

THE OFFICE/MINISTRY OF THE AUDITORS, RELATORS AND EXPERTS

(Lecture by Msgr. Higinio C. Velarde, JCD, during the Symposium on UPDATE ON MATRIMONIAL TRIBUNAL MINISTRY, at the UST, January 8-12, 2001)

INTRODUCTION

To start with, I would like to situate the subject matter or matters of this talk, at their respective places, as they appear in the Code of Canon Law.

You will notice that the provisions of the Code on the Auditors and Relators are found in only two canons: 1428 and 1429. These two figures are part of those who constitute the Tribunal of First Instance. The other figures are the Judge (cc. 1419-1427), and the Promotor of Justice, the Defender of the Bond and the Notary (cc. 1430-1437). In other words, in the canonical legislation regulating procedures, we expect to see, in every Tribunal of First Instance, these different figures exercising their respective offices according to the provisions of law.

On the other hand, the subject matter on experts is found under Title IV, Proofs, which is part of the Section on the Ordinary Contentious Trial. The expert then forms a separate group under the heading of Proofs, together with the 1) Declaration of the parties; 2) Documentary proofs; 3) Witnesses and their testimony; 4) Experts; 5) Judicial Access and Inspection; and 6) Presumptions.

Secondly, we are dealing with Ecclesiastical tribunals in general, that is, the tribunals being constituted in the diocese to deal with cases that they are competent to deal with according to law, and not only matrimonial cases. It would be quite useful to remind ourselves that matrimonial processes, especially about cases concerning the declaration of nullity of marriage belong to a specific part of Canonical Procedural Law, called Certain Special Processes. If there are special norms on auditors, relators and experts as regards their functions in matrimonial cases, we will also take note of them.

I. AUDITOR

A. NOTION

- C. 1428 with its 3 paragraphs simply lists the functions of the auditor and the persons who are responsible for their appointment. From what the canon says, we can pick up the following:
1. The auditor is the person who, in a specific case, is appointed to hear the parties, the witnesses and experts and to receive the documents for the instruction of the case.
 2. He is also called the instructor of the case (*iudex instructor*).

This appointment is made for each particular case, that is, only for the one the judge has to instruct. The figure of auditor is optional, since the judge or one of the members of the collegiate tribunal, including its president, may exercise this function.

*(There is another figure in penal law which, although not called the auditor, fulfills almost the same function as the auditor. This is found in Canon 1717. This refers to a situation where the Ordinary receives information about an offense having been committed. The provision of the canon contains the procedure that the Ordinary should follow. The fact subject to question must have at least the semblance of truth: what could be called the *fumus veri facti*. The subject who undertakes the investigation – previously called the “inquisitor” – may now be either the Ordinary himself, or some other suitable person appointed by the latter at his own discretion (a physical person, either male or female). **The investigator has the same faculties and obligations as the auditor.** This canon does not specify the manner of conducting the preliminary investigation. The object of the preliminary investigation is the reality of the fact: juridical imputability and extenuating or aggravating circumstances. When the offense is notorious and unquestionable, there is no need to investigate. To avoid any prejudgements or bias, the investigator is disqualified from acting as judge in the subsequent penal process.)*

B. FUNCTION

The primary function of the auditor is to “gather the evidence in accordance with the judge’s commission and, when gathered, to submit it to the judge” (c. 1428, par 3).

In other words, the main task of the auditor is merely to instruct the case. His is not to admit or reject the petition and formulate the *dubium*, nor to decide its value. His task consists solely in collecting proofs and handing them over to the judge. Unless the mandate of the judge prohibit him from doing so, he can also decide what proofs to be admitted and how they can be admitted, if such a question arises in the course of his function. (c. 1428 par 3)

C. APPOINTING AUTHORITY (Active Subject)

Who appoints the Judge auditor? C. 1428, par 1 states: “*The judge or, in the case of a collegiate tribunal, the presiding judge, can designate an auditor to instruct the case. The auditor may be chosen from the tribunal judges, or from persons approved by the bishop for this office.*”

The words of the canon clearly state that the appointment of auditors is optional: “*can designate...*” In other words, auditors may or may not be appointed.

(As to the fittingness of having auditors in the tribunals of the Church, where practically the only contentious cases are matrimonial ones, we think for the sake of procedural order and the advantages of immediate contact with the parties and witnesses, it is preferable that the auditor or instructor be one of the judges of the tribunal, the one appointed to act as the relator or ponens (as will be mentioned in the next subject matter.) Unless the circumstances are such that it is not possible for one of the tribunal judges to instruct the case, the trial must not be deprived of the advantages of immediacy, on which such emphasis is laid today and which is so highly recommended for the examination of the parties involved (cf. Comm. 4 [1970] 50-65, 69.)

D. WHO CAN BE APPOINTED? (Passive Subject)

Again c. 1428, par 1 states: “...*The auditor may be chosen from the tribunal judges, or from persons approved by the bishop for the office.*” This provision has several possibilities:

1. If there are several judges in the diocese, once the collegiate tribunal has been constituted, the presiding judge appoints one of the judges to be the auditor; (and, as has already been mentioned, it is advisable that the auditor be also the *relator* or *ponens*); the presiding judge may also appoint himself to be the auditor.
2. The presiding judge may also appoint as auditor, somebody from a group of people approved by the bishop to perform the function of auditor;
3. If there is a sole judge, the sole judge may appoint himself to be the auditor, or he can appoint somebody from a group of people approved by the bishop for the office of auditor. (c. 1425 par 4)

This means that, aside from the judges, a group may be appointed by the bishop to constitute a pool of auditors. C. 1428, par 2 provides: “*The Bishop can approve clerics or lay persons for the role of auditor. They are to be persons conspicuous for their good conduct, prudence and learning.*” Thus, the approval of auditors is reserved to the bishop. The Code of Canon Law of 1917 did not expressly exclude the laity from the office of auditor, but the then Congregation for the Council, declared on December 14, 1918 that they could not be (AAS 11 [1919] 132). Now, lay people, men and women, can become auditors, and the judge appoints them from the list of names approved by the bishop for this function, as well as those who are already among the diocesan judges, but the legal text does not make any preference of one over the other.

Unless delegated to do so, it is not a responsibility of the judicial vicar or of the presiding judge of the collegiate tribunal to make up the list of auditors. Neither is this binding on the bishop in such a way that his diocese must necessarily have auditors, apart from the judicial vicar, the associate judicial vicars, and the diocesan judges. The law does not define either the person who may dismiss the auditor, or the one who must hear the case when there is an objection against him; but since rejection is possible, and since it is the president of the collegiate tribunal or the sole judge himself (cf. cc. 1449, par 2; 1457, par 2) who appoints the auditor and grants the mandate, we think that one of these should settle the question.

E. HOW THE AUDITOR CONDUCTS THE EXAMINATION

Cc. 1558 – 1571 contain provisions on how to examine the witnesses. One of the most important functions of the judge, and one with most serious consequences is that of instructing a case and judicially questioning the parties and the witnesses. There are many factors which influence the efficacy of a testimony. Closely related to these is the method of questioning and of carrying out the examination. This is reflected in the caution on this point imposed by canon law.

1. The Place

The selection of the place where witnesses are usually examined is related to the prescriptions on the office of the tribunal and the collection of proofs in cc. 1468-1469. Three general norms are given:

- a) As a rule, ordinary witnesses are to be judicially examined at the office of the tribunal itself, unless in special cases, the judge considers another place in the area of jurisdiction to be more appropriate. In any event, the value of a testimony does not depend on the place where it is given. It must also be noted that the canons governing the examination of the witness (cc. 1558-1571) does not mention anything about getting the testimony of the witness by telephone or by mail or correspondence.
- b) Cardinals, patriarchs, bishops and those to whom the law of their country grants a similar favor, may choose the place where they wish to testify.
- c) Witnesses whom it is impossible or very difficult to hear at the office of the tribunal, either because of distance, illness, or some other impediment, will be examined in a place determined by decree of the judge. This rule is for the benefit of all those persons who in the diocese are considered to be physically or otherwise incapacitated. For those who live outside their own diocese, assistance may be requested from another tribunal, according to c. 1418. The judge in the case, however, must forward the questions and instructions according to which the witness is to be heard.

2. The Presence of the Parties

There are advantages and disadvantages associated with the attendance of the parties at the examination of witnesses. The legislator has chosen to maintain a balanced standard: he makes distinction between parties and their representatives, and, without being excessively emphatic about it, establishes two norms subject to exception at the discretion of the judge:

- a) The witnesses shall be examined without the presence of the parties, but the promotor of justice or the defender of the bond may be present, if they are taking part in the case; nevertheless, the judge may allow the parties to attend if he believes that their presence is desirable, especially when the matter concerns the private good;
- b) Their advocates or procurators may generally attend, unless the judge considers that the proceedings should be in secret, because of circumstances of persons and facts.

3. Individual and Separate examination of witnesses

This norm has been constantly in effect. No one must know or hear what others declare; care must be taken therefore, to prevent a witness who has already testified from repeating the testimony to those who are to be questioned later. When witnesses disagree among themselves or with a party, in a grave matter, the judge may arrange for them to confront one another, provided that, so far as possible, the confrontation does not give rise to disputes and scandal. Four points are inferred from this norm:

- a) there should be no confrontation unless there is serious disagreement in the testimonies;
- b) the confrontation is not a strict right of the party, but rather a faculty granted by law to the judge, to be used according to his sound discretion;
- c) the conditions for the use of this faculty are expressed in an ablative absolute: "*remotis, quantum fieri poterit dissidiis et scandalo,*" even though this is not an essential condition;
- d) the confrontation is to be considered an extraordinary means of examining the parties and the witnesses.

It is in a penal trial that a confrontation is most suitable, both as a means of discovering the truth of the offense, and as a way of verifying the proof submitted. On the other hand, confrontation was introduced in the contentious process by custom in some places, as an exception to the general norm which states that those testifying are to be examined *singillatim, separatim, seorsim*. Experts in procedural law, both civil and canonical, know from experience that confrontation does not often lead to discovery of truth of the facts; on the contrary, it tends to confuse matters even more for psychological reasons.

4. The Questions are to be proposed by the Judge or the Auditor:
If, while the judge is conducting the examination, the parties, their advocates, the defender of the bond, or the promoter of justice, who are lawfully present at the hearing, consider that the witness should be asked further questions, these are not to be proposed directly to the witness, but to the judge himself so that he may decide whether the questions are appropriate and relevant, and then propose them to the witness, unless particular law provides otherwise.
5. The Oath to Tell the truth and Nothing but the Truth:
In every judicial examination, the judge must remind the witnesses of the obligation to speak the whole truth and nothing but the truth; that is, only that which senses have perceived, since they are not to give opinions, draw conclusions about what was observed, or make suppositions.

Also related to the obligation to tell the truth is the oath which the judge, complying with c. 1532, asks the witness to swear to tell the truth or to have told it, in cases in which the public good is at stake. Whether or not the oath has been sworn must be mentioned in the acts, since "*facta sunt sui natura incerta.*" Since this is a matter of public record, whether or not the oath has been taken is a circumstance that affects the value of the testimony; if the witness refuses to testify under oath, the fact is recorded in the acts and the witness is heard unsworn.

6. Identity, Relationship and Source of information:
The subject matter of the questions is related to the three objects of the examination, considered as three stages of the interrogation:
 - a) Preparation and orientation, with the so-called general questions about the identity of the witness, and other peripheral, though pertinent questions which may appear less related to the disputed object. These help is to set the stage for the case, to provide background information, and to ascertain the dispositions of the witness.
 - b) The disclosure of facts. These questions refer directly to the disputed facts. It is useful to question about matters and facts which are undeniable in the acts, because the replies given by the witness might help the judge evaluate the testimony critically and objectively.
 - c) Attestation. These questions are intended to acquire new and useful data for the dispute, for instance, circumstances related to persons, place, and time, others related to the knowledge, truthfulness, and sincerity of the witness. They do not require long narratives; their purpose is to clarify details supporting the quality of the testimony.

7. Nature of the Questions: The questions should be:
- a) brief and simple; if they are long and complicated, it is difficult for the witness to answer each part consecutively, and to remember everything being asked; it is difficult also for the judge, when evaluating the replies, to be able to discern whether the whole question was answered, or whether the reply refers to all the parts of the question, or merely to the last one;
 - b) appropriate to the understanding of the person being examined; if technical terms are used when questioning persons unfamiliar with the disputed matter, the answers will be less reliable;
 - c) neither captious nor deceptive; the goal of the interrogation is to discover the truth, not to deceive the witness on a particular point nor to prevent him or her from relating the facts as they are perceived; this does not prevent the judge from asking questions, either *ex officio*, or at the request of those assisting, concerning any discrepancies in the testimony, or any incongruity or contradiction it might contain;
 - d) not leading: when a question is asked in such a way as to elicit a particular reply, the answer should not be attributed to the witness, nor is the testimony valid; for if it is false, the witness merely assented to a formulated lie, and even if it is true it is not helpful, not because the witness affirmed the truth, but because he or she merely agreed to what was suggested;
 - e) not giving any offense, either to the witness or to the parties, or to any of those taking part in the trial;
 - f) relevant: the judge decides if the questions are relevant by considering the subject of the dispute.

8. Secrecy of the questions:

The reason for this reservation about revealing questions to the witness before the examination is a legal precaution to avoid the risk of the witness's being prepared, forewarned or bribed. This kind of influence which could be exerted on the witness by the parties or their advocates is quite different from the simple recollection of past events that could help the witness describe more precisely facts and concrete circumstances.

9. Recording the examination:

The reply given by the witness to the judge shall be immediately committed to writing by the notary with absolute exactitude, not only in substance, but in the identical words used, at least that part of the testimony referring directly to the matter of the trial. When the testimony of the witness is recorded in writing, both prolonged accounts and excessive brevity should be avoided. Neither the interrogation of the witness nor the replies would have any value were they not recorded in the acts with accuracy and integrity.

The use of tape recordings is allowed as long as the replies are transcribed and, if possible, signed by the deponent; the notary will also sign thus testifying to the authenticity of the witness' signature.

F. LIMITATION AND OBLIGATION IN THE EXERCISE OF FUNCTION

1. Obligation to refrain from exercising the function of auditor in cases where personal interest may be involved by reason of consanguinity or affinity in any degree of the direct line and up to the fourth degree of the collateral line, or by reason of guardianship or tutelage, or of close acquaintanceship or marked hostility or possible financial profit or loss (c. 1448, par 1 & 2).

Impartiality is a demand which is so radical in the administration of justice. Everytime that there exists a reasonable sign of a possible partiality which could sway the judge in favor of one of the parties, the judge becomes suspect. The law eliminates this suspicion by ordering the judge to abstain from judging a priori in cases where he may have some interest, affection or hostility, with regards to the persons or objects in the case. It is evident that the judge, despite the mentioned situations, can be impartial and just, but even so, he should inhibit himself, for the good of the justice system itself and of the trust of the faithful on the administration of justice.

The present norm is more strict, because these persons, according to c. 1447, cannot exercise the function of judge or assessor under pain of nullity of the sentence. The mandate to abstain extends, in the same circumstances, to the promoter of justice and the defender of the bond, as well as, - and this is new in the legal text - to the assessor and the auditor.

To refrain from judging is a strict obligation, and the effect of a legal precept: *iudex ne suscipiat*. The word judge refers not only to the sole judge, but also to one, several, or all the judges of the collegiate tribunal, the auditors, judicial vicars, and associate judicial vicars, diocesan judges, delegated judges, as well as the lay judge in the collegiate tribunal.

A distinction should be made between the optional withdrawal of the judge from a case – in which he fulfills a duty imposed by law – from a strict objection against the judge which is an exception of suspicion that the parties may direct against the judges or other officers or ministers of the tribunal, in order that the person challenged refrain from taking part in a specific case.

The reasons for disqualification enumerated by the law are: 1) consanguinity or affinity in any degree of the direct line and up to the fourth degree in the collateral line (cc. 108-109); 2) guardianship and curatorship, which are intended for the protection of persons who are incapacitated: minors as well as adults who require special representation or assistance; 3) an intimate acquaintanceship, whether because of common life, a business partnership, or a very close friendship; 4) marked enmity, which might become hostility or implacable hate; 5) a special interest in the financial benefit which might be obtained, or in preventing some loss or avoiding some damage.

According to the same canon (par. 2) and in similar circumstances, the promoter of justice and the defender of the bond must abstain from exercising their office, so must – this is an innovation of the CIC/813 – the assessor and the auditor, apparently by virtue of the stipulation of c. 1425, par. 4. Those who exercise other offices in the tribunals,

even though they are not bound by law to disqualify themselves, may request a dispensation from the exercise of their office for one of the reasons given for abstention.

2. Forbidden to accept gifts

C. 1456 states: *“The judge and all who work in the tribunal are forbidden to accept any gifts on the occasion of a trial.”*

This canon repeats the traditional ban on accepting gifts. If the judges and any officers and collaborators who form the tribunal are to be impartial and above suspicion, none of them should accept gifts of any kind whatsoever, on the occasion of the trial. Gifts and other considerations given to judges or tribunal members always give rise to suspicion.

This prohibition does not distinguish between big and small gifts. Thus, whatever gift is received makes the judge suspect, because gifts usually sway the inclination in favor of the gift-giver, to the detriment of justice.

3. Incapable of being witness in the trial

c. 1550, par 2 states: *“The following are deemed incapable of being witnesses:*

1. the parties in the case or those who appear at the trial in the name of the parties; the judge and his assistant; the advocate and those others who in the same case assist or have assisted the parties.”

Incapable witnesses are those whom the law forbids to give evidence in a trial. They may be incapable because they lack, or are presumed to lack, the aptitude to tell the truth, because they might be partial to one of the parties, because of the requirements or obligations of their charge, or because their source of knowledge is inadequate for testifying. The canon distinguishes between two kinds of incapable persons: 1) the parties with those who assist them, and the members of the tribunal; 2) those who are bound by the secret of the confessional.

Advocates and procurators are not excluded if they have merely advised a party before the case is introduced. Those, however, who have assisted the litigation in all or any part of the case should be considered incapable. Judges and assistants in a tribunal are excluded from giving evidence, even those who have ceased to be involved in the proceedings if, subsequently, the case is heard in the appeal court.

4. Obligation of secrecy

C. 1455 par 1, talks about the obligation on the part of the judges and tribunal assistants to observe always the secret of the office, in a penal trial, and in a contentious trial, they are bound to observe it if the revelation of any part of the acts of the process could be prejudicial to the parties.

Strictly speaking, the secrecy to which this canon refers is the so-called secret of the office or professional secret. It is a secret entrusted under the express or tacit understanding that it will be kept. It is gravely binding by nature. It bears a more severe

obligation than the natural secret and its observance must be insisted upon for the sake of good order in social life.

In penal processes, this secrecy is always binding, because disclosure of the subject of the trial always entails damage to private and public interests. In cases involving the public good, such as matrimonial cases, the same applies, and the obligation to observe secrecy is identical. In contentious trials which concern only the private good of the litigants, professional secrecy is binding if damage might ensue from the disclosure of any of the procedural acts. Failure to maintain secrecy is tantamount to breaking the oath to keep it – if it was the object of the oath – , or at least a violation of the oath to fulfill the office properly and faithfully (c. 1454). Those who do not fulfill the obligation of secrecy can be punished (c. 1457).

There is always an obligation to maintain secrecy concerning the discussion held in the tribunal before the pronouncement of the sentence as well as about the votes and opinions given there (cf. Instr. *Provida mater Ecclesia* 203). Canon 1609, par 4, of the CIC/83 provides that a judge of a collegiate tribunal who does not wish to accede to the decision of the others is entitled to request that, if there is a formal appeal against the sentence, his or her conclusions should be forwarded to the higher tribunal (this does not apply in cases when first instance decisions are sent to the second instance for a decree of ratification).

Although the obligation to maintain secrecy dealt with here refers directly to the obligation of the tribunal, it refers explicitly to the judge who watches over the common good by guaranteeing the secrecy of all that has taken place in the process, if the circumstances indicated in the canon (par 3) exist. In matrimonial cases, the importance of this provision is obvious, since they are usually concerned with secret and intimate subjects, for example, impotence, insanity, sexual abuse, etc., and the information of the witnesses or the reports of the doctors could result in serious inconvenience or harm to these people. Moreover, any disclosure could give rise to the danger of collusion or bribery (cf. Instr. *Provida mater Ecclesia* 130).

5. The obligation to take the oath to exercise the office properly and faithfully

C. 1454 states: “*All who constitute a tribunal or assist in it must take an oath to exercise their office properly and faithfully.*”

This canon indicates those who are obliged to take an oath. The words of the canon have an extremely wide application: “all who constitute a tribunal or assist in it”. Consequently, apart from the judges, it refers also to the assessor, the auditor, the promoter of justice, the defender of the bond, the notary, and to all those who cooperate with the tribunal, for example, interpreters and experts. This oath is different from the one required of the parties (c. 1532) and of the witnesses (c. 1562 par 2).

Where the formalities of the oath are concerned, this canon, as distinct from cc. 1621 and 1622 of the CIC/17, says nothing about the person who should administer the oath (whether it is the bishop who named the persons in question or the judge who selected

them); whether it should be taken in presence of the notary who draws up the acts; whether the name of God should be invoked, etc. In practice, it is reasonable that there should be a crucifix, a book of the Gospels, etc.; the oath should be sworn with an appropriate formula which, according to an acceptable custom, notes that it includes the obligation to fulfill the office well and properly, to be faithful to the law of secrecy, not to accept any gifts whatsoever in their functions in a trial. The fact that the oath was taken must be faithfully recorded in the archives of the curia or apud acta.

II. RELATOR

A. NOTION and FUNCTIONS

Canon 1429 simply explains the function of the *relator* or *ponens* which is “*to present the case at the meeting of the judges and set out the judgement in writing.*” In other words, the *relator* or the *ponens* is one of the collegiate judges whose task it is to study the facts, make a critical examination of the evidence, of the pleadings for and against the petition of the plaintiff, and as a result, set forth the conclusion and, finally, present the final judgement in writing.

The *relator* or *ponens* is a figure which is proper of the collegiate tribunal and his function consists in the study of the acts, in order to inform the other judges, and to lay down the definitive sentence. The *ponens* is different from the instructor or auditor, even if one person may fulfill both functions. The president of the tribunal can be auditor and relator at the same time.

B. APPOINTMENT

The presiding judge appoints the *relator* or *ponens* in the collegiate tribunals. This appointment is obligatory: “*debet*”, and must be conferred of necessity on one of the judges of the college, who may be either the presiding judge himself or any of the other judges. The appointment of the *relator* must be recorded as well as any substitution, if there is a just reason for it.

C. PROCEDURE

a) For Tribunals with Sole Judge

In tribunals with sole judge, the elaboration and redaction of the sentence do not require special norms, but in the case of a collegiate tribunal, it is necessary to indicate how to proceed, since we deal with collegial acts and the solution is adopted by majority of the votes (c. 1426 par 1).

b) For Collegiate Tribunals

1. Discussion of the Case:

Canon 1609 describes the internal proceedings which must be followed by the collegiate tribunal up to the conclusion of the judgement settling the principal case.

- 1) The presiding judge of the collegiate tribunal decides the day and time when it is to meet for discussion, which is to be done at the tribunal office unless a special reason requires otherwise. To this meeting, the individual judges are to bring their written conclusions on the merits of the case, with the reasons in law and in fact for reaching their conclusions. These conclusions are to be added to the acts of the case and to be kept in secrecy.
- 2) Then, after invoking the Name of God, they are to present their conclusions, starting always with the *relator* or *ponens*. Under the chairmanship of the presiding judge,

they will discuss what is to be stated in the dispositive part of the sentence. It can happen that they will not be unanimous in their decision. If, after discussion, such disagreement cannot be resolved, the dissenting judge is allowed to remain with his decision and can demand that if there is an appeal, his or her conclusions be forwarded to the higher tribunal.

2. Preparation of the Sentence:

In addition to the deliberation and discussion of the judgement, the Code, in Canon 1610, considers the method to be followed in writing the sentence. When there is only one judge, it is his task, after mature deliberation, to decide and draw up the judgement according to the law. When there is a collegiate tribunal, however, the work of writing the judgement is the duty of the *ponens* or *relator*, who must use the points contributed by the individual judges in their discussion: those reasons about which the greatest number of judges agreed should be given priority. Once the judgement has been written, it should be submitted to each member of the tribunal for approval.

Par. 3 of the same canon indicates the maximum time limit for the publication of the judgement of the Tribunal, although it allows the judges to authorize longer period of time for grave reasons. No comment is made concerning the sole judge's responsibility in this regard which leads to deduce that he does not have the faculty to prolong the time limit.

Canon 1612 describes the way in which the sentence is to be drawn up:

- 1) After invoking the Name of God, the sentence must state the name of the Judge or Judges, the Tribunal, the Plaintiff, the Respondent and Procurator, with names and domicile duly indicated. It is also to name the Promotor of Justice and the Defender of the Bond, if they were engaged in the trial.
- 2) Then, briefly, the alleged facts are set out, with the conclusions of the parties and the formulation of the doubt.
- 3) The dispositive part of the sentence follows, prefaced by the reasons which support it.
- 4) The sentence ends with the date and the place in which it was given, and with the signature of the judge, or in the case of the collegiate tribunal, of all the judges, and of the notary.

III. EXPERT

The provisions on the use of experts in the CIC/83 are found in Bk VII, Processes; Part II, The Contentious Trial, Section I, the Ordinary Contentious Trial. Title IV, Proofs, Chapter IV, Experts, cc. 1574-1581.

The testimony of the expert is proof which was later incorporated into the procedures, and which has gained ground because of the advance of science and technology. Juridical doctrine has not established criteria regarding the figure of the judicial expert, since his function is situated in an intermediary position between the judge and the witness. According to the opinion of some, the expert is not an assistant or delegate of the judge, nor is he some sort of a technical judge with a

judicial function; but rather in canonical law, he is considered as an auxiliary to the judge, under whose service he places his technical knowledge. It is however, without doubt, that between the expert and the witness, there is a very intimate relationship, because both of them bring to the process his knowledge regarding the fact or facts that are the object of controversy. The difference is that the witness presents historical knowledge or past events which are directly perceived, while the expert does the same with regards to present events and through procedures which allow him to connect them with the past.

A. NOTION

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 effects, their relationship to other facts relevant to the case, and their influence on one another. In other words, the expert is one who is specialized in a science, technology or art, and whose professional knowledge are being consulted for observation, verification and evaluation of a fact. The word refers most often to psychiatrists, psychologists and others in the mental health fields. Social workers, marriage counselors, psychiatric nurses and therapists could all be placed under the category. The term also applies to handwriting experts, gynecologists, urologists; the latter two are required in cases of non-consummation of marriage and impotence.

The judicial expert is one who is assigned by the judge in order to prove a fact or determine the nature of something, according to the rules of science or of technology, in order to arrive at a decision. The mission of the expert, done through the technical means of his profession, is to verify a fact, and the elaboration of the information and their evaluative dictates. The activity of the expert consists in two elements: examination and inspection, and explanation or evaluation.

The juridical status of the expert is both that of a collaborator of the judge, and an instrument of proof; he is not simply a witness, *testis peritus*, nor a judge, *iudex facti*. According to canon law, the opinion of the expert is a means of proof subject to specific requisites.

B. KINDS OF EXPERTS

Experts can either be **judicial** or **extra-judicial**, according to their activities within or outside the judgement procedure. Judicial experts can be **necessary** if the judge or the law prescribes their intervention, or **voluntary**, if it is the parties who propose them and the judge accepts them. Necessary and voluntary experts are **public experts** because they exercise their function as auxiliary to the judge; but they can also be **private experts** of the parties, whom they are helping and advising (c. 1581, par 1). The private expert is neither judicial nor a simple assessor chosen by the party as a specialist to advise on technical or scientific matters without any function in the trial. This private expert is rather a juridical figure who intervenes in support of the party regarding technical information needed by that party and as a help to study and understand the opinions of the judicial expert.

C. NECESSITY (c. 1574)

The collaboration of experts is necessary if prescribed by law. If it is not required by law, the judge may and at times must obtain the reasoned advice of persons with special technical knowledge or skills. The judge must obtain the services of an expert when the qualified activity of that person is necessary or useful for establishing or proving some facts, or determining the true nature of something. It is incumbent on the judge, in each case, to decree whether the proof by experts should be requested, and if so, whether by one or several, whether it is requested by the parties or ordered *ex officio*. It is not necessary to request the opinion of an expert if, apart from its not being indispensable to the case, it is degrading and disagreeable for the person because of libellous inquiries and treatment, or is burdensome for the trial with regard to time, effort, and cost.

In marriage nullity cases, c. 1680 requires the judge to use the services of one or more experts, – in cases of impotence and where consent is lacking or defective because of mental illness, unless, of course, it is obviously useless in the circumstances. There seems to be a weight of opinion in support of the view that the opinion of the expert should be sought when the case involves psychological incapacity for marriage.

Impotence is not always easy to prove. It may be that the alleged impotence exists at the time the marriage is challenged and when the expert carries out a physical examination; however, its existence at the time of the wedding may still not be specifically established according to the conditions required by law.

Insanity or mental illness is not always apparent at the time of the celebration of the marriage. It falls to the experts to examine the patient according to scientific norms, and to evaluate the person's behavior before, during and after the marriage. It is the expert's duty to diagnose the illness, to indicate what are the possibilities of recovery, to report on the effects and gravity of that condition, and on its influence on consent; but it is the judge's duty to weigh the expert's conclusions in the light of the proceedings (c. 1579).

Furthermore, canon 1701, par 2 states that in the process for the dispensation from a ratified and non-consummated marriage, while an advocate is not required, the Bishop can, because of the difficulty of a case, allow the petitioner or respondent to have the assistance of an expert in the law. This is particularly true, in the event of a negative answer from the Apostolic See, in which case, this expert in the law, can inspect the acts of the case in order to decide whether anything further of importance can be brought forward to justify another submission of the petition (c. 1705, par 3).

D. LIMITATIONS

Canon 1576 states that experts have the same limitations as witnesses. In other words, like witnesses, experts are excluded from a case if they are deemed incapable or unfit (c. 1550), and they may be objected to for the same reasons or for other just causes (c. 1555). Experts can be excluded and objected to like witnesses, and for the same reasons, because the characteristics of canonical experts are similar to those of witnesses; the experts testify in court as technical witnesses. They may therefore be proposed by the parties or appointed *ex officio*, and excluded

or objected to; their conclusions are subject to criticism and their opinion cannot outweigh that of the judge in his final judgment (c. Felici, 14-02-1951, SRRD Dec 43 (1951); 102-104; c. Fiore, 06-07-1961, SRRD Dec 53 (1961) 352, no.3).

Those specialists may not be appointed experts if they are considered incapable of testifying, for instance, if they are bound to one of the parties by a close relationship, or if they have given a report outside the trial at the request of one of the parties. Those who have no qualifying title in the specialty required for the case are unqualified and those who are of such debased character that they are not deemed worthy of trust are unfit.

Among the just reasons for rejection are, for instance, the existence of a close friendship with one of the parties, or a public and implacable enmity with the other. Once an expert suggested has been effectively excluded or objected to, a substitute expert is to be appointed according to law. The reasons for the substitution should always be recorded in the acts; the same holds in a case when an expert ceases to act as one.

E. DUTIES OF THE EXPERT

1) Obligation to secrecy (c. 1455)

The three paragraphs of this canon deal with, respectively, the secret to which the ministers of the tribunal are bound by virtue of the office they have received: the secret, first of all, which is specific and proper to collegiate tribunals, which is the subject of a new and singular exception according to c. 1609, par. 4; and finally, the secret imposed by taking the oath, when there is reason to fear serious harm, to the persons who intervene in the process and are not members of the tribunal.

2) Take the oath to exercise the office properly and faithfully (c. 1454)

This canon indicates those who are obliged to take an oath. The words of the canon have an extremely wide application: "*all who constitute a tribunal or assist in it.*" Consequently, apart from the judges, it refers also to the assessor, the auditor, the promotor of justice, the defender of the bond, the notary, and to all those who cooperate with the tribunal, for example, interpreters and experts. This oath is different from the one required of the parties (c. 1532) and of the witnesses (c. 1562, par 2).

3) Produce the evidence according to the law and the mandate of the judge (c. 1578)

When the evidence of the expert is being produced, the norms prescribed by the law and indicated by the judge must be meticulously adhered to. Experts must conduct their examination and make their report individually and separated from one another. One expert should not reveal results to another, unless the judge has ordered that the appointed experts draw up and sign a single report. The fact that the experts disagree – whether in the joint report, or in the individual ones – does not mean that it is necessary to choose another or to appoint others. The experts should clearly indicate in the report which documents or other appropriate means were used for ascertaining the identity of persons, things or places; the method adopted in carrying out the assignment given; and the cogent arguments upon which the report's conclusions are based.

Evidence by expert is made up of several stages: appointment of the expert and acceptance of the appointment, an assigned task, the examination of the report, requested clarifications, and judicial evaluation. Once the judge has received the reports from the experts, he may communicate them to the parties and to the promoter of justice, or the defender of the bond, in case additional information is desired. They might ask that the expert specify the method used, complete what might have been omitted, provide the reasons for the conclusions, and eliminate any incoherence or contradictions. After studying the statements of the parties, their private experts, or of the promoter of justice or defender of the bond, the judge may summon the experts for an oral interrogation, if necessary, to elucidate questions raised concerning the report. The experts may bring to this examination any notes or relevant material. The conclusions of the experts should always be done in writing.

4) **In Matrimonial Cases**

It is necessary that the expert have some understanding of the purpose of the examination or investigation. Hence, he is to receive appropriate instructions and particular questions from the judge who is instructing the case. While it is true that it is not the task of the expert to decide on validity of consent, it will be most difficult for him to carry out his assignment unless he has some knowledge of the jurisprudence on matrimonial consent. It is expected that he will carry out all methods available to him in accordance with the rules and ethics of his specialty in the drawing up of his report for the Tribunal.

To assist him in the performance of his task, the Court Expert is to be given access to the acts of the case, and he is to act independently from other experts when a number of experts have been asked to deal with the case.

The expert is also to outline the procedures which he has used in arriving at his conclusions and to provide further clarification if the judge deems it to be necessary.

F. DUTIES OF THE JUDGE

1) To appoint the experts (c. 1575)

It is the responsibility of the judge to appoint the experts, under the following conditions: either after hearing the parties and, in public cases, the promoter of justice or the defender of the bond; or after receiving suggestions from the parties. The judge may also accept reports already drawn up by other experts – in the authentic procedural sense – either in the same case or in a different one disputed by the same parties, as long as the report is relevant to the dispute.

The fact that the judge hears the parties and considers their suggestions before appointing experts is related not only to the persons, but also to the subject matter which requires the attention of the expert. The parties have the right, as does the promoter of justice or the defender of the bond, if they intervene, to propose points which the experts should address in the study.

2) To define the task of the expert (c. 1577)

Keeping the suggestions of the parties in mind, the judge determines in a decree the different points to be studied by the experts. The judge must have a just cause for ignoring or rejecting the points offered by the parties; otherwise, his decree as well as the expert's report can be attacked as being defective or inadequate.

After the expert has accepted the appointment, a copy of the acts of the case, together with those documents and additional material considered by the judge to be necessary or useful in performing the task efficiently and accurately, are provided to that expert. The judge will then set a time limit to allow the expert to complete the study, prepare a detailed report, and submit conclusions.

3) To evaluate and weigh carefully the expert's conclusions (c. 1579)

The canonical procedural norm grants the judge freedom to submit the evidence of the experts to healthy criticism, and to weigh it together with the rest of the evidence. The canon orders the judge to give careful consideration to the conclusions of the experts, even when they are unanimous, and also to weigh the other circumstances of the case. It follows therefore that the opinion of the experts do not bind the tribunal, nor are they decisive in the trial, and even less so if based on facts which either do not appear in the acts or are not proven.

When the conclusions of the experts are concordant, however, and their professional practice is governed by a Christian concept of life, it is reasonable to assume that the judge will not ignore their reports except for very serious reasons. (c. Felici, 03-12-1957, SRRD 49 (1957) 791, no. 7; John Paul II, Address to the Roman Rota, 05-02-1987, AAS 79 (1987) 1453-1459; TPS, 32 (1987) 131-136). In any case, when providing the reasons for its decisions, the Tribunal must state the arguments that moved it to accept or reject the conclusions of the experts.

The conclusions of the experts are not binding upon the judge because experts are not judges but rather auxiliaries of the judge, who help him come to a decision, together with all the other elements of the process. By virtue of the principle of free evaluation of proofs, the judge is free, within the limits of logic, to evaluate the probative value of the expert testimony, but he should explain his reasons for accepting or rejecting.

All of these requirements provide justification for the claim that the judge is the expert of experts. Clearly, he must be well trained in philosophy, theology, and be expert in law and endowed with a wide knowledge of the empirical sciences.

G. RIGHTS OF THE EXPERTS

1) Right to just compensation (c. 1580)

In view of the contractual character of the expert's appointment (c. 1575), attention should naturally be given to his or her right to be provided with suitable means for the examination of the matters submitted for opinion, to be compensated for expenses and financial losses incurred, and to be given an honorarium for this service. The

expenses and honoraria of the experts should be fixed by the judge with fairness and equity, *ex bono et aequo*.

CONCLUSIONS

AUDITORS

Undoubtedly, the judge auditor is a key figure in the settling of a case in the tribunal, in the sense that the gathering of the facts on which the sentence is to be based, is the deciding factor, so to say. If the judge auditor has been so thorough and clear in his task, it would be easy for the judges to arrive at a moral certainty required to reach a decision. Otherwise, the least that could happen is for the tribunal to do a supplementary hearing, in case it is clear that this is the right course to be followed.

My experience in tribunal work has taught me that the more cases I try and hear, the more I improve in the task of being an auditor.

So, you might find the following practical recommendations useful:

1. Do not let the task intimidate you.

There is no such thing as a perfect case much in the same way as there is no perfect crime. You learn as you go along. Master the case very well and try to picture the parties in your mind. Then interview the witnesses with only one thing in mind - to fill in the blanks of the story, as you know it.

2. Do not intimidate the parties and the witnesses.

The parties will try to be defensive most of the time. Some, if not most witnesses, will also be defensive; worse, others will be non-cooperative. This is because, they do not clearly comprehend the internal workings of the tribunal. Try to put them at ease, and explain to them that all you need is for them to tell the truth.

3. Be patient

Most of the time, you will have to do the question in a way that you will be understood. Do not rush, and do not get irritated. When you are in a hurry or you are angry, you cannot concentrate on what you intend to know: the truth.

4. Do not be cute.

One of the bigger sins that the auditor may often commit is to try to show that he is smart: that he will catch the witness in a lie. He may be tempted to show off, that he knows how to dig up the most intimate of secrets. Remember, you are not a detective nor a spy, nor a prosecutor nor a defense lawyer in an impeachment case. You are a judge and all you want is the truth and nothing but the truth, so help me God!

5. Learn to make good follow-up questions. We call these: Ex officio questions.

Usually, there is already a prepared list of questions being given to the auditor, prepared by the promotor of justice or defender of the bond. Once, an auditor has gotten enough experience, he does not feel the need to study the case history anymore, much less to familiarize himself with the story of the case. He goes to the tribunal, expecting to find the prepared questionnaire laid down in front of him. It is always advisable to at least have an idea of the case, so that you will be able to formulate ex officio questions that are relevant and fact-finding.

RELATORS

The relator or *ponens* has the most difficult and demanding task in the case. It is not easy to put down in writing a decision after a case has been heard in court. It took me several weeks to be able to complete my first decision, ever. And it was not even original. I had to read several samples of the law portion of similar cases to be able to come up with my own law portion. This means that I copied from this, from this, from this and from that. After finishing the law portion, I knew, it was not me: I was Judge Oscar Cruz, Judge Felici, Judge Fagiolo, Judge so and so.

Then I had to write down relevant and pertinent portions of the testimonies of the witness to fill in the application of the facts to the law. This means reading and reading and reading the acts of the case again and again. But then again, that is why we have what we call jurisprudence. We read from previous decisions and then we look for parallel cases and use those decisions.

So, my recommendations to you are:

1. Have a very good library of good Tribunal decisions. Since we will be dealing mostly with matrimonial cases, there are good sources of decisions on all kinds of nullity cases. Of course, the best source is the book of decisions of the S. Roman Rota. Other books and periodicals and bulletins published by Canon Law Societies also carry recent decisions. Here in the Philippines, the tribunal of Manila has a very good collection of decisions.

2. As you go along manufacturing decisions, try to make a collection of your own. It is also good practice to already have some samples of law portions of decisions. They come in handy. We call them canned decisions - *de lata*. You get a case. You read the acts. You remember a law portion of a decision on a similar case. You look for it in your computer - copy or cut; paste in a new document; there you are, you have a law portion. Now all you have to do is apply the facts of the case. Obviously, this one cannot be canned. But then, one half of the job is already done.

3. Most of the time, if you are the relator or the *ponens*, you will be left alone by the other judges to do the job. That is not exactly what the canon says, about the collegiate tribunal coming to a decision, but we judges sometimes have a way of going around the canons. I wonder, what the judges would do, if the Defender of the Bond would raise an objection that the decision was not written down as prescribed by the Code. Just an observation!

4. My final advice: Strive to make a masterpiece of a decision every time you do one. Do not be content with mediocrity. Study and study and study. Someday, you will be gratified to know that other judges are quoting your decisions. So make sure that when they quote you, they are not quoting what you are quoted from other judges.

EXPERTS

In my experience as a Judge and as Relator or Ponens, here in the tribunal of Manila, there were several cases where the intervention of an expert was needed. Here they have an office where they sent the parties for psychological test or exams. We were careful not to call it psychiatric tests. The parties were usually allergic to the term. That was almost ten years ago. I do not know what is being done now or whether that office is still there.

In the other dioceses, I heard that there are very few experts who are able to help in matrimonial cases. While there are psychologists and psychiatrists in the provinces, they have no experience with matrimonial cases, as far as I know.

Anyway, all I can tell you about this one is my own experience.

1. Whenever I deal with an expert's report, I just remember what our professor told us before: The judge is the expert of experts. So, even if the expert ends his report with these words: "There is no doubt that this person lacked the due discretion needed to contract marriage", I say "Thank you very much!" and then proceed to write down my own decision. Sometimes, I disagreed; most of the time, I agreed.

2. Do some extra reading on personality disorders and other psychological anomalies. I remember, I used to enjoy quoting from the Diagnostic and Statistical Manual published regularly in the United States. I do not know what number this book has now. I stopped with DSM-III. You will get some idea on what the expert is talking about from this book. Just remember: you are a judge; not a psychologist or a psychiatrist.

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