
The *Litis contestatio* in the Canonical Penal Trial

La Litis contestatio en el proceso penal canónico

RECIBIDO: 2 DE ABRIL DE 2020 / ACEPTADO: 7 DE MAYO DE 2020

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Abstract: One of the principal elements of the trial is the act by which the judge, after hearing the parties and weighing the *libellus*, determines the terms of the controversy (the *litis contestatio*). Canonical tradition suggests that this moment can be reconfigured in a penal trial in terms of the *delicti contestatio*, since it involves a bearing witness before the judge of the public *notitia criminis* and opposition to it or at least the acknowledgment of being the one accused of it. This moment marks the institution of the *contradictorium* in the penal process and constitutes the basis for procedural self-defense. Judicial praxis deems it sufficient for the formula of the doubt to indicate the alleged delict together with a commonly indeterminate penalty, except in the case of most serious penalties. However, natural justice and the rationality of the judicial process seem to suggest that the formula of the doubt be endowed with greater specificity of the threatened penalty. This could even have implications for a more just administrative penal process.

Keywords: Penal Process, Judicial Process, *litis contestatio*, Formula of the Doubt, *contradictorium*, Right of Defense, Dismissal from the Clerical State.

Resumen: Uno de los elementos principales del proceso es el acto por el que el juez, tras haber oído a las partes y valorado el *libellus*, determina los términos de la controversia (la *litis contestatio*). La tradición canónica sugiere que, en el juicio penal, este momento puede reconfigurarse como *delicti contestatio*, puesto que supone poner en conocimiento del juez la *notitia criminis* y su oposición, o al menos el reconocimiento de ser el acusado. Este momento señala la iniciación del *contradictorium* en el proceso penal y constituye la base de la defensa propia en el proceso. La praxis judicial considera suficiente, para la fórmula de la duda, que se indique el delito que se le imputa junto a la pena que le corresponde que, por lo común, queda indeterminada, excepto en el caso de las penas más graves. Sin embargo, la justicia natural y la racionalidad del proceso parecen sugerir que, en la fórmula de la duda, debería delimitarse más concretamente la pena. Este proceder podría dar lugar también a un procedimiento administrativo penal más justo.

Palabras clave: Proceso penal, Proceso judicial, *litis contestatio*, Fórmula de la duda, *contradictorium*, Derecho de defensa, Dimisión del estado clerical.

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1. INTRODUCTION

The so-called administrativization of the penal process demands attention to what is essential for a just process, attention given eloquently and extensively by Mons. Joaquín Llobell¹. At the same time, being a kind of pragmatic solution to pressing contemporary demands, it lends itself to a return to the properly judicial form of the exercise of coercive power, which is rightly prescribed in the Church's sacred discipline as the ordinary pathway for administering justice when commission of a delict is alleged². Heightened appreciation of

¹ This phenomenon consists in the promotion, in legislation and praxis, of the imposition or declaration of even the gravest penalties by means of a simplified process by an administrative authority having some public interest in punishment (unlike an impartial third party, or a judge), sometimes even without the right to challenge the decision. It can be justified, as Mons. Llobell demonstrates, inasmuch as it is effective for discovering the truth, allows for the right of defense, and imposes upon the authority the obligation to act according to the standard of moral certitude; and it usually respects the right to a twofold level of jurisdiction. See especially J. LLOBELL, *Il giusto processo penale nella Chiesa e gli interventi (recenti) della Santa Sede*, Archivio Giuridico 232 (2012) 165-224, 293-357; IDEM, *Giusto processo e "amministrativizzazione" della procedura penale canonica*, Stato, Chiese e pluralismo confessionale. Revista telematica (www.statoechiese.it) (2019/n. 14) 1-62, and others in notes 1 and 4.

² Cfr. CIC can. 1341; CCEO can. 1402; CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Normarum mutationes introductae in M.P. "Sacramentorum sanctitatis tutela"*, 21-V-2010, Communicationes 42 (2010) 333-344, at art. 21 § 1 (*sub* "Titulus II. De ordine iudiciario") (here after SST/2010).

this norm and of the importance of ecclesiastical criminal justice prompts reflections on the correct manner of proceeding in carrying out a penal trial.

Apart from laying out and analyzing the full *iter* of the penal trial in a manner useful for students, it is scientifically advantageous to draw attention to individual moments within it and to perceive their interconnectedness with the others. In so doing, one begins to grasp the particular implications of the norm of can. 1728 § 1 (CCEO can. 1471 § 1)³.

The impetus for the penal trial resides in the accusation of the public minister of the Church; its beginning occurs at the time of the citation of the accused (can. 1517). Its interior dynamism is situated within the judicial investigation (the instruction of the cause) and the debate (the discussion of the cause). And its defining moment is in the deliberation of the judge and the issuance of the definitive sentence. The procedural culmination of the first two of these and the presupposition to the others is the foundation or cornerstone⁴ of the penal trial: the *litis contestatio* in which the judge establishes the terms of the controversy or determines the formula of the doubt⁵. It is also one aspect of the penal

³ The CIC/17, too, remitted itself to the norms on trials in general in regard to the *pars dinamica* of the criminal trial (cfr. can. 1959). For a proposed list of those aspects of the contentious trial that do not apply to the penal trial, and matters pertaining to judicial expenses, see the *praeivium canonum schema* in *Communicationes* 48 (2016) 163, sub “Can. 10 § 2”.

⁴ M. LEGA – V. BARTOCETTI, *Commentarius in iudicia ecclesiastica iuxta Codicem iuris canonici*, vol. 2, Anonima Libreria Cattolica Italiana, Rome 1950, 545, n. 1. On the substantial necessity of the *litis contestatio*, we read: «...in tabulis processualibus debet haberi actus quo iudex, perpensa actoris petitione vel petitionibus et rei responsionibus, declarat quinam sint controversiae termini ... et huiusmodi actus confici debet tum in *contensiosis* tum in *criminalibus*...» (*ibid.*, 548, n. 6). Cfr. SACRED ROMAN ROTA (= SRR), Definitive Sentence *c. DE JORIO, Monacen.*, *Nullitatis matrimonii*, 27-I-1965, SRR Decisiones, vol. 57, 84, n. 9: «Nos quoque concedimus *litis contestationem* esse fundamentum causae, quia eadem determinatur obiectum seu materia iudicii».

⁵ «La necessità [della *litis contestatio*] deriva dalla finalità di questo atto, vale a dire, la fissazione certa di ciò che costituirà poi l’oggetto dell’istruttoria, del dibattimento e della decisione» (M. J. ARROBA CONDE, *Diritto processuale e canonico*, 5th ed., Editiones Institutum Iuridicum Claretianum, Rome 2006, 373). Cfr. TRIBUNAL OF THE ROMAN ROTA (= RRT), Decree *c. FUNGHINI, Campinae Grandis, Nullitatis matrimonii; Nullitatis sententiarum*, 24-V-1989, RRT Decreta, vol. 7, 102, n. 3.

cause that distinguishes it from the most common kind of contentious cause (*nullitatis matrimonii*)⁶ and gives concrete expression to the object of a penal cause. This can be seen by demonstrating its particular character in a penal cause (*poenalis*), both in terms of its particular nature and its role in instituting the *contradictorium*, and by identifying and examining judicial praxis.

2. THE NATURE OF THE *LITIS CONTESTATIO* IN A PENAL CAUSE

The *ius vigens* has introduced some evolution in the notion of the *litis contestatio*. Since the use of the *cognitio extra ordinaria* in the Roman Empire, it has clearly included public and private elements. As is seen, there is now a dominance of the public element (the act of the judge) with a necessary connection to the private elements (the litigious disposition of the parties).

2.1. *An Act of Judicial Power*

The parties legitimately intervening in any penal trial, namely, the promoter of justice and the accused, may propose any number of accusations or defenses at various stages. Within the introductory stage of the process proper, the *libellus accusationis* may put forward several claims about points of fact, in response to which the accused may respond with more or less adequacy, persuasiveness, or relevance. The communication of the *libellus* (can. 1508 § 2) thus already reveals, to some extent, the object of the controversy, since the *libellus* is the juridical act that calls upon the ministry of the judge and proposes the object of the trial (cann. 1501-1502); and that ministry is one that the judge must exercise as a public service of the Church (cfr. can. 1457 § 1).

At the same time, the *libellus accusationis*, despite being prepared by command of the ordinary (can. 1721 § 1), is not an act of public power or authority; it is a petition by which this power is called upon and to which it is subject (cfr. can. 1505 § 1). Therefore, even in a penal cau-

⁶ On the tendency to avoid the expression "*litis contestatio*" in causes of nullity of marriage, see B. UGGÉ, *La terminologia non contenzioso dell'istruzione "Dignitas connubii"*, *Quaderni di diritto ecclesiale* 18 (2005) 364-375.

se, «by no means does everything which the Petitioner has written in the *libellus* necessarily have to be weighed as the object of the cause in the trial»⁷. Despite being written and submitted by a public minister of the Church, who is also prepared in canon law, it may contain factual narrations and allegations that lack foundation or objectivity. Whatever the case may be, the good order of the trial demands that its object be clearly established by the *dominus processus*, the judge. We read in can. 1513: «The *contestatio litis* occurs when the terms of the controversy, selected from the petitions and responses of the parties, are defined by a decree of the judge» (cfr. CCEO can. 1195 § 1). As the common doctrine on the *ius vigens* recognizes, the judge, after weighing the accusation and the responses of the accused, thus effects the *litis contestatio* by his own deliberative judicial decree, not as the mere ratification of some quasi-contract between the accuser and the accused⁸.

As a definitive act of the judge – an ordinatorial decree with potentially decisional components (cfr. can. 1617) – the *litis contestatio* brings to perfection the institution of the procedural relationship of the parties under his authority: «After the judicial petition has been proposed, some relationship is already established between a party and the judge;

⁷ See RRT, Decree *c. ALWAN, Ioubbe.-Sarben. et Iunien. Maronitarum, Nullitatis matrimonii; Pensionis alimentariae; Nullitatis sententiae*, 11-VI-2002, RRT Decreta, vol. 20, 92, n. 7.

⁸ See, e.g., Communicationes 41 (2009) 129, *sub* “*Can. 1729 § 2*”; I. GORDON, *De iudiciis in genere. II. Pars dinamica*, Pontificia Universitas Gregoriana, Rome 1972, 15, nn. 54-56; P. V. PINTO, *I processi nel Codice di diritto canonico: Commento sistematico al Lib. VII*, Pontificia Università Urbaniana-Libreria Editrice Vaticana, Vatican City 1993, 250-252; L. CHIAPPETTA (F. CATOZZELLA ET AL. [eds.]), *Il Codice di diritto canonico. Commento giuridico-pastorale*, vol. 3, 3rd ed., Edizioni Dehoniane, Bologna 2011, 104-106, nn. 5372-5373; A. STANKIEWICZ, *Commentary on can. 1513*, in Á. MARZOA – J. MIRAS – R. RODRÍGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, Gratianus Series, vol. IV/2, Wilson & Lafleur Ltée-Midwest Theological Forum, Montréal-Chicago 2004, 1156; M. J. ARROBA CONDE, *Diritto processuale canonico*, cit., 369-370; G. P. MONTINI, *De iudicio contentioso ordinario. De processibus matrimonialibus. Pars dinamica*, 3rd ed., Editrice Pontificia Università Gregoriana, Rome 2012, 76-77; G. MARAGNOLI, *La formula del dubbio (artt. 135-137)*, in *Il giudizio di nullità matrimoniale dopo l'Istruzione “Dignitas connubii”*. Parte Terza: La parte dinamica del processo, Studi Giuridici 77, Libreria Editrice Vaticana, Vatican City 2008, 88; C. M. MORÁN BUSTOS – C. PEÑA GARCÍA, *Nullidad de matrimonio y proceso canónico. Comentario adaptado a la Instrucción “Dignitas connubii”*, Dykinson, Madrid 2008, 240, IV.1.

when the citation is completed, the relationship is extended also to the adversary. The *litis contestatio*, which determines the object of the relationship, stands forth as the foundation of the trial»⁹.

The object of this act of the judge is the definition of the terms of the controversy or the *obiectum seu materia iudicii*¹⁰. It is stated in the form of a question, which is commonly called the formulation of the doubt (*formula dubii*) and is situated typically as the dispositive part of the decree. The determination of the object of the trial pertains to the nature of the trial¹¹, even if the manner in which it is accomplished may be left to the prudence of the legislator¹². For the various claims made by the parties in any trial are not left to be explored whimsically before the tribunal of justice. Nor, obviously, is the judicial function of the Church set in motion by the mere existence of a controversy among the faithful, or by the mere commission and denunciation of some grave violation of a law to which a penalty is attached. The definition of the object of the penal trial is proper to the one judging, since the presentation of an otherwise extrajudicial controversy or social conflict before the judge situates it within the public contentious setting of the trial¹³. The judge is the public figure who knows the law and is empowered to declare what is just (*iura novit curia*)¹⁴.

⁹ See F. ROBERTI, *De processibus*, vol. 1, Athenaeum Pontificii Seminarii Romani ad S. Apollinaris, Rome 1926, 421, n. 276.

¹⁰ «Obiectum seu materia iudicii determinatur litis contestatione qua proponuntur controversiae termini iudicialiter definiendi» (Communicationes 38 [2006] 136). This would be can. 154 of the 1976 *schema* (*ibid.* 41 [2009] 390) but would be eliminated by means of a consolidation of texts (cfr. *ibid.* 11 [1979] 92-93).

¹¹ Cfr. SRR, Interlocutory Sentence *c. POMPEDDA, Corporis Christi, Nullitatis sententiae*, 23-VII-1986, SRR Decisiones, vol. 78, 480-481, n. 9. Also: “È un momento importantissimo...” (A. CALABRESE, *Diritto penale canonico*, Libreria Editrice Vaticana, Vatican City 1996, 180, n. 9).

¹² And the legislator envisions “two kinds of *litis contestatio*”: based on petitions and responses communicated to the judge or at the end of a live session held between the parties and moderated by the judge (cann. 1507 § 1; 1513 §§ 1-2). Cfr. RRT, Decree *c. RAGNI, Ruremunden., Nullitatis matrimonii; Nullitatis sententiae*, 26-X-1993, RRT Decreta, vol. 11, 174, n. 5.

¹³ «Lis enim tunc videtur contestata, cum iudex per narrationem negotii causam audire coeperit» (C. 3.9.1).

¹⁴ SRR, Decree *c. SERRANO RUIZ, Bononien., Nullitatis matrimonii; Conformitatis sententiarum*, 24-X-1986, RRT Decreta, vol. 4, 146, 5c.

That being said, while the judge is the *dominus processus*, he may not dominate it by lapsing into arbitrariness. In regard to the definition of the object of the trial, his necessary independence as a third party prohibits him from personally adding allegations as if he were the accuser (*nemo iudex sine actore*). He may not ignore the petitions and responses of the parties, which “must be weighed” (*ponderari debere*) before he issues his decree¹⁵. Nor may he remain passive in the face of the silence of the parties following the citation, or rest content with informal responses, such as those given by way of a telephone call from the accused¹⁶. In the *litis contestatio*, therefore, while on the one hand the judge is not obliged to admit each allegation made by the promoter of justice, on the other hand «it is clearly not permitted to the judge to exceed or stray from the delictual facts asserted by the promoter of justice in order to take up an investigation, as it were, on his own initiative concerning other possible delicts»¹⁷. The safeguard against arbitrariness in-

¹⁵ See RRT, Decree *c. BOCCAFOLA, Neo-Eboracen., Nullitatis matrimonii; Nullitatis sententiae et decreti confirmatorii; Novae causae propositionis*, 25-VII-1989, RRT Decreta, vol. 7, 145, n. 14. The same *ponens* repeated this expression in a cause *Pittsburgensis* (*ibid.*, vol. 8, 87, n. 5).

¹⁶ «In casu quidem sub iudice invocato, ex actis iam confectis in Tribunali Atrebaten., partes litigantes videntur in iudicio nec convenisse in persona vel per alios rite mandatos, neque per documenta iure recepta» (SRR, Decree *c. DE LANVERSIN, Atrebaten., Nullitatis matrimonii; Nullitatis decreti*, 14-II-1985, RRT Decreta, vol. 3, 39, n. 14).

¹⁷ See RRT, Definitive Sentence *c. MCKAY, Poenalis; Iurium et refectionis damnorum*, 23-VII-2010, RRT Decisiones, vol. 102, 318, n. 12. In this cause, the promoter of justice had accused a priest of abuse of office because of writing a promissory letter in the name of the parish, while the judge *ex officio* added the charges of illegitimate alienation, culpable negligence in his office and some grave violation of divine or ecclesiastical law in the sense of can. 1399. In another cause, this same innovativeness of the judge resulted in the declaration of the partial nullity of the condemnatory sentence, inasmuch as it decided a cause not introduced by a judicial petitioner (cfr. Definitive Sentence *c. MCKAY, Poenalis*, 20-VI-2011, RRT Decisiones, vol. 103, 315-327, at n. 15). For the same principle, see also, e.g., SRR, Decree *c. FALTIN, Matriten., Separationis; Nullitatis sententiarum*, 25-V-1987, RRT Decreta, vol. 5, 82, n. 9c. For some doctrinal notes that could seem to be in tension with these principles, see R. COLANTONIO, *La “litis contestatio”*, in P. A. BONNET – C. GULLO (eds.), *Il processo matrimoniale canonico. Nuova edizione riveduta e ampliata*, Studi Giuridici 29, Libreria Editrice Vaticana, Vatican City 1994, 531, which cites a 1909 sentence *c. LEGA*, which cannot so easily be applied to the penal discipline currently in force.

trinsic to the decree is its motivation, which reveals the nexus between the petitions and responses and the dispositive part of the decree (the formula itself). This underscores in concrete terms the importance of supporting responses to the citation with argumentation. And obviously, such responses are to be formalized in a manner proper to a trial when they are offered at first only informally, especially, in the case of the responses of the accused, with the assistance of the advocate who must be appointed *ante litem contestationem* (can. 1723 § 2).

Typically, if the *libellus accusationis* is carefully written with reasonable foundation in the preliminary investigation, the *litis contestatio* contains no surprises for the accused. The object of the controversy will have been effectively communicated to the accused in the citation, and the *litis contestatio* will, practically speaking, serve to confirm it definitively for all parties¹⁸. The real respect of the right of defense demands, of course, that the decree be communicated to both parties, that is, that the object of the controversy be made known to them¹⁹.

Without a clear definition of the object of the controversy, the process will be null²⁰. And so when it has not been decreed properly after the citation and before the instruction of the cause, it must be attended to without delay as a condition *sine qua non* for proceeding further in the trial²¹. Otherwise, it will happen that «a decision [is] issued without

¹⁸ Cfr. F. ROBERTI, *De processibus*, vol. 1, cit., 453, n. 301.2; F. WERNZ – P. VIDAL, *Ius Canonikum. Tomus VI: De processibus*, 2nd ed., Universitas Gregoriana, Rome 1949, 360, n. 400.

¹⁹ See, e.g., RRT, Decree c. BOCCAFOLA, *Paulopolitana et Minneapolitana, Nullitatis matrimonii; Nullitatis sententiarum et novae causae propositionis*, 16-IV-1991, RRT Decreta, vol. 9, 51, n. 15; SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decree, *Disciplinaris*, Prot. n. 27200/96 CG, 18-XII-1996, in GRUPPO ITALIANO DOCENTI DI DIRITTO CANONICO (ed.), *I giudizi nella Chiesa. Il processo contenzioso e il processo matrimoniale*, Quaderni della Mendola 6, Glossa, Milan 1998, 75, note 154 (cited by J. LLOBELL); RRT, Decree c. BOTTONE, *Gedanen., Nullitatis matrimonii; Nullitatis sententiae*, 8-III-2000, RRT Decreta, vol. 18, 57, n. 5.

²⁰ For a relatively recent example of this, see Decree c. VERGINELLI, *Salten. in Uruguay, Poenalis; Nullitatis sententiae*, 15-X-2004, RRT Decreta, vol. 22, 68-75. Cfr. J. J. GARCÍA FAÍLDE, *Tratado de derecho procesal canónico*, 2nd ed., Publicaciones Universidad Pontificia de Salamanca, Salamanca 2007, 169, n. 4.

²¹ As is evidenced in one decretal in a particular case, the pope was able to proceed only after the object of the controversy was clear: «Lite vero coram nobis legitime contestata...» (X. 1, 6, 54 § 4). Similarly, when there was a dispute about the *litis contestatio*,

any process, without a *contradictorium* and with a denial of the right of defense»²².

2.2. *Response of the Accused*

2.2.1. The *litis contestatio* in *Contentious Causes*

The act of the judge by which the object of the trial is defined has as its content the formula of the doubt, or the question to be investigated, debated, and resolved. Arriving at this formula necessitates that the judge has heard from the accused party, or at least tried to hear him (*audiatur et altera pars*). The judicial citation is, in part, the procedural mechanism for promoting this prior hearing (can. 1507 § 1). Traditionally, the *litis contestatio* has been understood as the confluence of the petitioner's accusation and the opposing response (*contradictio*) of the accused, manifested before the judge²³. With this understanding no doubt in mind, the definition of the object of the trial has even recently been characterized as the *result* of the *litis contestatio*²⁴.

This traditional notion has now been modified, though, since, in general, the summoned parties may have a variety of responses. This

Pope Innocent III was able to proceed in handling the controversy only «lite coram nobis plenissime contestata» (X. 2, 7, 6).

²² See RRT, Decree *c. SABLE, Columben., Nullitatis matrimonii; Nullitatis sententiae*, 24-V-1999, RRT Decreta, vol. 17, 148, n. 7, in which the second instance tribunal issued a decision without any process, including “absentia ... litis concordationis...”.

²³ «...lis fuerit contestata, post narrationem propositam et contradictionem obiectam...» (Cod. 3.1.14.4). «Non per positiones et responsiones, sed per petitionem in iure propositam et responsionem secutam fit litis contestatio, qua ommissa nullus est processus» (X. 2, 5, 1). «Obiectum seu materia iudicii constituitur ipsa litis contestatione, seu formali conventi contradictione petitioni actoris, facta animo litigandi coram iudice» (CIC/17 can. 1726).

²⁴ One Rotal decree makes mention of «decreti quo, post litis contestationem, termini controversiae definiuntur (can. 1513)» (RRT, Decree *c. BURKE, Madraspolitana et Meliaporen., Nullitatis matrimonii; Confirmationis sententiae*, 20-VII-1988, RRT Decreta, vol. 6, 175, 4d). See also, e.g., P. V. PINTO, *I processi...*, cit., 252, note 354; J. L. LÓPEZ ZUBILLAGA, «Fijación del *dubium*», in J. OTADUY – A. VIANA – J. SEDANO (eds.), *Diccionario General de Derecho Canónico*, vol. 3, Thomson Reuters Aranzadi, Pamplona 2012, 990 (hereafter *DGDC*).

is why the general legislation insists no longer on the *contradictio rei animo litigandi facta* (cfr. CIC/17 can. 1726) but only on the decree of the judge whose content is *ex partium petitionibus et responsionibus desumpt[um]* (CIC/83 can. 1513 § 1). While being a reasonable modification, it seems to have been influenced by the matrimonialization of the ordinary contentious process, or the inclination to tailor the process to causes of nullity of marriage despite its general utility for any kind of trial, given that the spouse other than the petitioner may have no opposition to a declaration of nullity of the marriage, and even the defender of the bond may have nothing reasonable to put forward against the *libellus* which the party has a right to submit (cfr. can. 1432)²⁵.

In contentious causes, it is reasonable to expect from the summoned party the denial of the accusation, or a negative response. For otherwise the respondent would presumably strive to avoid the trial by entering an extrajudicial agreement of some kind. This has led doctrine to assert that, where there is a completely affirmative response to the citation (i.e., a total admission and surrender to the *petita*), «there can in no way be a true *litis contestatio*, since the one who so confesses does not have the intention to litigate. Hence, in such a case, the judge is not to issue the sentence but is only to impose a precept on the accused which he is to fulfill within a certain time»²⁶. And so his refusal to do so constitutes a litigious will (*animus litigandi*)²⁷. It is in this sense still, notwithstanding the fact that the *instantia* begins its pendency when the citation has been carried out (can. 1517), that the *litis contestatio* can be considered the «foundation and beginning of the trial»²⁸. For, somehow, the parties mutually testify (as *con-testes*) to the existence of a con-

²⁵ Cfr. Communicationes 38 (2006) 136, where then-Archbishop Sabattani justified the abolition of the cited litigious language by referring to the diverse reactions the summoned spouse may make to the citation. See also S. VILLEGGIANTE, *Ammissione del libello e concordanza del dubbio*, Ephemerides Iuris Canonici 34 (1978) 321-322, nn. 30-31.

²⁶ See F. SCHMALZGRUEBER, *Jus ecclesiasticum universum brevi methodo ad discentium utilitatem explicatum seu lucubrationes canonicae in quinque libros Decretalium Gregorii IX Pontificis Maximi*, vol. 2, Typographia Rev. Cam. Apostolicae, Rome 1844, 238-239, 242, nn. 3 and 6, quotation at 239.

²⁷ Cfr. M. LEGA – V. BARTOCETTI, *Commentarius...*, vol. 2, cit., 545-546, nn. 2-3.

²⁸ See F. SCHMALZGRUEBER, *Jus ecclesiasticum universum...*, cit., 235, Titulus V, n. 1.

trovercy (*lis*) between themselves²⁹. And, therefore, the *litis contestatio* would seem to demand at least the «intention to obtain a *judicial* resolution to the question» raised between the parties³⁰. Bearing in mind the essential and defining element of the decree of the judge (*vide supra* 2.1), the *litis contestatio* can be understood from one perspective to have a quasi-contractual character, since the parties both willingly submit to the jurisdiction of the judge: the petitioner initiates the cause, while the respondent is unwilling to resolve the matter extrajudicially, whether by refusal or passivity³¹.

2.2.2. *The delicti contestatio*

While there is no disputing the existence of the *litis contestatio* in a penal trial (cfr. can. 1728 § 1), it necessarily has a different character than what is described above. For a penal cause not only pertains to the public good in general but is even introduced by command of the public administration of the Church due to its innate orientation toward the welfare of society. This leaves its object immune from the free disposition of private parties, such as may be expressed in an extrajudicial agreement³². It does not primarily involve a controversy in which one claims a right against another (*lis*) but the public allegation of commission of a delict to the harm of society. The avoidance of “*lites in populo Dei*” (can. 1446 § 1) has to be understood in terms of whether some non-procedural measure can repair scandal, restore justice and reform the offender, such as by fraternal correction, rebuke, or other means (can. 1341). In canonical tradition, the *litis contestatio* in a penal cause

²⁹ Cfr. A. REIFFENSTUEL, *Jus canonicum universum complectens tractatum de regulis juris*, vol. 2, Louis Vivès, Paris 1866, 283, n. 22: «Nam *contestari*, idem est ac *simul testari*: atqui reus ... confitendo simul cum actore testatur super re petita...».

³⁰ See Communicationes 38 (2006) 136, emphasis in original.

³¹ The latter can rightly be said of the defender of the bond who, in the name of the Church, does not yield to the accusation of matrimonial nullity but expressly insists that the question be subject to the Church's jurisdiction.

³² Cfr. M. LEGA – V. BARTOCETTI, *Commentarius...*, vol. 2, cit., 563-564, n. 8. On the mitigated force of the response to the citation in causes concerning the public good (especially those matrimonial), see S. TESTA BAPPENHEIM, «*Litis contestatio*», in *DGDC*, vol. 5, 198.

has thus been designated otherwise as the *contestatio facti criminosi*³³, the *contestatio delicti*³⁴, or the *contestatio accusationis*³⁵.

The accused, who should have already been heard prior to issuance of the decree ordering the use of the judicial process (cfr. cann. 50; 1718 § 1), first learns of the judicial accusation proper at the time of the citation. The purpose of that citation is indicated by the legislator, who calls it the *citatio ad litem contestandam* (cfr. can. 1507 § 1), though it might be thought of as a *citatio ad delictum contestandum*, meaning that, in the penal process, the accused is confronted by the accusation and takes his stand before the judge, bearing witness, as it were, that he is the one accused of the delict. What is the content of this response to the citation? Need it always be one of denial of the accusations? What responses are possible? Doctrine retains its importance³⁶, despite the re-

³³ SACRED CONGREGATION OF BISHOPS AND REGULARS, Instruction *Sacra haec*, 11-VI-1880, in P. GASPARRI (ed.), *Codicis iuris canonici fontes*, vol. 4, Typis Polyglottis Vaticanis, Rome 1926, 1024, n. 26 (hereafter *Sacra haec*). Cfr. G. CHELODI, *Ius poenale et ordo procedendi in iudiciis criminalibus iuxta Codicem iuris canonici*, Trent 1925, 164, n. 122.

³⁴ SACRED CONGREGATION FOR THE PROPAGATION OF THE FAITH, Instruction *Cum magnopere*, 1883, in P. GASPARRI (ed.), *Codicis iuris canonici fontes*, cit., vol. 7, 477, n. XXVI. Cfr. S. B. SMITH, *The New Procedure in Criminal and Disciplinary Causes of Ecclesiastics in the United States*, 3rd ed., Fr. Pustet, New York-Cincinnati 1898, 131-137.

³⁵ M. LEGA – V. BARTOCETTI, *Commentarius...*, vol. 3, cit., 286ff; SRR, Definitive Sentence *c. FALTIN, Suboticana, Criminalis*, 10-XI-1987, SRR Decisiones, vol. 79, 778, n. 17.

³⁶ The response of the *pars conventa* remains «un fattore, se non fondamentale, certamente caratterizzante, nella connotazione della *litis contestatio*» (R. COLANTONIO, *La "litis contestatio"*, cit., 503, note 99). Some would say it is even of «fondamentale importanza per il proseguimento del processo. Da essa dipenderà il modo di stabilire l'oggetto della lite» (Z. SUCHECKI, *Il processo penale giudiziario nel 'Codex Iuris Canonici' del 1983*, Apollinaris 73 [2000] 391; see also J. L. LÓPEZ ZUBILLAGA, «Fijación del *dubium*», cit., 989). Formerly, doctrine insisted on a clear denial of the claim in order for there to be a true *litis contestatio* (see F. WERNZ – P. VIDAL, *Ius Canonicum...*, cit., 356, n. 396). However, some pre-1917 authors would admit of an “affirmative” response to the citation by which the accused admitted to the facts alleged but refused to yield and thus preferred to defend himself in a trial (cfr. M. CABREROS DE ANTA, *Título VII. De la contestación a la demanda*, in S. A. MORAN – M. CABREROS DE ANTA [eds.], *Comentarios al Código de Derecho Canónico con el texto legal latino y castellano*, vol. 3, BAC, Madrid 1964, 497 and 501, nn. 518 and 522 and his fuller study *La litiscontestación en el proceso canónico*, in *Nuevos estudios canónicos*, Editorial Eset, Vitoria 1966, 671-719). For the medieval doctrine and the Roman law influence on it,

ductive approach to it in can. 1513 § 1, while also noting, in view of the primary importance of the judge's decree (*vide supra* 2.1), that the respondent or accused is not seen as «the absolute protagonist of the *litis contestatio*»³⁷.

The response of the accused to the citation may be negative, meaning that it is contrary to the *libellus accusationis*. This contrariety pertains to the allegations as narrated by the accuser, what is requested (*petita*) as a consequence, or both: «I deny what is described as it is described and I deny that what is requested, as it is requested, should be done»³⁸. While the accused may not be able to deny truthfully that anything reported had occurred, the emphasis of the denial may stress the allegations *as related* by the accuser. It may also be based on ignorance of the facts supporting the claims. The denial may either generally deny the claims or may specify which particular claims are denied. The accused may admit to commission of the delictual act but challenge his own imputability or oppose the punishment proposed by the promoter of justice, claiming that it is disproportionate; such opposition materializes in his *animus litigandi*, or «an attitude of formal contradiction» to the *libellus*³⁹. His seemingly affirmative response would appear to be truly negative when he admits to a claim while offering a refutation of its juridical relevance (e.g., to the claim of theft, the accused admits that he received the petitioner's money but paid it back).

Along any such lines, the accused may be thought typically to be inclined to oppose the accusation, since grave claims are being made against him and he is vulnerable to punishment. Whatever explicit response he may make to the citation, it may be said that his *animus litigandi* is presumed if he is not both confessing and requesting the application of an extrajudicial measure, such as a correction or a penance⁴⁰. Should the accused refuse to reply to the citation, the doctrine insisting on the negative reply to the citation admits that contumacy

see J. OCHOA, "Actio" e "Contestatio litis" nel processo canonico, *Apollinaris* 52 (1978) 126-133.

³⁷ See G. P. MONTINI, *De iudicio contentioso ordinario...*, cit., 91.

³⁸ See A. REIFFENSTUEL, *Jus canonicum universum...*, cit., 280, n. 6.

³⁹ Cfr. R. COLANTONIO, *La "litis contestatio"*, cit., 504.

⁴⁰ Cfr. F. SCHMALZGRUEBER, *Jus ecclesiasticum universum...*, cit., 237, "Dixi 3"; A. REIFFENSTUEL, *Jus canonicum universum...*, cit., 280, n. 8.

or absence would authorize the judge to proceed to something «equivalent to [the *litis contestatio*] with respect to the procedural juridical effects»⁴¹.

On the other hand, the current legislation implies that the response to the citation may also be to some extent affirmative. The accused may admit to commission of one delict and remain silent about another, or he may confess to all accusations. This reveals the absence of *lis*, since the parties are in agreement that the delict was committed and that a punishment is merited. Such would involve a truly mutual bearing witness to the commission of a delict (*delicti contestatio*). However, this would not in itself serve as a basis for immediately issuing a condemnatory definitive sentence, not least because of the question of the probative force of a confession (cfr. can. 1536 § 2)⁴². It is possible that it could lead to a renunciation of the action by the promoter of justice with the consent of the ordinary (can. 1724 § 1), but this does not necessarily follow, considering that the ordinary had already judged the process to be required for repairing scandal and restoring justice (cann. 1341; 1718 § 1). «For, even if the accused should confess, the trial *of itself* proceeds further, as demanded by the public good so that the truth about the delict and its author may be judicially laid bare with other means apart from the confession, and also that the accused may be judicially punished»⁴³.

Indeed, his punishment is often socially necessary, lest grave offenses remain unpunished, redounding to the scandal of the faithful or at least some grave social injustice. For whatever response the accused gives to the citation, this moment will have been preceded by a preliminary investigation, resulting in a positive judgment about the foundation for claiming that the accused placed a gravely imputable, external act contrary to a law to which a sanction is attached; and the ordinary will have thus ordered the celebration of a penal process. The evolution of the

⁴¹ See F. WERNZ – P. VIDAL, *Ius Canonicum...*, cit., 359, n. 399, III.

⁴² Cfr. Z. SUCHECKI, *Il processo penale giudiziario...*, cit., 391.

⁴³ See J. NOVAL, *Commentarium Codicis iuris canonici. Liber IV. De processibus. Pars I. De iudiciis*, Pietro Marietti, Turin-Rome 1920, 535, n. 802. In more general terms does F. ROBERTI minimize the element of the *animus litigandi* since a party may readily renounced his right of defense (*De processibus*, cit., 452).

whole process thus contributes to the public good, since it definitively resolves the question of the alleged commission of the delict. What has to be made clear during the introductory stage is not so much the subjective acceptance of the allegation by the accused but a) the precise content of the claim as the procedurally configured societal interest and b) the unwillingness of the judge to proceed without giving the accused the right to be heard⁴⁴.

3. JURIDICO-PROCEDURAL ELEMENTS OF THE *DELICTI CONTESTATIO*

Any trial *nominis veri* involves the dynamic unfolding of the *contradictorium*, or the parties' mutual awareness and confrontation in a procedural relationship constituted under the moderation of the judge. Within that dimension of the trial, each party is able to place acts expressing his own self-defense. These elements essential to a just penal process find their procedural origin in the *delicti contestatio*.

3.1. *The contradictorium*

As ecclesiastical jurisprudence regularly recognizes, the *contradictorium* that is essential to the judicial process is instituted by the *litis contestatio*. This principle is repeated with the practical frequency of a juridical adage: «The *contradictorium* formally occurs by means of the *litis contestatio*»⁴⁵. For, in theory, it is the procedural moment in which «what the petitioner requests, the other party denies»⁴⁶, even if, in practice, what the promoter of justice requests, the accused may only formally resist by taking up his procedural condition as the accused.

⁴⁴ «...propositum litigandi non repeti a voluntate accusati sed ex necessitate seu natura accusationis» (M. LEGA – V. BARTOCETTI, *Commentarius...*, vol. 3, 287, n. 3).

⁴⁵ «Contradictorium autem formaliter fit per litis contestationem» (Interlocutory Sentence *c. POMPEDDA, Corporis Christi*, 23-VII-1986, cit., 480, n. 8; see also, e.g., RRT Decisiones, vol. 82, 86, n. 4; *ibid.*, vol. 84, 39, n. 4; RRT Decreta, vol. 6, 125, n. 6; *ibid.*, vol. 11, 137, n. 3; *ibid.*, vol. 12, 103, n. 5; *ibid.*, vol. 13, 101, n. 6; *ibid.*, vol. 15, 173, n. 3; *ibid.*, vol. 19, 156, n. 13). On this point in doctrine, see also, e.g., L. MADERO, «Contradictorio», in *DGDC*, vol. 2, 695-696.

⁴⁶ See RRT Decree *c. DORAN, Litoris Palmen.*, *Nullitatis matrimonii; Nullitatis sententiarum*, 29-XI-1990, RRT Decreta, vol. 8, 191, n. 8, at 1.

The principle of the *contradictorium*⁴⁷ presupposes the differentiation of the parties as titulars of distinct juridical interests and diverse positions in relation to the judge. This differentiation marks the moment in which each is constituted as a party. The promoter of justice, complying with the command of the ordinary (can. 1721 § 1), becomes a party in the penal cause when he submits the accusatory *libellus*, which is the first act of the process and his first act as *actor-accusator*. It is an act that demands an immediate jurisdictional response from the tribunal (cfr. can. 1505 § 1). The accused becomes a party in the cause when the cause is brought to his awareness by an authoritative act of the judge, namely, by communication of the decree of citation, which is the presupposition to the *delicti contestatio*⁴⁸. This act announces to the accused not merely the fact of the accusation, of which he may already be loosely aware, but also its admission into the jurisdiction of the Church and, in particular, of the tribunal that has cited him. It thus situates him in a procedural relationship with the accuser and with the judge, allowing him to take up his position and react to the accusation.

The decree of citation, however, is not itself an accusation but the communication of an accusation by an impartial judge. It should therefore convey to the accused his procedural equality with the promoter of justice before the judge. Notwithstanding the ecclesial stature of the mandate of the ordinary giving impetus to the judicial accusation, the just

⁴⁷ Cfr. G. ERLEBACH, *La nullità della sentenza giudiziale "ob ius defensionis denegatum" nella giurisprudenza rotale*, Studi Giuridici 25, Libreria Editrice Vaticana, Vatican City 1991, 61-75; F. DOTTI, *Diritti della difesa e contraddittorio: garanzia di un giusto processo? Spunti per una riflessione comparata del processo canonico e statale*, Tesi Gregoriana – Serie Diritto Canonico 69, Editrice Pontificia Università Gregoriana, Rome 2005, 83-85; L. MADERO, «Contradictorio», cit., 695-696.

⁴⁸ «Il contraddittorio viene ad esistere con l’emanazione e la regolare notifica del decreto di citazione alla parte convenuta» (G. ERLEBACH, *La nullità della sentenza giudiziale...*, cit., 72). «Ceterum, ut pars conventa possit contradictorium exercere seu petitioni actoris et processui sese opponere, sufficit ut cognoscat petitum et causam petendi..., quae ab actore indicantur» (SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Decree of the *Congresso*, prot. n. 709/70 VT, 6-IV-1971, in I. GORDON – Z. GROCHOLEWSKI [eds.], *Documenta recentiora circa rem matrimonialem et processualem cum notis bibliographicis et indicibus*, vol. 1, Pontificia Universitas Gregoriana, Rome 1977, 220, n. 1308).

collegial or singular judge always operates out of the blindness of lady justice⁴⁹. No favor or preference is shown to the promoter of justice who, while representing the solicitude of the public ecclesiastical administration, is but a party within the “enclosed, formal juridical world”⁵⁰ of the trial. The judge is external to the administration, even if subject to its vigilance over the correct administration of justice. This impartiality of the judge is a necessary feature of the judicial citation if it is to give birth to a true *contradictorium*. For the accused should be able to react to the citation not only formally but also with the assurance that he will be heard fairly.

In the *delicti contestatio*, both parties intervene against the other: the promoter of justice in response to the alleged extrajudicial acts of the accused, and the accused in response to the judicial accusations of the promoter of justice. And both are (able to be) heard by the judge, who thereafter determines the object of the penal trial based on these interventions. No less than in the rest of the process, in the introductory stage the parties thus enjoy the same procedural faculty to confront the claims of the other⁵¹. However, unless there is a solemn session held among the parties and the judge (can. 1513 § 2), the promoter of justice lacks an opportunity to react to the accused’s response to the citation as such. This fact, on the one hand, gives expression to the principle of the *favor rei*, who is placed in a juridical situation of disadvantage, while, on the other hand, the promoter of justice retains the right to make recourse to the college of judges so that the *delicti contestatio* may be further clarified (cfr. can. 1513 § 3).

⁴⁹ This blindness or impartiality has to be consistent throughout the Church’s judiciary. The right to an equal hearing is to be enjoyed by the “private” parties in a private controversy, by the petitioner (whether public or private) and the defender of the bond in causes of nullity of marriage, and even of the recurrent and the central public administration of the Church before the Apostolic Signatura in a contentious-administrative cause.

⁵⁰ See J. I. ARRIETA, *La noción de “processus”*, *Ius Canonicum* 35-36 (1978) 399.

⁵¹ «...in propatulo est in casu numquam viguisse contradictorium inter partes, cum utraque seorsim a Iudice audita sit, nequaquam tamen unaquaque quidquam dicens de allatis ab altera, quam omnino nesciebat» (RRT, Decree c. SERRANO RUIZ, *Ruremunden., Nullitatis matrimonii; Nullitatis sententiae et decreti confirmatorii*, 1-VII-1988, RRT Decreta, vol. 6, 161, n. 8).

The institution of the *contradictorium* is accounted for not only in the preparatory aspect of the *delicti contestatio*, which prompts the hearing of both parties. In relation to the whole process, it is established by means of the *delicti contestatio* understood as the decree of the judge defining the object of the trial⁵². For by means of this decree, the parties attain concrete awareness of the object of the trial and can thus contribute to the particular investigation to be carried out in the instruction and hold a relevant procedural dialogue in the eventual discussion.

3.2. *The Right of Defense*

This institution of the *contradictorium* in the introductory stage of the penal process creates a juridical environment in which the parties are able to exercise of the right of defense⁵³. Echoing the jurisprudential adage above, we read another with a distinct emphasis: «The right of defense is protected in the Code of Canon Law by the *litis contestatio*»⁵⁴. For already in the *delicti contestatio*, the promoter of justice's functional right to the jurisdictional protection of the public good comes to fruition (cfr. can. 221 § 1), and the accused enjoys the faculty to combat what is being alleged against him. The right of the accused to respond to the citation before the judge determines the object of the trial enables him to urge the judge to reject outright any false accusations. This is the foundation to a just penal process and has perennially been understood as a presupposition for exercising the right of defense⁵⁵. It

⁵² «Ast, in quolibet contradictorio, essenziale est delimitatio vel definitio formalis obiecti controversiae, quae perficitur per dubii concordationem» (RRT, Decree *c. LÓPEZ-ILLANA, Sancti Ioannis Portoricens., Nullitatis matrimonii; Nullitatis sententiae*, 18-II-1998, RRT Decreta, vol. 16, 41, n. 15c).

⁵³ «[N]on concipitur iudicium seu iudicialis disceptatio nisi adsit *contradictorium* seu facultas utrique parti concessa se defendendi adversus alterius partis assertiones et allegationes» (M. LEGA – V. BARTOCETTI, *Commentarius...*, vol. 2, cit., 900, n. 4).

⁵⁴ «Ius defensionis in Codice Iuris Canonici tuetur *litis contestatione*» (SRR, Interlocutory Sentence *c. DE FELICE, Montereyen. in California, Nullitatis sententiae*, 24-IV-1982, SRR Decisiones, vol. 74, 233, n. 4; see also Decree *c. TURNATURI, Roffen. in America, Nullitatis matrimonii; Nullitatis sententiae*, 14-VII-1995, RRT Decreta, vol. 13, 86, n. 19).

⁵⁵ «Et exponenda sunt illi [i.e., praelato accusato] capitula de quibus fuerit inquirendum, ut facultatem habeat defendendi seipsum...» (LATERAN COUNCIL IV, can. 8 *Qualiter*

also may give him an opportunity to become aware of the penalties to which he may be subject in an eventual condemnatory sentence.

Once the judge has determined the object of the trial, both parties enjoy a firm (passive) right to the communication of the text of the decree, so that they may truly participate in the trial. «The determination of the doubts and their communication are of the greatest importance since they are strictly connected with the concept of the trial and consequently with the right of defense. Without a determination of the matter, it cannot be considered a trial. Besides, no one can aptly defend himself unless he knows what it is about»⁵⁶. Obviously, should the object of the trial be communicated in only vague terms or remain concealed from either or both parties, it will be “practically impossible”⁵⁷ for them to construct an adequate self-defense⁵⁸.

It is unnecessary that the identity of the private or pre-judicial accuser(s) be revealed at the time of the *delicti contestatio*, since that is not essential to the object of the trial, *sensu stricto*. And in fact, apart from cases involving delicts against the sacrament of penance reserved to the Congregation for the Doctrine of the Faith⁵⁹, their identity will emerge during the instruction of the cause if and when the accusers are ci-

et quando, 1215, in A. GARCÍA Y GARCÍA ET AL. [eds.], *Conciliarum oecumenicorum generaliumque decreta. Editio critica*, vol. II/1, Brepols Publishers, Turnhout 2013, 172, lines 301-302).

⁵⁶ See Z. GROCHOLEWSKI, *De periodo initiali seu introductoria processus in causis nullitatis matrimonii*, *Periodica* 85 (1996) 353, n. 6. See also, e.g., RRT, Decree *c. TURNATURI, Mexicana, Nullitatis matrimonii; Nullitatis sententiarum*, 7-XII-2000, RRT Decreta, vol. 18, 282, n. 14; G. KOLONDRÁ, *Right to Fair Proceedings in the Judicial Penal Process in Light of the Norms on the Ordinary Contentious Trial*, *Canon Law Studies* 570, The Catholic University of America, Washington, D.C. 2009, 135-136.

⁵⁷ See SRR, Decree *c. BURKE, Omahen., Nullitatis matrimonii; Novae causae propositionis*, 10-II-1988, RRT Decreta, vol. 6, 30, n. 3b. See also SRR, Definitive Sentence *c. POMPEDDA, Ruremunden., Nullitatis matrimonii et sententiae*, 27-II-1984, SRR Decisions, vol. 76, 123-124, n. 8. This is a personal right, not one that can be fulfilled through one illegitimately designated by the judge (cfr. Interlocutory Sentence *c. POMPEDDA, Corporis Christi*, 23-VII-1986, cit., 481, n. 14).

⁵⁸ «Nemo autem est quin videat in phasi introductoria processus efficacem defensionem proprii iuris sine cognitione obiecti litis vix exstare possibilem» (RRT, Decree *c. MCKAY, Neo-Eboracen., Nullitatis matrimonii; Nullitatis sententiae*, 27-IX-2007, RRT Decreta, vol. 25, 41, n. 4).

⁵⁹ SST/2010 art. 24 § 1.

ted as witnesses⁶⁰. For their names are to be communicated to the accused (cfr. can. 1554); his necessary advocate (cann. 1481 § 2; 1723) has a right to propose *articuli argumentorum* (cann. 1552 § 2; 1561) and to be present at their judicial examination (can. 1559); and both the accused and his advocate have a right to inspect their testimony (cfr. can. 1598 § 1).

The right of defense at the moment of the *delicti contestatio* is concretized in one right that flows both from the principle of the burden of proof weighing upon the promoter of justice (cann. 1526 § 1; 1721 § 1) and the standard of moral certitude directing the pronouncement of the judge related to the principle of the *favor rei* (cfr. can. 1608 § 4). This right constitutes a self-protection against unjust punishment (can. 221 § 3), namely, the right not to confess to commission of the delict. In making his response to the citation, the accused is not bound to enter into the matter of his guilt. He may admit to having committed the delict, but he is not bound to do so (cfr. cann. 1728 § 2; 1531 § 1; 1532); for *nemo tenetur prodere seipsum*⁶¹.

The right of defense, however, does not permit the accused to impede the institution of the *contradictorium* in the form of making no response to the citation (cfr. cann. 1592; 1412; 1724 § 2). The accused “must respond” to the citation and to appear whenever he is legitimately summoned by the judge (cfr. cann. 1476; 1531 § 1).

4. THE CONTENT OF THE PENAL FORMULA OF THE DOUBT

Legislation identifies the definition of the terms of the controversy as the essence of the *litis contestatio*. In other words it declares the pre-

⁶⁰ Cfr. Communicationes 12 (1980) 194, sub “Can. 385”. On the necessity of revealing the names of the accusers, we read: «Di fatto là dove l'accusato non conosce l'accusatore e non può essere fatto il confronto, esiste un'effettiva mortificazione del diritto alla difesa e quindi anche un rischio per il raggiungimento della verità, rischio che, se esistono motivi validi, si dovrà pur correre, purché vengano usati tutti gli strumenti idonei perché sia ridotto al minimo» (V. DE PAOLIS – D. CITTO, *Le sanzioni nella Chiesa. Commento al Codice di Diritto Canonico Libro VI*, Manuali 8, Urbaniana University Press, Rome 2000, 245).

⁶¹ M. LEGA – V. BARTOCCETTI, *Commentarius...*, vol. 2, cit., 607-608, n. 2. See also 611, note 3 on moral or spiritual torture.

cise object of the trial which, in a penal cause, revolves around not some *lis* but the commission of some delict. This demands a clear, defining formula proper to the penal cause.

The law itself determines the elements of the formula of the doubt for certain kinds of causes, either describing such elements or even supplying the very words in Latin⁶². This is further directed by judicial praxis. In matrimonial causes, it poses the question *an constet de nullitate matrimonii, in casu*, typically specifying then the *caput nullitatis*. A generic formula for causes of rights (*iurium*) asks *an constet, in casu, de iure actoris asserto*. In contentious-administrative causes, the Apostolic Signatura proposes the doubt in terms such as these: *an constet de violatione legis, in casu, sive in procedendo sive in decernendo*, indicating the dicastery and the challenged singular administrative act in question. What ought to be the basic elements of the formula of the doubt in a penal cause?

4.1. *The Object of the Penal Trial*

Since the formula of the doubt articulates the object of a particular trial, its generic content corresponds with the object of any penal trial. A penal trial centers upon «that which pertains to the definition of guilt and the imposition [or declaration] of ecclesiastical penalties» (can. 1401, 2°) or «delicts in what pertains to imposing or declaring a penalty» (can. 1400 § 1, 2°). A penal trial is one way in which the Church coerces delinquent members of the faithful with penal sanctions (can. 1311), since the penalty is imposed or declared *in sententia ferenda* (cfr. can. 1314, first part).

⁶² See, e.g., CIC can. 1639 § 1; CCEO can. 1320 § 1; FRANCIS, motu proprio *Mitis Iudex Dominus Iesus*, 15-VIII-2015, AAS 107 (2015) 958-970, at can. 1676 § 5; IDEM, motu proprio *Mitis et misericors Iesus*, 15-VIII-2015, *ibid.*, 946-957, at can. 1362 § 5; RRT, Norms *Quammaxime decet*, 18-IV-1994, AAS 86 (1994) 508-540, at art. 62 (the last 4 words of § 1 now being derogated: cfr. FRANCIS, rescriptum ex audientia, 7-XII-2015, *L'Osservatore romano* [sabato 12 dicembre 2015] 8, at II.1); BENEDICT XVI, Motu Proprio *Antiqua ordinatione*, 21-VI-2008, AAS 100 (2008) 513-538, at artt. 54, 56.

According to Cardinal Lega⁶³, the immediate and formal object of the trial is the imposition or declaration of the penalty; the mediate and material object is the commission of the delict. In other words, the commission of the delict is an event that (allegedly) occurred in the circumstances of the life of the community and of the accused. The institution of a penal trial is aimed at applying the coercive power of the Church to that factual situation. The admission of an accusatory *libellus* brings into existence an enclosed juridical world that centers on the punishment of the delict, that is, the imposition or declaration of a penalty⁶⁴.

However, the logic of the judicial investigation situates the commission of the delict itself as the presupposition to the punishment, so that the former is necessarily the primary question, while the penal consequences follow from it. Thus, «when the delict is missing from the object of the litigation, the judge cannot decide on the penalty to be inflicted». Indeed, it is only «once malice or at least negligence has been demonstrated [that] the offender is punished according to the norm of law⁶⁵». Generically speaking, the formula of the doubt would also be a question of whether commission of the delict is established and, if so, whether some penalty is to be imposed or declared, as the case may be (*an constet de [nomen delicti] commissione ac, si affirmative, an poena sit irroganda/declaranda*).

⁶³ Cfr. M. LEGA – V. BARTOCETTI, *Commentarius...*, vol. 1, cit., 3 (n. 7) and 19 (n. 6); see also vol. 3, 253-154, n. 3. See also, e.g., H. H. CAPPELLO, *El promotor de justicia en el proceso penal canónico*, Anuario Argentino de Derecho Canónico 16 (2009-2010) 231, B.

⁶⁴ «L'oggetto del processo penale riguarda l'irrogazione della pena ... o la dichiarazione di essa ... a punizione di un comportamento antiecclesiale delittuoso» (V. DE PAOLIS, *Il processo penale nel nuovo Codice*, in Z. GROCHOLEWSKI – V. CÁRCEL ORTÍ [eds.], *Dilexit iustitiam. Studia in honorem Aurelii Card. Sabattani*, Libreria Editrice Vaticana, Vatican City 1984, 480, n. 3).

⁶⁵ See RRT, Decree c. MCKAY, *Romana, Poenalis; Diffamationis; Reparationis damnorum; Nullitatis sententiae; iuris appellandi; citationis Superiorissae partis reae conventae*, 23-I-2008, RRT Decreta, vol. 26, 11-12, n. 22. In that case, the first instance tribunal formulated the doubt in terms of whether the accused was to be punished with a penalty not excluding a censure, citing §§ 2-3 of can. 1390 without a clear specification of the delicts in question (see *ibid.*, 2, n. 3). The emphasis in the decree was thus on the necessity of stating in the formula of the doubt also the particular delict in question, which can only be punished when the offender is gravely imputable. Cfr. John 18:29-31.

4.2. *The Penal Formula of the Doubt in Judicial Praxis*

In the judicial praxis of the Roman Rota, the formula of the doubt necessarily identifies the concrete delict(s) being examined by the tribunal. Some variation is seen, however, in the degree to which the penalty is determined in the formula of the doubt. The pattern seems to be that it remains largely indeterminate when lesser penalties are envisioned, while it is more often determinate when the gravest penalties are envisioned.

4.2.1. *Penalties Undetermined in the Formula of the Doubt*

The indeterminate expression of penalties in the formula of the doubt is suggested by some qualified canonical doctrine⁶⁶. Sometimes this is stated generically in terms of whether penalties are to be applied, for example: «An constet de diffamatione ex parte Patris Fei adversus Clinum Costa adeo ut sit *locus applicationi poenarum* et refectioni damnorum in casu?»⁶⁷» (emphasis added in all cases).

In causes of defamation (cfr. can. 1390 §§ 1-2) – among the penal causes most commonly judged before the Rota – the punishment is often stated in terms of whether some reparation is to be imposed in the case of a condemnatory sentence. For example: «An constet de iniuria, diffamatione vel damno illato, *ita ut sit locus reparationi et refectioni in casu*»⁶⁸. Another example is more implicit still: «II. An constet de diffamationis in casu. III. Et quatenus affirmative ad II, *quomodo providendum*

⁶⁶ E.g.: «Se il Rev. N.N. ... sia colpevole del delitto di cui al can. ... e, in caso di decisione affermativa, se e quale pena canonica debba essere inflitta allo stesso Rev. N.N.» (C. PAPALE, *Formulario commentato del processo penale canonico*, Urbaniana University Press, Vatican City 2012, 65 and 86).

⁶⁷ SRR, Definitive Sentence *c. LEGA, Lausanen. et Geneven., Diffamationis*, 30-XII-1912, SRR Decisiones, vol. 4, 479, n. 3, in which a civil cause was joined with the criminal one. The Rota was competent by pontifical commission. The punishment was a ten day retreat, retraction of the defamatory teaching, and some material reparation (*ibid.*, 496, n. 13). For a similar formula of the doubt, see Definitive Sentence *c. GRAZIOLI, Diffamationis*, 2-VI-1924, *ibid.*, vol. 16, 186, n. 2.

⁶⁸ SRR, Definitive Sentence *c. AMADORI, Liverpolitana, Diffamationis et refectionis damnorum*, 31-VII-1916, SRR Decisiones, vol. 8, 242, n. 1. The punishment was primarily that the guilty party recant his defamatory statements (cfr. *ibid.*, 255, n. 10).

in casu⁶⁹». This means that the penalty would have to be determined by the condemnatory sentence⁷⁰. The sentence may determine the punishment simply to be the reparation of damages by a public statement or other form of restoration, as well publication of the condemnatory sentence in an ecclesiastical organ of communication. Or the sentence might also be more detailed. In one cause in which the formulation of the doubt was «An constet de diffamationis; ita ut *sit locus poenis...*», the relative dispositive part of the sentence determined the punishment to be a month-long retreat in a religious house, suspension *a divinis*, and payment of an amount to the parish involved⁷¹.

In a cause *Calaritana*, the first instance sentence acquitted the accused cleric of all five allegations proposed in the formula of the doubt, in which there was only an indication of the penal (and other) laws violated, without mention of any threatened punishments. The second instance sentence of the Roman Rota (to which the promoter of justice

⁶⁹ SRR, Definitive Sentence *c. MANY, Treviren., Diffamationis*, 7-II-1913, SRR Decisiones, vol. 5, 117, n. 1; in that case, these questions were subordinate to the primary question of the nullity of the appealed sentence, which was declared. See also, e.g., Definitive Sentence *c. LEGA, Cameracen., Diffamationis*, 28-I-1914, *ibid.*, vol. 6, 40, n. 2.

⁷⁰ There are many examples in which such determination in the sentence was clearly necessary. For instance: «An, et quanam damna, et in *quam mensura, reparare teneatur in casu*» (SRR, Definitive Sentence *c. MANY, Diffamationis et refectiois damnorum*, 17-XII-1917, SRR Decisiones, vol. 9, 303, n. 1, decided in the negative in regard to the delict); in a cause of alleged defamation and calumny decided in the negative, «*An et quomodo sit locus ... impositioni poenarum, in casu*» (Definitive Sentence *c. SOLIERI, Diffamationis*, 30-VII-1924, *ibid.*, vol. 16, 295, n. 1); in a cause involving the illegitimate placement of funds in which the penal cause was renounced, we read: «II. *An et quanam poenae sint irrogandae sacerdoti Claudio, in casu*» (Definitive Sentence *c. PARRILLO, Appropriationis indebitae et poenarum*, 9-VIII-1927, *ibid.*, vol. 19, 380, n. 4); in another decided in the negative, «III. *An et quibus poenis multandus sit sac. Crispinus, in casu*» (Definitive Sentence *c. PARRILLO, Diffamationis*, 4-IV-1933, *ibid.*, vol. 25, 188, n. 3); «...et quatenus affirmative, *an et quibus poenis dammandus sit idem Rev. Nestor*» (Definitive Sentence *c. PINTO, Poenalis; Diffamationis*, 25-II-2005, RRT Decisiones, vol. 97, 124, n. 3; the penalty of suspension was determined by the sentence, confirming the first instance decision). For a similar practice in regard to the disciplining of an advocate, see Decree *c. HUBER, Romana, Disciplinaria; Confirmationis decreti*, 27-XI-1997, RRT Decreta, vol. 15, 258-261 (at n. 1: «...et, quatenus affirmative, *quanam sit sanctio applicanda vel infligenda*»).

⁷¹ Cfr. SRR, Definitive Sentence *c. ROSSETTI, Diffamationis et refectiois damnorum*, 20-X-1917, SRR Decisiones, vol. 9, 257-274, at nn. 1 and 31.

had appealed) formulated the doubt in these terms: «An sententia Calaritana diei 30 ianuarii 1991 confirmanda vel infirmanda sit, in casu». This extended the lack of determination of the penalties, since overturning the challenged sentence would require the Rota to determine the penalties in its sentence. In the dispositive part of the 29-III-1994 sentence *coram* Civili, it in fact overturned the decision with regard to two delicts and imposed punishments never concretely threatened but presumably drawn out of the proven facts, namely, prohibitions of residence, of exercise of the *munus docendi* and of the public celebration of the Holy Mass⁷².

The formula of the doubt used in the second instance of that cause follows the typical praxis at the level of appeal, where it is a question of the confirmation of penalties previously imposed⁷³. In the case of an appealed condemnatory sentence, the penalties in question are in this way implicitly determinate in the appellate *delicti contestatio*, unless the appealed sentence was an acquittal or absolution, which would obviously state no penalties (as in the just-discussed cause *Calaritana*). On the other hand, the appellate tribunal may be more explicit. It may expressly refer to a penalty already imposed: «An constet de diffamazione in casu, ita ut *inflicta poena* sustineatur⁷⁴». Or it may even name it: «2. An sustineatur condemnatio ipsius sacerdotis *in praedictas expensas*, in casu? 3. An sustineatur decretum *suspensionis* latum contra eundem sacerdotum die 12 sept. 1911, in casu?⁷⁵».

⁷² The second instance sentence is unpublished (see RRT Decisiones, vol. 86, ix, n. 26), but these details are supplied in the third instance Rotal sentence *coram* PINTO (*Calaritana, Poenalis*, 26-XI-1999, *ibid.*, vol. 91, 725-726, n. 8).

⁷³ See, e.g., Definitive Sentence *c.* PINTO, *Calaritana*, 26-XI-1999, cit., 723-740, at nn. 6-9; Definitive Sentence *c.* MCKAY, *Poenalis*, 14-V-2009, RRT Decisiones, vol. 101, 78, n. 2.

⁷⁴ SRR, Definitive Sentence *c.* SEBASTIANELLI, *Diffamationis*, 29-VII-1915, SRR Decisiones, vol. 7, 348, n. 1. The relative dispositive part of the sentence reads: «In casu non constare de diffamazione» (356, n. 11).

⁷⁵ SRR, Definitive Sentence *c.* LEGA, *Diffamationis*, 8-III-1913, SRR Decisiones, vol. 5, 199-200, n. 2. See also, e.g., *ibid.*, 249-261. In one case, the particular penalty of suspension *a divinis* was imposed, and that was named in the formulation of the doubt: «An constet de diffamazione, ita ut *sit locus ... suspensionis irrogationi* in casu» (Definitive Sentence *c.* ROSSETTI, *Restitutionis in integrum et diffamationis*, 19-I-1923, *ibid.*, vol. 15, 11, n. 1).

The penalty might itself be the sole object of the controversy at the level of appeal, such as when the accused does not dispute the proven conclusions but the justness of the penalty determined in the condemnatory sentence. For example, one decree formulated this doubt: «An sustineatur *poena statuta per sententiam* Tribunalis W⁷⁶». In such cases, the indication of the penalty is perhaps only implicit in the formula of the doubt.

4.2.2. *Penalties Determined in the Formula of the Doubt*

It appears to be the common judicial praxis to make explicit mention of the perpetual expiatory penalty of dismissal from the clerical state (can. 1336 § 1, 5°) in the formula of the doubt when that most severe penalty might be imposed⁷⁷. In one cause, the first instance formula of the doubt ended in these terms: «If the Accused is found guilty of any, or all the above, *whether the Accused should be dismissed from the clerical state, or in the alternative, whether some other penalty should be imposed?*». Then, at the level of appeal, the Roman Rota's formula of the doubt indicated the three delicts alleged; then, it proposed the penal-

⁷⁶ SRR, Definitive Sentence *c. MASSIMI, Poenarum*, 17-VII-1917, SRR Decisiones, vol. 9, 156, n. 1. Similarly, see Definitive Sentence *c. MASSIMI, Poenae et restitutionis*, 2-XII-1922, *ibid.*, vol. 14, 329, n. 1, in which the punishment was mitigated slightly (333-334, nn. 15 and 17).

⁷⁷ Cfr. G. INGELS, *Dismissal from the Clerical State: An Examination of the Penal Process*, *Studia Canonica* 33 (1999) 196, n. 2.4. For an example of this, see the first instance formulation of the doubt cited here: RRT, Decree *c. HUBER, Neo-Eboracen., Poenalis; Nullitatis sententiae*, 14-I-1997, RRT Decreta, vol. 15, 1, n. 1. In another cause judged before the Rota, the inferior tribunal named the punishment of dismissal explicitly in the formula of the doubt and imposed it by sentence. The Rota's formulation of the doubt then asked whether that decision was to be confirmed, leaving the punishment only implicit, and it decided: «II. Adfirmative, seu firmandum esse sententiam definitivam die 3 iunii 2009 latam; Reum appellansem dimittendum esse e statu clericali» (RRT, Definitive Sentence *c. MCKAY, Poenalis*, 20-VI-2011, cit., 327, n. 20). For an example of a formula of the doubt in which the proposed penalties are not mentioned, see that of the first instance tribunal quoted in RRT, Decree *c. STANKIEWICZ, Posnaniensis, Dimissionis e statu clericali; Praejudicialis: Novae causae propositionis*, 11-XI-1993, RRT Decreta, vol. 11, 188, n. 4. The controversy in fact revolved around the penalty of dismissal imposed by the first instance tribunal and overturned by the appellate tribunal due to lack of proof of the delict meriting such a penalty.

ties in these terms: «et quatenus affirmative de Conventi culpa in alterutro vel in omnibus citatis delictis patratis, *an confirmanda sit poena eius dimissionis e statu clericali vel quanam alia poena ipsi irroganda sit*»⁷⁸. At the beginning of the trial, therefore, the judge envisioned dismissal from the clerical state while also making provision for some lesser penalty.

Other times, this most severe penalty is proposed, leaving the possibility of imposing lesser penalties implicit. In one cause, the Rotal *Turnus* judged the first instance formula of the doubt to be “clearly and correctly defined” in which the secondary question asked if “en caso afirmativo si hay que expulsarlo del estado clerical”⁷⁹. In another, the Rota’s own formula of the doubt at the level of appeal asked: «Utrum confirmanda an infirmanda sit sententia primi gradus Tribunalis Y, die 20 septembris 2000 prolata, qua Reus damnatus est poena perpetua dimissionis e statu clericali»⁸⁰. Thus it was a matter of confirming the penalty imposed or (implicitly) of reforming it.

The reverse approach could also be taken according to which the same penalty is proposed as the maximum possible penalty, thus anticipating the possibility of lesser penalties. This praxis fittingly echoes the legislation⁸¹. One first instance formula of the doubt posed the secondary question, in a manner approved by the Rota, in terms of whether the accused «is to be punished with just penalties, including dismissal from the clerical state, if the case warrants it»⁸².

⁷⁸ RRT, Definitive Sentence *c. HUBER, Poenalis*, 9-VII-2004, RRT Decisiones, vol. 96, 476-477, nn. 1-2. Since he was not found punishable for two of the delicts, the penalty of dismissal from the clerical state was mitigated to privation of the power of any office or function (can. 1336 § 1, 2^o), recognizing that he could celebrate the Holy Mass privately with the consent of the bishop (at 484, n. 10).

⁷⁹ RRT, Decree *c. DEFILIPPI, Salten. in Uruguay, Poenalis; Querelae nullitatis*, 30-XI-2000, RRT Decreta, vol. 18, 272, n. 9b.

⁸⁰ RRT, Definitive Sentence *c. MONIER, Poenalis*, 21-VI-2002, RRT Decisiones, vol. 94, 402, n. 4. In that case, bearing in mind some blame on the part of the religious superiors, the old age of the accused, and punishments imposed by the secular criminal court, the Rota reformed the punishment, imposing the lighter penalties of suspension from all acts of the power of orders and governance for nine years and the command to reside indefinitely in his religious house under the vigilance of his superiors (*ibid.*, 407-408, n. 14).

⁸¹ See, e.g., cann. 1364 § 2; 1367; 1370 § 1; 1387; 1394 § 1; 1395.

⁸² RRT, Decree *c. ALWAN, Phoenicen., Poenalis; Nullitatis sententiae*, 20-II-2001, RRT Decreta, vol. 19, 35, n. 2. The Rota there presented the *dubium* as “recte ... concordatum”.

Apart from that penalty, other graver penalties are rightly mentioned in the formula of the doubt. In one cause, a public official was said to have committed a delict in officiating at a marriage between Catholics (prohibited by the vicar general) and thus to have incurred excommunication. The Rota formulated the doubt thus, «An constet dñum Iosephum Gomez incurrisse excommunicationem, in casu». It decided in the negative due to the illegitimate constitution of that penalty⁸³.

Not even implicitly indicating the penalty of dismissal from the clerical state in the formula of the doubt in a cause in which that punishment is envisioned would appear to be exceptional. In a cause *Dublinensis*, the first instance tribunal proposed the question of whether the accused priest had committed sins against the sixth commandment with a minor and then envisioned an indeterminate penalty («If he is found to have committed such an offense or offenses *what penalties, if any, should be imposed?*»), only to decide, «The R. X. is dismissed from the clerical state». The Rota then formulated the doubt in these terms: «Utrum pars conventa violaverit can. 1395, par. 2 et quidem cum minore sexdecim annorum delictum de quo in canone patruerit et quatenus affirmative, *qua poena multandus erit*, seu utrum sententia primae instantiae confirmanda vel infirmanda erit». While the Rotal formulation of the doubt proposed no penalty explicitly, dismissal from the clerical state was being implicitly indicated since the Rota was in a position of deciding whether or not to confirm the dismissal from the clerical state⁸⁴.

⁸³ SRR, Definitive Sentence *c. MASSIMI, Medellen., Excommunicationis*, 7-VII-1924, SRR Decisiones, vol. 16, 284-288, at 285, n. 1. For a contentious cause introduced over the question of the alleged incurring of excommunication (*rectius: Iurium*), see Definitive Sentence *c. MASSIMI, Excommunicationis*, 18-VIII-1921, SRR Decisiones, vol. 13, 256-262.

⁸⁴ RRT, Definitive Sentence *c. COLAGIOVANNI, Dublinen., Poenalis; Dimissionis e statu clericali*, 14-VI-1994, Monitor Ecclesiasticus 122 (1997) 90-95 (see RRT Decisiones, vol. 86, xi, n. 42). Because of the illness and thus reduced imputability of the accused priest, the penalty was mitigated in the form of restriction from any ministry and ten years residence in a monastery under the vigilance of the superior.

5. INDICATION OF THE THREATENED PENALTY IN THE *DELICTI CONTESTATIO*

5.1. *The Moment(s) for the Determination of a Penalty*

There is no doubt that it is in the definitive condemnatory sentence that an explicit penalty is imposed upon the accused or declared to have been incurred⁸⁵. For it is only after the gathering of proofs, admission of arguments, and weighing of all of them – in a word, at the end of the process⁸⁶ – that the external violation of the law and the imputability of the accused will have been established.

While that is the ultimate moment when the judge exercises his discretion in regard to the penalty⁸⁷, the legislator's delineation of that discretion does not strictly and exclusively pertain only to the moment of the decision. After the completion of a preliminary investigation, the judge may already know, for example, whether greater evils will result from an overly hasty punishment, whether the offender is more disposed to reform and the scandals are reparable, whether it would be only a first offense (can. 1344), whether there were some factors mitigating imputability (cfr. can. 1345), whether it will be excessive to punish each delict as foreseen in the law (can. 1346), and whether he is inclined to punish the accused more gravely (can. 1349), even more gravely than the law or precept anticipates (can. 1326). In such cases, some self-limitation on the part of the judge would seem to be in order, since the broad discretion afforded by the legislation in determining which penalty is to be imposed «may raise some concerns about the protection

⁸⁵ «...profertur sententia, dictando dispositivam cancellario, cum explicita mentione, in casu damnationis, canonicae sanctionis accusato applicatae» (*Sacra haec*, cit., 1025, n. 35).

⁸⁶ Cfr. V. DE PAOLIS, *L'applicazione della pena canonica*, Monitor Ecclesiasticus 114 (1989) 89, at V; Z. SUCHECKI, *Il processo penale giudiziario...*, cit., 397, n. 5.1; Definitive Sentence c. MCKAY, *Poenalis*, 14-V-2009, cit., 81, n. 7; J. P. BEAL, *To Be or Not to Be, That is the Question. The Rights of the Accused in the Canonical Penal Process*, CLSA Proceedings 53 (1991) 95, n. 12.

⁸⁷ Cann. 1342-1350 are those which, «*a processo concluso*, lasciano al superiore o al giudice ampio margine ancora di discrezionalità» (V. DE PAOLIS – D. CITO, *Le sanzioni nella Chiesa...*, cit., 210, emphasis added). See the norm of can. 1720, 3°, which in this regard applies also to the definitive sentence (see the just-cited work, 254, n. 14.4).

of rights, especially where such discretion is exercised by relatively inexperienced superiors and judges»⁸⁸.

As is seen in judicial praxis, the formula of the doubt often leaves the specific penalty undetermined, unless it is a matter of the very grave perpetual penalty of dismissal from the clerical state, or perhaps even excommunication. This praxis follows the indeterminate nature of most of the penalties established in the general legislation, which frequently states that the offender can be punished (*puniri potest*) or is to be punished with a just penalty (*iusta poena puniatur*). While this may seem to endow it with the character of legitimacy, it surely may strike one (especially the accused) as being less just.

5.2. *A Fuller contradictorium*

At the time of the *delicti contestatio*, the accused will (or should) have been made aware of the outcome of the preliminary investigation (cfr. cann. 1718 § 1; 50-51; 54) and of the content of the *libellus accusationis* which ought to include mention of the penalties the promoter of justice thinks should be imposed or declared (can. 1508 § 2). If the *delicti contestatio* leaves the penalties under consideration unmentioned or purely implicit (*an et quaedam poenae, an sit locus applicationi poenarum, etc.*), the accused shall remain in suspense as to what punishment he may be facing. He may understandably find himself to be gravely preoccupied about this in a time when the goal of “zero tolerance” threatens to overcome the principle of proportionality in the imposition of punishments⁸⁹. In any case, this praxis affects the quality and scope of the *contradictorium*, since it limits the accu-

⁸⁸ T. J. GREEN, *Penal Law: A Review of Selected Themes*, *The Jurist* 50 (1990) 235. See also V. DE PAOLIS – D. CITO, *Le sanzioni nella Chiesa...*, cit., 254-255; J. SANCHÍS, *Commentary on can. 1315*, in *Exegetical Commentary*, cit., vol. IV/1, 242, n. 4.

⁸⁹ On this problem, see, e.g., K. BOCCAFOLA, *The Special Penal Norms of the United States and Their Application*, in P. M. DUGAN (ed.), *The Penal Process and the Protection of Rights in Canon Law, Proceedings of a Conference Held at the Pontifical University of the Holy Cross, Rome, March 25-26, 2004*, Gratianus Series, Wilson & Lafleur Ltée, Montréal 2005, 271-272. This was stressed in a report documenting a discussion held between officials of the CDF and leadership of the Canon Law Society of America, and it contextually seems to encourage an indication of the proposed penalty in the formulation of the doubt: «The joinder of the issue is very important in penal cases. It must be accurately prepared. The requested penalty must be appropriate to the cri-

sed party's ability to confront the penalties under consideration by the judge, a consideration that remains hidden during the process.

In situations such as what is observed in the above-cited cause *Dublinensis*, it is possible that an accused cleric and his advocate may not clearly know the gravity of the penalty to be imposed until the publication of the definitive sentence, even if they could know that it is possible in law. This could leave him inadequately defended before the judge, and it begins to undermine the principle of the *favor rei*. «Justly and rightly is the right of defense called an inalienable right, rooted in the very law of nature; and this not only means that the innocent not be condemned as a criminal, but also that a criminal not be subject to a graver penalty or be punished beyond what is due by justice»⁹⁰. Since the proper context for self-defense is within the process itself, some opportunity to combat a proposed penalty ought to be afforded him, that is, before it is imposed.

Were some serious penalty to be proposed more explicitly in the formula of the doubt (or even proposed in the citation and established in the *delicti contestatio*)⁹¹, the judge would be able to refine the ultimate, reasonable consequences of the trial. The accused and the promoter of justice could make recourse against the *delicti contestatio* were the penalty to be unequal to the alleged delict, by reason of either excess or deficiency. This surely should constitute one aspect of the discussion of the cause, in which the promoter of justice would try to reasonably defend the imposition of the proposed penalty, and the accused, even through his last response (can. 1725), its mitigation. Ultimately, the more mature consideration of this matter at different stages of the trial would prepare the judge, at the moment for issuing the definitive sentence, to know what is indeed the most just penalty.

me, and reflective of the particular law of the *Essential Norms* in the USA» (in S. A. EUART ET AL. [eds], *Roman Replies and CLSA Advisory Opinions 2010*, CLSA, Washington, D.C. 2010, 65).

⁹⁰ «Iure merito ius defensionis dicitur ius inalienabile, in ipso iure naturae radicum et hoc intelligitur nedum ne innocens condemnetur quasi reus, sed etiam ne reus graviolem poenam subeat, seu praeter debitum iustitiae puniatur (...)» (Definitive Sentence *c. FALTIN, Subotiana*, 10-XI-1987, cit., 779, n. 19).

⁹¹ «Praeses vel ponens una cum his notificationibus formulam dubii vel dubiorum ex libello desumptam partibus opportune proponat, ut ipsae respondeant» (*Dignitas con-nubii*, art. 127 § 2).

5.3. *The Rationality of the Judicial Order*

It is necessary, at least in certain cases, that the prospective penalty or penalties be clear from the outset of the trial so that the judicial vicar may know whether the cause is reserved by law to a college of three judges, thus binding him to constitute a collegial tribunal. For this legislative reservation is determined not so much by the alleged delict as by the penalty possibly to be imposed: «With the reprobation of contrary custom, the following are reserved to a collegial tribunal of three judges: ... 2° penal causes: a) for delicts which can carry with them the penalty of dismissal from the clerical state; b) the imposition and declaration of excommunication» (can. 1425 § 1). It does not seem sufficient for this matter to be resolved by the content in the *libellus accusationis*⁹², since the judge may or may not admit each accusation and penalty proposed by the promoter of justice. Indeed, if it is true that the promoter of justice «blames the accused for a certain delict and requests that certain penalties be paid by the accused»⁹³, the accused will (have the opportunity to) respond to that accusation and request. And, whatever response may be given to the citation, it is for the judge to clarify what delict(s) will be examined and what punishment(s) considered.

While the formula of the doubt is established out of the judge's independence from the promoter of justice, it constitutes an extension of the *libellus accusationis* in which the promoter of justice, among other things, not only asserts the juridical and factual basis on which his petition rests (can. 1504, 2°) – that is, the penal norm and the criminal event – but also identifies what is requested (*ibid.*, 1°), namely, a particular just punishment. By extension, it might be said that «both the *petitum* and the *causa petendi* must be precisely established in the decree stating the doubts»⁹⁴. And in a penal cause, the *causa petendi* is the de-

⁹² This solution is proposed by M. LEGA – V. BARTOCETTI, *Commentarius...*, vol. 1, cit., 131, n. 6 who, however, also seem hesitant about the matter. The starting point for this discussion is the judge's obvious lack of foreknowledge of the decision; but our proposal can be applied by means of the judge's prudent evaluation of the accusations and responses and the standard of the *fumus boni iuris*, as well as the judicious use of the technique of subordination.

⁹³ See M. LEGA – V. BARTOCETTI, *Commentarius...*, vol. 3, cit., 287, n. 3, emphasis added.

⁹⁴ See J. L. LÓPEZ ZUBILLAGA, «Fijación del *dubium*», cit., 990.

lict, while the *petitum* is the penalty. This is common and necessary in causes of nullity of marriage, but it is also arguably necessary in penal causes. One commentator wrote 100 years ago that the penal *litis contestatio* «consists in the determination a) of the delict committed, b) of the person of the accused and his imputability, and c) of the penalty to be paid by him»⁹⁵.

5.4. *The Scope of the Judge's Discretion*

It is unlikely the mind of the supreme legislator that the imposition or declaration of a penalty is subject to the pure discretion of the judge at the moment for arriving at a decision. For that could be indiscernible from the arbitrariness in a particular case that is to be avoided in the Church⁹⁶. When the legislator leaves a penalty indeterminate, its determination is subject to «the prudent evaluation of the judge» (can. 1315 § 2) and may even potentially include censures (can. 1349). However, when the law is indeterminate, it in effect merely establishes a violation of the law as a delict without truly threatening any penalty (cfr. CIC/17 can. 2195 § 1); this puts *the judge* in the position of threatening a penalty. A threat necessarily precedes a consequence or imposition; and since the imposition occurs in the definitive sentence, this threat has to occur earlier, namely, in the act that poses the questions to be decided by definitive sentence: *the delicti contestatio* (cfr. can. 1611, 1°).

The above-described judicial praxis seems to rest on the other hand, in part, on the legislator's choices to determine certain penalties for certain delicts. Thus, for example, when the legislator envisions the possibility of dismissal from the clerical state or the declaration or imposition of excommunication, the judicial vicar knows that he should

⁹⁵ «[In re criminali, *litis contestatio*] consistit vero in determinatione a) *delicti commissi*, b) *personae rei*, et *imputabilitatis illius*, c) *poenae* ab eodem luendae» (J. NOVAL, *Commentarium...*, cit., 536, n. 802). The author also includes “cum indicatione poenae” among the elements of the penal *litis contestatio* (*ibid.*).

⁹⁶ Cfr. PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *I. Principia quae Codicis iuris canonici recognitionem dirigant*, Communicationes 1 (1969) 83, n. 7.

constitute a collegial tribunal⁹⁷, and the judge would fittingly mention such penalties in the formula of the doubt. However, those are the maximum penalties for some delicts⁹⁸, which might not in fact be foreseen in particular causes, even at the beginning of the trial. Moreover, the penalties stated in law for particular delicts are not altogether determinative, insofar as the judge can in certain circumstances punish the accused more gravely than the law or a precept indicates (can. 1326): if he is a repeated offender, endowed with ecclesiastical dignity, has committed a delict through an abuse of authority or office, or deliberately omitted due diligence. And when that determined penalty is *latae sententiae*, the definitive sentence can both declare the penalty and impose another penalty. This norm even compromises the clarity of a penal process initiated due to violation of a penal precept, which, for its own part, threatens some penalty clearly (cfr. can. 1319 § 1)⁹⁹. During the introductory stage of the penal trial, the judge should indicate whether he already anticipates possibly punishing the accused more gravely than is indicated in the law or precept, lest the accused be left unable to defend himself against such a judicial threat prior to issuance of the definitive sentence.

⁹⁷ «...a secondo infatti del tipo di delitto, l'organo giudicante sarà monocratico ... o collegiale...» (C. PAPALE, *Il processo penale canonico. Commento al Codice di Diritto Canonico: Libro VII, Parte IV*, Manuali – Diritto 28, Urbaniana University Press, Rome 2012, 127).

⁹⁸ E.g., «aliae poenae addi possunt, non excepta dimissione e statu clericali» (can. 1364 § 2); «non exclusa excommunicatione» (can. 1378 § 3); «in casibus gravioribus dimittatur e statu clericali» (can. 1387); «non exclusa censura» (can. 1390 § 2); «gradatim privationibus ac vel etiam dimissione e statu clericali puniri potest» (can. 1394 § 1); «usque ad dimissionem e statu clericali» (can. 1395 § 1); «non exclusa, si casus ferat, dimissione e statu clericali» (*ibid.*, § 2).

⁹⁹ A precept threatens a specific penalty (can. 1319 § 1), and this precept is re-presented to the accused in a way that intraprocedurally confirms the threat (cfr. *Sacra haec*, cit., 1023, n. 15). This dynamic was verified, e.g., in a cause that reached the jurisdiction of the Rota in which a priest had been punished due to the delict of fornication and was threatened in a penal precept, should he fail to avoid contact with the woman, with perpetual *inhabilitas* and even excommunication. The *libellus accusationis* thus naturally had these in view, and they would be the object of the criminal trial (cfr. SRR, Definitive Sentence *c. GUGLIELMI, Poenarum; Incidentis de suppletiva probatione admittenda*, 11-VIII-1931, SRR Decisiones, vol. 23, 408-409, n. 1).

This matter also pertains to the protection of the public good, seen in procedural terms as the right of defense of the promoter of justice. Already at the outset of the trial, the judge might be able to perceive the likelihood of deferring the imposition of a penalty or abstaining from punishing, imposing a lighter penalty than is established in law, imposing a penance and no penalty, or suspending the obligation to observe a penalty if it is a first offense by one who has otherwise lived a praiseworthy life and there is no urgent need to repair scandal (can. 1344). To the extent that this can be foreseen at the outset of the trial, the promoter of justice has a right to be aware of it and insist, within the bounds of reason, that a just punishment be considered and identified in the *delicti contestatio*.

All of this being said, the judge undoubtedly cannot fully know what will be discovered during the instruction of the cause and what will be argued during the discussion. The deliberation of the college may itself arrive at a judgment in favor of a certain penalty that cannot have been foreseen at the beginning of the trial. This is why the legislator yields much to the discretion of the judge in the imposition of penalties. Accordingly, the formulation of the doubt should strive to be indicative of the penalty but also flexible. This means that it should attempt to anticipate what might be the gravest penalty reasonably foreseen at the beginning of the trial. The tribunal is clearly not bound to limit itself to what is explicitly stated in the formula of the doubt in this regard, but it offers the accused an indication of what grave penalty he could be facing, and it signifies to the promoter of justice what penalties seem to reside within the bounds of reason – perhaps not as grave as requested in the *libellus accusationis* or perhaps just as grave. Thus the formulation of the doubt may imitate the language of the legislation by a) posing the primary question of whether commission of a particular delict is established and b) by subordinately asking which penalty is to be imposed, *not excluding* some privation or prohibition, interdiction, suspension, excommunication, or dismissal from the clerical state, as the case may be. And the decree could add a clause along the lines of, «without prejudice to the margin of discretion attributed to the judge by law».

6. IMPLICATIONS FOR SIMPLIFIED PENAL PROCESSES

A brief note may be made in regard to the application of these considerations to the simplified penal process, that is, the administrative penal procedure by which the ordinary imposes or declares a penalty *per decretum extra iudicium* (cfr. cann. 1341; 1342 §§ 1, 3; 1720 *incipit*). For it is the duty of those who govern the Church and of the canonical science ever to strive that it be a just process, even if abbreviated.

In such processes, the ordinary is bound to make known to the accused the accusation(s) and the proofs (can. 1720, 1°). This would seem to refer to the delict(s) he is alleged to have committed without reference to any threatened or proposed penalty. At the same time, the accused fundamentally enjoys the *facultate sese defendendi* (can. 1720, 1°; cfr. can. 221 §§ 2-3). Justice would seem to demand that the penalty to which he stands vulnerable in the administrative penal process not be an enigma during its evolution, revealed to the accused only upon notification of the condemnatory decree. It may be reasonable to tolerate the omission of any kind of definition of the terms of a controversy when its object is obvious or clear¹⁰⁰. However, unlike certain coercive administrative procedures¹⁰¹, the administrative penal process does not have its own inherent condemnatory consequence. In general, the above-described discretion of the judge, applicable to the ordinary (can. 1342 § 3), urges the ordinary to propose at the outset of this process what maximum penalties to be imposed are anticipated, so that the accused may offer a complete self-defense¹⁰². Exemplary in this regard is the process for the dismissal of a member of a religious institute within which the major superior is to make «an explicit threat of subsequent dismissal» (can. 697, 2°).

¹⁰⁰ Cfr. Communicationes 38 (2006) 138-139.

¹⁰¹ See, e.g., cann. 695 § 1 (dismissal); 1742 § 1 (removal); 1750 (transfer).

¹⁰² The disciplinary procedures against clerics in the CIC/17 wisely ordered the ordinary not only to present an accusation to the offender but also to indicate to him the penalties that he could incur if he was found guilty or if he did not reform his behavior (see, e.g., can. 2168 § 2: «In monitione Ordinarius *recolat poenas* quas incurrunt clerici non residentes itemque praescriptum can. 188, n. 8...»; can. 2176: «*comminatis poenis...*»; can. 2182: «*poenas in haec delicta iure statutas*»).

7. CONCLUSION

The Church's mission inherited from her Lord to preach the Gospel to all the nations presupposes that she cultivate within herself the atmosphere of a family. In the family of the Church there is not only the supremely precious nourishment and inspiration drawn from the sacramental fountains of grace and the living Word of God but also the just organization of sacred things and the coordination of just social relationships. When she, like a just mother (her Pastors as just fathers), must coerce members of the faithful with punishments due to their infliction of scandal and injustice in the Church and injury of her sacred goods and the dignity of her members, she has to be a mirror of justice, reflecting the perfect justice of the One who will come to judge the living and the dead. In particular, her penal processes are always to be just, and their refinement through the reform of law and the perfection of judicial praxis ought not strive only to be minimally sufficient but truly exemplary. One way in which this can be done is, already at the beginning of a penal trial, to reveal to the one accused of a delict both the accusation and the possible maximum penalties that may be imposed upon him.

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