DE PROCESSIBUS MATRI-MONIALIBUS

BAND 31 (2024)

De Processibus Matrimonialibus

DE PROCESSIBUS MATRIMONIALIBUS

Fachzeitschrift zu Fragen

des Kanonischen Ehe- und Prozessrechtes

Herausgegeben von

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Schriftleitung: Elmar Güthoff

31. Band

Jahrgang 2024

Um aus dieser Publikation zu zitieren, verwenden Sie bitte diesen DOI Link:
https://doi.org/10.22602/IQ.9783745888577

https://nbn-resolving.org/urn:nbn:de:bvb:384-opus4-1122131

Bibliografische Information der Deutschen Nationalbibliothek:
Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über dnb.dnb.de abrufbar.

publIQation
ACADEMIC PUBLISHING

PubliQation – Wissenschaft veröffentlichen

Ein Imprint der Books on Demand GmbH, In de Tarpen 42, 22848 Norderstedt

Umschlagdesign, Herstellung und Verlag: BoD – Books on Demand GmbH,
In de Tarpen 42, 22848 Norderstedt

ISBN 978-3-7458-8857-7

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THE JUDICIAL POWER AND ITS EXERCISE BY LAYPERSONS IN MARRIAGE NULLITY PROCESS: LIMITS AND PROSPECTS

by Ernest B. O. Okonkwo

INTRODUCTION

Can laypersons[1] (non-clerics) exercise the judicial power they do not have?[2] This question posed by some members of the commission that revised the 1917 Code of Canon Law is still relevant. The laity's possession of judicial power and its exercise remain a theological-canonical conundrum. It is necessary to understand how the laity can have judicial power to be able to exercise it within the legal limits in the marriage nullity process.

The then Congregation for doctrine of faith and some commissions tried to resolve the unclarity on laity's unsuitability for the possession and exercise of the power of governance which embodies the judicial power. In the response of 08.02.1977 approved by the Roman Pontiff, the Congregation for doctrine of faith said: „Dogmatically, lay people are excluded only from intrinsically hierarchical offices, the capacity for which is linked to the reception of the sacrament of orders"[3]. The Congregation did not specify the hierarchical offices but left the

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1 The word laypersons or the laity in this context refers to non-clerics (c. 207): those who are not in Holy Orders whether they belong to the Institutes of Consecrated life or to the Society of Apostolic Life (LG 31).

2 PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Relatio complectens synthesim Animadversionum Ab.em.mis atque Exc.mis patribus commissionis ad novissimum schema codici iuris canonici exhibitarum, cum responsibus a segreteria et consultoribus datis Typis polyglottis vaticanis MCMLXXXI, 37; Comm. 14 (1982) 148.

3 „Dogmaticamente, i laici sono esclusi soltanto dagli uffici intrinsecamente gerarchici, la cui capacità è legata alla recezione del sacramento dell'ordine": PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, Acta et documenta pontificiae commissionis codici iuris canonici recognoscendo *Congregatio plenaria* diebus 20-29 octobris 1981 habita, Typis polyglottis vaticanis 1991, 37. Unless otherwise stated, all English translations of the 1983 Code are from the The Code of Canon Law in English translation prepared by The Canon Law Society of Great Britain and Ireland in association with the Canon Law Society of Australia and New Zealand and The Canadian Canon Law

determination *ad normam iuris* to the discretion of the *ad hoc* constituted bodies by the Holy See. The office of an ecclesiastical judge, however, involves more a juridical-canonical office and less of an intrinsically hierarchical office, which requires the role of an ordained minister[4].

On the contrary, some members of the plenary commission[5] for the revision of the 1917 Code observed that the canon permitting the laity to participate in judicial power should be suppressed. To sustain that the laity can exercise judicial power is, according to them, a violation of the theological principle that sacred power originates from the sacrament of Holy Orders, a disregard for the unity of power in the Church. Besides, a concession of power by competent human authority is dangerous and it is a contradiction in terms to exercise a power that one does not have and laity's possession of judicial power is foreign to the Vatican II teaching. Despite all these observations from the plenary commission, the pontifical commission revising the 1917 code did not suppress c. 1373 § 2 of 1980 schema of code[6] which is the current c. 1421 § 2[7] that prescribes the appointment of lay judges with the permission of the Episcopal Conference. According to the pontifical commission, the observation of the plenary presupposes an unproven principle, namely that the Second Vatican Council absolutely considered the sacrament of Holy Orders as the origin of the entire power of governance. The proof of such a principle means the absolute exclusion of laypersons from participation in the office of governing[8] which embodies the judicial power.

The differing positions of the pontifical commission and the plenary represent the two opposing schools of thought – the Munich school (also known as German school) and the Roman school – on the origin of power in the Church.

Society. Sydney 2001. Besides, English translations of non English authors are mine unless otherwise stated.

4 „Officia igitur laicalia sunt officia non intrinsece hierarchica, id est quae sacrum ordinem non requirunt." ERDÒ, P., Quaestiones de officiis ecclesiasticis laicorum: Periodica 81 (1992)187.

5 PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Relatio complectens synthesim animadversionsum ab Em.mis atque Exc.mis patribus commissionis ad novissimum schema codicis iuris canonici exhibitarum, cum responsionibus a secreteria et consultoribus datis, Typis polyglottis Vaticanis MCMLXXXI, 37-40, 308-309.

6 PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Schema codicis iuris canonici 1980. Città del Vaticano 1980, 307.

7 It is c. 1421 § 2 also in *Schema novissimum 1982*: PONTIFICIA COMMISSION CODICI IURIS CANONICI RECOGNOSCENDO, Codex iuris canonici schema novissimum iuxta placita patrum commussionis emendatum atque summo pontifici praesentatum, Typis polyglottis vaticanis 1982, 249.

8 Comm. 16 (1984) 54; Comm. 10 (1978) 231.

For the Munich school, the power of Christ present in the Church comes through the sacramental ordination. The unitary ecclesiastical theory of power of the Munich school differs from the dual ecclesiastical theory of power from the Roman school: the power of orders and the power of jurisdiction[9]. The power of orders derives from the sacramental ordination while the power of jurisdiction comes through the canonical mission from the hierarchy. Laypersons can have and can exercise this power of jurisdiction also known as power of governance (c. 129 § 1) in certain established offices and circumstances.

The laity's judicial power and its exercise in the tribunals depends more on the ontological share in the *munus regendi*[10] conferred by the sacrament of baptism, whereas the judicial power is obtained with the canonical mission. Our aim, therefore, is to examine the juridical understanding of judicial power, the laity's possession of judicial power, the exercise of the judicial power by the laity, the laity's limits to the exercise of judicial power, institutions of justice on the juridical status of decisions violating the limits and some prospects for overcoming the limits.

1. JURIDICAL UNDERSTANDING OF JUDICIAL POWER

Knowledge of judicial power and its characteristics is pertinent to its proper exercise. This power is one of the tripartite expressions of the ecclesiastical power of governance[11] (c. 135) which is part of *munus regendi*. It is the capa-

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9 The meaning of power of jurisdiction in 1917 CIC and 1983 CIC is not the same. In 1917 Code it was limited to executive and judicial power in civil law understanding. The power of jurisdiction also known as power of governance in 1983 CIC is broader and refers more to governing in line with the *tria munera* of the Vatican II's teaching. This power comprises legislative, executive and judicial power. The proposal to maintain only power of governance without the alternative name, the power of jurisdiction, was quashed because previsously there was always a question of the power of jurisdiction and by maintaining it all will know the kind of power referred to. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Relatio complectens*, Typis Polyglottis Vaticanis MCMLXXXI, 38: Comm. 9 (1977) 234.

10 According to John M. HUELS, „The *munus regendi* includes many activities in the areas of pastoral care and works of the apostolate, participation on consultative bodies, and various administrative and pastoral offices, not all of which involve the exercise of the power of governance". HUELS, J. M., The power of governance and its exercise by lay persons: A juridical approach: StudCan 35 (2001) 62.

11 According to Juan Ignacio ARRIETA: „The power of governance may be defined as the subjective, active, juridical position, constituted on the basis of the sacramental structure of the Church, which carries with it the capacity to produce unilateral juridical effects binding the faithful, within the terms of the competency of the office and of the

city of judges or a judicial college of a competent tribunal to examine authoritatively and to decide legitimately and rightly with definitive decisions, the concrete and the juridical controversies presented to them *ad normam iuris*. Through conformity to the norms, the judges or the tribunal are legally bound to respect the prescripts of the law and to be impartial in their exercise of the judicial power.

Not only is the adherence to the norms necessary but also the fidelity to the pastoral dimension of the judicial power. This pastoral dimension inculcates the idea that Christ is the Lord who judges through the judicial power and helps both the judges and those judged to the greatest of Christ's mission – the salvation of souls. More particularly, it also implies that the judicial power seeks justice animated in truth by applying some theological-canonical elements namely, charity, benignity, and canonical equity considered as tempering justice with mercy[12]. Canonical equity, however, does not mean replacing justice with mercy completely or intentionally murdering justice and truth. Rather, it is all about avoiding excessive rigidity in the interpretation and application of the letters of the law in certain circumstances especially those unforeseen by the law.

Both the juridical dimension and the pastoral dimension of the judicial power abound in a judicial process known as the judicial procedures for the protection of rights[13]. Specifically, it is a set of acts and solemnities prescribed by law and by a public authority for examining and dealing with judicial issues and cases[14]. Such issues and cases are mostly juridical controversies, and the judicial process's aim is to know the objective truth surrounding them by applying the laws to concrete cases in a just process which must recognise the right of defence. Pope JOHN PAUL II. rightly affirmed: „the right of defence depends of its very nature on the concrete possibility of knowing the proofs adduced both by the opposing party and *ex officio*"15. It is necessary that the judges always guarantee these elements of right of defence before pronouncing the definitive sentences in a judicial process such as marriage nullity process.

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attributions personally received". ARRIETA, J. I., Governance Structures within the Catholic Church. Chicago 2000, 21.

12 „Aequitas est iustitia dulcore misericordiae temperata", HOSTIENSIS, Henrici Cardinalis, Suma aurea, Interiectae recèns fuere eruditae ex Summa F. Martini Abbatis [...], s.n. Lugduni 1568, lib. V, de dispensationibus n. 1, v.quid sit dispensation, f. 436 ra.

13 Comm. 10 (1978) 216.

14 BESTE, U., Introductio in Codicem. Neapoli 1956, 831.

15 JOHN PAUL II., Allocution to the Apostolic Tribunal of the Roman Rota, 26.01.1989: WOESTMAN, W. H., Papal Allocutions to the Roman Rota 1939-2011. Ottawa 2011, 206.

The contentious, declarative, and pastoral nature of judicial process of Marriage nullity epitomizes the exercise of judicial power. In its *contentious nature* the process examines the juridical controversies of a given marital consent of the couples doubting the validity of their marriage or even those convinced of its nullity but want to find the truth irrespective of an existing concrete personal contention[16]. A competent judge, after examining and studying the cases, declares the juridical facts with a *declarative sentence.* This pronouncement depicts the *declarative nature* of the process given that it does not create or prove a new juridical condition but only ascertains and defines the existing juridical marriage bond or its existing nullity from the moment the marriage was celebrated. It is in this regard that Pope JOHN PAUL II. observed: „In fact, it is not a question of conducting a process to be definitively resolved by a constitutive sentence, but rather of the juridical ability to submit the question of the nullity of one's marriage to the competent Church authority and to request a decision in the matter"[17]. Apart from the contentious and declarative nature of the judicial marriage nullity process, some Roman Pontiffs in their allocutions[18] to the tribunal of the Roman Rota pointed out also its *pastoral nature.* Its immediate characteristics is canonical equity while its ultimate characteristics is the safeguarding of the sacrament of marriage with a view to caring and saving souls. The care of souls, however, in the judicial process does not mean that such a process takes full care of souls so as to demand the powers of the hierarchy without the participation of the laity who possess judicial power.

2. THE LAITY'S POSSESSION OF JUDICIAL POWER

A share in the *munus regendi* of Christ paves the way for the laity's possession of judicial power. Through the sacrament of baptism, laypersons ontologically share in the kingly office of Jesus Christ. This sharing entitles them to be subjects of rights and duties in the Church (cc. 96; 204 § 1) and disposes them for the exercise of ecclesiastical offices. In line with this baptismal effect on laypersons, Umberto BETTI, rightly observes: „Laypersons do not become capable of these offices because they are called to exercise them by the hierarchy, but they

16 Comm. 16 (1984) 56; Comm. 10 (1978) 211.

17 JOHN PAUL II., Allocution to the Roman Rota, 22.01.1996: WOESTMAN, Papal Allocutions (s. Anm. 15), 238.

18 See some Papal allocution to the Roman Rota: PIUS XI., 02.10.1939; PIUS XII., 03.10.1941; PAUL VI., 12.02.1968; JOHN PAUL II., 24.01.1981; BENEDICT XVI., 29.01.2010; FRANCIS, 24.01.2014.

are called to them by the hierarchy because they are sacramentally capable of them as lay people"[19].

The laity's capability obtained from baptism disposing them for a judicial office cannot empower them to exercise judicial power without the canonical mission given by the competent authority (LG, Nota explicativa, n.2). The canonical mission[20] confers judicial power through their appointment to the office of judges in a specified tribunal. The law itself prescribes that the judicial office confers judicial power to competent persons (cc.131 § 1; 145)[21]. The laity's exercise of judicial power may continue to remain vague if their possession of it is not proved by the judicial office conferred on them[22]. If the laity can hold ecclesiastical offices (c. 145 § 1)[23] as judges in ecclesiastical tribunals, then their possession of judicial power should not be in doubt. Because to hold a judicial office is to have and to exercise judicial power in accordance with certain laws[24]. If a layperson is appointed a judge by the competent diocesan bishop who, by divine institution, has the *munus regendi*[25] (LG 21), the lay judge has the judicial power by virtue of the conferred office. The laity's possession of judicial power does not deprive the bishop of his and the conceded power continues to be under the vigilance of the diocesan bishop. And it is in

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19 „I laici non diventano capaci di detti uffici perché sono chiamati ad esercitarli dalla gerarchia, ma dalla gerarchia vi sono chiamati perché essi ne sono sacramentalmente capaci in quanto laici". BETTI, U., In margine al nuovo codice di Diritto Canonico: Antonianum 58 (1983) 642.

20 This is a juridical act which the hierarchical authority established for the conferment of ecclesiastical office and the inherent ordinary power of governance to those already disposed sacramentally through a participation in the *tria munera* of Christ.

21 CELEGHIN, A., Origine e natura della potestà sacra. Morcelliana-Brixiae 1987, 489.

22 „Talis ergo potestas regiminis non pendere potestnec oriri ex ordine sacro sed iterum ex officio tantum cui adnexa erat." STICKLER, A. M., De potestatis sacrae natura et origine: Periodica 71 (1982) 71.

23 „An ecclesiastical office is any post which by divine or ecclesiastical disposition is established in a stable manner to further a spiritual purpose", c. 145 § 1.

24 „Potestas consistit velut in habitu, seu actu. 1. Officium vero ipsum actum. 2. Seu exercitium significat.", SCHMALZGRUEBER, F., Ius Ecclesiasticum universum. Tomus Primus, pars altera. Romae 1844, 184, n. 24; „Officium seu exercitium potestatis tum in iudice tum in ministris subest certis regulis.". LEGA, M. / BARTOCCETTI, V., Commentarius in Iudicia ecclesiastica: Vol. 1. Romae 1950, 205.

25 „The power of governance pertains to the *munus regendi*, but this ruling function of the Church is much broader than just the power of governance. The *munus regendi* includes many activities in the areas of pastoral care and works of the apostolate, participation on consultative bodies and various administrative and pastoral offices, not all of which involve the exercise of the power of governance". HUELS, The power of governance (s. Anm. 10), 62.

line with the Vatican II's teaching which called on the hierarchy to appoint the laity in ecclesiastical offices and to involve them in the apostolate of the hierarchy (LG 33, AA 24). Franz DANEELS rightly observed that the laity cannot of their own freewill assume and exercise any ecclesiastical office, but they are appointed into such a mission by the hierarchy; for the very nature of ecclesiastical office is connected with the offices of the shepherds[26]. No wonder the Supreme Legislator enshrined in the current Code of Canon Law that by virtue of the law itself the judicial power is attached to a given judicial office (c. 131 § 1) and the laity can cooperate in the exercise of the judicial power *ad normam iuris* (cc. 129 § 2; 135 § 1; 228 § 1).

3. THE EXERCISE OF THE JUDICIAL POWER BY THE LAITY

Laypersons cooperate in the exercise of the judicial power as part of the college of judges in marriage nullity process in local tribunals. Moved by the demanding situation of forming a collegial judge of three clerics in local tribunals, Pope PAUL VI., with the motu proprio *Causas matrimoniales*[27] conceded judicial power to the laity who stand out for their Catholic faith, for their morality and at the same time for their knowledge of Canon Law and forensic practice. While PAUL VI. favoured a lay man for the office, the 1983 Code preferred laypersons (man or woman) of good repute with a doctorate or at least a licentiate, in Canon Law (c. 1421 §§ 2-3; DC Art. 43 §§ 2-3). With the motu proprio *Mitis Iudex Dominus Iesus*, Pope FRANCIS granted judicial office to two laypersons who can form part of a college of judges of three in marriage nullity process (c. 1673 § 3). By so doing, he authorized the laity to be regular judges in marriage nullity cases and not just in times of paucity of personnel which needs the permission of Episcopal Conference.

The lay judges exercise the judicial power as an integrate part of a college of three or more judges in a competent tribunal with the ordinary vicarious power or with the delegated power under the law. When the judicial power is conferred in accordance with the law to the office of the ecclesiastical judge and it is exercised in the name of the capital office holders – the diocesan Bishop and the Roman Pontiff – that confer such power, it is an ordinary vicarious power. Thus lay judges are auxiliary judges to the diocesan Bishops in the diocesan tribunals. Klaus MÖRSDORF rightly observed: „The distinction between the ordinary power (potestas ordinaria) conveyed by an office (potestas ordinaria) and a proper

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26 DANEELS, F., De subiecto officii ecclesiastici attenta doctrina Vaticani II. Suntne laici officii ecclesiastici capaces? Roma 1973, 105.

27 PAULUS VI., Litterae apostolicae motu proprio datae *Causas matrimoniales*, 28.03.1971: AAS 63 (1971) V-VI, 443-444.

power (potestas propria) and a representative power (potestas vicaria) is basically based on the structural difference between the capital office and the auxiliary office"[28].

On another note, lay judges can also exercise delegated judicial power. This power is conferred to the person and not to the judicial office. It is often based on specific qualities of the person delegated. The delegated power of the judge „does not lapse on the expiry of the authority of the person who delegated" (c. 1512, 3°). Besides, the prohibition on delegating judicial power „except for the performance of acts preparatory to some decree or judgement" (c. 135 § 3) is for those judges having judicial power by delegation or by vicariousness. The concession of delegated power can be made in two ways: by law (*a iure*) when the law itself concedes it to determinate persons (c. 1688) and it can also come from the competent authority (*ab homine*). The Roman Pontiff (c. 1442) and the diocesan bishop can delegate the judicial power[29]. The Roman Pontiff can also delegate the judicial power directly or through the competent dicastery, e.g. the Supreme Tribunal of the Apostolic Signatura can, for a just cause, entrust the judgement of a marriage case to a tribunal that is incompetent (PE Art. 198, 2°; DC Art. 9, § 3). The diocesan bishop can also delegate his *potestas iudicandi* but the Roman Pontiff prohibits the diocesan bishop from doing such in the brief process of marriage nullity[30]. And unless otherwise stated by the Supreme Tribunal of the Apostolic Signatura or in the decree of appointment to the judicial office, whether it is vicarious or delegated power, the lay judges as well as the clerical judges in a college, have equal *potestas iudicandi* in emanating the definitive decisions. They can, however, have limits to the exercise of the *potestas iudicandi*.

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28 „So beruht die Unterscheidung der durch ein Am vermittelten ordentlichen Gewalt (potestas ordinaria) in eine eigenberechtige (potestas propria) und eine stellvertretende Gewalt (potestas vicaria) im Grunde aut der strukturellen Verschiedenheit zwischen Vorsteheramt und Hilfsamt": MÖRSDORF, K., Officium ecclesiasticum. Bemerkungen zu der konziliaren Weisung über das künftige Verständnis der kirchlichen Amtes: AfkKR 146 (1977) 505.

29 "Quod autem dari possit tribunal delegatum a S. Sede vel ab Episcopo eruitur sive ex normis generalibus sive quia in can.102 § 2 (de Normis Generalibus) soli iudices vetantur ne potestatem iudicialem delegent." Comm. 10 (1978) 243.

30 FRANCISCUS, Allocutio *Sono lieto di incontrarvi* ad participes cursus a Tribunali Rotae Romanae provecti, 25.11.2017: AAS 109 (2017) 1313-1316.

4. THE LAITY'S LIMITS TO THE EXERCISE OF JUDICIAL POWER

Laws – divine or ecclesiastical – set limits to the exercise of judicial power. The law reserving exercise of the judicial power only to clerics (c. 274 § 1) is one of the bases of the laity's legal limits to the exercise of the judicial power. Other laws, however, offer the laity the possibility of collaboration within certain limits in the exercise of the judicial power (cc. 129 § 2; 1421 § 2). The collaboration of the laity with the cleric in the exercise of judicial power may grant equality of judicial power in the judgement of cases but it does not substitute for the sacred power of the cleric who shares in the ministerial priesthood and has the role of forming and ruling the priestly people (LG 10). The laity, according to Gerard PHILIPS, are defined in terms of collaboration with the clerics and as auxiliary to them in their functions especially in situations of limited workforce[31]. The Motu proprio *causas matrimoniales* reflected the auxiliary spirit when it conceded the collaboration of a lay judge because of the impossibility to form a college of three cleric judges in marriage nullity process in the local tribunals[32].

The laity's limits concern those areas of the exercise of judicial power reserved *ex natura rei* to the clerics. One of the limits according to the law is: a lay judge cannot be a sole judge in any of the three forms of judicial marriage nullity process (ordinary, documentary, and brief processes) at all the instances of the local tribunal (cc. 1425 § 4; 1673 § 4). A sole judge, among other roles in a case, writes the definitive sentence (c. 1610 § 1; DC Art. 249 § 4). Even as a cleric judge, he cannot write the sentence as a single judge if he is dispensed from academic title by the Supreme Tribunal of the Apostolic Signatura with a decree having the clause: „*ut munus iudicis ad complendum collegium, exclusis muneribus praesidis et ponentis, explere in eodem foro possit*". On another note, although the legislator did not specify a sole cleric judge as the possible designated judge in the documentary process (c. 1688) the norm that a single judge must always be a cleric applies to the designated judge[33]. And for the respect of harmony in implementing the norm, the legal maxims – *ubi lex non distinguit nec nos distinguere debemus* and *lex quod voluit dixit, quod noluit tacuit* – should not be invoked.

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31 PHILIPS, G., La Chiesa e il suo mistero. storia, testo e commento della Lumen gentium. Milano 1982, 342.

32 PAULUS VI, Litterae Apostolicae motu proprio datae *Causas matrimoniales* normae quaedam „statuuntur ad processus matrimoniales expeditius absolvendos", 28.03.1971: AAS 63 (1971) 443, V § 1.

33 Comm. 10 (1978) 231.

Similarly, a lay judge is prohibited from being a president in a collegiate tribunal. The legislator stated clearly that the presiding judge in a collegiate tribunal of marriage nullity trial must be a cleric judge (c. 1673 § 3). In fact, as far as possible, the judicial vicars and the associate judicial vicars who must be priests are to preside over the collegiate tribunals (cc. 1420 § 4; 1426 § 2). This is not always possible in all tribunals because of the scarcity of personnel but the legislator does not concede the presidency to a layperson. The reason for such exclusion of the laity is not explicitly known. I can say, however, that it may not be unconnected with the exercise of the ministerial priesthood of the cleric who, as a principal pastoral care giver (PO 3), supports the faithful in matters concerning the sacraments such as matrimony (c. 213). Otherwise even the lay judge can also execute the presidential duties such as appointing an auditor (c. 1428 § 1) or a ponens (c. 1429) or deciding the day and the time for discussion of a case (c. 1609 § 1). Besides, there is an inexhaustive list found in article 46 of *Dignitas connubii* which lists 23 duties of a presiding judge. All of them may no longer be applicable with the reform by Pope FRANCIS with the motu proprio *mitis iudex dominus* which has given a lot of tasks to the judicial vicar.

The law allows diocesan bishops to appoint diocesan judges who are to be clerics (c. 1421 § 1). Should a diocesan bishop observe this rule ignoring the norm that encourages the possibility of including two lay persons in marriage cases in a collegiate tribunal of three judges (c. 1673 § 3), it would imply that the members of a collegiate tribunal would all be clerics. All judges in the diocese being clerics conforms with the prescriptions of c. 274 § 1 which states: „Only clerics can obtain offices the exercise of which requires the power of order or the power of ecclesiastical governance". And this may not be mere limitation, but it is more of exclusion from the exercise of the judicial power.

Lay persons can exercise judicial power, but they are excluded from being judicial vicars. According to c. 1420 § 4: „The judicial vicar and the associate judicial vicars must be priests of good repute, with a doctorate or at least a licentiate in canon law, and not less than thirty years of age". Apart from the requirement of being a priest, some laypersons have other required qualities more than some priests, but the law limits them from being judicial vicars. To be a judicial vicar is not just about having the qualities, exercising as a judge, and directing the affairs of the tribunal withing the limits of the law and directives of the moderator, it means constituting one tribunal with the diocesan bishop (c. 1420 § 2). To constitute one tribunal with the diocesan bishop, according to GianPaolo MONTINI, means that by extension, the judicial vicar enjoys the same ordinary judicial power as the diocesan bishop in the whole diocese except for the cases the law reserved for the diocesan bishop or the diocesan bishop reserved for him-

self[34]. The choice of a priest and not just a deacon for the office makes sense because, according to Paul WESEMANN, all the vicars of the diocesan bishop could be called his „alter ego"[35] and it may sound outlandish doctrinally to call a layperson an alter ego of the diocesan bishop. Besides, some ecclesiastical tribunals are competent not only for marriage nullity but also for ecclesiastical penal cases that involve priests. And it may be indecorous for a lay judicial vicar to adjudicate clerics in ecclesiastical matters[36].

All the legal limitations and even total exclusions continue to be the praxis in some local tribunals. It must, however, be remembered that judicial power needs to be exercised *modo iure praescripto* (c. 135 § 3). The ecclesiastical institutions of justice continue to remind the tribunal ministers of the necessity of being faithful to the laws without violating the legal limits.

5. INSTITUTIONS OF JUSTICE ON THE JURIDICAL STATUS OF DECISIONS INVOLVING THE VIOLATION OF THE LIMITS

Two ordinary institutions of justice (PE Art. 189 § 2) – the Tribunal of the Roman Rota and the Supreme Tribunal of the Apostolic Signatura – emanated some decrees on the status of decisions involving the violation of some limits. The rotal jurisprudence has no unanimous answer to the juridical status of such decisions involving such violations. A part supports that the decision involving the violation of the limit is illegitimate but valid while another argues for its invalidity. Regarding the illegitimacy but validity of such decisions, there are three decrees[37] that recognised the procedural irregularity of a sole lay judge or the presidency of a lay judge. The judges refrained from denying confirmation of the concerned sentences without considering the violation of the limits a reason for invalidating the sentences. In fact, in one of the decrees coram STANKIEWICZ[38] where the defender of the bond observed the procedural irregularity

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34 MONTINI, G., De iudicio contentioso ordinario de processibus matrimonialibus. II pars statica. Romae 2022, 258

35 WESEMANN, P., Il tribunale di I istanza ed i suoi compiti pastorali: MonEccl 109 (1984) 335.

36 „Indecorum est enim laicum vicarium episcopi esse et viros ecclesiasticos iudicare". C.16.q.7.c.22.

37 Coram MONIER, decr., 24.07,1996: RRDecr., vol. XIV, 170-174; coram STANKIEWICZ, decr., 27.11.1997: RRDecr., vol. XV, 252-257; coram CABERLETTI, decr. 16.12.1999, Comen., B. 124/1999.

38 Coram STANKIEWICZ, decr. 27.11.1997 (s. Anm. 37), 254-255, n. 6: „Etsi regula generalis in can.1425 § 4 statuta pro omnibus processibus valet (cf. can. 1657), sanctionem tamen nullitatis expresse non continent (cf. can. 10). Quam ob rem, si casu aliquo limi-

of a sole lay judge in a documentary process, the ponens argued that the norms limiting the laity's exercise of judicial power have no invalidating clause expressly attached to them (c. 10). The decree further noted that the lay judge being a legitimately appointed judge of the tribunal (c. 1620 2°), her decisions cannot be invalid based on her being a layperson.

On a different note, a decision given by a sole lay judge is considered invalid. In a rotal decree, coram DE ANGELIS[39], the appellant in the case posed an incidental question on the nullity of the sentence given by a lay judge in a documentary process. The ponens argued that the sentence by a sole lay judge was irremediably null because he had no power to judge in the tribunal as a sole judge according to c. 1620 2° which states: „A judgement is null with a nullity which cannot be remedied if it was given by a person who has no power to judge in the tribunal in which the case was decided".

The opposing positions of the few decrees from the Tribunal of the Roman Rota would ordinarily push one to seek further clarification from the Supreme Tribunal of the Apostolic Signatura. Most decrees of the Supreme Tribunal do not categorically affirm the nullity or the illegitimacy of the procedural irregularity. They reaffirm the provisions of the law. This is evident in some of the the Supreme Tribunal's replies and observations to the annual reports from the local tribunals regarding instances where a lay judge was the president of a college or a sole judge. Three of such cases partly read: 1. „omnino non convenit ut iudex laicus munus praesidis in collegio exerceat"[40]; 2. „It is in no way appropriate that a lay judge exercise the function of *praeses* in the college"[41] and 3. „According to the Code of Canon Law a lay judge can only be employed to complete a collegiate tribunal and not as a single judge (cann.1421, §§ 1-2; et 1425, § 4: see also can.129, § 2 and 274, § 1)".[42] What could be deduced as the

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tes muneris pro iudice laico statuti (cf. cann.1421 § 2; 1425, § 4) transgrediantur, evidenter haud apparet eundem ipso iure privari potestate iudicandi in Tribunali, in quo causa definitur, ita ut sententia exinde vitio insanabilis nullitatis laborare debeat (can.1620, n. 2), licet sint qui et contrariam opinionem propugnent. Haec tamen opinio unicum fundamentum nullitatis sententiae, tali in casu pronuntiatae, in laicorum inhabilitate perspicit participandi nempe in esercitio potestatis regiminis, cuius potestas iudicialis evidenter partem habet (can.135, §§ 1,3)."

39 Coram DE ANGELIS, decr., 07.07.2006: RRDecr., vol. XXIV, 83, n. 7: „Iudex laicus qui sententiam tulit carebat potestate iudicandi in Tribunali uti iudex unicus. Patres censuerunt haberi in casu nullitatem sententiae ad normam can.1620, n. 2; non autem nullitatem ex can.1602n.1 cum verba ‚a iudice absolute incompetenti' ad Tribunal potius quam ad personam iudicis referri debeant".

40 SSAT, Decretum Congressi, 25.11.1988, prot.n. 20045/88 VT.

41 SSAT, Letter of the pro-prefect, 27.04.1993, n. 2, prot. n.24242/93 VT.

42 SSAT, Letter of the pro-prefect, 30.04.1993, n.2, prot. n. 24001/93/VT.

stand of the Supreme Tribunal from the decrees and letters is the illegitimacy and not the invalidity of decisions adjudicated by lay judges violating their legal limits.

If laypersons are appointed to the office of judges in some local tribunals and if the laws prohibiting them from being the sole judges or the presidents of a college are not *ad validitatem*, it means that their definitive decisions or their involvement in them should not lead to null sentences or null acts. C. 1620 2° should be more applicable to one who does not have judicial power to adjudicate cases in the tribunals such as the defender of the bond or the promoter of justice or the judge who has no jurisdiction to exercise judicial power in a tribunal. The confusion and contradictions concerning the juridical status of the decisions of lay judges violating their legal limits needs urgent autoritative attention and convincing clarifications. Otherwise, a lot of tribunals will continue to exercise the judicial power *sine modo iure praescripto* (c. 135 § 3). All hope to remedy the situation, however, is not lost because there could be prospects that could enhance the chances of overcoming the limits.

6. SOME PROSPECTS FOR OVERCOMING THE LIMITS

It may not be out of place to consider the sacrament of baptism as the basis for the ontological foundation for the exercise of judicial power, not only for the laypersons but also for the clerics. By so doing, both clerics and laypersons will obtain offices which require the judicial power for exercising them with the help of canonical mission (c. 274 § 1). Thus, the problems arising from reservation of certain judicial roles to only clerics in the code may become history.

The possibility of modififying the norms limiting the judicial power of the laity is not ruled out completely. While the origin of the ecclesiastical judicial power is of divine law because derived from Jesus Christ the Judge (Jn 5:22-24),[43] purely ecclesiastical law, not divine law, regulates the exercise of it in the Church[44]. Consequently, the legal limitations being products of ecclesiastical law are subject to change with time. In fact, Roch PAGÉ rightly affirms: „The obstacle which determines that the lay judge will not exercise his jurisdiction outside a collegiate tribunal is purely ecclesiastical law. It is up to the legislator

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43 „Iudiciariam vero potestatem sibi a Patre attributam ipse Jesus Iudaeis, de sabbati requiete per mirabilem debilis hominis sanationem violata criminantibus, denuntiat: Neque enim Pater iudicat quemquam, sed omne iudicium dedit filo." PIO XII, Litterae encyclicae *Quas primas*, 11.12.1925: AAS 17 (1925) 599.

44 PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Relatio complectens synthesim, 309; Comm. 16 (1984) 55; HUELS, The Power of governance (s. Anm. 10), 64.

that it be otherwise. Obviously, if one day he decides that a layperson could be a single judge, he could logically also be a presiding judge in a collegial court"[45]. To this possibility, I will not hesitate to include a collegial court of laypersons.

With the possibility of the removal of some canonical roadblocks to the laity's exercise of judicial power, one could also think of a better co-responsibility or shared responsibility in the exercise of judicial power among the people of God. Such a co-responsibility implies that judges (clerics and laity alike) should have a common goal, equality of judicial power and legitimacy in the exercise of judicial office. It must not be forgotten, however, that in co-responsibility concerning the exercise of the judicial power as Ilaria ZUANAZZI rightly remarked „equality of legitimacy does not mean uniformity of action, because everyone contributes to their own way according to their vocation. The sacred minister and lay persons, as far as they are faithful, all participate in the common priesthood, which is mission of the people of God, but each in their own way"[46].

CONCLUSION

Laypersons can have the judicial power and can exercise it within the legal limits. The judicial power which is an aspect of the power of the governance in the Church does not originate from the sacrament of orders but from the canonical mission which, by conferring the judicial office to the laity also confers the ordinary judicial power. The laity's exercise of judicial power as judges may have some legal limitations but such limitations derived from ecclesiastical law may become history in future.

The basis of the origin of judicial power on canonical mission raises some questions concerning the unitary theory of ecclesiastical origin of power, the justification of the Supreme power of the episcopal college, the necessity of belonging to hierarchical communion for the exercise of the power of governance.

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45 „L'obstacle est de droit purement ecclesiastique, qui determine que le juge laic n'exercera pas sa jurisdiction en dehors d'un tribunal collegial. Il n'en tient qu'au legislateur qu'il en soit autrement. Èvidentemment, s'il décidait un jour qu'un laic peut être juge unique, il pourrait logiquement aussi être judge president dans un tribunal collegial" PAGÉ, R., Juges laïcs et exercice du pouvoir judiciaire: Thériault, M. / Thorn, J. (Hrsg.), Unico Ecclesiae Servitio. Canonical studies presented to Germain Lesage. Ottawa 1991, 209.

46 „Peraltro, eguaglianza di legittimazione non significa uniformità di azione, perché ciascuno contribuisce a proprio modo secondo la propria vocazione. Ministri sacri e laici, in quanto sono fedeli, partecipano tutti al sacerdozio comune, che è missione del popolo di Dio, ma ciascuno nella propria maniera" ZUANAZZI, I., La corresponsabilità dei fedeli laici nel governo ecclesiale: Gruppo italiano docenti di diritto canonico (Hrsg.), Il governo nel servizio della comunione ecclesiale. Milano 2017, 128.

These are more questions may continue to demand for convincing clarifications and they invite us all as members of the Church to continue researching in view of having judicial laws in harmony with clear theological doctrines. Such clarity that will encourage a balanced adherence to the judicial norms for the *whole people of God*, and not for some clericalizing clerics or de-clericalizing laity.

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ABSTRACTS

Engl.: The debate on the laity's possession of judicial power and its exercise in the Church continue to demand satisfactory clarity and conviction. This article examines the laity's possession of the judicial power and its exercise in marriage nullity process. It goes further to establish that laypersons disposed for participation in the kingly function of Christ through baptism can have judicial power by virtue of their appointment to the office of ecclesiastical judge through the canonical mission. This judicial power, however, has some legal limits and the violation of the legal limits determines the juridical status of their judicial decisions There are, however, some propsects that the violation of the legal limits derived from ecclesiastical law may be modified in future.

Dt.: Die Diskussion über den Besitz der richterlichen Gewalt durch Laien und ihre Ausübung in der Kirche verlangt weiterhin nach hinreichender Klarheit und Beurteilung. Dieser Artikel untersucht den Besitz der richterlichen Gewalt durch Laien und ihre Ausübung im Ehenichtigkeitsverfahren. Ferner geht er der Frage nach, ob Laien, die durch die Taufe zur Teilhabe am königlichen Dienst Christi befähigt sind, kraft ihrer Ernennung zum kirchlichen Richter durch die kanonische Sendung richterliche Gewalt ausüben können. Diese richterliche Gewalt hat jedoch einige rechtliche Grenzen, deren Überschreitung den rechtlichen Status ihrer richterlichen Entscheidungen bestimmt. Es gibt jedoch einige Anzeichen dafür, dass die Überschreitung der rechtlichen Grenzen, die sich aus dem Kirchenrecht ergeben, in Zukunft geändert werden könnte.

Ital.: Il dibattito sul possesso della potestà giudiziaria da parte dei laici e sul suo esercizio nella Chiesa continua a richiedere una certa chiarezza e convinzione. Questo articolo esamina il possesso della potestà giudiziaria da parte dei laici e il suo esercizio nel processo di nullità del matrimonio. Si prosegue, stabilendo che i laici preposti a partecipare alla funzione regale di Cristo mediante il battesimo possono avere la potestà giudiziaria in virtù della loro nomina all'ufficio di giudice ecclesiastico mediante la missione canonica. Questa potestà giudiziaria, tuttavia, ha alcuni limiti legali e la violazione di questi ultimi determina lo stato giuridico delle loro decisioni giudiziarie. Vi è pertanto la possibilità che

la violazione dei limiti giuridici derivanti dal diritto ecclesiastico possa essere modficata in futuro.