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**THE PRESIDING JUDGE:
PRESENT LEGISLATION AND FUTURE POSSIBILITIES
FOR MARRIAGE NULLITY CASES**

© by
Rev. Robert O. BOURGON

**A dissertation submitted to the Faculty of Canon Law,
Saint Paul University, Ottawa, Canada, in partial
fulfillment of the requirements for the degree of
Doctor of Canon Law**

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1997**



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**THE PRESIDING JUDGE: PRESENT LEGISLATION AND FUTURE
POSSIBILITIES FOR MARRIAGE NULLITY CASES
ROBERT O. BOURGON**

Any society, and the Church is no exception, needs an appropriate instrument for the resolution of disputes and authoritative declarations of facts concerning matters which are juridically doubtful. This has been accomplished over time by the use of various methods such as arbitration, mediation and court procedures in tribunals. In the course of the evolution of our present procedures, there arose a new understanding of the office and the role of the judge who was called to preside over particular cases.

What is the role or function of this president in trials and in matrimonial trials in particular? What are the responsibilities of the presiding judge? What qualities and qualifications are necessary to be appointed as a judge and as a presiding judge? Who can be a presiding judge? How is this ministry changing and evolving even now? These questions formed the basis of investigation for this dissertation. Previous studies had examined tribunals, procedural law and the various responsibilities of judges, but nothing specific was done on the presiding judge who is perceived as representing in a visible manner the judicial role and ministry of the Church.

Since the focus of the work was the presiding judge, several significant and related topics were not dealt with, such as: the substantive law concerning marriage, its indissolubility or sacramentality; the jurisprudence used in marriage trials, its development and evolution. However, although mention was made in passing of some non-formal procedures for dealing with questions of nullity and dissolution of marriage, the function of the presiding judge in such cases was not explored.

Chapter I examined the development of the concept of presidency in the resolution of conflict within the Church. Chapter II examined the role and responsibilities of the presiding judge. Some of these are shared with all judges, while others are unique to the praeses. Chapter III examined the qualities and qualifications required of presiding judges. An examination of the changes that occur when the function of praeses is fulfilled by bishops, judicial vicars, other clerics and even the laity was explored. Chapter IV presented an evaluation of the present procedural law which binds judges, especially the presiding judge, in marriage nullity cases.

The ministry of the presiding judge is one of trust, since he is the person these injured, angry and often times misinformed persons must trust to guide them through yet another painful experience.

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GENERAL INTRODUCTION

Any society, and the Church is no exception, needs an appropriate instrument for the resolution of disputes and authoritative declarations of facts concerning matters which are juridically doubtful. This has been accomplished over time by the use of various methods such as arbitration, mediation and court procedures in tribunals.

In questions concerning marriage, the use of a contentious process eventually evolved. In the course of this evolution a new understanding has arisen regarding the office and the role of the judge called to preside over or direct the administration of justice. He is to guard, protect, guide and be responsible for this task in the particular case entrusted to him.¹

STATEMENT OF THE QUESTION

The question, then, is what is the role or function of this president in trials in general and in matrimonial trials in particular? How did the concept of the presiding judge evolve and change over time? What are the responsibilities of

¹Cf. C. LEWIS and C. SHORT, A Latin Dictionary founded on Andrews' Edition of Freund's Latin Dictionary, Oxford, Clarendon Press, 1969, p. 1429.

the presiding judge? What qualities and qualifications are necessary to be appointed as a judge and/or a presiding judge? Who can be a presiding judge? How is this ministry changing and evolving even now? These questions form the basis of the work in this dissertation. They are not the only questions raised, but they are the guiding parameters which inspired the research.

Other studies have examined tribunals, procedural law and the various responsibilities of judges, but nothing specifically has been done on the presiding judge who is perceived as representing in a visible manner the judicial role and ministry of the Church.

LIMITS OF THE STUDY

This study does not pretend to provide definitive answers to all of the questions raised. In fact, often-times, other questions are posed which do not have an answer at this time. The hope is that this work will help to focus on the presiding judge and this important ministry in the Church.

In order to maintain this focus, several significant topics could not be dealt with in depth. Furthermore, this is not a study of the substantive law concerning marriage, its indissolubility or sacramentality. These will be mentioned

only in so far as they touch upon an understanding of the presiding judge's role.

The practical jurisprudence used in marriage trials has likewise been left aside. Although these developments are exceptionally important for the resolution of marriage cases, and judges are to remain informed of jurisprudential developments so as better to serve in the adjudication of cases, nevertheless, these developments do not influence the distinctive role or position of the presiding judge in a trial.

Historically, the Church has responded to the reality of divorce and remarriage remaining faithful to Gospel precepts. This has meant that ministering to the separated and divorced in their human weakness has led to different responses at different times. The evolution of marriage tribunals has been one such response. In addition, the search for the truth regarding the validity of a marriage has consequences in the personal, sacramental and spiritual life of the parties.

The responsibilities of presiding judges, should be adapted regularly so as to reflect the reality of guarding and protecting the rights of individuals and the Church. However, a change in policy in the procedure for marriage nullity cases is not imminent, so the present procedural law and discipline and its inherent possibilities will be examined.

The primary focus of this paper is the presiding judge in a formal marriage nullity case in the first instance. There are other procedures for dealing with questions of nullity and dissolution. For instance, there is the documentary or informal process used to declare the nullity of marriage on the basis of documentary evidence of the existence of a diriment impediment, a defect of legitimate form, or an invalid mandate of a proxy.² This informal process is a judicial process but is significantly more expeditious and simple. There is also a very simplified process for absence of form cases, distinct from the one followed when dealing with a defect of form. The latter is a pastoral and administrative determination of a person's freedom to marry.³

There are also special norms for the dissolution of marriages involving non-baptized persons. When both are non-baptized, a Pauline Privilege in favour of the faith can

²Cf. Codex iuris canonici auctoritate Joannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus, Romae, Libreria Editrice Vaticana, 1989, xxxii, 669 p. English translation in E. CAPPAROS, M. THÉRIAULT, and J. THORN, (eds.), Code of Canon Law Annotated, Montréal, Wilson and Lafleur Limitée, 1993, 1631 p. Unless otherwise indicated all references to canons are to the 1983 Code. Cf. canons 1686-1688.

³Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI AUTHENTICE INTERPRETANDO, Responsa ad proposita dubia, July 11, 1984, in Acta Apostolicae Sedis, [=AAS], 76 (1984) p. 747. The Code Commission responded that the pre-nuptial inquiry described in canons 1066-1067 was sufficient for such cases and the documentary process of canon 1686 was not required.

sometimes be used.⁴ In cases where one of the parties was unbaptized, the Petrine Privilege can at times be applied. These cases are governed by a special Instruction issued by the Congregation for the Doctrine of the Faith, December 6, 1973.⁵ Finally there are norms for ratum et non-consummatum marriage cases.⁶ These, as well as cases involving presumed death and separation of spouses, are usually handled by tribunals, although they are not formal marriage nullity cases.⁷

⁴Cf. canons 1143-1150. (Note: throughout this work we shall use "cf." when referring to additional matter, and "see" when paraphrasing an author).

⁵Cf. CONGREGATIO PRO DOCTRINA FIDEI, Instructio et normae, Ut notum est, December 6, 1973 in X. OCHOA, (ed.), Leges Ecclesiae post codicem iuris canonici editae, Roma, Commentarium pro Religiosis, 1966-1983, vol. 5, col. 6702-6705, n. 4244; English in T.L. BOUSCAREN, and J.I. O'CONNOR, (eds.), The Canon Law Digest, Mundelein, Illinois, Canon Law Digest, vol. 8, pp. 1177-1184.

⁶Cf. canons 1142, 1697-1706 and a circular letter of December 20, 1986; cf. CONGREGATIO PRO SACRAMENTIS, Litterae circulares, De processu super matrimonio rato et non consummato, December 20, 1986, Latin and English in Canon Law Society of Great Britain and Ireland Newsletter, 70 (June 1987), pp. 13-34. The earlier March 7, 1972, Instruction of this same Congregation is still of relevance, cf. CONGREGATIO PRO SACRAMENTIS, De quibusdam emendationibus circa normas in processu super matrimonio rato et non consummato servandas, March 7, 1972, in AAS, 64 (1972), pp. 244-252.

⁷For a more complete treatment of several of these procedures, cf. W.H. WOESTMAN, Special Marriage Cases: non-consummation, Pauline privilege, favour of the faith, separation of spouses, validation-sanation, presumed death, 3rd ed., Ottawa, Faculty of Canon Law, Saint Paul University, 1994, xi, 242 p.

DIVISION OF THE WORK

Chapter I will first look at how the concepts of praeses and iudex evolved throughout the history of the Church. The evolution of a procedural law dealing with marriage nullity cases will then be briefly mentioned but not examined in detail.⁸ There will also be reference to certain canons of the 1917 and 1983 Codes with their unique development.⁹

Chapter II will attempt to apply in a practical manner a more expansive interpretation of the definition of presiding judge. To accomplish this, some current comments on types of judges and an examination of the role and responsibilities of the presiding judge will be made.

There are certain responsibilities and functions that the presiding judge shares with all judges, and others that are unique to the praeses. The Code tends to use the word iudex to indicate the function of all judges and at times even that of

⁸For a development of the history of formal marriage nullity procedures, cf. A.C. DIACETIS, The Judgment of Formal Matrimonial Cases: Historical Reflections, Contemporary Developments, and Future Possibilities, Washington, D.C., Catholic University of America, 1977, x, 344 p. Canon Law Studies, no. 492.

⁹For an assessment and presentation of the development of the 1983 Code, cf. C.A. COX, Procedural Changes in Formal Marriage Nullity Cases from 1917 to the 1983 Code: Analysis, Critique and Possible Alternatives, Washington, D.C., Catholic University of America, 1989, x, 438 p. Canon Law Studies, no. 528.

the praeses. These canons will be examined to determine whether or not the praeses can fulfil these procedural functions alone, or whether the whole turnus has to be involved.

Chapter III will examine the qualities and qualifications required of judges and, more particularly, of presiding judges. There are several personal qualities which are necessary to be able to adjudicate properly, as well as to preside over a case. Some of these would be the ability to be reasonable and prudent. At the same time, there are external qualifications which must be met such as: being of good repute and academically qualified. Finally, an examination of the changes that occur when the function of praeses is fulfilled by bishops, judicial vicars, other clerics and even the laity will be explored.

Chapter IV presents an evaluation of the present procedural law which binds judges, especially the presiding judge, in marriage nullity cases. Is the law as it now exists meeting the needs and demands of those who approach the tribunal? Is marriage and the teaching of the Church on marriage protected or damaged by the present approach to marriage nullity? Are the rights and dignity of those who seek justice in marriage nullity procedures adequately respected and safeguarded? A response to these questions and others allows for a presentation of some possible alternatives to the

contentious or adversarial approach presiding judges are compelled to utilize in formal marriage nullity cases.

CHAPTER ONE

PRESIDING IN TRIALS: DEVELOPMENT OF THE CONCEPT

INTRODUCTION

The administration of justice has been and continues to be an important ministry in the Church. When a controversy must be resolved, as in the case of a dispute or a request for an authoritative decision regarding a doubtful matter, whether in the context of an ecclesiastical trial or not, a college of judges is often assembled. They are to safeguard the rights of persons as well as to promote and protect the good of the community.

This balance between individual rights and the good of the community has been difficult to maintain, demanding at times different expressions in the Church.¹ An adequate

¹"On doit constater que, replongée dans son contexte socio-culturel initial, la procédure de déclaration de nullité de mariage est très dépendante d'une finalité sociale d'une doctrine péniblement élaborée, et de plus qu'elle s'est d'emblée heurtée à plusieurs difficultés déjà significatives d'une certaine inadéquation avec le réel humain" (J.M. AUBERT, "Déclaration de nullité et société moderne", in Revue de Droit canonique, [=AUBERT, "Nullité"], 26 (1976), p. 68). Bernard Häring reflects the same attitude that the situation in life has changed and so the Church must rethink marriage, divorce and the procedures used to assess marriage situations. He indicates that the consequences of a failed marriage in the Middle Ages are different from the consequences of a failed marriage after the industrial revolution since the patriarchal family ceased to exist to provide a point of return for an abandoned spouse. See B. HÄRING, "A Theological Appraisal of Marriage Tribunals", in Divorce and Remarriage, [=HÄRING,

equilibrium in ecclesiastical court procedures has not always been attained. "At times Church procedures have been overly stringent and seemed to be based on a fear and mistrust inappropriate to a community of believers."² As a result of the constant evolution of procedural law and jurisprudence the style, purpose, responsibility and method of presidency in Church courts has changed and been adapted throughout history.

The words 'preside' and 'president' are subject to various nuances, depending on the time, place and context of their use. For example, the word praeses in Imperial Rome could refer to "the highest official in a province",³ while the meaning and connotation changes when referring to a democratic state or even to a liturgical celebration. How have the concepts of praeses and of presidency been adapted to meet the needs of the Church through history? How has the development of procedures for ecclesiastical trials affected our understanding of praeses? We hope to answer these questions in this chapter.

"Appraisal"], L.G. WRENN, (ed.), New York, Newman Press, 1973, p. 24.

²T. GREEN, "The American Procedural Norms - An Assessment", in Studia Canonica, [=GREEN, "An Assessment"], 8 (1974), pp. 340-341. Cf. L. ORSY, "The Function of Ecclesial Decision: A Theological Evaluation of Marriage Tribunals", in Concilium, [=ORSY, "The Function"], 87 (1973), p. 42.

³A. BERGER, (ed.), Encyclopedic Dictionary of Roman Law, [=BERGER], Philadelphia, American Philosophical Society, 1953, vol. 43, pt. 2, p. 646.

I. "PRESIDENT" AND "PRESIDING"

The 1983 Code of Canon Law⁴ contains words that speak of the role of presiding or presidency in approximately fifty canons.⁵ These canons refer to everything from presiding over elections in a collegial body, to presiding over the liturgy, to presiding at ecclesiastical trials. What does it mean to preside? What does praeses mean? What is the etymology of the word? In the context of ecclesiastical trials how are the words praeses and iudex connected? How are they distinct?

It is important to determine the exact meaning of the terms used as well as their origin so that a better understanding of the role of the presiding judge can be had. In most cases when one refers to the praeses in the context of ecclesiastical trials, there is a tendency to limit the application of this term to the judge who is appointed to preside in a collegiate tribunal with some added

⁴Codex iuris canonici auctoritate Joannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus, Romae, Libreria Editrice Vaticana, 1989, xxxii, 669 p. English translation in E. CAPPAROS, M. THÉRIAULT and J. THORN, (eds.), Code of Canon Law Annotated, [=Code, 1983], Montréal, Wilson and Lafleur Limitée, 1993, 1631 p.

⁵Code, 1983, canons 166, 173, 176, 177, 182, 230, 239, 295, 311, 338, 344, 348, 352, 353, 354, 377, 389, 409, 435, 437, 441, 442, 444, 446, 448, 452, 455, 456, 458, 462, 492, 500, 502, 507, 509, 514, 536, 625, 833, 899, 1426, 1428, 1429, 1449, 1505, 1507, 1590, 1609, 1677.

responsibility in the direction of the instruction of the process. This restrictive view of the presiding judge does not adequately reflect the history, present discipline nor the daily lived experience of presiding judges in tribunals today.

"Preside" comes from the two latin words: prae which means before, and sedeo, to sit.⁶ One definition of praeses then would be to sit rather than to remain standing.⁷ Another definition of the term indicates that the praeses is seated, established or posted in the front so as to protect, guide and care for others.⁸ In other words the praeses is seen as

sitting before a thing, to guard, take care of, or direct it; presiding, protecting, guarding, defending, [...] a protector, guard, guardian,

⁶ See A. FINDLATER, (ed.), Chambers' Etymological Dictionary of the English Language, [=Chambers' Dictionary], London, W. & R. Chambers Limited, 1895, p. 395.

⁷ "Être assis, siéger, indique la station assise, par opposition à la station debout [...] A divers sens spéciaux: dans la l. du droit et du rituel, se dit du juge qui siège" (A. ERNOUT and A. MEILLET, Dictionnaire étymologique de la langue latine: histoire des mots, 3rd edition, [=ERNOUT, Dictionnaire], Paris, Librairie C. Klincksieck, 1951, p. 1076).

⁸ See W. FREUND, Grand dictionnaire de la langue latine sur un nouveau plan par le Dr. Guill Freund, [=FREUND, Dictionnaire], traduit en français, revu sur les textes et considérablement augmenté par N. Theil, vol. 2, Paris, Firmin-Didot, 1862, p. 875.

defender, [...] one that ⁹presides over, a president, head, chief, ruler.

These definitions indicate clearly that the praeses is much more than a mere figurehead or, as in the case of ecclesiastical trials, some sort of director of process. The role of the praeses is precisely to be at the head, to lead, to direct, to guard and to protect those who are given into his charge.

The term iudex or "judge" also has an interesting development. It too comes from the two latin terms: ius which is the law¹⁰ and dicere which is to declare or to speak.¹¹ The judge then is

one who judges: a civil officer who hears and settles any cause: an arbitrator: one who can decide upon the merit of anything¹²

What the judge is to accomplish when attempting to exercise the function of judging is to

⁹C. LEWIS, and C. SHORT, A Latin Dictionary founded on Andrews' Edition of Freund's Latin Dictionary, [=LEWIS and SHORT, Dictionary], Oxford, Clarendon Press, 1969, p.1429.

¹⁰Ius is much more than a compilation of regulations or laws. A more accurate statement would be that ius is a declaration of what is just and right. For more on this topic cf. A. GAUTHIER, Roman Law and its Contribution to the Development of Canon Law, [=GAUTHIER, Roman Law], Ottawa, Faculty of Canon Law, Saint Paul University, 1996, pp. 27-29.

¹¹"Ainsi nommé de jus dicere, parce qu'il rend la justice, en vertu de ses pouvoirs" (FREUND, Dictionnaire, p. 303). The term iudex is also defined as "celui qui dit la formule de justice" (ERNOUT, Dictionnaire, p. 587).

¹²Chambers' Dictionary, p. 275.

point out or declare what is just or law: to hear and to decide: to pass sentence: to compare facts to determine the truth: to form or pass an opinion: to distinguish - to hear and determine authoritatively: to sentence.¹³

These definitions help to gain a more complete understanding of the concepts of presiding or presidency and that of judging. It would seem that these concepts, although distinct, are not mutually exclusive. That is to say that a person may be a iudex but not necessarily a praeses in a case. This is true in cases judged by a collegiate tribunal of judges. On the other hand, in present day ecclesiastical trials, and in particular in marriage cases, the praeses is a iudex.

The definition of the term 'preside' found in Black's dictionary is:

To occupy the place of authority as of president, chairman, moderator etc. To direct, control or regulate proceedings as chief officer, moderator, etc. To possess or exercise authority. To preside over a court is to "hold" it, -- to direct, control, and govern it as the chief officer. A judge may "preside" whether sitting as sole judge or as one of several judges.¹⁴

To 'preside' means to direct or control proceedings as the chief officer in authority. The study of the

¹³Ibid.

¹⁴H.C. BLACK, Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, [=BLACK'S], 5th edition, St. Paul, Mn., West Publishing, 1979, p. 1066.

complementarity and the distinctiveness of these concepts as they apply to the judge who is called upon to preside in a trial is central to the investigation of this dissertation. It is apparent that the term iudex is used more frequently than praeses in the canons of Book VII of the 1983 Code. Therefore, it is necessary to delineate clearly who is to preside and whether or not it is appropriate to apply the term "presiding judge" or praeses to the sole judge of an ecclesiastical case.

The example found in Black's definition is particularly applicable to our discussion. "A judge may 'preside' whether sitting as a sole judge or as one of several judges."¹⁵ The judge presides over or "holds" court, and is referred to as the 'presiding judge' whether the court is comprised of a college of judges or not.

The fact of the matter is that a sole iudex does preside in a case, yet this is never directly stated in the canons, nor is this judge referred to as praeses or presiding judge. It is hoped to be able to demonstrate that praeses in ecclesiastical trials is not limited to a collegiate court of judges, but does apply to the sole judge. An attempt will also be made to demonstrate that the concepts of praeses and iudex are intimately linked.

¹⁵Ibid.

The act of presiding in ecclesiastical trials is much more than merely managing a process or assembling the necessary court officers to settle a controversy. The presiding judge is not only to "point out or declare what is just or law" or "decide upon the merit"¹⁶, which is the responsibility of all judges, but also "to guard, take care of or direct"¹⁷ the case and those involved in it. This is the definition intended when referring to the presiding judge in this part of the investigation.

In the Church, there has been some development of the concept and application of what it means to preside in the context of the administration of justice. The question, "Who is to preside?", is essentially one of competence, determining which authority is responsible, who is the "protector, guard, guardian, defender"¹⁸ of the process or of the persons presenting themselves to the court. Who has the right and obligation to control, direct or act as chief officer of an ecclesiastical court?

A study of the development of the role of judge in the Church can give some indication of who was to preside, and how this exercise of authority was actually lived out. Some other

¹⁶Chambers' Dictionary, p. 275.

¹⁷LEWIS and SHORT, Dictionary, p. 1429.

¹⁸LEWIS and SHORT, Dictionary, p. 1429.

factors which influenced the Church's understanding of presidency in ecclesiastical courts are: the role of synods and provincial councils, the effect of the use of delegated judges, the rise of the influence of the Roman dicasteries, especially the Roman Rota, and finally, the effect of courts inferior to the bishop's court.

How did the concept of praeses, being the protector, guardian and defender, develop in the Church, especially regarding procedures for the resolution of controversy? Is there a link with the present day understanding of praeses in ecclesiastical trials as found in the 1983 Code of Canon Law?

II. PRESIDING IN THE EARLY CHURCH BEFORE THE PEACE OF CONSTANTINE (AD 313)

Leadership ability, acceptance by the community and possession of the spiritual qualities required of Christian leaders were essential to be chosen to preside over a community.¹⁹ As the faith spread, the need for leaders, in different geographic areas, became mandatory for its growth and protection. These leaders were chosen, as much as possible, from the community. At first, they were more

¹⁹1 Tim. 3: 1-7. Many of these same qualities are listed in canon 378 §1 of the 1983 Code.

charismatic and itinerant than administrative.²⁰ They did not concern themselves directly with the day to day administration of the local Church.²¹

As the needs of communities expanded and the faith became better established, these original leaders gave way to more administrative ones who remained in the community to direct and protect the integrity of the faith,²² and, so to speak,

²⁰"We have seen that the Johannine community did not seem to have authoritative church officers (presbyter-bishops) who could control doctrine by the very nature of their office, and so differed in this aspect from the churches attested in Luke-Acts, the Pastorals, and Matthew" (R.E. BROWN, The Community of the Beloved Disciple, New York, Paulist Press, 1979, p. 158).

²¹At this time the Apostles, chosen by Christ himself, were the leaders of the community. These men were called to be examples of faith first, and then administrators within the community. When the tasks of administration, such as the dispersing of aid to the widows, became a distraction for the Apostles, deacons were chosen to take care of the daily affairs of the community (Acts 6: 1-6). The qualities that became necessary to be a deacon are described in 1 Tim. 3: 8-13.

²²"Thus we find juxtaposed sayings which assign the authority to bind and to loose on the one hand to the community and on the other to Peter (a wandering charismatic) (Mt. 18:18; 16:19). We may compare the contradiction between rejecting all authority (Mt. 23:8 ff.) and recognizing early Christian 'prophets, wise men and scribes' (Mt. 23:34). This contradiction is easy to understand. The less the structures of authority in local communities had come under the control of an institution, the greater was the longing for the great charismatic authorities. And conversely, the greater the claim of these charismatics to authority, the less interest there was in setting up competing authorities within the communities. But when the local communities grew in size, there was a need for internal government which inevitably competed with the wandering preachers. This is probably the explanation of the differences between Peter and James. Peter,

preside over it. Becoming defenders or protectors of the faith and of the rights of members of the community was the first concern of those who were chosen as praesides.

There was a substantial impact on the Church caused by the expansion of the Roman Empire with its well-developed legal system.²³ Roman law was universally adaptable and kept an extensive empire together for centuries.²⁴ The concepts of order and authority in Roman law had evolved over time with the ius gentium, laws governing non-Roman citizens, being elaborated by the praetores peregrini, who had the

a wandering charismatic with no ties, was more in a position to risk coming into conflict with Jewish food regulations than James, the spokesman for the community in Jerusalem. Peter ate with Gentile Christians in Antioch, but James sent emissaries to make him conform with Jewish norms (Gal. 2:11 ff.)" (G. THEISSEN, Sociology of Early Palestinian Christianity, translated by John BOWDEN, Philadelphia, Fortress, 1978, p. 20).

²³See W. BURDICK, The Principles of Roman Law and Their Relation to Modern Law, [=BURDICK, Principles], Rochester, New York, Lawyers Co-operative Publishers, 1938, p. 1. Cf. GAUTHIER, Roman Law, pp. 4-15, for a concise description of the effect Roman law has had on canon law from antiquity to the present. "The ninth century is a period where the prestige of the ancient Roman is quite high. Thus we are not surprised to see the authors of the pseudo-Isidorian forgeries make generous use of Roman juridical texts. Consequently, the pseudo-Isidorian collections [...] constitute an important channel through which Roman law has penetrated into canon law, this time under the cover of false ecclesiastical attributions. This was especially important in the field of procedure" (GAUTHIER, Roman Law, p. 7).

²⁴See BURDICK, Principles, p. 2.

responsibility of dealing with matters concerning strangers or peregrini in Rome.²⁵

In settling disputes, there were levels of authority and levels of responsibility, or in other words levels of competence to be observed.²⁶ On the one hand, the Emperor could be said to preside over all matters in the Empire since he was the "head, chief, and ruler".²⁷ While, on the other, he delegated persons to represent him in various territories and to preside over matters within the limits of their appointment.²⁸

These delegates often chose others to assist them in the completion of their tasks and, in turn, gave them limited authority to preside over various aspects of the task entrusted to them.²⁹ This delegation and sub-delegation of

²⁵BERGER, pp. 528-529, alludes to this development under the title Ius gentium. W. Burdick alludes to the fact that Roman law developed greatly in the later Empire as a result of rulings of praetors in matters dealing with travellers or foreign visitors in Rome; see BURDICK, Principles, pp. 1-3.

²⁶Paul was able to appeal directly to the Emperor since he was a Roman citizen and so he could bypass all other levels of authority (Acts 25: 13-21).

²⁷LEWIS and SHORT, Dictionary, p. 1428.

²⁸Cf. BERGER, p. 519. An example of this type of delegation can be seen in the person of the Iudicans vice sacra.

²⁹"In a judicial trial, in controversies which required specific technical or professional knowledge the magistrate could appoint an expert (arbiter) instead of a judge (iudex) so that the judgment should be rendered by someone better

officers was particularly evident in the Roman court system and judiciary.³⁰ There was the possibility of a division in this system between those who were called to preside over the case and the one who actually rendered the decision. It would seem that the magistrate, praetor³¹ or princeps³² was the one who delegated the judge and set the limits of his authority.

After the death of the Apostles, bishops began to preside over matters of faith and discipline within their own territories. In the beginning, this presidency tended to be based on the moral force afforded the bishop rather than on

qualified than the average Roman citizen listed in the panel of judges. The discretionary powers of an arbiter in making his decision were not so severely restricted by the praetor's instructions as in ordinary trials" (ibid., pp. 365-366).

³⁰Cf. ibid., p. 518. An abbreviated history of what was meant by 'Iudex' is described under that title.

³¹Praetor. These were originally the highest officials. They eventually developed into the highest magistrates in the Republic after the consuls and were vested with imperium and far-reaching authority in military, administrative and judicial matters. Their principal domain was jurisdiction, for their creative development of the law. Eventually, the task of creating the law was taken over by bureaucratic officials and the praetorship became an office with little importance while the function of the praetor became that of arranging public spectacles and games. Cf. ibid., p. 647.

³²Princeps: "The emperor. [...] In the field of legislation the emperor's wishes were originally submitted for ratification by the people, an act which in the course of the first post-Christian century became a simple formality and later disappeared. In the jurisdictional domain the emperor was the supreme judge in both criminal and civil matters, either as a first or an appellate instance" (ibid. pp. 649-650).

any exact sense of priority in law or regulation. There was no doubt that the bishop was the leader in the community and so he exercised control and authority.³³

Pope Clement of Rome (circa 95-99) gave an indication of how the moral authority of the bishop was exercised, and at the same time indicated the beginnings of the distribution of levels of competence, in his attempt to resolve a developing schism in Corinth.³⁴ He demanded more than religious obedience, utilizing a military model focusing on the chain of command and the obedience of soldiers, where exact lines of authority were used to establish a sense of order which was likened to the will of God, while the opposite, disorder, came from the prince of this world.

He maintained that it was the bishop who was to exercise authority and preside over the community of believers:

But should any disobey what has been said by Him through us, let them understand that they will entangle themselves in transgression and no small danger.³⁵

³³"Jesus was sent by God; Christ commissioned the twelve apostles to preach the gospel and they appointed their first converts to be bishops and deacons. To rebel against the proper officials was to rebel against God" (C.T. CRAIG, The Beginning of Christianity, New York, Abingdon-Cokesbury Press, 1943, p. 277).

³⁴Cf. The Epistles of Saint Clement of Rome and Saint Ignatius of Antioch, Newly translated and annotated by J.A. Kleist, Westminster, Maryland, The Newman Bookshop, 1946, pp. 4-5.

³⁵Ibid., p. 45.

He claimed that the basis of the authority for the bishop to preside over the community was the will of Christ Himself:

This gate of observance of the law is the gate of Christ; blessed are those who enter by it and walk the straight path in holiness and observance of the law, performing without disturbance all their duties.³⁶

Schism and heresy were real threats, not only to unity but also to the integrity of the faith handed down from the Apostles. In this environment, bishops were seen as custodians of order with their primary functions being oversight and superintendence.³⁷ Their presence and authority were somehow a guarantee against schism and heresy since they were truly the praesides who, before all others, were to "guard, take care of and direct"³⁸ the community in matters of faith and discipline.

Saint Ignatius of Antioch (27-107) emphasized the role of the bishop as the monarchical head of the local community more than his responsibility as the representative of a wider Church organization.³⁹ There was a need in the Church to balance the roles of the bishop as presiding over a local

³⁶Ibid., p. 39.

³⁷See G.P. FISHER, The Beginnings of Christianity, New York, Charles Scribner's Sons, 1911, pp. 553-554.

³⁸LEWIS and SHORT, Dictionary, p. 1429.

³⁹See O. PFLEIDERER, Christian Origins, translated from the German by D.A. HUEBSCH, authorised edition, London, T. Fisher Unwin, 1906, p. 284.

community as its chief or ruler, and his being a representative of a universal reality in the Church.⁴⁰

In the early Church, the resolution of disputes⁴¹ was conducted in a collegial manner in the diocese, or for serious

⁴⁰The invasions from the Germanic tribes influenced somewhat the development of procedural law. Although the Church never adopted the Germanic model of trial or judicial presidency, as such, certain elements were assumed later (v.g. proof by miracles, etc.). Cf. A. VAN HOVE, Commentarium Lovaniense in Codicem Juris Canonici, vol. I, Prolegomena ad Codicem Juris Canonici, Mechliniae-Romae, H. Dessain, 1945, pp. 261-262. Likewise, there was some influence on the manner of appraising proofs, which now includes assessment following a purely legal method of gathering them. Cf. F. WANENMACHER, Canonical Evidence in Matrimonial Cases, Philadelphia, Dolphin Press, 1935, p. 139.

⁴¹There was the insistence that disputes be settled internally. See 1 Cor. 6: 1-11. Saint Paul was adamant about the fact that conflict should be resolved within the community of believers. A sense of autonomy and Christian pride was underlying this passage. There should be no conflict, but if conflict arises, then it is to be resolved internally and not through the interference of non-believers.

The first premise was to avoid conflicts, and law suits were to be the absolute last resort. In fact, Christians were urged to suffer a loss rather than begin a law suit. The meek and yielding party to a complaint was seen as a son of God, while the other was seen as "hard and forward, and overreaching and blasphemous, [...] a hypocrite, and the Enemy works in him." Those who were seen as hard and unyielding were to be corrected, reprov'd, rebuked, and then received back into the community. "For when such are corrected and reprov'd you will not have many lawsuits." It was certain that heathens were not to know about law suits among Christians. If there was to be court action of some sort, it was not to occur in a heathen court. See Didascalia Apostolorum, The Syriac Version translated and accompanied by the Verona Latin Fragments, with Introduction and Notes by R.H. Connolly, [=Didascalia], Oxford, Clarendon Press, 1969, Book 2: 45-46, pp. 109-110.

matters, in synods or provincial councils.⁴² Within the diocese the bishop was considered the authority and chief arbitrator, or, in short, the presiding judge who was to regulate disputes for the community. In the bishop, both concepts of praeses and iudex were connected. He was both judge and ruler.⁴³ This role changed as dioceses expanded and disputes multiplied and became more complex.

The administration of justice became the responsibility of the bishop with his college of clergy. He became the iudex competens⁴⁴ or the iudex ordinarius⁴⁵ for his diocese. He was to preside over judicial proceedings within it, but was not to decide the case without adequate assistance; in fact, the Didascalia Apostolorum maintained that the bishop was to be assisted by priests and deacons.⁴⁶ He was to preside over this college of advisors since he was considered, in Christian

⁴²See F.X. FUNK, Didascalia et Constitutiones Apostolorum, [=FUNK, Didascalia], 2 vols., Paderbornae, in libraria F. Schoeningh, 1905, Vol. I, p. 142; cf. D. BOUIX, Tractatus de iudiciis ecclesiasticis, [=BOUIX, Tractatus], editio secunda, 2 tomes in 1, Paris, Regis Ruffet et Sociis, Successoribus, 1866, Tome I, pp. 343-344.

⁴³Bishops, as administrators, were urged to promote harmony: "be not hard, nor tyrannical, nor wrathful, and be not rough with the people of God which is delivered into your hands" (Didascalia, Book 2: 57, p. 119).

⁴⁴Cf. BERGER, p. 518.

⁴⁵Cf. *ibid.*

⁴⁶See FUNK, Didascalia, vol. I, p. 142.

communities, as the iudex ordinarius for matters that were not as serious as the criminal prosecution of clerics.⁴⁷

III. PRESIDING IN COURT, UNTIL TRENT

After the Peace of Constantine in 313, bishops were allowed by the Emperor to adjudicate certain civil matters in their own courts. With the recognition of episcopal courts by secular authorities and an acceptance of the right of the bishop to preside over certain civil matters, some confusion arose as to who had the right or responsibility to preside over and judge various cases. Spiritual and temporal powers, at times, were so mixed that there was no clear delineation between Church and State.⁴⁸

⁴⁷See BOUIX, Tractatus, pp. 343-344.

⁴⁸See A. DUMAS, "Juridiction ecclésiastique", in Dictionnaire de Droit canonique, [=DUMAS, "Juridiction"], VI, col. 244; cf. F. DVORNIK, "Emperors, Popes and General Councils", in Dumbarton Oaks Papers, 6 (1951), pp. 1-23.

The Synod of Milan gave the Emperor the right to decide not only questions of discipline, but also of dogma. Emperors confirmed the decisions of ecclesiastical councils and promulgated their canons as imperial laws. Eventually Caesaropapism was made a permanent institution of the theocratic state of Justinian I (527-565). See W.M. PLÖCHL Storia del diritto canonico, [=PLÖCHL, Storia], (translated by P. GIANI), Milano, Massimo, 1976, vol. 1, pp. 116-117. The decision of both secular and ecclesiastical courts was recognized at times. See *ibid.*, vol. I, pp. 89-92.

The question of which was the appropriate authority to deal with matters of marriage was particularly difficult. Joyce concludes that the Church gained exclusive judicial competence toward the middle of the eleventh century. See G.

A. The influence of ecclesiastical synods and councils

The synodal approach to the administration of justice was the best reflection of the spirit of the early Church.⁴⁹ There was some emphasis placed on the monarchical role of the bishop

JOYCE, Christian Marriage: an Historical and Doctrinal Study, [=JOYCE, Christian Marriage], 2nd edition, London, Sheed and Ward, 1948, p. 225. A. Esmein echoes the same thoughts as Joyce; see A. ESMEIN, Le Mariage en Droit canonique, [=ESMEIN, Le Mariage], Paris, Recueil Sirey, 1929, vol. I, p. 25. Schillebeeckx, however, does not share this view, maintaining it took longer for the Church to exercise exclusive judicial competence. See E. SCHILLEBEECKX, Marriage: Human Reality and Saving Mystery, [=SCHILLEBEECKX, Marriage], 2 vols. in 1, London, Sheed and Ward, 1978, vol. II, p. 272. Romans considered marriage a private matter which endured as long as the consent of the parties remained. See S.P. SCOTT, The Civil Law, Cincinnati, The Central Trust Company, 1932, vol. I, n. 46, p. 89. In the end it was the Roman law that gave way to the development of marriage and family law in the canons of the Church. See H. JOLOWICZ, Roman Foundations of Modern Law, Oxford, Clarendon Press, 1957, p. iii; cf. W. PLÖCHL, Storia, vol. 1, pp. 116-117.

⁴⁹Cf. G. MORONI, (ed.), Dizionario di erudizione storico-ecclesiastica, [=MORONI], Venezia, Tipographia Emiliana, 1840-1861, vol. 66, p. 264. Reference is made to the Council of Toledo (693) as being the first to legislate about the diocesan synod (see *ibid.*, p. 274). The Council of Cloveshoe (747) ordered bishops on return from provincial synods to gather their clergy and religious superiors and make known the decisions of the councils. Cf. C.J. HEFELE and D.H. LECLERCQ, Histoire des Conciles d'après les documents originaux, [=HEFELE-LECLERCQ, Histoire], Paris, Letouzey et Ané, 1907-1952, vol. 3 pt. 2, p. 909.

The words 'synod' and 'council' are used interchangeably and may refer to either provincial or diocesan synods or councils. These expressions refer solely to regional or provincial gatherings of bishops for the first six centuries. See MORONI, vol. 66, p. 264 under "Sinodo".

as ruler in the diocese, but more was placed on the brotherhood that was to exist among bishops.⁵⁰ The synod, as an institutional expression of this brotherhood, became a part of the life of the Church in the East at the end of the second century,⁵¹ and in the West during the third century.⁵²

It was commonly accepted as a duty of the assembled bishops of a provincial synod to have a measure of vigilance over the appropriateness and justice of the procedures used by a diocesan bishop. The bishops demonstrated their concern for unity, harmony and justice by legislating in the Synod of Agde (506) that in cases of unjust excommunication:

the neighbouring bishops should advise him; and if he does not comply, they should not at the next synod deny communion to the excommunicated person,

⁵⁰Early in the Church there was the admonition that the bishop was not an absolute ruler. Fourth Synod of Carthage (398), canons 23, 25, 26, 28, all indicate that the judgment of a bishop had no effect unless it was confirmed by the clergy present; even then it could be reversed by a synod. See C.J. HEFELE, A History of the Christian Councils, [=HEFELE, History], translated by W.T. Clarke, 2nd ed. revised, Edinburgh, T. & T. Clarke, 1894-1896, vol. 2, p. 412, cf. J.D. MANSI, Sacrorum Conciliorum Nova et Amplissima Collectio, Paris, Arnheni-Leipzig, 1901-1927, vol. 3, pp. 947-948.

⁵¹See J. HAJJAR, "The Synod of the Eastern Church", in Concilium, 8 (1965), p. 56.

⁵²See J. HERON, The Church of the Sub-Apostolic Age: Its Life, Worship and Organisation, in Light of "The Teaching of the Twelve Apostles", London, Hodder & Stoughton, 1888, p. 117.

so that he may not through the fault of others die without this.⁵³

In other areas of the Church outside of Constantinople, synods or councils that would best meet the needs of the area were convoked as needed.⁵⁴ It was only eight hundred years later that the Fourth Lateran Council (1215) would make the holding of an annual synod⁵⁵ universal law.

⁵³This law was later incorporated into the Corpus Iuris Canonici, c. 8. Causa XI, q. 3. Commenting on this piece of legislation, C.J. Hefele states: "in the old collection of Church ordinance of Burchard, the end of this canon runs as follows: 'If the bishop will not follow his colleagues, they shall exclude him from their communion until the next Synod'" (HEFELE, History, vol 4, p. 77).

⁵⁴Apostolic Canon 38 (336), written about 500 A.D., even determined the times for the provincial synods which became generally accepted: "Bis in anno episcoporum concilia celebrentur, ut inter se invicem dogmata pietatis explorent, et emergentes ecclesiasticas secundo vero duodecima die mensis Hyperberetaei (id est juxta Romanos quarto idus Octobris)" (HEFELE, History, vol. I, pp. 473-474); cf. N. TANNER, (ed.), Decrees of the Ecumenical Councils, London, Sheed and Ward, 1990, vol. I, pp. 236-237.

⁵⁵The Council of Selegunstad (1022), in an appendix, outlined the procedures to be followed in a diocesan synod. The customary prayers, formalities and exhortation of the bishop or his vicar took place first; then, clerics could present their cases on the first day. Provision was made for the hearing, on the second and third days, of other cases after those of the clergy had been treated. It appears a summary process was used, with a vote or some form of consensus being reached by the clergy present. See J. HARDOUIN, (ed.), Acta conciliorum et epistolae decretales ac constitutiones summorum pontificum, Paris, Typographia Regia, 1714-1715, vol. 6, pars. I, col. 382-384. See also R. NAZ, "Causes synodales" in Dictionnaire de Droit canonique, [=NAZ, "Causes synodales"], vol. III, col. 118.

Difficulties with distance and travel made an assembly of the clergy in a diocese an exception rather than a rule, so bishops assembled their clergy in regional groupings while making their pastoral visitation. These so called 'partial synods' fulfilled in essence the same role as the diocesan one, making synodal justice more local and present to the communities of each region.⁵⁶

On such pastoral visits and partial synods, a delegate of the bishop, usually an archdeacon or archpriest, would precede the bishop, convoke the synod and as presiding judge invite priests to present cases of minor importance for immediate judgment while the more serious ones were kept for the bishop.⁵⁷ Judgment, based on the evidence of synodal witnesses⁵⁸ was swift. It was possible also to admit evidence presented by other members of the faithful who wished to testify under oath to the crimes or inappropriate behaviour that they had witnessed.⁵⁹ The search for adequate proof was

⁵⁶See NAZ, "Causes synodales", vol. III, col. 118.

⁵⁷See *ibid.*, col. 119.

⁵⁸See *ibid.*

⁵⁹In 1672, Bishop Étienne le Camus, bishop of Grenoble, actually conducted a similar procedure in each parish that was visited. In public, the pastor would have to give an account of the spiritual lives of the members of his flock, with the possibility of denouncing those who were causing problems. Likewise, the bishop would select members of the congregation to render an account of the behaviour and effectiveness of the ministry of the pastor. This manner of procedure was effective

not required, especially by these delegated itinerant judges.⁶⁰ If the judge was unconvinced of the innocence of an accused, the latter's innocence could be proven by means of the judicia Dei or the ordeals.⁶¹

An understanding of how diocesan synods were conducted is important for three reasons. First, it was at the level of the synod that justice was primarily exercised. Secondly, the procedures used indicate who actually did preside at them. Thirdly, the procedure used in a 'partial synod' can demonstrate part of the reason for the rise in power of courts and officials inferior to the bishop and, finally, how confusion regarding presiding over a process and deciding the controversy led to abuses in ecclesiastical courts.

B. The influence of Papal primacy and Papal legates

In the interests of unity, if not uniformity, the papacy in the course of history exerted an increasing control over the local churches by concentrating a number of administrative,

in maintaining justice, and allowing for the effective implementation of reform in the diocese; see *ibid.*

⁶⁰See *ibid.*

⁶¹The practice of the use of ordeals was not universally employed in the Church; see *ibid.*

legislative and judicial functions in its own hands.⁶²

Juridically, papal primacy had begun with Pope Clement of Rome around 96 A.D.⁶³ and was strengthened by the 'appeal canons' of the Council of Sardica (343).⁶⁴

The use of papal legates⁶⁵ further added to the power of the papacy and led to a parallel system in the administration of justice. The age of the Decretals was a period marked by the development of a system of law based on the intervention of a papal delegated judge.

It could be falsely concluded that these delegated judges became more prominent as a result of conditions in England. The papal delegated judge system was, in fact, already being used throughout the Christian world. However, the martyrdom of

⁶²J. LYNCH, "Some Landmarks in the Development of Papal Reservations up to 1400 A.D.", [=LYNCH, "Some Landmarks"], in The Jurist, 30 (1970), p. 146.

⁶³See F.X. FUNK, (ed.), Opera Patrum Apostolorum, Tubingae, in Libraria Henrici Lauppe, 1881, vol. 1, (ed. nova), p. 145.

⁶⁴See H. HESS, The Canons of the Council of Sardica, A.D. 343: A Landmark in the Early Development of Canon Law, Oxford, Clarendon Press, 1958, p. 46.

⁶⁵For a better understanding of the legal institution of the papal delegated judges and synodal judges cf. G. GRAHAM, Synodal and Pro-Synodal Judges, Washington D.C., The Catholic University of America, 1967, vii, 205 p., Canon Law Studies, no. 452; J. HICKEY, De Iudice synodali ac pro-synodali, Romae, apud custodiam librariam Pontificii Instituti Utriusque Iuris, 1951, 141 p.

Thomas Becket (1170) opened the doors in England, after 1172, for a large number of papal decretals with commissions for papal delegated judges.⁶⁶ These judges became competent in certain cases and were called upon to preside over matters delegated to them by the Holy See.⁶⁷

Pope Celestine III (1191-1198), in a letter to the Bishop of Rouen, indicated that it had been the custom of the Holy See to delegate more than one judge to resolve a case, because the sentence given by a college of judges gave a greater assurance of being correct.⁶⁸ This custom gave rise to an

⁶⁶See F.W. MAITLAND, Roman Canon Law in the Church of England, London, Mathuen and Company, 1898, p. 123; cf. C. DUGGAN, Twelfth Century Decretal Collections and Their Importance in English History, London, Athlone Press, 1963, University of London Historical Studies, no. 12, p. 19.

⁶⁷ These papal legates received much authority and responsibility. They could resolve monastic disputes, discipline those receiving lay investiture, absolve and reconcile penitents, regularize marriages, confirm those designated for episcopal ordination and even initiate major cases which were reserved to the Pope. LYNCH, "Some Landmarks", pp. 145-181, gives a brief but concise treatment of papal centralization and reservation until 1400 A.D.

⁶⁸See Corpus Iuris Canonici, editio Lipsiensis secunda, post Aemilii Ludovici Richter curas instruxit Aemilius FRIEDBERG, [=FRIEDBERG], Lipsiae, Tauchnitz (1879-1881), editio anastatica repetita, Lipsiae, Tauchnitz, 1928, 2 vols. Volume 1 is sub-titled Decretum Magistri Gratiani, [=Gratian, Decretum], while volume 2 is sub-titled Decretalium Collectiones, [=Gregory IX, Decretal; Liber Sextus; Clem.]; Decretum Gratiani emendatum et notationibus illustratum, una cum glossis, [=Glossa Ordinaria], Bartolomaeus BRIXIENSIS, (ed.), Venetiis, Apud Magnam Societatem, una cum G. Ferrario & H. Franzino, 1584, 2 vols, Gregory IX, Decretals, Liber, I, Tit. 29, de officio et potestate iudicis delegati, caput 21, FRIEDBERG, vol. II, col. 164-166. Cf. A.E. LYONS, The

important distinction between being appointed to a college of judges in solidum or simpliciter, since it would affect the manner in which the judge was to preside over and resolve a case.⁶⁹ Judges who were appointed in solidum could hear cases without the cooperation of the entire college, while those appointed simpliciter could not.

Early in the fourteenth century, in an effort to cope with the increased length of ecclesiastical processes, the power of the judge to direct, and so to preside over, a matrimonial trial was augmented through the introduction of an abbreviated or summary procedure⁷⁰ found in the rediscovered Digest of Justinian.⁷¹ The Popes never put into universal practice a full and formal trial for marriage cases, although

Collegiate Tribunal of First Instance With Special Reference to Matrimonial Causes, [=LYONS, Collegiate Tribunal], Washington, D.C., Catholic University Press, 1932, Canon Law Studies, no. 78, p. 3.

⁶⁹See LYONS, Collegiate Tribunal, pp. 3-4.

⁷⁰Cf. F. ROBERTI, De processibus: opus ad codicis schemata exactum SS Congregationum instructionibus normisque S.R. Rotae conlatis iurisprudentia tribunalium apostolicorum inspecta et cum iure canonico orientali comparatum, vol. I, editio quarta, De actione, de praesuppositis processus et sententiae de merito, Civitate Vaticana, apud custodiam Librarium Pontificii Instituti Utriusque Iuris, 1956, [=ROBERTI, De Processibus], vol. I, pp. 7-8.

⁷¹"But about 1070, the discovery of the Digesta confronted the Medieval world with the most comprehensive, substantial and imposing document of Roman juridical thought, with all its sagacity, fineness, and elegance" (S. KUTTNER, "The Father of the Science of Canon Law", in The Jurist, 1 (1941), [=KUTTNER, "The Father of the Science"], p. 12).

it would appear that this was certainly their desire.⁷² To avoid long delays and to expedite the processing of marriage cases a mitigated process was allowed where the judges and the litigants were excused from the observance of the solemnities of law.⁷³

Pope Clement V (1305-1314) in 1306, with the Constitution Saepe, outlined elements of the summary process he envisaged.⁷⁴ In this process the requirements of justice regarding complete proof and the protection of the rights of the litigants were maintained; however, the presiding judge had a vastly expanded cognizance of the case and directed the unfolding of the trial at his own discretion. His decision was given informally with useless appeals being rejected.

The Roman congregations and tribunals became more diversified and extensive, tending to operate per modum collegii.⁷⁵ At first, cases referred to the Holy See were

⁷²Cf. Gregory IX, Decretals, Liber II, Tit. 6, ut lite non contestate, caput 1, FRIEDBERG, vol. II, col. 258-259; A. VAN HOVE, Commentarium Lovaniense in Codicem Juris Canonici, 5 vols., vol. I, Prolegomena ad Codicem Juris Canonici, [=VAN HOVE, Prolegomena], Mechliniae-Romae, H. Dessain, 1945, n. 364.

⁷³Cf. Clem., Liber II, Tit. 1, de iudiciis, caput 2, FRIEDBERG, vol. II, col. 1143.

⁷⁴Cf. Clem., Liber V, Tit. 11, de verborum significatione, caput 2, FRIEDBERG, vol. II, col. 1200; LYONS, Collegiate Tribunal, p. 10.

⁷⁵See ROBERTI, De Processibus, vol. I, p. 225.

brought to the attention of the Pope himself and decided by him in consistory. It was the Pope who exercised the role of presiding judge and so presided over and adjudicated these cases.

The number of cases brought to Rome increased so dramatically that in order to assure equity, a detailed process of rendering judgment became necessary. The result was that a tribunal was established in Rome, eventually evolving into what was called the Roman Rota.⁷⁶

Initially, the Popes tended to appoint a cardinal or one of the papal chaplains to arrange for a suit to be accepted, hear the evidence, and then report to the Pope who would render a decision.⁷⁷ These delegates could be considered as presiding, directing or controlling the instruction of the case while the decision itself was left to the Pope. In this there seems to have been a division between the function of praeses in guarding, protecting and controlling the process and that of iudex as actually judging and so settling the case.

⁷⁶See ROBERTI, De Processibus, vol. I, p. 335.

⁷⁷See Sacrae Romanae Rotae Decisiones, seu Sententiae quae prodierunt anno 1909 -, [=S.R.R. Dec.], Romae, Typis Vaticanis 1912 -, vol. I, Praefatio, p. xiii; Cf. E. CERCHIARI, Capellani Papae et Apostolicae Sedis, [CERCHIARI, Capellani Papae], Romae, Typis Polyglottis Vaticanis, 1921, vol. I, p. 13.

Clement VI (1342-1352) bound the auditors to obtain the opinions of their co-auditors which resulted in a college hearing cases, with one of them called upon to preside in the college, deciding the case and presenting the sentence to the Pope for confirmation. By the end of the fourteenth century the auditors, through the person of the presiding or responsible auditor, were able to give their decision in the name of the Pope without needing his confirmation. This college took turns at hearing and presiding over cases.⁷⁸ The number of auditors was reduced from twenty to twelve by Pope Sixtus IV (1471-1481).⁷⁹

C. The influence of courts inferior to that of the bishop

There appear to be two reasons for the rise in popularity and power of courts inferior to the bishop's court. The first was that the court of the bishop had become overloaded as the number and complexity of cases increased. The second was the use of the lower prelates, especially the archdeacon or archpriest, in the 'partial synod'.⁸⁰ These prelates were, in

⁷⁸See ROBERTI, De Processibus, vol. I, p. 338.

⁷⁹Cf. M. LEGA, Praelectiones in Textum Iuris Canonici, De Judiciis Ecclesiasticis, [LEGA, De Judiciis], Rome, Typis Vaticanis, 1896, vol. II, p. 42; S.R.R. Dec., Praefatio, vol. I, p. xxix.

⁸⁰See NAZ, "Causes synodales", vol. III, col. 118.

fact, the first judges in a 'partial synod' and soon saw their role as presiding over the first court of the bishop, with the bishop's court becoming a court of appeal.

It would seem that, in many dioceses, the attempt to separate the care and control of the instruction of a case from its resolution, or in other words, the presidency of the process from the judgment of the merits of the case was unsuccessful.⁸¹ The officialis displaced the archdeacon as the ordinary judge who would be called upon to preside over and decide cases brought to the bishop's court.⁸² The tasks of presiding over the process and the judgment of the merits of a case were once again reconciled in the office of the officialis. The power and abuses of these lower courts were

⁸¹Canon 26 of the Council of Agde maintained that marriage cases were to be tried before the bishops of the province, see H.T. BRUNS, Canones Apostolorum et Conciliorum Saeculorum IV, V, VI, VII, [=BRUNS, Canones Apostolorum], Berolini, G. Reimer, 1839, vol. II, p. 151. A glossa on this section of the Decretum indicates that, at the time of the writing of the glossa, archpriests had jurisdiction over these cases but the bishop was the one who was competent to decide, cf. Glossa ordinaria, ad Decreti secunda pars, Causa XXXIII, questio 2, c. 1, s.v. comprovinciales.

In the end, delegated itinerant judges actually saw themselves as being able to operate autonomously, presiding over their own court and deciding upon the merits of a case. In some instances these delegated officials dared to judge and preside, even in the presence of the bishop, although they were to intervene only when the bishop could not be present.

⁸²See ROBERTI, De Processibus, vol. I, p. 251.

curtailed, but not completely removed, by the Fourth Lateran Council (1215).⁸³

IV. FROM THE COUNCIL OF TRENT TO THE 1917 CODE

The Council of Trent (1545-1563) declared that matrimonial cases belonged exclusively to ecclesiastical judges.⁸⁴ Deans, archdeacons and other inferior prelates were deprived of competence and so could not presume to preside over matrimonial and criminal cases or judge them. This restriction did not prevent them from being delegated by their bishop to judge matrimonial cases or even preside over them. They, however, could not act on their own authority. There was no further doubt that the court of first instance was the bishop's court. There were, of course, exceptional cases, reserved to the Holy See by law or by special reservation, and withdrawn from episcopal competence.⁸⁵

⁸³See D. MANSI, Sacrorum Conciliorum Nova et Amplissima Collectio, [=MANSI, Sacrorum Conciliorum], Paris, Arheni-Leipzig, 1901-1927, vol. XXII, col. 1047.

⁸⁴See Council of Trent, Session XXIV, de matrimonio, canon 12; H.J. SCHROEDER, The Canons and Decrees of the Council of Trent: English Translation by Rev. H.J. Schroeder, [=SCHROEDER, Trent], Rockford, Illinois, Tan Books and Publishers, Inc., 1978, p. 182.

⁸⁵Cf. Council of Trent, Session XXIV, Decree concerning Reform, chapter 20; SCHROEDER, Trent, pp. 211-212.

The Council of Trent, following the Constitution of Pope Boniface VIII (1294-1303), Statutum⁸⁶, stated that judges who were delegated to preside and judge in court were to have adequate knowledge. Trent prescribed that in every provincial council or diocesan synod there should be at least four judges chosen from each diocese who would preside over, that is take charge of, direct and adjudicate spiritual and ecclesiastical cases. These were to be called iudices synodales. In some dioceses, these judges were given jurisdiction and formed a collegiate diocesan tribunal which presided over and judged cases presented to it.⁸⁷ The bishop was the iudex ordinarius in his diocese. In order to fulfil this judicial task he could use other judges.

The abuses Trent tried to address continued and in some situations increased⁸⁸ until Pope Benedict XIV (1740-1758)

⁸⁶Cf. Liber Sextus, Liber I, Tit. 3, de rescriptis, caput 11, FRIEDBERG, vol. II, col. 941-942.

⁸⁷"Quod si alicubi ex consuetudine vel statuto particulari aliquid jurisdictionis habeat, quod hoc non merus assessor seu consiliarius, sed delegatus iudex censendus est" (Council of Trent, Session XXV, Decree Concerning Reform, Chapter 10; SCHROEDER, Trent, p. 244). Cf. BOUIX, Tractatus, vol. I, p. 467.

⁸⁸Benedict XIV cited the situation in Poland where there was an example of disregard for the canons of the Council of Trent. Cf. JOYCE, Christian Marriage, p. 402.

inaugurated a period of reform.⁸⁹ It was his intention to remedy abuses to the sacrament of marriage by tightening matrimonial procedures and safeguarding the sacredness of the bond of marriage.⁹⁰

On August 26, 1741, he issued his Encyclical Quamvis Paternae⁹¹ in which he sought to revive Tridentine legislation requiring bishops to convoke synods and appoint synodal judges so as to avoid unworthy judges presiding over and deciding marriage cases. The names of the synodal or pro-synodal judges were to be registered with the Holy See.⁹²

Some debate exists over the Pope's intention in reemphasizing synodal and pro-synodal judges. One school of thought maintains that these judges were delegates of the ordinary and not of the Pope.⁹³ If this were true, then the bishop's court would be the court of first instance, the metropolitan the court of second instance and the Roman congregations a court of third instance with final appeal to

⁸⁹Cf. BENEDICT XIV, Encyclical, Matrimonii, April 11, 1741, in Fontes, vol. I, n. 307; Encyclical, Quamvis Paternae, August 26, 1741, in ibid., vol. I, n. 315; Constitution, Dei Miseratione, November 3, 1741, in ibid., vol. I, n. 318.

⁹⁰See BENEDICT XIV, Encyclical, Matrimonii, in Fontes, vol. I, n. 307.

⁹¹Cf. Fontes, vol. I, n. 315.

⁹²See BOUIX, Tractatus, vol. I, p. 462.

⁹³Cf. J. HICKEY, De Judice synodali ac pro-synodali, pp. 39-40.

the Pope himself. The system of papal delegated judges would function in parallel with a diocesan court.

Another school of thought considers that Pope Benedict XIV actually intended to reestablish the synodal and pro-synodal judges as papal delegated judges, indicating that cases which were submitted to the Holy See would be delegated to the bishops first, who would function as papal delegated judges. If no bishop was available, then the case could be delegated to synodal or pro-synodal judges who would be delegates of the Pope, and not of the bishop.⁹⁴ This would mean that a bishop was not a iudex ordinarius, but a iudex delegatus in these cases. If this were true, there would be some confusion as to whether or not the bishop could delegate the instruction of such cases to the presidency of another, or was he bound to preside over all aspects of the case himself? In this line of thought it would seem that unless the mandate to the bishop read otherwise, he would have to preside himself.

The use of a bishop as a delegated judge would not enhance the dignity of the bishop as had been argued,⁹⁵ but place synodal judges on an equal footing with him since both were delegates of the Pope. The use of papal delegated judges

⁹⁴Cf. G. GRAHAM, Synodal and Pro-Synodal Judges, pp. 41-43.

⁹⁵See *ibid.*, pp. 41-43.

in this manner would perpetuate a parallel system of justice in the Church and allow for the possibility of competition with a diocesan court or provide yet another means to by-pass the diocesan court completely.

In the final analysis, history seems to favour the first school of thought over the second since there was a development of the dignity of the office of the bishop, a recognition of his right to preside as iudex ordinarius in his diocese, and a lack of use of papal delegated judges except in extraordinary situations. Besides, Pope Benedict XIV was, in many respects, progressive and innovative for his time, and not regressive as the second school of thought would imply.

On November 3, 1741, Pope Benedict XIV issued the Constitution Dei Miseratione implementing two reforms which had the greatest impact on ecclesiastical courts and protection for the sacrament of marriage: "the defender of the bond"⁹⁶ was responsible for protecting the bond of marriage from unlearned judges,⁹⁷ and two conforming sentences were required before a second wedding could be celebrated.⁹⁸

⁹⁶Dei Miseratione, intro. and art. 1.

⁹⁷Dei Miseratione, art. 4, reminded bishops that cases were to be committed to persons of upright character who had expert knowledge of the law. This had already been emphasized by the constitution Statum of Pope Boniface VIII, and in the Council of Trent, Session XIII, in the Decree concerning Reform, Chapter 4; cf. SCHROEDER, Trent, p. 83.

⁹⁸Dei Miseratione, art. 14.

He did not mention the need to establish a college of judges to decide cases, since several courts were using multiple judges, especially in the Roman Curia, and there had been no contrary legislation to permit judges to preside or render decisions alone.⁹⁹ Bishops could be considered the presiding judges of their dioceses in that they were to guard, care for and direct cases as well as settle them.

That is not to say that the bishop had to attend to each case personally. He was free to use his own discretion in determining the responsibilities and number of delegated judges.¹⁰⁰

The bishop is at liberty to give these delegated judges or tribunals, whether consisting of individual or collective bodies, power either to hear and pronounce final sentence upon the case, or only to hear or try it, and to reserve to himself the final sentence. Here we may remark that these collective bodies of judges, which we have just mentioned are greatly favoured both by the letter and by the spirit of the law of the Church.¹⁰¹

Pope Gregory XVI (1831-1846), on November 4, 1831, prescribed a collegiate tribunal system as the ordinary court of first instance in the Papal States.¹⁰² In order to avoid

⁹⁹See LEGA, De Judiciis, vol. II, n. 316.

¹⁰⁰Cf. ROBERTI, De Processibus, vol. I, pp. 235, 241.

¹⁰¹S.B. SMITH, Elements of Ecclesiastical Law, [=SMITH, Elements], New York, Benziger Bros., 1892, vol. III, p. 375.

¹⁰²Acta Gregorii Papae XVI, [=Acta Gregorii Papae XVI], V. Vannutelli-Bercasoni, (ed.), Romae, ex Typographia Polyglotta, 1901-1904, vol. IV, pp. 74-113. Regolamento organico di

confusion, an appendix was published outlining the methods to be followed and directing that the court consist of the ordinary and four associate judges.¹⁰³ The cardinal Secretary of State in a letter dated April 24, 1832 recommended a procedure when the requisite number of judges for a diocese was not available.¹⁰⁴

On August 22, 1840, the Congregation of the Council issued an Instruction based on the Constitution Dei Miseratione to be applied throughout the entire Church:¹⁰⁵ Cum Moneat Glossa presented procedures and formalities to be observed in marriage nullity cases. There were to be three officers involved in each case: the judge, the defender of the

procedura criminale.

¹⁰³Appendice al Regolamento organico e di procedura criminale per norma della Curie ecclesiastiche di tribunali ecclesiastici, e di giurisdizione mista, art. 4. "Il tribunale ecclesiastico di ciascuna Diocesi e composto dell'Ordinario, e di quattro giudici prescleti dal medesimo" (ibid., vol. IV, p. 113).

¹⁰⁴Cf. A. BIZZARI, (ed.), Collectanea in usum secretariae Sacrae Congregationis Episcoporum et Regularium, [=BIZZARI, Collectanea], 2a ed., Typographia Polyglotta, 1885, p. 177.

¹⁰⁵CONGREGATION OF THE COUNCIL, Cum Moneat Glossa, [=Cum Moneat], August 22, 1840, in Fontes, vol. VI, n. 4069; cf. SMITH, Elements, New York, Benziger Bros., 1892, vol. II, Appendix V, Ecclesiastical Trials, p. 436. [The numbering of the paragraphs of Cum Moneat Glossa will be taken from those that appear in the work of S.B. SMITH, Elements of Ecclesiastical Law.]

bond, and the notary.¹⁰⁶ The judge was to be either the bishop himself or his delegate who was to convoke the tribunal, cite the parties and witnesses, set the time limits, hear the experts in the cases of non-consummation or impotence, gather the testimony, ask questions ex officio, and render the final judgment. In short, it was this judge who was to preside over and decide the case.

Joseph Cardinal Rausher (1797-1875) wrote an Instruction to the Archdiocese of Vienna dated May, 4, 1855 which regulated matrimonial cases for the Archdiocese. This Instruction was eventually approved by the Holy See, for use in all of Austria in forma ordinaria and became known as the Austrian Instruction.¹⁰⁷ It was well received and recommended by Roman canonists and theologians.¹⁰⁸

For cases of possible nullity of marriage, the Instruction stated that the proper judge was the bishop of the

¹⁰⁶Cum Moneat, n. 1612: "...pars nullitatem matrimonii allegans comparebit... coram Iudice, adstante Defensore matrimonii et Cancellario."

¹⁰⁷Instructio pro iudicis ecclesiasticis quoad causas matrimoniales, [=Austrian Instruction], May 4, 1855, Acta et Decreta Sacrorum Conciliorum Recentiorum, Collectio Lacensis, [=Collectio Lacensis], Friburgi Brisgoviae, 1870-1892, vol. V, pp. 1286-1316.

¹⁰⁸See P. GASPARRI, (ed.), Tractatus canonicus de matrimonio, Romae, Typis Polyglottis Vaticanis, 1932, vol. I, p. 330.

diocese in which the husband had a domicile.¹⁰⁹ The bishop was to form a collegiate tribunal of at least four or at most six judges to hear and judge marriage cases.¹¹⁰

Decisions in collegiate tribunals were reached by an absolute majority vote of the judges. If there was a tie, and the case did not involve the validity of marriage, then the presiding judge or praeses decided the matter with his vote. If the case was a marriage nullity case, the validity of the marriage was to be upheld. The decision, as well as the motives for the decision were to be submitted to the bishop who could approve the decision or order further examination of the case.¹¹¹

The presiding judge was the official who was to present his decision to the bishop for confirmation or further

¹⁰⁹The rules of competence for marriage nullity cases can now be found in canons 1671-1673 of the 1983 Code of Canon Law.

¹¹⁰ Austrian Instruction, art. 97: "Episcopus in tractandis causis matrimonialibus utitur tribunali, quod ex preside et consiliariis ad minimum quatuor constare debet" (Collectio Lacensis, vol. V, p. 1298-1299).

¹¹¹ Austrian Instruction, art. 99: "Causas referendas, nisi, Episcopus peculiare quid statuatur, praeses consiliariis distribuit. Decisio fertur per suffragia absolute majora. Praeses mentem suam ultimus explicat et quando ipsius computato suffragio paria emergunt vota, rem suffragio suo decernit, nisi de sententia super matrimonii validitate ferenda agatur, quo quidem in casu votis paribus existentibus nunquam non pro validitate standum erit. Si Episcopo visum fuerit, praesidi virum, qui vices ejus gerat, adjungere, de negotiis eidem assignandis necessaria constituet" (Collectio Lacensis, vol. V, p. 1299).

direction. The bishop remained the proper judge, iudex ordinarius, in the diocese, but tended to delegate aspects of adjudication, direction, control and presidency in cases to other judges who were to preside in his name. The praeses could be seen as responsible for the instruction of the case while its final resolution could be reserved to the bishop.

V. PRESIDING IN TRIALS ACCORDING TO THE 1917 AND 1983 CODES

The study of the development of the competencies of some judicial structures in the Church indicates time and again that the bishop was competent as iudex ordinarius and that he could delegate others to preside over the adjudication of cases for him.¹¹² In most cases the bishop could not personally preside over the cases so he delegated others to fulfil this function.¹¹³

¹¹²Cf. S. WOYWOD and C. SMITH, A Practical Commentary on the Code of Canon Law, [=WOYWOD and SMITH, Commentary], new revised ed., New York, Joseph F. Wagner Inc., 1948, vol. 2, pp. 229-230; cf. also T.L. BOUSCAREN, A.C. ELLIS and F.N. KORTH, Canon Law: A Text and Commentary, [=BOUSCAREN ELLIS and KORTH, Text], Milwaukee, Bruce Publishing Company, 1966, pp. 169-170.

¹¹³"Iudices singulares in diocesibus nativa potestate sunt Episcopi; qui tamen, negotiorum mole oppressi, praesertim in Ecclesia Latina, aliis consueverunt committere causas iudicandas" (ROBERTI, De Processibus, vol. I, p. 241).

The 1917 Code¹¹⁴ strongly urged the bishop to appoint an officialis who formed one court with him.¹¹⁵ The bishop's capacity to preside and judge within the limits of his ecclesiastical competence was not compromised even though the jurisdiction of the officialis was not delegated but ordinary. The responsibilities of the officialis may be limited by the bishop in the exercise of this jurisdiction;¹¹⁶ however, the bishop was urged not to be too restrictive.

The 1917 Code demanded that each diocese, or its equivalent in law establish, as the ordinary court of first instance, a collegiate tribunal presided over by the local ordinary himself, or the officialis with two or four synodal judges¹¹⁷ who meet and act as a body to decide cases referred

¹¹⁴Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus, praefatione fontium annotatione et indice analytico-alphabetico ab E.mi Petro Card. Gasparri auctus, [=Code, 1917], Romae, Typis Polyglottis Vaticanis, 1933, xlvii, 786 p.

¹¹⁵See WOYWOD and SMITH, Commentary, vol. 2, p. 231; cf. BOUSCAREN, ELLIS and KORTH, Text, p. 185.

¹¹⁶See *ibid.*

¹¹⁷The synodal or pro-synodal judges of the Middle Ages were qualified and approved persons to whom the Holy See could entrust judicial matters, causae maiores, reserved to that forum. The synodal and pro-synodal judges of the 1917 Code are diocesan judges appointed at a diocesan synod to act as episcopal delegates and to form the ordinary collegiate tribunal of the diocese with the bishop or his officialis. "Codex iudices synodales restituit, sed eorum officium valde differt ab antiquo. Olim fuerunt iudices a S. Sede vel a Legatis apostolicis delegati: nunc potestate Episcopo collata,

to them. Formal cases of marriage nullity could not be heard by one judge, so the role of praeses in matrimonial cases was always exercised within the context of a collegial tribunal. The bishop or the officialis was to preside over the tribunal. Canon 1577 of the 1917 code prescribes:

The tribunal of associate judges must act as a body, and pronounce sentence according to the majority vote. The Officialis or the Vice-Officialis presides, and directs the procedure and decides what is necessary for the administration of justice in a given case.¹¹⁸

Canon 1578 of the same Code states:

With the exception of the cases enumerated in canon 1572, the bishop may always preside over the tribunal in person. However, it is highly expedient that the bishop let the cases, especially criminal and more important civil cases, be judged by the ordinary tribunal under the presidency of the Officialis or Vice-Officialis.¹¹⁹

It could be asked whether or not another judge could be appointed to preside. The 1917 Code in canons 1573, 1577 and

nati sunt efformare tribunal collegiale diocesenum" (ROBERTI, De Processibus, vol. I, p. 260); cf. F.X. WERNZ, and P. VIDAL, Ius Canonicum, [=WERNZ-VIDAL, Ius Canonicum], Romae, Universitas Gregoriana, 1927-1938, vol. VI, p. 83; J. NOVAL, Commentarium codicis iuris canonici, Romae, Marietti, 1920-1932, p. 62. The power of judges in the Codes of Canon Law is ordinary vicarious. A strict division of power is a recent legal phenomenon that does not necessarily apply to the exercise of judicial power by synodal and pro-synodal judges of the middle ages.

¹¹⁸English translation in WOYWOD and SMITH, Commentary, vol. 2, p. 233.

¹¹⁹Ibid.

1578 as well as Provida Mater¹²⁰ article 14, indicate that, for the liceity of the procedure, the bishop or officialis or vice-officialis must preside.¹²¹ There was, however, no limit placed on the number of vice-officiales who could be appointed.

Dissatisfaction with the procedural norms of the 1917 Code and with Provida Mater caused several countries to work at developing adaptations of the universal norms. Vatican II gave a new spirit to the life of the Church. There was a desire to change marriage tribunals so there would be a "better balance between the rights of the community and the rights of the person, the sanctity of the sacrament and the sacredness of the individual."¹²²

The legal reforms proposed by various nations had as their primary focus the pastoral care of those who came to them for help. Three areas of particular concern were noted: the collegiate tribunal (more than one judge), the competent forum and the mandatory appeal. In light of these concerns there was an urgent demand for a more expeditious process.

¹²⁰Cf. CONGREGATION FOR THE SACRAMENTS, Instruction Provida Mater, August 15, 1936, in AAS, 28 (1936), pp. 313-372. English translation in W.J. DOHENY, Practical Manual for Marriage Cases, [=DOHENY, Practical Manual], second edition, Milwaukee, The Bruce Publishing Company, 1947, pp. 2-120.

¹²¹Cf. ROBERTI, De Processibus, vol. I, pp. 252-253, 267.

¹²²D.G. NUGENT, "The 'Aggiornamento' and Marriage Annulments", in The Jurist, 28 (1968), p. 77.

Little attention was paid to who would preside or the concept of presidency over a court since this was not a specific area of concern.¹²³

The work of revision was completed and the new Code of Canon Law became effective the first day of Advent 1983. The diocesan bishop remains the proper judge primarily responsible for his court of first instance and can exercise this power personally or through others (canon 1419).¹²⁴ The requirement

¹²³See Communicationes, 2 (1970), p. 183, n. 7. Once the coetus de iure processuali of the Pontifical Commission for the Revision of the Code of Canon Law had completed its review of Book Four De processibus and the canons on formal marriage procedures, it noted that it saw as its task the development of a balance between uniformity and decentralization, and between a swift process and the secure protection of public and private rights. There were nine changes recommended: "1. a simplification of the rules determining the forum competens; 2. allowing for the possibility, in the first instance, of employing one lay judge in a collegiate tribunal, or only one cleric as judge; 3. reducing the limitations regarding the right to impugn a marriage; 4. providing for the acceptance or rejection of the libellus by the presiding judge alone; 5. giving to the judge the right to formulate the dubium, unless the parties petition a contestatio; 6. granting procedural parity between the defender and the advocate for the petitioner; 7. waiving the requirement for a separate oral examination of periti; 8. a simplification of the procedure in the second instance; 9. providing for an easier transition from a nullity action to the processus super rato" (W. LaDUE, "Causas Matrimoniales and the A.P.N. - A comparison", in Proceedings of the Canon Law Society of America, 35 (1973), p. 112).

¹²⁴See C.A. COX, Procedural Changes in Formal Marriage Nullity Cases from 1917 to the 1983 Code: Analysis, Critique and Possible Alternatives, [=COX, Procedural Changes], Washington, D.C., Catholic University of America, 1989, Canon Law Studies, no. 528, p. 28; cf. L. CHIAPPETTA, Il codice di diritto canonico: commento quiridico-pastorale, [=CHIAPPETTA, Commento], Napoli, Edizioni Denoiane, 1988, vol. 2, p. 552,

to appoint an officialis or judicial vicar remains (canon 1420), but the office has more stability than previously.¹²⁵

The collegiate tribunal and its functioning are described in canon 1425 §§1-3, which is similar to canon 1576 of the 1917 Code. The 1983 Code adds two more parts to canon 1425; one part allowing in certain cases for the use of a sole judge in the adjudication of a case that normally would be judged before a collegiate court at the first instance,¹²⁶ while the other indicates that, except for grave reasons, the judicial vicar is not to replace judges who have already been designated.¹²⁷

para. 4627-4629.

¹²⁵In the 1917 Code the officialis or vice-officialis was appointed at the discretion of the bishop. The present Code determines that there be a specific duration. Removal from office must be for a lawful and grave reason. See COX, Procedural Changes, pp. 29-30; cf. CHIAPPETTA, Commento, vol. 2, pp. 556-557, para. 4641.

¹²⁶Cf. COX, Procedural Changes, pp. 32-38. There are other conditions, namely that the Bishops' conference allows bishops to use this exception for as long as the impossibility of constituting a collegial tribunal exists, and that the sole judge, if possible, associate himself with an assessor and an auditor; cf. Z. GROCHOLEWSKI, "De variis tribunalium gradibus et speciebus", in INSTITUTO MARTÍN DE AZPILCUETA, Commentario exegetico al código de derecho canónico, [=Commentario], Pamplona, Ediciones Universidad de Navarra, S.A., 1995, vol. IV/1, pp. 754-810, especially pp. 797-799.

¹²⁷Cf. GROCHOLEWSKI, "De variis tribunalium", in Commentario, vol. IV/1, p. 800; CHIAPPETTA, Commento, vol. 2, pp. 559-560, para. 4646-4649; Communicationes, 10 (1978), p. 234; COX, Procedural Changes, pp. 32-37.

The various aspects of presiding at trials are now described by the different functions carried out by the presiding judge which are found in several canons of the 1983 Code.¹²⁸ The 1917 Code in canons 1577 and 1578 left 'all that was necessary for the administration of justice in a case' to the officialis or vice-officialis, who was the presiding judge.¹²⁹ It would at first appear that the presiding judge had more discretionary ability in the previous Code. This is not so. He still had to follow all of the rules of procedure found in the law of the Church, consisting of the Code itself, subsequent Motu proprios if any, Constitutions and Instructions.

Canon 1426 §2 of the present Code allows for the fact that there might be situations where the judicial vicar or associate judicial vicar may not be able to preside in all cases. It seems, therefore, that there could be circumstances

¹²⁸Some of the responsibilities of the presiding judge are: canon 1428 §2, on the appointment of auditors; canon 1449 §4, to conduct a hearing when there is an objection against an officer of the court; canon 1481 §1, to assess the ability of a party to stand in court; canons 1507 §1 and 1677, cite the parties; canon 1590, decide incidental questions; canon 1609, establish the time of the discussion of the judges and direct the discussion, to name but a few. Cf. GROCHOLEWSKI, "De variis tribunalium", in Commentario, pp. 801-802; L. NELI, The Role of the Judge in the Introduction of Cases Declaring Nullity of Marriage, [=NELI, Introduction], Rome, Pontificia Universitas Urbaniana, 1994, pp. 33-34; CHIAPPETTA, Commento, p. 560, para. 4650-4651; L. del AMO, "The judge" in Code, 1983, p. 887.

¹²⁹See WOYWOD and SMITH, Commentary, vol. 2, p. 206.

that would allow other judges to preside at trials.¹³⁰ The principal functions of the presiding judge are to instruct the case and render a decision. The division of instruction of a case from its decision is unusual.¹³¹

CONCLUSION

At first, the concepts of praeses and iudex in the context of the administration of justice and the regulation of controversy became intertwined in the person of the bishop. He was leader, protector, guardian and judge in the territory entrusted into his care. Through the course of history, the direction and control of the instruction of a case and its actual judgment have been linked, while at other times they were separated. The result is that some confusion existed and to some degree still exists over what it means to be praeses in ecclesiastical trials.

Some would limit the application of the term to collegiate court activities only. This has not been the experience of the Church. It is more accurate to say that the

¹³⁰The question of different judges presiding over cases will be discussed in detail in chapter three.

¹³¹See NELI, Introduction, p. 31. There is provision in the Code for a judge auditor to instruct a case (canon 1428) or a judge instructor as in cases of non-consummation of marriage (canons 1698-1700 and 1704).

presiding judge is the judge, whether a member of a collegiate court or not, who is responsible to guide, protect and direct the processing of a case as well as to hear and settle a cause.

The question of who is to preside over which type of case has had a rather confused and sometimes contradictory history. There were some developments in the understanding of the office and role of the individual bishop as presiding over the administration of justice in his diocese and his being the proper judge of controversy or dispute. At the same time, there was some tension as to whether or not the power of the bishop to preside was absolute or had to be exercised in concert with others, such as the clergy of the diocese.

The provincial synod saw itself as somehow having vigilance over and directing the proper administration of justice of bishops within their territories. It could be contended that these synods actually did, in some measure, preside over and administer justice within their territory.

The Roman Pontiff established his primacy and sent his delegates to preside over Church matters and at times render judgment in them. The use of papal delegated judges increased in the Middle Ages. For a time it seemed that those who were called to preside over the administration of justice in a local church were the papal legates and not the bishop of the diocese.

The bishop, at times, allowed others to preside in his name as delegated judges of minor affairs in the diocese. Originally, these delegates were to direct the instruction of the case, while the actual judgment was left to the bishop. It did not take long before these judges, in lower courts or at a 'partial synod', usurped the position of the bishop as the proper judge who was to preside over and judge in his territory.

The 1917 and 1983 Codes of Canon Law have further refined the presidential and judicial roles of the bishop and others in the administration of justice.

There are, however, certain other questions that are of particular interest to this study which are not directly answered in the law. For instance, in the present codification, has there been a clarification in the understanding of the role of the presiding judge, especially in matrimonial cases? What responsibilities are shared by all judges and what is unique to the presiding judge? What are the limits of the direction, control and guardianship of the presiding judge? What is unique to the presiding judge of a collegiate court and the judge who presides as sole judge? These are the topics of the next chapter.

CHAPTER TWO

JUDGES AND PRESIDING JUDGES: ROLE AND RESPONSIBILITIES

INTRODUCTION

The role of the presiding judge has evolved over time. The present Code of Canon Law¹ represents the latest stage in the evolution of procedural law and of the role of ecclesiastical judges in Church courts. As the understanding of the purpose of ecclesiastical trials has evolved, so too has the understanding of the role and responsibilities of the presiding judge.

In ecclesiastical trials, whether the court is established in a collegiate manner with several judges, or simply with one judge assisted by other court officers, one person must assume the responsibilities of presidency. As praeses, what does the presiding judge share with other judges in a case? What role does he fulfil which is unique? What are the responsibilities that the presiding judge is to exercise in conjunction with other judges? What responsibilities are unique to him in a collegiate court and which ones can be

¹Codex iuris canonici auctoritate Joannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus, Romae, Libreria Editrice Vaticana, 1989, xxxii, 669 p. English translation in E. CAPPAROS, M. THÉRIAULT, and J. THORN, (eds.), Code of Canon Law Annotated, [=Code, 1983], Montréal, Wilson and Lafleur Limitée, 1993, 1631 p. Unless otherwise specified all references to canons are to the 1983 Code.

distinguished from his judicial functions in a sole judge court?²

I. JUDGES: SOME DISTINCTIONS

The term iudex in the 1983 Code refers to several different realities. In essence a "judge" is a public person, either an individual or a college, legitimately designated with jurisdiction to hear and decide controversial issues in accordance with equity, justice and the norms established by law.³

They are considered to be the proper judge who are called to preside over a church, such as the Roman Pontiff who presides over the entire Church (canon 331), or a diocesan

²Cf. canons 1419-1425, 1427, 1447-1449, 1451-1453, 1455-1457, 1470, 1471, 1473, 1478, 1479, 1481, 1484 \$2, 1486 \$1, 1487, 1488 \$1, 1499, 1501, 1502, 1507, 1508 \$2, 1513. These canons describe what the law considers to be the role of the judge. The discussion will be limited to selected canons which will be used as a basis for a wider understanding of the role of judges and in particular of the presiding judge, whether a sole judge or one appointed for a collegiate tribunal.

³See L. NELI, The Role of the Judge in the Introduction of Cases Declaring Nullity of Marriage, [=NELI, Introduction], Rome, Pontificia Universitas Urbaniana, 1994, p. 27. Cf. L. CHIAPPETTA, Il codice di diritto canonico: commento quiridico-pastorale, [=CHIAPPETTA, Commento], Napoli, Edizioni Denoiane, 1988, vol. 2, pp. 551-552, para. 4623-4624; Z. GROCHOLEWSKI, "De iudice", in INSTITUTO MARTÍN DE AZPILCUETA, Commentario exegetico al Código de derecho canónico, [=Commentario], Pamplona, Ediciones Universidad de Navarra, S.A., 1995, vol. IV/1, pp. 766-770.

bishop (canon 375) and his equivalent in law (Canon 381).⁴ In one sense these persons can be said to preside over the administration of justice in the church under their care since they guide, protect and direct it as head or leader.

The law provides for the designation of diocesan judges, clerics or laity (canon 1421) who can exercise judicial power.⁵ These judges help to constitute a collegial tribunal to deal with cases reserved by law to a collegiate court (canon 1425).⁶ There is provision for the adjudication of certain cases by a sole judge (canon 1425 §1) or for those reserved to the bishop himself (canon 1420 §2). Likewise, in certain circumstances, cases normally judged by a collegial tribunal may be dealt with by a single judge (canon 1425 §4).⁷

The praeses or presiding judge is mentioned most often in reference to a collegiate court. For this reason, some have contended that "the role of the presiding judge emerges only when there are cases to be decided by a collegiate court (canon 1426)".⁸ However, we disagree with this position, since

⁴See NELI, Introduction, pp. 28-29.

⁵Cf. J. BEYER, "Iudex laicus vir et mulier", in Periodica, 75 (1986), pp. 29-60.

⁶More will be discussed about the collegiate court and its presidency in the next chapter.

⁷See NELI, Introduction, pp. 32-33.

⁸NELI, Introduction, p. 33.

it seems apparent that the guardianship, protection and guidance of the entire process, that is the guardianship of the instruction of a case, the right application of procedural norms, and a genuine protection of the rights of the litigants, are the responsibility of the presiding judge.

The definition of judge used by Neli indicates that he is "the public person by way of individual or collegial"⁹ who is to hear and decide. The actual work of assembling the information or proofs for a case may be entrusted to another, but the presiding judge, as an individual or as part of a college, still presides in the sense of guiding, protecting and directing the process and deciding the matter.

The ponens, according to Neli and Grocholewski, is designated only in a collegiate court. It is the ponens who is the judge relator of the college.¹⁰ Neli admits that the ponens may be the auditor or even the presiding judge.¹¹ Once again the interpretation of the term ponens is too narrow. The ponens is the one who writes the sentence. This is but one of the aspects of what it is to be iudex. Regarding cases decided by a sole judge, we contend that he is in fact both the

⁹NELI, Introduction, p. 27.

¹⁰See NELI, Introduction, p. 34; Z.GROCHOLEWSKI, "De auditoribus et relatoribus", in Commentario, vol. IV/1, pp. 809-810.

¹¹See NELI, Introduction, p. 34.

presiding judge and the ponens. As sole judge he is ultimately responsible for the correct application of procedural law to the case as well as its resolution by definitive sentence. In a collegiate court, various aspects of the activity of amassing the proofs, applying procedural law and writing the sentence may be carried out by one judge as presiding judge, or by other judges.

Wrenn indicates that the ponens has also been described as a referee. This is an interesting concept, but only further confuses the role of presiding judge, since the latter directs the discussion of the judges, and the ponens serves as recorder or relator to formulate the sentence.¹²

At this point it would be important to underline a difference between the Latin Code and the Eastern Code of 1990¹³ regarding the responsibilities of the presiding judge in a collegiate court. The Eastern Code indicates that the collegiate court must act as a collegiate body for validity if there is a question of:

1° the rejection of a petition for a counter-claim
or for an incidental case;

¹²See WRENN, "Processes", in J. CORIDEN, T.J. GREEN and D.E. HEINTSCHEL, (eds.), The Code of Canon Law: A Text and Commentary, [=WRENN, Processes], New York/Mahwah New Jersey, Paulist Press, 1985, p. 957.

¹³Codex canonum Ecclesiarum orientalium auctoritate Ioannis Pauli PP. II promulgatus, [=Eastern Code], Romae, Typis Polyglottis Vaticanis, 1990, 382 p.

2° the settlement of recourse against a decree of the presiding judge;
3° the sentence, even an interlocutory one, as well as decrees which have the same effect as a definitive sentence.¹⁴

Apparently, it was considered necessary to be more precise regarding acts which required the attention of the entire college of judges.¹⁵ The Latin Code does not spell out such restrictions. For example, the presiding judge is allowed to handle incidental cases and accept or reject a libellus, whether arising from a counter-claim or not.¹⁶

Neli indicates that the instruction of a case and its resolution may be characterized by the use of an auditor (canon 1428). He clearly distinguishes between the principal judge and the auditor.¹⁷ In passing, we could note that Roberti indicates that judge instructors do more harm than good since their involvement can result in the principal judge

¹⁴J. ABBASS, "Trials in General: A Comparative Study of the Eastern and Latin Codes", [=ABBASS, Comparative Study], in The Jurist, 55 (1995), p. 850. Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI ORIENTALIS RECOGNOSCENDO, Nuntia, [=Nuntia], Città del Vaticano, Libreria Editrice Vaticana, 5 (1977), p. 21, canon 22 §1.

¹⁵See Ibid. Cf. Nuntia, 5 (1977), p. 21.

¹⁶Cf. Z. GROCHOLEWSKI, "De iudice", in Commentario, vol. IV/1, pp. 802; CHIAPPETTA, Commento, vol. 2, p. 560, para. 4651.

¹⁷NELI, Introduction, pp. 34-35.

losing all contact with the parties.¹⁸ Chiappetta indicates that there is a distinction between the principal judge, the one who decides with a definitive sentence, and a secondary judge, the one who instructs a case by amassing evidence, such as an auditor.¹⁹ If this position is accepted, a hierarchy of judges according to their task or function in the turnus is created. To do this would be to forget that all collegiate judges collaborate in the resolution of a case by definitive sentence. There is also the danger of diminishing the role of praeses to that of directing the amassing of evidence and not encompassing the care or direction of all aspects of the case and of those involved in it. No such distinction between principal and secondary judges is made by Grocholewski in commenting on canon 1419.²⁰

Regarding auditors, it is important to remember that they are mandated by the presiding judge to fulfil a specific function and not to preside over the procedures or processing

¹⁸See F. ROBERTI, De processibus: opus ad Codicis schemata exactum SS Congregationum instructionibus normisque S.R. Rotae conlatis iurisprudentia tribunalium apostolicorum inspecta et cum iure canonico orientali comparatum, vol. I, editio quarta, De actione, de praesuppositis processus et sententiae de merito, [=ROBERTI, De Processibus], Civitate Vaticana, apud custodiam Librarium Pontificii Instituti Utriusque Iuris, 1956, p. 125. Cf. WRENN, Processes, p. 956.

¹⁹See CHIAPPETTA, Commento, vol. 2, p. 552, para. 4625.

²⁰Cf. Z. GROCHOLEWSKI, "De iudice", in Commentario, vol. IV/1, pp. 766-770.

of a case. In essence then, the presiding judge, whether in a collegiate tribunal or not, can, and often does, mandate others to assist or even assume some of the responsibilities of directing and guiding the gathering of evidence for cases.

This does not diminish the fact that the presiding judge is the guardian, protector and the one primarily responsible for the correct administration of justice, with all of its nuances, in a particular case so that an accurate and just decision may be rendered. After all, judges are bound by the truth so that in a canonical process they are to ascertain the truth and give it legal value.²¹

The Eastern Code has a slightly different approach to the sharing of responsibility, especially in the amassing of evidence, in a collegial court.²² It seems that, according to the Oriental legislation, the role of praeses, as one who guides and directs the process, falls to the ponens and not necessarily to the presiding judge.²³

The coetus intended to give this function to the ponens in view of the previous Eastern norm

²¹Cf. PIUS XII, Allocution to the Roman Rota, in Acta Apostolicae Sedis: Commentarium Officiale, Romae (after 1929: Civitas Vaticana), Typis Polyglottis Vaticanis, [=AAS], 36 (1944), p. 283; JOHN XXIII, Allocution to the Roman Rota, December 13, 1961, in AAS, 53 (1961), p. 819; JOHN PAUL II, Allocution to the Roman Rota, February 4, 1980, in AAS, 72 (1980) p. 173.

²²Eastern Code, canon 1085 §§1,2.

²³Eastern Code, canon 1085 §2.

(Sollicitudinem nostram canon 50 §1) and its principle that the ponens directs the case.²⁴

The Eastern Code has given the direction of the case to the ponens. It had been taken for granted that this responsibility would have been entrusted to the praeses so as to reflect the discipline of the 1983 Code. However, this did not occur. So, in the Eastern Code, the ponens effectively presides over the instruction of the case, remembering that the college as a whole may reserve certain acts to itself.²⁵ These developments in the Eastern Code indicate that the praeses in a collegial court of an oriental church sui iuris has a limited responsibility in amassing evidence for a case unless he is also the ponens.

This is not necessarily so according to the 1983 Code. The ponens can share in some procedural responsibilities, but it is the praeses of the college who ultimately guides and directs the overall process.²⁶ If the ponens is also the presiding judge, as is the case in many collegiate tribunals, the question is moot, as it is with a sole judge. The difference in perspective between the Latin and Eastern Codes

²⁴ABBASS, Comparative Study, p. 851. Cf. Nuntia, 5 (1977), p. 24, canon 27.

²⁵See *ibid.*, pp. 851-852. Eastern Code, canon 1091 §4.

²⁶More on the relationship between the presiding judge and the ponens in a case will be examined in section IV of this chapter.

is interesting since it demands clarity in deciding what it is to judge and what it is to preside.

Are the direction of the amassing of evidence and moderation of the discussion for the college of judges the only roles of the praeses? Is the act of deciding the only obligation of the iudex? The answer to both of these questions is in the negative. To limit an understanding of judge and presiding judge to the accomplishing of various procedural tasks would give credence to classifying judges as principal and secondary ones.²⁷ It would also limit the interpretation of the canons on the presiding judge to a minimal task, exercised only in a collegiate court setting.²⁸ Along the same lines, a restrictive interpretation serves to augment the differences between the Eastern and Latin Codes. These differences concerning procedural matters were intended to be minimal.²⁹ A much more comprehensive and broad definition must be applied, then, to both the praeses and the iudex.

The presiding judge is the judge, whether as sole judge or as head of a college of judges, who is responsible for the application of justice in the case before the court. This

²⁷Cf. CHIAPPETTA, Commento, vol. 2, p. 552, para. 4625.

²⁸Cf. NELI, Introduction, p. 33.

²⁹See ABBASS, Comparative Study, p. 836; PONTIFICIA COMMISSIO CODICI IURIS CANONICI ORIENTALIS RECOGNOSCENDO, Nuntia, Città del Vaticano, Libreria Editrice Vaticana, 30 (1990), p. 65.

means that the presiding judge is the one who is to guard, protect, guide and direct both the application of law to the case as well as the litigants. It is this definition of presiding judge which will be applied throughout this study.

The fact of the matter is that all judges are called to judge, that is to declare what is just, but not all judges, particularly in a collegiate court, are called to preside. An examination of the role of judges and of those called to preside will assist in clarifying what it means to guide, direct, protect or control ecclesiastical trials.

II. THE DISTINCT ROLE OF JUDGES³⁰

Gratian, in the Decretum,³¹ provides some interesting insights into the exact role of a judge who was to evaluate the evidence, with the confession of the accused being

³⁰This section will discuss primarily the external responsibilities of a judge which can be verified and legislated.

³¹Cf. Corpus Iuris Canonici, editio Lipsiensis secunda, post Aemilii Ludovici Richter curas instruxit Aemilius FRIEDBERG, [=FRIEDBERG], Lipsiae, Tauchnitz (1879-1881), editio anastatice repetita, Lipsiae, Tauchnitz, 1928, 2 vols. Volume 1 is sub-titled Decretum Magistri Gratiani, [=Gratian, Decretum], while volume 2 is sub-titled Decretalium Collectiones, [=Gregory IX, Decretal; Liber Sextus; Clem.]; Decretum Gratiani emendatum et notationibus illustratum, una cum glossis, [=Glossa Ordinaria], Bartolomaeus BRIXIENSIS, (ed.), Venetiis, Apud Magnam Societatem, una cum G. Ferrario & H. Franzino, 1584, 2 vols.

accepted as primary proof.³² The judge, for Gratian, was not to be swayed by the number of witnesses but rather by the reliability of their testimony and by their credibility; he did so by checking their condition in life, whether noble or peasant, honourable or notorious, whether they were testifying against an enemy or in favour of a friend.³³ The judge had a grave obligation before God to render a just decision and so care must be taken in hearing a case.

Likewise, he was to search into the case thoroughly by means of a full enquiry, freely permitting questioning, responding and objections, so that the positions of all the parties might be made clear.³⁴ Finally he concludes the case and passes judgment following the prescribed procedures for a trial.³⁵

These same functions and responsibilities rest upon all ecclesiastical judges today. In fact, the responsibilities and role of the judge have even been expanded since "the role

³²Cf. Gratian, Decretum, secunda pars, causa II, questio 1, c. 1, 2, 5, 10, FRIEDBERG, vol. I, col. 438-439, 443; causa XV, questio 5, c. 1-2, FRIEDBERG, vol. I, col. 753-754.

³³See Gratian, Decretum, secunda pars, causa IV, questio 2-3, c. 3, FRIEDBERG, vol. I, col. 538-541.

³⁴See Gratian, Decretum, secunda pars, causa XXX, questio 5, c. 11, FRIEDBERG, vol. I, col. 1107-1108.

³⁵Cf. Gratian, Decretum, secunda pars, causa II, questio 1, c. 1, 3, 5, 10-13, 18, 20, FRIEDBERG, vol. I, col. 438-439, 443-444, 446, 448.

exercised by the judge in guiding the instructional phase of the procedure, supplying even for the negligence of the parties themselves"³⁶ indicates the level of trust afforded, especially, to the presiding judge. The use of the term "judge" indicates that the sole judge has the responsibility of being praeses in its original meaning,³⁷ since he has the care and control of the process as well as the guardianship of the parties as his responsibility.

It would appear that there are three aspects of the role of judge, especially the presiding judge, as adjudicator in a case, namely: (a) fact-finding, (b) impartiality and (c) reasoned decision. We shall address these characteristics in turn.

A. The fact-finding role of the judge

The first stage of any canonical trial is the submission of the libellus to the tribunal (canons 1501-1506). This is a request to the tribunal to have a case heard by the competent

³⁶JOHN PAUL II, Allocution to the Roman Rota, January 22, 1996, in L'Osservatore Romano, English Edition, January 31, 1996, p. 5.

³⁷Cf. C. LEWIS and C. SHORT, A Latin Dictionary founded on Andrews' Edition of Freund's Latin Dictionary, Oxford, Clarendon Press, 1969, p. 1429.

presiding judge.³⁸ The petition must state before whom the case is to be heard, what is being sought³⁹ and from whom it is being sought (canon 1504 1°). The petitioner must also indicate upon which right the case is based,⁴⁰ and, in a general manner, provide some of the facts and proofs to be used to support the allegations (canon 1504 2°).⁴¹

Once the libellus has been submitted⁴², and the competence of the presiding judge established, he can accept or reject it (canon 1505).⁴³ He could reject the libellus if it is discovered that the petitioner lacks the right to stand

³⁸See NELI, Introduction, pp. 149-150. "Pour ce qui concerne le libelle: c'est maintenant le président du tribunal collégial qui l'admet (canon 1505 §1)", (Z. GROCHOLEWSKI, "Révision du procès canonique", in Studia Canonica, 17 (1983), p. 374).

³⁹Cf. A. STANKIEWICZ, "De relatione inter libellum litis introductorium et actionem in iure canonico", in Periodica, 76 (1987), p. 534.

⁴⁰Cf. *ibid.*, p. 529.

⁴¹Cf. R. RODRÍGUEZ-OCAÑA, "De libello litis introductorio", in Commentario, vol. IV/2, pp. 1168-1216, especially pp. 1168, 1178-1179, 1189-1197; NELI, Introduction, pp. 150-152.

⁴²For a more thorough discussion of the right to impugn the bond of marriage, cf. R. RODRÍGUEZ-OCAÑA, "De iure impugnandi matrimonium", in Commentario, vol. IV/2, pp. 1849-1865; L. MADERO, "The Right to Challenge the Validity of Marriage" in Code, 1983, p. 1032. Conditions for persons other than the spouses challenging the bond of marriage will not be dealt with in this dissertation.

⁴³On this subject, cf. Z. GROCHOLEWSKI, "De periodo initiali seu introductoria processus in causis nullitatis matrimonii", in Periodica, 85 (1996), pp. 83-116.

before the court (canon 1505 §2 2°), or if the facts alleged and the evidence submitted are insufficient to provide a foundation upon which to proceed with a thorough investigation (canon 1505 §2 4°).⁴⁴

On the other hand, if the libellus is accepted, the citation legitimately communicated or the parties have appeared before the presiding judge to pursue the case, he assumes a more active role in the case (canon 1512).⁴⁵ It is the presiding judge who, through the determination of the facts, formulates the terms of the controversy (canon 1513) and is to prescribe the time for the presentation of the evidence (canon 1516). He is authorized to make findings of fact based on information conveyed or on those admissions of the parties which constitute proof.⁴⁶ He is to analyze the

⁴⁴For a better understanding of reasons to accept or reject a libellus cf. R. RODRÍGUEZ-OCAÑA, "De causae introductione", in Commentario, vol. IV/2, pp. 1200-1209. On the right of the presiding judge to accept or reject a libellus cf. Z. GROCHOLEWSKI, "De iudice", in Commentario, vol. IV/1, p. 802; CHIAPPETTA, Commento, vol. 2, p. 560, para. 4651.

⁴⁵See M. CARRAGHER, Judicial Reasoning in the Context of Adjudication, [=CARRAGHER, Judicial Reasoning], Rome, Pontificia Studiorum Universitas a S. Thoma Aq. in Urbe, 1990, pp. 35-36.

⁴⁶See CARRAGHER, Judicial Reasoning, p. 35. Cf. NELI, Introduction, pp. 76-78.

issue presented to him much as a diagnostician in any field must assess a problem or complaint presented.⁴⁷

An account which is factual, specific, invoking definite legal rules and principles is to be drawn up for all concerned. Allegations are posited with a rendering of the facts as they relate to the matter before the court. The facts which the judge finds to be substantiated are taken to be established as true for the purposes of litigation. In the fact-finding investigation, there is a constant shift from the facts as presented to the relevant law, and back again.⁴⁸

⁴⁷See W. TWINING and D. MEIRS, How to Do Things with Rules: A Primer of Interpretation, 2nd ed., London, Weidenfield and Nicolson, 1982, p. 113. Cf. CARRAGHER, Judicial Reasoning, pp. 35-36.

Historically, the desire to avoid disputes, as much as possible, in the Church and to use, at any time, other means such as conciliation, mediation (canon 1446 §2) and arbitration (canon 1446 §3) to settle controversy have been constant, cf. Mt. 18: 15-16, 1 Cor. 6: 1-11; cf. also Didascalia Apostolorum, The Syriac Version translated and accompanied by the Verona Latin Fragments, with Introduction and Notes by R.H. Connolly, Oxford, Clarendon Press, 1969, Book 2: 45-46, pp. 109-110.

Pastoral means are to be used to help couples in a valid marriage reconcile and resume their conjugal life, rather than resort to a judicial process. If the marriage is invalid, couples are to be encouraged first to validate their union and then resume common life (canon 1676), cf. P.A. BONNET, "De officio iudicum et tribunalis ministrorum", in Commentario, vol. IV/1, pp. 917-919.

Unfortunately, the mediatorial efforts of the presiding judge are all too often futile. More often than not, his mediation is not accepted since the parties have already decided that a judicial solution is the only remedy for them.

⁴⁸See CARRAGHER, Judicial Reasoning, p. 38.

The petitioner and respondent may present witnesses to testify; however, the proof retained is ultimately the responsibility of the presiding judge (canons 1547-1557). He is to receive the information, determine the questions based on the proposals of the defender of the bond, and pose them to the witnesses (canons 1558-1570). The witnesses are to testify orally and not read from a prepared text or notes except for questions of calculations or accounts (canon 1566). The presiding judge, or his representative, is to guide the witness so that pertinent material is offered and tangential material avoided (canons 1561, 1564, and 1577).

The questions are to be brief, to the point, direct, relevant to the case and are not to lead the witness (canon 1564). If others wish to address questions to a witness, they are to propose these questions to the presiding judge, or his representative, so that they may continue with the interrogation (canon 1561). It is the presiding judge, personally or through others, who is to direct and control the amassing of all of the pertinent information presented from the depositions of the parties (canons 1530-1538) and the witnesses, as well as from the documentary evidence put forth in the trial (canons 1544-1546).

B. Impartiality as distinct from neutrality

The institutional framework of adjudication has been described as a process of guaranteeing the parties an opportunity for the presentation of proofs and reasoned arguments.⁴⁹ Therefore, the requirement of impartiality is necessary since it is the judge who is to decide the merits of a dispute. He is to assure the litigants a collaborative role by providing a forum in which the case can be presented, argued and proven.

Proper adjudication cannot be achieved without some standard of decision which may be imposed by the law or a superior and accepted by the parties. Justice cannot be found in a moral and legal vacuum. A judge cannot be impartial without some standard of evaluation shared by all concerned so that differences can be isolated, discussed meaningfully and subjected to a reasonable resolution.⁵⁰

Secular judges are required to judge according to the mores and standards of the society they represent. Likewise, ecclesiastical judges are to utilize the standards and

⁴⁹See L.L. FULLER, "The Forms and Limits of Adjudication", Harvard Law Review, 92 (1978), p. 364.

⁵⁰For more on the distinction and relationship between impartiality and neutrality, cf. CARRAGHER, Judicial Reasoning, pp. 40-44.

principles of the Church. The standard of decision and the principles which are operative for the Church are found in statements of doctrine and law which indicate the reason for forming the distinct society called the Catholic Church (for example canon 204).

The judge is to be impartial and not influenced by one or another of the parties, yet this does not mean that he is neutral. He is, in fact, expected to assimilate the teachings of the Church and to apply criteria for making a decision, not his own conception of what is good or right, but rather one based on the law and doctrine of the Church.⁵¹

There is a specifically Christian morality which influences the practical reasoning of Christians so that moral teachings are formative for choices made. Therefore, judges

⁵¹The judge is bound by the truth so that in a canonical process he is to ascertain the truth and give it legal value. In doing this he is to remain faithful to the law of the Church, cf. PIUS XII, Allocation to the Roman Rota, in Acta Apostolicae Sedis: Commentarium Officiale, Romae (after 1929: Civitas Vaticana), Typis Polyglottis Vaticanis, [=AAS], 36 (1944), p. 283; JOHN XXIII, Allocation to the Roman Rota, December 13, 1961, in AAS, 53 (1961), p. 819; JOHN PAUL II, Allocation to the Roman Rota, February 4, 1980, in AAS, 72 (1980) p. 173.

The Church has as its primary purpose the obligation and right to preach the Gospel since the deposit of faith has been left to it by Christ (canon 747 §1). These revealed truths are to be guarded, while at the same time being better understood, expounded and proclaimed (canon 747), cf. J. CORIDEN, "The Teaching Office of the Church", in J. CORIDEN, T.J. GREEN and D.E. HEINTSCHEL, (eds.), The Code of Canon Law: A Text and Commentary, New York/Mahwah New Jersey, Paulist Press, 1985, pp. 545-547.

are to be impartial, while at the same time remaining loyal to the teachings of the Church.⁵²

Impartiality involves the simple demand for administrative fairness and legislative quality in keeping with the mission of the Church. In administrative fairness, all enjoy equal standing before the law where its enforcement is equitable and balanced. This impartiality could be jeopardized when a presiding judge is called upon to supply for the negligence of a party. One author indicates:

I do not understand how the judge, who ought to be totally impartial in the case, is not converted in practice into the advocate of one of the parties in the exercise of the faculty of canon 1600 §1 3° and canon 1452 §2.⁵³

The point is well worth considering. The presiding judge is not necessarily obligated to fulfil this responsibility personally, but rather to assure that the negligence of the party does not impede the search for the objective truth and so frustrate the purpose of the trial. It is advisable that he instruct advocates, procurators and even auditors to supply

⁵²Cf. JOHN PAUL II, Allocution to the Roman Rota, January 22, 1996, in L'Osservatore Romano, English Edition, January 31, 1996, p. 5.

⁵³"No se comprende cómo el Juez, que debe ser totalmente imparcial en la causa, no se convierta en prácticamente un Abogado de alguna de las partes en el ejercicio de la facultad que en el canon 1600 §1 3° y canon 1452 §2" (J.J. GARCIA FAILDE, "Una primera lectura del nuevo Código de Derecho procesal canónico", in Revista española de Derecho canónico, 39 (1983), p. 155).

what is missing for either or both parties so that his impartiality is maintained.

C. Reasoned decisions

Fairness and effective adjudication are promoted by the judge who demonstrates that he has heard and assessed the evidence and arguments presented, by giving the reasons for his decision. There is an element of guarantee that he has not excluded material presented to him by the parties or added other material. The publishing of reasoned decisions assures that extraneous or private information was not the motivation for his decision (canon 1604 §1). The principle of quod non est in actis non est in mundo is applied and strengthens the integrity of the law as well as the decision of the judge.⁵⁴

Each judge must attain moral certitude regarding the matter to be decided (canon 1608 §1) and obtain this certitude from the acts of the case and the proofs presented (canon 1608 §2). He is to weigh and assess the proofs carefully, recognizing the efficacy of certain proofs, so that he can

⁵⁴See C. de DIEGO-LORA, "The Publication of the Acts, the Conclusion of the Case and the Pleadings" in Code, 1983, p. 993. Cf. R. RODRÍGUEZ-OCAÑA, "De actorum publicatione, de conclusione in causa et de causae discussione", in Commentario, vol. IV/2, pp. 1511-1513; L.G. WRENN, Processes, p. 965.

reasonably put forth his certitude with the assistance of the law.⁵⁵

It can be justified in part by the value of published reasons as a guarantee of consistency and conformity to law, but still more by the incentive to thoughtfulness and care that is supplied where the decision-maker must dredge up the reasons that were persuasive to him and place them in writing on his responsibility, whether they are published or not.⁵⁶

If the reasoning of the judge is set out in sufficient detail, it will show which principles were used in the processing of the case, which facts were found to be pertinent for the decision and whether or not the conclusions drawn from the facts fell within the statute or law.⁵⁷

A collegiate court is to proceed collegially (canon 1426), and so all are to work together in order to arrive at a decision and the reasons for it.⁵⁸ The presiding judge has the obligation of setting the time and day for the discussion

⁵⁵See WRENN, Processes, pp. 965 and 994-995. Cf. A.E. LYONS, The Collegiate Tribunal of First Instance With Special Reference to Matrimonial Causes, [=LYONS, Collegiate Tribunal], Washington, D.C., Catholic University Press, 1932, Canon Law Studies, no. 78, pp. 62-66.

⁵⁶J.P. DAWSON, The Oracle of the Law, Ann Arbor, Michigan, University of Michigan Law School, 1968, p. 88.

⁵⁷For a better development of this concept of providing the reasons for such decisions, cf. M. AKENHURST, "Statements of Reasons for Judicial and Administrative Decisions", in Modern Law Review, 33 (1970), pp. 154-169.

⁵⁸See Z. GROCHOLEWSKI, "De iudice", in Commentario, vol. IV/1, p. 801; cf. LYONS, Collegiate Tribunal, pp. 59-61.

of the case (canon 1609 §1). Individual judges bring their own assessment of the merits of a case with the reasons, in law and in fact, for their decision.⁵⁹ The conclusions of each judge are to be written and added to the acts of the case (canon 1609 §2). The individual opinion of the judge is to be kept secret except in the case of a judge who does not wish to accept the decision of the majority; then he or she could demand that his or her conclusions be sent to a higher court if there is an appeal (canon 1609 §4).⁶⁰ It would seem that it is the responsibility of the presiding judge to make sure that this demand is fulfilled.⁶¹

⁵⁹The complete argument and counter-argument assist in coming to a decision in the case and could also provide for a determination of the basis on which to appeal the decision, cf. J.W. BRIDGE, "The Duty to Give Reasons for Decisions as an Aspect of Natural Justice", in D. LASOK, A.J.E. JAFFEY, D.L. PERROT and C. SACHS, (eds.), Fundamental Duties, Oxford, Pergamon Press, 1980, pp. 81-95.

⁶⁰See C. de DIEGO-LORA, "De iudicis pronuntiationibus", in Commentario, vol. IV/2, pp. 1551-1558.

⁶¹For an understanding of some added responsibilities of the presiding judge in a trial, especially in the 1917 Code cf. LYONS, Collegiate Tribunal, pp. 55-57.

III. PARTICULAR RESPONSIBILITIES OF JUDGES⁶²

The presiding judge and all other judges accept the task of applying the law to concrete situations. In marriage nullity cases, the task is to clarify a doubt concerning the validity of a particular marriage bond. In his or her search for truth and its exposition, there are responsibilities which apply to all judges. Others rest upon the presiding judge alone. What are these responsibilities?

A. To apply right reason

Academic competence alone does not assure that a judge will be just or capable of rendering informed and reasonable decisions. Other qualifications, beyond the requirements of the law, are necessary to be an ecclesiastical judge.⁶³ The judge has been described as a just person, someone who is both

⁶²This section will discuss primarily the responsibilities of the judge which belong to the internal forum, such as personal characteristics, which cannot be legislated.

⁶³"First, beyond the experience and unique personal qualities required for these offices..." (Z. GROCHOLEWSKI, "Current Questions Concerning the State and Activity of Tribunals, With Particular Reference to the United States of America", in R.M. SABLE, (ed.), Incapacity for Marriage: Jurisprudence and Interpretation: Acts of the III Gregorian Colloquium, Rome, Pontificia Universitatis Gregoriana, 1987, p. 227).

learned in law and disposed to accept the constraints of rules and guiding principles.⁶⁴ The law stipulates professional training (canon 1421 §3), while those who judge must be reasonable and motivated to act according to law.⁶⁵

The reasonable person not only perceives and identifies concerns for others in a legal order, but acts to attain the good that is offered. The purpose of being reasonable is to participate in the values enshrined in law in a fitting manner.⁶⁶

The canons which describe the discipline to be observed in a trial (canons 1446-1457) demonstrate what the law determines as reasonable for the court.⁶⁷ They are designed to protect the integrity of ecclesiastical courts, the reputation of the judge and other court officers and, last but not least, the right of the parties to an objective, fair,

⁶⁴See T. HONORÉ, Making Law Bind: Essays Legal and Philosophical, Oxford, Clarendon Press, p. 213.

⁶⁵Cf. LYONS, Collegiate Tribunal, pp. 22-26.

⁶⁶See CARRAGHER, Judicial Reasoning, pp. 9-10.

⁶⁷"The Duties of the Judges and of the Officers of the Tribunal", tend to form the basis for a code of ethics or the standard of what is reasonable for an official of an ecclesiastical court. Cf. CANON LAW SOCIETY OF AMERICA, "Code of Professional Responsibility", in Canon Law Society of America Proceedings, 45 (1983), pp. 254-260; and CANADIAN CONFERENCE OF CATHOLIC BISHOPS, Responsibility in Ministry. A Statement of Commitment, Ottawa, CCCB, 1996, 46 p.

expeditious and just resolution of their case in a uniquely Christian manner.⁶⁸

B. To decide appropriately

Judges are called to assess the proofs and arguments of other canonists and so are obliged to ensure that their conclusions are grounded in fact and law as well as being worthy of consideration.⁶⁹

In order to accomplish these tasks, candidates for judicial office should be taught how to collect, screen and classify facts to obtain the needed background for a case. Detachment and discernment are two of the personal qualities needed here. Judges should have the intellectual and emotional detachment to develop an arrangement which would minimize conflict.

The Code indicates that when judgement is rendered by a sole judge he can associate himself with two assessors (canon

⁶⁸Cf. R.H. HELMHOLZ, "Canonists and Standards of Impartiality for Papal Delegated Judges", in Traditio, 25 (1969) pp. 386-404. Cf. also L. FOWLER, "Recusatio Iudicis in Civilian and Canonist Thought", in Studia Gratiana, 15 (1972), pp. 719-785.

⁶⁹For a more complete exposition of this concept, cf. A.F. Cournand and H. Zuckerman, "The Code of Science: Analysis and Some Reflections in its Future", in Studium Generale, 23 (1970), pp. 941-962.

1424).⁷⁰ Those who wish to be judges should be taught how best to use and appropriate the contributions of professionals in related fields such as doctrine, ethics, psychology and sociology. These extra considerations would help to create a proper and justified conceptual framework in which to assess cases.⁷¹

C. To be prudent

Laws are seldom self applying, and ambiguity is occasionally introduced due to the fact that a legal system serves a multiplicity of purposes.

However, the fundamental and inescapable principle must be reaffirmed of the intangibility of divine law, both natural and positive, authentically formulated in the canonical legislation on specific matters.

Thus it is never a case of bending the objective norm to the desires of private subjects, much less of interpreting or applying it in an arbitrary way.⁷²

⁷⁰ Cf. Z. GROCHOLEWSKI, "De iudice", in Commentario, vol. IV/1, p. 795; L. del AMO, "The Judge" in Code, 1983, pp. 884-885.

⁷¹ See CARRAGHER, Judicial Reasoning, p. 28.

⁷² JOHN PAUL II, Allocution to the Roman Rota, January 22, 1996, in L'Osservatore Romano, English Edition, January 31, 1996, p. 5.

To meet this challenge, the Code empowers judges to interpret the law in judicial sentences (canon 16 §3)⁷³ and, when faced with a real lacuna in the law, to follow the reasonable approach described in the legislation (canon 19).⁷⁴ The Code tends to use different words or phrases such as: iudicis est aestimare (canon 1543), iudex potest decernere (canon 1546 §3), sub iudicis moderatione (canon 1547) and prudenti iudicis existimatione (canon 1554), to describe the actions or decisions of a judge functioning in a prudential manner.

There is a presupposition that a judge possesses the necessary mental quality which enables him to use reason as the basis for a choice of commitments, projects or actions. He is presumed to be able to apply the most general practical principles concretely. There is nothing particularly judicial about this disposition, yet it is necessary when a judge is empowered to make a choice between alternative courses of action. If only one course of action can be lawfully adopted, then the judgement is not one of prudence or judicial power, but rather the performance of a duty. If the elements of a given rule are adequately satisfied, then the judge must act

⁷³These interpretations affect only those persons and matters for which the decision was given.

⁷⁴For more on ecclesiastical laws and their interpretation Cf. J. OTADUY, "De legibus ecclesiasticis", in Commentario, vol. I, pp. 289-298 and 380-398.

in a prescribed manner and render the decision with reasons based on law, fact and legal principles (canon 1608 §4).⁷⁵

The prudential power of the presiding judge is called upon almost immediately in the resolution of a case. He is to determine the preliminary questions of fact and choose between competing options. As to assessing the proofs, one canon states that any type of proof which seems useful may be submitted (canon 1527 §1), while another notes that facts alleged by one party and admitted by another do not require additional proof unless the judge or the law demands it (canon 1526 §2 2°). If a party insists on proof which has been rejected by a judicial decree, the presiding judge will settle the matter with no appeal against his decision.⁷⁶

If a party or witness refuses to appear before a presiding judge, then he can make alternate arrangements to have the person heard (canon 1528). The presiding judge is to proceed pro sua prudentia in the administration of the oath in cases that do not influence the public good, while for those

⁷⁵See GARRAGHER, Judicial Reasoning, pp. 29-30. In cases where moral certitude cannot be reached, the judge is to find in favour of the respondent or rule according to the law, as in marriage cases where the bond of marriage enjoys the favour of the law (canon 1060).

⁷⁶Proofs must be relevant to the issue being considered, be opportune and lawfully adapted so that they follow the appropriate legal form (canons 1527 §2 and 1629 5°).

which effect the public good, he is to determine the gravity of the reason for not administering it (canon 1532).

The presiding judge is to determine the relative probative value of documents that have been altered or damaged (canon 1543), and may determine that documents common to both parties be submitted in the process (canon 1545). There is a codicil providing that no one is obliged to exhibit documents, even common ones, which could harm others or violate a secret. In these situations the presiding judge may determine whether or not an extract could be transcribed which would not cause harm or violation of a secret (canon 1546).

As regards witnesses, the underlying principle is that evidence is admitted under the supervision of the presiding judge. His prudential decision is invoked to hear the evidence of a witness who is a minor under fourteen years of age, or those who are considered feeble of mind (canon 1550). The presiding judge determines the time limit beyond which a case will be considered abandoned when propositions for the interrogation of witnesses have not been submitted (canon 1552 §2).

Further, he can limit the number of witnesses to be heard (canon 1553), assure that the names of the witnesses are made known to the parties prior to their examination or at least before the publication of the acts (canon 1554), determine whether or not a witness should be excluded, for a just cause

at the request of a party (canon 1555), and make provision for the examination of witnesses who cannot present themselves to the tribunal (canon 1558 §§ 1,3).

Regarding expert testimony, prudential decisions of the presiding judge are required either to appoint professionals to assist in the case, or to accept reports of experts already employed by the parties (canons 1575, and 1581 §1), and allow them access to the acts of the case (canon 1581 §2). The presiding judge determines what is to be proven or which matter is to be diagnosed (canon 1577 §1), and, if there is more than one expert involved, he can ask for a joint report, or individual reports from each of the periti employed (canon 1578 §1). In some cases it may be necessary to inspect an object or a place. The presiding judge determines whether or not this is opportune and decrees what is to be seen or inspected (canon 1582).⁷⁷

This prudential power of the judge in the area of proofs alone is marked by a distinct reasonableness. Rules cannot hope to embody a comprehensive range of variables, hence open-ended standards are put in place to allow judges, especially

⁷⁷See R. BOURGON, "Proofs" in G. SHEEHY, et al., (eds.), The Canon Law Letter & Spirit: A Practical Guide to the Code of Canon Law, Dublin, Ireland, Veritas Publications, 1995, pp. 873-895. Cf. CARRAGHER, Judicial Reasoning, p. 30.

presiding judges, the flexibility to adapt the law to particular cases and circumstances.⁷⁸

In a recent allocution to the Roman Rota, January 22, 1996, Pope John Paul II spoke of "the canonical judge's proper task of considering the particular nature of each individual case in the specific culture in which it is found."⁷⁹ This very dependence upon the prudential abilities and the intentional flexibility of the law could result in inconsistency; however, it must be remembered that in the Church, each judicial sentence pertains to the individual case being handled and not to the whole Church as such (canon 16 §3).

There is one exception to this general rule in that the decisions, praxis, and interpretations of the Roman Curia may be sought to fill in a lacuna in the law (canon 19).⁸⁰

Since the abstract law finds its application in individual, concrete instances, it is a task of great responsibility to evaluate the specific cases in their various aspects in order to determine whether and in what way they are governed by what the law envisages. It is precisely at this stage that the judge's prudence carries out the role most its own; here he truly dicit ius, by fulfilling the

⁷⁸See CARRAGHER, Judicial Reasoning, p. 33.

⁷⁹JOHN PAUL II, Allocution to the Roman Rota, January 22, 1996, in L'Osservatore Romano, English Edition, January 31, 1996, p. 5.

⁸⁰For a brief discussion of the nature of Rotal jurisprudence as being capable of supplying for a lack in the law, cf. NELI, Introduction, pp. 230-234.

law and its purpose beyond preconceived mental categories, which are perhaps valid in a given culture and a particular historical period, but which cannot be applied a priori always and everywhere and in each individual case.⁸¹

The prudential interventions of the presiding judge become multiplied and varied depending upon the type of case, the culture or cultures involved, and the structure of the court used to deal with the controversy.

IV. CANONS REFERRING TO THE PRAESES

There are specific responsibilities which belong to the presiding judge designed to aid in an effective process. Some of these will be examined to illustrate that, although all judges share in the task of deciding, it is the presiding judge who is primarily the guide, guardian and leader in the instruction and resolution of a case.⁸² The canons referred to here mention praeses or the presiding judge directly.

⁸¹JOHN PAUL II, Allocution to the Roman Rota, January 22, 1996, in L'Osservatore Romano, English Edition, January 31, 1996, p. 5.

⁸²It is to be remembered that in the Eastern Code it is the ponens who directs the case as far as amassing evidence, and not the presiding judge. Cf. ABBASS, Comparative Study, pp. 850-852.

A. Designation of an auditor

It is the responsibility of the presiding judge to designate an auditor to instruct the case if necessary (canon 1428 §1). This appointment is a purely discretionary one. It would seem that the appointment of an auditor would ordinarily be limited to one person to instruct the hearing and amassing of evidence for the case according to the commission of the presiding judge (canon 1428 §3), but not necessarily so.

The auditor is to be appointed from a body of persons approved for this task by the bishop.⁸³ It is not the judicial vicar nor the presiding judge who are to approve auditors unless the bishop has delegated this task to them, but it is the responsibility of the presiding judge to appoint auditors, if he so chooses, for a particular case.⁸⁴

⁸³See Z. GROCHOLEWSKI, "De auditoribus et relatoribus", in Commentario, vol. IV/1, pp. 806-808.

Wrenn presents a brief history of the debate over the use of auditors and their qualifications in his comments on canon 1428 in Processes, p. 956. Unfortunately, it would appear that yet another type of court worker is envisaged, namely, a case instructor. This person is not to be confused with the auditor as described in the canon. In some courts they function much like case workers in secular civil service and prepare materials for the court.

⁸⁴The task, discretionary ability and the actual practice of the use of auditors will not be dealt with here.

B. Appointment of a ponens

The presiding judge in a collegiate tribunal must appoint a ponens or relator from the college of judges (canon 1429). This appointment, unlike that of auditors, is obligatory. The presiding judge could fulfil this role himself or appoint one of the other judges to this position.⁸⁵ If one of the judges has been appointed auditor (canon 1428 §1),⁸⁶ it may be best also to appoint that person as ponens since he could have better access to the evidence than other judges on the panel.⁸⁷

The ponens could, theoretically, be a lay judge (canon 1421 §2)⁸⁸ since the function of ponens, in the Code itself, is not restricted to clerics. The ponens is to study every aspect of the case and present it, as well as his or her own

⁸⁵See Z. GROCHOLEWSKI, "De auditoribus et relatoribus", in Commentario, vol. IV/1, p. 809.

⁸⁶Cf. *ibid.*

⁸⁷See *ibid.*

⁸⁸Cf. a response from the Apostolic Signatura as well as Grochowski's position in his comments on canon 1421 in Commentario, vol. IV/1, p. 786, where there is the adoption of the position of R. Pagé in "Juges laïcs et exercice du pouvoir judiciaire", in M. THÉRIAULT and J. THORN, (eds.), Unico Ecclesiae servitio, Ottawa, 1991, pp. 204-209. Pagé argues that the lay judge could not be the presiding judge. His argument is that it is the mind of the Legislator to limit the lay judge in the exercise of their office. These positions will be considered in the next chapter.

opinion, at the meeting of the judges to decide the issue (canon 1609) and subsequently to present the written judgement of the court (canon 1610 §§2-3).⁸⁹

In marriage cases, either the presiding judge or the ponens may proceed to the notification of the summons once the petition has been accepted (canon 1677 §1). The appointment of the ponens is to be recorded and if there is a substitution, it too is to be noted, indicating the just reason for it. Illness, inability to complete the task in the time allotted or even being the dissenting judge in the decision of a case (canons 1426 §1 and 1609 §4), could be just reasons to substitute the ponens.⁹⁰

C. Addressing exceptions

If an objection is raised against the promotor of justice, the defender of the bond, or any other officer of the tribunal, the presiding judge is to deal with the matter (canon 1449 §4). This can be handled as an exception (canons 1491-1500) or as an incidental matter in the trial (canons 1587-1597). A party may object, for any reason, and not only to those listed in canon 1448; it is the responsibility of the

⁸⁹See Z. GROCHOLEWSKI, "De auditoribus et relatoribus", in Commentario, vol. IV/1, pp. 809-810.

⁹⁰See *ibid.*

presiding judge ultimately to decide the merits of the objection and come to a solution which will protect the reputation of the officer, the right of the party to object, and the integrity of the court.⁹¹

D. Admitting the petition

Once he is satisfied that he is competent and that the petitioner has the right to stand before the court, the presiding judge must by decree admit or reject the petition (canon 1505 §1).⁹² It is the presiding judge who is to determine his competence (canons 1404-1415, and 1673) to study the case as well as the right of the petitioner to stand before the court (canons 1476-1480).⁹³

In the decree accepting a petition (canon 1505 §1), the presiding judge must summon the parties to court to effect the joinder of issue. They may choose to respond either in writing

⁹¹See P.A. BONNET, "De officio iudicum et tribunalis ministrorum", in Commentario, vol. IV/1, pp. 927-928.

⁹²Cf. Z. GROCHOLEWSKI, "De periodo initiali seu introductoria processus in causis nullitatis matrimonii", in Periodica, 85 (1996), pp. 96-100; NELI, Introduction, pp. 155-159.

⁹³Cf. NELI, Introduction, pp. 159-163; cf. also R. RODRÍGUEZ-OCANA, "De causae introductione", in Commentario, vol. IV/2, pp. 1189-1216.

or by presenting themselves personally to determine the issue (canon 1507 §1).⁹⁴

E. Convening the parties and joining the issue

If the presiding judge determines from the written responses that it is necessary to convene the parties, he can do so by a new decree (canon 1507 §1). The two options described are also reflected in the procedures outlined to establish the joinder of issue (canon 1513 §2).

The notification and summons may, in marriage cases, be issued by the ponens, if another judge of the college has been so appointed, once the presiding judge has accepted the petition (canon 1677 §1). After the passing of the time limit of fifteen canonical days, the presiding judge or the ponens can determine the formulation of the doubt ex officio and notify the parties (canon 1677 §2).⁹⁵

It is to be understood that even though the discretionary power of the presiding judge or of the ponens has been expanded, the petition and any responses on the part of the respondent must be taken into account in the formulation of

⁹⁴See NELI, Introduction, pp. 171-172.

⁹⁵For more on the citation of the parties and its juridical effects, cf. NELI, Introduction, pp. 178-192.

the doubt (canons 1501 and 1674).⁹⁶ A session may be held to determine the doubt or doubts upon which the bond of marriage is to be examined, if one of the parties requests it (canon 1677 §2).⁹⁷ Likewise, a party who wishes to challenge the formulation of the doubt has ten days in which to do so. The challenge to the formulation of the doubt is to be dealt with as soon as possible (canon 1513 §3). Once all objections have been considered, or the time elapsed without challenge, the presiding judge or the ponens is, by decree, to order the instruction of the case (canon 1677 §4).

F. Incidental matters

If an incidental matter arises, and is decided by decree, the tribunal can entrust it to an auditor or the presiding judge (canon 1590 §2). The collegiate judges need not all be involved in the regulation of such a question, even though the court would normally proceed in a collegial manner (canon 1426 §1). It would suffice if the presiding judge or even the

⁹⁶See *ibid.*, p. 194.

⁹⁷See *ibid.*, pp. 200-202.

appointed judge auditor (canon 1428 §1) were to decide the matter, or choose an appropriate manner of dealing with it.⁹⁸

G. Processing the case

The parties would have to be heard so that every opportunity would be given for them to defend their rights. The reasons and motivation for the decision of the presiding judge or the auditor, as well as a brief outline of the procedure used are highly recommended to prevent any question as to the validity of the decree and the integrity of the process (canon 1590 Cf. canons 51 and 1617).⁹⁹

It is up to the presiding judge of a collegiate tribunal to decide the day and time for the discussion of the case (canon 1609 §1). It is also his responsibility to determine if there are sufficient reasons for the meeting of the judges to take place in another location and not at the offices of the tribunal (canon 1609 §1).¹⁰⁰

⁹⁸This is not necessarily true in the Eastern Code. It would seem that the entire college would have to be involved in deciding some types of incidental matters, cf. ABBASS, *Comparative Study*, pp. 850-852.

⁹⁹Cf. NELI, Introduction, pp. 194-196.

¹⁰⁰Cf. C. de DIEGO-LORA, "De iudicis pronuntiationibus", in Commentario, vol. IV/2, pp. 1521-1530 and 1552-1558.

The law presumes that it is always possible for judges to assemble at a central location. Individual tribunals, whether diocesan, regional or inter-diocesan, may be geographically so extensive that it would be unreasonable to expect that a central meeting place is feasible. In much of the world, the possibilities for communication without actual physical presence have become so advanced that it is possible to hold a meeting of persons in several locations as if they were physically present. It would seem that the presiding judge has the discretion to decide on alternative arrangements for the meeting of the judges.¹⁰¹

He would have to assure confidentiality for such a meeting, while at the same time allow for a full and complete exchange between the judges. Conference calls, computer internet facilities or even fax machines are modern technological options. Obviously, the law presupposes a face to face meeting, yet it seems that the presiding judge can and at times should adapt the law to the particular situation and circumstances encountered.

¹⁰¹See *ibid.*, p. 1553.

H. The Procedure to be observed and the decision

The manner of conduct and procedure for the meeting is outlined where, after prayer and the invocation of the divine Name (canon 1609 §3), the presiding judge fulfilling the role of chairperson is to direct the discussion (canon 1609 §3). This same procedure is to be used in pronouncing interlocutory judgements (canon 1613)¹⁰² and decrees that are not merely directive (canon 1617).¹⁰³ He is to start with the ponens and then move on. It is the ponens who was responsible for making an in-depth study of the case and who is to present his or her findings to the rest of the judges (canon 1429).¹⁰⁴

The provision of starting with the ponens provides an appropriate beginning for the discussion and exchange of opinion since the ponens had a greater opportunity to study the acts of the case. If the ponens was the presiding judge, then the discussion would begin with him. If the ponens is another judge (canon 1429) the discussion would begin with that person.¹⁰⁵

¹⁰²Cf. *ibid.*, p. 1580.

¹⁰³Cf. *ibid.*, pp. 1596-1603.

¹⁰⁴See Z.GROCHOLEWSKI, "De auditoribus et relatoribus", in *Commentario*, vol. IV/1, pp. 809-810.

¹⁰⁵Cf. *ibid.*

In the event that the judges will not or cannot arrive at a decision, two possibilities are envisaged in canon 1609 §5. First there would be another meeting scheduled not more than one week from the original meeting to allow more time to study the merits of the case and come to a conclusion (canon 1609 §5). The presiding judge would also chair this meeting. There does not appear to be any restriction on holding only two sessions to decide the case. More sessions could be called in the following weeks, but they are not to exceed the bounds of justice and excessively prolong the case (canon 1453). If unanimity cannot be achieved then a majority vote will be sufficient to settle the question (canon 1426 §1).¹⁰⁶

The second option would be to request more complete evidence, such as an expertise. Some argue that the provision is not for new evidence (canon 1600 §1), but rather for an augmentation of the evidence that has already been presented and published (canon 1609 §5), and so further publication of this augmented information is not necessary.¹⁰⁷

Others contend that all aspects of canon 1600 apply so that new and supplemental evidence could be admitted following the restrictions and provisions found therein. It seems that

¹⁰⁶Cf. C. de DIEGO-LORA, "De iudicis pronuntiationibus", in Commentario, vol. IV/2, pp. 1555-1558.

¹⁰⁷See C. de DIEGO-LORA, "The Pronouncements of the Judge" in Code, 1983, pp. 996-997.

this latter opinion follows better the mind of the Legislator. After all, the purpose of a trial is to find and expose the objective truth (canons 1400 and 1611). Following the prescriptions of canon 1600 provides for a better protection of the rights of the parties as long as the trial is not unduly prolonged (canon 1453).¹⁰⁸ Once the new material has been properly integrated into the case and the judges have had an opportunity to study the material, then a new meeting is to be called by the presiding judge (canon 1609 §1).

Another alternative in such situations would be to appoint more judges to the turnus so that they may present other possible interpretations which could solve the impasse. These judges would have to be given adequate time to study the merits of the case and come to their own decision before another meeting of the turnus could be scheduled by the presiding judge.

V. AMBIGUITIES IN THE CANONS: IUDEX OR PRAESES

There are other responsibilities which fall to the judge who presides over a case. The term praeses is not used in the canons, yet it is clear that the presiding judge of a collegiate tribunal could deal with such matters rather than

¹⁰⁸See C. de DIEGO-LORA, "De iudicis pronuntiationibus", in Commentario, vol. IV/2, p. 1556.

involve the whole turnus.¹⁰⁹ The fact that the Code uses iudex in these situations is surprising since many cases, especially marriage cases, are to be tried by a collegiate court. This may be evidence of a lack of precision by those who drafted the section. It could also indicate a limited understanding of the presiding judge's role in fulfilling simply a minor procedural function.¹¹⁰

All judges are called to exercise the role of iudex, but not all are praeses in collegiate courts. At the same time, sole judges must preside over all aspects of the cases presented to them. Could it be that the Legislator intended the entire college to proceed in a collegial manner (canon 1426 §1) when the term iudex is applied? This would be untenable given an examination of some of these canons.¹¹¹

¹⁰⁹If we were to follow the thought of Chiappetta, the presiding judge exercises a secondary role in procedural matters only. His interpretation of praeses involves exclusively canons which utilise the term, cf. CHIAPPETTA, Commento, vol. 2, p. 552, para. 4625 and p. 560, para. 4651.

¹¹⁰See *ibid*.

¹¹¹The canons refer to iudex and not praeses, yet the responsibilities described are accorded to the presiding judge, see Z. GROCHOLEWSKI, "De iudice" in Commentario, vol. IV/1, p. 802; L. del AMO, "The Judge" in Code, 1983, p. 887; LYONS, Collegiate Tribunal, pp. 55-57.

A. Appointment of procurators and advocates

A party who desires the services of an advocate and procurator can freely appoint one. In penal cases there must be an advocate appointed either by the judge or the party, while in a contentious trial which involves minors or the public good, marriage cases being excepted, the judge is to appoint a defensor,¹¹² a legal representative for a party who lacks one (canon 1481).¹¹³ The appointment of a procurator or advocate is usually the responsibility of a litigating party except when the presiding judge or the law demands otherwise.

An advocate is someone approved by the diocesan bishop (canon 1483), usually appointed by the party to safeguard the rights of that same party.¹¹⁴ Pope Pius XII, in an allocution to the Roman Rota on October 2, 1944, indicated that the

¹¹²The use of the term defensor rather than advocatus indicates that these two representatives, although similar, are not the same. As a result, the translation of defensor used here is that found in Code, 1983.

¹¹³Cf. C. GULLO, "De procuratoribus ad litis et advocatis" in Commentario, vol. IV/1, pp. 1042-1046.

¹¹⁴Cf. *ibid.*, pp. 1049-1051.

ultimate duty of the advocate is "the discovery, ascertainment and legal assertion of the truth, the objective fact."¹¹⁵

A procurator is a proxy who by legitimate mandate acts in the name of someone else concerning legal matters (canons 1482 and 1484 §1).¹¹⁶ Marriage cases are an exception where, although the process does affect the public good, the parties may or may not exercise the right to appoint a procurator or advocate for themselves (canon 1481 §3).¹¹⁷ This does not exclude the presiding judge, since marriage cases are to be normally tried by a collegiate tribunal (canon 1425 §1 1°), from appointing a defensor for a party.¹¹⁸ It appears that the iudex mentioned in the canon also refers to the praeses of a collegiate tribunal.

The procurator and the advocate are to deposit an authentic mandate with the tribunal before undertaking their respective offices (canon 1484 §1).¹¹⁹ However, to prevent the extinction of a right, the presiding judge can admit a

¹¹⁵PIUS XII, Allocution to the Roman Rota, October 2, 1944, in AAS, 36 (1944), p. 286. See also W.H. WOESTMAN, (ed.), Papal Allocutions to the Roman Rota, 1939-1994, Ottawa, Faculty of Canon Law, Saint Paul University, 1994, p. 28.

¹¹⁶See C. GULLO, "De procuratoribus ad litis et advocatis" in Commentario, vol. IV/1, p. 1047.

¹¹⁷See *ibid.*, p. 1046.

¹¹⁸See *ibid.*

¹¹⁹See *ibid.*, pp. 1052-1053.

procurator without a mandate as long as there is a suitable guarantee given. All acts of the procurator would have no effect if a mandate is not presented within the time limit allowed by the presiding judge (canon 1484 §2).¹²⁰ The canon once again refers to the iudex.

B. Supplying for negligence

The presiding judge is ultimately called to direct the trial and to do all that can be done in order to make sure that justice is served. In some situations, the presiding judge is to supply even for the negligence of the parties (canons 1452 §2 and 1600 §1 3°). The canon uses iudex rather than praeses and could lead one to interpret it to mean that a sole judge can accept a procurator without a mandate for a period of time, risking the possible nullity of the acts of the procurator (canon 1620 6°), but a presiding judge in a collegiate tribunal would be obliged to assemble the whole college to agree to the exception, since collegial tribunals are to proceed in a collegiate fashion (canon 1426 §1). This does not seem to be an adequate interpretation. It is thus

¹²⁰See *ibid.*, p. 1054.

more likely that the presiding judge is responsible for such details in the processing of the case.¹²¹

Gullo indicates that the judicial vicar is the one who is referred to as the judge since the tribunal falls under his jurisdiction. In a case, the judicial vicar is to be presiding judge, if possible. But, if the judicial vicar or associate judicial vicar cannot preside, it is the representative of the judicial vicar, namely the presiding judge, who would be responsible for the guidance and direction of the case. Therefore, it is the presiding judge who is responsible.¹²²

C. Dismissal of procurators or advocates

In the dismissal of a procurator or advocate after the joinder of issue, the presiding judge and the other party must be notified for the dismissal to take effect (canon 1486 §1). The presiding judge mentioned in the canon would be obliged to indicate in the acts that the dismissal of the procurator or advocate was accepted, and decree that any further action by this procurator or advocate would have no effect in the trial.¹²³

¹²¹See *ibid.*, 1053.

¹²²See *ibid.*

¹²³See *ibid.*, pp. 1056-1058.

The party can dismiss the procurator or advocate; however, after the joinder of issue, the other party must also be notified. Taking cognizance of this also appears to be another of the functions of the presiding judge and not of the college as a whole.¹²⁴

D. Allotting time periods

Regarding the time period after the conclusion of the gathering of evidence for the parties to present their pleadings or observations (canon 1601) and the format of these pleadings, whether written or oral before the tribunal in session (canon 1602 §1), it is the judge (iudex) who is to determine these things.¹²⁵

If the presiding judge (praeses) can determine the time, day and, when necessary, the place or alternative arrangements for the collegiate tribunal to meet (canon 1609 §1), then it is apparent that this same presiding judge can determine the length of time for the submission of the pleadings and observations of the parties, as well as the manner in which these pleadings are to be received by the tribunal. This same

¹²⁴See *ibid.*

¹²⁵Cf. R. RODRÍGUEZ-OCANA, "De actorum publicatione, de conclusione in causa et de causae discussione" in Commentario, vol. IV/2, pp. 1498-1506.

opinion is held by Grocholewski when considering the presiding judge in a collegiate court.¹²⁶

These are but a few of the instances where the canons imply the presiding judge (praeses), but speak of the judge (iudex).¹²⁷ If the judge is to preside over the case, that is to control, direct, have a place of authority, or act as president, chairman or moderator in it,¹²⁸ then he is responsible for the overall administration of justice in the context of the case before him.¹²⁹

CONCLUSION

An understanding of the concept of praeses or presiding judge cannot be limited to a series of procedural functions. The presiding judge as praeses is called to be guardian and protector as well as director. These responsibilities do not

¹²⁶See Z. GROCHOLEWSKI, "De iudice", in Commentario, vol. IV/1, p. 802.

¹²⁷Other responsibilities are outlined by Grocholewski in his comments "De iudice", in Commentario, vol. IV/1, p. 802.

¹²⁸Cf. C. LEWIS and C. SHORT, A Latin Dictionary founded on Andrews' Edition of Freund's Latin Dictionary, Oxford, Clarendon Press, 1969, p. 1429; H.C. BLACK, Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, 5th edition, St. Paul Mn., West Publishing, 1979, p. 1066.

¹²⁹See C. GULLO, "De procuratoribus ad litis et advocatis" in Commentario, vol. IV/1, p. 1053.

apply exclusively to court procedures, but also to the litigants. It is precisely as guardian and protector that presiding judges, whether in a college or not, are considered, by those who approach ecclesiastical courts, as a living expression of justice and mercy in the Church.

The role of the presiding judge is to evaluate the evidence impartially, to search into a case thoroughly, to guide, to control, to direct a case and to render a just sentence, presenting reasons for the decision. At times the presiding judge is called to be a mediator rather than an adjudicator, but more often than not his role is that of ascertaining that the case has the appropriate forum in which to be heard.

Ecclesiastical judges are to be just, prudent and willing to accept the constraints of the law of the Church and Christian ethical principles. They are to be motivated to act in a social context as reasonable persons committed to upholding the values enshrined in the legal system. They are to be an instrument endowed with zeal to act in the interests of justice in the search for the truth. They are also required to have the capacity to assess evidence, sort through conflicting statements and arguments, constantly keeping in mind the public good.

Some of the specific canonical responsibilities of the praeses were reviewed as well as some others which the law

attributes to the iudex, but which are the responsibility of the judge who presides in an ecclesiastical trial.

The vast majority of cases before Church courts today involve the possible nullity of marriage, so this process will now be considered more specifically, especially in the first instance court. How do presiding judges fulfil their responsibilities in the everyday operation of a marriage tribunal? What factors change when different judges assume the role of the presiding judge in a collegiate court? What are the effects of having a lay judge as the presiding judge in a marriage nullity case? These questions form the basis of discussion in our next chapter.

CHAPTER THREE

THE APPOINTMENT OF PRESIDING JUDGES FOR MARRIAGE NULLITY CASES

INTRODUCTION

Presiding, that is, to guard, to take care of, to protect and to direct¹ the administration of justice,² and to apply the law, is both an art and a science. The necessary qualifications of judges, especially presiding judges, are both personal and professional. Canon 1421 §3³ refers to both of these.

This chapter, then, on the basis of canon 1421 §3 and related norms, will attempt to answer the following questions: Who is the presiding judge in ecclesiastical trials and, in particular, for marriage nullity cases? What description of the role of the presiding judge can be found in the 1983 Code

¹See C. LEWIS and C. SHORT, A Latin Dictionary founded on Andrews' Edition of Freund's Latin Dictionary, Oxford, Clarendon Press, 1969, p. 1429.

²The 1983 Code in Book Seven, De Processibus, deals with the various processes that are to be used in ecclesiastical tribunals today. Codex iuris canonici auctoritate Joannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus, Romae, Libreria Editrice Vaticana, 1989, xxxii, 669 p. English translation in E. CAPPAROS, M. THÉRIAULT, and J. THORN, (eds.), Code of Canon Law Annotated, [=Code, 1983], Montréal, Wilson and Lafleur Limitée, 1993, 1631 p.

³Unless otherwise specified all references to canons are to the 1983 Code.

of Canon Law?⁴ Is there a difference as to who can be presiding judge in a diocesan court and in an inter-diocesan tribunal?⁵

I. QUALIFICATIONS PRESCRIBED FOR THE APPOINTMENT OF JUDGES

Pope Benedict XIV (1740-1758) was especially concerned about the qualifications necessary in a person to be appointed judge in an ecclesiastical court.⁶ Synodal judges were selected for their proficiency in doctrine, their prudence and their zeal for justice.⁷ These same concerns are reflected in

⁴It should be noted at this time that while the office of judge and presiding judge was to be essentially the same in both the Latin Code and in the Codex canonum Ecclesiarum orientalium auctoritate Ioannis Pauli PP. II promulgatus, Romae, Typis Polyglottis Vaticanis, 1990, 382 p, there are, however, some significant differences in approach. For a brief treatment of some of these differences which affect the praeses and ponens, cf. J. ABBASS, "Trials in General: A Comparative Study of the Eastern and Latin Codes", in The Jurist, 55 (1995), pp. 834-874.

⁵In Canada there are inter-diocesan and diocesan courts of first instance. These are sometimes referred to as regional courts; however, they are not regional in the sense of the definition given in canon 433.

⁶Cf. BENEDICT XIV, Encyclical Quamvis Paternae, August 26, 1741, in Codicis Iuris Canonici Fontes, [=Fontes], cura E.mi Petri Card. Gasparri (ed.), 9 vols. Romae, Typis Polyglottis Vaticanis, 1923-1939, vol. I, n. 315.

⁷See Quamvis Paternae, art. 6, in Fontes, vol. I, n. 315, p. 691; D. BOUIX, Tractatus de judiciis ecclesiasticis, editio secunda, 2 tomes in 1, Paris, Regis Ruffet et Sociis, Successoribus, 1866, vol. I, p. 462.

the 1917 Code⁸ and even in the 1983 one (canons 1420 §4 and 1421). However, there have been significant changes in the new Code regarding the qualifications for appointment as an ecclesiastical judge. An examination of canon 1421 will assist in discovering some of these significant changes. It states:

Canon 1421 §1. The bishop is to appoint diocesan judges in the diocese who are clerics.
§2. The conference of bishops can permit lay persons to be appointed judges; when it is necessary, one of them can be employed to form a collegiate tribunal.
§3. The judges are to be of unimpaired reputation and possess doctorates, or at least licentiates, in canon law.⁹

The first paragraph is significantly simpler than the text of canon 1574 §1, the parallel canon of the 1917 Code. The former law required that presbyteri be appointed, while the present law allows for the appointment of clerici. This change extends the possibility to deacons (the only other possible rank of clerics, canons 207 §1, 266 §1 and 1008-1009),¹⁰ whether

⁸Cf. Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus, praefatione fontium annotatione et indice analytico-alphabetico ab E.mi Petro Card. Gasparri auctus, [=Code, 1917], Romae, Typis Polyglottis Vaticanis, 1933, canons 1573 §4 and 1574.

⁹Canon 1421 §1. In dioecesi constituentur ab Episcopo iudices dioecesani, qui sint clerici. §2. Episcoporum conferentia permittere potest ut etiam laici iudices constituentur, e quibus, suadente necessitate, unus assumi potest ad collegium efformandum. §3. Iudices sint integrae famae et in iure canonico doctores vel saltem licentiati.

¹⁰Cf. SECOND VATICAN COUNCIL, Dogmatic Constitution on the Church, Lumen gentium, [=LG], November 21, 1964, in AAS, 57 (1965), pp. 5-89, especially no. 10 and 20-29; English

permanent or transitional (canons 1031-1032), provided they are adequately qualified. This innovation could be important for small dioceses or some mission territories where there are few priests. The law allows for the office of judge to be filled in a stable manner by these clerics and not necessarily by priests.¹¹

The principal or chief judge, after the bishop, in each diocese was the "officialis", who was to judge with ordinary judicial power.¹² The former law maintained a distinction between synodal and pro-synodal judges and limited their number. It was mentioned that they adjudicated cases with power delegated from the bishop and the law expressly stated that they could be appointed from outside the diocese. This distinction between synodal or pro-synodal judges has been

translation in A. FLANNERY, (ed.), Vatican Council II: The Conciliar and Post Conciliar Documents, [=FLANNERY, Vatican II], Vatican collection Vol. 1, new revised edition, 1992, Northport, New York, Costello Publishing Company, 1992, pp. 360-361 and 371-387.

¹¹See C.A. COX, Procedural Changes in Formal Marriage Nullity Cases from 1917 to the 1983 Code: Analysis, Critique and Possible Alternatives, [=COX, Procedural Changes], Washington, D.C., Catholic University of America, 1989, Canon Law Studies, no. 528, pp. 30-31.

¹²"... cum potestate ordinaria iudicandi" (Code, 1917, canon 1573). There were also vice-officiales who presumably had a permanent office and ordinary power (canon 1573 of the 1917 Code), cf. T.L. BOUSCAREN and A.C. ELLIS, Canon Law: A Text and Commentary, Milwaukee, Bruce Publishing Company, 1951, p. 182.

dropped, as has the limitation on the number of judges who can be appointed.¹³

Obviously, the removal of the explicit mention of the authorization of the bishop to appoint judges from outside the diocese does not restrict the bishop to appointing judges from the diocese only.¹⁴

Judges are appointed to an ecclesiastical office (canon 145) established by law. There is no mention of delegated power for them or that they are to adjudicate with power delegated by the bishop; therefore, it can be concluded that they exercise ordinary and not delegated power.¹⁵

The second paragraph of canon 1421 has no parallel in the 1917 Code and was one of the most debated innovations in the procedural law. The impact of Vatican II can be clearly seen since Roman opposition to laity serving in tribunals was exceptionally strong immediately after the 1917 Code.¹⁶ Lay

¹³See COX, Procedural Changes, pp. 28-29.

¹⁴The canons on provision for ecclesiastical offices (canons 146-183) do not prohibit the appointment of those from outside the diocese. It seems that the bishop is free to do so following his own discretion if there is a need and the necessary qualifications are present in the prospective candidates.

¹⁵Cf. COX, Procedural Changes, p. 28.

¹⁶As late as December, 1918 there was a decision not to allow lay judges to be appointed for the adjudication of cases brought to an ecclesiastical court. In spite of a custom enduring approximately 170 years, lay men were forbidden to serve as judges. The Congregation of the Council judged that

men were explicitly excluded, while lay women were not even considered at the time.¹⁷ The role of the laity as being able to cooperate in the various powers of governance of the Church (canons 129 §2 and 204)¹⁸ and to be qualified to serve in ecclesiastical courts is specifically mentioned in the new law.¹⁹

The present law has opened to the laity almost all offices of a tribunal, except those of judicial vicar and adjutant or associate judicial vicar, and notary in cases

laity could not exercise any spiritual jurisdiction and so declared the custom reprobated. For them, it was inconceivable that such a custom could have received approbation from an ecclesiastical authority. At the same time the Congregation condemned the use of lay auditors since this was also an exercise of jurisdiction. They did allow a tolerance for the use of lay men as assessors that predated the 1917 Code and was a legitimate custom for more than 100 years. This tolerance was jaded by the indication that the practice of using lay men as assessors was contrary to the dignity of the Church. Cf. SACRA CONGREGATIO CONCILII, resolutio Wratislaviensis: Constitutiones tribunalium ecclesiasticorum, December 14, 1918, in AAS, 11 (1919), pp. 128-133.

¹⁷Cf. *ibid.*

¹⁸Cf. J.I. ARRIETA, "Power of Governance" in Code, 1983, pp. 144-146; A. McGRATH, "The Power of Governance" in G. SHEEHY, et al., (eds), The Canon Law Letter & Spirit: A Practical Guide to the Code of Canon Law, [=SHEEHY, Letter & Spirit], Dublin, Ireland, Veritas Publications, 1995, pp. 76-77, para. 272-276; A. VIANA, "De potestate regiminis", in INSTITUTO MARTÍN DE AZPILCUETA, Commentario exegetico al Código de derecho canónico, [=Commentario], Pamplona, Ediciones Universidad de Navarra, S.A., 1995, vol. I, pp. 841-844.

¹⁹Laity can now be auditors, notaries, and judges, as well as serving as procurators and advocates for the parties. Cf. canons 482-485, 1421 §2, 1428 §2, 1435, 1437, 1477, 1481-1490.

concerning the reputation of a priest (canon 483 §2). This openness, however, is not without distinction between the lay judge and the cleric who is a judge. There are certain limitations on lay participation in that a sole judge cannot be a lay person (canon 1425 §4), nor can a turnus of three or more judges consist of more than one lay judge (canon 1421 §2). These restrictions seem to reflect the ongoing debate over the capacity of the laity to participate in the power of governance in the Church.²⁰ We shall return to this point later in this chapter.

There is one other point to make at this juncture, namely the intervention of the Conference of Bishops²¹ for permission to employ the services of the laity as judges. This is one of the times where a Conference of Bishops²² is empowered to act

²⁰For a brief but concise exposition of the predominant positions held by canonists concerning this debate, cf. R. PAGÉ, "Juges laïcs et exercice du pouvoir judiciaire", in M. THÉRIAULT and J. THORN, (eds.), Unico Ecclesiae servitio, Ottawa, 1991, pp. 206-209; cf. also COX, Procedural Changes, pp. 40-47.

²¹The exercise of a joint ministry by the bishops in these matters follows the intent of the Second Vatican Council. Cf. SECOND VATICAN COUNCIL, Decree on the Pastoral Office of Bishops in the Church, Christus Dominus, [=CD], October 28, 1965, in AAS, 58 (1966), pp. 671-701, especially no. 36-38; English translation in FLANNERY, Vatican II, vol. 1, pp. 586-588. Cf. also LG, November 21, 1964, no. 23, English translation in FLANNERY, Vatican II, vol. 1, pp. 376-378.

²²The Conference of Bishops is similar to the concept of a provincial synod in the early Church. These synods tried to come to some common pastoral approach, as do Conferences of Bishops today; cf. canon 447. There were legislative

in order to adapt the general law of the Church to the needs of a specific region. The present Code in Book VII has outlined the procedures to be used for a unity of practice throughout the world in the resolution of conflict in the Church. The fact that the Conference can adapt the law, when necessary, indicates that the principle of subsidiarity²³ may

competencies exercised by these larger synods as there are in the present Conferences (cf. canons 231 §1, 236, 242, 284, 522, 961, 964, 1083, 1126, 1262, 1272, 1297, 1714, to indicate but a few). The provincial synods also exercised other competencies as do the Episcopal Conferences today (cf. canons 237 §2, 294, 314, 315, 318, 322, 439, 441, 708, 792, 809, 821, 823, 825, 841, 891, 1120, 1232, 1277, to indicate some but not all). For our purposes, the most important canons in procedural law that provide for the Conference to intervene when necessary are canons 1421 §2, 1425 §4, and 1439.

The greatest difference between these two bodies seems to lie in the fact that the provincial synods were also judicial in nature, allowing for the judgment and discipline of clerics and laity. This is not the role of the Conference of Bishops today. The lament over the end of synodal functioning and the warning concerning a crisis in the Church due to a lack of cooperation between church authorities may finally be ending; cf. F. DVORNIK, "Origins of Episcopal Synods", in James A. CORIDEN, (ed.), The Once and Future Church, Staten Island, New York, Alba House, 1971, pp. 55-56.

²³The development, origin and applications of the principle of subsidiarity are not, strictly speaking, within the realm of this dissertation. They do, however, touch upon many aspects of the Code and is applied in this discussion in so far as there tends to be a decentralization in canonical application. There are several instances where the general law asks to be adapted to the culture, time and situation in which it is being applied. There is now the possibility for a canonical pluralism similar to the theological, liturgical and ascetic pluralism that already exists. For more on the discussion of subsidiarity in the application of the Code, cf. F. MORRISEY, "The Importance of Particular Law in the New Code", in Proceedings of the Canon Law Society of America, 43 (1981), pp. 1-17. Cf. also J.A. CORIDEN, T.J. GREEN and D.E. HEINTSCHEL (eds.), The Code of Canon Law: A Text and

now be more broadly applied to the judicial, legislative and administrative life of the Church.²⁴

The third part of canon 1421 is a notable modification of the previous law.²⁵ We find there the requirement that judges are to be individuals of "good repute" (canon 1421 §3) as in the previous Code;²⁶ however, the present Code then states that the judges are to "possess a doctorate, or at least a licentiate, in canon law" (canon 1421 §3).²⁷ There is no longer the provision for equivalent expertise as in the previous Code, which did not specifically mention academic degrees for judges. Obviously, the rationale for the insistence on canonical degrees was to assure a higher calibre of canonical knowledge and skill in ecclesiastical courts.²⁸

Commentary, Mahwah, New Jersey, Paulist Press, 1985, pp. 6-7, 312.

²⁴See COX, Procedural Changes, p. 31.

²⁵Cf. Code, 1917, canon 1574 §1-2.

²⁶Cf. Code, 1917, 1574 §1.

²⁷In a parallel demand, judicial vicars and the associate judicial vicars are also to have the same academic qualifications. There is also an age limit of being not less than thirty years of age for these offices; see canon 1420 §4.

²⁸See COX, Procedural Changes, pp. 31-32. Zenon Grocholewski contends that this innovation is a particularly significant change as he reported in "Current Questions Concerning the State and Activity of Tribunals, With Particular Reference to the United States of America", in R.M. SABLE, (ed.), Incapacity for Marriage: Jurisprudence and Interpretation: Acts of the III Gregorian Colloquium, Rome, Pontificia Universitatis Gregoriana, 1987, pp. 227-229.

The requirement of academic degrees in the 1983 Code has been the source of some debate. Soon after the promulgation of the Code, James H. Provost examined this new requirement in a published article.²⁹ Several distinctions were made between officers of diocesan tribunals, and inter-diocesan tribunals, between judges appointed following the provisions of the 1917 Code and those appointed according to the 1983 Code. He argued that those who were appointed prior to the 1983 Code retained

The development of this requirement was one where not all were in agreement. In a meeting of the coetus for the revision of the canons De processibus on April 5, 1978, the consultors agreed to make the requirements for judges the same as for judicial vicars; see Communicationes, 10 (1978), p. 231. The Relatio reports that Cardinals König and Florit along with Archbishop Bernardin recommended that the norm of the 1917 Code recognizing equivalent knowledge be reinstated due to the difficulty, at least in some regions, of providing a sufficient number of personnel with the required degrees. This recommendation was not accepted by the Secretariat of the Commission which asserted that the dignity and the effective functioning of the office of judge required the serious study involved in pursuing a degree. There was the added statement that recourse could be made to the Apostolic Signatura if it was truly impossible to find sufficient people with the required degrees; see PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, "Relatio" in Communicationes, 16 (1984) p. 5 at canon 1373 §3. In order to use people with other 'equivalent knowledge' an indult is to be sought from the Apostolic Signatura which has competence in such matters; see canon 1445 §3, 1°.

Archbishop Grocholewski notes that the current practice of the Apostolic Signatura when granting indults to persons who do not have the required canonical degrees, is that these persons may not be designated as presiding judge or as ponens in a case; see Z. GROCHOLEWSKI, "De periodo initiali seu introductoria processus in causis nullitatis matrimonii", in Periodica, 85 (1996), p. 93, note 21.

²⁹Cf. J.H. PROVOST, "The Requirement of Canon Law Degrees for Court Officials", in The Jurist, 43 (1983) pp. 422-429.

their offices, regardless of their academic standing, because of what he considered to be an acquired right.³⁰

Provost made some interesting observations regarding the bishop's capacity to dispense from this new requirement. The 1983 Code in canon 85 defines the limits of the power to dispense "from merely ecclesiastical law in a particular case", while canon 87 §1 when speaking of the diocesan bishop states: "He cannot dispense from procedural laws or from penal laws, nor from those whose dispensation is specially reserved to the Apostolic See or to some other authority." Provost argued that the requirement for academic degrees was a disciplinary law and not a procedural one, even though the requirement is found in Book VII on Procedures, and so a dispensation could be granted by the bishop, under the usual conditions.³¹

He continued his argument regarding the appointment of people without academic degrees and reflected on the validity or liceity of the appointment. He concluded that even if the dispensation from the requirement of academic degrees was later found to be illicit, at the time of the appointment it would have been presumed valid and so all of the acts of

³⁰See *ibid.*, pp. 422-423.

³¹See J.H. PROVOST, "The Requirement of Canon Law Degrees for Court Officials", in The Jurist, 43 (1983), pp. 426-427.

judges appointed with the erroneous dispensation would be valid.³²

Finally, Provost explained that bishops who felt obliged to appoint judges who did not have the required degrees had two options, either to seek an indult from the Apostolic Signatura, or to dispense from the requirement and then appoint the judges.³³ It is important to remember that nowhere it is stipulated that canonical academic degrees are required for the validity of the appointment. Therefore, the appointment and acts of such judges would be valid (canon 149 §2).³⁴

Archbishop Grocholewski, in a presentation to the III Gregorian Colloquium, presented some contrary arguments regarding the requirement of academic degrees for tribunal personnel. He stated:

The reason for the requirement of the law is twofold. First beyond the experience and unique personal qualities required for these offices,

³²See *ibid.*, p. 428.

³³See *ibid.*

³⁴Those appointed to the office of judge under the provisions of the 1917 Code had to be "otherwise expert" (Code, 1917, canon 1573 §4). It could be argued that judges, even *officiales* and *vice-officiales*, appointed at this time, who were not removed from office and fulfilling their duties could claim an acquired right in continuing their work (canon 4). However, the Apostolic Signatura, as will be noted momentarily, has not recognized this as an acquired right since no procedure was required for the removal of a judge from his office.

there is an awareness that no one can carry out adequately the above-mentioned responsibilities without a solid and specific preparation and a precise knowledge of substantive and procedural law as well as of jurisprudence ...

Secondly, the term "expert" ("peritus") of CIC/1917 had been too broadly interpreted with consequent damage to the quality of work done by ecclesiastical tribunals.

The less prepared judge, not taking account of the complexity of the issues involved in individual cases... will constitute the greatest risk to pastoral effectiveness (not to speak of justice).³⁵

Grocholewski argued, contrary to Provost, that in many situations, judges appointed prior to the new Code do not have an acquired right to the office, but did admit that the question was complex.³⁶ He went on to explain the procedure for requesting from the Apostolic Signatura a dispensation from the academic degree requirement of 1421 §3.³⁷

Other authors had misgivings about the long-range impact of the canonical degree requirement, wondering whether or not dioceses would be able to staff tribunals adequately.³⁸ Some

³⁵Z. GROCHOLEWSKI, "Current Questions Concerning the State and Activity of Tribunals, With Particular Reference to the United States of America", in R.M. SABLE, (ed.), Incapacity for Marriage: Jurisprudence and Interpretation: Acts of the III Gregorian Colloquium, Rome, Pontificia Universitatis Gregoriana, 1987, pp. 227-229.

³⁶See *ibid.*, p. 230.

³⁷Cf. *ibid.*, pp. 231-232.

³⁸Cf. J.G. PROCTOR, "Procedural Changes in the 1983 Code: The Experience of the Ecclesiastical Provinces of California", in The Jurist, 44 (1984), pp. 471-473, 484.

argued that the question was not so much one of academics, but rather of ignoring other experiential wisdom.

The practical difficulties with such a requirement are enormous, but I believe more is at stake. The value of the mature priest with a fund of experience and common sense behind him is a source of wisdom that should not be excluded because of a lack of professional qualifications; to do so would be the height of folly and render the tribunal system in this country virtually inoperable.³⁹

There is little doubt that the question of equivalent knowledge or other qualifications will continue to be a matter of debate.

The question of the reputation of the individual judge is also an important one. The Code requires that judges "be of good repute" (canon 1421 §3). What does it mean to have a good reputation? All of Christ's faithful have a right to a good reputation if they deserve it (canon 220),⁴⁰ and yet in the exercise of personal rights the common good of the Church is to be considered (canon 223).⁴¹ The right to enjoy a good reputation is based on natural law and the dignity of the

³⁹D. HOGAN, "The Priest and Tribunal Work", in Priests and People, 1 (1987), pp. 203-204.

⁴⁰See A. Mc GRATH, "Christ's Faithful" in SHEEHY, Letter & Spirit, p. 124, para. 462-463; cf. D. CENALMOR, "De christifidelibus" in Commentario, vol. II, pp. 137-142; J. HERVADA, "Christ's Faithful" in Code, 1983, p. 195.

⁴¹See J. HERVADA, "Christ's Faithful" in Code, 1983, pp. 196-197; cf. D. CENALMOR, "De christifidelibus" in Commentario, vol. II, pp. 157-161; A. Mc GRATH, "Christ's Faithful" in SHEEHY, Letter & Spirit, p. 126, para. 470.

human person which was acknowledged in Vatican II.⁴² There is to be a balance between the inherent rights of an individual and the common good of the community. Each person is protected from an illicit revelation of defects such as in situations of calumny, insult, slander, rumour-mongering and derision. On the other hand, when the good of the community, especially the Church, is at stake, it is not only licit, but also ethical to bring defects to light, even if the reputation of the individual is damaged in internal circles.⁴³

There is no doubt that good reputation is to be considered when a bishop appoints judges to a tribunal (canon 1421).⁴⁴ Keeping this in mind, as well as the rules of interpretation of law (especially canons 16 and 17), some questions regarding the 'good repute' of the judge will be posed. Can, for instance, a cleric, or even a lay person, who has been accused of abuse⁴⁵ (and even prosecuted and found

⁴²Cf. SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World, Gaudium et spes, [=GS], December 7, 1965, in AAS, 58 (1966), pp. 1025-1120, especially 26-27; English in FLANNERY, Vatican II, vol. 1, pp. 927-928.

⁴³Cf. *ibid.*

⁴⁴For judicial vicars and associate judicial vicars; cf. canon 1420.

⁴⁵In this discussion abuse will refer to physical or sexual abuse of persons, including children.

guilty in the secular courts)⁴⁶ serve eventually as a judge in an ecclesiastical court? Are there other types of prosecution which could lead to a loss of good repute? Does the loss of good repute last forever or is there some limit to the effect of a secular infraction on reputation? What balance can be found in a situation where a choice is to be made between a cleric or lay person who has a good reputation but no canonical degrees and one with the required degrees, and a criminal record?

It would seem that a simple accusation or even the presence of suspicion, calumny, derision or any other similar type of damage to reputation is not enough to give rise to a loss of good repute. Similarly, minor infractions of the secular law, such as speeding tickets, or of an ecclesiastical law, such as failing to record a baptism immediately (canon 877 §1), although to be avoided, do not necessarily destroy reputation. At the same time, scandal and the loss of reputation has occurred as a result of a cleric, and at times a lay person, simply being accused of sexual misconduct. In some situations the effect on the accused and on the community is devastating. Indeed, unfortunately, it would seem that

⁴⁶For our purposes the terms "civil court" or "secular court" will be used to describe the courts of the country and not refer to the proper distinction between civil law and common law.

there is no limit to the effect on a person's reputation which apparently can never be rebuilt.

Ecclesiastical authority is to regulate the rights which are proper to the Christian faithful (canon 223 §2).⁴⁷ Therefore, in choosing judges the bishop is to decide if, within his territory or under his supervision, a cleric or lay person who has been accused, or even convicted of a criminal act can function as judge.

The Code itself does not provide a set of criteria to establish whether or not a candidate has a good reputation. There are no procedures outlined in the general law of the Church to assess reputation.⁴⁸ Nothing consistent has been developed in Conferences of Bishops to regulate the question of what is to be done with clerics who have a criminal record. At present, a bishop can decide on his own whether or not a specific person with a particular type of criminal record could serve on a court. Some type of pastoral guide should be

⁴⁷See A. Mc GRATH, "Christ's Faithful in SHEEHY, Letter & Spirit, p. 126, para. 471; cf. D. CENALMOR, "De christifidelibus" in Commentario, vol. II, pp. 159-161.

⁴⁸It is important to remember that those who appoint persons to various ecclesiastical offices are to judge whether the individual in question meets the requirements which the nature of the office or the law demand (cf. canon 149). Removal from all offices, except pastor, are governed by the norms of canons 92-195. Canon 521 on the appointment of pastors also gives some insight, regarding the requirements of law and character, in a parallel situation.

developed and agreed upon by Conferences of Bishops to avoid merely arbitrary decisions in these situations.⁴⁹

This pastoral guide would have to respect the right of the cleric or lay person with a criminal record to redevelop a good reputation, while at the same time safeguarding the common good,⁵⁰ specifically, in this case, the integrity of ecclesiastical courts. Compassion, forgiveness and the possibility for conversion are not to be overlooked by authorities in determining the status of reputation of any person⁵¹ who would serve the Church as a member of a tribunal. A judge is a person who possesses specific characteristics and qualities. These qualities are impossible to regulate or accurately assess. At the same time, it is important to acknowledge that they are not necessarily lost because of problems with reputation.

⁴⁹There is a difference between the appointment to an office, and removal from office. On the one hand, no one has the right to be appointed to an ecclesiastical office. On the other, once appointed to an office there are certain rights which are protected by the law so that removal from office requires some sort of procedure. The norms for the removal and transfer of pastors could give some indication of the procedures which might be used in similar situations (canons 1740-1752).

⁵⁰Cf. GS, para. 25-27; English in FLANNERY, Vatican II, vol. 1, pp. 926-928.

⁵¹As a Church we are bound to forgive injury and not to pass judgment on the inner culpability of others. Cf. GS, para. 28; English in FLANNERY, Vatican II, vol. 1, pp. 928-929.

II. THE PERSON OF THE PRESIDING JUDGE

The question of who is to preside over cases at various levels of court is one that requires consideration. The person who is in charge of a tribunal might not be the one who is called upon to guide, direct, protect or be responsible for the instruction of a particular case. Since the vast majority of cases considered before tribunals today involve a question of validity of marriage, our focus will be on these cases. Therefore, marriage cases are to be presumed as the focus of discussion unless otherwise indicated.

A. In a diocesan court

The 1983 Code of Canon Law indicates that in each diocese the diocesan bishop is the judge of first instance (canon 1419 § 1).⁵² He is the iudex natus who is able to exercise his

⁵²Cf. L. NELI, The Role of the Judge in the Introduction of Cases Declaring Nullity of Marriage, [=NELI, Introduction], Rome, Pontificia Universitas Urbaniana, 1994, pp. 28-29; L. CHIAPPETTA, Il codice di diritto canonico: commento quiridico-pastorale, [=CHIAPPETTA, Commento], Napoli, Edizioni Denoiane, 1988, vol. 2, pp. 551-552, para. 4623-4624; Z. GROCHOLEWSKI, "De iudice", in Commentario, vol. IV/1, pp. 766-770; J.A. BARRY, "The Judge" in SHEEHY, Letter & Spirit, p. 821, para. 2863-2864.

judicial function either in person,⁵³ or through others.⁵⁴ The diocesan bishop is to appoint a judicial vicar with ordinary power to judge cases and who is to form one tribunal with the bishop (canon 1420).⁵⁵ The court of first instance establishes the limit and nature of the controversy, gathers the necessary material to establish the facts of a case, defines its parameters and is the first to determine if there

⁵³In a response to a question as to whether or not a diocesan bishop even though attached to a regional tribunal could appoint a separate judicial vicar, the Apostolic Signatura responded affirmatively since bishops can exercise judicial power within their own diocese, cf. SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, "Response, February 17, 1995", in Revista española de Derecho canónico, 52 (1995), pp. 750-751.

⁵⁴The wording has been slightly altered from canon 1572 §1 of the 1917 Code to canon 1419 §1 of the 1983 Code; however, both canons express a doctrinal unity of authority in the episcopacy, see COX, Procedural Changes, p. 28.

Canons 381 and 391 of the 1983 Code speak of the pastoral, legislative and executive authority and responsibilities as well as their limits, for the diocesan bishop and those equivalent to him in law.

There is a difference of opinion regarding the power of governance or jurisdiction, as connected to the power of orders, and its exercise through others, especially the laity. The position of the Roman school of thought is spelled out in an article by R. PAGÉ, "Juges laïcs et exercice du pouvoir judiciaire", in M. THÉRIAULT and J. THORN, (eds.), Unico Ecclesiae servitio, Ottawa, 1991, pp. 206-209.

⁵⁵See CHIAPPETTA, Commento, vol. 2, pp. 553-554, para. 4630-4636. Cf. Z. GROCHOLEWSKI, "De iudice" in Commentario, vol IV/1, pp. 771-781; J.A BARRY, "The Judge" in SHEEHY, Letter & Spirit, pp. 821-822, para. 2865-2868.

are any exceptions or challenges to the court in the processing of the case in question.⁵⁶

On reading canon 1419, one could perhaps maintain that it is the bishop who is to preside, except in cases reserved to the Holy See, or in matters that concern the rights or temporal goods of a juridic person represented by the bishop. If this interpretation is accepted, the judicial vicar or associates, if there are any, would not preside over cases as those who guide, direct, control or protect, nor would they, necessarily, have ordinary power to judge.⁵⁷

But, it is one thing to acknowledge that the bishop can be seen to preside over the whole tribunal in the sense of being ultimately responsible for the court, and quite another to function as praeses in a given case. Our discussion will not dwell on the right of the bishop to be in charge of or responsible for a tribunal, but rather on the role of presiding in a given case before an ecclesiastical court.

In most situations the bishop would normally exercise his juridic responsibilities through the judicial vicar who, with

⁵⁶See L. del AMO, "The Judge" in Code, 1983, pp. 880-882; cf. NELI Introduction, pp. 155-176; Z. GROCHOLEWSKI, "De iudice" in Commentario, vol IV/1, pp. 766-781.

⁵⁷The advisability of a bishop presiding over specific cases is a matter of debate. It can be argued that in cases where the bishop is most inclined to intervene, such as criminal cases of clerics, such intervention could jeopardize the right to a fair trial (cf. canons 1448 and 1449 §3).

ordinary power to judge, presides over the administration of justice within the limits established by the bishop (canon 1420 §1).

In cases where a collegiate tribunal (canon 1425) is used,⁵⁸ the judicial vicar or associate judicial vicar, as far as possible, is to preside (canon 1426 §2). The judicial vicar, then, would normally be the presiding judge (praeses) for the bishop in a diocesan court. If the exception authorizing the use of one judge in cases to be normally considered by a collegiate court is involved (canon 1425 §4), then, even though the canon does not explicitly indicate it, the sole judge would preside.

There are situations where it is impossible or difficult for the judicial vicar or associate judicial vicars, if there are any, to preside over a case. For instance, cases of conflict of interest would fall under this category. In a collegiate court, one of the other judges⁵⁹ would then be appointed as the presiding judge and assume the role and responsibilities required of the praeses in that specific

⁵⁸Marriage cases are normally to be tried by a collegiate court. Cf. COX, Procedural Changes, pp. 32-36; A. DIACETIS, The Judgment of Formal Matrimonial Cases: Historical Reflections, Contemporary Developments, and Future Possibilities, Washington, D.C., Catholic University of America, 1977, Canon Law Studies, no. 492, pp. 8-168.

⁵⁹These judges would have been duly appointed by the bishop according to canon 1421.

case. Once the turnus has been established, a grave reason would be necessary to replace a judge or presiding judge (canon 1425 §5).⁶⁰ In situations where a sole judge would suffice, the judicial vicar or another judge appointed by him would preside over the case (canon 1424).⁶¹

B. In a regional or inter-diocesan court

Canon 221 §1 indicates that the Christian faithful can vindicate and defend their rights before an ecclesiastical court. One way the law attempts to safeguard this right, particularly for those challenging the validity of their marriage, is through tribunals. The provision of the 1983 Code for regional or inter-diocesan tribunals may be traced back to Pope Pius XI who in 1938 established regional tribunals in Italy, while later the Congregation for the Sacraments allowed some other countries to do the same.⁶² The Apostolic

⁶⁰Cf. Z. GROCHOLEWSKI, "De iudice" in Commentario, vol. IV/1, p. 800; J.A BARRY, "The Judge" in SHEEHY, Letter & Spirit, p. 827, para. 2879.

⁶¹The canon does not use the word 'preside', but the implication certainly is that the judge would preside over the case entrusted to him.

⁶²A series of provincial tribunals were established for Italy, PIUS XI, Motu proprio, Qua cura, December 8, 1938, in Acta Apostolicae Sedis, [=AAS], 30 (1938), pp. 410-413. In the Philippines 'regional tribunals' were permitted, SACRA CONGREGATIO DE DISCIPLINA SACRAMENTORUM, Decretum et normae, of April 28, 1941, in AAS, 33 (1941), pp. 363-368; for Canada

Constitution of Pope Paul VI, Regimini Ecclesiae Universae was the first universal legal document which spoke of regional and inter-diocesan tribunals. It empowered the Apostolic Signatura to provide for the establishment of inter-diocesan and regional tribunals.⁶³

The Signatura subsequently published norms to govern the creation of such tribunals and these took effect on March 25, 1971.⁶⁴ These norms provided for the possibility of inter-diocesan or regional tribunals in both first and second instance. The inter-diocesan or regional tribunal was no longer considered an extraordinary means of organizing the judicial activity in an area.

Several dioceses may wish to amalgamate their tribunals to establish one tribunal of first instance (canon 1423 §1). These inter-diocesan tribunals may be established for all cases that would normally come before a diocesan first

inter-diocesan tribunals were allowed at a later date, SACRA CONGREGATIO DE DISCIPLINA SACRAMENTORUM, Decretum et normae, May 13, 1946, in AAS, 38 (1946), pp. 281-287.

⁶³"Per sectionem primam Tribunal ea cognoscit, aut ex potestate ordinaria aut ex potestate delegata, quae eidem tribuuntur in Codice iuris canonici... tribunalium regionalium vel interregionalium erectionem curat." (PAUL VI, Constitutio Apostolica, Regimini Ecclesiae Universae, August 15, 1967, in AAS, 59 (1967), p. 921, n. 105).

⁶⁴Cf. SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, normae Pro Tribunalibus interdioecesanis vel regionalibus aut interregionalibus, December 28, 1970, in AAS, 63 (1971), pp. 486-492.

instance court, or for specific cases such as marriage cases only (canon 1423 §2).⁶⁵

The question of who is the president of such an arrangement is determined by the bishops involved. In some instances, one bishop from among the cooperating bishops is chosen as president or moderator to represent the bishops on the inter-diocesan tribunal. In others each bishop would maintain his role as iudex natus and they would meet to determine their function, role and responsibility in the cooperative venture.

The prescription of canon 1420 could also be extended to a regional or inter-diocesan tribunal, so that a judicial vicar would be chosen by the group of bishops and function in the same manner as in a diocesan court. There would normally be some representation by the participating dioceses in the appointment of associate judicial vicars to assist in the administration of the regional or inter-diocesan tribunal at the local diocesan level (for instance during the instruction phase).

The conduct and internal discipline of these regional or inter-diocesan tribunals differs from court to court. The

⁶⁵The diocesan bishop is free to exercise judicial power within his diocese even though it is part of a regional or inter-diocesan tribunal; cf. SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, "Response, February 17, 1995", in Revista española de Derecho canónico, 52 (1995), p. 751.

bishops themselves or their representatives determine the discipline to be observed in the regional or inter-diocesan court. In some, each diocese would be represented by an associate judicial vicar who would preside over the administration of justice within a diocese or limited territory on behalf of the regional or inter-diocesan court. It would even seem that these associates could function autonomously, rendering judgement, and merely reporting to the judicial vicar when required (1420 §3). In this situation the associate judicial vicar presides in the territory assigned to him.

In others, the associates, who might not be associate judicial vicars, may direct the gathering of evidence, but all aspects of the judgment and sentencing of the case belong to the judges in the central office of the inter-diocesan or regional court. The local representatives, whether associate vicars or not,⁶⁶ would in essence be auditors (canon 1428) or judge instructors for the case but not presiding judges (praesides).⁶⁷

⁶⁶In areas where there is a strong centralization, it seems that the associate judicial vicars are not truly functioning as assistants to the judicial vicar as in canon 1420, but are actually case instructors or auditors as in canon 1428 §3, even though they may otherwise have the title of associate judicial vicars.

⁶⁷Appeal courts, second instance, the tribunals of the Apostolic See and other recourses to the Apostolic See are not directly the matter of this dissertation and so will not be

III. PARTICULAR SITUATIONS REGARDING THE APPOINTMENT OF PRESIDING JUDGES

In this section we wish to note that the person of the presiding judge can change, depending on time and place. Also we intend to ask what happens when different persons are called upon to be praeses in a variety of situations?

A. In a diocesan court

1. The diocesan bishop as presiding judge

The Code maintains that in the first instance the diocesan bishop⁶⁸ is the proper judge (canon 1419 §1). There are provisions for him to exercise his judicial power either personally or through others (canons 391 §2 and 1419 §2). Although the law has maintained the principle, it is rare today for a diocesan bishop actually to choose to preside over cases within his diocese. However, it is possible in some circumstances, such as in dioceses which are quite small, or

dealt with here. The primary focus is presiding judges in tribunals of first instance.

⁶⁸Cf. canons 368 and 381 §2 for those who are considered equivalent in law to the diocesan bishop.

even in some mission territories, that he may be required to fulfil his judicial role personally. We could note in passing that diocesan bishops do not require academic degrees in order to preside over or judge cases as do other officials (canons 1420 §4 and 1421 §3). The Legislator has maintained that for diocesan bishops equivalent knowledge is sufficient to exercise judicial authority, even directly.

Consideration should be given to those who are equivalent to the diocesan bishop in law (canons 134, 381 §2 and 368). The heads of territorial prelatures and abbaties, apostolic vicariates, prefectures, and permanently established apostolic administrations along with missions sui iuris are all equivalent to the diocesan bishop in law (canon 368).⁶⁹ Not all of these persons, however, are ordained to episcopal rank, nor are they necessarily the heads of these bodies for life. For example, some territorial abbots, and heads of missions sui iuris are appointed for a period of time. Does this mean that while they are the head of the abbey or the mission they are considered competent to judge cases brought to them, but as soon as they are no longer in charge, they must obtain canonical degrees to judge or preside over cases? It would seem that these persons enjoy the capacity to judge without

⁶⁹Military Ordinaries are also considered to be in a similar situation. Cf. JOHN PAUL II, Apostolic Constitution, Spirituali militum curae, April 21, 1986, in Code, 1983, p. 1159, article 2 §1.

canonical academic qualification only as long as they are in charge of a particular church. If this is true, could the same be said of a diocesan bishop emeritus or does the Legislator intend that episcopal ordination is what substitutes for academic canonical qualification? Perhaps part of the answer can be found in considering the unique position of an auxiliary bishop.

2. An auxiliary bishop as presiding judge

There are three different types of auxiliary bishop foreseen in the Code: those appointed as collaborators with the diocesan bishop in the pastoral care of the diocese (canon 403 §1), those who have special faculties (canon 403 §2) and the coadjutor (canon 403 §3).⁷⁰ The canons indicate that the coadjutor and the auxiliary with special powers assist the diocesan bishop in the entire governance of the diocese and take his place when absent or impeded (canon 405 §2). Therefore, it seems that coadjutors enjoy a unique standing before the law and are to be appointed as vicar general and to have entrusted to them matters which would require a special

⁷⁰Cf. V. GORDON, "Coadjutor and Auxiliary Bishops" in SHEEHY, Letter & Spirit, pp. 229-230, para. 824-825; J.L. GUTIÉRREZ, "Coadjutor and Auxiliary Bishops" in Code, 1983, pp. 315-316; R. SOBAŃSKI, "De Episcopis coadiutoribus et auxiliaribus" in Commentario, vol. II, p. 823.

mandate.⁷¹ It seems also that the diocesan bishop is not to appoint the coadjutor as judicial vicar unless the smallness of the diocese or the limited number of cases suggests otherwise (canon 1420 §1). If there are situations where the coadjutor is appointed judicial vicar, he would judge cases with the same rights as the diocesan bishop. Likewise he would not require canonical academic degrees to fulfil this office. The auxiliary with special faculties is to follow what is contained in the Apostolic letter of appointment. The Holy See could even appoint an auxiliary with specific faculties to administer justice in a diocese or have more specific competencies for a diocesan tribunal under his direction.⁷²

As for other auxiliaries appointed to collaborate with the bishop but without special faculties, the matter is not as clear. These bishops, unless their Apostolic letter indicates otherwise, are assistants who are to be appointed vicars general, or at least episcopal vicars, and are dependent upon

⁷¹Cf. CD, no. 26. English in FLANNERY, Vatican II, vol 1, pp. 578-579; J.L. GUTIÉRREZ, "Coadjutor and Auxiliary Bishops" in Code, 1983, p. 317; R. SOBAŃSKI, "De Episcopis coadiutoribus et auxiliariis" in Commentario, vol. II, pp. 823-824.

⁷²An example of this type of appointment can be found in the appointment of Bishop Donald Wuerl as auxiliary bishop of Seattle, Washington, with specific faculties, cf. Origins, 16 (September 18, 1986), pp. 249 and 252.

the authority of the diocesan bishop (canon 406 §2)⁷³. The same argumentation as employed above can be used for appointing an auxiliary bishop as judicial vicar when the diocese is small or the number of cases so warrants (canon 1420 §1).

The question of academic degrees for those who are appointed as officers of the court, especially judicial vicars and judges, must be answered (canons 1420 and 1421).⁷⁴ There is nothing to say that these clerics (canon 207)⁷⁵ who hold episcopal rank and are collaborators with the bishop, as are clerics who hold presbyteral (canon 369) and diaconal rank (canon 835), are exempted from the requirement of possessing canonical academic degrees to function in these capacities. The unity and the dignity of the episcopacy⁷⁶ are not jeopardized by following the requirements of the Code or requesting an indult for those who are not academically

⁷³Cf. J.L. GUTIÉRREZ, "Coadjutor and Auxiliary Bishops" in Code, 1983, pp. 315-317; R. SOBAŃSKI, "De Episcopis coadiutoribus et auxiliaribus" in Commentario, vol. II, pp. 821-824.

⁷⁴Cf. Z. GROCHOLEWSKI, "De iudice" in Commentario, pp. 777-780 and 785.

⁷⁵Cf. J. HERVADA, "Christ's Faithful" in Code, 1983, pp. 188-190; J. FORNÉS, "De christifidelibus" in Commentario, vol II, pp. 47-52.

⁷⁶Cf. CD, in AAS, 58 (1966), pp. 671-701, especially paragraphs 25-26. English in FLANNERY, Vatican II, vol. 1, pp. 578-579.

qualified to function in court as a judicial vicar (canon 1420 §4) or a judge (canon 1421 §3).

It may well be argued that anyone who is ordained to the episcopal rank is exempted from the canonical academic degree requirement in order to function as a judge or judicial vicar. The point is that the Code itself does not make this exception and no official interpretation has been put forth, to date, to indicate that those who hold episcopal rank are exempted from the requirement of canonical academic training to function in an ecclesiastical court. Therefore, the question is not whether or not members of the episcopacy, or even those who are equivalent to the diocesan bishop in law but are not ordained as bishops, have the ability to adjudicate cases, but rather whether or not they are required also to possess canonical academic training? The law requires some academic recognition or at least adequate knowledge in Scripture, theology and canon law to be ordained a bishop (canon 378 §1 5°); therefore the added requirement for ecclesiastical court officials may well apply equally to titular bishops and bishops emeriti since the diocesan bishop, (exempt from the requirement as iudex natus), is to appoint judges who are to be clerici (canon 1421 §1) which includes titular bishops, priests and deacons (canon 207 §1).⁷⁷

⁷⁷Cf. LG, para. 10. English in FLANNERY, Vatican II, vol. 1, pp. 360-361.

3. A judicial vicar or associate judicial vicar as presiding judge

"As far as possible, the judicial vicar or an associate judicial vicar must preside over the collegiate tribunal" (canon 1426 §2). In many diocesan first instance courts the judicial vicar does, in fact, preside over the cases that are presented. It is the judicial vicar who establishes policies and protocols which could enhance the procedures outlined in the present Code. It is his responsibility to adapt procedural law to the culture and the place without becoming capricious or unduly influenced by any individual or situation.⁷⁸ In terms of responsibility for the proper functioning of the court, this officer is second only to the diocesan bishop. The vicar general or even the auxiliary bishops, if there are any, do not share in this responsibility. Therefore, it is reasonable to assume, as the Legislator does, that he will fulfil this responsibility diligently and personally (canon 1426 §2).

It must also be acknowledged that in some situations it is not possible for the judicial vicar to attend to all of the responsibilities of his office personally. In these

⁷⁸Cf. JOHN PAUL II, Allocution, January 22, 1996 in L'Osservatore Romano, English Edition, January 31, 1996, [=JOHN PAUL II, Allocution, January, 1996], p. 5.

situations, the diocesan bishop can appoint assistants (canon 1420 §3) who are also to serve as praeses in a collegiate court if possible (canon 1426 §2). Again, the Legislator indicates that the preference for the presidency of a collegiate court would fall to the judicial vicar or to assistants appointed to aid him.

The possible appointment of a team of vicars working together to accomplish the task of the proper administration of justice in a diocese, particularly in a large diocese, would seem to follow a pattern similar to the appointment of several priests for the pastoral care of a large parish or a number of parishes (canon 517 §1). The 1917 Code promoted the use of officiales or vice-officiales as presiding judges but did not, apparently, readily allow other judges to preside over a collegiate court.⁷⁹ There were, however, no restrictions placed on the number of vice-officiales who could be appointed to a tribunal, just as there are none in the present Code.

In a metropolitan court there is the possibility that one judicial vicar could be appointed for both the first instance of the metropolitan court and the second instance for the suffragan dioceses attached to the metropolitan see. Some

⁷⁹Cf. Code, 1917, canon 1578; cf. also S. WOYWOD and C. SMITH, A Practical Commentary on the Code of Canon Law, new revised ed., 2 vols in 1, New York, Joseph F. Wagner Inc., 1952, p. 233, for the English translation.

interesting scenarios may result in these circumstances. The judicial vicar could, depending on the case load, preside over cases in the first instance for the archdiocese, while at the same time presiding over cases in second instance for all of the suffragans. There is nothing specific in the law prohibiting one judicial vicar for both levels of court in a metropolitan see since it is one tribunal (canon 1447). The Apostolic Signatura would prefer a more definite and complete separation between the different grades of court and the officers who function within them, especially if the second instance is not the court of a metropolitan see.⁸⁰

4. Other clerics as presiding judge

There may be circumstances when it is impossible for the judicial vicar or even the associate judicial vicar to preside over some cases. It could be that the judicial vicar could not hear a case due to some conflict of interest or other

⁸⁰A letter to the Moderator of the Canadian Appeal Tribunal dated February 8, 1993 from the Apostolic Signatura indicates that a complete differentiation of officers at the two different grades of court is absolutely required so as to avoid any sense that there may be collusion between the first and second instance of court in marriage cases. See the article on the topic by Bishop R. Burke, then a Defender of the Bond with the Apostolic Signatura: R. BURKE, "Distinction of Personnel in Hierarchically Related Tribunals", in Studia Canonica, 28 (1994), pp. 85-98.

relationships (canon 1448).⁸¹ In these situations he would be wise to appoint another to hear the case and avoid a possible exception where the bishop in charge of the tribunal would have to settle the objection (canon 1449 §2). If there are no associate judicial vicars, then other judges would be appointed by the judicial vicar to hear the case, with one of them appointed as presiding judge, knowing that he cannot be substituted except for the gravest of reasons (canon 1425 §5). It is possible that the diocesan bishop could appoint an associate judicial vicar (canon 1420 §3); however, it is more likely that the judicial vicar would resolve the situation by appointing another judge to preside, without the intervention of the bishop (canon 1420 §2).

There are situations where there are associate judicial vicars available, but where the case load of the tribunal is so large that it would be unreasonable to expect that all cases would be presided over by the judicial vicar or associates, even if there are several of them. It is reasonable, however, to appoint one of the other clerics who

⁸¹Cf. L. del AMO, "The Duties of the Judges and of the Officers of the Tribunal" in Code, 1983, p. 903; P.A. BONNET, "De officio iudicum et tribunalis ministrorum" in Commentario, vol. IV/1, pp. 924-926. In some areas there are several different dialects spoken, or even situations of rivalry which are culturally induced. If the judicial vicar does not speak the dialect, or may pose a threat to the perception of justice being done because of cultural rivalry, then another judge should be appointed presiding judge for the case.

form the turnus for a case to be presiding judge so that cases are brought to conclusion as quickly as possible, within the bounds of justice, not beyond one year in first instance or six months in second (canon 1453). In practice, this reason is most often cited as justification for appointing another cleric on the turnus as presiding judge in a particular case, using the exception found in the phrase "as far as possible" in the canon (canon 1426 §2).⁸²

5. Lay persons as presiding judge

The question of whether or not a lay judge (canon 1421 §2) could be appointed as the presiding judge in a trial is not directly dealt with in the Code itself.⁸³ Indeed, there is no explicit canon which indicates that a lay person may not be appointed as presiding judge in a particular case. The second paragraph of canon 1421 has no parallel in the 1917 Code. The fact that the laity are urged to cooperate in the

⁸²It must be remembered that the cleric in question should not be one who has received an indult to judge from the Apostolic Signatura since they are, at times, not to be appointed as praeses or ponens; cf. Z. GROCHOLEWSKI, "De periodo initiali seu introductoria processus in causis nullitatis matrimonii", in Periodica, 85 (1996), p. 93, note 21.

⁸³The Code presupposes that the laity are to be assigned to cases as judges "where necessity suggests" (canon 1421 §2). It therefore cannot be affirmed that laity, and clerics for that matter, have a right to become judges.

governance of the Church (canons 129 §2 and 204)⁸⁴ and serve in ecclesiastical courts is new in the law.⁸⁵ For example, the bishop can now appoint auditors who are either clerics or lay persons (canon 1428 §2). In contrast, the 1917 Code required that, if at all possible, the auditors were to be chosen from

⁸⁴Some authors welcomed the innovations of the law, especially lay judges in ecclesiastical courts. For more information on these topics see P. FRATTIN, "Lay Judges in Ecclesiastical Tribunals", in The Jurist, 28 (1968), pp. 178-181; R.A. DUSTON, The Rights and Obligations of the Lay Christian Faithful: The Second Vatican Council Through The Revised Code of Canon Law, Rome, Pontificia Studiorum a S. Thoma Aq. in Urbe, 1986, vi, 433 p; S.E. SHOEMAKER, Lay Participation in Selected Structures of Church Government Since Vatican II, Washington, D.C., Catholic University of America, 1976, Canon Law Studies, no. 490, pp. 69-74.

⁸⁵There is some opposition to the use of laity as judges which seems to come from some German canonists who feel that there is a confusion between what truly belongs to the power of order and what belongs to the exercise of jurisdiction by the laity; cf. W. AYMANS, "Ecclesiological Implications of the New Legislation", in Studia Canonica, 17 (1983), p. 87. Cf. also W. AYMANS, "'Munus' und 'sacra potestas'", in Les droits fondamentaux du Chrétien dans l'Eglise et dans la société, Actes du IVe Congrès international de Droit canonique, Fribourg, Éditions Universitaires Fribourg, 1981, pp. 185-202; W. AYMANS, "Strukturen der Mitverantwortung der Laien", in Archiv für Katholisches Kirchenrecht, 159 (1990), pp. 368-386; K.L. MÖRSDORF, "Die Kirchengliedschaft im Licht der kirchlichen rechtsordnung", in Archiv für Katholisches Kirchenrecht, 131 (1962) pp. 345-393. These authors are convinced that laity are not to exercise judicial power as clerics do. They are joined by another author who makes a distinction between a constitutive sentence and a declarative sentence. In constitutive sentences true legislative power is exercised and so is not available to laity, while in marriage cases the objective juridical situation is not modified or changed but only clarified and is rendered juridically certain even though it was previously in doubt; cf. A. COLAGIOVANNI, "De innovatione processus matrimonialis in iure et in iurisprudencia S.R. Rotae" in Monitor ecclesiasticus, 98 (1973), p. 36.

the synodal judges; it did not authorize the use of lay auditors.⁸⁶ Again, in the 1983 Code, the laity can be appointed as promotor of justice or defender of the bond (canon 1435) while the 1917 Code required that these offices be filled by priests (sacerdotes).⁸⁷

The laity were considered capable of being procurators and advocates in both the 1917 and 1983 Codes, since these are not offices of the court, but rather are identified with the parties for a case (canons 1477, 1481-1490).⁸⁸ There does not seem to have been any restriction in these two functions to lay men only.

To indicate the significance of the admission of laity, male and female, to the office of judge there appear to be two areas which must be considered. First, the recognition of the fact that the laity can participate in the exercise of judicial power in the Church recovers an ancient tradition that harkens back to the time of the Apostles. Second, the admission of men and women to various offices in the tribunal removes the administration of justice in Church law from the shadow of gender discrimination, while at the same time taking

⁸⁶Cf. Code, 1917, canon 1581.

⁸⁷See Code, 1917, canon 1589 §1.

⁸⁸Cf. Code, 1917, canons 1647, 1655-1666.

advantage of the vast experience available from laity who are competent and properly trained.⁸⁹

It is possible to appoint one lay judge on a turnus to decide a case (canon 1421 §2). A question was raised as to whether or not a lay judge could actually be the praeses or even ponens in a case. A letter, dated January 7, 1988, to the Apostolic Signatura, from a judicial vicar in a suffragan see concerning the use of a lay judge as presiding judge at the second instance was answered January 12, 1989:

In response to the question whether a lay judge is able to fulfil (sic) the office of Presiding Judge [emphasis original] in a college, for your information we transmit this excerpt from a very recent decree of this Apostolic Signatura:

We note that, insofar as possible, the Judicial Vicar, or the Adjunct Judicial Vicar, must preside over a collegiate Tribunal, each of whom must be a priest (canon 1420 §4);

We take into account that the Presiding Judge of the college enjoys a certain authority over the other judges of the college, in the case, two priests (canons 1428, 1429, 1609 §1 and §4);

⁸⁹See COX, Procedural Changes, pp. 46-47. There has been some preliminary work done on attempting to assess the image of the tribunal and its workers, particularly in the United States. The results of a survey attempting to ascertain the attitude of people who approach the tribunal were presented at the Fiftieth Anniversary Meeting of the Canon Law Society of America. These results indicate that there is a greater need for education and lay involvement to remove the attitude that tribunals are mysterious and run by celibate clerics who are somehow disaffected from life and people. Cf. E. RINERE, "Tribunals -The Mystery Ministry" in Proceedings of the Canon Law Society of America, 50 (1988), pp. 193-193.

Since §2 of canon 1421, which must be considered an exception to §1 of the same canon, must receive a strict interpretation, it is totally inappropriate that a lay judge should exercise the office of Presiding Judge in a college.⁹⁰

The first thing to note is that the response presumes that all members of the turnus are equally qualified and enjoy good repute. This presumption in and of itself is not wrong, but what happens when a collegiate court is made up of two clerics who do not have academic qualifications, while the lay judge is qualified academically? Again, what about situations where the lay judge has much experience along with academic qualification, while the clerics have little or no tribunal experience even though they are academically qualified? What happens when the lay judge is the one who speaks the language or dialect of the parties, and/or is of the same culture, while the other judges are not? It would seem that in such situations the person who is more qualified and experienced should preside over the court so as to assure a swift and accurate administration of law in a specific case. However, the Apostolic Signatura appears to hold otherwise.

Secondly, the answer states that it is "inappropriate", not invalid or illicit. It would appear then that the use of a lay person as presiding judge is both valid and licit. There is no clarification presented as to what is 'inappropriate'

⁹⁰CANON LAW SOCIETY OF AMERICA, Roman Replies and CLSA Advisory Opinions, Washington, D.C., 1989, p. 49.

about the use of an experienced and academically qualified lay person to preside in court. If the purpose of procedural law is to aid in the "determination of an objective truth, which also concerns the common good",⁹¹ then it would seem that it is appropriate to place in that position the person who can best fulfil the role of presiding judge. It is difficult to see what is inappropriate about such an approach, especially when the best qualified or experienced person in the college is a lay person.

Third, there seems to be concern over a lay person being able to exercise some kind of authority over a priest. It would seem that the Code has attempted to follow more of a cooperative approach to the relationship between clergy and laity, indicating that there is first of all a common base for incorporation as people of God (canon 204 §1),⁹² and then once that common base has been acknowledged, a distinction is made between clerics and laity which is necessary for the hierarchical structure of the Church (canon 207 §1). There are differences;⁹³ however, the fact remains that all the faithful

⁹¹JOHN PAUL II, Allocution, January, 1996, p. 5.

⁹²Cf. LG, in AAS, 57 (1965), pp. 5-89, especially paragraph 31; English in FLANNERY, Vatican II, vol. 1, pp. 388-389.

⁹³Clerics are capable of the power of governance (canon 129 §1), while the laity cooperate in this power (canon 129 §2). There are also differences in their rights and obligations as can be seen for the laity in canons 224-231,

have been called to participate in the life of the Church (canon 205).⁹⁴

Fourth, there was little or no consideration of the possibility that permanent deacons, who are clerics, may be part of a collegiate tribunal. It is true that the case in question had two priests and one lay person as judges; however, it would be interesting to ask what the differences would be if the college were comprised of a mix of deacons and a lay person. Would there have been a different response if there was a permanent deacon on the panel of judges? Is there a difference if the deacons were transitional? Would it be inappropriate for a deacon to preside on a panel with priests as the other judges? There probably would have been no change in the response of the Signatura. The fact that a lay person would somehow have a role of leadership and even authority in a collegiate court is viewed to be 'inappropriate'.

Finally, how does the strict interpretation of canon 1421 §2 exclude the possibility that a lay person could be appointed as a presiding judge? If the Conference of Bishops, as a body, has decided that the use of lay judges is appropriate, necessary, and even to be encouraged, how can their use in a college as presiding judge be 'inappropriate'?

and for clerics canons 273-289.

⁹⁴Cf. J. HERVADA, "Christ's Faithful" in Code, 1983, p. 187.

It appears in this response that there is a lack of equality between judges on a collegiate court not because of experience, education, qualification or even quality of person, but due to ordination.

The second part of the response is also interesting and has some bearing on our discussion of the presiding judge, since in law the two offices of praeses and ponens can be interrelated and in marriage cases the ponens does have some particular responsibilities which are not found in other types of cases (canon 1677). The response continues:

To the question whether a lay judge can fulfil (sic) the office of ponens [emphasis original] in a college or not, this Supreme Tribunal does not intend to respond at this time, but notes that in any case the individual [emphasis original] Judges - and not just the ponens - having carefully examined the acts of the case, are to compose their written vote, in which they set forth their conclusions (canon 1609 §2). A more profound examination of the case carried out only by a lay judge and not the other cleric judges most certainly does not correspond to the intent of canon 1421 §1-2, especially in light of canons 129 §2 and 274 §1.⁹⁵

It would seem that the question is not settled in the mind of the Apostolic Signatura. The use of laity as presiding judge

⁹⁵CANON LAW SOCIETY OF AMERICA, Roman Replies and CLSA Advisory Opinions, Washington, D.C., 1989, pp. 49-50.

is strengthened by an examination of this part of the response concerning the ponens.

In practice, many times, the ponens and the presiding judge are one and the same person. This is not always the case; however, there is the possibility that the presiding judge would know the intricacies of a case better than other judges of the panel who are not directly involved in the amassing of the evidence.

The appointment of the ponens is the responsibility of the presiding judge (canon 1429). The ponens in marriage cases can order the instruction of the case by decree (canon 1677 §4). The actual amassing of the evidence could be entrusted to auditors who may well be priests or deacons (canon 1428). It seems that a lay ponens would again be seen as possibly exercising some authority over a cleric. The same questions could be raised with regard to the ponens, as with the presiding judge.

The interesting part of this response is the use of the canons quoted. The appointment of judges is again referred to, but this time in the context of the preparation of each judge for the judgement session (canon 1609). No distinction was made with regard to whether or not the judge was a lay person or a cleric. It is the responsibility of all judges in a collegiate court to prepare themselves to render a decision with moral certitude (canon 1608).

Another author wrote that it would seem to be the mind of the Legislator that the laity not be appointed as presiding judge or as ponens since a collegiate tribunal is to be presided over as far as possible by the judicial vicar or associate judicial vicar who are priests.⁹⁶ It was felt that lay judges cannot exercise their jurisdiction outside of the context of a collegiate tribunal.⁹⁷

It is our contention that the mens legislatoris is, in fact, that the general law of the Church is to be adapted to the needs of the local church, even in the case of laity being appointed as judges in tribunals. It is the Conference of Bishops who is to permit laity to be appointed, and who determines if there is sufficient necessity to adapt general law in this manner (canon 1421 §2).

⁹⁶"Mais actuellement, étant donnée sans doute la fonction du président tout au long de la procédure, elle ne peut être exercée par le juge laïc. D'ailleurs, la mens legislatoris paraît claire là-dessus si nous considérons le canon 1426 §2 qui statue que 'ce tribunal [collégial] est présidé, autant que possible, par le vicaire judiciaire ou un vicaire judiciaire adjoint'; ceux-ci devant être prêtres; ainsi se trouve exprimé le caractère particulier de la fonction du président du tribunal collégial" (R. PAGÉ, "Juges laïcs et exercice du pouvoir judiciaire", in M. THÉRIAULT and J. THORN, (eds.), Unico Ecclesiae servitio, Ottawa, 1991, p. 209). Cf. Z. GROCHOLEWSKI, "De iudice" in Commentario, vol. IV/1, pp. 785-786 and 802.

⁹⁷"L'obstacle est de droit purement ecclésiastique, qui détermine que le juge laïc n'exercera pas sa juridiction en dehors d'un tribunal collégial" (ibid.).

In the context of who can be presiding judge or even ponens it would seem that the laity truly are capable and suitable for these functions since they can be appointed as judges (canon 1421 §2). Is this really an exception to the law? Probably not. Rather, the Conference of Bishops can agree to appoint laity within their territory as judges. There may be in the appointment of laity a greater sensitivity to the call of each Christian to the apostolate by baptism and confirmation (canon 225 §1).

Archbishop Grocholewski notes that the current practice of the Apostolic Signatura when granting indults to persons who do not have the required canonical degrees, is that these persons, at times, may not be designated as presiding judge or as ponens in a case.⁹⁸ If it were to happen that on a turnus there were two clerics appointed who functioned as judges as a result of an indult and one qualified lay person, then who would be praeses? It would be apparent that the qualified lay person would certainly be the best candidate for such an appointment since the praxis of the Apostolic Signatura is that those who judge under an indult are not to be designated as praeses or ponens.

⁹⁸See Z. GROCHOLEWSKI, "De periodo initiali seu introductoria processus in causis nullitatis matrimonii" in Periodica, 85 (1996), p. 93, note 21.

There is still continued debate over which ecclesiastical offices and positions the laity can fulfil and which ones belong distinctly to the power of orders (canons 129, 228 and 274).⁹⁹

B. In a regional court

Many jurisdictions have resorted to a regional or inter-diocesan structure so as to minimize the impact for the support of tribunals on any one diocese of an ecclesiastical province.

The provisions for regional or inter-diocesan courts of both first and second instance (canons 1423 and 1439) present a slightly different scenario since it would appear that there is a substantial amount of room for the interpretation and adaptation of the general law of the Church to the individual circumstances of a country, region or territory larger than a diocese. It is possible for several inter-diocesan tribunals to be established for different reasons in the same geographic territory (canons 1423 §2 and 1439 §2). The requirements of the law for a first instance inter-diocesan court are: 1) that several diocesan bishops agree, 2) that there be approval of

⁹⁹Cf. LG, in AAS, 57 (1965), pp. 5-89, especially paragraph 24; English in FLANNERY, Vatican II, vol. 1, p. 378, explanatory note pp. 424-425.

the Apostolic See, 3) that the group of participating diocesan bishops or a bishop designated by them has all of the powers which a diocesan bishop has for his tribunal, 4) that it can be established for all cases, or 5) that it can be established only for some types of cases (canon 1423). The requirements for a second instance regional or inter-diocesan court are practically the same (canon 1439). We shall now examine various possibilities in the case of inter-diocesan tribunals.

1. A diocesan bishop or an auxiliary bishop as presiding judge

In an inter-diocesan or regional court system in the first and second instances (canons 1423 and 1439) the use of bishops as presiding judges, although possible, is exceptional. One bishop would be designated as being responsible for the tribunal; however, for him actually to preside over a case is rare. The bishop designated as responsible for the tribunal could be a diocesan bishop or an auxiliary since the law requires that he be a bishop designated by the group (canon 1423 §1).¹⁰⁰ In practice the judicial vicar for the inter-diocesan or regional tribunal is

¹⁰⁰Cf. J.A BARRY, "The Judge" in SHEEHY, Letter & Spirit, p. 824, para. 2871-2872; Z. GROCHOLEWSKI, "De iudice" in Commentario, vol. IV/1, pp. 789-794.

responsible for the proper administration of the tribunal, subject to the bishop moderator.

2. A judicial vicar or associate judicial vicar as presiding judge

The amalgamation of resources in a regional tribunal can aid in lessening the burden for individual dioceses in the administration of justice within their territory. The sharing of personnel and resources, as well as the type of cases that can be handled by a regional court are to be agreed upon before the court is established. The bishops could have agreed that the court is to handle only specific types of cases (canon 1423 §2). For example the regional courts of Canada are established to handle only marriage nullity cases, whether formal or informal, but not penal cases. Other cases such as informal marriage nullity, non-consummation, privilege of the faith, separation of spouses, presumed death, but not formal nullity cases, can also be handled in the diocesan court.¹⁰¹ Criminal cases in Canada are to be heard in the diocesan tribunals.

¹⁰¹For a more complete treatment of these types of cases see W.H. WOESTMAN, Special Marriage Cases: non-consummation, Pauline privilege, favour of the faith, separation of spouses, validation-sanation, presumed death, 3rd ed., Ottawa, Faculty of Canon Law, Saint Paul University, 1994, xi, 242 p.

The diocesan tribunal would still have to be established according to law and so there would be a limited sharing of responsibility by the diocesan bishops who participate in an inter-diocesan or regional venture. There is the possibility that a diocesan bishop could choose to have a case normally handled by the regional or inter-diocesan tribunal adjudicated within the diocese. Support for this possibility is found in the February 17, 1995 response of the Apostolic Signatura to the question of whether or not the diocesan tribunal is inferior to the regional or inter-diocesan tribunal.¹⁰²

The judicial vicar and associates, if there are any, are appointed to the inter-diocesan or regional court by the bishop or bishops responsible for the tribunal. These persons are, if possible, to preside over the cases brought to the court (canon 1426 §2). In many jurisdictions it is not possible for these officers to function as presiding judge in all cases brought to them, due to the number handled by the court. There is always the possibility of appointing more associate judicial vicars; however, the preferred solution has been to appoint a judge on the turnus as presiding judge. The same rationale and argumentation as expressed in the discussion of diocesan courts of first and second instance

¹⁰²Cf. SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, "Response, February 17, 1995", in Revista española de Derecho canónico, 52 (1995), pp. 750-751.

applies to the use of judges who are clerics and those who are laity in these regional or inter-diocesan courts.

CONCLUSION

The question of who is the presiding judge at various levels of court is one which requires a slightly different answer for each level. In the first instance diocesan court, the bishop is ultimately responsible. However, for all practical purposes, the bishop does not preside over cases in the first instance, except on rare occasions. It is most rare for a bishop to preside over the case of a possible nullity of marriage. Nevertheless, it is not beyond imagining that this could happen and the law provides that, following the ancient practice of the Church, the bishop is the proper judge of first instance.

The judicial vicar or associate judicial vicars, or those who are designated by them, normally preside since bishops tend to exercise their judicial power through others. This is particularly true in marriage nullity cases which comprise the vast majority of the work of a tribunal today. If the first instance court was established in a regional or inter-diocesan manner, then the bishop moderator has the same rights as the diocesan bishop for the diocesan court. The bishop moderator exercises his judicial power in the name of the cooperating

bishops through others, and so presiding is usually left to the regional judicial vicar or associate judicial vicars or those whom they designate.

Ecclesiastical judges are to be academically qualified to fulfil their role adequately, be persons who enjoy a good reputation, be clerics and, under some circumstances, laity. The canonical provisions for the office of judge have allowed more qualified individuals the opportunity to assist in the responsibilities of adjudicating cases. This sharing of responsibility could have dramatic effects, especially in the processing of marriage nullity cases.

There is no question that most often the presiding judge is a cleric, priest or deacon. The question though is whether or not laity who can be appointed judges can also be presiding judges. The Apostolic Signatura has responded that this is inappropriate, yet has made no declaration on the validity or liceity of such an appointment nor of the judicial acts of lay presiding judges. It would seem that it is possible to have the laity validly preside in a turnus in a declaration of nullity case.

The question of the effectiveness of tribunal processes and procedural law must now be raised. Is it possible that certain presiding judges are unable to fulfil the enormous task of truly representing the justice and mercy of the Church, especially in marriage nullity cases? Could it be that

they actually harm the values and teachings of the Church that they are called to uphold? Are those who approach the tribunal afforded the respect and defense of rights that they deserve? These are the concerns of the next chapter.

CHAPTER FOUR

THE PRESIDING JUDGE IN MARRIAGE NULLITY CASES: PRESENT AND FUTURE POSSIBILITIES

INTRODUCTION

The Codes of Canon Law¹ are the bases from which we draw the limits and guidelines for behaviour and responsibilities of those who belong to the society which is the Church (canon 204 §2).² Practical application or adaptation of the values and goals in a concrete setting is important not only for the administration of justice, but also for the maintenance of social order. Not surprisingly, then, the Church has attempted to adapt its discipline and legislation, at various times, to meet the needs of the faithful.³

¹Codex iuris canonici auctoritate Joannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus, Romae, Libreria Editrice Vaticana, 1989, xxxii, 669 p. English translation in E. CAPPAROS, M. THÉRIAULT, and J. THORN, (eds.), Code of Canon Law Annotated, [=Code, 1983], Montréal, Wilson and Lafleur Limitée, 1993, 1631 p. and Codex canonum Ecclesiarum orientalium auctoritate Ioannis Pauli PP. II promulgatus, Romae, Typis Polyglottis Vaticanis, 1990, 382 p.

²Unless otherwise specified, all references to canons are to the 1983 Code.

³Cf. JOHN PAUL II, Allocution to the Roman Rota, January 22, 1996 in L'Osservatore Romano, English Edition, January 31, 1996, [=JOHN PAUL II, Allocution, January, 1996], p. 5.

Thus, ecclesiastical trials have as their purpose to discover the truth so as to help procure the salus animarum of the faithful, "which in the Church is the supreme law" (canon 1752). In practice, this value, especially in marriage nullity trials, is to be exemplified in and by the presiding judge. We have examined the law indicating who can be presiding judges, what their qualifications are to be, their role in common with all judges and, finally, what are specifically the responsibilities of those who preside in a trial, whether as a sole judge or as head of a collegiate court.

At this point in our study, an assessment of the effectiveness of the present procedures for marriage nullity cases will present some challenges which must be met by ecclesiastical courts and specifically by presiding judges who are to guard, control, take care of, protect and direct the application of law and the administration of justice in specific cases.⁴

To carry out this assessment we should ask some questions. What exactly is being done in the investigation of a case of possible nullity of marriage? How do changes in attitudes and perspectives affect the role of the presiding judge in such cases? Are marriage nullity procedures truly a

⁴Cf. C. LEWIS and C. SHORT, A Latin Dictionary founded on Andrews' Edition of Freund's Latin Dictionary, Oxford, Clarendon Press, 1969, p. 1429. s.v. "praeses."

declaration of the status of persons based on the truth of the fact that ab initio the bond of marriage existed or did not exist? If the process is a statement of the truth and of fact, then is the contentious process really applicable to such investigations? Are the terms "plaintiff" and "respondent" appropriate to describe the parties in a nullity case? What possible alternatives have been proposed in the past and what are the possibilities for the future? These questions form the basis of our remarks in this chapter and will lead to a possible redefinition of the role of the presiding judge in marriage nullity cases.

I. VALUES AND RIGHTS TO BE PROTECTED BY THE PRESIDING JUDGE
IN MARRIAGE NULLITY PROCEDURES⁵

Culture, canonical procedures, respect for the rights of individuals and of the community, the understanding of sacrament and ecclesiology all evolve and develop with time. This calls for judges "to evaluate and weigh every individual case, taking into account the individuality of the

⁵Generally, rights and values are protected by the process itself with procedural rules and safeguards. The presiding judge is to apply these rules and principles thereby protecting these values and rights. Furthermore, he does this by reason of the fact that he is a member of the Church. Cf. the discussion on impartiality as distinct from neutrality pp. 67-70 above.

subject as well as the particular nature of the culture in which the person grew up and lives."⁶

Obviously, there has in recent times been growth and development in marriage nullity procedures, taking into account the culture and understanding of the day. To assess the present discipline it is necessary to examine briefly the values underpinning marriage nullity cases so that we can place canon law "within the context of a theological understanding of the Church and its development"⁷ and so better understand the particular role of the presiding judge in evaluating such situations. Such an understanding is vital to an appreciation of the values which the presiding judge attempts to safeguard in a marriage nullity case.

A. Values intended to be safeguarded by current marriage nullity procedures

Msgr. J.M. Serrano Ruiz, presently Vice-Dean of the Roman Rota, provides us with some insightful comments:

Anyone a bit familiar with recent developments in the jurisprudence of the Roman Rota will have no difficulty in distinguishing two types of procedure in the taking of decisions. The first type follows

⁶JOHN PAUL II, Allocution, January, 1996, p. 5.

⁷P. CHIRICO, "The Expression and Actualization of Values: Towards a Theology of Canon Law", in The Jurist, 42 (1982), p. 497.

the traditional and normal way of analyzing marriage cases: it uses the principles of positive law and evaluates proofs along criteria long considered valid. The second and more recent type concentrates on a study of the fundamental notions underlying canonical marriage law, and, inspired by the doctrine of Vatican II, it tries to discover those implications and objectives of positive law which may have meaning for modern man and be relevant to his needs.⁸

In order to change procedural law or even attitudes about marriage nullity cases, before any valid innovation can be considered it must be clear what values are protected and what is the purpose of an investigation of possible nullity. There would appear to be some tension between values protected through legislation by the Church and those lived by partners in marriage. This tension and expression of values, either structurally or personally,⁹ impacts upon procedural law in marriage nullity cases, as well as on the approach of judges in their attempt to decide cases with justice and equity.

What is a 'value'? How is it expressed and protected by the attitude and actions of the presiding judge? What impact does it have on an approach to marriage nullity cases?

⁸J.M. SERRANO RUIZ, "Values in the Formation of Christian Marriage", in Vidyajyoti, 42 (April, 1978), p. 150.

⁹Cf. P. CHIRICO, "The Expression and Actualization of Values: Towards a Theology of Canon Law", in The Jurist, 42 (1982), p. 498. Chirico stresses that 'personal' expression is one chosen by and adapted to the needs of individuals; while a 'structural' expression is chosen by the Church to express what is common to all, or to a particular group of Christians.

Values can exist only in relation to intelligent and free beings. They are "good things" which contribute to the development of persons. To understand the role of values we must begin with a foundational proposition: all human beings have been created imperfect, therefore they all must progress. [...] Now it is easier to see what a value is: a good thing, not in itself alone, but with its relationship to human persons. That is, the concept of value always includes two elements: it signifies a thing and its capacity to contribute to the perfection of human beings.¹⁰

There are different types of values. Some we discover instinctively, such as life over death; others are found through philosophical reflection. Christian values are the centre of study of moral theologians, while the values of canon law "are those which have a social significance; that is, those which are needed to build a Christian community and to sustain its life."¹¹ Individuals need a community in which to grow biologically, emotionally, intellectually and spiritually. In a similar manner, communities have their needs, such as a place to meet, a friendly environment for harmonious existence and "if they are a Christian community, they must also progress in grace and wisdom... like individual persons: they live and grow by reaching out for good things, by appropriating values."¹²

¹⁰L. ORSY, "The Relationship Between Values and Laws", in The Jurist, 47 (1987), p. 472.

¹¹L. ORSY, Theology and Canon Law, Collegeville, Minn., The Liturgical Press, 1992, p. 90.

¹²Ibid., p. 91.

1. Marriage itself as sacred and indissoluble

In marriage nullity procedures, judges in their service of love, are to "recognize the full value of marriage; to respect its existence in the best way possible; to protect those whom it has united in one single family."¹³ Marriage itself is a value since it comes from a family which, according to Vatican II, is the basis of society¹⁴ and "a school of human enrichment."¹⁵ Formal marriage nullity procedures are intended to foster and protect the sanctity and indissolubility of marriage.¹⁶

¹³JOHN PAUL II, Allocution to the Roman Rota, January 28, 1982, in AAS, 74 (1982), p. 452 and in W.H. WOESTMAN, (ed.), Papal Allocutions to the Roman Rota, 1939-1994, [=W.H. WOESTMAN, (ed.). Papal Allocutions], Ottawa, Faculty of Canon Law, Saint Paul University, 1994, p. 174.

¹⁴Cf. JOHN PAUL II, Allocution to the Roman Rota, January 24, 1981, in AAS, 73 (1981), p. 228 and in W.H. WOESTMAN, (ed.), Papal Allocutions, p. 165.

¹⁵SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World, Gaudium et spes, [=GS], December 7, 1965, in AAS, 58 (1966), pp. 1025-1120, especially paragraph 52; English in FLANNERY, Vatican II, vol. 1, pp. 956-957.

¹⁶Cf. L. NELI, The Role of the Judge in the Introduction of Cases Declaring Nullity of Marriage, [=NELI, Introduction], Rome, Pontificia Universitas Urbaniana, 1994, pp. 272-275; C.A. COX, Procedural Changes in Formal Marriage Nullity Cases from 1917 to the 1983 Code: Analysis, Critique and Possible Alternatives, [=COX, Procedural Changes], Washington, D.C., Catholic University of America, 1989, Canon Law Studies, no. 528, pp. 314-317.

Some would hold that the bond of marriage should be upheld at all costs. With concurrent changes in procedures, as well as the increase of divorce, the growing number of requests for nullity has created concern for those who espouse the maintenance of the bond at all costs. Others, however, hold that tribunals protect marriage and all the values attached to it as much by an affirmative decision as by a negative one.¹⁷

Marriage can fulfil its mission if it corresponds to the truth and is objectively valid. Therefore, if a declaration of a tribunal is at odds with such truth, it is counterproductive not only for the couple, but for the Church itself.¹⁸ Tribunals, then, have the task of maintaining a delicate balance in the protection of marriage. If too much is demanded of those who marry, then a valid and sacramental marriage would be possible for an elite few. This cannot be since marriage is the normal vocation for most people.¹⁹ On the

¹⁷Cf. COX, Procedural Changes, p. 316.

¹⁸See Z. GROCHOLEWSKI, "Aspetti teologici dell'attività giudiziaria della Chiesa", [= GROCHOLEWSKI, "Aspetti"], in Monitor ecclesiasticus, 110 (1985), p. 499.

¹⁹See Z. GROCHOLEWSKI, "Current Questions Concerning the State and Activity of Tribunals, With Particular Reference to the United States of America", [=GROCHOLEWSKI, "Current Questions"], in R.M. SABLE, (ed.), Incapacity for Marriage: Jurisprudence and Interpretation: Acts of the III Gregorian Colloquium, Rome, Pontificia Universitatis Gregoriana, 1987, p. 222.

other hand, to fail to demand that marriage be taken seriously as a vocation and a lifelong covenant that is unique among other human agreements, risks sacrificing the Church's teaching on the salvific nature of marriage.²⁰

The test of the effectiveness of procedural law is found in how well it fosters the whole teaching of the Church on marriage and enables the presiding judge to apply it accordingly. It may be argued that there is an inconsistency in the approach of the Church to marriage. Before marriage there is a tendency towards leniency, while in attempting to declare a marriage null there is more demanded than would ever have been thought of before the wedding celebration.

There are numerous safeguards in the law to protect the sacredness and indissolubility of marriage, such as: the presumption of law in favour of the validity of the bond of marriage until proven otherwise (canon 1060), the use of the ordinary contentious process even when both parties are in agreement regarding the nullity of their marriage (canon 1691), the requirements of proof of nullity (canons 1526-1586), the use of a defender of the bond (canon 1432), the preference for the use of the collegiate tribunal (canons 1425

²⁰See COX, Procedural Changes, p. 317.

and 1441),²¹ the necessity of two, at least substantially, conforming affirmative sentences before the celebration of a second marriage (canon 1684), the fact a that marriage nullity case never becomes a res iudicata (canons 1643-1644), and the mandatory review of all affirmative sentences (canon 1682). Judges are to reach moral certitude of nullity before rendering a decision of nullity (canon 1608) with the burden of proof resting on the plaintiff (canon 1526).²²

2. Truth

Another value which is to be protected by presiding judges in marriage nullity trials is truth.²³ This emphasis on the discovery of the truth in trials has been repeated through the ages and more recently in Papal allocutions to the Rota before and after the promulgation of the present Code of Law. In 1944, Pope Pius XII remarked:

Now in a matrimonial trial, the one end is a judgment in accordance with truth and law, which in

²¹In marriage nullity cases in first instance, as long as the impossibility of constituting a collegiate tribunal exists, a sole judge may adjudicate a case (canon 1425 §4). This is not allowed in other instances which deal with the case (canon 1441).

²²See COX, Procedural Changes, pp. 334-335. Cf. NELI, Introduction, p. 275.

²³Cf. COX, Procedural Changes, pp. 320-324; NELI, Introduction, pp. 290-292.

a suit for the declaration of nullity, is concerned with the alleged nonexistence of the matrimonial bond [...]. In other words, the end is the authoritative determination and implementation of the truth and the law which corresponds to it, in regard to the existence or the continuance of a matrimonial bond.²⁴

Likewise, Pope Paul VI states:

[A trial] is like a main line train track, whose axis is the search for objective truth and whose terminus is the proper administration of justice.²⁵

In ecclesiastical processes the truth has to be the "basis, foundation and mother of justice".²⁶ Pope John Paul II states that "the ecclesiastical judge's entire activity, as my venerable predecessor John XXIII stated, consists in exercising the 'ministry of truth'".²⁷ The presiding judge's search for the truth and its protection is an overriding concern, especially in marriage nullity cases where the truth about whether or not valid consent was exchanged, is necessary for justice to be done.

²⁴PIUS XII, Allocation to the Roman Rota, October 2, 1944, in AAS, 36 (1944), p. 282 and in W.H. WOESTMAN, Papal Allocutions, p. 24.

²⁵PAUL VI, Allocation to the Roman Rota, January 28, 1978, in AAS, 70 (1978), p. 182 and in W.H. WOESTMAN, Papal Allocutions, p. 145.

²⁶JOHN PAUL II, Allocation to the Roman Rota, February 4, 1980, in AAS, 72 (1980), p. 173 and in W.H. WOESTMAN, Papal Allocutions, p. 159.

²⁷JOHN PAUL II, Allocation to the Roman Rota, January 28, 1994, in L'Osservatore Romano, English Edition, February 2, 1994, p. 2 and in W.H. WOESTMAN, Papal Allocutions, p. 228.

Since marriage is indissoluble by divine law, any particular marriage [...] in its substantial and therefore objective reality, is valid or null independently of the decision of an ecclesiastical judge. Therefore if the judge errs by declaring a marriage null which is in fact valid, the judge "dissolves" in its essential reality that which God has rendered indissoluble. By declaring null that which by God's will is not null, the judge "liberates" the parties from obligations from which no judge is able to free them [...]. If, on the other hand, the judge erroneously declares non constat regarding the question of the nullity of a marriage which is objectively null, the judge obliges the pseudo-conjuges to continue a life of concubinage in opposition to the constitutive will of God, impeding them from exercising the fundamental right to contract a valid marriage.

The ecclesiastical judge is placed in the midst of a theological reality that is vital and operative. Should the declaration contrast with the essential truth established by God, it cannot help but be counterproductive on an ecclesiastical level of grace and of sanctification. From this flows a responsibility which I would call theological. It is a responsibility of the ecclesiastical judge before God.²⁸

²⁸"Dal momento che il matrimonio, per legge divina, è indissolubile, un qualsiasi concreto matrimonio [...] nella sua realtà sostanziale, cioè oggettiva, è valido o nullo indipendentemente dalla decisione del giudice ecclesiastico. Perciò, se il giudice sbaglia dichiarando nullo un matrimonio valido nella sua realtà esistenziale, 'scioglie' ciò che Dio stesso ha reso indissolubile, dichiara cioè nullo ciò che per volontà di Dio non è nullo, 'libera' le parti dagli obblighi dai quali non li può liberare [...]. Se, al contrario, erroneamente dichiara 'non constare' della nullità di un matrimonio in realtà nullo, obbliga, in opposizione alla volontà costitutiva di Dio, gli pseudo-coniugi a continuare la vita in concubinato ed impedisce loro di esercitare il diritto fondamentale a contrarre un valido matrimonio.

Il giudice ecclesiastico si intromette, quindi, in una realtà teologica, vitale ed operativa, e la sua dichiarazione, se contrasta con la verità esistenziale stabilita da Dio, non può essere che controproducente nel piano ecclesiale, nel piano dell' grazia e della santificazione. Di qui la

The objective truth can stand on its own without a declaration from a judge to validate it. As a matter of fact, any decision of a judge which is contrary to the truth damages the mission of the Church as well as the sanctity and indissolubility of the sacrament of marriage and injures the good of the souls of those who are wronged by such injustice.

The search for and protection of the truth in marriage nullity cases is more difficult due to the fact that truth is not mathematical or scientific, but rather refers to persons as they stand before God. While the investigation into a possible nullity may establish certain facts, the truth of the matter lies in their deeper meaning and interpretation in light of the relationship of the spouses.²⁹ The search for truth and coming to moral certitude in each case so as to render a decision (canon 1608)³⁰ was best described by Pope Pius XII when he stated:

Between the two extremes of absolute certainty and quasi-certainty or probability, is that moral certainty which is usually involved in the cases submitted to your court [...].

Sometimes moral certainty is derived only from an aggregate of indications and proofs, which taken

responsabilità, direi teologica, del giudice ecclesiastico davanti a Dio" (Z. GROCHOLEWSKI, "Aspetti", p. 499).

²⁹See COX, Procedural Changes, p. 321.

³⁰Cf. C. de DIEGO-LORA, "The Pronouncements of the Judge" in Code, 1983, pp. 995-996.

singly, do not provide the foundation for true certitude, but which, when taken together, no longer leave any room for reasonable doubt on the part of a person of sound judgment. [...] In this case, therefore, certainty arises from the wise application of a principle which is absolutely secure and universally valid, namely the principle of a sufficient reason.³¹

Absolute certitude would be impossible to attain in the investigation of possible nullity of marriage, while the use of probability alone could risk a violation of the truth about the validity or nullity of a particular marriage. The balance found in the concept of moral certitude arising from the facts presented in the case is not only more attainable, but is much more human and just.³²

The contentious nature of the marriage nullity process is the primary element in the Church's attempt to discover the objective truth of a situation and protect itself from abuse. As a Rotal judge wrote at the time:

A trial is of its very essence a controversy. I claim to have a certain right, and you deny it. You claim that I am bound by a certain obligation, and I deny it. [...] However, in Church courts today, trials seldom have to do with such matters. What is almost always at issue is rather the declaration of facts, indeed, the declaration of

³¹PIUS XII, Allocation to the Roman Rota, October 1, 1942, in AAS, 34 (1942), pp. 339-340 and in W.H. WOESTMAN, Papal Allocations, pp. 18-19.

³²Cf. C. de DIEGO-LORA, "De iudicis pronuntiationibus" in INSTITUTO MARTÍN DE AZPILCUETA, Commentario exegetico al Código de derecho canónico, [=Commentario], Pamplona, Ediciones Universidad de Navarra, S.A., 1995, vol. IV/2, pp. 1537-1550.

one very particular fact, namely, that a certain marriage has or has not been proved to be invalid.

There are those who contend that a trial or, if you will a judicial controversy, a formal claim by one party and denial by another before a judge with appropriate proofs and counter-proofs, is not the ideal method for developing safe and solid declarations of fact. They may be right. [...]

Be this as it may, history has contrived to make the People of God feel most secure in officially declaring certain important facts by means of a trial. Nor should this come as any surprise. For [...] those in authority [...] will generally and understandably believe that their decision is more likely to be accurate³³ than it might have been without the controversy.

Unfortunately, with the use of controversy there are some tragic side-effects which may not aid in the discovery of the truth in an expeditious manner. In the early Church, decisions were made in marriage cases "according to the depositions of the parties", but the fear of abuse escalated so that the "word of the parties was looked upon with suspicion."³⁴ In order to avoid unfounded suspicion and promote the dignity of persons, the Code now once again affords more probative value to the declarations of the parties, as was the case in the early Church (canons 1530-1538 and 1678-1680).³⁵

³³E.M. EGAN, "Appeal in Marriage Nullity Cases: Two Centuries of Experiment and Reform", in Monitor ecclesiasticus, 107 (1982), pp. 79-80.

³⁴See F. WANENMACHER, Canonical Evidence in Matrimonial Cases, Philadelphia, Dolphin Press, 1935, pp. 370-371.

³⁵See NELI, Introduction, p. 292.

3. Canonical equity

The administration of justice by judges, especially presiding judges, is more than a simple revelation of the truth, especially for Christians. It must be tempered with compassion and mercy reflecting the example of Christ. This value in canon law is known as canonical equity. Pope Paul VI spoke of it in relation to marriage nullity processes in this way:

Equity represents one of loftiest human aspirations. If societal life requires the determinations of human law, nevertheless the norms of this law, inevitably general and abstract, cannot foresee the concrete circumstances in which the laws will later be applied. Faced with this problem, law has sought to amend, to rectify, and even to correct the rigor of law. This is done through the operation of equity, which somehow embodies human aspirations for a better kind of justice.

In canon law, equity [...] is a characteristic of its precepts and the norm of their application; an attitude of mind and spirit that tempers the rigor of law. [...] Equity] here seeks a higher form of justice with a spiritual goal in mind.³⁶

Pope Paul indicated that there was to be a balance in the application of equity in canon law so that its use would not cause a disregard for the law and an abandonment of the

³⁶PAUL VI, Allocution to the Roman Rota, February 8, 1973, in AAS, 65 (1973), pp. 99-100 and in W.H. WOESTMAN, Papal Allocutions, pp. 118-119.

truth.³⁷ The higher form of justice attained through the proper application of equity underlying the law gives life, while strict adherence to the letter of the law can cause injury to the Church and its faithful.

The goal of a search for the truth and for canonical equity can be thwarted, however, in cases where there is an inability to obtain the required proof because of respondents who are non-cooperative or even hostile, or witnesses who fail to testify due to fear that the parties will learn the contents of their testimony, or who do not wish to become involved. Members of other Christian communities or those with no religious affiliation, called as witnesses or even as parties, who do not understand the process, can feel insulted or even hostile, claiming that the Church is simply invasive, asking questions which it has no right to ask since these matters are of a personal nature.

Finally, in several situations, the facts of the relationship are known to the parties alone and so cannot be verified by outside sources. In a number of these situations, then, the result of tribunal procedures is frustration, resentment and a charge that the Church is more interested in legal formalities than in justice or equity. The entire tenor of the process in marriage nullity cases with its citations,

³⁷Cf. *ibid.*, p. 103 and in W.H. WOESTMAN, Papal Allocutions, p. 122.

actions, exceptions, emphasis on defense and rights can lead people to react defensively and so actually impede the discovery of the truth and administration of justice by the presiding judge.³⁸

4. Salus animarum

"The purpose of the entire array of laws is to help the faithful in their spiritual life: what should be done because of duty from one's own conscience and a sense of responsibility, rather than by precepts."³⁹ The purpose of the law is to help in the salvation of persons so that they can more fully live their lives as Christians.⁴⁰

If canon law has its foundation in Christ, the Word incarnate, and hence serves as a sign and instrument of salvation, it does so only because of the work of the Holy Spirit, who imbues it with

³⁸Cf. NELI, Introduction, pp. 313-314; COX, Procedural Changes, pp. 338-340 and 360-362.

³⁹PAUL VI, Allocation to the Roman Rota, February 4, 1977, in AAS, 69 (1977), p. 151 and in W.H. WOESTMAN, Papal Allocations, p. 142.

⁴⁰"The correct conception of canon law places it into the order of salvation; it sees our whole legal system as part of the redeeming mission of the Church. [...] We often describe the nature and purpose of canon law by saying 'it must be pastoral.' I myself have used this expression many times. But to say that the laws, all laws in the Church, must have a redeeming quality might be an even better description of their special quality" (L. ORSY, "Integrated Interpretation; or The Role of Theology in the Interpretation of Canon Law", in Studia Canonica, 22 (1988), pp. 257-258).

power and strength. Thus, canon law must express the life of the Spirit, produce the fruits of the Spirit, and reveal the image of Christ.⁴¹

The concept of the law as a pastoral instrument has been stressed; pastoral solicitude is to permeate the Church's judicial activity,⁴² which is pastoral by nature.⁴³ Judges are, therefore, involved in a pastoral activity when called upon to adjudicate a complaint of nullity of marriage. It is pastoral in the potential for healing afforded by tribunal procedures to the individual and also to the ecclesial community of believers. A true pastoral spirit must strive to form the consciences of the faithful in light of the Gospel and the essential truth of each lived experience uncovered by careful investigation.⁴⁴

"To reduce the problem of unsuccessful marriages to declarations of nullity, a) presupposes a false diagnosis of the unfortunate situation; and b) is nothing other than a

⁴¹PAUL VI, Allocation to the Roman Rota, February 8, 1973, in AAS, 65 (1973), p. 97 and in W.H. WOESTMAN, Papal Allocutions, p. 117.

⁴²Cf. PAUL VI, Allocation to the Roman Rota, January 30, 1975, in AAS, 67 (1975), pp. 181-182 and in W.H. WOESTMAN, Papal Allocutions, pp. 130-131.

⁴³Cf. JOHN PAUL II, Allocation to the Roman Rota, February 17, 1979, in AAS, 71 (1979), p. 425 and in W.H. WOESTMAN, Papal Allocutions, p. 156.

⁴⁴Cf. GROCHOLEWSKI, "Aspetti", p. 502.

flight from the real pastoral issues."⁴⁵ An attempt at making law pastoral cannot be an excuse for abandoning the truth or even its spiritual value.⁴⁶

5. Ecumenism

The Church asserts jurisdiction over the marriages of all the baptized (canon 1671),⁴⁷ and so, in dealing with marriage nullity cases there is often an ecumenical dimension.⁴⁸ This has not been formally addressed in official sources, nor were ecumenical concerns explicitly included in the principles for the revision of the Code. Nevertheless, in promulgating the

⁴⁵GROCHOLEWSKI, "Current Questions", p. 222.

⁴⁶Cf. C. GUARINO, "Canonical and Theological Perspectives on Marriage, Divorce and Remarriage", in S. PRIESTER and J. YOUNG, (eds.), Catholic Remarriage: Pastoral Issues and Preparation Models, New York/Mahwah, Paulist Press, 1986, p. 52.

⁴⁷Cf. D. KELLY, "The Competent Forum" in G. SHEEHY, et al., (eds.), The Canon Law Letter & Spirit: A Practical Guide to the Code of Canon Law, [=SHEEHY, Letter & Spirit], Dublin, Ireland, Veritas Publications, 1995, p. 932, para. 3265; J. LLOBELL, "De foro competenti" in Commentario, vol. IV/2, pp. 1829-1833.

⁴⁸It could be noted that although the 1993 Directory for ecumenism addresses at length the question of mixed marriages and their celebration, no specific reference is made to nullity procedures and to their ecumenical significance; cf. PONTIFICAL COUNCIL FOR CHRISTIAN UNITY, "Directory for the Application of Principles and Norms on Ecumenism", March 25, 1993; English translation in Origins, 23 (1993-1994), pp. 129, 131-160, especially art. 143-160.

new Code, Pope John Paul II did refer to the Church's commitment to ecumenism which influenced the formulation of the present law.⁴⁹

Marriage nullity proceedings have an ecumenical dimension since the courts deal with members of other Christian churches and ecclesial communities and, at times, seek documentation or other evidence from these churches or communities. In spite of the lack of official attention to this aspect of tribunal ministry, ecumenical implications of marriage nullity procedures are somewhat broader than officially recognized.

The law has changed in marriage nullity procedures to allow other Christians and even non-baptized persons to impugn the validity of their marriage (canons 1476 and 1674). This removal of restrictions against non-catholics reflects an ecumenical sensitivity in marriage nullity procedures. All judges, especially presiding judges, must develop a deeper sensitivity to ecumenical concerns, particularly in the processing of marriage nullity cases.

Ecumenical values are not to be the determining factor in designing a procedural system for marriage nullity; however, a greater sensitivity to those concerns could help improve

⁴⁹JOHN PAUL II, Apostolic Constitution Sacrae disciplinae leges, January 25, 1983, in AAS, 75 (1983), pars II, p. xii.

legislation and inter-denominational relations.⁵⁰ To facilitate this, a wider consultation of other Christian and non-Christian communities could be an advantageous starting point giving those who are called to preside in marriage cases a more open perspective in which to situate decisions for or against marriage nullity.⁵¹

B. Rights to be protected in current marriage nullity trials

Procedural law must also be assessed on the basis of how well it fosters the substantive and procedural rights of people. Some of these rights shall now be considered,

⁵⁰The 1980 Synod of Bishops in proposition 14 had called for a study of the Orthodox approach to the reception of the Eucharist for those who were divorced and remarried. "Le Synode, dans son souci pastoral pour ces fidèles, souhaite qu'on se livre à nouvelle et plus profonde recherche à ce sujet, en tenant compte également de la pratique de l'Eglise d'Orient, de manière à mieux mettre en évidence la miséricorde pastorale" (LE 1980 SYNODE DES EVÊQUES, "Les 43 Propositions du Synode des Evêques sur la famille" in La Documentation Catholique, 78 (1981), p. 541). There has been no publication to date of such a study. This does not mean that the question has been dropped. Two very recent documents indicate that the question of reception of the Eucharist by the divorced and remarried is still being studied. Cf. JOHN PAUL II, Allocution to the Pontifical Council for the Family, January 24, 1997, "Welcoming the Divorced and Remarried" in Origins, 26 (1996-1997), pp. 583-584; PONTIFICAL COUNCIL FOR THE FAMILY, Plenary Meeting January 22-25, 1997, "Care of the Divorced and Remarried" in Origins, 26 (1996-1997), pp. 625-628.

⁵¹Cf. COX, Procedural Changes, pp. 344-345 and 374.

especially in relation to the presiding judge's responsibility to see that they are upheld and protected.

1. Personal rights

a) Dignity and respect

All people have the right to be treated with the respect that is in accord with human dignity, since all are created in the image and likeness of God.⁵² Lately, there has been more emphasis placed in canonical systems on the dignity and rights of individuals.⁵³ "The Church has always affirmed and promoted the rights of the faithful", and so "offers opportune juridical guarantees for protecting and safeguarding adequately the desired reciprocity between the rights and duties inscribed in the dignity of the person of the Christian faithful (christifidelis)."⁵⁴

⁵²Cf. GS, in AAS, 58 (1966), pp. 1025-1120, especially paragraphs 12, 15 and 16, pp. 1034, 1036-1037; English in FLANNERY, Vatican II, vol. 1, pp. 913-914, 915-917.

⁵³Cf. L. ORSY, Marriage in Canon Law: Texts and Comments, Reflections and Questions, Wilmington, Delaware, Michael Glazier, 1986, pp. 36-37.

⁵⁴JOHN PAUL II, Allocution to the Roman Rota, February 26, 1983, in AAS, 75 (1983), p. 555 and in W.H. WOESTMAN, Papal Allocutions, p. 177.

This balance between rights and duties is especially important in a society, such as ours, which appears to emphasize rights, but not duties. In practice this means that the credibility and good motives of the parties are to be presumed, barring any contrary evidence. Accordingly, the law now gives more credence to the confessions and other statements of the parties (canons 1536-1537)⁵⁵ and provides for the use of witnesses to support the credibility of the parties (canon 1679).⁵⁶ This respect for the natural dignity of the human person must be directed to rights rooted in the supernatural dignity of the Christian. One of these is the right to obtain the salvation of his or her soul.⁵⁷

b) The right to marry

There is a natural right to marry, rooted in human nature and in the divine plan of creation (canon 1058).⁵⁸ A serious

⁵⁵Cf. L. del AMO, "The Declarations of the Parties" in Code, 1983, pp. 955-956; T. DORAN, "De partium declarationibus" in Commentario, vol. IV/2, pp. 1299-1302.

⁵⁶Cf. D. KELLY, "Proofs" in SHEEHY, Letter & Spirit, p. 938, para. 3284; J. CARRERAS, "De probationibus" in Commentario, vol. IV/2, pp. 1894-1896.

⁵⁷Cf. J.J. GARCÍA FAILDE, J.J., "Principios inspiradores del proceso de nulidad matrimonial", in Ius Canonicum, 27 (1987), p. 156.

⁵⁸Cf. J. HERVADA, "Marriage" in Code, 1983, p. 661; J. BAÑARES, "De matrimonio" in Commentario, pp. 1063-1071.

injustice can be done if a person is truly free to marry and is denied the exercise of the right. If a marriage is objectively null, but a judge erroneously decides a case as non constat, then the parties are either forced to live in concubinage or impeded from exercising their fundamental right to marry.⁵⁹ The task of the presiding judge, as well as of all other judges in a tribunal is to ascertain the status of persons and declare whether or not they are free to marry.

In the Christian context, marriage exists for the good of the spouses as well as for that of the community.⁶⁰ While the law proclaims the right to marry of those who are not prohibited,⁶¹ there are, however, certain restrictions on the exercise of that right which may be found in the law itself, as when diriment impediments exist (canons 1073, 1083-1094), or as a result of a judicial sentence.⁶² The right to marry

⁵⁹See GROCHOLEWSKI, "Aspetti", p. 499.

⁶⁰Cf. T.P. DOYLE, "The Individual's Right to Marry in the Context of the Common Good", in Studia Canonica, 13 (1979), p. 245.

⁶¹Cf. D. KELLY, "Marriage" in SHEEHY, Letter & Spirit, p. 575, para. 2068; J. BAÑARES, "De matrimonio" in Commentario, pp. 1065.

⁶²For more information on the restrictions which may be placed upon the right to marry after a declaration of nullity of marriage, cf. J. HOPKA, "The Vetitum and Monitum in Matrimonial Nullity Proceedings", in Studia Canonica, 19 (1985), pp. 357-399.

remains, but the exercise of the right may be impeded for the good of the community or even that of the individual.

c) The right to spiritual goods

The Christian faithful have a right to the spiritual goods of the Church (canon 213).⁶³ Sacred ministers are not to refuse the sacraments to those who are properly disposed and not prohibited by law from their reception (canon 843 §1).⁶⁴ There is a definite spiritual hunger which motivates many to approach the tribunal so that an authoritative declaration can be made whether or not people who are divorced and remarried outside of the Church may once again be admitted to Holy Communion. The presiding judge is primarily responsible for the protection of this right.

⁶³Cf. J. HERVADA, "The Obligations of Christ's Faithful" in Code, 1983, pp. 192-193; D. CENALMOR, "De omnium christifidelium obligationibus et iuribus" in Commentario, vol. II, pp. 91-98.

⁶⁴Cf. D. KELLY, "The Sacraments" in SHEEHY, Letter & Spirit, p. 463, para. 1653; J. MARTÍN de AGAR, "De sacramentis" in Commentario, vol. III, pp. 422-426.

d) The right to follow one's own conscience

Another personal right which is part of the dignity of being human is the right to follow one's own conscience.⁶⁵ With each right comes a corresponding duty. The Church has the right and the obligation to proclaim the truth so that by this activity the faithful are assisted in the formation of their conscience.⁶⁶

Conversely it is the duty of the faithful to listen to and to take to heart the teachings of the Church in the formation of their consciences.⁶⁷ It is not uncommon for there to be a discrepancy between decisions made in conscience in the internal forum and the presumed legal status of persons in the external forum. The law attempted to coordinate, as far as possible, these two fora so as to preclude conflict between

⁶⁵This right was strongly asserted by the Second Vatican Council; cf. SECOND VATICAN COUNCIL, Declaration on Religious Liberty, Dignitatis humanae, [=DH], December 7, 1965, in AAS, 58 (1966), especially paragraphs 1 and 2, pp. 929-931; English in FLANNERY, Vatican II, vol. 1, pp. 799-801.

This dignity of conscience was also referred to in GS, in AAS, 58 (1966), pp. 1025-1120, especially paragraph 16, p. 1037; English in FLANNERY, Vatican II, vol. 1, pp. 916-917.

⁶⁶Cf. JOHN PAUL II, Allocution to the Roman Rota, January 28, 1994, in L'Osservatore Romano, English Edition, February 2, 1994, p.2 and in W.H. WOESTMAN, Papal Allocutions, p. 230.

⁶⁷Cf. DH, in AAS, 58 (1966), especially paragraphs 13 and 14, pp. 939-940; English in FLANNERY, Vatican II, vol. 1, pp. 809-811.

them.⁶⁸ However, it is impossible to eliminate completely all conflict between the internal and external fora, particularly in marriage nullity cases. Judges in tribunals must respect the God-given human right of following one's own conscience, especially that of the parties in a marriage nullity case.⁶⁹

In procedural law, keeping in mind the objective truth of whether a marriage is valid or not, some emphasis has been placed on the conscience of the judges who decide on the validity or nullity of a particular marriage, as can be seen in the possibility of a judge to have a dissenting opinion presented to the appeal tribunal (canon 1609 §4).

However, it must be noted that, at times, the process tends to ignore the present spiritual state of the parties concerned. Those who have maturely dealt with their own responsibilities in a marital breakdown are treated in almost exactly the same manner as those who have taken little or no time to reflect on their state in life.⁷⁰ The absence of an

⁶⁸This is contained in the second principle for the revision of the Code of Canon Law; cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Communicationes, 1 (1969), p. 79.

⁶⁹Cf. JOHN PAUL II, Allocution to the Roman Rota, January 26, 1989, in AAS, 81 (1989), pp. 922-927 and in W.H. WOESTMAN, Papal Allocutions, pp. 204-208.

⁷⁰See COX, Procedural Changes, p. 370.

explicitly spiritual dimension in the procedural law of the Church is somewhat disconcerting.⁷¹

2. Procedural rights of individuals

Procedural rights exist to guarantee that other substantive rights are protected through an exercise of the right to plead and to respond. Among these procedural rights we could mention the right to impugn the validity of a marriage (canons 1674 and 1675), the right of defense (canons 1476, 1481 §1, 1491, 1494, 1511, 1513 §3, 1554-1555, 1598, 1601-1602, 1620 7°), the right to adequate representation and counsel (canon 1481) and the right to challenge a decision when aggrieved by it (canons 1614, 1620-1623, 1626, 1628, 1630 §1, 1664, 1687 §2).⁷²

The right of defense has been strongly protected and elaborated upon.⁷³ However, there have been instances where the exercise of the rights of one or the other party has even

⁷¹Cf. G. LESAGE, "Pour une rénovation de la procédure matrimoniale", [LESAGE, "Pour une rénovation"], in Studia Canonica, 7 (1973), pp. 259, 262-264 and 268.

⁷²Cf. NELI, Introduction, pp. 275-286 and 310-311.

⁷³Cf. R. MCGUCKIN, "The Respondent's Rights in a Matrimonial Nullity Case", in Studia Canonica, 18 (1984), pp. 457-481. In this article there are ten specific rights identified in procedural law for respondents to defend their rights (cf. pp. 462-463). Cf. also F. DANEELS, "The Right of Defense" in Studia Canonica, 27 (1993), pp. 77-95.

come to the point of impeding justice. There is not only one side in a case, but rather "both this petitioner and this respondent have rights. To favour one party against another is to deny justice."⁷⁴

There are adequate legal provisions to protect a contentious respondent. Those who wish to oppose a declaration of nullity have every opportunity to vindicate their rights, including appeals, complaints of nullity of a sentence and petitions for a rehearing of the case. Indeed, it has been argued that there is an over-emphasis on protecting the respondent.

What is there to defend in a canonical action? [...] There is nothing to defend but for the most part there is an opportunity to satisfy a longing for revenge or for a liberation from suspicious, paranoid fears. Such motives as anger and paranoid fear should not force us into an elaborate system of appeal which from experience has produced very little if anything. It appears that we have over-emphasized this "right of defense" to encourage defendants to appeal rather than to cooperate that we might gather all of the facts to give a just, fair and final decision.⁷⁵

⁷⁴R. MCGUCKIN, "The Respondent's Rights in a Matrimonial Nullity Case", in Studia Canonica, 18 (1984), p. 477.

⁷⁵M.J. REINHARDT, "Relationships with the Roman Dicasteries", in Proceedings of the Canon Law Society of America, 41 (1979), p. 87.

There have been, at times, unfounded allegations of denial of rights which have been presented to our courts.⁷⁶ The problem of unfounded and lengthy appeals and the resulting possibility of a lack of justice was part of the theme in the 1996 address of Pope John Paul II to the Roman Rota.

In this overall framework, it thus seems contrived to have recourse to complaints based on alleged injuries of the right of defense as well as to attempt to apply to the judgment of marital nullity procedural norms which are valid in other sorts of procedures but are completely inappropriate to cases that never become an adjudged matter (res iudicata).

These principles must be elaborated and translated into clear judicial practice, especially through the jurisprudence of the tribunal of the Roman Rota, so that violence is not done to universal and particular law, nor to the rights of parties legitimately admitted to judgment. They also call for corrective measures by the Legislator or for specific norms for the application of the Code, as occurred in the past (cf. CONGREGATION FOR THE SACRAMENTS, instruction, Provida Mater Ecclesia, August 15, 1936).⁷⁷

There has been some progress in the protection of rights for both the petitioner and the respondent in marriage nullity cases, yet there remain difficulties which must be addressed if justice is to be afforded all who approach the Church and its courts.

⁷⁶Cf. K.J. RUZICK, "Competence, Nullity of the Acts, and the Appeals Process: A Look at the Procedural Law of the New Code", in Proceedings of the Canon Law Society of America, 44 (1982), p. 112.

⁷⁷JOHN PAUL II, Allocution, January, 1996, p. 5.

The personal rights of parties in marriage nullity cases are better protected by the requirement of the publication both of the acts (canon 1598) and of the sentence (canon 1614). There is now a relative parity between the defender of the bond and the advocates for the parties (canon 1678).⁷⁸ Finally, judges are bound to secrecy in contentious cases (such as marriage cases) and may bind others to the same (canon 1455).⁷⁹

These innovations are laudable; however, procedural law is still oriented toward the protection of the institution of marriage and not of the individual rights. "What is the right balance between protecting the institution and respecting the person?"⁸⁰ "Is the tribunal system satisfactory?"⁸¹ Orsy presents these arguments against tribunals as they now exist: 1) the system was designed for an historical situation vastly different from today; 2) there are serious questions as to

⁷⁸Cf. L. del AMO, "Proofs" in Code, 1983, pp. 1035-1036; J. CARRERAS, "De probationis" in Commentario, vol. IV/2, pp. 1889-1893.

⁷⁹Cf. P. BONNET, "De officio iudicum et tribunalis ministrorum" in Commentario, vol. IV/1, pp. 940-943; J.A. BARRY, "The Duties of the Judges and the Other Officers of the Tribunal" in SHEEHY, Letter & Spirit, pp. 843-844, para. 2926-2928.

⁸⁰L. ORSY, Marriage in Canon Law: Texts and Comments, Reflections and Questions, Wilmington, Delaware, Michael Glazier, 1986, p. 262.

⁸¹Ibid., p. 262.

whether or not equal justice is provided for the faithful since the availability and practice of tribunals remain "uneven"; 3) the resources required by effective tribunals are tremendous and may siphon off energy from other ministries leading to an imbalance in pastoral care.

On the other hand, the present system of tribunals may be viewed positively in that: 1) the procedure's primary purpose is to protect the common good and the institution of marriage, and thus may facilitate the discovery of the truth; 2) tribunals are instruments for developing the law and jurisprudence; and 3) while tribunals should be pastoral, the requirements of objective judgment are different from the pastoral care to the divorced which should be addressed in other ways.⁸²

The tribunal system as it is contains some unsatisfactory elements: 1) the system favours the institution over the individual with carefully built-in devices to protect the 'possibly' valid marriage with no parallel provisions to protect the 'possible' right of the individual to marry. At the same time, when tribunals are inefficient, for whatever reason, the right of the person to obtain justice within a reasonable time is jeopardized. 2) Tribunal procedures were conceived for the Western world with long-standing legal

⁸²See *ibid.*, pp. 284-285.

traditions and easy access to courts. This is not true in regions where communications are difficult, people are poor, there are few canon lawyers, or, where governments interfere in Church affairs. In these situations it may be virtually impossible to establish or maintain an efficient tribunal due to a lack of resources or 'qualified' personnel.⁸³ Canon law offers little help to those who may live under such conditions. 3) When cases are presented to a tribunal, the parties need understanding, patience, compassion, guidance and an experience of God's saving power. In short, they approach the tribunal for healing. The system does not respond to these needs; rather the parties are exposed to an adversarial litigation which was not designed to heal. While many presiding judges and other tribunal officials do their utmost to help, this is the result of their own initiative, and not by design of procedural law.⁸⁴

The question of the cultural aspect of the tribunal system has been addressed by another author indicating that culture also has an effect on the applicability of certain

⁸³See E.J. DILLON, "De processibus: An Analysis of Some Key Provisions", in Proceedings of the Canon Law Society of America, 42 (1980), p. 165; cf. also J.H. PROVOST, "Intolerable Marriage Situations Revisited", in The Jurist, 40 (1980), pp. 157-160.

⁸⁴Cf. ORSY, Marriage in Canon Law: Texts and Comments, Reflections and Questions, Wilmington, Delaware, Michael Glazier, 1986, pp. 286-287.

laws and procedures used in the tribunal.⁸⁵ As a result of these deficiencies and the imbalance toward the protection of an institution over a person, at times the rights of individuals may be sacrificed or significantly impaired.⁸⁶

3. Common good and rights of persons

"Justice is closely connected with peace and public order."⁸⁷ Law provides a balance between rights and duties, between liberty and responsibility, and between the dignity of the individual and the requirements of the common good. An imbalance which is destructive to the fabric of society and ultimately to the individuals who make it up is caused by an over-emphasis on either the individual or on the community.⁸⁸

In any society there are bonds established which hold the community together. In the Church these bonds can be described as constituting a communio fidelium where the good of persons

⁸⁵Cf. A. MENDONÇA, "Recent Rotal Jurisprudence from a Sociocultural Perspective", in Studia Canonica, 29 (1995) pp. 29-83, 317-355.

⁸⁶Cf. COX, Procedural Changes, pp. 352-360.

⁸⁷Z. GROCHOLEWSKI, "Problemi attuali dell'attività giudiziaria della Chiesa nelle cause matrimoniali", in Apollinaris, 56 (1983), p. 147.

⁸⁸Cf. PAUL VI, Allocution to the International Congress of Canonists, January 20, 1970, in AAS, 62 (1970), p. 109.

and that of the Church are both fostered. If there are difficulties, then, as Archbishop Grocholewski notes,

the concept of the Church as a communio fidelium presumes obviously that the bonds of communion among the Christian faithful - if they have been broken through a violation of rights and/or conflict - must be restored as soon as possible for the good of all the ecclesial community. Therefore, it is the duty of the Church to provide means appropriate for the restoration of the communion. Canonical procedural law properly attempts to furnish such means.⁸⁹

Presiding Judges, especially in marriage tribunals, are actively engaged in an attempt to restore to communion those of the community who are outside of it, or who feel marginalized by divorce. This mission is not only for the good of the individual person, but also for the whole community of the Church. The goal or "finality" of the administration of justice is directed to the healing of communio in all of its aspects.

This finality, therefore, must not be limited to respect for the person nor to the defense of the rights of the faithful, but it extends substantially further. The administration of justice in the Church, in fact, is directed toward the healing of the wounded "communio" in order to render efficacious the realization of the specific and individual vocation of each member of the

⁸⁹"Il concetto della Chiesa come communio fidelium postula ovviamente che i vincoli di comunione tra i fedeli - qualora fossero stati intaccati dalla violazione dei diritti e da conflitti - vengano quanto prima ripristinati per il bene di tutti la comunità ecclesiale, e che quindi il diritto della Chiesa fornisca i mezzi idonei per il ripristino della comunione. Il diritto processuale canonico cerca proprio di fornire tali mezzi" (GROCHOLEWSKI, "Aspetti", p. 492).

faithful. [...] In other words, the activity of ecclesiastical tribunals is directed in substance to the realization of the Church, to render more operative the salvific word of God.

Thus, for example, in marriage nullity cases [...] one is not dealing merely with safeguarding the rights of the presumed spouses (this is evident in the fact that a marriage can be declared null even against their will). Above all, one is dealing with safeguarding and promoting the sacramental reality of marriage which is a font of divine grace as well as a means of sanctification of the spouses and of the Church.⁹⁰

There is an interplay between the common good and that of the person which is complementary and mutually supportive.

The common good of society, which is the totality of those conditions of social life by which people are able to achieve their own perfection more fully and easily, consists primarily in the protection of the rights and duties of the human person. [...]

⁹⁰"Detta finalità non va, quindi, limitata al rispetto della persona e alla difesa dei diritti dei fedeli, ma sostanzialmente si estende oltre. L'amministrazione della giustizia nella Chiesa è infatti diretta a risanare la "communio" lacerata, a rendere fruttuosa la realizzazione della propria vocazione specifica da parte dei singoli fedeli [...]. Con altre parole, l'attività dei tribunali ecclesiastici è diretta in sostanza alla realizzazione della Chiesa, a rendere più operante la parola salvifica di Dio. Così, ad esempio, nelle cause di nullità di matrimonio [...] non si tratta semplicemente di salvaguardare i diritti dei presunti coniugi (tanto più che il matrimonio può essere dichiarato nullo anche contro la loro volontà), ma soprattutto si tratta di salvaguardare e di promuovere la realtà sacramentale del matrimonio che è fonte di grazia divina nonché mezzo di santificazione dei coniugi e della Chiesa" (Ibid., pp. 494-495).

The protection and promotion of the inviolable rights of the human person is an essential duty of every civil authority.⁹¹

In the final analysis, the Church best serves the common good of its members in so far as it is true to its mission of attempting to provide for the salvation of souls by the proclamation of the Gospel. The salvation of each member is worked out in the context of community where the sacraments become essential means to personal encounters with Christ and meaningful channels for social interaction in the community of the Church.⁹²

The Church must be seen to practice what it preaches regarding the Gospel message on marriage. "The dramatic divorce rate, as well as the rapid increase of nullity petitions presented to tribunals has resulted in the realization that the Church must meet the challenge with a renewed interest in the preparation for the reality of the sacrament of marriage."⁹³ The common good and the good of the person are achieved when there is adequate freedom afforded those who live in a well-ordered society protected by just laws. Judges in ecclesiastical courts, therefore, are always

⁹¹DH, in AAS, 58 (1966), especially paragraph 6, pp. 933-934; English in FLANNERY, Vatican II, vol. 1, pp. 803-804.

⁹²See T.P. DOYLE, "The Individual's Right to Marry in the Context of the Common Good", in Studia Canonica, 13 (1979), p. 245.

⁹³Ibid., p. 248.

to remain faithful to Church doctrine, especially in marriage cases.⁹⁴ The protection of personal rights should not diminish ecclesial communion since the Church has been described as the sacrament of unity.⁹⁵

There are some tensions evident between personal rights and the common good. The law tends to favour the common good (canon 124 §2),⁹⁶ and, in the case of marriage, to favour the bond (canon 1060)⁹⁷ over personal liberties.⁹⁸ The law should both protect the rights and foster the salvation of those whose marriages have failed and may be null, while, at the same time, proclaiming and maintaining marital permanence. This may not always be possible, yet it is clear that with the legal presumptions of the Code (canons 124 §2 and 1060), which are an attempt to preserve the credibility of the Church's

⁹⁴See JOHN PAUL II, Allocation to the Roman Rota, February 8, 1983, in AAS, p. 558 and in W.H. WOESTMAN, Papal Allocutions, p. 179.

⁹⁵See JOHN PAUL II, Allocation to the Roman Rota, February 8, 1983, in AAS, 75 (1983), p. 554 and in W.H. WOESTMAN, Papal Allocutions, p. 178.

⁹⁶Cf. M. THÉRIAULT, "De actibus iuridicis" in Commentario, vol. I, pp. 819-825; A. McGRATH, "Juridical Acts" in SHEEHY, Letter & Spirit, pp. 71-72, para. 255-258.

⁹⁷Cf. J. BAÑARES, "De matrimonio" in Commentario, vol. III, pp. 1083-1089; J. HERVADA, "Marriage" in Code, 1983, p. 661.

⁹⁸There were others who argued against the presumption of law as it stands and more for personal liberties. For a better understanding of the debate, cf. C.A. COX, Procedural Changes, pp. 126-131.

teaching on marital permanence, the common witness of the Church is favoured over individual rights or liberties.

There is a serious question as to whether or not the present tribunal system adequately reflects a consistent position on marriage in the Church. For instance, some inconsistency is found in the ease with which one may obtain a decision with regard to the validity of a marriage that lacked adequate form in contrast to the demands of a formal process.

The scandal is intensified further when we consider that a couple who marry "in the Church" to begin with and whose marriage goes on the rocks are caught unless an annulment can provide a way out. But another couple, equally fragile, who chose to marry outside church law and whose "attempted" marriage collapses can march down the church aisle again with other partners. What answer can theology give to people who claim that this is manifest injustice that the law-abiding couple is penalized unnecessarily and unmercifully?⁹⁹

When one considers the institution of dissolution of the bond¹⁰⁰ along with the formal nullity process, the documentary process and various administrative processes, what kind of witness about marriage is actually given? The question is not strictly a comparison of the various processes used,

⁹⁹D.J. DOHERTY, "Marriage Annulments: Some Theological Implications", in The Jurist, 38 (1978), p. 187.

¹⁰⁰The so-called Pauline privilege based on 1 Cor. 7: 12-15, and the Petrine privilege based on the power of the keys of the kingdom of God.

but rather focuses on what sort of witness is presented regarding the dignity and indissolubility of marriage.

The formal process, itself, can be seen to give a contradictory sign regarding marriage and lose credibility "if the Church itself blesses marriages, and then, sometimes after years of living together, declares many hundreds of those same marriages null."¹⁰¹ There is always the danger that many will conclude that the nullity process is merely a corollary to the secular system of divorce. The process would then become a means of extricating oneself from a broken marriage rather than a search for the truth regarding the validity of the bond even though the marriage has broken down. The answer is not to limit arbitrarily the number of formal declarations of nullity since a true marriage is a source of grace.¹⁰²

II. PRESIDING IN MARRIAGE NULLITY CASES: ALTERNATIVE PROPOSALS

During the period of the revision of the Code, there were numerous criticisms of the tribunal system -- and, by implication, of those who were called to preside in them -- as an effective means to deal with marriage nullity questions.

¹⁰¹GROCHOLEWSKI, "Current Questions", pp. 226-227.

¹⁰²See *ibid.*, p. 223.

There had been and still is some question as to whether or not marriage cases should be classified as contentious trials. This classification has led to being tied to antiquated concerns which are now adequately addressed by secular law.

Experience taught that, for the most part, those who sought nullity of marriage were seeking reconciliation with the Church and a remedy for conscience, not a further confrontation between themselves or even the vindication of rights.¹⁰³ There is also concern that the evangelical values of the Church are not reflected in tribunals or presiding judges and that there is too much emphasis on the protection of institutional values which does not ultimately protect the Church or the dignity of persons.

Finally, there is also some concern about the imposition of a Roman legal system on all societies and cultures which may end up being counterproductive. The procedural system of the Church in dealing with marriage nullity, while appropriate in its time, is no longer adequate to serve the Church's current legal and pastoral needs.¹⁰⁴

The classification of marriage nullity cases as contentious was forcefully challenged by Germain Lesage prior

¹⁰³See T. GREEN, "The American Procedural Norms - An Assessment", in Studia Canonica, [=GREEN, "An Assessment"], 8 (1974), p. 341.

¹⁰⁴Cf. COX, Procedural Changes, pp. 376-382.

to the 1983 Code. According to him there was a need to "undertake a profound revision of the rules of procedure by replacing the traditional system based on the 'conflict of rights' with a method inspired by the 'search for the truth'." ¹⁰⁵

The judicial process has for its purpose the resolution of a dispute between adversaries; thus by its nature it is "contentious". It puts two parties (or enemies) in opposition, engaged in a struggle which leaves a victor and a vanquished on the field of battle.

It is hard to see how a process thus understood is justified in a case involving the sacramental order, where it is essentially a matter of knowing the truth about a fact: the matrimonial consent, in which there is generally no bad will, nor victimizer nor victim. ¹⁰⁶

This whole approach seems "strange" for the Church which is to be inspired by the Gospel. The use of a "quasi warrior" strategy in the sacramental forum with the parties immersed in

¹⁰⁵ "Il semble impérieux d'effectuer une révision profonde des règles de procédure, en remplaçant le système traditionnel, fondé sur le «conflit de droits», par une méthode inspirée de la «vérité des faits»" (LESAGE, "Pour une rénovation", p. 254).

¹⁰⁶ "Le procès judiciaire a pour fin de résoudre un litige entre adversaires; par nature, il «est donc contradictoire». Il met en opposition deux parties, ou deux ennemis, engagés dans une lutte qui laissera sur le champ de bataille un vainqueur et un vaincu.

On voit mal comment un procès ainsi compris se justifie dans une cause d'ordre sacramentel, où il s'agit essentiellement de connaître la vérité sur un fait: le consentement matrimonial, dans lequel il n'y a généralement aucun mauvais vouloir, ni bourreau ni victime" (ibid., p. 256).

"juridic combat trying to conquer an adversary" is inappropriate to the healing mission of the Church.¹⁰⁷ Therefore, it was contended that the process involving a conflict of rights should be replaced with a process of investigation into the authenticity of marital consent.¹⁰⁸

There were others who also concluded that the process was too strongly based on a "conflict of rights" model.¹⁰⁹ This model made sense in its original historical context and in places where ecclesiastical judgments had civil and economic implications. Yet "an adversary model seems inappropriate in the sacramental arena where the basic issue is discerning the presence or absence of marital consent and/or capacity."¹¹⁰

During the revision process, there were other reports and recommendations submitted by the Faculty of Canon Law at Saint Paul University, the Canon Law Society of Great Britain and Ireland, the Canon Law Society of America, the Canadian Canon Law Society, the Canadian Conference of Catholic Bishops, the New Zealand Catholic Bishops Conference and the Inter-

¹⁰⁷Ibid., pp. 263-264.

¹⁰⁸See *ibid.*, pp. 263-264.

¹⁰⁹Cf. F.G. MORRISEY, "Procedural Law: The State of the Question", in Proceedings of the Canon Law Society of America, 40 (1978), pp. 54-55.

¹¹⁰T. GREEN, "A Living Jurisprudence", in Concilium, 107 (1977), p. 50.

Episcopal Conference meeting in Dublin, Ireland.¹¹¹ Even the coetus for the revision of procedural law noted:

Nearly everywhere canonical procedural law is used almost exclusively for marriage cases. However, in these days the conviction grows that the judicial process is less apt for deciding about a fact as unique as marriage, in which the parties cannot really be considered as "adversaries" opposing one another in a contentious undertaking.¹¹²

In the end, marriage cases remained as a contentious process with the reaction of some canonists reflecting disappointment due to the restrictions this placed on the development of a genuine response to questions of marriage nullity. The decision was seen as an "unfortunate and apparently artificial arrangement, which seems to favour the system over the needs of people."¹¹³

Some interesting questions were raised concerning the 'balance' set by procedural law. There appears to be no balance since

¹¹¹For more information on the reports sent to the commission for the revision of the Code in response to the 1976 schema, cf. COX, Procedural Changes, pp. 148-150.

¹¹²"Fere ubique ius processuale canonicum unice pro causis matrimonialibus adhibetur, dum in dies crescit persuasio viam iudiciariam esse minus aptam ad decidendum de facto tam peculiari quod est matrimonium, in quo partes non sunt considerandae tamquam 'adversariae', in lite contentiosa sibi invicem oppositae" (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Communicationes, 10 (1978), p. 211).

¹¹³L.G. WRENN, Procedures, Washington D.C., Canon Law Society of America, 1987, p. 9.

the problem is that the whole tone of a contentious process is wrong for a marriage case, especially an open-and-shut one that is completely uncontested, and all the tinkering in the world is not going to correct that problem. True balance is never achieved in that way.¹¹⁴

The solution is not to be found in another Provida Mater which essentially "turned out to be an exquisitely crafted non-solution,"¹¹⁵ but rather in a new system of procedural law.

This does not mean, of course, that the great wisdom to be found in the Church's traditional process would be ignored. But it does mean that we could start with a clean slate, free of any artificial encumbrances imposed from without.

To draft a complete procedural law from start to finish with only marriage cases in mind would be no easy task. Such a law would have to achieve over and over again that often elusive and delicate balance between all those competing values and sometimes seductive extremes that pervade tribunal work.¹¹⁶

It was apparent that there was and is a need for some sort of differentiated procedure for marriage nullity cases which would be juridic and possibly even judicial, but certainly not contentious.

On the other hand, some canonists felt that, since there were three polarized approaches proposed for the revision of procedural law, namely: 1) a radical call to abandon entirely

¹¹⁴L.G. WRENN, "In Search of a Balanced Procedural Law for Marriage Nullity Cases", in The Jurist, 46 (1986), p. 621.

¹¹⁵Ibid., p. 622.

¹¹⁶Ibid.

any procedures as contrary to the Gospel, 2) a call to keep a process, but not a contentious one, 3) a call to retain the traditional process but reform it, the best choice was the third option since it had served the Church well for so long.¹¹⁷ Others felt that there is no real difficulty with an adversarial approach for marriage nullity and that this may be an adequate means of discovering the truth.¹¹⁸

Likewise, during the revision process, there was criticism over the fact that the system was designed to meet the needs of a past age and so is presently "unjust" and "inherently artificial and unreal",¹¹⁹ so that "very often the law is not constructed for the good of the people, but for the good of the institution."¹²⁰ The tension between the good of the person and the good of the institution is one of the main questions that needs to be examined.¹²¹ It is still not

¹¹⁷See J. OCHOA, "Il 'De processibus' secondo il Nuovo Codice", in La nuova legislazione canonica, pp. 365-367.

¹¹⁸Cf. L. ORSY, "The Function of Ecclesial Decision: A Theological Evaluation of Marriage Tribunals", in Concilium, 87 (1973), p. 43; cf. also E.M. EGAN, "Appeal in Marriage Nullity Cases: Two Centuries of Experiment and Reform", in Monitor ecclesiasticus, 107 (1982), pp. 79-80.

¹¹⁹S.J. KELLEHER, Divorce and Remarriage for Catholics?, Garden City, New York: Doubleday, 1973, p. 11.

¹²⁰Ibid., p. 32.

¹²¹Cf. J. HERTEL, "Save the Bond? or Save the Person?", in America, 118 (February 17, 1968), p. 217.

certain that the institution of marriage is being preserved by the present procedural law.¹²²

Obviously, these tensions are faced most directly by presiding judges who are entrusted with the implementation, adaptation and protection of the Church's procedural law in particular cases. It is in the application of law to a specific case that the presiding judge is most often perceived as either saviour or villan.

There were other submissions to the Code Commission from various sources. These proposals would have resulted in a system that is essentially the same as is presently in place, except that some of the contentious attitudes and approaches would have been eliminated.¹²³ However, even these proposals were not accepted by the Commission. What are some practical possibilities? We shall now examine them.

A. The pastoral review board

One of the best proposals which deserves another look and could well become the basis for a different or even parallel procedural law for marriage is that put forward by Germain

¹²²Cf. J.F. BRESNAHAN, "Problems of Marriage and Divorce", in America, 118 (May 25, 1968), p. 708.

¹²³For a detailed explanation of these proposals and what they mean, cf. COX, Procedural Changes, pp. 170-176.

Lesage. He would have completely avoided all aspects of a contentious trial in marriage cases, but would have retained a juridical approach while moving away from a judicial solution. There was a tendency in his approach to move more towards an administrative process, as in canonization and laicization procedures, and away from a judicial process.¹²⁴ The process was to be "pastoral" in that it was to be a service oriented to fostering the salvation and spiritual fulfilment of persons, as well as maintaining a search for the truth.¹²⁵

The role of the matrimonial process is not so much to resolve a personal or interpersonal conflict as it is to search for the truth of the fact which is at the origin of the unhappy situation: the matrimonial consent as it was exchanged. [...] The first goal of a marriage case is to discover if it is possible to permit a person whose marriage has failed to remake his or her life with another spouse. [...] The search for proof should not be obscured or hindered by any other consideration than by the search for truth.¹²⁶

¹²⁴See LESAGE, "Pour une rénovation", pp. 267-268.

¹²⁵See *ibid.*, p. 257.

¹²⁶"Le rôle du procès matrimonial n'est pas tant de résoudre un conflit personnel, ou interpersonnel, que de rechercher la vérité sur le fait qui est à l'origine de la situation malheureuse: le consentement matrimonial tel qu'il a été échangé. [...]"

Le premier but d'une cause matrimoniale est de découvrir s'il est possible de permettre à une personne, dont le mariage est une faillite, de refaire sa vie avec un autre conjoint. [...]"

La recherche de la preuve ne doit être obscurcie ou retardée par aucune autre considération que celle de la vérité" (*ibid.*, p. 260). Cf. D. STAFFA, "De natura pastoralis

The judicial formalities would be replaced because judicial instruction of cases was not necessarily in harmony with the spirit of fraternity or evangelical simplicity. Judicial instruction was, after all, a secular process with an esoteric vocabulary, a set of complex rules for battle strategy which involved a biased confrontation.¹²⁷ The primary function of the presiding judge in this process would be the discovery of the truth so as to clarify with authority the freedom of the parties to remarry in the Church.¹²⁸

An adequate renewal of the marriage process, [...] would be to replace the present process founded on a "conflict of rights," with an investigation founded on the truth of the facts relevant to the matrimonial consent in the case. In the place of a "judicial tribunal" would be a "study board" or a "research group," which would scrutinize the validity of the marriage from a truly pastoral point of view, all in keeping with a juridical character in a way so as not to betray the rights, even temporal ones, of the parties.¹²⁹

administrationis iustitiae in Ecclesia" in Periodica, 61 (1972), p. 18.

¹²⁷See LESAGE, "Pour une rénovation", p. 262.

¹²⁸See *ibid.*, p. 260.

¹²⁹"Une rénovation adéquate du procès de mariage [...] pourrait être de remplacer le procès actuel, portant sur un «conflit de droits», par une enquête portant sur la vérité des faits relatifs au consentement matrimonial mis en cause. Au lieu d'un «tribunal judiciaire», on aurait un «service d'étude», ou un «bureau de recherche», qui scruterait la validité du mariage sous un angle vraiment pastoral, tout en gardant un caractère juridique, de façon à ne pas trahir les droits, même temporels, des parties" (*ibid.*, pp. 265-266).

Therefore, according to Lesage's proposal, the 'inquiry board' would be marked by a commitment to justice, team work and a minimizing of unnecessary formalities. Above all, there would have to be a dedication to the detection of the truth and a practice of Christian charity.¹³⁰

The current judicial process, on the other hand, is still conventional and artificial, marked at times by coldness due to the legal terminology and a polemical approach, intimidating because of the parallels to the secular courts, with prohibitive limitations and formalities which tend to give the impression that minutiae of procedure are more important than the truth, with serious risks of a denial of rights due to difficulties in adducing proofs and the dangers of publishing the acts.¹³¹

Lesage was certain that the goals of protecting the values of marriage and the rights of persons could be accomplished with a renewed judicial procedure.

It is possible to renew judicial procedure and to give it a pastoral character, without thereby sacrificing the security and guarantees which the juridic method affords. The inquiry into truth made by a study board or inquiry service should certainly develop according to an exact method which would assure: greater accessibility [to the means] for a study of cases, a psychological adaptation of the approach, a more reasonable process of instruction, a concentration on the

¹³⁰See *ibid.*, p. 266.

¹³¹See *ibid.*, pp. 269-271.

working out of proof, a modernization of equipment and a simplification of files.¹³²

He concluded that a thorough revision of procedural law was required to maintain the credibility of the Church's judicial system and to safeguard adequately the indissolubility of marriage, serve justice and orthodoxy, and finally to win the confidence of the faithful by demonstrating that ecclesiastical tribunals were truly evangelical and pastoral.¹³³

In the process envisaged by Lesage, the presiding judge with the defender of the bond would determine what was needed to establish the facts of the case. There would generally be two types of documentation: 1) a simple summary of the facts ascertained through public or private documents, such as baptismal and marriage certificates, and 2) an integrated summary of proofs gathered through the petition, medical records, testimony of the parties, witnesses and experts along with the observations of the defender of the bond and an

¹³²"Il est possible de rénover la procédure judiciaire et de lui donner une tournure pastorale, sans sacrifier pour autant la sécurité et la garantie que présente la technique juridique. La recherche de la vérité, effectuée par un bureau d'étude ou service d'enquête, devrait certes se dérouler selon une méthode exacte qui assurerait: une plus grande accessibilité de l'étude des causes, une adaptation psychologique de l'approche, une rationalisation du processus d'instruction, une concentration sur l'établissement de la preuve, une modernisation de l'équipement et un allègement des dossiers" (ibid., p. 271).

¹³³See ibid., pp. 278-279.

advocate.¹³⁴ The role of each 'officer' would be slightly altered so that the officialis would become a director (praeses), the defender his assistant with the advocates becoming counsellors for the parties.¹³⁵ The defender would no longer be seen as upholding indissolubility or even as the primary defender of the sacrament as in the thought of Pope Benedict XIV, but rather would be a member of a team who acts as an inquirer to assist the director (praeses) in the evaluation of the facts in light of the law in order to discover the truth of the situation.¹³⁶

The ideas presented in this article were never further developed by Lesage or others, yet this pastoral-administrative procedure has some merit even now. Others developed different ideas, such as a supplemental structure attached to the tribunal to compensate for the various weaknesses of procedural law, or even some system based on conscience, a reconciliation of internal and external fora and finally having local bishops develop their own discipline.¹³⁷

¹³⁴See *ibid.*, p. 273.

¹³⁵See *ibid.*, p. 276.

¹³⁶See *ibid.*, p. 277.

¹³⁷Cf. J.T. FINNEGAN, "The Capacity to Marry", in The Jurist, 29 (1969), pp. 141-156; cf. also F. DELTOMBE, "Pour une solution pastorale du problème des divorcés remariés", in Le Supplément, 130 (1979), pp. 329-354; L. ORSY, "Intolerable Marriage Situations: Conflict Between External and Internal Forum", in The Jurist, 30 (1970), pp. 1-14; L. ORSY, "The

B. Some specific possibilities for change

It had been hoped that the Code revision would have had the effect of eliminating the difficulties associated with effectively coping with the growing demand for declarations of nullity of marriage without doing violence either to the Church's teaching on marriage or to those who approach the tribunal for some form of statement with regard to any right they may have to enter again into marriage in the Church after a divorce. It is certain that the present system, particularly with regard to marriage nullity, needs to be further developed and changed. This sentiment was even expressed by Pope John Paul II in his 1996 allocution to the Roman Rota.¹³⁸ It can only be hoped that the "corrective measures" proposed by the

Function of Ecclesial Decision: A Theological Evaluation of Marriage Tribunals", in Concilium, 87 (1973), pp. 34-46; P.J. HUIZING, "On the Administration of Justice in the Church", in Concilium, 38 (1968), pp. 134-145; P.J. HUIZING, "Should the Church's Marriage Law be Revised?", in Concilium, 18 (1966), pp. 165-180; P.J. HUIZING, "Law, Conscience and Marriage", in The Jurist, 30 (1970), pp. 15-20; P.J. HUIZING, "The Sacramental Structure of Church Order and Its Implications", in The Jurist, 32 (1972), pp. 479-493; W. BASSETT, "The Role of the Local Bishop in the Sacrament of Marriage", in Concilium, 87 (1973), pp. 47-60.

¹³⁸Cf. JOHN PAUL II, Allocution, January, 1996, p. 5.

Pope are even more effective than the Instruction Provida Mater was seen to be by some.¹³⁹

There are other alternatives which can be explored since procedural law is bound to change under the influence of a living jurisprudence and the pressures of pastoral circumstances.

1. Use of the oral contentious process

The oral contentious process (canons 1656-1670) was an innovation introduced in the 1983 Code based on some practices found in the Church's judicial tradition.¹⁴⁰ The purpose of the process was to simplify procedures radically so that justice could be more expeditiously administered, while at the same time protecting the values of the Church. When this procedure is applied, the presiding judge has the discretionary ability to derogate from procedural norms which are not prescribed for validity (canon 1670).¹⁴¹ The process

¹³⁹Cf. L.G. WRENN, "In Search of a Balanced Procedural Law for Marriage Nullity Cases", in The Jurist, 46 (1986), p. 622.

¹⁴⁰Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Communicationes, 4 (1972), p. 60. A similar process was outlined in the Constitution Saepe of Pope Clement V in 1306.

¹⁴¹Cf. L. MADERO, "De processu contentioso orali" in Commentario, vol. IV/1, p. 1793; L. MADERO, "The Oral Contentious Process" in Code, 1983, p. 1029. The 1917 Code

could be used for all cases not expressly forbidden by law while at the same time guaranteeing the right of a party to request an ordinary contentious process (canon 1656 §1).

The question of whether or not marriage cases can be tried by this process is answered in the negative by the law itself (canon 1690).¹⁴² However, there was some discussion on this point during the revision process of the Code. It was felt that, at the time, most of the consultors preferred the ordinary contentious process since there was a fear that this new process was too innovative and that the changes to the procedures of the ordinary contentious process were not yet tried to see if they would result in a more expeditious handling of cases.¹⁴³

There are no particular theological or canonical reasons for not, at this time, examining the possibility of allowing the oral contentious process to be used for marriage nullity

prescribed that the officialis or vice-officialis was to discern what was necessary for the proper administration of justice in each case; see Code, 1917, canon 1577 §2. This seems to have some link, at least in principle, to our present canon 1670, since presiding judges have a similar ability to determine what is apt for the proper administration of justice in cases tried according to the oral contentious process. Cf. also D. KELLY, "The Oral Contentious Process" in SHEEHY, Letter & Spirit, p. 931, para. 3264.

¹⁴²Cf. J. CARRERAS, "Normae generales" in Commentario, vol. IV/2, pp. 1965-1966; L. MADERO, "General Norms" in Code, 1983, p. 1043.

¹⁴³Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Communicationes, 11 (1979), p. 271.

cases. If such cases are to continue to be considered as contentious processes and there are difficulties with the ordinary contentious process in the expeditious processing of nullity cases, not to mention the difficulties regarding the defense of the sacrament and individual rights outlined above, then the oral contentious process may be an acceptable option.

Several consultative bodies recommended this oral contentious process for marriage nullity cases; they represented a substantial part of the English-speaking world where there are active tribunals.¹⁴⁴ There has even been an argument put forward that the prohibition of the use of the oral contentious process could actually be dispensed from at times, based on the fact that the presiding judge could determine the relative difficulty of the case at the time of the contestatio litis. The argument used for dispensation from canon 1690 is based on the greater participation afforded advocates in the processing of a case (canon 1678)¹⁴⁵ so that the parties are better represented and aided in the protection of their interests.¹⁴⁶

¹⁴⁴Cf. C.A. COX, "The Procedural Law That Might Have Been: Some Proposed Changes That Were Not Adopted During the Code Revision Process", in The Jurist, 50 (1990), p. 620.

¹⁴⁵Cf. J. CARRERAS, "De probationibus" in Commentario, vol. IV/2, pp. 1889-1893; L. del AMO, "Proofs" in Code, 1983, p. 1035.

¹⁴⁶Cf. E.M. EGAN, "I processi speciali (matrimoniale e penale)", in Il Nuovo Codice, pp. 494 and 497.

It would seem that, in the application of the oral contentious process, the presiding judge would, in fact and not only in the perception of the parties, direct a team for a careful and just legal decision of the question. The process would be brief and yet maintain some of the formalities which the ordinary contentious process affords. The teaching of the Church would be defended by the interaction of the defender of the bond and the advocates for the parties.¹⁴⁷

There is little risk of actual abuse in the process since it is certain that a party could request from the beginning, or presumably at any time during the instruction, that the case be tried using an ordinary contentious process.

2. A pastoral-judicial board

If marriage nullity questions are actually a statement of fact and not a decision resolving a controversy,¹⁴⁸ then there is need for a rethinking of the stance of procedural law. The search for the truth of the freedom of this person to marry again in the Church is the question which must be

¹⁴⁷Cf. NELI, Introduction, pp. 319-320.

¹⁴⁸See GROCHOLEWSKI, "Aspetti", p. 499.

answered. The fact of the validity or nullity of the marriage is independent of any ecclesiastical court ruling.¹⁴⁹

One may question why the terms 'petitioner' and 'other party' or 'respondent' are used to designate the spouses who wish to challenge the validity of their marriage. Is the truth of the matter better reflected by the use of other terms to denote the spouses whose marriage bond is being challenged?

In some cases there is no response at all from the so-called 'other party' or 'respondent'. While for some there appears to be a complete disregard for Church processes, in others both parties are in agreement that the marriage should be declared null. Perhaps the terms of 'active' or 'passive' party in the investigation could be used to designate the spouses in these cases.

In others, particularly where one spouse is opposed to a declaration of nullity, the terms 'active' and 'objecting' party could be used. These terms and those like them would better reflect the reality that these persons are in one way or another, questioning the bond of marriage in their particular circumstance.

In yet other cases, the 'other party' or 'respondent' may well have several objections to a declaration of nullity of marriage. These objections, however, are seldom based on the

¹⁴⁹See *ibid.*

conviction that conjugal life should never have ended and must resume. Rather there appears to be a substantial amount of objection to the use of the terms 'nullity', 'null', or 'invalid'. The reaction is usually one in which the objecting party feels that the Church can somehow erase their life by declaring their marriage null.

Many fear that this 'making nothing' will somehow render their conjugal life meaningless, compromise their moral integrity since they unknowingly participated in something that now does not afford them the justification of marriage, and so they think they lived in sin for a period of time; and, finally, any children born of a marriage which has somehow been erased would, according to them, now be illegitimate.

All of these reactions are based, not on the truth, nor on the purpose of a declaration of nullity, but rather on the connotations surrounding the concept of nullity of marriage. Could there not be a more accurate, yet less offensive manner of indicating the fact that this marriage was indeed invalid from the beginning and so not binding in the Church. Perhaps it would be better to focus on the effect of the declaration where the marriage is considered non-binding in the Church. This would certainly eliminate the negative connotations of a declaration of nullity and remove much of the confusion and hostility in 'respondents' and 'petitioners' as well.

It must also be acknowledged that as a result of the confrontational attitude of procedural law with an emphasis on settling a dispute, often times marriage nullity procedures are used as a means of exacting vengeance on the spouse who has caused the trauma and hurt of separation and divorce. The objecting party does not want reconciliation, but rather wants to make sure that his or her former spouse cannot marry again in the Church. It is true that there are many situations where one party has been the victim and the other the victimizer; however, the purpose of the process is not to render retribution or impose a penalty on one or another spouse due to their past, possibly reprehensible, behaviour, but rather to state whether or not the marriage bond exists and so is binding for these people or not.

To this end, following the long tradition of the Church for an authoritative declaration of the truth,¹⁵⁰ a pastoral-judicial board similar to one envisaged by Germain Lesage could be established. It could declare the fact that this particular marriage does or does not bind the parties in the Church, or even arbitrate a solution to the separation of the parties if the possibility of reconciliation is discovered.

¹⁵⁰Cf. PIUS XII, Allocution to the Roman Rota, October 2, 1944, in AAS, 36 (1944), p. 282 and in W.H. WOESTMAN, Papal Allocutions, p. 24.

The presiding judge of such a board would be responsible for the case in that he or she would guard and protect the integrity of the teaching of the Church on marriage, as well as protecting and guarding the rights of the parties to an objective hearing, much as found in the oral contentious process.

The actual decision would not be subject to strict legal terminology, although this would be an integral aspect of the declaration of the fact, but focus more on the pastoral and spiritual dimension for the parties as a result of the investigation.

The court would not be adversarial in nature, but rather pastoral in the truest sense of the term, that is, by challenging all to follow the truth in a Christian manner. Of necessity, the process would be more personal and informal. That is not to say that the process would not be professional or lack objectivity.

What is envisaged is a process which, relying on the mission of the Church, is professional, objective and impartial, but also compassionate, forgiving and accountable to the whole Church community. The lessons learned from procedural law and jurisprudence would be an essential part of the background and training needed to preside over such a board. At the same time, an appreciation of the other disciplines of the Church, particularly pastoral theology,

would be helpful. Finally, there is need for the whole team to be able to use the secular sciences and disciplines available, so that the truth can be uncovered completely and the parties assisted in their own spiritual growth.

Obviously, a great deal of responsibility rests upon the presiding judge. The perception already exists that it is the presiding judge who is primarily, if not solely, responsible for the administration of justice in a particular case.¹⁵¹ At the same time, it is in the person of the presiding judge that most people experience the justice of the Church. It is laudable that so many who fulfil this role do have some pastoral experience so as to present the requirements of law with compassion and charity.

There could be other functions of this pastoral-judicial board that may not necessarily be applied only to marriage cases. This board could become an effective instrument of mediation and arbitration for disputes, including marital separation, before they actually approach a tribunal. This function would harken back to the very origins of the Church where it was considered preferable to resolve conflict within

¹⁵¹ Marriage cases should normally be treated by a college of at least three judges. Each judge is to assess the proofs and arrive at moral certitude regarding the validity of the marriage (canon 1608). It could arise that the presiding judge or even the ponens could hold the minority opinion. Nevertheless, the sentence of the court must be drawn up in accordance with the norms of canons 1609-1612.

the community before becoming involved with the courts, whether secular or ecclesiastical. Such a stable body on a diocesan or even inter-diocesan or regional level could be an effective means of aiding in the resolution of disputes in a juridic, but not necessarily judicial, manner.

Some of these ideas were discussed during the process for revision of the Code, when considering the development and implementation of administrative tribunals,¹⁵² but they were not accepted. In order to continue to develop jurisprudence, and as a means to assure accountability and uniformity of procedure, there could be a review board for the process. This review board would function in the same way as the first board.

The pastoral-judicial board would not necessarily replace the ordinary contentious process in marriage, but may be a parallel process or even a viable option in ministering to those who are divorced and wish to remarry in the Church.

CONCLUSION

It is important to remember that canon law, and in particular procedural law, is not static, but rather dynamic,

¹⁵²For a complete development of this type of juridic activity in the Church, cf. K. MATTHEWS, The Development and Future of the Administrative Tribunal, Ottawa, Saint Paul University, 1984, xv, 340 p.

therefore changing and growing. An assessment of the present procedural law indicates that there are serious difficulties in accomplishing the purpose of the law, especially in marriage nullity cases. This ties the hands of the presiding judge. Nor does there seem to be an adequate defense of the sacrament of marriage or of Church teaching regarding marriage in the present system. In some situations Church teaching is actually compromised. Likewise, at the same time, there does not seem to be an adequate respect for persons or their rights in the present adversarial approach to the question of marriage nullity. Finally, the system has little or no means to evangelize and reconcile those who come to the tribunal for justice. There are no built-in aids to the spiritual growth and development of these people at a time when they are in most need of it. In light of these shortcomings there has been an indication that change is necessary and possibly even forthcoming.¹⁵³

To that end, there are two recommendations proposed as parallel or even alternative options, while maintaining the possibility of utilizing the ordinary contentious process for truly contentious situations. These would change significantly the role of the presiding judge.

¹⁵³Cf. JOHN PAUL II, Allocution, January, 1996, p. 5.

First, if marriage is to continue being considered as a contentious process, then the oral contentious process could be employed by removing the prohibition of canon 1690. The presiding judge would have more freedom to demonstrate the mercy and justice of the Church in a pastoral and judicial setting.

Secondly, if marriage nullity is to be seen as a declaration of fact, then all references to a confrontational or adversarial system must be removed and replaced with language and attitudes which better reflect the truth of what is being investigated. A pastoral-judicial board could be established which would declare in an authoritative manner the presence or lack of a marriage bond, while at the same time respecting the individual and the common good of the Church and its teaching.

The presiding judge would be called to head a team whose first commitment is to the truth. This would not be a complete break with the past, but rather an attempt to achieve the flexibility and freedom needed to utilize the best of the juridic traditions of the Church and effectively adapt them to the needs of the world and people today. In essence, this pastoral-judicial board would objectively assess the needs, rights and desires of the individual and these same needs, rights and desires of the Christian community.

This could be a time of unparalleled growth in tribunal ministry, with the presiding judge called to adapt, develop and implement in a Christian manner changes which could give better witness to the first law of the Church, the salus animarum. There is no doubt that if such proposals or others like them were ever accepted, the image, approach and role of presiding judges would be significantly adjusted so that they would truly be guides, guardians and protectors in questions of nullity of marriage.

GENERAL CONCLUSION

Part of the human condition entails the presence of conflict. Within the Church, regrettably, conflict also exists between persons, between people and the community of faith, and at times between different communities of believers. This fact does not diminish the ideal revealed to us by Christ that we are to live as one body and one spirit in Him. Therefore, a need arose for some manner of regulating conflict, determining rights, or even declaring facts, a manner which would be just, equitable, represent the truth, and at the same time reflect the unique message and mission of the Church. Eight particular conclusions can be drawn from this study.

1) The role and responsibilities of the presiding judge have evolved over time. Some would contend that the presiding judge exists only within the context of a collegiate court. It has been demonstrated that the sole judge also is called upon to preside over the administration of justice within his court. The study also demonstrated that the presiding judge is much more than a director of a process or the one responsible to assure that all of the information is gathered appropriately.

Conflicts, in the early Church, were a public matter and so had an effect on the entire Christian community. In the beginning it was the bishop who was the arbitrator and judge

of disputes within the community. This presidency was carried out in the presence of the local clergy. Eventually, the bishop's responsibilities became so diverse that much of the work for the preparation of cases was left to lesser prelates. At first they were to prepare cases for the bishop; however, it did not take long before they were adjudicating cases in the name of the bishop and presiding in their own courts. These abuses were eventually curtailed and the bishop was once again confirmed as the iudex ordinarius for his diocese.

As an expression of the unity and brotherhood shared among leaders of the faith, a conciliar approach to the administration of the Church, in a particular area or province, was embraced. These councils or synods took on a supervisory role to foster a peaceful resolution of conflict, between bishops or between bishops and other clergy, or between bishops and the laity. There was an understanding that these synods or councils were the appropriate and competent forum to resolve serious matters affecting Christian communities in a territory.

Rome became more and more recognized as the primatial See and exerted greater influence on the right of bishops and councils to regulate difficulties within their territory. This primacy was also exerted through the use of papal delegated judges and the development of various Roman dicasteries. Levels of competence were developed and the right to preside

over certain cases was limited. Rules of competence were developed for levels or grades of tribunals, as well as for the right to preside over a particular case between courts which were equally competent. These rules, their genesis and their application were not treated except in so far as they touched upon the right of a judge to preside in a given case. Likewise the internal discipline of the tribunals or the congregations of the Holy See was not considered except in so far as the directives or responses that come from such congregations affect the responsibilities or person of the presiding judge.

Bishops tended to allow others to fulfil the office of praeses in their courts. These judges were delegated by the bishop to care for specific types of cases presented to them. There was no consistent application of law regarding the qualifications of judges or the procedures to be followed in questions of marriage nullity. The Roman dicasteries tended to function in a collegiate manner but other areas tended not to.

2) Eventually, consistent procedures evolved with the role of praeses becoming more distinct. The 1917 Code of Canon Law indicated that the diocesan bishop was to appoint an officialis. There was also the possibility that the officialis could have assistants appointed to aid him. These officers of the court were to fulfil the role of praeses in all cases presented to the court (see Code, 1917, canon 1578).

3) The Legislator tried to be as flexible as possible so as to avoid any undue hardship being placed upon smaller dioceses and mission territories which were unable to staff larger distinct offices for the administration of justice, especially for adjudicating marriage nullity cases. Nevertheless, it would seem that in preparing the 1983 Code there was an effort to avoid some of the criticism that arose after the promulgation of the 1917 Code: sensitivity for the salus animarum as well as for the defense of the sacrament of marriage is more evident in the framing of the new law regarding tribunals and the officers who are to function within them. The actual text and even the context for the interpretation of the law allowed for a substantial amount of flexibility so that justice would be easily accessible to all.

4) There are, unfortunately, those who desire a more stringent approach to the resolution of cases, especially marriage nullity ones. The 1983 Code requires that judges, and therefore presiding judges, are to be academically qualified and persons of good repute. These demands may seem reasonable; however, it must be remembered that not all dioceses or missions will have the resources or the personnel to meet the academic requirements.

With regard to good reputation there have been no pastoral guidelines established to assist a bishop in the selection of judges. The task of assessing the advisability of

appointing a prospective judge is complicated if there happens to have been some damage to the reputation of a candidate in the past. There is a need in this area as well to develop some type of consistent understanding and approach, at least for each Episcopal Conference, so that ambiguity can be avoided as much as possible.

5) The use of the laity in tribunals has certainly developed and expanded. They can be involved in almost all offices of the tribunal with only a few limitations. These limitations, however, do not appear to be based upon ability or qualification. The laity are still to be subject to the clergy in some manner and so cannot be seen to exercise any authority over the clergy. It is unfortunate that there is not a fuller understanding of authority as service to Christ and His people rather than as control over the behaviour of others. The hope is that those who are called to be clergy, exercising jurisdiction, do possess this understanding and put it into practice appropriately (canon 129). The cooperation of the laity is important, but not to be confused with an abdication of responsibility on the part of the clergy.¹

¹Cf. canons 118 and 145 of the 1917 Code, as well as canon 129 of the 1983 Code. Several articles have been written on the matter since 1983. R. PAGÉ, "Juges laïcs et exercice du pouvoir judiciaire", in M. THÉRIAULT and J. THORN, (eds.), Unico Ecclesiae servitio, Ottawa, 1991, pp. 197-212, presents a concise and helpful presentation of the question of laity in the exercise of judicial power in the Church.

6) Canonical procedural law, as outlined in the 1917 and 1983 Codes is at times inadequate to deal with the contemporary demands of cases of marriage nullity. A call for reform and even a radical departure from the ordinary contentious process was called for by some during the revision process. However, the numerous recommendations to develop a new and pastoral procedure for marriage nullity cases were rejected. As a result, procedural law was simply touched up in certain aspects to attempt to rectify some of the evident shortcomings which became apparent when the law was applied; however, it was not substantially revised. These new minor modifications in the law have been in place for nearly fifteen years and the same difficulties as before are still present. It must be acknowledged that the ordinary contentious process applied in marriage cases does not really meet the needs of the Church today, at least in those countries where cases are processed on a regular basis.

7) Alternatives, or even parallel procedures were presented for consideration during the period of revision of the Code to allow for the development of a new procedural law regarding marriage nullity, but these too were not accepted at the time. If, however, the Legislator retains the discipline that marriage nullity is to be considered a contentious process, then it seems clear that the oral contentious process would best serve the needs of those presenting marriage

nullity requests. In this oral process the presiding judge would truly direct and control the entire procedure so as to avoid undue confrontation and delays, while at the same time searching for the truth.

If marriage nullity cases are to be understood more as statements of fact, regarding the presence or absence of a bond of marriage, then a pastoral-judicial board with the capacity to use several different disciplines simultaneously to arrive at the truth would suffice. The presiding judge would in effect be the head of a team called to uncover and declare the truth of whether or not the bond of marriage is present.

All references to an adversarial type of trial would be eliminated, allowing for a multi-disciplined and multi-faceted approach to the question. True pastoral concern would be possible since those who were to approach this type of pastoral-judicial board would be challenged to face the truth and accept it in a Christian manner. The opportunities for healing in this environment are enormous.

Finally this board could also be used as an arbitration or mediation panel for marriage difficulties or even for other types of contention. The Conference of Bishops could establish this type of board for the resolution of difficulties within dioceses or even on a national level. The presiding judge in these cases would not necessarily adjudicate the merits of a

case, but would be responsible as an arbitrator or mediator to present options and opinions as an impartial third party. He would head a team which would be called upon to work with the local authorities to resolve conflict before it came to any court, ecclesiastical or secular.

8) The person and role of the presiding judge have evolved from the bishop alone exercising control over the arbitration of solutions and the adjudication of cases, to the bishop in conjunction with his clergy adjudicating, based on the merits of the case. As the number and complexity of cases requiring adjudication increased, the presiding judge was chosen from among members of the clergy who were to prepare the case for the bishop. Eventually, officiales or vice-officiales were to preside in marriage cases. Under the present Code, other judges can now preside over these cases.

The function of the presiding judge is expanding. So too is the understanding of who can fulfil this great ministry of trust. It is indeed a ministry of trust, first, for bishops, who must have confidence in those who are trained and disposed to work in this difficult area, and secondly, for those who approach the Church after separation or even divorce. The presiding judge is the person these injured, angry and often times misinformed persons must trust to guide them through yet another painful experience. Their trust is based on the hope that this time the pain will help them heal their hurt. He is

truly the one who is called upon to "sit before a thing, to guard, take care of, or direct it; presiding, protecting, guarding, defending, [...] a protector, guard, guardian, defender"² of the law and discipline of the Church and of the individuals who present themselves for assistance.

²C. LEWIS and C. SHORT, A Latin Dictionary founded on Andrews' Edition of Freund's Latin Dictionary, Oxford, Clarendon Press, 1969, p. 1429.

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BIOGRAPHICAL NOTE

Robert O. Bourgon was born in Sudbury, Ontario on March 10, 1956 to Robert V. Bourgon and Betty Jean Sellick. He received his primary education at Creighton Mine Public School in Creighton Mine, Ontario. His secondary education was obtained at Saint Charles College, Sudbury, Ontario. He then went to Queen's University in Kingston, Ontario taking the first two years of an Honours Life Sciences Degree. He transferred to the University of Western Ontario in London, Ontario and completed a Bachelor of Arts with a double major in Psychology and Philosophy. He attended Saint Peter's Seminary in London, Ontario and was ordained to the priesthood on May 8, 1981 for the Diocese of Sault Ste Marie. In June of the same year he was appointed as a Vice-Officialis for the Toronto Regional Tribunal. He obtained a J.C.L. from Saint Paul University in Ottawa, Ontario, in May 1984. He served as parish priest in Saint Bartholomew's Parish, Levack, Saint François Xavier, Cartier, and Saint Peter the Apostle in North Bay, while retaining his work in the Tribunal. He was appointed Officialis for the Diocese of Sault Ste Marie on February 15, 1988 and has served as a Diocesan Consultor and member of the Council of Priests for the Diocese. He began his doctoral studies in Canon Law at Saint Paul University in 1995.