Reforms Introduced in the Process of the Declaration of Nullity of Marriage by the *Motu proprio Mitis Iudex Dominus Iesus*

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Pope Francis has reformed the canonical process for the declaration of nullity of marriage by his *Motu Proprio Mitis Iudex Dominus Iesus*, issued on 15 August 2015, and published on 8 September 2015.[1] The changes to the Code of Canon Law, Book VII, Part III, Title I, Chapter I, "Cases to Declare the Nullity of Marriage" (cann. 1671 – 1691) came into effect on 8 December 2015, the opening day of the year of mercy. In fact, on 11 April 2015, the vigil of the Second Sunday of Easter, that is, the Sunday of Divine Mercy, Pope Francis issued the bull of indiction of the Extraordinary Jubilee Year of Mercy "*Misericordiae Vultus*", according to which the Holy Year, with its motto "*Merciful like the Father*" would open on 8 December 2015, the solemnity of the Immaculate Conception, and continue till 20 November 2016, the Solemnity of Christ the King. During this Extraordinary Jubilee Year of Mercy, Pope hopes to emphasize the merciful side of the Church. He has announced the plenary indulgence, available every day during this year, not only for those who travel to Rome, but also for those who visit the cathedral, shrines and other

churches in each diocese where the Jubilee Door is opened. He has also made provisions to receive this special grace for those who are old, alone, sick or imprisoned. He has sent the missionaries of mercy with special faculty to absolve the sins reserved to the Holy See. Thus during this Extraordinary Jubilee Year of Mercy he wants the faithful to know that no one is excluded from the mercy of God who never tires of forgiving those who come to him.

Moreover, the Roman Pontiff made the changes brought out in process of declaration of nullity of marriage to come into effect on the day of the dawn of the Jubilee Year of Mercy. He said that the changes in the annulment process were motivated by "concern for the salvation of souls" and particularly "charity and mercy" towards those who feel alienated from the Church because of their marriage situations and perceived the complexity of the Church's annulment process. Pope Francis has made these changes to take effect during the year of mercy to encourage people to seek the help of the Church. The year of mercy is the perfect time to seek the help of the Church. But these changes that show merciful face of God to those who are in matrimonial difficulties, are not limited only to this Extraordinary Jubilee Year of Mercy. For the changes brought out by the *motu proprio Mitis Iudex Dominus Iesus* of Pope Francis are amendments made to the existing canonical legislation affecting the process of the declaration of nullity of marriage.

The *motu proprio Mitis Iudex Dominus Iesus* contains an Introduction which includes among other things a few fundamental criteria that guided the work of reform, The actual legislative changes (cann. 1671 – 1691) and a *ratio*

procedendi (the way of proceeding) in cases regarding the declaration of the nullity of a marriage. Although the *ratio procedendi* is an integral part of the document, it nevertheless comes after the signature of the Pope. It could, in a way, be considered to serve as a complement to *Dignitas connubii*.[2] No matter what the legal significance of this part of the document may be, there is no doubt that it is to be observed.

Pope Francis constituted a committee, comprised of men renowned for their knowledge of law, their pastoral prudence and their practical experience, to undertake a reform of the processes regarding the nullity of marriage. This committee under the guidance of Dean of Roman Rota, drew up a plan for reform with due regard for the need to protect the principle of indissolubility of the marital bond. This committee with a short period of time came out with a framework for the new procedural law, that the Roman Pontiff, after careful examination with the help of other experts, promulgated with his letter *Motu Proprio Mitis Iudex Dominus Iesus*, issued on 15 August 2015. The Pope states that the essential motive for this reform is to assuage the conscience of the faithful who feel themselves estranged by their broken state of canonically married life and are unable to approach easily the ecclesiastical tribunal for their marriages to be declared null and void for various reasons. Moreover, the 3rd extraordinary General Assembly of the Synod of Bishops held in the Vatican from 5th to 19th October 2014 on the theme "The Pastoral Challenges of the family in the context of evangelization", spoke also of the special discernment for pastorally guiding persons who are separated, divorced or abandoned. Underlining the need

of their spiritual nourishment, spiritual communion, and their accessibility to the sacraments of Eucharist and penance, most of the synod fathers wanted a more streamlined and readily accessible juridical process for the faithful.

"A great number of synod fathers emphasized the need to make the procedure in cases of nullity more accessible and less time-consuming. They proposed, among others, the dispensation of the requirement of second instance for confirming sentences; the possibility of establishing an administrative means under the jurisdiction of the diocesan bishop; and a simple process to be used in cases where nullity is clearly evident. Some synod fathers, however, were opposed to this proposal, because they felt that it would not guarantee a reliable judgment. In all these cases, the synod fathers emphasized the primary character of ascertaining the truth about the validity of the marriage bond. Among other proposals, the role which faith plays in persons who marry could possibly be examined in ascertaining the validity of the Sacrament of Marriage, all the while maintaining that the marriage of two baptized Christians is always a sacrament."[3]

In the words of the Roman Pontiff, this reform, that reflects the wishes of the majority of the bishops, does not favour the nullity of marriage, but the speed of process as well as its simplicity so that the faithful are not unnecessarily made to wait in getting justice for their canonical state because of a delayed sentence.

I. Ordinary Matrimonial Process

1.1. Pre-judicial or Pastoral investigation

With the view to help the family pastorally especially the persons who are living in irregular matrimonial situations, a unified diocesan pastoral care of marriage must be carried out. In fact the diocesan bishop, in exercising his pastoral office, is to be solicitous for all Christ's faithful entrusted to his care, especially those who, because of their condition of life, are not sufficiently able to benefit from the ordinary pastoral care (see c. 383 §1). Thus the diocese, the family commission for example, must receive the faithful who are in difficulties of their marital state, and who have a doubt about the validity of their marriage or convinced of its invalidity, and helps them to understand their situation and collects the information and materials that are useful for an eventual judicial process, be it the ordinary or the briefer one. (art. 2)

The local ordinary can entrust this function to other suitable persons who are expertise in this matter, though not exclusively juridical-canonical. These persons could include the parish priest, the one who prepared the spouse for the wedding celebration, other clerics, religious or laity who are experts in counseling and guiding the spouses. (art. 3)

One diocese or the dioceses together in a province can form a stable structure to carry out this service of guiding the faithful in difficulties, and if appropriate, a hand book (*vademecum*) could be prepared with essential elements to conduct the investigation in a more appropriate way (art. 3). A work of this type (a procedural handbook) could indeed

be most helpful to auditors and those in charge of the preliminary investigation. The Canon Law Societies might take on the project of developing such a work in conjunction with the Conferences of Bishops concerned[4].

This pastoral investigation will be useful for the introduction of the case before the competent tribunal either by the spouses or perhaps by their advocates. The investigating person must make sure if the parties are in agreement about petitioning nullity (art. 4). These investigations can be made use of for making *libellus* which is to be presented to the competent tribunal (art. 5).

Although, it has been customary in many dioceses to carry out a preliminary investigation before a case is presented – so as to avoid spending time on cases that have little if any chance of being accepted – this was not formally prescribed in the Code. However the *Ratio* adds special articles on this subject. In fact, some of the judicial vicars were asked by the Apostolic Signatura why there was no negative sentence at all emanating from their tribunals. Given the fact now that the law provides for this inquiry, the initial requests could be rejected at this level, thus opening the possibility of a higher number of affirmative decisions because only those cases which seem to have a semblance of possibility of receiving an affirmative decision is retained.

1.2. Competent Forums

Can. 1672. In cases regarding the nullity of marriage not reserved to the Apostolic See, the competencies are:

- 1° the tribunal of the place in which the marriage was celebrated;

- 2⁰ the tribunal of the place in which either or both parties have a domicile or a quasi-domicile;

- 3⁰ the tribunal of the place in which in fact most of the proofs must be collected.

Among the three competent forum, as per art. 7 §1 of *ratio* the principle of proximity between the judges and the parties is to be observed as much as possible. All sources of competence are equal without priority given to one source over the other.

When the case is taken up by the tribunal of the place where the plaintiff has domicile, the parties need not live within the territory of the same Bishops' Conference, nor is the consent of the judicial vicar of the domicile of the respondent is required. Similarly, the consent of the judicial vicar of the domicile of the respondent is not required when the matrimonial case is taken up by the tribunal of the place in which in fact most of the proofs are to be collected. Thus the respondent need not be heard before the case is accepted by these two tribunals. There is also a small change in regard to the quasi-domicile of the plaintiff which was not allowed under the 1983 legislation.

1.3. The role of assessors in the penal of a single clerical judge

In principle "the cases of nullity of marriage are reserved to a college of three judges. A judge who is a cleric must preside over the college, but the other judges may be laypersons" (can. 1673 §3). However, "the bishop moderator, if a collegial tribunal cannot be constituted in the diocese or in a nearby tribunal chosen according to the norm of §2 (i.e. can. 1673 §2 according to which the bishop

is to establish a diocesan tribunal for his diocese to handle cases of nullity of marriage without prejudice to the faculty of the same bishop to approach another nearby diocesan or inter-diocesan tribunal), is to entrust cases to a single clerical judge who, where possible, is to employ two assessors of upright life, experts in juridical or human sciences, approved by the bishop for this task; unless it is otherwise evident, the same single judge has competency for those things attributed to the college, the *praeses,* or the *ponens*" (can. 1673 §4).

Though there can be one or two lay judges in a college of three judges presided over by a clerical judge, the lay judge cannot be a sole judge in deciding the matrimonial causes. The Church is still reluctant to allow for an entirely lay panel.

In the tribunal of a single clerical judge, he is to employ two assessors who are to be experts in juridical or human sciences besides being upright in life and approved for such task by the diocesan bishop. The words of the canon "where possible" is to be underlined. As regards, "human sciences" this is not limited to psychologists, social workers, or psychiatrists. It could also, in a number of countries, refer to the village elders who know the family situation well and can replace it in context. The assessors could interpret the acts of the case, having access to all of them. The formal intervention of an expert would not then be required. So, it can no longer be stated that in all cases referring to can. 1095, the intervention of a formal expert is required. Indeed the *Ratio* art. 14 §2provides "among the documents supporting this petition are included all medical records that can clearly render useless the requirement of an *ex*

officio expert"[5]. But, of course, the provision of can. 1678 §3 must be kept in mind, according to which unless it is clear from the circumstances the judge must make use of the service of the experts in cases of impotence or defect of consent because of mental illness or an anomaly of a psychic nature.

1.4. The Right to Challenge a Marriage

The following are qualified to challenge a marriage (can. 1674 §1)

- The spouses
- The promoter of justice when nullity has already become public and the convalidation of marriage is not possible or expedient.

A marriage which was not accused while both spouses were living cannot be accused after the death of either or both the spouses, unless the question of validity is prejudicial to the resolution of another controversy either in the canonical or civil forum (can. 1674 §2)

If a spouse dies while the case is spending, then by virtue of provision of can. 1518 the trial is suspended until the other spouse or another person insists upon its continuation. Here the legitimate interest of the person must be proved. (can. 1674 §3, art. 9)

The provision of can. 1674 has not introduced any change; in fact, it reflects what is said in cann. 1674 and 1675 of the 1983 legislation.

1.5. Introduction and Instruction of the Cases

1.5.1. Petition

It is the petition (*libellus*) that introduces the case before a competent tribunal. The petition must contain certain required elements to be accepted by the tribunal. Canon 1504 reads: "The Petition by which a suit is introduced must:

1° state the judge before whom the case is being introduced, what is being sought and from whom it is being sought;

2° indicate on what right the plaintiff bases the case and, at least in general terms, the facts and proofs to be evinced in support of the allegations made;

3° be signed by the plaintiff or the plaintiff's procurator, and bear the day, the month and the year, as well as the address at which the plaintiff or the procurator resides, or at which they say they reside for the purpose of receiving the acts;

4° indicate the domicile or quasi-domicile of the respondent".

While the petition must always be presented in a written form, in particular cases, the judge can receive an oral petition, but he will ask the notary to draft a petition from what is heard from the plaintiff. "The judge can admit an oral petition whenever a party is prevented from presenting a *libellus*: however, the judge himself orders the notary to draw up the act in writing that must be read to the party and approved, which takes place of the *libellus* written by the party for all effects of law" (art. 10).

Once a petition is received by the tribunal, it is communicated to the respondent for his/her observation and remarks. When the respondent fails to respond even after the second communication from the tribunal, it is taken for granted that he/she does not object the petition. "A respondent who remits himself or herself to the justice of the tribunal, or, when properly cited, once more, makes no response, is deemed not to object the petition" (art. 11 §2).

1.5.2. Acceptance of Petition and Summon to the Respondent (Citation)

When a judge receives a petition, he verifies first of all if he has the competence to handle the case and the petitioner has right to approach this court, and then he proceeds to accept or reject the petition depending on the gravity of the matter enumerated in the petition. Canon 1505 §1 states that "Once he (the judge) has satisfied himself that the matter is within his competence and the plaintiff has the right to stand before the court, the sole judge, or the presiding judge of a collegiate tribunal, must as soon as possible by his decree either admit or reject the petition". Before accepting the petition the judge also makes sure that the marriage has irreparably failed and that conjugal living cannot be restored (can. 1675)

Once the judge accepts a petition, he communicates it to the defender of the bond, and to the respondent if he/she has not signed the petition, obliging them to give their views within fifteen days. "After receiving the *libellus*, the judicial vicar, if he considers that it has some basis, admits it and, by a decree appended to the bottom of the *libellus* itself, is to order that a copy be communicated to the

defender of the bond, and unless was signed both parties, to the respondent, giving them a period of fifteen days to express their views on the petition" (can. 1676 §1).

1.5.3. Formulation of Joinder of Issue and of the process to be followed

After taking the views of the parties, and hearing from the defender of the bond, the judicial vicar decides by decree formulation of doubt (joinder of issue), i.e. on which ground or grounds the validity of marriage is challenged. The ground or grounds are to be precise and not generic (can. 1676 §5). He also decides the process to be followed: ordinary, or briefer. If the case is to be handled through the ordinary process, the judicial vicar, by the same decree, is to arrange the constitution of a college of judges, or of a single judge with two assessors according to can. 1673 §4 (can. 1676 §3); if a briefer process is decided upon, the judicial vicar proceeds according to the norm of can. 1685 (can. 1676 §4). This decree is communicated immediately to the parties and to the defender of the bond (1676 §2).

1.5.4. Declarations

The fact of the case is to be decided upon the depositions received from the parties and from the witnesses. "In cases of nullity of marriage, a judicial confession and the declaration of the parties, possibly supported by witnesses to the credibility of the parties, can have the force of full proof, to be evaluated by the judge after he has considered all the indications and supporting factors, unless other elements are present which weaken them." (can. 1678 §1)

1.5.4.1. Declaration of the parties (Petitioner and Respondent)

As per the provision of can. 1530, "the judge may always question the parties in order the more effectively to elicit the truth. He may do if requested by one of the parties, or in order to prove a fact which the public interest requires to be placed beyond doubt". Judicial confession and the declaration of the parties can have the full proof for the nullity of the marriage in question. Of course it is for the judge to evaluate the proof (can. 1678 §1).

Thus a judicial weight is given to declaration of the parties. It is not always necessary to have five or six witnesses. The judge is free to evaluate the weight to be assigned to specific testimony.

How to proceed in the absence of the respondent? Canon 1592 §1 says "If a respondent is summoned but does not appear, and either does not offer an adequate excuse for absence or has not replied in accordance with c. 1507 §1, the judge is to declare the person absent from the process, and that the case is to proceed to the definitive judgment and to its execution, with due observance of the proper norms". In this connection, the *ratio procedendi* observes regarding the party who does not want to co-operate fully, that "if a party expressly declares that he or she objects to receiving any notices about the case, that party is held to have renounced of the faculty of receiving a copy of the sentence. In this case, that party may be notified of the dispositive part of the sentence. (art. 13).

1.5.4.2. Declaration of Witnesses

Besides the declaration of the plaintiff and the respondent, the deposition of the witnesses also contributes

for arriving at the truth of the case to be decided. In fact, "proof by means of witnesses is admitted in all cases, under the direction of the judge" (can. 1547). The testimony of the one qualified witness can produce full proof when he makes a deposition concerning matters *ex officio* (can. 1678 §2)

1.5.4.3. Opinion of Experts

In cases of impotence or defect of consent because of mental illness or an anomaly of a psychic nature, the judge is to use the service of one or more experts. When the cause is so evident, then he need not have to approach the exports for report; in other cases the prescript of can. 1574 is to be observed, that is, the opinion of the experts is to be sought (can. 1678 §3). By virtue of the provision of can. 1574, "the service of experts are to be used whenever, by a provision of the law or of the judge, their study and opinion, based upon their art or science, are required to establish some fact or to ascertain the true nature of some matter".

1.5.4.4. During the deposition

During the deposition the defender of the bond, as pr the provision of can. 1677 §1, the legal representatives of the parties, as well as the promoter of justice, if involved in the trial, have the right (1) to be present at the examination of the parties, witnesses, and the experts, without prejudice to the prescript of can. 1559; that is, the judge may determine by reason of the circumstances of matter and persons, that the proceedings are to be in secret, and in such cases, the advocates, or procurators may not be allowed to be present at the examination; (2) to inspect the judicial acts, even those not yet published, and to review the documents presented by the parties.

The parties cannot be present at the examination of the witnesses and experts (can. 1677 §2). When there is question of private interest, the judge may determine that the parties are to be admitted during this examination.

During the deposition if the fact of non-consummation is ascertained, then the case could be shifted from the ordinary process to the process for the dispensation from a ratified and non-consummated marriage. "Whenever, during the instruction of a case, a very probable doubt arises as to whether the marriage was ever consummated, the tribunal, having heard both parties, can suspend the case of nullity, complete the instruction for a dispensation *super rato* and then transmit the acts to the Apostolic See together with a petition for a dispensation from either one or both of the spouses and the *votum* of the tribunal and the bishop" (can. 1678 §4).

1.6. The judgement, its appeals and its execution

1.6.1. The sentence of the first instance is executive (can. 1679)

One affirmative decision suffices. The mandatory appeal to the second instance is abolished; that is, no appeal is made within a peremptory time-limit of fifteen canonical days from the notification of the publication of the judgement. "The sentence that first instance declared the nullity of the marriage, once the terms as determined by cann. 1630 – 1633 have passed, becomes executive." (can. 1679).

The sentence becomes executive after fifteen days if there is no appeal. Then the parties are free to contract another marriage according to their choice if they so desire.

"After the sentence declaring the nullity of the marriage has been executed, the parties whose marriage has been declared null can contract a new marriage unless a prohibition attached to the sentence itself or established by the local ordinary forbids this" (1682 §1).

1.6.2. Possibility of appeal to the higher instance (can. 1680 §1)

It is important to note that the new legislation does not abolish the possibility of an appeal. The following persons have the right to introduce a complaint of nullity of the judgement or appeal against the sentence given in the first instance: the party who considers himself or herself aggrieved, the promoter of justice, or the defender of the bond.

1.6.3. Proceeding in the second instance (1680 §§2-4)

The tribunal of the second instance must always be collegiate for validity (can. 1673 §5). After receiving the complaint, and after receiving the acts from the first instance, the higher instance constitutes a college of judges, designates the defender of the bond and admonishes the parties to put forth their observations within the prescribed time limit. If the appeal clearly appears merely dilatory, the collegiate tribunal confirms the sentence of the prior instance by decree. If the appeal is admitted, then the tribunal proceeds in the same manner as the first instance with the appropriate adjustment. If a new ground of nullity of the marriage is alleged at the appellate level, the tribunal can admit it and judge it as if in first instance.

1.6.4. The appeal to the third instance (can. 1681)

There is possibility also to approach the third instance by the aggrieved party even after receiving an executive sentence. And for that the concerned party must bring forth new solid proofs and arguments. "If an executive sentence is issued, one can go at any time to a tribunal of the third level for a new proposition of the case according to the norm of can. 1644, provided new and grave proofs or arguments are brought forward within the peremptory time limit of thirty days from the proposed challenge" (can. 1681).

1.6.5. Entry in the register and the Second marriage (can. 1682)

Any matter pertaining to the canonical status of Christ's faithful by reason of marriage, by reason of adoption, the reception of sacred order, the making of perpetual profession in a religious institute, or a change of rite, must be noted in the baptism register (can. 535 §2). Consequently any change made in the marital status by way of declaration of nullity of marriage is to be entered not only in the marriage register but also in the baptism register. "As soon as the sentence is executed, the judicial vicar must notify the local ordinary of the place in which the marriage took place. The local ordinary must take care that the declaration of the nullity of the marriage and any possible prohibitions are noted as soon as possible in the marriage and baptism registers" (can. 1682 §2).

Once the sentence declaring the nullity of the marriage has been executed, the parties whose marriage has been declared null can contract a new marriage. Here of course the *vetitum* attached in the sentence itself or by the bishop must be taken into consideration.

1.7. Tribunal fees

The introduction to the *motu proprio Mitis Iudex Dominus Iesus* in its art. VI speaks about the duty proper to the Episcopal conference with regard to the works of the tribunals on declaration of the nullity of marriage. Being aware of the expenses involved in the tribunal works like just compensation of tribunal employees, and other maintenance, the *motu proprio* asks the Episcopal conference to ensure that the processes remain free of charge. "[...] Episcopal conferences, in close collaboration with judges, should ensure, to the best of their ability and with due regard for the just compensation of tribunal employees, that the processes remain free of charge, and that the Church, showing herself a generous mother to the faithful, manifest, in a matter so intimately tied to the salvation of souls, the gratuitous love of Christ by which we have all been saved" (art. VI). But it does not say anything how the Episcopal conference is to find the means to do this; thus it is left to the innovation of the each Episcopal conference.

The rescript issued by Pope Francis on 7 December 2015 regarding the implementation of the new laws of reform on procedures for the declaration of nullity of marriage, says that the Roman Rota shall decide cases according to the principle of evangelical gratuity, that is by *ex officio* patronage, notwithstanding the moral obligation of the more affluent faithful to offer a just contribution toward the causes of the poor. Can this be taken into consideration for the diocesan tribunals as well?

II. Abolition of the mandatory appeal

As we have already seen, the affirmative sentence given in the first instance becomes executive and the new norms do not require the mandatory appeal to the second instance. It was nothing but going back to the earlier practice of the Church that was in existence till second half of the eighteenth century; an affirmative sentence of nullity of marriage that was not appealed, was immediately executed after a single instance and thus resulted in a person's unmarried status and the possibility of a new marriage. It was Pope Benedict XIV by his apostolic constitution *Dei Miseratione* of November 3, 1741 set forth the requirement of two confirming decisions before a sentence becoming operative, the second instance based on the same ground or grounds for nullity as judged in the first instance.[6]

The requirement of two confirming sentences was welcomed and much appreciated among the canonists with the idea that it would curb the abuses in the lower tribunals and would uphold the dignity of the sacrament of marriage. Commenting on this innovation, cardinal Burke writes, "In legislating the requirement of a double agreeing sentence, he (the Pope) called to mind the firm principle by which causes regarding the states of persons never pass into *res iudicata*, therefore, enjoy always the possibility of being heard again if new proofs be found."[7] As a matter of fact, the double agreeing sentence assured "that we might consider the fuller elucidation of the truth in this very serious type of judgement in which the sacred covenant of the married is in question, and that judges, not without very certain knowledge of all things which most pertain to the matter, would dissolve by their sentence as invalid

from the beginning a bond of this sort, which is for so many reasons indissoluble."[8] Cardinal Burke further states that, "this innovation, an additional guarantee of the correctness of the decision given, was based not so much on an inherent mistrust of the honesty or the competence of the judges of first instance, but rather on the recognition of the possibility of honest error even on the part of conscientious judge."[9]

Giving up the mandatory second instance for affirmative sentence would not guarantee a reliable judgement whether in *decernendo* or *in procedendo.* Pope Paul VI gave an exception to the mandatory appeal a*d experimentum* to the United States Conference of Catholic Bishops in 1971. But two years later, the Holy See observed that "the faculty to dispense from appeal after a first favourable decision has been so broad that what was granted by way of exception has been made the rule: the statics prove this."[10] Thus this exception ended with the universal norms to be followed – initially those expounded in the *motu proprio Causas matrimoniales* (28 March 1971), and then the procedural system contained in the *CIC* 1983.[11] Roch Pagé, judicial vicar of Canadian Appeal Tribunal, Ottawa, says, "However, in my experience, I cannot support such a claim. And given my age and point where I am in my career, this is not a question of keeping my job."[12]

When the suggestion came from majority of the synod fathers to omit the mandatory appeal against affirmative sentence given by the first instance, some synod fathers were opposed to the proposal, because they felt that it would not guarantee a reliable judgement. They emphasized the primary character of ascertaining the truth about the validity of the marriage bond.[13] But in history, already Pope

Pius X in 1908 restricted the appeal to the higher tribunals. It was preferable that canonical process be conducted at the diocesan level, save appeals and certain recourse to the Apostolic See. This is proposed in the *Motu proprii Mitis Iudex Dominus Iesus* and *Mitis et Misericors* Iesus.[14] Pope Francis was very clear that the reform of the process of the matrimonial nullity is undertaken with the supreme law of the salvation of souls, upholding the sacramental dignity of the valid marriage between the Christian faithful. The abolition of mandatory appeal is only to speed up the process, and not to annul any marriage that might be valid from the beginning. During the press conference he gave on his return flight to Rome from USA, he stated, "In the reform of the procedures and the way, I closed the door to the administrative path, which was the path through which divorce could have entered. You could say that those who think this is "Catholic divorce" are wrong because this last document has closed the door to divorce by which it could have entered. It would have been easier with the administrative path. There will always be the judicial path."[15]

III. The Briefer Matrimonial Process before the Bishop

3.1. Diocesan bishop himself is competent

Canon 1683 rules that the diocesan bishop himself is competent to judge cases of the nullity of marriage with the briefer process. The diocesan bishop governs the particular church entrusted to him with legislative, executive and judicial power. While he exercises the

legislative power by himself, he exercises the other two powers personally or through some other persons: the executive power through the vicar general or episcopal vicar, the judicial power through the judicial vicar and judges (can. 391). Moreover, canon 1419 states that in each diocese and for all cases which are not expressly excepted in law, the judge of first instance is the diocesan bishop. He can exercise his judicial power either personally or through others. The same provision is found in 1673 §1. Bishop gets this judicial power (along with the other two powers) by his Episcopal consecration and being appointed as the shepherd and head of a particular church. In fact, in the early Church, the bishop took care of his faithful in all the fields including that of the judicial.[16] *Potestas iudicialis episcopalis* is the ancient *traditio ecclesia.*[17] Now Pope strongly invites the bishops to take up the practice of the holy bishops of the early centuries of the Church who tended to personally exercise the sacramental authority of fathers, teachers and judges – something received through the laying on of hands in Episcopal ordination.[18] They are to take up this task of judging the validity of the marriage bond of the faithful by themselves, if not in all the cases, but at least in the briefer process that he introduces in the reform of the matrimonial process of nullity. "It is thus hoped that the bishop himself, be it of a large or small diocese, stand as sign of the conversion of ecclesiastical structures, and that he does not delegate completely the duty of deciding marriage cases to the offices of his curia. This is especially in the streamlined process for handling cases of clear nullity being established in the present document." (art. III of the introduction of the *motu proprio*). So in the newly introduced briefer process, the bishop himself is the judge.

3.2. When the briefer matrimonial process can be used

Canon 1683 states: "The diocesan bishop himself is competent to judge cases of the nullity of marriage with the briefer process whenever:

1⁰ the petition is proposed by both spouses or by one of them, with the consent of the other;

2⁰ circumstance of things and persons recur, with substantiating testimonies and records, which do not demand a more accurate inquiry or investigation, and which render the nullity manifest."

If the *libellus* is presented jointly by both parties, or by one of them with the other party consenting, it can be considered eligible for the briefer process, provided all the other conditions have been met. Art. 15 of the *Ratio* provides that if the *libellus* was presented to introduce the ordinary process by only one party, but the judicial vicar believes that the case could be considered according to the briefer procedures, he then invites the respondent who has not signed the *libellus* to make known to the tribunal whether he or she intends to take part in the process.

Canon 1676 §1 notes that if the respondent did not co-sign the *libellus* he or she is given 15 days to respond. However, it is important to note that art. 11 §2 of the *Ratio* states that if the respondent makes no response, or remits himself or herself to the justice of the tribunal, the respondent is deemed not to object to the petition. However, two responses from Legislative Texts, October 1, 2015 (Prot. 15138/2015 and 15139/2015) insist that before the summary procedure can be used, the respondent must reply

positively. The presumption of not objecting can be used only for formal trials.[19] The consent of both parties required to initiate this procedure is a condition *sine qua non.* This explicit consent is foremost necessary because the brief process is an exception to the general norm. While the legislator formulated a presumption regarding the disposition of the respondent in art. 11 §2 of the procedural norms, this presumption applies only to the ordinary process and not to the brief process. If the whereabouts of a respondent are unknown, the case cannot be accepted for the briefer process (*processus brevior*).

Moreover, the response from Legislative Texts, dated October 1, 2015 (Prot. No. 15138/2015) provides that if, during the course of the formal trial, both parties agree, the procedure can be changed to the *processus brevior* - in a similar way as the passage from a formal process to the request of a dispensation *super rato* (cf. Can. 1678 §4).

When the petition is presented for the briefer process, it must contain additional elements besides the usual contents given in can. 1504. The *libellus* must carry the circumstances or facts that favour the nullity of the marriage without a detailed investigation. Canon 1684 reads, "The *libellus* introducing the briefer process, in addition to those things enumerated in can. 1504, must: 1° set forth briefly, fully, and clearly the facts on which the petition is based; 2° indicate the proofs, which can be immediately collected by the judge; 3° exhibit the documents, in an attachment, upon which the petition is based."

3.3. Circumstances of things and persons that can allow a case for nullity of marriage to be handled by means of the briefer process (art. 14 §1)

Among the circumstances of things and persons that can allow a case for nullity of marriage to be handled by means of the briefer process are included:

- Defect of faith which can generate simulation of consent or error that determines the will;
- A brief conjugal cohabitation;
- An abortion procured to avoid procreation;
- An obstinate persistence in an extra-conjugal relationship at the time of the wedding or immediately following it;
- The deceitful concealment of sterility, of Grave contagious illness, of Children previous relationship, Incarcerations;
- A cause of marriage completely extraneous to married life: unexpected pregnancy of the woman, physical violence inflicted to extort consent, the defect of the use of reason which is proved by medical documents.

3.4. Judicial vicar fixes the joinder of issue and names instructor and assessor (can. 1685)

The judicial vicar, in accordance with the provisions of canon 1685, names an instructor (i.e. auditor) and an assessor. "The judicial vicar, by the same decree which determines the formula of the doubt, having named an instructor and an assessor, cites all who must take part to a session, which in turn must be held within thirty days

according to can. 1686" (1685). The judicial vicar can designate himself as an instructor (art. 16).

It should be noted that although there are words "where possible" in canon 1673 §4 when referring to the appointment of assessors, when it comes to the briefer procedure, those words are not found. Thus the intervention of an assessor is required in such cases. Again as per the provision of canon 1687 §1, the diocesan bishop after he has received the acts, consults the instructor and the assessor before he issues the sentence.

3.5. Role of the instructor (can. 1686)

The instructor notifies the parties that they are to make available, at least three days prior to the instruction of the case, those specific points upon which the parties or the witnesses are to be questioned, unless they have already been presented along with the *libellus*.

A date is set for hearing. Canon 1686 speaks of a single hearing, in so far as possible. But, of course, this is not for validity. If necessary, there could be more than one session. Canon 1686 reads: "The instructor, insofar as possible, collects the proofs in a single session and establishes a time limit of fifteen days to present the observations in favour of the bond and the defense briefs of the parties, if there are any."

As per the provision of art. 18 §1 of the *Ratio* the parties and their advocates can be present for the examination of other parties and witnesses unless the instructor, on account of circumstances of things and persons, decides to proceed otherwise.

It is not necessary to transcribe *verbatim* the testimony received. The responses of the parties and witnesses are to be rendered in writing by the notary, but in a summary way and only that which refers to the substance of the disputed marriage (art. 18 §2).

After the conclusion of the hearings, canon 1686 provides that a period of fifteen days is then allotted for the presentation of briefs from the defender of the bond and the advocates.

3.6. Diocesan bishop issues the sentence (can. 1687 §1-2)

The acts are then presented to the diocesan bishop, who, first of all, is to consult with the assessor and the instructor, and to consider the observations of the defender of the bond and, if there are any, the defense briefs of the parties.

Art. 19 of the *Ratio* determines who is the "diocesan bishop" in the case of an inter-diocesan tribunal. "If the case is instructed at an inter-diocesan tribunal, the bishop who is to pronounce the sentence is the one of that place according to the competence established in accordance with can. 1672. If there are several, the principle of proximity between the parties and the judge is observed as far as possible."

Whether the diocesan bishop can delegate this responsibility to another person? According to art. III of the introduction of the *Motu proprio* "It is thus hoped that the bishop himself, be it of a large or small diocese, stand as a sign of the conversion of ecclesiastical structures, and that he does not delegate completely the duty of deciding

marriage cases to the offices of his curia. This is especially true in the streamlined process for handling cases of clear nullity being established in the present document." In the opinion of Morrisey, since the bishop was chosen personally for this position, it would not be appropriate for him to delegate to another the actual signing of the sentence. Nevertheless, we can keep in mind that canon 134 §3 is still in effect. This does not mean that he cannot rely on the advice of the judicial vicar and of others – somewhat similar to the procedure used for non-consummation and favour of the faith cases.[20]

If the bishop has the required moral certitude, he can give the decision. Otherwise, he remits the case to the ordinary process, which would call for new proofs or argument. "After he has received the acts, the diocesan bishop, having consulted with the instructor and the assessor, and having considered the observations of the defender of the bond and, if there are any, the defense briefs of the parties, is to issue the sentence if moral certitude about the nullity of marriage is reached. Otherwise, he refers the case to the ordinary method" (can. 1687 §1).

The sentence which is signed by the bishop and certified by the notary is to be relatively brief. It briefly and concisely explains the reasons for the decision. It would not be necessary to have a lengthy *in iure* section (art. 20 §2).

As per the provision of canon 1687 §2, "The full text of the sentence, with the reasons expressed, is to be communicated to the parties as swiftly as possible." Art.

20 §2 precises clearly that the parties are to be notified of the decision within one month of the day of the decision.

3.7. Appeal against the sentence (can. 1687 §3-4)

The parties, the defender of the bond, and, if involved in the case, the promoter of justice, can appeal the decision. Although, ordinarily, there would not be an appeal because the nullity is presumed to be evident, if there is one, it is addressed to the metropolitan, or, in the case of inter-diocesan tribunals, to the court of appeal that was duly established. There is always the right to appeal to the Roman Rota. The third paragraph of canon 1687 states that "An appeal against the sentence of the bishop is made to the metropolitan or to the Roman Rota; if, however, the sentence was rendered by the metropolitan, the appeal is made to the senior suffragan; if against the sentence of another bishop who does not have a superior authority below the Roman Pontiff, appeal is made to the bishop selected by him in a stable manner."

If the appeal seems to be merely dilatory or misleading, then the appeal court can dismiss it for lack of juridical prerequisites. If the appeal court accepts the appeal as there are valid new proofs or arguments, then the appellate court would treat the case in an ordinary method at the second instance. As per the fourth paragraph of canon 1686, "If the appeal clearly appears merely dilatory, the metropolitan or the bishop mentioned in § 3, or the dean of the Roman Rota, is to reject it by his decree at the outset; if the appeal is admitted, however, the case is remitted to the ordinary method at the second level."

IV. The Documentary Process

The documentary process is an abbreviated judicial process that can be employed if a marriage can be shown to be invalid because of an undispensed diriment impediment, or a defect in the legitimate canonical form or the absence of a proper mandate for a proxy standing in for one of the parties at the celebration of marriage through a document that is beyond challenge.[21]

With regard to the documentary process, the *motu proprio* has not effected any change from the existing norms of the Code of Canon Law of 1983. Only the word 'the diocesan bishop' is added in the first canon of this section (can. 1688) to read 'the diocesan bishop or the judicial vicar or a judge designated by him...' These three canons reproduce verbatim the former canons 1686 to 1688.

Can. 1688. After receiving a petition proposed according to the norm of can. 1677, the diocesan bishop or the judicial vicar or a judge designated by him can declare the nullity of a marriage by sentence if a document subject to no contradiction or exception clearly establishes the existence of a diriment impediment or a defect of legitimate form, provided that it is equally certain that no dispensation was given, or establishes the lack of a valid mandate of a proxy. In these cases, the formalities of the ordinary process are omitted except for the citation of the parties and the intervention of the defender of the bond.

Can. 1689 § 1. If the defender of the bond prudently thinks that either the flaws mentioned in can. 1688 or the lack of a dispensation are not certain, the defender of the bond must appeal against the declaration of nullity to the

judge of second instance; the acts must be sent to the appellate judge who must be advised in writing that a documentary process is involved.

§ 2. The party who considers himself or herself aggrieved retains the right of appeal.

Can. 1690. The judge of second instance, with the intervention of the defender of the bond and after having heard the parties, will decide in the same manner as that mentioned in can. 1688 whether the sentence must be confirmed or whether the case must rather proceed according to the ordinary method of law; in the latter event the judge remands the case to the tribunal of first instance.

V. The Papal Rescript *Ex audientia*

The role of the Apostolic See in judging the nullity of the marriage remains intact, though the number of cases to be presented to it might be considerably reduced due to the reform of the matrimonial process. In fact art. VII of the introduction of the *motu proprio* affirms the necessity to retain the practice of lodging appeal to the ordinary tribunal of the Holy See, that expresses and strengthens the bond between the particular churches and the See of Peter. At the same time the article warns against the abuse of such appeal that harms the salvation of souls. It further expresses the need for the adaption of the statutes of the highest appellate court according to the changed norms: "... insofar as necessary, the respective law of the Roman Rota will be adapted as soon as possible to the rules of the reformed process."

Thus Pope Francis issued a rescript *Ex audientia* on 7 December 2015 regarding the implementation of the recent reform to the Church's process for annulment. The rescript is divided into two parts with an introduction. In the introduction Pope acknowledges the jurisdiction of the Roman Rota as the ordinary court of appeal of the Apostolic See and its function of safeguarding the unity of the jurisprudence[22]. The first part clearly reiterates the coming into force of the new laws for the reform of marriage annulment procedure abrogating all the contrary laws or regulations whether they were issued in general, particular or specific form. The second part has six points[23], most dealing with technical matters of legal procedure within the Rota, and with the relationship of Rota to other courts in the Church's legal system.[24]

Conclusion

The objective of the reform of the laws on the procedures for the declaration of nullity of marriage is to be expedient and efficient in handling the matrimonial causes. The matrimonial irregular situation of the faithful affects not only the contractual nature of their matrimonial life but also their spiritual life and thus being deprived of so many spiritual benefits including the holy Eucharist, which the Lord offers abundantly to all the faithful including and especially the sinners. Pope Francis is very particular in his teaching and ecclesiology that the Church being found by the merciful Lord who reveals the merciful face of the Father, must be a merciful mother showing love to all her children, especially those who are far away from her due

to various reasons. The people who are experiencing the difficulties in their marital status – separated, divorced, divorced and remarried – must be of special subjects of the motherly love of the Church. Holy Father specifies once again in the introduction to the rescript *ex audientia* the objective of reform undertaken for the law of procedures for the declaration of nullity of marriage, which is to show mercy and justice to the faithful who experience matrimonial failure, and thus making them to discover themselves to be God's missionaries to their brethren for the good of the institution of the family. Thus the reform in the matrimonial process is effected so that the faithful in difficulties get justice of their marital status quickly and need not unnecessarily wait for long time to exercise and enjoy their full right in the Church.

The reform in no way dilutes the process; it only speeds up the process. It is not to declare all the marriages in difficulties as null and void like granting divorce to all the marriage petitioned. This is to help those whose marriage is in fact invalid, but waiting for a long time for the declaration of such fact by the ecclesiastical court. Diocesan bishops are asked to play a vital role in general in the process, and particularly in the briefer process which is newly introduced. Thus the reform is characterized by the centrality of the diocesan bishops in the sign of collegiality. They help the faithful by their merciful attitude towards justice. However, the bishops cannot disregard the marriage bond, should it be valid, for this would be a betrayal not of the Pope, but of Christ. Indeed, the teacher and master of their sacramental authority is Christ himself who will help them avoid any abuse of it.[25] Basing on the

words of Christ, the Church has always taught the indissolubility of the marriage validly concluded between the baptized persons. In order to uphold and safeguard the dignity of the sacramental character of the marriage, the Church always wanted to handle the nullity case in a juridical rather than administrative way.

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Endnotes

[1] On the same day Pope Francis issued another apostolic letter *motu proprio Mitis Et Misericors Iesus* by which the canons of the Code of canons of the Easter Churches pertaining to cases regarding the nullity of marriage are reformed.

[2] Instruction to be observed by diocesan and interdiocesan tribunals in handling causes of the nullity of marriage, issued by the Pontifical Council for Legislative texts on January 25, 2005.

[3] Synod of Bishops, *Ratio Synodi* (Final Report of the Extraordinary Synod of Bishops on the Family", no. 48.

[4] Francis G. Morrisey, "The *Motu proprio Mitis Iduex Dominus Iesus* "Paper presented to the special seminar held at Saint Paul University, Ottawa on November 19-20, 2015, p. 11.

[5] Francis G. Morrisey, p. 10.

[6] Pio Vito Pinto, "By the will and authority of Pope Francis. Procedural reform pertaining to the declaration of marriage nullity", in *L'Osservatore Romano* (weekly edition in English), 37, 11September 2015, p.4.

[7] Reymond Leo Burke, "The Nullity of Marriage Process as the search for Truth", in *Monitor Ecclesiasticus*, 129 (2014), p. 149.

[8] *Ibid.*

[9] *Ibid.*

[10] Roche Pagé, "Reflections of a Judicial Vicar of an Appeal Tribunal on the Proposed Reform of the Canonical Matri

monial Process", in *The Jurist,* 75 (2015), p. 65.

[11] Pio Vito Pinto, "By the will and authority of Pope Francis. Procedural reform pertaining to the declaration of marriage nullity", p.4.

[12] Roche Pagé, p. 64.

[13] *Ratio Synodi*, no. 48.

[14] Pio Vito Pinto, "By the will and authority of Pope Francis. Procedural reform pertaining to the declaration of marriage nullity", p.4.

[15]http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150927_usa-conferenza-stampa.html. ACCESSED ON 31 MARCH 2016.

[16] Angelo Becciu, "The centralized role of the bishop in marriage processes: An age-old practice", in *L'Osservatore Romano*, 46 (Weekly edition in English), 13 November 2015, p.4.

[17] Pius XII's address to Roman Rota on 29 October 1947, in William H. Woestman (ed.), *Papal Allocutions to the Roman Rota (1939 – 1994)*, Bangalore, Theological publications, 1995, p. 49; John Paul II's address to the Roman Rota on 29 January, 2005, in *Studies in Church Law*, 1 (2005), p. 13.

[18] Pio Vito Pinto, "By the will and authority of Pope Francis. Procedural reform pertaining to the declaration of marriage nullity", p.4.

[19] Francis G. Morrisey, p.18.

[20] Francis G. Morrisey, p. 21.

[21] John P. Beal, "*Mitis Iudex* Canons 1671 – 1682, 1688 – 1691: A Commentary", in *The Jurist*, 75 (2015), pp. 518 – 519.

[22] *Pastor bonus* art. 126 §1.

[23] 1. In marriage annulment cases before the Roman Rota, doubt must be cast according to the long-standing formula: *An constet de matrimonii nullitate, in casu.* 2. There shall be no appeal against the decisions of the Rota in matters of the nullity of sentences or decrees. 3. Appeal for the N.C.P. (*nova causae propositio*) is not permitted before the Roman Rota after one of the parties has contracted a new canonical marriage, unless the decision can be demonstrated to be manifestly unjust. 4. The Dean of the Roman Rota has the authority to dispense with the *Normae Romanae Rotae*

Tribunalis in procedural matters for a serious cause. 5. As wished by the Patriarchs of the Oriental Churches, the territorial tribunals shall have jurisdiction over the *iurium* cases connected with marriage annulment cases submitted to the judgement of the Roman Rota at appeal. 6. The Roman Rota shall decide cases according to the principle of evangelical gratuity, that is, by ex officio patronage, notwithstanding the moral obligation of the more affluent faithful to offer a just contribution towards the causes of the poor.

[24] Pivo Vito Pinto, "On the papal rescript *'ex audientia'* regarding the reform of annulment procedures introduced in August by Francis. Implementing and observing", in *L'Osservatore Romano,* (Weekly edition in English), 51-52, 18-25 December 2015, p. 20.

[25] Pio Vito Pinto, "By the will and authority of Pope Francis. Procedural reform pertaining to the declaration of marriage nullity", p.5.