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FOREWORD

The Canon Law Society of America (CLSA) is pleased to present the Proceedings of the seventy-first annual convention held in Louisville, Kentucky, October 12-15, 2009. The CLSA annually publishes for its members and others in the canonical community the major address, seminars and reports presented at the annual meeting.

We are grateful to the presenters who provided their final texts in a most timely fashion. Included in this edition of CLSA Proceedings is a listing of the participants attending the Louisville convention. This adaptation follows similar formats used by our sister societies in Australia, Canada, and Great Britain & Ireland. It also provides a record for those members who may earn continuing education credits for attendance.

The CLSA, established on November 12, 1939 as a professional association dedicated to the promotion of both the study and the application of canon law in the Catholic Church today, numbers over 1,400 members who reside in the United States and thirty-four other countries. CLSA Proceedings 71 (2009) should take its place among previous volumes as a professional resource. Additional copies of this volume may be purchased from the CLSA website: www.clsa.org.

For CLSA membership information, contact the office of the Executive Coordinator or the CLSA website.

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participation of the lay faithful in pastoral responsibilities."

Lay persons in the Church have always contributed to the life of a parish. In the years following the Vatican Council II many programs have provided for the education and formation of the laity. In addition, many episcopal conferences have formulated standards for accreditation and certification of lay ecclesial ministers to assure quality pastoral care. The needs of the times change and attention must continue to be given to ongoing formation of lay ecclesial ministers.

The Church is strengthened and the world is given great witness to the power of the Holy Spirit whenever the members of the Church work together to serve the needs of humanity. The kingdom of God is advanced here on earth by the generous service and dedicated commitment of priests and laity collaborating with one another. We rely on the Providence of God to supply laborers for the vineyard.

SEMERN

PROCEDURAL LAW:

SOME SUGGESTED REVISIONS AFTER TWENTY-FIVE YEARS

Reverend Ian Waters

I am honored to be invited to address you. The topic I have been given is *Procedural Law: Some Suggested Revisions after Twenty-Five Years*. I understand a workshop as a presentation of some reflections by me, leading to an interactive discussion about revisions that could be desirable or helpful. I am from the antipodes, in fact from the ends of the earth, as Australia and New Zealand are the two nations farthest in distance from the Holy See.

I shall start with a few background facts and statistics about Australia and New Zealand, and the Catholic Church there. I shall then look at six canons where adjustments would certainly help us in Australia and New Zealand. Then, in our discussion we could consider the implications for any change in your own situation in the United States, and whether there are other canons that could be adjusted. I understand that Archbishop Francesco Coccopalmerio, President of the Pontifical Council for Legislative Texts, has advised your Society that any submissions about amendments to the code would be considered by the Pontifical Council.

1. Australian and New Zealand Background

Australia, the world's oldest continent, was settled by Europeans only in 1788, ten years after Louisville was settled. Its land mass is approximately that of the United States minus Alaska. It was established as a penal colony for the not yet united kingdoms of Great Britain and Ireland, and its first three priests were Irish political prisoners. In 1804, it was made a prefecture apostolic (with one of the prisoners as its first prefect apostolic); in 1819, it became part of the Vicariate Apostolic of The Cape of Good Hope, Madagascar, Mauritius, New Holland and the Adjacent Islands; and in 1834 a vicariate apostolic autonomous from the other places. In 1842, the hierarchy was established with the vicariate being divided into three dioceses, one being the Archdiocese of Sydney, the first Metropolitan See created in British Dominions since the Reformation. There are at present thirty-three particular churches, namely five

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1 John Paul II, apostolic exhortation *Christifideles laici*, December 30, 1988, n. 26; *Orbis* 18:35 (February 9, 1989) 573.
Metropolitan Sees, two non-metropolitan Archbishops, twenty-one suffragan dioceses, a military ordinariate, and four Eastern church archeparchies (Chaldean, Maronite, Melkite and Ukrainian). Auxiliary bishops appointed to various archeparchies normally number twelve, which results in the Australian Catholic Bishops Conference (ACBC) having forty-five members. There is an apostolic nunciature in Canberra, the national capital. Australia was subject to the Congregation for the Propagation of the Faith until 1976.

Australia as a nation came into existence in 1901 when the six British colonies federated as six states of the new nation. There are also two territories. We are governed practically identically as Canada is: the British monarch is the head of state represented by a governor-general; the Westminster parliamentary system of government is used; as is the British judicial system. English is our language; its usage is English, not American. There are twenty-one million Australians; 26.5 percent are Catholic.

A neighboring country is New Zealand, settled a little after Australia, with a formal treaty being ratified with the indigenous Maori people in 1840. It is four hours flying time and two time zones east of Australia. From 1830, it was part of the Prefecture Apostolic of the South Sea Islands, and from 1846 part of the Vicariate Apostolic of Western Oceania. In 1848, the first two New Zealand dioceses were created. New Zealand now has one Metropolitan See, five suffragan dioceses and a military ordinariate. With auxiliary bishops, the New Zealand Bishops Conference normally numbers nine. There is an apostolic nunciature in Wellington, the national capital. New Zealand is still subject to the Congregation for the Propagation of the Faith.

When the Australian states were planning federation, New Zealand considered being part of the federation, but decided to remain an independent nation. The political system, governance, head of state and language are similar to Australia. There are almost four million New Zealanders; only 15 percent are Catholic.

Ecclesiastically, past linkages have included New Zealand sharing Australia's apostolic delegate from 1914 until 1969; New Zealand's bishops being summoned to two of Australia's plenary councils (1885 and 1937); New Zealand bishops meeting with the Australians from 1890 until the 1940s. Present linkages include having the one tribunal of appeal for the two nations, the jurisdictions of the Australian Eastern eparchies (except the Maronite) embracing New Zealand, and both bishops' conferences, along with those of Papua New Guinea and the Solomon Islands, and the Pacific, forming the Federation of the Episcopal Conferences of Oceania. The provinces of some religious institutes embrace both nations, and we have the one canon law society for the two countries.

March 4, 1878, with St. Andrews and Edinburgh as the Metropolitan See. Baltimore was established as a diocese (November 6, 1879) and a Metropolitan See (April 8, 1808) well after the United States became independent of Great Britain in 1776. The first Metropolitan See in British India (Agra, Bombay, Calcutta, Colombo, Madras, Pondicherry and Vizagapatam) were created on September 1, 1886.
and discipline of the clergy causes: That a faculty be granted to the bishops to hear and decide such cases without observing the legal formalties strictly; and that their decisions be considered valid and binding provided that justice and equity have been clearly fulfilled: ...  

After the promulgation of the 1917 code, in theory every diocese in the Catholic Church had a tribunal. In practice, only some in Australia and New Zealand had one. In 1927, ten years after the code was promulgated, only twelve of the twenty-seventy sees then in Australia and New Zealand had a tribunal, and moreover it would appear that some listed in the Australian Catholic Directory were mere book entries. The Fourth Plenary Council of Australia and New Zealand in 1937 mentioned a matrimonial tribunal in the diocesan curia in one of its 683 statutes, and in another stated that priests have no authority to declare a marriage invalid, but must commit it to the judgment of the ordinary. Clearly, such a matter was low on the list of episcopal concerns.

From the late 1930s, the Holy See started to promote the idea of regional tribunals. In fact, the first regional tribunals were in 1938 in Italy, where there was a proliferation of small dioceses, followed by the Philippines in 1940 and Canada in 1946. Later they were established in some parts of France from 1965, in Colombia in 1967, as well as in other places.

In 1953, at the initiative of the Holy See, the diocesan tribunals in Australia were abolished and replaced by provincial tribunals; for second instance, the five provincial tribunals appealed to each other in a round-robin basis. By the late 1960s, it was clear that this was unsatisfactory as only the tribunals of Sydney and Melbourne were equipped with sufficient skilled and qualified personnel to function satisfactorily. Therefore, the Holy See agreed that a Tribunal of Appeal be established for Australia, and that New Zealand use it as well. It was erected in 1975. The most skilled and qualified personnel of the first instance tribunals were appointed as judges and defenders of the second instance tribunal, and it was agreed the judicial vicar would not appoint a judge or defender to a case that has been judged in first instance in his/her own provincial tribunal. The Apostolic Signatura raised no objections to this until 1994. From then, it requested repeatedly that tribunal personnel must not function in a stable manner in two tribunals which are connected by reason of appeal. This requirement, although not in the code, has been inserted into Dignitas Convenit at art. 36. The Bishops of Australia and New Zealand attempted to negotiate about this with the Apostolic Signatura until last year without any success, arguing that it is better to have one strong functioning tribunal of appeal, than several smaller weaker and less efficient ones, and that in Australia and New Zealand where the Anglo-Saxon common law tradition is used, it is not uncommon for judges in our civil courts to be members also of their respective appellate courts, and that in no way this is seen as compromising the proper and impartial administration of justice. The Tribunal of Appeal is to be disbanded by the end of 2010, and we are to revert to a round-robin system.

The Canon Law Society of Australia came into being at a meeting which became its inaugural conference in Brisbane in June 1967. One of the three papers delivered on that occasion concerned matrimonial cases. The members of the new Society, who were technically equipped by canonical knowledge, were eager to find ways to be of better service to God’s people, and believed a more expert and quicker treatment of matrimonial cases would greatly assist this aspiration. Around that time, due to many factors, the hitherto relatively stable institution of marriage started to crumble and

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6 Capitula pro emandatione iuris canonici proposita ab Episcopo Provinciarum Sydneyensium et Melbournensis, September 5, 1904 (SAA, Synodal Matters).
7 Australian Catholic Directory for 1927, 14-220. A decade later, twenty-four of the twenty-nine sees had a tribunal (see Australian Catholic Directory for 1937, 125-351), but it seems that if they functioned their work was confined mainly to lack of form cases, as the records in the Metropolitan Sees for the years 1918-1953 (albeit incomplete) do not record one case of nullity of marriage from a suffragan being seen in second instance see Archives of the Tribunal of Melbourne, Index of Cases: V. Tiggesman to writer, Adelaide, June 17, 1999; G. Carroll to writer, Perth, July 7, 1999; A. Conaghan to writer, Sydney, July 20, 1999; P. Scully to writer, Brisbane, September 16, 1999.
8 Concilium plenarium IV Australia et Nova Zelandia (1937) dec. 122 and 271.
9 Pius XI, motu proprio, Qua cura, December 8, 1938: Acta Apostolicae Sedis (AAS) 30 (1938) 410-413; Sacred Congregation for the Sacraments (SC Sac), norms, July 10, 1940: AAS 32 (1940) 304-308.
10 SC Sac, decree, December 20, 1940 and norms, April 28, 1941: AAS 33 (1941) 363-368; Canon Law Digest (CLD) 2: 534-540. Also SC Sac, decree and norms, December 31, 1956: AAS 59 (1957) 163-169; CLD 4: 410-416 for a rearrangement including a national tribunal of second instance.
divorce became frequent and commonplace. In my own province of five dioceses, in the entire decade of the 1960s, there were eight cases of nullity of marriage. In 1974, there were thirty cases; in 1976 there were ninety-eight cases; and in 1990, there were 330. How could this work be processed by competent persons, when the procedural law demanded that three judges and a defender of the bond be used in two instances, which is eight persons per case?

Four reliefs were obtained and used by us at various times:

- The so-called American Procedural Norms (APN) were granted to Australia to be used from November 1, 1970 for three years; their use was extended until November 1, 1974, but not permitted after that (although they were allowed to be used in USA until 1983).

- On February 27, 1971 a new list of decennial faculties was issued to local ordinaries of countries under the jurisdiction of Propaganda, which still included Australia.

- Faculty 20 gave the bishops the power to reduce, because of a dearth of officers, the number of officials in the tribunal of first instance in such wise that the tribunal is constituted of three officials, namely, a sole judge, a defender of the bond, and a notary.

Australia ceased being a Propaganda country in 1976, but the bishops were permitted to enjoy all the decennial faculties until the implementation of the revised Code.

- Paul VI's motu proprio Causas matrimoniales (CM), issued in 1971, brought some modification to the provisions of the 1917 Code to the Church until 1983. These included a broadening of the conditions for a tribunal to be competent, and the possibility of a lay judge on a turnus and a sole clerical judge.

- Three special faculties (concerning competence, a sole clerical judge and the defender of the bond being not obliged to appeal against a decision so that there was no second instance examination) were granted to Australia on November 1, 1974. These faculties could be used in tribunals until the promulgation of the code, if in the judgment of the episcopal conference, the number of cases, the shortage of judges, and other grave factors warranted their use.22

A very real disadvantage in Australia and New Zealand is the absence of a canon law faculty. Canonical training is available only in overseas universities, with the complications of theological prerequisites and Latin. In Australia, we can be justifiably proud that we have tried seriously to remedy this to a certain extent, at least by the establishment in 1978 of the Institute of Tribunal Practice.23 It issues a certificate after two weeks residential study of jurisprudence and procedural law, twelve months supervised work, and a further two weeks of residential lectures. However, the Holy See will not give that course any canonical recognition! We have thoroughly considered several times the possibility of establishing a canon law faculty with a view to conferringlicences in canon law, but have had to admit reluctantly that the personnel and financial resources required by the Holy See before recognitio would be granted make such a dream impossible.24

4. Canon 1673 - The Competent Forum

Canon 1673 determines which tribunals are competent to hear marriage cases which are not reserved to the Holy See. These are fourfold.

The first forum is the tribunal of the place where the marriage was celebrated. There are no qualifications on this forum (which existed in the 1917 code, the APN, and CM) even if both spouses now live nowhere near this forum.

The second forum is the tribunal of the place where the respondent has a domicile or quasi-domicile. This is similar to what was in the 1917 code, which granted competency to the place where the respondent or (if one party was non-Catholic) where the Catholic party had a domicile or quasi-domicile. APN modified this to the place where either party resided. CM permitted residency that was not transient, but restricted to that of the respondent. This was in the 1976 draft of the code, but was changed in 1979 to the respondent's domicile or quasi-domicile, which is the current

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27 Sacred Congregation for the Propagation of the Faith, decennial faculties, February 27, 1971: CLD 7: 82-86.
formulation in the code. The third forum is the place where the plaintiff has a domicile (but not a quasi-domicile). It was not directly in the 1917 code (although it was available to a Catholic plaintiff married to a non-Catholic respondent). The use of this forum is limited by two restrictions, namely 1) both parties must live within the territory of the same episcopal conference, and 2) the judicial vicar of the domicile of the respondent, after consultation with the respondent, gives permission. This forum was not available in the 1917 code; APN permitted the place of the plaintiff’s residence; but CM had no provision for the place where the plaintiff lived. It was not in the 1976 draft, but was inserted in 1979 by the Code Commission because of many requests from the consultative groups asked to comment on the schemata, noting that the respondent was often not interested in proceedings, and that the plaintiff’s only motive to approach a tribunal was often by reason only of conscience, as all other remedies had been obtained from a civil divorce. After noting that there had been abuses in the use of faculties from CM and other faculties (presumably APN), a consensus was reached that the two restrictions would be sufficient. After a quarter century of use, it could be questioned why both parties should live within the territory of the same episcopal conference, and even why the judicial vicar of the respondent needs to consent. The present canon does not permit a plaintiff domiciled in Toronto, whose marriage was celebrated in Detroit where the respondent is domiciled, to have a case heard in Toronto. Yet, a plaintiff in San Diego can seek a hearing there if the respondent is in Maine. It could also be questioned why a plaintiff with a domicile is eligible for this forum, but not one with only a quasi-domicile. The five-year requirement for domicile is a long time for someone whose employment does not guarantee stability of residence. Moreover, there is much more mobility within our world than in 1983, due to vast innovations in transport and telecommunications.

The fourth forum is the tribunal where most of the proofs can be collected, with the restriction of the consent of the judicial vicar of the respondent’s domicile. For reasons already mentioned, it is difficult to see why a judicial vicar of mere quasi-domicile is excluded. CM had this provision; APN had a looser provision: the tribunal of the judge who considers his tribunal is better able to judge the case than any other case, with the restrictions of the consent of his own ordinary and the plaintiff’s ordinary and officials. The APN norm permitted tribunals to hear cases of those whose competent tribunal was unable to hear a case because it was practically defunct (which was the situation in some places in Australia and New Zealand in the early 1970s) or where a backlog meant a delay of years. I imagine that it would be more difficult to persuade the Holy See to revert to the APN norm, and I admit it could be open to abuses.

Therefore, for our discussion: could canon 1673 be amended so that the third section reads:

- the tribunal of the place where the plaintiff has a domicile or quasi-domicile
- and the fourth section reads:
- the tribunal of the place in which all most of the proofs are to be collected;
- or
- the tribunal of the place in which all most of the proofs are to be collected, provided that the respondent, having been heard, raises no objection?

5. Canon 1458 - The Order of the Hearing

This is more or less the same as the 1917 code (c. 1627). I suggest it is quite superfluous, and has little merit. Some cases naturally move expeditiously, due to the cooperation of both parties and all the witnesses, and patently clear grounds and evidence. Such cases naturally become ready to be judged as soon as the evidence has been marshalled and the defender of the bond has provided observations. With other cases, there are great delays, which can be caused by obstructive interventions by the respondent, few cooperative, available and knowledgeable witnesses, and delays with psychologists providing reports. I have been unserved to learn of tribunals whose secretarial staff and notaries apply a general policy “of being fair to everyone” and so judging in strict order of protocol number based on c. 1458. A canon such as that is superfluous and should be deleted, allowing tribunals to follow the normal principles of efficiency and commonsense.

6. Canon 1598 - The Publication of the Acts

This canon regulates the opportunity given to the parties and their advocates to examine all the evidence that has been assembled, so that the right of defense can be exercised. Until this point in the proceedings, they have not seen any evidence other than their own depositions. In the first draft of this canon, the parties and their advocates were permitted to inspect the acts and to receive a copy. There was much concern in Australia and New Zealand, and no doubt in North America, that an aggrieved respondent would bring a case in a civil court based on what had been presented in the tribunal, in particular from expert psychological reports. The result was this current version of the canon which removed the ability for the parties to have a copy of the evidence, and permitted the judge can decide that aliquotum actum not be shown to anyone.

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26 Communications 11 (1979) 257-258.
**What is aliquot actum?** It is variously translated as a given act (1983 American translation) or some part or parts of the acts (British translation) or a specific act (1998 American translation) or some act (Vatican translation of Dignitas Conscilii). The Latin words are clearly in the singular; most would find it difficult to translate these words as parts of the acts. There can be much debate about how to restrict several pieces of evidence; for example, several psychological reports about a party, or several pieces of evidence that indicate highly confidential information about one party that is unknown to the other. Rather than resort to a sort of casuistry such as stapling all psychological reports together and labelling this bundle as one act (psychological reports), it would surely be clearer to have the text changed to aliquot acta.

The Roman Rota, in a judgment *cens* Cormac Burke on June 11, 1992, held

"The canon simply authorises [the judge] to declare that a particular act (aliquot actum) be treated as reserved or confidential. Here a clear limit is indicated which the law does not allow the judge to exceed."

Similarly, in a judgement *cens* Cormac Burke on November 15, 1990, the Rota held

"the judge can decree that a given act is not to be shown to anyone. The deliberate use of the singular (aliquot actum) indicates that the canon does not contemplate, but rather excludes, the possibility that a judge can deny access to the whole of the Acts ... The Pope made specific reference to this canon in his 1989 address ... "the judge, in order to avoid very grave dangers, can direct that some particular act not be made known to anyone ..."

I am motivated too by the prescriptions of canon 220. Canon 220 requires that no one may unlawfully harm the good reputation which a person enjoys, or violate the right of every person to protect his or her privacy. There are very few references to the right to privacy in canon law. In fact, the only use of the word *intimitas*, translated as privacy in the current code, is in canon 220. In general, the implied references in canon law to privacy concern the tension surrounding the privacy of individual conscience in spiritual direction and the confessional, and in relation to the suitability of candidates for seminaries and institutes of consecrated life. Canon 630 §5 specifically forbids a religious superior to induce a member of the institute to make a manifestation of conscience.

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**Intimitas has a very specific meaning. It is not the same as solitude (privacy in the sense of solitude, or being alone), or privatus (privacy in the sense of a private individual or person or meeting). Its etymology is intimus, the superlative comparative adjective of interior, meaning inner or interior. Therefore it means interior privacy, and is best translated in the sense that is refers to conscience. Therefore, canon 220 requires that no one may violate the right of a person to protect the inner privacy of his or her conscience. Consequently, canon 220 indicates that it is absolutely wrong to force a person to do things such as reveal his or her secret sins, undergo psychological assessment, or reveal his or her private diaries or correspondence. I believe it can be questioned whether we have been somewhat too cavalier in the "encouragement" we have given to some plaintiffs seeking declarations of nullity of marriage at our tribunals to be psychologically tested, and whether we have exercised sufficient care in our use of the resulting psychological reports. Recent privacy legislation in both Australia and New Zealand - rather than canon law - will ensure some care in the future.

Therefore, for our discussion, could the words aliquot actum be changed to read aliquot acta?

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7. Canon 1425 - The Number of Judges

The 1917 code (c. 1576) introduced the institute of the collegiate tribunal as the norm, and made it obligatory for several categories of cases, including contentious cases concerning the bond of marriage. The 1983 code continued this requirement, except for matrimonial cases in which the ground is the existence of a diment impediment, or a defect of the lawful form or a lack of a valid proxy mandate, where a sole judge may be used in either instance. However, there is some relief from the burden imposed by this canon, namely that - if it is impossible to constitute a college of judges - the bishops’ conference can for so long as the impossibility persists permit a sole clerical judge in such cases, who, where possible, should be assisted by an auditor and an assessor.

Prior to the 1917 code, the law required a sole judge at both first and second instance.

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29 Pepe Benedict XIV prescribed the formalities to be observed in cases of nullity of marriage, which included a sole judge in each instance; see Benedict XIV, apostolic constitution Dei miseratione, November 3, 1741: Collectanea S. Congregations de Propaganda Fide, seu decreta, instructiones, rescripta pro apostolico missariis (Rome, Typographia polyglottos S.C. de Propaganda Fide, 1893), n. 1570, 575-9. Subsequent instructions from the Holy See did not change this prescription of a sole judge in each instance; see Sacred Congregation of the Council, instruction, August 22, 1840 (ibid.) n. 1571, 579-581, Supreme Congregation of the Holy Office, instruction to Eastern bishops, June 20, 1881 (ibid.) n. 1572, 581-591, and Sacred Congregation for the Propagation of the Faith, instruction, 1883 (ibid.) n. 1573, 591-594. Various particular councils in English speaking countries prescribed the observance of the 1883 instruction of Propaganda; see Acta et decreta Concilii plenarii Bollandenses.
The third of the American Procedural Norms, while stating that the collegiate tribunal was the norm, permitted a sole judge provided there was grave reason and no opposition from the defender of the bond, the promotor of justice, or the parties. This was welcomed by Australian canonists who were seeking a more professional and efficient system. While there had always been some qualified canonists keeping abreast with jurisprudence, these were necessarily augmented with others appointed as judges, solely because the bishops considered them to be presbyters of proven life and expert in canon law. However, the 1917 code (c. 1574) did not require academic qualifications or proven ability, and, as associate judges such men were frequently well-meaning but out of their depth. There is much anecdotal evidence about situations of two such men on a forum ousting one knowledgeable skilled canonist, simply because they could not grasp the issues. Therefore, entrusting a case to one skilled, qualified, knowledgeable judge is likely to bring a just decision expeditiously.

The APN were able to be used in USA from April 20, 1970 until the implementation of the revised code. Therefore, from 1970 until 1983 it was possible in USA to have a sole judge in first instance with no second instance hearing and, if there was an appeal lodged against the first instance decision, a sole judge in both instances.

In Australia, the APN were able to be used from November 1, 1970 until November 1, 1974. However, some other relief was available to Australia and New Zealand between 1974 and 1983. At any event, the motu proprio Causas matrimoniales of March 28, 1971 permitted a sole judge at first instance with the qualifications of the impossibility of a panel of three judges being formed, and no objections being lodged. The decennial faculty had no qualifications whatsoever to it.

The third of the 1974 faculties read

The faculty is given to grant in exceptional cases, if grave circumstances truly require it, and in the judgement of the defender of the bond and the ordinary of the place an appeal against the first sentence would clearly be superfluous, the defender of the bond be not obliged to appeal against the decision of the first instance tribunal, when it is given by a panel of three judges, so that in these circumstances this sentence may be executed immediately according to the norms of law.

Therefore in summary, it was possible in Australia from 1970 until 1974 for a marriage case to be judged by one judge only (one in first instance and none in second), and from 1974 until 1983 by either three judges (all in first instance) or four (one in first instance and three in second).

What is the purpose of an appeal tribunal or a second instance tribunal? Are the second instance judges judging the first instance judges or reviewing the decision? If the latter, why are three always needed? The role of second instance should not be to police possible abuses, which can surely be corrected by the right of defense, the use of the defender of the bond and advocates, and the ability to place a real appeal.

For discussion: Why does the law permit cases, in certain circumstances, to be heard by a sole judge in first instance but does not permit cases, when the same circumstances are present, to be heard in second instance by a sole judge? The negative effects are patent, namely delays (as each second instance judge has three times as many cases to study), or the use of inept judges to keep the system moving. Are there clear positive effects that ought to be fostered?

8. Canon 1615 - The Publication or Notification of the Judgment

The present canon states that the publication or notification of the judgment can be effected in one of two ways: either by giving a copy of the judgment to the parties or their procurators; or by sending them a copy of it via the public postal service.

When the 1980 schema of the code was being examined by the Code Commission, it rejected a request that there be the possibility of the judgment being sent to the advocates who would be able to explain better the judgment to the parties. The reason for the rejection was that the parties themselves were free to take the judgment to advocates if they desired an explanation.

In the 1917 code (c. 1877), there were three ways of publishing the judgment, namely by the judge reading it to the parties; or by informing the parties that the judgment was at the tribunal and allowing them to read it and request a copy; or by sending them a copy by the public postal service.

In Australia and New Zealand, ecclesiastical tribunals are viewed as private domestic tribunals of a private organization. No privilege of confidentiality can be attached to the evidence before a tribunal or to its pronouncements. There have been instances of upset difficult respondents making copies of a judgment, and disseminating it most widely. Witnesses can find parts of their evidence that are quoted in the judgment being circulated in written form.

For discussion: why does a written copy of the judgment have to be given to the parties? Could it not suffice to permit the judge to have the discretion to decide that in certain cases the publication of the judgment be solely by reading it to the parties?

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9. Canon 1682 - The Second Instance Examination

The present law requires that, where a first instance tribunal has declared for the nullity of a marriage, the case be sent to the appeal tribunal within twenty days, whether or not appeals have been made against the decision by either of the parties or the defender of the bond. Then the second instance tribunal of three judges, after weighing the observations of the defender of the bond and, if there are any, of the parties, is to issue a decree ratifying the first instance decision or to admit the case to an ordinary examination in the new instance.

There is an exception to this requirement: in matrimonial cases where the ground is the existence of a diment impediment, or a defect of the lawful form or a lack of a valid proxy mandate, there is no examination at second instance unless the first instance defender of the bond prudently judges the first instance judgment to be incorrect.

Who is this defender of the bond whose observations are to be weighed by the appeal tribunal? The legislator has made it clear in art. 265 of Dignitas Connubii that it is the defender of the bond of the same court of appeal - perennis animadversionibus defensoris vinculi etudem fori appellacionis - and no reputable commentator has suggested that the current legislation could be read otherwise. However, considering that the office of defender of the bond was not instituted until 1741 by Pope Benedict XIV, we could discuss whether it is really necessary to employ the time and services of two defenders of the bond in order to arrive at a correct decision? Surely the first instance defender, who is familiar with the evidence, has evaluated it, and has submitted his or her observations, would be in an excellent position to review the first instance decision, and comment specifically whether his or her objections have been considered properly by the first instance judgment, and rebutted adequately and convincingly or not. To suggest or suspect that the first instance defender of the bond may not be capable of performing his or her office properly is to suggest that the prerequisites for the office were ignored when the appointment was made. Canon 1435 mandates the prerequisites as an unimpaired reputation, a doctorate or at least a licentiate in canon law, and proven prudence and zeal for justice. If a defender of the bond has been chosen and appointed because he or she is thus qualified, it is difficult to see how his or her observations will not be sufficient to assist the second instance tribunal decide to issue a decree of ratification, or to submit the case to an ordinary second instance examination. This too can be discussed.

During the revision of the code, the Australian and New Zealand bishops recommended that a defender of the bond should not be required by law to appeal against an affirmative decision, although he/she should retain the right to do so when convinced that an affirmative decision did not represent natural justice.33 This really meant that a marriage case should not be required to have two hearings before a decree of nullity could be issued. In other words, a decision about a marriage by a church tribunal should be like a decision in a case of rights or a criminal case, namely there is no second examination of a case unless one of the parties or the defender of the bond appeals against the decision rendered.

There had been relief from this requirement with the use in Australian tribunals of the so-called American Procedural Norms. Norm 23.11 of these norms provided

In those exceptional cases, where in the judgment of the defender of the bond and his ordinary, appeal against an affirmative decision would be clearly superfluous, the ordinary himself may request of the episcopal conference that, in those individual cases, the defender of the bond be dispensed from the obligation to appeal, so that the sentence of first instance may be carried out immediately.

Consequently from November 1970 until November 1974, a judgment in first instance by an Australian tribunal could become absolute, without being subjected to any second instance examination or review, provided that the first instance defender of the bond judged that it was superfluous for the case to be examined in second instance.

Although the Holy See refused to permit continued use of the American Procedural Norms in Australia after 1974, it did grant on November 1, 1974 three special faculties to Australia that could be used until the revised Code of Canon Law became effective. The third of these faculties read

The faculty is given to grant that in exceptional circumstances, if grave circumstances truly require it, and in the judgment of the defender of the bond and the ordinary of the place an appeal against the first sentence would clearly be superfluous, the defender of the bond be not obliged to appeal against the decision of the first instance tribunal, when it was given by a panel of three judges, so that in these circumstances this sentence may be executed immediately according to the norms of law.34

This faculty was able to be used within Australia from November 1, 1974 until November 26, 1983. The procedure adopted required the President of the Episcopal Conference or another delegated bishop to grant a dispensation so that a case did not have to be reviewed in second instance on two conditions, namely that the case had been judged in first instance by a panel of three judges, and that the defender of the bond considered that an appeal would be superfluous. This possibility of avoiding the

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33 Australian Submission on the Schema De Procesibus (CLSANZ Newsletter, Spring 1977) appendix

34 At that time, it was permissible for matrimonial cases to be judged in first instance by a sole clerical judge by virtue of the decennial faculties issued to local ordinaries of countries under the jurisdiction of the Sacred Congregation of the Propagation of the Faith, which included Australia and New Zealand, and also by virtue of the 1971 universal norms issued by Pope Paul VI to expedite marriage cases.
second instance tribunal lasted until the 1983 code became effective. Since then, all cases have had to be reviewed in second instance, whatever the opinion of the first instance defender of the bond. Sadly, as a consequence, much time and effort of skilled but overworked canonists in Australia and New Zealand is expended on examining, in second instance, cases of marriage that are clearly null, and have been judged to be null. It would be much better, surely, if that valuable time and expertise could be spent on the twenty percent or so of cases that do require careful examination in second instance.

Therefore, for our discussion: Are there situations or cases, besides cases where the ground is the existence of a diriment impediment, or a defect of the lawful form or a lack of a valid proxy mandate, where the second instance examination could be waived or not obligatory or dispensed from. If so, what are they?

10. Some Concluding Remarks

I agreed to present this workshop at the request of the Convention Planning Committee who determined that this topic be restricted to procedural law. I understand that those attending the Society's conventions hope that some workshops deal with tribunal matters.

With my background from the antipodes, where the local church in comparison with that of North America is isolated with much fewer resources, facilities and personnel, I believe that these suggested modifications to the procedural law would help us immensely. However, I have very little confidence that the Holy See would permit such adjustments, as the Instruction Dignitas Conscientiae of 2005 appears to reinforce strongly the current law.

It is widely held that in Australia at present the average household has nine screens (including TVs, computers, PDS, MP3 players and mobile phones) and that seventy percent of Australians spend at least three hours daily in front of some sort of screen. Canons 822-832 legislate for books and other written material, but are silent about electronic communication, and its effects on the Church.

There are some patent lacunes in the current code. Many wonder why there are no canons for the possibility of the Holy See becoming impeded. There is no mention of Catholic health care, in contrast to the legislation on Catholic education, and this lack is frustrating for those involved with the governance of Catholic health care facilities that formerly belonged to religious institutes. Many involved with the application of religious law are frustrated that much of the current legislation is from a monastic or conventional perspective whereas most apostolic religious find it difficult to live that model. There is an increase in those who consider themselves called to live as consecrated virgins or hermits; yet there is little in the current code to help them.

In summary, there is much more scope for adjustments or modifications in sections of the code other than De Processibus.