

**THE USE OF EXPERTS IN THE ROMAN CATHOLIC CHURCH  
WITH PARTICULAR REFERENCE TO MARRIAGE CASES**

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## SUMMARY

The Roman Catholic Church has endured over many centuries. It is governed by a system of ecclesiastical law found in the Code of Canon Law 1983, which has antecedents in Roman law. Roman law valued the opinions of learned people to assist in decision-making. It is not surprising then, that the Church encompasses, in its framework of canon law, a reliance on the use of experts in its administrative and judicial functions. These experts are drawn from both the faithful and from professions in wider society. Collaboration with these people represents an important form of dialogue between society and the Church in its quest for specialist, informed and sound decision-making. The use of experts in the Church, however, has rarely been subjected to the scrutiny of rigorous research. This study examines the use of experts in Roman Catholic canon law in both the non-judicial (administrative) and the judicial fora.

The study identifies the relevant canons in the 1983 Code of Canon Law and other norms and reviews the areas which require consultation with experts. Part I, comprising Chapters 1 to 3, focuses on the administrative forum, in particular: art, architecture and finance; admission to and suitability for Holy Orders and Religious Institutes; and education. Although experts have many roles in these areas, sometimes consultation with them is essential for the validity of decision-making. Part II, comprising Chapters 4 to 6, deals in detail with the judicial forum. It examines the use of experts in relation to marriage nullity cases. Chapter 4 focuses on the substantive law of marriage and its treatment of experts. Chapters 5 and 6 set out an empirical study, of cases from the marriage tribunals of the Southwark Province and of Dublin, which ascertains whether or not there is compliance with canonical provisions: the former deals with what happens in practice when experts are consulted; and the latter with what happens when experts are not consulted.

The dissertation suggests not only that through the use of experts the law of the Church enables a direct dialogue with expertise outside the faithful in wider society, but that some practices concerning experts particularly in the judicial forum, in the work of the marriage tribunals studied, raise serious issues about compliance with the legal norms of the Church resulting in adverse implications for the exercise of rights of those affected by judicial decisions in the field of marriage nullity, including non-Catholics.

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## **DEDICATION**

I dedicate this work to my late, beloved husband – Denis D’Auria – who was a true educationalist; he embraced the concept of lifelong learning before ever it became common parlance. He sustained me, with his love, encouragement and support, in the early years of this study; I believe he continues to do so.

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To my family, Ronán, Déirdre, and Colum, my daughter-in-law Natalia, and my grandchildren, Enzo and Alonso I owe an incalculable debt of gratitude for their love, support, patience, and forbearance, always, but most particularly throughout the past four years.

## ABBREVIATIONS

AA	Paul VI, Decree on the Apostolate of the Laity, <i>Apostolicam Actuositatem</i> (18 November 1965)
AAS	<i>Acta Apostolica Sedis Commentarium Officiale</i> (Rome, 1909- )
ACS	Pius XI, Encyclical, <i>Ad Catholici Sacerdoti</i> (20 December 1935)
AG	Paul VI, Decree on the Missionary Activity of the Church, <i>Ad Gentes</i> (7 December 1965)
AN	Pontifical Council for Social Communications, Pastoral Instruction on Social Communications, <i>Aetatis Novae</i> (22 February 1992)
Ann	Ernest Caparros, M Thériault, J Thorn (Eds), <i>Code of Canon Law Annotated</i> (Montréal 1993)
ATF	Apostolic Letter <i>Motu Proprio, Ad Tuendam Fidem</i> (18 May 1998)
Augustine	P Charles Augustine, OSB, <i>A Commentary on the New Code of Canon Law</i> (8 Vols) (London, 1920-1924)
BCSNPF	Bishops' Conference of Scotland, <i>Norms for Priestly Formation in Scotland</i> (2005)
C (c, cc)	Canon(s)
CCC	<i>Catechism of the Catholic Church</i> (London 1994)
CCEO	<i>Code of Canons of the Eastern Churches</i> , Latin-English Edition, New English Translation (Washington, 2001)
CD	Paul VI, Decree Concerning the Pastoral Office of Bishops in the Church, <i>Christus Dominus</i> (28 October 1965)
CDVPHT	Congregation for Catholic Education, Instruction, <i>Concerning the Criteria for the Discernment of Vocations with Regard to Persons with Homosexual Tendencies in View of their Admission to the Seminary and to Holy Orders</i> (4 November 2005)
CDWDS (1997)	Congregation for Divine Worship and Discipline of the Sacraments, Circular Letter to Diocesan Bishops and other Ordinaries with Canonical Faculties to Admit to Sacred Orders, <i>On Scrutinies Regarding the Suitability of Candidates for Orders</i> , Prot No: 589/97 (28 November 1997)

<i>CI</i>	Pontifical Council for Social Communications, <i>The Church and the Internet</i> (22 February 2002)
<i>CIC</i>	Code of Canon Law (1983)
<i>CIC 1917</i>	Code of Canon Law (1917)
<i>CLD</i>	Canon Law Digest (New York, 1975- )
<i>CLSA</i>	Canon Law Society of America
<i>CLSG&amp;I</i>	The Canon Law Society of Great Britain and Ireland
<i>CNOFSMP</i>	Instruction, issued jointly by: The Congregations for: Clergy; Doctrine of the Faith; Divine Worship and Discipline of Sacraments; Bishops; Evangelisation of Peoples; Institutes of Consecrated Life; and Societies of Apostolic Life; and the Pontifical Councils for: the Laity; and the Interpretation of Legislative Texts, <i>On Certain Questions Regarding The Collaboration of the non-Ordained Faithful In the Sacred Ministry of Priest</i> , approved by the Supreme Pontiff, <i>in forma specifica</i> (15 August 1997)
<i>Comm</i>	<i>Communicationes</i> (Vatican City 1969- )
<i>CCom (CodCom)</i>	(Code Commission) Pontifical Commission for the Authentic Interpretation of the Code of Canon Law (1917 Code and 1983 Code (up to <i>Pastor Bonus</i> in 1988)
<i>CP</i>	Paul VI, Pastoral Instruction, On the Means of Social Communication, <i>Communio et Progressio</i> (23 May 1971)
<i>CT</i>	John Paul II, Apostolic Exhortation, <i>Catechesi Tradendae</i> (16 October 1979)
<i>DC</i>	Pontifical Council for Legislative Texts, Instruction, To be Observed by Diocesan and Interdiocesan Tribunals in Handling Causes of The Nullity of Marriage, <i>Dignitas Connubii</i> , (prepared by mandate of the Supreme Pontiff John Paul II with the close cooperation of the Congregation for the Doctrine of the Faith, the Congregation for Divine Worship and the Discipline of the Sacraments, the Supreme Tribunal of the Apostolic <i>Signatura</i> and the Tribunal of the Roman Rota) (25 January 2005)
<i>DSM</i>	Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association)
<i>Dugan</i>	Patricia Dugan and Luis Navarro (Eds), <i>Studies on the Instruction Dignitas Connubii; Proceedings of the Study Day Held at The</i>

*Pontifical University of the Holy Cross, Rome, January 19, 2006*  
(Montréal, 2006)

- EA* John Paul II, Post Synodal Exhortation, *Ecclesia in America* (22 January 1999)
- EC* Pontifical Council for Social Communications, *Ethics in Communications* (4 June 2000)
- ECtHR* European Court of Human Rights
- EI* Pontifical Council for Social Communications, *Ethics in Internet* (22 February 2002)
- EN* Paul VI, Apostolic Exhortation, *Evangelii Nuntiandi* (8 December 1975)
- ES* Paul VI, Apostolic Letter *Motu Proprio, Ecclesiae Sanctae* (6 August 1966)
- ExCE* Pope John Paul II, Apostolic Constitution on Catholic Universities, *Ex Corde Ecclesiae* (15 August 1990)
- Ex Comm* Ernest Caparros (General Ed)] *Exegetical Commentary on the Code of Canon Law*, English Edition (Chicago, 2004)
- GE* Paul VI, Declaration on Christian Education, *Gravissimum Educationis* (28 October 1965)
- Gen* Genesis
- GCD* Sacred Congregation for the Clergy, *The General Catechetical Directory* (11 April, 1971)
- GDC (1997)* Congregation for the Clergy, *The General Directory for Catechesis* (11 August 1997)
- GIRM* *General Instruction on the Roman Missal* (3 April 1969)
- GIRM (2002)* *General Instruction of the Roman Missal*, translated by the International Committee on English in the Liturgy (ICEL) (2002)
- GPsy* Congregation for Catholic Education, *Guidelines for the Use of Psychology in The Admission and Formation of Candidates for The Priesthood* (29 June 2008)
- GS* Paul VI, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes* (7 December 1965)

<i>GrS</i>	John Paul II, Letter to Families, <i>Gratissimam Sane</i> (2 February 1994)
<i>GTFP</i>	Congregation for Catholic Education, <i>Guide to the Training of Future Priests Concerning the Instruments of Social Communication</i> (19 March 1986)
<i>IM</i>	Paul VI, Decree on the Media of Social Communications, <i>Inter Mirifica</i> (4 December 1963)
<i>IO</i>	Sacred Congregation for Rites, Instruction On Implementing The Constitution on the Sacred Liturgy, <i>Inter Oecumenici</i> (approved in <i>forma specifica</i> by Pope Paul VI) (28 September 1964), to be observed from 7 March 1965
<i>LA</i>	Congregation for Divine Worship and the Discipline of Sacraments, Instruction, <i>Liturgicam Authenticam</i> (28 March 2001)
<i>LCS</i>	The Sacred Congregation for Catholic Education, <i>Lay Catholics in Schools: Witness to Faith</i> (15 October 1982)
<i>LG</i>	Pope Paul VI, Dogmatic Constitution on the Church, <i>Lumen Gentium</i> (21 November 1964)
<i>L&amp;S</i>	Gerard Sheehy, Ralph Brown, Donal Kelly and Aidan McGrath (Eds), <i>The Canon Law Letter and Spirit</i> (London, 1995) prepared by the Canon Law Society of Great Britain & Ireland
<i>Mark</i>	St Mark's Gospel
<i>Matthew</i>	St Matthew's Gospel
<i>MD</i>	Pius XII, Encyclical Letter, <i>Mediator Dei</i> (20 November 1947)
<i>MDGB&amp;I</i>	<i>Matrimonial Decisions</i> (Canon Law Society of Great Britain & Ireland)
<i>MM</i>	Paul VI, Apostolic Letter <i>Motu Proprio</i> , <i>Matrimonia Mixta</i> (1 October 1970)
<i>MS</i>	Sacred Congregation for Rites, Instruction, <i>Musicam Sacram</i> (5 March 1967)
<i>Nedungatt</i>	George Nedungatt (Ed), <i>A Guide to the Eastern Code</i> (Rome, 2002)
<i>New Comm</i>	John P Beal, James A Coriden, Thomas J Green (Eds), <i>New Commentary in the Code of Canon Law</i> (New York, 2000)
<i>OA</i>	Sacred Congregation for Clergy, Circular Letter on The Care of The Church's Historical and Artistic Heritage, <i>Opera Artis</i> (11 April 1971)



<i>OM</i>	Benedict XVI, Apostolic Letter <i>Motu Proprio</i> , On Several Amendments to The Code of Canon Law, <i>Omnium in Mentem</i> (26 October 2009)
<i>OT</i>	Paul VI, Decree on Priestly Formation, <i>Optatam Totius</i> (28 October 1965)
Para	Paragraph
<i>PB</i>	Paul II, Apostolic Constitution, <i>Pastor Bonus</i> (28 June 1988)
<i>Per</i>	<i>Periodica de re Morali Canonica Liturgica</i> (Rome, 1905- )
<i>PCCCAHPC</i>	Pontifical Commission for the Conservation of the Artistic and Historical Patrimony of the Church, Circular Letter, <i>Regarding The Cultural and Pastoral Training of Future Priests in Their Upcoming Responsibilities Concerning The Artistic and Historic Heritage of The Church</i> (15 October 1992)
<i>PDV</i>	John Paul II, Post-Synodical Apostolic Exhortation, To The Bishops, Clergy and Faithful, On The Formation of Priests in The Circumstances of The Present Day, <i>Pastores Dabo Vobis</i> , ((25 March 1992)
<i>PO</i>	Paul VI, Decree on the Ministry and Life of Priests, <i>Presbyterorum Ordinis</i> (7 December 1965)
<i>Pospishil</i>	Victor J Pospishil, <i>Eastern Catholic Church Law</i> , Revised and Augmented Edition (New York, 1996)
<i>PM</i>	Sacred Congregation for the Sacraments, Instruction, <i>Provida Mater Ecclesia</i> (15 August 1936)
<i>QI</i>	Congregation of Divine Worship and Discipline of Sacraments, Instruction, <i>Quam Ingens</i> (27 December 1930)
<i>QR</i>	Sacred Congregation for Religious, Instruction, <i>Quantum Religionis</i> (1 December 1931)
<i>QS</i>	Benedict XVI, Apostolic Letter <i>Motu Proprio</i> , <i>Quaerit Semper</i> (30 August 2011)
<i>RC</i>	Congregation for Religious and Secular Institutes, Instruction, <i>Renovationis Causam</i> (6 January 1969)
<i>RD</i>	John Paul II, Apostolic Letter, To Those Responsible for Communications, <i>The Rapid Development</i> (24 January 2005)

<i>RFIS</i>	Congregation for Catholic Education, Circular Letter, <i>Ratio Fundamentalis Institutionis Sacerdotalis</i> (6 January 1980)
<i>RFIS</i> (1985)	Congregation for Catholic Education, <i>Ratio Fundamentalis Institutionis Sacerdotalis</i> (19 March 1985)
<i>RI</i>	Sacred Congregation for Religious, Instruction, On the Careful Selection and Training Of Candidates For The States Of Perfection And Sacred Orders, <i>Religiosorum Institutio</i> (2 February 1961)
<i>RM</i>	John Paul II, Encyclical, On the Validity of the Church's Missionary Mandate, <i>Redemptoris Missio</i> (7 December 1990)
<i>SA</i>	<i>Suprema Sacra Congregation S Officii</i> , Instruction, <i>Sacrae Artis</i> (30 June 1952)
<i>SC</i>	Paul VI, Constitution on the Sacred Liturgy, <i>Sacrosanctum Concilium</i> (4 December 1963)
<i>SCDF</i>	Sacred Congregation for the Doctrine of the Faith
<i>SCh</i>	John Paul II, Apostolic Constitution on Ecclesiastical Universities and Faculties, <i>Sapientia Christiana</i> (29 April 1979)
<i>SCSac</i> ( <i>SCDWDS</i> )	Sacred Congregation for the (Divine Worship and) Discipline of the Sacraments
<i>SL</i>	Paul VI, Apostolic Letter <i>Motu Proprio Sacram Liturgicam</i> , (25 January 1964)
<i>SRRD</i> ( <i>RRTDecr</i> ; <i>RRDec</i> )	Decisions of the Roman Rota, (1909- )
<i>SV</i>	Pius XII, Encyclical, On Consecrated Virginitiy, <i>Sacra Virginitas</i> (25 March 1954)
<i>TCS</i>	Sacred Congregation for Catholic Education, <i>The Catholic School</i> (19 March 1977)
<i>TCSTTM</i>	Congregation for Catholic Education, For Seminaries and Educational Institutions, <i>The Catholic School on the Threshold of the Third Millennium</i> (28 December 1997)
<i>Text&amp;Comm</i>	James A Coriden, Thomas J Green and Donald E Heintschel, <i>The Code of Canon Law, A Text and Commentary</i> (New York, 1985)
<i>UR</i>	Paul VI, Decree on Ecumenism, <i>Unitatia Redintegratio</i> (21 November 1964)

*UISC* Congregation for the Doctrine of the Faith, Instruction, *On Some Aspects of the Use of the Instruments of Social Communication in Promoting the Doctrine of the Faith* (30 March 1992)

*USCCBPPF* United States Conference of Catholic Bishops, *Program of Priestly Formation* (Fifth Edition) (4 August 2006)

## INTRODUCTION

The Roman Catholic Church has endured over many centuries. It is governed by a system of ecclesiastical law found in the Code of Canon Law 1983 (*CIC*).<sup>1</sup> Canon law has antecedents in Roman law. From its origin, Roman law has always valued the opinions of learned people from various walks of life to assist in decision making and in the interpretation of norms.<sup>2</sup> It is not surprising then, that today the Church encompasses, in its framework of canon law, a reliance on the use of experts in its administrative and judicial functions. These experts are drawn from both the faithful and from professions in wider society. Collaboration with the latter, particularly, represents an important form of dialogue between society and the Church in its quest for specialist, informed and in the broadest sense scientifically-sound decision-making. The use of experts in the Church, however, has rarely been subjected to the scrutiny of rigorous research. This study examines the use of experts in Roman Catholic canon law in both the non-judicial (administrative) and the judicial fora. As canon law does not define ‘expert’, the study aims at a characterisation of the ‘expert’ appropriate to the proposed use.

The Second Vatican Council, Vatican II,<sup>3</sup> emphasized the role of the laity in the mission of the Church.<sup>4</sup> As a result, one of the main legal changes to the structure of the Church, since Vatican II, is lay participation in Church governance.<sup>5</sup> Today, whilst acknowledging all the baptized as the ‘people of God’,<sup>6</sup> *CIC* defines laity as ‘others’; that is those who are not

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<sup>1</sup> Roman Catholic canon law was first codified in 1917 (*CIC* 1917). Throughout this study the English translation of the canons of the 1983 Code of Canon Law is taken from Gerard Sheehy, Ralph Brown, Donal Kelly and Aidan McGrath (Eds), *The Canon Law Letter and Spirit* (London, 1995) (hereafter *L&S*), unless otherwise specified. Latin texts of the 1983 Code are taken from E Caparros, M Thériault, J Thorn (Eds), *Code of Canon Law Annotated* (Montreal, 1993). Translation of the canons of the Code of Canons of the Eastern Churches, is that in *Code of Canons of the Eastern Churches*, Latin-English Edition (Washington DC, 2001) (hereafter *CCEO*). Translations of canons of the 1917 Code are taken from Edward N Peters (Curator), *The 1917 Pio-Benedictine Code of Canon Law* (San Francisco, 2001) (hereafter *CIC* 1917).

<sup>2</sup> O F Robinson, *Ancient Rome* (London, 1992), pp24-25; R W Lee, *The Elements of Roman Law* (London, 1956), p441; and WW Buckland, *A Textbook of Roman Law*, Second Edition (Cambridge, 1932), pp605 and 635. For an Old Testament reference to the seeking of advice see Tobias IV: 19: Tobit says to his son, Tobias: ‘Ask advice of every wise person; never scorn any profitable advice’.

<sup>3</sup> The Second Vatican Council, or Vatican II, held between 1962 and 1965, was the twenty-first Ecumenical Council held by the Catholic Church and was the second held at St Peter’s Basilica in the Vatican. Church Councils, over the centuries, frequently took their name from the place where they were held.

<sup>4</sup> Paul VI, Dogmatic Constitution on the Church, *Lumen Gentium* (*LG*) (1964), 10. See Appendix IV.

<sup>5</sup> Prior to Vatican II, and until the revision of the 1917 Code (*CIC* 1917) culminated in the Code of Canon Law 1983 (*CIC*), the law focused on clerics and contained no definition of laity. *CIC* 1917 recognised: laity’s right to receive the sacraments and spiritual direction: the prohibition on laity to wear clerical dress; and parents’ obligation to raise and educate their children: *CIC* 1917, cc. 682; 683; and 1113. Otherwise, the law focused on associations of the faithful, rather than on laity as individuals: *CIC* 1917, cc. 684 -725; see Appendix III.

<sup>6</sup> *CIC*, c. 204§1. See Appendix I.

clerics.<sup>7</sup> Although only clerics are capable of the power of governance,<sup>8</sup> or jurisdiction,<sup>9</sup> the current law provides for the cooperation of the laity in the exercise of this power,<sup>10</sup> and allows laity to hold ecclesiastical offices,<sup>11</sup> provided certain conditions are met.<sup>12</sup> Even without holding office, ‘suitable’ lay people can be ‘experts’ or ‘advisors’. *CIC* canon 228 provides:

§1: ‘Lay people who are found to be suitable are capable of being admitted by the sacred Pastors to those ecclesiastical offices and functions which, in accordance with the provisions of law, they can discharge. §2: Lay people who are outstanding in the requisite knowledge, prudence and integrity are capable of being experts or advisors, even in councils in accordance with the law, in order to provide assistance to the Pastors of the Church’.

The Code of Canons for the Eastern Churches 1990 (*CCEO*) makes similar provisions for lay participation.<sup>13</sup> These Latin and Oriental norms increase the scope for dialogue and consultation between clergy and laity, and, indeed, between the Church and wider society.

This use of experts in the Church has not to-date been the object of a critical, extensive and systematic analysis. The seminal work by Breitenbeck (1987) compared the provisions in the first Code of Canon Law (*CIC* 1917) with those in *CIC*, rather than conducting a critical analysis of the revised canons.<sup>14</sup> This study is important, therefore, as it examines the areas in which responsibility for Church governance is now shared between clergy and lay faithful serving as experts, and in which there is consultation with experts from wider society. Canon law provides for the use of experts in both the non-judicial (administrative) and the judicial fora. Constructive dialogue, therefore, between society and the Church is crucial in decision-making. Although canon law does not define the term ‘expert’, canonists have defined it, but

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<sup>7</sup> *CIC*, c. 207§1. See Appendix I. Although this description might be considered negatively by some, it is understandable in a legal context when a group is to be divided into two sections ensuring nobody is excluded. For example, one speaks of ‘members’ and ‘non-members’ of a club or organisation.

<sup>8</sup> *CIC*, c. 274§1. See Appendix I.

<sup>9</sup> *CIC*, c. 129§1. See Appendix I.

<sup>10</sup> *CIC*, c. 129§2. See Appendix I.

<sup>11</sup> *CIC*, cc. 145; and 146. See Appendix I.

<sup>12</sup> *CIC*, c. 149§1. See Appendix I.

<sup>13</sup> *CCEO*, c. 408§1. See Appendix II.

<sup>14</sup> Marie Breitenbeck, ‘The Role of Experts in Ecclesial Decision-Making in the 1983 Code of Canon law’, *Doctoral Thesis* (Catholic University of America, 1987) (hereafter Breitenbeck, *Doctoral Thesis*). Breitenbeck addressed the question as to whether or not *CIC* extended the use of experts. She concentrated descriptively (not critically) on a textual comparison of the canons. This study seeks to analyse critically the revised canons. The other major work on experts pre-dated *CIC*. See Emmett Doyle, ‘The Consultation of Experts: An Historical Outline of the Legislation and Practice’, *Doctoral Thesis* (St Paul University, Ottawa, 1949) (hereafter Doyle, *Doctoral Thesis*).

not always in relation to the individual areas in which their use is required.<sup>15</sup> Furthermore, despite the fact that *CIC* requires the use of experts in both the administrative and judicial fora, the general norms governing experts are found in Book VII, which deals *only* with judicial procedures.<sup>16</sup> Consequently, the law requiring the use of experts in administrative areas is vague. Moreover, the majority of judicial cases heard in Roman Catholic tribunals are marriage nullity cases, which often involve people other than Roman Catholics. Therefore, this area is ideal to illustrate dialogue between society and the Church. The origin of this project was the direct observation, on the part of the researcher, of inconsistencies in practice with regard to the use of experts in matrimonial tribunals, particularly in respect of psychological incapacity cases.

Each Chapter begins by identifying the relevant canons in *CIC* which require experts, and the areas of governance to which the canons refer. Part I focuses on the administrative forum. Chapter 1 deals with: art, architecture and finance; Chapter 2, with admission to and suitability for Holy Orders and Religious Institutes and the exercise of ministry; and Chapter 3, with education (from parochial catechesis through schools to institutes of higher education). Each Chapter describes, explains and evaluates the many roles played by experts

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<sup>15</sup> Doyle, *Doctoral Thesis*, p1-2: '[An expert is] one who is experienced, or taught by use or practices; a skilful or practised person. It signifies knowledge obtained by experience together with prudent judgment, rather than great learning. At the same time, the word denotes a person who, possessing such knowledge and experience, is sought by others for consultation. The statement that an expert is a man of experience rather than of learning is of prime importance, for not all persons with exceptional learning are included when we speak of the consultation of experts'. At p3: 'In a limited, more modern sense, the word expert means a scientific or professional witness who gives evidence on matters connected with his profession'. Breitenbeck, *Doctoral Thesis*, p295: 'Experts in official documents are presented as persons with a specialized skill or art, whose services are sought in the course of a particular decision-making process'. Breitenbeck, at p7, cites Francis Wanenmacher, *Canonical Evidence in Marriage Cases* (Philadelphia, 1935), pp172-173: '[E]xperts in the grammatical sense are persons of special training, experience and ability in some craft or science. In the canonical and probatory sense they are persons thus endowed, acting in the capacity of witnesses who testify to the existence of a fact. ... Experts testify to facts that escape the notice of those not equipped by special training.... [E]xperts render weighty opinion according to their special science and craft, derived from the special facts observed. Thus the expert's office is somewhat analogous to that of a judge in so far as he forms and expresses his judgment or conclusions on the nature, concomitants, causes or effect of that to which his examination has made him a witness'. Kenneth Boccafola, in *Ex Comm*, p1328: 'An expert is one whose knowledge and experience make him an authoritative specialist in some art or science'. William J Doheny, *Canonical Procedure in Matrimonial Cases*, Vol I, Formal Judicial Procedure, Second Edition, Revised and Enlarged (Milwaukee, 1948), pp382-383: 'An expert is one whose knowledge and experience make him an authoritative specialist in some art or science'. Augustine, Vol VII, p241: '[E]xperts, or specialists, [are] persons learned or skilled in their own science or profession'. Joaquín Calvo, *Ann*, p977: '[An expert is] one whose knowledge, experience, or art, makes him an authoritative specialist in a particular field. This specialty should relate to particular facts, the perception, interpretation and assessment of which require a particular skill permitting assimilation of the facts, their causes and their effect, their relationship to other facts relevant to the case, and their influence on one another'.

<sup>16</sup> *CIC*, cc. 1574-1581. See Appendix I.

in administrative areas and in relation to a wide range of decision-making (e.g., from advising on the value of precious images, through fitness of candidates for ordination, to advice about training teachers). However, in some administrative areas, the use of experts is essential to the *validity* of decision making, which has an ethical dimension.<sup>17</sup> Therefore, this study concerns areas fundamental to the life of the Church and the administration of its canon law. The research question addressed in Part I is: Do the norms governing experts in the administrative forum: mandate the use of experts in each area; clarify the disciplines from which experts are to be drawn; describe the qualifications required of experts and their functions; and state whether or not failure to consult them results in invalidity of subsequent decisions?

Part II deals in more detail with the use of experts in relation to marriage nullity cases heard in the matrimonial tribunals of the Church, particularly with regard to psychological capacity. Chapter 4 examines the substantive law of marriage and its treatment of experts, with particular reference to psychological incapacity cases. Whilst the intention is not to suggest that the substantive decisions reached on nullity are incorrect, Chapters 5 and 6 comprise an empirical study of anonymized cases heard in the First Instance tribunals of the Roman Catholic province of Southwark in 2009.<sup>18</sup> Chapter 5 studies Southwark cases in which experts were consulted and these are compared with cases heard at the First Instance Regional Tribunal of Dublin in the same year. A comparison is then made between the practice of these lower tribunals and that of the superior Papal Tribunals in Rome. Chapter 6 analyses cases from the province of Southwark in which expert opinion was not sought and seeks to identify the problems which arise as a result of this failure to consult experts. The purpose of Part II is to establish whether or not these lower tribunals comply with the norms of canon law on the use of experts in psychological incapacity cases, and the possible effect of non-compliance on the rights of the parties involved (which may include non-Catholics). In short, therefore, the research question addressed in Part II is: Do lower tribunals in practice comply with the norms of canon law on the use of experts in psychological incapacity cases, and what effect does failure to comply with these norms affect the rights of the parties

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<sup>17</sup> William L Daniel, 'The Ethical Dimension of the Role of the Ecclesiastical Judge in the Rotal Allocutions of John Paul II', *Studia Canonica*, 40 (2006), pp71-93.

<sup>18</sup> 2009 was the most recent year in which almost all cases which had been submitted to Second Instance were completed.

involved? Approval for this empirical study was granted by the Ethics Committee of Cardiff University on 12 February 2013.

The majority of canon-law practitioners in the United Kingdom are not Latin scholars. Therefore, they rely on English Language material including translations of the decisions of the Papal Tribunals, which are sometimes anonymised and published in Latin. This study is, therefore, limited to an analysis of English language materials, such as the Catechism of the Catholic Church (*CCC*), *CIC*, Vatican documents (including Papal Allocutions, Apostolic Constitutions, and Encyclicals) and the writings of canonists. Differences in interpretation will be highlighted. Comparisons will be made with the use of experts in the 1917 Code of Canon Law (*CIC 1917*) and *CCEO*. Some suggestions for reform, both of law and of practice, will also be made. In short, in terms of methodology, the research questions are answered by reference to a wide range of both primary and secondary documentary sources and, for the empirical work in Part II, through the examination of case files of the marriage nullity cases submitted to the tribunals studied.



## **PART I**

### **THE USE OF EXPERTS IN THE ADMINISTRATIVE FORUM**

## CHAPTER 1

### THE USE OF EXPERTS IN ART, ARCHITECTURE AND FINANCE

Temporal goods are an important part of the patrimony of the Roman Catholic Church. As such, the Church has a considerable body of norms on temporal goods: their acquisition, administration, maintenance, and disposal. These goods must be held for prescribed purposes, and contracts entered into with respect to them must be valid at civil law.<sup>1</sup> The Church has specific norms, integral to its approach to temporal goods, which govern: the restoration of sacred images;<sup>2</sup> the building and restoration of churches;<sup>3</sup> financial administration;<sup>4</sup> and the alienation of property.<sup>5</sup> The Church uses experts extensively in fields related to these matters as part of its processes of decision-making in these areas. What follows addresses eight basic issues, namely: (1) whether the use of experts is mandatory; (2) the appointment of experts (and whether the experts are appointed from the faithful or from outside the Church; (3) the professional disciplines from which they are drawn and their qualifications; (4) their functions; (5) whether or not experts must be consulted individually or collectively; (6) whether non-compliance with the requirement to consult experts affects the validity of the relevant decision; (7) the weight and effect of the expert opinion or advice; and (8) whether the decision-maker is bound by expert opinion. This Chapter describes, explains, and evaluates norms (in terms of their comprehensiveness, consistency, and clarity) in relation to each area. It also compares these norms with those found in *CIC* 1917 and *CCEO*, and it proposes how the norms of the Latin Church may be improved. The regulatory instruments examined include *CIC* and papal documents; the works of commentators will also be examined.

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<sup>1</sup> *CIC*, cc. 22; 1254§§1, 2; and 1290. See Appendix I.

<sup>2</sup> See *CCC*, p266, para 1160 for the role of iconography and sacred images in the Church. See Appendix IV.

<sup>3</sup> Churches are used for worship: See Appendix IV: *CCC*, p456, para 2096.

<sup>4</sup> *CIC*, cc. 492-494. See Appendix I.

<sup>5</sup> Francis G Morrisey, 'The Alienation of Temporal Goods in Contemporary Practice', *Studia Canonica*, 29 (1995), pp293-316 (hereafter Morrisey, 'The Alienation of Temporal Goods'), p294, explains that strictly 'alienation' means 'conveyance' or 'transfer of ownership', but any transaction by which the 'patrimonial condition of the juridical person could be jeopardized' suffices for the provisions to apply. See also *Augustine*, Vol VI, pp592-593, Robert T Kennedy, *New Comm*, p1500 and Velasio De Paolis, 'Temporal Goods of the Church in the New Code with Particular Reference to Institutes of Consecrated Life', *The Jurist*, 44 (1984), pp343-360.

## 1. THE RESTORATION OF SACRED IMAGES

The Church considers the use of sacred images important because their veneration assists in worship.<sup>6</sup> The Church's Constitution on Sacred Liturgy, *Sacrosanctum Concilium (SC)* also ensures that images, over which it claims authority, comply with doctrine and tradition.<sup>7</sup>

Their restoration is also regulated. *CIC* canon 1189 provides:

‘The written permission of the Ordinary is required to restore precious images needing repair: that is, those distinguished by reason of age, art or cult, which are exposed in churches and oratories to the veneration of the faithful. Before giving such permission, the Ordinary is to seek the advice of experts’.<sup>8</sup>

The canon is clear on three requirements before restoration: written permission of the Ordinary is mandatory;<sup>9</sup> consultation with more than one expert is mandatory; and it is the Ordinary who is obliged to see the advice of the experts - there is no provision for delegation of this function by the Ordinary. The protection afforded by this canon is limited to images falling within a conjunctive, rather than disjunctive, list. They must be: ‘precious’;<sup>10</sup> distinguished by reason of their age, art or cult;<sup>11</sup> exposed for veneration in churches and oratories;<sup>12</sup> *and* in need of repair. However, the canon does not: define ‘experts’; specify whether they must be appointed from amongst the faithful; nor indicate the person responsible for determining when repair is needed (though it must be presumed that this would be the Ordinary or administrator of the goods in question).<sup>13</sup> Moreover, the canon is unclear as to: the experts’ professional disciplines, qualifications and functions; whether they

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<sup>6</sup> CCC, p266, pars 1161 and 1162. See also pp218-219, pars. 956- 958. See Appendix IV.

<sup>7</sup> SC, 122. See Appendix VI.

<sup>8</sup> The placing of this canon in Book IV on The Sanctifying Office of the Church (rather than in Book V on The Temporal Goods), reflects the role of sacred images in divine worship. All Christians are called to holiness: See Appendix VI: *LG*, 40.

<sup>9</sup> *CIC*, c. 134§1 defines the term ‘Ordinary’. See Appendix I.

<sup>10</sup> William Doheny, *Practical Problems in Church Finance* (Milwaukee, 1941), p23; describes ‘precious’ *objects* as those having ‘notable value because of artistic or historical reason, or by reason of the inherent material of which they are made’, whereas he defines ‘sacred’ *objects* as ‘those (ecclesiastical) goods ... which have been destined for divine worship by consecration or blessing’.

<sup>11</sup> This c. 1189 is also translated in *Text&Comm* using the word ‘cult’, but the more recent *New Comm* uses the word ‘veneration’. Latin: ‘*Imagines pretiosae, idest vetustate, arte, aut cultu praestantes, ...*’. In respect of canon 1186, in which the Latin text refers to ‘*cultum aliorum Sanctorum*’, *Text&Comm*, p841 uses ‘devotion’ to the other saints, and the later *New Comm*, p1413 uses ‘veneration’. Therefore, a ‘cult’ is an approved form of devotion or veneration, through which one is drawn to the adoration of God. CCC, p533, para 2502. See Appendix IV.

<sup>12</sup> Other precious images, such as those stored out of sight or exposed in, for example, presbyteries are protected by *CIC*, cc. 1283 and 1284, which do not specifically mandate the use of experts. See Appendix I.

<sup>13</sup> The Ordinary has the duty of care, but this can be delegated to the administrator: *CIC*, cc. 1276§1 and 1278. See Appendix I.

are to be consulted individually or collectively; and whether consultation with them goes to validity of the Ordinary's written permission. To address these issues, and the extent of the Ordinary's discretion in exercising these functions, it is necessary to resort to other canons and norms.

**Disciplines, Qualifications and Functions of Experts:** Instruments outside the Code shed only some light on these matters, but in varying degrees of detail. A pre-Vatican II Encyclical Letter (1947) referred to an advisory diocesan committee for sacred music and art - but it did not elaborate on the specific qualifications of its members.<sup>14</sup> However, a later instrument, an Instruction (1952),<sup>15</sup> provided that committee members be 'not only competent in the field of art' but also 'firm in their allegiance to the faith, brought up in piety and ready to follow the definite norms' – yet it too did not specify the members' qualifications or expertise. Indeed, there was no need for experts – when experts were lacking, consultation with the Metropolitan Commission or the Roman Commission on Sacred Art was required.<sup>16</sup> Nevertheless, these instruments implied that the experts would be from within the Church.

Failure to detail these requirements continued in several Vatican II and post-Vatican II documents. One of the aims of the Vatican II Constitution *Sacrosanctum Concilium* (1963) was to increase awareness and knowledge of 'the ministry of art' in the life of the Church; it articulates the Church's right to make judgments regarding works of art, recognises the role of 'religious' and 'sacred' art in divine worship,<sup>17</sup> and encourages their exposure for the purposes of veneration.<sup>18</sup> Moreover, the Constitution charges Ordinaries with their care and with the care and training of the artists themselves, permits certain adaptations to local needs and customs, and provides for teaching about art during priestly formation (itself implying expertise on the part of those responsible for formation).<sup>19</sup> Making provision for *liturgical* renewal, although stating that other commissions are *desirable*, the Constitution *mandates* the establishment of at least one diocesan commission on sacred liturgy, even if this is done in

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<sup>14</sup> *MD*, 109. See Appendix VI.

<sup>15</sup> *CIC*, c. 34§1. See Appendix I.

<sup>16</sup> Marie Breitenbeck, *Doctoral Thesis*, p137, citing *SA*, AAS 44 (1952), translation *CLD* 3: 511.

<sup>17</sup> *SC*, 122. See Appendix VI.

<sup>18</sup> *SC*, 125 and *CIC*, c. 1188. See Appendix VI and Appendix I.

<sup>19</sup> *SC*, 126-129 and *CIC*, c. 1188. See Appendix VI and Appendix 1. The importance of priestly training in religious art was reiterated later in *PCCCAHPC*.

collaboration with other dioceses.<sup>20</sup> However, for any judgment on works of art, it foresaw not only a diocesan commission for sacred art, perhaps fused with that on sacred liturgy,<sup>21</sup> but also the possibility of consulting ‘others who are especially expert’ and the commissions – this left room for wider consultation with experts beyond the Church, but it did not define their disciplines or qualifications.<sup>22</sup> Further, an Instruction, *Inter Oecumenici* (1964) to implement the Constitution, made provision for ‘experts, including the laity’, in ‘Scripture, liturgy, the biblical languages, Latin, the vernacular, and music’, to assist bishops in the absence of a liturgical commission.<sup>23</sup> This too may imply consultation with experts who are drawn from persons outside the Church. In turn, the Instruction *Musicam Sacram* (1967) provides that the diocesan commission on sacred music, which it commends rather than mandates,<sup>24</sup> might consist of experts in music and liturgy; but, once more, this instrument does not specify what the experts’ qualifications should be (though it does spell out in detail their roles).<sup>25</sup>

A Circular Letter, *Opera Artis* (1971), sought to tighten the provisions for the protection of sacred art by further addressing the work of the diocesan commissions on art and liturgy. Using the strong wording of *CIC* 1917,<sup>26</sup> the Circular Letter reveals concern both about damage to valuable works of art and disregard for legislation. It: requires the *approval* of the

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<sup>20</sup> *SC*, 44 - 45. In *SL (motu proprio*, indicating a juridical text) no II, Paul VI, acknowledging that some provisions of *SC* needed more time before implementation, decreed that this provision was to be implemented as of 16 February 1964. As this provision is not contrary to the provisions of *CIC*, it remains in force; *CIC*, c. 6§1. See Appendix I and Appendix VI.

<sup>21</sup> *SC*, 46; *SL* II. This clarifies that the aim was to promote close collaboration between the commissions, if they were not fused. See Appendix VI.

<sup>22</sup> *SC*, 126. See Appendix VI.

<sup>23</sup> *IO*, 40 (b). See Appendix VI. This Instruction was approved in *forma specifica*. A document approved ‘in common’ by the Pope remains one of the dicastery which issued it. The *Regolamento Generale della Curia Romana* clarified, in 1999, that unless the phrase ‘*in forma specifica approbavit*’ is included at the end of the document, papal approval has been ‘in common’. Therefore, if it contains this phrase, the document is in effect, a papal document. Moreover, according to John M Huels, ‘Assessing the Weight of Documents on the Liturgy’ *Worship* (2000), pp117-135 (hereafter Huels, ‘Assessing the Weight of Documents’), at p124, the words ‘*in forma specifica approbavit*’ change the value of the document ‘from an act of executive power to one of papal, legislative power. This means that the norms in that curial document have the same force as other universal laws’.

<sup>24</sup> Although possibly fused with the liturgical commission.

<sup>25</sup> *MS*, 54; 61; and 68. See Appendix VI.

<sup>26</sup> See *CIC* 1917, c. 1280 for the equivalent canon. See Appendix III. It was placed in Book III, on ‘Things’ and stated: ‘precious images ... shall never be restored’ without the written consent from the Ordinary, having consulted ‘wise and expert men’. Doyle, *Doctoral Thesis*, at p304 explains that *CIC* 1917 contained the first law governing the use of experts in the restoration of sacred images. *Augustine*, Vol VI, p243, considered the law long overdue as ‘ecclesiastical dignitaries often “restored” fine Romanesque churches of Gothic or Moorish architecture and converted them into whitewashed Barocco edifices. We may also be permitted to add that some modern statues savor very much of the “salon”. Take, for example, a good many representations of St Francis of Assisi and St Antony, which are anything but dignified in their fancy costumes’.

relevant commission for alterations to images; requires expert involvement in compiling itemized inventories of objects of artistic and historical importance, including their individual value; and urges regulation by Bishops' Conferences, in accord with civil law.<sup>27</sup> Although the obligation to compile the inventories lies with the rectors of churches or other places, the assistance of experts (perhaps also experts in civil law) in assessing the historical and monetary value of art is implied. Here too, the inference is that experts from outside the Church might be required. Later documents referred increasingly to training, qualifications and expertise, but do not provide any detail;<sup>28</sup> one refers to the Church's responsibility for training the experts.<sup>29</sup>

The commentators differ as to who the experts to be consulted before restoration might be: some consider that members of the diocesan commissions are the experts; others consider that the Ordinary has discretion to consult beyond the diocesan commissions. On the one hand, Breitenbeck acknowledges that when the law requires the utilization of 'experts' it envisions people 'skilled and knowledgeable in a particular area' but 'all too frequently' a limited interpretation is applied requiring only 'a person trained'.<sup>30</sup> She also concedes that the establishment of a diocesan commission *on sacred art* is not mandatory, but must be consulted if it exists; she understands that the mandatory *diocesan* commission *is* the group of experts consulted before restoration.<sup>31</sup> Thomas appears to agree, holding that the experts 'be a commission or standing committee'.<sup>32</sup> On the other hand, for Huels, the experts *include* the

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<sup>27</sup> *OA*, 2-7. *PCCCAHPC*, 1; 2; 5; 6; and 12 refer again to this 'ministry of art' and to the urgency in addressing ongoing concerns, albeit for other objects also. See Appendix VI. Although not a legislative document, *OA* is a document of a Roman curial dicastery and makes several references to the provisions of legislative documents and urges compliance. *CIC*, c. 477 defines the Bishops' Conference. See Appendix I.

<sup>28</sup> Breitenbeck, *Doctoral Thesis*, p184, citing SCDWDS, Letter, *Durante los meses* (8 November 1972), stated that the experts were to be trained and dedicated and be people on whom the bishops can rely. See also *LA*, 79 (d) (ii) in Appendix VI. Sacred Congregation for the Causes of Saints, *New Laws for the Causes of Saints, Norms to be observed in inquiries made by bishops in the Causes of Saints and General Decree on the Causes of the Servants of God whose judgment is presently pending at the Sacred Congregation* (7 February 1983), provided that the Postulator, who handles the case for the petitioner, 'must be expert in theological, canonical and historical matters as well as versed in the practice of the Sacred Congregation'.

<sup>29</sup> The Pontifical Commission for the Cultural Heritage of the Church, Circular Letter, *The Pastoral Function of Ecclesiastical Museum* (15 August 2001) speaks of establishing committees and appointing personnel to be assisted by experts and having well-trained guides. Moreover, it speaks of establishing 'specialized study centres in order to train experts in the areas of the cultural heritage of the Church' on 'a professional level'.

<sup>30</sup> Marie Breitenbeck, 'The Requirements for Experts in Church Law', *The Jurist*, 50 (1990), pp257-288, (hereafter Breitenbeck, *Jurist*), at p257.

<sup>31</sup> Breitenbeck, *Jurist*, p265, citing Julio Manzanares, Lamberto de Echeverría, (Eds), *Codico de Derecho Canónico, Edición Bilingüe Comentada*, Fourth Edition (Madrid, 1984), p576 and Royce Thomas, *Text&Comm*, p841. This could also be inferred from *PCCCAHPC*, 28, but this document concerned the *education* of future priests.

<sup>32</sup> Royce R Thomas, *Text&Comm*, p841, citing *SC*, 126.

commissions,<sup>33</sup> but he acknowledges the possibility of consulting additional experts beyond the commissions.<sup>34</sup> This understanding, that the commissions feature ‘among the experts’, is shared by de Agar.<sup>35</sup> McLean too acknowledges the need to consult the commission, but experts must come from ‘the sphere involved’; even when images do not conform to the canon’s conjunctive list, the Ordinary is still obliged to receive expert advice.<sup>36</sup> Huels, de Agar and McLean, therefore, reflect the Constitution *Sacrosanctum Concilium*, which makes no mention of either the diocesan or inter-diocesan commissions being *comprised* of experts; only that the *interdiocesan* commission be *assisted* by experts.<sup>37</sup> Given this provision one can argue *mutatis mutandis* that expert *assistance* is also envisaged for *diocesan* commissions.<sup>38</sup> Read suggests that if the required professional expertise is obvious, there is no need to legislate.<sup>39</sup>

As the foregoing discussion indicates, there are no norms in these instruments outside the Code dealing specifically and in any detail with the functions of the experts involved in the restoration of precious images. Indeed, as we have seen in the Introduction, all the norms in the Code explicitly governing experts are placed in Book VII on Judicial Process. Therefore, as to the experts’ functions with regard to the restoration of precious images, recourse must be had to *CIC* canon 1577 obliging the decision-maker to specify the issues to be addressed.<sup>40</sup> Importantly, Breitenbeck sees the law’s silence on professional qualifications as freeing the local Ordinary ‘to select whomever he envisions as the most appropriate expert’.<sup>41</sup>

In sum, whilst it is clear that competence in the relevant field is required, in the absence of any strict legal provisions about qualifications, experts to be consulted before restoration of precious images might include canon lawyers and, drawn either from the faithful or from the relevant professions in wider society, or both: civil lawyers; people familiar with the process of restoration; those familiar with the historical, artistic, cultural or monetary value of sacred

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<sup>33</sup> Implying that experts serve on them, rather than assist them.

<sup>34</sup> John Huels, *New Comm*, p1415, citing *OA*.

<sup>35</sup> José Tomás Martín de Agar, *Ann*, p743.

<sup>36</sup> Brian McLean, *L&S*, p675, ft 3, citing *SC*, 126 and *OA*.

<sup>37</sup> *SC*, 22.2. See Appendix VI.

<sup>38</sup> *PCCCAHPC*, 27 and 28. See Appendix VI.

<sup>39</sup> Gordon Read, *L&S*, p268, citing *Comm*, 14 (1982), p214 at Can 401: ‘[T]he Revision Commission took it for granted that [the diocesan chancellor] would be given a professional archivist to help him look after the historical material, and so thought it unnecessary to write this into the text’.

<sup>40</sup> *CIC*, c. 1577§1. See Appendix I.

<sup>41</sup> Breitenbeck, *Jurist*, p265.

images; and insurance personnel. Whilst no specific provision is made for the temporary transfer of precious images such as might occur during the process of restoration, experts in the removal and carriage of valuable art might also feature amongst those required.<sup>42</sup> The lack of detailed regulation on these matters suggests that the Ordinary enjoys a wide degree of discretion in determining the disciplines, qualifications and functions of experts in this field.

**Consultation - Individual or Collective:** Like *CIC* canon 1189, instruments outside the Code and the commentators are silent as to whether experts are to be consulted individually or collectively. If appropriate experts serve on diocesan commissions they may be consulted collectively, whereas if outside experts are consulted they may be consulted individually. It appears, therefore, by way of analogy with the use of experts in the judicial forum, that *CIC* canon 1578§1 applies, which means that the Ordinary has discretion in this matter.<sup>43</sup>

**Failure to Consult and Weight of the Expert Advice:** When the Ordinary gives written permission to restore goods, this constitutes a juridical act.<sup>44</sup> Although canon 1189 is silent on the effect of failure to seek expert advice (prior to giving permission), as well as on the weight to be given by the Ordinary to that advice, nevertheless, because under the canon the Ordinary is obliged to consult experts, *CIC* canon 127 applies; this provides:

‘§1: When the law prescribes that, in order, to perform a juridical act, a Superior requires the consent or the advice of some college or group of persons, the college or group must be convened in accordance with Can. 166, unless, if there is question of seeking advice only, particular or proper law provides otherwise. For the validity of the act, it is required that the consent be obtained of an absolute majority of those present, or that the advice of all be sought’.<sup>45</sup>

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<sup>42</sup> The Holy See’s permission is required for their *permanent* transfer or alienation, but this does not involve experts; *CIC*, c. 1190§§2 and 3. See Appendix I. Commenting on *CIC* 1917, Augustine maintained that the *temporary* transfer of relics or images for repairs or other reason was permissible without recourse to the Holy See, provided they were replaced. See *Augustine*, Vol. VI, p245.

<sup>43</sup> *CIC*, c. 1578§1. See Appendix I.

<sup>44</sup> Aidan McGrath, *L&S*, at p72 defines a juridical act as ‘an externally manifested act of the will by which a certain juridical effect is intended’, citing Robleda ‘*De conceptu actus iuridici*’: *Per* 51 (1962), p419. McGrath holds that the ‘defining feature’ of a juridical act is ‘its voluntary nature: it is a deliberate action by a subject; the object of the action is intended by the subject; moreover, the intention is in some way externally manifested: otherwise the act will remain purely internal, with no consequences for the social relationships between members of the Church’.

<sup>45</sup> *CIC*, c. 166§§1, 2 and 3. See Appendix I.



Moreover:

‘§2: When the law prescribes that, in order to perform a judicial act, a Superior requires the consent or advice of certain persons as individuals: 1° if consent is required, the Superior’s act is invalid if the Superior does not seek the consent of those persons, or acts against the vote of all or any of them; 2° if advice is required, the Superior’s act is invalid if the Superior does not hear those persons. The Superior is not in any way bound to accept their vote, even it (*sic*) if it is unanimous, nevertheless, without what is, in his or her judgement, an overriding reason, the Superior is not to act against their vote, especially if it is a unanimous one’.

*CIC* canon 1189 *explicitly* requires that expert *advice* be *sought* (not that expert consent is obtained). However, it does not state *explicitly* that failure to consult invalidates; also, the law enshrines a principle that only those laws which *expressly* state they are invalidating are to be considered so.<sup>46</sup> However, canon 127 *explicitly* states that consultation is required *for validity*; as such, it *expressly* states that failure to seek advice invalidates.<sup>47</sup> Therefore, in applying canon 127, if the Ordinary fails to consult experts, his decision to permit restoration is invalid. Moreover, if the Ordinary proposes to consult experts collectively (rather than individually) he must convene them as a group, unless particular or proper law provides otherwise. In short, although canon 1189 is silent as to whether or not, in the absence of particular or proper law, the mandatory requirement to convene the experts affects validity, it is clear that the advice of all of the experts whether consulted individually or collectively must be sought for validity of the subsequent written permission for restoration.

Contrary to the text of canon 1189, remarkably, Huels suggests that consultation by the Ordinary is not required – rather, *reports* of consultations with, or the recommendations of, experts suffice.<sup>48</sup> This interpretation removes personal responsibility from the Ordinary, whose permission is required and who is obliged by the canon to consult. Huels’ interpretation might be justified if the canon were silent or ambiguous on the matter, and

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<sup>46</sup> *CIC*, c. 10. See Appendix I.

<sup>47</sup> Augustine Mendonça, *L&S*, p9, para 29: ‘The term *expressly* is a specifically canonical one and must be understood as such. If a matter is stated *explicitly*, then it is manifestly stated in an “express” manner: Can. 126 is a clear example among many in the Code. Equally “express”, however, is a matter which is stated *implicitly*, as is exemplified in the following Can 127: it is explicitly stated that “for the validity of the act, it is required that the consent be obtained of an absolute majority of those present ...” thereby stating that without such a majority the act would be invalid’. See also Michael Carragher, ‘Invalidating Laws: *expresse vel aequivallenter*’, *A.A.VV., Iuri canonico quo sit Christi Ecclesia felix (Bibliotheca Salmanticensis, Publicationes Universidad Pontificia de Salamanca, 2002)*, pp171-216 (hereafter Carragher, ‘Invalidating Laws’), at p216; he warns that ‘it is perilous to read the canons in isolation from one another’. At p173, warning that ‘canon 10 is deceptively simple in its declaration regarding the identification of invalidating laws’, he says that sometimes one has to look elsewhere for the invalidating clause.

<sup>48</sup> Huels, *New Comm*, p1414-1415.

recourse to ‘parallel places’<sup>49</sup> led to provisions in the judicial forum permitting the judge to accept expert reports already made.<sup>50</sup>

Nevertheless, Huels later acknowledges that amongst categories of constitutional law, which cannot be dispensed, are those requiring prior consultation or permission before action.<sup>51</sup>

Carragher, on canon 1189, acknowledges that the Ordinary’s written permission is required before restoration but avoids addressing the effect of non-compliance with the requirement to consult: ‘[V]alidity is inappropriate here but not common sense’, suggesting that the Ordinary should ‘call upon greater resources of expertise and experience to advise on such work’; however, when discussing canon 127 he acknowledges that failure to consult invalidates the subsequent action.<sup>52</sup> This is relevant, particularly if the goods form part of the stable patrimony<sup>53</sup> of the diocese or juridical person - because the canons on alienation also apply when their value *could* be affected, for example, if they were to be damaged in the process of restoration.<sup>54</sup>

Canon 127 provides that when *advice* is required, the Superior (including the Ordinary) is not bound by it, but must nevertheless have an ‘overriding reason’ for rejecting it. Breitenbeck, acknowledges that under *CIC* 1917 there were those who held that expert advice should be

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<sup>49</sup> *CIC*, c. 17. See Appendix I.

<sup>50</sup> *CIC*, c. 1575. See Appendix I.

<sup>51</sup> This is based on *CIC*, c. 86. See Appendix I. John M Huels, ‘Categories of Indispensable and Dispensable Laws’, *Studia Canonica*, 39 (2005), pp41-73 (hereafter Huels, ‘Categories of Indispensable and Dispensable Laws’), p44, states, therefore, that ‘define’ in c. 86, does not apply simply to legal definitions; it means ‘determine’. At p48, he explains that a strict interpretation, that is, ‘pertaining to the essence of a thing ... without which both acts and institutes would be non-existent’ is too narrow and therefore incorrect. He defines ‘constitutive laws’ more broadly as ‘all laws regulating the fundamental and necessary aspects of every juridic institute in the canonical system’. At p49, he includes, in the categories of constitutive law: ‘laws requiring some means of external control prior to or subsequent to action (permission, consultation, consent, approval, etc); fundamental laws related to required offices, organs, and other structures; laws determining juridic capacity; laws establishing fundamental eligibility requirements; laws determining competencies of an office, organ, ministry, or status’.

<sup>52</sup> Carragher, ‘Invalidating Laws’, pp190 and 207.

<sup>53</sup> Kennedy, *New Comm*, p1495 defines ‘stable patrimony’ as: ‘all property, real or personal, movable or immovable, tangible or intangible, that, either of its nature or by explicit designation, is destined to remain in the possession of its owner for a long or indefinite period of time to afford financial security for the future. It is the opposite of free or liquid capital which is intended to be used to meet operating expenses or otherwise disposed of within a reasonably short period of time (within one or, at most, two years)’. Adrian Farrelly, ‘The Diocesan Finance Council: Functions and Duties According to the Code of Canon Law’, *Studia Canonica*, 23 (1989), pp149-166 (hereafter Farrelly, ‘The Diocesan Finance Council’), p160 defines it as: ‘[A]ll goods which are designated as constituting the minimum, reliable economic base by which the juridic person can subsist in an autonomous manner and take care of the purposes and services that are proper to it’.

<sup>54</sup> *CIC*, c. 1295. See Appendix I.

‘taken’,<sup>55</sup> and others that it need not be followed.<sup>56</sup> She holds that the Ordinary ‘should heed’ the advice of experts, but does not elaborate.<sup>57</sup> *CIC* therefore clarifies the situation somewhat but leaves determination of the reasons for rejecting advice to the person canonically obliged to seek it. Although the canon is silent on whether or not the ‘overriding reasons’ must be revealed or explained, the provisions governing the interpretation of experts’ reports in the judicial forum require this.<sup>58</sup> *CCEO* makes largely similar provisions to *CIC*,<sup>59</sup> but, for restoration, extends protection to ‘well-known icons or images’ that are held in great veneration by the people.<sup>60</sup>

Therefore, the law governing restoration of precious images mandates prior consultation by the Ordinary with experts, permitting consultation both within the Church and also with wider society. The law does not exclude non-Catholics from acting as experts. However, canon 1189 does not clarify, nor do other norms, what professional disciplines or qualifications are required of the experts, nor does it clarify whether they are to be consulted individually or collectively. Although not bound by the experts’ advice, the Ordinary’s failure to seek it invalidates his written permission which is required for restoration. It would appear prudent, therefore, for Bishops’ Conferences to tighten provisions by legislating for their territories and affording stronger protection for the Church’s precious assets by clarifying what qualifications are required of experts, their role, and by explicitly stating that failure on the part of an Ordinary to consult experts invalidates any permission they give for the restoration of these goods.

## 2. THE BUILDING AND RESTORATION OF CHURCHES

Whilst many of the norms and issues applicable to the use of experts in relation to the building and restoration of churches are similar to those on their use in the restoration of

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<sup>55</sup> Breitenbeck, *Doctoral Thesis*, p139, citing Henry A Ayrinhac, *Administrative Legislation in the New Code of Canon Law* (New York, 1930), p155.

<sup>56</sup> Breitenbeck, *Doctoral Thesis*, p136, citing Felix Cappello, *Summa Iuris Canonici* (Rome: *Apud Aedes Universitatis Gregoriana*, 1930), 2:255, although this referred to the building of churches.

<sup>57</sup> Breitenbeck, *Jurist*, p265.

<sup>58</sup> *CIC*, c. 1579§§1 and 2. See Appendix I.

<sup>59</sup> The canons are placed under Title XVI on ‘Divine Worship and Especially the Sacraments’. *CCEO*, cc. 887§§1, 2; and 1009§1. See Appendix II.

<sup>60</sup> *CCEO*, cc. 888§§2, 3; and 887§2. Protection extends to those of little historical, artistic or monetary value. *CCEO* also requires certain permissions, sometimes written, before transfer to another church or alienation of some images: *CCEO*, 887§1. See Appendix II.

precious images, unlike the latter, the Code prescribes that the advice of experts must be *used* in the building and restoration of churches. This is unique. *CIC* canon 1216 provides:

‘In the building and restoration of churches the advice of experts is to be used, and the principles and norms of liturgy and of sacred art are to be observed’.<sup>61</sup>

The written permission of the diocesan bishop, rather than the Ordinary, is required before *any* church is built;<sup>62</sup> the bishop must consult others prior to giving this consent in order to determine *inter alia* a need for the building - but (unlike in the provision for restoration of precious images) experts are not explicitly included in that consultation.<sup>63</sup> Whilst experts are not involved in the decision as to whether a church is to be built, their use is mandatory once a decision is made to build, or to restore, a church in terms of how this is to be achieved. *CIC* canon 1216 is clear on this point. However, there are ambiguities in the canon. The provision that expert advice be *used* suggests that it must be followed, or at least that considerable weight be given to it. Moreover, the canon gives no particular insight into who appoints the experts (unlike the norms on restoration of precious images under which the appointing body is the Ordinary). Furthermore, like the norms on the restoration of precious images, the canon does not address key issues, namely: the professional disciplines or qualifications required of the experts; their functions; whether or not experts must be consulted individually or collectively; or whether failure to consult them and to use their advice invalidates the appropriate subsequent decision. To these issues we now turn. As was the case with precious images, we must look beyond the Code for clarity on these matters.

**Appointment of Experts:** In contrast to the norms on restoration of precious images (under which the Ordinary is obliged to appoint experts), canon 1216 does not specify who is to appoint the experts in the building and restoration of churches. Commentators are also silent on this issue. Whilst it is the bishop who decides whether the church is to be built (and his permission is given without the requirement of recourse to experts), presumably the responsibility to appoint experts lies with the juridical person who will own the church to be built or who owns the church to be restored. This may or may not be the diocesan bishop.<sup>64</sup>

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<sup>61</sup> This canon is also placed in Book IV, but in Part II entitled ‘Sacred Places and Times’. See *CIC*, c. 1214 for a definition of ‘church’; Appendix I.

<sup>62</sup> See ft 9 above.

<sup>63</sup> *CIC*, c. 1215§§1, 2 and 3. See Appendix I.

<sup>64</sup> *CIC*, cc. 1255; 1256; 1276§1; 1278; and 1279§§, 2. See Appendix I.

**Disciplines, Qualifications and Functions of Experts:** *Sacrosanctum Concilium* provides for *inter alia* the construction of churches and for the competence of Bishops' Conferences in this area.<sup>65</sup> To implement this, an Instruction (1964) sets out criteria for the design and construction of churches.<sup>66</sup> It called on experts to be 'generous', but did not elaborate.<sup>67</sup> The *General Instruction of the Roman Missal*, while referring to consultation, does not mention experts.<sup>68</sup>

Doyle maintains that *CIC* 1917 required consultation with architects, who were not simply qualified in the science of construction, but also in church architecture.<sup>69</sup> For Breitenbeck, *CIC* 1917 'limited experts to "approved" Christian traditions of ecclesiastical architecture',<sup>70</sup> but included: 'the best authorities on building';<sup>71</sup> those 'competent in the field of art';<sup>72</sup> and those 'knowledgeable concerning liturgical theology as well as the role of art in the liturgy'.<sup>73</sup> They had to be 'willing' both to 'follow norms prescribed by ecclesiastical authority'<sup>74</sup> and 'to work with other experts in liturgical art and other specialized issues'.<sup>75</sup> Their role was to assist the Ordinary to: judge and approve architectural plans;<sup>76</sup> ensure that places of worship provided a prayerful atmosphere;<sup>77</sup> ensure that buildings fitted in with their surroundings; plan acoustics, and take financial resources into account.<sup>78</sup> Therefore, although competence, knowledge and personal attributes were important, for Breitenbeck no particular expertise

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<sup>65</sup> *SC*, 124; and 128. See Appendix VI.

<sup>66</sup> *IO*, 91- 99. See Appendix VI.

<sup>67</sup> *IO*, 46. See Appendix VI.

<sup>68</sup> *GIRM* (2002), 291: 'For the proper construction, restoration, and remodelling of sacred buildings, all who are involved in the work are to consult the diocesan commission on the sacred Liturgy and sacred Art. The diocesan Bishop, moreover, should use the counsel and help of this commission whenever it comes to laying down norms on this matter, approving plans for new buildings, and making decisions on the more important issues'.

<sup>69</sup> Doyle, *Doctoral Thesis*, p304.

<sup>70</sup> Breitenbeck, *Doctoral Thesis*, p259.

<sup>71</sup> Breitenbeck, *Jurist*, p266, citing Harold E Collins, *The Church Edifice and Its Appointments*, Second Edition (Westminster, MD, 1964), p4.

<sup>72</sup> *Ibid.*, p266, citing *SA*, *AAS* 44 (1952), p545; and *CLD* 3: 511.

<sup>73</sup> *Ibid.*, p266, citing R Kevin Seasoltz, 'The Sacred Liturgy: Development and Directions', *The Jurist*, 43 (1983), p21.

<sup>74</sup> *Ibid.*, p266, citing *SA*, *AAS* 44 (1952), 545; and *CLD* 3: 511.

<sup>75</sup> *Ibid.*, p266-267, citing NCCB Bishops' Committee on the Liturgy, *Environment and Art in Catholic Worship* (Washington USCC, 1978), p27.

<sup>76</sup> *Ibid.*, p267, citing R P Udalricus Beste, *Introductio in Codicem*, Third Edition (Collegeville, 1946), p621.

<sup>77</sup> *Ibid.*, p267, citing Harold E Collins, *op cit.*, p4 and Petro Vergari in Pio V Pinto, (Ed), *Commento al Codice di Diritto Canonico* (Rome, Urbaniana University Press, 1985), p698.

<sup>78</sup> *Ibid.*, p267, citing *Augustine*, 6: 17.

was required, but the law now provides an opportunity to utilize creatively ‘the contributions of a wide range of experts’.<sup>79</sup>

For Brown, the experts are members of the diocesan commissions.<sup>80</sup> Richstatter omits reference to experts.<sup>81</sup> Huels holds that a ‘reputable architect’ and ‘when possible, a liturgical consultant’ should also be consulted.<sup>82</sup> In the absence of specific law, it seems that architects, archaeologists, engineers, builders, historians, canonists, theologians, liturgists, musicians, sound technicians, insurers and members of diocesan committees could be appropriate experts.<sup>83</sup> Given the varied disciplines involved, these experts could be from outside the Church but would be required to work with those within it to meet all liturgical requirements.

**Consultation - Individual or Collective:** As in the case of precious images, canon 1216 is unclear whether these experts are to be consulted as a group or as individuals. However, consultation by the juridical person responsible for building or restoration is mandatory.

**Failure to Consult and Weight of the Expert Advice:** In view of the mandatory requirement to consult experts, canon 127 applies. Therefore, the same arguments regarding validity of the permission required before restoration of precious images are relevant here. However, it is not only the bishop’s permission which is at issue. Although the bishop’s permission is required for building a church (but not for restoration), and the validity of that permission depends on prior consultation with others, prior consultation by the relevant authority with experts as provided in canon 1216 affects the juridical act of building or restoring the church. Canon 1216 requires that expert advice be *used*. While Huels acknowledges the duty to *consult*,<sup>84</sup> only Breitenbeck refers to the duty to *use* expert advice; however, she refers simply to the differing opinions of commentators of *CIC* 1917.<sup>85</sup> Although canon 127 requires an ‘overriding reason’ to reject advice, this applies when advice

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<sup>79</sup> Ibid.

<sup>80</sup> Ralph Brown, *L&S*, p687.

<sup>81</sup> Thomas Richstatter, *Text&Comm*, p848.

<sup>82</sup> Huels, *New Comm*, p1430, cites a national directory of consultants published by The Federation of Diocesan Liturgical Commissions in Washington DC and M B Mauck, *Places for Worship: A Guide to Building and Renovating* (Collegeville, 1995).

<sup>83</sup> Or members of the committees of the relevant juridical person.

<sup>84</sup> Huels, *New Comm*, p1430 concedes that amongst those whose advice must be *sought* are the diocesan commissions.

<sup>85</sup> Breitenbeck, *Jurist*, p265.

is to be *sought*. The significance of the stronger language in canon 1216, therefore, is unclear.<sup>86</sup> Failure to *use* the advice, therefore, could invalidate.

The mandatory requirement to involve experts may, therefore, be compared with the position under *CIC* 1917. This obliged the Ordinary to observe Christian tradition, and laws regarding sacred art, when building or restoring churches; whilst consultation with experts was not mandatory,<sup>87</sup> commentators recognise that consultation was common practice and particular law sometimes mandated it.<sup>88</sup> *CCEO* generally requires the eparchial bishop's written permission before building churches,<sup>89</sup> but makes no provision for expert advice or indeed, for restoration, although that possibility is acknowledged.<sup>90</sup>

To sum up this section, despite the expressed concern of the Church over damage to ecclesiastical goods and disregard for legislation, *CIC* is remarkably vague in relation to the building and restoration of churches. Although the law mandates the use of 'experts' in this area, it does not: define the term 'expert'; specify the professions or expertise required of them; nor clarify whether competence in the field suffices.<sup>91</sup> Other juridical texts give little further insight. Commentators help however in identifying the *functions* of experts here, more so than they do in respect of precious images. Also, as with precious images, the law is unclear as to whether the required experts form part of the diocesan or inter-diocesan

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<sup>86</sup> *Text&Comm*, p848 uses the phrase 'the advice of experts is also to be employed' and *New Comm*, p1429 uses the phrase: 'after the advice of experts has been taken into account'.

<sup>87</sup> *CIC* 1917, c. 1164§1. See Appendix III.

<sup>88</sup> *Augustine*, Vol VI, p17 considered consultation with experts to be a 'dictate of common sense'. See also Doyle, *Doctoral Thesis*, p304, referring to the long-standing practice of consulting experts, he says the first mention of experts used in the construction of a new church is found in F X Schmalzgrueber *Ius Ecclesiasticus Universum*, L. IV, pars III, tit. 19 and 20 (Rome, *ExTypis Rev. Camerae Apostolicae*, 1843-1845). However, particular laws in Canada in 1863 and 1870 provided that in construction and restoration of seminaries, bishops 'should not' give consent without consulting experts; the First Plenary Council of Quebec in 1909 contained the law later appearing in *CIC* 1917, but applied it, not only to churches, but to rectories and other ecclesiastical buildings.

<sup>89</sup> *CCEO*, cc. 868; and 870. See Appendix II.

<sup>90</sup> *CCEO*, c. 873§§1, 2. See Appendix II.

<sup>91</sup> Personal communication with the Archdiocesan Administrator, Archdiocese of Cardiff, 18 May 2007 revealed that, prior to carrying out restoration work on St David's Cathedral, three firms of architects who had previously restored similar buildings were chosen and invited to give presentations on their proposals. Two responded. The first provided drawings and plans of proposals and gave what was considered a 'not very interesting' presentation. The second: envisaged carrying out a detailed structural survey of the existing building; expressed a need to see the liturgy 'in action'; and proposed interviewing the clergy about their needs and liturgical practice. A contract was entered into with the latter, although he had not produced the cheapest tender. The Dean of St David's Cathedral, Cardiff, said on 3 February 2008, that when deciding on an 'expert' architect to undertake renovations, other cathedrals which were recently renovated were also visited. St Anne's Cathedral in Leeds, which had been re-opened after major restoration work on 13 November 2006, was preferred and consequently the architect responsible for that work was commissioned.

commissions or act as outside advisors to them; moreover, commentators are divided on this issue. However, it seems that dialogue and consultation with experts outside church bodies and indeed, with non-Catholics, is not prohibited. Although canon 127 applies, and failure to consult the experts as to the building or restoration process invalidates, it remains unclear whether experts are to be consulted individually or collectively. Commentators also fail to explain either the significance of non-compliance with the mandatory provisions to consult or the requirement to *use* expert advice in respect of the building and restoration of churches. In short, Bishops' Conferences should legislate to clarify these ambiguities by specifying: the professions and qualifications required of the experts; their precise role; whether or not they are to be consulted individually or collectively; what weight is to be given to expert advice; and whether they have to be Catholic or may be non-Catholic.

### 3. FINANCIAL ADMINISTRATION

In order to protect temporal goods, the law requires the use of experts in financial administration. This section examines the canonical provisions for: a diocesan finance committee, on which experts serve; a diocesan finance administrator, who is an expert; and acts of restricted alienation of temporal goods, which require consultation with experts.

#### **The Diocesan Finance Committee:**

The law requires that a diocesan finance committee be established. Canon 492§1 provides:

‘In each diocese a finance committee is to be established, presided over by the diocesan Bishop or his delegate. It is to be composed of at least three of Christ’s faithful, expert in financial affairs and civil law, of outstanding integrity, and appointed by the Bishop’.

The canon is clear on some issues: the establishment of a diocesan finance committee is mandatory;<sup>92</sup> the bishop is responsible for appointing to the committee at least three experts

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<sup>92</sup> This canon is placed in Book II on ‘The People of God’. *Text&Comm*, p398 uses the term ‘truly skilled in financial affairs as well as in civil law’. *New Comm*, p646, uses ‘truly expert’. American translations and *CCEO* use the term ‘finance council’. Latin: ‘*consilium*’. *CIC* also mandates the establishment of a finance committee for each parish (*CIC*, c. 537) and other diocesan bodies, such as the council of priests (*CIC*, c. 495§1) and the college of consultors (*CIC*, c. 502§1) but there is no canonical requirement for experts among their members.



in finance and civil law;<sup>93</sup> lay people are not explicitly excluded;<sup>94</sup> and the bishop or his delegate presides over this committee.<sup>95</sup>

Other canons regulate the committee's role. The committee: prepares the diocesan annual budget and accounts for expenditure annually; and examines accounts submitted to the bishop by his administrators of temporal goods.<sup>96</sup> The committee has an advisory role also. The diocesan bishop must *consult* the committee before he: performs any act of administration of major importance;<sup>97</sup> determines what acts 'go beyond the limits and manner of ordinary administration' for his own subjects,<sup>98</sup> when their statutes are silent;<sup>99</sup> levies tax on public juridical persons under his authority,<sup>100</sup> or an extraordinary tax on other physical or juridical persons; invests endowments; reduces the obligations attached to pious causes; or appoints, or dismisses a finance administrator.<sup>101</sup> Moreover, the bishop requires the committee's *consent* before he places an act of extraordinary administration.<sup>102</sup> Given the provision for all juridical persons to have a finance committee or at least counsellors who assist in administration, the sharing of responsibility is an established principle.<sup>103</sup> Canon 492

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<sup>93</sup> *Text&Comm*, p398, uses, instead of 'appointed', the translation 'named', whilst *New Comm*, p646, uses 'appointed'. Michael Carragher, 'Papal and Episcopal Administration of Temporal Goods', Joseph Fox (Ed), *Render Unto Caesar: Church Property in Roman Catholic and Anglican Canon Law* (Rome 2000), pp57-68 (hereafter Carragher, 'Papal and Episcopal Administration'), p66, uses the term 'nomination', which might be a more accurate translation. Except in rare circumstances (see *CIC*, c. 523), it is the prerogative of the diocesan bishop to make appointments to ecclesiastical offices: See Appendix I: *CIC*, c. 157. Ecclesiastical office can be acquired in four ways: See Appendix I: *CIC*, c. 147. In the case of the finance committee, the canon is clear that the diocesan bishop appoints members; it is therefore, by free conferral.

<sup>94</sup> *CIC*, c. 228§2. See Appendix I.

<sup>95</sup> The law makes provision for delegation of presidential duties, but not for delegation of other responsibilities, such as the appointment of committee members. The question as to whom he might delegate is beyond the scope of this study, but it is important in respect of issues such as lay people cooperating in the power of jurisdiction (canon 129). Commentators are divided as to whether or not the bishop's delegate must be a cleric; see Gordon Read, *L&S*, p273; John A Alesandro, *Text&Comm*, p398; Francesco Coccopalmerio, *Ex Comm*, p1169; and Barbara Anne Cusack, in *New Comm*, pp646-647.

<sup>96</sup> *CIC*, cc. 493; 1287§1; and 1284§3. See Appendix I.

<sup>97</sup> *CIC*, c. 1277 is placed in Book V on 'The Temporal Goods of the Church'. See Appendix I. Although *CIC* contains no definition of acts of 'major' or 'greater' 'importance' or 'moment', Morrissey, *L&S*, p723, refers to such acts as affecting 'the financial situation of the diocese'. See also *Text&Comm*, p872 and *New Comm*, p1478. Kennedy, *New Comm*, p1478, notes that the 'proper place' to find a precise determination of 'acts of ordinary administration of greater importance', is in the statutes of the relevant juridical person.

<sup>98</sup> Kennedy, *New Comm*, p1478, defines acts of *ordinary* administration as: '[In general], those which occur regularly or whose financial consequences are moderate'.

<sup>99</sup> *CIC*, c. 1281§2 (and *CIC*, c. 638§1, in the case of Institutes of Consecrated life and Societies of Apostolic life). See Appendix I.

<sup>100</sup> *CIC*, cc. 113§2; 114§1; 115§1; and 116§§1 and 2. Goods owned by *private* juridical persons are not ecclesiastical goods (*CIC*, c. 1257§2). See Appendix I.

<sup>101</sup> *CIC*, cc. 494; 1263; 1305; and 1310§1. See Appendix I.

<sup>102</sup> *CIC*, c. 1277. See Appendix I. Morrissey, *L&S*, p723, defines such an act as 'that which has been determined as such by an approved decree of the relevant Bishops' Conference'.

<sup>103</sup> *CIC*, cc. 1279§§1, 2; and 1280. See Appendix I.

provides further that committee members, excluding the bishop's close relatives,<sup>104</sup> serve a five-year term, renewable indefinitely.<sup>105</sup> They are obliged to: carry out their duties in accordance with the law; give sincere opinions; and, if necessary, observe secrecy.<sup>106</sup> The committee remains in place *sede vacante*.<sup>107</sup>

Although *CIC* does not require the bishop to consult others prior to appointing the experts in finance and civil law, one eminent canonist considers that prior consultation with other 'experts' is required.<sup>108</sup> However, a number of ambiguities still remain. Canon 492 does not clarify: whether any professional qualifications are required of the experts; whether all members of the committee must be expert in finance and civil law; what is meant by 'Christ's faithful'; the measure of 'outstanding integrity'; who is obliged to provide information on which experts base their sincere opinions; and whether the fourth degree of consanguinity or affinity is included in the prohibition on appointment. Moreover, the canons requiring the bishop to consult the committee or obtain its consent are not explicit as to: whether or not experts are consulted individually or collectively; whether or not seeking advice or consent affects the validity of the bishop's subsequent act; or whether the bishop is bound by the committee's advice or, when consent is required, whether he must act according to their vote.

**Disciplines, Qualifications and Functions of Experts:** Commentators agree that the role of the finance committee is to oversee financial systems, to provide relevant and timely advice on fiscal issues and to advise the bishop regarding policy decisions.<sup>109</sup> However, except for Barr, who understands that the experts require a degree in law or business, commentators are silent on the issue of professional qualifications.<sup>110</sup> On the one hand, Breitenbeck, by

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<sup>104</sup> *CIC*, c. 492§3. See Appendix I. The canon is not explicit as to whether a fourth-degree relative is included in the prohibition. This is discussed below.

<sup>105</sup> *CIC*, c. 492§2. See Appendix I.

<sup>106</sup> *CIC*, cc. 127§3; and 1282. See Appendix I.

<sup>107</sup> *CIC*, c. 423§2. See Appendix I.

<sup>108</sup> Coccopalmerio, *Ex Comm*, p1170, although acknowledging that *CIC* does not require prior consultation, considers that the diocesan bishop 'will not omit consulting with experts so as to choose committee members who are *vere periti*'. Mgr Francesco Coccopalmerio is a member of the Church's Supreme Tribunal, The Apostolic *Signatura*, and was appointed President of the Pontifical Council for Legislative Texts in 2007.

<sup>109</sup> Read in *L&S*, p274-275. Alesandro, *Text&Comm*, p399. Cusack, *New Comm*, p649-650.

<sup>110</sup> Diane L Barr, *New Comm*, p296. Although commenting on *CIC*, c. 228 on lay experts, Barr acknowledges that 'competence' related to duties to be undertaken, is required, but special attention should be paid to qualifications and the 'manner in which expertise was obtained'. A member of the finance council 'would have to have obtained the necessary expertise in law and economics in a more formal fashion, such as obtaining a degree in law or business'.

reference to ‘a council of experts’, implies that all members are ‘experts’.<sup>111</sup> Cusack, preferring more than three members on the committee consisting of clerical and lay persons, considers that the committee is ‘an excellent arena’ for involvement of laity with ‘wide expertise’, such as in ethical investing, real estate, and the Church’s social teaching.<sup>112</sup> Read refers to ‘expertise’ in finance and civil law.<sup>113</sup> On the other hand, Caparros requires only ‘competence’.<sup>114</sup> Moreover, canonists disagree on the need for personal experience in the Church: Coccopalmerio, not ruling out an all-clerical or all-lay membership, but preferring a combination, recognises the opportunity to appoint a greater number of experts, but considers that ‘technical qualities’ trump moral ones.<sup>115</sup> Other canonists consider experience as ‘Christian faithful’<sup>116</sup> and pastoral considerations to be important.<sup>117</sup> Despite the different views of canonists, the canon, nevertheless, refers to the committee being ‘composed of at least three of Christ’s faithful, expert in financial affairs and civil law’. It seems, therefore, that there is room, not only for more experts in these fields, but also for other members who might not possess these specific requirements, perhaps having expertise in other relevant areas, such as canon law.

**Consultation - Individual or Collective:** Although canon 492 is silent on the issue of individual or collective consultation, as the experts form, or form part of, the committee, it is reasonable to assume consultation as a group. Therefore, as we have already seen, under canon 127, when their *consent* is required, they must be convened in accordance with canon 166 (which allows for legitimate absence).<sup>118</sup> For the validity of the bishop’s subsequent act he must have the consent of an absolute majority of those present.<sup>119</sup> If *advice* only is

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<sup>111</sup> Breitenbeck, *Doctoral Thesis*, p266.

<sup>112</sup> Cusack, *New Comm*, pp647-648.

<sup>113</sup> Read, *L&S*, p273.

<sup>114</sup> Caparros, *Ex Comm*, p185.

<sup>115</sup> Coccopalmerio, *Ex Comm*, pp1169-1170. Cusack, *New Comm*, p647: Appointment should be determined by ‘financial and civil law expertise’, rather than ‘ecclesiastical status’.

<sup>116</sup> Carragher, ‘Papal and Episcopal Administration’, p66: Members should be ‘expert in financial and legal matters’ but ‘input is not restricted merely to their technical expertise but rather calls upon their experiences as Christian faithful’.

<sup>117</sup> Alesandro, *Text&Comm*, p398: In addition to members’ expertise, ‘the advice of qualified accountants and attorneys may be insufficient or inadequate’ to address the *pastoral* implications of decisions.

<sup>118</sup> See Appendix I: *CIC*, c. 166.

<sup>119</sup> Royce R Thomas, in Arthur Espelage (Ed), *CLSA Advisory Opinions 1994-2000* (CLSA, Washington, 2002), p12, defines ‘majority’ as ‘any number over 50% or 50% +1’. Referring to *Black’s Law Dictionary*, Sixth Edition (1979), Thomas says “‘majority’ means ‘the greater number’. If there are two candidates, then the greater number of votes. But the term ‘absolute majority’ is used to clarify the difference between ‘majority’ and ‘plurality’. Therefore, when more than two candidates or positions are being voted on the ‘absolute majority’ would be the number greater than half the total valid votes cast’.

required, experts must be convened unless particular or proper law provides otherwise; for validity of the bishop's subsequent act, he must seek the advice of all.

**Failure to Consult and Weight of the Expert Advice:** Some commentators on canon 1277 requiring the bishop to consult (as to acts of administration of major importance), or obtain the consent of, the committee (as to acts of extraordinary administration), imply, by their reference to canon 127, that failure results in invalidity of the subsequent act,<sup>120</sup> whilst others are unequivocal on invalidity.<sup>121</sup> Canonists agree that the requirement under canon 127§2 to consult or obtain consent is not 'a mere formality', but an exercise 'of responsibility'.<sup>122</sup> The bishop is not bound by, but must have a legitimate reason to act against, the advice or consent.<sup>123</sup> Hill maintains that even when the *consent* of others is required for the validity of a superior's act and is given, the superior is not obliged to act; he or she may decide not to act or to delay the action.<sup>124</sup> An important issue is whether or not the bishop can break a tied vote of the committee in order to be free to act; commentators agree that he cannot,<sup>125</sup> as he is not a member of the committee.<sup>126</sup> A delegate, therefore, would be in the same position.

**Christ's Faithful:** Opinion is divided over what is meant by 'Christ's faithful' in this context. Some imply,<sup>127</sup> or understand,<sup>128</sup> that experts must be Catholic, while others hold

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<sup>120</sup> John J Myers, *Text&Comm*, p873 and Cusack, *New Comm*, p650.

<sup>121</sup> Kennedy, *New Comm*, p1478 and Mariano López Alarcón in *Ann*, p791, Morrisey, *L&S*, p723, and McGrath, *L&S*, p74, para 266 (although McGrath is commenting on c. 127).

<sup>122</sup> McGrath, *L&S*, p75, para 267; Myriam Wijlens, *New Comm*, p181; and Cusack, *New Comm*, p650.

<sup>123</sup> Morrisey, *L&S*, p723, para 2540, says the bishop is not bound but, referring to *CIC*, c. 127§2: '[H]e would act ... in the absence of an overriding reason, illegally and imprudently if he simply rejected it'. Richard Hill, *Text&Comm*, pp91-92 holds that *CIC*, c. 127§2, requiring an 'overriding reason' to act contrary to a consensus, also applies to §1. The bishop is not bound and can 'decide not to act or to delay acting'. See also, Cusack, *New Comm*, p650.

<sup>124</sup> Hill, *Text&Comm*, p91. However, this seems at odds with c. 127§2, 1°.

<sup>125</sup> *Ibid*, p92. Hill, commenting on *CIC*, c. 127§1, concludes in the negative, because the superior 'cannot give advice to himself or herself and cannot be said to consent to the action that he or she has presented with the recommendation that the group consent to it'; nor can he or she 'supply the required consent by breaking a tie'. McGrath, *L&S*, p74, para 265, citing *CCom*: '... [I]n the event of a tie, consent has not been obtained and the act cannot be performed. In these circumstances, the Superior *cannot* intervene to resolve the tie with a casting vote'. Emphasis in original. Wijlens, *New Comm*, p181 agrees; she explains: a vote ending in a tie 'may not be interpreted as giving consent. Such a vote implies consent is not given'.

<sup>126</sup> McGrath, *L&S*, p74, para 265: '[T]he group ... is an entity in its own right, distinct from the person of the Superior who is *not a member of it*'. Emphasis in original. Also Juan Ignacio Arrieta, *Ann*, p362. In response to the question as to whether or not the superior has the right of voting with the others at least to break a tie, the Pontifical Council for Legislative Text responded in the negative on 14 May 1985; this was given Papal approval on 5 July 1985 and promulgated on 1 August 1985. See *Ann*, p1619.

<sup>127</sup> Arrieta, *Ann*, p361: '... [T]he bodies established by common law within the diocese are ... to be entrusted to the faithful - clerics, religious and laypersons - according to their competence'. Read, *L&S*, p273: The appointment is open to 'lay people, religious or clergy, male or female', which implies Catholics.

that it is sufficient to be Christian.<sup>129</sup> As the experts' posts meet the criteria for ecclesiastical office (given their five-year appointment),<sup>130</sup> it follows that canon 149 applies.<sup>131</sup> Although the Code binds only the Latin Church, office holders must be 'in communion'.<sup>132</sup> The law describes 'full communion,'<sup>133</sup> but recognizes all baptised as 'Christ's faithful'.<sup>134</sup> According to McGrath, theologically, the term 'Christ's faithful' refers to all the baptised, whilst canonically it refers only to those in 'full communion'; he implies that when the *law* refers to 'Christ's faithful', 'full communion' is intended.<sup>135</sup> In other words, these experts must be Catholic and in full communion. This is supported by an Instruction (1997), stating that only those who possess the qualities required for members of pastoral councils, and who are in regular marital unions, may be elected to diocesan and parochial pastoral councils and *parochial* finance councils, which, unlike the diocesan finance committee, are not deliberative bodies.<sup>136</sup> Given that that this Instruction does not contain an exhaustive list of requirements, it can be argued that at least the same provisions, if not stricter ones, apply to the *diocesan* finance committee, which is a deliberative body.<sup>137</sup> However, membership of the committee is not necessarily linked with liturgical functions and neither expertise nor

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<sup>128</sup> Alesandro, *Text&Comm*, p398: Members 'must be Catholic'. Carragher, 'Papal and Episcopal Administration', p66: Their 'input ... calls upon their experiences as Christian faithful who are *fully engaged participants* in the life of the Church'. Emphasis added.

<sup>129</sup> Commenting on *CIC*, c. 149 requiring, for ecclesiastical office, 'communion with the Church', James H Provost, *New Comm*, p204, states: 'something more than being baptized is needed'; and as the office is exercised 'on behalf of the Church', the holder 'must have a positive commitment' to the Church. Acknowledging the need to be Christian, he argues that the canon limits the 'free choice of those who make provision for office' and therefore, should be interpreted strictly according to canon 18 and because, unlike some other canons, the canon does not require 'full communion', interpretation 'must stay with the wording of the text'. Cusack, *New Comm*, p647, ft 204, holds that opinions vary regarding whether or not members of the finance council, as well as the diocesan finance officer, must be Catholic, attributing the dissonance to the interpretation of c. 149§1.

<sup>130</sup> *CIC*, c. 145§1. See Appendix I.

<sup>131</sup> *CIC*, c. 149§1. See Appendix I.

<sup>132</sup> *CIC*, c. 1. See Appendix I.

<sup>133</sup> *CIC*, c. 205. See Appendix I.

<sup>134</sup> *CIC*, c. 204. See Appendix I. This, however, is a theological statement recognising that baptised participate 'in their own way' in the Church's mission.

<sup>135</sup> McGrath, *L&S*, p115, citing: *Comm*, 12 (1980), 60-61; and *Comm*, 14 (1982), 157 at Can. 201. See also commentary on *CIC*, c. 149, p88, para 324.

<sup>136</sup> *CNOFSMP*, Premis and Article 5§2. See Appendix VI. This Instruction was approved by the Supreme Pontiff, *in forma specifica* (see ft.23 above). *CIC*, c. 512§§1, 3 and *CCC*, p369, para 1650. See Appendix I and Appendix IV.

<sup>137</sup> Canonists appear to disagree on whether or not this requirement is one of disciplinary law, which can be dispensed under *CIC*, c. 87§1, or of constitutional law which cannot be dispensed. Disciplinary laws are defined by Mendonça, *L&S*, p49, para 175, as: 'those which command or prohibit something', citing Paul VI, *De Episcoporum Muneribus*, IV (15 June 1966): *CLD*: 6, 396. For the argument for disciplinary law, albeit cautioning against the practice, see Julian B Wellspring, 'Appointment of a Qualified Non-Catholic as Defender of the Bond', Arthur J Espelage (Ed), *CLSA Advisory Opinions 2001-2005* (2005), pp361-362, at p362. For the argument for constitutional law see Huels, 'Categories of Indispensable and Dispensable Laws', p49. Huels includes, in the categories of constitutive law: 'laws establishing fundamental eligibility requirements'.

personal qualities are *expressly* required for validity of appointment; therefore, non-compliance (appointing a non-Catholic or a Catholic not in full communion) does not invalidate an appointment, but the appointment could be rescinded either by a decree of the competent authority or by an administrative tribunal judgment.<sup>138</sup>

**Personal Attributes:** Although necessarily a subjective judgment, commentators agree that the purpose of the requirement for experts to be of ‘outstanding integrity’ is: to ‘preclude any suspicion of corruption’;<sup>139</sup> to avoid scandal;<sup>140</sup> or because ‘scrupulous honesty’ is required.<sup>141</sup> However, given that officeholders are amongst ‘Christ’s faithful’, they are bound to preserve ‘communion’ with the Church.<sup>142</sup> That the bishop’s close relatives are excluded from appointment as experts also avoids any appearance of nepotism or favouritism.<sup>143</sup>

**Responsibility for Providing Information:** The experts’ opinions must be sincere and consequently informed.<sup>144</sup> The law provides, albeit regarding alienation, that advice or opinion not be given until certain conditions are met,<sup>145</sup> but is silent on who is responsible for providing relevant information. Myers simply acknowledges the canonical requirements.<sup>146</sup> Morrissey says that those whose advice is sought must ‘insist on being given that information’, which implies an obligation on the person who seeks advice or consent.<sup>147</sup> Carragher agrees.<sup>148</sup> Therefore, the expert has a right to information which could influence his advice.

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<sup>138</sup> *CIC*, cc. 10; and 149§2. See Appendix I. See also Gregory Ingles, ‘Does the Finance Officer Spoken of in Canon 494 of Necessity Have to be a Catholic?’, Arthur Espilage (Ed), *CLSA Advisory Opinions 1994-2000* (CLSA, Washington, 2002), pp121-123.

<sup>139</sup> Read, *L&S*, p273.

<sup>140</sup> Cusack, *New Comm*, p647.

<sup>141</sup> Alesandro, *Text&Comm*, p398.

<sup>142</sup> *CIC*, c. 209. See Appendix I.

<sup>143</sup> Coccopalmerio, *Ex Comm*, p1171: ‘The “*ratio legis*” is possibly the fear of a conflict of interest between the committee members and the diocesan bishop’.

<sup>144</sup> Kennedy, *New Comm*, p1499: Informed consultation is ‘a principle of sound government, applicable by analogy, to all situations of consultation’.

<sup>145</sup> *CIC*, c. 1292§4. See Appendix I.

<sup>146</sup> Myers, *Text&Comm*, p881.

<sup>147</sup> Morrissey, *L&S*, p73

<sup>148</sup> Carragher, ‘Papal and Episcopal Administration’, p66: the diocesan bishop is ‘canonically bound’ to inform the finance committee of any previous alienation so that the members are ‘*au fait* with the financial state of the diocese’, otherwise the transaction is ‘canonically invalid’ even though possibly valid in civil law.

**Prohibition on Appointment of Bishop’s Close Relatives:** Although canon 492 prohibits the appointment of ‘persons related to the bishop *up to* the fourth degree of consanguinity or affinity’, it does not explicitly include the fourth degree in the prohibition. Some commentators refer simply to a prohibition ‘within the fourth degree’;<sup>149</sup> nevertheless Alesandro implies that the fourth degree is included.<sup>150</sup> Cusack understands that a fourth degree relative is not included as the canon, unlike that providing for prohibition on marriage, does not explicitly include the fourth degree.<sup>151</sup> As the principle is to prevent any appearance of nepotism or conflict of interest in the appointment of the experts, it would appear that one should err on the side of caution and include the fourth degree in the prohibition.

*CIC* 1917 similarly provided for establishing a ‘council’, but not for a delegate. At least two ‘suitable’ *men*<sup>152</sup> were to be appointed, but to be ‘expert’ in civil law was required only ‘insofar as possible’.<sup>153</sup> Prior consultation with the Chapter was required before appointment.<sup>154</sup> The Ordinary was obliged to consult the council ‘in administrative actions of greater moment’.<sup>155</sup> Members were obliged to take an oath to fulfil their duties faithfully before taking office,<sup>156</sup> and had only a consultative vote unless the law,<sup>157</sup> expressly, required their consent.<sup>158</sup> No term of office was indicated,<sup>159</sup> nor were the men required to be ‘Christ’s faithful’.<sup>160</sup>

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<sup>149</sup> Read, *L&S*, p272, para 982. Read refers the reader to *CIC*, cc. 108-109.

<sup>150</sup> Alesandro, *Text & Comm*, p398: ‘No member may be related to the diocesan bishop *within the fourth grade* of consanguinity or affinity i.e., the bishop’s first-cousin, grandniece, grandnephew, granduncle, grandaunt, or their spouses’. (Emphasis added).

<sup>151</sup> *CIC*, c. 1091§1. See Appendix I. Cusack, *New Comm*, p646, believes first cousins are not excluded on the basis that the canon does not say ‘up to and including’.

<sup>152</sup> The reference to ‘men’ remained in the draft canons throughout the revision of the Code, but was removed by Pope John Paul II during its final review. See Breitenbeck, *Doctoral Thesis*, p257.

<sup>153</sup> Doyle, *Doctoral Thesis*, p305, citing Sacred Congregation for the Propagation of the Faith, Instruction (8 September 1869), §27, *Fontes*, VII, §4876; Instruction (18 October 1883), §XIV, *Fontes*, VII, §4903. Doyle notes that prior to *CIC* 1917, Instructions did not mention ‘experts’ but ‘better qualified clerics’, whilst *CIC* 1917 ‘suggests’ that the chosen men be ‘experts’; he says the practice was to use priests and laymen such as lawyers and bankers.

<sup>154</sup> Edward N Peters, *The 1917 or Pio-Benedictine Code of Canon Law* (San Francisco, 2001), (hereafter *Peters*), p508. See Appendix III: *CIC* 1917, c. 1520§1.

<sup>155</sup> *CIC* 1917, c. 1520§3. See Appendix III.

<sup>156</sup> *CIC* 1917, c. 1522. See Appendix III.

<sup>157</sup> Or foundation documents.

<sup>158</sup> *CIC* 1917, cc. 1520§3; and 1532§3 (which required the consent of either the cathedral chapter or the Council of administration and interested parties before alienating goods of a specific value) and *CIC* 1917, c. 1539§2, which required the consent of the council of administration for the exchange of titles. See Appendix III.

<sup>159</sup> However, although not termed ‘experts’, a term of three years was stipulated for ‘provident men’ who were ‘suitable’ and ‘of good repute’ with whom the local Ordinary was to associate himself, in the administrations of goods pertaining to other churches or pious places when no provision in law was made for their own council of administration. See *CIC* 1917, c. 1521. These men would have dealt with issues such as property, endowments,

Due to their autonomous nature, provisions for the Eastern Churches are more complex, but *CCEO* makes somewhat similar provisions to *CIC* for an eparchial ‘finance council’. However, the bishop is obliged to consult others before he appoints more than one ‘suitable’ person; suitability implying knowledge of financial matters.<sup>161</sup> However, the canon requires merely that appointees be ‘expert, if possible, also in civil law’; therefore, this requirement is not absolute. The council consists of members *and* a president, clarifying that the president is not a member. There is no provision for a delegate. The council’s role is similar to that of the committee under *CIC*.<sup>162</sup> The eparchial bishop is obliged to consult, or obtain consent of, the finance council and others in similar circumstances.<sup>163</sup> *CCEO* is explicit that members have only a consultative vote unless consent is required by common law or particular law.<sup>164</sup> It requires council’s *consent* before tax is levied on juridical persons and is explicit that no tax can be levied on offerings collected during the celebration of Divine Liturgy.<sup>165</sup> It neither mentions a term of office nor requires experts to be of ‘Christ’s faithful’. *CCEO* is also explicit that the obligation to inform those whose advice or consent is required rests with the authority seeking advice or consent.<sup>166</sup> For certain acts of alienation, this provision can go to validity of that act.<sup>167</sup> Unlike *CIC*, *CCEO* explicitly *includes* the fourth degree of consanguinity or affinity in the prohibition on appointing the bishop’s relatives.<sup>168</sup>

In sum, the Bishops’ Conference should legislate, clarifying: the professional qualifications required of the experts and whether or not others, perhaps those possessing different expertise, could also be appointed to the committee; whether appointees must be Catholics in full communion or whether non-Catholics possessing the required professional qualifications in finance and civil law would suffice; who is responsible for obtaining or supplying information on which expert opinions are based; whether experts are to be consulted individually or collectively; the effect of non-compliance with the requirements to consult

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investments etc., and therefore would have been required to have knowledge and expertise in financial matters, civil law and canon law. See also *CIC* 1917, c. 1521§2. See Appendix III.

<sup>160</sup> Although this is likely to have been presumed.

<sup>161</sup> *CCEO*, c. 263§1. See Appendix II.

<sup>162</sup> To prepare an annual budget and to approve expenditure. *CCEO*, cc. 244§2; 263§5 and 934§4. See Appendix II.

<sup>163</sup> *CCEO*, cc. 262§1; 263§4; 1049; 1024§2; and 1054§2. See Appendix II.

<sup>164</sup> *CCEO*, c. 263§4. See Appendix II.

<sup>165</sup> *CCEO*, c. 1012§1. See Appendix II.

<sup>166</sup> *CCEO*, c. 934§3. See Appendix II.

<sup>167</sup> *CCEO*, c. 1038§2. See Appendix II.

<sup>168</sup> *CCEO*, cc. 122§1; and 263§3. See Appendix II.



experts or to obtain their consent; the weight to be given to advice; and whether or not the fourth degree of consanguinity or affinity is included in the prohibition to appointment.

### **The Finance Administrator:**

In addition to the diocesan finance committee, each diocese must have an expert in financial matters as finance administrator. This is a new provision in *CIC* and a further example of the possibility for lay participation in the governance of the Church. *CIC* canon 494§1 provides:

‘In each diocese a financial administrator is to be appointed by the Bishop, after consulting the college of consultors and the finance committee. The financial administrator is to be expert in financial matters and of truly outstanding integrity’.<sup>169</sup>

This canon is clear that: the appointment of a diocesan finance administrator is mandatory;<sup>170</sup> the bishop must make the appointment; the bishop’s prior consultation with, *inter alia*, the finance committee, on which at least three experts serve, is mandatory; the appointee must be expert in ‘financial matters’ and be ‘of truly outstanding integrity’. The canon further provides that the administrator: serves a five-year term, renewable indefinitely and, therefore, enjoys a degree of security of tenure. A ‘grave reason’ is required for removal from office, the determination of which requires the bishop’s prior consultation with, *inter alia*, the finance committee.<sup>171</sup>

However, the law remains unclear as to: the professional qualifications required of the appointee; whether or not the bishop’s prior consultation goes to validity of the appointment and removal; whether a contract valid at civil law is required, particularly for a lay appointee;

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<sup>169</sup> The canon is placed in Book II on ‘The People of God’.

<sup>170</sup> *Text&Comm*, p399 and *New Comm*, p651 use the term ‘finance officer’. The Latin text uses the word ‘*oeconomus*’. Albeit beyond the scope of this study, whether ‘*oeconomus*’ is translated as ‘administrator’ or ‘officer’ has implications as to: whether or not the canons governing administrators of temporal goods apply; and whether or not the post is an ‘ecclesiastical office’. Although *CIC* 1917 made no provision for this appointment, *Peters*, pp72, 168, 170, and 182, holding that in law the term ‘ecclesiastical office’ was interpreted strictly under *CIC* 1917, believes that the ‘*oeconomus*’ appointed during a vacant See, would hold ‘office’ in a broad sense. He consistently uses ‘*econome*’ both when speaking of administrators of temporalities appointed during a vacant See and when speaking of priests with care of souls. *Augustine*, Vol II, pp 481; 482; and 563-564, and Vol III, p478, refers to: ‘administrators’ in relation to administering revenues during a vacant See, if ‘appointed’, but to ‘procurator’ if elected; ‘vicar’ or ‘administrator’ in relation to temporary appointment to a vacant parish; and ‘substitute’ in relation to replacement of a suspended parish priest. Breitenbeck, *Doctoral Thesis*, p272 and Alesandro, *Text&Comm*, p399 hold that the ‘*oeconomus*’ of *CIC* 1917 was ‘not a mandatory office’.

<sup>171</sup> *CIC*, c. 494§2. See Appendix I.

what precisely is meant by ‘a grave reason’ required for removal from office, although it is clear that the bishop must consult, *inter alia*, the finance committee before determining its existence; and whether or not the bishop’s close relatives are excluded from appointment. Moreover, whilst some canons specifically apply to ‘all administrators’, others refer simply to ‘administrators’, leaving it unclear as to whether or not the financial administrator is included.<sup>172</sup>

**Disciplines, Qualifications and Functions of Experts:** The financial administrator’s role is to: administer diocesan goods according to the finance committee’s plan; pay authorised bills; and submit end-of-year accounts to the finance committee.<sup>173</sup> The bishop may entrust the appointee with supervising the administration of all goods belonging to public juridical persons subject to him.<sup>174</sup> The administrator is obliged to perform duties in accordance with law,<sup>175</sup> and diligently.<sup>176</sup> All involved in administration of temporal goods are liable for failure to discharge their duties.<sup>177</sup> Canonists agree on the finance administrator’s role,<sup>178</sup> and the need for financial ‘expertise’.<sup>179</sup> Although expertise in financial matters is required, despite the administrator’s role involving both canon law and civil law matters, some commentators suggest that the administrator can rely on the finance committee’s knowledge and expertise in these disciplines,<sup>180</sup> whilst others suggest that the administrator should ‘be able and willing’ to learn about canon law and civil law matters and their implications.<sup>181</sup>

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<sup>172</sup> *CIC*, cc. 1283; and 1288, which refer to ‘administrators’ whereas *CIC*, c. 1284 refers to ‘all administrators’. See Appendix I.

<sup>173</sup> *CIC*, c. 494§§3 and 4. See Appendix I.

<sup>174</sup> *CIC*, cc. 1276§1; 1278; and 1279§2. See Appendix I.

<sup>175</sup> *CIC*, c. 1282. See Appendix I.

<sup>176</sup> *CIC*, c. 1284. See Appendix I.

<sup>177</sup> *CIC*, c. 1289. See Appendix I. Given that this provision applies also to those who do not hold ecclesiastical office, it can be presumed to apply to members of the finance committee and the financial administrator.

<sup>178</sup> Read, *L&S*, p275; Alesandro, *Text&Comm*, p400; Breitenbeck, *Jurist*, p273; and Cusack, *New Comm*, p651.

<sup>179</sup> Caparros, *Ex Comm*, p186, commenting on *CIC*, c. 228 on lay experts, says the appointee ‘must be a true expert in the subject’ involving the selection of ‘the most suitable persons’, whether cleric or lay, but subject to the requirements of cc. 1282; and 1283.

<sup>180</sup> Read, *L&S*, p274, states that financial expertise is a ‘*sine qua non*’, but legal expertise is not required as it is supplied by the finance committee. But, at p275 he acknowledging that the administrator’s ‘basic responsibility’ is to manage diocesan funds ‘in accordance with canon law’, and he emphasizes that civil law must also be followed.

<sup>181</sup> Kevin E McKenna, Lawrence A DiNardo, Joseph W Pokusa (Eds), *Church Finance Handbook* (Canon Law Society of America, 1999), pp128-132. These authors see the finance officer as the ‘chief’ amongst various people with different roles in the management of diocesan goods; the financial administrator must have ‘true skills in financial matters’ and must be able both to ‘to comprehend the breadth of ... temporal holdings’, and to supervise ‘for the purpose of accomplishing the common goal’. They acknowledge that the finance officer is unlikely to be skilled in the ecclesiastical law of temporal goods at the time of appointment and therefore, must ‘be able and willing’ to become acquainted with the requirements of canon law, particularly with the relationship between the parish and the diocese one to another and also *vis-à-vis* civil law. For example, civil

Some canonists understand that the law requires professional financial qualifications,<sup>182</sup> which only laity can provide.<sup>183</sup> On the other hand, Alesandro believes that financial ‘expertise’ is required, but professional qualification is not an absolute requirement.<sup>184</sup> This suggests that ‘expertise’ can be acquired by knowledge and experience. However, Cusack acknowledges the involvement of *independent* auditors, which suggests the involvement of further and external qualified experts.<sup>185</sup> For Breitenbeck, the administrator’s duties include responsibility for: fiscal policies; medical, property and liability insurance; retirement programs; and endowments.<sup>186</sup> Given this wide range of responsibilities, knowledge of canon law and of civil law would appear to be not only appropriate, but necessary. The same argument applies here as did to members of the finance committee regarding the requirement to be a Catholic.<sup>187</sup>

**Appointment and Removal: Issues of Validity:** *Consultation* with the finance committee, as distinct from their *consent*, is a mandatory requirement before a financial administrator is appointed or removed; nevertheless, canon 127 applies. As we have seen earlier, failure to consult invalidates any appointment and removal. Moreover, Provost warns of the ‘domino

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law might recognise the bishop as owner of all diocesan property, but canon law respects parishes as dependent juridic persons, with the right to own property. These authors conclude that the appointee must, therefore: have ‘more than a nodding acquaintance’ with the canons; appreciate the ecclesial nature of the work; be able to implement canon law according to its spirit; and inspire others involved in the administration of temporal goods so that the ministry will be seen as service and be worthy of trust.

<sup>182</sup> Cusack, *New Comm*, p651 requires ‘expertise in the area of finances’ and a professional qualification, ‘usually as a certified public accountant’ or similar. Breitenbeck, *Jurist*, pp272 and 275, requires a ‘professional qualification of financial expertise’ and ‘special skills and particular expertise’, to cover the range of duties, citing J John J Myers, *CLSA Proceedings*, 44 (1982), 187.2 and A J Maida, ‘The Code of Canon Law and the Property of the Local Church’, Michel Thériault and Jean Thorn (Eds), *The New Code of Canon Law: Proceedings of the 5<sup>th</sup> International Congress of Canon Law* (Ottawa, 1986); 2: pp749, 752.

<sup>183</sup> Breitenbeck, *Doctoral Thesis*, p273, citing Charles J Ritty, ‘Changing Economy and the New Code of Canon Law’, *The Jurist*, 26 (1966), p483, credits him with the statement that the degree and variety of financial expertise required ‘could only be provided by qualified laypersons’ and that the ‘specific talents and expertise’ required for financial matters ‘are not the duties of shepherds of souls’; rather theirs are to preach, teach govern and sanctify. This cited article pre-dates *CIC*.

<sup>184</sup> Alesandro, *Text&Comm*, p399: The candidate must be, *inter alia*, ‘respected for financial expertise’, but ‘in many cases’, depending on specific diocesan needs, ‘the office holder should be a certified public accountant and capable of working well with the many different people affected by diocesan payrolls and program budgets’.

<sup>185</sup> Cusack, *New Comm*, p652.

<sup>186</sup> Breitenbeck, *Jurist*, p274. This is not inconsistent with the provisions of *PO*, 17; and 21. See Appendix VI.

<sup>187</sup> The post is an ecclesiastical office but *CIC*, c. 494 does not explicitly require the appointee to be a Catholic; as we have seen with membership of the finance committee, it would appear that the appointment of a non-Catholic would not invalidate the appointment, but the appointee could be removed by a decree of the competent authority or by a judgment of an administrative tribunal. See ft 138 above for reference. However, Alesandro, *Text&Comm*, p399, states that the appointee ‘must be a Catholic’.

effect' of invalidity of acts performed by officeholders who are invalidly appointed.<sup>188</sup> This could have implications at civil law because acts invalid under canon law can, nevertheless, be valid at civil law. Alesandro holds that a civil law contract of employment is not mandatory; however, acknowledging the need for dialogue between canon lawyers and civil lawyers *if* a civil contract is entered into, he suggests that account should be taken of the canonical 'right' of removal and 'an appropriate civil instrument should be drawn up,' providing 'legal recognition of these powers and the ability to exercise these canonical responsibilities in the market place'.<sup>189</sup> Coccopalmerio highlights the need for a civilly valid contract if the appointee is a lay person.<sup>190</sup> Breitenbeck notes that the finance officer and the experts on the finance committee are the only experts appointed for a term determined by universal law.<sup>191</sup> She points out that although administrators' primary accountability is to their bishop, the canons relating to these experts are the only canons which provide for the accountability of one expert to other experts, the finance administrator being accountable to the finance committee.<sup>192</sup> Given the five-year term and the civil law implications of the functions of the finance administrator, a canonically valid contract of employment, also valid at civil law, would appear appropriate, particularly if the appointee is a lay person.

**Grave Reason for Removal:** The finance administrator ordinarily remains in place *sede vacante*, which, in addition to the five-year term, is another indication of security of tenure.<sup>193</sup> Although all officeholders enjoy a degree of security of tenure,<sup>194</sup> canon law nonetheless

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<sup>188</sup> James H Provost, 'Opinion on canon 127', in Kevin Vann and James Donlon (Eds), *Roman Replies and CLSA Advisory Opinions* (Washington, DC, 1995), p38, although dealing with situations in which consent is required warns: '... [T]he requirement of consent is clearly spelled out in canon 127, ... failure to observe the law would result in invalidity of actions thus taken. ... [A]n invalid confirmation of the election would result in any actions performed by the office holder, whether in spiritual or temporal matters, being invalid (c. 179§4)'.

<sup>189</sup> Alesandro, *Text&Comm*, p400.

<sup>190</sup> Coccopalmerio, *Ex Comm*, pp1177-1178, explains a two-fold reason for a fixed-term contract: '(a) an easier method of replacing the administrator if really necessary; and (b) to discourage the diocesan bishop from intervening, so as to guarantee the autonomy of the administrator before the bishop in administrative matters. Otherwise the bishop could remove the administrator as a sign of disapproval which would provide a reason for the administrator to act in ways which would ensure his favour'.

<sup>191</sup> Other canonists agree that the finance administrator enjoys greater security of tenure than do other officeholders. See for example, Read, *L&S*, p274.

<sup>192</sup> Breitenbeck, *Jurist*, p274. Also Breitenbeck, *Doctoral Thesis*, p276. That is, the diocesan finance officer is accountable to the finance committee.

<sup>193</sup> *CIC*, c. 423§2. See Appendix I.

<sup>194</sup> Provost, *New Comm*, p225, describes three different types of 'subjective stability' of office: (a) conferral for an indefinite term, which provides the greatest stability, that is, 'full subjective stability'; (b) conferral for a definite term, which provides 'the same kind of subjective stability' but only for the duration of the term, which means that at the end of the term, no further cause or procedure is required other than notification of the cessation of the term; and (c) conferral 'at the prudent discretion of the competent authority, which 'has limited protection of subjective stability'.

provides for removal from office,<sup>195</sup> albeit that the demands of natural justice and charity must be met.<sup>196</sup> In some cases, an appointee can be removed freely;<sup>197</sup> in others, a ‘just’ reason, a ‘grave reason’ or ‘grave reasons’ must exist.<sup>198</sup> For the finance administrator, a ‘grave’ reason is required for removal. Canonists make different comparisons with other office holders, when ‘just’ or ‘grave’ reasons are required. On the one hand, Alesandro compares removal of the finance administrator with that of the Judicial Vicar and tribunal judges, requiring a ‘grave’ reason.<sup>199</sup> On the other hand, Coccopalmerio compares the removal with that of chancellors and notaries, requiring only a ‘just’ reason under canons 485 and 193.<sup>200</sup> For Barry, a ‘just’ reason might be a simple requirement by the bishop that the office holder is needed to serve elsewhere in another capacity.<sup>201</sup> A ‘grave’ reason is described variously as: ‘mental or physical illness, irreformable incompetence despite strenuous efforts by the appropriate authority, etc.’;<sup>202</sup> any ‘criminal act; inept and negligent management’, the bishop’s loss of faith in the office-holder;<sup>203</sup> ‘misappropriation of funds’;<sup>204</sup> or any reason mentioned in, or analogous to, those in canons 253§3 or 1741.<sup>205</sup>

Therefore, tension exists between canons 193§2 and 494§2. The former, dealing with the general requirements for all office holders, appointed for an indeterminate or a determinate time, requires the plural ‘grave reasons’ for removal from office,<sup>206</sup> whereas the latter, dealing with the particular post of finance administrator, although the appointment is for a determinate time, requires only the singular, ‘grave reason’. Moreover, if a ‘just’ reason is a simple requirement by the bishop that the office holder is needed to serve elsewhere in another capacity, it would appear logical that ‘free’ removal by the bishop requires at least a ‘just’ reason. Commentators do not address these tensions, but ‘full account’ of

<sup>195</sup> *CIC*, cc. 192; and 193§§1-3. See Appendix I.

<sup>196</sup> *CIC*, c. 195. See Appendix I.

<sup>197</sup> See Appendix I: *CIC*, c. 485.

<sup>198</sup> *CIC*, cc. 193§§1-3; 1422; and 1436§§1, 2. See Appendix I.

<sup>199</sup> Alesandro, *Text&Comm*, p400.

<sup>200</sup> For example, Coccopalmerio, *Ex Comm*, p1179 considers that *CIC*, c. 485, dealing with chancellors and notaries who can be ‘freely removed’ by the diocesan bishop, for a ‘just reason’ (see c. 193§3) is applicable to the finance administrator. However, c. 485 is silent regarding any ‘reason’. See Appendix I for the full text of canons.

<sup>201</sup> John Barry, *L&S*, p833, para 2896, commenting on *CIC*, c. 1436§2, dealing with the ‘removal’ of the promoter of justice or defender of the bond, states that a ‘just’ cause ‘need not imply any reflection whatever upon their competence’.

<sup>202</sup> McGrath, *L&S*, pp107-108.

<sup>203</sup> Breitenbeck, *Jurist*, p274, citing Farrelly, ‘The Diocesan Finance Council’, p165.

<sup>204</sup> Cusack, *New Comm*, p652.

<sup>205</sup> Arrieta, *Ann*, p179. *CIC*, cc. 253§3; and 1741. See Appendix I.

<sup>206</sup> Latin: ‘*graves causas*’.

circumstances must be taken,<sup>207</sup> ‘in light of equity, the good of souls, the common good, and the importance of office etc’.<sup>208</sup> As canon 494 specifically requires a ‘grave reason’, to remove the finance administrator, there appears little justification for reducing this to a ‘just reason’, most particularly if the appointee is a lay person whose contract of employment is valid at civil law. Furthermore, canon law provides that loss of office as a result of punishment for an offence is termed ‘deprivation’; this can only occur in accordance with *penal law*.<sup>209</sup> Therefore, although a clear distinction must be made between the effect of illness and culpable negligence,<sup>210</sup> lack of clarity remains over what constitutes a ‘grave’ reason for removal. Despite all the foregoing, the bishop is not bound by the advice he is required to seek before removal of the administrator.

**Prohibition on Appointment of Bishop’s Close Relatives:** Canon 494 does not explicitly prohibit the bishops’ close relatives from appointment as financial administrator. Some commentators are silent on the matter.<sup>211</sup> Others consider it would be imprudent to appoint such a person, given ‘the general intent ... to avoid any appearance of nepotism’,<sup>212</sup> and consider the prohibition ‘even more justifiable’ in relation to this appointment than to the finance committee.<sup>213</sup> On the other hand, others argue that the financial administrator is not a member of the committee,<sup>214</sup> which could be taken to imply that the provision excluding the bishop’s close relative to the committee does not apply to the finance administrator.

*CIC* canon 494 has no equivalent in *CIC* 1917. Because of the autonomous nature of the Eastern Churches more complex arrangements exist for their finance administrators.<sup>215</sup> Nevertheless, *CCEO* makes similar canonical provisions for the appointment, and removal requiring a ‘serious’ reason,<sup>216</sup> of an eparchial finance ‘officer’, who must be Christian and

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<sup>207</sup> McGrath, *L&S*, p108.

<sup>208</sup> Provost, *New Comm*, p226.

<sup>209</sup> *CIC*, c. 196. Unlike Judicial Vicars, the diocesan financial administrator can be removed by the diocesan Administrator; *CIC*, cc. 1420§5 and 427§1. See Appendix I.

<sup>210</sup> *CIC*, c. 1279§1. See Appendix I.

<sup>211</sup> Read, *L&S*, p274 and Cusack, *New Comm*, p651-652.

<sup>212</sup> Alesandro, *Text&Comm*, p399.

<sup>213</sup> Arrieta, *Ann*, p363.

<sup>214</sup> Read, *L&S*, p273 says: ‘[The financial administrator] is a servant of the finance committee not a member of it’. Cusack, *New Comm*, p652 agrees: [This officer may attend committee meetings ‘as staff to the council’ and ‘should at least attend the meeting at which the annual report is examined’.

<sup>215</sup> *CCEO*, c. 122§1. See Appendix II.

<sup>216</sup> *CCEO*, c. 262. See Appendix II.

‘outstanding for honesty’.<sup>217</sup> The term of office is left to particular law.<sup>218</sup> The eparchial finance officer is explicitly entrusted with oversight of all eparchial goods, and the bishop must define in ‘greater’ detail the relationship between the finance officer and the finance committee.<sup>219</sup> ‘Administrators’ are also required to take an oath to fulfil the office faithfully, but the canon does not specify ‘all’ administrators.<sup>220</sup> *CCEO* is explicit that the finance officer ordinarily remains in place *sede vacante*.<sup>221</sup> Moreover, *CCEO* explicitly states that the finance officer *is* a member of the finance council, membership of which excludes relatives of the eparchial bishop up to the fourth degree of consanguinity or affinity *inclusive*.<sup>222</sup> It can be argued, therefore, that the prohibition on the bishop’s close relatives becoming members of the finance council should be applied *mutatis mutandis* to the finance administrator.<sup>223</sup>

Although the establishment of a diocesan finance committee and the appointment of a finance administrator are mandatory and the posts are ecclesiastical offices, neither current Code provides for specific professional qualifications for these experts. Nor do the Codes require the experts to have knowledge of canon law. Furthermore, the financial administrator is not *required* to have knowledge of civil law despite the role involving management of the financial affairs of the diocese which requires compliance with many fields of civil law. Whilst the bishop’s prior consultation with, *inter alia*, the finance committee goes to validity of the appointment, the personal qualities required by canon law do not.

Again, by legislating, Bishop’s Conferences should clarify: the professional qualifications required of the financial administrator; whether a contract valid at civil law is required, particularly for a lay appointee; whether knowledge of civil law and of canon law is required; what precisely is meant by ‘a grave reason’ required for removal from office; whether or not the bishop’s close relatives are excluded from appointment; whether the finance administrator is bound by all canons referring to ‘administrators’; and whether dioceses are responsible for on-going training, particularly in the fields of canon law and civil law.

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<sup>217</sup> *CCEO*, c. 262§1. See Appendix II.

<sup>218</sup> *CCEO*, c. 262§2. See Appendix II.

<sup>219</sup> *CCEO*, c. 262§3. See Appendix II.

<sup>220</sup> *CCEO*, c. 1025. See Appendix II.

<sup>221</sup> *CCEO*, c. 232§1. See Appendix II.

<sup>222</sup> *CCEO*, c. 263§3. See Appendix II.

<sup>223</sup> *CIC*, c. 492§3. See Appendix I.

#### 4. THE ALIENATION OF GOODS

The Church recognises that it is sometimes necessary to alienate property.<sup>224</sup> The leading canon,<sup>225</sup> on alienation,<sup>226</sup> seeks to ensure that contracts of sale or transfer of goods are recognised at civil law.<sup>227</sup> Permission of the competent authority is required before goods, which constitute the stable patrimony of a juridical person and which exceed the sum determined by law, are validly alienated.<sup>228</sup> Bishops' Conferences restrict alienation by setting value limits for their region: the statutes of a juridical person not subject to the diocesan bishop determines the competent authority whose consent is required for the valid alienation of goods which form its stable patrimony and whose value is within these limits; otherwise the diocesan bishop is the competent authority, but he must first obtain the *consent* of, *inter alia*, the finance committee on which three experts in financial affairs and civil law serve.<sup>229</sup> Additionally, the Holy See's permission is required in certain circumstances.<sup>230</sup> When the goods to be alienated exceed the determined minimum sum, additional requirements must be met to ensure that the risk of loss to the Church is minimized; *CIC* canon 1293§1 provides:

‘To alienate goods whose value exceeds the determined minimum sum, it is also required that there be: 1° a just reason, such as urgent necessity, evident advantage, or a religious,

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<sup>224</sup> Most particularly to help the poor. See *Augustine*, Vol VI, p593: ‘... [I]t must be remembered that the purpose of Church property is wide, and that the poor and captives always had a special claim on the property of the Church. Hence, alienation even of sacred vessels was not considered forbidden if captives had to be redeemed or the poor succored. Forbidden, however, was any unwarranted and purposeless alienation, (under the feudal system any alienation without the consent of the Lord). This is still traceable in the present legislation, the reason for which is stated in can 1518’. Augustine, at p577 explains that this right ‘flows from the plenitude of his power, which embraces the final end of the Church as well as its means’.

<sup>225</sup> Ladislav Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation* (Liturgical Press, 1992), p56, explains: ‘A canon introducing a new chapter or a new topic in the Code can contain an important clue for the interpretation of all other canons in the same group’.

<sup>226</sup> The canon is placed in Book V on ‘Temporal Goods’, under Title III, on ‘Contracts and Especially Alienation’. Morrissey, *L&S*, at p732 explains that the term ‘alienation’ in the present context includes more than the transfer of ownership of property from one person to another by gift or sale; it includes ‘any transaction whereby the patrimonial condition of the juridical person may be jeopardised’ and gives examples of loans such as a mortgage or lease or the use of funds for a purpose for which it was not intended etc. See also Morrissey, ‘The Alienation of Temporal Goods’, p311: ‘Three elements usually enter into account when determining whether there is a risk of jeopardy: (a) loss or diminishing of *ownership*; (b) loss or diminishing of *sponsorship*; (c) loss or diminishing of *control*’. Emphasis in original. See also ft 5 above. See Appendix I: *CIC*, c. 1295.

<sup>227</sup> *CIC*, c. 1290. See Appendix I. When canon law embraces civil law and makes it its own, commentators use the term ‘canonization of civil law’. See Kennedy, *New Comm*, p1493.

<sup>228</sup> *CIC*, c. 1291. See Appendix I.

<sup>229</sup> *CIC*, c. 1292§1. See Appendix I.

<sup>230</sup> *CIC*, c. 1292§2. See Appendix I.



charitable or other grave pastoral reason; 2° an evaluation in writing by experts of the goods to be alienated’.

In addition to the permissions mentioned above, before the alienation of goods whose value exceeds the determined minimum sum, a legitimate reason must exist, and consultation with more than one expert is mandatory.<sup>231</sup> The experts’ function is to provide a written valuation of the goods. Further provisions stipulate that: reasonable precautions must be taken;<sup>232</sup> conflicts of interests must be avoided;<sup>233</sup> and weight must be given to the expert’s evaluation, as goods should not, generally,<sup>234</sup> be alienated for a lower price.<sup>235</sup> That weight must be given to expert evaluation is also implied by the requirement that those whose advice or permission is required are forbidden to give it until they are fully informed about relevant facts, such as the financial state of the juridical person concerned and about alienations which have already taken place,<sup>236</sup> indicating that the law does not require them to have previous knowledge. This is important because alienation can be valid at civil law even if canonical requirements are not met.<sup>237</sup>

In relation to experts, the Code does not clarify: who appoints them; what professional disciplines or qualifications are required; whether they must be consulted individually or collectively; whether non-compliance with the requirement to consult experts affects the validity of the competent authorities permission to alienate; or whether the decision-maker is bound by expert opinion.

**Appointment of Experts:** Commentators do not address the issue of who appoints the experts, but one suggests that the administrator involved in the alienation is responsible.<sup>238</sup>

**Disciplines, Qualifications and Functions of Experts:** Whilst Alarcón suggests they should be ‘experts in the art or science for which the evaluation is requested’,<sup>239</sup> others are silent on

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<sup>231</sup> Morrisey, *L&S*, p735 describes ‘urgent necessity’ as: ‘a tax burden’ or ‘another dept to be paid’.

<sup>232</sup> *CIC*, c. 1293§2. See Appendix I.

<sup>233</sup> *CIC*, c. 1298. See Appendix I.

<sup>234</sup> Morrisey, *L&S*, at p736 gives examples of exceptions: ‘a building or land which has become an expensive liability’ or offering the goods at a lower price to a ‘charitable’ or ‘apostolic’ purpose.

<sup>235</sup> *CIC*, c. 1294§1. See Appendix I.

<sup>236</sup> *CIC*, c. 1292§4. See Appendix I.

<sup>237</sup> *CIC*, c. 1296. See Appendix I.

<sup>238</sup> Morrisey, *L&S*, p732.

<sup>239</sup> Mariano López Alarcón, *Ann*, p803.

professional disciplines, but warn against using ‘government evaluations’,<sup>240</sup> and recommend an ‘appropriate formula’ involving assistance from ‘professionals’, and using ‘care and prudence’ in the choice of civil lawyers.<sup>241</sup> Kennedy suggests that advice of the ‘highest quality’ is required; and canonists should understand civil law and civil lawyers should understand canon law.<sup>242</sup> Canonists, therefore, appear more concerned that civil law is followed than they are about compliance with canon law.

**Consultation - Individual or Collective:** Although canon 1293 speaks of ‘an evaluation’ (singular) but by ‘experts’ (plural),<sup>243</sup> implying agreement, commentators are divided on the number of experts required; some require two;<sup>244</sup> others, one.<sup>245</sup> The emphasis here appears to be more on monetary value rather than on historical, artistic or devotional value.

**Validity of Permission and Weight of Expert Advice:** Whether or not failure to consult invalidates the competent authority’s permission to alienate is important because of possible validity at civil law. Canon 1291 provides that the competent authority’s permission is required for *valid* alienation of goods constituting stable patrimony and whose value exceeds the determined sum.<sup>246</sup> In the case of the diocesan bishop, he needs the prior *consent* of others before alienation of goods whose value falls within the determined limits.<sup>247</sup> Although the first paragraph of canon 1292 does not mention *validity* of the alienation, the next paragraph, dealing with, *inter alia*, goods whose value exceeds the determined sum and requiring the Holy See’s ‘additional’ permission, does.<sup>248</sup> It can be assumed, therefore, that *valid* alienation is implied in both situations. Moreover, canon 1293§1, dealing with goods

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<sup>240</sup> Kennedy, *New Comm*, p1501. He suggests these are prepared for tax purposes and are frequently out of date or otherwise ‘not in accord with market value’.

<sup>241</sup> Morrisey, ‘The Alienation of Temporal Goods’, p304.

<sup>242</sup> Kennedy, *New Comm*, at p1493, suggests: (a) that this canon imposes a responsibility on canonists to know ‘the basics of the secular legal system’, particularly in relation to contracts, so that they might ‘cooperate’ with civil lawyers representing church bodies; and (b) that civil lawyers should become familiar with the ‘canonical exceptions to the canonization of civil law’.

<sup>243</sup> Latin: ‘*aesimatio rei alienandae a peritis scripto facta*’.

<sup>244</sup> Morrisey, *L&S*, p735, holds that it is ‘generally accepted’ both under *CIC* 1917 and *CIC* that ‘at least two such evaluations’ are required. Also Kennedy, *New Comm*, pp1500 -1.

<sup>245</sup> Myers, *Text&Comm*, p881, this translation uses the word ‘estimate’ instead of ‘evaluation’. Myers sees the need for ‘expert consultation’ (*singular*) to ensure ‘objectivity and professionalism’ and refers to a written ‘opinion’ (*singular*) while at the same time acknowledging earlier commentators’ understanding of the need for at least two experts. However, he considers it ‘advisable’ that the ‘estimates’ (*plural*) be stated ‘as a range of values’, indicating an acceptable minimum and a hopeful maximum.

<sup>246</sup> *CIC*, c. 1291. See Appendix I.

<sup>247</sup> *CIC*, c. 1292§1. For Institutes of Consecrated Life and Societies of Apostolic Life, see *CIC*, c. 638§3, Appendix I.

<sup>248</sup> *CIC*, c. 1292§§1 and 2. See Appendix I.

whose value exceeds the determined minimum sum, speaks of ‘also’ requiring an evaluation by experts, which implies that validity is still affected.

Given that canon 127 applies even in cases in which alienation concerns goods whose value falls within the determined sums and experts are not involved, the consent of the required bodies goes to validity of the bishop’s permission required for alienation. Moreover, disclosure of information regarding prior alienation of divisible goods is required explicitly for *validity*.<sup>249</sup> Consent must be informed; the value of the goods proposed for alienation is, therefore, essential to the deliberations of those whose consent is required. Expert evaluation could even establish whether or not the value of goods falls below, or between the minimum and maximum determined sums, or exceeds the determined sum, thereby, identifying not only the competent authority whose permission is required for alienation, but also the canonical provisions which apply. It can be concluded, therefore, that obtaining expert evaluation goes to validity of the competent authority’s permission to alienate and therefore to the alienation itself.<sup>250</sup>

Under *CIC* 1917 any transaction which could adversely affect the economic condition of a juridic person required written valuation from a ‘thoughtful expert’,<sup>251</sup> although some commentators understood that more than one valuation was required.<sup>252</sup> *CIC* has not clarified the matter.

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<sup>249</sup> *CIC*, c. 1292§3. See Appendix I.

<sup>250</sup> Eithne D’Auria, ‘Alienation of Temporal Goods in Roman Catholic Canon Law’, 12 *Ecclesiastical Law Journal* (2010), pp33-52.

<sup>251</sup> *CIC* 1917, c. 1530§1. See Appendix III. William Doheny, *Practical Problems in Church Finance* (Milwaukee, 1941), p28, citing Barbosa, lib. III, c XXX, n. 12; Reiffenstuel, lib. III, iti. 13, n. 18; Laraona, “*Comm. Codicis*,” *Comm. Pro Relig.*, XIII (1932), p356, states that ‘urgent necessity’ was considered under *CIC* 1917 to be ‘payment of an urgent debt, the redeeming of a mortgage, the danger of rapidly declining values because of special real estate problems, an opportunity to sell at particularly advantageous price because of urgent demand, the restoration of a collapsing church, the purchase of sacred vessels, vestments, and other indispensable objects’.

<sup>252</sup> Breitenbeck, *Doctoral Thesis*, pp131-132, citing John A Abbo and Jerome D Hannan (Eds), *The Sacred Canons*, 2 Vols (St Louis, 1952), 2; 736; Henry A Ayrinhac *Administrative Legislation in the New Code of Canon Law* (New York, 1930), p 441; Alberto Blat, *Comentarium textus Codicis Iuris Canonici*, 5 Vols, (*Romae: Ex Typographia Pontificia in Instituto Pii IX*. 1921-1938), at Vol 3, p547; T Lincoln Bouscaren, Adam C Ellis and Francis N Korth, *Canon Law: A Text and Commentary*, Fourth Revised Edition (Milwaukee, 1966), p839; Joseph F Cleary, ‘Canonical Limitation on the Alienation of Church Property’, *Canon Law Studies*, 100 (Washington, 1936), p62; and Edward L Heston, ‘The Alienation of Church Property in the United States’, *Canon Law Studies*, 132 (Washington, CUA 1941) p83.

Because of the autonomous nature of the Eastern Churches more complex arrangements exist for the alienation of property depending on whether or not the goods concerned belong to a patriarchal Church, or to an eparchy within the patriarchal Church, or to a juridical person subject to an eparchial bishop. Different norms apply according to their value,<sup>253</sup> whether or not they belong to an eparchy lying within or without the territorial boundaries of the patriarchal Church, and whether or not the eparchial bishop concerned exercises his power within the territorial boundaries of the patriarchal Church.<sup>254</sup> Similar provisions to *CIC* exist in respect of the civil law of contracts.<sup>255</sup> The *consent* of the finance council is required for alienation of property belonging to the eparchy or a juridical person subject to the eparchial bishop, the value of which is, according to the Synod of Bishops of a patriarchal Church or the Apostolic See, within a stipulated amount.<sup>256</sup> The situation under *CCEO* is therefore, no clearer than that under *CIC*. The decision to alienate lies with the competent authority and although not bound by the vote of the bodies whose consent is required, according to *CIC* canon 127, an ‘overriding reason’ is required to act against this advice.

## Conclusion

The canonical requirements for consultation and dialogue with experts are important factors in the participative management of Church property, in which the laity can play a significant role. Whilst some of these experts can be found within the Church, others may be found in the wider society, when required for restoration or building work, the management of finance or in the assessment of the value of temporal goods in cases of restricted alienation. Despite the important roles played by these experts and that consultation with them goes to validity of the subsequent decisions, the law does not define the term ‘expert’. No specific qualifications are expressly required. Nor does the law oblige the Church to provide, or provide for, any special training or for continual professional development of experts.

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<sup>253</sup> That is, whether their value falls between the minimum and maximum determined sums; or between the maximum and twice the maximum sum; or above twice the maximum sum. Regardless of their monetary value, if they are ‘precious’ or donated, restriction also apply.

<sup>254</sup> *CCEO*, cc. 1035; and 1036. See Appendix II.

<sup>255</sup> *CCEO*, cc. 1034; and 1504. See Appendix II. *Nedungatt*, p703 implies these provisions do not apply to alienation: ‘The Code requires that the state law of the country is to be followed for contract and obligations (c 1034), except for alienation’.

<sup>256</sup> *CCEO*, cc. 1036§1; and 1037, 2°. In patriarchal Churches the *consent* of other parties is required for the alienation of goods, the value of which exceeds the maximum amount stipulated by the Synod of Bishops, but falls below twice the maximum (*CCEO*, c. 1037: 2°), or exceeds twice the maximum, or is given by vow, and in other cases if the value exceeds the amount established by the Apostolic See, or has been donated (*CCEO*, c. 1036). See Appendix II.

Canonists, even those who acknowledge the need for formal qualifications, fall short of defining skill and experience which characterise appropriate expertise; some merely require ‘trained’ or ‘competent’ people. Commentators are even divided as to whether these experts are to be found within the relevant diocesan commission or whether wider consultation is permitted. Few suggest consultation outside the Church although this is not prohibited by law, at least in respect of restoration of precious images or building or restoration of churches. Nor are commentators helpful on the precise functions of experts, particularly in relation to restoration. Like the law, they are silent on the issue of individual or collective consultation. They are also silent as to the effects of non-compliance with mandatory norms for consultation with experts; this is left to commentators on other canons, such as canon 127 (dealing with individual and collective consultation) and 1277 (dealing with acts of ‘administration of major importance’ or those of ‘extraordinary administration’). Moreover, they do not explain the significance of the legal requirement to *use* expert advice in the case of the building and restoration of churches.

Although the law requires members of the finance committee to be ‘of Christ’s faithful’ and suggests likewise for the finance administrator, by virtue of ecclesiastical office, commentators are divided on whether or not this provision requires ‘full communion’ and whether or not, despite the provision of *CCEO*, the fourth degree of consanguinity or affinity is included in the prohibition of appointment. Moreover, they are unhelpful in explaining the ‘grave reason’ required for removal of the finance administrator. In short, canonists appear more concerned about compliance with civil law than they are with compliance with canon law; only Provost warns against the ‘domino effect’ of invalid acts, albeit as a result of invalid appointments.

No specific knowledge of canon law is required of the experts in any of these fields. Lack of provision in universal law leaves competence to Bishops’ Conferences, comprised of a small number of members who may not have in-depth knowledge in the relevant fields. The danger is that rather than seeking out true experts, competence in the specific field suffices rather than expertise. It is suggested that new norms should be created, by the Bishops’ Conferences (or indeed by the Holy See) which address these issues. Such norms should clarify: in which situations the use of experts is mandatory; who is responsible for appointing them; whether the expert must be Catholic or may be non-Catholic; the professional

disciplines from which they are drawn and their qualifications; their functions; whether or not they must be consulted individually or collectively; whether non-compliance with the requirement to consult experts affects the validity of the relevant decision; the weight and effect of the expert opinion or advice; and whether the decision-maker is bound by expert opinion.

## CHAPTER 2

### THE USE OF EXPERTS IN ADMISSION TO HOLY ORDERS AND RELIGIOUS INSTITUTES AND THE EXERCISE OF MINISTRY

The sacrament of Holy Orders is fundamental to the life of the Church.<sup>1</sup> Although all the baptised participate ‘in their own way’ in the priestly office of Christ, certain functions can only be fulfilled by ordained ministers.<sup>2</sup> As these ministers act *in persona Christi*, their training, for which the Church claims exclusive authority, is an essential task.<sup>3</sup> The Church, therefore, has norms which govern candidature for Ordination and the exercise of ordained ministry. Likewise, the Church claims competence to establish Religious Institutes, which are also governed by their own law, to which admission, although not necessarily leading to Ordination, is also regulated.<sup>4</sup> Experts in health care can be used to assist in decision-making regarding the physical and psychological fitness of candidates for Holy Orders and religious life. This Chapter addresses four areas: candidature for Orders (irregularity and suitability); the exercise of ordained ministry; admission to religious institutes; and confidentiality. As was the case in Chapter 1, this Chapter examines: whether the use of experts is mandatory; the appointment of experts; the professional disciplines from which they are drawn and their qualifications; their functions; and whether or not experts must be consulted individually or collectively. It also explores: whether non-compliance with the requirement to consult experts affects the validity of the relevant decision; and the weight and effect to be given to the expert opinion or advice. These matters are discussed critically, especially where norms are unclear. Therefore, proposals for the creation of new norms are suggested.

#### 1. CANDIDATURE FOR ORDINATION

Admission to Orders involves not only the call, and its discernment,<sup>5</sup> but formation, by qualified personnel, over a six-year period, during which the candidate is educated and

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<sup>1</sup> *CIC*, c. 1008. See Appendix I. There are three degrees of Holy Order: bishop, priest and deacon. See also *CCC*, p348, para 1554; Appendix IV.

<sup>2</sup> *CIC*, cc. 204§1; and 274§1. See Appendix I.

<sup>3</sup> *CIC*, cc. 232; and 1009§3. See Appendix I. See also *CCC*, p346, para 1548; Appendix IV.

<sup>4</sup> *CIC*, cc. 573§2; 607§2; and 641. See Appendix I.

<sup>5</sup> William H Woestman, *The Sacrament of Orders and the Clerical State* (St Paul University, Ottawa, 2001) (hereafter Woestman, *The Sacrament of Orders*), p47-8, citing Pius XII, Apostolic Constitution, *Sedes Sapientia*

assessed.<sup>6</sup> The only explicit canonical requirements which go to validity of the sacrament of orders are that the candidate be male and baptized.<sup>7</sup> There are, however, other implicit, but nonetheless strict requirements.<sup>8</sup> A priest is a ‘man of communion’, who, in relations with all people, ‘must be a man of mission and dialogue’.<sup>9</sup> The Church, therefore, restricts admission to Holy Orders to those deemed capable and suitable. Regularity for Orders is distinguished from suitability. What follows deals first with irregularity for Orders and second with suitability for Orders.

## Irregularity for Orders

It is not required that regularity, that is, freedom from irregularity,<sup>10</sup> or freedom from impediment,<sup>11</sup> be established positively; it is presumed.<sup>12</sup> *CIC* canon 1041 provides:<sup>13</sup>

‘The following persons are irregular for the reception of orders: 1° one who suffers from any form of insanity, or from any other psychological infirmity, because of which he is, after experts have been consulted, judged incapable of properly fulfilling the ministry...’<sup>14</sup>

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(31 May 1956), in *AAS*, 48 (1956), pp 334-345. No 11, explains that ‘the divine call’ has to be ‘authoritatively approved, admitted, and controlled’ by hierarchical superiors. José María González del Valle, *Ann*, p785, says: ‘Vocation to the priesthood is not prior to the free choice made by the ecclesiastical superior’. See also *CIC*, cc. 233§1; and 385, which impose (respectively) an obligation on the whole Christian community and the diocesan bishop to foster vocations; see Appendix I. The importance of the ‘call’ is a consistent theme in Vatican documents; see *EA*, 40; *RI*, 13; *CDVPHT*, 3; *PDV*, 10; and *Gpsy* in Appendix VI.

<sup>6</sup> *CIC*, cc. 232-264; and 1027. See Appendix I. See also *OT*, 5; and *CDVPHT*, 3 in Appendix VI.

<sup>7</sup> *CIC*, c. 1024. See Appendix I.

<sup>8</sup> Eg., *CIC*, cc. 1009§2 and 1012. Other canonical conditions are stipulated, but do not necessarily go to validity; see eg., *CIC*, c. 597§1. See Appendix I.

<sup>9</sup> *PDV*, 18; and 26. See Appendix VI.

<sup>10</sup> Irregularities are ‘perpetual’ impediments. *CIC*, c. 1040. See Appendix I. Kelly, *L&S*, p562, para 2022, explains that there are other reasons for which a man may be barred from Orders, or forbidden their exercise, but these depend on the decision of the bishop or major Superior, and unlike impediments, the effects of which are automatic, recourse is possible against the competent Superior’s decision. He defines an impediment to Orders as ‘a personal defect which, by ecclesiastical law, forbids the reception of an order or forbids the exercise of an order already received’. Woestman, *The Sacrament of Orders*, p81, explains: ‘[Impediments are] canonical means to ensure the dignity and reverence of sacred ministry’.

<sup>11</sup> *CIC*, c. 1042 lists those who are impeded from receiving Orders, but the law does not require the involvement of experts. See Appendix I.

<sup>12</sup> See *CIC*, cc. 1025§1 and 1043 for the ecclesiastical authority’s obligation nevertheless, to make a judgment of freedom from all impediments and for the faithful’s share in this responsibility. See Appendix I.

<sup>13</sup> The canon is placed in Book IV on The Sanctifying Office of the Church, Part I, The Sacraments.

<sup>14</sup> *CCEO*, c. 762§1, 1° uses similar terminology. See Appendix II. The American Commentaries use slightly different language: *Text&Comm*, p729: ‘a person who labours under some form of insanity or other psychic defect due to which, after consultation with experts, he is judged incapable of rightly carrying out the ministry’; *New Comm*, p1214: ‘a person who labours under some form of amentia or other psychic illness due to which, after experts have been consulted, he is judged unqualified to fulfill the ministry properly’. The Latin text uses ‘*inhabilis iudicatur ad ministerium rite implendum*’.



Other irregularities involve direct action on the part of the candidate amounting to ecclesiastical offences;<sup>15</sup> they can, for the most part, be objectively discerned by the candidate's own confession and by civil or ecclesiastical documents.<sup>16</sup> This canon clarifies that: the *presence of irregularity* due to 'insanity' or 'any other psychological infirmity,'<sup>17</sup> must be positively established; and to do this, more than one expert must be consulted.<sup>18</sup>

However, the canon does not clarify: who appoints the experts; the professional disciplines and qualifications required of the experts; the meaning of the term 'incapable of properly fulfilling the ministry'; whether experts are consulted individually or collectively; whether failure to consult experts invalidates the declaration of irregularity; what weight must be given to the expert opinions; and the level of proof required to establish the irregularity.

**Appointment of Experts:** Commentators are silent on who appoints the experts. However, given that the judgments as to whether or not the candidate is capable of fulfilling ministry and whether or not to admit to Orders remains with the competent ecclesiastical authority, it would appear that this same authority is responsible for the appointments of the experts whose role is advisory.<sup>19</sup> Neither the norms nor the commentators address the question as to whether or not the individual concerned has a choice in the selection of the experts. Given the more recent Vatican guidelines (2008), which give a candidate for holy Orders a choice (albeit one which must be approved), it would seem that the individual has a say in the matter.<sup>20</sup>

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<sup>15</sup> Therefore, they concern also the moral order. See *CIC*, c. 1041, 2° - 6°. González del Valle, *Ann*, p794 suggests that 'the only *de facto* irregularity of defect [as distinct from delict] is that of 1°' of this canon. Moreover, 'in reality ... [the irregularity] speaks of those who *suffer*, not those who *suffered*', consequently it is an impediment, as c. 1044§ seems to suggest, rather than an irregularity, which is perpetual in nature. Emphases in original. He further holds that 'the system is not applied coherently: *CIC*, cc. 1047§3 and 1048 should refer to c. 1044 and not to c. 1041; c. 1049 should refer to c. 1044 as well as to c. 1041'. See Appendix I.

<sup>16</sup> *CIC*, c. 1041 lists others who are irregular for the reception of Holy Orders, but the intervention of experts is not required. See Appendix I.

<sup>17</sup> Latin: '...*qui aliqua forma laborat amentiae aliusve psychiae infirmitatis ...*'.

<sup>18</sup> Latin: '... *qua, consultis periti ...*'.

<sup>19</sup> This is consistent with *CIC*, cc. 1029 and 1025§§1, 2. Earlier drafts of *CIC*, c. 1041 implied that the experts judged whether or not a person was irregular, but the wording was amended to ensure that the expert's consultative role was clear and while they were competent to judge the existence of a psychological or psychiatric infirmity and its severity, the judgment as to irregularity for Orders remained with the ecclesiastical authorities. See Kelly, *L&S*, p563, citing *Epitome Juris Canonici* Vermeersch-Creusen 3 Vols (Malines 1937, 1940), Vol II, 175; Edward J Gilbert in *Text&Comm*, p729, citing *Comm*, 197; Robert J Geisinger, *New Comm*, p1216; Woestman, *The Sacrament of Orders*, p68; and Breitenbeck, *Jurist*, p259.

<sup>20</sup> See Appendix VI: *Gpsy*, 12.

**Disciplines, Qualifications and Functions of Experts:** Although canon 1041 does not specify the professional disciplines from which the experts might be drawn, nor their functions, its references to insanity and psychological infirmity infer the fields of psychiatry or psychology. Whilst some commentators are silent on the matter,<sup>21</sup> others focus on the definitions of insanity and psychological infirmity and, consequently, we have to infer from their understanding of these infirmities the professions from which experts are to be drawn.

On the one hand, Woestman argues that the expert must be someone able to distinguish temporary and permanent psychiatric or psychological conditions and establish their severity and effect.<sup>22</sup> He explains that ‘insanity’ does ‘not mean the temporary loss of the use of reason caused by an injury or a high fever, but a permanent state in which an individual is habitually deranged’.<sup>23</sup> The term in the canon ‘other psychological infirmity’ includes ‘psychotic disorders’.<sup>24</sup> Likewise, McDermott suggests that expertise in ‘insanity’ and ‘psychosis’ is required.<sup>25</sup> Kelly, speaking of ‘competent experts’, argues (rather unhelpfully) for expertise in ‘insanity’, which means ‘a habitual lack of the use of reason’, and in ‘other psychological infirmities’, which include ‘a wide range of personality disorders’.<sup>26</sup> Gilbert agrees: the required expertise is in ‘insanity’, ‘a disorder which habitually impairs the use of reason’, and in personality disorders, covered by ‘any other psychological infirmity’.<sup>27</sup> Therefore, these canonists focus on expertise in the disciplines of psychiatry and psychology.

By way of contrast, Geisinger suggests that the experts are not necessarily to be drawn exclusively from the fields of psychiatry and psychology. Rather than defining insanity or psychological infirmity, he suggests that the function of the experts is to determine the cause and effect of the candidate’s condition: ‘the impeding quality of the *amentia* or other psychic illness is seen in its effect’. Geisinger holds that the ‘presenting ordinary or ordaining bishop’ ‘enjoys a certain latitude’ in determining the applicability of canon 1041, 1°’. Nevertheless, the bishop ‘may not be arbitrary’, although his judgment is subjective. The

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<sup>21</sup> González del Valle, *Ann*, p794.

<sup>22</sup> Woestman, *The Sacrament of Orders*, p68.

<sup>23</sup> *Ibid.*, p67.

<sup>24</sup> *Ibid.*, p67: ‘Such as schizophrenia, paranoia, etc; serious neuroses, anxiety disorders, obsessive-compulsive disorder, etc; mood disorders like depressive disorder, manic-depressive disorder, etc; and some infirmities with an organic basis, e.g., Alzheimer’s disease, Pick’s disease, Huntington’s disease etc’.

<sup>25</sup> Rose M McDermott, *Text&Comm*, p517, ft 20.

<sup>26</sup> Kelly, *L&S*, p563.

<sup>27</sup> Gilbert, *Text&Comm*, p729.

investigation must be ‘thorough’ and involve examination by experts; the law ‘presumably refers to psychological experts’ but relying on the canon’s silence on professional disciplines, Geisinger considers that experts ‘need not be exclusively those credentialed in psychology or psychiatry’ but could be experts in ‘civil or criminal law, education, or clerical formation’.<sup>28</sup>

Canon 1041, although referring to experts (plural), does not explicitly require that insanity or other psychological infirmity be established having consulted more than one *medical* expert. Therefore, a medical expert might provide an opinion as to the existence of a condition, its severity and effect on the candidate’s ability to perform specific tasks, but an experienced or ‘expert’ novice master or rector of a seminary might provide an opinion as to the candidate’s ability to fulfil ministry.<sup>29</sup> Nevertheless, it appears from the nature of the irregularity that at least one expert in psychiatry or psychology is required to establish the existence of a condition, its severity and, above all, its effect. Given that the candidate must be judged by the ecclesiastical authority ‘incapable’ of, or ‘unqualified’ to, ‘properly’ or ‘rightly’ carry out ministry, it seems logical that the experts should understand the meaning of incapacity.

Interestingly, a candidate may also be irregular if he ‘gravely and maliciously mutilated himself or another’ or if he ‘attempted suicide’.<sup>30</sup> However, there is no requirement for an expert to be consulted as to whether these events give rise to questions about the candidate’s mental state. It is suggested that an ecclesiastical authority is not competent to determine this, and that an expert should be consulted. Some commentators only note the issue;<sup>31</sup> others suggest that this should be dealt with under canon 1041, 1° as a psychological matter.<sup>32</sup>

**Incapacity to Fulfil Ministry:** In light of the foregoing, expertise is needed to assist in the determination of the capacity or incapacity of a candidate ‘properly’ (or ‘rightly’) to exercise ministry. Woestman explains that ‘properly’ (or ‘rightly’) does not translate ‘the full import

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<sup>28</sup> Geisinger, *New Comm*, p1215-1216.

<sup>29</sup> A ‘rector’ presides over a seminary; see Appendix I: *CIC*, c. 239§1. *CIC* 1917 defined the rector’s role as maintaining ‘discipline’; see Appendix III: *CIC* 1917, c. 1358.

<sup>30</sup> *CIC*, c. 1041, 5°. See Appendix I.

<sup>31</sup> Geisinger, *New Comm*, p1218.

<sup>32</sup> Gilbert, *Text&Comm*, p730 and Kelly, *L&S*, p564, para 2027.

of the Latin text’;<sup>33</sup> when *CIC* uses for incapacity the words *inhabilis*, *inhabilitans*, and *inhabilitas*, it means ‘incapacity to do something’, and in the case of irregularity for Orders it refers to the lawful reception of Orders; not to *moral* fitness or probity.<sup>34</sup> Geisinger accepts that an irregularity is a perpetual impediment.<sup>35</sup> Breitenbeck, not addressing the meaning, holds that this irregularity on psychological grounds can be dispensed; but nevertheless, she considers ‘consultation with the experts would be a most critical and important step’ in decision-making; this again seems to infer the need to consult experts in the fields of psychiatry or psychology.<sup>36</sup> However, she gives no examples of circumstances where dispensation could be justified, but bases her argument on the fact that *CIC* does not list this irregularity among those for which a dispensation is reserved to the Holy See.<sup>37</sup> This raises the question as to whether irregularity due to insanity or psychological infirmity is one of natural law or of ecclesiastical law. Commentators hold different opinions.

Only ‘merely’ ecclesiastical law can be dispensed.<sup>38</sup> However, when suffering from insanity or psychological infirmity, a candidate’s *inherent* capacity is in question. On the one hand, Kelly, holding that the bar is one of ecclesiastical law, simply states: ‘Whether an infirmity induces the irregularity in an individual case depends on whether or not it renders the person incapable of fulfilling the ministry’.<sup>39</sup> Others, not addressing the issue as to whether the irregularity is one of natural law or ecclesiastical law, agree that an *irregularity* is ‘perpetual in nature’ but must be *de facto* current; past psychological infirmity leads only to a simple

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<sup>33</sup> William H Woestman, ‘Canons 1041, 1° and 1044 §2, 2°: Some Form of Insanity or Other Psychic Infirmity’, in Arthur J Espelage (Ed), *CLSA Advisory Opinions 1994-2000* (Washington, 2002), pp313-315 (hereafter Woestman, ‘Canons 1041, 1° and 1044 §2, 2°’), p314, citing Charlton T Lewis and Charles Short, *A Latin Dictionary* (Oxford, 1969). The adverb ‘rite’ refers to ‘the fulfilment and the correct carrying out for a valid celebration of the acts placed according to the *ordo* [of the rite] itself’. The correct and ‘original meaning’ of ‘rite’ is ‘according to religious ceremonies or observances’. This issue will be addressed further below as Woestman expands when dealing with impediment to the exercise of Orders already received. See ft 162 below.

<sup>34</sup> Woestman, *The Sacrament of Orders*, p66. Woestman, ‘Canons 1041, 1° and 1044 §2,2°’, p314, holds that the purpose of irregularities and impediments to the reception and the exercise of Orders is ‘to ensure the worthiness’ of priests, but this does not necessarily refer to moral behaviour.

<sup>35</sup> Geisinger, *New Comm*, pp1215-1216, holds that the canon: ‘does *not* state explicitly that the psychically impaired person is judged to be utterly *incapable* of fulfilling the demands of sacred ministry ... he need not lack the use of reason or labor under an irremediable psychosis... . The canon does not state whether the psychic problem need inhibit the person merely in liturgical ministry (e.g., presiding at Mass or hearing confessions), or rather in a broader pastoral sense as well (e.g., preaching, teaching, visiting, or parish administration) ... . [T]he problem must be recognizable and determined by experts, and must directly affect the person’s ability to exercise his office fittingly’. Emphases in original.

<sup>36</sup> Breitenbeck, *Doctoral Thesis*, p251 and Breitenbeck, *Jurist*, p260.

<sup>37</sup> Breitenbeck, *Jurist*, p260. See Appendix I: *CIC*, c. 1047§1.

<sup>38</sup> *CIC*, c. 85. See Appendix I.

<sup>39</sup> Kelly, *L&S*, pp562-563.

impediment.<sup>40</sup> On the other hand, McGrath, albeit commenting on *CIC* canon 99,<sup>41</sup> holds that a transitory condition can render a person temporarily incapable of acting, whereas an habitual or permanent condition, like a ‘serious mental illness of extended duration’, can render the person unfit to perform a valid juridical act; interestingly, he adds, they are ‘technically irregular for the reception of orders’, implying a bar of natural law.<sup>42</sup> Huels seems to suggest a natural law basis: laws which define essential constitutive elements of juridical acts cannot be dispensed; ‘define’ in this context means ‘determine’. Psychological capacity to ‘properly fulfil the ministry’ is both implicitly required and pertains to ‘the basic performance’ of the priest’s function; therefore, it is a constitutive element.<sup>43</sup>

Consequently, because of the natural law basis for this irregularity, it can be argued that canon 1041 is an invalidating law. It is, clearly, an incapacitating law; therefore, it must be interpreted strictly.<sup>44</sup> It can be further argued that because the canon expressly requires the constitutive element of capacity to fulfil ministry, no dispensation is possible. So, it appears that whilst *disciplinary* laws determining irregularities can be dispensed,<sup>45</sup> irregularity, due to insanity or incapacitating psychological illness, cannot.<sup>46</sup> An analogy can be made with the requirements for matrimony.<sup>47</sup> As such, the experts are to establish whether the candidate can understand and freely choose to receive Orders and can assume the appropriate obligations required for ministry. If the answer is affirmative, the candidate has capacity. Although ‘freedom’ means freedom from coercion, to establish irregularity on this ground, the experts would be required to establish lack of psychological freedom.<sup>48</sup>

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<sup>40</sup> González del Valle, *Ann*, p649.

<sup>41</sup> *CIC*, c. 99. See Appendix I.

<sup>42</sup> Aidan McGrath, *L&S*, p57.

<sup>43</sup> *CIC*, c. 86. See Appendix I. See Chapter I, ft 51. Huels, ‘Categories of Indispensable and Dispensable Laws’, p52, reminds the reader: ‘The word *express* in c. 10 includes both explicit and implicit statements of invalidity and incapacity’.

<sup>44</sup> *CIC*, c. 18. See Appendix I. The natural law basis for incapacity is restricted to 1° of canon 1041.

<sup>45</sup> Albeit sometimes reserved to the Holy See. See *CIC*, cc. 1041, 2° and 3°; 1041, 4°; and 1047 in Appendix I.

<sup>46</sup> Huels, ‘Categories of Indispensable and Dispensable Laws’, at p52, warns: ‘Constitutive laws establishing basic juridic capacity should not be confused with disciplinary laws that are incapacitating’. See *OT*, 2 in Appendix VI. Pope Paul VI speaks of the duty of Church ministers to recognize and consecrate ‘those candidates whose fitness has been acknowledged and who have sought so great an office with the right intention and with full freedom’. See also *CIC*, c. 124§1 in Appendix I.

<sup>47</sup> *CIC*, cc. 1057§1; and 1095. See Appendix I.

<sup>48</sup> *CIC*, cc. 219; 1026; and 1036. See Appendix I. The term in c. 1026, that ‘it is absolutely wrong’ to either compel anyone to receive Orders or to refuse Orders to anyone suitable, is a translation from the Latin ‘*nefas est*’. ‘*Nefas est*’ is used rarely in *CIC*, reflecting the strength of the prohibition (e.g., in c. 927, concerning consecration of only one element of Holy Communion, or of consecrating both elements outside the celebration of Mass; c. 983§1, violating the seal of confession; and c. 1190§1, forbidding the sale of relics). *CCEO* uses the

**Consultation - Individual or Collective:** Canon 1041 requires consultation with experts (plural). The requirement to engage more than one expert (from the field of psychiatry, psychology, or not), although not mentioned by some writers,<sup>49</sup> is commonly accepted by others.<sup>50</sup> Commentators are silent on the issue of individual or collective consultation.

**Failure to Consult and Weight of the Expert Advice:** As we have seen in Chapter 1, although *CIC* canon 10 might appear applicable, one needs to look elsewhere for the invalidating clause.<sup>51</sup> Both because the declaration of irregularity is a juridical act, and the law imposes a mandatory duty of prior consultation with experts, it can be argued that consultation is a condition on which the ecclesiastical authority's competence to make the declaration rests. Canon 127 applies and goes to validity.<sup>52</sup>

**Level of Proof for Irregularity:** As regularity is presumed, the *presence* of irregularity on *psychological grounds* must be established positively, having consulted experts. Breitenbeck makes no reference to the level of proof required to make a judgment on irregularity.<sup>53</sup> Kelly states that 'moral certainty', of *the presence* of irregularity, 'based on objective ... and provable evidence' is required.<sup>54</sup> For Geisinger, a 'subjective judgment' is required, but based on solid objective data which lead the Ordinary to 'moral certitude regarding *the presence or absence* of the impeding' cause.<sup>55</sup> As we will see later when discussing the level of proof required to establish suitability for Orders, it would seem that the competent authority must indeed reach 'moral certainty', which leaves no room for prudent doubt.

The norms on each of these matters, in relation to irregularity for Orders on psychological grounds, may be contrasted with those in *CIC* 1917 and *CCEO*. *CIC* 1917 distinguished

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phrase 'not permitted'. *CIC*, c. 1036 requires the candidate to sign a document as evidence of his freedom to enter the diaconate.

<sup>49</sup> González del Valle, *Ann*, p794.

<sup>50</sup> Kelly, *L&S*, p563, Gilbert, *Text&Comm*, p729, Geisinger, *New Comm*, p1215, Woestman, *The Sacrament of Orders*, p68, and Breitenbeck, *Jurist*, p258.

<sup>51</sup> See Chapter 1, ft 47.

<sup>52</sup> *CIC*, cc. 10; and 127. See Appendix I. See also Chapter 1, ft 51. See also *CCEO*, c. 934 in Appendix II.

<sup>53</sup> Breitenbeck, *Jurist*, pp257-288.

<sup>54</sup> Kelly, *L&S*, p563. See Pius XII, *Allocution to the Roman Rota* (1942) for a definition of 'moral certainty' in Appendix VII. It is akin to the concept of 'beyond reasonable doubt' in secular criminal law.

<sup>55</sup> Geisinger, *New Comm*, pp1215-1216.

irregularities by defect from those by offence.<sup>56</sup> Freedom from impediments was not presumed: this was to be established by testimonial letters from the Ordinary of each place where the candidate resided for more than six months since puberty; and banns were to be called in the secular cleric's parish church.<sup>57</sup> Although *CIC* 1917 recognised irregularity on psychological grounds, it did not require experts to establish the existence of the defect. *CCEO* is explicit in stating the role of the ecclesiastical authority in the 'calling' of a candidate.<sup>58</sup> Like *CIC*, it requires, for validity, baptised, male candidates and Episcopal ordination.<sup>59</sup> In contrast, irregularities are not distinguished from simple impediments; but to establish an impediment on psychological grounds, like *CIC*, consultation with more than one expert is required.<sup>60</sup>

In sum, *CIC* canon 1041 requires experts to assist in determining irregularity due to insanity or other psychological infirmity. However, it does not identify the professions from which 'experts' are drawn; nor does it define 'incapable of properly fulfilling the ministry'. Nevertheless, given the severity of the conditions required to establish this particular irregularity, psychiatrists or psychologists would appear the most suitable experts to consult. Most commentators agree on this. Moreover, neither the canon nor the commentators specify who appoints the experts or whether or not experts are consulted individually or collectively. However, failure to consult experts invalidates the decision, weight must be given to the expert opinions, and the level of proof required for irregularity is moral certainty.

### **Suitability for Orders**

Unlike regularity, but like irregularity, *suitability* is not presumed; it must be established positively, implying at least a human presumption of *unsuitability*.<sup>61</sup> Reflecting the provisions governing entry to major seminary,<sup>62</sup> the competent authority is obliged to ensure that candidates for Orders meet certain criteria: *CIC* canon 1029 provides:

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<sup>56</sup> *CIC* 1917, cc. 984; and 985. See Appendix III.

<sup>57</sup> *CIC* 1917, cc. 993; 987; and 998. In the case of soldiers, a period of three months was considered sufficient to have contracted an impediment. See *CIC* 1917, c. 994. See Appendix III.

<sup>58</sup> *CCEO*, c. 323§1. See Appendix II.

<sup>59</sup> *CCEO*, cc. 744; and 754. See Appendix II.

<sup>60</sup> *CCEO*, c. 762§1. See Appendix II.

<sup>61</sup> *CIC*, cc. 1052§1; and 1584 - 1586. See Appendix I.

<sup>62</sup> *CIC*, c. 241§1. See Appendix I.

‘Only those are to be promoted to orders who, in the prudent judgement of the proper Bishop or the competent major Superior, all things considered, have sound faith, are motivated by the right intention, are endowed with the requisite knowledge, enjoy a good reputation, and have moral probity, proven virtue and the other physical and psychological qualities appropriate to the order to be received’.

The competent authority is required to make judgments about *suitability* for Orders and the candidate’s benefit to the Church.<sup>63</sup> To establish suitability, the law requires that a candidate have, *inter alia*, ‘physical and psychological qualities appropriate to the order to be received’. However, no mention is made of the assistance of experts. Moreover, although still without reference to ‘experts’, various documents are required to establish ‘fitness’ and the ‘physical and psychological’ qualities; the latter follows ‘proper investigation’. It is in this context that experts might be involved. *CIC* canon 1051 states:

‘In the investigation of the requisite qualities of one who is to be ordained, the following provisions are to be observed:

1º: there is to be a certificate from the rector of the seminary or of the house of formation, concerning the qualities required in the candidate for the reception of the order, namely sound doctrine, genuine piety, good moral behaviour, fitness for the exercise of the ministry; likewise, after proper investigation, a certificate of the candidate’s state of physical and psychological health;

2º: the diocesan Bishop or major Superior may, in order properly to complete the investigation, use other means which, taking into account the circumstances of time and place, may seem useful, such as testimonial letters, public notices or other sources of information’.<sup>64</sup>

It is under paragraph two of the canon, then, that the bishop may consult experts in his determination of suitability. Nevertheless, the bishop is bound to keep himself informed of students’ progress.<sup>65</sup> Under canon 1051, paragraph one, two certificates are required: one from the rector attesting to the candidate’s personal qualities and fitness; and one confirming the candidate’s ‘psychical and psychological’ status, although ‘experts’ are not involved. The

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<sup>63</sup> *CIC*, c. 1025§§1, 2. See Appendix I.

<sup>64</sup> González Del Valle, *Ann*, pp802-803, says one of the source documents for *CIC*, c. 1051 requiring documentary evidence was *QI* because documents were a ‘more effective means’ to ascertain the existence of the vocation and suitability of aspirants; ‘testimonials’ are no longer obligatory. However, *CIC*, c. 1020 provides: ‘Dimissorial letters are not to be granted unless all the testimonials and documents required by law according to the norm of cann. 1050 and 1051 have been obtained beforehand’.

<sup>65</sup> *CIC*, c. 259§2. See Appendix I.



American translations imply that a single ‘testimonial’<sup>66</sup> from the rector suffices covering both the candidate’s qualities and his physical and psychological health,<sup>67</sup> which is more in keeping with the Latin text requiring only the rector’s ‘testimony’, which, it appears, could be oral.<sup>68</sup> These documents do not constitute an exhaustive list. Importantly, under paragraph two, the bishop or major Superior *may* use, as a source of information, experts and others *to complete his investigation*, suggesting that this means is permitted *if* uncertainty remains. Presumably, in such a case, the bishop or major Superior appoints the experts. However, the canon does not clarify: the professional disciplines or qualifications of those who provide the required certificates of physical and psychological health; or the degree of certainty required to establish suitability.

**Appointment of Experts:** Although the use of experts is not mandated, their use is permitted if necessary. Presumably, as the bishop may consult experts, it is he who appoints them. However, neither the norms nor the commentators address whether the individual whose suitability is in doubt has a choice in the selection of the experts. Given the more recent Vatican guidelines (2008), which give the candidate a choice (albeit one which must be approved by the seminary), it would seem that the individual has a say in the matter.<sup>69</sup>

**Disciplines, Qualifications and Functions of Experts:** Whilst canon 1029 on suitability is silent on this matter, commentators differ on the disciplines of those who assist in establishing suitability; indeed, one commentator considers that suitability is judged on ‘conditions of nature and grace’, without further clarification.<sup>70</sup> On the one hand, some commentators focus on establishing the required psychological health. Kelly, by analogy with canon 642,<sup>71</sup> which permits the use of experts ‘if necessary’ when assessing candidates

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<sup>66</sup> *Chambers Pocket Dictionary* (Edinburgh, 1998), p936 defines ‘testimonial’ as: ‘a letter or certificate giving details of one’s character, conduct and qualifications’; *The Concise Oxford Dictionary*, Eighth Edition (1990), p1262, defines ‘testimonial’ as: ‘a certificate of character, conduct or qualifications’.

<sup>67</sup> *Text&Comm*, p734 and *New Comm*, p1229. American commentators differ in their interpretation: Gilbert, *Text&Comm*, p734 refers to ‘testimonial letters’, whilst Geisinger, *New Comm*, p1230, under a heading ‘One Document, Dual Purpose’ says ‘the documentary requirements of *CIC*, cc. 1050 and 1051 may be integrated into one statement ...’.

<sup>68</sup> Latin text: ‘... *habeatur testimonium rectoris seminarii* ...’. *The Concise Oxford Dictionary*, Eighth Edition (1990) at p1262, defines ‘testimony’ as: ‘An oral or written statement under oath or affirmation’; ‘declaration or statement of fact’; or ‘evidence, demonstration’. *The Collins Gem Latin Dictionary* (1989), p334, defines ‘*testimomium*’ as ‘evidence’, ‘testimony’ or ‘proof’.

<sup>69</sup> *Gpsy*, 12. See Appendix VI.

<sup>70</sup> González Del Valle, *Ann*, p785, relying on *QI* and *QR*.

<sup>71</sup> *CIC*, c. 642. See Appendix I.

for the novitiate, acknowledges that ‘many seminaries and religious institutes now have a system of psychological assessment’ and refers to ‘school[s] of psychological thought’, which implies the use of psychologists.<sup>72</sup> However, any psychological report ‘should not be allowed to become the sole factor in determining a candidate’s fitness for ordination ... much less in determining whether ... he be admitted to a seminary formation’.<sup>73</sup> Gilbert makes a broad statement that the Church has ‘initiated psychological testing as part of the admissions procedures to seminaries’.<sup>74</sup> He states that canon 1041, 1°, requiring consultation with experts prior to declaring irregularity, will be used by the United States National Conference of Catholic Bishops in its Programme of Priestly Formation ‘to reinforce its policy of requiring psychological testing as part of the admissions process for candidates for Orders’.<sup>75</sup> Golden holds, without explanation, that canon 241, on qualities required for admission to seminary (including ‘physical and psychological health’), ‘urges the use of testing to determine the fitness of an applicant’s mental health’ - but this does not necessarily contradict the Holy See’s warning against the use of psychoanalysis, which is ‘commonly understood as an extended treatment for probing the unconscious’.<sup>76</sup> Geisinger’s says that whilst ‘testimonials composed in accord with canon 1051, 1° are usually succinct’, nevertheless, ‘there should be nothing perfunctory about the prior testing and investigation which culminate in the issuance of these testimonials’.<sup>77</sup> These authors, therefore, imply the routine use of psychologists.

On the other hand, Cunningham considers that in order to meet canonical requirements, in addition to a psychological assessment to aid in judging the candidate’s ‘motivation, stability, and capacity’, which implies routine psychological assessments, the help of spiritual directors for interviews, medical doctors and other professionals for examination of an applicant’s physical health is also required.<sup>78</sup> Smith, although acknowledging that ‘suitability of character and sufficient maturity can usually be established through less formal but equally effective means’, considers ‘[t]he applicant’s physical and mental health is best attested to by

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<sup>72</sup> Kelly, *L&S*, p557.

<sup>73</sup> *Ibid.* Also McGrath, *L&S*, p138.

<sup>74</sup> Gilbert, *Text&Comm*, p725.

<sup>75</sup> *Ibid.*, p729.

<sup>76</sup> Paul L Golden, *Text&Comm*, p182. Emphasis added. See Appendix I: *CIC*, c. 241.

<sup>77</sup> Geisinger, *New Comm*, p1230.

<sup>78</sup> Richard Cunningham, *New Comm*, p312-313.

professionals credentialed in the respective disciplines'.<sup>79</sup> However, she acknowledges: the reservations of others regarding routine psychological assessments; the practice of 'many institutes' requiring applicants to present 'various' medical evaluations; the 'difficult moral issues' facing both those who draw up admissions policies and those recommending applicants in the face of medical advances which 'enable the detection of HIV infection, chronic or debilitating diseases, and certain genetic predispositions'.<sup>80</sup>

The law governing suitability for Orders, unlike (as we shall see) that governing suitability for admission to the novitiate, enables rather than mandates the use of experts in cases of doubt or necessity.<sup>81</sup> Vatican documents infer that experts are only consulted where necessary. The development of these documents is as follows. The Apostolic Constitution *Deus Scientiarum Dominus* (1931) and an Encyclical (1935) highlighted the importance of training for the priesthood.<sup>82</sup> A later Encyclical (1954) acknowledged the *possibility* of consulting experts, *if necessary*, particularly in assessing suitability for the assumption of specific obligations flowing from Holy Orders and religious life.<sup>83</sup> A later Instruction (1961) called for a 'thorough examination by a Catholic Psychiatrist' for those with particular difficulties.<sup>84</sup> Vatican II's Decree on Priestly Formation (1965) did not require the use of experts to establish suitability; as this contains only general laws, Episcopal Conferences were charged with producing a program for priestly formation for their area, albeit requiring the Holy See's approval.<sup>85</sup> A Circular Letter (1980) encouraged the updating of these programs.<sup>86</sup> To this point, then, there was little in the general law on the use of experts in establishing suitability.

Concerned by cases of defection by, and dismissal of, priests, the Pope issued a Post-Synodal Exhortation (1992) on the formation of priests, considering this 'one of the most demanding

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<sup>79</sup> Rosemary Smith, *New Comm*, p807. Smith suggests 'testimonials' as a 'less formal' means of accruing information.

<sup>80</sup> *Ibid.* Smith holds that 'dental', 'ocular', and 'general physical evaluations' are required by some Institutes.

<sup>81</sup> *CIC*, c. 642. See Appendix I.

<sup>82</sup> Pius XI, Apostolic Constitution *Deus Scientiarum Dominus* (31 May 1931) was the first plan of studies promulgated for universities and ecclesiastical faculties throughout the world. Also Pius XI, Encyclical, *Ad Catholici Sacerdoti* (20 December 1935).

<sup>83</sup> *SV*, 50. See Appendix VI.

<sup>84</sup> *RI*, 31. See Appendix VI.

<sup>85</sup> *OT*, 1. See Appendix VI.

<sup>86</sup> *RFIS* (6 January 1980).

and important tasks' of the Church.<sup>87</sup> A Circular Letter (1997) on the investigations required to establish suitability for Orders followed; this had several 'attachments' to facilitate application.<sup>88</sup> Not containing new law, 'in the strict canonical sense of the term', the Circular Letter included a 'strong recommendation' that its provisions and those in the attachments, be followed.<sup>89</sup> These documents require investigation of candidates at each of the four 'moments in the process of priestly formation', the process of discernment being called a 'scrutiny'.<sup>90</sup> The competent authority is required to reach 'moral certitude' of suitability, founded on 'positive reasons' not merely on 'convictions or intuitions'.<sup>91</sup> Care is required with initial selection because of seminarians' expectations that they progress through the stages,<sup>92</sup> and later changes require 'new and grave precedents'.<sup>93</sup>

A 'Commission for Orders and Ministries' is 'appropriate' for each diocese.<sup>94</sup> At its meetings, held in closed session, members freely discuss the information on each candidate and vote (in secret if necessary) on whether or not he is to be recommended for admission to the relevant stage.<sup>95</sup> Moreover, important decisions regarding suitability for Orders require prior consultation with 'experts and those informed of the appropriate facts';<sup>96</sup> canon law

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<sup>87</sup> *PDV*, 2. See Appendix VI. This document summarized the nature and mission of the ministerial priesthood.

<sup>88</sup> CDWDS Circular Letter (10 November 1997) (hereafter 'Circular Letter (1997)') and attachments. These documents were based on *QI* and *Magna equiden*, published in 1930 and 1955 respectively. The purpose of the documents was: to facilitate the candidate's free assumption of the responsibilities of Holy Orders; and to emphasize both the serious nature of the investigation into suitability (at N9), and the competent authorities' 'grave moral responsibility' in this regard (at N6).

<sup>89</sup> *Ibid.*, N9.

<sup>90</sup> *Ibid.*, N4. The four 'moments' are namely, admission to: the seminary; the ministries of lector and acolyte; the diaconate; and the priesthood. The provisions were applicable to candidates to the permanent diaconate also.

<sup>91</sup> *Ibid.*, N2, N3.

<sup>92</sup> *Ibid.*, N7. At N6: Notwithstanding that genuine mistakes can occur, negligence or imprudence in making the decision to admit, which later results in defection, causes 'grave harm' both to individuals and the Church. At N8: The cause of any unusual occurrence, such as a candidate coming from another diocese, congregation, or institute of consecrated life, or house of formation, should be studied and the reasons for dismissal or leaving another house of formation should be sought in confidence. At N11: Judging whether or not a candidate is suitable for ordination to the transitional diaconate includes, of necessity, his suitability for ordination to the priesthood.

<sup>93</sup> *Ibid.*, N11.

<sup>94</sup> *Ibid.*, Enclosure III, *Commission for Orders and Ministries*, 1: The commission comprises 'only priests endowed with experience, sound doctrine, and considered judgment', appointed by the Ordinary 'for a specified term'.

<sup>95</sup> *Ibid.*, Enclosure III, N6.

<sup>96</sup> Circular Letter (1979), N10: 'Prudence, which is one of the virtues necessary in the exercise of the responsibilities of government, urges that decisions of importance not be taken without first having heard the views of experts and those informed of the appropriate facts'. Neither 'important decisions' nor 'experts' are defined.

regarding, *inter alia*, impediments and irregularities must be followed;<sup>97</sup> and the advice of the members of the commission must be sought as *individuals*.<sup>98</sup>

The competent authority is not bound by the Commission's opinion, but such an opinion holds 'great moral value'. Referring to canon 127§2, the provision that opinion '*should not* be set aside except for grave and well founded reasons' is repeated.<sup>99</sup> The Commission's opinion, whether affirmative or negative, must be registered in the candidate's file with an 'explicit indication of the result of the vote'.<sup>100</sup> Admission 'may not take place' if 'prudent doubt' exists, that is, one founded 'upon facts that are objective and duly verified'.<sup>101</sup> 'Written documentation' is to be kept.<sup>102</sup> Moreover, opinions 'of persons and councils' should be sought and only set aside for well-founded reasons.<sup>103</sup> Specific reference to *CIC* canon 127 implies its applicability here also. Documents required to establish suitability include:<sup>104</sup> 'certification' concerning the candidate's progress through the various stages, with 'explicit' reference to the evaluations;<sup>105</sup> and a 'medical certificate'.<sup>106</sup>

It is clear, therefore, that the investigation is a serious one and the competent ecclesiastical authority, guided by 'experienced' priests, makes the ultimate decision. Although canon 1051, 1° requires a certificate of physical and psychological health, 'experts' are not necessarily involved. The Circular Letter (1997) requires a psychological assessment 'only if there exists a just reason'; it makes specific reference to canon 1051, 1°, supporting the premise that *irregularity* on psychological ill-health grounds must be established positively with the use of experts - but the use of experts is not mandated in establishing suitability,

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<sup>97</sup> Ibid., N12, referring specifically to *CIC*, cc. 1025§1; 1041-1042; 1031§§1-2; 1032§§1, 2; 1035§2; and 1039.

<sup>98</sup> Ibid., N3.

<sup>99</sup> Ibid., Enclosure III, N7. Emphasis added. *CIC*, c. 127§2 states that the Superior 'is not to act against their vote' without 'an overriding reason'.

<sup>100</sup> Ibid., Enclosure III, N8. At N10: If a positive decision is reached it must be expressed in a Decree of Admission, which must be issued at least one month before the date of institution or Ordination.

<sup>101</sup> Circular Letter (1979), N2. This echoes *CIC*, c. 1052§3. See Appendix I.

<sup>102</sup> Ibid., N4. A personal dossier for each candidate is required and it is to be transferred from the archives of the seminary to the diocesan curia or competent major Superior after ordination to the diaconate.

<sup>103</sup> Ibid., N3. This echoes the provision of *CIC*, c. 127. See Appendix I.

<sup>104</sup> Ibid., Enclosure II. *Documentation for the Scrutiny for Each (Liturgical) Stage in the Candidate's Progress Toward the Priesthood*, at N8, makes provision for the proclamation of banns, with specific reference to *CIC*, c. 1051 2°, *permitting* the use of other means to complete the investigation. There is no strict legal requirement to publish banns.

<sup>105</sup> Ibid., Enclosure I, *Documentation for each candidate*, N4. These documents are required to be kept in each candidate's personal file.

<sup>106</sup> Ibid., Enclosure I, N7 draws comparisons with *CIC*, cc. 1051, 1°; and 241§1. The latter, dealing with admission to the major seminary, does not explicitly require certification.

although their involvement could be requested to settle doubt.<sup>107</sup> The question then arises as to how the required ‘psychological qualities’ needed for suitability are established routinely.

Guidelines for the use of psychology in the assessment of candidates for Orders were issued in 2008.<sup>108</sup> The guidelines acknowledge the requirement for ‘affective maturity’ and ‘absence of mental disorder’ in candidates for Orders.<sup>109</sup> Although discerning a vocation to the priesthood ‘lies outside the strict competence of psychology’, the advantage of meeting with ‘experts in psychological sciences’, ‘to compare notes and obtain clarification of some specific issues’, was noted - but this a general statement not specifically related to the assessment of individual candidates.<sup>110</sup> Experts, who cannot be part of the formation team, must: have ‘specific competence in the field of vocations’; be ‘distinguished for their sound human and spiritual maturity’; and ‘be inspired by an anthropology that openly shares the Christian vision about the human person’.<sup>111</sup> Thus, the experts need not be Catholic.

As to the discharge of their functions, experts can have access to interviews and tests with the candidate’s ‘previous, explicit, informed and free consent’. They can ‘offer formators an opinion regarding the diagnosis of – and, perhaps, therapy for - psychic disturbances’ and can ‘help support the development of the human qualities’ required for ministry. The importance of spiritual directors and confessors notwithstanding, ‘in exceptional cases that present particular difficulties – recourse to experts in the psychological sciences, both before admission to the seminary and during the path of formation, can help the candidate overcome ...psychological wounds’.<sup>112</sup> Moreover, these experts can help to assess a candidate’s capacity for the obligations of priesthood;<sup>113</sup> and they can help the candidate to reach a greater knowledge of himself, of his ‘potentialities and vulnerabilities’.<sup>114</sup>

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<sup>107</sup> Ibid., Enclosure I: N8.

<sup>108</sup> *GPsy*. See Appendix VI.

<sup>109</sup> Ibid., 2: The ‘extraordinary and demanding synergy of human and spiritual dynamics’ required during formation is acknowledged.

<sup>110</sup> Ibid., 4-5.

<sup>111</sup> Ibid., 6.

<sup>112</sup> Ibid., 5.

<sup>113</sup> Ibid., 8.

<sup>114</sup> Ibid., 15.

However, the use of specialist psychological or psychotherapeutic techniques must be avoided.<sup>115</sup> The inference here is that these methods are unacceptably invasive and endanger the candidate's right to privacy. Specific regulation for the use of experts is to be provided in the competent authorities' Programs of Priestly Formation. Experts can play a role in the initial phase of discernment, *if* suspicion arises about the existence of psychic disturbance but any therapy should be undergone before admission to the seminary. The expert's task is to 'furnish the candidate with the appropriate indications concerning the difficulties that he is experiencing and their possible consequences for his life and future priestly ministry'.<sup>116</sup>

The documents acknowledge the Church's responsibility for choosing suitable experts.<sup>117</sup> As a candidate cannot 'impose his own personal conditions', he 'must accept with humility and gratitude' the norms which the Church provides because of the responsibility she bears; therefore, *sometimes* a psychological assessment will be required.<sup>118</sup> However, the candidate's psychological consultation may only proceed with his previous, explicit, informed, and free consent'.<sup>119</sup> His written consent is required for the expert to communicate findings to the formators exclusively and only for the purpose of discernment of vocation.<sup>120</sup> Confidentiality must be respected (see below). Interestingly, the candidate may choose the expert, but the formator must agree the choice; the candidate can also refuse to undergo psychological assessment, in which case the formators 'will prudently proceed in the work of discernment with the knowledge they already have', bearing canon 1052§1 in mind.<sup>121</sup>

Although predating the guidelines, some Bishops' Conferences have produced, with the Holy See's approval, programs of priestly formation for their own territories. The Bishops' Conference in Scotland produced their program in 2005. The program considers 'psychological profiling' to be 'helpful' in measuring the candidate's 'level of intelligence'.<sup>122</sup> A 'comprehensive medical report' is required,<sup>123</sup> from a doctor appointed by

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<sup>115</sup> Ibid., 5.

<sup>116</sup> Ibid., 15.

<sup>117</sup> Ibid., 11.

<sup>118</sup> Emphasis added. This might be suggested by the spiritual director. This implies that it need not be routine.

<sup>119</sup> *GPsy*, 12.

<sup>120</sup> Ibid., 5-16.

<sup>121</sup> Ibid., 12.

<sup>122</sup> Bishops' Conference of Scotland, *Norms for Priestly Formation in Scotland* (2005) (BCSNPF), 4.22.

<sup>123</sup> Ibid., paras 4.24; and 5.11.

the Bishops' Conference,<sup>124</sup> in addition to a 'variety of background reports' before admission to the seminary,<sup>125</sup> although these are not defined.<sup>126</sup> The bishop may consult widely; psychologists are included in this process.<sup>127</sup> Psychologists, must however, be selected carefully from those with correct understanding of both Christian anthropology and the aims of priestly formation.<sup>128</sup> This falls short of requiring Catholic psychologists. During what is termed 'The Applicant's Year' three interviews with three different 'experts in the field of human development' occur, in order to: 'encourage the applicant to develop skills of personal reflection'; 'help the applicant look at the way human development ... supports the spiritual (vocational) development'; and 'help the applicant explore his openness to formation and potential for growth'.<sup>129</sup> This implies routine use of experts, at least during the first year.

The United States Conference of Catholic Bishops (USCCB) produced their program in 2006. This requires 'a thorough screening process',<sup>130</sup> including 'psychological assessment' as 'an integral part of the admissions procedure',<sup>131</sup> implying routine testing. It outlines the basic personal requirements for admission to the seminary in 'human, spiritual, intellectual and pastoral' dimensions,<sup>132</sup> indicating the documents required to establish suitability,<sup>133</sup> including evidence of the 'requisite level of affective maturity and the capacity to live celibate chastity',<sup>134</sup> verified by 'expert consultants', who are 'are well versed in and

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<sup>124</sup> Ibid., Norms, 1.16.

<sup>125</sup> Ibid., para 5.10: Examples of those 'who are competent' to give confidential reports, include the applicant's: parish priest or the priest who gave notice of his application; his 'house/form teacher or guidance teacher or chaplain in the applicant's secondary school'; his previous employers; 'responsible members of any organisation in which he may have been involved'; or any seminary in which the applicant has been in formation. Also *ibid.*, Norms, 1.17.

<sup>126</sup> However, McDermott, *Text&Comm*, p490, albeit referring to admission to the novitiate, suggests: Interviews with the candidate; a visit to the home; testimonials from former employers and teachers; and academic records.

<sup>127</sup> *BCSNPF*, 5. At 8: '[The diocesan bishop] must judge candidates according to human, moral, spiritual and intellectual gifts, as well as physical and psychological health and right intention, ... the bishop will associate others with himself in the discernment process. Priests, religious, lay men and women, educationalists and psychologists may all have a contribution to make'.

<sup>128</sup> Ibid., 7; and 10.

<sup>129</sup> Ibid., Norms, 1,10.

<sup>130</sup> United States Conference of Catholic Bishops, *Program of Priestly Formation*, Fifth Edition (4 August 2006) (*USCCBPPF*), 37; and 47.

<sup>131</sup> Ibid., 52.

<sup>132</sup> Ibid., 37.

<sup>133</sup> Ibid., 47: A criminal background check is required. At 63: 'Summaries of personal interviews with the applicant, evaluation from his pastor and teachers, academic records, standardized test scores, assessments by experienced formators of the applicant's motivation, and if applicable, previous seminary evaluations' are all required. Marriage certificates of parents may be requested. At 65: A thorough physical examination is required, 'including HIV and drug testing'.

<sup>134</sup> Ibid., 39.



supportive of the Church's expectations'.<sup>135</sup> This, too, falls short of requiring Catholic experts. Although the Holy See charged Bishops' Conferences with regulating the use of experts in their Program of Priestly Formation, USCCB's document charges individual seminaries with producing 'guidelines for psychologists',<sup>136</sup> albeit that methods used must respect the candidate's right to privacy, reputation and confidentiality',<sup>137</sup> and civil law must be followed.<sup>138</sup> Psychologists or 'other licensed mental health professional' can be 'a useful instrument of human formation',<sup>139</sup> implying their use throughout formation, but not specifying the sub-disciplines from which they might be drawn.

In short, these two programs of priestly formation, and their particular norms, suggest routine use of psychologists in the assessment and formation of candidates. However, they appear more focused on establishing suitability rather than *irregularity* on psychological grounds. Only the more recent Vatican guidelines (2008) refer to the candidate's choice of expert. Given that Vatican documents imply the use of expert psychologists *if necessary* (not routinely) and encourage the updating of these programmes, one would expect up-dated programmes to reflect the provisions of the Vatican documents more closely.

**Level of Proof for Suitability:** It is clear from the Circular Letter (1997), mentioned above, that the competent authority must reach 'moral certainty' of suitability for Orders.<sup>140</sup> This was reiterated later in an Instruction (2005).<sup>141</sup> Most commentators agree that the level of proof is high, but they do not all refer specifically to the expression 'moral certainty'.

Breitenbeck, although writing before publication of these documents, makes no reference to any level of proof.<sup>142</sup> However, Kelly holds that the bishop has 'a grave responsibility' to be 'as certain as possible' about the fitness of the candidate and 'the mere fact that nothing is known against him is not sufficient; his fitness must be positively shown to have been

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<sup>135</sup> Ibid., 51. Particular law can provide for additional documents.

<sup>136</sup> Ibid., 51; and 105.

<sup>137</sup> Ibid., 52.

<sup>138</sup> Ibid., 57.

<sup>139</sup> Ibid., 80; and 105.

<sup>140</sup> Circular Letter (1979), N2; and N3.

<sup>141</sup> *CDVPHT*, 3. See Appendix VI.

<sup>142</sup> Breitenbeck, *Jurist*. However, Breitenbeck deals only with the canons in which experts are explicitly mentioned. Assessment of suitability for Orders does not necessarily require the use of experts.

proven, in so far as is humanly possible'.<sup>143</sup> Although not to any specific degree, Gilbert also requires that the bishop be 'certain ... that the suitability of the candidate has been established by positive arguments'.<sup>144</sup> For Geisinger, 'moral certitude of fitness for orders' is required.<sup>145</sup> Early dismissal is required when there is moral certainty that the candidate is 'not a risk worth taking';<sup>146</sup> the requirement that the candidate be judged beneficial to the Church 'discourages a minimalist approach'.<sup>147</sup> Given the requirement to provide documentary evidence for suitability, an analogy can be made with the requirement, albeit in the judicial forum, that to give *any* judgment, a judge must reach 'moral certainty, based on objective proofs'.<sup>148</sup> Woestman supports this stance: the competent authority must reach 'moral certainty' in all judgments of human affairs.<sup>149</sup> The law forbids the bishop to ordain if he has 'definite reasons' for doubting the candidate's suitability.<sup>150</sup> By using the word 'definite', it is clear that an objective basis is required; if this doubt exists, the bishop *must not* ordain. However, if suitability is established positively, the bishop must not refuse ordination.<sup>151</sup> So, to *refuse* admission to Orders, the competent authority must have moral certainty of the *presence* of irregularity (or impediment). To *permit* the reception of Orders, the competent authority must have moral certainty of the *absence* of impediment and the *presence* of suitability.

The forgoing provisions may be compared with those of *CIC* 1917 and *CCEO*. Under *CIC* 1917, although experts were not required to establish suitability, the rector's *testimony* regarding the candidate's good morals was required, implying, like *CIC*, a presumption of unsuitability.<sup>152</sup> Although *CCEO* requires 'physical and psychic qualities' consistent with the reception of Orders,<sup>153</sup> and testimonial letters to establish suitability,<sup>154</sup> medical certificates are not mandated before admission to Orders, but these can be requested.<sup>155</sup> Rather than establishing 'fitness', a 'testimonial letter' from the rector regarding the candidate's 'good

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<sup>143</sup> Kelly, *L&S*, p570, para 2051.

<sup>144</sup> Gilbert, *Text&Comm*, p734.

<sup>145</sup> Geisinger, *New Comm*, p1230.

<sup>146</sup> *Ibid.*, p1204.

<sup>147</sup> *Ibid.*

<sup>148</sup> *CIC*, c. 1608§§1, 2. See Appendix I.

<sup>149</sup> Woestman, *The Sacrament of Orders*, p38.

<sup>150</sup> *CIC*, c. 1052§3. See Appendix I.

<sup>151</sup> *CIC*, c. 1026. See Appendix I.

<sup>152</sup> *CIC* 1917, c. 993, 3<sup>o</sup>- 5<sup>o</sup>. See Appendix III.

<sup>153</sup> *CCEO*, cc. 758§§1, 2; and 771. See Appendix II.

<sup>154</sup> *CCEO*, c. 769§1, 4<sup>o</sup> - 6<sup>o</sup>. See Appendix II.

<sup>155</sup> *CCEO*, c. 771§§3, 4. See Appendix II.

conduct' is required.<sup>156</sup> Unlike both *CIC* 1917 and the current *CIC*, *CCEO* does not require that a candidate for Orders be judged beneficial to the Church.

In sum, consultation with experts is mandated to assist in establishing irregularity for the reception of Orders, due to insanity or other psychological infirmity. However, suitability must be established positively by the provision, *inter alia*, of certificates as to the physical and psychological health of the candidate - but this does not necessarily involve experts. Rather, the bishop may use any appropriate means to establish suitability. In other words, consultation with experts here is not mandated, but is permitted. However, the practice of routine psychological testing before ordination appears widespread. Nevertheless, the professional disciplines and level of expertise of the testers remains unclear.

## 2. THE EXERCISE OF ORDAINED MINISTRY

Once Orders have been received validly, there is no specific requirement to monitor or continue to prove suitability. But, determination of suitability for admission to the episcopate is made by the Holy See; and by analogy with canon 1051 2°, consultation with experts is not excluded.<sup>157</sup> However, a cleric can become irregular for, or be impeded from, the exercise of Orders. The law, like that governing admission to Orders, distinguishes *irregularity* for, and *impediments* to, the exercise of Orders already received. However, unlike *CIC* canon 1041, which considered 'insanity or other psychological infirmity' which led to incapacity to fulfil ministry as an *irregularity*, curiously, canon 1044 considers this same incapacity, not as an *irregularity* but as an *impediment* to the exercise of Orders already received. *CIC* canon 1044 provides:

'§2: The following are impeded from the exercise of orders; ... 2° one who suffers from insanity or from any other psychological infirmity mentioned in Can 1041 n1, until such time as the Ordinary, having consulted an expert, has allowed the exercise of the order in question'.<sup>158</sup>

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<sup>156</sup> *CCEO*, c. 769§1, 4°. See Appendix II.

<sup>157</sup> *CIC*, c. 378§1. See Appendix I. Nor does *CIC* make provision for the initial or ongoing formation of a bishop. However, bishops are priests and therefore the canons on ongoing formation apply. Sacred Congregation for Clergy, *Directory for the Ministry and Life of Priests* (31 January 1994), clarifies this.

<sup>157</sup> *CIC*, c. 378§2. See Appendix I.

<sup>158</sup> *CIC*, c. 1044§2, 1° lists others who are *impeded* from the exercise of Orders already received, but there is no provision for the use of experts. See Appendix I.

This canon confirms that the causes of the impediment of insanity or any other psychological infirmity are identical to those in canon 1041, 1° (which we have discussed in the previous section). In the case of Orders already received, because the condition constitutes an impediment rather than an irregularity, the condition is not considered permanent. An expert (singular) must be consulted before the Ordinary allows the cleric to *resume* the exercise of Orders following the establishment of the impediment. But, it is clear from the reference to canon 1041, which requires experts (plural) to be consulted, that here too, experts (plural) must be consulted before the cleric is *deemed* to have suffered from the impediment. Moreover, also by reference to canon 1041, the impediment is incapacitating; therefore, the canon must be interpreted strictly.<sup>159</sup> This impediment affects someone who either contracted the condition after valid ordination or whose condition, existing prior to ordination but not in sufficient severity to constitute irregularity, deteriorated after ordination, causing incapacity to fulfil ministry properly. The canon also clarifies that the Ordinary decides whether or not to allow the cleric to return to the exercise of Orders.

The canon does not, however, clarify: whether or not the cleric has any choice with regard to the expert to be consulted; the professional disciplines or qualifications of the expert to be consulted before the cleric in question is returned by the Ordinary to ministry.

**Appointment of the Expert:** The law and indeed commentators are silent on who appoints the expert. Presumably the Ordinary appoints, as the canon is clear that it is the Ordinary who must consult the expert prior to returning the cleric to ministry. It would, however, seem reasonable that if the cleric had undergone treatment for the condition which caused the impediment, the professional concerned would be the most informed of his present status. No provision is made as to whether the cleric may be involved in the choice of the expert. Given the more recent Vatican guidelines (2008), which give the candidate a choice (albeit one which must be approved), it would seem that the individual has a say in the matter.

**Disciplines, Qualifications and Functions of the Expert:** Whether a *medical* expert must be consulted before the cleric is returned to ministry is unclear. Some authors are silent on this issue;<sup>160</sup> one simply refers the reader to canon 1041.<sup>161</sup> Kelly speaks of ‘an appropriate’

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<sup>159</sup> *CIC*, c. 18. See Appendix I.

<sup>160</sup> González del Valle, *Ann*, p796.

expert without further clarification.<sup>162</sup> On the other hand, Woestman implies that an expert qualified in psychic defects is required. He refutes the suggestion that the ‘psychic defect’ which impedes the exercise of Orders could refer to ‘any mental state rendering one unsuitable to function in the ministry’; rather, the irregularity (for reception of Orders) or impediment (for their exercise) renders the person ‘*incapable* of correctly exercising (*rite*) ordained ministry’.<sup>163</sup> He notes that *CIC* 1917 required a greater defect to impede the exercise of Orders already received than was required to impede the reception of the sacrament;<sup>164</sup> accordingly ‘the acts which can be correctly (*rite*) performed are not prohibited because of the defect’.<sup>165</sup> Woestman cites other authors who agree. For Woestman, ‘either one is impeded or is not; there is no middle ground’. For example, one cannot be impeded, because of this infirmity, from celebrating Mass publicly and not be impeded from celebrating Mass privately.<sup>166</sup>

The lack of clarity as to the meaning of the term ‘incapable of properly fulfilling the ministry’ which we met in relation to irregularity with regard to the reception of Orders, continues to be felt in this context. ‘Fulfilling’ might imply carrying out *all* tasks relevant to the order in question, while ‘exercise of the order’ might imply carrying out limited tasks or even a single task, for which the reception of Orders is required.<sup>167</sup> Establishing the severity of a

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<sup>161</sup> Gilbert, *Text&Comm*, p731.

<sup>162</sup> Kelly, *L&S*, p566. See also in relation to c. 689.

<sup>163</sup> Woestman, ‘Canons 1041, 1° and 1044 §2,2°’, p315, citing Russell E Smith, ‘Pedophilia and Church Law’, in *Ethics and Medics*, 15 (December 1990), 3. Emphasis added. Woestman explains that: ‘*rite* here does not refer to moral behaviour but to *ritualità*, i.e., the correct fulfilment for a valid celebration of acts placed in virtue of orders’, citing Velasio De Paolis, C.S., ‘*Delitti contra il sesto comandamento*’, *Per*, 82 (1993), pp 311-312. In discussing irregularities and impediments to receiving and exercising orders, he points out that for the exercise of the priesthood a person must have absolute mental qualities which ‘are incompatible with a psychological illness vitiating the will’, citing Ado Groin, ‘*Ordine sacro e difetti fisici nella nuova legislazione canonica: prime osservazioni*’, *Monitor Ecclesiasticus*, 119 (1984), p169. See also ft 33 above.

<sup>164</sup> *Ibid.*, pp314-315. Woestman explains that *CIC* 1917 ‘used the word *rite* in reference to physical defects or disabilities making a person irregular for the reception and the exercise of orders, but did not prohibit the exercise of orders received for those acts which “could be correctly performed” (*qui rite poni possunt*, c 984 2°)’. *CIC* 1917, c. 984, 2°. See Appendix III. See also ft 33 above.

<sup>165</sup> Woestman, *The Sacrament of Orders*, p67: ‘*Rite* means to celebrate according to the sacred rites or the liturgical prescriptions’. Also Woestman, ‘Canons 1041, 1° and 1044 §2,2°’, p314: ‘*Rite*’ refers to ordained ministry in the strict sense, not to those ministries shared with the non-ordained.

<sup>166</sup> Woestman, ‘Canons 1041, 1° and 1044 §2,2°’, p315, citing *Apostolic Signatura*, definitive sentence (9 March 1993), Prot. No. 22571/91 (CA, Pittsburgen).

<sup>167</sup> ‘Fulfil’ is defined by *The Concise Oxford English Dictionary*, Eighth Edition (1990), p475, as: 1: ‘bring to consummation, carry out’; 2: ‘satisfy (a desire or prayer)’; 3: ‘execute, obey (a command or law), perform, carry out (a task)’; 4: ‘comply with (conditions)’; 5: ‘answer (a purpose)’; 6: ‘bring to an end, finish, complete (a period or piece of work)’. Fulfil oneself: ‘develop one’s gifts and character to the full’. ‘To exercise’ is defined by *The Concise Oxford English Dictionary*, Eighth Edition (1990), p409 as: ‘to use or apply (a faculty, right,

condition, required to declare irregularity for Orders and impediment to their exercise is an important task for the expert. The expert needs to know what is required of the cleric. Woestman holds that this impediment has been too broadly interpreted and consequently incorrectly applied to remove priests from ministry who suffer from psychological infirmity, but who are not incapable of correctly celebrating the sacramental ministry; the Ordinary has other powers to restrict ministry.<sup>168</sup>

The foregoing can be compared with provision under *CIC* 1917 and *CCEO*. Under *CIC* 1917, irregularity for exercise of ministry (which needed to be graver than one preventing ordination) or impediment for the same, caused someone to be ‘prohibited’ from exercising Orders already received.<sup>169</sup> Although the use of experts was not mandated, freedom from irregularity due to insanity, epilepsy or possession by the devil, needed to be ‘certainly proved’ before readmission to ministry.<sup>170</sup> While no declaration of irregularity or impediment appeared necessary, there was no formal procedure for the removal of a pastor prior to 1910, but the practice was frequently employed; a decree in that year set out the process.<sup>171</sup> According to Doyle, one of the justifying causes for removal from ministry was insanity, ‘which must be such that according to the declaration of expert doctors they cannot forsee (*sic*) a perfect cure without danger of relapse’.<sup>172</sup> Doyle held that the experts should be ‘medical doctors, and as far as possible specialists in mental diseases’ and the responsibility to consult them was that of the bishop concerned, who could remove the pastor if danger of relapse persisted.<sup>173</sup> Curiously, this provision to consult medical experts did not find its way into *CIC* 1917, under which the bishop was obliged only to consult ‘two

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influence, restraint, etc)’; 2: ‘to perform (a function)’. However, albeit in a theological sense, no separation between the *munus docendi, sactificandi et regendi*, is possible: See *CNOFSMP*, 2 in Appendix VI.

<sup>168</sup> Woestman, *The Sacrament of Orders*, p68, ft 22: ‘The *Apostolic Signatura* has accepted the broad interpretation of “ministry” to include the functions of teaching and shepherding or governing in *CIC*, cc. 256§1 and 1008, in extreme cases and with caution for its application’. At p80: ‘A cleric is impeded by a psychological infirmity only after his ordinary has taken into account the opinion of experts, and then judges that the cleric is incapable of properly fulfilling the ministry’. The ordinary’s competence to restrict ministry is not affected.

<sup>169</sup> *CIC* 1917, c. 968§2. See Appendix III. Impediments to the exercise of Orders were not listed. Presumably, if any of the conditions giving rise to impediment for reception arose after ordination, the cleric would be impeded from the exercise of ministry.

<sup>170</sup> See Appendix III: *CIC* 1917, c. 984, 3°.

<sup>171</sup> Doyle, *Doctoral Thesis*, p223, citing *Sacra Congregatio Consistorialis*, Decree, *Maxima Cura* (20 August 1910), *Fontes*, V§2074.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*, citing Felix Cappello, *De Administrativa Amotione Parochorum* (Rome, 1911), p33.

examiners’; this duty appears to have been met by consulting other priests.<sup>174</sup> Moreover, the bishop was permitted to deny a pastor suffering ‘mental problems’ the opportunity to resign, presumably because he was deemed incapable of placing a juridical act.<sup>175</sup>

*CCEO* makes similar provision to *CIC* for both impediments to the exercise of Orders<sup>176</sup> and return to ministry in cases of insanity or psychological infirmity.<sup>177</sup> Interestingly, consultation with experts is still not required by either of the current Codes before removing a parish priest, even on grounds of ‘permanent illness of mind or body’ preventing him from fulfilling his task.<sup>178</sup> Therefore, the bishop may *remove* a pastor on psychological grounds without consulting experts, but the bishop cannot declare the priest *impeded* from exercising Orders on the grounds of psychological infirmity without consulting experts, and the bishop must consult an expert (singular) before permitting that (impeded) cleric to return to ministry.

In sum, to forbid the exercise of Orders already received, the competent authority must have moral certainty of the *presence* of irregularity (which does not require the use of experts) or the *presence* of impediment (which requires the use of experts if it is due to insanity or other psychological infirmity). To return a cleric who was impeded by virtue of insanity or other psychological infirmity, *an* expert must be consulted and the competent authority must reach moral certainty of the *absence* of the impediment. The professional discipline of this expert is unclear, and the commentators do not assist on this issue, but given the nature of the impediment it would seem that a psychiatrist or a psychologist would be appropriate to ensure that the psychological infirmity was no longer sufficiently severe to constitute an impediment.

### 3. RELIGIOUS INSTITUTES: ADMISSION AND PROFESSION

Not all candidates for religious life are candidates for Orders. However, analogies may be drawn between the requirements for the use of experts in admission to Orders and those for admission to religious life. Analogies may also be drawn between capacity to exercise

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<sup>174</sup> *CIC* 1917, cc. 2147§1; and 2154§1. See Appendix III.

<sup>175</sup> *CIC* 1917, c. 2148§1. See Appendix III.

<sup>176</sup> See *CCEO*, c. 763, 2°, for the addition of crimes to the list of impediments. See Appendix II.

<sup>177</sup> *CCEO*, c. 763, 3°. See Appendix II.

<sup>178</sup> *CIC*, cc. 1740; and 1741 and *CCEO*, cc. 1389; and 1390, 2°. See Appendix I and Appendix II.

ordained ministry and the suitability of members of religious institutes to make further profession.

### **Admission to Religious Institutes: Novitiate**

The law restricts admission to the novitiate of religious institutes to those who are both capable of living life in the particular institute and are suitable for it.<sup>179</sup> *CIC* canon 642 provides:

‘Superiors are to exercise a vigilant care to admit only those who, besides being of required age, are healthy, have a suitable disposition, and have sufficient maturity to undertake the life which is proper to the institute. This health, disposition and maturity are to be established, if necessary even by the use of experts, without prejudice to Canon 220’.

Canon 642 is clear that the health, disposition and maturity of candidates must be established positively; but, where doubt exists, the use of experts is mandated. The canon also implies that: the Superior of an Institute of Consecrated Life,<sup>180</sup> or of a Society of Apostolic Life,<sup>181</sup> is both the decision-maker and the person obliged to consult the experts. Unlike the law governing admission to Orders, the canon explicitly protects candidates’ privacy.<sup>182</sup> However, the canon does not clarify: who appoints the experts; the disciplines and qualifications of the experts to be consulted; the number of experts required; whether, if more than one is consulted, they are to be consulted individually or collectively; or what weight is to be given to the advice.

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<sup>179</sup> For a description of the novitiate see *RC*, 10, 1 in Appendix VI. See also Enid Williamson, *L&S*, p314; Williamson explains that each institute will have its own particular rules respecting ‘fidelity to the spirit, intentions and example of the founders and foundresses’. Smith, *New Comm*, p812 describes the novitiate as: ‘A preparation for life in the institute’ which is ‘an intense period of formation characterized by initiation into its life, mission, spirituality, and history; personal configuration to the paschal mystery; and discernment regarding the novice’s vocation to religious life in this particular institute’. See also *CIC*, c. 646 in Appendix I.

<sup>180</sup> These institutes can be religious or secular, and are a canonically established stable form of living where members make formal profession of life according to the evangelical counsels. See *L&S*, p314.

<sup>181</sup> Members live in community, but do not necessarily make formal profession of life according to the evangelical councils. See *L&S*, p314.

<sup>182</sup> *CIC*, c. 220. See Appendix I.



**Appointment of Experts:** McDermott considers that ‘*a doctor*’ recommended by the institute and familiar with [the institute’s] life and apostolate’ should be appointed, but she does not say by whom.<sup>183</sup> Smith, however, although agreeing, states that ‘institutes must choose carefully’ experts who understand and respect the religious life.<sup>184</sup> Others consider that the candidates should have a choice, albeit a limited one.<sup>185</sup> Therefore, the institute is responsible for the appointment; if the candidate chooses the expert, the institute must approve that choice.

**Disciplines, Qualifications and Functions of Experts:** In order to evaluate a candidate’s capacity to fulfil the demands of the particular institute concerned, it is reasonable to assume that any experts consulted must understand these demands.<sup>186</sup> Commentators largely agree that the experts required are drawn from the disciplines of medicine and behavioural sciences but some commentators are more specific than others. Smith holds simply that candidates’ physical and mental health is ‘best attested to by professionals credentialed in the respective disciplines’ and refers to the results of ‘such tests’, although she acknowledges other authors’ reservations about requiring psychological assessment on a regular basis.<sup>187</sup> Williamson suggests that medical doctors and psychologists are appropriate experts, but acknowledges that requirements for admission ‘should not be too severe’, because, during their novitiate, candidates are only beginning their formation for religious life; thus, experts ‘are to be used only “if necessary” when ‘suitability cannot be established by other means’.<sup>188</sup>

McDermott considers it ‘wise to require candidates to undergo a *physical* examination by ‘*a doctor*’, implying routine medical examination, but she does not suggest that any particular expertise is required, other than knowledge of the demands of life in the institute. Albeit emphasising the need to respect privacy, she acknowledges that ‘difficult’ cases ‘*may* require the services of *an* approved specialist in the behavioural sciences of high moral standards’.<sup>189</sup>

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<sup>183</sup> McDermott, *Text&Comm*, p490. Emphases added.

<sup>184</sup> Smith, *New Comm*, p807.

<sup>185</sup> Breitenbeck, *Jurist*, p283, citing R Hill, ‘Denial of Profession’, *Review for Religious*, 47 (1988), p938, in support of the member’s freedom to choose the expert: ‘The psychiatrist or psychologist or counsellor should be someone in whom both the member and the superior have confidence, and so there should be a short list of acceptable persons from which to choose ...’.

<sup>186</sup> *CIC*, c. 598§1. See Appendix I.

<sup>187</sup> Smith, *New Comm*, p807.

<sup>188</sup> Williamson, *L&S*, pp354-355, for example, by ‘long-term contact, interview, pre-novitiate training or postulancy’. Williamson also concedes that the requirements should not be too lax.

<sup>189</sup> McDermott, *Text&Comm*, p490. Emphases added.

This, therefore, suggests that: the use of experts in behaviour sciences is not routine; consultation with one expert suffices; and the medical doctor dealing with routine admission is not always sufficiently 'expert' to deal with 'difficult cases'. Rather, a specialist, with high moral standards and knowledge of the particular institute's demands, is required.

Breitenbeck agrees that a doctor 'familiar with the demands of religious life' should verify physical health.<sup>190</sup> However, mental health assessments undertaken 'to detect serious psychological illness' should be completed by 'experts in behavioural sciences, especially those trained in psychological testing'.<sup>191</sup> This implies that experts are required only when 'serious psychological illness' is suspected. Moreover: '[p]sychological experts should be open to the possibility of religious life as a viable life choice and not hostile or depreciative of such a choice, and be familiar with the emotional and psychological demands of religious life'.<sup>192</sup> Breitenbeck considers that canonists confuse matters when they refer to doctors who assess the physical health of the candidate as 'experts'; for Breitenbeck 'expert' opinion is only required in cases of serious psychological illness.<sup>193</sup> Therefore, she distinguishes the medical doctor providing the routine medical assessment from the expert required to detect serious psychological illness. Contrasting with Williamson's contention that requirements should not be strict, Breitenbeck quotes the chairman of the commission revising the canons on religious institutes as saying that Superiors are 'not to be easy in admitting candidates'.<sup>194</sup> She suggests that 'guidelines for admission could state that if a prospective candidate does not undergo psychological evaluation, then the application will not be considered'.<sup>195</sup> Although implying first that consultation with experts was required 'to detect serious psychological illness', Breitenbeck implies here that candidates should undergo routine psychological testing; moreover, the institute's own 'guidelines' should mandate this. Compulsory psychological testing is therefore required before admission.

On the other hand, Rincón argues that the experts involved should be those from the discipline of psychiatry. He holds that the requirement to protect privacy is intended to

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<sup>190</sup> Breitenbeck, *Doctoral Thesis*, p287. Physical disability is not necessarily a bar to admission to religious life.

<sup>191</sup> Breitenbeck, *Jurist*, p279.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*, p280.

<sup>194</sup> *Ibid.*, p281, citing M Said, 'The Present State of the Reform of the Code Concerning the Section, "*De Institutia Perfectionis*"', *Studia Canonica*, 8 (1974), p231.

<sup>195</sup> *Ibid.*

‘curtail abuse’ in the ‘obligation to subject’ a candidate to psychological examination, which requires the involvement of ‘a psychiatrist who is “truly expert, prudent and commendable for his moral principles” ... but only in particularly difficult cases’ and with the candidate’s consent.<sup>196</sup> This not only narrows the field to psychiatry and suggests that the use of one such expert suffices, but acknowledges that psychiatrists are only required in particularly difficult cases, not routinely. Moreover, it suggests that qualification as a psychiatrist is insufficient; rather a ‘truly expert’ psychiatrist who is ‘commended for his moral principles’ is required.

In short, the commentators differ as to the precise disciplines from which the experts are drawn and whether and precisely when routine psychological testing by experts is required. This diversity of opinion is due to the imprecision of canon 642 and the absence of guidance in norms outside the Code. As we shall see below, this lack of clarity should be addressed, and could be either by general norms or the norms of the religious institute in question.<sup>197</sup>

**Consultation - Individual or Collective:** Commentators are divided on the number of experts to be consulted. McDermott speaks in the singular,<sup>198</sup> as does Rincón,<sup>199</sup> but Breitenbeck and Williamson speak in the plural but do not elaborate.<sup>200</sup> Given this diversity of opinion on the numbers of experts to be consulted, it is hardly surprising that commentators do not address the issue of individual or collective consultation.

**Failure to Consult and Weight of Expert Advice:** Commentators do not address these issues.<sup>201</sup> The use of experts in admission to the novitiate is mandated if the Superior is in doubt: that is, if moral certainty of suitability is not reached. In these circumstances, therefore, once again, canon 127 applies: the Superior who makes the decision must have an overriding reason to act against advice.

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<sup>196</sup> Thomás Rincón, *Ann*, p516, citing *RC*, II, III. See Appendix VI. This reference seems to be more applicable to admission to profession than to the novitiate.

<sup>197</sup> Although subject to the Supreme Authority of the Pope (see *CIC*, c. 590), *CIC*, c. 586 protects the autonomy of each institute. See Williamson, *L&S*, p322, para 1150.

<sup>198</sup> McDermott, *Text&Comm*, p490.

<sup>199</sup> Rincón, *Ann*, p516.

<sup>200</sup> Breitenbeck, *Jurist*, p279 and Williamson *L&S*, pp354-355.

<sup>201</sup> Williamson, *L&S*, pp354-355; McDermott, *Text&Comm*, p490; Smith, *New Comm*, pp807-808.

Neither *CIC* 1917 nor *CCEO* require the use of experts in the process of admission to religious life. *CIC* 1917 is silent on the issue.<sup>202</sup> Doyle cites a case, dated 1721, which relied on ‘experts’ to establish an alleged hermaphrodite’s suitability to join a religious order of women, but no mention is made of the type of expert; by 1894 it was established that the judgment ‘of medical men’ was ‘the most forceful argument’ in such a matter.<sup>203</sup> *CCEO* provides that for admission to a monastery, ‘suitability and full freedom of a candidate’ must be evident to the Superior after investigation, without mention of the assistance of experts.<sup>204</sup>

### **Admission to Vows: Temporary and Further Profession**

On completion of the novitiate, a novice in a religious institute is to be admitted to temporary profession if found suitable; otherwise the novice ‘is to be dismissed’;<sup>205</sup> if doubt exists, the period of probation may be extended.<sup>206</sup> The decision as to suitability is that of the competent Superior.<sup>207</sup> Expert opinion is not mandated. That a novice can be dismissed reflects the institute’s limited responsibility for those who have not yet taken vows.<sup>208</sup>

However, once the period of temporary vows is complete, *CIC* canon 689§2 provides:

‘Even though contracted after admission, a physical or psychological infirmity, which, in the judgement of experts, renders the member mentioned in §1 unsuited to lead a life in the institute, constitutes a reason for not admitting the member to renewal of profession or to perpetual profession, unless the infirmity was contracted through the negligence of the institute or because of work performed in the institute’.

Prior consultation by the competent Superior with the institute’s council *and* just reasons (plural) are required before a member is excluded from making further profession on the

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<sup>202</sup> *CIC* 1917, cc. 538-552.

<sup>203</sup> Doyle, *Doctoral Thesis*, p216, citing *Sacra Congregation Episcoporum et Regularium* (8 March 1894).

<sup>204</sup> *CCEO*, c. 453§2. See Appendix II.

<sup>205</sup> There appears to be some tension in the use of the word ‘dismiss’. *CIC* Book II, Chapter VI, Article 3 deals with ‘The Dismissal of Members’. These canons address dismissal as the consequence of offences (cc. 694-695). ‘Other causes’, which are ‘grave, external, imputable and juridically proven’ (c. 696), and for those in temporary vows, ‘less grave reasons determined in the institute’s own law’, apply. Williamson, *L&S*, p389, defines ‘dismissal’ as ‘a penal measure reserved for serious offences’. However, in her commentary on *CIC*, c. 653§1, dealing with the dismissal of a novice, she states: ‘[A] dismissed novice should never be made to feel lessened by the event – in fact, the contrary’. It appears, therefore, that the meaning of the word ‘dismiss’ differs depending on whether it applies to novices or to those who have taken vows; it is a penal measure in relation to the latter.

<sup>206</sup> *CIC*, c. 653§2. See Appendix I. This concerns a novice, not a member in temporary profession.

<sup>207</sup> *CIC*, c. 656, 3°. See Appendix I.

<sup>208</sup> *CIC*, c. 653§1. See Appendix I.

completion of temporary profession.<sup>209</sup> A physical or psychological infirmity, but not including insanity,<sup>210</sup> which, in the judgment of experts, renders a member unsuited to life in the particular institute, constitutes ‘a reason’ (singular) for excluding the member from further profession.<sup>211</sup> There are, however, two exceptions: if the infirmity was caused by the institute’s negligence or by work within the institute. Canon 689§2 stipulates that *the experts make a judgment* on unsuitability for life in the institute; this contrasts with canon 1044 2° which, by referring to canon 1041 1°, requires that the impediment to the exercise of Orders already received be established by the bishop after prior *consultation* with experts.<sup>212</sup> However, the decision to exclude a member from further profession remains with the Superior. A member has no personal right to further profession; the law requires that the competent authority judge the member ‘suitable’, otherwise the member must leave.<sup>213</sup>

Although canon 689§2 states that more than one expert is involved in cases of physical or psychological infirmity, it does not clarify: the professional disciplines or qualifications of the experts; whether they are to be consulted individually or collectively; whether consultation goes to validity of the refusal to admit; or what weight is to be given to the experts’ judgments. In preventing an institute from dismissing an insane member who has taken temporary vows, even though unable to make further profession, the law highlights the institute’s responsibility to care for members incapable of independent life, whether inside or outside the institute. However, it makes no reference as to how insanity might be established.<sup>214</sup>

**Appointment of Experts:** Commentators do not address the issue as to who appoints the experts. Presumably, the Superior appoints, but there is no provision as to whether the candidate is involved in choosing the experts, yet Breitenbeck’s acknowledgment that ‘[c]ommon sense and charity seem to require that the member have some degree of freedom in choosing this professional, but not unlimited freedom’,<sup>215</sup> applies here *mutatis mutandis*.

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<sup>209</sup> *CIC*, c. 689§1. See Appendix I.

<sup>210</sup> The Institute has an obligation to care for a member who has become insane; *CIC*, c. 689§3. See Appendix I.

<sup>211</sup> *CIC*, c. 689§3. See Appendix I.

<sup>212</sup> Latin: ‘... *de iudicio peritorum* ...’. However, this is an advisory judgment.

<sup>213</sup> *CIC*, c. 657§1. See Appendix I.

<sup>214</sup> *CIC*, cc. 99; 124§1; and 689§3. See Appendix I.

<sup>215</sup> Breitenbeck, *Jurist*, p283.

**Disciplines, Qualifications and Functions of Experts:** An Instruction, *Renovationis Causam* (1969), predating *CIC*, required that a candidate's 'human and emotional maturity' be established; in 'certain more difficult cases' the Superior, with the agreement of the candidate, was permitted to consult 'a prudent and qualified psychologist, known for his moral principles' to examine the candidate, preferably 'after an extended period of probation, so as to enable the specialist to formulate a diagnosis based on experience'.<sup>216</sup> This, unlike canon 689§2, therefore, *permitted* consultation in difficult cases with a single psychologist.

Commentators, however, are not all specific as to the disciplines, qualification and functions of experts under canon 689§2. Williamson and McDermott are the most specific. For Williamson, 'doctors, psychiatrists and psychologists' are the appropriate experts; their function is to establish 'the history, cause, development and effects of the illness'.<sup>217</sup> Like Breitenbeck, Williamson understands that the competent authority should question whether or not the physical or psychological infirmity is irreversible, suggesting that this must be so before a member of an institute can be lawfully excluded, although no authority is cited in support.<sup>218</sup> McDermott, although using the term 'experts' in the plural, considers *a* 'doctor, psychiatrist, [or] psychologist' as appropriate.<sup>219</sup> She further advises that 'counselling during the time of temporary profession would help prevent shock at exclusion from subsequent profession' but she does not elaborate on the counsellor's professional discipline.<sup>220</sup>

Breitenbeck is less specific. She insists that any illness must be evidenced 'in the opinion of experts, not in the thinking of the major superior'.<sup>221</sup> She speaks only of 'professional experts in the human sciences'.<sup>222</sup> To exclude a member from further profession on psychological grounds, she says: '[I]t is obvious that the expert must be a highly trained professional, who possesses the requisite medical knowledge, psychological or psychiatric training which enables him or her to diagnose the physical or psychic illness'.<sup>223</sup> This implies the requirement to consult a single, competent professional, but not necessarily an

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<sup>216</sup> *RC*, II-III. See Appendix VI. *CIC*, c. 653§2 allows for a limited extended period of probation if doubt about suitability exists. See Appendix I.

<sup>217</sup> Williamson, *L&S*, p386.

<sup>218</sup> *Ibid.*, and Breitenbeck, *Jurist*, p282.

<sup>219</sup> McDermott, *Text&Comm*, p517.

<sup>220</sup> *Ibid.*

<sup>221</sup> Breitenbeck, *Doctoral Thesis*, p291, citing Lamberto de Echeverria (Ed), *Código de Devesho Canonico, Edición Bilingüe Comentada*, Fourth Edition (Madrid, 1984), p364.

<sup>222</sup> Breitenbeck, *Jurist*, p259.

<sup>223</sup> *Ibid.*, p282. Also Breitenbeck, *Doctoral Thesis*, p290.

‘expert’. This is reinforced with her comment that the member should ‘have some degree of freedom in choosing *this* professional, but not unlimited freedom’.<sup>224</sup> She notes that in 1961 the Holy See warned against the use of ‘experts trained in the psychoanalytic tradition’.<sup>225</sup> However, she attributes the fact that neither this warning, nor the suggestion during the revision of the Code in 1979, that only Catholic experts should be used,<sup>226</sup> found their way into *CIC*, to ‘an enhanced appreciation of the training, expertise and contributions of experts in general’, by those involved in the revision of Code.<sup>227</sup>

Holland acknowledges the need for a ‘just cause’ (singular) to refuse further profession; in order to establish this in cases of illness, ‘appropriate’, ‘medical’ experts (plural) are required.<sup>228</sup> However, she then goes on to speak of the functions of the expert (singular); that is, to ‘address the individual’s suitability for the life of the institute’, noting that the requirements of institutes will differ, as will those of individual candidates.<sup>229</sup>

In short, the commentators differ as to the precise disciplines from which the experts are drawn. This diversity is again due to the imprecision of canon 689§2 and the absence of guidance outside the Code. Once more, this lack of clarity should be addressed.

**Consultation - Individual or Collective:** In line with canon 689§2, Williamson speaks in the plural.<sup>230</sup> However, Breitenbeck, Holland, and McDermott speak initially in the plural, but then, contrary to the clear wording of the canon, suggest that only one professional is required.<sup>231</sup> They do not address the specific issue of individual or collective consultation. It can be argued that the reference to canon 127 in the Circular Letter (1997) (dealing with the investigations for admission to Holy Orders), in relation to the obligation to seek advice from members of the Commission for Orders and Ministries *individually*, should be applied here.<sup>232</sup>

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<sup>224</sup> Breitenbeck, *Jurist*, p283. Emphasis added.

<sup>225</sup> Breitenbeck, *Doctoral Thesis*, p292, citing *Suprema Sacra Congregatio S Officio, Monitum* (15 July 1961), AAS, 53 (1961), p571.

<sup>226</sup> Breitenbeck, *Doctoral Thesis*, p293, citing ‘*De Institutis Vitae Consecratae Per Professionem Concilliorum Evangelicum*’, *Comm*, 12 (1980), p186.

<sup>227</sup> Breitenbeck, *Doctoral Thesis*, p293.

<sup>228</sup> Holland, *New Comm*, p859.

<sup>229</sup> *Ibid.*, pp859 - 860.

<sup>230</sup> Williamson, *L&S*, p386.

<sup>231</sup> Breitenbeck, *Doctoral Thesis*, p291; Holland, *New Comm*, p859; and McDermott, *Text&Comm*, p516.

<sup>232</sup> Circular Letter (1997), 3.

**Failure to Consult and Weight of Expert Advice:** Some commentators, such as McDermott and Holland, are silent on these issues.<sup>233</sup> Williamson states that although the illness referred to ‘could well justify’ refusal to further profession, ‘the canon *does not positively* require that it be for this reason refused’.<sup>234</sup> In other words, even if the experts judge the candidate unsuitable, the Superior is not bound to refuse admission to further profession; the experts’ judgment merely provides ‘a reason’ for the Superior to refuse such admission. McDonough holds that the experts ‘would have to qualify according to canon 1574’,<sup>235</sup> but considers their opinions are not required for validity.<sup>236</sup> However, acting without the advice of such experts, ‘could easily result in recourse’ leading to reversal of the decision; exclusion would be invalid if the physical or psychological infirmity were contracted through the institute’s negligence or as a result of work undertaken within it.<sup>237</sup> Breitenbeck, on the other hand, acknowledging that the experts’ reports are ‘crucial to the decision-making process’, states:

‘While the language of the canon as such does not require the opinion of experts for the validity of the major Superior’s decision, there is no qualifying clause, such as “if necessary”, or “if it seems opportune” or “if warranted”. Therefore, the language of the canon is exceptionally strong in requiring expert judgment prior to exclusion of members from subsequent or final profession in religious institutes’.<sup>238</sup>

However, canon 689§2 is limited to unsuitability due to ‘physical or psychological infirmity’, which, in the judgment of experts, renders the member unsuitable. This judgment is, therefore, a pre-requisite for exclusion *on these grounds*. Therefore, canon 127 applies although the commentators do not address this matter. To exclude a member from further profession on the grounds of physical or psychic ill-health without consultation with the required experts and, moreover, without their judgment of unsuitability, would, therefore, be an invalid act on the part of the major Superior. Moreover, canon 689§2 states that expert opinions supporting unsuitability provide ‘a reason’ for refusal to admit to further profession - that is *one* of the ‘just reasons’ required by canon 689§1. However, the canon does not

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<sup>233</sup> McDermott, *Text&Comm*, pp516-517; and Holland, *New Comm*, p860.

<sup>234</sup> Williamson, *L&S*, p387. Emphasis added.

<sup>235</sup> *CIC*, c. 1574. See Appendix I.

<sup>236</sup> Elizabeth McDonough, ‘Separation of Members From The Institute; Canons 684-709’, in Jordan F Hite, Sharon L Holland, D Ward [Eds], *Religious Institutes, Secular Institutes, Societies of the Apostolic Life: A Handbook on Canons 573-746* (Collegeville, 1985), 221-273 (hereafter ‘*Religious Institutes*’), p240.

<sup>237</sup> *Ibid*.

<sup>238</sup> Breitenbeck, *Doctoral Thesis*, p291-292.



impose an obligation to refuse admission, but by virtue of canon 127 an overriding reason is required to go against experts' advice, especially if this is unanimous.

These provisions contrast with those under *CIC* 1917. This allowed an institute, for a 'just and reasonable cause', to exclude a member from renewal of temporary vows or from taking perpetual profession. However, illness was not considered among these causes, unless it could be proven that the illness had been deliberately concealed at the time of temporary profession.<sup>239</sup> Nevertheless, Doyle maintains that it was the practice of the Roman Rota, at least since the early eighteenth century, to use experts to prove *nullity* of religious profession due to insanity, using the same method of proof required to establish questions of inheritance, sickness and injury.<sup>240</sup> On the other hand, *CCEO* uses similar terminology to *CIC*, also requiring consultation with experts before regarding a temporarily professed person unsuited to life in the institute due to physical or psychological infirmity.<sup>241</sup>

#### **4. THE RIGHT TO PRIVACY AND THE CONFIDENTIALITY OF EXPERT REPORTS**

*CIC* canon 220 protects the right to privacy of all Christ's faithful.<sup>242</sup> As we have seen, explicit reference is made to this right in relation to admission to religious institutes, but not in relation to admission to Orders. Whilst canon 220 does not explicitly deal with confidentiality in the context of privacy, some canonists relate the two: confidentiality is an aspect of privacy. Confidentiality is particularly pertinent when dealing with personal and sensitive data such as medical and psychological reports. Although the sacramental seal of confession is inviolable,<sup>243</sup> candidates for Orders and for religious life must be able to rely

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<sup>239</sup> *CIC* 1917, c. 637. See Appendix III.

<sup>240</sup> Doyle, *Doctoral Thesis*, pp215-216. These 'methods' appear to have been the use of physicians, handwriting experts and arbiters. Doyle cites a 17C case where a doctor reported on the mental state of a person whose religious profession was under investigation of nullity, and he cites Benedict XIV's, *Constitution Dei Miseratione* (4 March 1748), *Fontes*, II§385, as authority for permitting a religious superior to appoint a 'canonical expert' from among the secular clergy to act as judge, but he makes no mention of the experts required to prove insanity.

<sup>241</sup> *CCEO*, c. 547§2. See Appendix II.

<sup>242</sup> *CIC*, c. 220. See Appendix I.

<sup>243</sup> *CIC*, cc. 983§1; and 630§1. See Appendix I. See also Patrick J Wall, *The Manifestation of Conscience in Roman Catholic Canon Law*, LLM in Canon Law Dissertation (Cardiff University, 2007). At pp35 – 41, Wall discusses the development of the concept of manifestation of conscience with regard to Religious Institutes through the ages. At p36, he notes that Pope Leo XIII, in his Decree *Quemadmodum* (1890), voided the constitutions of non-clerical members of religious institutes, with some exceptions, which required an annual manifestation of conscience. What was intended as a non-sacramental 'spiritual practice' became a command

also on confidentiality from their spiritual directors and formators.<sup>244</sup> Consequently, a number of issues arise as to whether ecclesiastical authorities have responsibilities in relation to: safeguarding the right to privacy and confidentiality; obtaining the consent of individuals prior to an examination of them by experts; the subject's right to access experts' reports; obtaining the subject's consent to disclosure of confidential experts' and other reports to third parties and to the use made of those reports; and the destruction of reports when their use is no longer required. What follows deals with these issues in relation to Orders and religious life together (to avoid repetition), though often, as we shall see, some commentators address them separately, whilst others do not address them at all.

**Safeguarding the Right to Privacy and Confidentiality: General:** Canon 220, protecting the right to one's good name and the right to privacy, is based on the dignity of the human person.<sup>245</sup> Nevertheless, some commentators are unhelpful in determining how this right is to be protected in light of the canonical requirements to provide ecclesiastical authorities with confidential information. This is particularly pertinent when personal and sensitive data, sometimes including physical and psychological reports, are required for admission to Orders and religious life. Moreover, such reports can sometimes be required after admission to assess an individual's physical or psychological status. Golden, commenting on canon 241 on prerequisites for admission to the seminary, does not address either the issue of privacy or that of confidentiality.<sup>246</sup> Cunningham, commenting on the same canon, states simply that an individual's right to privacy must be respected by those processing admissions to seminaries and religious institutes.<sup>247</sup> Provost, acknowledging the basic human right, maintains that as the right to privacy is 'a developing area' in civil law, 'it will be a source of debate and development over the coming years' in canon law.<sup>248</sup> Kaslyn acknowledges that questions can arise over respect for privacy particularly in relation to psychological and medical testing of individuals in the admission process to seminaries and religious institutes and accepts the

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by superiors for 'a complete scrutiny of the members without deference to conscience of the individual'. Wall points out that *Quemadmodum* has since been abrogated, but remains 'a persuasive source of the intent of the Holy See on the issue of manifestation of conscience'.

<sup>244</sup> *CIC*, c. 240§2. See Appendix I. However, spiritual directors and formators have responsibilities to guide candidates; see *ACS*, 71. See Appendix VI.

<sup>245</sup> *GS*, 26. See Appendix VI.

<sup>246</sup> Paul L Golden, *Text&Comm*, p182. *CIC*, c. 241. See Appendix I.

<sup>247</sup> Richard Cunningham, *New Comm*, p313, citing Sharon Euart, 'Canon Law and Psychological Testing for Admission to a Seminary', in R Wister (Ed), *Psychology, Counselling and the Seminarian* (Washington, DC, 1993) pp185-193, and the opinions of J Anderson, R Calvo and R Gobbons, in P Cogan (Ed), *CLSA, Advisory Opinions, 1984-1993* (Washington DC, 1995), pp44-52.

<sup>248</sup> Provost, *Text&Comm*, p153.

natural law basis for the right to privacy.<sup>249</sup> He notes that this right is embodied, for example in: the freedom of seminarians and members of religious institutes, to choose a confessor; the prohibition against securing the opinion of a spiritual director or confessor concerning admission to, or dismissal from, the seminary; and the prohibition on a Superior to induce a subject to manifest their conscience.<sup>250</sup>

Because the canons dealing with pre-requisites for admission, to a seminary and to Orders, are silent on the issues of privacy and confidentiality, commentators on those canons do not deal in any detail with these issues.<sup>251</sup> Geisinger, for example, mentions simply the need to show deference to the right to privacy and the protection of one's good name in establishing *irregularity* for Orders.<sup>252</sup> Although he expounds at length the lack of clarity in canon 1044§2 on the impediment to the exercise of Orders due to psychological infirmity, he makes no mention of the right to privacy or confidentiality.<sup>253</sup> Interestingly, Kelly when dealing with *suitability* for Orders (which does not mandate submission of experts' reports), suggests that the law which protects privacy in admission to the religious life should be applied also to the investigation for suitability for orders.<sup>254</sup> He is, however, silent on the issues of privacy and confidentiality when discussing impediment to Orders already received due to insanity or any other psychological impairment (which does require experts' reports).<sup>255</sup>

Williamson, commenting on canon 642 on admission to the novitiate, simply acknowledges that the candidate's privacy 'must never' be violated,<sup>256</sup> but she is silent on the right to privacy regarding physical or psychological infirmity after vows have been taken.<sup>257</sup>

Rincón maintains that the reference to privacy regarding admission to religious institutes is intended 'to curtail any possible abuse', but does not elaborate.<sup>258</sup> Smith too, acknowledges that the candidate's right to privacy must be respected and they must not be required to

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<sup>249</sup> Robert J Kaslyn, *New Comm*, p278, citing P Cogan (Ed), *CLSA Advisory Opinions 1984-1993* (Washington, DC, 1995), 'Opinions on c. 241§1', p44-47, and 'Opinions on cc 241§1; 1029; and 1051, 1°', pp47-52 in relation to HIV/AIDS testing.

<sup>250</sup> Kaslyn, *New Comm*, p278. *CIC*, cc. 240§§1 and 2; 241; 603§§1 and 5; 984; and 985. See Appendix I.

<sup>251</sup> *CIC*, cc. 1029; 1041; 1044; 1050; and 1051. See Appendix I. Kelly, *L&S*, p563; Gilbert, *Text&Comm*, p729; and Woestman, *The Sacrament of Orders*, p67.

<sup>252</sup> Geisinger, *New Comm*, p1216.

<sup>253</sup> *Ibid.*, pp1222-1224.

<sup>254</sup> Kelly, *L&S*, p557.

<sup>255</sup> *Ibid.*, p566

<sup>256</sup> Williamson, *L&S*, p355.

<sup>257</sup> *Ibid.*, pp386-387.

<sup>258</sup> Rincón, *Ann*, p516, p444.

manifest their conscience.<sup>259</sup> McGrath gives little more insight: commenting on canon 220, and noting its natural law basis, he states that the right to privacy must be balanced against the common good.<sup>260</sup> He acknowledges that this ‘could become a critical issue in the matter of candidature for the priesthood or for religious life’, but canon 220 ‘carries an implied warning to Superiors and others that, while observing the criteria laid down by the church, they must seriously take into account these basic rights of the individual’.<sup>261</sup> McGrath warns that ‘strictness should always be brought to bear on the choice and testing of students [for the priesthood]’.<sup>262</sup> In short, commentators offer very little detail on this matter.

**Consent of Individuals Prior to their Examination by Experts:** The necessity to obtain the candidate’s prior consent before consultation with experts or testing is acknowledged amongst commentators.<sup>263</sup> However, as Kaslyn warns, in applying for admission and agreeing to provide ‘certain confidential information’ an individual ‘does not thereby forfeit entirely the right to privacy’.<sup>264</sup> Williamson says simply that the candidate ‘must willingly agree to undergo whatever tests are proposed’,<sup>265</sup> implying little or no choice on the candidate’s part. Breitenbeck holds that a prospective candidate should be informed of the required assessment of both physical and mental health.<sup>266</sup> This, too, gives the impression of little choice for the candidate. Rincón, on the other hand, refers to the ‘extremely cautious’ provisions of *Renovationis Causam*, permitting consultation with a ‘truly expert psychiatrist’ but ‘only in particularly difficult cases and provided that the person concerned freely consented’.<sup>267</sup> McDermott acknowledges that experts can be consulted ‘with the knowledge and consent of the candidate, in keeping with the provisions of c 220’.<sup>268</sup> Smith acknowledges ‘difficult moral issues’ for those charged with drawing up admission policies due to medical advances which enable the detection of HIV and chronic or debilitating

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<sup>259</sup> Smith, *New Comm*, p808.

<sup>260</sup> McGrath, *L&S*, p124.

<sup>261</sup> Ibid.

<sup>262</sup> Ibid., p137.

<sup>263</sup> Kelly, *L&S*, p557; Gilbert, *Text&Comm*, pp725- 731; and Geisinger, *New Comm*, p1216.

<sup>264</sup> Kaslyn, *New Comm*, p278.

<sup>265</sup> Williamson, *L&S*, p355.

<sup>266</sup> Breitenbeck, *Jurist*, p280. Also Breitenbeck, *Doctoral Thesis*, p288. See also *Religious Institutes*, p119: ‘... [T]he institute or experts employed by the institute are to conduct their examination without prejudice to the right of a person to protect his or her privacy. This is an important consideration for institutes to use in guiding experts so that they do not use methods that would violate privacy or in any way harm the reputation of the institute’.

<sup>267</sup> Rincón, *Ann*, p516, citing *Comm*, 12 (1980), p186 and *RC*, II, III. Emphases added.

<sup>268</sup> McDermott, *Text&Comm*, p490.

diseases and certain genetic predispositions'.<sup>269</sup> She also acknowledges the 'serious dilemmas' facing institutes with regard to confidentiality, as information gleaned may be 'new' to the applicant; but she does not suggest how these difficulties can be overcome.<sup>270</sup>

Hite concentrates on the rights of the seminary or institute. Although Vatican guidelines now permit competent authorities to proceed to admission on the basis of information they already have, when a candidate refuses psychological testing,<sup>271</sup> Hite, albeit writing earlier, cautioned against admission without sufficient evidence of suitability. He maintained that if access to information was denied to the institute on grounds of violating or 'seeming to violate' rights to privacy, the institute 'should forego seeking information but it should not place itself at a disadvantage by granting admission on inconclusive evidence of suitability'.<sup>272</sup> Superiors 'must consider the potential harm that can be done to the candidate and the formation program or institute by admitting ... someone who is unqualified or unprepared'.<sup>273</sup> On the other hand, Woestman, sees no conflict between requirements for psychological testing and the protection of confidentiality and privacy.<sup>274</sup> The practice of physical examination and submission of the report to the supervisors, but with the strict caveat, requiring the candidate's explicit, informed and absolutely free consent, can also be applied to psychological health.<sup>275</sup> Woestman says that although the candidate has a right to refuse examination, so also the competent Superior may refuse admission if the candidate has not been positively screened.<sup>276</sup>

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<sup>269</sup> Smith, *New Comm*, p807.

<sup>270</sup> Ibid.

<sup>271</sup> *Gpsy*, 12.

<sup>272</sup> Hite, *Religious Institutes*, p120. However, at p119, Hite acknowledges: '... [T]he institute or experts employed by the institute are to conduct their examination without prejudice to the right of a person to protect his or her privacy. This is an important consideration for institutes to use in guiding experts so that they do not use methods that would violate privacy or in any way harm the reputation of the institute'.

<sup>273</sup> Ibid.

<sup>274</sup> William Woestman, 'Canons 241 and 1051, 1°', Arthur Espilage (Ed), *CLSA Advisory Opinions 1994-2000* (Washington, 2002), pp64-67 (hereafter Woestman, 'Canons 241 and 1051, 1°'), p66.

<sup>275</sup> Woestman, *The Sacrament of Orders*, p45. He cites Pius XII, 'Venus de mode entier' (10 April 1958): 'If the consent is unjustly extorted, any action of the psychologist will be illicit; if the consent is vitiated by a lack of freedom (due to ignorance, error, or deceit), every attempt to penetrate into the depths of the souls will be immoral'. Also cited is the Congregation for the Clergy's letter to an American Bishop (1998): 'It is the consistent teaching of the magisterium that investigation of the intimate psychological and moral status of the interior life of any member of the Christian faithful cannot be carried out except with the consent of the one to undergo such evaluation, as is clearly written about in the instruction of the Secretariat of State in their August 6, 1976 letter to pontifical representatives'.

<sup>276</sup> Woestman, 'Canons 241 and 1051, 1°', p67.

Wall, however, considers that the requirement of some Superiors in religious institutes that members agree to psychological assessment and counselling ‘under obedience’ is a ‘coercive measure’; this is done, he says, ‘to gain access to the mind of the member who in essence is doing a modern manifestation of conscience with the therapist’. He points out that the practice is contrary to current canon law and ‘violates a core right of the member to freedom of conscience’.<sup>277</sup> Care must be taken, therefore, to ensure the candidate’s freedom of choice; any psychological assessment or counselling must be undergone voluntarily.

### **Consent of the Individual to Disclosure of Confidential Reports to Third Parties:**

Few commentators deal directly with the subject’s consent to disclosure. Those who do address the matter do so either from the perspective of the rights of the seminary or institute, or else from the perspective of the rights of the individual. On the one hand, McDermott, on admission to the novitiate, implies that the institute has a right to access the reports; she simply considers that the decision-makers ‘should be privy to these records and know the recommendation of the religious responsible for the candidate during the probationary period’.<sup>278</sup> Although not dealing with expert reports but addressing the respective Superior’s testimony, required for admission of those who have left another seminary or religious institute, McGrath says that this testimony ‘should be communicated directly to the bishop concerned and obviously must be kept confidential’.<sup>279</sup> Whilst this implies that only the ordaining bishop should have access to it, he does not mention the candidate’s consent for its release. Provost, too, on canon 220, simply notes that the only other reference to this right in *CIC* is in canon 642 on admission to the novitiate, where experts’ reports are subject to it; no mention is made of consent for disclosure.<sup>280</sup>

On the other hand, Smith, commenting on admission to religious institutes, and acknowledging the problems posed by the obligation of confidentiality, holds that ‘signed release forms allow the results of such tests to be shared with the responsible superior in the institute’.<sup>281</sup> This too, implies that only the responsible Superior has access to it. Enquiries made by Superiors must be discreet; and candidates must not be required to manifest their

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<sup>277</sup> Wall, *Dissertation*, p41.

<sup>278</sup> McDermott, *Text&Comm*, p490.

<sup>279</sup> McGrath, *L&S*, p138. See also *CIC*, cc. 241§3; and 645§2. See Appendix I.

<sup>280</sup> Provost, *Text&Comm*, p153.

<sup>281</sup> Smith, *New Comm*, p807.

conscience.<sup>282</sup> Likewise, Holland acknowledges members' rights to privacy and confidentiality of experts reports, but she maintains that a member whose case is doubtful and who wishes to be admitted to further profession 'will cooperate in releasing necessary information to the competent superior'.<sup>283</sup>

By way of contrast, Breitenbeck addresses both the interests of the candidate and those of the institute. She acknowledges that experts should be guided as to methodology and the candidate should be informed of 'the types of test being utilized' and who is to see the report.<sup>284</sup> A prospective candidate should be informed that the results of these assessments will be forwarded to the Superiors of those institutes in which candidates are seeking admission; moreover, institutes 'should assure the candidate of the confidentiality of the experts' reports and should obtain from the candidate a signed release clearly stating the purpose of the examination'.<sup>285</sup> However, she also acknowledges the need for decision-makers to be informed: 'If proper law requires that certain members within an institute, such as the council or formation director, are to be involved in responsible decision-making regarding admittance, ... then they also should have access to the opinions of experts in order to render an informed decision'; she adds that they should be obliged to secrecy.<sup>286</sup> This however, implies that whilst the candidate should be told that the assessments will be forwarded to the Superior, it may, in fact, be shared with others, albeit that they are obliged to secrecy. Regarding exclusion from further profession because of physical or psychic illness, the action 'should be taken with equity, justice and charity' and the member should be given reasons for the decision.<sup>287</sup> Breitenbeck and McDermott consider that periodic evaluations and counselling during the time of temporary profession, presumably keeping the member informed of progress, would serve as advance warning of the Superior's decision.<sup>288</sup>

Interestingly, the United States Conference of Catholic Bishops' Programme of Priestly Formation insists that when a candidate leaves a seminary or religious institute and applies for admission to another, information on him will be shared: the purpose of expert reports is

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<sup>282</sup> Ibid., pp807- 808.

<sup>283</sup> Holland, *New Comm*, p859.

<sup>284</sup> Breitenbeck, *Jurist*, p280. Also Breitenbeck, *Doctoral Thesis*, p288.

<sup>285</sup> Breitenbeck, *Jurist*, p280.

<sup>286</sup> Ibid., p281.

<sup>287</sup> Ibid., p283. Also Breitenbeck, *Doctoral Thesis*, p291.

<sup>288</sup> Breitenbeck, *Jurist*, p283 and McDermott, *Text&Comm*, pp516-517.

‘full disclosure of all relevant information’,<sup>289</sup> to which the applicant must consent if the application is to be considered.<sup>290</sup> Wall acknowledges the relevance of civil law in this field.<sup>291</sup>

In short, although some commentators consider the individual’s consent to disclosure should be obtained, there are no canonical provisions requiring this. Nor do norms or commentators address the issue of a candidate’s right to access confidential reports compiled about them. These matters, therefore, should be addressed, at least in the institute’s own law.

**Use of Expert Reports by Third Parties:** Some commentators imply a more restricted use of experts’ reports than do others. Woestman holds that expert reports should be seen by the minimum number of people necessary, implying restricted use.<sup>292</sup> He notes that invasive methods of investigation are immoral, and warns that results ‘cannot be used in the external forum’.<sup>293</sup> Kaslyn, on admission to Orders, implies that reports are used solely to ascertain an individual’s suitability. He notes that the United States Conference of Catholic Bishops’ Programme of Priestly Formation ‘requires that throughout the admission process “the candidate’s rights to privacy should be respected and the careful management of confidential materials observed”; officials must carefully balance the rights of the institute or seminary to certain information in order to develop an educated judgment as to whether or not they

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<sup>289</sup> USCCBPPF, Addendum A, Preamble para 1. See also the Norms for Evaluation of Applications in these Cases [those previously enrolled in a formation program], 1: ‘At the departure from a seminary or diocesan formation program the diocesan bishops or seminary rector must inform the student by means of a written summary statement or letter of understanding that if he applies to a program of priestly formation in the future, relevant information will be communicated to the diocesan bishop, major superior, and, if necessary, the seminary rector, who is responsible for admission’.

<sup>290</sup> USCCBPPF, Addendum A, Norms 4: ‘At the time of application the applicant must permit the release of all relevant information concerning his departure from any previous program of priestly formation or institute of consecrated life or society of apostolic life to the diocesan bishop, and, if necessary, the seminary rector, to whom he is applying. . . . An applicant’s refusal to provide the release of all relevant information provides sufficient grounds to reject the application. . . .’

<sup>291</sup> Wall, *Dissertation*, at p4, points out that under United States law, the Superior has a right to the results because he/she is paying for the service.

<sup>292</sup> Woestman, ‘Canons 241 and 1051, 1<sup>o</sup>’, p67.

<sup>293</sup> Woestman, *The Sacrament of Orders*, p45-46, citing Gregory Ingles, ‘Protecting the Right to Privacy When Examining Issues Affecting the Life and Ministry of Clerics and Religious’, *Studia Canonica*, 34(2000), pp439-466. Woestman notes that if the person tested ‘has little or no control over the responses given’, he or she ‘may unwillingly reveal information of a most intimate and personal nature of his or her private psyche’. He considers inappropriate also the use of ‘a polygraph, the penile plethysmograph, drug induced responses, or other techniques of this nature’, as they are invasive.



should admit a specific individual and that individual's right to privacy'.<sup>294</sup> He points out that, officials in seminaries and religious institutes 'must provide adequate protection of material placed in the archives, including personnel files, in order to protect the privacy and good reputation of individuals'.<sup>295</sup> Kelly, too, acknowledges that the evidence required by canon 1029, concerning the qualities needed for ordination, 'must be treated with the utmost confidentiality and should not be used for any purpose other than that for which it was made'; the same applies to the documents and reports required by canon 1051, although he does not define those purposes.<sup>296</sup> In similar vein, Geisinger, commenting on canon 1051 regarding documentation to be provided to establish personal qualities and physical and psychological fitness for Orders, states that 'data regarding a candidate's psychological and psychical health must be guarded carefully. The information is confidential, whether it may justify his dismissal from formation or affirm his suitability'.<sup>297</sup> Smith, acknowledging the problems posed by the obligation of confidentiality, maintains that test results should be used in a 'manner which fosters understanding and growth, whether or not the applicant is admitted'.<sup>298</sup>

On the other hand, considering that the Church has initiated psychological testing as routine practice for admission to the seminary, Gilbert suggests that experts' reports should be used not only for admission, but also throughout the course of formation.<sup>299</sup> However, it appears clear that the sole purpose of obtaining experts' reports is to assess suitability and fitness for Orders or religious life; it seems reasonable, therefore, that reports continue to be useful until Orders are received or perpetual vows are taken. Interestingly, Breitenbeck addresses the experts' duty to 'instruct those who will read the report so they will be informed on the nature, uses, and limitations' of its content.<sup>300</sup> Hite considers that this would be 'helpful'.<sup>301</sup>

**Destruction of Reports No Longer Required:** Most commentators do not address this issue. Smith simply acknowledges the problem of destruction of test results when their use would

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<sup>294</sup> Kaslyn, *New Comm*, p278, citing P Cogan (Ed), *CLSA Advisory Opinions* 1984-1993 (Washington, DC,1995), 'Opinions on c. 241§1, p44-47; and 'Opinions on cc. 241§1; 1029; and 1051, 1°', pp47-52 in relation to HIV/AIDS testing.

<sup>295</sup> Kaslyn, *New Comm*, p278.

<sup>296</sup> Kelly, *L&S*, pp 557 and 570. *CIC*, cc. 1029; and 1051. See Appendix I.

<sup>297</sup> Geisinger, *New Comm*, pp1229-1230.

<sup>298</sup> Smith, *New Comm*, p807-808.

<sup>299</sup> Gilbert, *Text&Comm*, p725.

<sup>300</sup> Breitenbeck, *Jurist*, p280.

<sup>301</sup> Hite, *Religious Institutes*, p119.

no longer be valid.<sup>302</sup> Breitenbeck notes that the candidate ‘should be informed about what happens to the report after its initial use’, implying that it might have a further purpose.<sup>303</sup> In the United States, seminaries are encouraged to complete ‘exit’ evaluations for departing students and keep them on file, in case of a subsequent application, which implies that they are not destroyed when the candidate leaves.<sup>304</sup> In the event of a subsequent application to another seminary or institute, a written request for information is to be sent to all former dioceses, seminaries, or religious institutes to which the applicant was affiliated, and an oral interview with personnel responsible for the applicant’s formation is recommended.<sup>305</sup> This investigation is considered ‘an integral part of the internal discipline of the Church’; information gained must be added to the applicant’s ‘confidential, permanent file’.<sup>306</sup> This implies that the data is not destroyed when the applicant is ordained or takes perpetual vows.

Considerable personal and sensitive data, therefore, could be included in this file.

Documentation required by the Circular Letter (1979) for the scrutiny at each of the four stages of priestly formation requires, *inter alia*: the detailed ‘personal report’ of the rector of the seminary, in line with the guidelines given in an accompanying enclosure;<sup>307</sup> a collegial *consultation* of the priests entrusted with the formation in the seminary or the house of formation; a *consultation* of the candidate’s own pastor and a *consultation* of the priest in charge of the place where the candidate assists in pastoral work; the ‘*opinion* of the

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<sup>302</sup> Smith, *New Comm*, p807-808.

<sup>303</sup> Breitenbeck, *Jurist*, p280. Also Breitenbeck, *Doctoral Thesis*, p288.

<sup>304</sup> USCCBPPF, Addendum A. Commentary following Norms for Evaluation of Applications in these Cases [those previously enrolled in a formation program]: ‘Accurate information on the previous departure from a seminary formation program or from an institute of consecrated life or a society of apostolic life is essential in evaluating a decision for subsequent admission to a seminary. Diocesan formation programs and other seminaries are encouraged to complete a final ‘exit’ evaluation for departing students in order to have information on record regarding students at the time of leaving. This information (positive or negative) could be most helpful at a time of subsequent application’.

<sup>305</sup> USCCBPPF, Addendum A, Norms, 5: ‘... Those contacted should provide the pertinent information in a timely manner so as not to delay the process. For the sake of an accurate account written notes should be taken and included in the applicant’s confidential, permanent file. A record of calls or inquiries received by a diocese or seminary regarding a former student should be maintained. If any such institution or person responsible is not contacted with respect to a given application but nevertheless learns of it, all relevant information should be disclosed to the proper ecclesiastical authority’.

<sup>306</sup> USCCBPPF, Addendum A, Norms, Commentary following Norm 8: ‘...Historically, this process has not been public; rather it has been entirely private and for that reason, confidential. An applicant has a right to a good reputation and the protection of his privacy (c. 220), so any information gained through this procedure and any subsequent review will continue to be held with the highest degree of confidentiality. The process by which the committee on Priestly Formation might offer fraternal advice to a bishop or major superior will likewise be internal and confidential’.

<sup>307</sup> Circular Letter (1997), Enclosure II, N2 and Enclosure V entitled: *Some Guidelines for the Preparation of Reports Concerning Promotion to Orders (can.1029)*.

candidate's class companions', given personally in secret, expressing either a positive or negative opinion concerning the suitability of the candidate, together with reasons for that opinion;<sup>308</sup> and for the diaconate and the priesthood, the outcome of the canonical banns, 'proclaimed a sufficient length of time in advance in the parishes where the candidate has had extended residence'.<sup>309</sup> Moreover, following dismissal from another seminary, according to this Circular Letter, a 'written report' from the rector of any previous house of formation in which the candidate spent time is required, although the relevant canon requires only the respective Superior's 'testimony ... especially concerning the reason for their dismissal or departure'.<sup>310</sup> Given that teachers and previous employers could be asked for information regarding, amongst other topics, sickness absence, maturity, capacity for multi-tasking, and capacity for making and sustaining personal relationships, this information could be added to the file.

As the candidate's consent is necessary before any testing, for that consent to be informed, full and free, it seems reasonable that the candidate should be informed of: the need for testing; the method of testing; the report's intended use; who will have access to it; how and for how long the information will be stored; and if, when, and how it will be destroyed. Assurance of confidentiality within those limits should be forthcoming. Even if canon law has not specifically 'canonized' civil law in this respect, the faithful are morally bound by civil law, that is, civil law which promotes the common good, and is not contrary to either divine law or canon law.<sup>311</sup> Consequently, the civil law (which will necessarily vary from State to State) relating to personal and sensitive data should be followed.

## **Conclusion**

Training candidates for Orders and for religious life is an essential task for the Church. Although personal attributes and academic qualities are important, establishing the physical and psychological health of candidates is more problematic and the means used to establish these qualities positively are more controversial. This is a particularly difficult area for the

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<sup>308</sup> Circular Letter (1997), Enclosure II, NN3-5 and 7. Emphases added. Although appearing under the head 'Documentation', a written report is not specified here. With whom these priests are to consult is also unclear

<sup>309</sup> Ibid., Enclosure II, N8.

<sup>310</sup> Ibid., Enclosure I, citing *CIC*, c. 241§3. See also *CIC*, c. 645§2 for Religious Institutes. See Appendix I.

<sup>311</sup> *CIC*, cc. 22; and 1290. See Appendix I. Also *CCC*, p483, paras 2238-2242 in Appendix IV; Huels, *New Comm*, pp84-86 and p1255; and Kennedy in *New Comm*, pp1492-3 (in respect of contracts).

Church: she shoulders the responsibility to provide suitable clerics and religious, yet the examination and training of candidates involves particularly sensitive issues. The enquiry to establish the required criteria for suitability for ministry in the broad sense must respect on the one hand, both the candidate's right to privacy and the right of non-disclosure of matters of the internal forum of conscience; and on the other hand, the integrity of the priesthood and religious communities, and indeed, the wider community, must be safeguarded. A fine balance must be reached; sometimes the assistance of experts is required to achieve this.

Clearly, the condition causing irregularity for reception of Orders or an impediment to their exercise due to insanity or psychological infirmity is a serious one. The risk to the Church appears to be too great to allow a man suffering from insanity or other grave psychological infirmity to receive Orders. Once Orders have been validly received, however, the permanence of such a psychological condition is not presumed, but the cleric, the Church and the wider community must, nevertheless, be protected until the impediment ceases. Likewise, for religious life, psychological health must be established. Therefore, testing in these circumstances, that is, in order to settle a doubt about psychological health, is justified.

There is no canonical provision for *routine* testing in establishing suitability for Orders or admission to religious life. Moreover, it is clear from Vatican documents that there are restrictions on psychological testing. In fact, *CCEO* does not require any certificates of physical or psychological health for admission to Orders. Nevertheless, the practice of routine psychological testing before ordination and admission to religious life appears widespread, at least in the Latin Church. Indeed, some commentators hold that unless candidates agree to undergo testing, their application should not be considered.

In assessing suitability for Orders, which must be established positively, unless one knows what to test for, the value of routine psychological testing is questionable. Unless the characteristics and qualities which make the best clerics and members of religious life are known and candidates can be tested against these criteria, *routine* psychological testing would appear to have little relevance. In fact, testing could be considered to have demonstrated its weakness in light of the Church's more recent experience in discovering the

level of sexual abuse of children by clerics and religious.<sup>312</sup> This inherent weakness seems to be acknowledged in the Circular Letter (1997) requiring a psychological report, ‘only if there exists a just reason’, implying an objective reason to doubt psychological health.<sup>313</sup> This weakness is further reflected in Guidelines (2008), acknowledging not only the candidate’s right to refuse psychological testing, but the right not to have suitability judged solely on the basis of a refusal to undergo such testing.<sup>314</sup> However, this latter document, demonstrates its own weakness: rather than requiring assessment by independent experts, it suggests that formators and psychologists should ‘compare notes’, which gives the rector overseeing the candidate’s training an opportunity for input, which could influence the tester’s opinion.

Under *CIC*, although the required dimissorial letters cannot be granted until canonical requirements are met, the bishop is only obliged to be satisfied that the documents *referred to in canon 1050*, ‘are at hand’ and that the candidate’s suitability ‘has been positively established’.<sup>315</sup> Being ‘at hand’ does not necessarily mean that they are presented to the bishop; therefore, he might not see these documents and certificates. Whilst the purpose of the rector’s testimony is to assist the bishop in decision-making, this process leaves the rector with considerable influence over the ordinand’s prospects, as he is in a position to make a further interpretation of the expert report. Direct access, therefore, to these reports might be of more objective assistance to the bishop. Geisinger’s statement that ‘testimonials ... are usually succinct’ supports the premise that the bishop does not receive a detailed report. Whilst the rector might be in good position to judge the candidate’s personal attributes and suitability, reliance on his recommendation places a filter between the person ultimately responsible for the decision to ordain (i.e. the bishop), and the ordinand. As we have seen in Chapter 1 when discussing alienation, canon law requires that important decisions be made on the basis of detailed knowledge. This principle is reiterated in canon 259§2, requiring the

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<sup>312</sup> *Psychology and Priestly Formation – How do they Coexist?* Available at: <http://clericalwhispers.blogspot.co.uk/2010/08/psychology-and-priestly-formation-how.html> This article drew attention to the limitations both of psychological testing of candidates for Orders to assess their potential for, and therapy in curbing, criminal behaviour, yet it says the Church still depends on the psychological sciences for screening and formation purposes. It claims that a former Director of Formation stated that these sciences are ‘an important tool’ but the Church is ‘still working on the issue of clarity; how, precisely to utilize this field in the assessment and formation of seminarians’.

<sup>313</sup> Circular Letter (1997), Enclosure III, N8.

<sup>314</sup> *Gpsy*, 12. See Appendix VI.

<sup>315</sup> *CIC*, cc. 1020; and 1052. See Appendix I.

bishop to have detailed knowledge of ordinands' progress.<sup>316</sup> The Circular Letter (1997) confirms that important decisions regarding suitability for Orders require prior consultation with 'experts and those informed of the appropriate facts'. The ordaining bishop, therefore, must base his decision whether to ordain on sound facts; it is clear that where doubt exists recourse to expert assistance is permitted. However, the law does not clarify who these experts might be.

A purely textual analysis of canon 1051 obliges the rector to provide a certificate of the qualities and fitness of a candidate, which might be based on supervision, continuous assessment, appraisals and observance of the candidate's general health and demeanour over a period of at least six years. However, the canon does not state who is responsible for the certificate of physical and psychological health. A rector might, amongst others, be considered expert in his field of training candidates for ordination and capable of judging their suitability regarding academic achievement and personal attributes. Moreover, he could state that he is unaware of any physical or psychological impairment. But, he would not usually be qualified to provide a *certificate* of physical or psychological health.

Therefore, the English language translations of *CIC* appear to require more than the Latin text or *CCEO*. The requirement of a *certificate* of physical and psychological health implies referral to a physician, perhaps a general practitioner, and possibly also to a psychologist for testing, but a psychologist alone would not be qualified to assess physical health. The question then arises as to whether these professionals constitute 'experts'; if not, their suitability to assist in the decision-making process regarding irregularity for Orders or impediment of their exercise is questionable. If, on the other hand, a general practitioner is regarded as an expert and doubt is raised regarding the psychological health of the candidate (in other words, the issue of irregularity due to psychological infirmity is raised), it would suffice that the competent authority consult one other expert, possibly even the rector, before lawfully making a judgment of irregularity for Orders or, indeed, of impediment to their exercise on psychological grounds. Likewise, in cases of impediment to the exercise of Orders already received due to psychological infirmity, consultation with a general practitioner would suffice before returning the cleric to ministry. Canonists do not clarify the

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<sup>316</sup> *CIC*, c. 259§2: the bishop has a personal responsibility to get to know the candidates for ordination. See Appendix I.

matter; many appear to interpret the term 'expert' to mean general medical, psychiatric or psychological practitioners, but they do not seem to require anything more than competence, rather than expertise, in their respective fields, despite the canonical requirements to consult 'experts'. Breitenbeck agrees that canonists confuse the situation by this interpretation.

Interestingly, and despite the practice of routine psychological testing before ordination or admission to religious life, once suitability had been established, the legal presumption is that one continues to be suitable; there is no specific requirement to monitor or to continue to prove suitability. It is, therefore, important that the candidate is assessed correctly at the outset, and indeed as formation progresses. Whilst a degree of expertise on the part of competent ecclesiastical authorities is recognised in this endeavour, the Church also accepts that, generally speaking, the ecclesiastical authorities involved in candidates' training are not competent in the areas of physical and mental health. Consequently, recourse to the assistance of experts in these areas is, in cases of doubt, required. Given the Church's serious responsibility in this area, it would appear that true 'experts' should be involved. As we have seen, the level of proof required to establish suitability (or otherwise) is 'moral certainty'.

Given the Vatican guidelines (2008), emphasising the right of the individual to refuse psychological testing and the right not to have such refusal deemed sufficient reason to be considered unsuitable and the Vatican's warning against the use of 'experts trained in the psychoanalytic tradition' (which implies that these methods have been used), it might seem remarkable that (as the guidelines put it) 'law in the strict canonical sense of the term' was not promulgated. However, universal law could overburden dioceses which do not suffer from the problems these guidelines sought to address. The use of experts in the areas discussed above is not highly regulated by universal law. Bishops' Conferences are charged with producing Programs for Priestly Formation in their own territories (albeit that they must be approved by the Holy See). In practice, however, these seem to provide for routine psychological testing; moreover, this appears to be done, not independently, but in collaboration with the relevant seminary. The choice of experts used and whether or not a candidate can influence that choice is left to individual seminaries. Likewise, these issues are left to the law of the individual religious institutes. There is, however, no universal requirement that the expert consulted must be Catholic. Given the sensitive nature of the

enquiry and the requirements to hold information on file, the issue of confidentiality is also a serious one, which is not adequately addressed by the law or by commentators.

New norms, therefore, by Bishops' Conferences and religious institutes, should clarify: the precise circumstances when experts are to be consulted; who is obliged to appoint them; the professional disciplines from which they are to be drawn; the qualifications and experience required of them; their precise functions; whether they are to be consulted individually or collectively; the weight to be given to their opinions; the consequences of failure to consult them; whether candidates may choose them and whether the choice requires approval; how their reports are to be used and stored; and if, how and when they are to be destroyed.



## CHAPTER 3

### THE USE AND TRAINING OF EXPERTS IN THE TEACHING OFFICE OF THE CHURCH

Vatican II emphasises the triple mission of the Church (teaching, sanctifying and governing) and the role of all the faithful in this mission.<sup>1</sup> Book III of *CIC* is devoted to the teaching office of the Church, which is fulfilled through: Catholic universities, faculties, and schools; catechetical formation and missionary training; preaching; and social communication.

Despite the importance the Church places on education, Book III of *CIC* does not use the term ‘expert’ in this endeavour. Therefore, it does not contain any provisions for consultation with experts. However, this Chapter seeks to demonstrate that the use of experts is, nevertheless, implied and sometimes necessary. A distinction is also made between experts within Church and those without. Moreover, the Chapter highlights the Church’s training of experts for teaching and for consultation in other matters (such as sacred art). The Chapter exposes a lack of clarity in relation to several issues and it proposes new norms. To underline the importance which the Church places on education, it is necessary to explain the background to the Church’s authority and duty to teach her faithful, the right of the faithful to education, and the duty and right of parents to educate their children. In turn, the Chapter examines provisions for: Catholic universities and institutes of higher education; Ecclesiastical universities and faculties; Catholic schools; and catechesis, mission, preaching and social communication. *CIC*, other Vatican documents and the writings of canonists will be explored. Comparisons are also made with *CIC* 1917 and *CCEO*.

#### **The Church’s Authority and Duty to Teach**

The Church claims the inherent right to preach the Gospel throughout the world, and also to proclaim moral principles, not just for individuals, but in respect of the social order, so far as it affects human rights or the salvation of souls.<sup>2</sup> This implies knowledge of fundamental human rights and matters relevant to the salvation of souls, making her ‘expert in humanity’.<sup>3</sup>

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<sup>1</sup> *LG*, 10. See Appendix VI.

<sup>2</sup> *Matthew* 28: 19-20. *CIC*, c. 747. See Appendix I.

<sup>3</sup> *ExCE*, 3. See Appendix VI.

The Church also claims, for the Supreme Pontiff, infallibility *when teaching on matters of faith or morals*; this may be shared with the College of Bishops, when, gathered in an Ecumenical Council, or when otherwise in agreement, they declare definitive doctrine for the universal Church.<sup>4</sup> These doctrines, which require the assent of faith, may be distinguished from non-definitive doctrines which require ‘religious submission of mind’.<sup>5</sup> The faithful are bound to abide by these doctrines, according to the ‘hierarchy of truths’.<sup>6</sup> Sanctions may be applied for obstinately rejecting doctrines or for teaching condemned doctrines.<sup>7</sup>

Moreover, *CIC* articulates the Church’s duty and right to educate and found schools of all kinds and grades.<sup>8</sup> Reflecting the provisions of the Declaration on Christian Education (1965) requiring that education, which must be specifically Christian for the baptised, goes beyond Christian doctrine, *CIC* insists that education be holistic, taking account of age, sex, individual ability, and differing cultures and traditions; and that older children must be educated in matters pertaining to sex and be prepared for active participation in society.<sup>9</sup> This implies a degree of specialist training, knowledge and competence, if not experience and expertise, on the part of teachers.

Furthermore, the Apostolic See and College of Bishops are responsible for directing the ecumenical movement, which by its nature involves dialogue with those outside the Church.<sup>10</sup> Consultation with the competent authority of a non-Catholic community is required before any general norms for sacramental sharing are established.<sup>11</sup> This implies consultation between those who have deep knowledge of the doctrines and disciplines of each

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<sup>4</sup> *CIC*, cc. 336; and 749. See Appendix I.

<sup>5</sup> *CIC*, cc. 750§1; 751; 753; and 768§1. See Appendix I. The Latin ‘*obsequium*’ is translated as: ‘religious submission of mind’ in *L&S*, p419 and in *New Comm*, p917 and as ‘religious respect’ in *Text&Comm*, p548. Robert Ombres, ‘The New Profession of Faith and Oath’, *Priest and People* (1989), pp339-343, at 341 considers that these translations are not satisfactory, ‘submission’ being too strong and ‘respect’ too weak. He suggests that the word ‘allegiance’ is more accurate, if, indeed a translation should be used. See also Apostolic Letter *ATF*, which modified *CIC*, c. 750 and provided that definitive doctrines ‘must be firmly accepted and held’. Appendix VI.

<sup>6</sup> *CIC*, cc. 750§2; 752; and 754. See Appendix I. Also *UR*, 11 in Appendix VI.

<sup>7</sup> *CIC*, c. 1371. See Appendix I.

<sup>8</sup> *CIC*, cc. 794§1; and 800§1. See Appendix I.

<sup>9</sup> *CIC*, c. 795. See Appendix I. Also *GE*, 1; and 3. See Appendix VI.

<sup>10</sup> *CIC*, c. 755§1. See Appendix I: Also *UR*, 4. See Appendix VI.

<sup>11</sup> *CIC*, c. 844§5. See Appendix I. See also Eithne D’Auria, ‘Sacramental Sharing in Roman Catholic Canon Law: A Comparison of Approaches in Great Britain, Ireland and Canada’, 9 *Ecclesiastical Law Journal* (2007), pp264-287, at 271.

community concerned. Bishops' Conferences and bishops must legislate at local level on ecumenism.<sup>12</sup>

### **The Right to Education and the Duty to Educate**

*CIC* enshrines the faithful's right to Christian education.<sup>13</sup> It also recognises, for the laity, the right (and duty) to acquire knowledge of Christian teaching appropriate to their capacity, and the right to study and obtain academic degrees in the sacred sciences.<sup>14</sup> Moreover, it recognises their capacity to receive a mandate to teach these subjects,<sup>15</sup> and their right, albeit limited, to freedom of research and expression on subjects in which they are 'expert'.<sup>16</sup> This echoes the norm that laity may be experts and called upon to assist pastors.<sup>17</sup>

Reflecting the provisions of the Declaration on Christian Education (1965), parents, as primary educators of their children, are obliged to send their children, not necessarily to Catholic schools, but to schools which provide for Catholic education, or failing this, to provide Catholic education outside school.<sup>18</sup> Parents have both a duty and a right to choose the best means of catholic education for their children;<sup>19</sup> they also have a right to assistance from civil society, oversight of which is the responsibility of all the faithful.<sup>20</sup>

These provisions can be compared with those of *CIC* 1917 and *CCEO*, where the figure of 'the expert' is also found. *CIC* 1917 enshrined the Church's authority to teach, and to found schools.<sup>21</sup> It recognised the duty and right of parents to educate their children, and the community's responsibility in this regard.<sup>22</sup> *CCEO* makes similar claims for authentic teaching, and for founding schools.<sup>23</sup> It makes similar provisions for adherence to doctrines according to the hierarchy of truths, and recognises the duty and right to Christian

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<sup>12</sup> *CIC*, c. 755§2. See Appendix I.

<sup>13</sup> *CIC*, c. 217. See Appendix I.

<sup>14</sup> *CIC*, c. 229§§1, 2. See Appendix I.

<sup>15</sup> *CIC*, c. 229§3. See Appendix I.

<sup>16</sup> *CIC*, c. 218. See Appendix I.

<sup>17</sup> *CIC*, c. 228. See Introduction for the text of the canon.

<sup>18</sup> *CIC*, cc. 226§2; and 789. See Appendix I. Also *GE*, 3 in Appendix VI.

<sup>19</sup> *CIC*, c. 793§1. See Appendix I. Also *TCS*, 14 in Appendix VI.

<sup>20</sup> *CIC*, cc. 793§2; 797; and 799. See Appendix I.

<sup>21</sup> *CIC* 1917, cc. 1322§2; and 1375. See Appendix III.

<sup>22</sup> *CIC* 1917, cc. 1113; 1372§§1, 2; 1379§3; and 1335. See Appendix III.

<sup>23</sup> *CCEO*, cc. 595-597; 629; and 631§2. See Appendix II.

education.<sup>24</sup> Interestingly, *CCEO*, like *CIC* recognises students' freedom of inquiry and expression.<sup>25</sup> However, whilst *CIC* limits this to 'matters in which they are expert', *CCEO* limits it to 'matters in which they possess 'expertise''.<sup>26</sup> It would appear, therefore, that the terms 'expert' and 'possessing expertise' are synonymous. *CCEO* also provides for ecumenical activities; but unlike *CIC* it is explicit in requiring each church *sui iuris* to establish, 'if circumstances so suggest', a 'commission of experts on ecumenism'.<sup>27</sup> Although it does not define 'experts', it is clear that the consultation with other communities is between experts; that is between experts on this commission within the Church and those from outside in other ecclesial communities. *CCEO* makes similar provisions for sacramental sharing and consultation with the competent authority of another non-Catholic Church or ecclesial community before norms of particular law are enacted.<sup>28</sup>

## 1. CATHOLIC UNIVERSITIES AND INSTITUTES OF HIGHER EDUCATION

By claiming the right to establish schools of all kinds and grades, the Church implies specialist knowledge and expertise in various subjects and at various levels in her teaching staff.<sup>29</sup> Whilst *CIC* encourages the establishment of Catholic universities, it does not define 'Catholic universities' or 'institutes of higher education'.<sup>30</sup> However, the Apostolic Constitution, *Ex Corde Ecclesiae* (1990), regulating Catholic universities, describes them as: 'distinguished' by the 'free search for the whole truth about nature, man and God'; a 'community of scholars representing various branches of human knowledge'; an 'academic institution in which Catholicism is vitally present and operative'; 'dedicated to research, to teaching, and to various kinds of service in accordance with its cultural mission'; and 'open to all human experience ... ready to dialogue with and learn from any culture ... enabling it to come to a better knowledge of diverse cultures'.<sup>31</sup> By virtue of being Catholic, a university 'informs and carries out its research, teaching, and all other activities with Catholic

<sup>24</sup> *CCEO*, cc. 10; 15; 20; 404§§1-3; 598-600; 627§§1, 3; and 628§1. See Appendix II.

<sup>25</sup> *CCEO*, c. 21. See Appendix II.

<sup>26</sup> The Latin text of *CIC*, c. 218 states: '*Qui disciplinis sacris incumbunt iusta libertate fruuntur inquirendi necnon mentem suam prudenter in iis aperiendi, in quibus peritia gaudent, servato debit erga Ecclesiae magisterium obsequio*'. The Latin text of *CCEO*, c. 21 states: '*Qui in scientias sacras incumbunt, iusta libertate fruuntur inquirendi necnon mentem suam prudenter in eis aperiendi, in quibus peritam habent; servato debito erga magisterium Ecclesiae obsequio*'.

<sup>27</sup> *CCEO*, cc. 902-908. See Appendix II.

<sup>28</sup> *CCEO*, c. 671. See Appendix II.

<sup>29</sup> *CIC*, cc. 807; and 815. See Appendix I.

<sup>30</sup> *CIC*, c. 809. See Appendix I.

<sup>31</sup> *ExCE*, 4; 14; 43-44; and Articles 2§1; and 3§1. See Appendix VI.

ideals, principles and attitudes’.<sup>32</sup> Although ‘institutes of higher education’ are not defined, both canon 814 and the Constitution (1990) provide that they are governed by the provisions for Catholic universities.<sup>33</sup> The title ‘Catholic’ is restricted to those who have permission from the competent ecclesiastical authority.<sup>34</sup> The Constitution (1990) acknowledges: the limited institutional autonomy of Catholic universities; the importance of laity therein; and their oversight by Bishops’ Conferences and bishops; however, the scope of this right and duty of vigilance is limited to the university’s ‘Catholic character’.<sup>35</sup> The Constitution (1990) suggests pastoral measures to resolve problems with the university’s competent authority.<sup>36</sup>

**Canonical Classification of Teachers in Catholic Universities as Experts:** *CIC* classifies teachers in Catholic universities as experts - canon 810§1 provides:

‘In catholic universities it is the duty of the authority which is competent in accordance with the statutes to ensure the appointment of teachers who are suitable both in scientific and pedagogical expertise and in integrity of doctrine and uprightness of life, and if these qualities are lacking, to ensure that they are removed from office, in accordance with the procedure determined in the statutes’.

The requirement that teachers be experts is underscored by the requirement that teachers of ‘theological subjects’ have a mandate from the relevant ecclesiastical authority in addition to ‘scientific and pedagogical expertise’. *CIC* canon 812 provides:

‘Those who teach theological subjects in any institute of higher studies must have a mandate from the competent ecclesiastical authority’.

Therefore, only those who, in addition to meeting the requirements of canon 810§1, satisfy the standards required by the relevant ecclesiastical authority, may receive a mandate to teach ‘theological subjects’. This strengthens the premise that ‘expert’ is synonymous with ‘expertise’. However, neither *CIC* nor the Constitution (1990) specify the disciplines from which these teachers are drawn nor their professional qualifications. What ‘theological subjects’ require a mandate and who grants or obtains the mandate also lack clarity.

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<sup>32</sup> *ExCE*, Article 2§2. See Appendix VI.

<sup>33</sup> *CIC*, c. 814. See Appendix I. Also *ExCE*, Article 1. See Appendix VI.

<sup>34</sup> *CIC*, c. 808. See Appendix I.

<sup>35</sup> *CIC*, c. 810§2. See Appendix I. Also *ExCE*, 12; 25; and Article 2§5. See Appendix VI.

<sup>36</sup> *ExCE*, Article 5§2. See Appendix VI.

**Appointment of Teachers:** Canon 810§1 provides that the authority named in the statutes of each university or institute is to ensure the appointment of suitable teachers with ‘expertise’. Moreover, if this expertise or the required personal attributes are lacking, the same authority is responsible for their removal, in accord with the institution’s statutes.

**Disciplines and Qualifications of Teachers:** *CIC* requires teachers to be ‘suitable in scientific and pedagogical expertise’. Vatican II’s Declaration on Christian Education *Gravissimum Educationis* (1965), requires educational standards to be ‘truly outstanding’.<sup>37</sup> Moreover, the Constitution on Catholic Universities and Institutes of Higher Studies, *Ex Corde Ecclesiae* (1990), recognises the competence of these educational institutions to: employ ‘adequate’ personnel, ‘who are both willing and able’ to ‘promote its Catholic identity’;<sup>38</sup> instruct all new employees on the university’s Catholic identity;<sup>39</sup> run courses in Catholic doctrine; combine ‘academic and professional development’, including ‘appropriate ethical formation in that profession’ and ‘formation in moral and religious principles and the social teaching of the Church’;<sup>40</sup> employ a sufficient number of ‘qualified’ personnel,<sup>41</sup> to promote the pastoral care of all members;<sup>42</sup> engage in dialogue with other Catholic universities including Ecclesiastical Universities and Faculties (see below), other universities and research and educational institutions,<sup>43</sup> and cooperate with programmes of government and other national and international organisation.<sup>44</sup> The Constitution, therefore, does not identify the specific qualifications required of individual teachers or of those involved in dialogue and cooperation with other bodies. But, it is clear that teachers in Catholic universities are expected to continue to improve their ‘competence’.<sup>45</sup> The Constitution also demonstrates the broad range of expertise required.

Moreover, given that *CIC* requires Catholic universities to have at least a ‘chair of theology’ and to provide lectures addressing the theological questions arising from each faculty, it is

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<sup>37</sup> *GE*, 10. See Appendix VI. *CIC* does not describe the functions of teachers; however, their roles are described in *TSC*, 41 and 42 as doing more than conveying the sense of the subject taught (see ft 174 below) and in *LCS* (1982), 16 as going ‘well beyond the transmission of knowledge’ (see ft 179 below).

<sup>38</sup> *ExCE*, Article 4§1. See Appendix VI. Specific reference is made to *CIC*, c. 810 in respect of the qualities required of teachers.

<sup>39</sup> *ExCE*, Article 4§2. See Appendix VI.

<sup>40</sup> *ExCE*, Article 4§5. See Appendix VI.

<sup>41</sup> *ExCE*, Article 6§2. See Appendix VI.

<sup>42</sup> *ExCE*, Article 6§1. See Appendix VI.

<sup>43</sup> *ExCE*, Article 7§1. See Appendix VI.

<sup>44</sup> *ExCE*, Article 7§2. See Appendix VI.

<sup>45</sup> *ExCE*, 22. See Appendix VI.

reasonable to assume that an appropriately qualified Professor of Theology must be appointed.<sup>46</sup> There appears, however, no requirement that all teachers be Catholic; Coriden and Euart, dealing with the issue of a mandate, refer to teachers of theology who are not Catholics or not in the Latin Church.<sup>47</sup> Curiously, Coriden considers that canonical provisions are only ‘very general guidelines’ on suitability of teachers, pointing to ‘the kind of scholarly excellence and personal example which should characterise Catholic college faculty members’, but ‘they cannot be applied to teachers employed because of their doctrinal divergence (e.g. for ecumenical reasons) or where the discipline is devoid of doctrinal implications’, although the provisions are intended to extend to administrators.<sup>48</sup>

It seems, therefore, that the disciplines from which teachers are drawn and their specific qualifications must be defined by the proper statutes of the university or institute. One would expect that teachers would be qualified in the disciplines (if not sub-disciplines) of the specific subjects which they are required to teach.

**Theological Subjects - Granting or Obtaining a Mandate:** That teachers in Catholic universities are ‘experts’ is supported by the requirement for teachers of ‘theological subjects’ in *any* institute of higher education to have a mandate, from the competent ‘ecclesiastical’ authority. Morrissey does not address the granting authority.<sup>49</sup> However, Coriden and Euart acknowledge the silence of *CIC* but do not wholly agree. For Coriden, the Holy See and diocesan bishop are ‘surely capable’ of granting the mandate, but ‘probably’ other Ordinaries<sup>50</sup> are competent and ‘it might be argued’ that major religious Superiors ‘of clerical communities which own and operate Catholic colleges could give mandates for their own members’; however, Coriden holds that Bishops’ Conferences are ‘probably not included’.<sup>51</sup> Euart, on the other hand, includes Bishops’ Conferences as competent on the basis that canon 810 ‘assigns the duty and right of vigilance over Catholic doctrine in Catholic institutions of higher learning to conferences of bishops and diocesan bishops’.<sup>52</sup> If the diocesan bishop, ‘other Ordinaries’ and major Superiors are competent to grant a

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<sup>46</sup> *CIC*, c. 811§1. See Appendix I.

<sup>47</sup> Coriden, *Text&Comm*, p576 and Euart, *New Comm*, p969.

<sup>48</sup> Coriden, *Text&Comm*, p574.

<sup>49</sup> Morrissey, *L&S*, p444.

<sup>50</sup> See *CIC*, c. 134, for a definition of ‘Ordinary’. See Appendix I.

<sup>51</sup> Coriden, *Text&Comm*, p576.

<sup>52</sup> Euart, *New Comm*, p970.

mandate, there seems little justification for excluding the Bishops' Conference, which is an assembly of all the bishops of a territory, exercising pastoral offices together for the greater good.<sup>53</sup>

There is also some debate as to which subjects, and indeed, which educational institutions, require teachers to have a mandate. Morrissey is silent.<sup>54</sup> Regarding the subjects covered by the provision, for Coriden, the evolution of the canon through various drafts demonstrates that the original text has changed from 'theology or courses related to theology' to 'theological disciplines',<sup>55</sup> although this is also translated as 'theological subjects'.<sup>56</sup> Moreover, Coriden understands that because 'the law is clearly restrictive of "the free exercise of rights", it is subject to strict interpretation' under canon 18.<sup>57</sup> Therefore, he holds that although not 'strictly speaking "theology", dogmatics, historical, moral and sacramental theology, Church history, liturgical studies, canon law and sacred scripture' are 'probably' included. However, 'catechetics, many areas of pastoral studies, comparative religions, history or sociology of religion are not considered theological disciplines', but they are 'courses related to theology' and, therefore, are not covered by the requirement for a mandate.<sup>58</sup> Euart relies on the Constitution for Ecclesiastical Universities and Faculties (1979), which lists 'theological disciplines' as: Sacred scripture, fundamental theology (including ecumenism, non-Christian religions and atheism); dogmatic theology; moral and spiritual theology; pastoral theology; liturgy; Church history; patrology; archaeology; and canon law.<sup>59</sup> She concludes that the meaning of 'theological disciplines' should not be broadened 'beyond the academic disciplines of *Catholic*<sup>60</sup> theology or beyond the disciplines that are formally theological'; in her view, 'pastoral ministry, methodology of religious education, comparative religion, and history and sociology of religion' are excluded.<sup>61</sup>

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<sup>53</sup> *CIC*, c. 447. See Appendix I.

<sup>54</sup> Morrissey, *L&S*, p444, para 1598.

<sup>55</sup> Coriden, *Text&Comm*, p576.

<sup>56</sup> See *L&S*, p444.

<sup>57</sup> Coriden, *Text&Comm*, p576. *CIC*, c. 18. See Appendix I.

<sup>58</sup> *Ibid.*

<sup>59</sup> See General Norms for the Correct Implementation of *SCh*, Article 51 in Appendix VI.

<sup>60</sup> Emphasis added.

<sup>61</sup> Euart, *New Comm*, p969.



As to the institutions concerned, canon 812 requires a mandate for ‘those who teach theological subjects in *any institute of higher studies*’.<sup>62</sup> However, the Constitution *Ex Corde Ecclesiae* (1990) explains that its provisions are ‘a further development’ of *CIC* and ‘are valid for all *Catholic* Universities and other *Catholic* Institutes of Higher Studies throughout the world’; but its norms are to be applied locally in conformity with *CIC* and other legislation, including the statutes of individual institutes, and ‘as far as possible’ with civil law.<sup>63</sup> Although writing before the Constitution (1990), Coriden nevertheless understood ‘any institute of higher studies’ to mean ‘all and only’ *Catholic* ‘colleges and universities’,<sup>64</sup> but not seminaries.<sup>65</sup> Moreover, Coriden considers that the provision: is further limited to individuals employed on a full-time basis;<sup>66</sup> does not apply to teachers of theology, ‘who are not Catholics or not in the Latin Church’;<sup>67</sup> and is not retroactive.<sup>68</sup>

Interestingly, Euart too sees canon 812 as restricting the ‘right’ of freedom of enquiry and expression.<sup>69</sup> Consequently, it should be interpreted strictly; where there are differing interpretations ‘the stricter or narrower meaning should be given’.<sup>70</sup> The American translation, on which Euart comments, despite the fact that it was published ten years after the Constitution *Ex Corde Ecclesiae* (1990), states that teachers of theological disciplines in ‘any institute of higher studies *whatsoever*,<sup>71</sup> must have’ a mandate. Nevertheless, Euart, concludes that the requirement applies only to *Roman Catholic* teachers in *Catholic* colleges

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<sup>62</sup> *CIC*, c. 812. See Appendix I. Emphasis added.

<sup>63</sup> *ExCE*, Article 1. Emphases added. See Appendix VI.

<sup>64</sup> Coriden, *Text&Comm*, p575, explains that there was no requirement for an ecclesiastical mandate under *CIC* 1917, nor in the ‘teachings’ of Vatican II; it was introduced into concordats between the Vatican and Germany because of concerns about the teaching of religion due to the secularisation of schools. The provision then found its way, in 1931, into regulations for ‘pontifical faculties’ and was retained in the Constitution for Ecclesiastical Universities and Faculties (1979). Now, it is ‘extended to all teachers of theology in all Catholic colleges and universities’.

<sup>65</sup> *Ibid.*, p576: ‘All and only Catholic colleges and universities are included, that is, all Catholic institutions of post-secondary education, including academies, institutes, etc, but excluding seminaries because they are specifically regulated by another section of the Code, namely canons 232-264’. However, the Constitution states that its norms ‘are valid for all Catholic Universities and other Catholic Institutes of Higher Studies throughout the world’, which would exclude the *junior* seminaries referred to in *CIC*, c. 234§1.

<sup>66</sup> *Ibid.*: ‘Those who will be added to faculties to teach theology on a full-time basis as their chief faculty responsibility [are covered by the regulation]’. ‘One-time, part-time, or occasional theology teachers are probably not included because the canon is concerned with ongoing, long-term instruction’.

<sup>67</sup> Coriden relies on *CIC*, cc. 1 and 11. See Appendix I. However, it seems that his exclusion of Catholics who do not belong to the Latin Church is a moot point as *CCEO* also requires a mandate.

<sup>68</sup> Coriden maintains that the provision does not apply to those who already held appointments at the time the provision became effective. He relies on *CIC*, c. 9. See Appendix I.

<sup>69</sup> *CIC*, cc. 18; and 218. See Appendix I.

<sup>70</sup> Euart, *New Comm*, p969.

<sup>71</sup> *New Comm*, p966. Emphasis added. The earlier translation by the CLSA, *Text&Comm*, p575 and the translation by the CLSGB&I, *L&S*, p444, merely state ‘in any institute of higher studies’.

and universities.<sup>72</sup> Therefore, Coriden and Euart hold that only teachers of ‘theological disciplines’, in the strict sense, who teach at Catholic institutions, need a mandate; teachers of subjects related to theology and those at non-Catholic institutions do not.

Coriden reduces further the need for a mandate: he notes that earlier drafts of canon 812 required a canonical ‘mission’, whereas the final text speaks only of a ‘mandate’.<sup>73</sup> Moreover, the draft text ‘required’ (*egent*) a mandate, but the wording was changed later (for the final version) to ‘should have’ (*habeant oportet*).<sup>74</sup> Moreover, for Coriden, the provision for a mandate ‘is not directed to the institution’; the obligation ‘falls upon the individual teachers’.<sup>75</sup> This implies that appointments would need to be offered conditionally, ultimately depending on the competent ecclesiastical authority’s decision whether not to grant the mandate. It would seem logical however, that if the mandate is only required for those teaching in Catholic institutions, then the institution should be responsible for granting mandates to its own appointees; in other words that they would only appoint those to whom they could also grant a mandate. Euart agrees that the opening words of the canon place the obligation on the individual to obtain the mandate.<sup>76</sup>

However, canon 812 is unclear on this point. It merely states that teachers of theological subjects ‘must *have*’, rather than ‘must *obtain*’ a mandate. This does not oblige the teacher to apply for a mandate. Moreover, whilst the right to freedom of enquiry and expression is already limited by the requirement to submit to the *magisterium*,<sup>77</sup> there is no ‘right’ to an

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<sup>72</sup> Euart, *New Comm*, p969, citing *CIC*, c. 11. See Appendix I. See also Appendix VI: *ExCE*, Article 4§3.

<sup>73</sup> For a discussion on the distinctions between ‘mission’, ‘canonical mission’ and ‘mandate’ see Euart, *New Comm*, p966-969. At p968, Euart concludes: ‘Mission connotes entrusting to the laity certain tasks and certain offices which are considered to be proper to the hierarchy but which require neither the power of orders nor the power of jurisdiction for their lawful exercise. Mandate refers to those apostolic activities which remain activities proper to the laity in virtue of baptism, but which, at times, are joined more closely to the apostolic responsibility of the bishop. When acting pursuant to a mandate, a lay person acts, it would seem, on his or her own and in communion with the bishop, but not in the name of the bishop or the church hierarchy’. Not all agree however. Morrissey, *L&S*, p444 states: ‘This mandate is required because those who teach these subjects do so, not of their own authority, but in the name of the Church’, citing *SCh*, Article 27 (see Appendix VI), but this article refers to those with a ‘canonical mission’. Coriden, *Text&Comm*, p576, noting the change from using ‘canonical mission’ to ‘mandate’, states; ‘the “mandate” is simply a recognition that the person is properly engaged in teaching the theological discipline. It is not an empowerment, an appointment, or a formal commission. It is disciplinary, not doctrinal. It does not grant approval of what is taught nor is it a formal association with the church’s mission or ministry of teaching. There is no requirement [in canon 812] that the mandate be in writing or even explicit, nor that it be received more than once’.

<sup>74</sup> Coriden, *Text&Comm*, p576.

<sup>75</sup> *Ibid*.

<sup>76</sup> Euart, *New Comm*, p969.

<sup>77</sup> *CIC*, c. 218. See Appendix I.

appointment as a teacher; nor is there a 'right' to a mandate. There appears little justification, therefore, to apply a strict interpretation on the basis of the restriction of a right. Moreover, whilst there is justification for limiting the educational institutions in which a mandate is required on the basis of the Constitution *Ex Corde Ecclesiae* (1990), given that the Constitution on Ecclesiastical Universities (1979), on which Euart relies, includes the teaching of 'ecumenism, non-Christian religions, and atheism' in the list of 'theological subjects', there seems little justification for such a strict interpretation of 'theological disciplines', which excludes, for example, comparative religions.

**Withdrawal of a Mandate:** Neither canon 810 on removal of teachers at Catholic universities and institutes, nor canon 812 on mandates for teachers of theological subjects, deals with withdrawal of a mandate. Morrissey holds that 'in an appropriate situation, for a serious cause' a mandate can be withdrawn, but does not elaborate.<sup>78</sup> He acknowledges the limited scope of vigilance by Bishops' Conferences and bishops; their authority does not extend to judging the 'professional expertise' of teachers.<sup>79</sup> Coriden explains that the '*ius invigilandi*' is distinct from other levels of authority, such as 'ownership, governance, jurisdiction, control, intervention or even visitation'; it means a 'pastoral watchfulness, a benign surveillance, a solicitous oversight' and 'implies information and communication, inquiry, advice, sharing of concerns, even perhaps friendly persuasion, but it is not an adversarial relationship; it is neither inquisitorial nor authoritarian'.<sup>80</sup> Coriden notes the removal from earlier drafts of the canon of the bishop's power to dismiss teachers 'for reasons of faith or morals,' because it was considered 'unnecessary and inappropriate, an improper external intervention in the internal affairs of an institution'; the bishop's scope is limited to 'the basics of Catholic teaching and the way they are communicated and witnessed in the context of and in accord with the methods of an institution of higher education'.<sup>81</sup> Coriden questions whether the canons on higher education are applicable to the majority of Catholic universities and colleges in the United States, based on the fact that few are considered 'canonically' Catholic - that is, although Catholic in character and mission, they have no formal covenants with ecclesiastical authorities and receive no direct Church

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<sup>78</sup> Morrissey, *L&S*, p444, para 1601.

<sup>79</sup> *Ibid*, para 1596.

<sup>80</sup> Coriden, *Text&Comm*, p574.

<sup>81</sup> *Ibid*.

support.<sup>82</sup> Euart agrees. Although she acknowledges that canon 812 provides neither procedures for granting or for withdrawing mandates, she understands that any application of the canon, should take into account the rights of all those involved and the legal protection provided for the vindication of those rights.<sup>83</sup> It appears, therefore, that whilst the ecclesiastical authority which granted the mandate can remove it, only the authority named in the institute's own statutes which is responsible for appointing teachers can remove a teacher in accordance with due process; the ecclesiastical authority has only persuasive powers.

**Comparisons with *CIC 1917* and *CCEO*:** These provisions can be compared with *CIC 1917* and *CCEO*. Apart from seminaries, *CIC 1917* dealt with all educational institutions under the heading 'Schools'.<sup>84</sup> The Holy See governed the establishment and statutes of Catholic universities and faculties, as well as their degrees.<sup>85</sup> The law encouraged the establishment of Catholic universities in the absence of public universities 'imbued with a Catholic doctrine and spirit', and it encouraged Ordinaries to send their priests to such universities.<sup>86</sup> Preference was given in the appointment to ecclesiastical offices or benefices to those with doctorates or licentiates.<sup>87</sup> Augustine included medicine and law as faculties to which the right to educate extended.<sup>88</sup> *CCEO* defines a Catholic university as 'an institute of higher studies' which has been erected by the Holy See or by a competent ecclesiastical authority with 'previous consultation' with the Holy See.<sup>89</sup> This falls short of requiring the Holy See's approval; the patriarch of the Church *sui iuris* in which the university is established must have the consent of the Synod of Bishops.<sup>90</sup> *CCEO* outlines the aims of Catholic universities and other institutes of higher education.<sup>91</sup> It requires a Catholic university, which does not have a faculty of theology, to run courses in theology.<sup>92</sup> *CCEO* does not specify the qualifications required of university teachers generally, but teachers of subjects 'regarding faith and morals' must possess scientific and pedagogical skills and have a mandate; unlike *CIC*, *CCEO* is explicit that the competent authority can withdraw the mandate, for a grave

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<sup>82</sup> *Ibid.*, 571.

<sup>83</sup> Euart, *New Comm*, p970.

<sup>84</sup> *CIC 1917*, cc. 1372-1383. See Appendix III.

<sup>85</sup> *CIC 1917*, cc. 1376; and 1377. See Appendix III.

<sup>86</sup> *CIC 1917*, cc. 1379§2; and 1380. See Appendix III.

<sup>87</sup> *CIC 1917*, c. 1378. See Appendix III.

<sup>88</sup> *Augustine*, Vol VI, pp416 and 420. This is based on the understanding of the time that the '*studium generale*' of a university consisted of four faculties: theology, philosophy, medicine, and law.

<sup>89</sup> *CCEO*, c. 642§1. See Appendix II.

<sup>90</sup> *CCEO*, c. 642§2. See Appendix II.

<sup>91</sup> *CCEO*, c. 640. See Appendix II.

<sup>92</sup> *CCEO*, c. 643. See Appendix II.

cause, especially if the teacher lacks scientific or pedagogical suitability, experience or integrity of doctrine.<sup>93</sup> Therefore, within a patriarchal Church, the patriarch has this authority. This implies closer control by the patriarch than by the bishop under *CIC*. *CCEO* refers to the Church's teaching function as belonging 'only' to bishops, but 'shared' by clerics, and laity *with a mandate to teach*.<sup>94</sup> Theologians get special mention because of their 'expertise' and their obligation to collaborate with those 'well-versed' in other fields.<sup>95</sup>

Both the *CIC* and the commentators classify teachers at Catholic universities and institutes as people with 'expertise'. However, curiously, neither refers to them as 'experts'. It is left to each individual institution to provide for the appointment of suitable teachers (in accordance with its own statutes). It is also for the individual institution to determine the professional disciplines and qualifications needed. The relevant ecclesiastical authority is responsible for granting the mandate to enable the teaching of theological subjects but the law is unclear as to whether the onus is on the teacher to obtain the mandate. There is also a lack of clarity in *CIC* as to whether the mandate is required only for teaching in Catholic institutions. Whilst in principle the ecclesiastical authority granting the mandate may withdraw it, only the institution is competent to remove the teacher. Tighter universal or particular legislation could clarify: precisely what qualifications and expertise are required of teachers; what institutions and subjects require the teacher to have a mandate; who is responsible for granting or obtaining the mandate; and what constitutes a cause for removal of the mandate.

## 2. ECCLESIASTICAL UNIVERSITIES AND FACULTIES

*CIC* does not define 'ecclesiastical universities and faculties', but their purposes are described in *CIC* canon 815:

'By virtue of its mission to proclaim revealed truth, the Church has the right to have its own ecclesiastical universities and faculties to study the sacred sciences and subjects related to them, and to teach these disciplines to students in a scientific manner'.

Morrisey, however, defines ecclesiastical universities as 'institutes in which the sacred sciences - principally theology, sacred Scripture, liturgy, church history and canon law, and

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<sup>93</sup> *CCEO*, c. 644. See Appendix II.

<sup>94</sup> *CCEO*, c. 596. See Appendix II.

<sup>95</sup> *CCEO*, c. 606§1. See Appendix II.

ancillary subjects such as philosophy, patristics, archaeology and languages - are studied and taught scientifically'.<sup>96</sup> The Constitution on Ecclesiastical Universities and Faculties, *Sapientia Christiana* (1979), describes Ecclesiastical universities as those Catholic universities 'concerned particularly with Christian revelation and questions connected therewith and which are therefore more closely connected with her mission of evangelization'.<sup>97</sup>

*CIC* provides that ecclesiastical universities and faculties must be directed and approved by the Holy See; their statutes and program of studies must also have the Holy See's approval.<sup>98</sup> Only these institutions may award degrees which have canonical effect.<sup>99</sup> *CIC* provides that the canons applicable to Catholic universities - governing the appointment of suitable teachers and their removal, the mandates required to teach theological subjects, and the provision for pastoral care of students - are applicable also to ecclesiastical universities and faculties.<sup>100</sup> Bishops and religious superiors are obliged, insofar as the Church requires it, to send clerics and members of religious institutes who are 'outstanding in character, intelligence and virtue' to ecclesiastical universities or faculties.<sup>101</sup> The law infers here that those who attend these educational institutions belong in this category, and, moreover, implies that those who teach them must have appropriate expertise. Indeed a commentator on *CCEO* recognises the 'expertise' of *students* of the sacred sciences, which implies that students are, at least, being trained by the Church to be future experts.<sup>102</sup> Moreover, *CIC* canon 821 encourages bishops to establish other institutes for 'higher *religious* studies':

'Where it is possible, the Bishops' Conference and the diocesan Bishop are to provide for the establishment of institutes for higher religious studies, in which are taught theological and other subjects pertaining to Christian culture'.

A duty is placed, therefore, on Bishops' Conferences and diocesan bishops to provide for the establishment of these institutions, where possible, and to ensure that theology and 'other subjects pertaining to Christian culture' are taught. The canons on *Ecclesiastical* universities

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<sup>96</sup> Morrisey, *L&S*, p445, para 1601.

<sup>97</sup> *SCh*, Forward III. See Appendix VI.

<sup>98</sup> *CIC*, c. 816. See Appendix I.

<sup>99</sup> *CIC*, c. 817. See Appendix I.

<sup>100</sup> *CIC*, c. 818. See Appendix I.

<sup>101</sup> *CIC*, c. 819. See Appendix I.

<sup>102</sup> *Pospishil*, p367.

provide for the *establishment* of institutes for higher *religious* studies, but do not clarify what canons govern those institutes.

**Appointment of Teachers:** Apart from *CIC* norms governing Catholic universities, the Constitution on Ecclesiastical Universities and Faculties (1979), promulgated following consultation with ‘experts’,<sup>103</sup> requires the statutes for each ecclesiastical university or faculty to: provide for different ranks of teachers (which implies different levels of expertise);<sup>104</sup> define the authorities responsible for hiring, naming and promoting them;<sup>105</sup> and set out procedures for their suspension or dismissal,<sup>106</sup> especially in matters concerning doctrine.<sup>107</sup> Disputes are to be resolved internally, but failing this ‘experts’ are to be consulted.<sup>108</sup> Whilst, neither the experts nor their functions are defined, consultation with experts from outside the institution is implied.

**Disciplines and Qualifications of Teachers:** *CIC* provides that Ecclesiastical universities and faculties are bound by norms on the qualities required of teachers at Catholic universities.<sup>109</sup> Moreover, *CIC* requires close cooperation with other universities, even non-ecclesiastical ones, so that through scientific research a greater knowledge is acquired.<sup>110</sup> This is another example of consultation with outside bodies. The Declaration on Christian Education (1965) spoke of the role of the ecclesiastical universities and faculties in preparing students not only for the priesthood, but for teaching higher education (which is an example of the Church training future experts) and also for the ‘more rigorous intellectual apostolate’.<sup>111</sup> The objectives of ecclesiastical universities and faculties were to: ‘make more penetrating inquiry into the various aspects of the sacred sciences’; deepen the ‘understanding of sacred Revelation’; hand down and clarify the legacy of Christian wisdom; create and continue dialogue with non-Catholics and non-Christians; and ‘answer questions arising from the development of doctrine’, all of which imply a degree of expertise in various fields.<sup>112</sup>

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<sup>103</sup> *SCh*, Forward VI. ‘Experts’ are not described, but legal experts are implied. See Appendix VI.

<sup>104</sup> *SCh*, Article 23. See Appendix VI.

<sup>105</sup> *SCh*, Article 24. See Appendix VI.

<sup>106</sup> See Appendix VI: *SCh*, Article 30.

<sup>107</sup> Norms for the correct implementation of *SCh*, Article 22, N1. See Appendix VI.

<sup>108</sup> *Ibid.*, Article 22, N2, N3.

<sup>109</sup> *CIC*, c. 818. See Appendix I.

<sup>110</sup> *CIC*, c. 820. See Appendix I. Non-Catholic universities are not mentioned; they are not explicitly excluded.

<sup>111</sup> *GE*, 11. See Appendix VI.

<sup>112</sup> *Ibid.*

The Constitution *Sapientia Christiana* (1979), although abrogating previous law,<sup>113</sup> reiterated the objectives of the Declaration on Christian Education (1965), by describing the role of ecclesiastical universities and faculties in similar vein.<sup>114</sup> The Constitution refers to Ecclesiastical faculties of ‘other sciences’, which, although lacking ‘the special link with Christian revelation’, are still of assistance to the Church in its mission, have a ‘particular relationship with the Church's Hierarchy’, and are ‘destined for the education of both ecclesiastical and lay students’.<sup>115</sup> The Constitution (1979) acknowledges teachers’ ‘weighty responsibility’ to meet the needs of students.<sup>116</sup> It requires all teachers to ‘be marked by an upright life, integrity of doctrine and devotion to duty’.<sup>117</sup> However, those who teach ‘matters touching on faith and morals’ must do so in full communion with the Roman Pontiff and the *Magisterium* and those who teach ‘disciplines concerning faith or morals’, must make a profession of faith and possess a canonical *mission* from the Chancellor or his delegate.<sup>118</sup> This implies the requirement for teachers of these particular subjects to be a Catholic in full communion with the Church.<sup>119</sup> ‘Other teachers’ require ‘permission’.<sup>120</sup> However, all ‘permanent’ teachers or those promoted to the ‘highest ranks’, must receive a *nihil obstat* from the Holy See.<sup>121</sup> The Constitution (1979) also provides that *permanent* teachers are required: to be distinguished by their wealth of knowledge, witness of life and sense of responsibility; to have a ‘suitable’ doctorate, or equivalent ‘title’ or ‘exceptional and singular scientific accomplishment’; to demonstrate proof of suitability for scientific research, especially by published material; and to demonstrate teaching ability. These provisions are to be applied ‘in proportionate measure’ to non-permanent teachers.<sup>122</sup> On-going training is implied, but these requirements did not find their way into *CIC*.<sup>123</sup> The Constitution’s ‘special norms’, detailing the subjects, aims, objectives, and method of teaching for each

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<sup>113</sup> *SCh*, Forward VI. See Appendix VI.

<sup>114</sup> *SCh*, Forward III. See Appendix VI.

<sup>115</sup> *SCh*, Forward III. See Appendix VI.

<sup>116</sup> *SCh*, Forward IV. See Appendix VI.

<sup>117</sup> *SCh*, Article 26, N1. See Appendix VI.

<sup>118</sup> *SCh*, Article 26, N2. See Appendix VI. See ft 73 above for the distinction between a mandate and a mission.

<sup>119</sup> Strictly, the wording requires those who teach matters ‘touching’ on faith and morals to *do so* (that is the *teaching* is to be done) in full communion with the *Magisterium*, whereas the profession of faith required from those who teach disciplines ‘concerning’ faith or morals would be required *to be* (that is, the *teacher* must be) in full communion.

<sup>120</sup> *SCh*, Article 27, N1. See Appendix VI.

<sup>121</sup> See Norms for the correct implementation of *SCh*, Article 16 for a definition of ‘permanent’ teachers; Article 19, N1 for the requirement that the Statutes establish when a permanent status is conferred and Article 19, N2 for a description of the *nihil obstat*. See also *SCh*, Articles 20; 27, N2; and 28. See Appendix VI.

<sup>122</sup> *SCh*, Article 25, N1 and N2. See Appendix VI.

<sup>123</sup> *SCh*, Forward V. See Appendix VI.



discipline, emphasise the ‘particular nature and importance’ of, for example, theology, canon law and philosophy.<sup>124</sup> Provision is made for many and various subjects, indicating the range of expertise required.<sup>125</sup> These requirements, even more rigorous than those for Catholic universities, emphasise the Church’s vigilance over the standard of teaching required in Ecclesiastical universities and faculties and implies expertise on the part of teachers.

Moreover, the Constitution (1979) requires assistance from ‘experts’ in the future establishment and planning of universities and faculties. The experts involved are not defined, but there is a suggestion that bishops, academics, canonists and other university personnel are included.<sup>126</sup>

Although *CIC* provides that the same qualities are required of teachers in Ecclesiastical universities as are of teachers in Catholic universities, there is no explicit requirement that the more stringent norms for teachers in *seminaries* apply, even though candidates for the priesthood study at ecclesiastical universities and faculties.<sup>127</sup> Whilst outside the seminary, candidates require special care, but within seminaries, specific expertise is required in training candidates for ordination.<sup>128</sup> Seminarians must be educated in: sacred sciences; languages; philosophy; theology; scripture; canon law; liturgy; and ecclesiastical history.<sup>129</sup> In addition, the Constitution on the Sacred Liturgy (1963) provides that candidates be educated in sacred art, implying that they can become experts in this subject for the purpose of protecting the Church’s patrimony.<sup>130</sup> Seminarians must receive pastoral formation, have pastoral practice, and be prepared for all that ministry entails.<sup>131</sup> Therefore, teachers in seminaries must not only be adequately trained, but must have obtained canonical doctorates or licentiates; there is no provision for an ‘equivalent’ title.<sup>132</sup> That different teachers are

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<sup>124</sup> *SCh*, Article 65. See Appendix VI.

<sup>125</sup> Provision is made under Article 85 of the special norms for subjects such as: Christian archaeology; Biblical studies and ancient Eastern studies; Church history; Christian and classical literature; Liturgy; Missiology; Sacred Music; Psychology; Educational science or Pedagogy; Religious science; Social sciences; Arabic studies and Islamology; Mediaeval studies; Oriental Ecclesiastical studies; “*Utriusque Iuris*” (both canon law and civil law). See also Article 86, which entrusts responsibility to the Sacred Congregation for Catholic Education for special norms relating to these subjects.

<sup>126</sup> *SCh*, Articles 60; and 61. See Appendix VI.

<sup>127</sup> *CIC*, c. 253§1. See Appendix I.

<sup>128</sup> *CIC*, c. 235. See c. 236 for similar provisions for candidates for the permanent diaconate. See Appendix I.

<sup>129</sup> *CIC*, cc. 248; 249; 250; 252§§2, 3; and 257§2. See Appendix I.

<sup>130</sup> *SC*, 129. This was reiterated later in *PCCCAHPC*, 27. See Appendix VI.

<sup>131</sup> *CIC*, cc. 245, 246§2, 247§1; 255; 256; and 258. See Appendix I.

<sup>132</sup> *CIC*, cc. 239§1; and 253§§1 and 2. See Appendix I.

required for different subjects implies that the expertise required is of such a standard that they are not expected to reach this doctorate standard in more than one subject. Moreover, the whole program of teaching is to be coordinated.<sup>133</sup>

As one of the guiding principles for the revision of *CIC* 1917 was that of subsidiarity, it might not, on the one hand, be surprising that the universal law says little about specific requirements for university teachers, leaving individual institutions to produce their own Statutes, albeit in accord with the Apostolic Constitutions and other legislation.<sup>134</sup> On the other hand, lack of specific provisions leads to lack of clarity. Apart from the controversy which we have seen above, as to which subjects require the teachers to hold a mandate, there is also ambiguity as to precisely what institutes are covered by the universal law on Ecclesiastical Universities and Faculties and what constitutes an ‘equivalent title’ to a canonical doctorate required for permanent teachers under the Constitution (1979).

**Institutes of Higher Religious Studies:** Commentators differ as to which canons govern these institutes. As we have seen, according to Morrissey, the sacred sciences taught in Ecclesiastical universities are principally theology, sacred Scripture, liturgy, church history and canon law, and the ancillary subjects are philosophy, patristics, archaeology and languages.<sup>135</sup> Morrissey considers that because the institutes for higher *religious* studies, envisaged by canon 821 are not universities (despite the subjects taught) they are not bound strictly by, but ‘could well be guided by’ the principles contained in the canons on Ecclesiastical universities and faculties.<sup>136</sup> Coriden, on the other hand, acknowledges that canon 821 was moved from the chapter on Catholic universities to that on Ecclesiastical universities and faculties, precisely because the Commission revising the Code considered that these institutes ‘ought to depend entirely on ecclesiastical authority, otherwise they inevitably produce serious disagreements’.<sup>137</sup> He implies here that the provisions on Ecclesiastical universities apply to these institutes. McManus, although acknowledging this reasoning, disagrees: he holds that as these institutes of higher religious studies do not have

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<sup>133</sup> *CIC*, c. 254. See Appendix I.

<sup>134</sup> For the principles guiding the revision of *CIC* 1917, see James A Coriden, *An Introduction to Canon Law* (New York, 1991), p36,

<sup>135</sup> Morrissey, *L&S*, p445, para 1601.

<sup>136</sup> Morrissey, *L&S*, p446, para 1607. Morrissey considers these institutions include ‘institutes of religious studies, pastoral, missionary, catechetical institutes, and the like’.

<sup>137</sup> Coriden, *Text&Comm*, p578.

ecclesiastical status, they are not governed by the Constitution on Ecclesiastical Universities (1979) or by *CIC* canons 815-820 on Ecclesiastical Universities and Faculties, but by *CIC* canons 807-814 on *Catholic* Universities and Other Institutes of Higher Studies.<sup>138</sup>

However, canon 821 refers to institutes for higher *religious* studies *and* is placed in the chapter on *Ecclesiastical* Universities and Faculties, whereas *CIC* canon 814 refers simply to ‘institutes of higher *studies*’ *and* is placed in the chapter on *Catholic* Universities and Other Institutes of Higher Studies.<sup>139</sup> Therefore, albeit that canon 821 was moved from the chapter on Catholic universities to that of Ecclesiastical universities, it must have been so for a purpose; one might, therefore, expect the more stringent provisions of the Constitution and canons on Ecclesiastical Universities and Faculties (relating to the disciplines, qualifications, and mandates) to apply to these institutes of higher *religious* studies.

**Doctorates and Equivalent Titles:** Again, commentators differ on this issue. Coriden considers that although only Ecclesiastical universities and faculties can award degrees with canonical effect, ‘it has been a frequent practice to accept equivalent degrees in teaching positions and equivalent expertise in other church offices’.<sup>140</sup> However, McManus implies that non-canonical and equivalent degrees are acceptable as qualifications only ‘in cases where an equivalent expertise is mentioned in a canon’ or when ‘the requirement of a canonical degree may be readily satisfied, for example, by suitable experience’.<sup>141</sup> The Constitution (1979) explains that the required ‘suitable’ doctorate is one corresponding to the subject taught, but merely states that in the absence of a *canonical* doctorate at least a *canonical* licentiate is required.<sup>142</sup> Lack of clarity, therefore, remains.

The lack of clarity in the canons leads commentators to disagree on further issues. Canon 819 *obliges* the competent Superior to send outstanding young people to ecclesiastical universities and faculties when the good of the Church requires this.<sup>143</sup> McManus, in line with this text, considers that Superiors have a ‘duty’ to send ‘qualified’ students to these

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<sup>138</sup> Frederick R McManus, *New Comm*, p976.

<sup>139</sup> *CIC*, c. 814. See Appendix I.

<sup>140</sup> Coriden, *Text&Comm*, p577, citing the *Ordinationes*, AAS 71 (1979), p500, n17], which implements *SCh*.

<sup>141</sup> McManus, *New Comm*, p974, citing the Norms for the Correct Implementation of *SCh*, Article 17. See Appendix V.

<sup>142</sup> Norms for the Correct Implementation of *SCh*, Article 17. See Appendix VI.

<sup>143</sup> *CIC*, c. 819. See Appendix I.

institutions; that is, those students who fulfil the requirements.<sup>144</sup> Coriden, however, considers that the canon ‘warmly encourages’ Superiors to do so, citing the decree of Priestly Training (1965), and the Decree on Christian Education (1965) in support.<sup>145</sup> He says these documents ‘simply encourage higher studies in the sacred sciences and other areas’, and the canon ‘directs attention to the ecclesiastical universities and faculties as places to pursue them’.<sup>146</sup> However, he makes no reference to the fact that *CIC* post-dates these documents. Moreover, it would be difficult to establish that the Church did not require such people to be educated although the canon is ambiguous as to whether or not the Church’s need must be established positively.

The provisions for Ecclesiastical universities and faculties can be compared with those of *CIC* 1917 and *CCEO*. *CIC* 1917 dealt only with Catholic universities and faculties (under the title ‘schools), not Ecclesiastical universities and faculties. However, like under *CIC*: the Church claimed the right to found schools of any kind; the canonical Constitutions of Catholic Universities were reserved to the Holy See and their statutes required the Holy See’s approval; and the granting of canonical degrees required a faculty from the Holy See.<sup>147</sup> Unlike *CIC*, however, *CIC* 1917 made provision for those with a canonical doctorate to wear a ring and biretta.<sup>148</sup> *CCEO* defines ‘ecclesiastical’ universities and faculties as those canonically erected or approved by the competent ecclesiastical authority, which teach the sacred sciences and related subjects and have the right to confer academic degrees which have canonical effect.<sup>149</sup> *CCEO* further defines their purpose, but makes no specific provision for the appointment or suitability of teachers.<sup>150</sup> Statutes must conform to the norms of the Apostolic See, including those governing the appointment and dismissal of teachers.<sup>151</sup> *CCEO* has no specific requirement for teachers to take a profession of faith or an oath of fidelity, nor for the applicability of norms for Catholic universities to Ecclesiastical universities and faculties.

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<sup>144</sup> McManus, *New Comm*, p976.

<sup>145</sup> Coriden, *Text&Comm*, p578. *OT*, 18 and *GE*, 10. See Appendix VI.

<sup>146</sup> Coriden, *Text&Comm*, p578.

<sup>147</sup> *CIC* 1917, cc. 1375- 1377. See Appendix III.

<sup>148</sup> *CIC* 1917, c. 1378. See Appendix III.

<sup>149</sup> *CCEO*, c. 648. See also *CCEO*, c. 649 for a definition of the competent ecclesiastical authority. See Appendix II.

<sup>150</sup> *CCEO*, c. 647. See Appendix II.

<sup>151</sup> *CCEO*, c. 650. See Appendix II.

Although the statutes of individual Ecclesiastical universities and faculties are required to make provision for: different ranks of teachers; defining the competent authority for appointing and removing teachers; and the processes involved, the Bishops' Conference could do much to remove or reduce the ambiguities in universal law. For example, new legislation could clarify: which experts are to be consulted both if difficulties arise but cannot be resolved within these institutions and when planning the future establishment of universities and faculties and their specific role; the disciplines, and sub-disciplines, from which these experts, and indeed teachers, are to be drawn and the qualification required of them; what subjects and institutions require teachers to have a mandate; who is responsible for granting or obtaining the mandate; what conditions warrant removal of the mandate; what constitutes a 'suitable' doctorate and 'equivalent title'; and (given disagreement between canonists) that the Superior is obliged to send outstanding young people to ecclesiastical universities or faculties.

### 3. CATHOLIC SCHOOLS: THE EXPERTISE OF TEACHERS

*CIC* defines a 'Catholic' school as one under the control of, or acknowledged as such in a written document by, the competent ecclesiastical authority.<sup>152</sup> The use of the title 'Catholic' is reserved to those schools which have the consent of this authority.<sup>153</sup> The diocesan bishop is responsible for establishing schools if those with a Christian ethos, including those catering for special needs, do not already exist.<sup>154</sup> All instruction and education in Catholic schools must be based on the principles of Catholic doctrine.<sup>155</sup> Formation and instruction in the Catholic religion, wherever given, including through media of social communication, are subject to Church authority; the Bishops' Conference is responsible for regulating Catholic formation and education, and the diocesan bishop for overseeing the implementation of this regulation.<sup>156</sup> Also, the diocesan bishop has a right to oversee and inspect Catholic schools in his diocese and a right to issue directives concerning their general administration.<sup>157</sup> The documents *The Catholic School* (1977) and *The Catholic School on the Threshold of the Third Millennium* (1997), described the Catholic school as a means of 'constructive dialogue

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<sup>152</sup> *CIC*, c. 803§1. See Appendix I.

<sup>153</sup> *CIC*, c. 803§3. See Appendix I.

<sup>154</sup> *CIC*, c. 802§§1 and 2. See Appendix I.

<sup>155</sup> *CIC*, c. 803§2. See Appendix I.

<sup>156</sup> *CIC*, c. 804§1. See Appendix I.

<sup>157</sup> *CIC*, c. 806§1. Schools established by religious institutes are included. See Appendix I.

with the world’ and of training children to take an active part in the community.<sup>158</sup> The latter document stated that this purpose requires ‘outstanding educators’.<sup>159</sup> Whilst the document does not explicitly use the word ‘experts’ or ‘expertise’ (unlike the norms on university teachers), to be ‘outstanding educators’ clearly requires more than competence.

**Appointment of Teachers:** The local Ordinary has the right to appoint or approve teachers of religion and has the right to remove them or demand that they be removed; this authority is limited to ‘religious or moral’ considerations.<sup>160</sup> Therefore, professional incompetence is excluded as such a cause, but an immoral lifestyle is not. This emphasises the need to include specific canonical requirements in contracts of employment, which must accord with civil law.<sup>161</sup> Morrisey holds that in order to reflect the ‘character of a catholic school’ the lifestyle of a teacher of religion must be ‘not out of harmony with Christian living’. However, in dismissing teachers, Morrisey warns of the need to follow principles of natural justice, including the protection of the right of defence.<sup>162</sup> Coriden considers that the right of the local Ordinary to appoint and remove *teachers of religion* extends to all schools in his territory, but it does not extend to ‘teachers of other faiths or of comparative religions’.<sup>163</sup> This not only implies the possibility of appointing teachers from outside the Church, but that these non-Catholic teachers are not subject to the provisions of canon 803§2, which requires all teachers in Catholic schools to be ‘outstanding in true doctrine and uprightness of life’. For Coriden, dismissal on the ground of ‘religion or morals’ must be related ‘to the function of teaching the Catholic religion’.<sup>164</sup> The bishop’s right of visitation extends only to primary and secondary schools and not to universities and institutes of higher education within his diocese.<sup>165</sup> Moreover, his responsibility of vigilance is restricted to the ‘quality of education’; ‘the scope of visitation does not extend to all of the matters mentioned in *Christus*

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<sup>158</sup> *TCS*, 10; 13; 15 and *TCSTTM*, 17. See Appendix VI.

<sup>159</sup> *TCSTTM*, 18. See Appendix VI.

<sup>160</sup> *CIC*, c. 805. See Appendix I.

<sup>161</sup> *CIC*, c. 1290. See Appendix I.

<sup>162</sup> Morrisey, *L&S*, p441, para 1587.

<sup>163</sup> Coriden, *Text&Comm*, p569. This includes Catholic schools and others, whether public or private. He bases this opinion on the provisions of *CIC* 1917, which referred to ‘schools of whatever kind’, but he acknowledges the difficulties in practice unless the power was delegated to the school administrators.

<sup>164</sup> *Ibid.* However, this ignores the requirement to live exemplary lives and differs from Morrisey’s opinion that a teacher’s lifestyle should not be ‘out of harmony with Christian living’ and ‘in some places civil courts have upheld the dismissal of a teacher living in an irregular marital union’. See Morrisey in *L&S* p441, para 1587.

<sup>165</sup> *Ibid.*, p570.

*Dominus* (1965), because some of them are unrelated to the educational task'.<sup>166</sup> Euart agrees that the bishop's right of visitation does not extend to higher educational institutions.<sup>167</sup>

**Disciplines and Qualifications of Teachers:** *CIC* requires teachers in Catholic schools to be 'outstanding in true doctrine' (implying expertise) and lead exemplary lives.<sup>168</sup> Teachers of religion, even those in non-Catholic schools, must, in addition to possessing these qualities, be 'outstanding' in their teaching ability (again implying expertise).<sup>169</sup> The academic standard of teaching in Catholic schools and junior seminaries is to be at least comparable with other schools in the locality.<sup>170</sup> Furthermore, the necessity for the assistance of professionals in the education of children is recognised.<sup>171</sup> These requirements reflect those of the Declaration on Christian Education (1965), for: holistic education; teachers to work with parents; teachers to have 'suitable qualifications' in both secular and religious subjects; and teachers to have 'pedagogical skill'.<sup>172</sup> *The Catholic School* (1977), addressing problems facing Catholic schools, acknowledges the part the laity plays in cooperating in the apostolate of the bishops, but also implies expertise on the part of teachers as 'individual subjects must be taught according to their own particular methods'.<sup>173</sup> Teachers do 'more than convey the sense' of the subject taught; they guide pupils 'to the heart of total Truth' and 'eternal realities', thus emphasising the personal qualities required of teachers.<sup>174</sup> Teachers are required to be aware of 'developments in the fields of child psychology, pedagogy and particularly catechetics, and should keep abreast of directives from competent ecclesiastical authorities'; Catholic schools require 'the best possible qualified teachers of religion'.<sup>175</sup>

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<sup>166</sup> Coriden, *Text&Comm*, p570. A Decree Concerning the Pastoral Office of Bishops in the Church, *Christus Dominus* (1965), at 35§4, states that religious are subject to the diocesan bishop 'in those things which pertain to ... public worship, ... the care of souls, ... preaching (to the people), ... religious and moral education ... catechetical instructions and liturgical formation ...' etc. However, schools run by religious are subject to the local Ordinaries 'for purposes of general policy-making' and 'vigilance', but the autonomy of the religious in directing the schools remains intact. See Appendix VI.

<sup>167</sup> Euart, *New Comm*, p960.

<sup>168</sup> *CIC*, c. 803§2. See Appendix I.

<sup>169</sup> *CIC*, c. 804§2. See Appendix I.

<sup>170</sup> *CIC*, cc. 234§2; and 806§2. See Appendix I.

<sup>171</sup> *CIC*, c. 796. See Appendix I.

<sup>172</sup> *GE*, 5; and 8. See also *TCS*, 4; 8; 16; 19; 29; 35; and 45. See Appendix VI.

<sup>173</sup> *TCS*, 39; and 71. See Appendix VI.

<sup>174</sup> *TCS*, 41; and 42. See Appendix VI.

<sup>175</sup> *TCS*, 52. See Appendix VI.

Their need for ‘continuing formation’ and support through national and international organisations is also recognised.<sup>176</sup> *Lay Catholics in Schools* (1982) clarifies that teachers of doctrine require ‘religious knowledge guaranteed by appropriate certification’. It ‘highly recommends ...that all Catholics who work in schools, and most especially those who are educators, obtain the necessary qualifications by pursuing programs of religious formation in Ecclesiastical Faculties or in Institutes of Religious Science ... wherever this is possible’.<sup>177</sup> Degrees and pedagogical preparation provided in these institutes are considered ‘basic training’. Bishops are charged with: promoting, and providing for, training for teachers of religion and catechists; and for engaging in dialogue with them during their training.<sup>178</sup> This document describes a teacher as ‘not simply a professional who systematically transmits a body of knowledge’, but ‘an educator, one who helps to form human persons’, whose task goes ‘well beyond the transmission of knowledge’. Moreover, ‘adequate,’ but ‘indispensable’, ‘professional preparation’ is required ‘not only for imparting knowledge’, but also to fulfil ‘the role of a genuine teacher’.<sup>179</sup> Whilst acknowledging the vocational aspect of teaching, ‘professionalism’ is ‘one of the most important characteristics in the identity of every lay Catholic’; lay educators are required to have a ‘solid professional formation’, including ‘competency in a wide range of cultural, psychological, and pedagogical areas’.<sup>180</sup> *The Catholic School on the Threshold of the Third Millennium* (1997) provides that whilst Catholic schools are ‘for all’, ‘special attention’ is to be given to the weakest.<sup>181</sup> *Ethics in Internet* (2002) charges schools with teaching children not just the technology involved, but also about the responsible use of the Internet.<sup>182</sup> Although the language in the document is of ‘competency’, much of the foregoing implies expertise in a wide range of subjects, but specific qualifications are not mentioned.

Canonists agree that ‘expertise’ is required for teachers in Catholic schools. Morrisey uses the terms ‘expert’ and ‘expertise’ when referring to those who assist parents to fulfil their duty to educate children.<sup>183</sup> The ‘general administration’ of schools for which the bishop has the right to issue directives, includes, for Morrisey, approving catechetical texts and

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<sup>176</sup> *TCS*, 78; and 79. See Appendix VI.

<sup>177</sup> *LCS*, 55. See Appendix VI.

<sup>178</sup> *LCS*, 66. See Appendix VI.

<sup>179</sup> *LCS*, 16. See Appendix VI.

<sup>180</sup> *LCS*, 27. See Appendix VI.

<sup>181</sup> *TCSSTM*, 15. See Appendix VI.

<sup>182</sup> *EI*, 15. See Appendix VI.

<sup>183</sup> Morrisey, *L&S*, p438, para 1573.



examinations, and assuring compliance with civil law on health, safety, insurance and suchlike.<sup>184</sup> That Catholic schools must at least match the standard of other local schools demonstrates the importance placed on all aspects of education.<sup>185</sup> In acknowledging that schools must reflect the needs of the community, including ‘professional and technical schools, ... adult education, ... social service education, ... schools for the handicapped, ... [schools] for preparing religious educators’,<sup>186</sup> Coriden demonstrates the width of expertise required in all these areas.

These provisions can be compared with those under *CIC* 1917 and *CCEO*. Religious instruction, suitable to the age of the child, was compulsory in schools under *CIC* 1917; ‘youths’ were to be taught by ‘priests outstanding for their doctrine and zeal’.<sup>187</sup> Parents were obliged to send their children to Catholic schools if possible; local Ordinaries decided, in accord with instructions from the Holy See, which schools were suitable, thus limiting circumstances in which attendance at non-Catholic schools was permitted.<sup>188</sup> In the absence of Catholic schools local Ordinaries were obliged to establish them.<sup>189</sup> The law implied that Ordinaries had expertise in Catholic education as it entrusted them with oversight of schools within their territory, teachers of religion, and the materials used.<sup>190</sup>

*CCEO* also restricts the use of the title ‘Catholic’ to those schools which are either established by the eparchial bishop or higher ecclesiastical authority or have been recognised as such by them.<sup>191</sup> It emphasises the obligation on the community towards schools, and the bishop’s role in establishing and overseeing them, as well as providing for the religious education of Catholic students where it is lacking.<sup>192</sup> A holistic approach to education is also

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<sup>184</sup> Morrisey, *L&S*, p441, para 1588.

<sup>185</sup> *Ibid.*, para 1589.

<sup>186</sup> Coriden, *Text&Comm*, p567.

<sup>187</sup> *CIC* 1917, c. 1373§§1 and 2. See Appendix III.

<sup>188</sup> *CIC* 1917, c. 1374. See Appendix III. *Augustine*, Vol VI, p415, citing Instruction from the Holy Office, 24 November 1875 to the bishops of the US, at n1449, justified sending children to non-Catholic schools if there was no Catholic school, or if the Catholic school ‘cannot be considered suitable’. Negligent parents or those who permitted their children to attend public schools, in which ‘the ruin of their souls is inevitable’ or to attend ‘without sufficient cause’, and ‘without taking the necessary precautions’, when there was a suitable Catholic school and when they had the means to send their children to it, ‘cannot be absolved, as is evident from the moral teaching of the Church’.

<sup>189</sup> *CIC* 1917, c. 1379§1. See Appendix III.

<sup>190</sup> *CIC* 1917, cc. 1381; and 1382. See Appendix III.

<sup>191</sup> *CCEO*, c. 632. See Appendix II.

<sup>192</sup> *CCEO*, cc. 631§1; 635; 636§1; and 637. See Appendix II.

envisaged.<sup>193</sup> The eparchial bishop is afforded similar authority as in *CIC* with regard to visitation; it is the eparchial bishop's responsibility to appoint, approve and dismiss teachers of religion.<sup>194</sup> *CCEO* explicitly extends his competence to forbidding attendance at a particular school for a 'grave cause'.<sup>195</sup> Teachers, at least those in Catholic schools, are also required to be 'outstanding in doctrine' and live exemplary lives.<sup>196</sup>

The Church, therefore, requires teaching of the highest standards in its schools. Catholic schools must cater for a wide range of ages and abilities and provide holistic education in a variety of subjects. Consequently, it follows that the teachers employed in these institutions must be well trained and qualified to meet these needs. However, it appears that if schools are not entirely privately owned and run as Catholic Schools (for example, if the State provides financial assistance), the authority of the Church is limited to overseeing the teaching of religion. The Church's authority to approve, appoint and dismiss teachers must accord with civil law. The canon law on Catholic schools does not explicitly use the term 'expert' or 'expertise' to describe teachers or the standard required of them. However, the norms studied here require teachers to be 'outstanding educators' and the commentators speak of professionals assisting parents in education as 'experts' and as having 'expertise'. A point of difference between Catholic teachers as experts, and the use of experts in property and finance, and admission to orders and religious life, is that here the Church itself assumes a responsibility to ensure expertise through the training of teachers for Catholic schools.

#### **4. CATECHESIS, MISSION, PREACHING AND SOCIAL COMMUNICATION**

*CIC* does not refer to those involved in catechesis, missionary activity, preaching or social communication as 'experts'. However, as we shall see, both from *CIC* and other documents, the Church considers their role as of even greater importance than that of teachers (who as we have seen are classified canonically as 'experts'), and their training as rigorous.

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<sup>193</sup> *CCEO*, c. 634§3. See Appendix II.

<sup>194</sup> *CCEO*, cc. 638§1; and 636§2. See Appendix II:

<sup>195</sup> *CCEO*, c. 633. See Appendix II.

<sup>196</sup> *CCEO*, c. 639. See Appendix II.

## Catechesis

**Ministry of Catechists:** Catechists are defined as ‘lay members of Christ’s faithful’ who have received ‘proper formation’ and live exemplary ‘Christian’ lives.<sup>197</sup> *CIC* recognises diocesan bishops’ authority to issue norms governing catechesis and to provide a catechism.<sup>198</sup> It also recognises Bishops’ Conferences’ authority to prepare catechisms, and to set up catechetical offices.<sup>199</sup> Religious superiors and superiors of societies of apostolic life are charged with providing catechesis in their churches, schools and elsewhere.<sup>200</sup> Parish priests, too, are entrusted with teaching the faithful, adults and children, including those with special needs, albeit with the help of others.<sup>201</sup> Responsibility for catechesis extends, although under the Church’s direction, to all the faithful, but particularly to parents and guardians of children, who teach by ‘word and example’.<sup>202</sup> Local Ordinaries must ensure that catechists are trained and must oversee their work and ongoing formation.<sup>203</sup>

**Training and Qualification of Catechists:** Whilst *CIC* does not deal directly with these issues, what is required of catechists can be gleaned from the canons generally and other Vatican documents. *CIC* requires catechists to be familiar with the methods best suited to the capacity and needs of individuals; therefore, this requires considerable specialist subject knowledge and pedagogical skills, particularly in relation to those with special needs.<sup>204</sup> Legislative instruments, apostolic exhortations, encyclicals, letters and other documents addressed to various bodies such as Bishops’ Conferences, give insight into the legislator’s mind on the training of catechists. The development of these matters is as follows.

The Declaration on Christian Education, *Gravissimum Educationis* (1965), claims that ‘catechetical instruction’ is the Church’s own and, ‘foremost’, method of teaching.<sup>205</sup>

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<sup>197</sup> *CIC*, c. 785§1. See Appendix I.

<sup>198</sup> *CIC*, c. 775§1. See Appendix I.

<sup>199</sup> *CIC*, c. 775§§2 and 3. See Appendix I.

<sup>200</sup> *CIC*, c. 778. See Appendix I.

<sup>201</sup> *CIC*, cc. 773; 776; and 777. See Appendix I.

<sup>202</sup> *CIC*, c. 774§§1 and 2. See Appendix I.

<sup>203</sup> *CIC*, c. 780. See Appendix I.

<sup>204</sup> *CIC*, c. 779. See Appendix I.

<sup>205</sup> *GE*, 4. See Appendix VI.

*Christus Dominus* (1965), calls for the instruction of catechists ‘so that they will be thoroughly acquainted with the doctrine of the Church and will have both a theoretical and a practical knowledge of the laws of psychology and of pedagogical methods’.<sup>206</sup> It requires bishops to ensure that individuals’ educational capacity be respected.<sup>207</sup> Another Decree, on the apostolate of the laity, *Apostolicam Actuositatem* (1965), acknowledges that responsibility for catechesis is shared by families and priests but emphasises the importance of catechists, without whom ‘the apostolate of the pastors is often unable to achieve its full effectiveness’.<sup>208</sup> A Decree on the Missionary Activity of the Church, *Ad Gentes*, (1965), speaks of the need, due to the shortage of priests, for the ‘ministry’ and ‘office’ of catechists.<sup>209</sup> Catechists’ training ‘must be so accomplished and so adapted to advances on the cultural level that as reliable co-workers of the priestly order, they may perform their task well’.<sup>210</sup> This Decree calls for the establishment of schools for training catechists in doctrine, Scripture, and liturgy, as well as catechetical method and pastoral practice. Within these schools, in which catechists themselves could develop their own Christian character, courses are to be run for on-going training; full-time catechists are to receive a just wage, a decent standard of living and social security.<sup>211</sup> This Decree encourages the Sacred Congregation for the Propagation of the Faith to ‘provide special funds for the due training and support of catechists’; the hope is that those properly trained would receive a ‘canonical mission’ during a liturgical celebration, ‘so that in the eyes of the people they may serve the Faith with greater authority’.<sup>212</sup>

An Apostolic letter, *Ecclesiae Sanctae* (1966),<sup>213</sup> implementing, *inter alia*, two of the foregoing Decrees of Vatican II,<sup>214</sup> urges bishops and Bishops’ Conferences to appoint priest moderators of studies to facilitate on-going ‘scientific and pastoral training’ of priests, including training in catechetics.<sup>215</sup> Catechetical instruction is to be given in all churches and oratories belonging to religious and which are open to the public.<sup>216</sup> This letter encourages

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<sup>206</sup> *CD*, 14. See Appendix VI.

<sup>207</sup> *Ibid.*

<sup>208</sup> *AA*, 10; and 30. See Appendix VI.

<sup>209</sup> *AG*, 15. See Appendix VI.

<sup>210</sup> *AG*, 17. See Appendix VI.

<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid.*

<sup>213</sup> This letter was issued *motu proprio* indicating a juridical text.

<sup>214</sup> *CD* and *AG*.

<sup>215</sup> *ES*, Fostering Pastoral Study and Science: 7. See Appendix VI.

<sup>216</sup> *ES*, Religious: 37. See Appendix VI.

the Congregation for the Propagation of the Faith to promote close cooperation among the higher institutes of pastoral studies to perfect methods of catechesis.<sup>217</sup> The General Catechetical Directory (1971), states that the Decree *Provida Sane* (1935) ‘established’ the *Diocesan* Catechetical Office for the supervision of catechetics in the diocese.<sup>218</sup> The Directory provided that the diocesan catechetical office, ‘should have a staff of persons who have special competence’, including ‘a number of truly skilled people’.<sup>219</sup> It foresaw: an ‘Episcopal Commission for Catechesis’, comprised, *inter alia*, of *ex officio* members and ‘experts’; and the establishment of various levels of schools, including those of university standard, for the initial, and ongoing training of catechists.<sup>220</sup>

The Apostolic Exhortation *Evangelii Nuntiandi* (1975) emphasises the need for good instructors and refers to catechesis as a ‘superior art’, which is ‘indispensable’.<sup>221</sup> *The Catholic School* (1977) reiterates these sentiments. A later Apostolic Exhortation *Catechesi Tradendae* (1979) emphasises the pastor’s ‘primary responsibility’ and ‘leading role in catechesis’, albeit that this is shared by parents, teachers, catechists and others.<sup>222</sup> This Exhortation describes catechesis as: the ‘education of children, young people and adults in the faith’; ‘especially the teaching of Christian doctrine imparted, generally speaking, in an organic and systematic way, with a view to initiating the hearers into the fullness of Christian life’; and ‘it is a sacred duty and an inalienable right’.<sup>223</sup> The Exhortation also recognises the ‘right’ of the faithful to receive ‘the word of faith’ in its entirety.<sup>224</sup> It acknowledges the importance of: the personal attributes of catechists; the art of pedagogy; the use of suitable methods of teaching; the incorporation of an ecumenical dimension, requiring respect for other ecclesial communities; and specialist centres for training.<sup>225</sup>

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<sup>217</sup> *ES* III, Norms for the implementation of the Decree, *Ad Gentes*: 18. See Appendix VI.

<sup>218</sup> Emphasis added. *CIC* speaks only of the Bishops’ Conference’s *authority* to establish a catechetical office to assist individual diocese. See Appendix I: *CIC*, c. 775§3.

<sup>219</sup> *GCD*, 126. *GCD* (1971) was mainly intended for those who have responsibility for organizing catechesis. Its purpose was to provide assistance in the production of catechetical directories and catechisms. Since it applied to the universal Church where conditions differ greatly, it states that only average conditions are considered; therefore, it deals in general with a plan which is to be promoted, rather than imposed. See Appendix VI.

<sup>220</sup> *GCD*, 98; 109; 110 and 126. See Appendix VI.

<sup>221</sup> *EN*, 44. See Appendix VI.

<sup>222</sup> *CT*, 16; and 22. See Appendix VI.

<sup>223</sup> *CT*, 14; 18; and 45. See Appendix VI.

<sup>224</sup> *CT*, 30. See Appendix VI.

<sup>225</sup> *CT*, 29; 31; 32; 51; 58; and 71. See Appendix VI.

*Lay Catholics in Schools* (1982) distinguishes the teaching of religion and catechesis, but acknowledges their complementary role; both should form ‘part of the curriculum of every school’.<sup>226</sup> It charges Bishops with training both teachers and catechists.<sup>227</sup> An Encyclical *Redemptoris Missio* (1990) refers to catechists as ‘specialists’, implying something more than competence, and to the need for training, culminating in academic qualifications.<sup>228</sup> A papal letter to families *Gratissimam Sane* (1994) stresses the complementary role of spouses, who learn through their own experience and that of other couples. As a consequence ‘one could say that “experts” learn in a certain sense from “spouses”, so that they in turn will then be in a better position to teach married couples’.<sup>229</sup> This letter refers to ‘an increasing number of experts, physicians and educators who are authentic lay apostles for whom the promotion of the dignity of marriage and the family has become an important task in their lives’.<sup>230</sup> *The General Catechetical Directory* (*GCD*, 1971) was revised and entitled *The General Directory for Catechesis* (*GDC* 1997), by bishops and by ‘experts in theology and catechesis’. This revised version, speaks of ‘schools’ for catechists having two levels: one for those catechists who are ‘ordinary’; and one for those ‘who have responsibility for catechesis’, for example, ‘in parishes and vicariates as well as full time catechists’.<sup>231</sup> In addition, for ‘experts’ in catechesis, it provides that a ‘higher level of catechetical formation to which priests, religious and laity might have access is of vital importance’; the hope is that such higher institutes should be founded to train catechists to direct catechesis at diocesan level.<sup>232</sup> These institutes ‘ought to function as a university so far as curriculum, length of course and requisites for admission are concerned’; these institutes should also train ‘those who teach catechesis in seminaries, houses of formation and in the catechetical schools’ and should carry out research.<sup>233</sup>

There is, therefore, much evidence that catechists require not only a depth of knowledge but specialist training and expertise. Commentators, although not using the term ‘expert’, appear to agree on this. Morrissey, commenting on canon 777 on the responsibility of parish priests for catechesis, does not use the term ‘expert’, but he highlights the varying needs of different

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<sup>226</sup> *LCS*, 56. See Appendix VI.

<sup>227</sup> *LCS*, 66. See Appendix VI.

<sup>228</sup> *RM*, 73. See Appendix VI.

<sup>229</sup> *GrS*, 16. See Appendix VI.

<sup>230</sup> *GrS*, 12. See Appendix VI.

<sup>231</sup> *GDC* (1997), 248; and 250. See Appendix VI.

<sup>232</sup> *GDC* (1997), 251. See Appendix VI.

<sup>233</sup> *Ibid.*

age-groups amongst the faithful, and those with special needs, who ‘may not be relegated to a secondary or subsidiary place’.<sup>234</sup> Morrissey recognizes that the means and methods used may have to be adapted to local conditions and circumstances.<sup>235</sup> Coriden holds that the aim of catechesis is ‘to render ... faith lively, conscious, and effective’.<sup>236</sup> Again, not referring to ‘experts’ or ‘expertise’, he refers to: the need for ‘different kinds of instructional programs’ for different age-groups and abilities; the requirement to take into account the ‘natural talent, aptitude, strength of faith, knowledge, training and ability’ even of ‘potential helpers’; the specialist nature of the ongoing catechesis required at parish level, including that for the handicapped; and the importance of initial and ongoing training for catechists themselves.<sup>237</sup> He later describes catechetics as one of the ‘paramount forms of ministry’, which goes beyond teaching to making faith ‘living, explicit and operative’; catechists are required to reach a ‘crucial level of formation’.<sup>238</sup>

These provisions, which reflect the ecclesiology of Vatican II, can be compared with the provisions of *CIC* 1917 and *CCEO*. *CIC* 1917, with its emphasis on clerics, considered catechetical instruction ‘a proper and most grave office’ amongst clerical functions.<sup>239</sup> The pastor’s responsibility extended to teaching children and adults.<sup>240</sup> However, this focussed on: preparation of children for the sacraments including post-first communion instruction; children’s instruction during Lent; and adult instruction on Sundays and Holy Days and during Lent.<sup>241</sup> A pastor could enlist the help of other priests and ‘if necessary, pious laymen’.<sup>242</sup> ‘Holy Missions’ for the local flock were to be held at least every ten years.<sup>243</sup> The local Ordinary decided if the help of religious was required.<sup>244</sup> The burden, therefore, fell on clergy and religious, by virtue of their training for priesthood or religious life. Nevertheless, *CIC* 1917 also recognised parents’ obligation to catechise children.<sup>245</sup> No

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<sup>234</sup> Morrissey, *L&S*, p430, paras 1548 and 1549, citing *GCD*, 91.

<sup>235</sup> *Ibid.*, para 1551.

<sup>236</sup> Coriden, *Text&Comm*, p555.

<sup>237</sup> *Ibid.*, p557-559.

<sup>238</sup> Coriden, *New Comm*, pp933 and 937.

<sup>239</sup> *CIC* 1917, c. 1329. See Appendix III.

<sup>240</sup> *CIC* 1917, cc. 1330; 1331; and 1332. See Appendix III.

<sup>241</sup> *CIC* 1917, cc. 1330-1332. See Appendix III.

<sup>242</sup> *CIC* 1917, c. 1333. See Appendix III.

<sup>243</sup> *CIC* 1917, c. 1349. See Appendix III.

<sup>244</sup> *CIC* 1917, c. 1334. See Appendix III.

<sup>245</sup> *CIC* 1917, c. 1335. See Appendix III.

provision was made, however, for the training of lay catechists. *CIC* 1917, therefore, demonstrates the less well-developed systems of catechetics of the time.<sup>246</sup>

*CCEO*, post-dating *CIC*, recognises the obligation of each Church *sui iuris*, particularly bishops, but also parishes, to provide catechesis taking the special character of the Eastern Churches into account.<sup>247</sup> Like *CIC*, *CCEO* obliges parents/guardians to teach children ‘by word and example’.<sup>248</sup> *CCEO* too, requires catechists to have special formation and on-going training.<sup>249</sup> Pedagogical skills are also necessary.<sup>250</sup> However, when ‘properly formed’ catechists are obliged to assist the Church,<sup>251</sup> particular law provides for their remuneration.<sup>252</sup> Unlike *CIC*, which permits, *CCEO* mandates the establishment of a catechetical commission.<sup>253</sup> Catechesis should be ecumenically orientated.<sup>254</sup> Extensive knowledge of both Catholic doctrine and that of other churches is, therefore, required. It is clear that like *CIC*, *CCEO* also requires that catechists are trained and have expertise.

## Mission

**Ministry of Missionaries:** *CIC* acknowledges the obligation of all the faithful to cooperate in missionary activity.<sup>255</sup> However, overall responsibility rests with the Supreme Pontiff, the College of Bishops, and, at local level, with bishops.<sup>256</sup> Because of their dedication to the Church, religious institutes, too, shoulder responsibility appropriate to their way of life.<sup>257</sup> *CIC* is not explicit regarding who appoints missionaries nor the training and qualifications required, but like catechists, this can be gleaned from the canons generally and from other Vatican documents. Ecclesiastical authorities ‘choose’ and ‘send’ missionaries, both cleric and lay; this implies competence to appoint them and to make judgments regarding their suitability for the task.<sup>258</sup>

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<sup>246</sup> *CIC* 1917, cc. 1350§1; and 1351. See Appendix III.

<sup>247</sup> *CCEO*, cc. 617; 619; and 621. See Appendix II.

<sup>248</sup> *CCEO*, c. 618. See Appendix II.

<sup>249</sup> *CCEO*, c. 622§2. See Appendix II.

<sup>250</sup> *CCEO*, c. 626. See Appendix II.

<sup>251</sup> *CCEO*, c. 624§3. See Appendix II.

<sup>252</sup> *CCEO*, c. 591§2. See Appendix II.

<sup>253</sup> *CCEO*, c. 622§1. See Appendix II.

<sup>254</sup> *CCEO*, c. 625. See Appendix II.

<sup>255</sup> *CIC*, c. 781. See Appendix I.

<sup>256</sup> *CIC*, c. 782§§1 and 2. See Appendix I.

<sup>257</sup> *CIC*, c. 783. See Appendix I.

<sup>258</sup> *CIC*, c. 784. See Appendix I.



**Training and Qualifications of Missionaries:** *CIC* considers that because of their dedication to the service of the Church, members of institutes of consecrated life are obliged ‘to play a zealous and special part’ in missionary activity, implying that they have also an obligation to acquire the necessary skills.<sup>259</sup> Missionaries are ‘heralds of the Gospel’ sent to places where the Church ‘has not yet taken root’ until new structures enable the work of evangelisation.<sup>260</sup> Catechists for mission require ‘proper formation’, in ‘schools founded for this purpose’; this implies specialist training and expertise in teaching and in the formation of missionaries on the part of the trainers.<sup>261</sup> Missionaries, in turn, are required to judge a person’s readiness to receive both the message of the Gospel and the sacrament of baptism.<sup>262</sup> Although each diocese is to have a designated priest to promote missionary activities, laity are obliged to ‘acquire the appropriate formation which their role demands’.<sup>263</sup>

As with catechesis, legislative documents refer to the obligation of all the faithful to engage in missionary activity. The Dogmatic Constitution on the Church *Lumen Gentium* (1964) urges bishops to encourage the faithful to participate in mission.<sup>264</sup> A Decree on Missionary Activity, *Ad Gentes* (1965), emphasises the importance of schools to train catechists for missionary work.<sup>265</sup> Moreover, missionaries are required to have a ‘suitable natural temperament’, ‘talent’, ‘other qualities’, and to ‘have been trained to undertake mission work’.<sup>266</sup> More recently, the Encyclical *Redemptoris Missio* (1990) called for a renewal of missionary activity, which has ‘but one purpose: to serve man by revealing to him the love of God made manifest in Jesus Christ’.<sup>267</sup> One of the roles of missionaries is to engage in dialogue between ‘experts’ of different religions, and those of other disciplines.<sup>268</sup>

Morrisey distinguishes the general obligation of the faithful to engage in the missionary activity of the Church and ‘professional’ missionaries, implying different levels of training

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<sup>259</sup> *CIC*, c. 783. See Appendix I.

<sup>260</sup> *CIC*, c. 786. See Appendix I.

<sup>261</sup> *CIC*, c. 785§§1 and 2. See Appendix I.

<sup>262</sup> *CIC*, c. 787§2. See Appendix I.

<sup>263</sup> *CIC*, cc. 791; and 231§1. See Appendix I.

<sup>264</sup> *LG*, 17; and 27. See Appendix VI.

<sup>265</sup> *AG*, 17. See also: *AG*, 30. See Appendix VI.

<sup>266</sup> *AG*, 23. See Appendix VI.

<sup>267</sup> *RM*, 2. See Appendix VI.

<sup>268</sup> *RM*, 57; and 82. See Appendix VI.

and expertise.<sup>269</sup> He notes that many religious institutes and societies were, throughout the ages, founded specifically with missionary activity as their *raison d'être*.<sup>270</sup> He defines missionaries as those 'who are endowed with the proper natural temperament, have the necessary qualities and outlook, and are ready to undertake missionary work'.<sup>271</sup> He describes missionary catechists as those, 'where there is a shortage of clergy and religious', who are 'lay people of exemplary Christian life who have received special training' and are 'of the highest importance'.<sup>272</sup> Moreover, catechists must be 'very carefully prepared' and their training 'in keeping with cultural progress'.<sup>273</sup> In line with canon 786, missionary work includes 'building up newly founded churches until they are fully established and can stand on their own'; 'special care and formation' is required for the newly baptized.<sup>274</sup> Coriden explains that lay missionary catechists are to be 'suitably instructed', but their work is nevertheless to be carried out 'under the direction of a missionary; lay catechists are to be the assistants or associates of missionaries'.<sup>275</sup> This implies that missionaries themselves are more highly trained and experienced. In recruiting laity for missionary activity, O'Reilly warns of the importance of 'suitable preparation, professional specialization, as it is called'.<sup>276</sup> He acknowledges the 'very important role' of catechists in assisting missionaries, including 'organizing liturgical functions' in the absence of the missionary priest, such as prayer services, liturgy of the word on holy days of obligation, distributing Holy Communion, baptizing, and assisting at marriages; he refers to the necessity for them to be 'properly instructed for the office which they are to fulfil'.<sup>277</sup> There is no doubt, therefore, that special training and expertise is required of missionaries and missionary catechists.

The foregoing contrasts with the lack of any provision for missionary training under *CIC* 1917, although mission territories were recognised and distinguished from local 'missions'.<sup>278</sup> Unlike the Latin Church, the Eastern Churches do not have a history of foreign missionary activity. Nevertheless, *CCEO* recognises these Churches now as 'totally

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<sup>269</sup> Morrissey, *L&S*, p431, para 1553.

<sup>270</sup> *Ibid.*, p432, para 1555.

<sup>271</sup> *Ibid.*, para 1556, citing *Ad Gentes*, 23.

<sup>272</sup> *Ibid.*, para 1556-1557, citing *Ad Gentes*, 17; and 23.

<sup>273</sup> *Ibid.*, p433, para 1558.

<sup>274</sup> *Ibid.*, para 1559 and p434, para 1565. See Appendix I: *CIC*, c. 786.

<sup>275</sup> Coriden, *Text&Comm*, p561.

<sup>276</sup> Michael A O'Reilly, *New Comm*, p943.

<sup>277</sup> *Ibid.*

<sup>278</sup> *CIC* 1917, c. 1350§2. See Appendix III.

missionary’; ‘mission territories’ being those recognised as such by the Holy See.<sup>279</sup> *CCEO* requires missionaries to be ‘suitably trained preachers’.<sup>280</sup> Missionaries, whether native or not, are required to be ‘qualified’ in the necessary skills and ability; they require formation in missiology and missionary spirituality as well as education in the history and culture of the people they serve.<sup>281</sup> They are required to be prudent in their dialogue and cooperation with non-Christians.<sup>282</sup> *CCEO* specifically refers to the establishment of schools in mission territories, and each eparchy is to have a priest designated to missionary work.<sup>283</sup> Also, a commission for missionary activity in the synod of bishops or the council of hierarchs is recommended.<sup>284</sup> Therefore, the need for special training for missionary work is clear.

## Preaching

**Ministry of Preachers:** Preaching, too, is recognised as fundamental to the Church’s mission to teach and spread the word of God. *CIC*, reflecting the provisions of the Constitution on the Sacred Liturgy (1963), recognises the expertise of preachers, particularly in relation to: the Roman Pontiff and the College of Bishops, who are the principal preachers, and who individually have the right to preach everywhere.<sup>285</sup> It also recognises diocesan bishops’ authority to preach and their duty to oversee preaching in their dioceses.<sup>286</sup> All clergy, because of the faithful’s right to hear the word of God, have a correlative duty to preach to those in their care.<sup>287</sup> However, when preaching to others, they must have at least the presumed consent of the rector of the church, and when preaching to religious that of the Superior.<sup>288</sup> Members of institutes of consecrated life, when ‘called upon’ by the bishop, assist in this mission.<sup>289</sup> Laity can be invited to assist clergy in the ministry of the word.<sup>290</sup> They are permitted to preach in a church or oratory when ‘necessary’ or ‘advantageous’, but, like everyone, they are obliged to observe the provisions of the Bishops’ Conference.<sup>291</sup>

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<sup>279</sup> *CCEO*, cc. 584; and 594. See Appendix II.

<sup>280</sup> *CCEO*, c. 585§1. See Appendix II.

<sup>281</sup> *CCEO*, c. 589. See Appendix II.

<sup>282</sup> *CCEO*, c. 592§2. See Appendix II.

<sup>283</sup> *CCEO*, cc. 592§1; and 585§3. See Appendix II.

<sup>284</sup> *CCEO*, c. 585§2. See Appendix II.

<sup>285</sup> *CIC*, cc. 756§1; and 763. See Appendix I.

<sup>286</sup> *CIC*, c. 386§1. See Appendix I.

<sup>287</sup> *CIC*, cc. 757; 528§1; 762; and 767. See Appendix I.

<sup>288</sup> *CIC*, cc. 764; and 765. See Appendix I.

<sup>289</sup> *CIC*, c. 758. See Appendix I.

<sup>290</sup> *CIC*, c. 759. See Appendix I.

<sup>291</sup> *CIC*, cc. 772§1; and 766. See Appendix I.

However, the homily is reserved to a priest or deacon.<sup>292</sup> It appears, therefore, that a parish priest could, in line with these provisions, appoint a lay person to preach.

**Training and Qualifications of Preachers:** The Decree on Priestly Formation (1965) recognises the need for training candidates for Orders in preaching techniques.<sup>293</sup> Preachers must adapt their method of preaching to the condition of the listeners and the circumstances of the times.<sup>294</sup> This would, at least at times, include children and those with special needs. The strict regulation of preaching by laity implies the need for particular expertise.<sup>295</sup>

Commentators acknowledge the importance of preaching, but appear to afford different levels of strictness to their interpretation of law. For Morrisey, employing a strict interpretation, the obligation of a ‘serious and sustained study, based on the Scriptures and on the official teaching of the Church, with an accordingly critical analysis of what is daily portrayed by many newspaper, radio and television outputs’ is imposed on those who preach.<sup>296</sup> Preachers are obliged to bring the word of God to all, including migrants, exiles, refugees, sailors, airmen, itinerants, holidaymakers, those who have given up the practice of religion and unbelievers.<sup>297</sup> The diocesan bishop is responsible for setting the required standard and the programme for preaching.<sup>298</sup> Permission for laity to preach ‘in church’, extends to preaching at Mass, provided such preaching does not constitute the homily, which, ‘because of its ritual nature and its intimate connection with the Eucharist is reserved to a priest or deacon’.<sup>299</sup>

Coriden, on the other hand, applies a broader interpretation. For him, the present need for more preachers has led to the dropping of the prohibition on lay preaching in favour of ‘people who are committed to the ministry of the word, trained in the scriptures and theology, and skilled in communication’.<sup>300</sup> Despite reservation of the homily to clerics, Coriden states

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<sup>292</sup> *CIC*, c. 767§1. See Appendix I.

<sup>293</sup> *OT*, 19. See Appendix VI.

<sup>294</sup> *CIC*, c. 769. See Appendix I.

<sup>295</sup> For example, knowledge of languages or experience in teaching children or those with special needs.

<sup>296</sup> Morrisey, *L&S*, p426, para 1534.

<sup>297</sup> *Ibid.*, p426-427, para 1536.

<sup>298</sup> *Ibid.*, p427, para 1536.

<sup>299</sup> *Ibid.*, p425, para 1529.

<sup>300</sup> Coriden, *Text&Comm*, p552.

that the homily should ‘ordinarily’ be given by the celebrant.<sup>301</sup> He later explains that ‘[a]n occasional exception for good reasons does not constitute a violation for one who usually observes the rule conscientiously, i.e., the principle of substantial observance can be applied’.<sup>302</sup> Although the law permits laity to preach in a church if ‘necessary’ or ‘advantageous’, Coriden holds that ‘it is not a substitute for clerical ministry, nor does it require that other ministers be lacking’; this ministerial role should not be described as ‘exceptional, abnormal, or extraordinary’, because it is a ‘fully legitimate lay function which has now become commonplace in the Catholic Church’.<sup>303</sup> Although under canon law, there is no specific provision for training, Coriden holds that ‘the ability and preparation to preach must naturally be considered’ and ‘qualified lay persons may be called upon to preach wherever preaching takes place’.<sup>304</sup> The required permission ‘could be presumed or implicit in an appointment to pastoral office’.<sup>305</sup> Coriden acknowledges that preaching is ‘demanding and difficult. It requires: thorough learning, especially in scripture and theology; Christian maturity and experience; communication and language skills; familiarity with the community; imagination; and time to prepare well’.<sup>306</sup> This broad interpretation does not appear to comply with an Instruction (1997), which clarifies that preaching by laity is not a right, but of an ‘exceptional nature’.<sup>307</sup> Moreover, this Instruction abrogates any norms previously permitting laity to preach the homily, and states that provisions of the Bishops’ Conference permitting laity to preach must receive approval of the Holy See.<sup>308</sup>

Comparisons can be made with *CIC* 1917 and *CCEO*. Under *CIC* 1917, primary responsibility for preaching rested with the Pope and bishops.<sup>309</sup> Bishops could enlist the help of pastors and ‘suitable men’, provided they received a ‘mission’ by faculty or office.<sup>310</sup>

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<sup>301</sup> Ibid., p553, citing *GIRM* (1969), 42. However, *CIC* post-dates this document and *CIC*, c. 767§4 provides that the pastor or rector of a church is to see to it that the prescriptions of the canon are ‘conscientiously observed’.

<sup>302</sup> Coriden, *New Comm*, p930. Coriden gives, at p929, as an examples of ‘good reason’, a lay person preaching at Masses for children, citing SCDWDS, *Directory for Masses with Children*, (1 November 1972); and at p930, as examples of ‘necessity’: infirmity, exhaustion, and old-age on the part of the presiding priest.

<sup>303</sup> Ibid., p927.

<sup>304</sup> Ibid.

<sup>305</sup> Ibid.

<sup>306</sup> Ibid., pp927-928.

<sup>307</sup> See Appendix VI: *CNOFSMP*, Article 2. This Instruction was prepared by six Sacred Congregations and two Pontifical Councils and moreover, was approved *in forma specifica*. It is, therefore, a weighty document.

<sup>308</sup> *CNOFSMP*, Articles 2§3; and 3. See Appendix VI.

<sup>309</sup> *CIC* 1917, cc. 1327§1; and 1336. See Appendix III.

<sup>310</sup> *CIC* 1917, cc. 1327§2; and 1328. See Appendix III.

The preaching of ‘sermons’ was governed by specific canons.<sup>311</sup> A faculty, available only to priests and deacons having undergone examination, and which could be revoked, was required from the local Ordinary.<sup>312</sup> Lay people were forbidden to preach in churches; this included lay religious.<sup>313</sup> Stringent provisions were in place for preaching in clerical, religious, and lay religious institutes, and for priests from outside the diocese.<sup>314</sup>

Like *CIC*, *CCEO* acknowledges the primary role of clergy as leaders and preachers, and the bishops’ responsibility to regulate preaching.<sup>315</sup> The role of the ‘Christian’ laity in the ministry of the word is recognised, albeit that, unlike *CIC*, both a mandate, and ‘extraordinary circumstances’, are required.<sup>316</sup> Like under *CIC*, the homily is reserved to a cleric.<sup>317</sup> A ‘just cause’ approved by the hierarch is required before a pastor can pass the obligation of preaching a homily to another on a regular basis.<sup>318</sup> *CCEO* explicitly requires preachers to teach the faithful about human rights and social justice.<sup>319</sup> Although stringent provisions are in place for lay preaching, it appears that it is becoming more common.<sup>320</sup> Delivering a sermon prepared by a priest, however, is not considered ‘true preaching’.<sup>321</sup> There is no doubt therefore, that here also, skill, training and expertise are required.

## Social Communication

**Ministry of Social Communication:** As to methods of social communication, the Church claims the right to use these to fulfil her mission.<sup>322</sup> However, the norms in *CIC* focus largely on writings.<sup>323</sup> All the faithful, especially those ‘in any way’ involved in the

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<sup>311</sup> *CIC* 1917, cc. 1337-1348. See Appendix III.

<sup>312</sup> *CIC* 1917, cc. 1337; 1340§§1 and 2; and 1342. See Appendix III.

<sup>313</sup> *CIC* 1917, c. 1342§2. See Appendix III.

<sup>314</sup> *CIC* 1917, cc. 1338; and 1341§1. See Appendix III.

<sup>315</sup> *CCEO*, cc. 289§1; 610; 609; 614§1; and 615. See Appendix II.

<sup>316</sup> *CCEO*, cc. 608; and 610§4. See Appendix II.

<sup>317</sup> *CCEO*, c. 614§4. See Appendix II.

<sup>318</sup> *CCEO*, c. 614§3. See Appendix II.

<sup>319</sup> *CCEO*; c. 616§2. See Appendix II.

<sup>320</sup> *Pospishil*, p368.

<sup>321</sup> *Ibid.*, citing J Huels, ‘The Ministry of the Divine Word (Canons 756-761)’, *Studia Canonica*, 23 (1989), pp325-344; and J Provost, ‘Brought Together by the Word of the Living God (Canons 762-772)’, *Studia Canonica*, 23 (1989), pp345-372.

<sup>322</sup> *CIC*, c. 822§1. See Appendix I.

<sup>323</sup> The norms are placed in Book III on The Teaching Office of the Church, under Title IV, ‘The Means of Social Communication and Books in Particular’. Morrissey, *L&S*, p449, points out that ‘audio or visual recordings’ are unlikely to be covered by the provisions on ‘writings intended for publication’, envisaged by canon 824§2. Coriden, too, in *Text&Comm*, p579 reckons that: ‘oral or electronic communication’, ‘secular or

management or use of the media, have a duty to work together to ensure that all forms of social communication are ‘imbued with a human and Christian spirit’.<sup>324</sup> Everyone is obliged to observe the norms of the Bishops’ Conference if speaking about Christian teaching on radio or television.<sup>325</sup> Writing in publications which are accustomed to attacking the catholic religion or good morals is forbidden without ‘just and reasonable cause’, although clerics and religious may do so with the permission of the local Ordinary.<sup>326</sup> Pastors have a threefold right and duty to: be vigilant so that the media do not adversely affect the faith and morals of the faithful; give approval or permission for publication;<sup>327</sup> and condemn writings which are harmful to faith or morals.<sup>328</sup> All writings, ‘which touch on matters faith or morals’, must be submitted to the appropriate ecclesiastical authority, for permission or approval, before publication.<sup>329</sup> This implies expertise, on the part of the ecclesiastical authority, in all matters which ‘touch on faith and morals’, in relation to the publication of: catechisms; textbooks on various related subjects; books on Sacred Scripture prepared with non-Catholics; prayer books; collections of ecclesiastical decrees; further editions or translations of works already published; and republication of liturgical books.<sup>330</sup>

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broadly religious topics’, and publications for private circulation are not covered; nor do the provisions apply to non-Catholics. See also Coriden, *New Comm*, p980.

<sup>324</sup> *CIC*, c. 822§§2, 3. See Appendix I.

<sup>325</sup> *CIC*, c. 772§2. See Appendix I.

<sup>326</sup> *CIC*, cc. 831§1; and 832. See Appendix I.

<sup>327</sup> Morrisey, *L&S*, p448, at para 1611 explains: ‘[P]ermission (*licentia*) is usually expressed by the word *imprimatur*’, which ‘carries with it an implicit declaration that the work contains no doctrinal or moral ‘error’, whereas approval (*approbatio*) ‘seems to involve more than permission’, implying ‘acknowledgement ... of the positive worth of the work’. However, Coriden, disagrees: *Text&Comm*, p580: ‘[P]ermission is required by persons; *approbatio* ‘does not really mean approval’, but signifies that the writing contains nothing which the Ordinary ‘perceives to be harmful to faith or morals’ and is a ‘negative judgement of non-offensiveness; it is ‘not an endorsement or recommendation of the book’. *Approbatio* therefore, only ‘permits the author to publish’. This stance changes somewhat, however, in his later writing when he considers that the words are ‘virtually indistinguishable’; the canons, he claims ‘use them interchangeably’. See Coriden, *New Comm*, p980. He cites an Instruction from the CDF (1992), n 7.2 as indicating that ‘the two have exactly the same effects. It is a distinction without a difference’. However, this document refers first to the writings which require ‘approval’ and then states: ‘Prior permission is required, *on the other hand* ...’ and goes on to list those relevant writings, which implies a difference in their nature although the effects are the same. It appears, therefore, that Coriden’s original explanation is closer to the correct one; the person requires the permission and the approbation refers to the content of the writing. However, the Instruction states that approval or permission ‘presupposes’ that nothing objectionable has been found; ‘guarantees that the writing ... contains nothing contrary to doctrine; ‘attests that all the pertinent prescriptions of canon law have been fulfilled’, and ecclesiastical permission ‘constitutes both a juridical and a moral guarantee’. This is more than a ‘negative judgement’ referred to by Coriden, who considers the claim ‘hyperbole’ (at p984). See Appendix VI: *UIISC*, 7§1, (a) (b); 7§2; and 10§1.

<sup>328</sup> *CIC*, c. 823. See Appendix I.

<sup>329</sup> *CIC*, c. 824§§1 and 2. See Appendix I.

<sup>330</sup> *CIC*, cc. 825; 826§§1 - 3; 827; 828; and 829. See Appendix I.

**Appointment of Censors:** *CIC* permits the local Ordinary to appoint censors and by permitting the Bishops' Conference to establish a commission or to draw up a list of suitable people who might assist the local Ordinary in making a judgment regarding suitability for publication, the law implies the Bishops' Conference's authority also to appoint these censors.<sup>331</sup> Morrissey holds that the diocesan bishop may appoint censors 'on a permanent or on an ad hoc basis', but he may also have recourse to the list approved by the Bishops' Conference, which might give him access to 'a degree of knowledge on a wider range of subjects than might otherwise be available to him'.<sup>332</sup> Coriden considers that the Bishops' Conference may 'compile a list' of people to be employed individually or collectively (the latter enabling 'some form of collegiate action and corporate responsibility') or the local Ordinary may appoint his own censors.<sup>333</sup>

**Discipline and Qualification of Censors:** *CIC* requires censors to be 'outstanding for their knowledge, right doctrine and prudence'; apart from these personal qualities, they are required to be objective, and to be capable of writing a reasoned report, on which the local Ordinary can base his decision, implying certain knowledge and expertise.<sup>334</sup> Moreover, given their role to judge whether or not the writing is harmful to faith or morals, censors would be required to have a deep knowledge of 'the hierarchy of truths'.<sup>335</sup>

**Expertise in Social Communication:** Vatican II issued a Decree on Social Communication (1963) which recognises that while means of social communication could serve the Church, regulation is required to curb abuses.<sup>336</sup> This Decree, recognising the Church's duty to instruct the faithful in the use of the media, encouraged the diocesan bishop to put aside a special day, annually, for this purpose.<sup>337</sup> It also obliged the laity to imbue the media with a Christian spirit, and to contribute to the Church's endeavour by prayer and funding.<sup>338</sup> Moreover, it provides that: the proper exercise of the right to information demands that true and complete information is communicated in a 'proper and decent' manner, respecting human dignity; all forms of art should respect the moral order; and particular responsibility

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<sup>331</sup> *CIC*, c. 830§1. See Appendix I.

<sup>332</sup> Morrissey, *L&S*, pp451- 452.

<sup>333</sup> Coriden, *Text&Comm*, p583.

<sup>334</sup> *CIC*, c. 830. See Appendix I.

<sup>335</sup> Coriden, *New Comm*, p984.

<sup>336</sup> *IM*, 2; and 3. See Appendix VI.

<sup>337</sup> *Ibid.*, 3; and 18.

<sup>338</sup> *Ibid.*



falls on all those who communicate information, including public authorities, but parents have particular responsibility.<sup>339</sup> Interestingly, the decree recognises the use of experts in assisting the faithful, particularly the young, to understand new technology and to use it wisely, but this provision did not find its way into *CIC*.<sup>340</sup> Skilled people are to be appointed in order that all media can serve the apostolate.<sup>341</sup> Laity and clerics require training, according to their needs, in faculties, institutes, seminaries, schools, and lay apostolate groups.<sup>342</sup> National media offices are foreseen, under the direction of a committee of bishops or at least one bishop, with lay experts playing a role.<sup>343</sup> The diocesan bishop is charged with overseeing this endeavour.<sup>344</sup> A later Instruction *Communio et Progressio* (1971) charges bishops with the task of consulting experts to assist the Church in its use of the media.<sup>345</sup> These professionals and experts require knowledge and social communication skills, obtained from specialist training, so that they are competent when called upon.<sup>346</sup> The establishment of professional associations is encouraged, as is the appointment of official spokespeople.<sup>347</sup> Training in this field is considered a ‘most urgent task’, even for recipients of information.<sup>348</sup> The National Episcopal Commission for Social Communication is responsible for providing guidelines for the development of the apostolate of social communication and for collaborating with the Pontifical Commission.<sup>349</sup> The need for special training for priests, not only in their personal use of media, but also for the purposes of training the faithful and ‘specialist training’ for those who work in the mass media or train those who do, is recognized in other documents.<sup>350</sup> On the twentieth anniversary of the aforementioned Instruction (1971), another Instruction *Aetatis Novae* (1992) recognised the advances in technology affecting, positively and negatively, people’s ‘psychological, moral and social development’ and set out guidelines for diocesan pastoral plans for social communication programs. Whilst the value of modern media in the task of evangelisation was recognised, so was the need for: education on the use of the media; ‘professional’ skills for those actively engaged in media work for the Church, including doctrinal and spiritual formation;

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<sup>339</sup> *Ibid.*, 5-7; and 10-12.

<sup>340</sup> *Ibid.*

<sup>341</sup> *Ibid.*, 15.

<sup>342</sup> *Ibid.*, 15-16.

<sup>343</sup> *Ibid.*, 21.

<sup>344</sup> *Ibid.*, 20.

<sup>345</sup> *CP*, 4; and 5. See Appendix VI.

<sup>346</sup> *Ibid.*, 15; 38; and 71.

<sup>347</sup> *Ibid.*, 79; and 174.

<sup>348</sup> *Ibid.*, 64; and 65.

<sup>349</sup> *Ibid.*, 172.

<sup>350</sup> *GTFP*, 4-7. Also *RFIS* (1985), 68. See Appendix VI.

recognition of the psychological pressures experienced and ethical dilemmas faced by media workers; and dialogue between the Church and the secular media.<sup>351</sup>

With regard to publishing written material, another Instruction (1992) explained that ecclesiastical approval or permission presupposes that the censor found nothing objectionable and confirms that the provisions of canon law have been fulfilled.<sup>352</sup> It follows therefore, that censors must have extensive knowledge of doctrine and law. It confirmed that reprinting is not considered to be a new edition; reprinting and translations of an original nevertheless, require further approval or permission to publish.<sup>353</sup> Catholic publishers are required not to publish material which has not received the prescribed permission.<sup>354</sup> Religious institutes with a special charism<sup>355</sup> for publishing have particular responsibility in this regard.<sup>356</sup>

A later document on ethics (2000) emphasises the need for training for all, clerics and laity, who are involved in Church activities.<sup>357</sup> A further document *The Church and the Internet*, (2002) addressed the use of the internet as a means of social communication. The internet was addressed again in an Apostolic Letter (2005); this acknowledged its usefulness, but it also emphasised the need for training in its use and the need for pastoral support for professionals who experience psychological pressures because of their internet work.<sup>358</sup> It reiterates the particular responsibility of religious institutes with a special charism for using the mass media.<sup>359</sup>

It is clear, therefore, that when using the different means of communication, detailed knowledge is required in areas such as scripture, theology, canon law, and catechetics and diverse skills are required in the use of the means of social communication available.

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<sup>351</sup> AN, 4; 8; 11; 17; and 18. See Appendix VI.

<sup>352</sup> UISC, 7§2. See Appendix VI.

<sup>353</sup> Ibid., 9.

<sup>354</sup> Ibid., 15§1.

<sup>355</sup> Rhidian Jones, *The Canon Law of the Roman Catholic Church and the Church of England: A Handbook* (Edinburgh, 2000), p25: 'Charism' is defined as: 'God-given gifts or graces which give rise to obligations and rights. Such gifts are given primarily for the benefit of the Church and the world rather than of the individual who is bestowed with them'. See also CCC, p186, para 799; and p435, para 2003 in Appendix IV; and AA, 30 in Appendix VI.

<sup>356</sup> Ibid., 18.

<sup>357</sup> EC, 26. See Appendix VI.

<sup>358</sup> RD (unofficial translation), 9. See Appendix VI.

<sup>359</sup> Ibid., 8.

Morrissey points out that republishing original texts or publishing official translations of them ‘requires a comparison with the approved text’,<sup>360</sup> which implies a particular skill. Moreover, in the case of scriptural texts, approval must come from the Holy See.<sup>361</sup> An Ordinary is not bound by the censor’s opinion; the decision to grant or refuse approval remains that of the Ordinary.<sup>362</sup> Coriden agrees.<sup>363</sup> However, for Coriden, the provisions of canon 823 do not extend to prohibition on publication or use but to ‘expressing disapproval ... offering a critique, and pointing out errors or inadequacies’;<sup>364</sup> freedom of expression must be honoured,<sup>365</sup> and restrictions are subject to strict interpretation.<sup>366</sup> Coriden speaks of the ‘expertise’ of censors, in ‘scripture, theology, canon law, catechesis etc’ with ‘considerable diversity of background and viewpoint’,<sup>367</sup> although he later speaks only of ‘competence’ and a ‘fair and balanced outlook’.<sup>368</sup> For Coriden, the censor’s role is limited to ‘doctrinal evaluation’;<sup>369</sup> and ‘only the narrow categories of publications’, provided in canons 825-828 are covered by the provisions; ‘[t]he vast majority of writings, even those on theology and morality are not subject to censorship in virtue of this canon’.<sup>370</sup>

These provisions can be compared with those under *CIC* 1917 and *CCEO*. *CIC* 1917 was more stringent and concentrated on the censorship and prohibition of books, which included daily publications, periodicals and other published writings.<sup>371</sup> The Church claimed the right: to require the approval of the competent authority before publication by any of the faithful; and to prohibit books published by anyone, whether Catholic or not.<sup>372</sup> Specifically, books referring to religious matters required prior censorship.<sup>373</sup> Clerics and religious were forbidden to edit profane material and to write for newspapers and periodicals, without their Superiors’ consent.<sup>374</sup> Laity required approval of the local Ordinary to write for publications

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<sup>360</sup> Morrissey, *L&S*, p449.

<sup>361</sup> *Ibid.*, p450.

<sup>362</sup> *Ibid.*, p452.

<sup>363</sup> Coriden, *Text&Comm*, p584.

<sup>364</sup> *Ibid.*, p580.

<sup>365</sup> *Ibid.*, p584.

<sup>366</sup> Coriden, *New Comm*, p979.

<sup>367</sup> Coriden, *Text&Comm*, p583.

<sup>368</sup> Coriden, *New Comm*, p983.

<sup>369</sup> Coriden, *Text&Comm*, p584.

<sup>370</sup> Coriden, *New Comm*, p979.

<sup>371</sup> *CIC* 1917, cc. 1384-1405. See Appendix III.

<sup>372</sup> *CIC* 1917, c. 1384§1. See Appendix III.

<sup>373</sup> *CIC* 1917, cc. 1385; and 1388§1. See Appendix III.

<sup>374</sup> *CIC* 1917, c. 1386§1. See Appendix III.

that attacked the Church or good morals.<sup>375</sup> Translations of texts of sacred Scripture required the consent of the Holy See.<sup>376</sup> Translation of already approved texts and new editions required further permission.<sup>377</sup> Permission was to be granted in writing; the name of the person granting permission and time and place of the grant were to be printed in the publication.<sup>378</sup> Censors were appointed at diocesan level, implying a stable post, rather than *ad hoc* appointment.<sup>379</sup> As censors were bound to adhere to doctrine, law, prescriptions and the thinking of the doctors of the church, their knowledge needed to be extensive.<sup>380</sup> Although no specific qualifications were stated, they were clergy ‘commended by age, erudition, and prudence’.<sup>381</sup> There was, therefore, no recognition of expertise in the laity.

Like *CIC*, *CCEO* acknowledges the church’s right, and her need, to use appropriate forms of social communication.<sup>382</sup> Provisions on the publication of writings are similar to those in *CIC*.<sup>383</sup> However, *CCEO* is explicit on the duty to make access to sacred Scripture easier for non-Christians.<sup>384</sup> Approval of writings by one hierarch is insufficient for their use in another eparchy.<sup>385</sup> Whilst the norms on censors are similar to those under *CIC*,<sup>386</sup> those relating to liturgical texts are somewhat more complex.<sup>387</sup> *CCEO* obliges all ‘to collaborate’ in the church’s mission, but, interestingly and reflecting the advances in technology since *CIC* was promulgated, it refers specifically to those who are ‘expert’ in the production and transmission of communications and calls them to offer their assistance to the bishops.<sup>388</sup> In turn, it calls on bishops, albeit with the help of institutes of social communication, to teach the faithful to use the media advantageously; and to provide for the training of experts in this field; moreover *CCEO* explicitly states that the policy of ‘praising and blessing good books’ can be more effective than the censure and condemnation of evil’.<sup>389</sup> Nevertheless, eparchial bishops, the synod of bishops of the patriarchal Church, the council of hierarchs and the

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<sup>375</sup> *CIC* 1917, c. 1386§2. See Appendix III.

<sup>376</sup> *CIC* 1917, c. 1391. See Appendix III.

<sup>377</sup> *CIC* 1917, c. 1392§§1, 2. See Appendix III.

<sup>378</sup> *CIC* 1917, c. 1394§1. See Appendix III.

<sup>379</sup> *CIC* 1917, c. 1393§1. See Appendix III.

<sup>380</sup> *CIC* 1917, c. 1393§2. See Appendix III.

<sup>381</sup> *CIC* 1917, c. 1393§3. See Appendix III.

<sup>382</sup> *CCEO*, c. 651§1. See Appendix II.

<sup>383</sup> *CCEO*, cc. 654; 658; 659; 660; and 662§2. See Appendix II.

<sup>384</sup> *CCEO*, c. 655. See Appendix II.

<sup>385</sup> *CCEO*, c. 663§2. See Appendix II.

<sup>386</sup> *CCEO*, c. 664. See Appendix II.

<sup>387</sup> *CCEO*, cc. 656; and 657. See Appendix II.

<sup>388</sup> *CCEO*, c. 651§2. See Appendix II.

<sup>389</sup> *CCEO*, c. 652§1. See Appendix II.

Apostolic See all have competence to forbid the faithful to use, or pass on to others, instruments of social communication detrimental to the integrity of faith and morals.<sup>390</sup> Moreover, *CCEO* requires detailed legislation at local level, for the use of radio, cinema, and television when dealing with faith or morals;<sup>391</sup> intellectual property must be protected in accordance with civil law.<sup>392</sup> *CCEO* emphasises that the canons extend to icons and images, to the display and sale of goods, and to the productions of shows in schools.<sup>393</sup>

## Conclusion

It is clear that whilst all the faithful have a role to play in the teaching mission of the Church, the Supreme authority and the bishops are responsible for oversight of Catholic teaching. Teachers, even those in ecclesiastical universities and faculties, are not referred to either in the *CIC* or in Vatican documents as ‘experts’. Nevertheless, they, and catechists, are required to have: extensive knowledge of Catholic doctrine and pedagogical skills (including psychology), relative to their specific roles. The Church is required to provide for this knowledge and skill by establishing educational institutions of different kinds and levels. Whilst no specific academic qualifications are required for teachers in Catholic universities, they are nevertheless required to reach high standards in teaching, live exemplary lives, and have a valid mandate if they teach ‘theological subjects’. The Constitution on Ecclesiastical Universities (1979) requires teachers to: hold a canonically valid degree or equivalent title; have proof of research skills; and demonstrate their teaching ability. Given that a ‘doctorate’ in the specific discipline taught is required for teachers in Ecclesiastical universities and faculties, a high degree of expertise is implied. In addition, teaching methods are to be continually revised and updated, which implies on-going professional or specialist training. Likewise, catechists, and missionaries require special formation in particular schools. Censors too are required to be people ‘outstanding for their knowledge, right doctrine and prudence’. A comprehensive knowledge of Catholic doctrine is, therefore, required in addition to the capacity to make objective judgments based on Church doctrine, faith and morals, and the ability to submit a written report to the bishop. The ‘experts’ referred to in the Vatican documents are people to be consulted for advice before decision-making. These

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<sup>390</sup> *CCEO*, c. 652§2. See Appendix II.

<sup>391</sup> *CCEO*, c. 653. See Appendix II.

<sup>392</sup> *CCEO*, c. 666. See Appendix II.

<sup>393</sup> *CCEO*, c. 665. See Appendix II.

‘experts’ may have similar qualifications and expertise to those seeking advice, but are out-with the body requesting that advice. For example, those consulted when matters cannot be settled internally or when an ecclesiastical authority is planning to establish a new university.

The provisions of *CCEO* are more detailed. For example, they require: a council for the promotion of the ecumenical movement; a catechetical commission and centre; catechesis to be ecumenically orientated; a designated priest and a commission for missionary activity; and a commission of ‘experts on ecumenism’ in each church *sui iuris*. Furthermore, it specifies the bishop’s authority to forbid attendance at a particular school and gives competence to the ecclesiastical authority to dismiss teachers for professional incompetence. Reflecting advances in technology since the promulgation of *CIC*, *CCEO* calls on the assistance of ‘experts’ to assist the bishops in relation to the media, but also obliges the bishops to train the experts and to legislate at local level. It is clear, therefore, that although teachers are not referred to but are classed canonically as ‘experts’, *CIC* and Vatican documents leave no doubt that the highest standards are required in all Catholic educational institutions. New norms, however, could clarify: precisely what professional qualifications are required and what constitutes equivalent experience or expertise; which teachers require a mandate; whose responsibility it is to obtain or grant it; and whose responsibility it is to remove it.

## **PART II**

### **THE USE OF EXPERTS IN THE JUDICIAL FORUM: MARRIAGE LAW**

## CHAPTER 4

### THE LAW OF MARRIAGE AND ITS TREATMENT OF EXPERTS

This Chapter examines the canon law of the Catholic Church on matrimony and the role of experts under it in determining the capacity of the parties to marriage. Capacity, including psychological capacity for marriage, is fundamental to a valid marriage; incapacity renders a marriage invalid. Moreover, establishing psychological incapacity is equally vital before a failed marriage can be declared invalid under this head. The law requires experts to play a key role in marriage nullity cases concerning psychological incapacity. By way of contrast, however, there are some circumstances in which the decision-maker who declares a marriage invalid (usually a tribunal) is qualified to make the decision alone, and so the role of experts in establishing incapacity is minimal or not required, or has discretion as to whether or not to consult experts.

What follows examines: (1) the substantive law of marriage (as it expresses the doctrine of the Church); (2) the structure, competence and procedure of the marriage tribunals; (3) the law on the use of experts in marriage cases generally; and (4) the use of experts in the process of declarations of marriage nullity with particular reference to their use in the special case of psychological incapacity. These matters are explored by analysis of materials including, the Catechism of the Catholic Church, *CIC* (particularly canon 1095 on psychological incapacity), jurisprudence of the papal tribunals, papal speeches to tribunal personnel (namely, Papal Allocutions), other Vatican documents and the writings of canonists. Comparisons will also be made with the use of experts in *CIC* 1917 and *CCEO*. This examination is needed in order to establish the framework for the case studies (treated in Chapters 5 and 6) and whether the judicial processes used in these cases comply with the relevant law.



## 1. THE SUBSTANTIVE LAW OF MARRIAGE

The substantive law of the Church deals with what constitutes marriage - that is, its nature and formation; what prevents formation; and how the Church deals with ‘terminating’ these unions.<sup>1</sup>

**The Nature of Marriage: Formation and Validity:** In Roman Catholic doctrine, the consent of the parties makes a marriage; and consummation makes a ratified marriage absolutely indissoluble.<sup>2</sup> Marriage was established by the Creator, and is an irrevocable covenant,<sup>3</sup> entered into by mutual and free consent, exchanged between one man and one woman.<sup>4</sup> Parties consent to indissolubility, fidelity and a union open to fertility.<sup>5</sup> The vocation to marriage ‘is written in the very nature of man and woman as they came from the hand of the Creator’.<sup>6</sup> To marry, therefore, is a right of natural law.<sup>7</sup> Although marriage can be threatened with disorder by evil, this can be overcome with God’s grace.<sup>8</sup> The law of the Church is built around these doctrinal tenets.

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<sup>1</sup> If formation is prevented a true marriage fails to come into existence and therefore it can be declared null, *ab initio*, that is, from the outset, as distinct from terminated.

<sup>2</sup> CCC, p364, para 1626. See Appendix IV. In 12C the school of Bologna (represented essentially by the canonist Gratian) held that the exchange of solemn promises *and* consummation made marriage, whilst the school of Paris (represented by the theologian, Peter Lombard) held that consent alone made marriage. Alexander III ended the debate by decreeing, in 1181 that marriage came into being through consent alone, but the bond could not be dissolved if the marriage was consummated. Therefore, consummation made *sacramental* marriage (that is, between two Christians) *absolutely* indissoluble. The principle of consensual contracts was already established in Roman law, but it was not until the 12C that canonists classified marriage in the context of a consensual contract. See Beal, *New Comm*, p1236 and Ladislav Örsy, *Marriage in Canon Law: Texts and Comments; Reflections and Questions*, (Dublin, 1988) (hereafter Örsy, *Marriage in Canon Law*), p26. At p61, Örsy explains that the exchange of consent was akin to the Roman idea of a consensual contract, which was informal rather than formal.

<sup>3</sup> Although *CIC* uses the word ‘contract’ more frequently, it sometimes refers to a ‘covenant’. E.g., *CIC*, cc. 1055§1; 1057§2; and 1063, 4°. See Appendix I. Kelly, *L&S*, p572, para 2057 explains: ‘The term [covenant], which is used to translate the Latin *foedus*, ... serves to broaden and enrich the concept of Christian marriage, by linking it (a) to the covenant between God and his chosen people and (b) to the Pauline model of the Church as the spouse of Christ, although the terms “covenant” and “contract” refer to the same reality’. For doctrinal sources see CCC, p361, para 1612 in Appendix IV and *GS*, 48 in Appendix VI.

<sup>4</sup> CCC, p359, para 1605; and p364, paras 1625 and 1628. See Appendix IV. ‘Freedom’ has two aspects: freedom from canonical impediment; and psychological freedom.

<sup>5</sup> CCC, p361, para 1614; p368, para 1643; and p370, para 1652. See Appendix IV.

<sup>6</sup> CCC, p359, para 1603. See Appendix IV. Marriage is, therefore, a divinely created but natural institution.

<sup>7</sup> *GS*, 26. See Appendix VI.

<sup>8</sup> CCC, p360, paras 1606 -1608. See Appendix IV.

*CIC* 1917 described, but did not define, this doctrinal concept of marriage.<sup>9</sup> Between the baptized, it was a sacrament; its primary end was the procreation and education of children; its secondary end was the mutual support of the spouses; and its essential properties were unity and indissolubility.<sup>10</sup> *CIC*, too, describes rather than defines marriage.<sup>11</sup> Marriage is a permanent and exclusive, irrevocable covenant between one man and one woman'; it is ordered to the well-being of the spouses and to the procreation and upbringing of children; its essential properties are unity and indissolubility; and it results from the legally manifested and free exchange of consent between parties who are legally capable of it.<sup>12</sup> *CIC* does not define the rights and duties of the spouses either, but these, too, can be deduced largely from various canons.<sup>13</sup> As we have seen, the parties' consent obliges them to permanence, fidelity and openness to children; and each party assumes, at the exchange of the marital consent, equal obligations and rights within marriage and towards the community.<sup>14</sup> Moreover, parents have a duty to care for, and educate, their children.<sup>15</sup>

As to validity, under *CIC*, every marriage, once celebrated according to the law applicable to the parties at the time, is presumed to be valid; if validity is challenged by one of the parties, this presumption can cede to proof of the contrary.<sup>16</sup> *CIC* canon 1060 provides:

'Marriage enjoys the favour of the law. Consequently, in doubt, the validity of a marriage must be upheld until the contrary is proven'.

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<sup>9</sup> Doyle, *Text&Comm*, p738.

<sup>10</sup> *CIC* 1917, cc. 1012§1; and 1013§§1 and 2. See Appendix III.

<sup>11</sup> Several canons are theological statements giving canonical effect to the doctrine of marriage.

<sup>12</sup> *CIC*, cc. 1055§1; 1056; 1057§§1 and 2; and 1134. See Appendix I. The emphasis placed in *CIC* 1917 on the primary and secondary ends of marriage has been abolished.

<sup>13</sup> *CCC*, p365, para 1631. See Appendix IV. See also: Cormac Burke, 'The Essential Obligations of Matrimony', *Studia Canonica*, 26 (1992), pp379-399. Burke notes that the 'essential' rights and duties are not listed in canon 1095, but, citing John Paul II, *Allocution to the Roman Rota* (1984), in which the Pope acknowledged that the canon has been 'formulated in a generic way', and awaits 'further determination', suggests that the lacuna 'is evidently meant to be filled in by doctrine and in particular by jurisprudence'.

<sup>14</sup> *CIC*, cc. 226§1; and 1135. See Appendix I.

<sup>15</sup> *CIC*, cc. 226§2; 793; 797; 798; and 1136. See Appendix I. For Christian parents, this extends to Christian education; and for Catholic parents, to Catholic education.

<sup>16</sup> *CIC*, c. 1674. See Appendix I. Kelly, *L&S*, p576, para 2071 explains: Marriage is presumed to be valid even when proof of a ceremony is lacking but marriage is 'in possession', that is, 'where the parties and others genuinely believe' the couple was actually married. See also *DC*, Articles 2§1; and 4§1 in Appendix V. The juridical status of this document is discussed below. Also Michelle Flood, 'Presumption in Canon Law and its Application to Marriage Legislation', *Studia Canonica*, 41 (2007), pp401-440, at p407: 'To overturn a presumption, either the presumption itself is challenged or the fact it is established on is challenged'.

Although baptism of both parties is required for capacity to receive the *sacrament* of marriage, Roman Catholic canon law admits of different types of marriages: (a) a *natural law* marriage, that is, one between two non-baptised persons or between a baptised person and a non-baptised person; (b) a *sacramental* marriage, that is, one between two baptised persons;<sup>17</sup> and (c) a ratified *and* consummated marriage.<sup>18</sup> However, all marriages are considered intrinsically indissoluble; the continuation of a validly contracted marriage does not depend on the will or conduct of the parties.<sup>19</sup>

*CCEO* describes marriage, matrimonial consent, and form, similarly to *CIC*.<sup>20</sup> Essential to valid marriage, therefore, is the legally manifested and free consent of a man and a woman who are legally capable. This consent must be ordered to: unity; indissolubility; the well-being of the spouses; and the procreation, upbringing and education of children.

**Termination of a Valid Marriage:** Only death of a spouse terminates valid, *sacramental* and consummated marriages.<sup>21</sup> *Natural law* marriages can be dissolved by virtue of the Pauline privilege if *neither* party was baptised and under certain conditions.<sup>22</sup> Dissolution by virtue of the Petrine privilege is possible if only one party was baptised.<sup>23</sup> In these cases, the

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<sup>17</sup> *CIC*, cc. 842§1; 849; and 1055. See Appendix I. Baptism is a sacrament of initiation; therefore, a party who is not baptised can neither receive nor administer the sacrament of matrimony. In Roman Catholic theology, parties to marriage administer the sacrament to one another; the minister or official witness ‘assists’ by receiving the parties’ matrimonial consent on behalf of the Church (see *CCC*, p365, para 1630, in Appendix IV). In Eastern Catholic Churches the minister of the sacrament is the priest or bishop who, having received the parties’ consent, ‘crowns’ the parties (see *CCC*, p364, para 1623, Appendix IV). Marriage is *ipso facto* a sacrament between baptised parties.

<sup>18</sup> *CIC*, c. 1061§1. See Appendix I.

<sup>19</sup> *GS*, 48. See Appendix VI. Also John Paul II, *Allocution to the Roman Rota* (1997); and Benedict XVI, *Allocution to the Roman Rota* (2009). See Appendix VII.

<sup>20</sup> *CCEO*, cc. 776 - 780. See Appendix II. With regard to form, because the Eastern Churches are Churches *sui iuris*, some variation occurs. Also because of the close relationship between the Eastern Catholic and Eastern non-Catholic (Orthodox) Churches, some variation occurs in the law governing the celebration of marriages between an Eastern Catholic and an Eastern non-Catholic (see *CCEO*, cc. 828-842 in Appendix II).

<sup>21</sup> *CIC*, c. 1141. See Appendix I.

<sup>22</sup> See *CIC*, cc. 1143-1150 for norms governing dissolution by virtue of the Pauline Privilege (when *neither* party was baptised throughout the marriage and one seeks baptism but the other departs). If one party receives baptism during the marriage, the Petrine privilege applies. See Appendix I.

<sup>23</sup> Petrine privilege cases (when only one party was baptised throughout the marriage and a party seeks a new marriage) are governed by their own norms. If the unbaptised party receives baptism during the marriage, the marriage automatically becomes sacramental. See SCDF, Instruction, *Ut notum est* (6 December 1973), cited by Kelly, *L&S*, p650, para 2321. Interestingly, according to Kelly, these norms were not promulgated but an English translation can be found in *Canon Law Digest*, 8, pp1177-1184.

ecclesiastical authorities alone are usually competent but they could consult experts, for example to authenticate documents.

A party to a valid *sacramental but non-consummated* marriage can, for a just reason, seek dissolution and dispensation from the obligations of marriage from the Roman Pontiff.<sup>24</sup> Under *CIC* 1917, in these cases in which non-consummation was claimed, the use of experts for corporal inspection was mandated, unless this would serve no purpose.<sup>25</sup> Whilst this is not required under *CIC*, provision is made for expert assistance in difficult cases or if the Apostolic See considers that the fact of non-consummation has not been proven.<sup>26</sup>

**Termination of an Invalid ‘Marriage’:** Although all celebrated marriages are presumed valid, canon law recognises that by virtue of a serious flaw, some are not true marriages as understood by the Church.<sup>27</sup> Canon law does not treat of ‘voidable’ marriages; consequently, any marriage declared null is considered null *ab initio*. Whilst canon law enshrines the principle of freedom to marry, it also recognises that the natural right to marry is not absolute.<sup>28</sup> Formation of marriage is prevented by: the existence of an impediment; lack or defect of form; or invalid consent.

*Impediments to marriage:* *CIC* 1917 distinguished impedient impediments, which simply forbade marriages and therefore rendered them unlawful, from diriment impediments, which were invalidating.<sup>29</sup> *CIC* makes no such distinction: a diriment impediment renders a person

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<sup>24</sup> *CIC*, c. 1142. See Appendix I. The process for dispensation from non-consummated marriage is governed by *CIC*, cc. 1697-1706.

<sup>25</sup> *CIC* 1917, c. 1976. See Appendix III.

<sup>26</sup> *CIC*, cc. 1701§2; and 1705§3. See Appendix I.

<sup>27</sup> They are, however, considered putative marriages and children born of these unions are legitimate. See *CIC*, cc. 1061§3 and 1137 in Appendix I. Kelly in *L&S*, p578, para 2075, citing *CComm*, rep 26.I.1949; and *CLD* 3 405 explains: “‘celebrated’ in this context means celebrated before the Church’ and cases of total lack of form, such as occurs when a Catholic marries outside the Church without dispensation, are not considered putative marriages. In order to be considered ‘putative’ and therefore subject to judicial process, a marriage ‘must be invalid by reason of an impediment, a defect of consent, or a defect of canonical form which was not total, e.g., where the person assisting at the marriage was not authorised to do so in accordance with Cann.1108-1112, or where there were not two witnesses’. However, if the parties were unaware of the lack of authorisation, or a party became aware at a later date, a *sanatio in radice* (retroactive validation) is possible. Although *CIC* does not repeat the negative implications of illegitimacy of *CIC* 1917, Kelly, *L&S*, p641, para 2294, citing *Comm*, 10 (1978) 106 at Can 333; 15 (1983) 240 at Can 1091-1094 explains that the notion of illegitimacy was retained ‘since it might have consequences in particular law and in order to highlight the sanctity of marriage’.

<sup>28</sup> *CIC*, cc. 843§1; and 1058. See Appendix I.

<sup>29</sup> *CIC* 1917, c. 1036§§1 and 2. See Appendix III.

incapable of marriage.<sup>30</sup> *CIC* contains an exhaustive list of impediments; namely: lack of the requisite age; antecedent and perpetual impotence; prior bond; non-baptism of one party; sacred orders; public perpetual vow of chastity taken in a religious institute; abduction for the purpose of marriage; murder for the purpose of marriage; prohibited degrees of kinship (consanguinity); affinity; public propriety; and legal relationship arising from adoption.<sup>31</sup> *CCEO* lists similar, invalidating, impediments.<sup>32</sup>

It is worth noting at this stage of our discussion that ecclesiastical authorities (typically clergy) have discretion as to the use of experts to establish the existence of impediments (either by approaching experts during the investigation for freedom to marry prior to marriage, or when the validity of a marriage is challenged on the basis of an impediment).<sup>33</sup> However, in the case of the impediment of impotence, which, whether due to a physical or psychological cause, is a medical condition, consulting at least one expert is mandatory (unless the authority decides that this would serve no purpose).<sup>34</sup> Consequently its true existence, and its antecedent and perpetual

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<sup>30</sup> *CIC*, c. 1073. See Appendix I. Kelly, *L&S*, p589, para 2110, commenting on this canon, explains that a diriment impediment ‘is an objective circumstance attaching to a person which, in virtue of either divine or human law, makes that person *incapable* of validly contracting marriage. ... [It] is not to be interpreted as a restriction on the natural right to marry enjoyed by all; it is, rather to be seen as a necessary regulation of the exercise of that right, in the specific interest of the spouses themselves, of the family and of the common good of society (see Can. 1058). Thus understood, this canon is a clear example of an *incapacitating law* (see can 10 and commentary thereon), which operates independently of the person’s knowledge or will; in other words, it renders invalid even a marriage which is contracted in good faith by one or both of the parties (see Can 15§1). This is so even if the impediment directly affects only one of the parties, as e.g., in the case of the impediment of age (see Can 1083§1): a marriage cannot be invalid for one party and valid for the other’. Emphases in original. See also *CIC*, c. 1073. Impediments are governed by cc. 1073-1094. Some are of divine law, which bind Catholics and non-Catholics alike and cannot be dispensed; for example the impediment of consanguinity in the direct line and in the second degree of the collateral line (*CIC*, cc. 1091§1; and 1078§3). Others, of merely ecclesiastical law, binding only Catholics, can be dispensed, but some require that certain conditions are met (see for example, *CIC*, c. 1129). Dispensation is sometimes reserved to the Holy See (see *CIC*, c. 1078§2). In some cases, ecclesiastical law is an extension of divine law: for example divine law prohibits marriage in the direct line of consanguinity and up to the second degree of the collateral line; ecclesiastical law extends this to the fourth degree (see *CIC*, c. 1091§1). See Appendix I.

<sup>31</sup> *CIC*, cc. 109§1; 1075§1; 1083§1; 1084§1; and 1085-1094. See Appendix I. Kelly, *L&S*, p609 explains: ‘The impediment of affinity is based upon a relationship through a valid marriage. It exists between the man and the blood relations of the woman, and between the woman and the blood relations of the man’.

<sup>32</sup> *CCEO*, cc. 790§1; and 800-812. However, these are not identical to *CIC*: for example, *CCEO*, c. 811 retains the *CIC* 1917 (c. 1079) impediment of spiritual relationship, that is between the person being baptised and the sponsor or the minister, which is no longer retained in *CIC*. See Appendix II.

<sup>33</sup> *CIC*, cc. 1066; and 1574. See Appendix I.

<sup>34</sup> *CIC*, c. 1680. See Appendix I.

nature, must be established; where doubt exists, marriage is neither to be forbidden, nor declared null.<sup>35</sup>

*Lack/Defect of Form:* There is some tension between the doctrine that consent alone makes marriage and canon law, which adds other associated formal criteria for validity; *CIC* stipulates that Roman Catholics are incapable of valid marriage unless they manifest that consent according to the norms laid down for ritual.<sup>36</sup> An authorised or delegated person must assist by receiving consent in the name of the Church.<sup>37</sup> The marriage must take place ordinarily in the parish church of one of the parties; otherwise permission is required.<sup>38</sup> Liturgical norms must be followed, and records kept.<sup>39</sup> This tension between doctrine and law is highlighted in *CIC* canon 1107, which presumes valid consent despite the existence of an impediment or defect of form.<sup>40</sup> Nevertheless, when at least one party to a marriage is Catholic, capacity for valid marriage involves conformity with canon law governing ritual. However, when only one party is

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<sup>35</sup> *CIC*, c. 1084§2. See Appendix I. Kelly *L&S*, p599, para 2142 explains: '[Impotence] involves three essential elements: (a) erection of the male member; (b) penetration, at least partial, by it of the female vagina; (c) ejaculation within the vagina. If any of these is impossible - for whatever reason, whether on the part of the male or on that of the female - there is impotence. This impotence will, however, invalidate a marriage only if it is antecedent, perpetual and certain'.

<sup>36</sup> *CIC*, c. 1. See Appendix I. Also Kelly, *L&S*, p622, para 2229, citing Fourth Lateran Council Constitution 51: *Conciliorum Oecumenicorum Decreta*, Bologna 1991 258, 755-757 and Denzinger & Schönmetzer *Enchiridion Symbolorum* 1813-1816, explains that the Council of Trent issued a decree *Tametsi* in 1563, which, for validity, required a marriage to be celebrated before an authorised priest and at least two witnesses, a record of which was to be kept in the parish register. Beal, *New Comm*, p1238, ft 30, citing *AAS*, 40 (2 August 1907) pp525-530, explains that because of the upheaval caused by the Reformation, *Tametsi* was not universally promulgated, particularly in Protestant countries. It was not until the Sacred Congregation for the Council promulgated the decree *Ne Temere* in 1907 that the law requiring the observance of the 'form' of marriage for validity, was promulgated universally. See also *CCC*, p365, paras 1630 and 1631. See also James A Brundage, *Law, Sex and Christian Society in Medieval Europe* (Chicago and London, 1987) pp552-561.

<sup>37</sup> *CIC*, cc. 1108 - 1123 for norms governing the form of marriage. See Appendix I. The term 'lack of form' is used when there is a total lack, that is, when, for example a Catholic marries totally outside the Church without dispensation. The term 'defect of form' is used when, for example, the assisting minister is not properly delegated. See ft 27 above. The requirements of c. 1112§2, that a delegated lay person be: 'suitable'; 'capable of giving instruction to those who are getting married'; and 'fitted to conduct the marriage liturgy properly'; does not, however, go to the validity of the marriage. Kelly, *L&S*, p626, para 2243, citing *Comm*, 15 (1983), 236 at Can. 1066, explains that the lay person acts as a 'qualified witness' and is 'in no way exercising the power of governance' and 'may not do anything reserved to a priest or deacon'.

<sup>38</sup> *CIC*, c. 1115; and 1118. Permission is also required for a marriage between a Catholic and a non-Catholic Christian (see *CIC*, c. 1124). *CIC*, cc. 1125- 1128 provide for the conditions under which permission can be granted. However, failure to obtain permission goes to lawfulness rather than validity (see *MM*, 1 in Appendix VI). *CIC*, cc. 1116; and 1130-1133, make provision for exceptional circumstances in the absence of a delegated minister and for marriages celebrated in secret. See Appendix I.

<sup>39</sup> *CIC*, cc. 1119-1123. See Appendix I.

<sup>40</sup> *CIC*, cc. 1107; and 1161§1. See Appendix I. This is significant in cases of the retroactive validation of an invalid marriage due to cessation of the invalidating impediment, when consent can be assumed to endure.

Catholic, a dispensation can be granted; no experts are involved as the local Ordinary is competent to grant the dispensation.<sup>41</sup> When non-Catholic Christians marry, the Catholic Church applies the law governing marriage in their own church or ecclesial community.<sup>42</sup> Likewise, in the case of non-Christians, the law by which the parties were bound at the time of the marriage is applied by the Catholic Church.<sup>43</sup>

*Invalid consent:* The law recognises certain circumstances invalidating marital consent: psychological incapacity; ignorance; error of person; error concerning a quality of person, which was directly and principally intended; deceit; error determining the will concerning the unity, indissolubility, or sacramental dignity of marriage; a positive act of the will excluding marriage, or ‘any essential element’ or ‘any essential property’ of marriage; the unlawful imposition by one party of a condition upon the other; force or grave fear; or absence of a party from the ceremony, or absence of a valid proxy.<sup>44</sup> *CCEO* lists similar circumstances.<sup>45</sup>

## 2. THE STRUCTURE, COMPETENCE AND PROCEDURE OF THE TRIBUNALS

This section begins with the hierarchical structure of tribunals and the personnel who function within them. The law concerning the competence of tribunals generally and with regard to marriage cases will then be outlined, followed by the law governing administrative and judicial procedures in marriage cases.

**Structure of Tribunals:** Roman Catholic ecclesiastical courts, referred to as tribunals, are hierarchically structured.<sup>46</sup> The Pope is the supreme judge in the Church.<sup>47</sup> The diocesan bishop

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<sup>41</sup> *CIC*, c. 1127§2. See Appendix I.

<sup>42</sup> *Dignitas Connubii (DC)*, Article 4§1. See Appendix V.

<sup>43</sup> *DC*, Article 4§2. See Appendix V.

<sup>44</sup> *CIC*, cc. 1095-1099; 1101-1105. See Appendix I. Canon law governing the intention of the mind required to receive sacraments is based on sacramental theology; the intention must be to do what the Church intends. See Ladislav Örsy, *Marriage in Canon Law: Texts and Comments; Reflections and Questions* (Dublin, 1988) (hereafter, Örsy, *Marriage in Canon Law*), p127. Kelly, *L&S*, p617, para 2210, defines a condition placed on a marriage thus: ‘a stipulation by which an agreement is made contingent upon the verification or fulfilment of some circumstance or event which is not yet certain’.

<sup>45</sup> *CCEO*, cc. 818- 827. See Appendix II.

<sup>46</sup> Because Eastern Churches are churches *sui iuris*, there are some differences between *CIC* and *CCEO* in the provisions for church tribunals. See *CCEO*, cc. 1055-1085 in Appendix II.

<sup>47</sup> *CIC*, c. 1442. See Appendix I.

is the judge of a local (diocesan) tribunal of First Instance.<sup>48</sup> Appeals from First Instance are usually heard by the Appellate Metropolitan Tribunal of Second Instance.<sup>49</sup> Further appeals to higher instances are usually heard at the Papal Tribunal, called the Roman Rota.<sup>50</sup> The Church's supreme tribunal is the Apostolic *Signatura*.<sup>51</sup> The purposes of a trial are: (1) to pursue or vindicate rights; (2) to declare juridical facts; or (3) to impose or declare penalties.<sup>52</sup> Marriage cases concern (1) and (2).<sup>53</sup>

The diocesan bishop is obliged to appoint a Judicial Vicar, who is his principal judge, but may also appoint assistants, called 'associate Judicial Vicars'.<sup>54</sup> The diocesan bishop is also obliged to appoint clerical judges, but may, with approval of the Bishops' Conference, also appoint lay judges; all these personnel must have a doctorate or licentiate in canon law and be 'of good repute'.<sup>55</sup>

The diocesan bishop must also appoint a promoter of justice and a defender of the bond, who can be clerics or lay people, but must also have a doctorate or licentiate in canon law and be 'of good repute' and 'of proven prudence and zeal for justice'.<sup>56</sup> The former must participate in penal cases and is bound to protect the public good; the latter must intervene in cases involving nullity of sacred orders or nullity or dissolution of marriage and must highlight everything which can be argued reasonably against nullity or dissolution.<sup>57</sup> When the law mandates the participation of these tribunal officials, their absence renders the Acts of the case null.<sup>58</sup>

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<sup>48</sup> *CIC*, c. 1419. See Appendix I.

<sup>49</sup> *CIC*, c. 1438. See Appendix I. See c. 435 for a definition of Metropolitan.

<sup>50</sup> *CIC*, cc. 1443; and 1444§1. See Appendix I.

<sup>51</sup> *CIC*, c. 1445§1. See Appendix I. The Apostolic *Signatura*, the Church's Supreme Tribunal sometimes grants competence to Second Instance Tribunals to hear cases in the third grade.

<sup>52</sup> *CIC*, c. 1440. See Appendix I.

<sup>53</sup> The imposition of a *vetitum* (a prohibition on future marriage) is not a penalty; it is a pastoral tool to ensure that a new marriage is not contracted until the invalidating cause no longer exists. See ft 98 below.

<sup>54</sup> *CIC*, c. 1420§§1, 2 and 3. See Appendix I.

<sup>55</sup> *CIC*, cc. 1420§4; and 1421§§1, 2 and 3. See Appendix I.

<sup>56</sup> *CIC*, c. 1435. See Appendix I.

<sup>57</sup> *CIC*, cc. 1430; 1431§1; 1432; 1696; and 1721. See Appendix I.

<sup>58</sup> *CIC*, c. 1433. See Appendix I. 'Acts' refer to the entire bundle of papers put before the judges. As will become clear in Chapters 5 and 6, validity of the procedural Acts is of particular importance in marriage nullity cases, the purpose of which is to pronounce on the personal status of the parties, that is, whether or not they are free to marry.



A party may appoint an advocate and procurator; but in penal cases, the appointment of an advocate is mandatory.<sup>59</sup> Advocates and procurators must be adults of good reputation and must present an authentic mandate to the tribunal; the advocate, however, must be Catholic, unless the diocesan bishop permits otherwise, and must hold a doctorate in canon law or be ‘truly skilled’ and approved by the same bishop.<sup>60</sup> It can be argued, therefore, that personnel who must have specific qualities, academic qualifications and experience are themselves ‘experts’ in their field. *CCEO* makes similar provisions to *CIC*.<sup>61</sup>

**Competence of Tribunals:** The Church claims exclusive competence to judge, not only disciplinary cases, but those ‘linked with the spiritual’, which include marriage cases.<sup>62</sup> Canon law governs the competent forum for judicial cases generally; for example, some cases are reserved to the Roman Pontiff, or to the Roman Rota.<sup>63</sup> Otherwise, the competent forum can be: one’s domicile or quasi-domicile; the place where the relevant subject matter is located; the place of contract; or the place where the offence was committed.<sup>64</sup> Canon law also governs the competence of judges.<sup>65</sup> Nevertheless, the faithful retain the right to approach the Holy See directly.<sup>66</sup>

With regard to marriage nullity cases, although the Church recognises the power of the civil authority over the merely civil effects of marriage,<sup>67</sup> her claim to competence over the marriages of the baptised, even if only one party is baptised, is comprehensive.<sup>68</sup> The Church, however, only hears marriage nullity cases of non-Catholics when there is a Catholic interest, that is, in order to establish a party’s freedom to marry a Catholic.<sup>69</sup> The competent forum for marriage

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<sup>59</sup> *CIC*, c. 1481. See Appendix I.

<sup>60</sup> *CIC*, cc. 1483; and 1484. See Appendix I.

<sup>61</sup> *CCEO*, c. 1086-1101. See Appendix II.

<sup>62</sup> *CIC*, cc. 1401; and 1671. See Appendix I. Kelly, *L&S*, p572, para 2059 explains that even before marriage was formally defined as a sacrament in the thirteenth century, it was traditionally held, since earliest times, that marriage had ‘a sacred dimension’.

<sup>63</sup> *CIC*, cc. 1404-1416. See Appendix I.

<sup>64</sup> *CIC*, cc. 102 (for acquisition of domicile and quasi-domicile); and 1408-1413. See Appendix I. See also *DC*, Article 10 in Appendix V, for competence for marriage nullity cases.

<sup>65</sup> *CIC*, cc. 1406; and 1407. See Appendix I. See also *DC*, Articles 8; and 9 in Appendix V.

<sup>66</sup> *CIC*, c. 1417. See Appendix I.

<sup>67</sup> *CIC*, cc. 1672. In cases of separation of spouses, see *CIC*, c. 692§§2, 3. See Appendix I. See also *CIC* 1917, c. 1016 in Appendix III and *CCEO*, cc. 780; and 1358 in Appendix II, for this recognition.

<sup>68</sup> *CIC*, cc. 1059; and 1671. See Appendix I.

<sup>69</sup> *DC*, Article 3. See Appendix V.

nullity cases is the tribunal of: the place of marriage; the respondent's domicile; the plaintiff's domicile if certain conditions are met; or the place where most of the proofs are to be gathered, if certain conditions are met.<sup>70</sup>

**Procedural Law: Administrative and Judicial:** This sub-section contains a brief outline of: (a) the types of marriage cases which can be dealt with administratively and the relevant process; and (b) the judicial procedure for marriage nullity cases.

### *Administrative Cases*

Dissolution of valid marriage, involving Pauline or Petrine privileges, are processed administratively:<sup>71</sup> the former by the diocesan bishop provided all canonical requirements are met; the latter, investigated and prepared locally, are forwarded, with the diocesan bishop's recommendation, to the Holy See for decision.<sup>72</sup> These ecclesiastical authorities are competent in these cases; the involvement of experts is not mandated. Although not strictly judicial, dispensation from ratified but non-consummated marriage cases are prepared locally under judicial procedural norms, and are then forwarded, with the bishop's recommendation, to the Roman Rota, for decision.<sup>73</sup> Although their use is not mandated, experts may be required in these cases to verify the fact of non-consummation.<sup>74</sup>

Cases involving separation of spouses, when the sacred bond of marriage remains intact, can be decided either by the diocesan bishop's decree or by a judgment of a judge; when canon law has

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<sup>70</sup> *CIC*, c. 1673. See Appendix I.

<sup>71</sup> See fts 22 and 23 above. The canons governing Pauline privilege cases are placed in Book IV of the Code, on The Sanctifying Office of the Church, not in Book VII on Judicial Procedures.

<sup>72</sup> *CIC*, cc. 1143-1150. See Appendix I. The SCDF is the competent body to process Petrine Privilege cases.

<sup>73</sup> *CIC*, c. 1142 on non-consummation is also found in Book IV, on The Sanctifying Office of the Church, but the process is governed by cc 1697-1706 under judicial processes, but the process differs somewhat from other marriage cases – eg, no advocate is involved (c.1701§2) and the Acts are not published (c. 1703§1). See *CIC*, c. 85 for dispensation as an exercise of 'executive power'. See Appendix I. See also *QR*, Article 2 in Appendix VI, for transfer of competence from the CDWDS to the Roman Rota. This provision came into force on 1 October 2011.

<sup>74</sup> Kelly, *L&S*, p947, para 3319 explains: 'Where there is no physical evidence of non-consummation and the basis for proving it is what is called the "moral argument", it will be important to have witnesses as to the moral character and credibility of the parties (see Can. 1679). If the principal evidence of non-consummation is physical, medical experts will obviously have to be called to attest to this fact'.

no civil effect, a civil judgment can suffice.<sup>75</sup> However, spouses retain the right to the ordinary contentious process and to appeal.<sup>76</sup> Nullity cases due to *lack* of form are processed administratively, similarly to pre-nuptial investigation establishing freedom to marry.<sup>77</sup> The involvement of experts is not mandated in these cases. All other nullity cases are subject to the judicial process.

### *Judicial Cases*

When the validity of a marriage is challenged, the object of the tribunal is to decide, by a search for objective truth, whether the (presumed) validity of marriage is upheld or can be overturned by proof of the contrary, in which case the couple is free to exercise their right to marry.<sup>78</sup> There are two types of judicial procedure for marriage nullity cases: the Ordinary Contentious Process and the Documentary Process. This section also deals with the level of proof required.

*Ordinary Contentious Process:* Because marriage enjoys the favour of the law and involves the public good, any challenge to its validity is contentious, even if a party does not contest the allegation.<sup>79</sup> Hence, marriage nullity cases are subject to the canons governing: trials in general; the contentious trial; the matrimonial process; and personal status. These procedural norms have been collated in the Instruction *Dignitas Connubii* (2005).<sup>80</sup> Only the spouses, or in exceptional cases the promoter of justice, can challenge the validity of marriage.<sup>81</sup> Before a judge accepts a marriage nullity case, he is obliged, whenever there is hope, to try to persuade the spouses to

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<sup>75</sup> *CIC*, c. 1692. See Appendix I. Kelly, *L&S*, p944, para 3305, citing *CCom*, rep 25.IV.1932: AAS 24 (1932); *CLD* I 554, explains that the Ordinary, either *ex officio* or at the request of the parties, can decide whether an administrative or judicial process is used.

<sup>76</sup> *CIC*, c. 1693. See Appendix I.

<sup>77</sup> As previously explained, lack of form is distinguished from defect of form (see fts 27 and 37 above). Lack of form for a Catholic could be verified by a baptismal certificate confirming baptism into the Catholic Church and a subsequent marriage certificate confirming the marriage in a non-Catholic Church or register office in addition to a search of the relevant chancellery records to establish whether or not a dispensation had been granted. In the event that a dispensation was granted, the presumption of validity prevails, in which case the judicial process would be required to investigate invalidity on a different ground.

<sup>78</sup> *DC*, Article 65§2. See Appendix V. Also Pius XII, *Allocution to the Roman Rota* (1944); and John Paul II, *Allocution to the Roman Rota* (1989); Appendix VII.

<sup>79</sup> Marriage is not a private contract. The legal (civil and canonical) requirement to have witnesses and to register the marriage reflects the public, communitarian nature of marriage. See Benedict XVI, *Allocution to the Roman Rota* (2006); Appendix VII.

<sup>80</sup> Hereafter *DC*.

<sup>81</sup> *DC*, Article 92§1. See Appendix V.

resume their conjugal life.<sup>82</sup> A party must petition the competent tribunal and the plaintiff bears the burden of proof.<sup>83</sup> The competent judge must accept or reject the petition.<sup>84</sup> The Judicial Vicar must constitute the tribunal and inform the plaintiff of the names of the appointed personnel.<sup>85</sup> The respondent must be cited, after which the case is pending.<sup>86</sup> The grounds on which the case is to be heard are decided.<sup>87</sup> The proofs are gathered: parties and their witnesses are questioned and documents can be submitted.<sup>88</sup> The judge, too, can provide proofs.<sup>89</sup> When this process is complete, the parties must have access to accrued evidence and may comment further.<sup>90</sup> No additional evidence is permitted thereafter, but all evidence gathered must be submitted.<sup>91</sup> The discussion phase then begins: if an advocate has been involved, pleadings are submitted; the defender of the bond then submits observations.<sup>92</sup> The parties may respond.<sup>93</sup> The tribunal convenes.<sup>94</sup> The judges, having studied and weighed the evidence, bring their own written, reasoned opinion on the merits of the case.<sup>95</sup> A discussion follows.<sup>96</sup> Judges are permitted to change their opinions and may send a dissenting judgment secretly to the Appeal tribunal.<sup>97</sup> Judgment is by majority vote and it is pronounced; and a *vetitum* is imposed if necessary.<sup>98</sup> Denial of the right of defence invalidates the judgment.<sup>99</sup>

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<sup>82</sup> DC, Article 65. See Appendix V. See also John Paul II, *Allocution to the Roman Rota* (1990), stating that this provision was not to be understood as a mere formality. See Appendix VII.

<sup>83</sup> DC, Article s 114; 115§1; and 156§1. See Appendix V.

<sup>84</sup> DC, Articles 119; and 121. See Appendix V.

<sup>85</sup> DC, Article 118. See Appendix V.

<sup>86</sup> DC, Articles 126-134; and 138-142. See also Articles 143- 152 governing suspension, abatement and renunciation of the instance and Articles 153-154 governing suspension in cases of doubtful consummation. See Appendix V.

<sup>87</sup> DC, Articles 135-137, govern this procedure. See Appendix V. The parties can have recourse against these grounds.

<sup>88</sup> DC, Articles 155-202. See Appendix V.

<sup>89</sup> DC, Article 7§2. See Appendix V.

<sup>90</sup> DC, Articles 229-236. See Appendix V.

<sup>91</sup> DC, Articles 237-239; and 241. See Appendix V.

<sup>92</sup> DC, Article 240. See Appendix V.

<sup>93</sup> DC, Articles 242; and 243§1. See Appendix V.

<sup>94</sup> DC, Articles 246-262. See Appendix V.

<sup>95</sup> DC, Articles 48§1 (for norms on assigning judges); and 248 for the convening of the tribunal for judgment. See Appendix V. Also *CIC*, c. 1425 for cases reserved to a collegiate tribunal of three judges: these include contentious cases concerning the bond of marriage. See Appendix I.

<sup>96</sup> DC, Article 248§3. See Appendix V.

<sup>97</sup> DC, Article 248§4. See Appendix V.

<sup>98</sup> Articles 31; 250§1; and 254§1. See Appendix V. A *vetitum* is a prohibition on future marriage. See Jack Hopka, 'The *Vetitum* and *Monitum* in Matrimonial Proceedings', in *Studia Canonica*, 19 (1985), pp357-399 (hereafter Hopka, 'The *Vetitum* and *Monitum*'), p357. A *vetitum* can be administrative, for example, when it is applied to postpone a marriage in accordance with canon 1066, or judicial, when added to a judicial sentence. See also *CIC*, cc. 1684§1; and 1070, in Appendix I, providing for a prohibition on future marriage, but only the supreme authority in the Church can attach an invalidating clause to a prohibition. See also DC, Article 251, in Appendix V, for cases

*Documentary Process:* Marriage nullity cases involving impediments or *defect* of form can be decided by a single judge, following the (mandatory) intervention of the defender of the bond, using an abbreviated, so called, ‘documentary process’, on the basis of an authentic and incontrovertible document establishing the allegation *and* it is certain that no dispensation was granted.<sup>100</sup> If witness evidence is required, the ordinary contentious process is applicable.<sup>101</sup> That the defender of the bond is obliged to lodge an appeal, *if* there is doubt about the facts, implies that, unlike the ordinary contentious process, there is no automatic appeal.<sup>102</sup> The parties, however, retain the right of appeal.<sup>103</sup> If the judge fails to reach moral certainty of nullity he remits the case to the ordinary contentious process at First Instance.<sup>104</sup>

*Level of Proof Required to Declare Marriage Invalid:* Following the provisions of law regarding the efficacy of proofs, and having weighed those proofs in accordance with his conscience, the judge must reach ‘moral certainty’ of nullity, based on *the acts and the proofs*, before declaring a

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in which a prohibition is mandatory and those in which consideration of an imposition is mandatory. See also Kelly in *L&S*, p940, para 2393: Kelly holds that the importance of this pastoral tool is disregarded or at least considered of little importance, usually on the ‘simplistic grounds’ that it does not invalidate a future marriage; however, he makes the point that ‘the purpose of a *vetitum* is twofold: (a) to protect the sacrament of marriage; and (b) to alert a future possibly unsuspecting spouse or perhaps even a deceived spouse to the problems which occasioned the breakdown of the previous union’.

<sup>99</sup> *CIC*, c. 1620. See Appendix I.

<sup>100</sup> *CIC*, cc. 1686; and 1688. See Appendix I. Also *DC*, Articles 295-299; Appendix V.

<sup>101</sup> Robert Bourgon, *L&S*, p880, para 3069, holds that documentary cases are an exception to the norm of *CIC*, c. 1547, permitting witness evidence in all cases under the discretion of the judge. However, this interpretation is not universally held. Craig A Cox, *New Comm*, p1781, acknowledges Bourgon’s view, but holds, that witness evidence is permitted. *DC* Article 296§2, however, obliges the judge to ensure that all the requirements of the canon are met before embarking on the documentary process and Article 297§1 obliges him, in cases of impotence or defect of form, to carry out a preliminary investigation ‘lest a cause be admitted lightly and with temerity to the documentary process’. See Appendix V, for full text. Moreover, William Daniel, ‘Motives in *Decernendo* for Admitting a Cause of Marriage Nullity to an Ordinary Examination’, *Studia Canonica*, 26 (2011), pp67-120, at p69-70, criticises Craig and others’ interpretation of law, as ‘highly objectionable’, albeit on the issue of the role of the Second Instance Tribunal. Moreover, the ECtHR *Pellegrini -v- Italy*, 20 July 2001 (Application No: 30882/96), was highly critical of the ecclesiastical tribunals when, although witness evidence was submitted, they used the documentary process.

<sup>102</sup> *CIC*, c. 1687. See Appendix I. Kelly in *L&S*, p942, para 3298, however, appears to understand that if the defender is in doubt, there is no obligation to appeal: ‘[T]he defender *can* appeal against the sentence *if* he prudently considers that the defects mentioned in Can. 1686 are not established or that there is some doubt about the lack of a dispensation (§1)’. Emphasis added.

<sup>103</sup> *CIC*, c. 1687§2. See Appendix I.

<sup>104</sup> *CIC*, c. 1686 *permits* the judge to omit the formalities of the ordinary contentious process *if* uncontroverted documents prove nullity of the marriage. See also *CIC*, c. 1688 in Appendix I and Kelly, *L&S*, p942, para 3297.

marriage null; otherwise, he is obliged to find the case not proven.<sup>105</sup> Strict norms govern the content of the judgment, and the method of communication to the parties.<sup>106</sup> Compliance is crucial, going to efficacy and legitimacy of the transmission of the case to Second Instance.<sup>107</sup> Parties must be advised as to how the decision can be challenged.<sup>108</sup>

A decision for nullity is subject to automatic appeal.<sup>109</sup> Provision is made for challenging the judgment, either by a plaint of nullity, or by appeal.<sup>110</sup> Two conforming sentences are required before a declaration of nullity can be issued.<sup>111</sup> First Instance decisions for nullity can be ratified by an abbreviated process, or, if the judges cannot reach moral certainty of nullity by this abbreviated process, the First Instance decision can be confirmed after a Second Instance hearing following the ordinary contentious process, even with the possibility of submitting further evidence.<sup>112</sup> First Instance decisions against nullity, if appealed, are always subject to the ordinary contentious process at Second Instance, as are those cases appealed to higher grades of trial.<sup>113</sup> Marriage cases never become an adjudged matter; they remain open to challenge at a new examination on the basis of new and serious proofs.<sup>114</sup>

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<sup>105</sup> *DC*, Article 247§§2-5. See Appendix V. See also Pius XII, *Allocution to the Roman Rota* (1942) for a definition of ‘moral certainty’; Appendix VII. It is akin to the concept of ‘beyond reasonable doubt’ in secular criminal law.

<sup>106</sup> *DC*, Articles 250-256; and 258. See Appendix V. Although the term ‘publication’ is used, it refers only to the principle parties (or their procurators) and the defender of the bond. See also John Paul II, *Allocution to the Roman Rota* (1989) in Appendix VII.

<sup>107</sup> *DC*, Article 257§1. See Appendix V. See also John Paul II, *Allocution to the Roman Rota* (1989) in Appendix VII. Grzegorz Erlebach (Judge of the Roman Rota), ‘The Challenge of the Sentence and the Transmission of the Cause *Ex Officio*’, in *Dugan*, 117-140 at pp126-128, insists that the full reasoned judgment (not just the dispositive part), must be given or sent to the parties as the ‘most fundamental prerequisite’ to legitimate transmission of a cause to the appeal tribunal. At p127, ft 28, Erlebach criticises tribunals for practices which are ‘incongruous with the law’, by which tribunals send ‘only the dispositive part of the sentence with a note that the party may request a complete copy of the sentence at the tribunal offices’.

<sup>108</sup> *CIC*, c. 1614. See Appendix I. Also *DC*, Article 257§2; Appendix V.

<sup>109</sup> *DC*, Article 263-268. See Appendix V.

<sup>110</sup> *DC*, Articles 269-278 (governing a plaint of nullity); and Articles 279-289 (governing appeal). See Appendix V.

<sup>111</sup> *DC*, Article 291. See Appendix V.

<sup>112</sup> *DC*, Article 265; and 267§1. See Appendix V.

<sup>113</sup> *DC*, Articles 266; and 268. See Appendix V. A Third Instance judgment is required if the judgments at First and Second Instance are not in conformity. The grade of tribunal does not always coincide with the grade of trial. See *CIC*, cc. 1417; 1632§2; and 1683 in Appendix I.

<sup>114</sup> *DC*, Articles 289§1; and 290§1. See Appendix V. There are many examples of this occurring; for example, see Augustine Mendonça (Ed), *Rotal Anthology: An Annotated Index of Rotal Decisions from 1971 to 1988* (CLSA, 1992) (hereafter Mendonça, *Anthology*): Case No: 83-097, *coram* Pinto, 27 May 1983, *ME* 110 (1985) 328-337, pp64-65 and Case No: 75-050, *coram* Raad, 14 April 1975, *Dec* 67 (1986) 238-272, p89. Although there had been two conforming decisions for nullity in these cases, the respondent in the former case and the respondent and defender in the latter, appealed to the Roman Rota, which admitted the case to a new hearing on the basis of ‘serious violations of procedural law by the first instance tribunal’ in the former and ‘approaches and opinions’ which were

### 3. THE LAW ON THE USE OF EXPERTS IN MARRIAGE CASES GENERALLY

*CIC* is more attentive to marriage preparation than was *CIC* 1917. It outlines the responsibility of the faithful for sacramental preparation, including marriage.<sup>115</sup> Although the term ‘expert’ is not used, the local ordinary has responsibility to provide for pre- and post-marital assistance, having, ‘if opportune’, consulted men and women ‘of proven experience and expertise’.<sup>116</sup> But the law is silent on what is required to fulfill these criteria. Nevertheless, canon law requires that it be *positively established*, with the help of the community, that no obstacle to valid or lawful celebration of marriage exists; this requires moral certainty to be reached.<sup>117</sup> Although marriage can be postponed, allowing time for resolution of doubt, there is no mandatory requirement to consult experts, at this stage, about the capacity of the parties to marry.<sup>118</sup>

As was the case under *CIC* 1917, the current canons governing the use of experts are placed amongst those governing trials.<sup>119</sup> *CCEO* does likewise and makes similar provisions to *CIC*.<sup>120</sup> *CIC* 1917, like *CIC* provided for consultation with experts whenever the law or the judge required it to establish some fact or to discern the true nature of something.<sup>121</sup> Without defining the word ‘expert’, it is, and was under *CIC* 1917, acknowledged that nevertheless, dialogue with experts was required, not just in judicial cases, but in other areas of decision-making and in other types of cases, as we have seen in previous chapters.<sup>122</sup> The provisions of these codes will be

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‘not in line with current doctrine and jurisprudence’ in the latter. The Rota upheld the validity of the marriage in both cases.

<sup>115</sup> *CIC*, cc. 843§2; and 1063. See Appendix I.

<sup>116</sup> *CIC*, c. 1064. See Appendix I. The American translations use the words ‘proven experience and skill’.

<sup>117</sup> *CIC*, cc. 1066 - 1070. See Appendix I. Kelly in *L&S*, p583, para 2094 explains that this obligation is not restricted to reporting listed impediments, but includes ‘other possible invalidating factors’ such as, ‘serious psychiatric illness’, ‘gross personal immaturity’, a ‘manifestly serious alcohol problem’, or the existence of duress or a condition. Doyle, *Text&Comm*, p581, para 2087 explains that ‘positive proof’ of the legal freedom to marry is required and ‘the person responsible for the preparation of the couple must be morally certain about their freedom...’.

<sup>118</sup> *CIC*, c. 1077. See Appendix I. As this canon restricts the free exercise of rights, it must, according to c. 18 be interpreted strictly.

<sup>119</sup> *CIC* 1917, Chapter III of Volume VII, Book IV on Ecclesiastical Trials, cc. cc 1792-1805. *CIC* Book VII: Judicial Procedures, cc. 1574-1581.

<sup>120</sup> *CCEO*, Title XXV, cc. 1255-1262.

<sup>121</sup> *CIC* 1917, c. 1792. See Appendix III. *CIC*, cc. 1574-1581. See Appendix I.

<sup>122</sup> Breitenbeck, *Doctoral Thesis*, p6 acknowledges the lack of definition despite the requirement to consult experts in ‘several key areas of decision-making’. Bourgon, *L&S*, p891, para 3108 refers to consulting ‘the psychological or psychiatric expert’ in marriage-nullity cases, but other situations could call for ‘theological, medical, legal, artistic’,

compared here as it is important to distinguish: (a) the roles that experts play in marriage nullity cases; and (b) discretionary and mandatory use of experts.

**Experts under *CIC 1917*:** Under *CIC 1917*, the ecclesiastical judge:

- Selected the expert: in private cases, he did so at the request of at least one party, with the consent of the other; in cases involving the public good, he was obliged to consult the promoter of justice and defender of the bond;<sup>123</sup>
- Had discretion to consult an expert in certain circumstances, or to recall an expert for clarification;<sup>124</sup>
- Defined the issues to be addressed by the expert;<sup>125</sup>
- Decided on the number of experts if not stipulated by law;<sup>126</sup>
- Had discretion as to whether or not parties could be present while the expert fulfilled his task;<sup>127</sup>
- Had discretion to set the time-limit for the expert's submission of his report, and to extend this having first consulted the parties;<sup>128</sup>
- Had discretion to consult additional experts if the original experts disagreed or were unsuitable;<sup>129</sup>
- Was obliged to weigh, in addition to the experts' opinions, the circumstances of the case;<sup>130</sup> and:
- Was obliged to explain, when he gave his decision, why he accepted or rejected the experts' opinions.<sup>131</sup>

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or 'financial experts'. Wrenn, *Text&Comm*, p986, refers to 'psychiatrists, psychologists' and 'gynaecologists, urologists, and even handwriting analysts'. Cox, *New Comm*, p1693, refers to experts in 'psychology, anthropology, sociology, theology, finance' and 'authentication of documents etc'. Boccafolo, in *ExComm*, Vol IV, 2, p1328, refers to experts in: the restoration of 'fine art'; 'architecture or building repair; 'the value of real estate'; or the fields of 'economics, civil law, or even canon law itself'; and 'the medical doctor and/or psychiatrist'.

<sup>123</sup> *CIC 1917*, c. 1793. See Appendix III.

<sup>124</sup> *CIC 1917*, cc. 1801§2; 1806; and 1808. See Appendix III.

<sup>125</sup> *CIC 1917*, c. 1799§1. See Appendix III.

<sup>126</sup> *CIC 1917*, c. 1793§3. See Appendix III.

<sup>127</sup> *CIC 1917*, c. 1797§2. See Appendix III.

<sup>128</sup> *CIC 1917*, c. 1799§2. See Appendix III.

<sup>129</sup> *CIC 1917*, c. 1803. See Appendix III.

<sup>130</sup> *CIC 1917*, c. 1804§1. See Appendix III.



However, *CIC* 1917, canon 1976 provided:

‘An inspection of the body of either or both spouses to be conducted by experts is required in cases of impotence or non-consummation, unless this appears evidently useless under the circumstances’.

Moreover, canon 1982 provided:

‘Also in cases of defect of consent from amentia [insanity], there is required the vote of experts who, if there is cause shall examine the infirm one, according to the precepts of the art, [as well as] the actions that led to the suspicion of amentia; moreover, the experts must hear as witnesses those who visited the infirm one before’.

Therefore, the mandatory requirement to consult experts referred only to: (a) cases concerning impotence or non-consummation of marriage ‘unless this appears evidently useless’; and (b) to cases concerning ‘amentia’, ‘if there is cause’.<sup>132</sup>

Under *CIC* 1917, experts were:

- Obligated to tell the whole truth; failure resulted in mandatory punishment;<sup>133</sup>
- Required to be found suitable by a competent body;<sup>134</sup>
- Considered, once they had taken the required oath, to have accepted their function;<sup>135</sup>
- Responsible for damages if they failed to complete their task in time;<sup>136</sup>
- Required to submit their opinions either orally or in writing; if orally, a written record was to be made and signed;<sup>137</sup>
- Required to explain their methodology, argumentation and basis for their decision;<sup>138</sup>

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<sup>131</sup> *CIC* 1917, c. 1804§2. See Appendix III. *Augustine*, Vol VII, p248, interestingly, interprets the provision ‘when he gives his decision’, as not being obliged to give reasons for his decision, but *if* he does, he should explain why he admitted or rejected the conclusions of the experts’.

<sup>132</sup> Doyle, *Text&Comm*, at p775 explains: ‘Traditionally, this ground of nullity [canon 1095] was known as *amentia* or insanity. This is a legal rather than medical term having no precise diagnostic meaning in either discipline’.

<sup>133</sup> *CIC* 1917, c. 1794. This seems to suggest that experts were chosen from among the faithful. See Appendix III.

<sup>134</sup> *CIC* 1917, c. 1795§1. See Appendix III.

<sup>135</sup> *CIC* 1917, c. 1797§1. See Appendix III.

<sup>136</sup> *CIC* 1917, c. 1798. See Appendix III.

<sup>137</sup> *CIC* 1917, c. 1801§1. See Appendix III.

<sup>138</sup> *CIC* 1917, c. 1801§3. See Appendix III.

- Required to submit individual reports unless the judge requested one to be signed by all; any individual disagreements were to be noted;<sup>139</sup>
- Subject to the same norms as witnesses in respect of objections and exclusion;<sup>140</sup> and:
- Entitled to remuneration.<sup>141</sup>

In marriage cases, relatives could act as witnesses to the investigation.<sup>142</sup> In cases of impotence or non-consummation, character references as to the veracity of the parties were required.<sup>143</sup> Two ‘medical’ experts were required to examine the man; two midwives were required to examine the woman unless she requested two physicians or the Ordinary considered this necessary.<sup>144</sup> Inspection of the woman required the presence of an approved chaperone.<sup>145</sup> Each expert was required to examine the woman individually and to submit individual reports within the prescribed time limit.<sup>146</sup> The judge had discretion to have mid-midwives’ reports scrutinised.<sup>147</sup> Having submitted their reports, all experts and the chaperone involved were interviewed individually under oath.<sup>148</sup> Those who examined the parties previously could not act as experts; they could however, give evidence as witnesses.<sup>149</sup>

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<sup>139</sup> *CIC* 1917, c. 1802. See Appendix III.

<sup>140</sup> *CIC* 1917, cc. 1795§2; and 1796. See Appendix III.

<sup>141</sup> *CIC* 1917, c. 1805. See Appendix III.

<sup>142</sup> *CIC* 1917, c. 1974. See Appendix III. *Augustine*, Vol V, at p422, explains that close relatives were allowed to give testimony in marriage cases because they ‘know their genealogy or pedigree better than strangers’.

<sup>143</sup> *CIC* 1917, cc.1975. See Appendix III. *Augustine*, Vol V, at p423, explains that the ‘seven-hand’ (*septima manus*) proof is of Germanic origin, adopted by Gratian and by the Decretals. Husband and wife each bring forward seven relatives, friends or acquaintances, of either sex, of any age or condition, preferably of their own kin, who are acquainted with their character, actions and conduct to testify to their trustworthiness. Whilst they could not testify to the non-consummation, they could be ‘asked whether the couple lived together affectionately, whether there were quarrels, whether medicine was used to cure impotency or a physician was consulted’. At p424 he suggests that an example of this exception ‘unless this appears evidently useless’, would be a case of a woman who lived as a prostitute following civil divorce, when bodily inspection ‘could hardly bring results’. He also considers that the judge chose the experts ‘after consultation with the *defensor vinculi*’ [defender of the bond].

<sup>144</sup> *CIC* 1917, c. 1979§§1 and 2. See Appendix III. *Augustine*, Vol V, at p425, explains: that two physicians were required for the man and, for the woman, two midwives, of good reputation, who were ‘legally approved (by a state diploma or county or city certificate) were required; all were to be appointed *ex officio*’. See *CIC* 1917, c. 1980§2, for reference to these doctors as ‘physicians or obstetricians’.

<sup>145</sup> *CIC* 1917, c. 1979§3. See Appendix III.

<sup>146</sup> *CIC* 1917, c. 1980§§1 and 2. See Appendix III.

<sup>147</sup> *CIC* 1917, c. 1980§3. See Appendix III. *Augustine*, Vol V, at p426 explains that this would ensure that mid-wives’ reports were ‘made along scientific lines’.

<sup>148</sup> *CIC* 1917, c. 1981. See Appendix III. *Augustine*, Vol V, at p426, points out that these professionals were also bound by their professional obligation to secrecy.

<sup>149</sup> *CIC* 1917, cc. 1977; and 1978. See Appendix III.

Although ‘*amentia*’ was interpreted narrowly under *CIC* 1917, its effect on marital consent was understood and consequently, such cases required the *vote* of experts, who, *if there was cause*, were to examine, according to their expertise, the affected person and the alleged behaviour.<sup>150</sup> Augustine explains that these experts were psychiatrists.<sup>151</sup> In addition, experts who had attended the party previously ‘should’ be heard as witnesses.<sup>152</sup>

Although *CIC* 1917 required that experts were found suitable by a ‘competent’ body, implying fitness to practice, it was silent on specific professional qualifications. Augustine held:

‘[S]cientific equipment is the first qualification of an expert. From a physician, *e.g.*, we demand above all medical knowledge and experience. This, however, does not exclude, but rather implies, honesty and conscientiousness ... [Experts should] hold a certificate or diploma as to their fitness from a competent public authority, ... but no exception [taken against the expert] is admissible on the sole plea that a man has no public certificate’.<sup>153</sup>

Breitenbeck holds that the ‘general consensus of commentators’ was that experts were used because they had ‘some type of specialized or technical training or art’.<sup>154</sup> She considers that Augustine held the ‘strongest’ view, requiring experts to be able to apply ‘their skill or science to the subject in dispute’, whilst others held that an uneducated, uncultured person, including one who lacked basic reading skills, could, in certain circumstances be considered ‘expert’, even in preference to a qualified expert, particularly if they possessed practical experience.<sup>155</sup>

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<sup>150</sup> See Appendix III: *CIC* 1917, c. 1982. Augustine, Vol V, p427, discussing c. 1982 on *amentia*, uses the term ‘verdict’, rather than ‘vote’ (Latin: *suffragium peritorum*); there is no suggestion that the experts cast a vote with regard to the tribunal’s decision for nullity or otherwise. *Collins Latin-English Dictionary* (Glasgow, 1989) gives additional meanings for ‘*suffragium*’: i.e., ‘judgment’ or ‘approval’.

<sup>151</sup> Augustine, Vol V, at p427.

<sup>152</sup> Ibid.

<sup>153</sup> Augustine, Vol VII, at p243.

<sup>154</sup> Breitenbeck, *Doctoral Thesis*, p30.

<sup>155</sup> Breitenbeck, *Doctoral Thesis*, p31, cites Moran, in Sabio Moran and Marcelino Cabrerros De Anta, *Comentarios al Código de Derecho Canónico* (Madrid, *Biblioteca de Autores Cristianos*, 1964), 3: 568, as holding that uneducated people, even those who could not read, could nevertheless have the required ‘expertise’ and only if, after all circumstances were weighed and found equal, could preference be given to someone holding an academic degree or official title. Breitenbeck states, citing Regatillo, in Eduardus Regatillo, *Interpretatio et Iurisprententia Codicis Iuris Canonici*, (Sanrander: Sal Terrae, 1949), p329, that there were those who held that ‘uncultured, unlearned persons are to be admitted [as experts] provided that they have a practical knowledge of the matter in question, such as a farmer in a matter relating to the land’.

**Experts under *CIC*:** The leading canon on experts under *CIC* is canon 1574, which states the general principle:

‘The services of experts are to be used whenever, by a provision of the law or of the judge, their study and opinion, based upon their art or science, are required to establish some fact or to ascertain the true nature of some matter’.

Under *CIC*, the ecclesiastical judge:

- Appoints the expert, at the request of the parties or having consulted them, or he accepts expert reports already made; he can also approve private experts;<sup>156</sup>
- Defines, having listened to the parties’ suggestions, the points to be addressed by the expert;<sup>157</sup>
- Sets the time-limit for the submission of expert opinions or reports;<sup>158</sup>
- Has discretion to recall an expert for clarification;<sup>159</sup> and:
- Is obliged both to weigh, in addition to the experts’ opinions, all the circumstances of the case, and to explain why he accepts or rejects expert evidence.<sup>160</sup>

These canons are silent on the obligation to consult the promoter of justice and the defender of the bond.<sup>161</sup>

Experts (which, as we shall see, may be either court-appointed or ‘private’ and party-nominated but court-approved) are:

- Entitled to receive accrued evidence *and* any documents required for the fulfillment of the task; private experts, although permitted to submit their own reports are only allowed access to documents ‘in so far as they are required for the discharge of their duty’;<sup>162</sup>

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<sup>156</sup> *CIC*, cc. 1575 requires at least consultation with the parties; it is silent regarding consent. Also c. 1581§1. See Appendix I.

<sup>157</sup> *CIC*, c. 1577§1. See Appendix I.

<sup>158</sup> *CIC*, c. 1577§3. See Appendix I.

<sup>159</sup> *CIC*, c. 1578§3. See Appendix I.

<sup>160</sup> *CIC*, cc. 1579§§1 and 2. See Appendix I.

<sup>161</sup> *DC*, Article 204§2 requires the parties and the defender of the bond to be *notified* of the appointment. See Appendix V.

- Required to explain: (a) how they identified people, places or things, (b) their methodology; (c) their argumentation; and (d) the basis for their conclusions;<sup>163</sup>
- Required to submit individual reports unless the judge requests one to be signed by all; differences of opinion are to be noted;<sup>164</sup>
- Subject to the same norms as are witnesses in respect of objections and exclusion;<sup>165</sup> and:
- Entitled to remuneration.<sup>166</sup>

Unlike *CIC* 1917, these canons are silent on: the requirement to be truthful;<sup>167</sup> the requirement to take an oath;<sup>168</sup> punishment in case of failure and responsibility for damages; and suitability to be confirmed by a competent body.<sup>169</sup> As experts would be, at least generally speaking, professionals, one would expect the provisions of *CIC* 1917 to be equally applicable and pertinent today. However, in some countries, such as in the United Kingdom, decisions of Catholic tribunals are not recognized at civil law; therefore, punishment in cases of failure and responsibility for damages are more appropriately dealt with by the civil courts.

In marriage nullity cases *CIC*, in canon 1680, is quite specific:

‘In cases concerning impotence or defect of consent by reason of mental illness, the judge is to use the services of one or more experts, unless from the circumstances this would obviously serve no purpose. In other cases, the provision of Can. 1574 is to be observed’.<sup>170</sup>

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<sup>162</sup> *CIC*, cc. 1577§2; and 1581§2. See Appendix I. See also Chapter 1 fts 147 - 148, regarding the right of the expert to information which could influence his decision.

<sup>163</sup> *CIC*, c. 1578§2. See Appendix I.

<sup>164</sup> *CIC*, c. 1578§1. See Appendix I.

<sup>165</sup> *CIC*, cc. 1576; and 1555. See Appendix I.

<sup>166</sup> *CIC*, c. 1580. See Appendix I.

<sup>167</sup> *CIC*, c. 1577§2, which, however, requires ‘proper and faithful discharge’ of duty. See Appendix I. See also, *DC*, Article 205, which requires that experts be chosen because of, *inter alia*, their ‘religiosity and honesty’ and, for marriage nullity cases under *CIC*, c. 1095, their adherence ‘to the principles of Christian anthropology’. See also, Article 207§2, requiring experts to carry out their task ‘properly and faithfully’. See Appendix V. Moreover, as they are subject to the norms governing witnesses, they are also obliged to tell the truth.

<sup>168</sup> Although *CIC*, c. 1562§1 requires the judge to remind ‘the witness’ of ‘the grave obligation to tell the truth and nothing but the truth’ and §2 requires the judge to administer an oath ‘to the witness’ but makes provision for a witness to be heard unsworn. C. 1532 gives the judge discretion regarding whether or not an oath is to be administered, but only in cases which do not involve the public good.

<sup>169</sup> *DC*, Article 205§1, which, however, requires a testimonial for experts. See Appendix V.

<sup>170</sup> This canon is placed in Book VII, *Judicial Procedures*, Part III, *Certain Special Processes*, Title I *Matrimonial Process*, Article 4, *Proofs*. The American translations use slightly different words. For example, *Text&Comm*, p1013 uses ‘unless it is obvious from the circumstances that this would be useless’, and *New Comm*, p1773 uses ‘unless it is clear from the circumstances that it would be useless to do so’.

This is an example, therefore, of the *law* mandating the use of at least one expert, as stipulated in *CIC* canon 1574. This is the only specific requirement for the use of experts as a means of proof in a canonical trial.<sup>171</sup> So, by general principle, like *CIC* 1917, *CIC* requires the use of experts in cases of impotence and defect of consent by mental illness, albeit that *CIC* is silent in respect of non-consummation and on the need for bodily inspection in cases of impotence.<sup>172</sup> The caveat in *CIC* canon 1680, ‘unless ... this would serve no purpose’, is akin to that of *CIC* 1917 canon 1976 regarding impotence and non-consummation (i.e. ‘unless this appears evidently useless under the circumstances’). Likewise, the requirement in *CIC* canon 1574 mandating the use of experts to ‘establish some fact or to ascertain the true nature of some matter’ is similar to that in *CIC* 1917 canons 1792 and 1982 concerning *amentia* which required examination by experts ‘if there is cause’. It is clear, therefore, that *CIC*, like *CIC* 1917, mandates the use of experts whenever a pertinent fact falling outside the judges’ competence needs to be established; in such cases, the judge therefore has no discretion.

Whilst judges can decide on the number of experts, if they invoke the exception, they must, nevertheless, reach moral certainty of nullity *on the basis of the acts and the proofs*; otherwise the legal presumption of validity prevails. Therefore, in order to find for nullity of marriage, the tribunal must be in possession of sufficient evidence to prove: the fact of antecedent and perpetual impotence; or the fact of an antecedent mental condition, the nature, severity and adverse effect of which caused incapacity to marry. As such matters are usually beyond the competence of the ecclesiastical judge, the law recognises the need for expert opinion.

**Experts under *CCEO*:** The wording of the canons here governing experts is similar to *CIC*.<sup>173</sup> In marriage nullity cases involving impotence or defect of consent because of ‘mental illness’, *CCEO* also requires the intervention of at least one expert, unless this would be useless.<sup>174</sup>

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<sup>171</sup> Kenneth Boccafola, *ExComm*, Vol IV, 2, p1329.

<sup>172</sup> Nowadays, it is more difficult to establish non-consummation by bodily inspection; see ft74 above for reliance on the ‘moral argument’ in these cases. However, in cases of impotence, when the validity of marriage is challenged, it is still likely that an expert opinion would be required to verify its presence (whether the cause be physical or psychological), at the material time. As we have seen, the presumption is that one possesses capacity for marriage and consequently, marriage is not denied; impotence is, therefore, usually investigated *post-hoc*.

<sup>173</sup> *CCEO*, cc. 1255-1262. See Appendix II.

<sup>174</sup> *CCEO*, c. 1366. See Appendix II.

#### 4. EXPERTS AND THE SPECIAL CASE OF PSYCHOLOGICAL INCAPACITY

The leading canon on invalid consent explicitly deals with *people* who are *inherently* incapable of exchanging marital consent; this consensual incapacity is based on the principle that nobody is bound to the impossible.<sup>175</sup> *CIC* canon 1095 provides:

‘The following are incapable of contracting marriage:  
1° those who lack sufficient use of reason; 2° those who suffer from a grave lack of discretion of judgement concerning the essential matrimonial rights and obligations to be mutually given and accepted; 3° those who because of causes of a psychological nature, are unable to assume the essential obligations of marriage’.<sup>176</sup>

Establishing the nature of incapacity outlined in this canon, requires an understanding of the evolution of the canon. *CIC* 1917 had no equivalent canon, although the concept of invalidity due to *amentia* or insanity existed.<sup>177</sup> Shortly after the promulgation of *CIC* 1917, a Rotal tribunal held that true insanity was not necessarily required to be psychologically incapable of contracting marriage; due to the advances in psychology and psychiatry, the concept of psychological incapacity broadened.<sup>178</sup> Later Rotal decisions reflected the understanding that lesser degrees of impairment could be incapacitating.<sup>179</sup> These advances were welcomed by

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<sup>175</sup> Beal, *New Comm*, p1302, ft 114, cites as authority, *Regulae Iuris*, 6, Boniface VIII, *Liber sextus* (1298) in *Corpus Iuris Canonici*, and A Stankiewicz, *De accommodation regulae ‘impossibilium nulla obligatio est’ ad incapacitatem adimplendi matrimonii obligationes*, p68, (1979) 643-672, albeit when commenting on paragraph 3° of canon 1095.

<sup>176</sup> *CCEO*, c. 818 has similar wording. See Appendix II. *Text&Comm*, p775 and *New Comm*, p1297 use the words ‘psychic’ instead of ‘psychological’.

<sup>177</sup> *CIC* 1917, c. 1082. See Appendix III. Beal, *New Comm*, p1297 explains that the Church and society knew little about mental illness and it was thought that a person, suffering severe illness could contract marriage validity during a ‘lucid interval’. At p1298, he explains that the test for capacity was ‘the degree of the use of reason required for someone to commit a mortal sin’, which usually occurred at about the age of seven. Later, acknowledging the need to understand the nature of marriage, the age was raised to that of puberty (twelve for women and fourteen for men). It was thought necessary to keep the bar low in order ‘not to prevent simple folk from being judged incapable for marriage’. See *CIC*, c. 1083 in Appendix I for the canonical age for marriage (men -16 yrs; women - 14 yrs)

<sup>178</sup> Augustine Mendonça, ‘Incapacity to Contract Marriage: Canon 1095’, *Studia Canonica*, 19 (1985), pp259-325 (hereafter Mendonça, ‘Incapacity to Contract Marriage’), at p267, citing *coram* Prior, 11 December 1919, *SRR*, explains: ‘[T]he simple use of reason is no longer a criterion of ability to place a naturally sufficient marital consent... [Based on the teaching of St Thomas]: “*Maiores autem rationis discretio requiritur in futuram quam ad consentiendum in unum praesentem actum*” [S.T. IV, 2,2,2], greater discretion of reason is required to bind oneself to future obligations than to consent to a present act’.

<sup>179</sup> Mendonça, ‘Incapacity to Contract Marriage’, p269, citing *coram* Wynen, 23 February 1941: Wynen held that a simple use of reason and a simple choice of free will was insufficient for matrimonial consent; an ‘estimative or evaluative knowledge’ was required. *Coram* Felici (3 December 1957), cited in the same article at p269 and by CJ

Pope Pius XII in his Allocution to the Roman Rota in 1941.<sup>180</sup> Interestingly, civil law also embraced the concept of diminished responsibility.<sup>181</sup> Rotal jurisprudence and Papal Allocutions continued to contribute towards broadening even further the concept of psychological incapacity in canon law to include incapacity to evaluate knowledge and to apply this to the prevailing practical circumstances proportionate to the important decision to marry (grave lack of discretion of judgment) and inability to assume the essential obligations of marriage - now both enshrined in *CIC* canon 1095.

As we have seen, provision is made elsewhere in *CIC* for other types of incapacity such as impediments, lack or defect of form, and other types of consensual defects. However, canon 1095 evolved from the concept of *amentia*, and, consequently deals with *people* who are *inherently* incapable of marriage; therefore, it involves *psychological* incapacity. This is clear from the Latin text.<sup>182</sup> It concerns, therefore, a fact of human nature which is defined by science, although canon law categorises those affected; the ecclesiastical judge decides whether or not the affected person belongs in a specific category. Ecclesiastical jurisprudence, rightly, has relied on the findings of the behavioural sciences, which recognise a variety of disturbances affecting, in various degrees, the capacity of the person both to make decisions concerning the essentials of marriage and to assume essential obligations.

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Hettinger in 'Matrimonial Jurisprudence: The Second Postconciliar Decade?', *The Jurist*, 37 (1977), pp358-375 at p367, required not only the 'cognitive' faculty, which was responsible for the 'apprehension of truth, abstracting the universal from the particular', but also capacity for exercising the 'critical faculty', which is the 'power of judging and reasoning and of bringing judgments together so that new judgments can be deduced from them'. This critical faculty, according to another Rotal judge, Felici, appears in man later than the cognitive faculty. Mendonça, *op. cit.*, p270, citing a Rotal judgment of Sabatanni (24 February 1961), explains that capacity to exercise this 'critical faculty' could not be attributed to a particular chronological age; puberty was not necessarily adequate, but discretion of judgment proportionate to marriage was required.

<sup>180</sup> Annual Papal speeches to the officials of the Roman Rota are called 'allocutions'. See Pius XII, *Allocution to the Roman Rota* (1941) in Appendix VII.

<sup>181</sup> Eithne D'Auria, 'Grave Lack of Discretion of Judgement in Roman Catholic Canon Law of Marriage', *LLM Dissertation* (University of Wales, College of Cardiff, 1996), Chapter IV, Grave Lack of Discretion of Judgement, Development of Jurisprudence, pp40-53, citing *Durham v United States* 214, F2d 862, 870 (D. Cir. 1954), which held that a criminal is not responsible if the unlawful act was the product of mental illness or disease.

<sup>182</sup> '*Sunt incapaces matrimonii contrahendi ...*'. *Incapaces* is used, denoting *inherent personal* incapacity, rather than *inhabiles*, which denotes *legal* incapacity. See e.g., *CIC* c 171§1, 1° where both terms are used: '*Inhabiles sunt ad suffragium ferendum: 1° incapax actus humani; ...*'. See also William L Daniel, 'Juridic Acts in Book VII of the 1983 *Codex Iuris Canonici*', *Studia Canonica*, 40 (2006), pp433-486.



Given the Church's understanding that the right to marry is of natural law, it follows that she acknowledges the capacity of most people to marry and found a family. Hence, there is no specific canonical requirement to *establish* psychological capacity *positively* before the celebration of marriage.<sup>183</sup> Most marriages are celebrated without prior consultation with experts, but when a marriage fails a canonical judicial investigation can establish whether or not a true marriage ever existed.

The question then arises as to whether or not canon 1680, mandating the use of at least one expert in cases involving 'a defect of consent by reason of mental illness', is to be invoked when a defect of consent due to incapacity is alleged under canon 1095. An analysis of the views of commentators will demonstrate that they appear to agree both on their understanding of the differences between the three paragraphs of the canon and on the psychological basis for the defect of consent due to the incapacities described in canon 1095. They agree that the first and second paragraphs deal with the formation of the act of consent and the third paragraph concerns inability to assume the object of consent. However, despite acknowledging the psychological basis for incapacity, there is no consensus regarding: the tests and methods to be used to assess personal incapacity; or the need to consult experts to establish the existence, severity and effect of the psychological condition which allegedly caused the incapacity.

**Insufficient Use of Reason:** An act of will is required for valid marriage.<sup>184</sup> Therefore, a person who lacks sufficient use of reason is incapable of contracting marriage. Canonists agree on the serious nature of this psychological incapacity. The use of the adjective 'sufficient' indicates that for marriage 'a proportionally developed capacity is necessary'.<sup>185</sup> As the right to marry is one of natural law, historically, defects of consent were considered to be rooted in the natural law.<sup>186</sup> The whole of canon 1095 concerns 'difficulties of a psychological nature'; marital capacity 'can be substantially undermined by disturbances, both transient and permanent, that are

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<sup>183</sup> Carreras, *ExComm*, Vol IV, 2, p1825: 'Because we are dealing with "incapacities", when any doubt exists (whether it be of fact or of law) ... not only the judge but also whoever is assisting at the celebration of the marriage must always presume ... capacity'.

<sup>184</sup> *CIC*, c. 1057§2. See Appendix I.

<sup>185</sup> Örsy, *Marriage in Canon Law*, p131.

<sup>186</sup> Beal, *New Comm*, p1296.

psychic or psycho-somatic in nature'.<sup>187</sup> Lack of sufficient use of reason means, in canonical terms, 'a permanent or temporary state of mind attributed to a variety of causes', such as 'mental illness', which Rotal jurisprudence understands as: 'psychotic disorder'; 'psychopathies', commonly known as 'personality or character trait disorders'; or 'psychoneuroses'.<sup>188</sup>

Positively, to marry a person must have the capacity to: think rationally;<sup>189</sup> know;<sup>190</sup> and make a responsible human act.<sup>191</sup> Negatively, causes of incapacity must be 'so severe as to impede the use of reason; more important than the determination of the correct clinical classification is whether the person knew right from wrong'.<sup>192</sup> Permanent causes include severe mental handicap, psychotic mental illness or brain damage; temporary causes include drunkenness or drug abuse.<sup>193</sup> These can affect judgments and decisions 'even if their symptoms may not be immediately manifest'.<sup>194</sup> When judging cases on this ground, 'careful attention must be paid to the mental competence of the person at the time consent was elicited'.<sup>195</sup> Therefore, the psychological basis for this ground and the need to establish its severity and effect is not in doubt.

**Grave Lack of Discretion of Judgment:** Grave lack of discretion of judgment also renders a person incapable of marriage. Both Mendonça and McGrath agree that the difference between paragraphs 1° and 2° of canon 1095 is one of degree of impairment.<sup>196</sup> For Kelly, the concept is

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<sup>187</sup> Ibid., p1297, citing Rotal judge, Ragni, 26 November 1985, *SRRDec 77* (1985), p554. This affirmative decision actually involved alcoholism. See Mendonça, *Anthology*, p77: Case No: 85-019.

<sup>188</sup> Doyle, *Text&Comm*, p775.

<sup>189</sup> Örsy, *Marriage in Canon Law*, p130.

<sup>190</sup> Kelly, *L&S*, p610, para 2183: 'It is not the *content of the intellect* that is in question here - that is considered under Can 1096 - but the *fundamental ability to know*. If this is lacking entirely or seriously inadequate, the person simply cannot consent'. Emphasis in original. Doyle, *Text&Comm*, p775: 'If a person lacks sufficient use of reason so as not to know what he or she is doing at the time consent is exchanged, then there is no consent'.

<sup>191</sup> Beal, *New Comm*, p1298: 'When a disruption of the "psychological process involved in forming the human act ... seriously impeded the rational function of the mind and deprived a person of any meaningful deliberation concerning personal capacity for marital commitment and the choice of the object of consent", he or she may be judged to lack sufficient use of reason', citing Augustine Mendonça, 'Consensual Incapacity for Marriage', *The Jurist*, 54 (1994), pp482-486 (hereafter Mendonça, 'Consensual Incapacity'), p409 (*sic*).

<sup>192</sup> Doyle, *Text&Comm*, p776.

<sup>193</sup> Kelly, *L&S*, p610, para 2183.

<sup>194</sup> Örsy, *Marriage in Canon Law*, p131.

<sup>195</sup> Beal, *New Comm*, p1298.

<sup>196</sup> Mendonça, 'Incapacity to Contract Marriage', p275 and Aidan McGrath, 'Moral Certainty and Cases of Nullity Based on Canon 1095: Some Reflections', *CLSG&I Newsletter*, No 169 (March 2012), pp50-72 (hereafter McGrath, 'Moral Certainty'), at p64. However, Pedro Juan Viladrich, 'Is a Reform of Canon 1095 Needed?',

concerned ‘*not so much with intellectual or cognitive ability, as with being able to use such intellectual ability in a practical way*’.<sup>197</sup> Positively, a person must have the capacity: to ‘decide responsibly’.<sup>198</sup> One must be capable of evaluating sufficiently the nature of marriage and consequently, choosing it freely.<sup>199</sup> Therefore, one must be capable of forming judgments by drawing conclusions from the material acquired by experience.<sup>200</sup> The critical faculty required depends on: ‘the mature ability to grasp what the marital relationship entails’; the ability to ‘relate marriage as an abstract reality ... to [the] concrete situation’, which requires insight; and ‘freedom from mental confusion, undue pressure or fear’.<sup>201</sup> Capacity must be proportionate to the consequences of the decision, which in the case of marriage involves the capacity ‘to create and sustain the community of the whole of life’.<sup>202</sup> Abstract knowledge of marriage is insufficient; *capacity* for ‘critical deliberation’ is also required; this must be proportionate to the ‘serious and perpetual obligations of marriage’.<sup>203</sup> ‘In short, the critical faculty is the capacity to make a prudent judgment about *this* marriage with *this* person at *this* time’.<sup>204</sup> Freedom in choosing marriage means that the decision is based on ‘reasonable’, not ‘pathological’, motives.<sup>205</sup>

Kelly acknowledges the presumption that capacity for marriage must ‘be ... within the compass of most people’.<sup>206</sup> Örsy and Doyle hold that the issues involved in canon 1095 ‘are not canonical’,<sup>207</sup> and agree with Kelly that the defect must be serious.<sup>208</sup> Causes are ‘usually due to

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Patricia Dugan and Luis Navarro (Eds), *Matrimonial Law and Canonical Procedure* (Montreal, 2013), pp73-96, at p77, holds that all three paragraphs ‘are frequently viewed as three steps in the gravity of a contracting party’s psychic pathology’.

<sup>197</sup> Kelly, *L&S*, p611, para 2185. Emphasis in original.

<sup>198</sup> Örsy, *Marriage in Canon Law*, p130.

<sup>199</sup> Doyle, *Text&Comm*, p775.

<sup>200</sup> *Ibid.*, p776.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> Beal, *New Comm*, p1299. It is important to distinguish *capacity* for critical deliberation from *de facto* deliberation as we shall see later in the case studies in Chapters 5 and 6.

<sup>204</sup> *Ibid.*, p1300. Emphasis in original.

<sup>205</sup> *Ibid.*, citing *coram* Pinto, 18 December 1979 *SRRDec* 71 (1979), pp587-588.

<sup>206</sup> Kelly, *L&S*, p611, para 2186.

<sup>207</sup> Örsy, *Marriage in Canon Law*, p130. Örsy recognises the incompetence of canon law to define psychological incapacity for marriage; the science of empirical psychology and medical psychiatry must ‘fill the gap and provide the necessary information’. At p131, he acknowledges that ‘the deviation of judgment from what is considered normal must be significant’. See also Doyle in *Text&Comm*, p778, who considers that any diagnosis of a disorder, ‘even a tentative one, is a clinical and not a juridical issue’. At p776 he acknowledges that the condition must result

some form of psychopathy or personality disorder'.<sup>209</sup> Although not mutually exclusive, permanent causes include, for Kelly, 'very low intelligence, brain damage, mental illness, personality disorder', whilst transitory causes can include the 'influence of alcohol or other drugs, or serious psychological pressure'; but the cause 'must be operative at the time of marriage'.<sup>210</sup> According to Beal, in addition to disorders such as psychoses, neuroses and personality disorders, which can 'impair critical deliberation' or 'restrict internal freedom', 'inveterate attitudes contrary to the Christian understanding of marriage' and deep seated 'attitudes that pervade the socio-cultural milieu' can, even in the absence of external coercion, cause the person to feel compelled to marry and thus remove their freedom:

'Despite the firm assertion of John Paul II that "the hypothesis of a real incapacity is to be considered only when an anomaly of a serious nature is present", Rotal jurisprudence has continued to issue affirmative decisions in cases where lack of due discretion is alleged, not only when the basis for the defect is a serious habitual mental disorder, but also when the defect is rooted in a serious but transitory disturbance of the mind'.

Beal cites no Rotal cases to substantiate this claim, which he attributes to Mendonça.<sup>211</sup> For Doyle, poor judgment can result not only from a *total* impairment, but also from a *significant* impairment of the intellect, or from lack of internal freedom due to causes 'rooted in psychological or emotional problems which do not impede the intellect but have a significant influence of the will' thus, 'marriage is chosen in a true state of mental confusion'. Although one's emotional and psychological state is critical, the test is vague: since people differ, the 'intangible factors' of understanding, evaluation, decision-making and responsibilities of marriage, 'cannot be objectively measured for all persons of all background and cultures. The responsibility of being a marriage partner and a parent must be evaluated in the context of one's emotional and psychological state as well as that of the other party'.<sup>212</sup> For Kelly, the gravity of the defect will 'be measured by evaluating the person's personality and abilities as derived from

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in a 'serious inability to evaluate critically the decision to marry in light of the consequent obligations and responsibilities'.

<sup>208</sup> Kelly, *L&S*, p611, para 2186: '[M]inor defects of judgement will not suffice to invalidate matrimonial consent, [the condition must] remove the person's powers of judgement completely or at least so cloud them that he or she is incapable of consenting to marriage'.

<sup>209</sup> Doyle, *Text&Comm*, p776, citing *coram* Fagiolo, 23 January 1970, *EIC* 27 (1971), pp147-151; and *coram* Pompedda, 28 April, 1971, *ME* 97 (1972), pp787-796.

<sup>210</sup> Kelly, *L&S*, p611, para 2187.

<sup>211</sup> Beal, *New Comm*, p1300, citing Mendonça, 'Consensual Incapacity', pp500-504 (*sic*).

<sup>212</sup> Doyle, *Text&Comm*, p776, citing M Ahern, 'Psychological Incapacities for Marriage', *Studia Canonica*, 7 (1973), pp230-231.

a range of evidence of behaviour and usually also from reports of psychological or psychiatric experts'.<sup>213</sup> Rotal judge Burke, (writing extra-judicially), is clear about the psychic nature and extraordinary occurrence of incapacity.<sup>214</sup> Therefore, this ground must also have a psychological base, the severity and effect of which must be established.

### **Inability to Assume the Essential Obligations of Marriage because of Causes of a**

**Psychological Nature:** The essential obligations of marriage constitute the object of consent; the canon explicitly states the psychological basis for this ground of nullity. Örsy acknowledges that 'psychological' causes 'defy a precise definition, but can be of an infinite variety'; positively, a person must be capable of carrying out their decision to marry by action.<sup>215</sup> For Doyle, parties must be capable of assuming essential [marital] obligations'.<sup>216</sup> To prove invalidity, it is insufficient to demonstrate unwillingness or failure to fulfill essential obligations - rather, a party must suffer from 'a debilitating psychological condition to such an extent that it is impossible to begin and sustain a marital relationship'.<sup>217</sup> Causes are no longer limited to 'sexual anomalies' but include a 'psychotic disorder' or 'personality disorder'; however, it must be 'a true constitutional impairment which prevents the person from improving his or her situation'.<sup>218</sup> In the absence of a comprehensive list of causes, the phrase 'of a psychic nature' covers 'a wide range of possibilities' including personality disorders, which are 'very complex' and 'elusive' phenomena, which resist 'easy analysis'.<sup>219</sup> 'Scientific advances in understanding the nature and effects of the personality disorders' have influenced jurisprudence; whilst Rotal jurisprudence 'generally demanded a clearly diagnosed disorder in incapacity cases', 'emotional immaturity' suffices.<sup>220</sup> The canonical meaning of 'immaturity' is not simply chronological, but 'a

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<sup>213</sup> Kelly, *L&S*, p611, para 2186.

<sup>214</sup> Cormac Burke, 'The Distinction Between no. 2 and no. 3 of Canon 1095', *The Jurist*, 54 (1994), pp228-233. Also Cormac Burke, 'Some Reflections on Canon 1095', *Monitor Ecclesiasticus*, 117 (1992-I), pp133-150: 'If one considers marriage as one of the most natural of institutions, then consensual incapacity, for an adult endowed with sufficient use of reason, is a most *unnatural* phenomenon'. Emphasis in original. Burke served as a Rotal judge from 1986 to 1999.

<sup>215</sup> Örsy, *Marriage in Canon Law*, p131.

<sup>216</sup> Doyle, *Text&Comm*, p775.

<sup>217</sup> *Ibid.*, p778.

<sup>218</sup> *Ibid.*, citing *Comm*, 7 (1975), p50.

<sup>219</sup> *Ibid.*, citing E Egan, 'Psychopathy and the Positing of an Act of Matrimonial Consent', *Studia Canonica*, 10 (1976), p313.

<sup>220</sup> *Ibid.*, pp777-778, citing *coram* Lefebvre, 31 January 1976, *Monitor Ecclesiasticus* 102 (1977), p285. Doyle also refers to *DSM III*, 90-92 on 'Childhood Onset Pervasive Development Disorder', where he says that the clinical description of the disorder on which Lefebvre relied, included criteria such as 'gross and sustained impairment in

psychological condition which affects the ability to make judgments, to control one's actions, and to relate to another; as such, it is not a temporary condition, but a permanent one'.<sup>221</sup> For Doyle: 'Continuing research developments, changing terminology and the elusive nature of the disorders themselves make exact diagnosis difficult'; although classification and nomenclature vary, the essential finding must be that a person 'gravely afflicted has a severely weakened or non-existent freedom of choice and of control over his or her affective-impulsive life'; '[a]t the core ... is the mind of husband and wife ...'.<sup>222</sup> A psychotic disorder 'may' incapacitate someone from 'marriage to anyone at any time', but this is not so easily demonstrated with a personality disorder; what is required is that incapacity for the specific marriage under investigation be demonstrated.<sup>223</sup> For Beal, 'the psychic defect that gives rise to the incapacity must be present at the moment of consent and not something that emerges during common life; it is always intrinsic, but the cause is not necessarily 'an identifiable mental illness', but can be 'any disorder or disturbance of the human mind, if it is sufficiently severe'.<sup>224</sup> The cause, however, must have existed antecedent to marriage and must have made the assumption of obligations impossible, not just difficult.<sup>225</sup> Agreeing with Doyle, traditionally these cases were limited to sexual disorders, but jurisprudence now embraces Vatican II's teaching of 'essential obligations of marriage'.<sup>226</sup> Beal disagrees with Doyle, however, on the necessity of permanence of the condition, but he acknowledges differing views on this matter.<sup>227</sup>

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social relationships, e.g., lack of appropriate affective responsivity, inappropriate clinging, asociality, lack of empathy'. Lefebvre's affirmative decision on inability to assume the essential obligations of marriage, however, involved a party who suffered from affective immaturity and passive-dependent personality. Lefebvre explained that incapacity can result from an illness or from some other psychic abnormality (see Mendonça, *Anthology* p90: Case No: 76-017).

<sup>221</sup> Ibid., p778.

<sup>222</sup> Ibid., p777-778, citing *coram* Anné, 4 December 1975, *EIC* 33 (1977), 176-177, translation from D Felhauer, 'The *Consortium Omnis Vitae* as a Juridical Element of Marriage' in *Studia Canonica*, 13 (1979), pp7-171 at 139-140.

<sup>223</sup> Ibid., citing *coram* Serrano, 5 April 1973, in *CLD* 8, p718: 'It is not necessary to maintain that this man is incapable of any possible marriage. Whatever may be the case for other interpersonal relationships which he could have or would have formed ... it is sufficiently clear that we must judge that this concrete marriage was null from the beginning'.

<sup>224</sup> Beal, *New Comm*, p1302-1303.

<sup>225</sup> Ibid., p1303.

<sup>226</sup> Ibid., p1302: This includes 'the capacity ... to establish and sustain the partnership of the whole of life that is perpetual and exclusive and ordered to the good of the spouses and to the procreation of offspring'.

<sup>227</sup> Ibid., p1303, citing J Pinto Gomez, 'L'immaturità affettiva nella giurisprudenza rotale', in P Bonnet and C Gulio (Eds), *L'immaturità psico-affettiva nella giurisprudenza della Rota Romana* (Libreria Editrice Vaticana, 1990), pp50-51, holding the view that it must be permanent. Beal explains that this was based on a comparison with impotence, but he cites Rotal jurisprudence, *coram* Bruno 19 July 1991 *ME* 117(1992), p171, Mario Pompedda, 'Annotazioni circa la "incapacitas adsumendi onera coniugalia"' in, *Studi di diritto matrimoniale canonico* (Milan,

Although distinguished from physical incapacity associated with the impediment of impotence, the understanding of ‘psychological causes’, for Kelly, is still developing in jurisprudence; however, apart from ‘nymphomania’ and ‘satyriasis’, the causes of incapacity for a ‘true conjugal relationship’ are ‘many and varied’, but must have been antecedent and be a ‘serious psychological defect’ and not ‘merely a diminished capacity’, ill-will or moral weakness.<sup>228</sup>

**Summary of the Three Grounds:** For Örsy, Kelly, Doyle and Beal, therefore, the incapacities hypothesised in all three paragraphs of the canon, concern a person’s psychological or psychiatric status at the time of exchanging consent. The law recognises that while the right to marry is one of natural law, and consequently is within the capacity of the majority, the exercise of that right is impossible for those: (a) who are incapable of positing the valid juridical act of marital consent, whether the cause is permanent or temporary, because they lack sufficient use of reason; (b) whose powers of judgment are seriously impaired because, although not necessarily lacking basic knowledge or capacity to posit some responsible acts, they lack the psychological capacity to assess the practical, prevailing circumstances and the implications which flow from them, or they lack the fundamental psychological freedom required for valid matrimonial consent; and (c) who, although possibly capable of knowing what marriage involves and making a free decision, are, for psychological reasons beyond their control, incapable of assuming the object of consent, that is, the essential obligations of marriage.

It is clear from the foregoing analysis that: (a) the ground of ‘lack of sufficient use of reason’ turns on a person’s *incapacity* to place the ‘responsible act’ of marital consent; (b) the ground of ‘grave lack of discretion of judgment concerning the essential rights and duties of marriage’ turns, not on whether or not a person *made or did not make* a free and critical evaluation of the circumstances surrounding the marriage, but on *incapacity* to evaluate critically the decision to marry in light of the consequent rights and obligations; and (c) the ground of ‘inability to assume the essential obligations of marriage because of causes of a psychological nature’, turns, not on a

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Giuffré, 1993) pp97-100 and Mendonça, ‘Consensual Incapacity’, 531-534 (*sic*), as holding his view that it suffices to prove that person was incapable of assuming the obligations of marriage at the time of consent.

<sup>228</sup> Kelly, *L&S*, p612, para 2189 - 2192.

party's willingness, or on whether or not a person fulfilled these obligations, but on *inability* to *assume* them at the material time.

The latter two grounds explicitly limit the scope of incapacity to the essential rights and/or duties of marriage. The more important the consequences, the greater the powers of judgment required to make a decision. Marriage is life-long, involving another person intimately. The possibility of caring for and educating children also arises. Moreover, marriage is not merely a private contract; it involves the common good of society as evidenced in canon law and in civil law by the requirement to involve witnesses who represent the community.<sup>229</sup>

**The Applicability of Canon 1680 to Canon 1095:** As we have seen, there is consensus that the basis for the incapacities outlined in canon 1095 is the existence of a severe and debilitating psychiatric or psychological cause, and canonists acknowledge the difficulty in establishing the existence, severity and effect of such a cause. They are nevertheless divided on whether or not the use of experts is mandatory in cases involving this canon. Some emphasise the principle enunciated in canon 1680 (which mandates the use of experts); others emphasise the exception (unless their use serves no purpose). They are also divided on precisely when the principle and exception apply and whether or not judges can exercise discretion in these cases.

*Emphasis on Principle:* McGrath holds that *CIC* canons 1574 and 1680 are two canons indicating *when experts are to be used*.<sup>230</sup> The use of experts 'appears to be mandatory in all nullity cases involving impotence or any part of canon 1095'.<sup>231</sup> Experts are required: (a) 'where the nature and severity of the psychopathology cannot easily be determined on the basis of other evidence'; (b) 'where it is difficult to distinguish psychological factors from organic factors'; (c)

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<sup>229</sup> In Roman Catholic doctrine, 'marriage establishes the couple in a public state of life in the Church' and the family home 'is rightly called "the domestic church, a community of grace and prayer, a school of human virtues and of Christian charity"'. *CCC*, p372, paras 1663 and 1666. See Appendix IV.

<sup>230</sup> Aidan McGrath, 'At the Service of Truth: Psychological Sciences and their Relation to the Canon Law of Nullity of Marriage', 27 *Studia Canonica* (1993), pp 379-400, (hereafter McGrath, 'At the Service of Truth'), at p381. Emphases added. Also Aidan McGrath, 'Assisting Judges in Their Arduous Task: *Dignitas Connubii* and the Assistance it Offers in Cases Based on Canon 1095', *Studies in Church Law*, Vol IV, (Bangalore, 2008), pp109-142: at p120: 'The intervention of experts in cases of nullity being considered under canon 1095 is mandatory, not optional'. Speaking of the exception at p121: '[T]he exception must not become the norm'. Also at p121, citing P Bianchi: '[T]he judge is not required to have or exercise clinical expertise - that belongs to the expert'.

<sup>231</sup> McGrath, 'At the Service of Truth', p381, citing G Versaldi, '*Animadversiones quaedam relate ad allocutionem Ioannis Pauli II ad Romanam Rotam diei 25 ianuarii 1988*' in *Periodica*, 78 (1989), p254.



where the imposition of a *vetitum* is foreseen; and (d) where a new hearing of a case is being sought after two conforming sentences.<sup>232</sup> The judge may deem it necessary to consult experts in other cases with a psychological dimension, for example when the level of susceptibility to deceit or threats, or that of ignorance, is to be established.<sup>233</sup> For McGrath, the benefit to the jurisprudence of tribunals of the advances in psychiatry and psychology depends on ‘proper respect’ being shown to expertise in those disciplines; in cases involving canon 1095, ‘the intervention of an expert or experts should constitute part of the standard procedure’.<sup>234</sup> He concludes that, if this appears excessive, one only has to refer to Morrisey’s warning:

‘Without the assistance of experts ... there is a risk of identifying as a personality disorder any personality trait which is irritating to others’.<sup>235</sup>

McGrath insists that ‘judges must remember that they must not play at being amateur psychologists’:<sup>236</sup>

‘[O]nly in truly exceptional cases, where there is ample evidence from other sources, should the services of an expert not be sought. And, where it proves impossible to find an expert, the judges, in reading and researching, must be very careful that they retain their own role in the process: they are not to attempt to make a diagnosis or an analysis of behavior which lies beyond their competence. ... [An expert] provides the judges with elements of information from his own sphere of competence, i.e., information concerning the nature and extent of particular psychic or psychiatric conditions upon which the nullity of the marriage is alleged’.<sup>237</sup>

McGrath acknowledges the possibility that expertise might be sought from fields other than psychology and psychiatry, such as from a counsellor, a social worker, therapist, neurologist or sexologist,<sup>238</sup> whereas others appear to limit the experts’ role to cases involving claims of psychopathology or mental disorder ‘since the illness does not always manifest itself at the actual

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<sup>232</sup> Ibid., citing Augustine Mendonça, ‘The Role of Experts in “Incapacity to Contract” Cases (c. 1095)’, in *Studia Canonica*, 25 (1991) (hereafter Mendonça, ‘The Role of Experts’), p417-450.

<sup>233</sup> Ibid., p380-381.

<sup>234</sup> Ibid., p398.

<sup>235</sup> Ibid., p398, citing Francis Morrisey, ‘Revising Church Legislation on Marriage’, in *Origins*, 9 (1979-1980), p216.

<sup>236</sup> Ibid., p396.

<sup>237</sup> Ibid., p398-399.

<sup>238</sup> Ibid., p382, citing Marie Breitenbeck, ‘The Use of the Psychological Expert in Formal Cases’, in T P Doyle (Ed), *Marriage Studies: Reflections in Canon Law and Theology*, Vol 2 (Washington DC, CLSA, 1982), p90; Breitenbeck, ‘The Use of Experts in Marriage Nullity Cases’, in *Proceedings of the Annual Convention of the Canon Law Society of America*, 51 (1989), p32, note 14, and Mendonça, ‘The Role of Experts’, pp433-434.

time of the marriage'.<sup>239</sup> McGrath notes the caveat, 'unless from the circumstances [the involvement of experts] would obviously serve no purpose' - but given the principle, 'such circumstances would have to be regarded as exceptional' and would require the court to be in possession of 'sufficient evidence to place the gravity and effects of the disturbance at the time of marriage beyond doubt'.<sup>240</sup> Any decision by a judge not to use an expert 'must be an act of prudence ... and not an act of capriciousness'.<sup>241</sup>

Although not specifying what would constitute 'unavailability' of experts, McGrath warns that 'creative imagination' on the part of tribunals, however sincere, is 'fraught with danger' and does 'not inspire confidence in an objective evaluation of the nature, origin and effects of the particular psychic difficulty'.<sup>242</sup> He stresses the need to respect the autonomy of the two sciences:

'... [I]f an expert opinion or report is to be of real value in any marriage nullity case, then the judge and the expert must participate in a proper dialogue between the two sciences: that of the psychological expert on the one hand, and that of the canonist on the other. ... Each science must preserve its proper autonomy and the relationship of one to the other must always be kept in mind; psychological science is a means by which the judge may arrive at the truth in a particular case; it is not the source of all the answers to all the questions before the judges'.<sup>243</sup>

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<sup>239</sup> Breitenbeck, *Doctoral Thesis*, p233, citing Pedro Lombardia and Juan Ignacio Arrieta (Eds) *Código de Derecho Canónico, edición anotada* (EUNSA, 1883), p871 at p1005 and Wrenn, *Text&Comm*, p1013. However, although Wrenn does not hold that experts must always be used, he does require the use of experts 'whenever a marriage case [on grounds of incapacity] seems to involve a psychopathology or mental disorder'. See also William J Doheny, *Canonical Procedure in Matrimonial Cases*, Vol I, Formal Judicial Procedure, Second Edition, Revised and enlarged (Milwaukee, 1948), p382-383: '[T]he [experts] most frequently employed by matrimonial tribunals are: first, handwriting experts, and secondly, doctors of medicine who are particularly proficient in questions of insanity or impotency'.

<sup>240</sup> McGrath, 'At the Service of Truth', p395-396, citing Papal Allocutions of 1987 and 1988.

<sup>241</sup> *Ibid.*, p396, citing Mario F Pompedda, 'Incapacity to Assume the Essential Obligations of Marriage', in R M Sable (Ed), *Incapacity for Marriage, Jurisprudence and Interpretation: Acts of the III Gregorian Colloquium, 1-6 September 1986, St John's Provincial Seminary, Plymouth, Michigan, USA* (Rome, 1987), pp208-210. See also Gerard T Jorgensen, 'The Role of the Expert in Tribunal Proceedings', *CLSG&I Newsletter*, 142 (2005), pp62-73. Jorgensen also cites Pompedda and the Apostolic *Signatura*, Prot. No: N 28259/97 and concludes at p66: 'It would be reasonable to conclude that the intervention of experts in cases of nullity considered under canons 1084 and 1095 is mandatory ... the exception cannot be and must not become an alternative norm'. Also Boccafolo, *Ex Comm*, p1329: 'In accord with the provisions of c 1680, then, it would seem that a judge should make use of the help of experts in any case whose *caput nullitatis* would be based on c 1095, for all of the three clauses of c 1095 are concerned with a psychic incapacity for matrimonial consent, and the supreme legislator has recently made clear that such a psychic incapacity can truly be envisioned only in the presence of a serious anomaly affecting the ability to know and to will'.

<sup>242</sup> *Ibid.*, p397. McGrath cites as examples of 'creative imagination': (a) the use of the civil maxim of 'the common estimation of the ordinary man'; (b) the incorporation of the writings and analysis of H Nouven in *Intimacy*; and (c) the use of a civil divorce decree stating that a party suffered from a specific psychiatric condition.

<sup>243</sup> *Ibid.*, p382-383.

Cox, too, sees canon 1680 as an example of circumstances where the use of experts is required by law, albeit that ‘psychic causes’ might be relevant in marriage cases beyond consensual incapacity; consequently the range of experts required might go beyond the discipline of psychology. For example, an expert in the teaching of another religion might assist in establishing ‘an error determining the will’, or handwriting experts might be required to authenticate documents.<sup>244</sup> Cox cites McGrath and Mendonça as stating that the phrase ‘because of mental illness’, ‘at least implicitly covers all of the psychic causes involved in the three parts of canon 1095’.<sup>245</sup> Örsy is of like mind, acknowledging the incompetency of law to define precisely what is required for valid marital consent; psychology and psychiatry must ‘fill the gap’.<sup>246</sup> Canons from the field of psychology or psychiatry should be interpreted ‘according to scientific criteria, taking into account the evolutionary nature of these sciences’ and ‘if a canon speaks of the effect of mental diseases, it should be interpreted according to the latest advances in medicine and not according to the state of information of the legislator at the time of the promulgation of the law’.<sup>247</sup> The law should be understood in terms of its function, that is, the value which it intends to serve.<sup>248</sup> The hierarchy of values must be taken into account and where conflict exists, the greater value prevails.<sup>249</sup> If the defects described in canon 1095 are judged from the horizon of scientific psychology, canon law ‘receives the verdict based on medical evidence’, otherwise ‘it tries to decide a medical issue which is beyond its competence’, but it must ensure that correct vision of authentic Christian anthropology is not violated.<sup>250</sup> If interpreted as merely legal terms, medical science would not influence their meaning and ‘legalism would reign supreme’.<sup>251</sup> For Örsy, therefore, the role of the expert complements that of the judge; their expertise differs, but dialogue between them is essential in order that the expert establishes the psychological status of the party at the material time and that his findings are correctly interpreted, in light of Christian anthropology, by the ecclesiastical judge.

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<sup>244</sup> Cox, *New Comm*, p1773-1774, citing McGrath, ‘At the Service of Truth’, p381. See Appendix I: *CIC*, c. 1099 for error determining the will.

<sup>245</sup> *Ibid.*, p1773, citing Mendonça, ‘The Role of Experts’, pp420-424 and McGrath, ‘At the Service of Truth’, p381.

<sup>246</sup> Örsy, *Marriage in Canon Law*, p130.

<sup>247</sup> Ladislav Örsy, *Theology and Canon Law: New Horizons for Legislation and Interpretation* (Collegeville,1992), p56.

<sup>248</sup> *Ibid.*, p28.

<sup>249</sup> *Ibid.*, p58.

<sup>250</sup> *Ibid.*, p31. Emphasis in original.

<sup>251</sup> *Ibid.*, p58.

Doyle hints at the incompetence of ecclesiastical judges when he says that the diagnosis of a disorder is a ‘clinical’ rather than a ‘juridical’ issue; he acknowledges the complexity of the field when he explains that classifications can vary leading to experts having differing opinions.<sup>252</sup> He implies the need for the intervention of a psychiatrist, specifically in cases involving allegations of grave lack of discretion of judgment, when he acknowledges that the ‘psychiatrist and the jurist’ must establish the party’s ability to form judgments.<sup>253</sup> For Doyle, it is insufficient to establish the mere fact of a personality or nervous disorder; ‘what must be determined is the gravity of the condition and its actual effect on the intellectual capacity to evaluate the decision or the ability of the will to choose freely’.<sup>254</sup> When discussing the issue of absolute and relative incapacity, Doyle refers to the reluctance of ‘psychiatrists and psychologists’ to pronounce on absolute incapacity, preferring to ‘limit their opinions to the case before them’.<sup>255</sup> His inference that expert opinion is required in these cases is strengthened by his statement that the primary concern is not the ‘psychic disorder’, but ‘its effects upon the interpersonal relationship’.<sup>256</sup> He emphasises that ‘occasional acts of irresponsibility, be they grave or light do not in themselves constitute proof either of incapacity or of the existence of a psychological disorder’; nevertheless, he says that a ‘pattern of such behavior can and usually does provide evidence of such a disorder’.<sup>257</sup> Taken out of context, this latter statement could imply that evidence of a consistent pattern of behaviour, without establishing its true cause, is sufficient to prove incapacity, but this would ignore his earlier statements that antecedence and severity of the condition need to be established, and more particularly, the effect of the existing condition on the party’s capacity to consent. Establishing these criteria would normally be beyond the competence of the ecclesiastical judge.

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<sup>252</sup> Doyle, *Text&Comm*, p778, citing M Pompedda, ‘Neuroses and psychopathic personalities in relation to consent’, Lecture Notes from the *Cursus Renovationis*, given in Rome at the Gregorian University, 1973, in H McMahon, ‘The Role of Psychiatric and Psychological Experts in Nullity Cases’, *Studia Canonica*, 9 (1975), p66.

<sup>253</sup> *Ibid.*, p776, citing L Hinslie and R Campbell, *Psychiatric Dictionary* (New York: Oxford University, 1970), p419.

<sup>254</sup> *Ibid.*

<sup>255</sup> Doyle, *Text&Comm*, p778-779, citing J Higgins, ‘Psychological Influences on the Matrimonial Bond’, in W Bassett (Ed), *The Bond of Marriage* (Notre Dame, Ind, 1968), p208. Absolute incapacity means incapacity for any marriage; relative incapacity means incapacity for marriage to a particular person.

<sup>256</sup> *Ibid.*, p779.

<sup>257</sup> *Ibid.*

Like McGrath and Cox, Kelly notes that in *any* marriage nullity case the judge *can* decide, under *CIC* canon 1574, that the use of an expert is required. However, he acknowledges that due to the ambiguity of the term ‘mental illness’ there is controversy as to whether or not canon 1680 is applicable to cases heard under canon 1095; some writers arguing that because some ‘transitory personality disorders’ can cause nullity but are not ‘mental illnesses in the strict sense’, experts are not required, but his own view is:

‘... [I]t would be at least rash for a judge to decide in advance that in a particular case he is not faced with a mental illness, however that is to be defined. Moreover, he needs the services of the expert to decide what effect the person’s condition ... has had on ... consent. To prejudge either of these issues is to trespass on the expert’s field and to risk making inadequately based decisions’.<sup>258</sup>

Moreover, cases of inability to assume the essential obligations of marriage:

‘will usually involve ... expert evidence about the nature and effects of the alleged psychological defect. Evidence of mere behavior, no matter how depraved, is not *of itself* evidence of inability. It must be shown that the behavior was the result of a serious psychological defect and was not caused by ill-will or moral weakness’.<sup>259</sup>

Use of the word ‘usually’ implies that experts are not always required; nevertheless Kelly warns against focusing on behaviour and acknowledges the danger imposed by proceeding without expert opinion in cases involving psychological matters, precisely because they fall beyond the competence of the ecclesiastical judge.

Ortiz emphasizes the rarity of cases which could proceed in the absence of expert evidence:

‘...[C]ompletely unfound are the situations of incapacity not demonstrable in the external forum or the causes of incapacity which the unique means of proof at the deposition of the judge might be the declarations of the parties. In these cases, there are necessarily external manifestations of the anomaly, confirmable in other means of proof, of documents and witnesses, as well as experts. Except in the rarest cases of impossibility of hearing relatives or friends, or of procuring any clinical history of the subject (perhaps possible in situations of forced emigration or of persecution) causes of consensual incapacity are not introduced with the sole proof of the declarations of the party or parties’.<sup>260</sup>

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<sup>258</sup> Kelly, *L&S*, p938, paras 3286-3287.

<sup>259</sup> *Ibid.*, p612, para 2192, citing John Paul II, *Allocution to the Roman Rota* (1987). Emphasis in original.

<sup>260</sup> Miguel Ángel Ortiz, ‘The Declarations of the Parties and Moral Certitude’, in *Dugan*, pp53-89, at p68. Ortiz is Professor of Canon Law, Pontifical University of *Santa Croce*.

Commenting on the equivalent canon to *CIC* 1680, in *CCEO*,<sup>261</sup> Grocholewski, considers it would be a ‘serious mistake’ to consider circumstances ‘obviously useless’ if they were not; specifically regarding marital incapacity, Grocholewski refers simply to the Papal Allocutions to the Roman Rota of 1987 and 1988, in which he considers ‘the right approach concerning dialogue between the psychologist and the psychiatrist and the ecclesiastical judge’ was explained.<sup>262</sup>

*Emphasis on Exception:* Under *CIC* 1917 the services of an expert were required: ‘*unless* this would appear evidently useless’ in cases which were then confined to impotence and non-consummation; and ‘if there is cause’ in cases of *amentia*.<sup>263</sup> According to Wrenn:

‘The 1976 draft of procedural law (c 345), referring to impotence and defect of consent due to a mental disorder dropped the “unless” clause, (*perhaps* because *CIC* [1917] canon 1982 on “*amentia*” had not contained such a clause), but it was reinstated in the 1980 draft (c1632), “either because experts are not always necessary or because they are not available in some places”’.<sup>264</sup>

First, Wrenn does not mention that *CIC* 1917 canon 1982 required an expert ‘if there is cause’, that is, if the fact, severity or effect of the illness needed clarification. Second, by saying ‘perhaps’ he appears to speculate. Third, he does not explain how the unqualified ecclesiastical judges could supply for such expert evidence, or how experts could be deemed unavailable in places where tribunals exist. He acknowledges that all three paragraphs of *CIC* canon 1095 involve a ‘defect of consent’; consequently, ‘*whenever*’ such a case ‘*seems* to involve a psychopathology or mental disorder (*mentis morbis*), the services of an expert are *in order*’.<sup>265</sup> This clearly implies that the defects of consent referred to in *CIC* canon 1095 need not involve psychopathology or mental disorder and consequently the use of experts is not always

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<sup>261</sup> *CCEO*, c. 1366. See Appendix II.

<sup>262</sup> Zenon Grocholewski, in *Nedungatt*, p775-776. Cardinal Zenon Grocholewski is a curial member of the Congregations of the Doctrine of the Faith and of Bishops and is a member of the Pontifical Council for Legislative Texts. He also taught at the Faculty of Canon Law of the Pontifical Gregorian University in Rome (1975-1999), and at the Faculty of Canon Law of the Pontifical Lateran University in Rome (1980-1984). In addition, he gave lectures on Administrative Justice at the *Studio Rotale* of the Roman Rota (1986-1998). He currently serves as Prefect of the Congregation for Catholic Education and as Grand Chancellor of the Pontifical Gregorian University. The juridical states of Papal allocutions is discussed below.

<sup>263</sup> *CIC* 1917, cc. 1976; and 1982. Emphasis added. See Appendix III.

<sup>264</sup> Wrenn, *Text&Comm*, p1013, citing *Comm*, 11 (1979), p264. Emphasis added.

<sup>265</sup> *Ibid.*, p1013. Emphases added.

mandatory. However, he does not explain what causes, other than psychopathology or mental disorder, could give rise to these defects, or what circumstances would render it unnecessary for the judge to consult an expert. In a later publication, he claims:

‘A lack of due discretion ... does not always involve a mental disorder. Sometimes the indiscretion is caused by predominantly extrinsic causes coupled with immaturity. In such cases the services of an expert would be at the discretion of the judge. It is only when a true disorder is present that a perital report is required’.<sup>266</sup>

This implies that ecclesiastical judges are, without the benefit of any expert evidence, competent to determine: (a) whether or not a ‘true disorder’, latent or operative, existed at the material time; (b) the party’s level of psychological maturity at the material time; (c) the nature of any ‘extrinsic cause’; (d) the severity of such a cause; and (e) the effect of such a cause when combined with ‘immaturity’ on the person’s capacity to consent. Wrenn does not explain the method to be used in assessing the party’s psychological capacity, which is pertinent given both the canonical presumption of capacity and the requirement to consult experts to establish otherwise.

Breitenbeck, citing others in support, sees the exception as empowering a judge ‘to forego’ consulting an expert, albeit ‘if circumstances would render it useless’. She points out that the original *schema* of this canon made no reference to the possibility of omitting the use of experts, but the consultors foresaw the possibility that in some cases it would not be necessary and in others experts ‘would not be available’; consequently the exception was suggested, introduced and retained. She does not explain how, if a tribunal exists in a particular place, experts could be deemed unavailable. Nor does she cite authority to support her opinion that the unavailability of experts permits the judge to proceed to a definitive judgment on psychological incapacity grounds. Nevertheless, the judge would ‘*frequently* consider it unnecessary [to consult an expert] and therefore useless’.<sup>267</sup> However, she acknowledges that the circumstances in which the exception is permitted are restrictive, namely, when: (a) the judge is sufficiently convinced

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<sup>266</sup> Lawrence Wrenn, *The Invalid Marriage* (CLSA, 1998), p30.

<sup>267</sup> Breitenbeck, *Doctoral Thesis*, p231, citing Juan José Garcia Failde, *Nueve Derecho Procesal Canónico: Estudio sistematico-analitico comparado* (Salamanca: Universidad Pontificia de Salamanca, 1984), p147 and Aldo Stella, *Le Prueba Pericial en las Causas Matrimoniales por Incapacidad Psiquica: Innovationes del Código Reformado* (*Universitas Canonica*, 4, 1984), p93. Emphasis added.

by documents and testimony already presented; (b) expert opinion already submitted is accepted; (c) expert opinion from a prior civil or ecclesiastical case is pertinent; and (d) the judge has decided to approve experts proposed by the parties.<sup>268</sup> However, these circumstances, although not involving a court appointed expert, nevertheless involve the submission of expert opinion. Breitenbeck cites De las Heras, who holds that expert opinion would be useless in two circumstances: where it is clear that the psychological anomaly exists; or ‘when there is no indication whatsoever of the alleged anomaly’.<sup>269</sup> But, the former implies that it is sufficient to establish the existence of a psychological anomaly, without reference to antecedence, its severity, or its effect on the party’s capacity to consent; the latter implies that a case could still proceed under the heading of incapacity in the absence of any anomaly. Breitenbeck understands De las Heras’ interpretation of the exception as expressing ‘a wish to avoid expert opinion as a mere formality and ... to prescribe it as necessary only when expert information could complete or explain something which does not enjoy sufficient clarity’.<sup>270</sup> However, this appears to emphasise the exception rather than the rule; it emphasizes avoidance of consultation without explaining the judge’s competence to replace the expert.

Although Cox warns that the exception, like any exception, must be interpreted strictly: the canonical presumption, ‘which should not be overturned lightly’, is that the service of an expert is required.<sup>271</sup> However, he concludes that if the evidence has certainly: (a) established the relevant facts; (b) clarified the nature and meaning of those facts in light of jurisprudential issues, such as antecedence and severity; the judge ‘has the authority to proceed to a decision without involving an expert’.<sup>272</sup> He does not explain how these relevant facts can be established and clarified, particularly the *effect* on a party’s psychological status at the material time which clearly involves complex issues belonging to a field of science generally beyond the ecclesiastical judge’s competence, without any expert input.

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<sup>268</sup> Ibid.

<sup>269</sup> Ibid., p232, citing Feliciano Gil de las Heras, *Organización judicial de la Iglesia en el Nuevo Código (Ius Canonicum*, 24, 1984), p184.

<sup>270</sup> Ibid., citing de las Heras, op. cit., p184.

<sup>271</sup> Cox, *New Comm*, p1773, citing *CIC*, c. 18.

<sup>272</sup> Ibid., citing McGrath, ‘At the Service of Truth’, pp359-398.



Whilst accepting that the canon is an example of the law mandating the use of an expert, Kelly argues that the exception involves situations where ‘there is manifestly nothing for the expert to investigate, or ... the matter is already fully ... or adequately proven without the expert evidence, especially where the disorder in question is florid and obviously manifest’.<sup>273</sup> However, he does not explain how the absence of anything to investigate is relevant in cases of either impotence, for which he acknowledges ‘medical testimony is needed’, or mental illness, which is also a medical issue and usually beyond the competence of an ecclesiastical judge. He does not focus on establishing the existence, severity or effect of a psychological condition on a person’s capacity at the material time, either to elicit marital consent or to assume its object.

Beal, acknowledging that proof of a ‘serious and habitual mental disorder’ causing lack of sufficient use of reason, ‘usually’ requires the services of psychological experts, considers that they ‘may shed little light’ on the critical issues in cases involving ‘serious but transient disturbances such as intoxication’.<sup>274</sup> He does not explain how unqualified ecclesiastical judges can do better. Moreover, in grave lack of discretion of judgment cases, Beal states:

‘[J]udges must reconstruct the marital decision-making process, as investigators reconstruct the scenes of traffic incidents, to attempt to identify critical faults or omissions in the reasoning process that may have rendered it fatally flawed’.<sup>275</sup>

For Beal, this involves ‘a two-step process’: the identification of an underlying disorder or disturbance ‘that has impaired a person’s psychic functioning’; and the weighing of ‘the seriousness of the impact of this impairment on the faculties involved in the decision-making process against the seriousness of marital rights and obligations’.<sup>276</sup> Moreover, he acknowledges that ‘psychological experts *can* provide invaluable assistance to judges in identifying the nature, seriousness and impact of psychic disorders and disturbances and in reconstructing the dynamics of the process that led to the choice of marriage’.<sup>277</sup> It is clear, therefore, that this is a specialist task, but Beal mentions neither the ecclesiastical judges’ competence to proceed without expert opinion, nor appropriate methodology. Regarding inability to assume the essential obligations

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<sup>273</sup> Kelly, *L&S*, p938, paras 3285- 3286.

<sup>274</sup> Beal, *New Comm*, pp1298-1299.

<sup>275</sup> *Ibid.*, p1301.

<sup>276</sup> *Ibid.*

<sup>277</sup> *Ibid.* Emphasis added.

of marriage, Beal acknowledges that ‘identifying the nature of the disorder and assessing its severity *usually* require the services of a psychological expert’ and that Rotal sentences ‘speak of the *necessity* of using experts in cases of consensual incapacity’.<sup>278</sup> This implies that expert consultation is not mandated and that Rotal jurisprudence need not be followed.

Some canonists, therefore, emphasise the principle enshrined in canon 1680 and warn against the dangers of ecclesiastical judges overstepping their competence, while others emphasise the exception. Although incapacity must be due to an antecedent and severe cause, there is no real consensus regarding whether or not consultation and dialogue with experts is mandated in psychological incapacity cases; consequently, it is not surprising that there is also a lack of consensus as to how the main requirement of proof, that is, establishing the *effect* of the cause on the party’s capacity to consent, is met. Given that, generally speaking, ecclesiastical judges lack competence in this area, it is unclear how obstacles to reaching moral certainty are overcome without the use of experts. Any argument that because paragraph 2° of the canon does not include the term ‘psychological’, such a cause is not required, is not a valid one when interpreting canon law, which takes account of context, including the development of the wording of canons throughout the various *schema* during the revision of *CIC* 1917.<sup>279</sup> The history of this canon demonstrates clearly its origin in the concept of *amentia*.

*CIC* canon 1680 makes no explicit reference to physical examination; although that might prove necessary in order to establish the fact or nature of something. Interestingly, neither *CIC* 1917 nor *CIC* provide for the possibility of expert unavailability. It is likely therefore, that the legislator intended experts to be consulted but recognised that in some cases the information might already be in the tribunal’s possession, thereby making *further* consultation with experts unnecessary; hence provision for the exception to the general rule. Nevertheless, some authors clearly hold, not only that experts need not be consulted, but that the unavailability of experts provides a sufficiently valid reason to proceed with a marriage nullity case on grounds of incapacity without any expert evidence whatsoever, without explaining precisely what

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<sup>278</sup> *Ibid.*, p1303, citing Mendonça, ‘Consensual Incapacity’, p541 (*sic*). Emphases added.

<sup>279</sup> *CIC*, c. 17. See Appendix I. Also, Mary McAleese, *Quo vadis?: Collegiality in the Code of Canon Law* (The Columba Press, 2012), p35: ‘In Canon Law, the research pathway has some but not always exact parallels with civil law. It has noteworthy differences especially the significance attached, by canonists, to the textual changes made over the course of the drafting process’.

constitutes ‘unavailability’ or explaining how an ecclesiastical judge can supply for the expertise required to establish the existence and effect of a serious condition on a party’s capacity for marriage. In incapacity cases, an expert’s role is to assist the judge to reach moral certainty regarding: (a) the existence of a serious psychological cause; (b) its antecedence; (c) its severity; and (d) most particularly, its adverse effect on a party’s capacity to consent; when the tribunal does not already have this information. None of these authors explains how judges can reach moral certainty of these facts, when the experts who are required to establish them are ‘unavailable’; nor do they provide authority for their stance that judges can proceed in these circumstances.

**Documents Supporting the Mandatory Use of Experts:** Some of these opinions on whether or not experts are mandated, however, pre-date several weighty documents which support the premise that experts must be used in cases in which *CIC* canon 1095 is invoked.<sup>280</sup> Although not strictly legislative, these include:

1. Some Papal Allocutions, given by the Church’s supreme legislator, and judge; these are issued to officials of the papal tribunals, but are intended for all tribunal officials; and they give insight into the supreme legislator’s mind. Their content is to be considered binding when it concerns the context of law, because law and doctrine are inseparable;<sup>281</sup>
2. A declaration made by the Church’s Supreme Tribunal, the Apostolic *Signatura*, (1998) in response to a specific question posed by a judicial vicar regarding the possibility of reaching moral certainty of nullity of marriage on the basis of a judge’s personal knowledge, when expert evidence was unavailable;<sup>282</sup> and:

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<sup>280</sup> See Huels, ‘Assessing the Weight of Documents’, pp119-133. Although addressing liturgical issues, Huels considers that four questions must be answered to assess the weight of an ecclesiastical document: 1) Is the document theological or juridical in nature? 2) Who is the authority that has issued the document? 3) To whom is the document addressed? and 4) Is the document juridically binding?

<sup>281</sup> *CIC*, cc. 17; 331; and 1442. See Appendix I. See also John Paul II, *Allocutions to the Roman Rota* (1989), in which the Pope explained that in these speeches he addresses ‘all engaged in the administration of justice in the ecclesiastical tribunals ...’; and (2005): 6, in which he explains the juridical nature of the content of these speeches. See Appendix VII. See also Robert Ombres, ‘Canon Law and Theology’, 14 *Ecclesiastical Law Journal* (2012), pp164-194, in which he addresses the juridical nature of Papal Allocutions.

<sup>282</sup> Supreme Tribunal of the Apostolic *Signatura*, Prot. N. 28252/97, *Questions regarding the use of the expert in marriage nullity cases* (16 June 1998). English translation in *CLSGB&I Newsletter*, No 150, (June 2007), pp11-13.

3. The Instruction, *Dignitas Connubii* (2005) (*DC*), which explains extant law and is binding on those who execute it; this is published by the Pontifical Council for Legislative Texts, by mandate of the supreme legislator, and with the close cooperation of two other major Pontifical Congregations, and that of the Supreme Tribunal whose moral and juridic authority is unquestionable.<sup>283</sup>

These documents will be explored in turn.

***Papal Allocutions to the Sacred Roman Rota:*** Allocutions have not defined the term ‘expert’ but Popes have described members of the Rota as people: whose most serious obligation in marriage cases is that of protecting conjugal society; possessing personal qualities of ‘outstanding character and learning ... outstanding virtue and integrity of life’; who are experts in their own field; and capable of wise judgment and teaching.<sup>284</sup> Popes have described the Rota itself as: possessing ‘the highest prestige and greatest expertise’; and being an ‘unequaled expert body’, whose jurisprudence is considered ‘expert’.<sup>285</sup> Papal judges have legal qualifications, experience, knowledge of language and local custom, and knowledge of theology and Christian anthropology.<sup>286</sup> The subject matter of Papal Allocutions by successive Popes varies, but they have been consistent in their treatment of doctrine, law, and the need for unity of jurisprudence throughout the ecclesiastical tribunals.<sup>287</sup>

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Although, not having the force of law (see Appendix I: *CIC*, c. 16), this declaration was given by the Apostolic *Signatura*, following consultation with its own experts, and having discussed the matter in the presence of the Prefect. See also Morrissey, ‘Papal and Curial Pronouncements: Their Canonical Significance in Light of the 1983 Code of Canon Law’, *The Jurist* 50 (1990), pp102-125, in which he explains, at p121, that private replies ‘enable canonists to make good and practical applications of the existing legislation’.

<sup>283</sup> *CIC*, cc. 6§2; 16§1; 17; and 34§1. See Appendix I. The SCDF and SCDWDS were involved in the preparation of this Instruction. See also Joaquín Llobell, ‘The Juridical Nature of the Instruction *Dignitas Connubii* and Reaction to it in the Church’, in *Dugan*, pp3-31 (hereafter Llobell, in *Dugan*), at p6-9 for the sources of interpretation of the law relevant to *DC*. Also: *DC*, *Proemium*; Appendix V; *OM*, for relevant amendments of *CIC* in Appendix VI; and John Paul II, *Allocutions to the Roman Rota* (1981, 1983, and 1999) in Appendix VII.

<sup>284</sup> John XXIII, *Allocution to the Roman Rota* (1959); Paul VI, *Allocution to the Roman Rota* (1968, 1974); and John Paul II, *Allocution to the Roman Rota* (1984). See Appendix VII.

<sup>285</sup> John XIII, *Allocution to the Roman Rota* (1959); Paul VI, *Allocution to the Roman Rota* (1968); and John Paul II, *Allocution to the Roman Rota* (1984). See Appendix VII.

<sup>286</sup> Paul VI, *Allocution to the Roman Rota* (1974); John Paul II, *Allocution to the Roman Rota* (1984 and 1987). See Appendix VII.

<sup>287</sup> Including the protection of rights.

*Church Doctrine:* Papal Allocutions reiterate Church doctrine, the basis for law. The Allocutions repeat the Christian anthropological principles that human person is capable of loving God, his creator, but experiences internal difficulties in this life.<sup>288</sup> These can be overcome by uniting with God, albeit that this involves effort and sacrifice.<sup>289</sup> Difficulties within marriage are no exception.<sup>290</sup> This neither means, pessimistically, that man is destined to follow his impulses or social conditioning, nor optimistically, that he can attain fulfillment on his own.<sup>291</sup> Marriage, created by God, is a source of sanctification.<sup>292</sup> This concept of marriage as ‘an intimate sharing of life and love’ in which the spouses ‘give themselves to each other and accept each other’, must be considered when assessing capacity for marital consent.<sup>293</sup> Marriage, as a natural institution, cannot demand, for validity, more than the capacity of the majority.<sup>294</sup> Papal Allocutions have sought consistently to emphasise, not only the importance of marriage and the family in society,<sup>295</sup> but the role of the Rota in protecting: doctrine, specifically the doctrine of the indissolubility of marriage;<sup>296</sup> the natural right to marry;<sup>297</sup> and the requirement and sufficiency for the judge to reach ‘moral certainty’ of nullity of marriage, based on the acts and proofs, before making such a declaration.<sup>298</sup>

*Law and Jurisprudence:* The Allocutions stress repeatedly, not only the inherent pastoral nature of canon law, of which procedural law is a component,<sup>299</sup> but the role of the Roman Rota in safeguarding: the truth;<sup>300</sup> rights<sup>301</sup> (which are not unlimited);<sup>302</sup> the administration of justice;<sup>303</sup>

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<sup>288</sup> John Paul II, *Allocution to the Roman Rota* (1987). See Appendix VII.

<sup>289</sup> John Paul II, *Allocution to the Roman Rota* (1995). See Appendix VII.

<sup>290</sup> John Paul II, *Allocution to the Roman Rota* (1987). See Appendix VII.

<sup>291</sup> *Ibid.*

<sup>292</sup> *Ibid.*

<sup>293</sup> *Ibid.*

<sup>294</sup> John Paul II, *Allocutions to the Roman Rota* (1997 and 2001). See Appendix VII.

<sup>295</sup> Pius XII, *Allocution to the Roman Rota* (1940); John XXIII, *Allocution to the Roman Rota* (1959); Paul VI, *Allocutions to the Roman Rota* (1975, 1976, and 1978); and John Paul II, *Allocutions to the Roman Rota* (1981, 2003, and 2004). See Appendix VII.

<sup>296</sup> Pius XII, *Allocutions to the Roman Rota* (1940 and 1941); John XXIII, *Allocution to the Roman Rota* (1959); John Paul II, *Allocutions to the Roman Rota* (2000 and 2002); and Benedict XVI, *Allocutions to the Roman Rota* (2006 and 2010). See Appendix VII.

<sup>297</sup> Pius XII, *Allocution to the Roman Rota* (1941); and Benedict XVI, *Allocutions to the Roman Rota* (2009 and 2011). See Appendix VII.

<sup>298</sup> John Paul II, *Allocution to the Roman Rota* (1980). See Appendix VII.

<sup>299</sup> John Paul II, *Allocutions to the Roman Rota* (1979 and 1990: 2, 6). In these allocution John Paul II spoke of a fair trial being a right of the faithful. See Appendix VII.

<sup>300</sup> Pius XII, *Allocution to the Roman Rota* (1944); Paul VI, *Allocutions to the Roman Rota* (1963, 1973 and 1978); John Paul II, *Allocutions to the Roman Rota* (1979, 1980, 1981, 1984, 1987, 1988, 1994 (3), 1999, 2002 (5), 2004

uniformity of ministry and doctrine,<sup>304</sup> and judicial decisions.<sup>305</sup> Although there is no canonical doctrine of precedent regarding judicial *decisions*,<sup>306</sup> in order to achieve uniformity of decisions, inferior tribunals are charged with following the *substantive and procedural law* of Rotal jurisprudence,<sup>307</sup> *exclusively*.<sup>308</sup> Correct interpretation of law requires knowledge of the whole body of Church teaching.<sup>309</sup>

*Expert Evidence:* Papal Allocutions acknowledge the value of advances in empirical sciences,<sup>310</sup> which have influenced not only the revision of law,<sup>311</sup> but also judicial decisions by the provision of expert evidence,<sup>312</sup> particularly in incapacity for marriage cases.<sup>313</sup> However, tribunals must be ‘on guard against the temptation to exploit the proofs and procedural norms in order to achieve what is perhaps a “practical” goal, which might be considered “pastoral,” but is to the

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(6), and 2005 (1, 5); and Benedict XVI, *Allocutions to the Roman Rota* (2006, 2007, 2009 and 2010). See Appendix VII.

<sup>301</sup> John XXIII, *Allocation to the Roman Rota* (1959); Paul VI, *Allocation to the Roman Rota* (1967 and 1977); John Paul II, *Allocation to the Roman Rota* (1979 and 1996 (3)); and Benedict XVI, *Allocation to the Roman Rota* (2008). See Appendix VII.

<sup>302</sup> *CIC*, c. 223§2. See Appendix I. Also Paul VI, *Allocation to the Roman Rota* (1977); and John Paul II, *Allocation to the Roman Rota* (1994 (3)). See Appendix VII.

<sup>303</sup> Paul VI, *Allocation to the Roman Rota* (1978); John Paul II, *Allocutions to the Roman Rota* (1981, 1984, 1993, 1998, and 2002 (1)); and Benedict XVI, *Allocutions to the Roman Rota* (2008 and 2010). See Appendix VII.

<sup>304</sup> Paul VI, *Allocation to the Roman Rota* (1977); and John Paul II, *Allocation to the Roman Rota* (1986). See Appendix VII.

<sup>305</sup> John Paul II, *Allocation to the Roman Rota* (1993 (3)); and Benedict XVI, *Allocutions to the Roman Rota* (2008 and 2011). See Appendix VII. See also McGrath, ‘Moral Certainty’, p58: ‘...[I]t is not sufficient simply to quote local jurisprudence, no matter how well presented or published - it might well be mistaken, and an error remains an error no matter how often it is quoted!’ See also Appendix VIII, Case No: 82-172, p102, *coram* Egan.

<sup>306</sup> *CIC*, cc. 16§3; and 19. See Appendix I. See also Norman Doe, ‘Canonical Doctrines of Judicial Precedent: A comparative study’, *The Jurist* 54 (1994), pp205-215. Doe, quoting c. 16§3 argues: (a) ‘judicial decisions do not have the force of law ... the only binding effect of a judicial decision is upon those involved in the litigation and it affects only the matter for which it was given’; (b) quoting c. 1400, ‘The object of a judicial decision is not to create law or to impose prospectively an obligation on courts to follow that decision in subsequent similar cases’; (c) ‘judicial interpretation does not *proprio vigore* bind other courts ... the only authentic and binding interpretation of a law ... is that of the legislator or his delegatee – and ... [it] must be promulgated’; (d) ‘[rather than] judges being obliged to *follow* earlier judicial decision ... [they are] obliged to *consult* other judicial decisions’; and (e) ‘if the law is silent on a point “the case is to be decided in light of ... the jurisprudence and praxis of the Roman Curia”’. Emphases in original,

<sup>307</sup> John Paul II, *Allocation to the Roman Rota* (1998), and Benedict XVI, *Allocation to the Roman Rota* (2008). See Appendix VII.

<sup>308</sup> John Paul II, *Allocutions to the Roman Rota* (1992 (4) and 1998); and Benedict XVI, *Allocation to the Roman Rota* (2008). See Appendix VII.

<sup>309</sup> John Paul II, *Allocation to the Roman Rota* (2005 (6)). See Appendix VII.

<sup>310</sup> Pius XII, *Allocation to the Roman Rota* (1940); and John Paul II, *Allocation to the Roman Rota* (1987 (2), 1996 (3) and 1998 (6)). See Appendix VII.

<sup>311</sup> Paul VI, *Allocation to the Roman Rota* (1968). See Appendix VII.

<sup>312</sup> Pius XII, *Allocation to the Roman Rota* (1941). See Appendix VII.

<sup>313</sup> Paul VI, *Allocation to the Roman Rota* (1976). See Appendix VII.

detriment of truth and justice'.<sup>314</sup> Expert evidence has inherent dangers.<sup>315</sup> Unless experts consider the Church's holistic, doctrinal, and Christian anthropological stance, including a correct view of human normality,<sup>316</sup> their findings can be misleading.<sup>317</sup> Consequently, experts who ignore this vision should be avoided;<sup>318</sup> dialogue is easier if judge and expert share a common understanding of anthropology.<sup>319</sup> Judges have responsibility to interpret expert reports critically in light of acceptable anthropology.<sup>320</sup> A correct understanding of human normality is essential; parties to an unsuccessful marriage may have: (a) failed to use available natural and supernatural resources; (b) suffered slight pathological disturbances, which caused a reduction, but not deprivation of freedom; or (c) behaved immorally.<sup>321</sup> Consequently, a failed marriage is not proof of incapacity.<sup>322</sup> Canonical (that is, minimal) maturity for marriage must not be confused with full maturity, the goal of human development.<sup>323</sup> A serious anomaly must exist to prevent the formation of marriage due to psychological incapacity.<sup>324</sup> Pope John Paul II stated:

'[O]nly the most severe forms of psychopathology impair substantially the freedom of the individual...[and]...it is of fundamental importance that, on the one hand, the identification of the more serious forms and their distinction from the slight, be carried out by means of a method that is scientifically sure; and on the other hand it is important that the categories that belong to psychiatry or psychology are not automatically transferred to the field of canon law without making the necessary adjustments which take account of the specific competence of each science'.<sup>325</sup>

Moreover, a validly contracted marriage does not rely, for its continued existence, on the subsequent conduct of the parties.<sup>326</sup> Canonical maturity, difficulty and normality must be distinguished, respectively, from full maturity, incapacity and abnormality.<sup>327</sup>

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<sup>314</sup> John Paul II, *Allocutions to the Roman Rota* (1979; and 1994: 4). See Appendix VII.

<sup>315</sup> Paul VI, *Allocution to the Roman Rota* (1976); and John Paul II, *Allocutions to the Roman Rota* (1980; and 1982). See Appendix VII.

<sup>316</sup> John Paul II, *Allocution to the Roman Rota* (1988); and Benedict XVI, *Allocution to the Roman Rota* (2009). See Appendix VII.

<sup>317</sup> John Paul II, *Allocutions to the Roman Rota*. (1987, 1988, 1995 and 2004). See Appendix VII.

<sup>318</sup> John Paul II, *Allocution to the Roman Rota* (1995). See Appendix VII.

<sup>319</sup> John Paul II, *Allocution to the Roman Rota* (1987 (3)). See Appendix VII.

<sup>320</sup> John Paul II, *Allocution to the Roman Rota* (1987 (2)). See Appendix VII.

<sup>321</sup> John Paul II, *Allocution to the Roman Rota* (1987 (5)). See Appendix VII.

<sup>322</sup> John Paul II, *Allocution to the Roman Rota* (1987 (7)). See Appendix VII.

<sup>323</sup> John Paul II, *Allocution to the Roman Rota* (1987 (6)). See Appendix VII.

<sup>324</sup> John Paul II, *Allocution to the Roman Rota* (1987 (7)). See Appendix VII.

<sup>325</sup> John Paul II, *Allocution to the Roman Rota* (1988). See Appendix VII.

<sup>326</sup> Benedict XVI, *Allocution to the Roman Rota* (2009). See Appendix VII.

*The Role of the Expert:* In psychological incapacity cases, which are ‘exceptional’, the intervention of an expert is required as a matter of principle, to establish the existence, severity and effect of an antecedent mental anomaly on the party’s capacity for consent.<sup>328</sup> Behaviour or imprudent decisions do not suffice to prove nullity.<sup>329</sup> Areas of competence are to be mutually respected.<sup>330</sup> The expert must establish causes of behaviour by scientific means, and distinguish mild, moderate and severe forms of psychopathology.<sup>331</sup> Although *CIC* is silent on a mandatory oath specifically for experts, they can be required to take one and they can be sworn to secrecy.<sup>332</sup> Defenders of the bond, themselves ‘expert’, have a duty to: evaluate expert reports in light of Christian anthropology, highlighting unscientific, incorrect, or exaggerated conclusions; ensure that all possible causes for marriage failure are considered; and lodge an appeal when necessary.<sup>333</sup> Judges are responsible for correct interpretation of expert reports, avoiding misleading conclusions, and for deciding on the nullity or otherwise of marriage, thus safeguarding the ministry of truth and charity.<sup>334</sup>

*Commentary on the 1987 and 1988 Allocutions:* Grocholewski clarified that the 1987 Allocution concerned all three grounds of nullity hypothesised in canon 1095; mild and moderate forms of psychic difficulties, encountered in ordinary life are insufficient to cause nullity - it is not how people act, but their potential to act which is at issue.<sup>335</sup> Moreover, *CIC* was not intended to introduce either a totally new interpretation or a break with the former law; the new law, including that applicable to marriage, was to be interpreted in light of tradition.<sup>336</sup> The

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<sup>327</sup> Benedict XVI, *Allocution to the Roman Rota* (2009), in which he revisited the principles announced by John Paul II, in his Allocutions of 1987 and 1988. See Appendix VII.

<sup>328</sup> John Paul II, *Allocution to the Roman Rota* (1987 (2)); and Benedict XVI, *Allocution to the Roman Rota* (2009). See Appendix VII.

<sup>329</sup> John Paul II, *Allocution to the Roman Rota* (1988); and Benedict XVI, *Allocution to the Roman Rota* (2011). See Appendix VII.

<sup>330</sup> John Paul II, *Allocution to the Roman Rota* (1987 (8) and 1988). See Appendix VII.

<sup>331</sup> John Paul II, *Allocution to the Roman Rota* (1988). See Appendix VII.

<sup>332</sup> Norms governing witnesses apply. *DC*, Article 167. See Appendix V. Pius XII *Allocution to the Roman Rota* (1944); and John Paul II, *Allocutions to the Roman Rota* (1980 and 1989). See Appendix VII.

<sup>333</sup> John Paul II, *Allocution to the Roman Rota* (1988). See Appendix VII.

<sup>334</sup> John Paul II, *Allocution to the Roman Rota* (1987). See also *Allocution to the Roman Rota* (1997), in which the Pope repeated much of the content of this Allocution, and 2009 in which Benedict XVI spoke of the ‘principle’ of consulting experts. See Appendix VII.

<sup>335</sup> Zenon Grocholewski, ‘The Ecclesiastical Judge and the Findings of Psychiatric and Psychological Experts’, *The Jurist*, 47 (1987), pp449-470.

<sup>336</sup> John Paul II, *Allocution to the Roman Rota* (1993). See Appendix VII.



Allocutions of 1987 and 1988, therefore, focusing on marital incapacity and the use of experts, clarify that: the existence of a ‘grave anomaly’ at the time of the exchange of consent must be established and its severity and effect on the party’s capacity to consent demonstrated. This anomaly must have been sufficiently severe, not just to have caused difficulties, but to have prevented the party from eliciting matrimonial consent.

Following these Allocutions, Mendonça addressed the question as to whether or not the use of experts was mandated in cases involving canon 1095. Having discussed the evolution of canons 1095 and 1680, Mendonça poses the question as to whether, following the allocution of 1987, ‘the expressions: “causes of a psychic nature” of canon 1095; “mental illness” of canon 1680; and “anomaly of a serious nature”, mentioned in the papal allocution [are] to be considered identical’ and he answers in the affirmative, but holds ‘the necessity of employing an expert or experts is not absolute but only *relative* (or *facultative*), i.e., *relative* to each case to be determined by the judge in the concrete circumstances ...’. Acknowledging the Holy Father’s words that these cases *demand* the help of experts, Mendonça considered that these must be interpreted in light of canon 1680, ‘which grants discretionary faculty to the judge of employing expert help’; the principle is ‘muted by the exception’, albeit that it is subject to strict interpretation.<sup>337</sup> However, he quotes Pompèdda:

‘When one says that the *perita* is a facultative means of proof, one is not saying that such a choice is purely “arbitrary” or “optional”, or a choice left to the capriciousness of a judge. We are speaking of a discretionality which is dependent upon and connected with the procedural exigencies in a specific case. This is particularly true in matrimonial cases which concern grave psychic defect or for causes of impotence. What distinguishes mere arbitrariness or capriciousness from a facultative choice of the judge is the procedural need in a specific case. ... Certainly, to lack any psychological or medical documentation in a case, to lack any qualified testimony (that of doctor, psychologist/psychiatrists) - even if these testimonies are not based on a specific role to which they were assigned in a case - to lack all this, and then for a judge to say that because of his own competence in psychological/psychiatric matters he can do without these,

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<sup>337</sup> Mendonça, ‘The Role of Experts’, pp424-425, citing G Versaldi, *Animadversines quaedam relate ad allocutionem Ioannis Pauli II ad Romanun Rotam diei 25 ianuarii* 1988, p254-255. In this article, Mendonça acknowledged that a survey of several tribunals in Canada showed that in 1989, a total of 3,200 cases were heard. 94.5% of these were judged on the basis of canon 1095, 2° and 3°. In 35% of these experts had been involved. However, practice differed between tribunals, some employing experts in 98% of cases while in others it was in less than 2% of cases. 95% of experts used were psychiatrists; 5% were psychologists.

the legitimacy of such a judge's behavior must be called into question. I would question the legitimacy of the omission of *perita* under such circumstances'.<sup>338</sup>

Mendonça proceeds: 'A judge cannot say that all those who suffer from "personality disorders" are incapable of contracting marriage because almost 95% of marriage cases dealt with in local tribunals involve personality disorders'. He criticises the 'faulty logic' of other writers who hold that 'incapacity can be established by the "common estimations of man"' without the help of experts, as being contrary to the requirements of law and praxis.<sup>339</sup> Mendonça concedes that there may be situations in which the exception can be invoked, for example, if 'medical records or psychiatric reports on previous treatment or examination may be available *and* in the light of other testimonies'. However, he also says: 'the testimonies of witnesses alone may provide an abundance of facts and indications which clearly identify the factors impeding a mature decision or the capacity to implement the object of that decision', but does not explain how this is sufficient to evaluate the party's capacity at the material time. Moreover, he says that experts are not required if 'the judge [finds] no trace of psychopathology or psychological disturbance which could have deprived the person of the capacity to contract'.<sup>340</sup> He does not explain how these cases can proceed on incapacity grounds, but presumably, the judge would have to find the case not proven.

***Declaration from the Apostolic Signatura:*** A Judicial Vicar of an un-named diocese claimed that the civil law of his country prohibited psychiatrists and psychologists from assisting in the ecclesiastical tribunals. This presented difficulties when dealing with marriage nullity cases under *CIC* canon 1095. He asked the *Apostolic Signatura*:

'Whether in such circumstances judges are allowed to pronounce in favour of nullity, if they arrive at the moral certitude which is required in favour of nullity, through their own non-professional knowledge, without the services of experts'.

The *Apostolic Signatura* responded:

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<sup>338</sup> Ibid., p425, citing Mario Pompedda, 'Incapacity to Assume the Essential Obligations of Marriage', in *Incapacity for Marriage*, p210. (No further reference is given).

<sup>339</sup> Ibid., p426, citing Lawrence Wrenn, 'Marriage Tribunals and the Expert', in *The Bulletin of the National Guild of Catholic Psychiatrists*, 25 (1979), p54 and H McMahon, 'The Role of Psychiatric and Psychological Experts in Nullity Cases' in *Studia Canonica*, 9 (1979), p73.

<sup>340</sup> Ibid.

‘Indeed an affirmative response - as the same Judicial vicar points out - would bring about that the services of experts can be omitted not only if it is obvious from the circumstances that it would be useless (canon 1680), but also if circumstances render these services morally impossible’.<sup>341</sup>

Some pertinent basic principles, such as moral certainty, were addressed, citing the Papal Allocution of 1942.<sup>342</sup> The declaration then stated, citing canon 1680 and the Papal Allocutions of 1987 and 1988:

‘In cases based on grounds which are dealt with in Canon 1095, unless it is obvious from the circumstances that this would be useless, the services of experts are required. Therefore, in such cases the services of a psychiatrist or psychologist are mostly required to distinguish the psychic condition of the party or parties at the time of the celebration of the marriage.<sup>343</sup> In cases based on incapacities, which are dealt with in Canon 1095, considering their complex nature, it is hardly possible that in a case, in which the services of an expert appear necessary, the judge can arrive through his own non-professional knowledge, at the moral certitude which is to be derived from the acts and the proofs and which is required in order to pronounce an affirmative sentence (Cf. canon 1608§§1, 2, 4).<sup>344</sup> The services of experts in such cases are to be employed not only because they have been prescribed by law, but especially because such services are an instrument of proof, which, as happens in most cases, the Judge cannot ignore in order to achieve moral certainty “from the acts and the proofs” so as to be able to pronounce sentence in favour of nullity of a marriage’.<sup>345</sup>

The Declaration, focusing on the exception, states:

‘An expert report about the psychic state of a party can seem to be “evidently useless” in order to prove the nullity of a marriage: (a) when, even if the matter in hand is not an expert report in the technical sense, in the acts there exists a document or testimonial, which is so qualified, that it provides sufficient relevant proof to the Judge; (b) when from proven facts and circumstances, without any doubt, there appears either a lack of sufficient use of reason or a serious lack of discretion of judgement or an incapacity to assume the essential obligations of marriage. The reason is that in this case the nullity of the marriage can be declared on account of an evident lack of consent, without the need of a carefully drawn up diagnosis of the psychic cause due to which there exists that defect. However, in such cases the Judge can ask the expert to explain some document or fact, which exists or is alleged in the acts. But, we are dealing with two cases which should not be considered except as exceptions from the general rule.’<sup>346</sup>

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<sup>341</sup> Supreme Tribunal of the Apostolic *Signatura*, Prot. N. 28252/97, *Questions regarding the use of the expert in marriage nullity cases* (16 June 1998). English translation in *CLSG&I Newsletter*, No 150 (June 2007), pp11-13.

<sup>342</sup> *Ibid.*, para 1, p11.

<sup>343</sup> *Ibid.*, para 2, p11-12.

<sup>344</sup> *Ibid.*, para 3, p12.

<sup>345</sup> *Ibid.*, para 4, p12.

<sup>346</sup> *Ibid.*, para 5, p12.

If a party refuses to subject himself to an examination by an expert, it is usual for the judge to ask the expert for a 'report' (*votum*) based on the acts alone. If such is "an expert report" (*peritia*) in the technical sense (*sic*). Evidently, in this case one can ask the same expert to explain the importance of such a "*votum*" in order to distinguish the true nature of the psychic defect. It is clear that this same "*votum*" should not be assessed in psychiatry or psychology in the same way as a "*peritia*" in the technical sense.<sup>347</sup>

A judge, who asks for a "*peritia*" or, if such is the case, a "*votum*", should observe assiduously the regulations of the relevant canonical procedural law... . On his part, the expert is bound to observe diligently not only the precepts and ethical norms of his art or science, but also the regulations of both canonical and civil law in fulfilling duly and faithfully his own duty (cf. Canons 1574, 1577§2 and 1578§2).<sup>348</sup>

The Declaration concludes:

'Since the services of experts, who are distinguished for their knowledge and experience and who adhere to the principles of Christian anthropology, are to be considered of great importance in settling marriage cases of nullity based on the grounds dealt with in Canon 1095, one must absolutely see to it that the principles indicated above are duly explained to those whom it concerns'.<sup>349</sup>

*Commentary on the Declaration:* Commenting on this Declaration, Mendonça appears to downplay its canonical significance initially by stating that, although the Apostolic *Signatura* cites *Pastor Bonus* as authority, the document is, nevertheless, a 'simple' *declaration*, which is 'neither a general executory decree nor a singular administrative act (decree)'.<sup>350</sup> Having analysed this declaration in detail, Mendonça answers the Judicial Vicar's question in the affirmative, based on the premise that 'numerous affirmative sentences' were pronounced on such grounds at Rotal level, their legitimacy never being questioned.<sup>351</sup> However, it is clear

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<sup>347</sup> Ibid., para 6, p12.

<sup>348</sup> Ibid., para 8, p13.

<sup>349</sup> Ibid., para 9, p13.

<sup>350</sup> Augustine Mendonça, 'The Apostolic *Signatura*'s Recent Declaration on the Necessity of Using Experts in Marriage Nullity Cases', *Studia Canonica*, 35 (2001), pp33-58, (hereafter Mendonça, 'Declaration') at p43-44, citing Francis Morrissey, *Papal and Curial Pronouncements: Their Canonical Significance in Light of the Code of Canon Law*, Second Edition, Revised and Updated by Michael Thériault (Ottawa, 1995), pp30-32. See also *PB*, Art 124, 1°: 'The *Signatura* also has the responsibility: 1. to exercise vigilance over the correct administration of justice, and, if need be, to censure advocates and procurators; 2. to deal with petitions presented to the Apostolic See for obtaining the commission of a case to the Roman Rota or some other favour relative to the administration of justice; 3. to extend the competence of lower tribunals; 4. to grant its approval to tribunals for appeals reserved to the Holy See, and to promote and approve the erection of interdiocesan tribunals'.

<sup>351</sup> Mendonça, 'Declaration', p57.

from the Papal Allocutions of 1987 and 1988 that the Pope had serious concerns about the interpretation of the law on incapacity for marriage.<sup>352</sup> Moreover, McGrath points out:

‘[While this allocution of 1987 was] interpreted by many as an attack on the practice of local tribunals ... commentators have been quick to point out that, while the contents of the allocution are directed to all tribunals, they were presented immediately to the judges of the Roman Rota’.

McGrath also cites Rotal cases which have been subsequently criticised both for non-use of experts and for the manner in which expert reports were interpreted and used.<sup>353</sup> More recently, the Pope was still not content with the interpretation of the law on incapacity for marriage.<sup>354</sup> Moreover, the ‘common and constant praxis’ of the Roman Rota, both before and after the promulgation of *CIC*, is to use experts in cases of consensual incapacity.<sup>355</sup>

Mendonça nevertheless acknowledges the general principles: a judge must reach moral certainty; the only sources for moral certainty are the acts and the proofs; the proofs must be evaluated in accord with conscience and with due regard for the legal provisions about the efficacy of certain proofs; and in the absence of moral certainty the judge must pronounce in favour of the bond of marriage.<sup>356</sup> He further acknowledges: ‘as a general rule’ when canon 1095 is invoked, ‘the services of expert(s) are mandatory’, but this is not ‘an absolute requirement’, as the law provides an exception. He concedes that the *Signatura* has identified only two circumstances in which the exception applies: (1) when there is ‘a document, such as a clinic report by a competent expert’, or ‘a hospital record’, or ‘testimony (either of an expert called in to testify as a witness in the case or by someone who provides a clear description of the person’s psychic

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<sup>352</sup> William H Woestman, ‘Judges and the Incapacity to Assume the Essential Obligations of Marriage’, *Studia Canonica*, 21 (1987), pp315-323 (hereafter Woestman, ‘Judges and Incapacity’), at p316: ‘Putting aside the sensationalism of the public press, [following the Papal Allocation of 1987], one hears a serious voice raising a question that is in urgent need of thoughtful consideration and an adequate response’.

<sup>353</sup> McGrath, ‘At the Service of Truth’, at 393-394, citing Versaldi, ‘*Momentum et consecraria allocutionis Ioannis Pauli II ad auditores Romanae Rotae diei 5 Februarii 1987*’, p110, and Z Grochowski, ‘The Ecclesiastical Judge and the Findings of Psychiatric and Psychological Experts’, in *The Jurist*, 47 (1987), p449.

<sup>354</sup> Benedict XVI, *Allocution to the Roman Rota* (2009). See Appendix VII.

<sup>355</sup> Antoni Stankiewicz, ‘Some Indications About Canon 1095 in the Instruction *Dignitas Connubii*’, in *Dugan*, 35-49 (hereafter Stankiewicz, ‘Some Indications: Canon 1095’), at p43, citing *coram* Huot, dec 26 June 1984, *RRDec.*, Vol. LXXVII, p636, n 12; and *coram* Jarawan, dec, 10 March 1989, *RRDec.*, Vol LXXXI, p 195, n 7b, etc. Stankiewicz was Dean of the Roman Rota from 2004-2012.

<sup>356</sup> Mendonça, ‘Declaration’, p57, citing Urbano Navarrete in *Commentarium*, in *Per*, 87 (1998), p626.

condition)’; or (2) when the psychological condition is so clear from the proofs that the judge has sufficient evidence of the alleged incapacity’.<sup>357</sup>

Furthermore, Mendonça concedes:

- (a) ‘unless a judge is also a psychiatrist or psychologist’ he is ‘not to play an expert’s role by diagnosing [the person’s] mental state or psychological condition’;
- (b) ‘without professional formation in behavioural sciences a judge cannot and should not try to indulge in evaluating the clinical data or information found in the acts ... without help from experts in psychology or psychiatry’; and:
- (c) ‘[although a judge’s insights acquired from dealing with cases] would certainly be very helpful in understanding better the mental state or psychological condition of a person, [those insights would not qualify him] to diagnose and to establish prognosis in a given case’.<sup>358</sup>

So, although Mendonça appears to emphasise the exception, nevertheless, he acknowledges both the principle and the limited circumstances, outlined by the Apostolic *Signatura*, in which the exception can be invoked.

**The Instruction *Dignitas Connubii*:** A decade after the famous Papal Allocutions of 1987 and 1988, the Pope announced his intention to provide an Instruction to guide those involved in processing marriage nullity cases.<sup>359</sup> This Instruction sought to simplify procedures in marriage cases, the norms governing which were to be found under three different headings in *CIC* 1983.<sup>360</sup> While seeming at times to extend the law, an Instruction cannot modify it, but gives it ‘more precise definition’.<sup>361</sup> In its preamble, *DC* acknowledges advances in medical sciences.<sup>362</sup> *DC* contains eleven articles governing experts.<sup>363</sup> Article 203§1 repeats the provisions of *CIC* canon 1680, but adds the qualification ‘or because of the incapacities described in canon 1095’, clarifying that the principle enunciated in canon 1680 applies to all three grounds hypothesised in *CIC* canon 1095. *DC* retains the exception in canon 1680, that is, ‘unless from the circumstances

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<sup>357</sup> *Ibid.*, p58.

<sup>358</sup> *Ibid.*, pp57- 58.

<sup>359</sup> See Appendix VII: John Paul II, *Allocution to the Roman Rota* (1998).

<sup>360</sup> *CIC*, cc. 1400-1500 on trials in general; cc. 1500-1670 on the contentious trial; and cc. 1671-1707 on special matrimonial processes.

<sup>361</sup> Llobell, in *Dugan*, pp3-31, at p4, citing numerous authors including Bianchi, Hilbert, Kowal, Lüdocke, Rodríguez-Ocaña, and Morrissey.

<sup>362</sup> *DC*, *Proemium*. See Appendix V.

<sup>363</sup> *DC*, Articles 203-213.

[expert opinion] would appear evidently useless'.<sup>364</sup> It appears, therefore, that the legislator intended that at least one expert be consulted in cases involving canon 1095, unless the tribunal was already in possession of the necessary information, but never intended to limit the scope of the canon to cases of *diagnosed* 'mental illness'.<sup>365</sup>

*DC* reiterates the judge's responsibility to appoint the expert in these cases,<sup>366</sup> but instead of the obligation to consult the parties as in *CIC* canon 1575, it merely requires parties to be informed of the appointment.<sup>367</sup> Whilst *CIC* is silent regarding the suitability of experts, *DC* clarifies that they must: 'have obtained a testimonial of their suitability'; be 'outstanding for their knowledge and experience'; and 'be commended for their religiosity and honesty'.<sup>368</sup> *DC* further requires 'special care' to be taken so that experts in psychological incapacity cases 'who adhere to Christian anthropological principles' be appointed.<sup>369</sup> The judge's obligation to define, by decree, the points the expert is to address is repeated in *DC*, but the obligation to include specific questions in cases of incapacity, and impotence, is clarified.<sup>370</sup> Other provisions of *DC* reiterate the provisions of *CIC*.<sup>371</sup>

*DC* requires the expert to respond to the questions posed by the judge, but only within his own field of knowledge and expertise.<sup>372</sup> If more than one expert is consulted, the provisions of *CIC* are repeated.<sup>373</sup> In addition to the expert's duties outlined in *CIC*, *DC* requires that the degree of certainty the experts' conclusions enjoy be specified.<sup>374</sup> Moreover, following the 1988 Allocution, in which the importance of the office of the defender of the bond was highlighted, *DC* specifically charges the defender with assisting the judges by ensuring that: questions put to the expert are clear and relevant to an incapacitating condition and do not go beyond his

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<sup>364</sup> *DC*, Article 203§1. See Appendix V.

<sup>365</sup> *DC*, Article 203§2, which repeats *CIC*, c. 1574, but omits the words 'by a provision of the law', (presumably, because *DC*, is limited to judicial procedures in marriage nullity cases) and adds the example of experts required to authenticate documents. See Appendix V.

<sup>366</sup> *DC*, Article 204§1. This repeats *CIC*, c. 1575. See Appendix V.

<sup>367</sup> *DC*, Article 204§2. See Appendix V.

<sup>368</sup> *DC*, Article 205§1. This provision reflects the continuity of law from *CIC* 1917, even when not expressly stated in *CIC*. See Appendix V.

<sup>369</sup> *DC*, Article 205§2. See Appendix V.

<sup>370</sup> *DC*, Articles 207-209. See Appendix V.

<sup>371</sup> For example, see *DC*, Articles 206; 207§§2 and 3; and 211-213. See Appendix V.

<sup>372</sup> *DC*, Article 209§3. See Appendix V.

<sup>373</sup> *DC*, Article 210§1. See Appendix V.

<sup>374</sup> *DC*, Article 210§2. See Appendix V.

competence; any expert's views which do not correspond to the principles of Christian anthropology are highlighted; and any incorrect evaluation of expert reports by the judges of First Instance is brought to the attention of the Appeal Tribunal.<sup>375</sup>

*Commentary on DC:* Stankiewicz, commenting on *DC*, highlights the importance of following procedural norms, which govern 'the form, the value and the timing of procedural acts and the order in which they are carried out'; they 'principally safeguard, in the procedural context, the substantive law'. Through procedural norms 'the normative substantive law is activated, carried out and becomes the concrete and real case'.<sup>376</sup> Acknowledging the difficulty of interpretation, he applies the procedural norms of *DC* to the substantive norm of canon 1095; identifying five 'perceptive norms':

- (a) Article 56§4, on the duties of the Defender of the Bond regarding canon 1095;
- (b) Article 203§1, on the necessity to engage one or more experts unless this would be evidently 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's investigation, formed by the questions proposed by the judge, with specific reference to the three forms of incapacity hypothesised in canon 1095nn 1°-3°; and:
- (e) Article 251, although not specifically mentioning canon 1095 mandating an imposition of a prohibition on a further marriage (a *vetitum*) on a party found to have been incapable of marriage due to a permanent cause.<sup>377</sup>

According to Stankiewicz, these five norms reflect both the concern over the quantitative increase in cases pleaded under canon 1095, 2° and 3° and the complexity of the substantive norm of canon 1095, which is based on the natural law, but which appears not always to be

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<sup>375</sup> *DC*, Article 56§§1; and 4. See Appendix V.

<sup>376</sup> Stankiewicz, 'Some Indications: Canon 1095', pp35-36.

<sup>377</sup> *Ibid.*, p45, ft 43, citing L M Rulla, in *Anthropology of the Christian Vocation*, Vol. 1, *Interdisciplinary Bases* (Rome, 1986), pp71-77, ft 31. See Appendix V, for the text of the relevant articles of *DC*. See also ft 98 above.



understood correctly.<sup>378</sup> He refutes arguments put forward by authors in favour of using experts at the discretion of the judge, citing, apart from *CIC* and *DC*, the ‘common and constant Rotal jurisprudence’, and the Church’s *Magisterium*, as authority for the mandatory involvement of experts in cases in which either impotence or canon 1095 is pleaded, except where it would be evidently useless. In *other* cases, expert evidence is left to the discretion of the judge. For Stankiewicz, the ‘knowledge and experience’ required of experts clearly implies formal specialist qualifications.<sup>379</sup>

Therefore, Papal allocutions (particularly those of 1987 and 1988), the Declaration of the Apostolic *Signatura* (1998) and *DC* (2005) are clear that experts are required in psychological incapacity cases, except in very limited circumstances.

## Conclusion

The Church teaches that marriage is an irrevocable covenant, by mutual and free consent exchanged between a man and a woman. It is a lifelong, indissoluble and faithful union, open to the procreation of children. To marry is a right of the natural law. Therefore, the Church recognises that marriage is within the capacity of most people. However, valid marriage can be prevented by impediments, lack or defect of form, or invalid consent caused by defects, including psychological incapacity. When a marriage fails, the ecclesiastical tribunals, whose structure and operation is governed by canon law, are competent to investigate pleas of nullity (including those based on psychological incapacity), submitted by either party in order to establish whether or not a true marriage came into existence, and consequently, the parties’ status

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<sup>378</sup> *Ibid.*, p37. Stankiewicz cites Rotal statistics: ‘[D]uring the year 2005, of the 126 definitive decisions, 57 (50 sentences, 7 decrees of ratification) concerned canon 1095, 2°, and 44 (39 sentences and 5 decrees of ratification) concerned canon 1095, 3°’. At p38 Stankiewicz states: ‘... [O]ne does not encounter the feared jurisprudential rigidity but rather laxism in the application of the law. This is found in the accustomed reasoning of ecclesiastical sentences which not unfrequently (*sic*) 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’.

<sup>379</sup> *Ibid.*, pp43-45. Stankiewicz is critical of Lawrence Wrenn, who, in *The Invalid Marriage*, p30, holds that the judge has discretion as to whether or not to consult an expert (see ft 266 above). Stankiewicz also cites John Paul II, *Allocution to the Roman Rota*, 1987, and the Supreme Tribunal of the Apostolic *Signatura*’s declaration of 16 June 1998.

in the Church regarding freedom to enter a new marriage. *CIC* canon 1095, evolving as it did from the *CIC* 1917 concept of *amentia*, involves *psychological* incapacity; when this is alleged the law mandates the use of experts, except in very limited circumstances (namely, when the required information is already available to the tribunal (canon 1680)). Since the promulgation of *CIC*, Papal Allocutions (especially those from 1987 and 1988), reflecting on, and usually endorsing, the common and constant praxis of the Roman Rota, have reiterated the obligation to consult experts when any of the incapacities enshrined in *CIC* canon 1095 is pleaded. In 1998, the Apostolic *Signatura* clarified the need to engage experts in psychological incapacity cases and the limited circumstances in which the exception permitted in *CIC* canon 1680 (i.e. when the tribunal already has the information) can be invoked. To clarify matters still further, the Instruction *DC* (2005) repeats and further clarifies the provisions of *CIC*. This Instruction incorporates the provisions of the Papal Allocutions and reflects the common and constant praxis of the two Papal tribunals. It sets out in detail the mandatory requirements to appoint and consult experts in incapacity cases and to pose specific, relevant questions to them.

The norms governing experts are found in *CIC* under ‘Judicial Procedures’; consequently, they focus on the use of experts in the judicial forum. There is, therefore, considerable dissonance between the clarity of provisions for the use of experts in the administrative governance of the Church (as we have seen in Chapters 1 to 3) and those in the judicial forum. The Church has always safeguarded marriage and the doctrine of indissolubility. Therefore, marriage nullity cases, forming the major workload of ecclesiastical tribunals, should benefit from the more detailed and clearer provisions outlined here, most particularly in *DC*. Some canonists acknowledge the requirement to engage experts in psychological incapacity cases as well as the limited circumstances in which the permitted exception applies. Others, however, instead of embracing the clearly presented law, which is facilitative and inherently pastoral, find innovative ways of circumventing these provisions. For example, they cite, but without clear authority, the unavailability of experts as justification for invoking the exception to the general principle, although no law provides for this circumstance. It would seem reasonable to expect that wherever tribunals exist, experts can be found. Some canonists, therefore, appear to understand that the judge has wide discretion as to the involvement of experts, even in these cases of psychological incapacity to exercise a right of the natural law. Moreover, these canonists do not

explain how the canonical requirements - to establish the existence of an ‘anomaly’ based on psychopathology and its severity, and to demonstrate its effect on a party’s psychological capacity at the material time of exchanging consent - can be satisfied without expert input. Nor do they explain the ecclesiastical judge’s competence in this field, or the methodology to be used to establish the party’s psychological status. It is not surprising therefore, that, as we shall see in the forthcoming chapters, experts are not used uniformly in practice. Coincidence between orthodoxy and orthopraxy, therefore, is of critical importance to uniformity of jurisprudence, to the value of certainty in upholding the rule of law in the Church and to the universal salvific mission of the Church.<sup>380</sup>

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<sup>380</sup> *CIC*, c. 1752. See Appendix I.

## CHAPTER 5

### THE USE OF EXPERTS IN PSYCHOLOGICAL INCAPACITY FOR MARRIAGE IN PRACTICE: CASE STUDIES

Marriage, as an institution of the natural law, is within the capacity of most people. We have seen that, under canon law, incapacity to marry can be caused by impediments, lack or defect of form, or invalid consent. Invalid consent due to *psychological* causes requires a ‘scientifically sure’ assessment of the party in whom the incapacity is alleged; the use of experts is mandated, except in very limited circumstances. Canon law presumes: capacity for marriage at canonical age, and the validity of marriage once celebrated; therefore, the *contrary* must be proven to the degree of moral certainty before a declaration of nullity can be issued. Moreover, the law requires the ecclesiastical judge to be qualified in canon law, and it is reasonable, therefore, to assume his competence to exercise his office and to interpret and apply the law correctly. However, this is a *requirement* of law, not a legal *presumption*.<sup>1</sup> A judge’s role in marriage nullity cases is to decide whether or not the evidence presented leads to the judges’ moral certainty of the fact of nullity.

This Chapter identifies cases in Southwark and Dublin in which *incapacity* to consent was alleged and experts were consulted. These cases have been anonymized to protect the identity of those involved. A brief statistical survey gives an overall view of the number of cases involved and the number of cases heard under the different heads of incapacity. Whilst the intention is not to suggest that the substantive decisions reached on nullity are incorrect, the cases in which expert opinion was sought are studied in an attempt to establish: (a) the rationale for seeking expert opinion; (b) whether or not the expert was tribunal-appointed; (c) whether or not procedural law was followed; and (d) whether or not expert opinion influenced the tribunal. A comparison will be made between the use of experts in Southwark cases and those from another jurisdiction (Dublin) as well as those in a sample of cases from the Roman Rota.

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<sup>1</sup> William L Daniel, ‘Motives in *Decernendo* for Admitting a Cause of Marriage Nullity to an Ordinary Examination’, *Studia Canonica*, 45 (2011), pp67-120, at p70. See Appendix IX for full quotation.

## **1. THE SOUTHWARK PROVINCE: JURISDICTION AND DOCUMENTS EXAMINED**

The Interdiocesan Tribunal of Second Instance of Southwark (ITSIS) accepts cases on appeal from four diocesan First Instance tribunals.<sup>2</sup> The cases appealed in 2009 are studied here.<sup>3</sup> Ninety-five cases were received by ITSIS. Files were available for seventy-seven of these.<sup>4</sup> Of the 18 unavailable files,<sup>5</sup> no information was available regarding the use of experts. However, the ITSIS register reveals the following information about them:<sup>6</sup>

- The First Instance reached affirmative (proven) decisions on grounds of incapacity in seventeen cases,<sup>7</sup> all of which involved the ground of grave lack of discretion of judgment concerning the essential matrimonial rights and obligations to be mutually given and accepted;<sup>8</sup>
- In eight cases this incapacity was found proven in both parties;<sup>9</sup> and in nine cases it was found proven in one party.<sup>10</sup> Therefore, a total of twenty-five people were found to be legally incapable on this ground;
- ITSIS agreed with all these affirmative decisions; it was unclear whether ITSIS ratified these decisions following the abbreviated process or following a full (ordinary contentious) hearing;<sup>11</sup>

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<sup>2</sup> The dioceses are: Plymouth, Portsmouth, Arundel and Brighton, and Southwark (which, although it is one tribunal has two First Instance offices, which operate independently).

<sup>3</sup> 2009 was the most recent year in which almost all cases which had been submitted to Second Instance were completed. Cases have been given Arabic numbers 1-95 corresponding to the number of cases received by ITSIS, with '09' referring to 2009.

<sup>4</sup> The unavailable files had been returned to the individual dioceses.

<sup>5</sup> 09/9; 09/12; 09/13; 09/14; 09/18; 09/24; 09/25; 09/26; 09/27; 09/29; 09/40; 09/41; 09/46; 09/47; 09/58; 09/59; 09/68; 09/93.

<sup>6</sup> *CIC*, c. 1637§4 provides that unless it is established otherwise, an appeal is presumed to be against all the grounds of the judgment. See Appendix I. However, the Second Instance register records only the grounds on which an affirmative decision had been reached at First Instance; it is unclear therefore, whether all grounds alleged at First Instance, or only those on which an affirmative decision was reached, were considered at Second Instance. However, *DC* Article 265§6 permits confirmation on one ground only as this is sufficient to declare the marriage invalid. See Appendix V.

<sup>7</sup> 09/9; 09/12; 09/13; 09/14; 09/18; 09/24; 09/25; 09/26; 09/29; 09/40; 09/41; 09/46; 09/47; 09/58; 09/59; 09/68; 09/93. Incapacity was not recorded at Second Instance in 09/27 but it is unclear whether or not it was alleged and found not-proven at First Instance.

<sup>8</sup> *CIC*, c. 1095, 2<sup>o</sup>. See Appendix I. Although important to bear in mind, hereafter, the qualification 'concerning the essential matrimonial rights and obligations to be mutually given and accepted,' will be omitted unless specifically required.

<sup>9</sup> 09/13; 09/14; 09/25; 09/26; 09/41; 09/46; 09/47; 09/93.

<sup>10</sup> 09/9; 09/12; 09/18; 09/24; 09/29; 09/40; 09/58; 09/59; 09/68.

- None of these cases involved either incapacity due to lack of sufficient use of reason,<sup>12</sup> or incapacity due to inability to assume the essential obligations of marriage, because of causes of a psychological nature;<sup>13</sup> and:
- No *vetita* were imposed.<sup>14</sup>

Of the seventy-seven available files, two cases were returned to First Instance.<sup>15</sup> Incapacity was not pleaded in seven cases.<sup>16</sup> Another contained a plea of incapacity in the original petition, but without explanation this ground was not included in the joinder of the issue.<sup>17</sup> This left sixty-seven cases pleading, *inter alia*, grounds of incapacity.<sup>18</sup> No pleas of lack of sufficient use of reason were received.

Sixty-four cases involved grave lack of discretion of judgment: twenty-seven of these concerned both parties;<sup>19</sup> thirty-seven concerned one party.<sup>20</sup> Therefore, ninety-one pleas

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<sup>11</sup> *CIC*, c. 1682§2. See Appendix I. There is an automatic appeal against an affirmative First Instance decision. The procedure at Second Instance is the same as that at First Instance. However, after an affirmative decision, the law provides for a simple ratification process at Second Instance, but if the judges cannot reach moral certainty with this process, the case is subject to a full hearing following the ordinary process. In case of a negative (not-proven) decision, the parties retain the right of appeal. These not-proven judgments are always subject to the ordinary process at Second Instance. See Appendix I *CIC* cc 1628 and 1640 and Appendix V: *DC* Article 266.

<sup>12</sup> *CIC*, c. 1095, 1°. See Appendix I.

<sup>13</sup> *CIC*, c. 1095, 3°. See Appendix I. Hereafter, the qualification ‘because of causes of a psychological nature’ will be omitted, unless specifically required.

<sup>14</sup> The imposition of a *vetitum* is mandated if the incapacity is considered permanent. See Appendix V: *DC*, Article 251.

<sup>15</sup> In 09/2 the civil divorce decree absolute referred to the religious marriage which had taken place a year after the civil marriage; its validity therefore, was in question as the civil authorities should have been concerned only with the first (civil) marriage. The civil authorities subsequently amended the decree absolute to refer to the original marriage which had legal effect. In 09/10 there was no valid plea. *CIC*, c. 1501; See Appendix I. See also Paulo Moneta (Professor of Canon Law at the University of Pisa), ‘Determination of the Formulation of the Doubt and Conformity of the Sentence’, in *Dugan*, pp93-113, p97. Moneta explains the ‘basic rule’ that only the parties may challenge the validity of marriage; hence the requirement for a valid petition from one of them. The judge may not, therefore, determine the grounds, even if that ‘could better meet their interests’. At p98, he acknowledges the party’s vested interest, but the judge must not supersede the party’s wishes or ‘apply a broader ground including the one originally formulated’.

<sup>16</sup> 09/63; 09/64; 09/71; 09/73; 09/74; 09/91; and 09/95.

<sup>17</sup> 09/53. The ‘joinder of the issue’ is sometimes called the ‘formulation of the doubt’. See Appendix I: *CIC*, c. 1513§1. First, under *CIC*, c. 1611, 1° the judge is obliged to address all the issues admitted in the joinder of the issue. Second, hearing the case on grounds other than those in the petition raises questions about the plaintiff’s understanding of the basis for the plea. See ft 15 above regarding the right of the parties to make their plea.

<sup>18</sup> The other grounds pleaded were: an intention against the good of the spouses (09/15; 09/22; 09/34; 09/54; 09/75); an intention against the good of children (09/28; 09/36; 09/42; 09/48; 09/49; 09/55; 09/80; 09/86; 09/88; 09/89; 09/92); an intention against the good of fidelity (09/30; 09/66; 09/82); total simulation (09/33; 09/35; 09/38; 09/39; 09/89); and error concerning a quality of person directly and principally intended (09/37; 09/77).

<sup>19</sup> 09/1; 09/6; 09/11; 09/21; 09/23; 09/30; 09/39; 09/42; 09/45; 09/48; 09/51; 09/55; 09/56; 09/60; 09/61; 09/65; 09/66; 09/72; 09/75; 09/80; 09/81; 09/82; 09/83; 09/86; 09/87; 09/88; 09/90.

were heard on this ground at First Instance. Sixty-nine affirmative decisions on this ground were ratified at ITSIS, but contrary to law, the Second Instance reasoning at ITSIS is not recorded;<sup>21</sup> a further two affirmative decisions were confirmed following the ordinary contentious process. Twenty pleas received negative (not-proven) decisions on this ground at First Instance, but this ground was found proven in the other party in ten cases,<sup>22</sup> which was sufficient to declare the marriage invalid. Of the remaining negative decisions on this ground,<sup>23</sup> an affirmative decision was reached on another ground in all but one case.<sup>24</sup> Therefore, in only one case was there a totally negative decision; that was on grave lack of discretion of judgment pleaded in either or both parties when no other ground was pleaded.<sup>25</sup> This negative decision was confirmed by ITSIS; the legal presumption of validity was therefore upheld in this one case.

Pleas of inability to assume the essential obligations of marriage were heard in thirteen cases at First Instance. Twelve concerned one party;<sup>26</sup> one concerned both parties.<sup>27</sup> Therefore, fourteen pleas were heard on this ground. Affirmative decisions were reached in eleven;<sup>28</sup> negative decisions were reached in three.<sup>29</sup> In the cases involving these three negative decisions, an affirmative decision was reached on: grounds of grave lack of discretion of judgment in both parties in one case;<sup>30</sup> inability to assume the essential obligations of marriage in the other party in the second case;<sup>31</sup> and error on the part of the other party in the third case. Consequently, these three marriages were declared invalid; two on grounds of incapacity.

In sum, seventy-one pleas of grave lack of discretion of judgment and eleven pleas of inability to assume the essential obligations of marriage succeeded. In all, seventy-nine

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<sup>20</sup> 09/3; 09/4; 09/5; 09/7; 09/8; 09/15; 09/16; 09/17; 09/19; 09/20; 09/22; 09/28; 09/31; 09/32; 09/33; 09/34; 09/35; 09/36; 09/38; 09/43; 09/44; 09/49; 09/50; 09/54; 09/57; 09/62; 09/67; 09/69; 09/70; 09/76; 09/78; 09/79; 09/84; 09/85; 09/89; 09/92; 09/94.

<sup>21</sup> DC, Article 265§4. See Appendix V.

<sup>22</sup> 09/11; 09/21; 09/23; 09/39; 09/42; 09/56; 09/61; 09/82; 09/86; 09/90.

<sup>23</sup> Two of these involved a negative decision on this ground in respect of both parties: 09/48 and 09/72.

<sup>24</sup> An intention against the good of children (09/48; 09/49; 09/67; 09/89); an intention against the good of spouses (09/54); and inability to assume the essential obligations of marriage (09/72).

<sup>25</sup> 09/1.

<sup>26</sup> 09/8; 09/16; 09/37; 09/44; 09/52; 09/55; 09/65; 09/76; 09/77; 09/78; 09/80; 09/87.

<sup>27</sup> 09/72.

<sup>28</sup> 09/8; 09/16; 09/37; 09/44; 09/52; 09/65; 09/72; 09/76; 09/78; 09/80; 09/87.

<sup>29</sup> 09/55; 09/72; 09/77. (09/72 involved both parties).

<sup>30</sup> 09/55.

<sup>31</sup> 09/72.

people were found legally incapable.<sup>32</sup> If one adds to this the twenty-five people declared incapable of marriage from the unavailable files, the total number amounts to one hundred and four. A *vetitum* was suggested by First Instance and confirmed by ITSIS in five cases.<sup>33</sup> In addition, a *vetitum* was added by ITSIS in two further cases.<sup>34</sup> A *monitum*, or warning,<sup>35</sup> was confirmed in one case.<sup>36</sup>

## 2. THE SOUTHWARK CASE STUDIES: FACTS, EXPERTS, JUDGMENTS AND ANALYSES

Despite the high number of incapacity pleas, an expert report was obtained in only six cases. An analysis of the Acts of these six cases involving experts follows.<sup>37</sup> This begins with a brief outline of the facts of each case and pertinent evidence provided by the party or parties and their witnesses (if there were any). If an advocate was involved, pertinent animadversions are recorded. The observations of the defender of the bond are then highlighted. The procedure for appointing the expert will then be outlined followed by an account of expert findings. Pertinent issues from the law section of the judgment will then be set out followed by the tribunal's application of law to the case. A brief discussion concludes each case.

It is worth noting at the outset that it was impossible to distinguish any of the six cases from other cases in which expert evidence was not sought; therefore, the rationale for seeking expert opinion was unclear in all six cases. Psychiatric illness or psychological impairment cannot account for expert involvement because these conditions were alleged in other cases

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<sup>32</sup> The apparent discrepancy is resolved by the fact that three people were found to be incapable on both grounds (grave lack of discretion of judgment and inability to assume the essential obligations of marriage): the plaintiff in 09/80 and the respondents in 09/65 and 09/87.

<sup>33</sup> In 09/19 a *vetitum* was imposed on the plaintiff and in 09/45 on the respondent, both of whom were found to have suffered from a grave lack of discretion of judgment. In 09/44 and 09/87, a *vetitum* was imposed on respondents who were found to have been incapable of assuming the essential obligations of marriage. In 09/80 a *vetitum* was imposed on the plaintiff who was found both to have suffered from a grave lack of discretion of judgment and to have been incapable of assuming the essential obligations of marriage.

<sup>34</sup> In 09/8, a *vetitum* was imposed on the respondent, and in 09/72 on the plaintiff; they were found to have been incapable assuming the essential obligations of marriage.

<sup>35</sup> Hopka, 'The *Vetitum* and *Monitum*', p357: 'A close cousin of the *vetitum* is an even more enigmatic figure: the *monitum*. The *monitum* is a warning that an impending marriage should take place only after the greatest caution has been exercised to make sure that the parties are able to marry'.

<sup>36</sup> In 09/36 a *monitum* was imposed on the plaintiff who was found to have suffered from a grave lack of discretion of judgment.

<sup>37</sup> 'Acts' refer to the entire bundle of papers put before the judges.



when expert opinion was not sought.<sup>38</sup> Nor can the policy of any particular diocese account for their input.<sup>39</sup>

### **Case 1:**<sup>40</sup>

This case demonstrates that the tribunal pursued grounds of incapacity when no ground was pleaded by the plaintiff in the petition itself and when the tribunal sought expert opinion in relation only to one of the parties when incapacity was alleged in both parties.

**Facts:** This marriage was a sacramental marriage celebrated before 1983. The plaintiff (husband) and respondent (wife) married when they were twenty-six and twenty-two years old respectively. Three children were born. The husband alleged the wife's infidelity and desertion (to live with another woman) after almost thirty years of marriage. The husband did not plead an established ground for nullity in his petition. Although there was no evidence of objection from either party, the grounds tested by the tribunal were grave lack of discretion of judgment on the part of either or both parties (on the basis that whilst pre-dating *CIC*, canon 1095 applies to this marriage as natural law affects all marriages).<sup>41</sup> Both parties testified. Their accounts of the relationship differed - both accused each other of infidelity; witness evidence about their relationship was largely hearsay - the witnesses offered no evidence on capacity. The parties did not report any difficulties in their courtship. The marriage suffered from extraneous pressures: both parties had stressful jobs; the plaintiff developed illness and sought early retirement, consulting an occupational health physician and a psychiatrist. The tribunal approached this psychiatrist for an expert report on the plaintiff. The Acts included the plaintiff's signed consent for release of his medical records.

**Expert Report:** The expert indicated that his report was requested by the tribunal secretary. The expert was a consultant psychiatrist, a clinical tutor, a Fellow of the Royal College of

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<sup>38</sup> There were many examples, as we shall see in Chapter 6. But, for example: in 09/8, the respondent allegedly used illicit drugs; in 09/16, the respondent allegedly was aggressive before marriage and imprisoned after marriage; in 09/20, the respondent was alleged to be aggressive and violent after marriage; in 09/35, the plaintiff admitted heavy drinking; in 09/45, the respondent, allegedly suffered psychological trauma following active military service; and in 09/55, the respondent allegedly got into debt, which led to 'hospital treatment'; yet no expert was consulted in these cases.

<sup>39</sup> Of the five tribunal offices: two cases came from one; one came from each of two more; and none came from the remaining two.

<sup>40</sup> 09/1.

<sup>41</sup> See Kelly, *L&S*, p615, para 1099.

Physicians and of the Royal College of Psychiatrists, and held a Diploma in Psychological Medicine. The expert listed documents used in the preparation of his report, namely: the plaintiff husband's out-patient records; referral letters from his general practitioner; a letter from his Occupational Health Physician; and 'various documents and letters from the State Benefits Agency'. The expert also interviewed the respondent wife on two occasions. The expert report addressed the plaintiff's condition under the headings: presenting history; previous health record; early life history; family history; marital history to 1997; current circumstances in 1997; diagnosis; treatment and progress 1997-2006; and comment. The expert confirmed the plaintiff's referral to him twenty-nine years after marriage, and reported that he had no prior disorder of mental health. His symptoms were anxiety, lack of sleep, loss of confidence, loss of energy, loss of concentration and forgetfulness. These symptoms amounted to clinical depression but also fitted the category of 'mixed anxiety and depressive disorder'. This, reported the expert, is the 'commonest disorder seen in general practice settings' and is 'derived from stressful life events' such as applied in this case due to increasing work pressure and family circumstances. In short, the expert found no psychological disorder antecedent to the marriage in the plaintiff husband.

**Advocates:** The respondent wife, opposing the grounds, appointed an advocate who argued against nullity. The advocate argued that neither party misunderstood the nature of marriage. The plaintiff husband then appointed an advocate who argued that both parties' lack of marriage preparation and the respondent's lack of Catholic upbringing resulted in an immature understanding of marriage. The respondent's advocate refuted this argument, saying that neither marriage preparation nor Catholic upbringing was an impediment to marriage, which is a natural right that can, and is, exercised by many people without the benefit of either.<sup>42</sup>

**Defender of the Bond:** The defender of the bond highlighted evidence of the parties': pre-marital discussions of important issues (including discussions with their priest about marriage); capacity; initial happiness within marriage; and difficulties occurring later in marriage. He noted that the medical report did not demonstrate any psychological problems antecedent to the marriage.

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<sup>42</sup> Whilst pre-marriage preparation is encouraged, the overriding natural right to marry prevails. Pastors, however, have a general canonical duty to instruct their flock. See Appendix I: *CIC*, c. 1063.

**The Tribunal's Understanding of the Law:** The tribunal described the concept of 'due discretion' or 'discretion of judgment', articulated in canon 1095, as a 'mature decision'. It discussed the requirements of: adequate knowledge regarding the nature of marriage; the ability to deliberate critically; and the freedom to do so. It acknowledged that 'it is not unreasonable' for judges to presume that this capacity 'exists in all people who have attained adulthood'. The tribunal had to be satisfied that at least one party did not have this capacity.

**The Law Applied:** Neither ground was found proven; the legal presumption of validity was upheld. The judgment acknowledged the parties': uneventful upbringing; capacity to reach senior positions in their respective professions; understanding of the nature of marriage; honourable intentions; and success as parents. It held that: the couple experienced difficulties within the marriage; the plaintiff developed illness late in marriage; the respondent could no longer live with him; she left the marital home to live with her female friend; and there was no evidence of lesbianism. The tribunal gave weight to the expert report: it held that although concentrating on the plaintiff's ill-health from his pre-retirement period, the report confirmed that there was no prior record of psychiatric ill-health. Therefore, the parties' incapacity to marry had not been proven.

**Second Instance Judgment:** The Second Instance judgment was available in this case. Its law section referred to the 2001 Papal Allocution confirming the doctrine of marriage and the requirement for minimum capacity. It also cited a Rotal judge's judicial reference to freedom from coercion,<sup>43</sup> and three Rotal decisions. The first of these described three essential elements of discretion of judgment: sufficient knowledge of the object of marital consent; sufficient evaluation of the value of the object; and sufficient internal freedom of choice.<sup>44</sup> The second referred to minimal marital capacity, which does not require perfect mental

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<sup>43</sup> This judgment was published later: *Coram Faltin*, 11 November 1988, *L'immmaturita psico-affettiva nella giurisprudenza della Rota Romana*, 169: 'Since all Christian faithful enjoy the right to be free from every form of coercion, it necessarily follows that they be free not only from external but also from internal coercion in the exercise of their freedom: otherwise there is no human act, that is, one flowing from the intellect and will'. Faltin was a Rotal judge from 1987-2001.

<sup>44</sup> Two of the three cases cited were from Mendonça, *Anthology*. These cases are given the numbers assigned to them in that publication. The first case cited in the judgment, Case No: 84-079, *coram* Pompedda, received an affirmative decision at the Rota, but concerned a plaintiff who was 'diagnosed as suffering from a "neurotic-dysthymic" and "psycho-sexual" disorder'. Cardinal Mario Pompedda was Dean of the Roman Rota from 1993 until he became Prefect of the Apostolic *Signatura* in 1999. He resigned, as is customary at the age of seventy-five, in 2004.

health; the *clinical* gravity of psychological disturbance should not be equated with *juridic* gravity which accounts for lack of discretion of judgment'.<sup>45</sup> The third referred to the limitation on the scope of *CIC* canon 1095 2° to the essential rights and duties of marriage.<sup>46</sup>

The Second Instance agreed with the plaintiff's advocate that 'proper catechesis' is 'essential' before marriage, but conceded that 'defective preparation' was not an established ground for nullity; non-Catholic Christians with no knowledge of marriage as a sacrament nevertheless establish the sacrament when they validly exchange consent, even in a civil ceremony. There was nothing to suggest that either party in this case did not understand marriage or was incapable of it. Therefore, the First Instance negative decision was confirmed; the legal presumption of validity prevailed.

**Discussion:** This case is a good illustration of the tribunal relying on expert opinion - on the basis of the expert report the tribunal found no antecedent causal link to account for the plaintiff husband's alleged incapacity to marry. However, the case also demonstrates flaws in the tribunal's compliance with marriage cases procedure as well as the law on experts, and also in its understanding of the grounds for psychological incapacity for marriage.

First, procedure: the plaintiff petition referred to no ground for nullity; it should have, as provided in canon law which requires a valid plea to be included in the petition.<sup>47</sup> It is, therefore, unclear why psychological incapacity was pursued, particularly in the respondent. However, the plaintiff's allegation that the respondent left the marital home to live with 'another woman' could infer a lesbian relationship, in which case incapacity could be alleged, but this would require the appointment of an expert which the tribunal failed to do. However, the tribunal conceded that there was no evidence to substantiate any allegation of lesbianism.

Second, when the tribunal did appoint an expert for the plaintiff it did not follow the relevant procedure. The tribunal secretary, not the judge, requested the expert report, breaching *DC* Article 204§1. Neither the expert's religious affiliation nor his views on Christian anthropology were known, contrary to *DC* Article 205§§1, 2. There is no indication of:

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<sup>45</sup> The judgment cited Mendonça, *Anthology*, Case No: 84-080, *coram* Di Felice. Di Felice was a Rotal judge until 1986.

<sup>46</sup> *Coram* Burke, 11 November 1994, *Studia Canonica*, 30 (1996), pp221-238.

<sup>47</sup> *CIC*, c. 1504, 2°. See Appendix I. *DC*, Article 116§2. Appendix V.

notification of the expert's appointment to the respondent or to the defender of the bond, contrary to *DC* Article 204§2; the Acts being given to the expert, contrary to *DC* Article 207§2; any time-limit on the submission of his opinion, contrary to *DC* Article 207§3; a decree outlining the points to be addressed, contrary to *DC* Article 207§1; or specific questions for the expert to address, contrary to *DC* Article 209. As there were no copies of correspondence to the expert in the Acts, it was impossible to establish what was requested of him. The expert recorded neither methodology nor his degree of certainty, contrary to *DC* Article 210§2. Moreover, the plaintiff was, allegedly, suffering from early dementia, but neither the expert nor the tribunal dealt with the issue of reliability of his evidence. Nevertheless, had procedures been followed the outcome should not have been different because there was no evidence of any antecedent 'grave anomaly' which might have given rise to incapacity.

Third, the tribunal equated 'discretion of judgment' with a 'mature decision', focusing on whether or not the parties *made* a mature decision, rather than whether or not they were *incapable* of it. This approach fails to distinguish *incapacity* from *difficulty* or imprudence, or even negligence. The judges, however, did take all the circumstances of the case into account and focused on establishing an antecedent causal link.

### **Case 2:**<sup>48</sup>

This case highlights the tribunal's willingness to pursue grounds of incapacity without expert opinion on the respondent husband in whom the plaintiff wife alleges incapacity, namely that he was incapable of marriage because he was homosexual or bisexual. The plaintiff claims to have sought to marry a person with specific qualities which (under canon 1097§2) she 'directly and principally intended'. She petitioned for nullity also on the basis that she was in error about such qualities in the respondent. The tribunal appointed an expert for the *plaintiff* - yet her incapacity was not alleged - and it failed to identify the quality in the respondent of which the plaintiff claimed to be in error at the time of the marriage.

**Facts:** This was a natural law marriage; the plaintiff wife was not baptised. She claimed that unknown to her at the time of the marriage the respondent husband was homosexual or

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<sup>48</sup> 09/37.

bisexual, therefore he was incapable of assuming the essential obligations of marriage. They married when they were nineteen and twenty-three years old respectively. The marriage lasted thirty-five years; two children were born. Both parties testified. The plaintiff alleged: an unhappy childhood; no means of independent financial support; a short courtship; and marriage within six months of meeting the respondent. She further alleged that the respondent had not sought a pre-marital sexual relationship. He had male friends, but was always affectionate with the plaintiff and he wanted children. The plaintiff loved him and understood marriage as a permanent, faithful union. Immediately after marriage, she alleges that 'it became perfectly obvious' that the respondent was homosexual; he admitted not liking women. She alleged late consummation of marriage because he wanted to 'legitimise' their relationship as heterosexual to deflect suspicion. The marriage suffered extraneous pressures; their first child was disabled and needed special care. The plaintiff alleged that the sexual relationship ceased, due to the respondent's sexual orientation. She alleged that twenty years after marriage the respondent was convicted of homosexual behaviour, which was, for her, 'the last straw'. Thirty-five years after marriage she suffered mental ill-health and retired from work. Having made a full recovery she obtained a civil divorce. She joined a dating agency and met another man. The tribunal sought an expert report for the plaintiff.

The respondent testified that he attended a psychiatrist when experiencing difficulty at boarding school, which he left but subsequently did 'quite well'. He claimed that his inexperience, fear and 'confusion' over his sexual orientation led to a late consummation of the marriage. He acknowledged the possibility of bisexuality, but claimed never to have had a relationship with a male. He admitted loving the plaintiff. The only two witnesses gleaned their information solely from the plaintiff.

**Expert Report:** The consultant psychiatrist provided a report consisting of thirteen lines on headed notepaper. He confirmed seeing the plaintiff, as an out-patient, three times at intervals of several months over one year, thirty-five years after marriage. His predecessor had seen her three months earlier. She was diagnosed, by another doctor nine years previously as suffering from 'depressive symptoms'. He confirmed that the plaintiff's statement to the tribunal 'is consistent' with her account to him and 'fits in quite well with the psychiatric difficulties she has experienced in the past'. Not doubting her veracity, he considered her a 'genuine person who has been through very difficult times'; the nature of

her marital relationship was ‘one of [her] more bitter complaints and a very important factor in triggering her depression’.

***Defender of the Bond:*** The Defender of the Bond, probably confused by the expert report on the *plaintiff*, dealt with the ground of *her* grave lack of discretion of judgment (which was not alleged). Considering there was no evidence supporting her incapacity the defender highlighted: the parties’ canonical age at the material time; strong evidence suggesting they both understood the nature of marriage; lack of pressure to marry; their expectation of a normal married life with children; their prior discussions regarding marriage (including openness to children); lack of corroboratory witness evidence; scant information from the plaintiff’s psychiatrist, which relied on her own account; the duration of the marriage; and the possibility that the plaintiff’s evidence was influenced by the prism of failure.<sup>49</sup> The defender raised no objection to the ground of the respondent husband’s incapacity on the basis of his admission of confusion over his sexual orientation and the absence of doubt about the plaintiff’s account.

***The Tribunal’s Understanding of the Law:*** Quoting canon 1095, 3<sup>o</sup> and outlining the doctrine of marriage, the judgment’s law section concluded: if ‘it is clear that disorders [of a psychic nature which gravely injure consent] were already present, at least in a latent state, *before* marriage and at the moment of the manifestation of consent, even though they become openly destructive *after* marriage’, such disorders invalidate. The tribunal acknowledged the wisdom of the law in ‘placing emphasis upon the involvement of an expert’.

***The Law Applied:*** The tribunal found both grounds proven - error in the plaintiff and incapacity in the respondent; as such, the marriage was invalid. Although the plaintiff’s incapacity was not alleged, the tribunal considered that the plaintiff was ‘young and inexperienced in terms of relationships’. It held: her admission that she was ‘madly in love’ with the plaintiff, whilst merely corresponding with him, ‘indicates a lack of maturity’; and she was ill-equipped to cope with the respondent’s ‘confused’ sexual orientation. Regarding the respondent, the tribunal held that he was ‘consciously or unconsciously prepared to go through a wedding in order to be able to present himself to [his employers] as a heterosexual

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<sup>49</sup> The defender also appeared to confuse the ground of ‘error about a quality of the person’ with the ground of ‘deceit’, questioning whether or not the respondent ‘deliberately’ concealed his sexual ambiguity from the plaintiff.

man who could continue with his career. ... To know oneself, as he freely admits, to be entering marriage being of a confused sexual identity is clearly proof of an inability to assume the obligations of marriage'. Both affirmative decisions (that the marriage was null on both grounds) were ratified at Second Instance.

**Discussion:** This case demonstrates procedural flaws throughout. The tribunal accepted the plaintiff's petition, allegedly signed by the respondent (whom she claimed refused to testify) and witnessed by a third party, whose position was not declared, and decreed the respondent absent, contrary to *DC* Articles 126-130 and 138§3. However, the respondent testified later when the judge contacted the plaintiff because of the paucity of evidence. The Defender of the Bond who intervened was not the defender named in the Constitution of the Court; no explanation was given for this change and no decree of substitution appeared in the Acts.<sup>50</sup> The following breaches of *DC* procedure also occurred. Expert opinion was sought for the plaintiff, the wrong party because her incapacity was *not* alleged; no expert report was sought for the respondent, in whom incapacity was alleged. The tribunal administrator, not the judge, wrote to the plaintiff's psychiatrist, enclosing both the plaintiff's letter permitting release of her statement to the tribunal and a copy of that statement, but not the Acts. The expert was asked if he was willing to provide: 'written confirmation of her statement'; and 'any other pertinent information concerning this person', which are not the relevant questions required by *DC*. There is no indication of: any notification of the expert's appointment either to the respondent or to the defender of the bond; a decree outlining the points to be addressed; or a timescale for submission of the report. The expert's religious affiliation or views on Christian anthropology were unknown. He provided no testimonial. Nor did he offer an explanation of methodology, or the degree of certainty he reached.

The law section explained both of the alleged grounds; that is, of inability to assume the essential obligations of marriage and of error about a quality of a person, and discussed these grounds in relation to the correct parties, and, moreover, the tribunal found for nullity on both grounds. Nevertheless, the final sentence of the judgment repeated the defender of the bond's mistake and found for nullity on the *plaintiff's* grave lack of discretion of judgment, which

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<sup>50</sup> *DC*, Articles 55; and 118§2. See Appendix V.



was not pleaded. There was no mention of the ground of error here; the tribunal failed to identify any quality in the respondent about which she was allegedly in error.<sup>51</sup>

Despite acknowledging the wisdom of the canonical requirement to engage an expert, the tribunal, without explanation, concluded, without expert opinion, that the ‘psychological basis required ... is clearly shown in the testimonies to have its origins in the respondent’s confused sexual identity’. In finding for nullity on grounds of his incapacity, the tribunal accepted the respondent’s admission of ‘confusion’ over his sexual orientation as proof of his incapacity.<sup>52</sup> Although the respondent conceded the possibility of bisexuality, the judges did not distinguish the *difficulties* which this might pose, from *incapacity*. Nor did they explain their path from a presumption of validity to a finding for the contrary. It is well-settled that the judges’ conclusion that the respondent was prepared to go through marriage for an ulterior motive does not go to the heart of the ground of incapacity, but rather to his intention.<sup>53</sup> There was no discussion about a *vetitum*, which implies capacity for future marriage.

### Case 3:<sup>54</sup>

This case illustrates the tribunal’s willingness to set aside expert opinion, despite its correct focus and support for the party’s capacity for marriage and, nevertheless, to find for nullity. Moreover, the tribunal failed to give the defender of the bond access to the expert report.

**Facts:** Both parties are Catholic. The plaintiff wife and respondent husband married at twenty-two and twenty-one years old respectively. The respondent husband allegedly suffered pre-marital psychiatric illness, causing sexual difficulties. One natural child was born after eight years of marriage to the couple’s delight, and another was adopted twelve

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<sup>51</sup> Moreover, given the plaintiff’s testimony that she would have been happy to marry even if she had known of the respondent’s sexual orientation prior to marriage, it is difficult to see how the tribunal could find that she ‘directly and principally’ intended to marry a heterosexual man above the person of the respondent.

<sup>52</sup> Despite, as we shall see later, the Rota’s insistence that the *severity* of bisexuality or homosexuality be established.

<sup>53</sup> Had he entered marriage in order to conceal his sexual orientation, simulation, that is a positive act of will to exclude marriage or an essential element or an essential property of marriage, might have been an appropriate ground to allege, but this ground is governed by *CIC*, c. 1101§2, which was not pleaded. Moreover, the Rota, as we shall see later, considers the ground of psychological incapacity to be internally incompatible with capacity for placing a positive act of will.

<sup>54</sup> 09/52.

years later. The marriage lasted twenty-seven years. The plaintiff alleged the respondent husband's inability to assume the essential obligations of marriage; the tribunal sought an expert report for him. Both parties testified. The plaintiff claimed that the respondent suffered an 'incident' of depression during the four-year courtship; this resolved spontaneously with her father's support. They were both in love and keen to marry. Despite attending counselling, their sexual problems were never fully resolved, but they were happy. There were extraneous pressures on the marriage. After nine years of marriage the respondent suffered another episode of depression; he was referred to a psychiatrist, was treated, and improved. Infrequent episodes of depression followed, resulting in a diagnosis of manic depression. During treatment for this, he consumed alcohol, which led to confusion and incoherence, but not to violence. His career suffered. He sought advice; as he was unable to pursue his desired career path, he chose another within the same discipline. Work was time-demanding; the plaintiff wife's career progressed and she took on additional responsibilities. After twenty years of marriage the couple, considering their relationship strong, adopted a child. After twenty-five years of marriage the respondent husband was diagnosed with a physical illness. He found solace with a third party. After twenty-six years of marriage he left the matrimonial home, returned after three months, but left permanently a year later. They were divorced civilly after thirty-one years of marriage. The respondent agreed largely with the plaintiff's account of the marriage. Witnesses had little contact with the couple at the material time, but testified that the respondent was a good husband and father. Although one witness was aware of the plaintiff's concerns about the respondent's level of affection early in the relationship, witnesses knew only of late psychiatric illness. They opined that infidelity caused the failure of the marriage. Data relating to specific pharmaceuticals was also submitted; the respondent claimed to have used these products, but it did not contain data about his prescribed medication.

**Expert Report:** The expert confirmed that the Associate Judicial Vicar of the relevant diocese requested the report. The expert understood that both parties consented to disclosure 'of their personal details' for the purposes of obtaining a medical report. The expert identified himself as a qualified doctor, with post-graduate training in psychiatry. He addressed specific questions put to him: 'How would the respondent's manic depression have affected his sexual functioning?; How would you describe the effect the sexual dysfunction would have had on the couple's capacity to form a satisfactory marital relationship?; and:

What effect would the respondent's manic depression have had on his capacity to form a satisfactory marital relationship with the plaintiff?'. He described the features and characteristics of manic depression, giving statistics for outcomes with and without treatment,<sup>55</sup> although he noted that the full spectrum of causes was still unclear because of their complexity; but, frequency of episodes depends on compliance with medication.<sup>56</sup> He focused on the respondent's alleged 'sexual dysfunction' in relation to his *desires*.<sup>57</sup> The report states that paucity of evidence precluded the expert from discussing some causes of non-organic sexual dysfunction. The expert noted the spontaneous resolution of the first (pre-marital) episode of illness; there were no significant episodes for another eight years. He concluded that: there was no clear relationship between the respondent's condition and his 'sexual dysfunction'; and there was no causal link between his medication and 'sexual dysfunction'. He accepted the *difficulties* caused by the condition, and that it prevented the respondent from forming *mature* intimacy with the plaintiff, but noted the 'many extensive periods of happy partnership', both before and after the manifestation of disorder. That it had a negative effect later in the marriage did not prevent the couple from enjoying most of their lives. The effects of extraneous events, which added to the difficulties, were not so severe as to fulfil the official definition of 'aversion'. The expert cited many possible causes for the difficulties, but conceded these were 'mere speculation'. From the evidence, the expert could only 'suspect' that the couple *did not* give *sufficient* time to discussion about their problem prior to marriage; the respondent being unable to meet the frequency of intimacy that the plaintiff *desired*. He concluded that this would not prevent the couple from having a 'satisfactory marital relationship in absolute terms'; and the evidence demonstrated that the marriage was 'more enjoyed than not' by the couple. He opined that the respondent's condition could be controlled with medication.

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<sup>55</sup> The expert cited the World Health Organisation (*WHO*), International Classification of Diseases (*ICD*), 10 (1992): 'The International Classification of Diseases (*ICD*) is the standard diagnostic tool for epidemiology, health management and clinical purposes. This includes the analysis of the general health situation of population groups. It is used to monitor the incidence and prevalence of diseases and other health problems. It is used to classify diseases and other health problems recorded on many types of health and vital records including death certificates and health records. In addition to enabling the storage and retrieval of diagnostic information for clinical, epidemiological and quality purposes, these records also provide the basis for the compilation of national mortality and morbidity statistics by *WHO* Member States. It is used for reimbursement and resource allocation decision-making by countries. *ICD-10* was endorsed by the Forty-third World Health Assembly in May 1990 and came into use in *WHO* Member States as from 1994. The 11th revision of the classification has already started and will continue until 2015'.

<sup>56</sup> He cited various medical publications.

<sup>57</sup> Sexual *desire* has no canonical significance.

***Defender of the Bond:*** The defender highlighted: the witnesses' lack of knowledge; the respondent's capacity to assess the plaintiff's family values at the material time, to learn and to benefit from them; lack of pressure or objection to marriage; the respondent's desire to marry and have children; his admission that he made a life-long commitment; his lack of doubt; his preparation for marriage, including reception into full Communion with the Catholic Church; his capacity for a pre-marital sexual relationship with the possibility of conception; the spontaneous resolution of his pre-marital episode of depression; lack of any indication at the material time that the later diagnosed condition would arise; his capacity to consummate the marriage despite difficulties; his capacity to share marital responsibilities; the late onset of the first serious episode of illness, occurring after their child's birth; the successful treatment with anti-depressants; the occurrence of only two major episodes of his illness several years apart; the periods when no medication was required; the unknown effect of his self-medication; the unknown effect of a later onset of physical illness; the many happy times, despite the sexual relationship failing to meet expectations; the twenty-seven year marriage; and the infidelity leading to the ultimate failure of the marriage.

***The Tribunal's Understanding of the Law:*** The judgment referred to Rotal jurisprudence stressing the psychological nature of consensual incapacity, which at the moment of consent must have been already there '*in actu primo proximo*, and not something which would not have arisen unless some other post-nuptial causes intervened'.<sup>58</sup> A decree of the tribunal stated that the expert is to be asked about his 'religious affiliation, professional qualifications and the methodology used in arriving at his conclusion'. It also stated that the expert is to answer questions relating to the respondent's 'sexual dysfunction' and the questions 'are to be prepared in accordance with the provisions of DC Article 56§4'.<sup>59</sup> The tribunal understood that 'one of the essential elements of marriage is a sexual relationship. This must be conducted in a way that contributes to the well-being of both spouses'.

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<sup>58</sup> The citation for the Rotal decision was *coram* Pinto, 30 May 1986, *MDGB&I*, Vol 25, p46. The relevance of this Rotal case was not explained; the Rota found that incapacity was not proven because the severity of the party's alcoholism and gambling was not established. The relevant point of law was the principle that incapacity was of the natural law. Furthermore, both grave lack of discretion of judgment and inability to assume the essential obligations of marriage had been found not-proven at First Instance; the Second Instance found the latter ground proven and petitioned the Apostolic *Signatura* to have the case heard at Third Instance in England; this request was denied. The Rota returned a not-proven decision. See Mendonça, *Anthology*, Case No: 86-012, *coram* Pinto, *ME* III (1986), pp389-396.

<sup>59</sup> *DC*, Articles 207§1; and 56§4. See Appendix V. The decree did not mention *DC*, Article 209.

**The Law Applied:** The tribunal found the ground proven. The tribunal issued a decree stating that the expert's report was set aside on the basis that the expert had denied the parties access to it.<sup>60</sup> Consequently, it could only be used as 'supporting' evidence under canon 1679.<sup>61</sup> Nevertheless, it formed part of the Acts.<sup>62</sup> The tribunal acknowledged: pre-marital intercourse occurred; the parties disagreed about the level of sexual difficulties;<sup>63</sup> witnesses were unaware of difficulties; a sexual relationship occurred regularly in early marriage but declined later; a child was born; there was a 'degree of affection and intimacy' in the marriage; the plaintiff wife 'probably' had a higher libido and greater expectations than the respondent husband; the respondent's illness deteriorated after marriage allowing a diagnosis to be made;<sup>64</sup> and the marriage lasted twenty-seven years. Nevertheless, it held that the sexual relationship was 'unsatisfactory', particularly for the plaintiff. It admitted focusing *entirely* on the respondent's ability to meet the plaintiff's *needs and expectations* in the sexual relationship. It concluded that the respondent's 'mental health problems and drinking, which occurred later in the marriage, exacerbated an already existing difficulty. His erectile dysfunction and the infrequency of intercourse meant that he was unable to satisfy the plaintiff's physical needs, and he was thus incapable of undertaking this essential obligation of marriage'. Furthermore, the judgment concludes: 'having carefully considered the *dubium* proposed: namely, whether this marriage *appears* null and void ...', the tribunal found incapacity to be proven, vitiating the marriage.<sup>65</sup> The decision was ratified at Second Instance.

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<sup>60</sup> It was withheld from the parties under DC, Article 230. See Appendix V.

<sup>61</sup> CIC, c. 1679. See Appendix I. John Beal, 'The Substance of Things Hoped For: Proving Simulation of Matrimonial Consent', *The Jurist*, 55 (1995), pp745-793 (hereafter Beal, 'The Substance of Things Hope For'), p766, explains: 'An *adminiculum* is: a prop or support; an accessory thing. An aid or support to something else, whether a right or the evidence of one. It is principally used to designate evidence adduced in aid or support of other evidence, which without it is imperfect (citing *Black's Law Dictionary*, Sixth Edition, s.v. "*adminiculum*").

Strictly speaking an *adminiculum* is not a distinct category of proofs, but a particular use to which other types of proof are put. Thus, an *adminiculum* can be a declaration of a party, an extrajudicial confession, a document, or a witness deposition that supports and lends to another proof probative weight that it does not have in itself. An *adminiculum*, then, is not a proof that has to be evaluated, but rather the value given to determined proofs that by themselves lack perfect probatory force, but that in union with others serve them as auxiliaries, and, taken together, can form a composite proof with cumulative efficacy', citing Leon del Amo, *La clave probatoria en los procesos matrimoniales (indicios y circunstancias)* (Pamplona: EUNSA, 1978), p150.

<sup>62</sup> DC, Article 21. See Appendix V.

<sup>63</sup> For example, the respondent describes the honeymoon as a 'disaster sexually' but the plaintiff merely describes 'difficulties'.

<sup>64</sup> The expert explained that in order to make a diagnosis of manic depression, two episodes were required.

<sup>65</sup> Emphasis added.

**Discussion:** The tribunal failed to adhere to both procedural and substantive law.

First, the respondent's psychiatrist was not consulted. No reasons were given for choosing the particular expert consulted. Whilst the expert was a doctor, with post-graduate *training*, he did not claim post-graduate specialist *qualification*.<sup>66</sup> The following contravened the clear terms of *DC*. The expert did not submit a testimonial. Although a Catholic, he did not reveal his level of adherence to the faith nor his views on Christian anthropology. It appears that he was given limited access to evidence.<sup>67</sup> The expert did not explain his methodology or the level of certainty he reached. There is no evidence of a time-limit on submission of his report. Nor is it clear if the tribunal notified the defender of the bond of his appointment. There is no indication that the defender even saw the expert's report; the defender made no mention of it. In addition, there is no evidence from the documents, other than the decree, that the expert refused the parties access to his report which might have supported the tribunal's decision to set it aside.<sup>68</sup> Nor is there evidence that: the parties' permission was sought, or given, for the release of their personal data; or the report, which supported the respondent's capacity, was given any weight, even as 'supporting' evidence.

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<sup>66</sup> He described his position as 'staff-grade', denoting an appointment to a permanent position as a middle-grade doctor. This appointment can rely on experience alone and does not imply any postgraduate qualification. Staff-grade posts are non-consultant career posts, not training posts. See <http://www.bmj.com/cgi/content/full/315/7120/S2-7120>: 'The simple advice that should be given to a young doctor considering taking up a staff grade post is "Don't do it". The posts are not for training. They are non-consultant career posts. ... Traditionally, the British medical profession has been hostile to the development of non-consultant career grade staff, expressing this through both the BMA and the royal colleges. Grades such as the staff grade, or previously senior hospital medical officers, have been perceived as a threat to standards and a possible means of obtaining medical care on the cheap. ... It should be clearly understood that the staff grade is not a route to becoming a consultant'. The expert claims to be an inceptor member of the Royal College of Psychiatrists. Inceptorship is open to qualified medical practitioners who intend to train for the Membership of the Royal College of Psychiatry examinations (see [http://pb.rcpsych.org/cgi/issue\\_pdf/advertising\\_pdf/23/11.pdf](http://pb.rcpsych.org/cgi/issue_pdf/advertising_pdf/23/11.pdf)). It appears, therefore, that he has little chance of promotion. On the one hand, staff-grade post-holders can be seen as failed consultants but on the other, it allows those who are unable or unwilling to climb the career ladder to work at a suitable level. It is not clear, therefore, whether this expert took the Royal College examinations and failed to reach the required standard, or never sat them at all.

<sup>67</sup> As a decree states that answers are to be 'based on his reading of the testimony of the parties', it is unlikely that the expert was given witness evidence. Moreover, the expert declared that he read the plaintiff's statement and both parties' answers to the tribunal's questions, implying that he based his opinion on this information alone.

<sup>68</sup> 'Very serious dangers' are required to withhold evidence from publication, but these are not identified in this case. *DC*, Article 230. See Appendix V. *CIC*, c. 1598§1. Appendix I. One might expect a medical practitioner to refuse to compile or at least to release a medical report until he had sight of the parties' signature of consent.

Second, despite evidence only of the respondent's sexual *difficulties* and a lack of medical evidence confirming the diagnosis of manic depression, the questions which the tribunal put to the expert presupposed this diagnosis and sexual *dysfunction*. Moreover, instead of focusing on minimal capacity, the tribunal's questions referred to the effect of the respondent's 'dysfunction' on his capacity for a '*satisfactory relationship*', not for entering the natural state of marriage.<sup>69</sup> The tribunal did not discuss the severity of the respondent's condition *at the material time*; there was no evidence that he ever took sick leave from work.

Third, apart from accepting uncorroborated assertions as facts,<sup>70</sup> the tribunal based its judgment on an incorrect understanding of the law. Validity of marriage does *not* depend on: sexual activity;<sup>71</sup> desires and expectations;<sup>72</sup> or on how it is conducted.<sup>73</sup> The tribunal also failed to address the observations of the defender of the bond.<sup>74</sup> The tribunal did not consider the possibility that the marriage failed because of infidelity.<sup>75</sup> Therefore, the tribunal does not explain its path from the legal presumption of validity to reaching moral certainty of the contrary, which is the *raison d'être* of a judgment.<sup>76</sup>

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<sup>69</sup> Emphasis added. See Aidan McGrath, 'At the Service of the Truth' p389: '...[T]he word "normal" is a very relative term. If marriage is to be seen as the natural vocation of most men and women, then the "norm" cannot be pitched too high, otherwise the way is opened to the dreadful situation foreseen by Egan whereby the word "relationship" when referred to marriage is equated with "happy relationship" and capacity for marriage is extended to capacity for a successful and happy marriage', citing E M Egan, 'The Nullity of Marriage for Reason of Insanity or Lack of Due Discretion of Judgement', in *Ephemerides iuris canonici*, 39 (1983), p54; E M Egan, 25 January 1979, in *Studia Canonica*, 14 (1980), p203, no 10; and E M Egan, 21 April 1980, in *Studia Canonica*, 15 (1981), pp331-332, no 15.

<sup>70</sup> For example, the tribunal accepted uncorroborated allegations that the respondent's mother 'suffered from severe post-natal depression from which she never recovered' and 'encephalitic Parkinsonism', the significance of which is not explained.

<sup>71</sup> *CIC*, cc. 1061§2; and 1085§1. See Appendix I. That marriage involves a heterosexual relationship means that it can only exist between a man and a woman, not that it depends on a 'sexual' relationship. Catholic doctrine clearly upholds the virginity of Mary, Mother of Jesus, the validity of whose marriage was never in doubt. Also *CCC*, p111, para 496, and p112, para 499. See Appendix IV.

<sup>72</sup> Beal, 'The Substance of Things Hoped For', p757. Although dealing with the subject of invalid consent due to exclusion by a positive act of the will of an essential element or an essential property of marriage, Beal explains: '[T]he party may have difficulty distinguishing what he or she wanted, desired, and hoped for when entering marriage and what he or she actually intended', indicating that hopes and desires do not go to validity.

<sup>73</sup> Benedict XVI, *Allocution to the Roman Rota* (2009). See Appendix VII.

<sup>74</sup> *DC*, Article 212§2. See Appendix V.

<sup>75</sup> *DC*, Article 212§1. See Appendix V. See also John Paul II, *Allocution to the Roman Rota* (1988). See Appendix VII. The Pope instructed that all possible causes for the breakdown of a marriage be considered and not just the hypothesis of incapacity.

<sup>76</sup> *DC*, Articles 250§1; 254§1; and 247. See Appendix V. See also Lynda Robitaille, 'Through the Lens of *Dignitas Connubii*: The Judge's Active Role in Marriage Nullity Cases', *Studia Canonica*, 40 (2006), pp137-182 (hereafter Robitaille, 'Through the Lens of *DC*'), pp140-141: 'The parties must understand the judge's interpretation or moral certitude in regards to their marriage. Otherwise, the judgment has not fulfilled its final end which is to discover the truth, and also to render justice'.

Finally, without explanation or discussion, and despite the deterioration in the respondent's health, the tribunal decided that the respondent's incapacity was not permanent. The tribunal neither explained the judges' competence to reach this conclusion nor its methodology. The inference is that, despite the deterioration in his mental health after marriage the respondent is now capable of satisfying another spouse sexually; consequently he can meet canonical requirements and a future marriage should not be prohibited.

#### **Case 4:**<sup>77</sup>

This case illustrates the tribunal's: willingness to pursue, and find proven, a ground of incapacity when that ground is not alleged by the plaintiff in the petition for nullity; willingness to pursue two separate grounds of incapacity in a party without expert opinion about that party; failure to consider the effect of extraneous pressures on the marriage; and failure to consider grounds individually, making it impossible to follow its reasoning.

**Facts:** Both parties are Catholic. The plaintiff husband and respondent wife married when they were twenty-one and nineteen years old respectively.<sup>78</sup> The common life lasted about twenty-seven years; four children were born. The plaintiff alleged that he suffered psychiatric illness late in marriage. The respondent claimed she suffered from dyslexia; her mental health also suffered late in the marriage. The grounds alleged were: grave lack of discretion of judgment on the part of either or both parties; and the respondent's inability to assume the essential obligations of marriage. The additional ground of inability to assume the essential obligations of marriage on the part of the plaintiff husband was added later. The tribunal obtained an expert report only for the plaintiff. Both parties testified. The plaintiff claimed that both parties came from unhappy homes. They met after the respondent's father died. The plaintiff became a Catholic and learned that redemption sets one free from unhappiness. The marriage suffered extraneous pressures. The plaintiff offered no witnesses.<sup>79</sup> The respondent claimed that she was bullied at school. She corroborated the plaintiff's account of the marriage. Most of the witnesses claimed not to know of problems

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<sup>77</sup> 09/72.

<sup>78</sup> The plaintiff was originally the respondent; the original female plaintiff renounced her case and the male respondent pursued the case as plaintiff. No explanation was obvious from the Acts.

<sup>79</sup> As the original respondent, it is unclear whether or not he was aware of his right to do so.



until fifteen years after marriage when the plaintiff became ill, but the respondent's mother claimed in evidence that he took anti-depressives for a short time while still at school.

**Expert Report:** The expert confirmed that he prepared his report at 'the tribunal's' request. A consultant psychiatrist, he declared that his report was based solely on 'two documents'.<sup>80</sup> He addressed questions put to him by the tribunal, concluding, on the basis of the plaintiff's own account, that the plaintiff 'possibly' suffered anxiety in adolescence; this may have been a 'character trait', but there was no evidence that it 'reached clinical intensity'. The expert speculated further: the plaintiff's religious faith 'gave his life meaning and purpose'; his motivation for marriage was psychological - he wanted to leave an anxious environment and marriage was a 'safe haven'; and his faith was a solution to his problems. The expert opined that the plaintiff suffered from paranoid schizophrenia. This has a late onset and is associated with 'a preservation of the personality'; he could be prone to idolise the respondent. However, he concluded that the condition can be controlled by medication.

**Defender of the Bond:** The defender highlighted: reliance on hearsay evidence; lack of evidence of pre-marital problems and of foreseeable problems; evidence of the parties' understanding of marriage and capacity within it; and the late onset of problems. Highlighting the absence of expert opinion (thinking there was none, as was the case at the time), which he submitted was required, the defender specifically asked that, if the judges disagreed with the need for expert opinion, the case be returned to him for further consideration.<sup>81</sup>

**The Tribunal's Understanding of the Law:** The tribunal understood that grave lack of discretion of judgment can be found in three situations: 'when there is a lack of a sufficient intellectual (abstract) knowledge of the object of consent; or where a partner has not attained sufficient critical knowledge proportionate to the conjugal contract; or either party lacks the capacity to deliberate with sufficient weighing of motives and freedom'. Inability to assume the essential obligations of marriage 'may be technically and medically verifiable, or in some

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<sup>80</sup> This implies that he was not given the Acts.

<sup>81</sup> The defender's expectation, therefore, would have been that the case would be returned to him: for further consideration if the judges deemed an expert report was not required; or for consideration of the expert report, should the judges deem a report was required.

cases, it can be possible to judge from the pattern of a person's life and from consistent traits and disposition that a person lacked the capacity to assume the responsibilities of marriage'.<sup>82</sup>

***The Law applied:*** The only ground the tribunal found proven, was that of the plaintiff husband's inability to assume the essential obligations of marriage. The First Instance deferred judgment until an expert report was obtained. All grounds were considered together. The question the tribunal addressed was: 'whether they both understood the nature of the covenant into which they were entering and that they would be capable of fulfilling that covenant'.

The tribunal acknowledged many obstacles to reaching moral certainty. It accepted: expert opinion that 'the plaintiff's "sense of anxiety and apprehension may have been a character trait, [but] there is no evidence to suggest that it reached clinical intensity"', but 'the "predominant symptomatology" would present a "diagnostic label of paranoia/paranoid schizophrenia", which does not manifest itself until much later'. However, it gave weight to: expert evidence that when the plaintiff developed episodes of mental illness 'he would have developed abnormal perceptions and abnormal thinking'; and witness testimony that the plaintiff took anti-depressants for a short period of time during adolescence; the latter being evidence of an underlying undiagnosed mental illness. For the tribunal, the salient points were that the plaintiff was unhappy and married for 'psychological reasons'. Expert opinion confirmed that the respondent's allegation of his possessiveness was consistent with his illness. The tribunal also accepted the respondent's *difficulties* with the sexual relationship, but acknowledged some contradiction and her later illness.

On the one hand, the tribunal held: that the marriage 'did in fact settle into a loving and caring relationship, open to children'; difficulties only arose with the manifestation of the plaintiff's declining mental health; and, acknowledging the parties' regret that help was not sought early, the marriage 'began regrettably to wither'. So, the tribunal concluded that neither party lacked the necessary discretion of judgment for marriage; they were resilient and determined to marry each other and understood their commitment. On the other hand, finding for the plaintiff's inability to assume the essential obligations of marriage, the tribunal held that although the parties sought to establish marriage, this 'could not realistically be

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<sup>82</sup> The judgment cited *coram* Serrano, 9 July 1987. This judgment is not listed in Mendonça, *Anthology*.

sustained'. Marriage was, for the plaintiff, 'a relief from "anxiety and intimidation" and a "safe haven"'. The plaintiff's symptoms prevented him from entering 'a *consortium vitae* between equals'.

**Discussion:** First, the fact that the original plaintiff became the respondent may have led to the confusion as to whose inability to assume the essential obligations of marriage was alleged originally. The Acts did not clarify the situation, so, it may have been alleged in the original respondent, who became the plaintiff. However, although the Acts contain no objection to the ground of the plaintiff's inability to assume the essential obligations of marriage, it was not included in the joinder of the issue; therefore there was no valid petition for this ground. This contravenes *CIC* and *DC*.<sup>83</sup> Nevertheless, all four grounds were tested.

Second, canonical procedure for appointing experts was not followed. No expert was appointed for the respondent, despite two grounds of incapacity being alleged in her. There is nothing in the Acts to establish: who chose or appointed the expert; why he was chosen in preference to either party's psychiatrist; that the parties and the defender of the bond were notified;<sup>84</sup> or any time-limit for submission of his report. There was no decree outlining the questions and the questions which were put to the expert did not comply with *DC* although one question did address the issue of antecedence.<sup>85</sup> The expert did not: provide a testimonial; explain his methodology; or clarify the degree of certainty he reached. Moreover, although the plaintiff's condition had deteriorated, the reliability of his evidence was not addressed, either by the expert or by the tribunal. The expert's religious affiliation or views on Christian anthropology were unknown, but, that he acknowledged the part played by the plaintiff's faith in alleviating his condition suggests that he accepts Christian anthropological principles.

Third, the tribunal's deferral of judgment until an expert report was submitted implies that moral certainty of nullity could not be reached in its absence. There was no explanation for

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<sup>83</sup> *CIC*, c. 1504, 2°. See Appendix I. Also *DC*, Article 116§2. See Appendix V.

<sup>84</sup> Therefore, it appears that *DC*, Article 204 was breached. As the defender of the bond requested an expert report and there is no further input from him, it is clear that he did not see it. It seems clear that *DC*, Article 56§4 was breached.

<sup>85</sup> *DC*, Articles 207; and 209. See Appendix V.

not returning the case, together with the expert opinion, to the defender of the bond, who has the right to be heard last.<sup>86</sup>

Fourth, the law section implied that it is possible to conclude for nullity ‘from consistent traits’ and a person’s ‘disposition’, as if these could constitute the required ‘grave anomaly’. The expert, however, found no evidence of pre-marital illness in the plaintiff but *speculated* that he may have suffered some degree of anxiety, which fell short of a clinical condition. This fails to establish the existence of a condition sufficiently severe *at the material time* to prevent the exercise of a natural right. Although the expert states that paranoid schizophrenia is associated with a ‘preservation of the personality’, implying capacity to sustain relationships at least to some degree, the tribunal did not establish to what degree it occurred in the plaintiff.

Fifth, the judges gave weight to the finding that the plaintiff married ‘for psychological reasons’ although this was mere speculation by the expert. Moreover, wanting a ‘safe haven’ and having a proper understanding and motive for marriage are not mutually exclusive. No weight was given to evidence of the plaintiff’s capacity to sustain the marriage for many years as a good spouse and parent. The parties’ regret that they failed to seek assistance earlier, implies that deterioration could have been ameliorated or prevented, which is consistent with the expert’s opinion that the condition can be controlled by medication; yet the tribunal did not address this aspect of the illness. Moreover, the judges’ acceptance that: the marriage ‘settled down initially into a loving and caring relationship, open to children’; difficulties ‘commenced with the manifestation of the [plaintiff’s] declining mental health’; and the marriage ‘began to wither’; makes it even more difficult to understand how they could, at the same time, conclude that the marriage never came into existence.

Lastly, dealing with all grounds together makes it impossible to follow the argument as to how three grounds of *personal* incapacity failed and one succeeded. Moreover, the judgment did not explain how many identified obstacles to reaching moral certainty were overcome. *Difficulty* was not distinguished from *incapacity*, unless one must conclude that all sufferers of the sub-type paranoid schizophrenia are incapable of assuming the essential obligations of marriage, regardless of either its severity at the material time or its propensity to control by

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<sup>86</sup> DC, Article 243§1. See Appendix V.

medication. There was no discussion about the imposition of a *vetitum*, implying the tribunal's belief that the plaintiff is capable of future marriage. The affirmative decision was ratified at Second Instance without reference to the unproven grounds. However, a *vetitum* was imposed on the plaintiff by ITSIS.

**Case 5:**<sup>87</sup>

This case demonstrates the tribunal's willingness: to pursue grounds of psychological incapacity in the absence of evidence of any such impairment in the party in whom incapacity is alleged; and, ignoring the presumption of law, to find for nullity on the basis of *absence* of evidence proving *validity* on grounds of intention alleged in the *absent* respondent.<sup>88</sup>

**Facts:** This was a mixed marriage; the plaintiff wife was Catholic and the respondent husband was a member of the Church of England. They married when they were twenty-eight and twenty-six years old respectively. The plaintiff claimed eighteen years of common life; the marriage lasted seven years. No children were born of the union; the couple discovered they were infertile. The plaintiff alleged that she would not have married the respondent had she known the extent of his political affiliation. The plaintiff alleged her own incapacity due to her grave lack of discretion of judgment and the respondent's intention against the good of the spouses. The plaintiff submitted a report from her general practitioner. Only the plaintiff testified.<sup>89</sup> She alleged that after two years of happy marriage, the respondent became more deeply involved in politics. He became violent, but, believing in her marriage vows, she did not leave home. The respondent became involved with a third party and sought divorce. One witness, having heard of the problems directly from the plaintiff after the marriage failed, admitted having little contact with the couple at the material time. This witness claimed to have voiced concerns about the respondent but could not pinpoint any reason. The witness alleged that the plaintiff was stressed during the marriage and drank to excess, but this did not cause problems. This witness found the respondent unsympathetic. The other witness knew nothing of the material time, but

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<sup>87</sup> 09/54.

<sup>88</sup> The substantive law on the ground of simulation, governed by *CIC*, c. 1101§2, is not relevant to this study.

<sup>89</sup> As no copies of correspondence were available, it is not possible to establish that the respondent's rights were protected. However, the Acts stated that the respondent responded to citation declining to participate but he did not oppose the application. There was, however, no decree of absence.

testified: the couple was happy initially; the plaintiff appeared 'level-headed'; and the respondent was arrogant and immature. The marriage ended because of infidelity and the respondent's neglect of the plaintiff.

**Expert Report:** The plaintiff's general practitioner confirmed that she was his patient; he reported only physical ailments and did not report any psychological issues.

**Defender of the Bond:** The defender of the bond highlighted: that marriage is a natural institution, consequently, incapacity is a most unnatural phenomenon; the plaintiff's correct understanding of marriage; the lack of pressure to marry; the plaintiff's love for the respondent; the couple's happiness for four years until their infertility was discovered; the possible effect of extrinsic pressures; that the plaintiff's claim that she would 'probably' not have married the respondent had she known of his interests and involvement, was given in hindsight; lack of corroboratory evidence of incapacity; the requirement to establish the severity of any 'appreciable psychological condition'; and the sole claim by a witness that the plaintiff was 'not worldly wise'. The respondent's behaviour was not conducive to harmonious marriage or to the plaintiff's wellbeing, but there was no evidence to support the claim that this was his intention at the outset. There was no indication of his motive for marriage.

**The Tribunal's Understanding of the Law:** Without specific citations, the tribunal made reference to Rotal judges' understanding of the *bonum conjugum*<sup>90</sup> as an essential element of marriage.<sup>91</sup> Capacity for marriage has three elements: 'due (cognitive/intellectual) knowledge'; critical knowledge, which is 'the ability to form judgements and move the will and power to judge and reason, the capacity to compare, integrate and deduce new judgements'; and internal freedom, which is 'freedom from immature, obsessive and overpowering ideas, fantasies, emotional pressures etc'.

**The Law Applied:** The ground of the plaintiff's incapacity was found not-proven. The tribunal accepted: the plaintiff's allegations as fact; evidence of initial happiness in the marriage; pre-marital 'indications' that the respondent was 'not an easy man'; and post-

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<sup>90</sup> Good of spouses.

<sup>91</sup> The judgment cited Di Felici, Bruno and Pompedda. Whether the first of these was a decision of Felici or Di Felice is unclear.

marital deterioration in his behaviour. The tribunal found that, although the plaintiff's decision to marry may have been imprudent, it was not unreasonable at the time as it was based on lack of information due to concealment by the respondent 'rather than her carelessness or recklessness'.<sup>92</sup> Although the tribunal found for nullity on grounds of the respondent's intention (rather than incapacity), it accepted: there were discrepancies in the plaintiff's testimony; the marriage was happy initially; problems began after marriage; the respondent's behaviour changed two years after marriage leading to deterioration in the relationship, which 'may very well be as much due to the plaintiff beginning to realise that things were not satisfactory as to change in the respondent'.

**Discussion:** The following breaches of *DC* occurred.

First, as to the capacity of the plaintiff wife, there is no indication that the general practitioner's report was requested by the tribunal or that it was approved as a 'report already made' by another expert.<sup>93</sup> The doctor's reason for compiling the report was unknown. He did not reveal his: religion; views on Christian anthropology; methodology; or degree of certainty. He answered no specific questions. There was no indication that the defender of the bond was notified of his appointment. Nothing in the report supported the plaintiff's incapacity. Although the tribunal held that the plaintiff's incapacity was not proven, it implied that 'carelessness or recklessness' would have sufficed to cause her incapacity. It could be argued, however, that weight was given to the expert report, but this was not obvious from the judgment.

Second, the tribunal found for nullity on grounds of the *absent* respondent's intention. This appeared to be based solely on allegations of his behaviour after marriage. The tribunal did not explore the respondent husband's motives for marriage, let alone his motives for simulating marriage.<sup>94</sup> Ignoring the presumption of law, it found for nullity on the *absence* of evidence supporting the respondent's intention to promote the plaintiff's well-being and happiness.<sup>95</sup> Without explanation, it held that his behaviour was a manifestation of a

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<sup>92</sup> Deceit was not alleged.

<sup>93</sup> *DC*, Article 204. See Appendix V.

<sup>94</sup> For nullity to succeed on this ground, it is required to prove that an ulterior motive did not co-exist with a proper motive for marriage.

<sup>95</sup> The tribunal stated: 'The truth is that nowhere in the evidence is there any sign of the respondent doing anything, or saying anything, that was intended to promote the plaintiff's happiness and wellbeing, least of all

character *trait* that was present antecedent to marriage and which influenced his intention.<sup>96</sup> There was no discussion regarding the imposition of a *vetitum*, mandated by *DC* when this ground is found proven.<sup>97</sup> The decision was ratified at Second Instance with no mention of the ground of incapacity.

#### **Case 6:**<sup>98</sup>

This case demonstrates the tribunal's error in attributing an expert's report to the marriage under investigation, when it referred to another union. Moreover, it shows the tribunal's willingness to pursue grounds of incapacity in both parties without expert evidence relevant to either of them, even when the respondent could not be traced and was, therefore, unaware of the grounds alleged against him. The plaintiff alleged her own grave lack of discretion of judgment and the respondent's grave lack of discretion of judgment and inability to assume the essential obligations of marriage. The tribunal, finding all grounds proven, dealt with grounds together, making it impossible to follow its argument in respect of the separate grounds of inherent incapacity.

**Facts:** The (then unbaptised) plaintiff wife married the Presbyterian respondent when they were twenty and thirty-two years old respectively. The common life lasted eighteen months. One child was born of the union. The plaintiff and her present partner (not the respondent) married civilly and are now Catholics. The plaintiff alleged that the respondent had a psychiatric history. The plaintiff alleged the grounds of grave lack of discretion of judgment in either or both parties and the respondent's inability to assume the essential obligations of marriage. An expert report was submitted, but it refers to another union. Only one party, the plaintiff wife, testified. She alleged an unhappy childhood. Her father died and her mother became an alcoholic and cohabited with another alcoholic who was violent. The plaintiff was abandoned and placed in an orphanage at the age of four. She was fostered several times.

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doing or saying anything with that aim that would have inconvenienced him or put him out'. This ignores both the presumption of validity and the fact that the exchange of vows provides evidence of an honourable intention; the onus is on the party making the allegation to overturn these presumptions.

<sup>96</sup> 'Influencing' his decision was not distinguished from determining it. The tribunal stated: 'His violence later in the marriage clearly shows a scornful disregard for the plaintiff. But this simply appears as a stronger manifestation of a character trait that was present before the marriage as well as in its early days. The judges look in vain for any indication that the respondent wanted or intended this relationship to be a mutual one for the good of the plaintiff as well as for his own'.

<sup>97</sup> *DC*, Article 251. See Appendix V.

<sup>98</sup> 09/87.



She was diagnosed with dyslexia; thereafter she reports an uneventful schooling although she gained no qualifications. Having lived with the respondent's family, she married him six months after they met. She claimed that he suffered from schizophrenia and he had been hospitalised several times from the age of twelve. She first claimed she was aware of his illness, but later denied this. She testified that both parties intended marriage to be permanent, faithful and open to the possibility of children. After marriage, the respondent became violent when he consumed alcohol or failed to take his medication. The violence increased but she stayed at home because she believed in the permanence of marriage and had nowhere to go. Her doctor and friends advised her to divorce; she could no longer cope with the respondent's mental illness. Two character references were submitted for the plaintiff. No witnesses testified. Nevertheless, the tribunal contacted the respondent's mother, who confirmed his psychiatric condition. She reported that by marrying the respondent, the plaintiff thought she could help him, implying her prior knowledge of his illness. Contact with the respondent was lost. This witness's present husband stated, also in a letter, that the respondent could 'behave perfectly normally' when taking his medication. He accused the respondent of attempted fraud. He claimed that 'in the opinion of the psychiatrist, the [plaintiff] wife ... exhibited similar symptoms' and any offspring had 'a high percentage chance of inheriting such a dreadful disease'.

**Expert Report:** A report from a Diocesan Safeguarding Coordinator was submitted. It referred to a previous 'application', not by either party, but by the plaintiff's *present* civil law husband, regarding a child of a previous partner. The report stated: 'work was carried out with the family, and the case was then closed'.

**Advocate's pleadings:** The plaintiff's advocate pleaded: character references confirmed her reliability; the respondent's antecedent condition was confirmed by evidence; and any discrepancies in testimony were minor. In support of the plaintiff's grave lack of discretion of judgment the advocate pleaded: her troubled childhood; she 'had no idea of normal marriage'; she fell under the influence of her mother-in-law; she rushed into marriage after a short courtship; lack of evidence that she weighed up such a crucial decision; and her ignorance of the respondent's illness until after marriage. Supporting the respondent's grave lack of discretion of judgment, the advocate, on the basis of the the plaintiff's account, argued that the respondent's deception about his age and violent behaviour 'indicate' an

approach to the sacrament of marriage which was totally contrary to Catholic understanding of marriage. He concluded that the respondent was ‘not able to consider what he was doing’ and ‘it is clear’ that he ‘did not intend to establish the “*totius vitae consortium*”’. He cited authority for affording full proof to parties’ depositions under certain conditions,<sup>99</sup> and quoted Rotal judge Pinto as stating that it was sufficient to prove the existence of schizophrenia at the time of the celebration of the marriage, in order to find for nullity.<sup>100</sup> In respect of the respondent’s inability to assume the essential obligations of marriage the advocate pleaded that there was evidence of violent behaviour and a diagnosis of schizophrenia. He quoted Rotal judge Mattioli as stating that although a person might not have lost the faculty to understand and to will marriage he could still be unable to fulfil the essential obligations of marriage.<sup>101</sup>

***The Defender of the Bond:*** The defender highlighted the discrepancy in evidence regarding whether or not the plaintiff knew of the respondent’s illness before marriage and the lack of knowledge about the respondent’s response to treatment.

***The Tribunal’s Understanding of the Law:*** Although the law section of the judgment distinguished the two alleged grounds, it implied that only *CIC* canon 1095, 3<sup>o</sup> requires a psychological cause. It suggested that ‘generally’ the psychological cause is personality disorder, but stressed that more important than the diagnosis is the effect of the cause on a person’s ‘natural capacity’ to enter marriage, ‘with its perpetual rights and obligations’. Importantly, the cause must be present at the time of consent, although possibly latent. The law section stated that Rotal jurisprudence, ‘although cautious about the invalidating effects of this illness in its initial stages, is unanimous in its position that schizophrenia renders a person incapable of valid marital consent *when it has reached its qualified or “manifest” and terminal stages*’.<sup>102</sup> However, it then goes on to say: ‘it is also established jurisprudence

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<sup>99</sup> Raymond Burke, *La confessione giudiziale delle dichiarazioni giudiziali delle oarte*, in aa.vv. *I Mezzi di Prova Nella Cause Matrimoniali Secondo la Giurisprudenza Rotale* Studii Giuridici XXXVIII, (Lib. Ed. Vaticana, 1995), p29. The advocate stated: ‘The declarations of the parties, according to the norm of canon 1536§2 and 1679, are able to have the force of proof on the following conditions: 1) that there is no possibility of other proofs; 2) that there are witnesses to the truthfulness of the parties, inasmuch as this is possible; 3) there are other indications and circumstances’. Also Pompèdda, *Studi di Diritto Processuale Canonico*, Giuffrè Editore, (Milan, 1995), p215. He also cites *DC*, Article 180§2; see Appendix V.

<sup>100</sup> *Coram Pinto*, 20 November 1969, *SRRD* 62 (1969), pp1024-1031, *MDGB&I* (1997), Vol 33, no 22, pp116-121, at p119.

<sup>101</sup> *Coram Mattioli*, 28 November 1957, *SRRD* 62 (1969), pp1026, *MDGB&I* (1997), Vol 33, no 23, p119.

<sup>102</sup> The judgment cited *coram Stanziewicz*, 5 April 1979 and *coram Huot*, 7 June 1979. Emphasis added.

that, once the presence of the illness *has been diagnosed before* and after marriage, it must be necessarily concluded that it has affected consent. It is a habitual illness and does not admit lucid intervals'.<sup>103</sup> Again citing Rotal jurisprudence, it acknowledges that the expert's task is 'to assist the Judges in understanding the exact nature of the personality defect, together with its causes and its effects on the person's mental and affective processes'.<sup>104</sup> The tribunal cited authority that schizophrenia affected the party's capacity under both *CIC* canon 1095, 2<sup>o</sup>,<sup>105</sup> and 3<sup>o</sup>.<sup>106</sup> The tribunal also acknowledged lack of corroboratory evidence, but citing a decree from the Holy Office, specifically addressed to the Vicariate Apostolic of Sweden, the tribunal held: the presumption that the full force of proof cannot be given to the deposition of a party was overturned;<sup>107</sup> and this 'new approach was taken into' *CIC*, which 'lists the depositions of the parties as the first category of proof'. The tribunal acknowledged the caveats mentioned in canon 1536 and 1679.<sup>108</sup>

***The Law Applied:*** All three grounds were found proven. On the basis of character references, the tribunal accepted the plaintiff's account of her upbringing, courtship and marriage uncritically. It interpreted the report from the Safeguarding Coordinator as referring to allegations by the child of *this* marriage, against the plaintiff's present civil-law husband, albeit that matters had been resolved. Finding for nullity on grounds of the respondent's incapacity, the tribunal credited the advocate with presenting 'a clearly reasoned and jurisprudentially founded argument for an affirmative decision on all grounds', and considered the defender's reference to the respondent's treatment as 'irrelevant given the established jurisprudence regarding those who suffer from schizophrenia'. A *vetitum* was imposed.

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<sup>103</sup> The judgment cited *coram* Fiore, 20 October 1984. Emphasis added.

<sup>104</sup> *Coram* Stankiewicz, 26 March 1981, stating the principle that no one is bound to the impossible; *coram* Pompedda, 11 April 1988, *RRDec* 80 (1993), pp199-202, explaining the '*ius ad communionem vitae*'; and *coram* Faltin, 28 October 1988, *RRDec* 80 (1992), p579, n9.

<sup>105</sup> *Coram* De Jorio, 17 June 1970, in J García Faílde, *Manual de Psiquiatría forense canonical*, (1991), p241. This case does not appear to be published in English.

<sup>106</sup> *Coram* Huot, 5 June 1981, in M Pompedda, *Studi di Matrimoniale Canonico* (1993), p319; and *coram* Bruno, 21 July 1983. Only Bruno's decision is annotated in English; see Mendonça *Anthology*, p66, Case No: 83-136.

<sup>107</sup> The decree from the Holy Office, 12 November 1947, concerned marriages within the Vicariate Apostolic of Sweden. Also Rotal judgments: *coram* Mattioli, 24 March 1956, *RRDec* 48 (1956), 284; *coram* Felici, 2 April, 1957, *RRDec* 49 (1957), 278; and *coram* Pinto, 22 April 1974.

<sup>108</sup> *CIC*, cc. 1536; and 1679. See Appendix I.

Considering the plaintiff's incapacity, the tribunal stated: 'In addition to her psychological trauma', she suffered physical illness. She 'jumped at the chance' to live with the respondent's family; the respondent's mother's disapproval of pre-marital intimate relationships led to pressure to marry. The plaintiff was 'desperate' and 'did not understand her doubts'. Although doubtfully motivated and misplaced, she found the attention shown to her 'too attractive' to resist. The tribunal held that the plaintiff was 'severely emotionally immature'; her desire for acceptance 'clouded' her judgment and she 'exercised no discretion in marrying the respondent'.

**Discussion:** There was no indication as to: who sought the report; why it was submitted; or whether or not the tribunal accepted it as 'expert' opinion. The Safeguarding Coordinator's qualifications, experience, or religious affiliation were not specified. The relevance of the report was unclear. Despite the law section's acknowledgement of the need for experts, the tribunal appointed none for either party; nor did it consider the caveats in Rotal jurisprudence regarding the invalidating effect of schizophrenia.<sup>109</sup> Moreover, it failed to mention that Rotal judge Bruno's cited decision involved four experts; the severity of the illness at the material time was confirmed.<sup>110</sup> Rather, the tribunal concluded simply that so long as schizophrenia is *diagnosed*, nothing else requires consideration. Presumably, the tribunal attributed weight to allegations of the respondent's frequent hospitalisation, lack of steady employment, previous failed relationships and attempted fraud, as indicators of severity, but this was not obvious from the judgment. Although the law section acknowledged the distinction between the two grounds of incapacity, the tribunal dealt with them together in respect of the respondent. It is therefore, impossible to follow the reasoning in respect of these two heads of nullity.

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<sup>109</sup> Other Rotal judges also recognise the caveats. Mendonça *Anthology*, p1: Case No: 71-006, *coram* Di Felice, 13 January 1971, *Dec* 63 (1980), 25-31: 'According to approved jurisprudence, one who suffers from schizophrenia cannot elicit valid matrimonial consent because the disorder causes disturbance in the discretion of judgment. The disorder must be in the qualified (manifest) state at the time of exchanging consent'. Also p1: Case No: 71-067, *coram* Palazzini, 31 March 1971, *Dec* 63 (1980), 235-245: '... Hence, if [schizophrenia] is found to be present in a person in its qualified or manifest stage before and after the wedding, marriage of such a person can be declared null for lack of discretion of judgment'. At p74: Case No: 84-145, *coram* Fiore, 20 October 1984, *Dec* 76 (1989), 541-554: '...[I]n any qualified stage of this illness [schizophrenia], the person affected by it can be considered as deprived of the discretion of judgment proportionate to marriage. ... Only an expert in psychiatric/psychological sciences can detect the actual presence and severity of the disorder. ... [O]nce its presence is diagnosed before and after the marriage we must necessarily conclude that it had affected consent'.

<sup>110</sup> See Mendonça *Anthology*, p66: Case No 83-136, *coram* Bruno, *Dec* 75 (1988), 473-484.

It appears that in the absence of expert opinion and without applying Christian anthropological principles the tribunal assumed, on the basis of the plaintiff's own account that she must have suffered psychological trauma because of her childhood experiences, resulting in severe emotional immaturity; her past, therefore, determined her future. The tribunal did not explain the judges' competence to assess her psychological condition, its severity and its effect at the material time. Nor did it explain its methodology. Despite the respondent's mother's account to the contrary, and the fact that the plaintiff lived in the respondent's home prior to marriage, the tribunal held that she was 'kept in the dark' about the respondent's illness, and this deception was compounded by his tendency to lie. The relevance of this to her incapacity is unclear; deceit was not alleged.<sup>111</sup> Without scientific explanation, *failure* to exercise discretion of judgment was equated with *incapacity*. *Difficulty* and *imprudence* were not distinguished from incapacity. The significance of the Safeguarding Coordinator's input was not explained. Therefore, the pertinent questions remained unanswered. Although without discussion, a *vetitum* was added in respect of the respondent and was confirmed at Second Instance.

### **Intermediate Conclusion:**

These six cases demonstrate the tribunals' willingness to pursue grounds of psychological incapacity even when: there was no valid petition; a respondent, in whom incapacity was alleged, was untraceable; and no expert report was sought for a party in whom incapacity was alleged. No explanation was given as to how or why these cases fell under the exception provided in *CIC* canon 1680. Moreover, in some of these six cases, the law sections of the judgments acknowledged the mandatory use of experts in incapacity cases.

When expert opinion was sought, procedural law in respect of the appointment and instruction of experts was not followed. Crucially, in no case were the questions mandated in *DC* put to the expert; therefore, these remained unanswered. In Case 2, the expert report was sought for the wrong party, yet the tribunal found for incapacity in the other party, without expert opinion. Moreover, it found for nullity also on grounds of the plaintiff's error about a quality in the respondent, without identifying that quality. In Case 3, in which an expert supported the party's *capacity* strongly, the tribunal set the expert report aside, yet

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<sup>111</sup> *CIC*, c. 1098. See Appendix I.

found for the party's *incapacity*. In Case 4, one ground of nullity was alleged in the plaintiff (although two were heard) and two were alleged in the respondent. An expert report was sought only in respect of the plaintiff. The expert found no severe psychological anomaly operative at the material time, yet the tribunal found for the plaintiff's incapacity on the ground that was not pleaded. In Case 5, although incapacity was found not proven, the tribunal, nevertheless pursued the ground when there was no evidence of any psychological impairment; the plaintiff provided a medical report which confirmed only physical ailments. The tribunal found for nullity, however, on grounds of *intention* in the other (absent) party, ignoring the presumption of validity and relying on *lack* of evidence of *validity*. In Case 6, the tribunal found for incapacity in both parties; no expert report was sought for either party. The (absent) respondent had a psychiatric history, but the plaintiff merely reported a difficult childhood, which the tribunal accepted as an inevitable cause of her incapacity. In Cases 4 and 6, the tribunal dealt with more than one ground of incapacity together, making it impossible to follow its argument; in Case 4, it dealt with the grounds in both parties (two grounds in each party), together, despite incapacity being a personal and inherent incapacity. In Cases 5 and 6, the tribunal did not seek the expert reports and it was unclear whether they accepted them as such; their relevance was unclear. No reasons were given for not, in some cases, approaching the party's own psychiatrist, who would have been more likely to be able to give a more detailed and accurate account of the party's condition at the material time. Only in Cases 3 and 4 did the expert consider the ameliorating effect of medication; however, the tribunal gave no weight to this consideration; in Case 4 the expert held that there was no evidence that the party's possible anxiety reached 'clinical intensity' prior to marriage, but the tribunal nevertheless found for his incapacity. Only in Case 1, therefore, can it be said that the tribunal gave weight to the expert report and found the allegations of incapacity in both parties not proven on the basis that no anomaly antecedent to marriage was found.

Furthermore, the tribunals' understandings of law were incorrect in some of the cases. The tribunals focused on whether or not a party failed to exercise discretion of judgment, thereby failing to distinguish imprudent decisions, or difficulty, from incapacity. In Case 3, the tribunal understood that a sexual relationship was an essential element of marriage and therefore, focused on the parties' sexual *desires* and *expectations*, which have no canonical relevance. It concluded that one party's *failure* to meet the other's *needs* and *expectations*, amounted to incapacity; once again, this does not distinguish failure from incapacity.

Except in Case 3 (in which the expert report supporting capacity was set aside) and Case 4 (in which the expert concluded that there was no evidence of anxiety having reached ‘clinical intensity’) it was impossible to demonstrate that the experts focused on the severity and effect of a pre-existing cause. Moreover, as the rationale for appointing experts is unclear, it seems that in all the cases the tribunals decided arbitrarily both to engage experts and on the weight to be given to their opinions.

### 3. A COMPARISON WITH THE DUBLIN REGIONAL TRIBUNAL

A comparison is now made between the practice of the First Instance tribunals already studied (from the four dioceses in Southwark province, appealing to ITSIS) and that of the First Instance Regional Tribunal in Dublin, a tribunal serving several dioceses (appealing to the National Appeal Tribunal of Ireland), in the same year (2009). The matrimonial business of the Dublin Tribunal is equivalent to that of the sum of the four diocesan tribunals in Southwark province. First, what follows compares statistics in relation to: the overall number of cases heard; and the number of cases in which grounds of psychological incapacity were alleged. Second, it compares the practice of the tribunals in terms of: their use of experts; procedural errors; interpretation of law; and the weight given to expert evidence.

**Statistics:** Overall in 2009: ninety-five cases were heard in Southwark province; ninety cases were heard in Dublin. Psychological incapacity was alleged in eighty-four in Southwark and in eighty-eight in Dublin.<sup>112</sup> Grave lack of discretion of judgment (GLDJ) was alleged in eighty-one cases in Southwark, compared to eighty-seven in Dublin. In Dublin, in fifty-seven cases the ground (GLDJ) was alleged in both parties, and in thirty cases in one party. Therefore, compared to ninety-one petitions on GLDJ in Southwark, Dublin received one hundred and forty-four. In Southwark, seventy-one were found proven and twenty were

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<sup>112</sup> Therefore, psychological incapacity was alleged in all but two cases in Dublin. In one of these two cases, (No 56), relative impotence was alleged in both parties and found proven in both parties. Non-consummation was alleged. After marriage each party discovered that the other had been sexually abused; counselling failed. The fact of non-consummation was proven by: (a) evidence given *tempore non suspecto*; (b) expert testimony from the plaintiff’s general practitioner; (c) expert evidence from a counsellor; and (d) a psychological assessment of the plaintiff by a psychologist. The psychologist concluded that the parties had been traumatised by their past experiences and neither party could extend to the other the high level of support each required because of those experiences. In the other case (No 48) grave fear was alleged in both parties and found proven in the plaintiff; in addition the plaintiff’s error and deceit were alleged but found not proven.

found not-proven, compared with eighty-seven proven and fifty-seven not-proven in Dublin. Southwark received thirteen cases alleging inability to assume the essential obligations of marriage (IAO), whereas Dublin received eleven. In Dublin, two of these cases involved both parties; nine involved one party. Therefore, compared with Southwark's fourteen petitions, Dublin heard thirteen on IAO. In Southwark, eleven were found proven and three were not, whereas in Dublin, four were proven and nine were not.

So, in Dublin, of the one hundred and fifty-seven pleas of incapacity,<sup>113</sup> ninety-one succeeded and sixty-six failed, as compared with one hundred and five pleas in Southwark, of which eighty-two succeeded and twenty-three failed. The table below compares: the overall numbers of cases from the four First Instance diocesan tribunals in Southwark and the First Instance Regional Tribunal in Dublin; the number of cases in which incapacity was pleaded; the number of petitions for GLDJ and IAO; the numbers of affirmative (proven) and negative (not proven) decisions reached in respect of these two grounds of incapacity; and the number of cases receiving negative decisions on all grounds.

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<sup>113</sup> There were one hundred and forty-four petitions on grave lack of discretion of judgment and thirteen on inability to assume essential obligations.



Table of Cases

	Cases from 4 First Instance Southwark Tribunals	Cases from First Instance Regional Tribunal in Dublin
No of cases overall	95	90
No of cases pleading incapacity	67+17 unavailable files = 84	88
No of cases pleading se GLDJ	64+17 unavailable files = 81	87
No of cases pleading IAO	13	11
No of pleas of GLDJ	91	144
No of pleas of IAO	14	13
Total No of pleas of incapacity	105	157
Affirmative decisions on GLDJ	71	87
Affirmative decisions on IAO	11	4
Negative decisions on GLDJ	20	57
Negative decisions on IAO	3	9
Total number of affirmative decisions on incapacity (proven invalidity)	82	91
Total number of negative decisions (not-proven)	<b>23</b>	<b>66</b>
No of cases receiving negative decisions on all grounds	<b>1</b>	<b>14</b>

These figures demonstrate that the Dublin tribunal was equally willing to pursue psychological incapacity in almost all cases. However, there is a significant difference between the numbers of incapacity petitions receiving not-proven decisions, and of cases which failed on all alleged grounds (i.e. negative decisions).<sup>114</sup> It appears, therefore, that in Southwark the tribunals were reluctant to allow a case to fail completely, as one proven ground was sufficient to declare the marriage invalid. This suggests that the Southwark tribunals were more liberal in declaring invalidity than the Dublin tribunal.

**The Use of Experts:** The most significant difference in the practices of the tribunals compared concerns compliance with the mandatory requirement to consult an expert in marriage cases involving psychological incapacity: Dublin complied with this, Southwark did not. Also, unlike Southwark, the Dublin tribunal employed a part-time psychologist who conducted a psychological assessment in almost all parties in whom psychological incapacity was alleged.<sup>115</sup> Tests routinely used in these assessments included: the Wechsler Adult Intelligence Scale (WAIS); the Rorschach Projective Technique;<sup>116</sup> the Eysenck Personality Questionnaire;<sup>117</sup> and the Rotter Incomplete Sentence Test.<sup>118</sup>

The exception permitted in *CIC* canon 1680 was invoked in few cases. In these cases, whilst an expert was not consulted, the tribunal had ample evidence of incapacity from other sources. For example, in one case, a medical document revealed that the plaintiff suffered pre-marital addiction, received ‘constant treatment’ and had a history of non-compliance with treatment. This evidence, combined with witness evidence, of a dysfunctional family in which the plaintiff suffered sexual abuse, and of his father’s alcoholism, led the judges to find for his incapacity on grounds of his grave lack of discretion of judgment *and* inability to assume the essential obligations of marriage.<sup>119</sup> A *vetitum* was imposed. The Second Instance Tribunal ratified the decision and confirmed the *vetitum*.

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<sup>114</sup> These figures are marked in the table above in bold.

<sup>115</sup> Arabic numbers, No 1 to No 98 are assigned to the Dublin cases. E.g., No 15: This case involved an arranged marriage among the travelling community; grave lack of discretion of judgment was alleged in both parties. The female plaintiff’s psychological assessment indicated that she functioned at a ‘very low level of intelligence – amongst the lowest 2% of the population’ and she ‘showed signs of serious immaturity’. The tribunal found for her incapacity, but not that of the absent respondent.

<sup>116</sup> This measures personality characteristics and emotional functioning.

<sup>117</sup> This assesses character traits.

<sup>118</sup> This is designed to identify dysfunctional behaviour.

<sup>119</sup> No 24.

In another case, in which grave lack of discretion of judgment was alleged in both parties, both parties came from dysfunctional families.<sup>120</sup> Moreover, they met while in-patients in a psychiatric hospital. Both parties had a history of attempted suicide; they were receiving continuous treatment. Neither party worked; they received State disability benefits. All witnesses opposed the marriage. Witness evidence demonstrated that the plaintiff wife's father died when she was an infant. She was raised, in fear, by her mother and three aunts who had learning difficulties. Acknowledging the plaintiff's pre-marital, severe psychiatric illness, the tribunal considered that she had a poor understanding of marriage. Before marriage, the respondent husband threatened suicide if the plaintiff left him, causing pressure on the plaintiff to marry.<sup>121</sup> Both parties were hospitalised after marriage. The plaintiff was forced to seek safe shelter shortly after marriage. The respondent husband had been sexually abused. He coped with stress by consuming alcohol. Evidence confirmed his abusive behaviour at sexual, psychological and physical levels. Counselling failed. In light of these circumstances, the tribunal decided that there was no need for expert evidence. It held that both grounds were proven and the marriage was declared invalid.

**Procedural Errors:** At the Dublin tribunal, only its judgments and not the Acts were available for study; in Southwark the judgments and most of the Acts were available. At the Dublin tribunal, therefore, it was impossible to study general procedure, for example, in terms of citing respondents, or of appointing and instructing experts. However, with one exception, the tribunal's reliance on expert opinion in psychological incapacity cases seemed to account for the apparent reluctance, unlike in Southwark, to pursue, or at least find proven, grounds in respondents who were uncooperative, and therefore not subject to psychological assessment.<sup>122</sup> In this one exception, a plaintiff wife married a man who had been previously

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<sup>120</sup> No 9.

<sup>121</sup> There was a history of psychiatric illness in the respondent's family; his mother had been admitted frequently to a psychiatric hospital.

<sup>122</sup> E.g. In No 4, the respondent withdrew evidence; consequently, the ground alleged in her was not pursued, due to lack of evidence. In Nos: 6, 17, and 24, because of the uncooperative respondents and lack of psychological reports, the tribunals held that there was insufficient evidence to consider incapacity grounds alleged in them and reached a not proven decision. In No 15, although the sole judge found evidence that the respondent held views 'not in keeping with Church teaching on marriage', without objective evidence, 'it would be rash' to rely on suspicions. In No 18, the respondent allegedly became violent when the plaintiff objected to her socialising alone; however, because of her lack of cooperation and consequent absence of a psychological assessment, the tribunal did not pursue any ground in her. In No 24 the tribunal acknowledged there was a *prima facie* case for grounds in the respondent, but because of her lack of cooperation and consequent absence of a psychological report, no grounds were alleged in her.

married.<sup>123</sup> The expert (the psychologist employed by the tribunal) found that although there were many indications of difficulties, there was ‘nothing to suggest that [any of these] was so severe as to deprive her’ of capacity to marry. The tribunal, therefore, held that she was capable. Also, regarding the non-cooperative respondent, the tribunal held that his alleged violent behaviour ‘raised questions’ but did not prove incapacity. Second Instance, however, agreeing that the plaintiff had made a foolish decision, disagreed in respect of the respondent, holding that: he was ‘psychologically prone to violence’; and ‘excluded the giving of this love to the plaintiff’. This tribunal did not distinguish wilful bad behaviour from incapacity. Third Instance,<sup>124</sup> based on *lack of evidence*,<sup>125</sup> also focused on the respondent’s behaviour, and consequent *failures*.<sup>126</sup> Moreover, as we saw in Southwark Case 3, the tribunal accepted the plaintiff’s *desires* and *expectations as rights*, and held that the respondent, ‘failed not only to understand the necessity of giving himself to those expectations’, but completely failed ‘to recognise, even now, that his behaviour not alone was contrary to the expectation of Christian marriage, but actively militated against such expectations’. A *vetitum* was imposed. Furthermore, this Third Instance tribunal confused *withholding* a substantial element of marriage, which goes to the heart of the ground of simulation, with incapacity, with which it is internally incompatible.<sup>127</sup>

In other Dublin cases procedural errors, identified in some of the Southwark cases, were evident. For example, some judges treated grounds together, even when the ground was alleged in both parties, making it impossible to follow the reasoning for individual grounds of *personal* incapacity.<sup>128</sup> In one case, grave lack of discretion of judgment was alleged in both parties.<sup>129</sup> The marriage was happy initially, produced seven children and lasted twenty-one years. The respondent wife had a psychiatric history, which became very severe *after* marriage. The expert found that, despite many deficiencies, she functioned ‘within average range of ability’ and although ‘some paranoid tendencies’ were indicated, negative findings did ‘not approach pathological levels at present’. Nevertheless, and without argument, the

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<sup>123</sup> No 2.

<sup>124</sup> Although the Roman Rota is the usual competent Third Instance tribunal, Third Instance competence was granted to a local, regional tribunal.

<sup>125</sup> E.g., ‘[There is] no evidence of an intimate, trusting, loving, interpersonal relationship’; and ‘no evidence of meaningful communication’.

<sup>126</sup> E.g., ‘His behaviour reveals how apart they were as a couple’.

<sup>127</sup> *CIC*, c. 1101§1. See Appendix I. Rotal jurisprudence, discussed later, holds that one cannot be incapable of positing consent and, at the same time be capable of withholding that consent ‘by a positive act of the will’.

<sup>128</sup> E.g., Nos: 12, 20, 24, 31.

<sup>129</sup> No 12.

tribunal found the ground proven in her but not in the plaintiff husband. The tribunal held that the couple *failed* to get to know one another. The tribunal, therefore, did not establish the severity and effect of the plaintiff's condition at the material time, so the reasoning was unclear. Second Instance ratified the decision for nullity.

Although the expert reports were not available, it appeared from the judgments that, as in Southwark cases, many *DC* provisions may have been breached. For example, although in most cases, and unlike the practice in Southwark, the expert examined the parties in whom incapacity was alleged, there was no evidence from the judgments that the expert had been given the Acts. Nor was it clear that the expert: revealed either any degree of adherence to faith or to Christian anthropological principles;<sup>130</sup> addressed the specific questions required by *DC*; or achieved any specific degree of certainty regarding findings. Nor in many cases, was it clear that the expert: identified any specific 'grave anomaly' pre-existing marriage; focused on the effect of any such anomaly on the party's capacity *at the material time*; or explained how the effect could be verified. Moreover, the expert, at least in some cases, appeared to have assessed the parties in light of post-marital events, leaving the gravity of the party's condition at the material time in doubt.

For example, a Catholic plaintiff wife married a Muslim respondent.<sup>131</sup> The marriage lasted eight years; two children were born. The plaintiff claimed: she had a 'nervous breakdown' aged seventeen; and she acted 'impulsively' following the respondent's early proposal of marriage. The expert found: the plaintiff had psychological problems, including 'extremely childish' emotional functioning and 'extremely high' anxiety levels; and she suffered depression six months after the birth of her first child. However, the tribunal discussed neither her alleged pre-marital 'breakdown' nor post-partum depression. Like, in Southwark Case 3, the tribunal considered that the plaintiff 'had high expectations' and was not satisfied with five-star hotel accommodation. It held: she married a man of another nationality, religion and culture, whom she barely knew, in order 'to belong to someone'. Consequently, she had poor insight and gravely lacked discretion of judgment, rendering the marriage invalid. Therefore, as the tribunal did not identify a 'grave anomaly', its severity and effect

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<sup>130</sup> However, as the expert was employed by the tribunal, this information might have been available to the tribunal.

<sup>131</sup> No 3.

at the material time was not demonstrated; nor did the tribunal distinguish an imprudent decision from an invalid one. Nevertheless, a *vetitum* was imposed.

In some cases, even though the Dublin tribunal focussed on the material time, it did not address the severity and effect of the (latent) condition. For example, in one case, a plaintiff wife's grave lack of discretion of judgment and inability to assume the essential obligations of marriage were alleged.<sup>132</sup> The expert opined: because of many psychological problems, including 'depressive tendencies' and a 'poor self-image', the plaintiff was in a 'very poor state emotionally' when deciding to marry; but she developed anorexia 'shortly after marriage'. The expert found that although her 'problems' originated in childhood, they 'could have been added to' by subsequent trauma, depression and 'maladaptive use of denial as defence'. However, the tribunal, dealing with both grounds together, held that her anorexia occurred *antecedent* to marriage; alcohol-abuse in her parental home was the root of all her problems. The tribunal nevertheless found that her grave lack of discretion of judgment was not proven, but she was incapable of assuming essential marital obligations. Second Instance ratified the decision. The reasoning was unclear.

Another procedural error occurred in a case in which, instead of returning a 'not-proven' decision, the judges decided not to hear an alleged ground on the basis of the defender of the bond's observations.<sup>133</sup>

**The Tribunal's Understanding of Law:** Like in Southwark cases, instead of establishing the existence of a 'grave cause' and its severity, and demonstrating its effect on the party's capacity for marriage *at the material time*, judges in Dublin frequently equated *failure* to exercise *prudent* judgment with *incapacity* to marry. For example, in the law section of one judgment, whilst discussing grave lack of discretion of judgment, the judges credited Pompedda with stating: 'with regard to matrimonial consent, something even more is required [than is required for placing a human act].'<sup>134</sup> That is, a certain foresight or intellectual consideration of the bond which is coming into being and the conjugal duties that

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<sup>132</sup> E.g., No 20.

<sup>133</sup> No 24. *CIC*, cc. 1514; 1608§4; and 1611. See Appendix I. Once the ground is accepted, it should be heard and if necessary a not-proven decision reached.

<sup>134</sup> No 71.

will derive from it'.<sup>135</sup> This quotation implies that *de facto* consideration is required; not just *capacity* for it. However, the tribunal did not reveal that Pompedda's decision, in fact, involved a plaintiff suffering personality change following pre-marital cerebral trauma; expert opinion was that she was incapable of critical evaluation.<sup>136</sup> Nor did the tribunal explain the significance of this decision to the extant case.

In another case, the tribunal found a respondent, contrary to his own belief that marital problems were extraneous, incapable of assuming essential obligations.<sup>137</sup> The expert reported: 'some' problems; impulsivity; immaturity; and anxiety. Moreover, the judges acknowledged: lack of pre-marital problems; post-marital financial difficulties; and his post-marital bad behaviour. Although acknowledging the existence of *difficulties* and without reference to cause, the judges concluded: the respondent 'did not take enough time to get to know the plaintiff'; he was unable to think towards the good of the spouses; and the parties were unsuited. Therefore, he did not exercise discretion of judgment. Second Instance ratified the decision of invalidity on grounds that he 'lacked the qualities that would seem essential for marriage'. *Difficulty* was not distinguished from *incapacity*; no 'grave anomaly' was identified, as is required by the norms of the Church.

When grave lack of discretion of judgment was alleged in both parties, a suggestion of immaturity in the respondent (not proof) sufficed to convince the tribunal of incapacity.<sup>138</sup> The judges found for nullity only in the respondent wife. The expert reported 'immaturity' (without further detail), but also 'a serious personality defect' (not disorder). But the tribunal considered that the respondent: was 'very unfocused'; 'had plenty of time to sort herself out during the nine-year courtship; but 'drifted into marriage without consideration'. It held that expert opinion '*suggests* she did not have the maturity to handle what was happening' and found the ground proven.<sup>139</sup> Here, an expert finding of 'immaturity' proved incapacity without attribution to any specific cause – that is, a *suggestion* of 'immaturity' sufficed to cause nullity.

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<sup>135</sup> The judgment cited *coram* Pompedda, 19 February 1974, *SRRDec* 66 (1974), pp105-106.

<sup>136</sup> Mendonça, *Anthology*, Case No: 74-030, *coram* Pompedda, 19 February 1974, *Dec* 66 (1983), 105-110, p17.

<sup>137</sup> No 31.

<sup>138</sup> No 23.

<sup>139</sup> Emphasis added.

In another case, the expert opined that a plaintiff wife was ‘immature’, but the tribunal gave weight to events which occurred after marriage; therefore, the seriousness of her underlying condition at the material time was not established.<sup>140</sup> The plaintiff wife met the respondent husband three months after the death of his former wife. They married two years later. He had a child from his former marriage. Grave lack of discretion of judgment was alleged in both parties. Witness evidence referred to the plaintiff’s ‘depression’ before marriage. The plaintiff alleged that she wanted a child but her post-marital pregnancy ended in its early stages. The expert found that her many psychological problems, including immature emotional functioning and ambivalence, originated in childhood and concluded that she would have ‘problems’, even with a supportive partner. The judges, accepting these findings, held that ‘she suffered from a disposition that led to a decision contrary to all common sense’. However, without reference to any specific cause, they held that her need to have a child was ‘compounded’ by loss of the pregnancy. The tribunal did not explain how a post-marital event could have affected consent. Both grounds were found proven but the reasoning in respect of the respondent was clearer. The tribunal accepted expert opinion that he: was ‘obsessed with sex’; functioned emotionally ‘at the level of a young teenager’; and he dealt with grief in ‘an inappropriate manner’; therefore, he was not ‘psychologically free’. A *vetitum* was imposed on both parties and confirmed at Second Instance.

As well as high expectations, low self-esteem also featured in some cases as a cause of incapacity. On one occasion, expert opinion supported a plaintiff husband’s ‘low level of insight’.<sup>141</sup> Witness evidence showed that both sets of parents had reservations as to the suitability of the parties. The tribunal considered that the plaintiff’s failure ‘to see the break in the relationship coming’ was ‘typical of someone with low self-esteem’. Despite Rotal judge Burke’s warning against incorrectly interpreting such psychological concepts as ‘self-esteem’, ‘freedom from shame or guilt’ and ‘self-doubt’, as these would have different meanings depending on whether or not one comes from a Christian or secular anthropological viewpoint,<sup>142</sup> the tribunal held that the plaintiff’s ‘unrealistic expectations indicate that his

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<sup>140</sup> No 7.

<sup>141</sup> No 26.

<sup>142</sup> Cormac Burke, writing judicially: *Sentence of 9 July 1998*, available at <http://www.cormacburke.or.ke/node/469>; and extra-judicially: ‘Psychiatry: A “Value-Free” Science?’, *Linacre Quarterly*, Vol 67:1 (February, 2000), pp59-88. *Coram* Burke, ‘Decision 5 November 1992, *RRD*, Vol 84, pp527-528’, *Studia Canonica*, 32 (1993), pp486-496: Burke warns that personality traits, such as ‘low self-esteem’ and ‘unassertiveness’, ‘serve to prove nothing about ... consensual incapacity either under c. 1095 2° or



decision-making process was fundamentally flawed'; consequently, he lacked sufficient discretion of judgment. Second Instance ratified the decision and a *vetitum* was imposed.

Subjective findings of aberrant behaviour were accepted, too, without reference to a psychological cause. For example, a plaintiff husband alleged that shortly before the marriage the respondent wife admitted a possible pregnancy. Although he doubted it, she alleged he was the father.<sup>143</sup> Despite their agreement to postpone children, the plaintiff offered support. The pregnancy was confirmed; an abortion took place on honeymoon. The expert found that the plaintiff husband had psychological problems, including high ambivalence and extreme emotional immaturity. The tribunal held: his complicity in procuring the abortion displayed actions contrary to the good of children;<sup>144</sup> he entered a pre-nuptial agreement;<sup>145</sup> he acted in haste; and he functioned emotionally at the level of a young teenager. His grave lack of discretion of judgment was found proven. Second Instance ratified the decision. The Second Instance held: the plaintiff, 'when faced with a conundrum displayed immaturity which would surprise the average man'; the couple 'could have had [the child's] paternity checked and if proven, the child could have been adopted or kept'; the decision to abort was immoral and demonstrated 'complete lack of discretion of judgment'. Neither tribunal identified a serious anomaly other than 'immaturity', which was evidenced by behaviour. Moreover, the tribunal did not distinguish *immoral* behaviour from *incapacity*. Given the plaintiff's admission of complicity in the abortion and his willingness to enter a pre-nuptial agreement, the tribunal could have pursued grounds of his intentions against the good of children or of permanence, but did not do so.<sup>146</sup>

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c 1095 3°. See also Burke's warning to judges: *Rotal Decision 23 July 1988*, available at: <http://www.cormacburke.or.ke/node/470>: 'An ecclesiastical judge must bear the Pope's cautions very particularly in mind when presented with an expertise which gives a diagnosis of an inadequate or incapable personality in a contracting party, basing this largely on the "poor self-esteem" and/or "weak self-image" which the expert considers the party to possess'.

<sup>143</sup> No 4.

<sup>144</sup> The ground of a positive intention against the good of children was not alleged.

<sup>145</sup> The ground of a positive intention against permanence was not alleged.

<sup>146</sup> In another case, too, no serious psychopathology at the material time was identified; behaviour held sway. In No 44, the respondent husband's grave lack of discretion of judgment and inability to assume the essential obligations of marriage was alleged. He admitted sexual abuse of his child from a previous relationship. Judges held that if a condition 'so affected the person concerned that the natural process of discerning and evaluating was radically undermined', nullity of marriage would result. Expert opinion was that the respondent's personality functioning 'is seriously disturbed'; his view of relationships is 'extremely distorted'; he has poor insight and his subjective thinking is 'extremely immature'. Although not addressing his capacity at the material time, the judges held that a man who 'could perpetrate such an outrage on his own child proves a radical distortion of behaviour, thought and understanding'. Thus, he gravely lacked discretion of judgment and was incapable of assuming the essential obligations of marriage. Second Instance ratified the decision.

Pre-marital pregnancy featured in another case also. A plaintiff husband alleged that the respondent wife claimed a pre-marital pregnancy and threatened suicide.<sup>147</sup> They married but the baby was adopted. The marriage lasted eighteen years and produced four children. The judges held that the expert finding of his ‘naivety’, ‘bewilderment’ and ‘poor insight’ at the material time, ‘greatly reinforced’ his own evidence that he entered marriage in doubt and under pressure; his thinking was ‘not at all realistic’, but ‘bizarre’. The judges found for his grave lack of discretion of judgment, which Second Instance ratified. No ‘grave’ pathological cause was identified and consequently its severity was not established and its effect was not demonstrated.

In many cases, even when incapacity could have been argued, for example, when a party came from a dysfunctional family, or abused drugs, or expert evidence supported childish emotional functioning, or a ‘serious personality defect’, the judges, nevertheless, focused on *failure*, rather than *incapacity*.<sup>148</sup> However, sometimes the distinction between *failure* and *incapacity* was clear. In one case, the expert concluded that the plaintiff was: ‘very subjective’ in her outlook on life; ‘extremely anxious’; and inclined to ‘over-interpret’

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<sup>147</sup> No 17.

<sup>148</sup> No 9: Although the psychological assessment showed: poor self-image; ambivalence; a high level of inner tension; and overall emotional functioning which was ‘very childish for [his] years’; the tribunal found that the plaintiff husband was ‘a private man’, who ‘bottled up pressure’ and was ‘not communicative’. He ‘seems to have been distracted by the recent death of his mother to whom he was attached’. He was ‘over weight and bullied at school’. The respondent wife was: ‘difficult to live with’; ‘jealous’; and ‘did not want him to have relationships with other women, even work colleagues’. The judges concluded that the problems ‘should have been glaringly obvious’ to the plaintiff husband before marriage, but he ‘did not see them’; consequently he suffered from grave lack of discretion of judgment. Second Instance ratified the decision on the basis of the psychological assessment demonstrating ‘personality problems’. No 11: There was evidence of the respondent husband’s dysfunctional family and his abusive behaviour; judges concluded that he ‘failed to appreciate marriage as *totius vitae consortium*’. No 13: Grave lack of discretion of judgment was alleged in both parties. The plaintiff husband claimed that he was ‘stressed’ having taken over his father’s business when he died. His mother, with whom he had a volatile relationship, had attempted suicide. He took drugs and had a ‘whirlwind romance’. The respondent wife became jealous and behaved irrationally; she claimed that the plaintiff took drugs, cross-dressed and had certain sexual preferences. The plaintiff met a third party within six months of marriage. Although the psychological assessment confirmed the plaintiff’s ‘serious personality defect’, the judges, finding for his incapacity, but not that of the respondent wife, acknowledged discrepancies in the principal parties’ accounts, but concluded: the plaintiff ‘did not take the necessary time to get to know the respondent sufficiently’; he ‘ignored all the warning signs’; and he ‘did not weigh up the consequences of his decision to marry’. The judges made no reference to incapacity. No 25: Grave lack of discretion of judgment was alleged in both parties; both grounds were found proven. The tribunal held that the plaintiff husband ‘failed to evaluate the evidence before him prior to marriage’; he proceeded, despite reservations. The ground in the respondent wife appeared to have been based on bad behaviour; there was police involvement because of her drinking. Second Instance ratified the decision in respect of both grounds.

situations, ‘judging them to be more threatening than they are in reality’.<sup>149</sup> However, the tribunal, taking into account witness evidence, which it considered contradictory and not corroboratory, held that no serious cause was established. The Second Instance agreed: although the plaintiff’s background was *difficult*, there was no evidence of *serious* trauma. Allegations of youth, inexperience and immaturity were ‘too sweeping’ to assess. She may have *failed* to reflect critically, but there was no evidence of *incapacity*; she had asked serious questions before committing herself. She may not have been *fully* aware of the extent of problems but it was not possible to show lack of perception. The couple ‘had radically different views’. Although this case demonstrates inconsistency in the understanding of law, it showed that the judges, in this case, did not rely solely on the psychological assessment.

**Weight given to Expert Reports:** As we have seen, weight was given to psychological assessments, even when, although based on objective tests, the expert had not focused on establishing a serious cause and demonstrating its effect *at the material time*.<sup>150</sup> However, other cases demonstrated that some judges did not rely solely on expert opinion; other circumstances were taken into consideration.<sup>151</sup> Moreover, some judges did not always

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<sup>149</sup> No 5.

<sup>150</sup> There were many examples of this: No 6: The psychological report supported the plaintiff wife’s: ‘extremely poor’ level of insight; depressive and paranoid tendencies; extreme impulsivity; high ambivalence; and emotional functioning below the level of a mature adult’. Judges acknowledged evidence that problems began in childhood: her parents drank heavily; she left school aged fifteen to work abroad; her mother left the family home, leaving the plaintiff in a caring role as her younger brother suffered brain damage following an accident. The respondent was a heavy drinker, unreliable and inconsiderate. The plaintiff’s sole reason for marriage was her pregnancy which she discovered having taken an overdose of drugs. She was in no fit state to make a decision to marry. Her grave lack of discretion of judgment was found proven. Second Instance ratified the decision on the basis that she had a dysfunctional background, was left to her own devices, was forced to take responsibility for siblings and consequently latched on to the respondent. She saw no alternative but marriage. The inference was that the plaintiff’s decision was not psychologically free. In No10, judges found ‘serious conflict’ between the principal parties’ evidence regarding pressure from pre-marital pregnancy. However, the plaintiff’s father described the news as an ‘earthquake’ and attested to the plaintiff’s religiosity. The judges accepted that the psychological assessment revealed a ‘serious personality defect’ and in addition to witness evidence which ‘broadly supports’ the view that pressure made it ‘extremely difficult’ for the plaintiff to think clearly, found for his grave lack of discretion of judgment.

<sup>151</sup> No 16 involved an arranged marriage within the travelling community. Grave lack of discretion of judgment was alleged in the plaintiff. His psychological assessment revealed intellectual functioning within the lowest 4% of the population, which raised questions about his capacity to understand and appreciate the nature and implications of the rights and duties of marriage. There were serious problems in his personal development and maturation. The sole judge held that when these ‘insights’ are placed alongside [other] ‘facts’, he was ‘seriously hampered in his capacity to consent at the age of seventeen; he had tried to resist but was powerless’. Second Instance ratified the decision agreeing that through no fault of his own, he was unable to understand. No 18 also involved a marriage within the travelling community; whilst not strictly an arranged marriage, the plaintiff’s brother chose the respondent. The plaintiff’s psychological assessment revealed a polite and gentle character whose level of intellectual functioning was low and his emotional functioning was that of a dependent child. The tribunal held that this revealed radically defective personal development which reinforced the accrued evidence. His grave lack of discretion of judgment was found proven and ratified at Second Instance. No 22:

accept expert reports uncritically. For example, in one case the expert concluded, citing many features, that a plaintiff wife had a ‘serious personality defect’, which ‘may have begun in childhood’.<sup>152</sup> The tribunal, however, rejected the expert report and found no evidence of an antecedent ‘psychological grave anomaly’; rather, witness evidence proved extraneous causes for the failure of the marriage, which did not support invalidity; the plaintiff’s grave lack of discretion of judgment and inability to assume the essential obligations of marriage, although dealt with together, were found not proven.<sup>153</sup>

In another case, in which grave lack of discretion of judgment was alleged in both parties, the psychologist reported many psychological features in the plaintiff wife, including: childish functioning; poor insight; and a high score on the Eysenck lie test.<sup>154</sup> The tribunal, however, found that her psychological profile ‘falls short’ of proving grounds; naivety was not evidence of incapacity. Likewise, although the expert suggested ‘immaturity’ in the respondent husband, the judges held that he behaved badly towards the plaintiff and witness evidence revealed nothing to indicate that either party misunderstood the consequences of their decision. No grounds were proven. Second Instance confirmed the decision with the same reasoning.

Psychological reports did not, however, always support incapacity. On one occasion, when grave lack of discretion of judgment was alleged in both parties, the plaintiff husband claimed he had a problematic childhood.<sup>155</sup> The expert found that he: was ‘indecisive and somewhat ambivalent’; had ‘poor self-image’; and had ‘strong paranoid tendencies’. But as there was ‘no gross abnormality’ and he had ‘reasonable ability to form and maintain relationships, he could have been helped by a supportive partner’. The respondent wife did

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The psychological assessment in this case focused on the material time and revealed that the male plaintiff was ‘in a very poor state emotionally’; this was exacerbated by over-consumption of alcohol and drugs from an early age; the sexual abuse he suffered had far-reaching negative consequences for subsequent personality development. Judges, in conjunction with testimony that he had been abused aged eight years, consumed alcohol from age ten, smoked hash from age eleven, played truant from school and was excluded from school due to his disruptive behaviour, concluded for nullity on grounds of his grave lack of discretion of judgment because he was not in a position to make life-changing decisions. A *vetitum* was imposed. The respondent, on the other hand and in whom the ground was also alleged, was domineering, materialistic and ambitious and there were many ‘undesirable aspects’ to her character, but the judges found that it was doubtful if her ability to give consent was affected. Therefore the ground was not proven. Second Instance confirmed the decision.

<sup>152</sup> No 31.

<sup>153</sup> The same reasoning featured in No 23, in which the expert reported ‘serious personality defect’.

<sup>154</sup> No 71.

<sup>155</sup> No 21.

not cooperate; the judges held that the evidence suggested she made a mistake and unilaterally decided to end the relationship. The tribunal found neither ground proven.

In another case, the expert assessed both parties and found that the respondent wife suffered ‘limitations in personality functioning’ but there was no evidence of pathological causes; she understood marriage but made a foolish choice.<sup>156</sup> The tribunal found her grave lack of discretion of judgment not-proven. The plaintiff husband, on the other hand, possessed ‘sufficient intelligence’ but: was ‘emotionally underdeveloped’; had an ‘addictive personality’; and his personality functioning was seriously defective, especially in the area of ‘intimate personal relationships’. The tribunal held that, although not malicious, as a consequence of his own seriously distorted personality functioning, manifested in excessive drinking, and drug-abuse, he was prevented from being able to assess his fitness for a lifelong union. Both his grave lack of discretion of judgment and inability to assume essential obligations were proved. The distinction between the two grounds, however, was not clear.

### **Intermediate Conclusion:**

Like the Southwark tribunals, the Dublin tribunal pursued psychological incapacity grounds in almost all cases heard in 2009. This was true even when evidence supported other grounds. Unlike Southwark, however, the Dublin tribunal consulted an expert routinely in psychological incapacity cases and was reluctant to pursue incapacity grounds in absent respondents. Also, as was the case in Southwark, full compliance with *DC* was not evident. Moreover, and again like in Southwark, some expert opinions referred to childhood events as *possible* causes of later problems, but there was little evidence that expert opinions focused on establishing the party’s psychological status *at the material time*. It was not clear how ‘possible’ causes helped the judges to establish the extent to which they did, in fact, adversely affect the party concerned, to the degree of moral certainty and in light of Christian anthropological principles. In Dublin, for example, the expert referred frequently to features, such as ‘extremely high ambivalence’, or ‘extreme anxiety’, without (crucially) reference to their effect on a party’s decision-making capacity. In most of the Dublin cases, the expert appeared to link evidence of pre-marital adverse circumstances inevitably with subsequent

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<sup>156</sup> No 1.

behaviour, without any indication of the application of Christian anthropology; in other words, parties' past determined their future.<sup>157</sup> Whilst there were some references to a party's possible capacity with 'a stronger partner', there were none to recourse to spiritual help, as there was in one case in Southwark.

Like in Southwark, the judges in Dublin, with few exceptions, focused on establishing *failure* to exercise discretion of judgment, but did not extrapolate as to whether the failure had a grave psychological basis. Therefore, failure, even possible culpable failure, was equated with incapacity. Although it was unclear how it could be measured, judges equated *failure* to give *sufficient* time or *sufficient* consideration to marriage, with *incapacity*. Moreover, the judges' focus on *behaviour* led them to consider aberrant behaviour invalidating without distinguishing wilful behaviour from compulsive behaviour due to psychological anomalies. Post-marital behaviour was also given weight, but not necessarily linked to a psychological cause antecedent to marriage. Nor was evidence of *difficulty* distinguished from incapacity. So, like in Southwark, few judges insisted on establishing a grave psychological and antecedent cause. In Dublin, even when such conditions as 'personality defect' or 'depression' were suggested or verified, their severity and effect on a party at the material time was not demonstrated. Moreover, many judges accepted evidence of character traits, such as 'naivety' and 'low self-esteem', as sufficient to prove incapacity for marriage; both Southwark and Dublin tribunals gave weight to evidence of 'desires', 'unrealistic expectations' and 'poor insight', without establishing any resultant grave psychological impairment; this applied a broad interpretation to the term 'essential rights and duties of

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<sup>157</sup> The Rota, in 2004, criticised an expert report from the Dublin Regional Tribunal on this basis. In 'Decision *Coram Defilippi*, 19 January 2004 (Dublin)', *Studia Canonica*, 40 (2006), pp211-244, at p238: '[The expert] did not in any way treat the question of the gravity of the imperfections in the petitioner's personality. She did not attempt to make any structural analysis of his personality. And so, she did not in any way explain under what psychological aspect the man's decision to marry was truly affected'. Likewise, the judgment criticised the second expert, also from Dublin (p232), at 239: '[Immediately], without any medical-legal discussion, [the expert] arrives at her conclusions. And these conclusions seem to suggest that ... we are dealing with only ... difficulties to establish a happy conjugal communion, and certainly not with a true incapacity ...'. Moreover, at p240, the Rotal judgment concluded that the second expert's opinion was not consistent with the accrued evidence; rather the expert 'argues in a deterministic manner' and 'she did not make any structural analysis of the man's personality. She deduced, especially from the so-called "tests" (Rorschach Projective Personality [Test] and the "House Tree Person Projective Drawing Test") some imperfections of the petitioner's personality, and has attempted to explain, as if in a deterministic manner, that the man's personality was disturbed as a result of [previous events] ... the expert omitted completely any discussion of the issue of the gravity of the man's alleged disturbance and of the psychological effects, which perhaps resulted therefrom, on the decision to marry'. In this case, the Rota agreed with the First Instance not-proven decision on both parties' grave lack of discretion of judgment and disagreed with the Appeal Tribunal's affirmative decision. Therefore, the validity of the marriage was upheld.

marriage’, which limits the scope of canon 1095. However, in Dublin there was evidence that at least some judges did not accept expert reports uncritically; if expert opinion conflicted with, or was not supported by, other evidence, it was rejected. This rigour, combined with some judges’ insistence on establishing a grave and antecedent psychological basis for incapacity for marriage, led to a lack of uniformity, both of jurisprudence and of decisions. Like in Southwark, however, there was no evidence that judges in Dublin discussed the imposition of a *vetitum* routinely; but it was applied in cases demonstrating serious aberrant behaviour. In short, although Dublin did have the psychological assessment of the parties, neither Southwark nor Dublin focussed, as they should have, on the parties’ psychological status at the material time.

#### 4. THE PRACTICE OF THE ROMAN ROTA

The decisions of the Roman Rota are written in Latin. Some are published later, in anonymised format. Of these, only some are translated, published in English, and made readily available to English-speaking practitioners. A brief perusal of annotated Rotal cases heard between 1971 and 1988, and published in 1992, is carried out here, to ascertain the practice of the Rotal tribunals regarding the interpretation of canon 1095 and the use of experts.<sup>158</sup> We deal first with cases of grave lack of discretion of judgment followed by those alleging inability to assume the essential obligations of marriage.

##### **Grave Lack of Discretion of Judgment:**

Rotal jurisprudence clarifies that canon 1095, based on the natural law principle that nobody is bound to the impossible,<sup>159</sup> involves the examination of personal capacity, proportionate to the specific contract of marriage.<sup>160</sup> But, there is no quantitative measure of capacity.<sup>161</sup> However, the Rota holds that whilst it is not necessary to identify a specific cause in terms of diagnosis,<sup>162</sup> it is necessary to establish the existence of serious<sup>163</sup> psychopathology,<sup>164</sup>

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<sup>158</sup> Mendonça, *Anthology*. See Appendix VII for full references, extracts and explanations. This is the only compilation of its kind. Mendonça examined a large number of Rotal decisions and identified their principal points of law.

<sup>159</sup> Case Nos: 77-063, p31-32; and 78-197, p39. See Appendix VIII.

<sup>160</sup> Case Nos: 71-074, pp1-2; and 76-014, p29. See Appendix VIII.

<sup>161</sup> Case No: 76-135, p28. See Appendix VIII.

<sup>162</sup> Case Nos: 71-065, p1; 78-115, p38; and 83-118, p65. See Appendix VIII.

whether permanent or temporary,<sup>165</sup> and to demonstrate its effect on the party's capacity for marital consent at the material time.<sup>166</sup> Rotal jurisprudence is clear that Vatican II has not changed or expanded the notion of 'essential rights and duties of marriage'.<sup>167</sup>

Of the annotated cases studied, those found proven on grounds of grave lack of discretion of judgment, involved diagnoses of such serious conditions as: psychic immaturity;<sup>168</sup> paranoid personality;<sup>169</sup> neurotic anxiety;<sup>170</sup> learning difficulties;<sup>171</sup> transient mental disturbance;<sup>172</sup> schizophrenia;<sup>173</sup> paranoid schizophrenia;<sup>174</sup> schizoid personality;<sup>175</sup> hysterical personality;<sup>176</sup> paranoid personality;<sup>177</sup> passive-aggressive personality;<sup>178</sup> borderline personality;<sup>179</sup> impulsive personality;<sup>180</sup> obsessive-compulsive neurosis;<sup>181</sup> obsessive-compulsive personality;<sup>182</sup> anti-social personality;<sup>183</sup> manic depression (psychosis or neurosis);<sup>184</sup> depressive disorders<sup>185</sup> including psychoneurosis,<sup>186</sup> neurotic anxiety,<sup>187</sup> depressive neurosis<sup>188</sup> and reactive

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<sup>163</sup> Case Nos: 72-135, p7; 80-053, p50; 76-082, p27; and 78-044, p35. See Appendix VIII.

<sup>164</sup> Case Nos: 76-070, p26; 76-050, p26; and 76-082, p27. See Appendix VIII.

<sup>165</sup> Case Nos: 74-043, p18; and 78-013, pp34-35. See Appendix VIII.

<sup>166</sup> Case No: 76-142, p29. See Appendix VIII.

<sup>167</sup> Case Nos: 77-052, p31 (conjugal love is not a juridic element) and 77-095, p32 ('absolute communion of life and love' is not required for validity). In Case No: 81-176, pp99-100, the judge criticised the [Canadian] inferior tribunal for interpreting Vatican II's concept of the marital 'communion of life and conjugal love' as an essential element of marriage; rather it is a consequence and not a constitutive element of marriage. He considered it 'absurd' to argue that marriage is null in the absence of love. See Appendix VIII.

<sup>168</sup> Case Nos: 79-052, p42; and 85-002, p76. See Appendix VIII.

<sup>169</sup> Case No: 79-053, pp42-43. See Appendix VIII.

<sup>170</sup> Case No: 79-151, p46. See Appendix VIII.

<sup>171</sup> Case Nos: 80-214, p54; 83-037, p63; 83-176, pp67-68; and 83-085, p64. See Appendix VIII.

<sup>172</sup> Case No: 85-016, p77. See Appendix VIII.

<sup>173</sup> Case Nos: 71-006, p1; 71-067, p1; 71-135, p3; 71-236, p5; 72-018, p5; 72-118, p6; 83-080, p64; 72-207, p8; 72-246, p9; 73-084, p13; 78-190, p38; 74-082, p18; 75-144, p24; 78-045, p35; 77-110, pp32-33; 79-058, p43; 79-183, p48; 83-032, pp62-63; 83-122, pp65-66; 83-136, p66; and 84-145, p74. See Appendix VIII.

<sup>174</sup> Case No: 7099, p2. See Appendix VIII.

<sup>175</sup> Case Nos: 80-037, p49; 83-040, p63; and 85-005, p76. See Appendix VIII.

<sup>176</sup> Case Nos: 71-137, p3; 72-148, p7; 73-132, p14; 74-191, p20; 72-226, p8; and 75-148, p25. See Appendix VIII.

<sup>177</sup> Case No: 73-077, p13. See Appendix VIII.

<sup>178</sup> Case No: 81-122, p58. See Appendix VIII.

<sup>179</sup> Case No: 79-202, p49. See Appendix VIII.

<sup>180</sup> Case No: 83-188, p68. See Appendix VIII.

<sup>181</sup> Case Nos: 71-142, p3; 71-227, p5; 79-145, p46; 83-071, p63; 83-109, p65; 83-146, p66; and 86-020, p80. See Appendix VIII.

<sup>182</sup> Case Nos: 72-118, p6; 73-183, p16; 77-038, p30; 77-079, p32; 77-122, p33; 80-178, p53; 83-118, p65; 83-165, p67; and 84-012, pp68-69. See Appendix VIII.

<sup>183</sup> Case Nos: 79-062, p4;3 and 75-034, p21. See Appendix VIII.

<sup>184</sup> Case Nos: 71-121, p3; 73-209, p16; and 84-096, p74. See Appendix VIII.

<sup>185</sup> Case No: 78-002, pp34. See Appendix VIII.

<sup>186</sup> Case No: 73-071, p13. See Appendix VIII.

<sup>187</sup> Case No: 81-052, p56. See Appendix VIII.

<sup>188</sup> Case Nos: 85-007, p76; 86-005, pp78-79; and 86-008, p79. See Appendix VIII.



depression;<sup>189</sup> psychic immaturity,<sup>190</sup> including affective immaturity;<sup>191</sup> immature personality (when the severity of its effect is properly demonstrated by experts);<sup>192</sup> alcoholism;<sup>193</sup> homosexuality;<sup>194</sup> anorexia nervosa;<sup>195</sup> use of substances,<sup>196</sup> drug dependence;<sup>197</sup> personality change following organic brain injury;<sup>198</sup> and post-traumatic stress (neurosis).<sup>199</sup>

However, even when serious conditions were confirmed by experts, the Rota did not always reach moral certainty that consent was vitiated,<sup>200</sup> either because the anomaly was not proven to be sufficiently severe,<sup>201</sup> or because antecedence was not proven, and therefore, it could not have affected consent at the material time.<sup>202</sup> These cases included diagnoses of: paranoid personality;<sup>203</sup> learning difficulties;<sup>204</sup> schizophrenia;<sup>205</sup> paranoid schizophrenia;<sup>206</sup> schizophrenic reaction;<sup>207</sup> schizoid personality;<sup>208</sup> personality disorder;<sup>209</sup> hysterical personality;<sup>210</sup> hysteria;<sup>211</sup> paranoid personality;<sup>212</sup> passive aggressive personality;<sup>213</sup> dependent personality;<sup>214</sup> borderline personality;<sup>215</sup> obsessive-compulsive neurosis;<sup>216</sup> obsessive-compulsive personality;<sup>217</sup> anti-social personality;<sup>218</sup> manic depression;<sup>219</sup>

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<sup>189</sup> Case No: 73-024, p11. See Appendix VIII.

<sup>190</sup> Case Nos: 85-012, p77; 85-020, p78; 85-021, p78; 86-013, p79; and 86-014, p79. See Appendix VIII.

<sup>191</sup> Case Nos: 83-156, p61; 84-079, p71; 84-097, p72; and 88-010, pp81-82. See Appendix VIII.

<sup>192</sup> Case No: 79-010, p40. See Appendix VIII.

<sup>193</sup> Case Nos: 72-140, p7; 82-012, p59; 82-153, p61; 83-174, p67; and 85-019, p77. See Appendix VIII.

<sup>194</sup> Case No: 73-025, pp11-12. See Appendix VIII.

<sup>195</sup> Case No: 82-180, pp61-62. See Appendix VIII.

<sup>196</sup> In Case No: 72-185, p8, phenobarbital was used. In Case No: 73-117, p14, Librium and Ecunil were used. Case No: 82-135, p60, involved (ab)use of Surmontil, Valium and Librium by a person with personality disorder; were used. See Appendix VIII.

<sup>197</sup> Case No: 84-073, p71. See Appendix VIII.

<sup>198</sup> Case Nos: 74-016, p17; and 74-030, p17. See Appendix VIII.

<sup>199</sup> Case No: 86-017, pp79-80. See Appendix VIII.

<sup>200</sup> Case No: 78-044, p35. See Appendix VIII.

<sup>201</sup> Case Nos: 76-009, p25; 76-136, p28; and 79-050, p42. See Appendix VIII.

<sup>202</sup> Case Nos: 76-056, p26; 79-159, p46; and 80-134, p52. See Appendix VIII.

<sup>203</sup> Case No: 80-153, p52. See Appendix VIII.

<sup>204</sup> Case Nos: 75-103, p23; and 80-231, p53. See Appendix VIII.

<sup>205</sup> Case Nos: 72-108, p6; 75-124, p24; 76-066, p27; 77-024, p29; 78-091, p36; and 83-006, p62. See Appendix VIII.

<sup>206</sup> Case No: 76-056, p26. See Appendix VIII.

<sup>207</sup> Case No: 71-205, p4. See Appendix VIII.

<sup>208</sup> Case No: 79-159, p46. See Appendix VIII.

<sup>209</sup> Case Nos: 71-199, p4; 73-214, p16; 80-105, p51; 8093, p57; and 84-104, pp72-73. See Appendix VIII.

<sup>210</sup> Case Nos: 71-238, p5; 73-031, p12; 77-173, p33; 80-155, p53; 81-015, pp55-56; and 84-119, p73. See Appendix VIII.

<sup>211</sup> Case Nos: 79-091, p44; and 79-122, p45. See Appendix VIII.

<sup>212</sup> Case Nos: 77-032, p30; and 80-011, p49. See Appendix VIII.

<sup>213</sup> Case No: 79-104, p44. See Appendix VIII.

<sup>214</sup> Case Nos: 81-009, p55; 81-040, p56; and 84-003, p68. See Appendix VIII.

<sup>215</sup> Case No: 84-164, pp74-75. See Appendix VIII.

<sup>216</sup> Case No: 71-155, p3. See Appendix VIII.

<sup>217</sup> Case Nos: 74-157, p20; 79-050, p42; 83-168, p67; 83-197, p68; and 84-049, p70. See Appendix VIII.

depressive disorders, such as depressive neurotic personality;<sup>220</sup> psychic immaturity,<sup>221</sup> including affective immaturity,<sup>222</sup> immature personality,<sup>223</sup> and episodic neurotic reaction;<sup>224</sup> bisexualism;<sup>225</sup> homosexuality;<sup>226</sup> lesbianism;<sup>227</sup> psychic impotence;<sup>228</sup> old age;<sup>229</sup> use of prescription drugs;<sup>230</sup> organic physical illness giving rise to mental disturbance, such as meningitis;<sup>231</sup> and physical trauma.<sup>232</sup> So, even when serious anomalies, such as schizophrenia, manic depression, or personality disorders were diagnosed, the Rota held that these conditions admit of degrees of severity; if the severity and effect were not demonstrated to have vitiated consent, the validity of the marriage was upheld. Therefore, these Rotal judgments revealed the following:

- Rotal tribunals consulted experts routinely in psychological incapacity cases; when a party refused to cooperate with experts, incapacity alleged in that party was found not proven;<sup>233</sup>
- A plea of incapacity is internally incompatible with: a plea of an intention by a positive act of the will to exclude marriage or an essential element or essential property of marriage; and a plea of force and fear;<sup>234</sup>
- Rotal tribunals were frequently critical of inferior tribunals' interpretation of law,<sup>235</sup> and of their lack of canonical procedure.<sup>236</sup>

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<sup>218</sup> Case Nos: 75-101, p23; 79-044, p41; 79-125, p45; 81-054, p56; 83-097, pp64-65; and 85-22, p78. See Appendix VIII.

<sup>219</sup> Case Nos: 73-086, p13; and 84-038, p69. See Appendix VIII.

<sup>220</sup> Case No: 78-146, p37. See Appendix VIII.

<sup>221</sup> Case Nos: 77-049, p30; 77-056, p31; 79-025, p41; 81-125, p58; and 86-021, pp80-81. See Appendix VIII.

<sup>222</sup> Case Nos: 79-191, p48; 80-103, p51; 80-195, p53; 80-227, p54; 82-058, pp59-60; 83-088, p64; 84-070, pp70-71; 84-122, pp73-74; 84-146, p74; 84-166, p75; and 84-182, pp75-76. See Appendix VIII.

<sup>223</sup> Case No: 83-150, p66. See Appendix VIII.

<sup>224</sup> Case No: 84-080, pp71-72. See Appendix VIII.

<sup>225</sup> Case No: 72-157, p8. See Appendix VIII.

<sup>226</sup> Case Nos: 74-011, p17; and 78-099, p37. See Appendix VIII.

<sup>227</sup> Case No: 73-008, p11. See Appendix VIII.

<sup>228</sup> Case No: 84-025, p69. See Appendix VIII.

<sup>229</sup> Case No: 83-072, pp63-64. See Appendix VIII.

<sup>230</sup> Case No: 75-040, p21. See Appendix VIII.

<sup>231</sup> Case Nos: 73-142, p15; 73-150, p15; and 76-050, p26. See Appendix VIII.

<sup>232</sup> Case No: 83-153, p66. See Appendix VIII.

<sup>233</sup> Case Nos: 8097, p57; and 72-108, p6. See Appendix VIII.

<sup>234</sup> See Case Nos: 72-135, p7; 72-248, p9; and 79-095, p44 for incompatibility with a positive intention and Case No: 73-161, p15 for incompatibility with force and fear. The rationale was that one cannot be psychologically incapable of marital consent and, at the same time, be capable of either excluding something essential to marriage 'by a positive act of will' or suffer force and fear. See Appendix VIII.

<sup>235</sup> Case Nos: 72-277, p10; 75-052, p22; 77-095, p32; 79-009, p40; 79-201, p48; 83-097, pp64-65; and 83-168, p67. See Appendix VIII.

<sup>236</sup> Case Nos: 84-070, pp70-71; and 77-049, p30. See Appendix VIII.

The routine use of experts in incapacity cases demonstrates that the Rota acknowledges judges' incompetence to pronounce on medical matters.<sup>237</sup> 'Psychiatric and psychological principles should be integrated with juridic principles' when dealing with incapacity cases.<sup>238</sup> Some judgments are explicit in: stating the requirement to consult experts,<sup>239</sup> in order to establish the severity of the condition,<sup>240</sup> and its effect at the material time;<sup>241</sup> and describing the expert's role.<sup>242</sup> In many cases, more than one expert was consulted.<sup>243</sup> When experts disagreed, the tribunal found cases not proven.<sup>244</sup> Doubt about a diagnosis was sufficient to obstruct moral certainty.<sup>245</sup> There is no doubt, however, that judges, not experts, made the decision about the nullity or otherwise of marriage.<sup>246</sup> Moreover, expert opinions did not hold sway;<sup>247</sup> they were treated with caution,<sup>248</sup> and even criticised.<sup>249</sup> According to Daniel, cases referred to the Rota without having established a grave psychopathological cause, are not ratified but are subjected to ordinary examination at the Rota.<sup>250</sup> This is not the case, as we shall see, in the local tribunals studied in Chapter 6.

<sup>237</sup> Case Nos: 83-122, pp65-66; 83-188, p68; and 71-081, p2. See Appendix VIII.

<sup>238</sup> Case No: 81-111, p58. See Appendix VIII.

<sup>239</sup> The terminology used included such phrases as: 'it is necessary'; '[advice] must be sought'; 'the judge must seek'; 'it is important'; 'it is essential'; in all cases of incapacity. For example: Case Nos: 71-168, p3; 71-175, pp3-4; 73-005, pp10-11; 76-082, p27; 80-200, p53; 81-025, p56; 81-125, p58; and 84-145, p74. Others were explicit in relation to the type of condition with which they were dealing, for example: Case No: 80-134, p52, (neurotic personality or actual neurosis); 76-135, p28, (schizophrenia); 80-086, p50, (traumatic neurosis); 78-061, p36, (serious illness); 80-93, p57 and 83-040, p63, (personality disorder); 77-173, p33, (hysterical personality); 84-096, p74, (manic depressive illness); 81-125, p58, (serious or mental psychopathic disorders); 80-103, p51, (psychological or psychiatric disorders); 73-142, p15, (mental disturbances); 73-150, p15, (alleged organic disorder of personality, caused by meningitis); 86-017, pp79-80, (the psychological effect of pre-marital pregnancy); 73-065, p12, 76-135, p28 and 73-208, p16, (schizophrenia); 80-237, p54, (psychopathic [personality] disorders); 80-93, p57, (personality disorder); 83-040, p63, (schizoid personality); and 84-096, p74, (mental illness). See Appendix VIII.

<sup>240</sup> Case Nos: 73-030, p12; 76-135, p28; and 84-145, p74. See Appendix VIII.

<sup>241</sup> Case Nos: 81-129, p58; and 82-152, pp60-61. See Appendix VIII.

<sup>242</sup> Case No: 84-043, p70. See Appendix VIII.

<sup>243</sup> Two experts were consulted in: Case Nos: 78-184, p38; 75-103, p23; and 75-124, p24. Three experts were consulted in: Case No: 78-194, p39. Four experts were consulted in: Case Nos: 83-136, p66; and 72-062, p6. Six experts were consulted in: Case No: 86-008, p79. See Appendix VIII.

<sup>244</sup> Case Nos: 75-117, p24; 77-173, p33; 78-146, p37; 79-091, p44; 81-054, p56; 81-125, p58; and 82-169, p61. See Appendix VIII.

<sup>245</sup> Case No: 83-197, p68. See Appendix VIII.

<sup>246</sup> Case Nos: 86-011, p81; 82-169, p61; and 84-043, p70. See Appendix VIII.

<sup>247</sup> Case Nos: 72-018, p5; 72-062, p6; 73-008, p11; 73-214, p16; 75-040, p21; 75-101, p23; 75-124, p24; 77-056, p31; 79-104, p44; 81-025, p56; 83-072, pp63-64; 83-150, p66; 84-049, p70; 84-070, pp70-71; and 84-104, pp72-73. See Appendix VIII.

<sup>248</sup> Case No: 77-088, p32. See Appendix VIII.

<sup>249</sup> Case No: 80-089, p51. See Appendix VIII.

<sup>250</sup> William L Daniel, 'Motives in *Decernendo* for Admitting a Cause of Marriage Nullity to an Ordinary Examination', *Studia Canonica*, 45 (2011), pp67-120, page 74. See Appendix IX.

Although not universally held, some Rotal judges go so far as to hold that the invalidating condition must be such that the appointment of a procurator for a person, suffering from grave lack of discretion of judgment, goes to validity of the decision.<sup>251</sup> However, Rotal judge Pinto distinguishes juridic capacity to stand in court and capacity to elicit matrimonial consent.<sup>252</sup>

It appears, therefore, that Rotal jurisprudence heeds the warning in the 1988 Papal Allocution that ‘it is important that the categories that belong to psychiatry or psychology are not automatically transferred to the field of canon law without making the necessary adjustments which take account of the specific competence of each science’.<sup>253</sup> This is not obvious in many of the cases in Southwark and Dublin, even those in which experts were consulted.

### **Inability to Assume the Essential Obligations of Marriage:**

Rotal jurisprudence also confirms the natural law basis for this ground of incapacity.<sup>254</sup> The cause must be serious<sup>255</sup> psychopathology;<sup>256</sup> not light character flaws.<sup>257</sup> There is consensus that the condition must be antecedent,<sup>258</sup> but there is some dissonance as to whether or not it must be perpetual;<sup>259</sup> however, a party needs to be able to assume the *perpetuity* of rights.<sup>260</sup>

Cases found proven involved diagnoses of: schizophrenia;<sup>261</sup> antisocial personality;<sup>262</sup> affective immaturity;<sup>263</sup> affective immaturity/passive dependent personality;<sup>264</sup> obsessive-compulsive neurosis;<sup>265</sup> obsessive-compulsive personality;<sup>266</sup> borderline personality;<sup>267</sup>

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<sup>251</sup> Case Nos: 72-247, p9; and 72-263, p10. See Appendix VIII.

<sup>252</sup> Case No: 77-058, p31. The judgment would be null if, prior to or during the process, experts had declared a party incapable of standing in court; otherwise the validity of the decision must be upheld. See Appendix VIII.

<sup>253</sup> John Paul II, *Allocution to the Roman Rota* (1988). See Appendix VII.

<sup>254</sup> Case Nos: 72-008, p86; 74-001, p88; 80-111, p97; 85-044, p107; and 86-012, p108. See Appendix VIII.

<sup>255</sup> Case No: 71-160, p86. See Appendix VIII.

<sup>256</sup> Case No: 84-100, p106. See Appendix VIII.

<sup>257</sup> Case Nos: 78-169, p94; 80-111, p97; and 81-065, p98. See Appendix VIII.

<sup>258</sup> Case Nos: 74-001, p88; 80-069, p97; 80-061, pp96-97; 83-128, p103; and 84-100, p106. See Appendix VIII.

<sup>259</sup> Case Nos: 76-017, p90; 79-109, p95; 82-023, p100; 82-168, pp101-102; and 85-017, pp107-108. See

Appendix VIII.

<sup>260</sup> Case No: 81-058, p98. See Appendix VIII.

<sup>261</sup> Case No: 85-044, p107. See Appendix VIII.

<sup>262</sup> Case Nos: 83-177, pp104-105; and 84-130, p106. See Appendix VIII.

<sup>263</sup> Case Nos: 76-092, p91; and 77-002, pp91-92. See Appendix VIII.

<sup>264</sup> Case No: 76-017, p90. See Appendix VIII.

<sup>265</sup> Case Nos: 83-071, p90; and 83-109, p103. See Appendix VIII.

<sup>266</sup> Case No: 80-117, p97. See Appendix VIII.

hyper-sexuality;<sup>268</sup> sexual neurosis;<sup>269</sup> homosexuality;<sup>270</sup> and anorexia nervosa.<sup>271</sup> Diagnosis, by experts, was not sufficient to prove nullity; the severity and effect of the condition at the material time had to be demonstrated.<sup>272</sup>

Cases found not proven involved diagnoses of conditions such as: psychopathic personality;<sup>273</sup> schizoid personality;<sup>274</sup> hysterical/paranoid personality;<sup>275</sup> hysterical/obsessive-compulsive/paranoid personality;<sup>276</sup> psychoneurosis;<sup>277</sup> antisocial personality;<sup>278</sup> affective immaturity;<sup>279</sup> psychic immaturity;<sup>280</sup> obsessive/compulsive neurosis;<sup>281</sup> obsessive-compulsive personality/passive-aggressive personality;<sup>282</sup> depressive neurosis;<sup>283</sup> manic-depressive psychosis;<sup>284</sup> manic-depressive neurosis;<sup>285</sup> relative incapacity;<sup>286</sup> nymphomania;<sup>287</sup> satyriasis;<sup>288</sup> hyper-sexuality;<sup>289</sup> frigidity;<sup>290</sup> homosexuality;<sup>291</sup> bisexuality;<sup>292</sup> trans-sexuality;<sup>293</sup> impotence;<sup>294</sup> incest-related psychological problems;<sup>295</sup> alcoholism;<sup>296</sup> and sterility.<sup>297</sup>

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<sup>267</sup> Case No: 88-007, p109. See Appendix VIII.

<sup>268</sup> Case Nos: 72-008, p86; 72-300, p87; 75-037, p89; and 85-017, p107-108. See Appendix VIII.

<sup>269</sup> Case Nos: 79-171, p95; and 81-058, p98. See Appendix VIII.

<sup>270</sup> Case Nos: 73-025, p87; 78-094, p93; 83-044, p103; and 83-130, pp103-104. See Appendix VIII.

<sup>271</sup> Case No: 82-180, p102. See Appendix VIII.

<sup>272</sup> Case No: 86-011, p108. See Appendix VIII.

<sup>273</sup> Case No: 71-058, p86. See Appendix VIII.

<sup>274</sup> Case No: 74-075, p88. See Appendix VIII.

<sup>275</sup> Case No: 75-050, p89. See Appendix VIII.

<sup>276</sup> Case No: 82-023, p100. See Appendix VIII.

<sup>277</sup> Case No: 82-181, p102. See Appendix VIII.

<sup>278</sup> Case Nos: 79-109, p95; 82-030, pp100-101; and 82-064, p101. See Appendix VIII.

<sup>279</sup> Case No: 81-065, p98. See Appendix VIII.

<sup>280</sup> Case Nos: 77-149, p92; and 84-091, pp105-106. See Appendix VIII.

<sup>281</sup> Case Nos: 78-014, pp92-93; and 78-038, p93. See Appendix VIII.

<sup>282</sup> Case No: 84-150, pp106-107. See Appendix VIII.

<sup>283</sup> Case No: 78-136, pp93-94. See Appendix VIII.

<sup>284</sup> Case No: 76-125, p91. See Appendix VIII.

<sup>285</sup> Case No: 88-007, p109. See Appendix VIII.

<sup>286</sup> Case Nos: 78-169, p94; 79-046, pp94-95; 80-039, p96; and 81-100, p98. See Appendix VIII.

<sup>287</sup> Case No: 88-011, pp109-110. See Appendix VIII.

<sup>288</sup> Case Nos: 72-222, pp86-87; and 75-112, p90. See Appendix VIII.

<sup>289</sup> Case No: 74-001, p88. See Appendix VIII.

<sup>290</sup> Case Nos: 77-116, p92; and 81-127, p99. See Appendix VIII.

<sup>291</sup> Case Nos: 78-099, p93; 79-175, p96; 80-22, p96; 83-179, p105; and 86-001, p108. See Appendix VIII.

<sup>292</sup> Case No: 82-043, p101. See Appendix VIII.

<sup>293</sup> Case No: 75-049, p89. See Appendix VIII.

<sup>294</sup> Case Nos: 75-017, p88; and 84-025, p105. See Appendix VIII.

<sup>295</sup> Case No: 80-061, pp96-97. See Appendix VIII.

<sup>296</sup> Case Nos: 83-128, p103; 83-174, p104; and 86-012, p108. See Appendix VIII.

<sup>297</sup> Case No: 73-187, pp87-88. See Appendix VIII.

Here too, some inferior tribunals were criticised for their procedural errors, including finding for nullity when a respondent was unavailable for assessment,<sup>298</sup> and for their interpretation of law.<sup>299</sup> In some cases the absence of an expert report convinced the Rota to decide that the case was not-proven, indicating their acknowledged incompetence in medical matters.<sup>300</sup> In the annotated cases studied, there was no information on the use of the *vetitum* by the Rota.

So, it seems clear that the Rota is upset by, and critical of, interpretations and decision of some local courts. Many of the types of defects criticised by the Rota, however, were found in the Southwark and Dublin cases.

## Conclusion

There is a stark contrast between Rotal practice and that of the local tribunals studied here at Southwark and Dublin. Rotal judgments demonstrate a stricter interpretation and a more rigorous application of the law on experts than do these local tribunals. There is a clear consensus among Rotal judges that in order to prove psychological incapacity, expert opinion is required to establish the existence of serious psychiatric illness or psychological impairment and its severity, and to demonstrate its effect on the parties' capacity for marital consent at the material time of the marriage. Whilst the Dublin tribunal adhered more rigorously to the requirement to consult an expert, than did the Southwark tribunals, the Dublin expert failed frequently to focus on the effect of a condition on the party's capacity at the material time. That Rotal judges' focus on *incapacity for*, rather than *failure to exercise*, discretion of judgment, is demonstrated by a critical analysis of expert reports; unless reports demonstrate the severity and effect of the condition at the material time, to the satisfaction of the Rota, the validity of the marriage is upheld. The judgments of Southwark and Dublin tribunals rarely reflect the same rigour - although these tribunals are required by the Papal Allocutions to follow Rotal jurisprudence exclusively.

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<sup>298</sup> Case No: 80-97, p57. See Appendix VIII.

<sup>299</sup> Case Nos: 75-050, p89; 78-169, p94; 79-046, pp94-95; 81-176, pp99-100; 82-023, p100; 82-030, pp100-101; 82-172, p102; 83-140, p104; 84-025, p105; 84-056, p105; and 84-150, pp106-107. See Appendix VIII.

<sup>300</sup> Case Nos: 75-112, p90; 80-111, p97; and 88-011, pp109-110. See Appendix VIII.



## CHAPTER 6

### THE NON-USE OF EXPERTS IN PSYCHOLOGICAL INCAPACITY FOR MARRIAGE: CASE STUDIES

As seen in Chapters 4 and 5, *CIC* canon 1680 mandates the use of experts in cases involving psychological incapacity for marriage, ‘unless from the circumstances this would obviously serve no purpose’. Moreover, Papal Allocutions have clarified that: canon law, of which procedural law is a component, is inherently pastoral, and must be followed; procedural law provides for a fair trial, which is a right of the faithful; and tribunals must be ‘on guard against the temptation to exploit the proofs and procedural norms in order to achieve what is perhaps a “practical” goal, which might be considered “pastoral,” but is to the detriment of truth and justice’. The 1988 Papal Allocution clarified that ‘only the most severe forms of psychopathology’ cause psychological incapacity to exercise the natural right to marry; also, ‘a method that is scientifically sure’ must be employed to identify ‘the more serious forms’ of psychopathology and to distinguish them from ‘the slight’. Furthermore, denial of the right of defence renders judicial decisions null.

This Chapter identifies cases, appealed to *ITSIS* in 2009, in which, although psychological incapacity was alleged, no expert was consulted at First Instance.<sup>1</sup> Whilst the intention is not to suggest that the substantive decisions reached on nullity are incorrect, an analysis of these cases aims to establish: the judges’ rationale for not seeking expert opinion; how tribunals assessed the psychological status of the parties at the material time; and whether the tribunals identified a ‘grave’ and antecedent ‘anomaly’ or rather (contrary to law) used as determinants allegations of character traits, ‘immaturity’, or aberrant behaviour, without examining their causes. This will be done by exploring: the issues pertinent to the use of experts; procedural matters; the law sections of judgments; and the application of the law to the facts of the case.

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<sup>1</sup> The few Dublin cases in which experts were not consulted have been dealt with in Chapter 5 because they demonstrated that sufficient evidence was already in the possession of the tribunal; hence there was clear justification for invoking the exception provided in *CIC*, c. 1680.



## 1. THE ISSUES FOR EXPERTS

In the Southwark tribunal cases studied for 2009, there were eighty-nine pleas of incapacity under canon 1095, 2<sup>o</sup> and twelve such pleas under canon 1095, 3<sup>o</sup>, in which no expert was consulted. No reasons were given in any of these judgments for not consulting experts, despite in some cases, allegations of psychiatric history, psychological impairment, or aberrant behaviour, and despite the absence of any documentation supporting a cause which would justify non-use of experts (on the basis of the exception in *CIC* canon 1680).<sup>2</sup> It was, therefore, impossible either to establish the judges' rationale for their failure to consult experts or to ascertain how these cases were deemed to fall under the canon 1680 exception. Moreover, the judges made no reference to the specific questions required under *DC* to be put to the expert - so these remained unanswered. The judges neither explained how the fact of the parties' psychological status, at the material time, was established (as required by *CIC* canon 1574), nor their competence without the help of experts to establish this fact. Therefore, one can only conclude that the tribunals did not acknowledge these mandatory requirements in psychological incapacity cases. Thus, the provisions of *CIC* 1983 and *DC* governing the appointment and instruction of experts were not met in these cases.

Furthermore, not only did the tribunals in these cases pursue grounds of incapacity where there was no obvious psychological cause, but they were inconsistent both in their pursuit and application of the grounds. For example, when incapacity was alleged in a plaintiff, it was not always pursued in the respondent, despite similar pre-marital circumstances, on which the case relied, prevailing for both parties.<sup>3</sup> Moreover, when post-marital behaviour not conducive to marital harmony was considered sufficient to prove incapacity in some cases,<sup>4</sup> it was not in others.<sup>5</sup> This inconsistency was evident even in some cases when psychiatric illness,<sup>6</sup> or drug abuse,<sup>7</sup> or both,<sup>8</sup> was alleged in respect of respondents. Reluctance to pursue grounds in respondents would be understandable if it were due either to the tribunals'

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<sup>2</sup> In 09/8; 09/44; 09/65; 09/76; 09/78; 09/80; various psychiatric illnesses were alleged.

<sup>3</sup> For example: 09/7: Both parties attended school in the UK while their families lived abroad; incapacity was alleged only in the plaintiff, due to 'lack of confidence' and 'immaturity'.

<sup>4</sup> E.g., 09/11. In 09/16, despite insubstantial corroboratory evidence, judges relied on alleged behaviour to find that a respondent 'was not able to take on the responsibilities of marriage'.

<sup>5</sup> 1-0/57; 09/69; and 09/85: Plaintiffs alleged addiction or illegal behaviour in respondents, but no grounds were pursued in these respondents.

<sup>6</sup> 09/38; 09/49; and 09/90.

<sup>7</sup> 09/19; and 09/50.

<sup>8</sup> 09/15.

inability to trace respondents, or to respondents' refusal to undergo psychological testing. However, it was evident that tribunals frequently pursued incapacity grounds in plaintiffs, cooperative respondents, and even some absent respondents, without any expert evidence; consequently, this possible explanation does not hold. Rather, instead of consulting experts to establish the existence of a grave cause, and its severity and effect on the party's capacity for marital consent, the argument is strengthened that many tribunals rely only on evidence of behaviour which is deemed by the judges not to be conducive to marital harmony.

## 2. PROCEDURAL MATTERS

It should be obvious *from the Acts* that due process was followed; whether or not due to failure to record significant procedures, this study revealed several procedural errors. First, interestingly, some judges pursued the ground of incapacity regardless of a plaintiff's *belief in capacity*. This was contrary to the law which provides that: marriage is a spiritual matter (therefore, an allegation of its nullity is a serious matter of conscience); only the parties can allege nullity of their marriage (the judges cannot do so);<sup>9</sup> and the onus of proof lies with the plaintiff.<sup>10</sup> Cases in which parties believed in their own capacity and/or that of their spouse were, nevertheless, accepted and pursued as incapacity cases,<sup>11</sup> despite evidence supporting other grounds.<sup>12</sup> Therefore, judges appear to have been instrumental in deciding the grounds to be pursued. However, it remained unclear as to whether or not many plaintiffs, on whom the onus of proof lies, understood the *nature* of canonical psychological incapacity; it was sometimes unclear as to whether or not they were even aware that psychological incapacity had been alleged.<sup>13</sup> Even when a plaintiff's testimony seems to have strongly supported her

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<sup>9</sup> *CIC*, c. 1674. See Appendix 1. See Paulo Moneta, 'Determination of the Formulation of the Doubt and Conformity of the Sentence', in *Dugan*, pp93-113, at p97, for a warning that a judge 'may not supersede' parties' wishes, in determining grounds 'even if he were convinced he could better meet their interests'.

<sup>10</sup> *CIC*, c. 1526§1. See Appendix 1.

<sup>11</sup> For example, the parties in whom grave lack of discretion of judgment was alleged believed in their own capacity in 09/17; 09/20; 09/33; and 09/56. The plaintiffs believed both parties were capable in 09/19; 09/28; 09/35; 09/43; 09/62; 09/82; 09/86; and 09/94.

<sup>12</sup> For example: In 09/49, evidence supports the plaintiff's intention against the good of children, but the ground of her grave lack of discretion of judgment was pursued, albeit found not proven. In 09/78: The plaintiff wife alleged that the respondent deceived her, but this ground was not pursued; rather her grave lack of discretion of judgment and the respondent's inability to assume the essential obligations of marriage were tested.

<sup>13</sup> For example, in 09/31: The plaintiff husband believed that the marriage, which lasted seventeen years and produced four children, was happy initially; the original ground alleged was error about the quality of a person (canon 1097§2). The judge, deeming the original ground to have been based on alleged 'sexual *difficulties*', decreed that the case should be heard on the grounds of the plaintiff's grave lack of discretion of judgment.

capacity, the tribunal held that she gravely lacked discretion of judgment.<sup>14</sup> Therefore, the basis in this case for the allegation of incapacity was unclear, as was the plaintiff's understanding of the ground and what she was required to prove. Although no serious psychopathology was identified, the tribunal concluded that her decision to marry was not based on mature reflection; therefore, she lacked a mature approach to marriage. The judges, as such, equated lack of 'mature' reflection, without reference to its cause, with lack of capacity for marriage. In other words, the judges equated *failure* with *incapacity* and focused on *behaviour* rather than establishing that the cause of the behaviour was psychopathological and it resulted in *inherent incapacity*.

Second, in some cases, there was no valid plea.<sup>15</sup> A plaintiff husband, after eleven years of marriage, alleged that the marriage was happy for five years, but the respondent stopped loving him and was unfaithful; these are not grounds for nullity. The plaintiff admitted: knowing the nature of marriage; having honourable intentions; considering both parties capable of marriage; and being happy for five years. He now doubted the respondent's *intentions*.<sup>16</sup> Nevertheless, the tribunal accepted the ground of the plaintiff husband's grave lack of discretion of judgment. Despite a three-year courtship, scant evidence from the plaintiff, and absence of reliable witness evidence, judges failed to explore the interpersonal relationship. They found for the plaintiff's incapacity on the basis of: his own account that the couple did not know each other well; the parties were only twenty-three and twenty-one years old respectively; and the respondent's father *thought* she was not ready for marriage until she was at least twenty-one. Consequently, the judges held that the parties were immature. The judges' finding that the plaintiff 'misjudged marriage' with the respondent, implied that a mistake suffices to cause nullity. The Appeal Tribunal submitted the case to ordinary process.<sup>17</sup> Despite citing: the 1987 Papal Allocution;<sup>18</sup> Rotal jurisprudence,

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<sup>14</sup> 09/11: A plaintiff wife believed in her capacity. Judges accepted that she assessed her prospective spouse accurately. She: declined the respondent's first proposal, implying capacity to assess the prevailing circumstances and to make a judgment on the basis of her findings; admitted discussing the future, implying capacity to plan ahead; admitted cohabitation without problems, implying capacity for an intimate interpersonal relationship with the respondent; acknowledged lack of pressure to marry, implying freedom; and declared her intention to honour fidelity, permanence and openness to children, implying correct knowledge and intention.

<sup>15</sup> *CIC*, cc. 1501; 1504; and 1620. See Appendix 1. *DC*, Articles 114; 115§1; 116§1; and 122. See Appendix V. Also William L Daniel, 'The Rejection of a *Libellus* Due to Lack of Any Foundation Whatsoever (*CIC*, c. 1505§2, 4°', *Studia Canonica*, 43 (2009), pp361-387. See also Chapter 5, fts 15 and 17.

<sup>16</sup> 09/28. *CIC*, c. 1101§2 is the relevant canon for an intention, by a positive act of will to exclude marriage or an essential element or an essential property of marriage. See Appendix 1. The respondent's intention against the good of children was heard but found not-proven; the tribunal failed to locate her.

<sup>17</sup> This occurs when the First Instance decision cannot be ratified by the abbreviated process.

requiring *absence* of psychological freedom,<sup>19</sup> and acknowledging the difficulty in proving incapacity after many years of marriage;<sup>20</sup> and authors acknowledging that *DC* requires the use of experts to establish the severity and effect of an existing a grave anomaly;<sup>21</sup> the Appeal Tribunal, nevertheless, focused (incorrectly) on *behaviour* as a determinant of incapacity.<sup>22</sup> The judges confirmed the First Instance judgment, neither seeking expert opinion nor explaining the methodology used to assess the plaintiff's level of maturity or capacity at the material time. No psychological cause was established; therefore its severity and effect on the plaintiff's capacity could not be demonstrated. The basis for these affirmative decisions, therefore, was unclear. Although found not proven, another case alleging the absent respondent husband's inability to assume the essential obligations of marriage was pursued, despite no indication of psychological impairment.<sup>23</sup> The plaintiff wife merely alleged that the respondent, after four years of happy marriage, 'deliberately chose to live a lifestyle' which 'in no way reflected the values, aims and beliefs he had previously committed to sharing' - such an allegation neither constitutes a valid ground for nullity, nor supports incapacity. Interestingly, in this case, the tribunal held that in the absence of a 'proper psychological assessment' of the respondent there was insufficient evidence to reach moral certainty of his incapacity.<sup>24</sup> However, the tribunal found for nullity on the ground of the plaintiff's error about a quality in the respondent, which was not even identified. In another case, although the respondent husband's inability to assume the essential obligations of marriage was not alleged, the tribunal appeared to address this ground, rather than his alleged

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<sup>18</sup> The tribunal acknowledged that 'only a "serious psychic anomaly" (a serious mental disorder or disturbance) can be the cause of an incapacity' and that 'this is not the same as the unconscious forces in the human psyche, accepted by modern Christian psychology', citing Rulla, *Antropologia della vocazione Cristiana*, (Edizioni P di Pietro Marietti, 1985), p56.

<sup>19</sup> The judgment cited Rotal decision *coram* Burke, 5 November 1992. The Appeal Tribunal acknowledged that 'the pathological lesion of the will ... must be so grave that the natural capacity of self-determination, in which lies the essence of freedom, has been lost ... it must be shown that freedom was not just affected, but really taken away'.

<sup>20</sup> The judgment cited Rotal decision *coram* Pompedda, 16 December, 1985 *RRD*, Vol 77, p586, holding that if there was no history of 'treatment from doctors or experts in psychiatry or psychology, it seems almost impossible to conclude with certainty to a psychic anomaly or character disorder at the time of consent'.

<sup>21</sup> The Appeal Tribunal cited K Lüdickem & R Jenkins, *Dignitas Connubii Norms and Commentary* (Canon Law Society of America, 2006), p346. Expert assistance was required to establish whether specific behaviour was due to the presence of a psychic condition, but was not required when 'the proofs are so overwhelming that an expert report would serve no purpose, or when previous expert reports are available that can be used in the trial'.

<sup>22</sup> The judgment stated: 'One of the best indicators of a person's incapacity ... is the abnormality of his behaviour vis-à-vis his decision-making capacity in life in general'.

<sup>23</sup> 09/77.

<sup>24</sup> The judges also acknowledged that the tribunal required not only signs 'that a true communion of life did not happen, but that it *could not* happen, given the make-up' of the person.

grave lack of discretion of judgment, which was found proven (albeit on the basis of post-marital events).<sup>25</sup>

Third, whilst canon law makes provision for cases to proceed to judgment, when a genuine search for a respondent's whereabouts has proved unsuccessful, or when respondents refuse to participate, proceeding without legitimate citation invalidates the process.<sup>26</sup> Contrary to the provisions of *DC*, efforts to find respondents, or proof of citation, were not always recorded, so it was impossible to demonstrate whether or not many respondents ever received their citations.<sup>27</sup> This is particularly pertinent when incapacity is found proven in an absent respondent,<sup>28</sup> and when confidential information is subsequently sent to addresses from which no response has been received.<sup>29</sup> Denial of the right of defence goes to validity of a decision; it is imperative, then, that the respondent's legitimate citation be demonstrated. The method of citing respondents was inconsistent across the tribunals studied.

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<sup>25</sup> 09/82: The judgment stated: 'It is clear that the respondent simply could not cope with the birth of his son. Whether this was because he had really wanted a girl, or because he felt he was not receiving enough attention, or he could not manage the responsibility involved, we do not know, but we do know that his reaction came soon after the birth, and showed an escalating inability to cope with the situation. ... [O]nce the child was born he either had to change his priorities and put the child first, or go; he appears to have chosen the latter'. How this affected his decision-making faculties at the time of marriage was unclear.

<sup>26</sup> *CIC*, cc. 1508; and 1509§2. See Appendix 1. *DC*, Articles 130§2; 132§1; and 138§1. See Appendix V.

<sup>27</sup> In many cases, although copies of the citation letters were not included in the Acts, nor was the method of citation recorded, decrees of absence merely stated that no response had been received from the respondent (09/16; and 09/45). Sometimes respondents were not located; these letters were returned to the tribunal (09/4; 09/28; and 09/60). On other occasions two letters were sent to the same address, supplied by the plaintiff (09/21; 09/22; 09/50; 09/55; 09/56; 09/65; and 09/66). Sometimes many years had elapsed since the plaintiff had contact with the respondent (09/28: eighteen years; 09/43: twenty-five years). A plaintiff's declaration (albeit sometimes under oath) that the respondent's domicile was unknown appeared to suffice to decree the respondent absent (09/43; 09/44; 09/85; and 09/94); some of these decrees merely stated that following 'diligent' searches the respondent could not be found, but there was no evidence of any search having been made (e.g. 09/43; 09/44; and 09/94). Moreover, in 09/44, a memorandum stated: 'The original diligent enquiry required by Art 132§1 did not produce details of the respondent's domicile', but the only evidence of a search was the plaintiff's statement that he made a *Google* search. Other judgments merely stated that respondents were 'cited according to the norms of the Law and practice of this tribunal ... and when no reply had been received ... he was declared absent by the Presiding Judge according to the norms of *Dignitas Connubii* Article 138§1'. But, this Article applies to a party legitimately cited. There was no evidence of a second citation, required by *DC*, Article 138§3 (09/57; and 09/62). In other instances a respondent's response declining to participate did not form part of the Acts, but was interpreted in the judgment as not wishing to have any further communication from the tribunal (09/20); consequently, *DC*, Articles 134§3 and 258§3 were invoked. In contrast in 09/5, the plaintiff placed a notice in a local paper in an attempt to locate the respondent but to no avail.

<sup>28</sup> For example in 09/44, the respondent wife was not located. In 09/76, the respondent declined to participate in the process; but on the basis of the plaintiff wife's testimony of his behaviour and her suspicion of his depression, the tribunal, acknowledging that the evidence was sometimes 'bizarre' found for his incapacity because he was 'seriously unsound mentally'.

<sup>29</sup> As occurred, for example, in 09/28: The parties had no mutual contact for eighteen years.

Two tribunals offer three options, but these options differ between these two tribunals. One offers three possibilities to respondents: (a) to give evidence; (b) only to be kept informed of the *process*; and (c) to have no further contact from the tribunal. Option (b) affords the respondent the possibility of exercising rights at a later stage of the trial. The second tribunal offers the following possibilities: (a) to give evidence; (b) only to be informed of the *outcome*; and (c) to waive the exercise of rights. Option (b) does not afford the respondent the possibility of being involved during the process of the case. Moreover, when the respondent chose option (b), this tribunal's decree of absence stated that the respondent has waived the exercise of rights, which is, in fact, option (c).<sup>30</sup> The tribunal's own understanding of the difference between options (b) and (c), is, therefore, questionable.

A third tribunal, sometimes (but not always), offers four options to the respondent: (a) 'I am willing to give evidence'; (b) 'I do not wish to help with your enquiry'; (c) 'I wish to be informed of the outcome of the case'; and (d) 'I do not wish to receive any further contact from the tribunal'. However, when a respondent chose option (c), the tribunal interpreted it as reason to invoke *DC* Article 258§3, which applies to someone choosing option (d).<sup>31</sup> No tribunal offered the parties the option of entrusting themselves to the justice of the court, provided in *DC*.<sup>32</sup> Even when respondents were cited it was sometimes unclear whether or not they had been informed of alleged grounds,<sup>33</sup> which goes to their right of defence, even if they decline to participate.<sup>34</sup> Furthermore, it was unclear whether or not they had been given the opportunity to: object to grounds; name witnesses or object to those named by the other party; appoint an advocate; or challenge the decision.<sup>35</sup> There was no evidence of any encouragement given to a respondent who declined to give testimony.<sup>36</sup> Advocates or

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<sup>30</sup> 09/33; 09/35; and 09/90.

<sup>31</sup> 09/19. *DC*, Article 258§3. See Appendix V. This article applies if a party has declared that he does not want *any notice at all about the cause*; he is thus considered to have renounced his right *to obtain a copy of the sentence*.

<sup>32</sup> *DC*, Article 134§§2 and 3. See Appendix V.

<sup>33</sup> 09/8; 09/76; and 09/78. In 09/28, on the same day as the decree of absence was issued, a letter was sent to the respondent wife informing her of the alleged grounds. This was returned as she was unknown at that address; there was no record of further efforts to locate her. In 09/34, the respondent asked for the petition, which implies that it was not attached to the letter of citation as prescribed in *DC*, Article 127§3.

<sup>34</sup> John Paul II, *Allocution to the Roman Rota* (1989). See Appendix VII.

<sup>35</sup> *DC*, Articles 101§1; 135§4; 139§2; 199; and 200. See Appendix V.

<sup>36</sup> *DC*, Article 138§2. See Appendix V. See also John Paul II, *Allocution to the Roman Rota* (1989) in which he *oblige*s judges 'to offer the respondent all opportune information ... and to seek patiently the party's full cooperation in the process, also for the sake of avoiding a partial judgment in a matter of such gravity'. See Appendix VII.

procurators were rarely appointed, but there was no consistency of practice.<sup>37</sup> Moreover, in one case, even when it was unclear whether a respondent husband was informed of the ground of inability to assume the essential obligations of marriage alleged against him, his lack of objection to the petition was interpreted as evidence that he ‘carefully considered the matter and feels he has nothing to add to the plaintiff’s petition’ and ‘[it is his] sincerely held belief that the petition should succeed’.<sup>38</sup> No expert opinion was sought in this case, but on the basis of the plaintiff wife’s evidence that she suspected he was ‘suppressing his true sexuality’ and her character references the tribunal concluded that: she ‘presented the [psychological] causes in a good way’. Despite the marriage having taken place twenty-one years previously and lasting five years, the tribunal concluded that the causes were: ‘rooted in [the respondent’s] personality’; ‘of a serious nature’; and were present at the time of marriage.

Fourth, failure to publish evidence to the parties invalidates the procedural Acts.<sup>39</sup> However, one tribunal’s decree of publication states: ‘all parties who have a right *and who have expressed a desire to do so, should be given access [to the evidence]*’.<sup>40</sup> This not only ignores the tribunal’s *obligation* to publish the Acts, but shifts responsibility onto the parties to ask for access to the Acts. Moreover, the Acts did not always demonstrate that: parties were given access to the observations of the defender of the bond; the *decision* was *legitimately* published (particularly to the respondent), which is required for it to be effective; or parties were informed of the ways in which the decision could be challenged.<sup>41</sup> Whilst proper procedure might have been followed, this was not evident from the Acts; thus, it was impossible to be certain that parties’ rights were protected sufficiently to verify legitimacy of the decisions.<sup>42</sup>

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<sup>37</sup> In 09/15, a procurator, appointed for the *respondent* and in the absence of any expert opinion, argued, on the basis of the plaintiff’s evidence, that the respondent ‘would have had mental difficulties in contributing to the facts’, implying support for the plaintiff’s plea, rather than protection of the respondent’s interests. 09/56: An advocate was appointed *after the publication of the acts*, without explanation. 09/87: An advocate was appointed for the plaintiff, but not for the absent respondent.

<sup>38</sup> 09/78.

<sup>39</sup> *CIC*, c. 1598§. See Appendix I. *DC*, Article 229. See Appendix V. See also Chapter 4, ft 106. In 09/43, the decree of publication recorded that *DC*, Article 134§3 applied to the respondent. But, this Article applies to respondents whose mailing address is *known*, not to respondents whose whereabouts are *unknown*, as was the case in this instance.

<sup>40</sup> E.g., 09/30; and 09/48. Emphases added.

<sup>41</sup> *CIC*, c. 1615. See Appendix I. *DC*, Articles 242§1; 257§§1 and 2. See Appendix V. See also Chapter 4, ft 107.

<sup>42</sup> For example, in 09/57, the decree of formulation of the doubt claims that the ‘parties’ have been notified of their right of appeal according to *Dignitas Connubii*, Article 135§4 (but there was no further evidence of this).

Fifth, the practice, evident in the cases studied in Chapter 5 (when experts were consulted), of judging independent grounds of nullity together, was also seen in these cases processed without expert evidence. Consequently, it was impossible to follow the argument in relation to each individual ground. This practice is, as we have seen, inconsistent with Rotal jurisprudence. In some cases, even grounds considered by Rotal jurisprudence to be internally incompatible, were considered together, and found proven.<sup>43</sup> In other cases, a ground in one party and a different ground in the other party were considered together.<sup>44</sup>

It appears, therefore, that grounds of incapacity are used inappropriately by local tribunals, at least in many cases - and dialogue between the tribunals and the parties is insufficient to ensure that the parties are fully informed of: their rights; the processes involved; and the meaning of the alleged grounds.<sup>45</sup>

### 3. AN EXAMINATION OF THE LAW SECTIONS OF JUDGMENTS

What follows examines the law sections of these judgments to establish: whether or not the judges relied on Rotal jurisprudence; the judges' understanding and application of the key canonical terms relevant to psychological incapacity, namely, 'grave lack of discretion of judgment', 'inability to assume essential obligations', and 'the essential rights and obligations of marriage'; and whether or not the judges made any reference (and if so in what way) to the mandatory requirement to consult experts in incapacity cases.

**Rotal Jurisprudence:** Whilst law sections sometimes quoted the texts of canons,<sup>46</sup> doctrinal documents,<sup>47</sup> and publications,<sup>48</sup> they did not always refer to Rotal jurisprudence.<sup>49</sup> When

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The decree of publication claims to have notified 'both parties and their advocates', but no advocate was appointed. The sentence was published on the same day as the appeal was lodged before Second Instance, which deprived the parties of the exercise of their right, under *DC*, Articles 279§1 and 281§1, to lodge an appeal before the First Instance judge within fifteen days.

<sup>43</sup> See Chapter 5, ft 234 and Case Nos: 72-135, p7; 72-248, p9; and 79-095, p44 in Appendix VIII. In 09/42, the grounds of grave lack of discretion of judgment and an intention against the good of children were alleged in both parties; both grounds, considered together, were found proven in respect of the plaintiff, but were found not proven in respect of the respondent.

<sup>44</sup> In 09/33, one party's grave lack of discretion of judgment and the *other* party's intention against marriage are dealt with together.

<sup>45</sup> See Robitaille, 'Through the Lens of *DC*', p157.

<sup>46</sup> For example, mainly *CIC*, cc. 1095; 1055; 1056; 1057; and 1096.



the law sections did cite Rotal decisions, they did not always: give full references for those decisions; report the outcomes of those decisions; or explain their relevance to the case under consideration. For example, in one case the judges considered grave lack of discretion of judgment and inability to assume the essential obligations of marriage in an absent respondent whose ‘depression’ was alleged; there was no supporting expert evidence. The judges cited two Rotal decisions, but their relevance was unclear.<sup>50</sup> The first Rotal decision, unlike the instant case, involved a party with ‘borderline personality disorder’ supported by expert evidence. In the second decision, unlike the instant case, the Rota found incapacity not proven; it took exception to the lower tribunal’s interpretation of ‘discretion’.<sup>51</sup>

**Grave Lack of Discretion of Judgment:** The law sections of these judgments were not consistent about the precise meaning of the term ‘grave lack of discretion of judgment’. When distinguishing grave lack of discretion of judgment and inability to assume the essential obligations of marriage, at least one law section inferred that only inability to assume the essential obligations required a psychological basis; grave lack of discretion of judgment did not require a psychological basis.<sup>52</sup> In another case, judges recorded Rotal judge Lefebvre as describing ‘discretion of judgment’, positively, as ‘the ability’ to ‘show good intrapersonal and interpersonal integration’.<sup>53</sup> In several other cases, judges quoted Rotal judge Pompedda, albeit writing extra-judicially, as ‘presenting the following synthesis of the three components of a “mature decision”’:

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<sup>47</sup> There were many references to doctrinal sources, but for example, 09/11; and 09/35: *CCC*. 09/11; 09/31; 09/35; and 09/36: *GS*. 09/35: *Genesis* 2:24 and *Mark*: 10, 2-12. 09/36: *Matthew*: 19:6. 09/35; 09/42; and 09/45: *Papal Allocutions*.

<sup>48</sup> Many published books and articles were cited, but for example, 09/28: Ladislav Örsy, *Marriage in Canon Law* (1988); 09/28: K Lüdicke & R Jenkins, *Dignitas Connubii Norms and Commentary* (CLSA, 2006); 09/36: Cormac Burke, ‘Marriage Studies V’, in Gerald T Jorgensen (Ed), *Sources in Matrimonial Law* (CLSA 2004), p14f, and Augustine Mendonça, ‘Consensual Incapacity for Marriage’, *The Jurist*, 54 (1994), pp 494ff); 09/56: J Provost, ‘Canon 1095: Past, Present, Future’, *The Jurist*, 54 (1994), pp95-96; and 09/70: Viladrich, but no reference is given.

<sup>49</sup> For example, 09/4; 09/5 and 09/28; made no reference to Rotal jurisprudence.

<sup>50</sup> 09/65: Pompedda, 25 November 1987, in *SRRDec*, 70 (1978), pp508-515 and Pompedda, 22 January 1979, *SRRDec*, 71 (1988), pp18-22. See Mendonça, *Anthology*, pp39 and 40.

<sup>51</sup> There were many other examples: 09/23; 09/50; and 09/86 referred to Rotal judge, Stankiewicz, without any citation; in 09/65 the Rotal case cited upheld the validity of marriage; in 09/8; 09/50; and 09/86, although no neurotic disorder was evident, the law sections referred simply to ‘Rotal jurisprudence’ cases dealing with neurotic disorders; in 09/76; 09/77; 09/78, the Rotal decisions involved addiction; in 09/76 a Rotal decision involving a vendetta was cited; and in 09/84, the case involved borderline personality disorder, but these issues were not relevant to the case under consideration.

<sup>52</sup> 09/65.

<sup>53</sup> 09/23: An incomplete citation is given: Lefebvre, 1 March 1961. Charles Lefebvre was Dean of the Roman Rota from 1976 to 1978.

“Sufficient cognitive knowledge of the object and of the subject of consent;  
Sufficient critical evaluation of the object, of the motives and of the subject in relation to the contract; and  
Sufficient internal freedom either to evaluate the motives, that is, to deliberate, or to control impulses or internal limitations”<sup>54</sup>.

In several further cases, judges cited Pompedda, writing judicially, as describing, negatively, *situations* in which discretion of judgment *can be lacking*:

‘A grave lack of discretionary judgement can be found in three situations: when there is a lack of a sufficient intellectual (abstract) knowledge of the object of consent; or where a partner has not attained sufficient critical knowledge proportionate to the conjugal contract; or either partner lacks the capacity to deliberate with sufficient weighing of motives and freedom’.<sup>55</sup>

However, judges did not mention that Pompedda upheld the validity of marriage in this cited Rotal decision.<sup>56</sup> Referring to another of Pompedda’s decisions which did find for nullity on grounds of grave lack of discretion of judgment, the judges failed to mention that the plaintiff was diagnosed with a ‘neurotic-dysthymic and psychosexual disorder’ and that the Rotal decision acknowledged that even in cases of immaturity, incapacity is not a given.<sup>57</sup> Moreover, the judges did not always acknowledge the Rota’s insistence on the establishment of serious psychopathology and demonstration of its severity and effect. In many cases of lack of discretion of judgment, judges focused was on whether or not a *de facto* ‘mature decision’ was made, rather than on the parties’ *capacity* to make it.<sup>58</sup>

Judges from three different tribunals referred to decisions of Rotal judges Anné and Felici, stating that *capacity* to ‘reason and make new judgments flowing from acquired knowledge’ is required for discretion of judgment.<sup>59</sup> Further, one of these tribunals, in several cases, states:

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<sup>54</sup> 09/22; 09/36; 09/48; 09/49; and 09/50: M F Pompedda, ‘*Maturità psichica e matrimonio nei canoni 1095, 1096*’, *Apollinaris*, 57 (1984), p134. Cardinal Pompedda was involved in the ecclesiastical tribunal system from 1955 until his retirement in 2004. He was appointed Dean of the Roman Rota in 1993 and Prefect of the Supreme Tribunal of the Apostolic *Signatura* in 1999.

<sup>55</sup> E.g., 09/34; 09/72; and 09/90: *coram* Pompedda, 22 January 1979.

<sup>56</sup> Mendonça, *Anthology*, Case No: 79-009, p40.

<sup>57</sup> 09/04; and 09/80, citing Mendonça, *Anthology*, Case No: 84-079, p71.

<sup>58</sup> Rotal decisions focus on capacity. For example, ‘Decision *Coram* Defilippi, 19 January 2004 (Dublin)’, *Studia Canonica*, 40 (2006), pp211-244, at pp217-218, citing another Rotal decision, *coram*, Funghini, 19 May 1993 (*RRDec* 85 (1993)), p404, n2.

<sup>59</sup> 09/20; 09/48; 09/49; 09/54; and 09/85, cite *coram* Anné, 28 June 1965; 09/28 cites *coram* Felici, 20 December 1957; and 09/36 refers to Felici without citation. Cardinal Pericle Felici was Prefect of the Supreme Tribunal of the Apostolic *Signatura* at the relevant time.

‘According to Felici, it is not enough to be *capable* of exercising the cognitive faculty, one must *be able* to exercise a critical faculty, which alone renders one capable of forming a judgment and of moving the act of the will’.<sup>60</sup>

However, judges in this same tribunal, and in another tribunal, record, possibly erroneously, a crucial difference in this same quotation, clearly focusing on *de facto exercise*, of the critical faculty:

‘[I]t certainly does not suffice to be *capable* of exercising the cognitive faculty, but one must *exercise* the critical faculty’.<sup>61</sup>

So, judges (some even within the same tribunal) differed in their interpretation of this Rotal jurisprudence despite the fact that the diocesan tribunal is that of one bishop;<sup>62</sup> some judges held that for validity of marriage a party must *exercise* the critical faculty, whilst others required demonstration of *capacity* to exercise it. In some cases, however, the judges quoted a Rotal decision which focused on personal capacity, and which warned against confusion between grave lack of discretion of judgment and parties’ incompatibility, or an imprudent choice of partner.<sup>63</sup> Some judges also acknowledged that imprudent decisions, and difficulty, must be distinguished from incapacity.<sup>64</sup> Perhaps these varying interpretations highlight the dangers encountered when Rotal decisions, published in Latin, are translated unofficially (usually by academics); they are not therefore ‘authentic’ translations.<sup>65</sup>

Some law sections referred to Rotal explanations of the psychic nature of the cause of grave lack of discretion of judgment,<sup>66</sup> and of the issues of its gravity,<sup>67</sup> and proportionality to

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<sup>60</sup> 09/48; 09/49; and 09/50. No references were given. Emphases added.

<sup>61</sup> E.g., 09/22; and 09/36: citing *coram* Felici, 3 December 1957, *RRDec* 49: 788. Emphasis added.

<sup>62</sup> *CIC*, c. 1420§1. See Appendix I. Also, John Barry, in *L&S*, p821, para 2866. Any dissonance in interpretation of law is, therefore, serious.

<sup>63</sup> 09/48; and 09/85. The decision was attributed to ‘Di Felici’ of 11 December 1975, *SRRDec*, but as Rotal judge Angelo *Di Felice* served from 1969-1986, this is likely to be an error; Rotal judge Pericle Felici served earlier. In 09/80, Di Felice, in Mendonça, *Anthology*, Case No: 79-044, p41, was cited. In this decision of 14 March 1979, Di Felice rejected two presumptions of the Second Instance tribunal: (a) that full maturity was required in order to give valid consent; and (b) unhappiness in marriage is always a sign of psychological incapacity.

<sup>64</sup> 09/51; 09/75; 09/76; 09/78; and 09/80.

<sup>65</sup> CLSGB&I publishes some local cases; they are therefore cited in other local judgments. See Aidan McGrath, ‘Moral Certainty and Cases Based on Canon 1095; Some Reflections’, in *CLSGB&I Newsletter*, No 169, (March 2012), pp50-72, at p58 in which he warns: ‘...[I]t is not sufficient simply to quote local jurisprudence ... it might well be mistaken, and an error remains an error no matter how often it is quoted!’

<sup>66</sup> 09/28, citing Rotal judge Burke’s decisions of 5 November 1992, *Studia Canonica*, 27 (1993), pp486-496§§13-14) and 25 November, 1993, *Studia Canonica*, 29 (1995), pp241-253), requiring a grave ‘pathological

marriage,<sup>68</sup> whilst others relied on Guiry's 'working definition of "maturity"'.<sup>69</sup> Guiry, despite writing after the Papal Allocutions (1987 and 1988), which explained the need for severe psychopathology to prove incapacity, considered that canonical 'immaturity', sufficient to cause nullity, is not a psychopathological state. Law sections, although acknowledging that terms such as 'immaturity' and 'incompatibility' were 'imprecise', nevertheless, considered them strong indicators of grave lack of discretion of judgment.<sup>70</sup> In some cases, the law sections implied that there was no need to establish a grave psychological cause.<sup>71</sup> Cause was considered irrelevant: a 'mistake' or an 'influenced' decision sufficed.<sup>72</sup> Moreover, *time* for reflection, provided for by a courtship, was essential.<sup>73</sup> The law section of one judgment inferred that the canonical minimum age for marriage for a man, and two years in addition to the canonical minimal age for a woman, was insufficient for maturity to marry.<sup>74</sup> Evidence of behaviour, without reference to its cause, was emphasised.<sup>75</sup>

**Inability to Assume the Essential Obligations of Marriage:** Judges acknowledged the psychological basis for inability to assume the essential obligations of marriage in some cases,<sup>76</sup> but not in all.<sup>77</sup> There was dissonance as to whether this form of incapacity must be perpetual; the judges in one case held that it need not, but the reasoning was somewhat unclear:

'[Incapacity need not be perpetual], since one is dealing with a state and with obligations that arise at the very moment that the conjugal relationship is established. These obligations

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lesion'; and 09/23 citing *coram* Parisella, 25 November 1976, requiring 'mental illness', such that 'no union of life can be formed'.

<sup>67</sup> 09/50; and 09/86 stating that Rotal jurisprudence 'presupposes a serious psychological disorder' and requires an objective link between the disorder and 'the flawed process' in lack of discretion.

<sup>68</sup> 09/28 citing *coram* Sabatanni, 24 February 1961, *coram* Lefebvre, 6 July 1967 and *coram* Di Jorio, 30 April 1969. 09/70; 09/81; and 09/82 citing *coram* Mark Said, 13 March 1965.

<sup>69</sup> 09/70; 09/81; and 09/82, citing Robert Guiry, 'Immaturity, Maturity and Christian Marriage', *Studia Canonica*, 25 (1991), pp93-114, in which he relies on the *Diagnostic and Statistical Manual*, published by the American Psychiatric Association (*DSM*). See Cormac Burke, *Sentence of 25 November 1993*, for his criticism of ecclesiastical judges' use of *DSM*. Available at: <http://www.cormacburke.or.ke/node/410>.

<sup>70</sup> 09/3; and 09/20.

<sup>71</sup> In 09/06; and 09/83, judges considered that inadequate 'attitude' and an inadequate 'approach to life generally and to ... marriage in particular' or lack of commitment, sufficed to prove nullity.

<sup>72</sup> 09/28; 09/38; and 09/76: 'Undue haste' or misjudgment '*for whatever reason*' could be sufficient to cause nullity. In 09/75, 'clouded judgment' or making a 'wrong' decision sufficed.

<sup>73</sup> 09/48; 09/49; 09/85; 09/33; and 09/38.

<sup>74</sup> 09.75: '[N]o one would call sixteen-year olds mature'.

<sup>75</sup> This was true in many cases, for example: 09/7; 09/15; 09/70; 09/81; 09/82; and 09/88.

<sup>76</sup> 09/37; 09/76; 09/77; 09/78; 09/55; and 09/80.

<sup>77</sup> In 09/16; and 09/44, 'bad habits' such as drunkenness or gambling were accepted, without distinguishing culpable behaviour from addiction, as causes of incapacity.

cannot admit of any discontinuity - they either arise or they do not, and they can only arise at the moment of consent, not thereafter. Consequently, an incapacity, be it perpetual or not, which touches the essential obligations at the time of the exchange of consent must carry with it invalidity because one is dealing with a state which arises or does not arise at consent; in that moment there is the capacity to consent validly or not. Drawing together all these elements, canon 1095§3 implies that a person may be rendered incapable of contracting if he is affected by a serious psychic cause which impedes him from assuming the essential obligations of marriage'.<sup>78</sup>

This explanation does not distinguish capacity to assume *perpetual obligations* from capacity to assume them *perpetually*. Since obligations are *assumed* at the moment of consent, all that is required for validity is capacity to assume *perpetual obligations*, not capacity to assume them *perpetually*, since post-marital events which then prevent one from fulfilling these obligations cannot invalidate marriage; consequently, it is confusing to say '*obligations cannot admit of any discontinuity*'. Moreover, canon 1095, 3° does not '*imply*' that a person '*may*' be rendered incapable of marriage *if* he is affected by a serious cause. It states a fact: those, whose capacity *is* substantially and adversely affected, *are* incapable. Therefore, the focus must be on establishing the severity and effect of the antecedent and serious cause, to determine whether or not the person is *incapable*.

**The Meaning of Essential Obligations of Marriage:** Judges varied in their interpretation of 'essential obligations of marriage'. Some judges referred to Rotal judges' descriptions, limiting the term to the goods of spouses and children, or unity and indissolubility;<sup>79</sup> sometimes judges simply acknowledged these limitations.<sup>80</sup> Nevertheless, despite the requirement to interpret laws, which restrict the free exercise of rights (such as canon 1095), strictly, some judges applied a broad interpretation to this term.<sup>81</sup> They held that a 'list' which is 'not taxative', includes 'maturity of personal conduct', 'kindness and gentleness', 'manners in mutual relationships', 'stability of conduct', 'ability to adapt to circumstances', 'responsibility for the material well being of the home and family' and 'sharing and consultation on important issues', as part of 'what may be understood as the essential rights and obligations of marriage'.<sup>82</sup> Marriage comprised 'a complex balance of emotions, desires, judgements, self-knowledge, maturity and commitment', requiring 'sufficient psychological

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<sup>78</sup> 09/65.

<sup>79</sup> 09/17; 09/19; 09/31; 09/32; 09/43; 09/44; 09/56; 09/57; 09/62; 09/69; 09/79; and 09/94, citing Pinto's decision of 30 May 1986, *MDGBI*, Vol 25, p46. 09/50 quotes Rotal judge Ragni, but without citation.

<sup>80</sup> For example, 09/78; and 09/86.

<sup>81</sup> *CIC*, c. 18. See Appendix I.

<sup>82</sup> 09/23; 09/30; 09/51; and 09/65.

maturity' for a person 'to perceive critically and freely and to choose marriage with *all* its rights, obligations and responsibilities'.<sup>83</sup> Exchanging consent involved a 'complex process' in which the couple is 'drawn into a complex of rights and obligations'.<sup>84</sup> Whilst some judges acknowledged that marriage was within the natural capacity of the majority,<sup>85</sup> others held that the doctrine and law of marriage has expanded.<sup>86</sup>

Some law sections cited Rotal jurisprudence explaining that: psychological freedom means freedom from compulsion;<sup>87</sup> impulsive behaviour does not necessarily indicate lack of freedom;<sup>88</sup> and freedom requires 'reasonable', not pathological, motivation.<sup>89</sup> Others simply acknowledged these principles.<sup>90</sup> But, another held that capacity required freedom from *any* pressure, including persuasion of conscience.<sup>91</sup>

**The Mandatory Requirement for Experts:** Despite law sections referring, as we have seen, to Rotal decisions which relied on grave, psychological, or physio-psychological causes for incapacity,<sup>92</sup> few law sections referred to experts. Interestingly, some law sections, although not referring to the need for experts, nevertheless, implied the requirement to make a psychological assessment of the party concerned.<sup>93</sup> Moreover, some acknowledged: the complexity of the decision-making process;<sup>94</sup> capacity concerned the time of the change of consent;<sup>95</sup> and there was no legal 'unit of measure' of incapacity.<sup>96</sup>

Furthermore, in one case the judges acknowledged that the focus must be on: 'the operation of the critical faculty of the mind at the time consent was given'. However, consideration

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<sup>83</sup> 09/50. Emphasis added.

<sup>84</sup> E.g., 09/30; 09/51; and 09/65.

<sup>85</sup> 09/42, citing Colagiovanni, 11 December 1985 *RRDec* 1985, p571. Also 09/75; 09/78, citing Rotal Judge Doran's lecture to the CLSGB&I, which in turn cites Thomas Doyle, but no reference is given.

<sup>86</sup> 09/81; and 09/82, claiming that c. 1055 'extends the issue of ignorance beyond mere sexual matters'.

<sup>87</sup> 09/36; and 09/87, citing *coram* Faltin, November 11, 1988, in *L'immatùrità psico-affettiva nella giurisprudenza della Rota Romana*, p169.

<sup>88</sup> 09/28, citing Agustoni, 27 May 1980, in *RRD*, Vol 72, p402.

<sup>89</sup> 09/84, citing Pinto, 18 December 1979.

<sup>90</sup> 09/8; 09/49; 09/50; and 09/86.

<sup>91</sup> 09/88.

<sup>92</sup> 09/8; 09/50; 09/55; 09/80; and 09/86.

<sup>93</sup> 09/8; 09/23; 09/28; 09/30; 09/36; 09/39; 09/48; 09/49; 09/78; 09/84; and 09/85. The terminology used included phrases such as: 'A judge has to look into the "psychic condition" of the contractant(s)...'; '...hidden in the psyche of the human person are elements which influence our decision making'; 'The Judges will use an assessment of the context of the act of consent, the psychological condition of the individual', etc.

<sup>94</sup> 09/50; 09/76; 09/77; and 09/78.

<sup>95</sup> 09/8; 09/50; 09/70; 09/80; 09/81; and 09/86.

<sup>96</sup> 09/8; and 09/50, citing Sabattani, but without any reference.

was to be given to: ‘any extrinsic or transitory influences’, which may have incapacitated the individual ‘to the required degree’; and ‘any inherent habitual psychological deficiencies which could be said to indicate that the person was *a priori* predisposed to a gravely defective exercise of discretion of judgment’, which might range from ‘a poorly developed personality to the extremes of psychological illness’.<sup>97</sup> Moreover, some law sections acknowledged that: the invalidating cause must have affected the *formation* of the act of consent seriously and adversely; and establishing this fact involves identifying ‘the factors affecting the psychological faculties of a person’ and determining ‘their effects upon consent’.<sup>98</sup> Whilst some judges acknowledged the *value* of expert opinion, they held that experts’ were reluctant to make ‘absolute’ diagnoses.<sup>99</sup> Despite the foregoing, judges did not explain how these criteria could be established in the absence of an expert. In one case, judges acknowledged both the psychological basis for canonical immaturity and its *symptoms*, but did not explain how this condition could be verified without expert opinion; rather they posed the question as to how psychological immaturity affects validity of consent. They credited Rotal judge Anné with ‘what may be considered a fairly conclusive answer to that question:

“[I]f from the life history of the future spouse, *in the judgement of the experts*,<sup>100</sup> it is established that already before the wedding there existed a serious deficiency in intrapersonal and interpersonal integration, that person must be considered incapable of correctly understanding the nature of the communion of the whole life itself, . . . and likewise incapable of rightly judging and reasoning about this lasting communion of life that must be undertaken with another person”<sup>101</sup>.

Yet, without explanation, the judges proceeded to find for the plaintiff wife’s psychological immaturity, that is her grave lack of discretion of judgment, without expert opinion or any formal history of psychological impairment. Throughout the cases studied, the judges

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<sup>97</sup> 09/30.

<sup>98</sup> Eg., 09/8; 09/50; and 09/86, citing Sabattani, but without reference.

<sup>99</sup> 09/28. The judges acknowledged that the assistance of experts would be required to establish whether behaviour had a psychological basis, citing K Lüdicke & R Jenkins, *Dignitas Connubii Norms and Commentary* (Canon Law Society of America, 2006), p346. 09/76; and 09/78, cited Rotal judge Serrano, 5 April, 1973, in *CLD* 8, p718. Serrano holds that incapacity can be ‘relative’, i.e., in relation to the particular spouse. But Burke holds that this view is only held by few Rotal judges, and cites many others who hold his contrary view. See Cormac Burke, ‘Some Reflections on Canon 1095’, *Monitor Ecclesiasticus* 117 (1992-I), pp133-150. Available at: <http://www.cormacburke.or.ke/node/272>. For further discussion on relative incapacity see: Cormac Burke, *Sentence of 14 November 1996; Interlocutory Sentence of 16 November 1989; Sentence of October 20, 1994 (Peoria)*, and *Sentence of 25 November 1993 (Dublin)*, Available at: <http://www.cormacburke.or.ke/search/node/relative>.

<sup>100</sup> Emphasis added.

<sup>101</sup> 09/23, citing, *coram* Anne, July 22, 1969. No further citation is given.

mentioned neither the methods they used to assess parties' capacity, nor their competence to do so.

Law sections, therefore, did not clarify the precise meaning of key terms; even within the same tribunal, interpretations differed. Few law sections required the existence of a grave anomaly *preventing* the exercise of the critical faculty; many required only that the critical faculty was not *exercised*. Only one law section referred to personal *potential*.<sup>102</sup> Moreover, some law sections focused on the *quality* of the decision to marry, equating 'discretion of judgment' with a *de facto* 'mature decision',<sup>103</sup> whilst others emphasised the dissonance between 'discretion of judgement' and 'maturity'.<sup>104</sup> Moreover, the term 'essential rights and obligations of marriage' was interpreted broadly in many cases, to include harmonious behaviour, financial competence and 'all' matrimonial rights and duties. Psychological freedom was not always distinguished from persuasion of conscience. Therefore, despite the mandatory requirement to interpret canon 1095 strictly, it was interpreted broadly. Moreover, without reference to what is *essential* to marriage and notwithstanding its natural state, one law section explained that if a person entered marriage understanding it *differently* from 'Church teaching', they were considered incapable of exercising the natural right to marry.<sup>105</sup> Given these differing interpretations it is hardly surprising to find dissonance regarding the requirement to use experts. Therefore, law sections, in failing to require the establishment of a 'grave cause' identified by scientific means, let alone the demonstration of its severity and effect, did not reflect Rotal practice. Nor did these law sections reflect Rotal judge Huot's distinction between 'discretion of judgement' and 'consent':

[D]iscretion of judgment is a natural condition pre-existing the act of consent. It is a condition of a person and only in its effects it becomes a defect of consent. ... [A] defect of discretion resulting from an abnormal constitution of the contractant [should not be confused with] the contractant's timid, amoral or impulsive character which he/she does not attempt to overcome, [because in the former circumstance the person] is impeded ... whilst [in the latter] there is an unwillingness to conform to the principles of right conduct'.<sup>106</sup>

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<sup>102</sup> 09/81. See also Zenon Grochowski, 'The Ecclesiastical Judge and the Findings of Psychiatric and Psychological Experts', *The Jurist*, 47 (1987), pp449-470, at p456-457.

<sup>103</sup> E.g., 09/50; 09/60; 09/61; 09/66; and 09/86.

<sup>104</sup> E.g., 09/42, citing: John Paul II, *Allocution to the Roman Rota* (1987); and Corso, 14 March 1990, n4 in AAVV, *L'immatruita psico-affettiva nella giurisprudenza della Rota Romana (Liberia Editrice Vaticana, Citta del Vaticano, 1990)*, p238.

<sup>105</sup> 09/65.

<sup>106</sup> See Mendonça, Case No: 84-104, *coram* Huot, 26 June 1984, *Dec* 76 (1989), pp432-441, pp72-73.



#### 4. THE APPLICATION OF LAW TO THE FACTS OF THE CASE

What follows is an examination of the application of law by the judges to the facts of individual cases in order to establish: how a party's psychological status at the material time and hence, (in)capacity for marriage, was assessed and determined; what evidence was given weight; and the tribunals' use of the *vetitum*.

**Assessment and Determination of Psychological Status:** Some plaintiffs, but not all, alleged psychiatric illness or psychological impairment in one or both parties. However, it was unclear as to how the judges made an assessment of the party concerned, most particularly, *at the material time*. It was not obvious that the tribunals studied, or the judges practising within them, used any systematic approaches in their treatment of incapacity cases when no expert evidence was sought. For example, the way in which judges approached cases did not appear to be based on whether or not: the party in whom incapacity was alleged participated in the investigation and therefore, whether that party was available for any type of assessment; there was *any* allegation of psychiatric illness or psychological impairment; or there was corroborative evidence to support either the alleged incapacity or validity of marriage.

First, sometimes the judges had evidence from both parties in whom incapacity was alleged but found for nullity in only one party despite the fact that both parties had potential for psychological impairment. For example, in one case a plaintiff wife alleged: she took tranquillizers at the age of fourteen because of nervousness and fear of failure; she had poor relationships with family members; and she had a troubled background.<sup>107</sup> Nevertheless, the respondent husband's evidence supported validity. He claimed: they had honourable intentions when they married and knew each other well; they were happily married for ten years; then, their needs changed. He further alleged that: the plaintiff wife 'wanted to be cared for', whilst he was busy as his career progressed; the plaintiff began drinking to excess; and she became depressed. The marriage lasted seventeen years and produced two children. The judges held that: the plaintiff wife was 'swept up' in the new liberated world in which she worked; she was unable to evaluate the marriage; she lacked freedom to marry because of her 'need' to be liberated from commitments to her own parents; the respondent showed the

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<sup>107</sup> 09/84.

plaintiff little affection; the plaintiff became depressed; and when her 'fairy-tale' marriage did not materialise, her nervous personality led to a 'breakdown'. The judges were satisfied that her 'continuing dependent relationship' was demonstrated by her early retirement to care for her ill mother; they held that she was 'particularly needy'. Without establishing the severity of her alleged 'nervousness', nor demonstrating its effect on her capacity to marry at the material time, nor taking account of post-marital events, the judges found for her grave lack of discretion of judgment; and therefore the marriage was invalid. Regarding the respondent, however, the judges held that although he had: a difficult childhood background; an alcoholic father who committed suicide; and difficulty being self-critical (evidenced by his failure to mention his adultery in testimony); he was independent and confident. There was nothing to indicate lack of either maturity or understanding of marriage; therefore, his incapacity was not proven. In this instance, therefore, for the tribunal, the plaintiff wife's adverse childhood experiences determined her incapacity for marriage (rather than causing difficulty), but the respondent husband's difficult childhood was not held to have determined his future; the reasoning was unclear.

Second, and interestingly, in other cases, a poor family background sufficed despite lack of evidence of resultant trauma at the material time - the judges depended on testimony rather than establishing true psychological impairment. In one case, a plaintiff wife, who alleged her own grave lack of discretion of judgment, claimed that she 'inherited' her mother's 'paranoia'. There was no formal diagnosis, reference to treatment, or evidence of impairment of day-to-day functioning. Nevertheless, without corroborative evidence, the judges, finding for her grave lack of discretion of judgment, held that she: had a poor relationship with her parents; was insecure; was influenced by her mother who was 'deeply' religious; had a 'series' of 'inappropriate' relationships, which, although not serious, indicated her lack of readiness for marriage; and she had 'hit a low point'. She was, therefore, 'in no position' to give the kind of 'careful, reasoned, considered, critical, objective and balanced judgment that is essential'.<sup>108</sup> In another case, judges considered previous failed relationships as an indicator of 'neediness' and, therefore, grave lack of discretion of judgment, although there was no history of psychopathology.<sup>109</sup> Similarly, myalgic encephalitis (ME) featured in a case in which the plaintiff wife alleged her own inability to assume the essential obligations

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<sup>108</sup> 09/50.

<sup>109</sup> 09/39.

of marriage. She claimed she came from an unhappy home and that marriage, for her, was 'God's will'. There was no formal evidence of her medical condition, save the respondent's corroboration of its existence, although the priest who officiated at the wedding thought the plaintiff was 'not well'. She had previous unsuccessful civil marriages. The tribunal found for both her grave lack of discretion of judgment and inability to assume the essential obligations of marriage.<sup>110</sup>

Third, sometimes the judges relied on the evidence of the plaintiff and the plaintiff's witnesses alleging psychiatric illness, and, therefore, incapacity, in an *absent* respondent. In one case, the absent respondent's brother died before the marriage. The respondent was allegedly diagnosed with clinical depression six months after marriage. There was no evidence of his sickness absence from work or that he received medication, only cognitive behavioural therapy, after which his recovery began. However, by this time the plaintiff wife suffered depression and the couple separated. The plaintiff admitted that the respondent's psychiatrist declared him 'of sound mind' when he left the marital home for another woman. Moreover, the judges acknowledged that it was impossible to establish when his illness became severe. Nevertheless, they found for his grave lack of discretion of judgment and his inability to assume the essential obligations of marriage. They held: he was completely dependent on the plaintiff; he was 'incapable' of making a decision to marry; and his illness 'had its roots' in his late brother's psychiatric illness. Moreover, without reference to degrees of severity, the judges held that 'depression' was 'an extremely serious illness' that 'radically disrupts an individual's ability to make decisions' and was 'a very debilitating mental illness that distorts the sufferer's perception of what is real'.<sup>111</sup> This implies that, for the judges, depression, regardless of its severity, causes invalidity.

Fourth, judges accepted an allegation of incapacity in a *plaintiff* husband although the psychiatric illness was alleged in the *absent respondent* wife. The plaintiff alleged his *own* grave lack of discretion of judgment on the basis that, due to his youth and ignorance, he did not understand the significance of the respondent's illness; rather, he found it interesting. The plaintiff husband, although alleging that the respondent received electro-convulsive therapy, was unaware of any medication received by the respondent wife at the material time

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<sup>110</sup> 09/80.

<sup>111</sup> 09/65.

and he admitted that her condition deteriorated after marriage. He also admitted that the respondent's parents 'probably' had reservations about the marriage because they would have seen their daughter marrying a 'feckless student, with no job'. He considers that both parties were 'possibly' escaping from 'relatively unhappy' circumstances. However, he had a poor recollection of the two-year courtship; he remembered nothing of the wedding, not even the venue. Nevertheless, the judges, relying on the plaintiff's self-assessment that he had an 'inadequate understanding of the nature of marriage' and was 'immature', held that: he had a poor role model of marriage and family life; and he had a disabled brother who received the greater share of attention. Furthermore, the couple's lack of *desire* for children indicated 'a distorted view of the nature of marriage'. Consequently, he *failed* to evaluate both marriage itself and the respondent as a spouse; he was thus gravely lacking in discretion of judgment.<sup>112</sup>

Fifth, judges accepted an allegation of incapacity in a plaintiff when the respondent became psychiatrically ill after marriage (although the plaintiff alleged pre-marital substance abuse by the respondent). The plaintiff wife alleged *her own* grave lack of discretion of judgment. The judges questioned her *failure* to give 'more serious thought to the wisdom of what she was doing'; she relied on prayer and God's grace for a happy marriage. The judges held that her decision to marry was *not* unreasonable (as others who knew the circumstances thought it would be a successful marriage because the respondent had ceased using drugs). Moreover, the judges acknowledged that assertions of naivety are insufficient to prove nullity. Nevertheless, they concluded, without explanation, that the plaintiff 'was more than naïve' and 'dependent' on the respondent, thus lacking discretion of judgment.<sup>113</sup> 'Unfounded optimism' was considered indicative of grave lack of discretion of judgment in other cases also.<sup>114</sup> Moreover, wilful substance abuse was not always distinguished from dependence.<sup>115</sup> However, in one case, the tribunal did hold that a respondent husband, accused of substance abuse, was 'self-assured and confident'; therefore his incapacity was not proven.<sup>116</sup>

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<sup>112</sup> 09/44.

<sup>113</sup> 09/15.

<sup>114</sup> 09/30; and 09/86.

<sup>115</sup> In 09/8, the judges considered that the respondent's condition at the material time was 'largely irrelevant'; 'drugs affect people's minds'. In 09/16; and 09/44, 'bad habits' such as drunkenness or gambling were accepted, without distinguishing culpable behaviour from addiction. In 09/76; 09/77; and 09/78, judges distinguished abuse and addiction. See Patrick S Morris, 'Alcoholism and Marital Consent', *Studia Canonica*, 34 (2000), pp155-195, at p156-157.

<sup>116</sup> 09/39.

Sixth, an allegation that a party was adversely affected by psychiatric illness in a *family member* sufficed for a judge to accept a plea of incapacity. For example, a plaintiff wife who demonstrated foresight as a teenager in arranging to live with her grandparents because of her volatile relationship with her father (who, she claimed, suffered depression), alleged her own grave lack of discretion of judgment. Although she admitted cohabiting happily with the respondent for two years before marriage, and she had no history of psychiatric illness or psychological impairment, the judges held that her poor relationship with her father ‘pushed’ the parties ‘closer together’ and ‘the maturity shown [in her behaviour] was concerned only with day to day practicalities of life’; the ground was considered proven.<sup>117</sup> Likewise, judges heard cases on incapacity grounds when psychiatric illness was alleged in a parent or parents, even though there was no evidence of psychopathology in the party in whom incapacity was alleged.<sup>118</sup> Moreover, in one case, in which grave lack of discretion of judgment was alleged in an *absent* respondent wife, the judges accepted allegations of her ‘family history’ of depression. Despite witness’ evidence that she was mature and experienced because of a previous long-term relationship, the judges, relying largely on allegations of post-marital *behaviour*, concluded that her previous failed relationships were a reflection of her parents’ lifestyle of successive marriages and cohabitation with several partners. They held that the (absent) respondent had ‘leanings towards depression’, and that her past experiences ‘must have had an effect on her’. Consequently, she entered marriage, understanding it as her parents did, constituting grave lack of discretion of judgment.<sup>119</sup>

Seventh, it was abundantly clear in one case that the judges (erroneously) understood canon 1095 2° did *not* require a psychological cause. Both parties’ grave lack of discretion of judgment was alleged, in addition to the *absent* respondent wife’s inability to assume the essential obligations of marriage. Judges acknowledged that: ‘without a psychological assessment’ it was not possible to determine the cause of the respondent’s behaviour; and her problems possibly began after marriage. Consequently, it was not possible to find for her inability to assume the essential obligations. Nevertheless the judges (without expert opinion) concluded that both parties gravely lacked discretion of judgment.<sup>120</sup> Likewise, in

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<sup>117</sup> 09/4.

<sup>118</sup> In 09/5; and 09/87, psychiatric illness was alleged in one parent and in 09/5, it was alleged in both parents.

<sup>119</sup> 09/56.

<sup>120</sup> 09/55.

another case, the plaintiff wife alleged that the *absent* respondent husband (whose previous marriage also failed) was violent. The marriage lasted fourteen years and five children were born. The plaintiff, alleging her own grave lack of discretion of judgment, testified that her pre-marital pregnancy was *not* the cause of the marriage. However, the judges held that it *was*. There was no evidence of psychopathology; rather, the judges relied on her own admission that she was ‘unable’ to resist the ‘showering of gifts’ from the respondent. They held that her immaturity was demonstrated by ‘the often seen “moth flying too near to the flame” that can be present in human nature’.<sup>121</sup> Therefore, if present in human nature, no abnormality was identified. In another case, judges held that a plaintiff suffered ‘mental turmoil’ because of his drinking, but this was *not* the cause of his incapacity; rather, it was a witness’ *opinion* that his ‘personality was not right for marriage’, which was persuasive.<sup>122</sup>

So, in these cases of psychological incapacity, the judges appeared to consider that no *psychopathology* needed to be established. Judges accepted cases on the basis of unsubstantiated allegations of: pre-marital ‘nervous breakdown’;<sup>123</sup> ‘depression’;<sup>124</sup> and ‘immaturity’, without reference to their severity.<sup>125</sup> Moreover, it was clear that judges were willing to pursue allegations, not only when psychiatric illness or psychological trauma, were alleged or implied, but also on the basis of behaviour alone, for example: pre-marital misuse of alcohol,<sup>126</sup> and aggression,<sup>127</sup> sometimes deteriorating after marriage and leading to imprisonment.<sup>128</sup> When there was no suggestion of psychopathology, judges explained that ‘immaturity’ can be indicated by: ‘rearranging the furniture in the marital home without consultation’;<sup>129</sup> making decisions without involving the other party;<sup>130</sup> being unable to cope with a spouse’s behaviour;<sup>131</sup> poor performance as a parent,<sup>132</sup> or in marriage;<sup>133</sup> failure to

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<sup>121</sup> 09/22.

<sup>122</sup> 09/35.

<sup>123</sup> 09/66.

<sup>124</sup> 09/65.

<sup>125</sup> Grave lack of discretion of judgment was found proven in 09/35; 09/38; 09/39; 09/42; 09/56; 09/69; 09/70; 09/80; 09/85; 09/88; and 09/92. In 09/48; and 09/49, the grounds were found not proven.

<sup>126</sup> 09/35.

<sup>127</sup> 09/94: The female plaintiff, in whom the ground is alleged, claims that she had counselling while at school because she was an ‘angry teenager’.

<sup>128</sup> 09/16.

<sup>129</sup> 09/36.

<sup>130</sup> 09/42.

<sup>131</sup> 09/38.

<sup>132</sup> 09/66.

<sup>133</sup> 09/86: Judges acknowledged that all was well until the respondent’s employers relocated but the couple could not move because of the plaintiff’s family business. They held: the plaintiff ‘was not equipped to deal

discuss marital problems;<sup>134</sup> irresponsible behaviour,<sup>135</sup> such as heavy drinking on Friday nights;<sup>136</sup> or having unrealistic expectations.<sup>137</sup> Moreover, despite the legal presumption of capacity, judges sought evidence of *maturity* and found for nullity in its *absence*.<sup>138</sup> This held true also when considering other grounds.<sup>139</sup> Even when judges found it difficult to define what *was* required by law for capacity, they concluded that whatever was required, was absent, with specific reference to ‘conjugal love’.<sup>140</sup>

**Weight Given to Allegations:** Without establishing any resultant psychological trauma, judges gave weight to *allegations* of an extraordinary wide range as indicators of incapacity, from how a party *felt*, through *events* or *circumstances* occurring at the material time, to *vague assertions* of immaturity. These were as follows: feeling ‘let down’ by parents;<sup>141</sup> a party needing to feel respected;<sup>142</sup> experiencing ‘cold feet’,<sup>143</sup> remote<sup>144</sup> or recent bereavement;<sup>145</sup> the marriage of friends at the material time;<sup>146</sup> baptism of a child occurring at the time of the marriage;<sup>147</sup> marrying ‘on the rebound’;<sup>148</sup> parties having different personalities;<sup>149</sup> parties coming from different socio-economic backgrounds;<sup>150</sup> one party being professionally subordinate to the other;<sup>151</sup> a party requiring a *visa*;<sup>152</sup> a turbulent courtship;<sup>153</sup> youth;<sup>154</sup> parties having nothing,<sup>155</sup> or little, in common;<sup>156</sup> parties keeping

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with this’; he was ‘hopelessly ill-prepared’ to deal with a person such as the respondent, although he did come to appreciate this, but when it was ‘too late’.

<sup>134</sup> 09/66.

<sup>135</sup> 09/69.

<sup>136</sup> 09/90: Friday-night drinking was ‘indicative of someone out of her depth’.

<sup>137</sup> 09/94.

<sup>138</sup> 09/04; 09/51; 09/83; and 09/92. In 09/38: The plaintiff could not remember what led to the marriage forty years previously; judges held that it ‘should never have taken place’.

<sup>139</sup> 09/54.

<sup>140</sup> 09/83.

<sup>141</sup> 09/38.

<sup>142</sup> 09/78; and 09/79.

<sup>143</sup> 09/78.

<sup>144</sup> 09/33.

<sup>145</sup> 09/35; 09/36.

<sup>146</sup> 09/55.

<sup>147</sup> 09/76. The civil marriage was validated when the couple’s child was baptised.

<sup>148</sup> 09/43.

<sup>149</sup> 09/35; and 09/51.

<sup>150</sup> 09/38; and 09/69.

<sup>151</sup> 09/23: The female plaintiff, married a widower with children; professionally she had been his subordinate.

<sup>152</sup> 09/61: The *timing* of the marriage was, allegedly, *influenced* by the respondent’s need for a visa.

<sup>153</sup> 09/51; and 09/75. The hope was that marriage would improve the situation.

<sup>154</sup> 09/6; 09/36; and 09/38.

<sup>155</sup> 09/66; and 09/69.

<sup>156</sup> 09/94.

separate finances;<sup>157</sup> ‘pressure to marry’;<sup>158</sup> failure to communicate;<sup>159</sup> failure to evaluate the impact of alcohol consumption (despite witness evidence that nobody could have predicted it);<sup>160</sup> failure to cooperate with civil authority;<sup>161</sup> inability ‘to accept the respondent’s prodigality’;<sup>162</sup> ‘emotional insecurity’;<sup>163</sup> academic maturity ‘outmatching’ emotional maturity;<sup>164</sup> ‘naivety’;<sup>165</sup> lack of self-determination;<sup>166</sup> ‘drifting into marriage’;<sup>167</sup> having a ‘weak character’ evidenced by ‘flitted from job to job’;<sup>168</sup> being ‘spoilt’;<sup>169</sup> and having a ‘selfish attitude’.<sup>170</sup> A party’s ‘desires’ and ‘lack of self-esteem’,<sup>171</sup> even when the tribunal acknowledged that the party was ‘very much in control of her decision to get married’,<sup>172</sup> nevertheless, carried weight. Both being influenced by parents,<sup>173</sup> and conversely, not taking parental advice or that of others,<sup>174</sup> were considered indicative of immaturity, or at least of indicating either that ‘all was not well’ before marriage,<sup>175</sup> or a party’s ‘inability’ to weigh the situation properly.<sup>176</sup> Even post-marital aggression;<sup>177</sup> post-marital traumatic stress;<sup>178</sup> and incurred debts,<sup>179</sup> were considered pertinent, but how these circumstances affected consent given at the material time was not clarified by the judges.

Whilst some of these circumstances, prevailing at the material time, could be held to have caused some degree of *influence* or even pressure, the judges did not establish the strength of any such influence or pressure. Nor did they identify any ‘grave anomaly’. Therefore, the inference was that these circumstances *must have had* a detrimental effect on the parties,

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<sup>157</sup> 09/36; and 09/50.

<sup>158</sup> 09/3.

<sup>159</sup> 09/ 56; and 09/79.

<sup>160</sup> 09/57.

<sup>161</sup> 09/61.

<sup>162</sup> 09/79.

<sup>163</sup> 09/86.

<sup>164</sup> 09/50.

<sup>165</sup> 09/55. In 09/20, despite many obstacles, the judges, without explanation, declared that they could arrive at moral certainty and ‘safely assume the plaintiff’s naïveté coming from rural Ireland’.

<sup>166</sup> 09/79.

<sup>167</sup> 09/20.

<sup>168</sup> 09/66.

<sup>169</sup> 09/38; and 09/56.

<sup>170</sup> 09/56.

<sup>171</sup> 09/51.

<sup>172</sup> 09/65.

<sup>173</sup> 09/50.

<sup>174</sup> 09/36.

<sup>175</sup> 09/75; and 09/94.

<sup>176</sup> 09/39.

<sup>177</sup> 09/20.

<sup>178</sup> 09/45.

<sup>179</sup> 09/55.



resulting in serious character flaws supporting incapacity for marriage. This goes against the Christian anthropological principle that one's past does not necessarily determine one's future. Sometimes, an imprudent decision,<sup>180</sup> or finding that 'something' was wrong,<sup>181</sup> sufficed. Moreover, the judges found that an *invalidating* defect can even exist in the *circumstances* themselves (and not, as should be the case, inherent in the parties).<sup>182</sup>

As seen in the study of the law sections, in many cases, judges, instead of seeking to establish the required serious 'anomaly', considered that *failure to exercise* the critical faculty, or *failure to give sufficient* thought or consideration to the decision to marry, sufficed to prove nullity.<sup>183</sup> Moreover, the *seriousness* or *depth* of pre-marital discussions about marriage and the *degree* to which discretion of judgment was *exercised* was considered relevant, without reference to how this could be measured.<sup>184</sup> *Lack* of evidence proving that the parties *gave* sufficient thought to the decision sufficed for the tribunal to conclude that they did not.<sup>185</sup> Even when a plaintiff husband admitted having *de facto* pre-marital discussions and judges accepted that he had a proper understanding of marriage, the judges held that he *failed* to make a *proper* assessment of the decision to marry.<sup>186</sup> Ignoring 'warning signs',<sup>187</sup> (even when judges accepted this was a free choice<sup>188</sup>), or a party's own testimony that they failed to plan ahead, sufficed to support incapacity,<sup>189</sup> as did failure to consider an *alternative* to marriage.<sup>190</sup> A pre-marital sexual relationship was held to 'demonstrate a disordered

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<sup>180</sup> 09/21: The tribunal held that whilst the decision to marry 'is difficult to explain', the 'only' explanation was that the respondent had exerted 'control' over the plaintiff.

<sup>181</sup> 09/45. See also ft 72 above.

<sup>182</sup> 09/80.

<sup>183</sup> 09/3; 09/5; 09/6; 09/7; 09/8; 09/11; 09/15; 09/19; 09/20; 09/21; 09/22; 09/31; 09/32; 09/38; 09/42; 09/43; 09/44; 09/51; 09/60; 09/68; 09/69; 09/81; 09/83; 09/90; 09/92; and 09/94. For example, the terminology used included: 'the decision ... lacked any balanced, reasoned, objective, critical, balanced (*sic*), exercise of judgement'; 'this was not a reasoned decision'; '[the decision] was not based on a mature reflection'; 'the plaintiff gave no thought [to the decision]'; 'the plaintiff failed to bring sufficient reflective thought to bear on the nature of marriage ... she was thus gravely lacking the discretion of judgment required for marriage'; 'there would seem to have been little discussion about children'. In 09/79: A sole judge held: 'The question the Court has to decide is not the maturity of the plaintiff, but whether or not he brought sufficient reflective thought to bear on the decision to marry'.

<sup>184</sup> 09/5; 09/6; 09/7; 09/15; 09/20; 09/21; 09/34; 09/48; 09/51; 09/79; 09/83; 09/92.

<sup>185</sup> 09/4; 09/15; and 09/38.

<sup>186</sup> 09/79.

<sup>187</sup> 09/4; and 09/81.

<sup>188</sup> 09/16.

<sup>189</sup> 09/92; 09/57; and 09/79.

<sup>190</sup> 09/83.

understanding of the place of a sexual relationship within marriage’, constituting grave lack of discretion of judgment, without reference to moral responsibility.<sup>191</sup>

Moreover, in some cases judges focused on a party’s *motive* or *intention*. Whilst motive might *influence* a decision (for example, when someone wishes to escape a difficult or intolerable situation), it can, nevertheless, co-exist with a proper motive and intention to marry.<sup>192</sup> Therefore, to prove *incapacity*, the existence of a consequent and sufficiently severe psychological *determinant* impairment must be established,<sup>193</sup> but this was not obvious in the judgments.<sup>194</sup> Furthermore, although some law sections acknowledged the distinction between psychological pressure and persuasion of conscience, these were not distinguished in concrete cases. Even when a party believed marriage ‘was the right thing to do’, the judges held that marriage for this reason indicated: a lack of commitment;<sup>195</sup> the ‘sole motive’ for marriage in a case of pre-marital pregnancy;<sup>196</sup> or that ‘love for the plaintiff was not uppermost in the respondent’s mind’.<sup>197</sup> Moreover, when judges accepted that a plaintiff’s faith informed her decision, they held that her grave lack of discretion of judgment was evidenced by her failure to heed ‘alarm bells’.<sup>198</sup>

Throughout these cases, therefore, the focus of the judges’ attention was on behaviour, sometimes even exclusively within marriage - and if this was considered not conducive to marital harmony, judges found for incapacity.<sup>199</sup> Post-marital events having an adverse effect on marital relationships were also given weight. These included: the birth of children;<sup>200</sup> illness;<sup>201</sup> death;<sup>202</sup> relocation;<sup>203</sup> and infidelity.<sup>204</sup> In many cases, several decades had

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<sup>191</sup> 09/79; and 09/94.

<sup>192</sup> See Cormac Burke, ‘Sentence of 14 November 1996’, available at: <http://www.cormacburke.or.ke/node430>.

<sup>193</sup> Mendonça, *Anthology*, Case No; 79-095, *coram* Fiore, 26 May 1979, *Dec* 71 (1988) pp295-299, p44.

<sup>194</sup> 09/31; 09/32; 09/34; 09/60; and 09/79.

<sup>195</sup> 09/69.

<sup>196</sup> 09/66.

<sup>197</sup> 09/81. Mendonça, *Anthology*, Case No: 77-052, *coram* Anné, 26 April 1977, *Dec* 69 (1987), pp221-227, p31: ‘... the right to “*communio vitae*” is juridic. .... Conjugal love is not a juridic element’. Case No: 77-095, *coram* De Jorio, 25 June 1977, *Dec* 69 (1987), pp343-351, at p32: ‘[A]bsolute communion of life and love would be beyond the capacity of most people’.

<sup>198</sup> 09/90.

<sup>199</sup> In 09/88, the judges held that the respondent’s alleged behaviour was ‘reprehensible’, indicating ‘total lack of respect’ for the plaintiff and demonstrating ‘a complete lack of affective maturity’.

<sup>200</sup> 09/82.

<sup>201</sup> 09/66.

<sup>202</sup> 09/36.

<sup>203</sup> 09/34; and 09/43.

elapsed since the marriage; therefore, establishing a party's psychological status at the material time would be difficult even with expert assistance.<sup>205</sup>

**Use of the *Vetitum*:** A *vetitum* (a prohibition against future marriage) or *monitum* (a warning against a future marriage) was imposed in four cases of proven grave lack of discretion of judgment. Although there was no evidence of discussion, reasons were given in only two of these cases;<sup>206</sup> yet, all were confirmed at Second Instance. ITSIS imposed one additional *vetitum* when this ground was proven.<sup>207</sup> In one other case, in which a party was found incapable of assuming the essential obligations of marriage, the tribunal imposed a *vetitum*, simply declaring, without explanation, that the alleged psychiatric condition, of the *unlocated respondent wife*, was 'permanent'.<sup>208</sup> In no other case did the judges discuss the possibility of imposing a *vetitum*. Nor did they explain how they considered the proven ground of incapacity not to be permanent;<sup>209</sup> in some cases they simply asserted, without explanation, that the party's condition was 'not permanent'.<sup>210</sup> In one case, judges stated simply that a *vetitum* was 'inappropriate'.<sup>211</sup> Interestingly, in another case, the judges, finding for the plaintiff's grave lack of discretion of judgment, acknowledged that her 'behaviour and attitudes have not changed'. Yet they did not discuss a possible *vetitum*, despite her desire to enter a new marriage to a Catholic and in the Catholic Church.<sup>212</sup>

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<sup>204</sup> 09/19; 09/28; 09/30; 09/62; and 09/83.

<sup>205</sup> In 09/17, the marriage took place forty years earlier and in 09/20, the marriage took place almost fifty years earlier.

<sup>206</sup> In 09/19 a *vetitum* was imposed on the plaintiff because of subsequent failed relationships. In 09/36, the judges were not convinced that the plaintiff understood marriage; a *monitum* was suggested. In 09/45, a *vetitum* was imposed on the respondent; although the reason was not stated, there was evidence that he suffered psychological trauma after marriage. In 09/80, a *vetitum* was added in respect of the plaintiff; the reason was unclear.

<sup>207</sup> 09/8: A *vetitum* was added in respect of the respondent at Second Instance. No discussion or reason was obvious.

<sup>208</sup> 09/44: The plaintiff husband, asserting that the respondent's condition was one of 'a psychotic, delusional state', was 'loath to give a diagnosis'. See Robitaille, 'Through the Lens of *DC*', p154: 'In the judgment, the reasons for the nullity of the union must be clear, as well as the reasons for the imposition of the *vetitum*, and the procedure for having it lifted'.

<sup>209</sup> The imposition of a *vetitum* is mandatory when the cause of incapacity is permanent; consideration of a *vetitum* is mandatory in cases of simulation, but this was not obvious in judgments: see *DC*, Article 251 in Appendix V.

<sup>210</sup> 09/17; 09/31; 09/32; 09/43; 09/62; 09/68; 09/79; and 09/94. In 09/69 the judges accepted the plaintiff's word that her present relationship is 'a very stable relationship on every level'.

<sup>211</sup> 09/57.

<sup>212</sup> 09/11.

## Conclusion

The local tribunals studied were willing, not only to pursue incapacity grounds in the absence of any psychiatric illness or psychological impairment and without expert opinion, but without explaining how the cases fell under the permitted exception of proceeding without an expert. Therefore, the exception has become the rule.<sup>213</sup> This is in breach of canonical requirements expressed in *CIC* and *DC*, which have been explained repeatedly in: Rotal jurisprudence; Papal Allocutions; and a Declaration of the Church's Supreme Tribunal. Whilst the judges in the Regional Tribunal of Dublin consulted experts routinely, the existence of true psychopathology, and the demonstration of its severity and effect on the party concerned *at the material time*, was nevertheless, and like in the Southwark tribunals, not always established. There was also inconsistency in practice amongst local tribunals in the application of both procedural and substantive law. How much of the dissonance in interpretation of substantive law is due to lack of access to authentic translations of Rotal decisions is unclear.

The focus of attention, therefore, in all these tribunals, unlike the Rota, was on *behaviour*, without reference to its *cause*. This led judges to address, not the *psychological capacity* of the party to elicit valid consent, but rather whether or not the party gave what the judges deemed to be 'sufficient' thought and consideration to the decision to marry. Moreover, if the judges considered that a party behaved in a way which the judges deemed not conducive to marital harmony, the judges found for nullity. This implies a reasoning that if a party behaved in such a way, they *could not* have understood marriage as the Church understands it or they *could not* have behaved otherwise. This, however, leaves no room for wilful bad behaviour or negligence or other moral irresponsibility. Moreover: allegations, even when uncorroborated, given in hindsight and through the prism of failure, were frequently accepted as facts; and post-marital events were often given weight without explanation as to their relevance to consent already exchanged. There was, therefore, little evidence that the principles of Christian anthropology were applied; less than ideal childhood experiences were

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<sup>213</sup> Gerard T Jorgensen, 'The Role of the Expert in Tribunal Proceedings', *CLSGB&I Newsletter*, 142 (2005), pp62-73, at 66, citing G Versaldi, 'The Role of Experts in Marriage Procedures', *Forum*, 9 (1998), 2:91 and M F Pompedda, 'Incapacity to Assume the Essential Obligations of Marriage', R Sable (Ed), *Incapacity for Marriage: Jurisprudence and Interpretation*, (Pontificia Universitas Gregoriana, 1987) p210. Jorgensen accepts that judges 'go beyond their competence' in psychological incapacity cases; non-use of experts must 'remain the exception'.

seen as root causes of incapacity as were allegations of immaturity, without reference to cause or severity. In many cases there was no distinction between: failure (even culpable failure) and incapacity; difficulties and incapacity; wilful behaviour and compulsive behaviour; character *traits* or personality *defects* and personality *disorders*; or imprudent decisions or mistakes and invalid decisions.

Therefore, in the local cases studied, it was impossible to establish, from the Acts: whether parties' rights were upheld; the judges' rationale for not seeking expert evidence; or the judges' argument from a canonical presumption of validity to a finding for the contrary. Nor was it possible to establish the existence of an antecedent 'grave anomaly' in each case; consequently, the severity and effect of any such anomaly could not be demonstrated. Moreover, judges failed to explain their competence to establish the existence of psychological causes and to assess their severity and effect on a party's capacity for marriage at the material time, in the absence of any expert assistance. Nor did they explain: the methodology used; how evidence was weighed; or how obstacles to reaching moral certainty were overcome. This is particularly pertinent when the questions required by law to be put to the expert remained unanswered. Despite the requirement to consider all possible causes for the failure of the marriage, the tribunals failed to do this also.

Tribunals, therefore, leave themselves open to criticism for their apparent failure to engage in dialogue with parties, thereby instructing them of their rights, the meaning of grounds for nullity, and the process involved. They can be criticised for not ensuring that the Acts demonstrate: *prima facie* bases for pleas; that respondents were legitimately cited; the tribunals' methods of citation; that parties' rights were protected regarding access to evidence, observations of the defender of the bond, and reasoned decisions, which go to efficacy and validity of the decisions themselves; and an explanation to parties as to how they can have recourse against the decisions. Moreover, in failing to consult experts, they have deprived parties of the 'scientifically sure' methods of psychological assessment required by Papal Allocutions to provide evidence of incapacity to marry. It appears, therefore, that although canonical procedures are already in place to ensure a fair trial, much could be done at local level to ensure that these are followed within the tribunals themselves.

## CONCLUSION

Roman Catholic Canon Law provides for the use of experts in a wide range of areas of ecclesial life. Constructive dialogue with experts is, therefore, an important factor in the administrative forum, namely: the restoration of art, the restoration and building of churches, and the administration of finance and alienation of property; the admission of candidates to Holy Orders and Religious Institutes and the exercise of ministry; and the teaching office of the Church which occurs in universities, schools, catechesis and missionary activity. It is also an important factor in the judicial forum with regard to the management of marriage nullity cases in the tribunals of the Church. The laity may play a significant role as experts in all of these areas and they are not always explicitly required to be Catholics. However, *CIC* places the norms governing experts under 'judicial processes'. Thus, the law on experts in the administrative forum remains vague (and an examination of *CIC* 1917 and *CCEO* does little to clarify the *CIC* provisions). Despite the important role experts play, and failure to consult them when mandated by law can invalidate the subsequent decisions, the law does not define 'expert'.

With regard to art, architecture and finance, consultation with experts is mandated by law. However, the law is unclear as to: the qualifications required of the experts (and indeed, in some cases the disciplines from which they are to be drawn and their role); and whether they are to be consulted individually or collectively. Moreover, the law is not always clear as to who is responsible for appointing the experts. There is no explicit requirement that these experts have expertise in canon law, despite their involvement in canonical affairs. Nor does the law oblige the Church to provide (or provide for), any special training for experts or for their continual professional development. There are also areas upon which the commentators fail to clarify the canonical position. Although they acknowledge the need for formal qualifications, commentators are often unhelpful as to precisely what expertise is required; some require only competence. Moreover, few commentators suggest appointing experts from outside the Church. They are silent as to whether the experts are to be consulted individually or collectively and many are silent on the effect of non-compliance with mandatory consultation. Commentators are also divided on the meaning of terms relevant to the appointment of experts, for example: whether 'Christ's faithful' means 'full communion' for the purposes of appointment of an expert to an office; whether 'the fourth degree' of

consanguinity or affinity' is inclusive for the purpose of disqualifying a candidate for appointment as an expert; and what constitutes a 'grave reason' for removal of an expert from office.

The Church has a particularly difficult task in relation to assessing candidates' suitability (including psychological fitness) for admission to Holy Orders and Religious Life and during ministry following admission. The practice of routine psychological testing in assessing suitability is questionable. Moreover, the candidate's right to privacy and confidentiality must be balanced against the rights of the community which they will serve. This right to privacy is especially pertinent when the psychiatric and psychological status of candidates and, indeed, priests and religious, needs to be established by the relevant ecclesiastical authorities. Yet, although experts in these fields must be consulted in prescribed circumstances, the law is vague as to: the precise disciplines and qualifications required of the experts; the methods of testing suitability to be used by them; and the use, storage and disposal of expert reports.

Despite the importance the Church places on education, its stringent provisions for the training of all teachers, catechists and missionaries, and the high standards of teaching it requires, *CIC* does not use the term 'expert' to describe educators. However, it is clear that the highest standards are required in all educational institutions. Professional knowledge, expertise, and specialist, scientific and pedagogical skills are required of these educators, and over a wide range of subjects. Interestingly, the later *CCEO*, reflecting the advances in technology since the promulgation of *CIC*, not only calls on 'experts' in social media to assist bishops, but obliges bishops to train experts and to legislate on this matter at local level. There is no doubt, however, that *CIC* and Vatican documents require both that experts be trained and used in the field of education. Therefore, Bishops' Conferences could do much to clarify the ambiguities in the law, such as: the disciplines from which experts are to be drawn; whether they can be drawn from outside the Church; the professional qualifications required of them; whether or not failure to consult them when mandated by law invalidates subsequent decisions; what educational institutions and subjects require the teacher to have a mandate; who is responsible for obtaining or granting the mandate; what warrants removal of the mandate; what canons govern higher institutes of religious studies; and what constitutes an 'equivalent' title to a pontifical doctorate. As canonists disagree about many of these

issues, clarification is required and would improve the understanding of rights and roles in this field.

The law relating to experts in the judicial forum enjoys greater clarity than it does in the administrative forum. Much has been achieved since the promulgation of *CIC* in resolving any doubt about the mandatory requirement to consult experts in the special cases of psychological incapacity for marriage under canon 1095: experts must be consulted. Papal Allocutions (1987 and 1988) have focused on the need to consult experts to establish, by scientifically sure methods, the existence of psychopathology and its severity and to demonstrate its effect on the party's capacity to marry at the material time of exchanging consent. Moreover, the Church's supreme Tribunal issued a Declaration (1997) outlining the limited circumstances in which the exception to the general rule provided in canon 1680 (that is, the mandatory requirement to consult experts in psychological incapacity cases) can be invoked. *DC* (2005) put the mandatory requirement to consult experts when any incapacity enshrined in *CIC* canon 1095 was pleaded beyond doubt. It further clarified the judge's obligations in: appointing the expert; in posing specific questions to him; and in interpreting expert reports in light of Christian anthropology. It also clarified what was required in and of the expert in terms of personal qualities and professional functions. Some canonists rightly acknowledge the requirements to engage experts in psychological incapacity cases and the limited circumstances in which the exception can be invoked. However, other canonists find innovative ways of circumventing the principle of the mandatory use of experts and do not explain their reasons for invoking the exception: this has the potential to damage society's view of the Church on which the parties involved rely for a just decision.

The study of cases heard in 2009 in Southwark and Dublin demonstrated a stark contrast between the practice of the Roman Rota and that of local tribunals, despite the fact that local tribunals are charged with following Rotal jurisprudence exclusively. Psychological incapacity cases from the Rota demonstrated the routine use of experts. Affirmative decisions relied, not simply on expert evidence of the existence of a serious condition, but on demonstrating its effect on the party concerned at the material time. Without this, and indeed, when there was disagreement amongst the experts consulted, the validity of the marriage was upheld by the Rota. In contrast, on the basis of the records, the Southwark tribunals rarely consulted experts in these incapacity cases and, when they did, the rationale



for so doing was not obvious. Although the Dublin tribunal consulted an expert routinely, the expert reports did not always focus on identifying true psychopathology, and, more importantly, on the severity and effect of any such anomaly on the party *at the material time*. Moreover, in both Southwark and Dublin, the provisions of *CIC* and *DC* regarding the appointment and instruction of experts were not met. In some Southwark cases, the expert report was not sought for the party in whom incapacity was alleged; in another case the expert report was set aside and the judges found for the party's incapacity, although the expert report supported strongly the party's capacity. Crucially, in both the Southwark and Dublin tribunals, the questions which are required to be put to the experts remained unanswered.

When experts were not consulted in Southwark cases and no reasons were given, one can only conclude that the tribunals concerned did not acknowledge the mandatory requirements to do so. Moreover, as the judgments neither explained clearly the methodology used to assess the psychological status of the party concerned, nor the argument from a presumption of personal capacity for, and validity of, marriage, to a finding for the contrary, it was not possible to ascertain the causal link between psychopathology and the failed marriage. Both in Southwark and in Dublin the judges' interpretation of law varied, even within their own tribunal. First, most judges employed a broad interpretation of 'the essential matrimonial rights and obligations' which limit the scope of canon 1095. Second, ignoring Christian anthropology, many judges considered that difficult childhood experiences determined a party's future, rendering them incapable of marriage at the material time. Third, instead of looking for signs of psychopathology and the party's *capacity* to marry, judges addressed the question as to whether or not a party *exercised* discretion of judgment. These interpretations led the judges to focus on *behaviour* without reference to its cause. These practices are in need of reform. Church norms require the judge to look beyond behaviour to its cause; it is the role of the expert, not the judge, to determine, by scientifically sure means, whether or not the behaviour has a psychopathological basis and its effect on the party at the material time. The expert's advises the judge, whose role it is to declare whether or not this leads him to moral certainty of nullity.

So, decisions for nullity appeared to be based on parties satisfying judges that the parties failed to exercised due diligence in their decision to marry or failed to behave in a way

conducive to marital harmony. There was little evidence from the Acts of the cases in Southwark particularly that the existence of any serious psychopathology was established, let alone its severity and its effect on the party's capacity at the material time, to exercise the natural law right to marry. Consequently, tribunals failed to distinguish: *failure to exercise* (even culpable failure) discretion of judgment and incapacity; *difficulty* and incapacity; wilful behaviour and compulsive behaviour; character *traits* or *slight* personality *defects* and serious personality *disorders*; *imprudent* decisions or mistakes and invalid decisions. The tribunals should have engaged experts and instructed them to focus on the effect of psychopathological causes at the material time. The tribunals must improve their practice in this regard; it is important that justice is not only done, but is seen to be done.

Moreover, failure to record procedures, and, indeed, procedural errors, made it impossible to establish, from the Acts, whether or not parties' rights were protected sufficiently to ensure validity of the decisions. The Church, therefore, is left open to criticism. The law requires consultation with experts in order to assist in decision-making; sometimes that consultation goes to validity of the decision. The Church, therefore, needs to be seen to engage in sufficient dialogue with experts, and indeed with parties to marriage nullity cases, whether Catholic or not, in the quest for expertise to assist in this decision-making process. Invalid decisions as a result of non-compliance with church norms can have serious repercussions for both the Church community and for perceptions of it in wider society. As the stable patrimony of the Church needs to be protected, candidates for Holy Orders and Religious Life need to be deemed suitable, seminarians and the Catholic community require education to a high standard in order to fulfil the Church's mission, so parties to marriage nullity cases need their status in life (freedom or otherwise to marry) determined. To declare a person psychologically incapable of exercising a right of natural law is to say something very profound about that person; such a declaration requires an objective and scientific basis.

In short, as the norms governing the use of expert in the administrative forum are unclear on some key issues, the Church could benefit from more detailed provisions - and the Bishops' Conference is the obvious competent body to address this; however, by way of contrast, the legal structure for the use of experts in the judicial forum are already in place and clear - but these norms need to be more rigorously enforced.

**THE USE OF EXPERTS IN THE ROMAN CATHOLIC CHURCH**  
**WITH PARTICULAR REFERENCE TO MARRIAGE CASES**

EITHNE D' AURIA

Volume 2

Appendices and Bibliography

## APPENDICES

The texts of the extracts from documents referred to in Volume I and contained in Volume II have been removed for copyright reasons. However, the documents in Appendices I-IX are listed below. Most are available on the internet and all extracts from Volume II are available in hard copy from Cardiff University Library.

**APPENDIX I:** Canons of The Code of Canon Law (1983) (*CIC*)

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