

# How to determine which process is best for each case?

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## ***Introduction***

We would like to start our presentation dealing with the preliminary steps and choices at the beginning of every case of nullity, having clearly in mind the Bishop's role: 1) personal exercise of judicial power (not only but mainly in the briefer process); 2) establishment of his own tribunal; 3) formation of personnel, both clerics and lay people, to serve the faithful in the judicial ministry.

When necessary, we will refer to some elements that must be explained in detail in the presentation of the ordinary process, the documentary process and the briefer process before the Bishop.

Our aim is to offer all the elements that allow us to lead each case in the most appropriate direction, so that it can be effectively solved, without avoidable delays.

## ***1.- The first step: a service close to the faithful***

Speaking to the participants in the course held in the Roman Rota from the 7th to the 12th of March 2016, the Holy Father reiterated the reasons to reform the process, and mentioned the suffering of the faithful due to the ending of their marriage and often who are often oppressed by doubt as to whether or not it was valid, highlighting the need to simplify the procedure. The Church, lately, finds with undeniable frequency these faithful who are in need for justice and cannot afford delays in its response, always bearing in mind that God's justice is his mercy.<sup>1</sup>

In the introduction of the Rescript "*ex audientia*" on 7 December 2015, on the "first vespers" of the entry into force of the new marriage invalidity process, the Pope reiterated that the two Motu Proprio Apostolic Letters of 15 August 2015 had been "issued to implement justice and mercy on the truth of the bond of those who have experienced marriage failure."<sup>2</sup>

By virtue of his fundamental place in the exercise of justice in his diocese, an inescapable dimension of his ministry of governance, the Bishop, father and judge, icon of

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<sup>1</sup> Cfr. FRANCESCO, Angelus del 15 settembre 2013.

<sup>2</sup> FRANCESCO, Rescriptum ex Audientia SS.mi del 7 dicembre 2015. Introduzione, Quaderni dello Studio Rotale 23 (2016) 45.

Christ-Sacrament,<sup>3</sup> has to offer all the faithful of his diocese, who need this service, the possibility of verifying concretely the validity or not of their marriage bond, for the judicial road. It is not enough to wait for the faithful to present themselves asking for this service. As the Good Shepherd did, it is a question of approaching the faithful to offer this service. The Pope said receiving the participants of the course just mentioned: “Charity and mercy, as well as reflecting on experience, have pushed the Church to become even closer to these children of her, meeting their legitimate desire for justice.”<sup>4</sup>

Therefore, it is not a matter of offering only the service of the diocesan tribunal or of a neighboring diocese, but also a concrete pastoral service that will guide the faithful towards the tribunals and, if it is the case, will accompany them along this painful and not always easy examination.

This is why the first five procedural rules of the *Motu Proprio Mitis Iudex* encourage Bishops to organize a preliminary or pastoral investigation service in their diocese.

The service of justice, it should be well known to all, is by its nature a pastoral service. Its pastorality will shine in a special way if, in addition to what is specifically done in the tribunal, it is possible to organize in the diocese a bridge that unites the area of ordinary pastoral care with that of justice. It is a question of offering, to separated people or couples in crisis, information, counseling, and mediation service, linked with a family ministry, which welcomes them with regard to the preliminary investigation of a properly judicial marriage process.<sup>5</sup>

## **2.- The second step: the choice between the judicial options**

If the first stage points out the *fumus iuris*, so to speak, the sufficient data to consider possible the nullity of marriage, the faithful can present the *libellus* requesting the judicial decision.

If specific special circumstances are verified, two faster options are applicable. If not, the ordinary process applies. Firstly, we will stop to clarify who makes the decision about which of the judicial options is to be chosen in a concrete case, then the conditions necessary to apply the documentary process or the briefer process before the Bishop. In the absence of these special conditions, the ordinary process applies.

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<sup>3</sup> Cfr. TRIBUNALE APOSTOLICO DELLA ROTA ROMANA, Sussidio applicativo del *Motu Proprio Mitis Iudex*, Introduzione, n. 1, p. 9.

<sup>4</sup> FRANCESCO, Mens legislatoris del 12 marzo 2016, Quaderni dello Studio Rotale 23 (2016) 49.

<sup>5</sup> Cfr. FRANCESCO, Esortazione Apostolica *Amoris laetitia*, n. 244, dove si cita anche *Mitis Iudex*, Regole procedurali, artt. 2-3.

## 2.1. Who decides the judicial option

The Faithful must present the *libellus* requesting the declaration of nullity to the competent authority. Taking into account the need to make the tribunals as close as possible to the faithful in need of their service, the titles of competence, indicating the tribunals to which the faithful can appeal by requesting the declaration of nullity of their marriage, have been simplified. Competent tribunals are those (and therefore the bishops, as will be seen shortly), of the place of the marriage celebration; or of the domicile or quasi-domicile of one or both of the parties; or where most of the evidence has been collected.<sup>6</sup> All qualifications are equivalent to each other. It is possible, therefore, to resort to any of them, to choose the tribunal in which to present the case. In any case, taking into account the principle of the proximity of the tribunals to the faithful, to make the treatment of cases more agile it will be appropriate to opt, as far as possible, for the closest tribunal to the parties.<sup>7</sup>

Upon admitting the *libellus*, it is necessary to notify it to the defender of the bond and to the other party, if signed only by one,<sup>8</sup> and then decide which process is to be applied.

Generally it is the Judicial Vicar of the tribunal, whether diocesan or inter-diocesan, to decide on choosing the documentary, the briefer or the ordinary process.<sup>9</sup> In some situations where there is no diocesan tribunal, it is either the Bishop or his Judicial Vicar who decides which process to utilize, although there is no diocesan tribunal in the diocese.

If the Bishop opted for the documentary or briefer process, the judicial vicar cannot oppose his decision, because the judicial vicar has a vicarious power, a vicarious participation in the ordinary power of the bishop who, in his Church “is pastor and head, therefore a judge among the faithful entrusted to him.”<sup>10</sup>

### 2.1.1. The decision to apply the documentary process to a case

If the conditions I will explain later are verified, the diocesan bishop or the competent Vicar of the tribunal, according to canon 1672, is entitled to choose which process to utilize.<sup>11</sup>

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<sup>6</sup> Cfr. can. 1672.

<sup>7</sup> Cfr. Regole procedurali, art. 7 § 1.

<sup>8</sup> Cfr. can. 1676 § 2.

<sup>9</sup> Cfr. cann. 1676 § 1 e 1688.

<sup>10</sup> *Mitis Iudex*, Proemio, III.

<sup>11</sup> Cfr. can. 1688 e *Regole procedurali*, art. 21.

### **2.1.2. The decision to apply the briefer process**

a) Under ideal conditions, the Bishop will have his own diocesan tribunal. In this case, the judicial vicar of the tribunal receives the *libellus* and decides the application of the briefer process and the following steps.

b) If the Bishop does not have a diocesan tribunal but only a judicial Vicar, the latter can receive the *libellus* and, if the necessary conditions are verified, can opt for the briefer process.<sup>12</sup>

c) If the Bishop does not have a judicial Vicar in the diocese, he has the possibility of working alongside a qualified person (possibly cleric, but also a lay person with academic degree and experience) of his own diocese, or a priest incardinated in another diocese, which assists him in coming to the decision to address a cause to the briefer process.<sup>13</sup>

d) If the Bishop does not even have the help of a priest from another diocese, he can remit the trial to a neighboring tribunal, so that the faithful have the opportunity together with their Bishop to decide on their case of nullity with the briefer process<sup>14</sup>.

If there is no Judicial Vicar in the diocese the *libellus* and the request for the briefer process is to be addressed to the Bishop of the diocese.<sup>15</sup>

Taking into account, moreover, that the power of the diocesan bishop is ordinary and proper, while the power of the judicial vicar is ordinary and vicarious,<sup>16</sup> it is clear that the diocesan bishop will always be able to decide for himself the process to apply, without the need to consult the judicial vicar, although normally he will not, as far as possible, make this decision without this consultation.

### **2.1.3. The decision to apply the ordinary process**

This process must be applied whenever the judicial Vicar accepts a *libellus*, and the conditions for using the briefer process do not exist.

Normally the judicial vicar will decide the application of the ordinary process, but the bishop, of whose power the judicial vicar participates vicariously, can do the same (one who has another participate in his power, does not lose the ability to exercise the power of office by the that another participates in his power.

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<sup>12</sup> Cfr. *Sussidio applicativo...*, 2.1., p. 19.

<sup>13</sup> Cfr. *Sussidio applicativo...*, 2.2.-2.3., p. 19.

<sup>14</sup> Cfr. *Sussidio applicativo ...*, 2.4., p. 19.

<sup>15</sup> Cfr. *Sussidio applicativo...*, 2.2.-2.4., p. 19.

<sup>16</sup> Cfr. can. 1673 § 1.

## 2.2. Documentary process necessary requirements

This process can be applied when it is possible to prove the nullity through a document that is not subject to contradiction or exception, which allows the judge to ascertain without doubt the existence of a diriment impediment or a defect of a legitimate form, while establishing with the same certainty that the dispensation was not granted. It can also be applied when the marriage is carried out by a proxy who lacks a valid mandate.<sup>17</sup> The decision to use the documentary process in a determined case belongs to the diocesan bishop or the competent judicial vicar according to canon 1672.<sup>18</sup>

## 2.3. Requirements necessary for the briefer process

The III Extraordinary General Assembly of the Synod of Bishops had requested “a summary process to be started in cases of well-known nullity.”<sup>19</sup> This request was accepted by the Holy Father, establishing the “briefer” process.

This new marriage process,<sup>20</sup> which is added to, but does not overlap or merge with the existing processes (i.e., the judicial and the documentary), is the one that arouses the most curiosity and perhaps concerns in some Bishops, especially because the decision has been entrusted exclusively to them.

It is a suitable tool to respond to the faithful who find themselves in the special circumstance of an evident case of nullity, with easy to find and irrefutable evidence and, at the same time, without the danger of conflict between the parties.<sup>21</sup>

This new process has restored the ancient personal exercise done by the Bishop of his judicial power of governance and involves him in his personal exercise as a judge, in cases where the arguments in favor of nullity are especially evident.<sup>22</sup>

The legislator himself highlights the reason for this choice. Taking into account that in cases of evident nullity it is not necessary to submit the faithful to avoidable delays, but not forgetting the indissolubility of marriage, for this reason he exclusively entrusted the deciding of these cases to the Bishop, “who by virtue of his pastoral office is with Peter the greatest guarantor of Catholic unity in faith and discipline.”<sup>23</sup> In this way, he relied on the Bishops, involving them personally in the judicial response to the faithful in cases of failed marriages in which the nullity is evident.

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<sup>17</sup> Cfr. can. 1688.

<sup>18</sup> Cfr. Regole procedurali, art. 21.

<sup>19</sup> III Assemblea Generale Straordinaria del Sinodo dei Vescovi (5-19 ottobre 2014), Relatio Synodi, n. 48.

<sup>20</sup> Mitis Iudex, art. 5: “Il processo matrimoniale più breve davanti al Vescovo”.

<sup>21</sup> Cfr. il caso preso come esempio dal Papa: FRANCESCO, Mens legislatoris del 12 marzo 2016, in Quaderni dello Studio Rotale 23 (2016) 49.

<sup>22</sup> Cfr. Mitis Iudex, Proemio, IV

<sup>23</sup> Mitis Iudex, Proemio, IV.

a) The first prerequisite for the application of the briefer process is the agreement of both parties, which must always be expressly stated.

There are two ways for the parties to express their agreement. First: the petition is presented by both parties. Second: the petition presented by one party only but with the express consent of the other, both with regard to the same question, as though as far as the application of the briefer process before the Bishop and grounds of nullity for which the validity of the marriage is alleged.

b) In addition to the agreement of the parties to apply the briefer process, the nullity must be necessarily evident, that is “circumstances of facts and persons occur, supported by testimonies or documents, which do not require an investigation or a more accurate instruction, and make the nullity manifest.”

This condition, of course, cannot be understood as if the proof of nullity were already fully included in the *libellus*. It means instead that in the *libellus* the circumstances of facts and persons must be indicated that, proven by the depositions of the parties and witnesses, as well as with the documents presented, make the nullity of the marriage in the case evident and clear.<sup>24</sup>

Normally these circumstances of facts and persons have to be identified in the preliminary investigation, which should allow one to distinguish between the cases in which the possibility of a nullity of the bond is suspected and , those in which the proof is easy and the nullity is evident.

The procedural rules indicate some of these circumstances that can make a nullity evident.<sup>25</sup> These circumstances do not allow an automatic application, as if, in the presence of some of them, the nullity of the marriage could be immediately concluded. Of course, “these circumstances are in fact not new grounds of nullity. It is simply a matter of situations that jurisprudence has long since established as symptomatic elements of invalidity of the nuptial consent, which can be easily proven by testimonies or documents that are readily available.”<sup>26</sup> It is, therefore, a useful list indicative of the cases in which, in the light of the rotal jurisprudence, it is possible to find obvious nullities.

## **Conclusion**

In order to address the cases of matrimonial nullity in the right and most appropriate way, it is not sufficient to have a correct organization of the tribunals, which is however always necessary. We must start with the help and guidance service that

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<sup>24</sup> Mitis Iudex, can. 1683, 2°.

<sup>25</sup> Cfr. Mitis Iudex, Regole procedurali, art. 14 § 1.

<sup>26</sup> Sussidio applicativo..., 3.1.b, p. 32.

supports the faithful from the first moment of trouble, even before reaching the final failure. This requires the commitment of the whole particular Church to offer the service of a unified pastoral care of marriages. We all have to strongly support couples and help them to realize the dream that everyone has at the beginning, to reflect in their lives with the help of grace, the mystery of the union between Christ and the Church.<sup>27</sup>

Once the case has been submitted to the tribunal, the bishop must use the tribunal and vicar of the tribunal but, at the same time, he can't leave the requests of the faithful<sup>28</sup> completely delegated to these offices. He will also have to be ready to carry out his duties, not only judging but also deciding, if it would be the case, the which option to use in the concrete case.

Service to the faithful is very demanding, and this leads us to choose priorities. It can be said, without doubt, that implementing justice and mercy on the “truth of the bond of those who have experienced marriage failure,”<sup>29</sup> and leaning towards “her most fragile children, marked by wounded and lost love” reflects a priority reported by the two last Assemblies of the Synod of Bishops, the Third Extraordinary of October 2014 and the Fourteenth Ordinary of October 2015.<sup>30</sup>

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<sup>27</sup> Cfr. Ef 5, 32.

<sup>28</sup> Cfr. *Mitis Iudex*, Proemio, III.

<sup>29</sup> FRANCESCO, *Rescriptum ex Audientia SS.mi del 7 dicembre 2015*, *Quaderni dello Studio Rotale* 23 (2016) 45.

<sup>30</sup> XIV ASSEMBLEA ORDINARIA DEL SINODO DEI VESCOVI, *Relatio finalis*, n. 55.