracted and from other possible sources.<sup>14</sup> Fifthly, the Defender must appeal within the prescribed time from the first sentence favoring nullity.<sup>15</sup>

In order that the Defender of the Marriage Bond may be able to fulfill these obligations, he also has rights.<sup>16</sup> Among these are included the following: he may inspect the acts of the process at any time and at any stage of the trial, even though they have not been published; he may request new extensions of time for the drawing up of the written documents; he may request that other witnesses be introduced or that the same ones be re-examined, even though the trial has been completed and the process published, and he may also present new observations or animadversions; he may demand that other acts which he has suggested, be drawn up, unless the tribunal refuses by unanimous vote.

The imposition of such grave obligations and the bestowal of such unusual rights upon the Defender lead to the conclusion that he is really acting as a party

in the case.<sup>17</sup> The plaintiff, or petitioner, is seeking that his marriage be annulled or that the bond of that marriage be dissolved. The Defender of the Marriage Bond officially contests the declaration of an annulment or the granting of a dissolution from the marital bond. Consequently, in a marriage case, the presence and the active participation of the Defender of the Bond is, as a general rule, always required. Together with the other participants he is to be cited to appear by the presiding judge,<sup>18</sup> although the citation does not require all the usual formalities.<sup>19</sup> The acts of a session of a court are invalid if the Defender of the Marriage Bond has not been cited and if he is not actually present for that session. However, if the Defender happens to be present, even though he is not summoned, the acts of that session are valid. If he has been duly summoned but does not appear, the acts of a session are also valid, but these acts afterwards should, nevertheless, be submitted to his scrutiny so that he may set forth any observations or proposals that he deems necessary or opportune.<sup>20</sup>

One of the important areas necessitating the Defender's presence and participation concerns his composition of interrogatories that are to be proposed to the parties and to the witnesses. Standardized questionnaires or forms, with little or no variation for individual situations, may frequently be used in the *summary* cases

<sup>14</sup> I BOUSCAREN, *op. cit. supra* note 3, at 797.

<sup>15</sup> Canon 1986.

<sup>16</sup> Canon 1969; Instruction, *Provida Mater*, art. 71.

<sup>17</sup> III CAPPELLO, *SUMMA IURIS CANONICI* 280 n.340.

<sup>18</sup> Canon 1587; Instruction, *Provida Mater*, art. 74.

<sup>19</sup> I DOHENY, *op. cit. supra* note 7, at 158 n.5.

<sup>20</sup> Canon 1587; Instruction, *Provida Mater*, art. 15.

of Canon 1990, especially when the basis of the alleged nullity is *ligamen* or bigamy, and where the evidence is largely documentary. In other cases, the preparation of the questions to be asked requires that the Defender make a thorough and conscientious study of the specific case, because each will have its own distinctive, differentiating qualities. The questions should be clear and should pertain to the issue, with special emphasis on ascertaining the real truth about the impediment or the grounds for nullity that are alleged.<sup>21</sup> Naturally, the questions are to be brief, uncomplicated, relevant, and not leading or suggestive of the answer. They should, moreover, be adapted to the intelligence and background of the person being questioned, and they should be expressed in language and terms that are easily understood.<sup>22</sup>

The questions are proposed to the parties and witnesses not by the Defender, but *only by the judge*.<sup>23</sup> The judge must not disregard the Defender's interrogatories, but, according to his discretion, he may also propose questions of his own, *ex officio*. The questions prepared by the Defender would not necessarily be expected to elicit complete and exhaustive information about all the phases of the case because the Defender is primarily interested in upholding the validity of marriage. Thus, the examining judge has the distinct obligation of preparing sets of questions that are designed to supplement those of the Defender in seeking out all the arguments to establish validity or

invalidity.<sup>24</sup>

The composition of the interrogatories is but one of the serious duties incumbent upon the Defender of the Marriage Bond. Another major obligation is his presentation to the court of his written observations or animadversions in defense of the marriage's validity and in opposition to its alleged nullity.<sup>25</sup> This presentation occurs during the discussion of the case, after all available proof has been offered and after the Advocate has submitted his brief in behalf of the petitioner's claim of invalidity. The parties or the Advocate have the right to reply to the observations of the Defender,<sup>26</sup> but the Defender may rejoin if he wishes,<sup>27</sup> especially since the law always gives him the right to be heard last.<sup>28</sup>

Neither the Code of Canon Law<sup>29</sup> nor the Instruction *Provida Mater*<sup>30</sup> specifies the form or content of the Defender's animadversions beyond rather general suggestions. For clarity and order most Defenders of the Marriage Bond emulate the outline followed in the sentences of the Sacred Roman Rota. Accordingly, there are three main sections or divisions followed by a conclusion. The first section sketches the facts, circumstances and history surrounding the marriage in question and its adjudication; the second section expounds clearly and succinctly the principles of law involved in the case; the third section demonstrates the relationship between the facts and the law that leads

<sup>21</sup> Instruction, *Provida Mater*, arts. 70, 99.

<sup>22</sup> Canon 1775; Instruction, *Provida Mater*, art. 102.

<sup>23</sup> Canon 1742; Instruction, *Provida Mater*, art. 101.

<sup>24</sup> I DOHENY, *op. cit. supra* note 7, at 150.

<sup>25</sup> Instruction, *Provida Mater*, art. 180.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Id.* art. 183.

<sup>29</sup> Canon 1968.

<sup>30</sup> Instruction, *Provida Mater*, art. 20.

to the Defender's conclusion and to his recommendation that the court should reject the decision or sentence that the nullity of the marriage has been certainly proved.

Even after the Defender has submitted his final observations in defense of the validity and the court has rendered its decision, his duties are not necessarily completed. The Defender, within the time prescribed by law, is always bound to appeal to a higher tribunal from the first sentence of a formal process declaring the invalidity of a marriage. This obligation to appeal is so binding and urgent that should the Defender neglect to lodge the appeal, he must be compelled to do so by the presiding judge.<sup>31</sup> Should the appellate court affirm the nullity of the marriage in its decision, the Defender in Second Instance must decide according to his own conscience whether or not to appeal further. If there have been two sentences upholding invalidity, and if there is no further appeal to a third tribunal by the Defender in Second Instance, the parties have the right to contract marriage ten days after the declaration of the second sentence.<sup>32</sup>

This discussion of the role and intervention of the Defender of the Marriage Bond may help us see the differences between a civil and a Church court, both

in procedure and in purpose. In a matrimonial case that is adjudicated before an ecclesiastical tribunal, the validity of a sacrament and the welfare of souls are involved. In conclusion, therefore, we should call attention to the forceful and pertinent words of Pope Pius XII at the time of his address to the Sacred Roman Rota:

The nuptial contract is by its very nature, and in the case of two baptized persons by its elevation to the dignity of a Sacrament, ordained and determined, not by the will of man, but of God. It is enough to recall the words of Christ: 'What God hath joined together, let no man put asunder' (Matt., 19:6), and the teaching of Saint Paul: 'This is a great sacrament; but I speak in Christ and in the Church' (Eph., 5:32). The profound gravity of this obligation in the service of truth in matrimonial trials, springing as it does from the supreme and imperishable source of the law of God, must always be strongly asserted and inculcated. In matrimonial cases before ecclesiastical tribunals there is never room for trickery, perjury, subornation, or fraud of any kind! Hence all persons who have any part in these trials must keep an alert conscience, and at need must awaken and revive their conscience to remember that basically these trials are conducted not before the tribunal of men but before that of the omniscient God, and that consequently the judgments rendered, if they are falsified by any fraud affecting the substance of the case, are without value before God and in the realm of conscience.<sup>33</sup>

<sup>31</sup> Canon 1879; Canon 1986; Instruction, *Provida Mater*, art. 212.

<sup>32</sup> Canon 1987; Instruction, *Provida Mater*, art. 220.

<sup>33</sup> III BOUSCAREN, *op. cit. supra* note 3, at 613-14.