DE PROCESSIBUS MATRI-MONIALIBUS

BAND 32 (2025)

De Processibus Matrimonialibus

DE PROCESSIBUS MATRIMONIALIBUS

Fachzeitschrift zu Fragen

des Kanonischen Ehe- und Prozessrechtes

Herausgegeben von

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Schriftleitung: Elmar Güthoff

32. Band

Jahrgang 2025

Um aus dieser Publikation zu zitieren, verwenden Sie bitte diesen Link:
https://nbn-resolving.org/urn:nbn:de:bvb:384-opus4-1188645

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.

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

Elmar Güthoff, Karl-Heinz Selge, Sabine Konrad (Hrsg.)

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

ISBN 978-3-8482-0839-5

INHALTSVERZEICHNIS

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DPM 32 (2025) 119-143

INNOVATIONS AND CHALLENGES IN THE CANONICAL MATRIMONIAL PROCESS

by Luigi Sabbarese

FOREWORD

After 40 years from the coming into force of the Code for the Latin Church, and after almost ten years from the coming into force of the *Mitis Iudex Dominus Iesus* (*MIDI*),[1] which introduced a radical reform of matrimonial processes, I intend to examine some aspects that highlight the novelties and the innovations brought by the reform, which is nevertheless on a path of novelty in continuity, in view of a certain perfecting of the procedural norm, a path that is not without its fragilities and limitations.

1. THE RECENT HISTORY OF THE REFORM OF THE CANONICAL MATRIMONIAL PROCESS

The recent history of the reform of the canonical matrimonial process for the Latin Church and the Eastern Churches owes its rapid implementation to the thrusts that emerged during and from the III Extraordinary General Assembly of the Synod of Bishops. Especially in Nos. 48-49 of the *Relatio Synodi*,[2] some proposals for a reform of the procedures were gathered and, dealing with the „streamlining of the procedure" for matrimonial cases, the active responsibility of the diocesan Bishop and the preparation and commitment of an adequate number of legal practitioners were reaffirmed. I am not in position to assess whether these two aspects constitute real progress in canonical matrimonial processes, but they certainly were and remain ever-present challenges that accompany every canonical process.

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1 FRANCIS, Litterae apostolicae motu proprio datae *Mitis Iudex Dominus Iesus*, quibus canones *Codicis Iuris Canonici* de causis ad matrimonii nullitatem declarandam reformantur, 15.08.2015: AAS 107 (2015) 958-970.

2 SYNOD OF BISHOPS, III Extraordinary General Assembly, *Relatio Synodi*, 18.10.2014, No. 49: Enchiridion Vaticanum 30/1639-1640.

However, already in his address to the Apostolic Signature on 08.11.2013, the Pope had emphasized episcopal responsibility in the administration of justice:

„Your activity is aimed at fostering the work of the Ecclesiastical Courts, which are called to respond adequately to the faithful who turn to the Church's justice to obtain a just decision. You work to ensure that they function well, and you support the Bishop's responsibility to train suitable ministers of justice"[3].

The Synod's requests were acknowledged by the Pope, who set up a special commission on 27.08.2014 to draft a proposal to reform the canonical matrimonial process[4]. The Commission[5] concluded its work, which then resulted in the two m.p. *MIDI* and *Mitis et Misericors Iesus* (*MMI*),[6] which came into force on 08.12.2015 and replaced the canons regulating the matrimonial process in both the Code for the Latin Church and the Code for the Eastern Churches.

With the promulgation of the new laws on the canonical matrimonial process, there followed a series of questions and particular responses that in some way required further authoritative clarifications regarding the new normative framework in force; these clarifications converged both in interventions that had to make explicit the Pope's *mens* on the reform with the declaration published on 08.11.2015 in *L'Osservatore Romano* and with the rescript of 07.12.2015 regarding the fulfilment and observance of the new law of the matrimonial process,[7] and with the *Subsidium* published by the Roman Rota applying the m.p.

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3 FRANCIS, Address *This Your Session*, to the Plenary Session of the Supreme Tribunal Apostolic Signature, 08.11.2013: AAS 105 (2013) 1152. The translation is mine.

4 It should be noted that the reforming instances of this process were already present even before the last two synodal assemblies; in fact, two commissions were at work at the Pontifical Council for Legislative Texts, one on matrimonial processes and one on matrimonial law, which concluded their work at the same time as that of the special papal commission.

5 Of this Commission we know the members (BONI, G., La riforma del processo matrimoniale canonico. Osservazioni e questioni aperte: Gruppo Italiano Docenti di Diritto Canonico [Hrsg.], La riforma del processo canonico per la dichiarazione di nullità del matrimonio. Milano 2018, 107-108, Anm. 9), but nothing is known of the *iter* of the work, nor of the drafts that led to the final text. The singularity of the preparatory phase, of which nothing is known and of which there appear to be no (consultable) minutes, makes it difficult, where necessary, to find the *mens legislatoris*.

6 FRANCIS, Litterae apostolicae motu proprio datae *Mitis Iudex Dominus Iesus*, quibus canones *Codicis Iuris Canonici* de causis ad matrimonii nullitatem declarandam reformantur, 15.08.2015: AAS 107 (2015) 958-970.

7 For the complexity and multiplicity of the framework of sources I refer, *ex multis*, BONI, La riforma (s. Anm. 5), 162-197, 217-231.

MIDI of January 2016,[8] and, finally, in other less formally demanding interventions[9].

In my opinion, all these post-motu proprio interventions constitute a strong limitation as they denounce a certain lack of clarity in the elaboration of the *dictio normae* and thus also in the application of the law itself[10].

According to other opinions, the work of the reform „was done most quickly[11] and the revision was carried out with relatively limited, if any, direct consulting"[12].

2. THE MAIN INNOVATIONS INTRODUCED WITH THE REFORM OF THE MATRIMONIAL PROCESS

The main innovations introduced in the *CIC* include:

a) for matrimonial cases not reserved to the Apostolic See, the modification of the equivalent titles[13] of jurisdiction for which, with regard to the domicile

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8 It is strange, to say the least, that the marriage processes in the CIC and the CCEO have been updated with a double m.p. and not provided with a specific application aid for the MMI.

9 For example, the allocution of 26.11.2017 to the participants in a training course promoted by the Roman Rota (Comm. 49 [2017] 276-279). In the doctrine, there has been no lack of those who have even qualified this allocution as an authentic interpretation regarding the *processus brevior*; thus, for example: SALACHAS, D., L'applicazione del processus brevior e del processo documentale secondo il m.p. Mitis et Misericors Jesus nei matrimoni di mista religione e di disparità di culto: Periodica 108 (2010) 99.

10 A few authors have also noted how the amalgamation of certain canons to make room for the new canons on the *processus brevior* and not to change the overall numbering corresponds to „a questionable technique of normative production": SANTORO, R., Riforma del processo matrimoniale canonico e rafting normativo: il caso della nuova numerazione dei canoni: Foderaro, A. / Palumbo, P. (Hrsg.), Diritto canonico: persone, comunità, missione. A 40 anni dalla promulgazione del Codice per la Chiesa latina. Napoli 2024, 216.

11 DANIEL, W. L., An analysis of Pope Francis' 2015 Reform of the General Legislation Governing Causes of Nullity of Marriage: The Jurist 75 (2015) 431.

12 Ebd., 432. Also PAGÉ, Questions Regarding the Motu Proprio Mitis Iudex Dominus Iesus: ebd., 616.

13 See in doctrine SALVATORI, D., I fori competenti e le novità introdotte da Mitis Iudex Dominus Iesus. Studio delle fonti del can. 1672: analisi storico-comparativa. Roma 2021; DEL POZZO, M., I titoli di competenza e la „concorrenza materiale" alla luce del m.p. Mitis Iudex Dominus Iesus: IusEccl 28 (2016) 475.

and quasi-domicile of the plaintiff,[14] it is no longer provided that the parties must reside in the territory of the same Episcopal Conference and that the judicial vicar of the place of domicile of the defendant, after hearing the defendant, must agree;[15] the same simplification has also involved the criterion of the place where most of the evidence is to be gathered[16] (c. 1672);

b) the reinforcement of the principle, already foreseen in c. 1419, according to which the diocesan Bishop is the judge[17] of first instance for marriage nullity cases, for which the law does not expressly make an exception, being able to exercise judicial power personally or through others, according to the norm of law (c. 1673 § 1) and having to constitute for his diocese a diocesan tribunal for cases of marriage nullity, without prejudice to the possibility of access to another closer diocesan or interdiocesan tribunal (c. 1673 § 2);

c) the possibility that in the panel of judges, presided over by a cleric judge, the remaining judges may be lay persons[18] (c. 1673 § 3), while c. 1421 § 2,

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14 MONTINI, G. P., Competenza e prossimità nella recente legge di riforma del processo per la dichiarazione della nullità del matrimonio: In Charitate Iustitia 34 (2016-2017) 33.

15 This simplification was hailed as pastoral care for the spouse who is a plaintiff and can choose the competent court. Thus PEÑA GARCÍA, C., La reforma de los procesos canónicos de nulidad matrimonial: el motu proprio *Mitis Iudex Dominus Iesus*: EstE 90(2015) 632-634; IZZI, C., Il processo canonico di nullità del matrimonio dalla codificazione post-conciliare alla riforma scaturita dalla riflessione sinodale sulla famiglia: EstE 97 (2022) 73-74, Anm. 73.

16 An important challenge affecting the evidentiary phase concerns the admission and admissibility of non-documentary evidence and thus all the various types of digital evidence. GIRAUDO, A., Prove e nuove tecnologie nel processo canonico: Aa.Vv., Matrimonio e processo: la sfida del progresso scientifico e tecnologico. Vatican City 2016, 273-294; BARCA, S., La prova digitale nel processo di nullità matrimoniale: Palombi, R. / Franceschi, H. / Di Bernardo, E. (Hrsg.), Iustitia et sapientia in humilitate. Studi in onore di Mons. Giordano Caberletti. Tomo II. Vatican City 2023, 603-625; ZAMBON, A., Il processo canonico di fronte alle nuove tecnologie*:* Aa.Vv., Sinodalità e processo canonico. Vatican City 2023, 39-58.

17 According to MONETA, P., La dinamica processuale nel m.p. „Mitis iudex“: IusEccl 28 (2016) 40-41: the greater involvement of the Bishop can guarantee the celerity of the process and avoid laxity in the most delicate judgments.

18 In this context, the evolution of the exercise of judicial power, which after the 1983 Code and after the M.P. *MIDI* reform, increasingly saw the access of the laity, has been assessed as a „progressive marginalisation of judicial power“. In this sense, for example, MONTINI, G. P., Questioni circa l'esercizio della potestà giudiziale: Sabbarese, L. (Hrsg.), La potestà nella Chiesa. Rome 2023, 127-133.

in regulating judgments in general, limits participation in the panel to a single lay person;[19]

d) the possibility of entrusting matrimonial cases to a single clerical judge, when it is not possible to constitute a collegial court in the diocese or in the neighbouring court (c. 1673 § 4), while the court of second instance must always be collegial (c. 1673 § 5);

e) the provision for appeal to the Metropolitan Court of second instance, subject to the provisions of cc. 1438, 1439 and 1444 (c. 1673 § 6);

f) prior to the acceptance of the case, instead of the spouses' attempt at conciliation,[20] it is now required that the judge must have reached the certainty that the marriage has irretrievably failed, so that it is impossible to re-establish conjugal cohabitation (c. 1675);

g) the possibility given to the judicial vicar, after hearing the defender of the bond, to convert the ordinary matrimonial proceedings into a shorter one when the defendant who has not signed the *libellus* does not manifest his position even after the second admonition (c. 1676 § 2); in this case he must proceed in accordance with 1685 (c. 1676 § 4);

h) the recognition of the value of full proof to the judicial confession and to the declarations of the parties, supported by possible credible witnesses of the same, to be evaluated by the judge considering all the clues and evidence, if there are no other elements to refute them (c. 1678 § 1); similarly, the testimony of a single witness can be fully authentic if it is a qualified witness who testifies on things carried out *ex officio*, or the circumstances of the facts and persons suggest it (c. 1678 § 2);

i) the abolition of the principle of the so-called „double conformity", providing that the judgment that has declared the nullity of the marriage for the first time, after the time limits laid down in cc. 1630-1633 have elapsed, becomes enforceable (c. 1679);[21]

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19 In doctrine, this limitation may be overcome, and no difficulty is encountered in entrusting the office of sole judge or president of the panel of judges to a layman. See, for instance, IZZI, C., Il processo canonico di nullità del matrimonio dalla codificazione post-conciliare alla riforma scaturita dalla riflessione sinodale sulla famiglia: EStE 97 (2022) 1192.

20 On this subject, see SANTORO, R., Il tentativo di conciliazione nel diritto procedurale canonico: Diritto e religioni 1 (2012) 52-55.

21 On the doctrine's calls for the abrogation of double conformity of the judgment, see BETTETINI, A., Matrimonio e processo canonico: proposte per una innovazione nella tradizione: Jus-online 1 (2015) 1-16.

l) the consequent reform of the rules governing appeal, providing that: 1) the party who considers himself burdened, the promoter of justice and the defender of the bond have the right to file a complaint of nullity of the judgement or an appeal against the same in accordance with cc. 1619-1640 (c. 1680 § 1); 2) once the terms established by law for the appeal and its continuation have elapsed, after the higher court has received the judicial acts, the panel of judges must be constituted, the defence counsel must be appointed and the parties warned to present their observations within a pre-established period of time, after which the collegiate court must confirm the first-instance judgement with its own decree if the appeal is manifestly dilatory (c. 1680 § 2;);[22] 3) if the appeal is admitted, the same procedure must be followed as in the first instance, albeit with the necessary adaptations (c. 1680 § 3); 4) if a new ground of nullity of the marriage is introduced in the appeal, the Tribunal may admit it and judges on it as in the first instance (c. 1680 § 4);

m) the introduction of the shorter matrimonial process[23] before the diocesan Bishop (cc. 1683-1687),[24] *processus vere iudicialis*[25].

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22 MONTINI, G. P., „Si appellatio mere dilatoria evidenter appareat" (cann. 1680 § 2 and 1687 § 4 MIDI): alcune considerazioni: Periodica 105 (2016) 663-699; DI BERNARDO, E., Problemi e criticità della nuova procedura: AA.VV., La riforma del processo matrimoniale ad un anno dal motu proprio Mitis Iudex Dominus Iesus. Vatican City 2017, 145-150; ERLEBACH, G., Algunas cuestiones sobre la apelación en las causas de nulidad matrimonial: Ius Communionis 5 (2017) 65-87; DEL POZZO, M., L'appello manifestamente dilatorio: AA.VV., Prassi e sfide dopo l'entrata in vigore del m. p. Mitis Iudex Dominus Iesus e del Rescriptum ex audientia del 7 dicembre 2015. Vatican City 2018, 83-117.

23 „It seems likely that the addition of this process will induce new confusion among the faithful and thus create new pastoral challenges": DANIEL, W. L., The Abbreviated Matrimonial Process before the Bishop in Cases of „Manifest Nullity" of Marriage: The Jurist 75 (2015) 546, Anm. 10.

24 PEÑA GARCÍA, C., El nuevo proceso „brevior coram episcopo" para la declaración de la nulidad matrimonial: MonEccl 130 (2015) 567-593; MUSSELLI, L., Diritto matrimoniale: DERS. / TEDESCHI, M., Manuale di diritto canonico. Bologna 2005, 278-279; NAPOLITANO, E., Il processus brevior nella lettera apostolica motu proprio datae Mitis Iudex Dominus Iesus: MonEccl 130 (2015) 549-566; SABBARESE, L. / SANTORO, R., Il processo matrimoniale più breve. Disciplina canonica e riflessi concordatari. Bologna 2016; SABBARESE, L., Il processo più breve: condizioni per la sua introduzione, procedura, decisione: Okonkwo, E. B.O. / Recchia, A. (Hrsg.), Tra rinnovamento e continuità. Le riforme introdotte dal motu proprio Mitis Iudex Dominus Iesus. Vatican City 2017, 39-58.

25 Against the risk, warned in doctrine, of perceiving it or even using it as a sort of administrative procedure, abbreviated, that is, simple and lacking the minimal procedural

3. THE PASTORAL THRUST, I.E., PRIOR COUNSELLING AND INTRODUCTION OF THE CASE

Judicial pastoral care and the preliminary investigation represent „a decisive direction of the reform [which] consists in the most pastoral orientation to be given to judicial activity“[26]. All the more reason why such an orientation must be reflected in the consultation prior to the introduction of a case[27].

The *Procedural Rules* (*PR*), for the correct and accurate application of the law renewed with m.p. *MIDI*, in articles 2-5, offer provisions regarding pastoral enquiry to guide the faithful in the verification of the validity of their marriage and the possible introduction of the cause[28].

With the promulgation of the m.p. *MIDI* and the *PR,* the need to provide effective services and increasingly well-prepared people to accompany, discern and integrate the faithful who are experiencing broken marriages and wounded family situations has strongly re-emerged. In this context, reflection is opened on the preliminary or pastoral enquiry, an aspect which is partly new and certainly fascinating, and the responsibility of parish priests in particular is clarified, not without that of Bishops and other operators, in an attempt both to eradicate that false aporia between law and pastoral and to reconsider the concept of judicial pastoral care, without confusing pastoral accompaniment and procedural activity, by making false emphases and overly creative interpretations[29].

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guarantees. Vgl. DEL POZZO, M., I titoli di competenza e la „concorrenza materiale“ alla luce del m. p. Mitis Iudex Dominus Iesus: IusEccl 28 (2016) 475; IZZI, C., Il processo canonico di nullità del matrimonio dalla codificazione post-conciliare alla riforma scaturita dalla riflessione sinodale sulla famiglia: EstE 97 (2022) 1192.

26 BERNARDO, E. di., Problemi e criticità (s. Anm. 22), 118.

27 And it appears in the entire *CIC*, as argued by ORTAGLIO, L., La spinta pastorale del Codice di Diritto Canonico: Foderaro / Palumbo (Hrsg.), Diritto canonico (s. Anm. 10), 77-84.

28 The preliminary or pastoral enquiry, aimed at knowing the condition of the separated or divorced faithful and gathering what may be useful for a possible trial, whether ordinary or shorter, will take place within the diocesan marriage ministry; This enquiry will be entrusted to persons deemed suitable by the local Ordinary, for instance the parish priest himself or the one who prepared the spouses for the celebration of the marriage, who must, among other things, enquire whether the parties are in agreement to request the nullity; the enquiry closes with the libellus, to be presented to the competent court if necessary.

29 Vgl. ARROBA CONDE, J. M., Sfide attuali del diritto processuale canonico: AA.VV., Il diritto canonico nella missione della Chiesa. Vatican City 2020, 115.

In the *PR*, necessary according to Pope FRANCIS for the correct and accurate application of the new matrimonial norm, the expression „prejudicial or pastoral enquiry" appears for the first time in Article 2,[30] on the meaning of which there has been some debate.

Preliminary or pastoral investigation may be understood as that specific action of the Church that intends to accompany, discern and integrate the matrimonial situations of those faithful who are experiencing crises or difficulties and wish to verify the possibility of overcoming such situations either by restoring conjugal and family life or by ascertaining the validity or otherwise of their marriage.

This investigation is prejudicial insofar as it deals with the various preparatory aspects that concern the examination of things and/or persons before the intervention of a judge. In fact, there is no mention of the judicial request at this stage (c. 1501) precisely because it is a preliminary stage, where the intervention of a judge is not envisaged to examine a case judicially. Precisely because the intervention of the judge is not yet foreseen, the canon which prohibits the judge from gathering evidence before the dispute is contested (c. 1529) must not be invoked. The preliminary investigation serves for the eventual introduction of the judicial process.

On the other hand, such an enquiry has as its primary purpose the salvation of the souls of the faithful, and it is the duty of pastors to know the condition of the faithful in matrimonial crisis, especially of the separated and divorced faithful who doubt the validity of their marriage or who have matured the conviction of its nullity (cf. *PR, proemium* and art. 2), to offer the ecclesial community support in order to return to a dutiful participation in Christian life.

However, the attention and discernment of complex matrimonial situations with a view to achieving serenity of conscience must not succumb to the temptation to superficially use or even eliminate another type of technical discernment that is properly carried out in the process[31].

In this sense, canonical doctrine rightly does not automatically consider the failure of a marriage to be interchangeable with its nullity. In knowing and accompanying these faithful in their different conditions, one must be able to distinguish reparable conditions, with the appropriate juridical-pastoral care, from irreparable ones, for which a different kind of juridical-pastoral care would be needed.

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30 Vgl. TUPPUTI, E., L'indagine pregiudiziale o pastorale alla luce del m.p. Mitis Iudex Dominus Iesus. Applicazione nelle diocesi della Puglia. Vatican City 2021.

31 Vgl. ARROBA CONDE, J. M., Servizio alla persona e tecnica giudiziale nel diritto canonico: Boni, G. / Camassa, E. / Cavana, P. / Turchi, V. (Hrsg.), Recte sapere. Studi in onore di Giuseppe Dalla Torre, Bd. I. Turin 2014, 19-36.

It is not always the case that the outcome of the preliminary or pastoral enquiry should require the opening of a matrimonial nullity trial.

However, should there be a matrimonial process to be applied, it would be appropriate to gather the elements necessary to be able to start and conduct it. For the initiation of the process for the declaration of matrimonial nullity, the grounds of nullity and the circumstances listed in *PR* art. 14 must be taken into consideration. In fact, *PR* art. 2 proposes a second way forward, that is, the collection of elements useful in the celebration of the judicial process for the declaration of matrimonial nullity: ordinary or shorter process (and also the documentary process which is part of the judicial processes for matrimonial nullities, although it is not expressly mentioned in *PR* art. 2).

If there is a doubt of matrimonial nullity, a doubt that the pastoral-juridical competence of the parish priest and his co-workers are not able to accompany with clear indications, with a view to initiating the nullity process, the parish priest may invite the spouse(s) to turn to the integrated diocesan counselling, or to find trusted lawyers who can offer adequate accompaniment.

If the outcome of the accompaniment reveals facts relevant to initiating the matrimonial process, the libellus (c. 1501) is drawn up with the useful elements available. It is up to the canonists or other experts in the field, present in the integrated advisory commission, to draw up the libellus to be presented for the introduction of the matrimonial declaration process, although the admission of the libellus is up to the judicial vicar (cc. 1675 and 1676 § 1, *PR* art. 15). There is nothing to prevent the trusted lawyer, possibly chosen by one of the parties (which bypasses the integrated diocesan counselling but not the parochial counselling) from drafting the libellus for his client. In that case, diocesan-level counselling would not be necessary, parish-level counselling having been sufficient. Otherwise, once the drafting of the booklet is completed, it is handed over to the spouse for presentation to the competent court (*PR* art. 4 and c. 1672) or to his lawyer, if he already has one. Before handing it over to the Court, there is nothing to prevent the booklet from being revised by the spouse or/and his/her lawyer to make some useful changes for his/her presentation without going back to the integrated counselling committee.

On the other hand, if the investigation reveals other outcomes, which have nothing to do with matrimonial nullity proceedings, they will be dealt with through the appropriate procedures.

The preliminary or pastoral enquiry and the trial to declare a marriage null and void are realities of a different nature and operate with precise aims from each other. While the process to declare a marriage null and void aims to establish the truth about the legal existence or otherwise of a marriage, the preliminary phase has more purposes, such as, for instance, gathering the elements useful for the judicial process, or researching the different elements underlying the crisis, dis-

cerning the spouses` past and present marital status, or even accompanying them towards a just and equitable „solution", respecting the spouses` personal journey and the Church's indications. It seems more important to focus attention and expertise on the quality of the well-prepared and conducted prejudicial or pastoral pathway, rather than dwelling on the length of it.

In the context of the prejudicial or pastoral enquiry, there has been a growing attention to the role of parish priests,[32] recovered and more direct protagonists of that pastoral proximity that sees them involved in accompanying, discerning and integrating conjugal and family fragilities that may also require a peculiar intervention of judicial verification of the validity or otherwise of a marriage. The parish priest accompanies, with due caution and competence, both the phase preceding the introduction of a case, and the celebratory phase of the process, as well as the concluding phase, especially where the ecclesiastical court ruling has confirmed the validity of a failed marriage.

Unlike the diocesan Bishop, who has his own sphere of intervention in the matrimonial process, both because he is *iudex natus* of his own court and because he is competent to judge the nullity in the *processus brevior*, for the parish priest, it must be said that he has no role in the matrimonial process in the strict sense of the term, except when he is summoned as a witness, either by a party or *ex officio*, or he is asked for information on the credibility and religiosity of the parties and the witnesses in the case, as was already the case before the reform of the procedure.

The preliminary consultative function, which can be carried out by parish priests as well as others entrusted with this task, must sooner or later meet with a technical comparison so that precise indications can be given on the individual cases; and this cannot be done in an approximate, hasty manner and without any canonical preparation in this regard. Such preparation is urgent, especially since the important purpose of the preliminary or pastoral investigation is to identify the circumstances of *PR* art. 14, for a possible shorter trial.

Enhancing the value of the parish office in the process and accompaniment of spouses entails giving back its proper place to the function of pastoral proximity which the parish priest, as his own pastor, exercises perhaps more than the bishop, since he is entrusted with a *certain communitas fidelium* (c. 515 § 1) and

32 Vgl. SABBARESE, L., Il ruolo del parroco nella riforma del processo matrimoniale canonico: AA.VV., Le „Regole procedurali" per le cause di nullità matrimoniale. Linee guida per un percorso pastorale nel solco della giustizia. Vatican City 2019, 71-93.

must seek to know and accompany the faithful entrusted to his care (c. 529 § 1)[33].

The pastoral care of proximity, as the red thread of the recent reform, belongs in itself to the sensitivity of the conciliar Church and its legislator.

A further field of intervention for parish priests, a field more naturally connected with the preparation of the cause, is that of family pastoral work at the parish level or perhaps more realistically at the inter-parish or diocesan level.

In the context of family pastoral care, a specific, but unfortunately unknown and inapplicable, area of intervention concerns the conclusion of the canonical process for the declaration of the nullity of a marriage and the conclusions of the operative part of the judgement, with the relative pastoral care also after the conclusion of the canonical process: both when the nullity is proven and (especially) when the nullity is not proven, the responsibility of the parish priests to continue discerning and accompanying does not cease, thus signifying even more effectively the criterion of pastoral proximity and effectively qualifying the identity and activity of the Ecclesiastical Courts as pastoral offices to all intents and purposes.

During the preliminary investigation, legal situations may also arise that can be traced back to administrative procedures: dissolution of a sacramental marriage by non-consummation or dissolution of the natural bond *in favorem fidei*.

Therefore, the preliminary enquiry as a counselling service is not reserved exclusively for the Catholic faithful, but must also be open to non-baptized persons who wish, on the basis of *PR* art. 2, to verify the nullity of their marriage, in the case of a marriage with a cult disparity, for instance, or to verify the possibility of dissolving a natural bond *in favorem fidei* with a view to a canonical marriage with a new Catholic partner.

An important aspect to emphasize is that in the case of judicial verification of a failed marriage, the ecclesiastical court does not judge the persons and their acts from a moral point of view of guilt, but aims to reach the juridical truth on the validity of the consent at the time of the marriage: whether there were, therefore, defects of consent, dispensable impediments or a defect of form. Therefore, especially when the preliminary investigation is oriented towards the introduction of a canonical case, it is indispensable to ensure a technical-juridical character to the investigation itself; in addition to moral and spiritual support, it is

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33 The criterion of accompaniment and the criterion of proximity are better understood if contextualized in the pontifical magisterium preceding the *MIDI*, namely in the Apostolic Exhortation EG (*Evangelii gaudium*), which presents accompaniment as becoming companions on the journey and in life, adopting a shared path and goal. Vgl. FRANCIS, Apostolic Exhortation *Evangelii gaudium*, 24.11.2013: AAS 105 (2013) 1019-1137.

also necessary to guarantee the spouses the competence that the preliminary or pastoral investigation must assume because of and in view of the preparation of the libellus.

A specific contribution of the parish priest, and the Bishop with him, could be to undertake, in a spirit of authentic conversion of structures, a kind of specific training, albeit not in the complete and demanding form of an academic type.

Finally, it is useful to reiterate that a fundamental aspect of the link between pastoral care, especially that of accompanying irregular or merely difficult situations, and the activity of the Tribunals is precisely the preliminary or pastoral enquiry, referred to in *PR* art. 1-5. To understand this connection, it is indispensable that the investigation is not oriented from the beginning and only to the opening of a trial for the declaration of the nullity of a marriage. This is because not every failed marriage is automatically a null marriage; the accompaniment of spouses in crisis, in the context of a unitary marriage pastoral – an important novelty[34] of the m.p. *MIDI* –, entails assistance in overcoming crises and, when possible and according to the concrete situations, the decision for the separation of the spouses, for the restoration of conjugal life, for the validation or sanctioning of the marriage, or the initiation of technical advice with a view to preparing and introducing the case libellus.

Bridging the gap between pastoral and legal should also be considered during the trial and when it has ended, even if the outcome of the case is negative.

Therefore, the pastoral significance of canon law must be grasped, and likewise the close link between pastoral dimension and juridical dimension, a link that is based not only on the integral concept of the person, but also on a correct ecclesiological vision, which envisages a connatural unity between the mystery dimension and the historical dimension of the Church of Christ. From this point of view, the historical-legal dimension is revealed as an intrinsic aspect of the pastoral: both are aimed at *salus animarum*; and postulates a relationship of reciprocal immanence: law participates in the pastoral *munus* of Christ who builds the community and preserves it in the order and respect of just relations. Such pastoral action cannot be conceived, nor can it operate without justice, which is properly an expression of charity.

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34 Vgl. Izzi, C., Il processo canonico di nullità del matrimonio dalla codificazione post-conciliare alla riforma scaturita dalla riflessione sinodale sulla famiglia: EstE 97 (2022) 1190.

4. THE CENTRALITY OF THE DIOCESAN BISHOP IN THE PROCESS, ESPECIALLY IN THE *PROCESSUS BREVIOR*

The reform of the canonical matrimonial process has introduced a series of innovations[35] among which the introduction of a shorter trial before the Bishop is of significant importance, due to its being the concrete implementation of the instances of procedural celerity and episcopal propinquity „among the faithful entrusted to him" that emerged in a pressing manner during the work of the Synod of Bishops[36].

In particular, within the *Relatio Synodi* of the III Extraordinary General Assembly of the Synod of Bishops, in Part III, *The Comparison: Pastoral Perspectives,* under the heading „Healing Wounded Families",[37] in dealing with the situation of divorced persons, moreover repeatedly placed at the center of the reflection of the doctrine,[38] besides gathering a series of proposals for a reform of the procedures, also in the perspective of a streamlining of the matrimonial cases, some always valid requirements were re-proposed, especially the responsibility of the diocesan Bishop and the preparation and commitment of an adequate number of legal practitioners.

This need was also emphasized by Pope FRANCIS in the above-mentioned address to the Apostolic Signature on 08.11.2013[39].

The Synod of Bishops gave further support to the concrete implementation of this last element cited by the Pope, which characterizes the *mission of* the Apos-

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35 Vgl. BONI, G., La recente riforma del processo di nullità matrimoniale. Problemi, criticità, dubbi (parte prima): Stato, Chiese e pluralismo confessionale 9 (07.03.2016), 1-78; DERS., La recente riforma del processo di nullità matrimoniale. Problemi, criticità, dubbi (parte seconda): Stato, Chiese e pluralismo confessionale 10 (14.03.2016), 1-76; DERS., La recente riforma del processo di nullità matrimoniale. Problemi, criticità, dubbi (parte terza): Stato, Chiese e pluralismo confessionale 11 (21.03.2016), 1-82.

36 Vgl. PUNDERSON, J. R., Accertamento della verità „più accessibile e agile": preparazione degli operatori e responsabilità del Vescovo. L'esperienza della Segnatura Apostolica: Sabbarese, L. (Hrsg.), Sistema matrimoniale canonico in Synodo. Vatican City 2015, 88-90.

37 Vgl. SYNOD OF BISHOPS, III Extraordinary General Assembly, *Relatio Synodi*, 18.10.2014, Nos. 44-54: Enchiridion Vaticanum 30/1635-1645.

38 Vgl. DE PAOLIS, V., I divorziati risposati e i sacramenti dell'eucaristia e della penitenza, in Permanere nella verità in Cristo. Matrimonio e comunione nella Chiesa cattolica. Siena 2014, 169-197; ORTIZ, M. A, La pastorale dei fedeli divorziati risposati civilmente e la loro chiamata alla santità: ERRÀZURIZ, C. J. / ORTIZ, M. A., Misericordia e diritto nel matrimonio. Roma 2014, 99-129.

39 Vgl. FRANCIS, *This Your Session* (s. Anm. 3), 1152.

tolic Signature,[40] which demands that the responsibility of the diocesan Bishop be *emphasized*,[41] making it necessary to correct the text of the *Relatio post disceptationem,* which read: demands that the responsibility of the diocesan Bishop be *increased*[42].

The direct intervention of the diocesan Bishop in the exercise of the jurisdictional function does not represent a new responsibility imposed by some disciplinary law, being by its very nature an integral part of the Bishop's office in his *munus pastorale*, as the shepherd of the flock entrusted to him[43].

In this perspective, even the Congregation for Bishops, in its *Directory for the Pastoral Ministry of Bishops*, reaffirmed that „the responsibility of governing the diocese rests on the shoulders of the Bishop“[44], and therefore even if he normally exercises this judicial power *per alios*, through his own Tribunal (c. 1419) or, together with other Bishops, in an interdiocesan tribunal (c. 1423), the diocesan Bishop is responsible for moderating and supervising the exercise of judicial power.

The exercise of this supervisory power, in the case of the metropolitan or diocesan court, lies directly with the Bishop as moderator of his court, whereas in the case of the interdiocesan court, it lies with the *coetus* of Bishops or the moderating Bishop chosen by them[45].

Bishops, in view of the importance and difficulty of matrimonial nullity cases, in addition to promoting the preparation of suitable legal practitioners for their Tribunals, must also perform a supervisory function, ensuring that those chosen to perform this function devote themselves to their activity with diligence and in accordance with the law[46].

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40 Vgl. DE PAOLIS, V., Amministrazione della giustizia e situazione dei Tribunali ecclesiastici: Revista Española de Derecho Canonico 64 (2007) 339-377.

41 Vgl. SYNOD OF BISHOPS III Extraordinary General Assembly (s. Anm. 37), No. 49.

42 SYNOD OF BISHOPS, XIV Ordinary General Assembly, *Relatio post disceptationem*, 13.10.2015, No. 44: OssRom, 13.10-14.10.2015, 5.

43 This principle constitutes the concrete implementation of the teachings of the Second Vatican Council, made explicit in LG 27.

44 CONGREGATION FOR BISHOPS, Directory *Apostolorum successores*, 22.02.2004, No. 160: Enchiridion Vaticanum 22/1965.

45 Vgl. PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Instruction *Dignitas connubii,* 05.01.2005, artt. 24 § 1 and 26: Enchiridion Vaticanum 23/97 and 99.

46 Vgl. PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Instruction Dignitas connubii, art. 33: Enchiridion Vativanum 23/106.

In this perspective, Pope FRANCIS' reform significantly emphasizes this responsibility of the diocesan Bishops, not only when they directly exercises their judicial power in the shortest trial,[47] but also in the profiles closely linked to the organization of the judicial apparatus within the particular Church entrusted to them.

The current c. 1673 sanctions, in fact, that „in each diocese the judge of first instance in cases of nullity of marriage, for which the law does not expressly make an exception, is the diocesan Bishop, who can exercise judicial power personally or through others, in accordance with the norms of law" (§ 1) and that he „shall constitute for his diocese the diocesan tribunal for cases of matrimonial nullity, without prejudice to the faculty for the same Bishop to have access to another neighboring diocesan or interdiocesan tribunal" (§ 2)[48]. This norm re-proposes for the matrimonial sphere what was already sanctioned in c. 1419 § 1 for judgments in general, overcoming, in fact, the advisability for the Bishop not to exercise this power personally, unless special reasons require it, provided by the Pontifical Council for Legislative Texts in art. 22 § 2 of the Instruction *Dignitas connubii*[49].

It is obviously not a question of claiming what the current legal system already provides for when it states that they can decide to reserve for themselves the cases they consider opportune (c. 1419). This reservation, however, does not exempt the Bishop from following and correctly applying the established universal procedural rules, since „if it is true that the judicial procedure for the declaration of the nullity of a marriage is not in itself divine law, it is equally true that it has developed in response to divine law, which requires an effective and appropriate instrument to arrive at a correct judgement on the request for nullity"[50].

It follows that the discipline of the canonical matrimonial process, as a whole, „is not contrary to a truly pastoral or spiritual approach to a supposed matrimonial nullity but safeguards and promotes the fundamental and irreplaceable

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47 Bua, as someone has observed in doctrine „many of them are not canonist or, even if they are, may have limited experience in the judicial forum or experience only in the distant past": DANIEL, W. L., The Abbreviated Matrimonial Process before the Bishop in Cases of „Manifest Nullity" of Marriage: The Jurist 75 (2015) 553.

48 On the controversial application of § 2 of c. 1673, I refer to DI BERNARDO, Problemi e criticità (s. Anm. 22), 121-126.

49 Vgl. MINGARDI, M., Il ruolo del Vescovo diocesano: QdE, La riforma dei processi matrimoniali di Papa Francesco. Una guida per tutti. Milan 2016, 96-97.

50 BURKE, R. L., Il processo di nullità canonica del matrimonio come ricerca della verità: Dodaro, R. (Hrsg.), Permanere nella verità in Cristo. Matrimonio e comunione nella Chiesa cattolica. Siena 2014, 201-202. The translation is mine.

justice without which it is impossible to show pastoral charity. [...] For its respect of law and a judgement in conformity with truth, the canonical process of marriage nullity is, therefore, a necessary element of the pastoral charity to be shown to those who assert the nullity of matrimonial consent"[51].

The provision of an extraordinary judicial procedure[52] or, rather, a shorter one, as outlined in the m.p. *MIDI*, constitutes the concrete translation of the proposals to increase the pastoral dimension of the cases, to streamline them as far as possible and to enhance the role of the Bishop, even though it is a solution presented in clear opposition to the proposal for an administrative route to be entrusted to the Bishop himself.

This fact further supports the responsibility of the diocesan Bishops, who are entrusted with the delicate task of implementing and bringing to life this important legislative reform in the particular Churches entrusted to them.

One of the main criteria that guided the reform of the canonical matrimonial process resides in the recovered centrality of the Bishop's judicial function[53]. In fact, § 1 of c. 1673 repeats almost literally the provision of c. 1419 § 1. The Bishop is the natural judge of the diocesan court of first instance; he judges personally or through others. Alongside the diocesan Bishop are also those equated to him by law, listed in c. 368 (also c. 381 § 2). He is competent to judge all cases, except those expressly excluded by law.

The shorter trial before the Bishop, in accordance with criteria 3 and 4 set out in the proem of m.p. *MIDI*,[54] is perhaps the most critical innovation of the reform[55].

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51 BURKE, Il processo di nullità (s. Anm. 50), 205-206. The translation is mine.

52 ARROBA CONDE, J. M., Le proposte di snellimento dei processi matrimoniali nel recente Sinodo, 74.

53 The attribution to the Bishop of the personal exercise of the judicial function constitutes a real innovation, especially with respect to other norms that suggested, instead, that the bishopric should abstain from judging personally, as, for example, we read in the instruction *Dignitas connubii,* art. 22 §§ 1-2: Enchiridion Vaticanum 23/95. By all means, the new law must be composed with the provisions of cc. 1448-1451 of the *CIC* and art. 67-70 of the Instruction *Dignitas connubii:* Enchiridion Vaticanum 23/140-143.

54 „The Bishop himself is a judge. [...] It is therefore hoped that [...] he does not leave the judicial function in matrimonial matters completely delegated to the offices of the curia. This applies especially in the shorter process, which is established to resolve the most evident cases of nullity. [...] to be applied in cases where the accused nullity of the marriage is supported by particularly evident arguments".

The doctrine has not failed to point out certain critical aspects of the pre-trial phase in the *processus brevior*.

One can discuss the advisability/necessity of resorting to the institute of rogatory letters in a trial that should by its very nature be shorter, to be held in a single hearing/session,[56] in respect of proximity.

Having reaffirmed the principle of the maximum celerity of the shortest trial, which provides for the gathering of evidence in a single hearing/session, established the necessary competence of the instructor who guides the procedural machine, recourse to the institute of rogatory letters must be commensurate with the two aforementioned conditions-characteristics of the shortest trial form.

There is then to be considered the necessity of resorting to an *ex officio* expert opinion; such a means of proof would undermine one of the conditions of procedural due process in the shorter form of a trial, i.e. the evidence of nullity. Here, too, it will be difficult to observe the celerity typical of the shorter form of proceedings. The submission of a prior expert's report merely indicates that the patron has ascertained the clinical soundness of his hypothesis before introducing the case; such an expert's report should not be considered sufficient for the activation of the shorter form of proceedings, even when it is drafted by an expert known to the court. The expert report in such a case constitutes a strengthening element of the *fumus boni iuris*[57].

Finally, reference may be made to a possible supplementary enquiry. If it were necessary to resort to it, it would be admitted that the case lacks obvious nullity and the case would have to be remitted for ordinary examination, at the request of the parties or the judicial vicar[58].

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55 See, for all, MONTINI, G. P., Aspetti problematici e punti critici nell'applicazione del processus brevior: Franceschi, H. / Ortiz, M. A. (Hrsg.), Ius et matrimonium IV. Roma 2023, 221-256.

56 Vgl. BIANCHI, P., Lo svolgimento del processo breve: la fase istruttoria e di discussione della causa: QdE, La riforma dei processi matrimoniali di Papa Francesco. Milan 2016, 73-74.

57 Vgl. BIANCHI, P., Lo svolgimento del processus brevior: Gruppo Italiano Docenti di Diritto Canonico (Hrsg.), La riforma (s. Anm. 5), 308-309; DEL POZZO, M., Il processo matrimoniale più breve davanti al Vescovo. Roma ^{2}2021, 244.

58 For the different positions in doctrine, I refer to BIANCHI, Lo svolgimento (s. Anm. 57), 309-312; DI BERNARDO, Problemi e criticità (s. Anm. 22), 140; MONTINI, G. P., Gli elementi pregiudiziali del processus brevior: consenso delle parti e chiara evidenza di nullità: AA.VV., Prassi e sfide dopo (s. Anm. 22), 62-63.

Once the preliminary investigation of the case is complete, the observations of the bond defender and, if there are any, of the parties, the case passes to the diocesan Bishop for decision.

Having received the acts, the Bishop, who acts as sole judge, proceeds with a series of fulfilments with a view to achieving moral certainty regarding the case: he consults with the instructor and the councilor; he evaluates the observations in defense of the bond; if there are any, he also evaluates the parties' defense briefs.

If after these acts the Bishop reaches moral certainty, then he issues the final judgement. If not, that is, if the necessary moral certainty cannot be reached from the acts, the Bishop must refer the case for ordinary examination.

In the case of a diocesan court, no problem arises in identifying the Bishop competent to give the judgment. But in the case of an interdiocesan tribunal, „if the case is heard in an interdiocesan tribunal, the Bishop who must pronounce the sentence is the one of the place on the basis of which jurisdiction is established in accordance with can. 1672. If there is more than one, the principle of proximity between the parties and the judge is to be observed as far as possible“ (*PR*, art. 19). This establishes the criterion of proximity, new in the canonical sphere, which perhaps needs to be clarified with the help of practice, jurisprudence and canonical science.

If the Bishop, after consultation with the instructor and the examination of the *pro vinculo* defenses and the parties' pleadings, if any, has not been able to reach moral certainty, he must refer the case back to the ordinary examination.

In this case, c. 1687 § 1 establishes that the Bishop may not issue a negative judgement, but must allow the parties to have access to an ascertainment of the truth concerning the validity or otherwise of their marriage according to the ordinary process.

If the diocesan Bishop has reached moral certainty and intends to declare the marriage null and void, he will issue the final judgment, the full text of which will be signed by the Bishop himself and the notary, will contain the reasons in a brief and orderly manner, and will be notified to the parties as soon as possible, that is, within a month from the date of the decision, as art. 20 § 2 *PR* specifies.

It is useful here to at least mention some critical issues that specifically affect the *coram Episcopo* decision-making phase[59].

This seemed to be the most critical aspect of the shorter trial: both because the Bishop is invested with a technical competence that he does not always possess,

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59 Vgl. Di Bernardo, Problemi e criticità (s. Anm. 22), 142-144; Bianchi, Lo svolgimento (s. Anm. 57), 318-324.

nor should he possess, and because anomalous practices are established that illegitimately provide for the exercise of the delegable judicial function in the shorter trial.

That being said, it should not be excluded that the Bishop may be assisted by the instructor or assessor in drafting the judgment, provided that it is then the Bishop himself who produces the arguments or at least reviews the judgment personally without merely signing it.

Of course, if the *petitio iudicialis* in the shorter trial is initiated by both parties or by only one of them but with the consent of the other, it will be difficult for the parties to appeal. Therefore, if the Bishop cannot pronounce a negative judgment, it is solely up to the defender of the bond to exercise the right of appeal.

C. 1687 § 3, which introduced a new discipline, determines that the appeal can be made either to the Metropolitan or to the Roman Rota. While the appeal to the Roman Rota constitutes a law that reflects a very ancient principle that has always allowed appeals to the Holy See,[60] the appeal to the Metropolitan constitutes a concrete application of one of the inspiring criteria of the reform desired by Pope FRANCIS.

In concrete terms, the appeal system is regulated according to the subject issuing the sentence; therefore, if the sentence is issued by the diocesan Bishop, the appeal must be made to the Metropolitan or to the Roman Rota; if the sentence is issued by the Metropolitan, an appeal is made to the oldest suffragan see,[61] if the sentence is issued by a Bishop immediately subject to the Apostolic See, an appeal is made to the Bishop permanently designated by the latter.

An appeal is also subject to an assessment of admissibility by the person who is competent to admit it, pursuant to § 3 above, since if the appeal is based on merely dilatory reasons, it must be dismissed *in limine* by decree; if, on the other hand, it is admitted, the case goes to ordinary second instance.

In the end, it must be noted that, with reference not only to the shorter trial but also to judicial matrimonial proceedings, there is a „progressive problematization of judicial power in matrimonial matters“[62].

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60 This principle was also reiterated in the Rescript of Pope Francis, *The Entry into Force*, on the Completion and Observance of the New Law of the Matrimonial Process, 07.12.2015: „Recognizing the Roman Rota, in addition to the *munus* proper to it of ordinary appeal of the Apostolic See [...]“: AAS 108 (2016) 5.

61 As determined by the PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Particular Response about the *Suffraganeus antiquior* in the new can. 1687 § 3 *Mitis Iudex*, Prot. 15155/2015, 15.10.2015: www.delegumtextibus.va

62 Vgl. MONTINI, Questioni circa l'esercizio (s. Anm. 18), 133-136.

5. THE PROXIMITY PRINCIPLE

The reform implemented by Pope FRANCIS, in the perspective of the desired pastoral conversion of ecclesiastical judicial structures, has placed the diocesan Bishop at the center of the canonical matrimonial process.

In particular, Pope FRANCIS, in reaffirming the principle according to which 'the Bishop himself is judge', states: „In order that the teaching of the Second Vatican Council may finally be translated into practice in an area of great importance, it has been decided to make it evident that the Bishop himself in his Church, of which he is the pastor and head, is for this very reason judge among the faithful entrusted to him. It is therefore to be hoped that in both large and small dioceses, the Bishop himself will offer a sign of the conversion of ecclesiastical structures, and not leave the judicial function in matrimonial matters completely delegated to the offices of the curia. This is especially true in the shorter process, which is established to resolve the most evident cases of matrimonial nullity“[63].

In this respect, in order to balance the procedural streamlining with the fundamental principle of *favor matrimonii,* Pope FRANCIS specifies: „It has not escaped my notice, however, how much an abbreviated trial could jeopardize the principle of the indissolubility of marriage; precisely for this reason, I wanted the Bishop himself to be the judge in such a trial, who by virtue of his pastoral office is, with Peter, the greatest guarantor of Catholic unity in faith and discipline.“[64]

Despite the good intentions of the new law, however, the principle of proximity has not failed to question doctrine. For example, the question may be raised as to whether the appeal to the Roman Rota, provided for in c. 1687 § 3, together with the appeal to the Metropolitan, can really be considered an application of the principle of proximity; or, whether recourse to the third-instance court for the *nova causae propositio*, even in the case of an enforceable judgment issued by a first-instance court, can favor the application of proximity[65].

In addition to the critical remarks on the principle of proximity, there is also to be highlighted the effectiveness of this principle that can operate between the

63 FRANCIS, Litterae apostolicae motu proprio datae *Mitis Iudex Dominus Iesus*: AAS 107 (2015) 559-560.

64 Ebd., 560.

65 Vgl. IZZI, Il processo canonico (s. Anm. 15), 1193. Even if the *dictio normae* indicates that this recourse is not preceptive – „potest“ says the canon – and the doctrine points out that the previous legislation admitted the jurisdiction of the Court of Second Instance. Thus, for example, ZANETTI, E., Commentary on c. 1681: QdE, Codice di Diritto Canonico Commentato. Milan ^{6}2022, 1353.

court and the party, as suggested by art. 7 § 2 of *PR*, by implementing different and specific verification and guarantee activities: verifying the actual domicile or quasi-domicile of the plaintiff in the territory within the jurisdiction of the court seised and not a fictitious domicile or quasi-domicile; guaranteeing the proximity of the court to both parties, especially to the one that is more distant geographically or for other reasons through the procedural instruments already provided (c. 1418; art. 7 § 2 *PR*), such as letters rogatory, judicial access, the publication of documents in another court in the vicinity or in another place near the party.

In doctrine, some authors have also ventured possibilities in which the implementation of the principle of proximity is urgently needed: the judge may suggest to the author of the libellus to bring the case before a Court closer to one or both parties; he may ask the Apostolic Signature for an extension of jurisdiction, when none of the competent Courts is close, or a transfer of the case to another Court, when proximity has been hindered in order to hinder the other party[66].

6. NEW PERSPECTIVES AFTER THE PROMULGATION OF THE M.P. *MITIS IUDEX DOMINUS* IESUS

C. 1673, as amended by *MIDI,* is new and has no counterpart in the *CIC*, except for § 1 which repeats almost literally the provisions of c. 1419 § 1. It reaffirms that the Bishop is the natural judge of the diocesan court of first instance and judges personally or through others. Alongside the diocesan bishop are also those equated to him by law, listed in c. 368 (also c. 381 § 2). He is competent to judge all cases, except those expressly excluded by law.

The new c. 1673 provides that for matrimonial nullity cases, the Bishop can make use of the Tribunal he has set up for his own diocese, or he can access another diocesan or interdiocesan Tribunal which is closer.

For the first case, it is no longer necessary to apply to the Apostolic Signature to request and obtain the extension of jurisdiction, while for the second case, the provisions of c. 1423 must be observed. Several diocesan Bishops can constitute an interdiocesan or regional Tribunal, the moderation of which can be entrusted to the Bishops of the dioceses concerned as *coetus* or to a Bishop chosen by them as moderator of the Tribunal.

Cases for the declaration of the nullity of a marriage are judged by a Collegial Tribunal which, according to cc. 1425-1426, is composed of three judges (five

66 Vgl. MONTINI, G. P., Competenza e prossimità nella recente legge di riforma del processo per la dichiarazione della nullità del matrimonio: In Charitate Iustitia 34 (2016-2017) 37.

judges for the most difficult cases). The College is obligatory in contentious cases of the nullity of sacred ordination and marriage and in contentious cases of dismissal from the clerical state and excommunication. It judges according to a turn; it is presided over by a clerical judge, while the other collegial judges may be lay people[67].

This is what the new c. 1673 § 3 establishes: the integration of the judging panel with two out of three lay judges not only reconfirms the favor to be accorded to the panel with respect to the monocratic judge, but also removes „the Conferences of Bishops from the faculty to allow lay judges, which is now allowed to all Courts“[68]. This aspect constitutes, definitely, a notable opening compared to the *CIC*, which does not allow (only one) lay judge in a judging college of three or five judges: in fact, c. 1421 § 2 provides for this, which conditions the judicial function of a lay person in a judging college to the sole case of necessity and the permission of the Conference of Bishops.

- One might now ask how doctrine has accepted or interpreted the opening brought by FRANCIS' m.p. with the new c. 1673 § 3.
- There is an obvious acceptance of the openness of the new m.p., which allows the presence of two lay judges in a panel of judges. For some, however, this openness is not sufficient[69] and has gone further, calling, for example, for the admission of three lay judges,[70] or of the lay monocratic judge[71]. Such an opening could be a solution to the „chronic lack of

67 About the participation of lay people to the judicial power, see OKONKWO, E. B.O., The judicial power and its exercise by laypersons in marriage nullity process: limits and prospects: DPM 31 (2024) 103-118; MANCINI, L., L'esercizio della potestà giudiziale nella Chiesa da parte di Fedeli laici. Sviluppo e interpretazione della normativa canonica. Rome 2023.

68 MONTINI, G. P., Gli studi di Diritto Canonico alla luce della riforma del processo matrimoniale: Educatio Catholica 4 (2018) 13.

69 Thus, for example, MONETA, P, Introduzione al diritto canonico. Turin 2016, 150, who assesses the reform as „still too restrictive“.

70 Vgl. BONI, La recente riforma (parte terza) (s. Anm. 35), rivista telematica (www.statoechiese.it), no. 11/2016, 21.03.2016, 17; TAVANI, A.P. , I cambiamenti del diritto canonico attraverso l'evoluzione del ruolo dei laici nella funzione giudiziaria: Il diritto ecclesiastico 128 (2017) 634; Ders., I laici e la funzione giudiziaria: AA.VV., I soggetti del nuovo processo matrimoniale canonico. Vatican City 2018, 197.

71 Vgl. BONI, La recente riforma (parte terza) (s. Anm. 70), 19-20; LLOBELL, J., I processi matrimoniali nella Chiesa. Roma 2015, 116; TAVANI, I laici (s. Anm. 70), 198.

trained personnel"[72]. Even, in a *de iure condendo* perspective, part of the doctrine has advocated entrusting the laity with a function close to that of the judicial vicar as well as that of a rotal auditor[73].

- Certainly, today the line that admits, by reason of baptism, the participation of the laity in the power of governance in those spheres that do not require sacred orders is prevailing.
- The exercise of judicial power of governance by the laity does not imply that this power should be considered *eo ipso* „inferior" compared to, for example, the power of governance of the Ordinaries, who exercise it in all spheres of government, including legislative and executive power. Judicial power is undoubtedly a power exercised on the base of historical facts brought before the court and therefore entails a sort of technical discretion limited to the procedural context, but this does not mean that it must be concluded that it is of lesser importance or entails less demanding discernment and decision-making.

BRIEF CONCLUSION

In the light of the foregoing, it is currently possible to assess the canonical matrimonial process in relation to its reform and its impact on current procedural law through a few aspects:

The refinement of the technical/regulatory instruments will be all the more effective the more it will have been shared during the maturation and preparation of the reforms;

Standards should always be updated, although one should not overdo it, nor should one update individual institutes by „attacking" the Code and losing sight of the congruity of the whole;

Regular update is necessary for the administration of justice, but it is not sufficient: it must be followed by more than adequate preparation of practitioners in the field of justice.

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72 NAVARRO, L., Il ruolo dei laici nella prassi dei Tribunali e alla luce dei più recenti documenti magisteriali: AA.VV., Le „Regole procedurali" (s. Anm. 32), 107.

73 Vgl. TAVANI, I laici (s. Anm. 70), 199-200. More in general on the openings of the m.p. *Mitis Iudex Dominus Iesus* and the unexpressed potential about the laity and judicial power, I refer to REA, F. S., L'esercizio della potestà giudiziaria del fedele laico per una „Chiesa in uscita": Commentarium pro Religiosis 99 (2018) 324-359; SÁNCHEZ, R. R., Juez único, jueces laicos y asesores en el motu proprio „Mitis Iudex Dominus Iesus": Revista Española de Derecho Canónico 75 (2018) 235-272.

This latter aspect of the training and preparation of legal practitioners constitutes a perennial challenge of the Church in every age[74].

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ABSTRACTS

Dt.: Die Geschichte der letzten Reform der Ehenichtigkeitsverfahren hat in der Lehre großes Interesse geweckt, sowohl aufgrund einiger eingeführter Neuerungen als auch wegen der Art und Weise, wie die Reform durchgeführt wurde, und vor allem aufgrund bestimmter Aspekte, die viele Zweifel aufwarfen und verschiedene klärende Maßnahmen erforderten, um eine korrekte Anwendung des Gesetzes zu gewährleisten.

Nach der Darlegung der wichtigsten Neuerungen, die durch das Motu Proprio *Mitis Iudex Dominus Iesus* eingeführt wurden, richtet der Beitrag den Fokus auf den „pastoralen Impuls", den der Gesetzgeber der Reform verleihen wollte, indem er eine vorherige Beratung im Rahmen der vorgerichtlichen oder auch pastoralen Untersuchung einführte. Anschließend geht der Autor auf die zentrale Rolle des Diözesanbischofs im Verfahren, insbesondere im *processus brevior*, ein sowie auf das Prinzip der Nähe und auf die neuen Perspektiven, die durch die Reform eröffnet wurden, und hebt dabei sowohl Vorteile als auch bestehende Grenzen hervor.

Ital.: La storia della recente riforma dei processi matrimoniali ha interessato molto la dottrina sia per alcune storiche novità introdotte, sia per il modo con cui la riforma è stata portata avanti, sia, soprattutto, per certi aspetti che hanno suscitato tanti dubbi e hanno richiesto svariati interventi di chiarificazione al fine di garantire una corretta applicazione della legge.

Enunciate le principali innovazioni apportate dal m.p. *Mitis Iudex Dominus Iesus*, l'articolo focalizza l'attenzione sulla spinta pastorale che il Legislatore ha voluto dare alla riforma, introducendo la consulenza previa tramite l'indagine pregiudiziale o pastorale; l'Autore si sofferma, poi, sulla centralità del Vescovo diocesano nel processo, specie nel *processus brevior*, sul principio di prossimità e sulle nuove prospettive avviate dalla riforma, evidenziando vantaggi e limiti.

Engl.: The history of the recent reform of matrimonial trials has greatly interested the doctrine both for some historical innovations introduced, and for the way in which the reform was carried out, and, above all, for certain aspects that have

74 Vgl. DEL POZZO, M., L'impatto della riforma sul diritto proceduale vigente: AA.VV., La riforma del processo (s. Anm. 22), 79-80.

raised many doubts and have required various interventions of clarification to guarantee correct application of the law.

Considering the main innovations brought by the m.p. *Mitis Iudex Dominus Iesus*, the article focuses attention on the „pastoral push" that the Legislator wanted to give to the reform, introducing prior consultancy through the preliminary or pastoral investigation; the Author then focuses on the centrality of the diocesan Bishop in the process, especially in the *processus brevior*, on the principle of proximity and on the new perspectives launched by the reform, highlighting advantages and limitations.