



**CLSA PRECONVENTION – 2024  
ARRIVING AT THE TRUTH IN CAUSES OF  
MARRIAGE, SINNERS AND SAINTS**

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Marriage Nullity	Penal Trial	Causes of Saints
<div style="display: flex; justify-content: space-between; align-items: center;"> <div style="width: 30%; border-left: 2px solid #e67e22; padding-left: 10px;"> <h2 style="margin: 0;">COMMON THEMES</h2> <ol style="list-style-type: none"> <li>1. Ministers of Justice</li> <li>2. The Formulation of the Doubt</li> <li>3. Moral Certitude</li> <li>4. Collection of Proofs</li> <li>5. Use of modern Technology</li> </ol> </div> <div style="width: 65%;"> <ol style="list-style-type: none"> <li>6. Publication of the Acts</li> <li>7. Evaluation of the Proofs</li> <li>8. The Appeal: Getting it right the first time</li> </ol> <p><b>Conclusion:</b> The purpose of the canonical norms</p> </div> </div>		

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## Marriage Nullity

## Penal Trial

## Causes of Saints

## ABBREVIATIONS

- DC:** Pontifical Council for Legislative Texts, instruction **Dignitas connubii**, 25 January 2005.
- MI:** Pope Francis, apostolic letter **Mitis iudex Dominus Iesus**, 15 August 2015.
- SST:** Congregation for the Doctrine of the Faith, *Normae de Delictis Congregationi pro Doctrina Fidei Reservatis*, **Sacramentorum Sanctitatis Tutela**, 11 October 2021.
- NS:** Congregation of the Causes of Saints, **Normae Servandae** in Inquisitionibus ab Episcopis Faciendis in Causis Sanctorum, 7 February 1983.
- SM:** Congregation of the Causes of Saints, instruction **Sanctorum Mater**, 17 May 2007.

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## Marriage Nullity

## BEAL REMINDS US:

« procedural law serves two distinct but related functions, one instrumental and the other intrinsic.

The first and most frequently emphasized function of procedural law is instrumental, to guide and structure the search for truth. Individual procedural norms and the procedural system itself have emerged and evolved from the conviction, rooted in centuries of judicial experience, that procedural regularity promotes accurate fact-finding. While the truth is more than the sum of facts, accurate fact-finding is indispensable to the search for truth and without truth there is no justice. ...

Procedural law also has an intrinsic end, namely, to respect the human and Christian dignity of the parties by providing them with the opportunity for meaningful participation in decisions that profoundly affect their lives. »

J. Beal, "Making Connections: Procedural Law and Substantive Justice," in *The Jurist*, 54 (1994), pp. 113-114.

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## Marriage Nullity

### PROCEDURAL LAW

Montini recalls that procedural law “can be compared to the study of the rules of a game, of research, of a dialogue. Procedural law is not the end/goal, it is a *means*, by which the end is achievable.”

What is the goal? Arriving at an understanding of the truth, thus giving justice, through the acquisition of moral certainty about the facts.

G.P. Montini, *De iudicio contentioso ordinario. De processibus matrimonialibus 1/2. Pars statica addenda post Litteras Apostolicas motu proprio datas Mitis Iudex Dominus Iesus. Rome, PU Gregoriana, 2017, p. 31.*

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## Marriage Nullity

### MONTINI CONTINUES:

“Process law is method. Truth and justice are its end.”

An attitude to avoid: that procedural law is “an obstacle, something to overcome or sidestep”

G.P. Montini, *De iudicio contentioso ordinario. De processibus matrimonialibus 1/2. Pars statica addenda post Litteras Apostolicas motu proprio datas Mitis Iudex Dominus Iesus. Rome, PU Gregoriana, 2017, p. 33, 46.*

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## Marriage Nullity

### WHAT IS ESSENTIAL TO THE PROCESS?

The *contradictorium* whose object is to get at the truth.

The procedural norms will protect the *contradictorium*.

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## Marriage Nullity

### WHAT IS THE *CONTRADICTORIUM*?

“the right to contradict petitions, proofs and deductions of the other party or proposed *ex officio*.”

C. Erlebach, 2 May 2013 (Poland), in *The Canonist*, 6 (2015), p. 265, #3, citing a decision c. Stankiewicz, 20 July 1995.

Quoting Lega, Erlebach continues that the *contradictorium* “is the faculty granted to both parties to defend themselves against the assertions and allegations of the other party.”

C. Erlebach, 2 May 2013 (Poland), in *The Canonist*, 6 (2015), p. 265, #3, citing M. Lega – V. Bartocetti, *Commentarius in iudicia ecclesiastica*.

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## Marriage Nullity

### JOHN PAUL II SPOKE OF THIS IN HIS 1989 ALLOCUTION TO THE ROMAN ROTA:

“One cannot conceive of a just judgement without the contention (*contradictorium*), that is, without the concrete possibility granted to each party in the case to be heard and to be able to know and contradict the requests, proofs, and deductions adopted by the opposing party or *ex officio*.”

C. Erlebach, 2 May 2013 (Poland), in *The Canonist*, 6 (2015), p. 265,, #3, citing John Paul II, allocution to the Roman Rota of January 26, 1989, #3.

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## Marriage Nullity

### TWO SEPARATE BUT INTERCONNECTED THINGS: *CONTRADICTORIUM* AND RIGHT OF DEFENCE:

These ideas are very similar, but Erlebach defines them separately by explaining: “when someone is denied any power to defend self, there is indeed [...] no *contradictorium* [...] without which one cannot speak in a proper sense of a true and integral trial ...”

Erlebach continues: “it is the right of defence which gives birth to the *contradictorium*.”

C. Erlebach, 2 May 2013 (Poland), in *The Canonist*, 6 (2015), p. 266, #4, citing a decree c. Doran, 2 April 1992 and later Erlebach cites himself: *La nullità della sentenza giudiziale 'ob ius defensionis denegatum'*

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**Marriage Nullity**

**THE FOCUS OF OUR TIME TOGETHER:**

- This is not a comprehensive overview of the procedural law of the Church, but we hope it will be a practical help to refine / renew our practices
- We all work with contentious processes; we all gather evidence and work to best understand the truth
- We will focus on the law regarding specific aspects of contentious processes: how they function, highlighting aspects that might be interpreted differently in practice and in theory
- We will consider our own practices in light of gathering and assessing evidence

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**Marriage Nullity**

**Penal Trial**

**Causes of Saints**

**1. THE MINISTERS OF JUSTICE**

- Recommendation: Reread Book VII during this Pre-Convention

Type of Trial	Actor	Pars Conventa	Judge
Declaration of nullity	Petitioner / Respondent	Defender of the Bond / Respondent	Impartial Judge
Penal Trial	Promoter of justice	Accused (with procurator/advocate)	Impartial Judge
Cause of Canonization (Diocesan Inquiry)	Postulator	Promoter of justice	Episcopal delegate

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## Marriage Nullity

### JOHN BEAL SPEAKS OF THE ROLE OF THE JUDGE IN A PROCESS:

«The foundational presumption of the judicial process structured in the revised code is that judges, whether single judges or colleges, will direct the unfolding of the process from the submission of the *libellus* until the publication of the sentence. ...

Canon law has not adopted the adversary system of adjudication, familiar to citizens of common law countries, in which the judge acts as a neutral referee between the parties who bear the burden of coming forward with evidence in support of their claims. Instead, canon law has opted for elements of an inquisitorial system in which the judge, while remaining impartial between the two parties, takes an active role in searching out evidence to supply for the negligence of the parties or to insure that the process reaches the truth (c. 1452).»

J. Beal, "Making Connections: Procedural Law and Substantive Justice," in *The Jurist*, 54 (1994), p. 146.

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## Marriage Nullity

### 1. THE MINISTERS OF JUSTICE

#### Requirements for Office in a marriage nullity trial

- Judge: JCD or JCL / single cleric or panel with one lay person (cc. 1421 §§2-3; DC, art. 43)\*
  - \*Since 2015, in marriage cases two lay judges may serve on a college (c. 1673 §3)
- Defender of the Bond: JCD or JCL, and "of proven prudence and zeal for justice" (c. 1435; DC, 54)
  - The defender of the bond's presence is 'always required' (DC, art. 56§1)
  - Defender is to "propose any kind of proofs, responses and exceptions that, without prejudice to the truth of the matter, contribute to the protection of the bond" (c. 1432, DC art. 56, §3)

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## Marriage Nullity

### 1. THE MINISTERS OF JUSTICE

- Advocate: JCD “or otherwise truly expert” / cleric or lay (c. 1483; DC art. 105, §1)
- Procurator: JCD “or otherwise truly expert” / cleric or lay (c. 1483; DC art. 105, §1)

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## Marriage Nullity

## Penal Trial

## Causes of Saints

### 1. THE MINISTERS OF JUSTICE

- **Obligations of the Actor** who initiates the Cause (**Petitioner, promoter of justice, postulator**):
  - Present the Libellus (c. 1502).
  - Bear the burden of proof (c. 1526 §1).
- **Rights of the responding party** (**Defender of the Bond, advocate for the accused, promoter of justice**):
  - Enjoys the presumption of law: Marriage is presumed valid (c. 1060). The accused is presumed innocent (cc. 1584, 1321 §1). No right to canonization is presumed.
  - Right to speak last (cc. 1603 §3, 1725, CIC/17 c. 1984 §1)

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## 1. THE MINISTERS OF JUSTICE

- **The promoter of justice** is bound by office to provide for the public good (c. 1430).
- **In the penal trial:** He brings the accusation (c. 1721).
  - The action or criminal accusation is reserved only to the promoter of justice to the exclusion of all others (CIC/17 c. 1934).
- **In cause of saints:** He responds to the postulator in causes of canonization. He is traditionally seen as the devil's advocate.
  - He is vigilant about the observance of the law and the thoroughness of the inquiry (SM, Art. 56).

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## 1. THE MINISTERS OF JUSTICE

### Requirements for Office in the penal trial

- **Judge:** JCD or JCL / single cleric or panel with one lay person (cc. 1421 §§2-3) *\*unlike annulment panels (c. 1673 §3)*
  - In SST, judges must be priests, unless dispensed (SST, Artt. 13, 1°; 14).
- **Promoter of justice:** JCD or JCL / cleric or lay (c. 1435)
  - In SST, must be a priest, unless dispensed (SST, *ibid*).
- **Advocate:** JCD or otherwise expert / cleric or lay (c. 1483)
  - In SST, must have JCD or JCL (SST, Art. 13, 3°).

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## 1. THE MINISTERS OF JUSTICE

In causes of saints, the **Tribunal** is composed of:

- Episcopal delegate – serving the impartial role as judge instructor.
- Promoter of justice – serving the role against the cause, also known as the *advocatus diaboli*, in contrast with the postulator, the *advocatus Dei*.
- Notary
- Medical Expert – serving to advise the Tribunal in the investigation of medical miracles (SM Art. 53-60).

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## 1. THE MINISTERS OF JUSTICE

**Requirements for Office** in causes of saints

- Episcopal delegate: priest / competent in theology and canon law (and history for an ancient cause) (SM, Art. 54).
  - No specific pontifical degrees required.
- Promoter of justice: priest / same qualifications (SM, Art. 57).
- Postulator: cleric or lay / expert in theology, canon law, history and praxis of Dicastery (SM, Art. 12 §4).
- Vice-Postulator: mandated by the Postulator as representative.

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## Marriage Nullity

## Penal Trial

## Causes of Saints

## 2. THE FORMULATION OF THE DOUBT

Preparation for the Litis Contestatio:

- **The choice of fora**
  - **In a marriage nullity trial:** place where the marriage was celebrated, place in which either party has domicile or quasi-domicile, place of most of the proofs (c. 1672) - opened up in 2015 with *Mitis iudex*.
  - **In the penal trial:** The forum of the domicile or quasi-domicile of the accused (c. 1408), the forum of the delict (c. 1412), of the maladministration (c. 1413), or by connected cases (c. 1414).
    - The Bishop and promoter of justice chose the forum based on where the libellus is presented. The forum is fixed by the citation (c. 1512, 2°).
  - **In causes of saints:** The forum where the Servant of God died or where the miracle occurred (NS, 5). Transfer of competence is requested of the Dicastery of Causes of Saints.

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## Marriage Nullity

## Penal Trial

## Causes of Saints

## 2. THE FORMULATION OF THE DOUBT

- **The libellus**
  - **In marriage nullity trials:** the petitioner and/or petitioner and respondent present a *libellus* specifying 'the reason for petitioning, that is, the ground or grounds of nullity' (c. 1504.2°; DC art. 116§1.2°).
  - **In the penal trial:** The promoter of justice alleges the violations of law that will form the basis of the doubt (c. 1504, 1° and 2°).
  - **In causes of saints:** The postulator presents evidence of the reputation (*fama*) of holiness, martyrdom, or offering of life (SM, Artt. 4-8).
    - The ground of "offering of life" was introduced by Pope Francis in the apostolic letter *Maiorem hac Dilectionem*, 2017.

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## Marriage Nullity

## Penal Trial

## Causes of Saints

## 2. THE FORMULATION OF THE DOUBT

### • Citation

- **In marriage nullity trials:** In the decree of admission, the *praeses* must cite the respondent (c. 1507, §1; DC, art. 126, §1).
- **In the penal trial:** The accusation must be made known to the accused who must be cited to the trial (c. 1508 §1).
- **In causes of saints:** The intention to open the cause must be made known in three steps. The Bishop must notify and seek the opinion of:
  - the episcopal conference,
  - the Holy See through the nihil obstat,
  - and the faithful through the edict (NS, 11 and 15c).

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## Marriage Nullity

## HOW ARE GROUNDS SET?

- The petitioner presents petition
- The respondent responds
- The judge sets the grounds
- Parties can respond to the grounds, but it is the judge's decision

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## Marriage Nullity

### 2. THE FORMULATION OF THE DOUBT

Basic premise: all grounds named in the joinder of the issues must be answered in the sentence.

Does it make sense to name only one ground in the joinder?

Is there a downside to numerous grounds?

- a long sentence
- 'using up' grounds which cannot then be used in future

This section from Lynda Robitaille, "The Formulation of the Doubt: the Essential Link Between First and Second Instance Decisions, published in *Studia canonica* (2015).

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## Marriage Nullity

### HOW TO NAME GROUNDS PRACTICALLY:

- be as formal and precise as possible naming the grounds
- Name the party involved
- use only the canons on form (c. 1108), impediments (cc. 1083-1094), or consent (cc. 1095-1103) NOT cc. 1055 and 1057

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## Marriage Nullity

### Naming grounds:

Not too precise, not too generic; grounds must refer explicitly to one or the other party, or both.

Not just 'incapacity,' but include what number of canon 1095 is involved; it would also be too limiting to name the source of the incapacity (i.e., alcoholism, narcissism, etc.).

For c. 1101, determine what kind of simulation is involved, not just simulation in general.

G. ERLEBACH, "Il 'capo di nullità' secondo la giurisprudenza della Rota Romana," in QSR, 19 (2009), p. 136.

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## Marriage Nullity

### MULTIPLE GROUNDS IN A JOINDER:

are considered integrated (compatible) or segregated (incompatible).

“when two grounds are theoretically intrinsically incompatible they must be segregated and one or the other(s) heard only subordinately ... when certain grounds are compatible they may be integrated, that is, heard as equally principal grounds ...”

A. MENDONÇA, "Practical Aspects of Using Multiple Grounds in Formal Marriage Nullity Cases," in SIC, 30 (1996), p. 97.

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### Marriage Nullity

When subordinating grounds, the grounds must be in the same party

Grounds that are separated by 'and' mean that each ground in the joinder must be addressed in the decision, or by 'or' which means that the grounds are listed subordinately.

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### Marriage Nullity

#### SUBORDINATE GROUNDS CAN BE USED:

- When there is more than one ground alleged against a party
- When those grounds are incompatible

Using subordinate grounds means that rather than needing to answer every doubt with an affirmative decision and a negative decision when using grounds that are incompatible, judges could find in the affirmative on the first ground, and dismiss the second incompatible ground as not proposed. There would be a decision only on one affirmative ground; the ground that was not proposed would not have been addressed.

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## Marriage Nullity

### AN IMPORTANT CONSEQUENCE:

If judges answer every ground, when there are incompatible grounds there will necessarily be a negative response. A negative response means that the ground can be appealed, but it cannot be addressed again at first instance. A ground that has not been proposed has not been given a negative response.

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## Marriage Nullity

### EXAMPLES OF GROUNDS THAT WOULD BE SUBORDINATED:

Total and partial simulation

Simulation and incapacity

Simulation and fear

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**Marriage Nullity**

## CHANGING THE GROUNDS AFTER THE JOINDER

During the course of the instruction of the case, the ground(s) can be changed by decree. However, both c. 1514 and DC, art. 136 recall that the impetus to change the ground must come from the party.

The doubt “cannot be validly changed unless by a new decree, for a grave reason, and the request of a party, with the other party and the defender having been heard ...”

HOWEVER, c. 1452 and DC, art. 71 give some insights.

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**Penal Trial****Causes of Saints**

## 2. THE FORMULATION OF THE DOUBT

- The formulation of the doubt defines the scope of the trial or inquiry.
- Based on the formulation, the judges and the parties will determine what proofs are relevant and must be presented.

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## Penal Trial

### 2. THE FORMULATION OF THE DOUBT

- **The Formulation of the Doubt in the penal trial:**
  1. Did the accused commit the delict of X as mentioned in canon N?
  2. ...repeat if there are multiple alleged delicts...
  3. If so, is the accused gravely imputable for this violation [these violations]?\*
  4. If so, what penalty is to be imposed?\*

\*Note the subordination of these grounds.

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## Penal Trial

### 2. THE FORMULATION OF THE DOUBT

- The Formulation of the Doubt will be based on the libellus of the promoter of justice.
- The promoter should list the alleged delicts, their possible penalties, and the penalty sought.
  - Be attentive to any change in canon numbers and possible penalties after *Pascite Gregem Dei*, effective 8 December 2021.
  - Where there is a change in law, the more favorable law applies (c. 1313 §1).

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## Penal Trial

### 2. THE FORMULATION OF THE DOUBT

- The promoter of justice need not argue for imputability, which is presumed by the law itself (c. 1321 §4).
- The citation communicates the Libellus and calls the accused to the Joinder (c. 1507 §1). The accused must have an advocate who can respond in writing or appear in person (cc. 1513 §2 and 1723).
- As the advocate is not likely to agree with the charges brought by the promoter, the judge sets the grounds on those accusations that appear founded (cf c. 1505 §2, 4°).

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## Causes of Saints

### 2. THE FORMULATION OF THE DOUBT

- **The Formulation of the Doubt in causes of saints:** The dubium is fixed by law depending on the kind of case:
  1. A confessor who practiced **heroic virtue**  
Whether it is proven that the Servant of God practiced the theological virtues (faith, hope, charity to God and to neighbor), the cardinal virtues (prudence, justice, temperance, fortitude) and the connected virtues (poverty, chastity, obedience, humility) to a heroic degree;  
and the existence of the reputation of holiness in life, at death and increasing after death, as well as the reputation of intercessory power.

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## 2. THE FORMULATION OF THE DOUBT

### 2. A **martyr** who died for the faith

Whether the martyrdom is proven, on account of the hatred of the faith on the part of the persecutors, and with the willing acceptance of death for the faith by the Servant of God;

and the existence of the reputation of martyrdom at death and increasing after death, as well as the reputation of intercessory power.

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## 2. THE FORMULATION OF THE DOUBT

### 3. A person who **offered his or her life** for charity

Whether the heroic offering of life of the Servant of God until death out of charity is proven as well as the Christian virtues, at least to an ordinary degree;

and the existence of the reputation of offering of life for charity at death and increasing after death, as well as the reputation of intercessory power.

- (The apostolic letter *Maiorem hac Dilectionem*, 2017, Art. 2, requires a nexus between the offering and the death that occurs in a brief period of time.)

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## 2. THE FORMULATION OF THE DOUBT

### 4. An alleged **miracle** is investigated separately:

Whether it is proven that there is no natural cause that can explain the alleged miracle,

and whether it is proven that the unique intercession of the Servant of God was invoked.

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## 3. MORAL CERTITUDE: OBJECT OF ANY PROCESS

Pius XII in 1942 allocution to the Rota described moral certainty:

- To be distinguished between ‘absolute certainty’ or ‘greater or lesser probability.’ In absolute certainty, there is no doubt. With probability, there is “foundation for the fear of error.”
- With moral certainty, there is the “exclusion of well-founded or reasonable doubt” but the possibility of error remains.

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## Marriage Nullity

### CANON 1608: MORAL CERTAINTY

§1. For the pronouncement of any sentence, the judge must have moral certitude about the matter to be decided by the sentence.

§2. The judge must derive this certitude from the acts and the proofs.

§3. The judge, however, must appraise the proofs according to the judge's own conscience, without prejudice to the prescripts of law concerning the efficacy of certain proofs. ...

§4 notes that if the judge is not convinced, then the favor of the law (validity of the marriage) must be upheld.

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## Marriage Nullity

### DC, ART. 247, §2 ADDS TO OUR UNDERSTANDING OF MORAL CERTAINTY:

“In order to have the moral certainty necessary by law, a preponderance of the proofs and indications is not sufficient, but it is required that any **prudent positive doubt** of making an error, in law or in fact, is excluded, even if the mere possibility of the contrary remains.”

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## Marriage Nullity

### WHAT DOES *MITIS IUDEX* SAY ABOUT MORAL CERTAINTY?

**Title IV - Art. 12.** "To achieve the moral certainty required by law, a preponderance of proofs and indications is not sufficient, but it is required that any prudent doubt of making an error, in law or in fact, is excluded, even if the mere possibility of the contrary is not removed."

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## Marriage Nullity

### GROCHOLEWSKI QUOTES PIUS XII IN SPEAKING OF THE OBJECTIVITY OF MORAL CERTITUDE:

"... this certainty is understood to be objective, that is, based on objective motives.' Objectivity, therefore, constitutes an essential characteristic ... Indeed, it is not 'a purely subjective certitude, founded on sentiment or on this or that merely subjective opinion perhaps even on personal credulity, lack of consideration or inexperience.'"

Z. Grocholewski, "Moral Certainty as the Interpretative Key of Procedural Norms," in *Forum*, 8 (1997), p. 59.

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## Marriage Nullity

### ON WHAT IS MORAL CERTAINTY BASED?

The certitude must come from the acts and the proofs (*ex actis et probatis*).

If moral certitude comes from the acts and the proofs, then the process which puts together those acts and proofs must work toward the objective that the judge(s) will learn the truth of the matter and be able to arrive at moral certitude.

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## Marriage Nullity

### LLOBELL ADDS TO OUR UNDERSTANDING:

“moral certainty is not a merely subjective state – an intuition of the judge, however, ‘intense’ it may be – which is incapable of being demonstrated ‘*ex actis et probatis*’ (can. 1608, §2) to the parties and to the appeal tribunal; it must be a certainty (and, as such, it cannot be subjective), ‘communicable’ to all the subjects for which the sentence is intended and who possess both an adequate knowledge of the matter at issue, and ‘sound judgment’: the parties, the appeal tribunal and, lastly, the community ...”

J. Llobell, “Moral Certainty in the Canonical Marriage Process,” in *Forum*, 8 (1997), pp. 357-358.

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## Marriage Nullity

### JUDITH HAHN EXPLAINS:

“evaluating proof in canon law is restricted by some rules. Yet interestingly, canon law also adheres to the free evaluation of evidence as a standard for dealing with proof. Pius XII referred to this standard when explaining moral certitude to the Roman Rota in 1942. He stated that modern jurisprudence did not adhere to formalism but did follow the principle of free evaluation of evidence (*‘la massima del libero apprezzamento delle prove’*).”

“The judge has to evaluate the proof freely and decide the case based on her or his evaluation, but she or he must explain her or his decision in a way that other judges might be able to consent to it. This restriction of reasonableness makes the judge’s free conviction ‘more rational and less subjective’ ...”

Judith Hahn, “What does it mean to be ‘Morally Certain’? How secular standards of proof help to understand canonical decision making,” *The Canonist*, 11 (2020), pp. 238; 239.

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## Penal Trial

### 3. MORAL CERTITUDE

- **In the penal trial:** **Moral certainty** is required to find the commission of a delict is proven (cc. 1342 §1, 1608 §1).
- **Search for the truth:** When the public good is at stake, the judge can proceed ex officio and can supply for the negligence of the parties in furnishing proofs (c. 1452). The judge is to act impartially with a view toward arriving at the truth.

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## Penal Trial

### 3. MORAL CERTITUDE

- **Motive:** While motive is an important factor in simulation, proving the motive of the accused is not required in a penal trial.
- The advocate may refer to the motive of the accused if it mitigates culpability (cc. 1323-1324).
- The promoter of justice may refer to the motive of the accused if it aggravates culpability (cc. 1325 and 1326, 3° and 4°).
- **Imputability:** While the promoter of justice does not need to prove imputability, the advocate may argue that there was a lack of malice or negligence on the part of the accused (c. 1321 §2). Dangers of arguing that the accused is incompetent.

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## Penal Trial

### 3. MORAL CERTITUDE

- **Past offenses:** The accused may not be punished for past offenses that are barred by prescription, by which criminal action is extinguished (c. 1362 §1).
- However, proofs regarding past behavior may be introduced if they have probative value regarding a delict presently under consideration.
- They may be useful in arriving at moral certitude.

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## Penal Trial

### 3. MORAL CERTITUDE

- **Silence of the accused:** It is for the judge to interpret what can be inferred by the silence of a witness (c. 1531 §2).
- Yet, the accused cannot be compelled to confess a delict (c. 1728 §1).
- Furthermore, the accused benefits from the new canon 1321 §1: “A person is considered innocent until the contrary is proved.” Therefore, the judge cannot interpret the silence of the accused as proof of guilt.
- Yet, silence might prove some element of the case (e.g. that the accused does not deny being acquainted with another party).

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## Causes of Saints

### 3. MORAL CERTITUDE

- **In causes of saints:** Moral certainty is the standard at all levels of the evaluation of a Cause for Canonization (SM, Art. 1 §2).
- The diocesan inquiry must search for proofs with a view to establishing moral certainty regarding the object of the inquiry.
- In the Roman Phase, the object of the Positio is to establish moral certainty regarding the doubts to be resolved: “*An constet de virtutibus/martyrio... in casu et ad effectum de quo agitur*” (Regolamento of the Dicastery of Causes of Saints, Art. 62 §1).
- In the Roman Phase, the high standard is seen in the need for a supermajority of votes in favor of a cause at any stage.

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## Marriage Nullity

### 4. COLLECTION OF PROOFS

Beal reminds us: “The aim of all proofs is to demonstrate to the judge through the mediation of argumentation the existence of certain facts relevant to the object of the trial which, at the outset of the process, were doubtful or controverted.”

Proofs of all kinds can be used in marriage nullity cases, testimonies of parties and witnesses, as well as documents, credibility witnesses and experts.

J. Beal, “The Substance of Things Hoped For: Proving Simulation of Matrimonial Consent,” in *The Jurist*, 55 (1995), p. 749.

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## Marriage Nullity

### *DIGNITAS CONNUBII* ON PROOFS

**DC, Art. 156** – § 1. The burden of proof lies on the one making an assertion (can. 1526, § 1).

§ 2. Those things which are presumed by the law itself have no need of proof (cf. can. 1526, § 2, n. 1).

**Art. 157** – § 1. Proofs of any kind which seem useful for understanding the cause and are licit can be brought forward. Proofs which are illicit, whether in themselves or in the manner in which they are acquired, are neither to be brought forward nor admitted (cf. can. 1527, § 1).

§ 2. Proofs are not to be admitted under secrecy, unless for a grave reason and as long as their communication with the advocates of the parties has been guaranteed, without prejudice to artt. 230 and 234 (cf. can. 1598, § 1).

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## Marriage Nullity

### DIGNITAS CONNUBII ON OBTAINING PROOFS:

**Art. 162 – § 1.** The parties, the witnesses, and as the case may be, the experts are to be examined in the seat of the tribunal, unless the judge for a just reason thinks otherwise (cf. can. 1558, § 1).

§ 3. The judge is to decide where persons are to be heard for whom it would be impossible or difficult to come to the seat of the tribunal because of distance, illness or other impediment, without prejudice to the prescriptions of artt. 29; 51; 85 (cf. can. 1558, § 3).

**Art. 169 –** The questions are to be brief, adapted to the capacity of the person being questioned, not involving several matters at the same time, not confusing, not tricky, not suggesting a response, avoiding any offensiveness, and pertinent to the cause in question (can. 1564).

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## Marriage Nullity

### WHAT PROOFS?

- testimonies of parties and witnesses (cc. 1527-1528; 1530-1538; 1592-1594; 1547-1573; DC, artt. 177-178; 193-202)
- documents (cc. 1539-1546; DC artt. 183-192)
- credibility witnesses (c. 1679)
- experts (cc. 1574-1581; 1680; DC artt. 203-213)

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## Marriage Nullity

### MERLIN AMBROSE REMINDS US:

“There are various types of questions vis-à-vis examination of the witnesses and the following elements are to be paid attention to: a) the questions should be brief and simple, failing which creates difficulty for the witness to answer each part consecutively and to remember everything being asked; b) the questions also should be appropriate to the understanding of the persons being examined; c) the questions must not be captious nor deceptive since the goal of examination of the persons is to discover the truth and not to deceive the witness on a particular point; d) leading questions are to be avoided. When a witness is posed with a leading question, the witness answers on the basis of what he or she heard in the question, not on the basis of what he or she knows. Questions are considered leading not only when they expressly contain the desired answer, but also when they insinuate it. “In this way, the investigating judge induces an interrogated person to say what he wants to hear, and therefore abuses his authority.” If a judge poses a leading question, he could be considered as biased; e) offensive questions are also to be avoided; f) questions, which do not further the case or whose answers the witness would have no way of knowing, are irrelevant and are to be avoided.”

M. Ambrose, “The Significance of the Proof in the Instructional Phase. Canons 1526-1581, 1598-1600, 1678,” in *The Canonist*, 12 (2021), p. 271.

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## Penal Trial

### 4. COLLECTION OF PROOFS

- The observations above also apply in **penal trials**.
- **In the penal trial: the promoter of justice** bears the burden of proof and will present most of the witnesses.
  - The promoter presents to the judge the subject matter on which the promoter’s witnesses are to be examined (cc. 1533 and 1552 §2).
  - During the testimony, the promoter may suggest questions to the judge, in order to prove the guilt of the accused (c. 1561).
  - The promoter must be cited for each session to fulfill his or her function. It is not enough to simply examine the acts at the end (c. 1433).
  - The judge may limit the number of the promoter’s witnesses (c. 1553).

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## Penal Trial

## 4. COLLECTION OF PROOFS

- The rights of **the advocate**:
  - The list of witnesses is communicated to the advocate (c. 1554).
  - The advocate can request a witness be excluded for a just cause (c. 1555).
  - During the testimony, the advocate has a right to be present and may suggest questions that challenge the witness' testimony (c. 1561). The accused may not be present (c. 1559).
  - The judge must carefully balance the requests of the promoter and the advocate.

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## Penal Trial

## 4. COLLECTION OF PROOFS

- The rights of **the advocate**:
  - The advocate does not need to prove the innocence of the accused which is a presumption of law (cc. 1321 §1, 1608 §4 and 1726).
  - However, the advocate can present witnesses that either testify to the innocence of the accused or that contradict the assertion of guilt.
  - The advocate also presents the subject matter on which the advocate's witnesses are to be examined (c. 1552 §2).
  - If the judge determines a witness does not have useful testimony, the judge may curb the number to be examined (c. 1553) (e.g., mere character witnesses may offer a written statement).

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## Penal Trial

## 4. COLLECTION OF PROOFS

- **The accused** may be called to testify by the promoter or required to testify by the judge (c. 1530).
  - There is no “Fifth Amendment” right of the accused not to testify.
  - But the accused is not bound to admit guilt nor to take an oath (c. 1728 §2).
  - There is no benefit in questioning the accused unless questions can be asked without calling for self-incrimination. The advocate will counsel the accused not to answer an incriminating question.
  - Is there an alternative? The judge may put questions in writing that invite the accused or the advocate to respond.

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## Penal Trial

## 4. COLLECTION OF PROOFS

- **The obligation of secrecy:**
  - The judges and personnel must observe secrecy. Even witnesses can be bound by secrecy to protect the reputation of others, to prevent discord, scandal, or another disadvantage (c. 1455).
  - The questions must be secret and not made known to the witness in advance to preclude the possibility of collusion or corruption (cc. 1565 §1 and 1570).

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## Penal Trial

## 4. COLLECTION OF PROOFS

- **In graviora delicta cases**, special considerations apply:
- Parties bringing more grave accusations *contra sextum* may become uncooperative with the passage of time.
- Witnesses are not questioned before the joinder (c. 1529). However, an investigator or auditor may need to take advantage of what may be the only opportunity to gather all meaningful testimony.
- A witness who fears ill repute, hardships, or grave evils is exempt from testifying (c. 1548 §2, 2°).

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## Penal Trial

## 4. COLLECTION OF PROOFS

- **In graviora delicta cases related to confession**, additional considerations apply:
- The identity of an accuser in a delict involving confession cannot be revealed to the accused without permission (SST, Art. 4 §2).
- The judge must respect the seal of confession. Questions may not inquire into the content of any confession (SST, Art. 4 §2).
- Questions must be artfully phrased to arrive at the truth.

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## 4. COLLECTION OF PROOFS

- In causes of saints: **The postulator** bears the burden of proof and will present most of the witnesses.
- A recent cause often calls for hearing a variety of witnesses (perhaps 50 to 100). An ancient cause calls for fewer witnesses (at least 12) who testify to the reputation of the Servant of God.
- The postulator presents information about the Servant of God, used to assist in composing the interrogatory (c. 1552 §2, SM, Art. 37).
- The postulator is bound by secrecy and cannot reveal the questions to the witnesses (SM, Artt. 51, 80 §1 and 87 §1). The postulator may not take part in the hearing of witnesses *ad validitatem* (SM, Art. 94).

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## 4. COLLECTION OF PROOFS

- **The promoter of justice** must be cited for each session to fulfill his or her function. Serving as the devil's advocate, it is not enough to simply examine the acts at the end (SM, Art. 56 §3, 85 §1 and 91 §§1 and 3).
- The promoter composes the interrogatory which should probe the Servant of God to arrive at the truth (SM, Art. 78 §2).
- During the testimony, the promoter may suggest ex officio questions to expose faults or clarify obscure points (SM, Art. 91 §2).
- The promoter ordinarily suggests at least two ex officio witnesses especially if there are persons opposed to the cause (SM, Art. 96).

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## 4. COLLECTION OF PROOFS

- **The obligation of secrecy:**
  - All the officials of the diocesan inquiry and all witnesses must promise secrecy (SM, Art. 51 §1, 99 §2).
- **Use of an auditor:** Ordinarily, witnesses are heard by the judge, unless circumstances require hearing the witness through another (c. 1528).
  - **In causes of saints:** The use of an auditor is not permitted. All testimony must be taken by the one episcopal delegate...
  - ...except in a miracle inquiry: If a medical witness is unwilling, another doctor can be appointed to take the testimony (SM, Art. 108).

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## 4. COLLECTION OF PROOFS: DOCUMENTS

- **In the penal trial:** The following **Documents** may be probative:
  - For monetary delicts, stealing, bribery: financial documents;
  - For heresy, schism, inciting hatred, contempt or animosity: books, articles, letters, or notes;
  - For perjury or falsification: a falsified document;
  - For attempted marriage or concubinage: public records, marriage license, wedding announcement, or photographs;
  - For homicide, kidnapping, child abuse: police report or court records;
  - For the attempted ordination of a woman: newspaper articles.

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## 4. COLLECTION OF PROOFS: EXPERTS

- **In the penal trial:** **Experts** may provide useful evidence:
  - A theologian to testify regarding heresy?
  - An accountant to testify regarding financial crimes?
  - A legal/criminal expert regarding computer crimes *contra sextum*?
- **In causes of saints:** **Experts** are used in several roles:
  - Theologians read the published writings of the Servant of God;
  - Historians gather documentary evidence about the Servant of God;
  - Medical experts evaluate the subject of an alleged healing.

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## 4. COLLECTION OF PROOFS: JUDICIAL INSPECTION

- **In the penal trial:** An inspection of the layout of a rectory may prove or disprove the credibility of an accuser in a case of abuse.
- **In causes of saints:** The tomb and other places of significance are examined for signs of prohibited cult (SM, Art. 118).
  - The following are forbidden: images of the Servant of God crowned with halo or aureole, decorated with rays or nimbus; publication of books about miracles, revelations, or intercession of the Servant of God; testimonials at the tomb of graces or miracles received; images or lamps at the tomb; Mass or Divine Office in honor of the Servant of God; public veneration of relics; burial of the Servant of God under an altar.

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## Marriage Nullity

## Penal Trial

## Causes of Saints

## 5. USE OF MODERN TECHNOLOGY

“Can. 1567, §2 and DC art. 173, §2 permit the use of tape recorders or recording gadgets at the discretion of the judge, provided that the responses are afterwards transcribed in complete fidelity to the responses and if possible signed by the deponents.”

See also c. 1569 and SM, Art. 111.

M. Ambrose, “The Significance of the Proof in the Instructional Phase. Canons 1526-1581, 1598-1600, 1678,” in *The Canonist*, 12 (2021), p. 272.

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## Marriage Nullity

## HOW EVIDENCE IS GATHERED

The ideal in law is to take oral testimony (c. 1528, DC, art. 161, §1; art. 165, §1; art. 170).

DC, art. 173, §1: “the answer is to be written down immediately ... and must relate the very words of the deposition ...”

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## Marriage Nullity

### MORE ON GATHERING EVIDENCE:

DC, art. 173, §2: “the use of a recording machine ... can be admitted ... as long as the responses are then put into writing ...”

What of telephone recordings? Hand written or typed depositions? Zoom or Skype calls?

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## Marriage Nullity

### “MODERN COMMUNICATION GADGETS”:

“interrogation by telephone or by e-mail or Skype call may not be accepted as an ordinary means of questioning the witnesses because such interrogations and depositions do not sufficiently satisfy the requirements given by cann. 1556-1570. It was expressly said that testifying by telephone was not prohibited in the canon. In the interrogation by an e-mail one cannot be certain about the observance of can. 1560, §1 and DC art. 165, §1 which prescribe that the individual witnesses are to be questioned separately. In fact, it can happen that the witnesses in writing their depositions or testimonies consult one another. Similarly, one cannot ensure the fulfilment of this juridical requirement in an interrogation by telephone, if one witness might have already heard the testimony given by another witness present in the same room or speaking on another telephone extension. In the replies submitted via e-mail, the feasibility of clarifying some doubts of the facts is very less. Moreover, there is no guarantee of the identity of the person who attends to the telephone and who really composed the written responses (can. 1563).”

M. Ambrose, “The Significance of the Proof in the Instructional Phase. Canons 1526-1581, 1598-1600, 1678,” in *The Canonist*, 12 (2021), p. 277.

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## Marriage Nullity

### OTHER AUTHORS WHO CONSIDER MODERN MEANS OF GATHERING EVIDENCE:

William Daniel, “The Canonical Norms on the Judicial Examination or Interrogations: Their Purpose, Implementation, and Non-Observance” in *Jurist* 78 (2022) 132-202.

Michael Nobel, “Challenges for Interrogating Parties and Witnesses – Can Video-Conferencing Technology be Used to Instruct Marriage Cases Especially When Parties and Witnesses Live Outside the Diocese?” in *CLSG&I Newsletter* n. 201, February 2022, pp. 67-91.

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## Marriage Nullity

## Penal Trial

## Causes of Saints

### 5. USE OF MODERN TECHNOLOGY

- The tribunal must have a **stable location** (c. 1468). No completely virtual tribunals.
- **Complications of distance** may be overcome in different ways.
  - The witness may travel to the Tribunal (c. 1558 §1) or may be heard in another nearby place in the diocese (c. 1558 §3).
  - The tribunal personnel may travel to another diocese for a session, with the permission of the local diocesan bishop (c. 1469 §2).
  - The judge can request a rogatorial examination by another tribunal (c. 1418). In *causes of saints*, a full rogatorial inquiry must be constituted (NS, 26; SM, Artt. 114-115).

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## 5. USE OF MODERN TECHNOLOGY

- **Tape recorders** may present possible difficulties (See William Daniel article).
- **Court transcriptionists** may lengthen the acts and make them unwieldy by memorializing unnecessary information (c. 1567 §1).
- **Telephone interviews** are not foreseen.
  - Problems with telephone interviews (See William Daniel article).
  - A remote advocate might be present via telephone to listen to a session and advise the accused. Potential shortcomings.

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## 5. USE OF MODERN TECHNOLOGY

- **Video interviews**, not available when the Code was promulgated, allow participants to see, hear and participate in a session.
  - 8 May 2020 letter of the Congregation for the Clergy allowing consultation via videoconference during Covid as long as it remained necessary (Prot. 2020/1683).
  - Video conferencing is now common in civil judicial proceedings.
  - Consider the phrase in canon 1469 §2, “For a just cause and after having heard the parties...”
    - If the parties have no objection, could the judge use video conferencing?

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## Penal Trial

## 5. USE OF MODERN TECHNOLOGY

- **Video interviews** may solve some problems and create others.
  - The expense involved for travel by the witness, tribunal staff and advocate may constitute a just cause?
    - Note the provision on expenses incurred by the witness (c. 1571).
  - A difficulty is raised under canon 1469 §2 regarding the exercise of judicial power in multiple jurisdictions.

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## Penal Trial

## 5. USE OF MODERN TECHNOLOGY

- **In the penal trial:** Consider the possible relevance of **electronic information:**
  - video or audio recordings of homilies or talks,
  - blogs, podcasts, social media posts,
  - evidence that a secret recording is made of a confession
  - internet search history, cell phone data, emails, text messages.

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## 5. USE OF MODERN TECHNOLOGY

- In causes of saints: **Testimony** must be in person.
- **Proofs admitted** can include any kind of proof that seems useful (c. 1527 §1), though practically, it must be reduced to writing.
  - An exception has been made for CD-ROMs of medical scans.
- **Published writings** include materials disseminated by the Servant of God in print (books, articles, bulletins),
  - but not those disseminated by others, especially after death,
  - nor those transmitted electronically (videos, podcasts, audio recordings, blogs, emails, television or radio programs).

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## 6. PUBLICATION OF THE ACTS (C. 1598; DC, ART. 229)

To whom are the acts published?

- “Parties and their advocates”; not the parties’ procurator

What is published?

- See DC, art. 230 and c. 1598, §1: “in order to avoid very serious dangers, the judge can decree that some act is not to be shown to the parties, with due care however that the right of defense always remains intact.”

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## Marriage Nullity

### CANON 1598: THE PUBLICATION OF THE ACTS

Purpose: to be able to see the complete acts, to know on what evidence the judge will come to a decision.

Publication takes place at the tribunal. DC, art. 233, §2 adds: if a party lives far away ... he can inspect the acts at a nearby tribunal or "another suitable place."

Advocates may receive a copy; parties cannot.

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## Marriage Nullity

### C. VISCOME, 6 OCTOBER 2020, NULLITY OF SENTENCE (C. 1598 §1):

"In order for any process to be considered judicial in the truest sense of the word, both parties have the right to legitimate information on the part of the Tribunal and the right to be heard, together with the faculty to intervene in the process as well as to contradict the other party.

Among the principal moments of the process, publication of the acts is eminent. This constitutes the element of great importance for the protection of the right of defence, that is to say, under the subjective aspect of at least one party in the cause or under the public aspect, that is, of the very principle of *contradictorium*, because through concession of the faculty to read the acts of the cause, a party is able to oppose the proofs presented by the other party and by completing personal proofs (cfr. can. 1598, §2). Then the parties have the right to present personal defence in the discussion phase (cfr. can. 1601). Therefore, it is not surprising that the Legislator prescribes publication of the acts "under pain of nullity" (can. 1598, §1). Omission or substantial defect of publication of the acts affects not only this precise phase of the process, but in the case it carries with it the real denial of the right of defence (cfr. can. 1620, 7°)."

C. Viscome, 6 October 2020, *The Canonist*, 12 (2021), pp. 130-131, #3.

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## Marriage Nullity

### C. 1620.7 (DC ART. 270.7): DENIAL OF RIGHT OF DEFENSE

The right of defense is important at these moments in a process:

- The right to be cited
- The right to know and respond to the grounds at issue
- The right to present evidence
- The right to know the witnesses
- The right to know the evidence (proofs) presented (publication of the acts: c. 1598, DC art. 229)
- The right to respond to the evidence and present arguments
- The right to know the sentence (argument as well as decision)
- The right to appeal (including the right to know the process of appealing)

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## Marriage Nullity

### BEAL COMMENTS:

« The right of defense bears on both the instrumental and the intrinsic ends of procedural law. Since the informed participation of the parties is an important component of the judicial dialectic leading to the truth, one cannot conceive of just judgment without the 'contradictory,' that is to say, through the concrete possibility granted to each party in the case to be heard and to be able to know the contradict the requests, proofs and deductions adopted by the opposing party or 'ex officio.'

Unless the parties have this concrete possibility for meaningful participation in the resolution of the case, the intrinsic end of procedure is also thwarted. Thus, the 1983 code sanctions with incurable nullity sentences issued after a process in which a party's right of defense had been denied (c. 1620.7). »

J. Beal, "Making Connections: Procedural Law and Substantive Justice," in *The Jurist*, 54 (1994), p. 169; he is citing John Paul II's 1989 allocution to the Roman Rota.

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## Marriage Nullity

### NATURAL LAW, RIGHT OF DEFENSE IS ESSENTIAL:

Rotal judges remind us that we must distinguish between the natural law issues involved in the right of defense and the positive law issues. What matters is that the natural law of the right of defense is not violated. While the positive law procedural rules are important, it is not essential to the validity of the process if some formalities were omitted, or if different steps did not take place in the proper order, provided that the essentials of the process have been fulfilled.

C. Agustoni, decree, 7 November 1986, in *R.R.T. Decreta*, 4 (1986), p. 171, n.4, where he is citing a decree c. Serrano, 15 March 1985.

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## Marriage Nullity

### CANON 1598, §2:

“To complete the proofs, the parties can propose additional proofs to the judge.”

Note: once further proofs have been collected, the new acts must be published (DC, art. 236; c. 1598, §2)

90

## 6. PUBLICATION OF THE ACTS

- **In the penal trial:** Publication serves as the opportunity for the promoter of justice and the advocate to examine the acts of a penal trial, under penalty of nullity (c. 1598 §1).
  - Balance withholding a specific act for a most grave danger against the right of defense (c. 1598 §1). Delicts around confession require special protection of the accuser (SST, Art. 4 §2).
- **In causes of saints:** The acts are published to the promoter of justice, who has participated in the sessions for hearing witnesses, and the postulator who sees the acts for the first time (NS, n. 27b and c).
  - Acts may not be withheld in causes of saints.

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## 6. PUBLICATION OF THE ACTS

- Whether or to give the advocate a copy of the acts (c. 1598 §1), or to facilitate their inspection in another Tribunal (c. 1418)?
  - A copy of the acts is not given to the accused.
  - Copies of the acts are not given out **in causes of saints**.
- Time limits for viewing the acts are set by the judge (c. 1466), and can be extended in the interest of justice (c. 1465 §2), but should not prolong the trial (c. 1465 §3).

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## 6. PUBLICATION OF THE ACTS

- The purpose of publication is to determine if additional evidence should be presented,
  - whether to contradict an assertion made in the acts, or
  - to support a point not sufficiently elucidated in the acts.
- The possibility of introducing additional proofs (c. 1598 §2) is
  - at the discretion of the judge (c. 1527 §2),
  - within the time set by the judge (c. 1466),
  - for the sake of justice,
  - but without unnecessarily prolonging the trial (c. 1465 §3).

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## 7. EVALUATION OF THE PROOFS

- testimonies of parties and witnesses (cc. 1527-1528; 1530-1538; 1592-1594; 1547-1573; DC, artt. 177-178; 193-202)
- documents (cc. 1539-1546; DC artt. 183-192)
- credibility witnesses (c. 1679)
- experts (cc. 1574-1581; 1680; DC artt. 203-213)

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**Marriage Nullity**

## 7. EVALUATION OF THE PROOFS — JUDICIAL CONFESSION

*Mitis iudex*: “Can. 1678 § 1:

“In cases of the nullity of marriage, a judicial confession and the declarations of the parties, possibly supported by witnesses to the credibility of the parties, can have the force of full proof, to be evaluated by the judge after he has considered all the indications and supporting factors, unless other elements are present which weaken them.”

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**Marriage Nullity**

## CONSIDERING *MITIS IUDEX*, BEAL CONCLUDES:

“The new canon 1678, §1 completely reverses the traditional standard for assessing the probative weight of the depositions of the parties. No longer are the parties to the marriage case considered suspect; no longer is it considered unusual that the depositions of the parties might be sufficient to provide full proof. Instead of stipulating that the depositions are capable of providing full proof only when they are fully corroborated by other indices and circumstances, the law now asserts simply that these depositions are capable of providing full proof ‘unless other elements are present which weaken them.’”

J. Beal, “*Mitis iudex* Canons 1671-1682, 1688-1691: A Commentary,” in *The Jurist*, 75 (2015), p. 499.

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## Marriage Nullity

### RENKEN SPEAKS OF TRYING TO ESTABLISH

“the credibility of the party as an element of truth.”

He continues: “The judgment reached by credibility witnesses must be based on facts and experiences with the party, not only on sympathy for the party, friendship or family ties.”

He adds: “the character witness is required to address the *veracity* (subjective element) and *vivid recall* (objective element) of the party who makes a judicial declaration ...”

J. Renken, “The Testimony of Character Witnesses in Marriage Nullity Cases,” in *Philippine Canonical Forum*, 15 (2013-2014), pp. 200-201.

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## Marriage Nullity

### RENKEN HIGHLIGHTS AN IMPORTANT CONCLUSION:

If a judge comes to a conclusion based on the declaration of the party strengthened by *indicia* and *adminicula*: “his moral certitude is derived principally, but not exclusively, from the declarations of the parties.”

If there are no proofs other than the declarations of the parties, the judge can look to using credibility witnesses.

J. Renken, “The Testimony of Character Witnesses in Marriage Nullity Cases,” in *Philippine Canonical Forum*, 15 (2013-2014), pp. 206-207.

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## Marriage Nullity

### CREDIBILITY WITNESSES ONLY USED “IF FULL PROOFS ARE NOT AVAILABLE ELSEWHERE.”

Renken concludes: “Character testimony may rightly be termed, therefore, ‘subsidiary proof’ which provides a ‘moral argument’ supporting the declarations of the parties.”

He concludes: “This also means that it is not permissible to set aside other, normal elements of proof ... in favor of using the more convenient element of credibility witnesses.”

J. Renken, “The Testimony of Character Witnesses in Marriage Nullity Cases,” in *Philippine Canonical Forum*, 15 (2013-2014), p. 210-211.

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## Penal Trial

### 7. EVALUATION OF THE PROOFS

- **Full proof:** The standard of canon 1678, noted above, can only be applied to causes of nullity of marriage. One witness **can** constitute full proof in an annulment after consideration of all indications and supporting factors (c. 1678 §1).
- **In the penal trial**, the traditional standard must be followed. A judicial confession and the testimony of one witness **cannot** constitute full proof unless corroborated by other elements (cc. 1536 §2 and 1573).

100

## 7. EVALUATION OF THE PROOFS

- **In causes of saints:** The instruction takes place in the diocesan phase, and the evaluation takes place in the Roman phase.
- Witnesses are categorized based on the source of their knowledge:
  - Eye witnesses, or 1<sup>st</sup> class witnesses (*de visu*), are to be heard.
  - 2<sup>nd</sup> class witnesses (*de auditu ab videntibus*), may be heard.
  - 3<sup>rd</sup> class witnesses (*de auditu ab audientibus*) are not to be heard (SM, Art. 98).
- In ancient causes, when there are no 1<sup>st</sup> class witnesses, testimony is sought from those knowledgeable about the reputation of holiness, offering of life or martyrdom.

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## 7. EVALUATION OF THE PROOFS

- **In causes of saints:** The variety of witnesses adds to the credibility of the Cause:
  - Witnesses should include family and relatives, as well as non-relatives (SM, Art. 98 §1).
  - Witnesses include laity, religious, and clergy including bishops if possible (Dicastery of Causes of Saints, Regolamentoo of Postulators, 2021, 20c).
  - For a religious Servant of God, witnesses must be chosen from outside the institute as well as from the members (SM, Art. 100).
  - Witnesses should include those favorable to the Cause, but especially those contrary (SM, Art. 96).

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**Marriage Nullity**

## 8. THE APPEAL: GETTING IT RIGHT THE FIRST TIME

- Canon 1680, §2 from *Mitis iudex*:

“After the time limits established by law for the appeal and its prosecution have passed, and after the judicial acts have been received by the tribunal of higher instance, a college of judges is established, the defender of the bond is designated, and the parties are admonished to put forth their observations within the prescribed time limit; after this time period has passed, if the appeal clearly appears merely dilatory, the collegiate tribunal confirms the sentence of the prior instance by decree.”

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**Marriage Nullity**

## WHO CAN APPEAL OR ASK FOR A COMPLAINT OF NULLITY AGAINST A SENTENCE?

- Parties and their advocates
- Defender of the bond
- Promotor of justice

*Mitis iudex*, c. 1680 and the role of the defender

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## Marriage Nullity

### C. CABERLETTI, DECREE ON THE PRELIMINARY QUESTION OF ADMISSION OF APPEAL, DEC. 14, 2021

Citing c. 1682, §2 and achieving the principles of “brevity of the matrimonial process, and keeping in mind the salvation of souls”, Caberletti highlights the reasons why an appeal would be granted. Speaking of the new c. 1680 that came out with *Mitis Iudex* in 2015, Caberletti cites Roberti and notes: “The purpose of the appeal is twofold: “First, that errors be corrected, and second, that the cause be submitted to a new and fuller examination. However, the appeal should not be understood as recourse against a lower judge due to wrongful treatment, but as a means established by law for deliberation in favor of a more correct administration of justice.””

c. Caberletti, decree on the preliminary question of admission of appeal, Dec. 14, 2021, in *Decisions of the Roman Rota*, 1 (2023), pp. 93-107, at pp. 94-95, #2.

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## Marriage Nullity

### CABERLETTI SPEAKS OF WHY AN APPEAL WOULD BE CONSIDERED ‘MERELY DILATORY’ AND BE DENIED:

“For there to be a denial of the course of an appeal in the second grade of judgement, the new can. 1680 demands a certain quality, signified by the word ‘merely,’ such that the dilatory appeal is evident and lacking arguments that render the reform of the appealed sentence probable. ... something is usually considered as ‘merely’ if it consists of a single element or fact, with no argument to the contrary brought forward.

At the same time, the judge makes up his or her own mind about the quality mentioned above by scrutinizing the acts of the case and the proofs that led the judge of the first grade to issue an affirmative sentence. Therefore, the evidence of a merely dilatory appeal, in addition to the arguments of the defense in that appeal, must be taken from the acts and the proofs in such a way that it is morally certain that the probability of a reform of the previous sentence in no way applies. (cf., can. 1608, §1).”

c. Caberletti, decree on the preliminary question of admission of appeal, Dec. 14, 2021, in *Decisions of the Roman Rota*, 1 (2023), p. 96, #2.

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## Marriage Nullity

### C. CABERLETTI, DECREE ON THE PRELIMINARY QUESTION OF ADMISSION OF APPEAL, DEC. 14, 2021

The judges concluded: “*the appeal of the respondent woman should not be admitted*” and thus the first instance affirmative decision was confirmed.

c. Caberletti, decree on the preliminary question of admission of appeal, Dec. 14, 2021, in *Decisions of the Roman Rota*, 1 (2023), p. 107, #6.

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## Marriage Nullity

### C. ERLEBACH, PRELIMINARY QUESTION: WHETHER AN APPEAL IS MERELY DILATORY, FEB. 13, 2020

“In the case of an appeal against a sentence which first declared the nullity of the marriage, it is not necessary to proceed immediately with the ordinary process of a second grade of judgment; rather, the quality of the appeal is to be considered preliminarily. For if the appeal “appears to be merely dilatory, the collegiate tribunal confirms the sentence of the prior instance by decree” (can. 1680 §2), or otherwise it will proceed at the appellate grade. Therefore, the basis of the debate at this preliminary phase concerns the question of whether it is clearly established that the appeal is merely dilatory, or not.

Every appeal is inherently dilatory in that it prolongs the attainment of a *res iudicata*, or, in causes of nullity of marriage, of a matter that is *quasi-iudicata* or formally adjudicated. When, however, is an appeal merely dilatory?”

C. Erlebach, preliminary question, Feb. 13, 2020, in *Decisions of the Roman Rota*, 1 (2023), pp. 93-108, at p. 95, #3.

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## Marriage Nullity

### ERLEBACH EXPLAINS, FEB. 13, 2020:

- p. 95, #3: “the appeal should be considered merely dilatory if any reason is lacking that would make a reformation of the appealed sentence probable.”

“an independent examination of the acts made by the college of Judges is also required, namely, to see whether there is intrinsic and extrinsic coherence in the appealed decision. The first type of coherence refers to the logical consistency of the sentence itself, that is, whether its dispositive part is adequately based on the stated principles of law and the *in facto* section of the same sentence. Extrinsic coherence, on the other hand, concerns the relationship between the acts of the process, previous sentences, and the appealed sentence, especially its *in facto* section, to ascertain whether the facts have been properly addressed or if some significant omissions have occurred that would lead to the opposite conclusion.” (p. 96, #3)

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## Marriage Nullity

### ERLEBACH CONTINUES, FEB. 13, 2020:

P. 97, #3: “If from an examination carried out in this way, it is established that the appeal is merely dilatory, that is, if no reason is given which would make the reform of the appealed decision probable, the judges of the appellate tribunal will by that fact declare as well-founded the moral certainty of the prior grade of judgment concerning the nullity of marriage, for which reason the appealed sentence should be confirmed by virtue of the moral certainty obtained in the preliminary phase of the appellate grade. It would be another matter if, from such a comprehensive examination of the basis of the appeal, it is not manifestly established that the appeal was clearly merely dilatory, in other words, if some well-founded or reasonable doubt could not be excluded (cf., Address of Pius XII to the Roman Rota, October 1, 1942, AAS 34 [1942], p. 339) concerning the declared nullity of the marriage, for which reason a reformation of the sentence would be probable. In such a case the appeal should be admitted.”

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## Marriage Nullity

### ERLEBACH EXPLAINS THAT THE JUDGES FIND THE ARGUMENT IN FAVOUR OF NULLITY DEFICIENT:

- P. 101, #7: “The *in facto* section of the appealed decision gives rise to several important difficulties: a) above all – from a general point of view - it is not understood by what reasoning the Judges came to acknowledge proof of the grave lack of discretion of judgment in the Petitioner man.”
- P. 105, #7: “one conclusion is clear: the *in facto* section does not offer conclusive arguments. This section is not logically based on the facts of the case, but rather shows the completely arbitrary judgment of the Tribunal.”
- Pp. 106-107, #9: “it is highly probable that [the sentence] will be reformed at a new grade of judgment, in which case the Respondent’s appeal, even if it had been made for non-noble, subjective reasons, cannot be considered merely dilatory.”

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## Marriage Nullity

### ERLEBACH CONCLUDES, FEB. 13, 2020:

- pp. 107-108, #10: “the appeal of the respondent woman against the sentence of the Tribunal of the first grade of judgment is not to be considered as merely dilatory.”
- Thus, the judges conclude: “The Petitioner man, who desires a declaration of the nullity of his marriage as quickly as possible, is invited to carefully consider – perhaps with the assistance of a legal expert – the reasons behind this decree. He is encouraged to promptly indicate to This Apostolic Tribunal whether he wants to pursue the cause on the ground of his defect of discretion of judgment at the Roman Rota, or if he prefers rather to exercise his right before another competent forum based on a different ground.”

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**Penal Trial**

## 8. THE APPEAL: GETTING IT RIGHT THE FIRST TIME

- In the **penal trial**: Appeals are heard by the appellate tribunal or by direct appeal to the Roman Rota in second instance (cc. 1444 §1 and 1632 §1).
- However, *graviora delicta* cases are within the competence of the Dicastery for the Doctrine of the Faith (SST, Art. 16).
- Unlike annulments, new grounds cannot be added in second instance in the **penal trial** (c. 1639 §1).
- The joinder can only review what was decided in first instance.

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**Penal Trial**

## 8. THE APPEAL: GETTING IT RIGHT THE FIRST TIME

- The purpose of the penal appeal is to subject the case to a higher level of justice. The appellate tribunal is not bound by the decision in first instance and can reverse any decision.
- An appeal made to request a lighter sentence might result in a harsher sentence in second instance.
- An appeal of only part of the sentence allows the other party to appeal the remainder of the sentence.
- If the advocate appeals the choice of penalty, the promoter can appeal a *non constat* decision on one of the other grounds.

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## 8. THE APPEAL: GETTING IT RIGHT THE FIRST TIME

- **In causes of saints:** All the acts of the diocesan inquiry are sent to Rome for study and the evaluation of the cause.
  - Procedural or material defects will delay a cause.
  - The postulator will be asked if the defects can be remedied.
  - A supplementary diocesan inquiry may be required to gather additional proofs.
  - If a cause is mishandled at the outset, it may be said to be “born badly,” and the defects tend to hamper the cause throughout its progress.

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## CLOSING DISCUSSION:

The purpose of the canonical norms and how we implement them in practice.

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