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# RECUSAL AS A GUARANTEE FOR THE IMPARTIALITY OF THE ECCLESIASTICAL COURT

# INSTYTUCJA WYŁĄCZENIA SĘDZIEGO GWARANTEM BEZSTRONNOŚCI SĄDU KOŚCIELNEGO

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**Abstract**

The article examines the mechanism of recusing a judge based on the principle of judicial independence in impartial administration of justice. First, attention is drawn to the reasons for recusal, followed by the conclusion that it involves a judge who is the object of a justified suspicion of bias. Next, the author presents the procedure of excluding a judge from adjudicating in a trial, with a special emphasis on the authority competent to conduct incidental proceedings for recusing a judge. Last, the consequences of accepting a request to recuse a judge are presented: the change of a judge, not of the degree of the trial, and the validity of procedural acts performed before and after an application for recusal has been filed. The author raises a number of questions and offers some clarification for the legislator on the mechanism of recusal. The institution of judicial recusal is a pillar and guarantee of a fair and impartial ecclesiastical process.

**Keywords:** procedural canon law, canon law process, impartiality of the court, judicial independence, recusal

**Abstrakt**

Artykuł porusza problematykę instytucji wyłączenia sędziego związanej z zasadą niezawisłości sędziego kościelnego w sprawowaniu bezstronnego wymiaru sprawiedliwości. W pierwszym punkcie zwrócono uwagę na przyczyny wyłączenia sędziego, dochodząc do wniosku, że wyłączeniu podlega sędzia, wobec którego zachodzi uzasadnione podejrzenie stronniczości. W kolejnym punkcie omówiono procedurę wyłączenia sędziego od orzekania w procesie, ze szczególnym uwzględnieniem organu kompetentnego do rozstrzygnięcia sprawy wpadkowej o wyłączenie sędziego.

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W ostatnim punkcie zostały przywołane skutki uwzględnienia wniosku o wyłączenie sędziego, którymi są: po pierwsze, zmiana osoby sędziego, a nie stopnia postępowania; po drugie, ważność czynności procesowych dokonanych przed i po złożeniu wniosku o wyłączenie. Autor w kilku miejscach opracowania stawia pytania oraz proponuje doprecyzowanie przez ustawodawcę niektórych kwestii w przedmiocie instytucji wyłączenia sędziego. W konkluzji należy stwierdzić, że instytucja wyłączenia sędziego stanowi fundament i gwarancję rzetelnego oraz bezstronnego procesu kościelnego.

**Słowa kluczowe:** prawo kanoniczne procesowe, proces kanoniczny, bezstronność sądu, niezawisłość sędziowska, wyłączenie sędziego

## Introduction

One of the main tasks of an ecclesiastical judge is to seek the objective truth concerning the case he is examining in a process. The trial, led by a judge, is aimed at achieving moral certitude, referred to by the 1983 Code of Canon Law (Canon 1608 § 1), and passing a judgement. This essential role of the judge plus the Church's concern to ensure an impartial and objective administration of justice supports the institution of recusal in the ecclesiastical judiciary. It has received interest from both the legislature and canonist doctrine, as well as the jurisprudence of the Holy See Tribunals, as will be discussed in what follows. My aim is to present as comprehensively as possible the institution of recusal and its impact on the impartiality of the court and, at the same time, the independence of the ecclesiastical judge. The reasons, procedure and effects of recusal on the entire process conducted before the ecclesiastical court will be presented, too. Such a presentation of the issue will contribute to a better understanding of the functioning of justice in the Roman Catholic Church.

## 1. Reasons for recusal

Impartiality (or lack of bias) or objectivity [Szymczak 1988a, 150] is firmly entrenched in canon law; it is one of the fundamental principles underlying the exercise of authority in the Church. It obliges the competent authority to make decisions not on the basis of personal beliefs or prejudice, but on objective criteria. Canon law invokes this principle by prescribing the rejection of any "favouritism," which the opposite of impartiality (Canons 524, 626, 830 § 2, 1181). Consideration for a person

(*acceptio personarum*), or partiality, was referred to by St Augustine of Hippo as being guided in one's decisions not so much by the factual state of affairs but by favouring one party due to some personal considerations, such as sympathy or appreciation. This kind of bias is opposed to distributive justice, as highlighted by St Thomas Aquinas [Majer 2019, 262]. Such partiality was also condemned by God, who "does not show favouritism" (Romans 2:11) or "there is not favouritism with him" (Ephesians 6:9). Any subject that has ecclesiastical power of governance must show consideration for the entire community of the Church, without favouring anyone, always rising above personal interests. Impartiality stems from both the principle of justice and specific norms regulating the exercise of power. This is apparent, in particular, at court: an ecclesiastical judge, when passing a judgement, must be free from any kind of external pressure [ibid., 263]. Judicial independence is a statutory principle of ecclesiastical justice, which posits a judge issues decisions independently, and they are made within the limits of the law and on the basis of his own conviction [Pikus 2002, 277].

The impartiality of the judge is guaranteed, for example, by recusal, which can be requested by a litigant. This institution was already codified in Canons 1613-1616 of the 1917 Code of Canon Law. Today, it is regulated in Canons 1448-1451 CIC/83. Regarding nullity cases, recusal is provided for in Articles 67-70 of the 2005 instruction *Dignitas connubii*, nos. 67-70. In Canon 1613 § 1 CIC/17, the legislator prescribed that a judge may not hear a case in several cases: by reason of consanguinity or affinity in any degree of the direct line and up to the second degree of the collateral line, guardianship (*tutela*) or curatorship, close intimacy or great aversion, expected benefit or the avoidance of harm; also by virtue of having served as a advocate or attorney in the case. If, on the other hand, he accepted a case involving one of the above circumstances, he could be recused at the request of either party in accordance with Canon 1614 § 1 CIC/17. In the CIC/83, Canon 1448 § 1 provides that a judge is not to accept a case for adjudication in eight cases: consanguinity or affinity in any degree of the direct line and up to the fourth degree of the collateral line; guardianship; curatorship; close acquaintance; great animosity; making a profit; the avoidance of a loss. Thus, it can be seen that this provision was only modified in terms of the degree of consanguinity and affinity in the lateral line (from the second to the fourth degree). The issue of recusing a judge who, in an earlier instance, acted as an advocate or attorney

for at least one of the litigants, is now regulated by Canon 1447 CIC/83. Moreover, this provision further adds to the catalogue of persons excluded *ipso iure* from adjudication in the trial a judge, the promoter of justice, the defender of the bond, a witness, and an expert who were previously involved in the case at hand. A violation of the above prohibition would result in the defect of irremediable nullity (Canon 1620, 1º) and constitute a suspicion of the judge's partiality, and thus would also be a legitimate reason for his recusing him at the request of a party – both the complainant and the defendant – in keeping with Canon 1449 § 1.

### 1.1. Consanguinity or affinity

Consanguinity is a relationship that occurs between people connected by blood ties and descended from a common ancestor [Szymczak 1988b, 774]. In contrast, affinity is defined as a family relationship holding between one spouse and relatives of the other spouse [ibid., 870]. In canon law, consanguinity is computed through lines and degrees. In the direct line, there are as many degrees as there are people born, excluding the ancestor. On the other hand, there are as many degrees in the lateral line as there are people in the two lines together, excluding the ancestor (Canon 108 CIC/83. In contrast, affinity arises by virtue of a valid marriage – even if not consummated – and exists between the husband and his wife's relatives and between the wife and her husband's relatives. It is calculated in such a way that the husband's relatives are in the same line and in the same degree in-laws (affines) of the wife, and vice versa (Canon 109). The figure below can be used to better understand how consanguinity and affinity are computed.

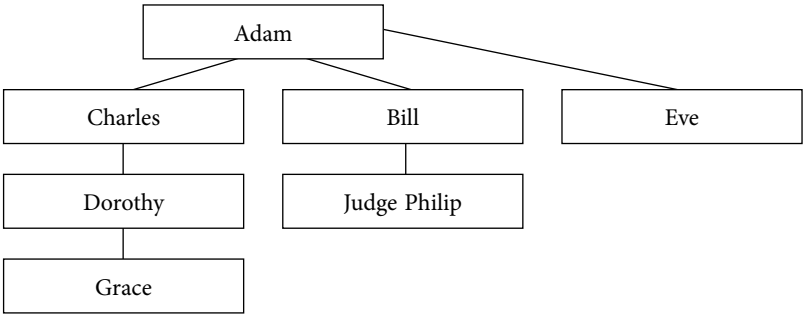


Figure 1. Computing consanguinity in canon law

Under Canon 1448 § 1 CIC/83, a judge who is a relative or an in-law of any of the litigants in all degrees of the direct line and up to the fourth degree of the collateral line is to be barred from adjudication on the grounds of consanguinity or affinity. It follows from the illustration above that Judge Philip is related to: Bill (first degree of the straight line), Adam (second degree of the lateral line), Eve (third degree of the lateral line), Charles (third degree of the lateral line), Dorothy (fourth degree of the lateral line), and Grace (fifth degree of the lateral line). Thus, Judge Philip is subject to recusal (unless he himself has previously abstained from adjudication) if at least one of the litigants were: Bill, Adam, Eve, Charles, or Dorothy. He is allowed to hear the case of Grace only, who is related to him only in the fifth degree of the lateral line.

### 1.2. Guardianship or curatorship

In exercising her powers, a minor person – that is, one under the age of 18 (Canon 97 § 1) – is subject to the authority of the parents or a legal guardian. The exceptions are those cases in which minors are exempted from the parents' or the legal guardian's authority under divine law or canon law (e.g., with regard to canon procedural law – Canon 1478). The ecclesiastical legislator provides a clause referring to state law regarding the appointment of a legal guardian and his or her exercise of authority over the minor – this is a case of canonising a civil law. The exceptions are those cases in which canon law stipulates otherwise, or the diocesan bishop has validly recognized in certain cases that care should be taken to appoint a guardian other than the one established by state law (Canons 98 § 2 and 1479). Guardianship in canon law is granted to minors. Its exercise is entrusted to the legal representative of a minor who does not have parents or whose legal interest is at variance with the legal interest of the parents. In addition, the Polish Civil Code[1] regulates in Article 13 § 2 that a guardianship is established – in accordance with Polish law – for a fully incapacitated person, unless he or she remains under parental authority. On the other hand, guardianship, as a rule, is granted to adults who need

[1] Act of 23 April 1964 – The Civil Code, Journal of Laws No. 2022, item 1360, as amended [hereinafter: CC]. The Civil Code distinguishes three types of legal capacity: full capacity (Articles 10 and 11), limited capacity (Articles 15-16) with its effects (Articles 17-21), lack of capacity (Articles 12-13) and the associated effects (Article 14).

special representation or assistance. Its exercise is entrusted to the statutory representative of an adult without capacity for legal act. A minor can also be placed in the care of a curator (Canon 105 § 2); the legal situation of the minor is not protected by the parents or a legal guardian, or there occurs a conflict of interest between the minor and the parents or the legal guardian. Additionally, Article 16 § 2 CC provides that a curator is appointed for a person who is partially legally incapacitated in accordance with Polish law. Under Polish law, guardianship and curatorship are regulated also by the Family and Guardianship Code,[2] Articles 145-184. They are among the institutions serving to protect legally incapacitated individuals. Should a potential conflict of interest arise, a judge who has guardianship or care of one of the parties is recused by virtue of having such guardianship or care.

### 1.3. Close intimacy or aversion

Intimacy is defined as a close, familiar relationship [Szymczak 1989c, 980]. Aversion, on the other hand, is an inimical feeling, or a dislike of someone or a prejudice against someone [Szymczak 1988b, 323]. Recusal applies to a judge who is related to one of the litigants by close intimacy (*intimae vitae consuetudinis*) resulting from, for example, cohabitation, running a business together or having a very close friendship with one of the parties. Similarly, a judge who has a dislike for any of the parties (*magnae simultatis*), which may be due to things like intense aversion leading to antipathy or intransigent hatred toward any of the parties [Del Amo 2023, 895]. At no point does the ecclesiastical legislator enumerate situations involving close intimacy or aversion. Therefore, based on the doctrine of canon law and life experience, it should be judged prudently in each particular case whether the situation meets the criteria of *intimae vitae consuetudinis* or *magnae simultatis*.

### 1.4. Expected advantage or avoidance of damage

Finally, recusal applies to a judge who expects a material or spiritual advantage (*lucri faciendi*) or wants to avoid a damage (*damni vitandi*), including material or spiritual. This is because, typically, a judge who expects

[2] Act of 25 February 1964 – The Family and Guardianship Code, Journal of Laws No. 2020, item 1359.

some kind of advantage from either of the litigants or wants to avoid a damage has strong ties with one of the parties. His judgement might result from a biased decision influenced by an expectance of a specific outcome (e.g., by virtue of being appointed for a specific position) [Pawluk 2016, 209]. The notion of expected advantage also informs the ban on accepting any gifts by reason of his handling the case, provided for in Canon 1456 and Article 74 DC. Such reprehensible conduct could arouse reasonable suspicion that the judge's impartiality is impaired.

### 1.5. Other causes

We can ask this: Apart from the cases mentioned above, can an ecclesiastical judge be recused under other circumstances? I believe so for at least two reasons. Canon 1448 § 1 mentions only the cases where a judge is not allowed to undertake a case in which he has a stake of any kind. However, there is a fundamental difference between a judge's withdrawal from hearing a case and his recusal at the request of any of the litigants. A judge's withdrawal (*iudex inhabilis*) from adjudication in a given case is his sovereign decision, made in compliance with canon law and his own conscience. In contrast, the recusal of a judge (*iudex suspectus*) occurs at the request of a litigant, so in this case the initiative lies with the litigant, not the judge. That a judge can be recused for some other reasons was also advocated by the rotal jurisprudence[3] when the CIC/17 was in force, and by some canonists. Thus, it seems valid to state that also in the current state of the law, a judge can be recused whenever any of the litigants harbours a legitimate suspicion that the judge is guided by a preference for some of the litigants (Article 67 § 1 DC). In other words, a judge can be recused in any case in which there is a reasonable suspicion of impartiality.

When creating, applying and interpreting canon law, it is also necessary to take into account its specific aspects, e.g., the *forum internum*.[4] Therefore, we can ask: Does the fact that a judge happens to be a confessor of any of the litigants constitute sufficient grounds for his recusal? This question may initiate further discussion.

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[3] Dec. c. De Jorio of 15 February 1964, RRD 56 (1964), p. 143, n. 8, as cited in: Del Amo 2023, 895.

[4] For more on this, see Erdö 2006, 11-35.

In nullity cases, DC provides a kind of interpretive boundary for recusal, which in Article 68 § 5 regulates that procedural acts, when lawfully performed by a judge, cannot substantiate a request for his recusal, except in cases described in Canon 1448 § 1. Therefore, in nullity cases, a judge's autonomous procedural decision that is disadvantageous to either party will never be reason enough for recusing the judge. At the same time, this provision narrows down too broad an interpretation of the reasons for recusal, as it could turn out harmful for the trial. It seems logical that this principle can also be applied in other processes conducted by ecclesiastical tribunals.

The impartiality of judges is also addressed by a number of other provisions on the functioning of ecclesiastical courts: requirements for the office of judge (Canons 1420 § 4 and 1421 § 3), the stability of his office (Canons 1420 § 5 and 1422), the independence of the judicial vicar from the diocesan bishop in adjudication (Canon 1420 § 2), the possibility for a single judge to appoint assessors (Canons 1424 and 1425 § 4), the stability of the adjudicating panel (Canon 1425 § 5), handling cases in an established order (Canon 1425 § 3), handling cases in the order in which they are filed (Canon 1458), openness of proceedings (Canon 1598 § 1). What is more, judicial impartiality is supported by all other norms aimed at guaranteeing the equality of litigants (e.g., Canons 1434, 1508 § 1-2, 1514, 1523, 1533, 1544, 1554, 1615, 1637 § 1, 1659 § 1, 1660).

The guarantee of objective and impartial administration of justice is also the duty to strictly adhere to material and procedural norms, from which the diocesan bishop cannot grant dispensation (Canon 87 § 1). A violation of the norms of judicial process would undermine the authentic Magisterium of the Church and the canonical legal order [Rozkrut 2003, 701]. Similarly, the principle of impartiality would be offended if one, in deciding court cases, were guided by emotions, feigned sympathy, misconceptions or a pseudo-pastoral desire to assist in difficulties.[5] Offending the principle of impartiality can also, under specific circumstances, tantamount to abuse of power (Canon 1378 § 1), simony (Canon 1380) or bribery (Canon 1377 § 1).

[5] See also Ioannes Paulus PP. II, *Ad Romanae Rotae auditores, oficiales et advocatos coram admissos* (29.01.2005), AAS 97 (2005), p. 164-66; XVI, *Ad sodales Tribunalis Romanae Rotae* (29.01.2010), AAS 102 (2010), p. 110-14.

## 2. The recusal procedure

A recusal procedure commences when a judge himself does not withdraw from handling a case, and a party to it requests recusal. Such an exclusion is a legal instrument, whereby the litigants can demand that the court officially consider their application for recusal [Krukowski 2007, 75]. In the 1917 Code of Canon Law, the legislator provided for a recusal procedure – Canons 1614 § 1-2,[6] 1615 § 3[7] and 1616.[8] In the current Code, the legislator regulates this procedure in Canon 1449 § 1 and grants a procedural entitlement to recuse a judge to both the petitioner and the defendant. It seems logical that such power is also vested in the defender of the bond and the promoter of justice, if they are involved in the process. Should circumstances be revealed to suggest that the principle of impartiality might have been breached by the court, and at the same time the procedural guarantees of independence of the ecclesiastical judge be impaired, it is necessary to grant the party's request and recuse the judge suspected of being biased. The filing of a request for recusal puts the court under the obligation to consider the incidental case in accordance with the provisions of Canons 1587-1591 CIC/83. The request must be made, in writing or orally, through the judge presiding over the principal case (Canon 1588).

When the objection relates to a judge who is not a judicial vicar or a deputy judicial vicar, it is considered by a judicial vicar (called an official) or his deputy (Canon 1449 § 2). It seems that in the case where the objection involves a judge who is a member (not the presiding judge) of the collegial panel – either clerical or secular – the most practical solution would be for the incidental case to be dealt with by the presiding judge, who, as a matter of principle, should be a judicial vicar or an adjutant judicial vicar (Canon 1426 § 2). If, in turn, the objection involves a judicial vicar or an adjutant judicial vicar, such a request must be considered by the diocesan

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[6] Canon 1614 § 2: "Si ipsemet Ordinarius sit iudex et contra ipsum exceptio suspicionis opponatur, vel abstineat a iudicando vel quaestionem suspicionis definiendam committat iudici immediate superiori."

[7] Canon 1615 § 3: "Quod si ipsemet Ordinarius declaratus fuerit suspectus, idem peragat iuder immediate superior."

[8] Canon 1616: "Exceptio suspicionis expeditissime definienda est, auditis partibus, promotore iustitiae vel vinculi defensore, si intersint, nec in ipsos suspicio cadat."

bishop (Canon 1449 § 2) or the bishop moderator of the court (Article 24 § 2 DC), who by law presides over the tribunal (Canon 1419 § 1).

The instruction *Dignitas Connubi* uses the concept of bishop moderator. Typically, he is the diocesan bishop who presides over his tribunal. In an interdiocesan tribunal, the role of judicial moderator is performed by a bishop appointed by the diocesan bishops who constitute the tribunal. In a tribunal of second instance, constituted by the conference of bishops (Article 25, 3º-4º DC), the moderator of the tribunal is a bishop designated for that function by the conference. However, bishops can decide for themselves whether they will make decisions regarding the operation of the interdiocesan tribunal collegially, and consequently no bishop moderator of the court needs will be needed, or whether they will delegate the presidency of the interdiocesan tribunal to a bishop moderator designated by them. The legislator does not explicitly require that the bishop moderator be the bishop of the diocese where the interdiocesan tribunal is located; nor does it require that it be one of the bishops who constitute this tribunal. However, it would be the most advantageous if the bishop moderator were one of the diocesan bishops constituting the tribunal (Article 26 DC). In special cases, it is also possible for bishops to designate as the moderator a bishop from another area, for example, a retired bishop who was trained as a canonist, or one of their auxiliary bishops [Sztychmiler 2007, 61].

If an application were lodged to recuse a judge who were a bishop, the legislator obliges him to refrain from adjudicating 1449 § 3). Now, the question arises: If the objection involved a bishop who is not an ordinary, such as an auxiliary bishop who serves as a diocesan judge, would such a bishop also – by operation of law – abstain from adjudicating? It seems that in the current state of the law, any bishop, including an auxiliary one who is a diocesan judge, is obliged to refrain from participating in the process if a request for recusal has been filed against him. It follows that the legislator, in Canon 1449 § 3, uses the term *episcopus* 'bishop,' and not *episcopus diocesianis*, as in Canon 1419 § 1 [Lewandowski 112-14]. In my opinion, however, this regulation seems unfounded. If the diocesan judge is an auxiliary bishop who does not, in principle, preside over the tribunal, why should he be treated differently from other diocesan judges? Should the mere fact of episcopal ordination play such a significant role in recusation (leaving aside, of course, the regulations involving the diocesan bishop or the bishop moderator of the tribunal)? I believe

that the following wording of Canon 1449 § 3 would afford more precision and relevance: *Si Episcopus dioecesanus sit iudex et contra eum recusatio opponatur, ipse abstineat a iudicando*. Clarifying this provision would thus not lead to unnecessary doubts of interpretation. The logical consequence of such a solution would be to have a judicial vicar consider an application to recuse a judge who is a bishop but not a diocesan bishop or bishop moderator. If, on the other hand, the auxiliary bishop were also a judicial vicar (which is unlikely), then the request for his recusal would have to be considered by his superior – either the diocesan bishop or the moderator of the tribunal.

Also, a note should be taken of recusal that can be applied in the process *coram Episcopo*, the former instituted by the motu proprio *Mitis Iudex Dominus Iesus*.[9] In a briefer process (*processus brevior coram Episcopo*), a request for recusal lodged by a party to the case, in this case the diocesan bishop, makes it necessary to examine a marriage annulment case in the ordinary process [Majer 2015, 179]. This follows from the disposition of the previously discussed Canon 1449 § 3, pursuant to which a judge who is a diocesan bishop against whom an allegation of bias has been levelled is required to abstain from adjudication. It seems that even in a situation where such a request were not sufficiently motivated, the diocesan bishop, by the very fact that a request for his recusal has been filed, is obliged to refrain from further participation in the process. There is a legitimate concern, it seems, that a diocesan bishop, who as a rule is actively involved in the life of the local Church, will more often than other diocesan judges be liable to recusal with respect to cases involving people with whom he has some kind of relationship (friendly or otherwise), such as politicians or persons involved in the life of the Church. This is because a legitimate suspicion may arise that his motivation is personal. Therefore, it is recommended that the bishop not meet with the parties before they petition for marriage annulment, since any form of assistance on his part would later exclude him as a judge in a possible trial [Majer 2017, 146].

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[9] Franciscus PP., Litterae apostolicae motu proprio *Mitis Iudex Dominus Iesus* quibus canones Codicis Iuris Canonici de Causis ad Matrimonii nullitatem declarandam reformatur (15.08.2015), AAS 107 (2015), p. 958-67; English text available at: https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-iudex-dominus-iesus.html.

To continue our deliberations on authorities competent to consider a request for recusal, let us now move on to discuss cases in which the judges are members of the Holy See tribunals. When the trial is conducted before the Tribunal of the Roman Rota in the second and further instances (Canon 1444), a party to the case also has the option of requesting the recusal of the judge if he is an auditor of the Roman Rota. In such a situation, the request is examined by the Supreme Tribunal of the Apostolic Signatura (STAS) (Canon 1445 § 1, 3º; Article 196, 3º of the Apostolic Constitution *Praedicate Evangelium*[10]).

If the case is handled by the STAS, in keeping with Canon 1445, the parties also have the option to request recusal. In the situation where the recusal request does not involve a cardinal, provisions of the CIC/83 are applied by analogy, and therefore the case is decided by the prefect of the STAS [Malecha 2009, 575]. When an *exceptio suspicionis* is brought against the prefect or a cardinal of the STAS, the case is handled by the Roman Pontiff in accordance with Articles 23 and 24 of the motu proprio *Antiqua ordinatione*.[11]

Typically, a recusal request is lodged by a party or parties before the joinder of the issue (after the parties have been served the decree appointing the adjudicating panel). However, it can also be submitted at any other stage of the process if the allegation of bias emerged "after the issue was already joined" (Canon 1459 § 2). After the application is filed, a dispute arises with the following parties: the person or persons requesting recusal

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[10] Franciscus PP, Costituzione apostolica *Praedicate Evangelium* sulla Curia Romana e il suo servizio alla Chiesa e al Mondo (19.03.2022); English text available at: https://www.vatican.va/content/francesco/en/apost_constitutions/documents/20220319-costituzione-ap-praedicate-evangelium.html.

[11] Benedictus PP. XVI, Litterae apostolicae motu proprio datae *Antiqua ordinatione* Quibus Supremi Tribunalis Signaturae Apostolicae lex propria promulgatur (21.06.2008), AAS 100 (2008), p. 513-38; English text available at: https://www.vatican.va/content/benedict-xvi/en/apost_letters/documents/hf_ben-xvi_apl_20080621_antiqua-ordinatione.html. See Pontificia Commissio Decretis Concilii Vaticani II Interpretandis, *Responsa ad proposita dubia* (01.07.1976), AAS 68 (1976), p. 635. The following was asked: "1. *Utrum proponi possit exceptio suspicionis adversus singulos S. R. E.* Cardinales Signaturae Apostolicae, et quatenus affirmative; 2. Quaenam via et ratio sit sequenda ad exceptionem suspicionis definiendam." The Commission's reply of 1 July 1976 was: *Affirmative ad primum, seu exceptionem suspicionis adversus singulos S. R. E. Cardinales Signaturae Apostolicae moveri posse; ad secundum, res deferatur Summo Pontifici.*

and the judge against whom the objection has been made. However, this dispute also indirectly involves the parties to the main dispute and, if they participate in the process, the defender of the bond and the promoter of justice. The participation of the promoter of justice is mandatory in penal processes. In addition, he may take part in contentious trials in which, as deemed by the bishop, the public good may be jeopardised. The legislator also makes obligatory the participation of the promoter of justice in cases in which he has appeared in previous instances (Canons 1430-1431). On the other hand, the participation of the defender of the bond is mandatory in cases of nullity of sacred ordination or nullity or dissolution of marriage (Canons 1432-1433).

A judge who is competent to consider a request for recusal is obliged by the legislator to hear the parties before making his decision. Additionally, he is also to consult the promoter of justice and the defender of the bond, if they are participating in the trial and no objections have been made against them. A request for recusal is to be decided as promptly as possible (*expeditissime*), that is, in the shortest possible time (Canon 1451 § 1).

The filing of an application for recusal results in the resolution of an incidental case and the issuance of a legally and factually motivated decree by the authority competent to consider this request. No appeal is possible against this decree (Canon 1629, 4º-5º). If, however, there were grounds for that, such a decree can be contested by filing an action for its invalidity or restoration of the previous state, depending on the type of defect this decision entails.[12]

### 3. Effects of recusal

The 1917 Code of Canon Law provided for a recusal procedure in Canon 1615 § 1-2.[13] Currently, one of the effects of granting a recusal request is the replacement of the recused judge with another judge. The legislator provides that in such a case the person, not the grade of the trial, is to be

[12] Dec. c. Sabattani of 25 May 1962, RRD 54 (1962), p. 284, nos. 42-43, as cited in: Del Amo 2023, 896.

[13] Canon 1615 § 1 would afford more precision and relevance: "Si iudex unicus aut aliquis vel etiam omnes iudices qui tribunal collegiale constituunt suspecti declarentur, personae mutari debent, non vero iudicii gradus." § 2: "Ordinarii autem est in locum iudicum qui suspecti declarati sunt, alios a suspicione immunes subrogare."

changed (Canon 1450). This means that a new judge must be appointed, but within the court conducting the trial. This general rule means that a case conducted by a court of first instance is not handed over to a court of appeal if a judge is recused. This is because recusal is personal at all times – that is, it always applies to a single person or persons, and not the court as an institution. Were it impossible to appoint another judge in place of the excluded judge, for example, on account of staffing shortages in the court in question or the lack of a judicial candidate who, after a possible nomination, could be appointed to replace the recused judge, the main trial should be entrusted to another competent court. In this case, the grade of the court (the instance of the dispute) does not change. In nullity cases the jurisdiction of the court is regulated in Canon 1672. If there is no other competent court to handle the main trial (in this case, for the annulment of a marriage), then, in accordance with Article 69 § 2 DC, a request is to be lodged with the STAS, detailing the situation and requesting the appointment of a competent court to hear the case for the annulment of the marriage.

Other consequences of granting a request for recusal relate to the validity of procedural acts taken before the request was filed; namely acts performed both before the issue was joined (e.g., accepting a petition in marriage nullity cases) and acts placed taken after the joinder of the issue, that is, after the issuance of the decree establishing the litigation formula, which specifies, among other things, the grounds for marriage nullity based on which the process will develop. The law provides that, in principle, procedural acts placed before the filing of a recusal application are valid (Canon 1451 § 2, *pars prima*). Procedural acts performed after the request has been filed are to be rescinded if a party (the law does not specify which, so it should be assumed that it is both the petitioner and the defendant) requests that these acts be rescinded within ten days of granting the recusal (Canon 1451 § 2, *pars secunda*). This time limit is to be computed as per Canon 203. It seems reasonable, therefore, that the decree excluding the judge should contain information on this entitlement of the litigants.

The law provides for acts taken after the filing of a request for the recusal of any judge, not just the one whose impartiality has been questioned. In a situation where an application is filed to recuse a judge who is a member (not the presiding judge) of the adjudicating panel, subsequent decrees

issued by the presiding judge can be voided if either litigant lodges a request to that effect.

**Summary**

Summing up our deliberations on the institution of recusal in the canonical process, we clearly notice the ecclesiastical legislator's intent to prevent situations where the judge could be biased with regard to the sentence being handed down. This reflects the Church's concern to guarantee its faithful access to impartial and objective justice. The ecclesiastical legislator does not regulate the reasons for recusal enumeratively, while listing only some cases, mentioned in the first part of the paper. The conclusion can be drawn, however, that any situation involving a legitimate suspicion of bias on the part of the judge or judges can be a sufficient reason for recusal. The requirements for candidates for the office of ecclesiastical judge also seem justifiable, because in deciding to recuse a judge one will need to demonstrate life and judicial experience necessary for a prudent assessment whether the impartiality of a judge of some judges can indeed be questioned. The legislator also regulates the procedure for excluding a judge from adjudication. In the course of our reflections, questions emerged of our analysis of ecclesiastical legislation, canonist doctrine and judicial practice, which are not always possible to answer unequivocally. Ultimately, the effects of a decision on recusal will be decisive for the development of the main process, in which an allegation of judicial bias has been submitted and a respective request has been granted. The effects include the unchanged degree of the trial (as a rule) and the validity of acts placed before the lodging of a recusal request. After analysing the institution of recusal, we become convinced that this institution lays the foundation for and guarantees a fair and impartial ecclesiastical trial.

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