

THE OFFICE/MINISTRY OF THE JUDGE IN THE TRIBUNAL

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The Tribunal Ministry has been a specialized apostolate in the Church. Its task is demanding but ironically there are relatively few clerics who are interested in and dedicated to rendering service in this kind of work. We know of a good number of Ecclesiastical Tribunals that are existing. But statistics show that only a few of them are truly active in the resolution of cases presented to these ecclesiastical courts, mostly because of lack of qualified personnel.

A Matrimonial Tribunal of First Instance, strictly speaking, may already be established and rendered operative with the appointment of a qualified Judicial Vicar as Sole-Judge, a Defender of the Bond and a Notary. >From these there ecclesiastical offices, the office of Judge is primarily important. Archbishop Oscar Cruz describes its office: “A good Judicial Vicar primarily in terms of integrity and ability, commitment and availability is a real asset, a precious endowment of a Tribunal” (Oscar V. Cruz, *Marriage Tribunal Ministry*, Manila (1992), p. 70).

This paper is intended to present the ministry or office of the Judge of the tribunal as provided in the New Code of Canon Law. The paper has four parts. The first three parts are presentation on the nature of the ministry of the judge, the rights and obligations thereto appertaining, and the specific responsibilities from the introduction to the judgment of case. Lastly, I will give an evaluation by way of practical suggestions toward an effective and efficient judicial ministry.

I. NATURE OF THE MINISTRY OF THE JUDGE

The judicial process is the evolution of the lawsuit between the parties ending at its decision, conducted by the judge *in contrario*, according to the solemnities prescribed by law (Private Notes, Said “De Processibus”, Rome, p. 2). The judge is the “dominus” of both the process and the parties from the moment the petition is submitted. It is the judge who is the pivot, the balance beam; he must concede the parties equal rights within the process.

1. *Judicial Power*: The power of governance is divided into legislative, executive and judicial power (c. 135, par. 1). In each diocese, the bishop holds ordinary judicial power. He is the local ecclesiastical judge who can decide cases by himself or by others.

The Judicial Vicar acts in the name of the diocesan Bishop in his general administration of justice within his ecclesiastical jurisdiction. He is a priest who oversees the diocesan judicial ministry. In addition to a Judicial Vicar, the diocesan Bishop may appoint Diocesan Judges who pronounce a decision on a given issue. There can be only one Judicial Vicar for every Diocese but there can be more than one Judge therein.

The Judicial Vicar and the Diocesan Judges wield judicial powers. We are concerned here with the judge who wields judicial power in the name of the bishop in the diocesan marriage tribunal or in the name of the bishops in the regional tribunal.

They are entrusted with the noblest function of judging (*ius dicere*) in a lawsuit by applying to a specific case the law issued in the abstract by the legislator. They are tasked with the responsibility to see that justice is done. In their ministry they are faced with two situations in the course of the process: that of the fact which requires the objective truth, and that of law which claims fidelity to the norm. The firm

adhesion to one and to the other reality is what produces the “beautiful fruit of justice” (John Paul II, *Allocution to the Roman Rota*, April 2, 1980).

2. *Qualification and Appointment:* The Judge should be a cleric of irreproachable character and versed in church law. His appointment should be made in writing. A person, appointed Judicial Vicar, automatically becomes the judge, similarly also the Associate Judicial Vicar. The office of the Judicial Vicar or Officialis is a necessary one in the diocesan curia. The Judicial Vicar has ordinary power. The fact that a judicial vicar has not been appointed in a diocese does not mean that the vicar general will have judicial power. Although the same person may be both vicar general and judicial vicar, the vicar general may not assume the role of judicial vicar merely because one has not been appointed.

In each diocese the Bishop is to appoint diocesan judges, who are clerics (c. 1421, 1). The episcopal conference can permit that lay person also be appointed judges. Where necessity suggests, one of these can be chosen in forming a college of judges (c. 1421, 2). Judges are to be of good repute, and possess a doctorate, or at least a licentiate in canon law (c. 1421, 3). The appointment of lay diocesan judges is premised on the condition that the episcopal conference allows it.

The CBCP following the guidelines of the Congregation for Bishops, Prot. No. 35/84, concerning Lay Persons as Judges in Ecclesiastical Tribunal, resolved the following. First, the diocesan bishop may recommend lay persons to the CBCP to be appointed judges, provided that they are Catholics of unimpaired reputation and have a doctorate, or at least, licentiate in canon law. Secondly, whenever there is lack of academic qualifications the diocesan bishop may have recourse to the Supreme Tribunal of the Apostolic Signatura in order to ask for the needed dispensation, provided these lay persons are expert in civil law and with at least a three-year experience in ecclesiastical courts. Thirdly, lay persons cannot sit as judges in cases against clerics, or in cases concerning the declaration or imposition of interdict or excommunication.

The judicial vicar, the associate judicial vicar and the other judges are appointed for a specified period of time, without prejudice to the provision of canon 1420, 5. They cannot be removed from office except for a lawful and grave reason (c. 1422). The Code wishes to avoid two dangerous extremes, namely, the instability of the office and its being held for life, in perpetuity. Thus, it provides the appointment for specific, not indefinite, periods. It also decrees that those in office may not be removed without a lawful and grave reason. Their office does not cease during the vacancy of the episcopal see. However, the new bishop must confirm their appointment. They cannot be removed by the diocesan administrator (c. 1420, 5).

3. *Sole Judge and Collegiate Tribunals.* There are two types of Tribunal by reason of the number of judges who would apply the laws to the point of controversy. One is called Sole Judge Tribunal. Here only one judge renders justice, applies the law according to proof given and substantiated, resolves and decides the controversy according to the information provided and proven, and effects resolution of case. In any trial a sole judge can associate with himself two assessors as advisers; they may be clerics or lay persons of good repute (c. 1424).

The other is called Collegiate Tribunal. It consists of three or five judges who will effect the resolution of the case submitted to the tribunal. Canon 1425 provides a list of matters reserved to a collegiate tribunal of three judges one of which concerns the bond of marriage.

In a collegiate tribunal there should be a Presiding Judge, a Ponens or Relator and an Associate Judge. The Presiding Judge is the first among equals. His primary function is to direct the hearing and, common with the other judges, he must proceed in accord with procedural principles and render in writing his votum. The Ponens, likewise, investigates the case and renders votum in writing. He proposes

the sentence in the name of the collegial judges after decision has been reached. The Associate Judge investigates and renders his votum in the case.

Canon 1609 describes the internal proceedings that must be followed by the collegiate tribunal up to the conclusion of the judgment settling the principal case. The presiding judge decides the day and time when it is to meet for discussion. Unless a special reason requires otherwise, the meeting is to be at the tribunal office (1). On the day appointed for the 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). Having invoked the divine Name, they are to offer their conclusions in order, beginning always with the ponens or relator in the case, and then in order of precedence. Under the chairmanship of the presiding judge, they are to hold their discussion principally with a view to establishing what is to be stated in the dispositive part of the judgment (3).

II. RIGHTS AND OBLIGATIONS OF THE JUDGE

The role of the judge in the Tribunal is to direct the hearing of the case and to decide the issue. The eventual decision of the judge can be premised only on the deposition of the parties in the case, corroborated by the testimony of witnesses and the opinion of experts where necessary. In the strictly judicial form of procedure the judge must remain impartial both during the hearing and also in taking the decision. But this does not mean that he remains passive.

In order to accomplish his important role in the tribunal the judge is called on to hold the following obligations firmly, in accordance with the expressed provisions of the Code of Canon Law:

1. *Diligence* (c. 1453). Judges are to ensure that, within the bounds of justice, all cases are brought to a conclusion as quickly as possible. They are to see to it that in the tribunal of first instance cases are not protracted beyond a year, and in the second instance not beyond six months. The norm provided in this canon is that tribunal have the obligation to ensure that there is no undue delay both in the first instance and appellate courts and this is closely related to the expediting of court by the parties and the tribunal. The old Code (c. 1620) set the limit of two years in the first instance and of one year in second instance. The new Code has reduced the periods by half. The reason for the reduction is, perhaps, the advancement in technology. We now have the computer and telephone system to expedite communication. Thus, there is no reason for delaying the process of a case within the prescribed period of time.

2. *Oath* (c. 1454). All who constitute a tribunal or assist in it must take an oath to exercise their office properly and faithfully. The canon indicates those who are obliged to take an oath. It must be interpreted in a wide sense. Thus, apart from the judges, it refers also to the assessor, auditor, promotor of justice, defender of the bond, notary, and all those who cooperate with the tribunal, for example, interpreter and experts. This oath is different from the one required of the parties and witnesses. It is an oath of fidelity and loyalty to the Church and of commitment to the pastoral office.

3. *Secrecy* (c. 1455). In a penal trial, on the one hand, the judges and tribunal assistants are bound to observe always the secret of the office. In a contentious trial, on the other hand, they are bound to observe it if the revelation of any part of the acts of the process could be prejudicial to the parties (c. 1455,1). They are also obliged to maintain permanent secrecy concerning the discussion held by the judges before giving their judgment, and concerning the various votes and opinions expressed there, without prejudice to the provisions of canon 1609, par. 4 (c. 1455, 2). Indeed, the judge can oblige witnesses, experts, and the parties and their advocates or procurators, to swear an oath to observe secrecy.

This may be done if the nature of the case or of the proofs are such that revelation of the acts or proofs would put risk the reputation of others, or give rise to quarrels, or cause scandal of similar untoward consequences (c. 1455, 3).

Strictly speaking, the secrecy provided to in this canon refers to the so-called *secret of the office* or *professional secrecy*. 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 matrimonial trials which concern only the private good of the parties, professional secrecy is binding if damage might ensue from the breaking the oath to keep it or at least a violation of the oath to fulfill the office properly and faithfully. Those who do not fulfill the obligation of secrecy can be punished (c. 1457).

The obligation to maintain secrecy refers directly to the obligation of the tribunal. However, it refers explicitly by extension to the judge who watches over the common good by guaranteeing the secrecy of all that has taken place in the process. In matrimonial cases, the importance of this provision is obvious, since they are usually concerned with secret and intimate subjects, for example, impotence, personality disorder, sexual and physical abuse, and other confidential matters. Likewise, the testimony of the witnesses or the reports of the doctors could result in serious inconvenience or harm to these people if secrecy is not prudently observed. Moreover, any disclosure could give rise to the danger of collusion or bribery (Instruction, *Provida Mater Ecclesia*, 130).

4. *Gifts* (c. 1456). The judges are forbidden to accept any gifts on the occasion of a trial. The canon repeats the traditional ban on accepting gifts. The wisdom behind this prohibition is for the judges to be impartial and above suspicion. Thus, none of them should accept gifts of any kind whatsoever, on the occasion of the trial. The prohibition does not distinguish small or big gifts, as specified in the Decretals. Any gift received by the judge is prohibited, unless it is clear from the intention of the donor. As a general rule, gifts and other considerations given to judges always give rise to suspicion *latet angus in herba*.

5. *Impartiality* (c. 1448). The judge is not to undertake the hearing of a case in which any personal interest may be involved by reason of consanguinity or affinity in any degree of the direct line up to the fourth degree of the collateral line, or by reason of guardianship or tutelage, or of close acquaintance or marked hostility or possible financial profit or loss.

To refrain from judging is a strict obligation and the effect of a legal precept: *iudex ne suscipiat*. The context of the term “judge” in this case refers not only to the sole judge, but also to one, several, or all the judges of the collegiate tribunal.

A distinction should be made with regards to the optional withdrawal of the judge from a case. On the one hand, the judge withdraws himself from a case in which he fulfills a duty imposed by law. On the other hand, he withdraws by reason of a strict objection against himself by another person. The latter is an exception of suspicion that the parties may direct against the judge in order that the person challenged refrain from taking part in a specific case.

Impartiality is necessary in the administration of justice. The Code sees situations or circumstances that may render the judge partial in handling case. They are concrete reasons in favor of the abstention by judge. They are the following:

- 1) consanguinity or affinity in any degree of the direct line 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 incapacitated;
- 3) an intimate acquaintanceship, whether because of common life, a business partnership, or a very 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.

It is evident that the judge, when confronted with these circumstances, can be impartial and right, however he must inhibit himself for better judicial process and confidence among the faithful in the administration of justice.

III. THE JUDGE DURING THE TRIAL

Process is a series of actions and should be ordered to resolution of an object which is controversial and resolve the doubts surrounding controversies. We shall now deal with the series of actions in the judicial process of marriage case and view the important role of the judge in every stage of the judicial movement.

A. Introduction and Preliminary stage of the case

1. *Pastoral Settlement*: Before he accepts a case and whenever there appears to be hope of success, the judge is to exhaust all pastoral means to persuade the parties that, if it is possible, they should perhaps validate their marriage and resume their conjugal life (c. 1676).

This canon is an indication of the legislator's desire to avoid the introduction of lawsuits as far as possible. With due regard for justice the judge, he is required to use every suitable pastoral means to obtain an understanding between the parties. However, agreements and arbitration (c. 1715) cannot be used in these cases, since they pertain to the public good (c. 1691); for this reason, the validation of the marriage (cc. 1156-1165) and the re-establishment of conjugal life are advised.

2. *Submission of a Plea*: Only after establishing impossibility of reconciliation of the couple will the judge proceed to investigate a case. For a process to be valid, there must be a petition. A judge cannot investigate any case unless a plea, drawn up in accordance with canon law, is submitted either by a person whose interest is involved, or by the promotor of justice (c. 1501). He cannot initiate a case on his own authority.

The principle *nemo iudex sine actore* is sanctioned with absolute thoroughness by this canon. The filing of a suit, based on the necessary initiative of one of the parties, leads one to conclude that this canonical process is governed by the principle of initiative. The *ex officio* initiative of the judge, recognized in the second part of canon 1452, 1, must be acknowledged as compatible with the requirement of a petition from the party mentioned in canon 1501, unless there is an express norm to the contrary.

Likewise, by prescribing that the judge cannot hear the case if a plea has not been submitted "in accordance with canon law," is tantamount to ordering that the beginning of any canonical trial be subject to the principle of formal legality.

3. *Acceptance/Rejection of Plea*: It is the responsibility of the judge of the tribunal to accept or reject the petition. However, his competence must first be verified as well as the right of the plaintiff to stand before the court. In other words, he has to verify whether the plaintiff has procedural capacity and even the necessary capacity *ad procesum*. If these requisites are not fulfilled, a decree will be issued rejecting the petition outright. It will also have to be rejected if any of the requisites prescribed in canon 1505, nos. 1-3, are lacking.

The judge is obliged to accept/reject petition within a month. If within one month of the presentation of a petition, the judge has not issued a decree admitting or rejecting it in accordance with canon 1505, the interested party can insist that the judge perform his duty. If, notwithstanding this, the judge does not respond, then after ten days from the party's request, the petition is to be taken as having been admitted (q. 1506).

This measure prevents prejudice to the party resulting from unreasonable negligence of the judge. However, practical problems might still arise after that, if the negligence continues, especially with regard to the summons to appear in court, unless the tribunal changes its mind. In these cases, it will be necessary to proceed against the judge by means of denunciation and even by penal process if the judge is considered to be guilty of culpable negligence in the exercise of the office (c. 1389, 2).

4. *Summons*: In the decree by which a plaintiff's petition is admitted, the judge or presiding judge must call or summon the other parties to court to effect the joinder of issue; he must prescribe whether, in order to agree the point at issue, they are to reply in writing or to appear before him. If, from their written replies, he perceives the need to convene the parties, he can determine this by a new decree (c. 1507, 1).

The judge or the presiding judge of the tribunal by means of a decree must admit the petition of a plaintiff. Consequently, it is ordered that the other parties be called or summoned to court to effect the joinder of the issue. This option complies with the dual procedural possibility provided in canon 1513, 2, for establishing the joinder of issue, which must be determined in the decree admitting the petition and summoning the parties within twenty days of the request.

The petition introducing the suit is to be attached to the summons, unless for grave reason the judge considers that the petition is not to be communicated to the other party before he or she gives evidence (q. 1508, 2). This faculty which is conferred on the judge when there are grave reasons must be used only in exceptional cases. He must then declare in the decree the reasons that can justify his decision.

5. *Joinder of Issues*: Once the joinder of the issue has occurred, the judge is to prescribe an appropriate time within which the parties are to present and complete the proofs (c. 1516). The completion of the joinder of issue concludes the introductory phase of the trial and the probationary one begins. The legislator leaves it to the discretion of the judge to set a suitable time for presenting and completing the evidence.

The judge is to appoint another guardian or curator as soon as possible in the event the guardian or curator ceases from office and if the party has neglected to do so within the brief time prescribed by the judge himself (c. 1519).

B. Ordering of the Hearing

1. *Competence*: Once the summon has been lawfully communicated, or the parties have presented themselves before a judge to pursue the case, the matter ceases to be a neutral one; the case becomes that of the judge or of the tribunal, in other respects lawfully competent, before whom the action was brought;

the jurisdiction of a delegated judge is established in such a way that it does not lapse on the expiry of the authority of the person delegated (c. 1512). In other words, at this stage the jurisdiction is already consolidated by the summons.

The procedural relations between the parties themselves and with the judge are generated by a lawfully served summons. Henceforth, the bonds deriving from these relations in reference to the object of the trial come into being. The lawful summons also brings about special effects from a formal or juridical point of view. The citation of the judge is a one-time act with the exception of serious doubt on the part of the judge that the respondent may not have received or understood the summons. In this case, he may issue a new citation. With the serving of the summons, the juridical effects, that is, relationships of the parties and the judge are complete. It is the judge who will now mediate the relationship between the parties.

The judge can be punished by the competent authority with appropriate penalties, not excluding the loss of office; either if, with no legal support, he declare himself competent and hear and determine cases; or if, through deceit or serious negligence, they cause harm to the litigant (c. 1457).

2. *Extraterritoriality*: The judge enjoys extraterritoriality of exercise of his power (c. 1469). It pertains to his activities outside his own jurisdiction. A judge who is forcibly expelled from his territory or prevented from exercising jurisdiction there, can exercise his jurisdiction and deliver judgment outside the territory. Likewise, he can go outside his own territory to gather proofs, for a just reason and after hearing the parties and with permission of the place ad quem.

As a general norm the judge may not exercise his judicial power outside his own territory. However, there are two possible exceptions: 1) if the judge in question has been violently expelled from his own territory or impeded in the exercise of jurisdiction; and 2) if there is a just reason for it and the parties are heard, the judge may collect evidence of any kind outside his own territory with the permission of the bishop ad quem.

3. *Imposition of Sanctions*: To preserve the sacredness of the whole proceedings in the tribunal, the judge can impose sanctions during trial (c. 1470). When cases are being heard before the tribunal, only those persons are to be present whom the law or the judge decides are necessary for the hearing of the case. The judge can with appropriate penalties take to task all who, while present at a trial, are gravely lacking in the reverence and obedience due to the tribunal. He can suspend advocates and procurators from exercising their office in ecclesiastical tribunal.

4. *Exclusion from the Hearing*: As general rule, only those persons required by the general law or by the judge for conducting the process, are allowed to be present in the courtroom. The judge should consider that if publicity in itself is a guarantee for the parties before the tribunal, it can also give rise to scandal and be an unfair weapon in the hands of aggressive litigants who use sensationalism as a means of harassment against honest and worthy parties.

5. *Declaration of Non-Competence*: A judge, who becomes aware at any stage of the case that he is absolutely non-competent, is bound to declare his non-competence (q. 1461). An exception of absolute non-competence can be made against a judge. In such case, he is totally lacking in jurisdiction in a contentious case by reason of the matter, the person, or the grade of the tribunal. Moreover, a declinatory exception of absolute non-competence can be made to the judge himself, ex officio. In effect, after the examination of the incident, he will abstain from hearing the case. Likewise, one judge might request a *restraining order* of another competent judge to permit him, by means of a judicial injunction, to ask the non-competent judge to withdraw from the case and refer the proceedings already completed to the competent tribunal.

A judge who, at any stage of the trial or instance of the case, becomes aware of his absolute non-competence must declare it, otherwise his judgment, if handed down, would be vitiated by irremediable nullity (c. 1620, 1). This being the case, there would be no justification for continuing legal proceedings that would ultimately prove futile.

C. The Judge and the Parties in the case

1. *Obligation to Attend Trial*: The judge can oblige parties to attend court (c. 1477). Even though the plaintiff or the respondent has appointed a procurator or advocate, each is always bound to be present in person at the trial when the law or the judge so prescribes.

The fact that parties are free to appoint an advocate to assist and a procurator to represent them in the process, does not exempt them from the obligation to appear before the tribunal, (e.g. 1524, 3; 1530-1532; 1560, 2), when it is prescribed by canonical norms or decreed by the judge.

2. *Appointment of Curator/Guardian*: The judge appoints curator or guardian, if he considers that the rights of minors are in conflict with the rights of the parents, guardians or curators, or that these cannot sufficiently protect the rights of the minors (c. 1478). This norm must be interpreted in the light of cc. 96-98. It considers various classes of physical persons who, in principle, lack procedural capacity, and who may act in a trial by legal representation of another person. Strictly speaking, procedural capacity is only a specific kind of general capacity of action that coincides with the ability or capacity to make a claim and to respond personally in a process.

The judge can admit a guardian or curator appointed by a civil authority, after he has consulted, if possible, the diocesan Bishop of the person to whom the guardian or curator has been given (c. 1479).

3. *Removal of Procurator/Advocate*: For a grave reason, the judge can remove the procurator and the advocate by a decree given either ex officio or at the request of the party (c. 1487). Considering the seriousness of the nature of the removal from office, it is only right that the decree be based on a grave reason. However, the proper assessment of a grave reason for the removal is reserved to the exclusive discretion of the judge.

The judge can also sanction and fine advocate and procurator (c. 1488). For instance, both the procurator and advocate are forbidden to influence a suit by bribery, seek immoderate payment, or bargain with successful party for a share of the matter in dispute. If they do so, any such agreement is invalid and the judge can sanction or fine them. Moreover, the advocate can be suspended from office and, if this is not a first offense, can be removed from the register of advocates by the Bishop in charge of the tribunal. The same sanctions can be imposed on advocates and procurators who fraudulently exploit the law by withdrawing cases from tribunals that are competent, so that other tribunals may judge them more favorably. In this case, there is usually falsification of domicile of the parties.

D. The Judge and the Witnesses

1. *Interrogation*: The judge determines the time limit within which the propositions on which the interrogation of the witnesses is requested; otherwise, the request is to be deemed abandoned (c. 1552, 2).

2. *Identity*: When witnesses are introduced, their names and addresses must be provided to the tribunal, as well as the points upon which they are to be interrogated. Frequently, this is overlooked,

resulting in expense and loss of time. Without the points on which the witnesses are to be questioned, the judge is unable to determine whether a witness has sufficient knowledge of the case and is capable.

3. *Number*: The judge determines the number of witnesses (c. 1553). It is for the judge to curb an excessive number of witnesses. *Testes non numerantur, sed ponderantur*. An excessive number of witnesses should be avoided. The judge has the right and obligation to curb excessive number of witnesses who are introduced without sufficient reason. No appeal is allowed against a decree of the judge to eliminate certain witnesses from a long list.

4. *Notification*: The judge is responsible for giving notification of the names of the witnesses (c. 1554). Prior to the examination of witnesses, their names are to be communicated to the parties. If, in the prudent opinion of the judge, this cannot be done without great difficulty, it is to be done at least before the publication of the proofs.

This is usually done before the judicial interrogation, so that he might ascertain if there are any objections to any of them. When, in the judge's opinion, this notification cannot be carried out in due time without serious difficulty, it must not be omitted and should be done at least before the publication of the testimonies. When a judge decides to delay the notification until after the examination, he should justify the exception in a decree providing his reason for failing to follow the general norm.

5. *Summon*: The decree of the judge effects the summons of a witness upon lawful notification to the witness (c. 1556). Witnesses must be duly summoned by a decree of the judge to testify and the summons must be lawfully served.

6. *Exclusion*: Canon 1550, paragraph 2, number 1, states that the following are deemed incapable of being witness: the parties in the case or those who appear at the trial in the name of the parties; the judge and his assistant; and the advocate and those other who in the same case assist or have assisted the parties.

The canon speaks of those who are incapable, but it eliminates the category of suspect witnesses, which was contained in the 1917 Code. These witnesses were considered as such because of their irregular conduct or condition, that is, they lack veracity and/or probity. These incapable persons may never be called on to testify for reason of partiality or damages.

7. *Examination*: As a general rule, the judge must examine all witnesses in his own tribunal personally. The Commission of for the Revision of the Code does not allow the use of telephone in the examination of witnesses.

Regarding the examination of witnesses, the judge has the following duties and responsibilities:

First, the judge determines the place of interrogation of witnesses. Witnesses are to be examined at the office of the tribunal unless the judge deems otherwise (c. 1558, 1). Without prejudice to the provisions of cc. 1418 and 1469, 2, the judge decides where witnesses are to be heard for whom, by reason of distance, illness or other impediment, it is impossible or difficult to come to the office of the tribunal (c. 1558, 3).

The judge is not totally free to choose the place for the interrogation of witnesses. In the selection of the place where witnesses are usually examined, he must follow the prescriptions on the office of the tribunal and the collection of proofs. As a rule, ordinary witnesses are to be judicially examined at the tribunal office itself, unless in special cases, the judge considers another place in the area of jurisdiction to be more appropriate. However, witnesses whom it is impossible or very difficult to hear at the tribunal

office will be examined in a place determined by decree of the judge. For those who live outside their own diocese, assistance may be requested from another tribunal (c. 1418). The judge in the case, however, must forward the questions and instructions according to which the witness is to be heard.

Second, the judge determines confrontation of witnesses. If in a grave matter the witnesses disagree either among themselves or with one of the parties, the judge may arrange for those who differ to meet or to confront one another, but must, in so far as possible, eliminate discord and scandal (c. 1560, 2). When witnesses disagree among themselves or with a party, in a grave matter, the judge may arrange for them to confront one another. However, the judge must provide that, so far as possible, the confrontation does not give rise to disputes and scandal. Four points are inferred from this norm:

1. There should be no confrontation unless there is serious disagreement in the testimonies;
2. 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;
3. 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
4. The confrontation is to be considered an extraordinary means of examining the parties and the witnesses.

Third, the judge determines the interrogation of witnesses (1561). As a general rule, the judge conducts the examination of a witness. However, it may happen that while the judge is conducting the examination, the parties, their advocates, the defender of the bond, or the promotor of justice, are lawfully present at the hearing. If they consider that the witness should be asked further questions, these are not to be proposed directly to the witness. They shall address them to the judge himself so that he may decide whether the questions are appropriate and relevant. It is only then that the judge proposes them to the witness, unless particular law provides otherwise.

Fourth, the judge determines who is present at the examination of witnesses (c. 1559). As a general rule, the parties cannot be present at the examination of the witnesses. However, when there is question of a private interest, the judge can determine that they are to be admitted. Their advocates or procurators, likewise, may attend, unless by reason of the circumstances of matter and persons, the judge had determined that the proceedings are to be in secret.

There are advantages and disadvantages associated with the attendance of the parties at the examination of witnesses. The New Code has chosen to maintain a balanced standard. It makes a distinction between parties and their representatives. It establishes two norms subject to exception at the discretion of the judge: 1) 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. The judge may allow the parties to attend if he believes that their presence is desirable, especially when the matter concerns the private good. 2) Their advocates or procurators may generally attend, unless the judge considers that the proceedings should be in secret, because of circumstances or person and facts.

Fifth, the judge is to remind the witness of the grave obligation to tell the whole truth and nothing but the truth. The judge is to administer an oath to the witness (c. 1532). The New Code offers an innovation on the question of administering an oath depending on the culture of the people. In general, people do not have the same esteem for the inviolability of an oath, as was once the case. Hence, its role in the 1983 Code is diminished. Thus, if a witness refuses to take an oath, he or she is to be heard unsworn. In such judicial examination, the judge must remind the witnesses of the obligation to speak the whole truth and nothing but the truth.

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 testimony. If the witness refuses to testify under oath, the fact is recorded in the acts and the witness is heard unsworn.

Six, the judge is to establish the identity of the witness and source of information (c. 1563). The judge is first of all to establish the identity of the witness. The relationship that the witness has with the parties is to be probed. Thus, when specific questions concerning the case are asked of the witness, enquiry is to be made into the source of his or her knowledge and the precise time the witness came to know the matters that are asserted.

The subject matter of the questions is related to the three objects of the examination, considered as three stages of the interrogation (Code of Canon Law Annotated, edited by E. Caparros, M. Theriault & J. Thorn, Montreal (1993, p. 971):

- 1) Preparation and orientation. These are 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 to set the stage for the case, to provide background information, and ascertain the dispositions of the witness.
- 2) 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.
- 3) Attestation. These questions refer directly 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.

Seven, the judge has the faculty to recall witnesses who have already been examined, either at the request of a party or *ex officio* (c. 1570). The judge, however, must consider the reasons which could justify a new examination, either those alleged by the party in the plea, or reasons for the proceeding *ex officio*. He should also consider the necessity and utility of such recall.

Eight, the judge should assess equitably the expenses the witnesses incurred and the losses they sustained by reason of their giving evidence (c. 1571). Witnesses have a right to compensation for their travel and lodging as well as for lost wages, according to the equitable assessment of the judge. Thus, in anticipation of these expenses, the judge, before summoning the witnesses, may request that the party deposit with the court a certain sum of money to cover the compensation.

E. The Judge and the Experts

Experts are specialists in their chosen science or profession. Their testimonies or reports could serve to prove some fact or to diagnose something. If the matter in controversy is technical these experts become necessary. Witnesses render facts relative to case, experts render technical judgment about the fact. What is the role of the judge in relation to the experts?

1. *Admission*: Canon 1608 provides the basic legislation for the procedure which the judge is to adopt in arriving at his decision. In reaching moral certitude, he must use only what is to be found in the acts and the proofs. There are a number of canons which will assist him in sifting the proofs and determining their value. He is also advised that he must evaluate the proofs conscientiously.

2. *Evaluation*: In attending to the material provided for him by the expert, the judge is to weigh attentively the conclusions of the experts in the light of the circumstances of the case, and he is to express the reasons which prompt him to admit or reject these conclusions (c. 1579).

According to an author (Peter Connors, *The Use of Psychological and Medical Reports in Marriage Nullity Cases*, in Doogan, Hugh (ed.), Catholic Tribunals. Marriage Annulment and Dissolution. E. J. Dwyer (Australia, New Town, 1990), pp. 201-203), in the evaluation of expert, the judge is to attend to the subjective and objective elements of the report of the expert. On the one hand, for him the subjective element consists of the following:

1. The possible interest which the expert may have in the case if the party happens to be his own client
2. The professional competence and the experience of the expert
3. The school of thought of the expert

“In his 1987 address to the Roman Rota, Pope John Paul II paid particular attention to the confusions and misunderstandings caused by *anthropological presuppositions which accompany so many pronouncements of psychologists and psychiatrists in regard to marriage nullity which are often irreconcilable with Christian anthropology.*” (Ibidem).

He maintains that the “Pope gives some examples of trends which are incompatible with the essential elements of Christian Anthropology” (Ibidem):

1. By reducing the significance of the conjugal union to a simple means of gratification, self-fulfillment or psychological release;
2. By being closed to values and meanings which transcend the immanent factor and which allow man to tend toward the love of God and of his neighbor as his final vocation;
3. By a pessimistic view...that man could not conceive any other inspiration than that imposed on him by his impulses or social conditioning, or on the other hand an exaggeratedly optimistic view...that man has within himself his fulfillment and that he can achieve it on his own

On the other hand, for him the objective element consists of the following:

1. The judge is to evaluate the truth of the facts on which the expert bases his or her opinion;
2. He is to examine whether these facts are contradicted by other proven facts in the acts of the case;
3. He is to evaluate the reliability of the methods of examination used by the expert;
4. He is to examine and determine whether the conclusions of the expert follow logically from the certain and proven facts of the report;
5. He is to ensure that the questions posed by him to the expert have been treated.

“The judge must also keep in mind that the type of certitude to which the expert is accustomed is physical rather than moral. But once again it can be noted that it is not the task of the expert to determine certitude, but rather to diagnose the mental illness and its effect on the ability to give consent” (Ibidem).

4. *Rejection/Disagreement*: The opinion of expert is not binding for the judge since the expert is not judge but his auxiliary in making judgment. In virtue of the principle of appreciation of evidence, the judge is free. Thus, within the limits of logic, in order to estimate the probatory value of the expert, he must have a justification to accept or reject it.

Consequently, the judge ought to provide the reasons why he considers that he is not able to accept the advice given to him by the expert (c. 1579). This provision is consonant with the more general norm governing the attitude which a superior is to adopt towards advice given by a council (c. 127, 2).

Indeed it is possible that the experts may disagree about the precise nature of the malady, but are at one in affirming that it did exist at the time of the marriage and it was of sufficient intensity as to have prevented sufficient consent.

4. *Expert of all Experts*: 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. Then he will be able “to distinguish between judgments of experts based on the specific competence of the expert and those which are not so based. He must be able to assess the level of seriousness and validity of the expert’s judgment in the light of elements which are, so to speak, ‘external’ to it” (Grocholewski Z, op. cit. p. 457-458).

The Rotal address of Pope John Paul II in 1987 draws attention to fundamental points which must be observed by the responsible judge: First, the necessary distinction between incapacity and psychic difficulty. And secondly, the anomaly must be of a serious nature so that it substantially vitiates the capacity to understand and/or to consent.

F. The Judge and the Conclusion of the case

When all the evidence and proofs have been collected, the judge of the tribunal may now begin to conclude the case by formulating his decision. This final stage involves series of responsibilities on the part of the judge.

1. *Inspection of the Acts*: The judge permits parties and advocates to inspect acts of case (c. 1598,1). When the proofs have been assembled, the judge must, under pain of nullity, by a decree permit the parties and advocates to inspect at the tribunal office those acts which are not yet known to them. In case which concern the public good the judge can decide that, in order to avoid very serious dangers, some part or parts of the acts are not to shown to anyone.

The wisdom of this reservation is extended to the power of the judge power to refuse to allow some part or parts of the acts of the trial to be published when it is considered opportune, when it concerns public good.

In the 1976 Schema, the publication of all acts was mandated under pain of nullity but avoiding serious damages: greater indifference among the parties, alienation of witnesses, civil cases resulting from the deposition of the parties and testimony of witnesses. For this reason, the judge must proceed with great caution on what acts may not be published but without violating the right of defense.

2. *Decree of Conclusion*: The judge decrees the conclusion of case (c. 1599). The conclusion of the case (*conclusio in causa*) is now reached, when everything pertinent to the production of proofs has been completed, including those presented after the publication of the acts.

A judicial decree is always required to signal the conclusion of the case. But the conclusion of the case is brought about chiefly by the fact that the canonical time or the time limit allotted by the judge for proposing proofs has expired. This has a preclusive effect. It may proceed, also, from the fact that both parties declare that they have no more evidence to present, or that the judge considers the case to be satisfactorily instructed. In these two cases, it will not be necessary to wait for the time limit or limits allowed to expire before issuing the decree of conclusion of the case.

3. *Decree of Acceptance of New Evidence*: The judge can decree or allow further evidence after conclusion by recalling earlier witnesses or calling new ones or making provision for other proofs not previously requested (c. 1600). This is an exception to the principle of preclusion. However, an effort has been made to restrict the possibility of ordering this belated evidence which may be admitted only in cases provided for in the canon. The acceptance of new evidence is allowed in all cases when without it the definitive judgment could result in an injustice, according to the saying: *verosimile quod non est praesumitur falsum*.

4. *Submission of Pleadings*: The judge decrees time allowed for pleadings and observations (c. 1601). The period of time referred to can be extended, since all judicial time limits are by nature subject to extension (c. 1465, 2).

G. The Judge and the Pronouncements of Judgment

The parallel rubric of this section (*De Iudicis Pronuntiationibus*) in the old Code is “De Sententia”. The former is more generic since a sentence, as well as a decree, are all pronouncements of the judge.

The pronouncement of judgment is the culminating act of the process, in which the judge exercises the plenitude of his power of jurisdiction and responds adequately to the right of action and contradiction of the parties resolving the controversy. At this final stage of the process the judge assumes other important responsibilities.

1. *Moral Certitude*: The judge proceeds to judgment (c. 1608). To arrive at a judgment, the judge must have in his mind moral certainty about the matter to be decided in the judgment. He must derive this certainty from the acts and from the proofs. Likewise, he must conscientiously weigh the proofs with due regard for the provisions of law about the efficacy of certain proofs.

The appreciation and evaluation of proofs is incumbent on the conscience of the judge. The Code adheres to the principle of free assessment of the evidence, which in some cases the prescriptions of law are to be applied, such as the validity of some pieces of evidence.

2. *Decision*: A judicial case is decided by a judgment. Such is a solemn act of the judge whereby a definitive decision is pronounced on the object of the trial. The pronouncement of the judge should refer to each and every issues of the case and contained in the petition of the parties, and formally expressed in the formulation of doubts.

Before the judge is able to hand down a decision in a case, it is necessary that he arrive at moral certitude. The moral certainty that the judge must have about the matter or the object of the trial is neither

an absolute certainty, a mere probability, nor a subjective conviction. Laws of logic and ethics by which human conduct is governed must support it.

“Certitude is defined as the state of the mind in which the mind, based upon the understanding of valid reasons, assents to a judgment without fear. Although it is a state of the mind it is based on reasons which are derived from objective evidence. There are degrees of certitude. For instance there is metaphysical certitude and physical certitude. Our understanding of moral certitude comes from our scholastic philosophical tradition and is based on the understanding of the customary conduct of human beings. It means that while it is possible that in the laws of human conduct there may be exceptions, such exceptions are not to be expected in the normal course of events. Moral certitude is that which excludes a well founded or reasonable doubt” (P. Connors, Op. Cit.).

A vital distinction, therefore, is that between moral certitude and opinion which accepts the possibility of error because the evidence does not exclude the probability that the contrary is true.

Moral certitude is based on the force of the objective evidence which can be either internal or external. In other words, the subjective state of mind must be derived from evidence which is placed before the mind and which is to be found in the acts of the case and in the proofs.

Internal evidence is that which comes from our understanding of the thing itself and compels the mind to assent. For instance, the judge will doubtless form some impression of the parties from his meeting them during a formal interrogation, and will assist him in arriving at a moral certitude.

External evidence is the type which is more frequently used by the judge; it is the evidence of the parties, and of the witnesses, the reports given by the experts and documents which may be submitted. All of these taken together are what make it possible for the judge to arrive at moral certitude.

Because the objective evidence is made up of many factors, these factors have to be critically assessed by the judge. And in the case of a psychological report, this is even more necessary. He has the task of applying the law to the particular case and to do this he must not only know the law, but he must have the ability to carry out the legal techniques of inquiry and assessment.

III. EVALUATION

1. The judge of the tribunal should have a competent and efficient staff to handle increasing number of marriage cases. In as much as all of the tribunals in the Philippines are sole-judge, except the Archdiocese of Manila, it will be of great relief on the part of judge to have reliable personnel at his disposal.

“Matrimonial Tribunals should be well organized and ably managed, duly sustained and accordingly developed for responsive and effective ministry to those in need of their service” (OVC, Marriage Tribunal Ministry, p. 78). Tribunal staff refers to those physical persons formally engaged in the ministry of justice in the Church according to their respective juridical offices and functions.

For a sole-judge tribunal, it is imperative to have the following persons as support personnel to the judge, aside from the Defender of the Bond:

Auditor: He is designated by the judge to hear a given case, to gather evidence in the case according to his indications, and to submit the findings to him for his eventual decision on the case. The

only requirements for the appointment of an auditor who may be a cleric or lay are, conspicuous of their good conduct, prudence and learning (c. 1428, 2).

Notary: the judicial vicar to a concrete case names him. He must be physically present to authenticate and manage all the instruments of the case. As reliable support staff to the judge, he must be able to transcribe all the acts during the formal hearing of the parties and witnesses. What constitutes most of the job will be the translation of the formal deposition of the parties and the testimony of the witnesses in the vernacular to the English language. This bulk of work hinders the judge to formulate his decision at the earliest possible time.

2. Mutual cooperation among tribunals must be fostered in order to provide immediate assistance among judges. The assistance of other tribunal judges begins with the preliminary interview of the parties, usually the respondent, who may be residing in another jurisdiction. It is also needed by the judge to determine the competence of his tribunal subsequent to the consent of another tribunal. This is called prorogation of competence. Likewise, the assistance of another tribunal is needed in the deposition of the parties and the testimony of witnesses upon the request of the tribunal ad quem. This is called rogatory investigation.

The desired mutual cooperation among tribunals will facilitate process from the preliminary stage to the final judgment of the case by the judge. It will also mean less expense.

3. On-going formation and in-service training of judges should be implemented in the regional or national level. According to Archbishop Oscar V. Cruz, “While the general degree of Doctorate or Licentiate in Canon Law of duly acknowledged practical expertise therein at least is basic for appointment of a judge as expressed by law, this however is not really enough. Good acquaintance with if not mastery of Procedural Law and familiarity with matrimonial jurisprudence are imperative” (OVC, Marriage Tribunal Ministry, p. 68).

He continues, “Furthermore, it is certainly not enough simply to acquire the necessary degree and to know the pertinent jurisprudence. The desired formation should be on-going precisely in terms of a continuous study of Process and updated jurisprudence” (OVC, loc. Cit.).

4. The judge may explore the possibility of establishing linkage with local expert, particularly the guidance personnel of Catholic school. These guidance personnel are mostly qualified in assisting the judge since they are required to have a Master or Doctorate Degree in Psychology. Their service to the judge of the tribunal can be credited as an outreach program of the school.

One advantage of having the services of these local guidance personnel is the adaptation of testing materials according to the conditions of the parties, namely, their social, mental and cultural traits. Another advantage is the facility of access to an expert on the part of the tribunal. Presently, mostly all our tribunals do not require expert or in the event they seek the opinion of one, Our Lady of Peace Guidance Center in Manila is the only available institution for such expertise. This center handles several cases. Thus, it takes couple of months to process marriage nullity case.

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