Ensuring Justice and Searching for Truth in the Marriage Nullity Process

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Abstract: *Clients have a right to a fair trial. Judges and other officials ensure fairness by observing secrecy (cf. can. 1455, CIC 1983). This is necessary in a penal trial and in some cases also in a contentious trial. Judges are also required to maintain confidentiality concerning the discussion among them in a collegiate tribunal when making their judgement. If they breach the law of secrecy, they are punished with appropriate penalties and also with dismissal from office. The judicial examination of the parties is the core of the process. This phase leads the gathering of that important information which can lead the judge to the truth (art. 177, DC). »The best way of obtaining evidence are the statements of the spouses. The spouses are expected to be sincere and honest when describing their failed marriage.« A judge is obliged to remind the parties and the witnesses about their duty to speak the whole truth and only the truth.*

Keywords: *marriage nullity process, canon law, Church, marriage, truth, judge, defender of the bond, advocate.*

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Introduction

Searching for the truth and ensuring justice must be the guideline for each judge, civil and ecclesiastical, as well as all those involved in court proceedings.[1] This paper will be

[1] When civil courts declare their decisions, people immediately take sides. Some find the decision fair, others do not. An individual's opinion is largely formed by their worldview and beliefs. This is, of course, only a view from the outside, in general, a response to what has been heard. Opinions are divided on whether or how public opinion affects the judge's decision. The fact is that the public closely monitors such legal proceedings with relevant content and reacts accordingly. When there is a belief that the judicial system does not work well, in other words, that it does not act rightfully, the public criticism is all the more justified and necessary.

devoted to the matter of the search for truth in the marriage nullity process.[2] In doing so, it will note the changes that have occurred with Pope Francis' Apostolic Exhortation, *Mitis Iudex Dominus Iesus* (*MIDI*),[3] which enriches the search for truth in the nullity process.

1. The judge and court staff – sincere in the search for the truth (*foro interno*)

The judges in canonical proceedings decide on matters of public welfare or on private issues. Therefore, they should strive for a fair trial, which will be in accordance with regulations.[4] All officials of ecclesiastical courts must take an oath to perform their tasks properly and faithfully (can. 1454, 1983 *CIC*). The oath must be made freely and publicly and it does not need to be renewed unless it was given for a particular case or event, in which case the oath expires when the judgment or conclusion is reached.[5] At the last conclave in 2013, when the elector cardinals were choosing a new pope, they made a public oath of secrecy in the Sistine Chapel and promised that they would act according to the instructions of the Apostolic Constitutions.[6] This oath of the cardinals was broadcast live.

[2] How to arrive at truth is a complex issue, especially today, when the world of virtual technology allows unimaginable manoeuvres. The so-called virtual reality is becoming a part of everyday life, and many do not see the difference between the two. The dividing line is very blurred especially in interpersonal relationships. Young people do not meet at school dances, but communicate with a stranger of dubious identity from their rooms. There are many abuses and disappointments.

[3] The papal document *MIDI* was issued 'Motu Proprio' on 15 August 2015. On 8 September the same year, it was published by the Press Office of the Holy See in its *Bollettino Sala Stampa della Santa Sede*, and in the newspaper *L'Osservatore Romano* a day later in Italian. *MIDI* became effective on 8 December 2015, after it was published in the September issue of the official gazette of the Holy See, *Acta Apostolicae Sedis*: Francis, »Quibus canones Codicis Iuris Canonici de Causis ad Matrimonii nullitatem declarandam reformantur,« in *AAS*, vol. 107, 2015, pp. 958-70.

[4] From time to time, the media reports on finding corruption in economic affairs of State. It is reported as though the people are accustomed to it and it should not be a surprise. Less publicly known and therefore more notable when it occurs, is the corruption in the judiciary; that is, the corruption in those places where justice and truth should be promoted to the highest degree.

[5] Cf. Mario Francesco Pompeda, »De processibus,« in *Commento al Codice di Diritto Canonico*, (Vatican City: Libreria Editrice Vaticana, 2001) p. 858. The oath is an act common in all legal systems around the world. In Slovenia, the most famous public oath is perhaps the one taken by elected judges or other officials in Parliament. Globally, the public are interested in the oaths made by the Heads of State (USA) and monarchs before taking office.

[6] The Cardinals' oath reads: *Et ego, Cardinalis N., spondeo, voveo, ac iuro. Sic me Deus adiuvet et haec Sancta Dei Evangelia, quae manu mea tango* (And I, (name), Cardinal (name), promise, vow and swear. Thus, may God help me and these Holy Gospels which I touch with my hand).

Can. 1454, *CIC* 1983, concerns the oath to be taken by tribunal officials. The instruction *Dignitas Connubii* (*DC*) refers to the tribunal officials as »ministers« and divides them into four groups: a) The Judicial Vicar, the Adjunct Judicial Vicars and other Judges; b) Auditors and Assessors; c) The Defender of the Bond and the Promoter of Justice; d) The Head of the Tribunal Chancery and the other Notaries.[7] All of these must take an oath to carry out the task diligently and correctly. This means that they are to be diligent in continuing to deepen their knowledge of matrimonial and procedural law as well as that they should study the jurisprudence of the Roman Rota (art. 35 §§ 2 and 3). Can. 1454, *CIC* 1983, does not specify before whom the oath must be taken.[8] The 1917 Code is, respectfully, much more specific. Cann. 1621-1622 stipulate that the officials must swear an oath before the Ordinary or before a judge that had chosen them. They could also take the oath before an authorized cleric. Upon taking the oath, they had to utter the name of God, priests had to place a hand on their heart whilst other believers would touch the book of the Gospels.

The task of the judicial vicar is of the utmost importance and under special protection by law. Before the local Ordinary or his delegate, he must personally make a profession of faith according to the formula approved by the Apostolic See (can. 833 5°, *CIC* 1983) and give an oath of fidelity (art. 40, *DC*). The Congregation for the Doctrine of the Faith published the text *Profession of Faith* and *Oath of Fidelity* in 1989.[9] Can. 833, *CIC* 1983, thus determines the profession of faith. The text *Oath of Fidelity* also provides that the expressed formula is to be used by members of the Christian faithful mentioned in can. 833 nn. 5-8, which includes the

[7] Pope Francis has specifically evaluated the role of the bishop as judge in *MIDI*. He is not only the Moderator of the tribunal, but also the judge. In the introduction of the said document, the Pope says: »In order that a teaching of the Second Vatican Council regarding a certain area of great importance finally be put into practice, it has been decided to declare openly that the bishop himself, in the church over which he has been appointed shepherd and head, is by that very fact the judge of those faithful entrusted to his care. 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« (*MIDI*, preface n. III).

[8] At the Maribor Ecclesiastical Court in Slovenia, the text of the oath of judges reads: »I (name) swear that I will carry out the service as a Judge of the said Court diligently, accurately and faithfully according to the regulations of the Code of Canon Law and while doing so I will not look at the persons and their validity, but only on justice, and that I will preserve the secrecy in the limits of the abovementioned regulations. So help me God and these Holy Gospels which I touch with my hand.«

[9] Congregation for the Doctrine of the Faith, »Professio fidei et iusiurandum fidelitatis in suscipiendo officio nomine Ecclesiae exercendo,« in *AAS*, vol. 81, 1989, pp. 104-6.

judicial vicar (previously it applied only to bishops). Both texts came into force on 1 March 1989. Pope St. John Paul II issued the Apostolic Letter Motu Proprio *Ad Tuendam Fidem* on 18 May 1998, by which certain norms are inserted into the *CIC* 1983.[10] Another paragraph was added to can. 750 asserting that everything set forth definitively by the Magisterium of the Church regarding teaching on faith and morals must be firmly accepted and held. Equally, can. 1371 received an appropriate reference to can. 750 §2. The Congregation for the Doctrine of the Faith then issued a Doctrinal Commentary on the Concluding Formula of the *Professio Fidei*, where it is explained that, »In addition, the obligation has been established for some members of the Christian faithful, called to assume particular offices and the community in the name of the Church, to publicly make a profession of faith according to the formula approved by the Apostolic See« (n. 3).[11] The abovementioned comment further explains that the three paragraphs added to the *Profession of Faith* are »intended to better distinguish the order of the truths to which the believer adheres« (n. 4). The second paragraph, which was added to the *Profession of Faith*, has a special significance, as it »includes all those teachings belonging to the dogmatic or moral area« (n. 6). The judicial vicar, as well as other court officials, must devote special attention to understanding and accepting the Church's teaching. Since the work of ecclesiastical courts mostly concerns matrimonial issues, it is necessary that the officials, especially those who have a vital role in litigation, are familiar with the judicial practice of higher courts and that they continuously enhance their learning in order to search for and declare the truth.

In this regard, Pope Benedict XVI, in an address to the officials of the Court of the Roman Rota, stated:

> We might wonder in particular why rotal sentences possess a juridical importance that exceeds the immediate context of the causes in which they are issued. Regardless of the formal value that every ordinary juridical process can attribute to previous proceedings, there is no doubt that in a certain way, its individual decisions concern the whole of society. Indeed,

[10] John Paul II, »Litterae Apostolicae Motu Proprio datae quibus normae quaedam inseruntur in Codice Iuris Canonici et in Codice Canonum Ecclesiarum Orientalium,« in *AAS*, vol. 90, 1998, pp. 457-61. In that apostolic letter, the Pope states: »This same Nicene-Constantinopolitan Creed is contained in the Profession of faith developed by the Congregation for the Doctrine of the Faith, which must be made by specific members of the faithful when they receive an office, that is directly or indirectly related to deeper investigation into the truths of faith and morals, or is united to a particular power in the governance of the Church« (n. 1).

[11] Congregation for the Doctrine of the Faith, »Professio fidei et iusiurandum fidelitatis in suscipiendo officio nomine Ecclesiae exercendo una cum nota doctrinali adnexa,« in *AAS*, vol. 90, 1998, pp. 542-51.

> they continue to determine what all can expect from the tribunals, which undoubtedly influences the tenor of social life. Any legal system must seek to offer solutions in which, as well as the prudential evaluation of individual cases, the same principles and general norms of justice are applied. Only in this way is a trusting atmosphere created in the tribunals' activity and the arbitrary nature of subjective criteria avoided.[12]

In order for a judge (and other officials) to be a guarantor of truth, he (they) must be of good repute[13] (cann. 1420 §4 and 1421 §3, *CIC* 1983). Of course, academic qualifications and skills are important to assist a judge in the search for truth, but qualifications are not sufficient in themselves. Can. 1435 states that the defender of the bond and the promoter of justice are also required to be people of unimpaired reputation. In addition, they are to be »of proven prudence and zeal for justice«.[14] Zeal for justice is a characteristic that should be inherent not only in the defender of the bond and the promoter of justice, but also others professionally involved in court proceedings. Unimpaired reputation is the quality that *CIC* 1983 places above academic qualifications and probably not without significance. Moral norms take precedence over intellectual ones, as people look to the court with confidence that they will find justice, and that the personnel, judges and others, are of high moral standing protects the client's confidence. It goes without saying that unimpaired reputation refers to a life lived in accordance with the Catholic faith, which was already sufficiently and broadly indicated in the texts of the congregation.

2. Means for the provision of justice (*foro externo*)

So far, the focus has been on the internal area of the individual out of concern for the truth. External resources are also important, as they can provide a means to ensure fairness within ecclesiastical courts.

Can. 1456 of the 1983 Code provides that »the judge and all officials of the tribunal are prohibited from accepting any gifts on the occasion of their acting in a trial«. This ban, which was enacted by the legislator, refers not only to the judge but also to all officials of the tribunal. All manner of gifts are prohibited on the occasion of their acting in a trial. This provision is, of course, to ensure that a party with an interest would not be able to affect the final outcome. This cannot happen

[12] Benedict XVI, »Ad omnes participes Tribunalis Romanae Rotae,« in *AAS*, vol. 100, 2008, p. 85.

[13] *integrae famae*

[14] *ac prudentia et iustitiae probati*

if the court officials are truly dedicated to their mission and perform as promised. Officials of the Court must reject any gift.[15]

Clients have a right to a fair trial. Judges and other officials ensure fairness by observing secrecy (cf. can. 1455, *CIC* 1983). This is necessary in a penal trial and in some cases also in a contentious trial. Judges are also required to maintain confidentiality concerning the discussion among them in a collegiate tribunal when making their judgement. If they breach the law of secrecy, they are punished with appropriate penalties[16] and also with dismissal from office. Of course, this provision also applies to other officials of the court. Indeed, they can be punished by the judge (cf. can. 1457). Additionally, can. 1389 of the 1983 Code provides examples of the type of behaviour that can be punished: when someone abuses an ecclesiastical power or function or when, through culpable negligence, someone illegitimately places or omits an act of ecclesiastical power. Such people are to be punished according to the gravity of the act or omission with a just penalty[17] (see also can. 1391 regarding falsifying a public ecclesiastical document). The Bishop Moderator of the tribunal or the *coetus* of Bishops have the duty to protect by appropriate means against negligence, incompetence or abuses and to ensure the correct administration of justice (art. 75 §2, *DC*). However, the provisions concerning punishment are fairly general. It is necessary to interpret them strictly. It would be interesting and useful to know what types of sanctions have been imposed on the offenders. The bishop or judge, respectively, has to exercise right judgement.

The court also guarantees fairness by resolving cases in the order in which they were submitted and entered in the register (cf. can. 1458). Can. 1627 of the 1917 Code did not contain the word 'list', so abuses of that manner perhaps more easily occurred. The courts must have a protocol or a book, in which the submitted cases are entered. This ensures impartiality, since judges take them in turn and are not free to choose lawsuits. They are assigned to them according to the order of entry. Thus, there is a double safeguard: the inscribed order of matters and turns of judges. Of course, this does not mean that, if a case has been sufficiently instructed and is ready for judgment, it has to wait for the preceding, perhaps more difficult cases, to be concluded.[18] If particular exceptional circumstances require that a case is heard more quickly, this can be allowed but a decree must state the reasons for

[15] The Old Testament contains guidelines for a fair trial. In Leviticus, for example, it says: »Be fair, no matter who is on trial. Don't favour either the poor or the rich« (Lev 19, 15).

[16] *congruis poenis*

[17] *iusta poena*

[18] Cf. Mario Francesco Pompeda, op. cit., p. 860. Other examples may affect the order of solving issues, so see also cann. 1491-1500 and 1587-1597, *CIC* 1983.

that decision (cf. can. 1458). The acts that arrive at the court are recorded in »the protocol book« by the notary (art. 61 §2, *DC*). The notary must be *integrae famae et omni suspicione maiores* (can. 483 § 2)[19]. New cases should be stamped with the date of arrival and signed by the notary.[20] In addition, the notary performs many other important functions and is responsible for the order in the court office.

3. The parties in the cause, seeking justice

Proceedings for a judicial declaration of invalidity of marriage usually commence when one of the spouses, the applicant, presents a petition. The other spouse in the process becomes the defendant. In these legal disputes, of course, it is not the case that one side wins and the other loses; this is not the purpose of the procedure. It is about one of the parties believing that the failed marriage may have been void, and so trusting the righteous judgment of the ecclesiastical court. The process necessarily involves the defender of the bond, without whom the process is invalid.

3.1. Spouses (and their witnesses) – the *private* parties in the cause

The right to challenge the validity of the marriage belongs to the spouses and also to the promoter of justice (cf. can. 1674 §1, *CIC* 1983). In the briefer matrimonial process before the Bishop, both spouses can challenge the marriage at the same time, or one with the agreement of the other. The applicants are therefore both spouses and a famous maxim *nemo iudex sine actore* turns into *nemo iudex sine actoribus*, so as to indicate the plurality of applicants. The promoter of justice, with the consent of the spouses, can also request a nullity process that makes use of the briefer process.[21]

This discussion will not address all the procedural acts of the spouses but will list only those aspects which are appropriate to the search for truth. Since it is the difficult duty of a judge to come to the truth, it is most expedient that both spouses take part in a process investigating the possible nullity of a marriage (art. 95 §1, *DC*). Although can. 1476, *CIC* 1983, provides that a party legitimately summoned must respond, the ecclesiastical courts do not have the power to enforce this provision,

[19] Can. 483 §2 *CIC* 1983: The chancellor and notaries must be of unimpaired reputation and above all suspicion. In cases in which the reputation of a priest can be called into question, the notary must be a priest.

[20] Cf. Leon del Amo, »L'ordine da seguire nel giudicare le cause,« in *Codice di Diritto Canonico e leggi complementari* (Rome: Colleti a San Pietro, 2016), p. 976.

[21] Cf. Massimo del Pozzo, *Il processo matrimoniale piu breve davanti al Vescovo* (Rome: EDUSC, 2016), pp. 109-10.

unlike the civil courts, which are able, by force if necessary, to bring a person to court even against his or her will. In the canonical process, a person who does not respond to the summons is declared absent from the trial (can. 1592 §1), which makes the judge's task more difficult.[22] In this context, it is worth mentioning the Sentence of the Tribunal of the Roman Rota *coram* Monier (6 March 2015), in which the judges wrote: »However, in our case we think that the judicial confession of the woman overrides all difficulties or doubts in order to arrive at a solution. In fact, as the Fathers of the *Turnus* wrote in the preceding Rotal sentence of 19 June 2012, the absence of the woman respondent from the trial 'makes the acquisition of confession impossible'.«[23]

The judicial examination of the parties is the core of the process. This phase leads the gathering of that important information that can lead the judge to the truth (art. 177 *DC*). »The best way of obtaining evidence are the statements of the spouses. The spouses are expected to be sincere and honest when describing their failed marriage.«[24] A judge is obliged to remind the parties and the witnesses about their duty to speak the whole truth and only the truth (art. 167 §1, *DC*): »in cases where the public good is at stake, the judge is to administer an oath to the parties to tell the truth or at least to confirm the truth of what they have said unless a grave cause suggests otherwise« (can. 1532; with regard to witnesses, see can. 1562 §2). The judge may administer an oath to them or, if need be, a promise to keep secrecy (art. 167 §3, *DC*). The client's oath itself is not proof that what is said at the hearing is always true, but it is more or less a guarantee of truth, which the judge must assess.[25]

The judicial confession should also be noted. As provided in can. 1535 of the 1983 Code, »a judicial confession is the written or oral assertion of some fact against oneself before a competent judge by any party *concerning the matter of the trial*, whether made spontaneously or while being questioned by the judge«. *DC* adds that, in the marriage nullity process, a judicial confession is a statement »by which a party asserts a fact regarding oneself that is *opposed to the validity of the marriage*«

[22] In this regard, it is useful to note the opinion of the Pontifical Council for Legislative Texts, published in: Sharon A. Euart and John A. Alesandro, *Roman Replies and CLSA Advisory Opinions 2015* (Washington: Canon Law Society of America, 2015), p. 20. A diocesan bishop turned to this authority seeking clarification regarding the status of the cited party in a marriage case who no longer wished to receive communications from the tribunal. The Pontifical Council for Legislative Texts answered that the tribunal, once having declared a party absent, has no obligation to notify that party of the decree of the publication of the acts and has as well no obligation to notify the sentence.

[23] The sentence was published in the journal *Quaderni dello Studio Rotale*, vol. 23, 2016, pp. 133-54.

[24] Sebastijan Valentan, »Izpoved zakoncev in pričevanje njihovih prič: v postopku ničnosti imajo zasliševanja zakoncev in prič osrednje mesto,« in *Cerkev danes*, vol. 50, no. 3, 2016, p. 16.

[25] Cf. Leon del Amo, op. cit., p. 1019.

(art. 179 §2, *DC*). These judicial confessions, however, do not have *plenae probationis*, »unless there are present other elements of proof that *entirely* corroborate them« (can. 1536 §2). Synonymous to the moral certainty that a judge must have in order to declare the marriage null is full proof.[26] Full proof occurs when »any prudent positive doubt of making an error, in law or in fact, is excluded, even if the mere possibility of the contrary remains« (art. 247 §2, *DC*). Moreover, the judge must assess what is the value of the extrajudicial confessions of the parties against the validity of the marriage and other extrajudicial declarations (art. 181, *DC*). Some have argued (in the US, for example) and might still argue that it is possible to achieve moral certainty; that is, prevailing certainty, by a preponderance of proofs. This does not seem right, because a small amount of hard evidence can lead a judge to moral certainty in a way that a lot of evidence that are not strong might not. Quality over quantity is required.[27] Even if a single piece of evidence is sufficient, the judge must review and consider all the material collected and, therefore, also the testimony of witnesses, the opinion of any experts and any other evidence.

3.2. The Defender of the Bond – the *public* party

In these matters, in addition to the spouses, who are private parties, the defender of the bond always participates. He is a public party acting on behalf of the Church. It has already been mentioned that he is an officer of the court. This section will focus on his duties, which he implements to ensure fairness of the process and to be able to come to a sincere knowledge of the truth about marriage.

[26] Cf. Joaquin Llobell, *I processi matrimoniali nella Chiesa* (Rome: EDUSC, 2015), p. 205.

[27] Referring to the judge's role in achieving moral certainty, Pope John Paul II, in his address to the Tribunal of the Roman Rota in 1980, stated: »Consequently, no judge may pass sentence in favour of the nullity of a marriage if he has not first acquired moral certainty of the existence of this nullity. Probability alone is not enough to decide a case. To any compromise in this connection, there could be applied what has wisely been said of other laws concerning marriage; any relaxation contains within it an impelling dynamic: »if the custom obtained, the way is paved for the toleration of divorce in the Church, although covered by another name,« in *AAS*, vol. 72, 1980, p. 176. A university professor and law expert, Mgr. Joaquin Llobell, in a recent article, emphasizes that Pope Francis, with the abolition of the double conforming judgment, has for the first time enshrined in law in *stricto sensu* the necessity of moral certainty (cf. art. 12, *MIDI*) and has, thus, given it formal validity in line with the thinking of his predecessors, Pius XII and St. John Paul II. Even the so-called dominant certainty, which is achieved by a preponderance of evidence, is thus presented as inadequate. The judge should achieve moral certainty. Pope Francis confirmed in *MIDI* what has already been enshrined in art. 274 §2 of *DC*. Moral certainty has been mentioned several times also in *Subsidium* for the application of *MIDI* issued by the Apostolic Tribunal of the Roman Rota. Joaquin Llobell, »Questioni circa l'appello e di giudicato nel nuovo processo matrimoniale,« in *Ephemerides Iuris Canonici*, vol. 56, no. 2, 2016, pp. 405-48.

As the title suggests, it is the defender who defends the bond, respectively, precluding its invalidity.[28] In our time, his mission is all the more important because the marital bond is being greatly devalued in the sense of relativism. As provided in can. 1432 of the 1983 Code, the defender of the bond »is bound by office to propose and explain everything which reasonably can be brought forth *against nullity* or dissolution« (*DC* uses the positive expression »to the protection of the bond«, art. 56 §3).[29] The formulation of *DC* emphasizes the mission of the defender of the bond much better than the wording of the Code; that is, to protect the bond. The defender can never act in favour of the nullity of marriage (art. 56 §5, *DC*); he has no choice other than to defend the validity of the marriage.[30] The defender of the bond must be involved throughout the process. Before the judge either admits or rejects the libellus, it is advisable to hear the defender of the bond (art. 119 §2, *DC*). The defender's opinion at the beginning is not essential, but that opinion might assist the judge in the decision about accepting the case and so is advised. The defender of the bond is »to exhibit [...] the specific points of the matters about which the interrogation of the parties, witnesses or experts is being sought« (art. 164, *DC*), but »the judge's questions cannot be deleted or corrected. If the defender of the bond finds the questions too difficult or inadequate, he can only communicate it to the judge who prepared the questions«.[31] He must ensure that the experts, when they are deemed necessary, are instructed clearly and within their competence and that their expertise is in accordance with Christian anthropology. When such expert opinion is presented, the defender has a duty to point out to the judge anything in the report that speaks in favour of the marriage (cf. art. 56 §4, *DC*). The defender of the bond has the right, after the publication of the acts, to propose other proofs to the judge in order to complete them (art. 236, *DC*). As has been stated, the defender of the bond is present at the very beginning of the cause in order to truly protect the bond of a marriage. The defender's role is also important in the end. After the discussion of the case but before the pronouncement of the sentence, the defender writes observations (art. 245 §2, *DC*). The Code, in

[28] *Nomen est omen*.

[29] The role of the defender of the bond is the subject of addresses by Pope Pius XII and John Paul II to the court of the Holy Roman Rota: Pius XII, »Allocutio ad praelatos auditores ceterosque officiales et administros tribunalis S. Romanae Rotae necnon eiusdem tribunalis advocatos et procuratores,« in *AAS*, vol. 36, 1944, pp. 281-90; John Paul II, »Allocutio ad Romanae Rotae auditores simul cum officialibus et advocatis coram admissos,« in *AAS*, vol. 80, 1988, pp. 1178-85.

[30] Cf. Philippe Hallein, »Nuove facolta per il difensore del vincolo nello svolgimento di un processo di nullita matrimoniale? Uno studio sinottico tra il Codice e l'istruzione Dignitas connubii,« in *Periodica*, vol. 99, 2010, p. 520.

[31] Stanislav Slatinek, »Vloga branilca vezi in izvedenca v ničnostnih zakonskih pravdah,« in *Bogoslovni vestnik*, vol. 71, 2011, p. 114.

can. 1606, provides that the judge, before pronouncing the sentence, must request the observations of the defender of the bond. *DC* is more precise on this matter, since the judge cannot pronounce the sentence without first obtaining the written observations of the defender of the bond.

In the briefer matrimonial process before the bishop, the role of the defender of the bond is even greater, since he alone is defending any bond of marriage that may exist. Spouses who are challenging the validity of their marriage in such proceedings unanimously file the petition due to the facts, which render the nullity manifest (can. 1683 2°, *MIDI*). The new can. 1687 §1 provides that in the briefer process, where the bishop is the judge, he must also consider the observations of the defender of the bond. Speed and concentration of the process do not only require his active and vigilant role, but also the detailed work as well as the treatment of collected documents and interviews. Since an appeal by the spouses against the judgment in such proceedings is most unlikely, it is the defender of the bond who may file the appeal. Such would ultimately be a good sign of ecclesiastical judicial process.[32]

4. The advocates – assisting their clients in finding the truth

The work of advocates is known in all legal systems. The canonical system is no exception. However, their use differs from country to country. They may be mostly used in Italian canonical procedures. In Slovenia, nullity applicants rarely choose a lawyer. Their use and presence depend to some extent on how the institution of advocacy has developed in individual countries and the effect it has had in society (and the Church).

The purpose here is not to present a historical overview but to point out the role of the advocate to assist in searching for truth in the marriage nullity pleadings.

The advocates, the defender of the bond and the promoter of justice can be of exceptional assistance to the judge in the search for truth, both in fact and in law. Therefore, Pope St. John Paul II, in 1980, in his annual address to the officials of the Roman Rota said:

> It is necessary, therefore, to look in the documents for proofs of the alleged facts, and then proceed to a criticism of each of these proofs, comparing it with others, and in such a way that the earnest advice of St. Gregory the Great may be put into practice seriously: »The unconsidered shall not be rashly judged« (*ne temere indiscussa iudicentur*, Moralium, l. 19, c. 25, no. 46, and PL, vol. 76, col. 126). The pleadings of the advocates, the observa-

[32] Cf. Massimo del Pozzo, op. cit., pp. 121-2.

> tions of the defender of the bond, and the possible opinion of the promoter of justice exist for the purpose of helping this delicate and important work. They, too, in carrying out their task, the first in favour of the parties, the second in defence of the bond, the third *in iure inquirendo*, must serve the truth, in order that justice may triumph.[33]

The task of the advocate must therefore be to assist the client in the process in accordance with the client's wishes; that is, to assist the spouse who believes that their marriage was invalidly contracted or, indeed, to assist a spouse if he/she believes the marriage is not invalid.

The 1983 Code specifically devotes cann. 1481-1490 to the roles of advocates and procurators. In each court, to the extent possible,[34] stable advocates are to be appointed (can. 1490). Clients can act on their own behalf in marriage nullity proceedings; that is, they can act without an advocate, but they can also choose one freely.[35] If the judge believes that the client needs an advocate, he himself can appoint one (art. 101 §2, *DC*). As has already been observed in relation to other officials, the advocate must also be of good reputation and a Catholic, if the bishop does not decide otherwise. They must have a doctorate in canon law or be otherwise truly expert and approved by the bishop, unless they have obtained the diploma of Rotal Advocate (art. 105, *DC*). The advocate is obliged to protect the rights of the client and to observe confidentiality (cf. art. 104 §1, *DC*). It is forbidden for the advocate »to betray his duty because of gifts, promises or another reason« (art. 110 3°, *DC*). The advocate must represent the interests of the client who is represented by him/her, whether chosen by that client or allotted to the client, and the advocate must work for truth. Since they are not court officials, the stable advocates are not subordinate to the court and so they are freely able to carry out their functions.[36] If they act in an ecclesiastical court, they must swear an oath before the bishop or judicial vicar, if he is empowered to act by the bishop, that they will justly abide by the provisions of the Code of Canon Law.

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[33] John Paul II, »Ad Tribunalis Sacrae Romanae Rotae Decanum, Prelatos Auditores, Officiales et Advocatos, novo Litibus iudicandis ineunte anno: de veritate iustitiae matre,« in *AAS*, vol. 72, 1980, p. 175.

[34] *quatenus fieri possit*

[35] Concerning the free choice of a lawyer, see also: http://www.delegumtextibus.va/content/dam/testilegislativi/risposte-particolari/cic/Circa%20il%20diritto%20delle%20parti%20di%20designare%20il%20proprio%20Avvocato%20nelle%20cause%20giudiziari.pdf. Accessed 05 April 2017.

[36] Cf. Joaquin Llobell, »I patroni stabili e diritti-doveri degli avvocati,« in *Ius Ecclesiae*, vol. 13, 2001, p. 77.

If a client demands that the advocate in a marriage nullity application should try in every way to prove the invalidity of the marriage, when such appears contrary to the truth, the advocate must refrain from such representation because of moral integrity. During the proceedings, the advocate may request copies of the acts, but they cannot be given to anybody, including the client that is represented (art. 235, *DC*). When the process is at an end, a copy of the sentence is handed to the client or the representative (art. 258 §1, *DC*). »The procurators have a right to acquaint themselves with the final act of the procedure: with the final judgment, which contains the reasons and motives for the decision« (cann. 1615 and 1622 2°, *CIC* 1983; cann. 1298 and 1304 §1 2°, *CCEO*). Only then they can consider the reasonableness of a complaint or any other method of challenging the latter. Although it may seem incredible, even after the promulgation of the 1983 Code, some courts published only the dispositive part of the sentence, without giving any necessary reasons for it (cann. 1611 3°, 1612 §3 and 1622 2°, *CIC* 1983; cann. 1294 3°, 1295 §3 and 1304 §1 2°, *CCEO*).[37]

The changes given effect by *MIDI*, which affected the canons in the 1983 *CIC*, specifically referring to the marriage nullity process, did not affect canons 1481-1490 of the same Code, which address the subject of procurators and advocates. Lawyers who represent the parties are mentioned three times in *MIDI*; in can. 1677 §1 and artt. 4 and 18 of the *Ratio procedendi*. Art. 4 mentions the ability of the spouses themselves or their lawyer, to begin canonical proceedings. This practice already existed in those countries where ecclesiastical courts had engaged such lawyers. The Pope strongly recommends the pre-judicial or pastoral inquiry in parishes or dioceses for those who doubt the validity of their marriage. The advocate may also be involved in this stage. Reasons for an invalid marriage are not always clear and careful consideration should be given prior to filing the request for a nullity investigation. In addition to the other requirements imposed by *MIDI*, the briefer process requires the consent of both parties. It is not always easy to obtain such. The spouse who wants to start such a procedure must also approach the other spouse, who may have many reasons not to cooperate. Again, this could be a task for the advocate, but it should be noted that any sort of coercion, even if the other spouse is not sure, can impact negatively on the outcome of the case. The briefer process allows the advocate to be present at the examination of the parties, the witnesses, and the experts and to inspect the judicial acts and review the documents presented by the parties (can. 1677 §1, *MIDI*). Questions to the parties and witnesses may be proposed and a written opinion may be submitted at the end. In that way, the advocate can make a useful contribution in this decisive stage of the proceedings.

[37] Joaquin Llobell, »*I patroni stabili e diritti-doveri degli avvocati*,« op. cit., p. 77.

To a bishop, who is the judge in the case, but not present at the hearing itself and therefore does not have a direct and immediate relation to the essence of justice, a written opinion of the lawyer can be of great help to achieve the necessary moral certainty in deciding on the matter.[38]

Conclusion

The causes that declare the nullity of a marriage are influenced by many factors. Although the judge, who must decide the matter, has the greatest responsibility, his final decision is still shaped by the defender of the bond, the parties and their witnesses, as well as advocates and others who participate in the process.

In the whole process, the most important element is determining the truth. There are courts in which, in the course of a year, all those marriages for which the judgement was given were declared invalid. Although this is theoretically possible, it raises a doubt that the decisions were properly considered and if the purpose of such litigation was to truly ascertain the truth and not just to please the parties, thus allowing them easier access to the sacraments.

Marriage is a sacred thing and the court entrusted with assessing the invalidity of a marriage must pursue the truth and then declare it. The fact is that not every unfortunate marriage is void. Spouses sometimes find it difficult to accept that fact but, in these matters, the only criterion must be moral certainty. Anything else is unacceptable. All this is beautifully summed up in the thoughts of emeritus Pope Benedict XVI: »*Ubi societas, ibi ius*: every society draws up its own system of justice. *Charity goes beyond justice*, because to love is to give, to offer what is 'mine' to the other; but it never lacks justice, which prompts us to give the other what is 'his', what is due to him by reason of his being or his acting. I cannot 'give' what is mine to the other, without first giving him what pertains to him in justice. If we love others with charity, then first of all we are just towards them«.[39] The precise, careful and conscientious work of everyone who works in the ecclesiastical court will contribute to the perception of the Church as a guarantor of truth and love.

[38] Cf. Paolo Moneta, »Il ruolo dell'avvocato nel nuovo ordinamento processuale,« in *La riforma del processo matrimoniale ad un anno del Motu Proprio Mitis Iudex Dominus Iesus*, (Libreria Editrice Vaticana: Vatican City, 2017), pp. 153-71.

[39] Benedict XVI, »Litterae Encyclicae Caritas in veritate,« in *AAS*, vol. 101, 2009, p. 644.

OSIGURAVANJE PRAVDE I TRAŽENJE ISTINE U POSTUPKU NIŠTAVOSTI ŽENIDBE

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Sažetak: *Klijenti imaju pravo na pravedno suđenje. Suci i ostali službenici osiguravaju pravednost čuvanjem službene tajne (usp. kan. 1455, CIC 1983.). To je nužno u kaznenom suđenju, a u nekim slučajevima i u parničnom suđenju. Suci su također dužni čuvati tajnu u pogledu rasprave među njima u zbornom sudu prilikom donošenja presude. Ako prekrše zakon o čuvanju tajne, kažnjavaju se primjerenim kaznama, kao i otpuštanjem s dužnosti. Sudsko ispitivanje stranaka srž je postupka. Ova faza vodi prikupljanju važnih informacija koje mogu dovesti suca do istine (čl. 177, DC). »Najbolji način dobivanja dokaza izjave su supružnika. Očekuje se da će supružnici biti iskreni i pošteni kada opisuju svoj neuspjeli brak.« Sudac je dužan podsjetiti stranke i svjedoke o njihovoj dužnosti da govore čitavu istinu i samo istinu.*

Ključne riječi: *postupak ništavosti ženidbe, kanonsko pravo, crkva, ženidba, istina, sudac, branitelj veze, odvjetnik.*

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