FROM RENOVATION TO REFORM: A CRITICAL ANALYSIS OF POPE FRANCIS’ REFORM OF THE CANONICAL PROCESS DECLARING THE NULLITY OF MARRIAGE

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Statement of independent work

Hereby I, Yves Mambueni Makiadi, declare and assure that I have composed the present thesis with the title: *From Renovation to Reform: A Critical Analysis of Pope Francis’ reform of the Canonical Process Declaring the Nullity of Marriage*, independently, that I did not use any other sources or tools other than indicated and that I marked those parts of the text derived from the literal content or meaning of other Works – digital media included – by making them known as such by indicating their source(s).

*Nijmegen, 2017.*
“The welfare of the human person and the family, in which one realizes the great part of one’s dignity as well as the good of society itself, demands that the Church today, even more than in the recent past, encircle the matrimonial and familial institution with particular protection”

(Address of Pope John Paul II to the Tribunal of the Roman Rota, January 24, 1981)
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“If the Lord does not build a house in vain do its builders toil…” (Ps.127:1)

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**CHAPTER ONE: DIGNITAS CONNUBII AND THE RENOVATION OF THE 1983 CODE’ S**

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GENERAL INTRODUCTION

The Nullity of marriage within the context of the Catholic Church is still somehow very little known. This limited knowledge is not due to the lack of interest toward the topic, but because many Catholics who find themselves involved in marriage irregularity, which may have nullity as the last solution, still do not know that this possibility exists. And if they do know, many of them still do not clearly know where to start and how to proceed in the appropriate way to establish the truth regarding their marriage situation. Ordinarily marriage is “established through a freely given and received consent between both parties”\(^1\). However, in the context of the Catholic Church, marriage is beforehand a divine institution; a sacrament established by the Lord and entrusted under the good care of the Church\(^2\) to represent in this world a true image of the divine love of God for his people and participation in the loving covenant uniting Christ with the Church\(^3\).

Aware of the many challenges and difficulties faced by this divine institution, whose sacramentality prevent it from being treated as a “private matter that each person can construct at will”\(^4\) and, whose “validity could be judged by the parties themselves with a juridic efficacy that would permit them to enter new marriage”\(^5\), the Church has for sanctuary carefully established a judicial process that is thoroughly carried out through investigations and discussions to assist those who, besides being affected by the situation of failed marriages, end up questioning their true validity. This judicial process is aimed neither to break the existing bond of marriage, nor to favor the Church’s granting of divorce, but to lead to the establishment of the truth about the existence or the non-existence of the sacred bond, which then allows a marriage to be declared valid or null. These investigations are carried out through a judicial process that aims to offer a fair trial to those who question the validity of their celebrated marriage and seek for the help of the Church to establish the truth about their situation.

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\(^1\) See CIC (1983), c.1057, 1-2: “1. The consent of the parties, legitimately manifested between persons qualified by law, makes marriage; no human power is able to supply this consent...”.

\(^2\) Ibid. c. 840: “the sacraments of the New Testament were instituted by Christ the Lord and entrusted to the Church...”


Referring to the process of the elaboration of the above mentioned judicial process and its true motivations, Pope Francis declared:

“Through the century, the Church, having attained a clear awareness of the words of Christ, came to and set forth a deeper understanding of the doctrine of indissolubility of the sacred bond of marriage, developed a system of nullities of matrimonial consent, and put together a judicial process more fitting to the matter so that ecclesiastical discipline might conform more and more to the truth of the faith she was professing”⁶

This judicial process however, underwent renovations and changes as the result of the Church’s commitment and faithfulness to promote and protect the marriage institution in this constantly changing world, while providing to those who experience doubt and trouble regarding their marriages to ascertain the truth about their validity. In the recent years, the ongoing pressure and challenges faced by the marriage institution and its doctrine of indissolubility and, the non-stop increasing number of Church members seeking for the nullity of their failed marriages, became the fundamental reasons behind the move taken by the Church to support, interpret and clarify the supreme law established by the 1917 and 1983 Codes of Canon Law. Through the promulgation of some important documents, the Church has shown her commitment to protect and promote its doctrine and traditions about the Marriage Institution. Two of the recent documents of this kind that are directly connected to the Code of Canon Law and particularly to the norms related to the judicial process declaring the nullity of marriage are: Dignitas Connubii (2005), as an Instruction that renovated the Code, offering an authentic interpretation of the canons related to the nullity process established by the 1983 Code; and The Motu Proprio Mitis Iudex Dominus Iesus (2015), that came to reform the canons of the Code of Canon Law pertaining to cases regarding the nullity of marriage.

It is obvious that both of the abovementioned documents with their novelties and changes, have in different ways affected the structure of the process designed in the 1983 Code to handle cases of marriage nullity. Now, considering the actualization and the authentic interpretation offered by Dignitas Connubii on one side and the legislative reform introduced by Mitis Iudex on the other, both are based on the process for marriage nullity as established by the new Code, we could not resist the temptation to express our concern making these fundamental questions: What did remain from 1983 Code’s established Judicial process for declaring the nullity of marriage?; How did actualization and reform affect the established canonical process? Is the judicial process the only way to handle problems related to nullity?; What is the suitability of the new reform and its introduced changes?; Could another alternative have been possible?; Succinctly, how can we appreciate the nullity process today in respect to the teaching of Vatican II that served as an inspiration for the renewal of the nullity process under the New Code?⁷

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⁷ John Paul PP. II, Discorso Di Giovanni Paolo II In Occasione Dell’Inaugurazione Dell’Anno Giudiziario Della Sacra Rota Romana, gennaio 26,1984, no.2: “…esso [Codice di diritto canonico] rappresenta una guida autorevole per
These are the few questions we are going to answer in this work; starting first by establishing a closer relationship between the nullity process as suggested by the 1983 Code on one hand and the novelties brought by the Dignitas Connubii and the Mitis Iudex on the other, before offering a critical analysis of the actual state of the nullity process as it appears to us following the work of the reform effected by the Motu Proprio Mitis Iudex. This critical analysis will include some simple observations and suggestions, notes on general appreciation of the reformed nullity process and a general conclusion.
O. Conceptual Design

O.1. Research Question

“From the Renovation brought by the Instruction Dignitas Connubii to the Legislative Reform operated by Motu Proprio Mitis Iudex: What did remain of the Judicial Process for Declaring the Nullity of Marriage as originally established by the 1983 Code? In other word, how can we appreciate the canonical nullity process today after its renovation by Dignitas Connubii and the recent reform effected by Mitis Iudex?

O.2. Research Method

We assume that the success of our research depends extensively on the method we have chosen for its realization. Keeping in mind the broadness and the importance of the topic, but the many challenges coming its way, we have chosen the critical method for the discipline of Canon Law as the road map for this research. This method is a library oriented one and it involves the collecting of copious amount of information and many different views that authors have expressed in respect to the topic. Here we bring together two documents which, though not from the same nature, one being a body of executive norms, and the other a body of legislative norms however, both are directly connected to the 1983 Code of Canon Law and specifically to the process declaring the nullity of marriage suggested by the Code; the process that the first document has renovated and that the second has reformed. By bringing together these two documents in respect to the 1983 Code’s established nullity process, our objective is not to establish which of the two is better, but to verify the fidelity of the documents to the tradition and how much novelties they have introduced affect not only the Canon that codifies the teaching of the Church, but as well the process of matrimonial nullity as it appears to us today. For that purpose, we are going to rely on comments, approaches and the analysis of the experts in the matter of canon law regarding the one or the other aspect of the process as they are interpreted by Dignitas Connubii and then reformed by Mitis Iudex.

O.3. Definition of Concepts

Canon Law, as any other law, uses juridic language and concepts which are not only unfamiliar to many people, but also difficult to understand, especially for those who have no connection with law. Being aware of the limitation such juridic language may cause to some of our lectors, particularly those who have no experience in canon law, we thought that it would be of significant help to provide here some of the key concepts we are going to use in our work and their meaning to facilitate the reading and the overall understanding of the work.

-Appeal: is a challenge to a definitive sentence that asks a higher tribunal to look a second (or third) time at the evidence gathered by the previous tribunal and to render a new – and, the appellant hopes, different – sentence” (See J.P. Beal, Canons 1671-1682, 1688-1691: A Commentary, p.508)

-Complaint of Nullity: “is a challenge to a definitive sentence which alleges that the procedure followed by the tribunal in reaching the decision was so defective that the decision should be thrown out or vacated and the complainant granted a new trial...” (See J.P. Beal, p.507)
- **Defender of the bond**: The office of the defender postdates that of the promoter of justice or prosecuting attorney, who is involved in all penal cases and in those contentious cases in which the public welfare is involved (c.1430-1437). (See J.A. Coriden, pp.957-958)

- **Favor Matrimonii**: This is a term that refers to a special favor that the law accords to marriage as established in canon 1060. And to say that marriage enjoys the favor of the law means simply that a legally recognized marriage is presumed to be a valid union...unless the contrary is proven (See J.A. Coriden, p.744)

- **Instruction**: “Instructions clarify the prescripts of laws and elaborate on and determine the methods to be observed in fulfilling them. They are given for the use of those whose duty it is to see that laws are executed and oblige them in the execution of the laws. Those who possess executive power legitimately issue such instructions within the limits of their competence”. (CIC.1983, c.34)

- **Judicial Vicar**: Sometimes refers to as the chief judge, is a priest chosen by the Bishop to judge cases with ordinary power (c.1420)...this is not the same as the episcopal vicars (See J.A. Coriden, p.954).


- **Libellus**: An official document that the petitioner prepares and presents to the tribunal to request the opening of a nullity process. This must clearly indicate in general terms both the law and the facts on which the claim is based as required by canon 1504. (See J.A. Coride, p.971)

- **Motu Proprio**: Papal document issue by the Sovereign Pontiff of his own accord or on his own initiative are given by way of decree. [...] the term motu proprio signifies that he makes it his own (See J.A. Coriden, The Code of Canon Law: A Text and Commentary, Paulist Press, New York/Mahwah, 1985, p.50).

### O.4. Research Sources

The main sources for our research has to do with the 1983 Code of Canon Law to which both documents: Dignitas Connubii(2005) and Mitis Iudex(2015), as already mentioned in the introduction, refer to; may it be to explain and interpret or to reform the canons of the Code. To these three documents is added The New Commentary on the Code of Canon Law to give us a broader view and the deepest understanding of the spirit behind each one of the canons related to the cause of nullity. Moreover, based on the very nature of the topic, the challenges to the outcome and the answers to our many questions come from a number of journals, articles and comments offered on the topic.

This first chapter of our research reflects on the actualization of the nullity process by the instruction Dignitas Connubii which came 22 years later after the promulgation of the 1983 Code. It gives strength to and actualizes the norms related to the process of declaring the nullity of marriage which was established by the new Code. This is the process that the Church has been shaping throughout history to protect and promote the divine institution of marriage entrusted under her pastoral care. The chapter includes historical background and description of Dignitas Connubii, its relation to the canonical nullity process and the relevance of the novelties it has introduced to support the nullity process.

I.1. Historical Background and Description of the Instruction Dignitas Connubii

Ordered by Pope John Paul II in 1996, Dignitas Connubii, as the title indicates is an instruction that defends the dignity of marriage by suggesting a legal procedure to be followed by all ecclesiastical tribunals in cases of the declaration of marriage nullity. The difficulty related to the methodology used by both the Codes of 1917 and 1983, leaving the norms related to the process of nullity scattered throughout the code, particularly within book VII, the complications experienced by our ministers of justice in the exercise of their ministry as consequence of such methodology, and the abuse in applying some of the existing laws, prompted the initiative for the elaboration of such a valuable guide that came to the ecclesiastical stage of tribunals 22 years after the promulgation of the 1983 Code of Canon Law to facilitate the work of those working in the tribunals for the finding and the right implementation of the corresponding norms related to the nullity process. Underlining the connection between Dignitas Connubii and the 1983 Code, Cardinal Julian Herranz convincingly affirms: “...this Instruction does not only reiterate the text of canonical code, but also contains interpretations, explanations of what the laws prescribe and further measure concerning procedures for their execution”

This document, which was prepared and elaborated by the interdicasterial commission composed by the Pontifical Council for Legislative Texts with the cooperation of two tribunals and two Congregations, is based on the norms established by the 1983 Code of Canon Law that “not only translated into canonical language the renewed vision of marriage and family presented by the second Vatican Council, but as well gathered together the legislative doctrinal and enough jurisprudential progress” to regulate cases declaring the nullity of marriage. Different dicasteries within the commission put together their competence and worked for almost ten years on the publication of the instruction Dignitas Connubii that was promulgated on January 25th 2005, “after the draft prepared by the Pontifical Council was carefully studied and approved by the Roman Pontiff, before officially ordering through a

10 See DC. (2005), Prologue p.1.
letter dated November 13th 2004, the publication of the definitive text of the Instruction11 to be observed by Diocesan and Interdiocesan Tribunals in handling causes of Marriage Nullity.

Based on its nature and following the intention of the supreme legislator, the Instruction Dignitas Connubii with its 308 articles organized in 15 titles, is first and essentially dedicated to Judges and other ministers of justice working in the tribunals within the context of the Latin Church. And because of that, the document is defined as “a sort of Vademecum, that will serve as an easy guide to help tribunal officials throughout the universal church to better handle their work in the canonical process of matrimonial nullity…”12.

Far in attempting to present itself as an equivalent to the Code of Canon Law, nor to abrogate the norms related to the nullity process that the new Code has established to assure that questions regarding the validity or nullity of the sacred bond of marriage will always be submitted to a truly judicial trial that the Church has established as “the exercise of its claimed authority over marriage institution”13 to protect the sacramentality of the marital bond, Dignitas Connubii, following on the Supreme legislator’s intention, as clearly explains by Ph. Hallein14 and, based on its function being an instruction15, offered itself to facilitate the consultation and the implementation of the norms of the Code of Canon Law and so, to help judges handle process declaring the nullity of marriage with great respect for the Church jurisprudence and with the required speed.

Dignitas Connubii however, is not the first document of its kind, since it was already preceded by the Instruction Provida Mater16, which was published some decades after the promulgation of the 1917 Code by the Sacred Congregation for the Discipline of the Sacraments and which, in its own time, concretely in 1936, came as a guide to Diocesan judges and other ministers of justice in handling the matrimonial process of nullity, with “the stated intention of providing for the causes of nullity to be instructed and decided more quickly and more securely”17. Those same criteria and method used by Provida Mater were adopted for the elaboration of the Instruction Dignitas Connubii with regards to the renewed procedural laws of the 1983 Code since; following on Pope John Paul II’s intention, “…It was necessary to repeat the positive experience that the similar instruction, Provida Mater, met with in 1936”18 while offering the concrete interpretation of the norms and the actualization of the nullity process established by the 1917 Code.

11 F. Daneels, Storia della Redazione della Dignitas Connubii, in: Periodica de Re Canonica, Vol.104.1, Pontificia Universita Gregoriana, Roma, 2015, pp.204-205.[we have it translated from Italian].
13 See CIC (1983), c.1671 “Marriage cases of the baptized belong to the ecclesiastical judge by proper right”
14 Ph. Hallein, Le defenseur du lien, 95, nota 71 : According to Ph. Hallein, in his letter dated February 4th, 2003 sent to Cardinal Julian Herranz, then President of the Pontifical Council for Legislative Texts, the Pope expressing his intention regarding the nature and characteristic of the expected document, he requested the Pontifical Council “to issue an Explanatory Instruction on current law on matrimonial proceedings, avoiding real and promising innovations of current rules”. Cf. F. Daneels, Op. Cit., p.196, [we have it translated from Italian]
15 See CIC (1983), c.34,1-2.
17 See DC (2005), Prologue, p.2.
Despite its importance however, Dignitas Connubii, the same as Provida Mater, did not come so soon, as we already mentioned here above, since it was necessary to allow some time to pass and learn from the experience of the interpretation and faithful implementation of the norms related to the renewed matrimonial process as established by the new Code\textsuperscript{19}. Dignitas Connubii aimed to help those working in the tribunal to remain focused on the objective truth as the first purpose of the nullity process. It helps bringing clarity to judicial process and ensures that our judicial ministers will always protect the indissolubility of the sacred bond, even while applying the principle of celerity as they handle such a delicate matter. And to reach out such an end, a big responsibility is entrusted to the Diocesan bishops, established as Judges by divine law, to organize well-structured tribunals that count with their active and personal involvement, and to prepare ministers able to carry on such an important service to the Church and to the Christian community, as insistently reminded Pope John Paul II\textsuperscript{20}. How did the instruction contribute to the renovation of the 1983 Code’s established nullity process? is the following point of our reflection.

I.2. Dignitas Connubii and the Handling of the Process Declaring Marriage Nullity

The Instruction Dignitas Connubii which, as the title itself indicates, defends the dignity of marriage and its properties, accomplishes with this particular and very important mission not only by suggesting an actualized legal procedure to be followed by judges from the ecclesiastical tribunals all over the world while handling cases of nullity of marriage, but as well by strengthening some very particular norms and principles that prevent the nullity process from falling into formalism or subjectivism, being “the riches of marriage and the family, which in Christ are transformed into a real process of sanctification and of an apostolate, what this instruction intends to promote in accordance with its specific juridical dimension”\textsuperscript{21}. Rather than to present here the whole structure of the nullity process, which follows on the structure elaborated by the 1983 code, this point will bring out those particular norms and principles Dignitas Connubii strongly insists upon to allow the process declaring the nullity of marriage to be carried out with both the seriousness and the speed required by their very nature, while protecting marriage institution and its properties of unity and indissolubility as required by John Paul II\textsuperscript{22}.

\textsuperscript{19} See DC.(2005), Prologue, p.2.
\textsuperscript{21} J. Herranz, Op. Cit.
\textsuperscript{22} Prot. N.8678/2003: “…Il Santo Padre,...ha disposto che questo Dichastero emani un’apposita Istruzione esplicativa delle medesime...che avrà come fine la tutela dell’ indissolubilità del matrimonio, dovrà costituire un valido ausilio per gli operatori dei tribunal ecclesiastici, semplificando ove opportuno alcune norme processuali”, Cf. F. Daneels, Storia Della Redazione Della Dignitas Connubii, p.197.
I.2.1. Nullity Process and the Search for the Objective Truth

Within the context of the Catholic Church, the matrimonial nullity process, that the Church has been shaping throughout the history, can be conceived as the “Church’s exercise of its claimed authority over marriage institution entrusted under its pastoral care by proper right” (cc.1671-1672). It is the authority that the Church exercises through its Ecclesiastical tribunal in this particular case, to determine whether the marriage was invalidly contracted. This is what is clearly expressed in canon 1671 which simply states: “Marriage cases of the baptized belong to the ecclesiastical judge by proper right”\(^\text{23}\), and then insists “…even if only one party is catholic…”\(^\text{24}\).

Following on this longstanding tradition, and aware of the many challenges that threaten this divine institution, Dignitas Connubii did not only re-affirm the need for the church to continue with the praxis of submitting cases of marriage validity or nullity to a truly judicial trial\(^\text{25}\), but as well deepen the understanding of the corresponding norms to assure that true justice will be done to marriage and to the sacred bond. The finality of the renewed process however, is neither to break the existing bond, about which the church claims authority only in cases of “non-sacramental marriage or ratified and non-consummated marriage (cc.1697-1706)”\(^\text{26}\), nor to modify the established by the code based on the renewed teachings on marriage institution offered by the second Vatican Council(cf.GS 48); but to reaffirm the real need for the establishment of the objective truth by allowing a fair trial to all those who question the validity of their marriage.

The juridical process aims not to grant nullity nor to dissolve the existing bond, but to ascertain the truth that demonstrates whether the marriage was contracted invalidly. And to get there, the instruction has then suggested a canonical process that not only “guarantees to the parties their full right of defense and appeal to the higher grade of trial” (Art.263-289), but as well strengthens and encourages the active participation of the defender of the bond during the process (Art.56,1-6), while preserving the traditional requirement for double conformity of sentences (Art.290-294/c.1682) to assure that the nullity process will always be carried out with the seriousness required by its nature and, that the indissolubility of the sacred bond will not be compromised. Since the big responsibility in the process lies on judges, to assure the impartiality of the process, dignitas connubii insists then on entrusting the nullity process and some questions of exception to a college of judges (Art.45,4/78,1/135,4), while requiring a moral certainty from the judge president before reaching out any final decision (c.1608. art. 247,1), to make sure that “the possibility of the contrary is excluded, even though the absolute possibility of the contrary remains”\(^\text{27}\). The judge who, after a diligent study of the cause, is not able to arrive at this certainty, clearly requires the instruction in its art. 247.5, is to rule that the nullity of marriage has not been proven\(^\text{28}\).

\(^{23}\) See CIC (1983), c.1671.
\(^{25}\) See DC.(2005), Art.3,1-3.
\(^{26}\) See CIC (1983), cc.1697-1706.
\(^{28}\) See DC. (2005), Art.247,5. cf. CIC. c.1608,4 and c.1060.
Commenting on the issue, Monsignor Antoni Stankiewicz convincingly assured that this judicial process “guarantees greater reliability in the ascertainment of the truth relative to the value of every marriage and of the judgement on it, and thus, safeguards the “favor matrimonii” (c.1060) and the “favor indissolubilitatis” that must always inspire the Judicial activity of the Church”.

The problem with the judicial process however, is that majority of Catholics have no canonical formation. They do not only understand what goes on during the judicial process, but they do not even know their own rights when it comes to the judicial process. When they come to the tribunal, they do not come to ask for the truth to be established regarding their situations, but most of the time for the Church to acknowledge their situation and support them in their decision against their previous marriage they accuse of some irregularities. This is a big challenge that the Church has been dealing with, despite finding in the judicial process the more suitable way to deal with cases related to marriage nullity. In this respect, the reaffirmation of the judicial dimension of the process might not solve the whole issue.

Nevertheless, though this juridical practice is sometimes subject to harsh critics by those who would like the question regarding the validity of the marriage to be solved in “solely internal forum, through the so-called nullity of conscience”, however, judicial process is seen by many in the Church as the best way to deal with the issue of the nullity of the marital bond, being the marriage institution “a public union whose nullity cannot be declared by the parties themselves”. In one of his articles on canonical process, Cardinal Burke wrote: “The canonical process of declaration of nullity of marriage by its respect for the right to a judgement in accord with the truth is, therefore, a necessary element of the pastoral charity to be shown to those who allege the nullity of marriage consent”.

I.2.2. Dignitas Connubii and the Celerity of the Nullity Process

In the conclusion of his address on the occasion of the Press Conference for the presentation of the Instruction “Dignitas Connubii”, Mons. Velasio De Paolis praised the new document with these words: “The recently published instruction certainly offers ministers of justice who work in the ecclesiastical tribunals a clear and reliable explanation of the procedure for bringing cases of marital nullity to conclusion, with both the seriousness and the speed required by their very nature”. Now, we all know that any serious issue or decision-making needs some time; particularly when it comes to the contentious matter regarding the nullity of marriage, whose process depends not on one, but on so many factors. The question to be

30 Ibid.
asked here is: how to make the process move along faster without compromising the seriousness required to investigate the causes for marriage nullity?

With Dignitas Connubii, the way to speed up the process while handling seriously such a controversial question, following on the Supreme Legislator’s intention, is obtained not by changing existing norms, which the instruction has no power to do; but by clarifying the spirit of the corresponding norms, while providing Judges with a practical instrument, a guide to facilitate their work. The guide to help them find the corresponding norms without spending too much time and, applying those norms accordingly. That is why Dignitas Connubii was directed to judges and those working in the ecclesiastical tribunals. For Pope Francis, this is “a modest useful vademecum that truly takes the ministers of the tribunals by hand through the unfolding of a process that seeks to be simultaneously both certain and swift”34. Here it is understood that Dignitas Connubii insists on the promotion and protection of these two values: thoroughness and speediness, which are fundamental to the procedure for marriage nullity, and which simply means that “a trial may be neither unduly prolonged for the sake of completeness nor unduly abbreviated for the sake of speed”35. From this point of view, there is no conflict between favor celeritatis and the seriousness of the cases related to the process for declaring marriage nullity. And favor celeritatis already promoted by Paul VI 1971’s “Causas matrimoniales36” and now by “Dignitas Connubii” (Art.72) following on the established by the Code of Canon Law (c.1453) imposes no threat neither to favor matrimonii nor to favor indissolubilitatis.

I.2.3. Dignitas Connubii and the Requirement for Double Conformity of Sentences

Dignitas Connubii continues in the same tradition imposed by Pope Benedict XIV37 almost 300 years ago, requiring mandatory double conformity of affirmative sentences from the first instance to protect the sacred bond of marriage against any wrong jurisprudence and the easy granting of nullity as it was happening in several ecclesiastical tribunals in those years, as well explained Kennedy38. This meant to assure that the procedural law regarding marriage nullity is to be carried out thoroughly to assure the unity of the Church jurisprudence, especially in matter of such great importance, and to avoid compromising the doctrine of indissolubility. This norm imposed by Pope Benedict XIV was then introduced in the Code of Canon law as

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36 Paul PP. VI, Motu Proprio Causas Matrimoniales, March 28, 1971, AAS 63(1971), p.442: “Therefore, while awaiting the full reform of the marriage process...we thought it well to issue certain norms on the constitution of ecclesiastical tribunals and on the judicial process, which will expedite the matrimonial process itself”. In: (https://w2.vatican.va/content/paul-vi/it/motu_proprio/documents/hf_p-vi_motu-proprio_19710328_causas-matrimoniales.html), (Accessed on 16-09-2017).
canon 1682.1\textsuperscript{39}, and later on promoted and interpreted in the article 264 of the Instruction Dignitas Connubii that insists: “A sentence which first declared the nullity of marriage is to be sent \textit{ex officio} to the tribunal of appeal within twenty days of the publication of the sentence...”. While interpreting canon 1682.1, Dignitas Connubii insists on the double conformity of sentences not only as the expression of the ecclesiastical tribunal’s jurisprudence to prevent Judges from rendering sentences which may endanger the validity of marriage, but as well insists that this is the \textit{conditio sine qua non} before the parties will be allowed to enter another marriage; unless there is a situation that prevents them from doing so, as suggested Art. 301,1-2/cf. c.1684,1.\textsuperscript{40}

Dignitas Connubii goes even farther distinguishing two types of conformity: The formal and the substantial, and has taken good care in elaborating a legal procedural for declaring the conformity of sentences. While “the \textit{formal conformity} of sentences is based on the same parties involved, the same marriage as object, the same ground of nullity and the same reasoning of law and facts” (c. 1641,1. Art. 291,1), the \textit{substantial or equivalence conformity} of sentences “occurs when both sentences have the same parties, the same marriage, and the same facts and proofs in common, but the grounds of nullity are different”\textsuperscript{41}. The substantial conformity (Art.291,2) is as well a valid legal procedure and does not contradict paragraph 1 of the c. 1641\textsuperscript{42}, since it is possible and legal for two sentences to use different grounds of invalidity in reaching out the same final decision. The most important here is that both type of conformity contribute deeply and validly to increase the tribunal’s jurisprudence, limiting the possibility of error, while pushing toward the uniformity of tribunal’s decisions. The requirement for double conformity of sentences reveals itself to be one of the strongholds that protect marriage against any false jurisprudence and wrong sentences; and in this way to keep safe the indissolubility of the sacred bond of marriage. Depsite its many advantages however, today, not only the relevance of such norm, but as well its contribution to the celerity of the process is highly questioned; especially by those who see in it a simple formality in the actual well-organized ecclesiastical judicial system and somehow time-consuming practice; as we are going to demonstrate in the following chapter.

\textbf{I.2.4. Dignitas Connubii and the Moral Certainty of the judge}

Under the title Ten (10) of the instruction: “The Pronouncement of the Judge”, Dignitas Connubii clearly states: “In order to declare the nullity of a marriage there is required in the mind of the judge moral certainty of its nullity” (Art.247,1/c. 1608,1.)\textsuperscript{43}. Simply understood as the Judge’s state of mind before taking any decision, moral certainty is a condition that the judge reaches out after a long process involving thorough analysis of parties’ declarations,

\begin{footnotesize}
\textsuperscript{39} See CIC (1983), c.1682.2 : “The sentence which first declared the nullity of marriage, is to be transmitted ex officio to the appellate tribunal within twenty days from the publication of sentence...”.

\textsuperscript{40} See DC. (2005), art. 301,1, Cf. c.1684,1 “...unless this has been prohibited by a vetitum added to the sentence or decree itself or imposed by the ordinary of the place, without prejudice to art.294”


\textsuperscript{42} See CIC (1983): c.1641.1.

\textsuperscript{43} See DC, (2005), art.247,1, Cf. c.1608,1.
\end{footnotesize}
witnesses’ testimonies, documents, facts and proofs that provide the judge with concrete evidence regarding the truth of the matter placed under his competence.\(^{44}\)

In his allocution of 1980 to the Roman Rota, John Paul II referring to the complexity of the problem faced by judges while deciding cases of nullity of marriage, called the process of arriving at moral certainty "[...] the most demanding and delicate phase of the trial.\(^{45}\)" since on her depends the ultimate protection or destruction of the sacred bond.

The Instruction Dignitas Connubii dedicates 61 articles (155-216) to different elements to be considered in this process to the judge’s moral certainty. This is to show on one hand, how big is the judge’s responsibility toward this matter of great importance, which is the Doctrine of marriage and, on the other hand, to make sure that the judge’s last decision will always be based on objective truth; which is neither “an absolute certainty, where every possibility of doubts is excluded, nor subjective certainty based of personal opinion, sentiment or impression of the cause”\(^{46}\); but a certainty that derived from those things that have been carried out and proven in the process.\(^{47}\)

With all these principles to be seriously taken into consideration in cases involving the nullity of marriage, Dignitas Connubii clearly reiterates that the establishment of the nullity process born out of the Church mission and pastoral ministry to serve the salvation of the souls while attending the needs of those wounded by failed marriages, should not be understood as an opening door toward the granting of divorce with the blessing of the Church; but as a suitable way to protect the sacredness of marriage institution, while establishing the truth about the validity or the invalidity of the celebrated marriage. Nullity can be granted, but not without, beforehand, reaching out the conviction and the certainty that “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). The speed, which is required following on the nature of the process (c.1453), is reached out thanks to the judges’ expertise and the seriousness of their commitment. To make sure that the sacred bond will always be protected, Dignitas Connubii insists on one hand on the defender of the bond’s presence and multifunction, and on the other hand on moral certainty as the Substance of the nullity process (art. 247.1). That’s why it clearly established that “the judge who, after a diligent study of the cause, is not able to arrive at this certainty, is to rule that the nullity of the marriage has not been proven...” (Art.247,5).

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\(^{44}\) A. Stankiewicz, Op. Cit.


\(^{46}\) A. Stankiewicz, Op. Cit.

\(^{47}\) See DC (2005), art.247,3, Cf. c.1608,2.
I.3. On the Novelties Introduced by the Instruction Dignitas Connubii and their Relevance to the Nullity Process

The relevance of the novelties introduced by the Instruction Dignitas Connubii in its relation to the Code of Canon Law can be well appreciated not only in the context of the fidelity that the document shows to its nature being an Instruction, but as well on the contribution of those novelties as they are introduced to meet the supreme legislator’s intention and the context of the implementation of the renovated nullity process.

Being an Instruction, Dignitas Connubii, as mentioned above, does not only re-order and unify the canons of the Code, but as well deeply and authentically interprets, explains and actualizes them without modifying them, but giving further measure concerning the procedure for their execution. From this perspective, introduced novelties, while apparently appear to go beyond its competence being an instruction and a body of executive norms, in reality they only respond to an effort to materialize the Supreme Legislator’s deep intention to improve the seriousness and the speediness of the canonical process, while remaining faithful to the existing norms, and so to provide equal opportunity to everyone concerned with nullity process. Rather than to weaken the position of the Code and its jurisprudence, Dignitas Connubii with its changes appears to reinvigorate the Code and particularly the canons related to the process for the declaration of matrimonial nullity by clearly and authentically establishing the real context and the proceeding for the execution of each one of those canons and so to assure that “the nullity process will be carried out with speed and seriousness required by its very nature”\(^ {48}\). Now, whether or not the introduced novelties materialize the need for the celerity of the process, will be proven with the analysis of some of the most salient among them.

I.3.1. On the Needs for Free Counselling of the Parties

Article 113,1 of the instruction Dignitas Connubii expresses the need for every tribunal to have an available office or at least a person available to which/whom everyone concerned with the situation of nullity of marriage may freely approach and without any charge, to ask for any necessary information about their situation and, if necessary, about the possibility and the requirement to initiate a process of nullity of their failed marriage\(^ {49}\). This novelty expresses the pastoral dimension of the document which, like the code itself in its can 1676\(^ {50}\), encourages judges to attempt pastoral ways able to bring about reconciliation between spouses, before initiating any juridical process\(^ {51}\).

Located within the context of the tribunal, this office will be of great help not only for those who are concerned by nullity problem, as they will be provided with counselling and needed information in case they decide to initiate the process; but as well for the judges who

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\(^ {48}\) V. De Paolis, Op. Cit.

\(^ {49}\) See DC. (2005): art.113,1.

\(^ {50}\) See CIC (1983): c.1676 and DC.(2005), art.65,1.

\(^ {51}\) See DC. (2005), art.65,1-2.
will be assured that the petitioner and in some extent, the respondent as well, have a clear idea of what the process implies. And this can even contribute to the celerity of the process in relation to the preparation and introduction of the libellus to initiate the process.

The only danger that the tribunal must avoid, as suggests Peña García, will be to convert this office or service to a kind of previous judgement done without all the guarantees offered by justice or, to appoint for the service a very scrupulous person with a very reduced or completely negative vision of the nullity of marriage, who will end up discouraging people from challenging their marriages; even when they present some evidences of irregularity or invalidity. Moreover, in case the office or the person accomplishes faithfully with the service, then the concerned parties will benefit from some concrete and fundamental information to allow the process to move smoothly; with both parties well informed of their rights and duties.

**1.3.2. On the Possibility for a Common Procurator or Advocate**

The possibility for both parties to name a common procurator or advocate is suggested in the Art.102 of the Instruction Dignitas Connubii. This praxis, even though it does not appear in the 1983 Code however, “is not totally new, since it had been already largely acknowledged by previous doctrines as possibility in cases related to the nullity of marriage” even though in reality many tribunals have been reticent in accepting such practice. The reason behind this attitude, we guess, could be the fear that both parties by presenting the same advocate or procurator for the same cause, might be attempted to arrange everything in the way which might not always favor the sanctity of marriage, but which will probably better help them to get what both are requesting for. To make this praxis more acceptable, suggests Carmen G. Peña, “it will be better to elaborate an appropriate normative process to be followed in this case of common advocate”.

The advantage of this previously rejected possibility, which Dignitas Connubii converted into norm in its article 102, is that it offers some contributions for the celerity of the process by avoiding time-consuming, especially in reference to the notification of the judicial acts to the respondent and the time it takes while waiting for his/her reaction, as required by Art. 126,1-2. Nevertheless, to avoid compromising the validity of marriage and the seriousness of the process by making the possibility for a common advocate to become a norm, Dignitas Connubii promotes and insists on the active presence and role of the defender of the bond to confront both parties and to defend the validity of the bond till the opposite is

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53 See DC. (2005), art.102: “If both parties are seeking a declaration of the nullity of the marriage, they can name for themselves a common procurator or advocate”.


55 Ibid.

This position is expressed by Cardinal Julian Herranz as he insists: “in the case of the process of matrimonial nullity, a specific role has been introduced that enables those characteristics to be maintained when both parties are in agreement in requesting the declaration of nullity: in each case it is the task of the defender of the bond to contribute to all that can be deduced in favor of the existing validity of marital bond”\(^{58}\). This declaration just makes it clear that the agreement of both parties to present common advocate is not a guarantee that marriage has indeed failed and that the nullity must in any case be granted. It is rather to be proven.

While this praxis gives the impression of missing to the principle of what is meant by truly juridical process, for lack of confrontation between two parties however, the role assigned to the defender of the bond as established by Art.56,3.5\(^{59}\) put back on track the normal structure of the process by challenging the one common advocate till he/she proves that the accused marriage was truly null. “Even in cases when the respondent shows no interest to play the adversarial role as comments Wrenn however, the required presence of the defender of the bond to some extent assures that there is at least a proponent and an opponent, a position and an opposition”\(^{60}\).

Moreover, to get full benefice of this praxis, the role and right of the defender of the bond are to be fully respected by judges. Even in case of positive sentence from the first instance, without prejudice to the article 280\(^{61}\), the defender’s right of appeal, as well established by article 279,1-2\(^{62}\), must be observed. Nevertheless, as well notices Peña García, “this praxis, though official, it might not be so common, because of the many difficulties for the parties not only to agree on the object/ground of nullity, but as well to decide to have the same advocate”\(^{63}\).

**I.3.3. On the Introduction of the Equivalent or Substantial Conformity of Sentences**

“Decisions are considered to be equivalently or substantially conforming when, even though they specify and determine the ground of nullity by different names, they are still rooted in the same facts rendering the marriage null and the same proofs”\(^{64}\). This notion is not really new. Born out of two changes in marriage procedures promulgated in the 1936’ Instruction Provida Mater, “the equivalence conformity, the same as the formal conformity, was already put into practice outside Rome by the tribunal of first and second instance, despite the lack of

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\(^{57}\) See DC. (2005), art 56,1-6: “1.In causes of the nullity of marriage the presence of the defender of the bond is always required...3.In every grade of trial, the defender is bound by the obligation to propose any kind of proofs, responses and exceptions that, without prejudice to the truth of the matter, contribute to the protection of the bond...” Cf. c.1432.

\(^{58}\) J. Herranz, Op. Cit.

\(^{59}\) See DC. (2005), art. 56, 3.5.


\(^{61}\) See DC. (2005), art.280,1-2, Cf. cc.1629 and 1643.

\(^{62}\) See DC. (2005), art.279,1-2, Cf. c.1628.


\(^{64}\) See DC. (2005), Art. 291,2.
any express provision in the law permitting it.” Dignitas Connubii however, reinforces the notion, not only by insisting on its application but as well, by promoting equivalence conformity as norm to be acknowledged by tribunals of different grades.

“Historically developed as an application of the juridic principle of canonical equity to simplify the process used in the execution of the sentences in marriage cases,” the equivalent conformity relying on juridic fact, broaden the issue related to the nullity of marriage by giving judges of the appellate tribunal the freedom to base the declaration of nullity on a different ground, if necessary, while reaching out the same conclusion. This notion, comment Foster, “simply recognizes that a marriage is invalid not because of the grounds of invalidity stated in the law (cc.1095-1099 and 1101-1103) but because of the facts proven during the canonical process.”

The equivalent conformity will certainly help in some cases to avoid misunderstanding between the two instances which may lead to an unnecessary time consuming in case of differences of views regarding the ground of nullity. In this respect comments Foster: “The possibility that marriage nullity can be decided on multiple grounds has raised the prospect that courts of second instance and higher have a remedy other than giving a negative decision when they do not agree with the decision of the lower courts on specific grounds.” Moreover, despite of the many advantages it can bring in the process, the equivalent conformity reveals itself very limited because of its restricted application, even in cases of marriage, as it is applicable only in cases involving defect of consent.

I.3.4. On the Role and Functions of the Defender of the Bond

The insistence on the role of the defender of the bond and the requirement of his presence in any stage of the process as emphasizes by the instruction Dignitas Connubii (Art.56,1-2), are expressions of the Church’s commitment, following on the tradition instituted by Benedict XIV’s Dei Miseratione, together with the requirement for double conforming affirmative sentences, to safeguard the sacred bond of marriage institution against the abuses of the concerned parties and the passivity of the tribunals. Following on that tradition, the defender of the bond, insists Dignitas Connubii, is required not only to be present and witness the process, but to be an active part of what is going on during the process. He is to bring out all the arguments and proofs in favor of marriage, until the contrary is proven (Art.56,3,5). And so, the document encourages not only his presence and interventions, but as well his involvement in some decisions making (Arts. 119,2. 238. 306,3. 307,3).

66 Ibid., p.279.
67 Ibid., p.280.
68 Ibid., p.275.
69 See E.J. Kennedy, Op. Cit. p.24: “Another solemnity was introduced by Pope Benedict XIV, viz., the necessity of a special officer, the defensor Matrimoniorum: he had to be present at every marriage trial when the validity of a bond was in question”.

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While on one hand his role and many functions, we believe, contribute to increase the jurisprudence of the tribunal, whose decisions he (the defender of the bond) has the full right to challenge as established by arts.221,1-270 and 279,1-271, on the other hand, there are some authors who believe that these many functions not only may not always help to the right functioning of the tribunal, but as well might not contribute to the celerity of the nullity process wished by all. According to Peña Garcia, these many functions assigned to the defender of bond can become a kind of interference with the principle of equality among the parties72, whenever the defender’s functions push him too far to become a sort of an “assessor”73 to the Judge in matter related to the a) Admission and rejection of the libellus (art.119,2), b) the conclusion of the cases (art.238), c) the granting of the gratuity of process to someone (art.306,1), d) the right to call on the advocate to comply with his/her task (art.307,3), and e) the right to make a recourse against the praeses or ponens’ decision (art.221,1-2).

Even though they seem like interfering with the principle of equality among judges however, all these different functions are accomplished with the right intention, not only to assure the seriousness of the process by requiring an active implication of the defender of the bond during the process, but as well to assure that marriage, with its properties will be always seriously defended and protected. To underline the relevance of this novelty, Pope Francis insisted:

“Among the moments of solicitude manifested in the instruction Dignitas Connubii, I have already seized the opportunity to mention the proper and primary contribution of the defender of the bond in the marriage process […]. The presence of the defender of the bond and the faithful fulfilment of his or her task does not condition the judge. Rather, it allows for and facilitates the impartiality of his[judge] judgement insofar as the judge is faced with arguments both in favour of and contrary to a declaration of nullity of a marriage”74.

Now, it’s up to the defenders of the bond to faithfully and validly comply with such high responsibility of defending, in the name of the Church, the sanctity and the validity of the sacrament of marriage; and to our judges to respect and support the full exercise of such a role as intrinsic part of the process; since all of them serve the same purpose: the establishment of the objective truth regarding the sacred bond of marriage.

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70 See DC. (2005), art.221,1: “1. Unless something else is expressly provided for, an interested party or the defender of the bond can have recourse to the college against a decree of praeses, ponens or auditor which not merely procedural, in order to institute an incidental cause…”.

71 See DC. (2005): art.279,1-2, Cf. c.1628.


74 Francis PP., Address to Congress on “Dignitas Connubii”, January 24, 2015.
I.3.5. On the Role of the Advocate During the Process:

The presence and active role of a qualified advocate in the process as required by the Instruction Dignitas Connubii, does not only result in better defense of the parties, being the advocate an expert in the matter, but as well assures a better development of the process, especially in causes of particular difficulty, as well requires Art.101 of Dignitas Connubii. Without denying the parties' *Ius Postulandi* or the right to defend themselves as well suggested canon 1481,175, Dignitas Connubii insists on the required presence of a well-qualified advocate to accompany the parties, to assure that their rights are respected and as well, to assure the good development of the process; while bringing his/her own expertise in those matters. The instruction makes it a norm for the tribunal to always provide an advocate for the parties, in case they do not yet have their own (art.101,2), and calls on the responsibility of the tribunal to provide qualified advocates willing to offer gratuitous service to the parties (Art.307,1-2). The possibility for the judge to reveal, even under oath, some secret acts to the advocate, as suggests art.23476, underlines the importance of the role assigned to the advocate to protect the *Ius defensionis* of the parties against the famous secret proof of canon 159877. Without the novelty introduced by article 234 of Dignitas Connubii, here above mentioned, the exception suggested by canon 1598,1 of the code and repeated in the article 230 of the instruction Dignitas Connubii, could have been a real violation of the right of defense of the parties as established in article 22978 which repeats the provision of canon 1598.

The big obstacle with this norm is that it is not always easy to keep secret about certain matters, and in this general rule, advocates make no exception. In case the advocate fails to keep these secrets, then the required by canon 234 could turn into a disaster for the process. That is the reason why the same article requires advocates of the parties to take an oath or promise to observe secrecy before they read those acts that have been declared secret by the judge.

I.3.6. On the Role of the College to hear questions of Exception:

While the new code clearly entrusted much of the responsibility during the nullity process to a single Judge, the one presiding over the tribunal, as established in cc.1460,1-3, 1527,279, Dignitas Connubii al contrary, insists on the College of judges to handle different aspects and situations related to matrimonial nullity process such as: The college to hear the recourse against the decree of the praeses or ponens: Art. 45,4/135,4 (c.1513,3). To decide the question

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76 See DC (2005), art.234 : "If the judge thinks that in order to avoid serious danger some act is not to be shown to the parties, the advocates of the parties, having first taken an oath or made a promise to observe secrecy, may study the same act”.
78 See DC (2005), art.229,1-4: “...2.the publication of the acts is carried out by decree of the judge by which the parties and their advocates are given the faculty for examining the acts. (cf. can.1598,1)…”.
79 See CIC (1983), c.1460,1: “ If an exception is proposed against the competence of the judge, that judge must deal with the matter...” and c.1527,2: “If a party insists that a proof rejected by a judge be accepted, the judge is to decide the matter as promptly as possible (expeditissime)”.

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expeditissime if a party insists for the rejected proof to be readmitted: Art.45,5/158,1 (1527,2). To hear the recourse from the defender of the bond in case he/she judges not merely procedural the decree issued by the praeses, ponens or auditor regarding incidental questions: Art.221-222 (c.1589,1-2).

The insistence on the college of judges to handle the mentioned situations will not only increases the Church Jurisprudence whenever judges combine their expertise to decide on the same case, but as well will encourage “major impartiality in the judgement, when it is not the same judge to revoke his own sentence”80, as suggested by can. 1460,1. On the other side, it shows how important is the nullity process to be handled by a college of judges (art.45,1-13) and not by a single judge who may easily fall into temptation of acting out of subjectivism, personal conviction or interest. The college of judges not only assures the Impartiality of judgement but as well, allows the extension of the horizon and a larger appreciation of the situation, which may be a great contribution to the Church’s commitment to promote and protect marriage institution. However, for some reasons, the reservation to the college of judges to treat the above-mentioned situations, may as well slowdown the process, especially as the last decision not only depends on the availability of every one of the judges, but as well to the judges’ openness to reach out a common ground before issuing the last decision. This praxis however, might not affect much the process if it is thus required by the seriousness of the process itself.

1.4. Conclusion

In conclusion to this first chapter we may say that Dignitas Connubii with its imperfection and limitation has materialized the Church’s inspiration and deep concern to persevere in her intention of improving the seriousness and the speediness of the proceedings, by facilitating the access to the trial to all those concerned with nullity cases, and rendering the decision of the tribunal uniform. While suggesting a legal process to be follow by those entrusted with the delicate task of handling the process for marriage nullity, while making it easy for ministers of justice and offering equal opportunity to everyone who is concerned to have a fair trial however, Dignitas Connubii appears to show no weakness in respect to its main finality, which is the effective protection of marriage institution and its properties of unity and indissolubility following on the main purpose of the canonical process. Through its legal interpretation of some of the principles of the supreme law, as mentioned and explained in this chapter, Dignitas Connubii appears to have made it so clear that the purpose of the process is not to grant nullity at any cost, but to establish the objective truth regarding the validity or the invalidity of the celebrated marriage, while protecting the sacred bond of marriage.

The preservation of the juridical nature of the process declaring the nullity of marriage, the requirement for the mandatory double confirming sentences, the introduction of the equivalent conformity and the insistence on the many and active roles of the defender of the bond, all together give to the Instruction Dignitas Connubii a very special character, making of

80 C. Peña García, La Aplicación de la Instrucción Dignitas Connubii en España., p.527.
it one of the most important documents that offer an authentic interpretation of the legislative doctrinal and the jurisprudence contained in the renewed Code in respect to the causes of nullity. This is what Cardinal Julian Herranz meant when he said “: “...this Instruction does not only reiterate the text of canonical code, but also contains interpretations, explanations of what the laws prescribe and further measure concerning procedures for their execution”81. Finally, the speed and seriousness that the process requires because of the nature of the matter, are made possible not by procedural changes of what is suggested by the 1983 Code, but by bringing together the corresponding norms, actualizing the context of their implementation and so, offering to the ministers of tribunals a valuable instrument to guide them in the finding of those corresponding canons and to their correct implementation.

According to the Instruction Dignitas Connubii, the celerity of the process is acquired not by making new laws, but through the expertise of the ministers of justice and the deep commitment in their ministry. With well-prepared justice ministers, to whom the Instruction is first dedicated, the need for celerity required by the nature of nullity process will certainly not compromise neither favor Matrimonii nor favor Indissollubilitatis, which is the finality of the established nullity process. While there may be still questions in respect to the novelties introduced by the document and their possible contribution to the celerity of the process wished by all however, it would not be a contradiction to confirm that with Dignitas Connubii the need for celerity remains subordinated to the seriousness of the process and to the real protection of the indissolubility of the sacred bond.

I.5. General Appreciation

While Dignitas Connubii appears to impose lots of seriousness in handling nullity process, as clearly manifested through changes and introduced novelties however, it is the document’ s direct intention to speed up the process that is called into question by authors like Peña Garcia according to whom, Dignitas Connubii, despite the relevance of its novelties, had not in itself the direct finality to make the nullity process agile, but only to explain the context of the application of the existing norms. The choice which, according to Professor Peña Garcia, clearly manifests the document’s limitation and weaknesses82. This argument, though justifiable however, sounds to be in contradiction with the Supreme Legislator’ s intention and the true spirit of the document. Since are not only those entrusted with the preparation and elaboration of the document who repeatedly insisted on its intention to improve the seriousness and the celerity of the process83, but even recently Pope Francis confirmed such intention; when in his speech delivered on the occasion of the celebration of the 10th

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82 C. Peña García, Derecho a una Justicia Eclesial Rápida…, p.744: “…pese a la relevancia y extensión de esta norma...lo cierto es que la misma no tiene por finalidad directa la de agilizar los procesos de nulidad sino simplemente clarificar como debe aplicarse la ley vigente...el mismo hecho de la elección de una norma administrativa de desarrollo como es la instrucción...indica ya la finalidad y límite de este texto normativo...”
Anniversary of the instruction Dignitas Connubii, the Holy Father, refereeing to the importance of the instruction, clearly insisted:

“...Dignitas Connubii which is not meant for the specialists of the law, but rather for those who work in the local tribunals...is in fact a modest but useful vademecum that truly takes the ministers of the tribunals by hand through the unfolding of a process that seeks to be simultaneously certain and swift”84.

So, to say that the celerity of the process which, according to Dignitas Connubii is to be obtained first and foremost through the expertise of our ministers of justice and their full understanding of the law and the real context of their implementation, while fully supporting the time frame suggested by canon 1453; is to deny Dignitas Connubii of one of the main purposes of its elaboration, as the document shows real commitment to promote the celerity of the nullity process, but without neglecting the required seriousness in the handling of such delicate and important matter.

That tribunals and our justice ministers have missed till now the opportunity to fully implement the new provisions offered by the document that not only took at least nine years of preparation and consultation before its promulgation, but as well benefited from the expertise of so many dicasteries, tribunals and well-known canonists85, clearly help us to understand where is the true source of those many difficulties and problems that are directly experienced in the handling of the nullity process. By keeping with the Supreme Legislator’s intention that is deeply connected to its nature of being an instruction, Dignitas Connubii allowed the canons related to the procedural laws of the nullity of marriage to remain in their full force and thus, to be always cited or referred to whenever the judicial process actualized by the instruction is followed with the purpose of ascertaining the objective truth regarding the sacred bond of marriage86.

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84 Francis PP., Address to Congress on “Dignitas Connubii”, January 24, 2015.
85 F. Daneels, Storia Della Redazione Della Dignitas Connubii, pp.171-208.
CHAPTER TWO: MITIS IUDEX AND ITS LEGISLATIVE REFORM OF THE CANONICAL PROCESS DECLARING THE NULLITY OF MARRIAGE

It was only ten (10) years after the promulgation of the instruction Dignitas Connubii that the new document given Motu Proprio came to the stage to reform the process for marriage nullity established by the 1983 code and renovated by the instruction Dignitas Connubii in 2005, as well explained in the previous chapter. The reform which came when less it was expected and supposedly to renew the mission and the pastoral commitment of the Church, trying to give concrete and satisfactory answers to concrete situations some faithful are going through, effected a significant revision of the procedural law governing cases of marriage nullity by enacting some fundamental changes that go from introducing a new abbreviated process to the breaking with the traditional norm that regulated the canonical process of marriage nullity for around 300 years. This second chapter will tell the historical context and circumstances of the preparation and promulgation of the Motu Proprio Mitis Iudex as well as the fundamental changes it has introduced in the process declaring the nullity of marriage which was till then regulated by the instruction Dignitas Connubii.

II.1. Historical Context and Circumstances

It was August 15th 2015, on the occasion of the Solemnity of the Assumption of the Most Blessed Virgin Mary that the Apostolic Letter given Motu Proprio Mitis Iudex Dominus Iesus was promulgated as “a response to a request made by the majority of bishops who took part to the extraordinary Assembly of the Synod of Bishop on family; as they have requested for a more streamlined and readily accessible judicial process”\(^{87}\).

Came to stage when less expected, the Motu Proprio Mitis Iudex Dominus Iesus, comments Roch Page’ “was received with surprise by many bishops, including, most probably, many of the delegates to the Synod of Bishops, and canon lawyers around the world”\(^{88}\). The surprise according to Page’ was due to the fact that Mitis Iudex was promulgated while “the issue concerning the reform of the nullity process [which Mitis Iudex addresses] was still on the agenda of the Ordinary Assembly of the Synod of Bishops scheduled for October 2015”\(^{89}\).

And even most surprisingly was that unlike other works of reform, Mitis Iudex not only was prepared without much consultations and discussions, but as well it was done in very short time; practically in less than a year; the move that caused some authors and probably many Catholics, including ourselves today, to question the seriousness of the document and its suitability.

The special commission to examine the question was established on August 27, 2014, even though some months have to pass before it came into force on December 8,2015, as well

\(^{87}\) Francis PP., Apostolic Letter Motu Proprio Mitis Iudex, Prologue, p.2.


\(^{89}\) Ibid.“The Motu Proprio Mitis Iudex Dominus Iesus...was received with surprise by many bishops,...Especially so since the issue was still on the agenda of the ordinary Assembly of the synod of bishops in October 2015”.
explains Frans Daneels90. Despite the many controversies surrounding the context of its preparation, in his prologue, Pope Francis assured that “the reform was carried on by people with enough knowledge of the law and known for their pastoral prudence and practical experience; but as well with the collaboration of other experts who, together with the commission, carefully examined the work of the reform before its promulgation”91; an argument which did not prevent many people from asking how such an important work of reform should be realized in so little time. Page’ offered one of the harshest critics as he complained about “the lack of transparency from the [preparatory] commission”92.

Being a legislative text by nature, Mitis Iudex, following on the intention of the supreme legislator, introduced juridical changes which resulted on the reform of the canonical process for marriage nullity; “a reform which, insists the Holy Father, is not to be perceived as granting of Catholic divorce”93; but as an answer to the “need to make the procedure in cases of nullity more accessible and less time consuming, and, if possible, at no expense”94. Talking of the situation and context that motivated the work of reform, Pope Francis wrote:

“the desire for this reform is fed by the great number of Christians faithful who, as they seek to assuage their consciences, are often kept back by the juridical structures of the Church because of physical or moral distance. Thus, the Charity and mercy demand that the Church, like a good mother, be near her children who feel themselves estranged from her”95.

This choice certainly justifies the strong pastoral orientation that characterizes Mitis Iudex and which corresponds to “the great zeal for the salvation of souls that remains the supreme end of the Church’s institution, rules and laws”96. To ensure the truth of the sacred bond, which is the finality of every nullity process, Mitis Iudex like Dignitas Conubii, conserved the juridical dimension of the process, even though the majority of Bishops gathered in the extraordinary Assembly have clearly requested for an administrative solution to the problem. In one of his articles about the ordinary process, John P. Beal referring to Pope Francis’ choice to conserve the juridical dimension of the process, despite the request for a simple administrative process, he comments: “The unparalleled need to safeguard the truth of the sacred bond is cited as the reason for not acceding to many requests for an even more streamlined administrative procedure for marriage cases”97.

90 F. Daneels, A First Approach to the Reform of the Process for the Declaration of Nullity of Marriage”, in: The Jurist, Vol.76, 2016, p. 115.”…The motu proprio Mitis Iudex Dominus Iesus for the Latin Church and the distinct motu proprio for the Oriental Catholic Churches were made public on 8 September 2015 and came into force on December 8,2015”.
92 R. Page’, Op. Cit., pp.607-608: “The special commission established by Pope Francis on August 27,2014 to study the question, worked with no transparency over the few months it took to prepare the substance of the motu proprio”.
93 Ibid.
96 Ibid., p.1.
By ordering the reform of the process of canonical marriage, the supreme pontiff was convinced that “the declaration of nullity, simplified and made agile, without being confused to the granting of divorce, could offer a solution to many more marriage cases than those actually examined by the Church tribunals.”  

That is the way the Church as a good mother, animated by charity and mercy, has chosen to show her closeness to those who are wounded by failed marriage and turn to her for a help. Despite its novelties and the many questions it raises, the aim of the reform insists Pope Francis is “the need to protect the unity of the faith and teaching regarding marriage, the source and center of the Christian family.”

How much protection Mitis Iudex offers today to marriage institution and to the sacred bond of marriage?, will be verified with the following points.

II.2. Mitis Iudex and the New Legislation of the Process Declaring the Nullity of Marriage

The promulgation of Mitis Iudex and its entering into force, given motu proprio, meant the renewal of the canons 1671-1691 of the 1983 code of canon law related to the special process declaring the nullity of marriage as they were preserved in their renovated form by the instruction Dignitas Connubii promulgated ten years earlier. Even though not every single canon from the 1983 code was reformed however, the reform did produce a renewed process to deal with cases of nullity that, following on the Supreme legislator’s intention, has to be carried on with speed, simplicity and at no expense.

II.2.1. Mitis Iudex and the Newly Designed Ordinary Process of Nullity

Animated with pastoral zeal to practice justice without neglecting mercy; and committed to render the nullity process more agile and accessible, Francis’ Motu Proprio presented a new version of the canon 1671-1691 of the 1983 code dedicated to the special process for the declaration of the nullity of marriage whose aim is “not to favor nullity, but the speed and simplicity of the nullity process, while protecting the indissolubility of the bond of marriage.” Since the reform did not change every single canon of the special process of marriage nullity as designed by the new code, we find it convenient with this point to present in a very general way different phases of the nullity process, while trying to underline in every phase, some of the important changes introduced by the reform in respect to the canons pertaining to this particular matter. For question of space, we are not going to talk about the documentary process which is not really affected by the reform, except some of the norms that particularly connect it [the documentary process] to the ordinary process, and which are now reformed or abrogated.

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98 F. Daneels, A First Approach…, p.118.
99 Ibid., “…in fact, charity and mercy require the Church, as a mother, to make herself closer to her children who consider themselves separated from her”.
II.2.1.1. Introductory Phase

To initiate this phase which consists of the preparation, introduction, evaluation and acceptance of the libellus, before establishing the formula of the doubt as suggested by canon 1677,2-3\textsuperscript{102}; being the reform not only directed to the need for fair justice, but as well for strong pastoral purpose\textsuperscript{103}, Mitis Iudex suggests a special pastoral care to be offered to those particularly concerned by the situation of nullity and those who are still searching and requesting for the truth to be established regarding their marriage bond. And for that purpose, in the Artt.2-5 of the ratio procedendi\textsuperscript{104}, the Pope insists on a kind of pre-judicial or pastoral inquiry to be organized in the diocesan or parish level and, to be entrusted to suitable persons with appropriate expertise to welcome and accompany those affected by the situation of failed marriage, providing for them counselling and the needed information for the preparation of the libellus, in case there is a real need to initiate the judicial process. And so, following on this same purpose, and keeping with the Church’s tradition that sees in the judicial process the last resort for the resolution of conflicts, as it was already expressed by the canon 1676 of the new code and the art.65,1 of Dignitas Connubii, the reformed canon 1675 made it clear that “the judge is to accept the case only after he has been informed that the marriage is irreparably failed; when there is no hope for a possible reconciliation of the spouses”\textsuperscript{105}. This pre-judicial or pastoral investigation structure which can be part of one diocese or interdiocesan organization, is not to be confused with the established by art 113,1 of the pre-cited instruction [DC] that speaks of the structure for counselling but within the general structure of the tribunal\textsuperscript{106}; while the artt.2-5 of ratio procedendi require a purely pastoral structure in parish and diocesan level and, out of the context of the tribunal.

The insistence on the need for such pre-judicial or pastoral inquiry could be the reason why the renewed canon 1675 of Mitis Iudex, unlike canon 1676 of the 1983 code and the art. 65,1 of Dignitas Connubii, does not require from the judge another pastoral effort for the reconciliation of the spouses after he has been already informed that there was no longer hope for such reconciliation. On the other hand, we believe that the insistence on such pre-judicial or pastoral inquiry not only responds to the principle of celerity by avoiding time consuming with extra effort for reconciliation after the libellus is already presented to the judge, but as well manifests the pastoral solicitude of the church to promote the dignity of marriage and the need to protect the principle of the indissolubility of the marital bond. Nevertheless, the success of such structure and its positive contribution to the Church’s mission and commitment of protecting the indissolubility of the bond of marriage, will depend on the quality, the expertise, the seriousness and the commitment of those entrusted with such a big pastoral responsibility. That is why article 3 of Mitis Iudex made it clear: “This same inquiry is entrusted to persons deemed suitable by the local ordinary, with the appropriate expertise...”\textsuperscript{107}.

\textsuperscript{102} See CIC (1983): c.1677,2
\textsuperscript{103} See MI. (2015): Ratio Procedendi, (paragraph 1).
\textsuperscript{104} See MI. (2015): Artt.2-5.
\textsuperscript{105} See MI. (2015): c.1675.
\textsuperscript{106} See DC. (2005): art.113.1.
\textsuperscript{107} See MI. (2015), Ratio Procedendi, art. 3.
Since the choice of the competent tribunal (c.1502), according to the suitability of the petitioner, precedes the introduction of the libellus, the renewed canon 1672 of Mitis Iudex, which replaces canon 1673 of the 1983 Code, introduces a change that expands the competence to the tribunal where the petitioner has quasi-domicile to be able to hear the case of marriage nullity. With this expansion, a privilege which was previously limited only for the respondent, “the new norm, comments Beal, gives effect the principle of proximity between the parties and the judge, by giving him/her more freedom to approach the judges and the tribunal geographically close to the place they may be spending substantial part of their lives and with which they can deal more directly.” To avoid the risk of violating the respondent’s right of the defense while applying the new provision of the canon 1672, the tribunal has to take good care in cases in which the respondent lives in territory other than of the petitioner. And for that, good communication and sincere cooperation have to be established between tribunals located in different territories.

II.2.1.2. Instructory Phase

From the normal process as established by canon 124,3-5 of the 1983 code and Art. 118, 1-2 of the Instruction Dignitas Connubii, it is the responsibility of the judicial vicar, after having received the libellus, to establish at once the tribunal consisting of judges or single judge, defender of the bond, promotor of justice and notary to examine the competence of the petitioner and the validity of the libellus to be admitted for the case; before the praeses or the single judge will then proceed with the citation of the respondent and others who have to take part in the trial and the elaboration of the formula of doubt. In the new canon 1676 of Mitis Iudex all these functions are entrusted to the judicial vicar who is charged with the power “to determine the competence of the tribunal to hear the case, accept or reject the libellus, to cite the other parties to the trial, to join the issues, to decide whether the case is to be handled through the ordinary process or the abbreviated process before the bishop.” It is only after completing all these operations that the judicial vicar, would then appoint judges and needed officials to hear and decide the case. Beside the expansion of the competence accorded to the tribunal where the petitioner has quasi-domicile, canon 1672 of the reform, following on the aim of making the process shorter and simpler while avoiding time consuming, “eliminates the requirement of contacts with the respondents and their judicial vicar prior to accepting cases as the forum of the petitioner or of the majority of proofs” as it was established by canon 1673,3-4 of the 1983 code.

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110 See CIC (1983), c.1425, 3-5.
111 See DC. (2005), art. 118, 1-2.
113 See Mi. (2015), c.1676,1-5.
114 J.P. Beal, The Ordinary Process according to Mitis Iudex, p.179.
115 J.P. Beal, Mitis Iudex...: A Commentary, p.476.
While on one hand the new canon 1672 contributes to shortening the process and making it simpler however, on the other hand the elimination of the requirement of a possible objection from the respondent, previous to initiate the case, about the competence of the tribunal chosen by the petitioner as suggested by canon 1673.4, may give some advantages to the petitioner by choosing a tribunal whose favor he/she can easily enjoy, the choice which may turn on the disadvantage of the respondent who will have no option than to adhere the choice of the tribunal made by the petitioner. The new favor accorded to the petitioner as part of the changes effected by Mitis Iudex in this point, may result in a real violation of the right of defense of the respondent as we already mentioned it above. In this respect suggests Beal: “With the disappearance of this formality, tribunals will have to take care that allowing a forum convenient for the petitioner does not have the inadvertent effect of riding roughshod over the rights of the respondent”\(^{117}\).

While insisting on the appointment of the judicial vicar with vicarious judicial power to assist the ordinary in the handling of processes, canon 1673 of the reform kept it clear that unless there is an exception, the diocesan bishop who, in virtue of his office “enjoys the legislative, the executive and the judicial power, is the first judge within his diocese to judge cases of nullity and marriage”\(^{118}\); and he does not really need a canonical degree to exercise his judicial power, as comments Beal\(^{119}\). This requirement though not new however, has something special to offer. What is special with this renewed canon 1673 is the emphasis that Mitis Iudex puts on the role of the ordinary bishop as the first judge in the diocesan level. Unlike Dignitas Connubii that insists on “diocesan bishop to exercise his judicial power through the judicial vicar, unless special causes demand it”\(^{120}\), Mitis Iudex encourages the diocesan bishop to have much personal involvement in the day to day operation of the tribunal; especially when dealing with cases of marriage and nullity. This personal involvement is much encouraged especially in cases of abbreviated process introduced by Mitis Iudex in its canons 1683-1687. This abbreviated process, as we are going to present it further, is considered as one of the greatest innovations of this work of reform.

Another novelty brought by this renewed canon 1673 within the instructory phase of the process is with respect to the organization of the collegiate tribunal. According to paragraph 3of this same renewed canon, a college of judges can now be composed of a presiding cleric judge and two other judges who may be both lay persons\(^{121}\). The new canon expands the number of laypersons from 1, as it has been till recently allowed, following on the authorization given by Paul VI\(^{122}\), to 2; while insisting on the third member and the one

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\(^{118}\) See MI. (2015), c.1673.


\(^{120}\) See DC. (2005), art.22,1-2: “1.In each diocese the judge of first instance for causes of nullity of marriage not expressly excepted by the law is the diocesan bishop, who can exercise judicial power personally or through others, in accordance with the law (cf.c.1419,1); 2.Nonethless, it is expedient that, unless special causes demand it, he not do this personally”.

\(^{121}\) See MI. (2015), c.1673,3: “...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”.

\(^{122}\) Paul PP. VI, motu proprio *Causas matrimoniales*, March 28,1971, n.5,1, AAS 63 (1971) p.443; “If it is impossible [...] to form a college of three clerical judges, the Episcopal Conference is given the faculty of permitting in the first and the second instance the setting up of a college composed of two clerics and one layman” in:
presiding to be a cleric. And in case of impossibility to organize a collegiate tribunal, contrary to canon 1425,4\textsuperscript{123} that requires a special permission from the bishops’ conference, new canon 1673,4\textsuperscript{124} of mitis Iudex entrusts full power to the diocesan bishop to decide about the competent single judge to be entrusted with such responsibility.

\textbf{II.2.1.3. The Probatory Phase}

Even though Mitis Iudex did not introduce many changes in this phase in respect to the norms that regulate the gathering of evidences however, it did significantly modify the norms governing the weight to be given especially to the juridical confession and declaration of the parties and the testimony of a single witness. While canon 1536,2 of the 1983 code clearly “abstains to accord the force of full proof to the parties juridical confession and declaration, unless supported by other elements that thoroughly corroborate them”\textsuperscript{125} however, in the paragraph one (1) of the reformed canon 1678 that replaces the pre-cited canon (1536,2) and Art.180,1-2 of the instruction Dignitas Connubii, Mitis Iudex reversed the formula by requiring “the force of full proof for the juridical confession and the declaration of the parties, unless there are elements that weaken them”\textsuperscript{126}. This very significant change, comments Beal, will certainly “eliminate the longtime existing awkward conflict situation in which petitioners, even when convinced that their marriages were invalid however, they were unable to prove it in the external forum because of the existing norms that attributed no force of full proof to their declarations or because of a lack of credible witnesses to corroborate their declarations”\textsuperscript{127}.

The renovation brought by the new canon 1678 of Mitis Iudex does not only favor the parties, but also the witness by requiring the force of full proof to be attributed to the testimony of one single witness in case it is given by a qualified witness. While canon 1573 of the 1983 code and Art.202 of Dignitas Connubii required some conditions before the testimony of a single witness can be given a full credit, the new canon 1678,2 simply establishes that “the testimony of one witness can produce full proof if it concerns a qualified witness…and if the circumstances of things and persons suggest it”\textsuperscript{128}.

While this new norm (c.1678) may open a large possibility for parties to be able to prove the invalidity of their marriage and avoid time consuming in case there are not enough witnesses available to corroborate the parties’ declarations however, a big responsibility lies on the judge’s moral certainty to determine how credible is the parties’ declaration and how qualified is the single witness; a task not so easy to accomplish. Since the reform does not

\textsuperscript{123} See CIC(1983): c.1425,4.


\textsuperscript{125} See CIC(1983), c.1536,2.

\textsuperscript{126} See MI.(2015), c.1678,2: “In cases of nullity of marriage, a judicial confession and the declarations of the parties, possibly supported by witnesses to the credibility of the parties, can have the force of full proof...”.

\textsuperscript{127} J.P. Beal, The Ordinary process according to Mitis Iudex, p.187.

\textsuperscript{128} See MI.(2015), c. 1678,2.
offer specific criteria to be applied in case of the evaluation of a single witness, it is obvious that despite the changes introduced however, the new canon can still rely on the canon 1572 of the 1983 and Art.201 of Dignitas Connubii that took care to specify criteria to be used in evaluating whether the single witness is worthy or not of full credence.129

II.2.1.4. The Decisory Phase

After the case is sufficiently instructed and fully supported by necessary proofs, facts and clarifications as recommended by canon 1606, and after having requested the observation of the promotor of justice and the defender of the bond and, if there is no complaint from the parties and from the defender of the bond, the Judge president can pronounce the last sentence immediately.130 One of the most significant changes introduced by Mitis Iudex in respect to the decisory phase of the process is the elimination of the traditional mandatory requirement for double conforming affirmative sentences, as the new canon 1679 simply establishes: “The sentence that first declared the nullity of marriage, once the term determined by cann. 1630-1633 have passed, becomes executive”131. This new canon abrogates canon 1682,1 of the 1983 code and the Art.264 of the instruction Dignitas Connubii that made it mandatory the review of first instance affirmative decisions, “requiring every positive sentence from the first instance to be transmitted ex officio to the appellate tribunal for its confirmation before the parties can be allowed to enter new marriage in the Church”132.

According to the new canon 1679, there is no need for the automatic transfer of the sentence from the first instance tribunal to the appellate tribunal. The affirmative sentence from the first instance can be transferred to the appellate tribunal only in case there is an appeal or complaint of nullity, as suggests can 1680,1. In case there is no appeal neither from the respondent nor from the defender of the bond to the higher instance, once “the peremptory period of fifteen useful days has elapsed”, the tribunal that rendered the sentence will simply have to notify the parties that they were free to enter new canonical marriage if they wish to; unless there are some impediments that stop them from doing so; as clearly establishes canon 1682,1134 of the reformed process, which repeats canon 1684,1 of the 1983 Code and the Art. 301,1 of the instruction Dignitas Connubii. This change, together with the abbreviated process, is considered one of the biggest innovations since it has abrogated a disposition of the law that regulated the procedural law governing marriage nullity cases for almost 300 years since its establishment by Pope Benedict XIV’s 1741 constitution Dei Miseratione.

129 See CIC(1983), c.1572.
130 See CIC(1983), c.1606.
131 See MI.(2015), c.1679.
132 See CIC(1983), c.1682,1-2: “1. the sentence which first declare the nullity of the marriage is to be transmitted ex officio to the appellate tribunal ...”.
133 See CIC (1983), c.1630,1.
134 See MI. (2015), c.1682,1.
The elimination of the double conforming positive sentences met largely with the reform’s spirit and the aim of rendering the process agile and simple, by avoiding the extra few months it takes in the appellate tribunal for the confirmation of the first instance sentence or some more months up to some years whenever the case is readmitted to the ordinary process.\textsuperscript{135} Introduced in a context totally different from our own, where justice suffered lots of abuses because of lack of expertise and true commitment from tribunal’s ministers; for the majority of the 2014’s synod fathers this disposition was seen now as pure formalism, and therefore no longer necessary in this new context in which the Church’s judicial system is far better organized than it was in the time Pope Benedict XIV decided to introduce this disposition.

Another element that contributed to the derogation of the mandatory required double conforming of affirmative sentences, as largely explains J. Llobell in one of his many articles, was the high number of positive sentences from the first instance that were confirmed by the appellate tribunal\textsuperscript{136}; be it by a decree or by new sentence, which reinforced the idea that the norm “has been superfluous and thus not necessary for protecting the indissolubility of marriage”\textsuperscript{137}. While the big majority required for its elimination however, we are informed that this choice was objected by some of the 2014’s synod fathers as they feared that the elimination “would not guarantee a reliable judgement which reached the truth about the validity of the marriage bond”\textsuperscript{138}.

Despite the suppression of the mandatory double conforming affirmative sentences however, the reform has kept the right for the aggrieved party, the defender of the bond and the promotor of justice to proceed with the appeal to the higher instance in case there is a real need to do so (c.1680,1)\textsuperscript{139}. About the issue of the appeal, Mitis Iudex did not introduce much changes in relation to the established by the new code, a part from requiring all the situation of appeal, except for cases in which the appeal appear merely dilatory (c.1680.2)\textsuperscript{140}, to be dealt with ordinary process (c.1680,3). After the judge of the appellate tribunal, based on his moral certainty and the observation of the defender of the bond and other members of the tribunal reaches out the conclusion of the trial and the final sentence, this will have to be written down and signed by the three judges that composed the appellate tribunal and be published following on the established by canon 1615\textsuperscript{141}.

\textsuperscript{135} J.P. Beal, \textit{Mitis Iudex...: A Commentary}, p.505: “Depending on the caseloads and relative efficiency of appellate tribunals, the previous system of mandatory review of affirmative first instance decision added several months to several years to the duration of the marriage nullity process”.


\textsuperscript{138} Synod of Bishops, XIV Ordinary General Assembly: at no.47.

\textsuperscript{139} See Mi. (2015), c.180,1: “The party who considers himself aggrieved, as well as the promotor of justice and the defender of the bond, have the right to introduce a complaint of nullity of the judgment or appeal against the sentence, according to cann. 1619-1640”.

\textsuperscript{140} Ibid. c.1680,2: “...After this time period has passed, if the appeal clearly appears merely dilatory, the collegiate tribunal confirms the sentence of the prior instance by decree”.

\textsuperscript{141} See CIC(1983), c.1615.
II.2.2. *Mitis Iudex* and the Abbreviated Process before the Bishop

The Abbreviated Process constitutes one of the greatest renovations introduced by the motu proprio *Mitis Iudex*. This novelty that came as a concrete answer to one of the proposals advanced by the 2014’s synod fathers “who requested for a simple process to be used in case where nullity is clearly evident”\(^{142}\), is instituted as a new way for dealing with the process declaring the nullity of marriage in addition to the ordinary and the documentary process as they are found in the 1983 Code. Exclusively placed under the diocesan bishop’s authority who is designated as the competent judge, as well establishes canon 1683\(^{143}\), *processus brevior*, as the name clearly expresses it, is all about the shortening of the process in cases where exist facts that render nullity evident; in which cases, almost the same as in the documentary process, some of the formalities of the ordinary process are to be omitted. Speaking about the institution of the briefer process and the conditions for its application, The Holy Father insists: “For indeed, in simplifying the ordinary process for handling marriage cases, a sort of briefer process was devised – besides the current documentary procedure – to be applied in those cases where the alleged nullity of marriage is supported by particularly clear arguments”\(^{144}\).

As any other process, the newly introduced abbreviated process, whose canons reproduce with only some slight changes the canons of the 1983 Code (cc.1686-1688) that belong to the documentary process\(^{145}\), the briefer process starts with the introduction of the libellus to be received by the Judicial vicar and in which, according to the established by can.1684, “the petitioner must set forth briefly, fully and clearly the facts on which the petition is based; clearly indicate the proofs to be collected and, exhibit any document that supports the petition”\(^{146}\). After receiving the libellus, the Judicial Vicar, in accordance with canon 1685\(^{147}\), will decide whether the case will be heard with the briefer process. That means the last decision on whether the case will be submitted to the abbreviated process does not depend on the parties, even when they request for that; but on the observation of the Judicial Vicar.

After the completion of the preparation of the formula of doubt, following on the suggested by the same canon 1685, the judicial vicar will name an instructor and an assessor; and as well, will cite all those who must take part in the trial. Following on the established by canon 1686 “it falls under the instructor’s responsibility, and not a judge, to collect the necessary proofs, and this has to be done in a single session”\(^{148}\). After the peremptory period of 15 days established by the instructor for the parties to present their observations is elapsed, the acts of the process will be handed on to the diocesan bishop who, following on the

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\(^{142}\) Synod of Bishops, XIV Ordinary General Assembly, at no. 48.


\(^{144}\) Ibid., p.2.


\(^{146}\) See MI. (2015), c.1684: “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”.

\(^{147}\) See MI. (2015): c.1685.

\(^{148}\) Ibid. c.1686.
established by canon 1687.1, “after having consulted with the instructor and the assessor, and having considered the observation of the defender of the bond and the defense brief of the parties, if there are any, will have to issue the sentence; but only after having reached the moral certitude about the nullity of marriage”\textsuperscript{149}. if not, insists the same canon, “the diocesan bishop is to refer the case to the ordinary process”\textsuperscript{150}.

After the sentence including all the reasons for nullity is communicated to the parties; these will be then free to enter new marriage in case they wish to do so and whenever there is no impediment imposed on them (c.1682.1). Moreover, in case there is complaint against the sentence, following on canon 1687,\textsuperscript{2}1\textsuperscript{51}, the aggrieved party, same as in ordinary process, have then the right to appeal to the metropolitan or to the Roman Rota, following on the established by paragraph 3 of canon 1687.

While the new process clearly responds to the principle of celerity, with a process that may take only a month to be completed, and as well responds to the principle of proximity between the judge and the faithful, by showing them how much the Church cares about their situation however, the abbreviated process is still raising too many questions regarding its relation to the principle of the protection of the indissolubility, as it gives the impression that nullity is now easier to obtain; an idea that may easily encourage divorce oriented mentality, which may then compromise the Church’s doctrine regarding marriage institution.

Despites the many advantages that offers the abbreviated process before the bishop, there exist two main difficulties in applying this new process\textsuperscript{152}. The first, there is no guarantee that every case that will be judged with the abbreviated process will be really briefer; not only because of the limited canonical formation of some bishops\textsuperscript{153}, even though they are not required to have canonical formation to exercise their judicial power, but as well because of their busy schedule and the many commitments they have. I, myself, have recently experienced it. Last October I have been making contact with the secretary of a Bishop from our neighbor Diocese to get an appointment for a very important issue, though it was not extremely urgent one. And I was informed that due to the Bishop’s busy schedule, it was possible to meet with him only until next year. And this was true, because I was able to check the Bishop’s schedule from the website of the Diocese, and it was exactly as I had been informed, it was a full schedule with a mix of commitments in and outside the Diocese. So, I need to wait at least for three months before I could meet with the bishop.

This example of my personal experience is the proof that Bishops are not always present in their dioceses, and due to the internal commitments and responsibilities connected to their pastoral ministry, they are always busy and often in move. As Daneels clearly puts it: “...such a process places a heavy burden on diocesan bishops, who have many other duties and often lack adequate preparation in canon law and experience in judging matrimonial

\begin{footnotesize}
\begin{itemize}
\item[149] See MI. (2015), c.1687.1.
\item[150] Ibid.
\item[151] Ibid., c.1687.2: “The full text of the sentence, with the reasons expressed, is to be communicated to the parties as swiftly as possible”.
\item[152] F. Daneels, First Approach..., p.131.
\item[153] Ibid., p.130: “...However, it is often the case that diocesan bishop do not have adequate preparation for personally exercising their judicial power”.
\end{itemize}
\end{footnotesize}
cases, which as a rule are in no way easy to judge.\textsuperscript{154} We hope that every diocesan bishop will have available time and acquire enough experience to handle this delicate matter related to marriage nullity process or, at least to have a trustworthy judicial vicar to rely upon to avoid compromising the teaching of the Church and particularly the doctrine of indissolubility.

And the second difficulty is related to the parties’ ability to comply with all the requirements to initiate the briefer process. The same as for the documentary process, it will not always be easy for both parties to agree on the same ground for the nullity of their marriage, and as well not easy to present all the evidence, as required by Article 14,1 of the ratio procedendi; proofs that will need no further investigation, since they are clear enough to render a marriage invalid. And because of such limitations, as predicts Frans Daneels, it is clear that there might not be many cases to be judged with the abbreviated process\textsuperscript{155}. But at least, the faithful can still appreciate that the Church has put forth such possibility to speed up the nullity process.

\textbf{II.2.3. Mitis Iudex and the Gratuity of the Nullity Process}

In the third paragraph of the sixth fundamental criteria among those that guided the work of reform we read:

“\textit{Episcopal conference, 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 processes remain free of charge, and that the Church, showing herself a generous mother to the faithful, manifests, in a matter so intimately tied to the salvation of souls, the gratuity of the love of Christ by which we have all been saved}”\textsuperscript{156}.

This same issue about the gratuity of the process has been developed in the instruction Dignitas Connubii, though with much details concerning the conditions and the context for its implementation. While Dignitas Connubii clearly reminds that “the parties are bound to contribute to paying the judicial expenses according to their ability”\textsuperscript{157} and speaks of the gratuitous assistance only under some circumstances\textsuperscript{158}, Mitis Iudex, calling on the conferences of bishops to take good care of the financial situation of their tribunals while in collaborating with judges, simply requires that processes be made free of charge, as cited above. Contrary to canon 1649,1-5 of the 1983 Code that put every charge under the responsibility of the couple, and gave freedom to follow particular norms to be established by every bishop in his particular diocese, the reform insists on the collaboration of the conference of bishops to provide for the financial necessity of their local tribunals, a commitment which we believe, will encourage ministers of justice to faithfully accomplish with their duty while the faithful, especially those having doubt regarding the validity of their marriage bond, will feel encouraged to approach the tribunal to present their cases and expect to obtain within a

\begin{itemize}
\item \textsuperscript{154} F. Daneels, \textit{First Approach} ..., p.131.
\item \textsuperscript{155} Ibid.
\item \textsuperscript{156} See MI. (2015): \textit{Prologue}, p.3.
\item \textsuperscript{157} See DC. (2005): Art.302.
\item \textsuperscript{158} Ibid., Artt. 303-308.
\end{itemize}
reasonable period of time the decision that establishes the truth about their marriage struggle.

The gratuitous of the process established thanks to the encouragement and the assistance of the episcopal conference to the ordinary, and particularly in respect to the function of the diocesan tribunal, assures the sixth criteria, “will restore the proximity between the judge and the faithful”\(^\text{159}\), since “no faithful will no longer be kept away from the ministry of justice because of excessive expenses”\(^\text{160}\) which they are not always able to afford. The gratuity of the nullity process can be seen as the real manifestation of the generosity of the Church which, as a good mother, is expected to show a real concern for the good of her children while offering them the gratuitous love of Christ for their personal salvation.

Moreover, we fear that the implementation of this new norm, despite all the advantages it offers, as mentioned here above, may not be all a success and might not produce the result expected. We think here of its implementation in the dioceses with very limited financial recourses, like in many countries in Africa; in the situation where the conference of bishops, despite the willingness to support the ordinary bishops and to collaborate with the functioning of their ecclesiastical tribunals, find themselves unable to offer all the required necessities, not only for the just compensation and remuneration of the tribunal employees, but as well for their on-going formation, for them to be able to assure the good functioning of the tribunal, while offering to the faithful a service of quality, among which, the necessity of handling their marriage cases with “both the seriousness and the speed required by their very nature”\(^\text{161}\).

The implementation of the full gratuity of nullity process, while on the one hand will certainly give to the Church the possibility to manifest the gratuitous character of Christ’s love and salvation, on the other hand, without any doubt, might cause some serious difficulties to those dioceses with not good financial situation. To avoid such difficulties, we believe, the implementation of some of the norms suggested by Dignitas Connubii in its renovation of the canon 1649,1-5 of the 1983 Code, particularly Artt. 302, 305, 307.1-3 and 308 can still be very useful in this respect. Which means, without imposing a fix and somehow exaggerated price to be paid for the process, the party can still be required to contribute according to their ability, while keeping totally open the possibility for full exemption of judicial expenses in cases where necessity requires the gratuity of the process. It is true that the tribunal fees in relation to the nullity cases will not solve the whole financial situation of the tribunal, but they may help our tribunals to provide to some of their primary needs.

\(^\text{159}\) See MI. (2015), Prologue (VI th criteria), p.3.
\(^\text{160}\) See DC. (2005), art. 308.
\(^\text{161}\) V. De Paolis, Op. Cit.
II.3. Conclusion

Pope Francis’ reform puts lots of pressures on the bishops, who are not only required to organize well-structured tribunals equipped with fully committed ministers, but as well to have an active participation to the daily activities of their local tribunals, and so to assure that faithful who are experiencing doubt about their failed marriages are given access to fair justice and that the truth regarding their situation is established within a reasonable period of time and at no expenses. While every measure is taken to reach out the reform’s finality, which aims not only to favor the speed of the process and the simplicity due them, but as well to protect the sanctity of marriage however, the suppression of the mandatory requirement for double conforming affirmative sentences, left the doctrine of indissolubility without the strong protection it has been always surrounded with and, with the institution of the abbreviated process we are given the impression that nullity is now easier to obtain, and that the marriage bond the spouses build up with their mutual consent can now easily be wiped away, even for just a simple reason; as long as both spouses decide to do so.

Something which remains very clear here for every person able to make a critical analysis of the outcome of the reform is that the reform, besides its strong pastoral dimension and all the positive novelties it has introduced to render the nullity process agile however, has left the doctrine of indissolubility almost totally exposed and somehow weakened. Hopefully, animated with the pastoral zeal for the salvation of souls, our bishops, in whom Pope Francis has placed his total trust for the success of the reform, will do their best to assure that the so promoted speed that characterizes the spirit of the reform will not compromise the seriousness of the nullity process and, that the dignity of Marriage Institution and its essential property of indissolubility will always be protected from any eminent danger to which they seem now to be exposed to.

II.4. General Appreciation

The reform of the norms regulating the process declaring the nullity of marriage promulgated by Pope Francis, following the 2014’s extraordinary general Assembly of the Synod of bishops, has acquired monumental significance, not only because it is given as the Supreme Pontiff’s exercise of his legislative authority in the Church, but most importantly it is because “on one hand it reforms an institute that has been for centuries the object of the legislative attention of the Roman Pontiffs and on the other, because it touches upon a matter that is fundamental to every society, including the ecclesial society: the dignity, stability and sanctity of marriage and the family”162.

The reform has surely effected some of the most fundamental changes in the Church’s juridical system in respect to the declaration for marriage nullity, as it was established by the 1983 Code of canon Law and till then promoted by the instruction Dignitas Connubii. While the Spirit of the work of reform is characterized by a need to speed up the nullity process to be handled with the required simplicity however, this need for celerity of the process comes

along with the supreme legislator’ mission, in the name of the Church, to defend the indissolubility of the marriage bond and to establish proximity between the judge and the parties requiring from every diocese, if possible, to have a well-established juridical structure able to welcome and accompany those experiencing doubt about the bond of their marriage.

Moreover, the emphasis put on the celerity of the process declaring the nullity of marriage, particularly concretized with the elimination of the requirement for double conformity of affirmative sentences and the introduction of the abbreviated process before the Bishop still raises too much questions about the suitability of this Motu proprio and its capability to bring positive solutions to those affected by broken marriages and to the increasing number of the faithful requesting for the nullity of their marriages. Our deep concern is not really about the introduced changes effected by the reform, but most importantly about the risks, voluntarily taken, to which the two here above mentioned fundamental changes expose the doctrine of indissolubility carefully protected and promoted by Pope Francis’ predecessors.

What sounds surprising here for everyone reflecting on this very context is that the Holy Father was fully aware of such eminent risk. As he himself clearly admitted: “...Nevertheless, we are not unaware of the extent to which the principle of indissolubility of marriage might be endangered by the briefer process...” With this declaration however, it becomes somehow ambiguous to fully trust the idea that the celerity of the process acquired through these fundamental changes, namely the elimination of the requirement for double conforming affirmative sentences and the institution of the abbreviated process before the bishop, would assure full protection to the doctrine of indissolubility of marriage that the reform, following on the Church’s tradition and teaching, is committed to protect; as clearly stated in its prologue.

Pope Francis’ reform offers a great pastoral openness as it insists on restoring the principle of proximity between the judge and the parties to be obtained through the call to the bishops to establish ecclesiastical tribunals in their respective dioceses, to assure its function through their personal involvement, and so to assure the unity of faith and teaching within the Church. To allow such proximity to be effective, the holy Father called on diocesan tribunals to handle the process of nullity not only avoiding time consuming, but as well by making the process free of charge, thanks to the generous collaboration of the conference of bishops to provide for the fundamental needs of the tribunal and of its ministers. The insistence on the pre-judicial investigation suggested in the Artt. 2-3 of the ratio procedendi gives strength to the pastoral dimension given as characteristic of this reform; being the good of the Christian faithful the Church’s essential end. All these new dispositions do not only help to improve the pastoral commitment of the Church, especially toward those who are wounded by situation of failed marriage, but as well, on one hand reveal the very nature of the Church who, as a generous mother, is expected always and everywhere to show her concern for her children and to manifest to them the gratuity of the salvific love of Christ;

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164 Ibid. p.1: “This committee, under the guidance of the Dean of the Roman Rota, drew up a plan for reform with due regard for the need to protect the principle of the indissolubility of the marital bond”.

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while on the other hand express the holy Father’s invitation to the Church and all its institutions, committed to the salvation of the souls, to learn to be meek and humble as Jesus, her founder; and we probably will not be wrong to think that this was the reason why Pope Francis has chosen to entitle this Motu Proprio *Mitis Iudex Dominus Iesus*. Nevertheless, for whatever reason it may be, meekness should never neglect the need for true justice, especially in respect to such a delicate and important matter related to canonical process for declaring the nullity of marriage; since, as Pope Benedict once said in his speech: “charity without justice is not charity, but counterfeit...”\(^{165}\)

CHAPTER THREE: ON THE CRITICAL ANALYSIS OF MITIS IUDEX INTRODUCED
FUNDAMENTAL CHANGES AND THE SUITABILITY OF THE REFORM

Until this stage of our research we have presented in somehow detailed and analytical way the nullity process that the Church has established with the promulgation of the 1983 Code of Canon Law, its purpose and its development over the time, fully supported and promoted through the Church’s magisterium and papal allocutions. In the last decades, the marriage nullity process has been object of the promulgation of two very important documents, namely: the instruction Dignitas Connubii and the Motu Proprio Mitis Iudex Dominus Iesus, which we have deeply explored in the previous chapters, as they reveal on the one hand the Church’s concern regarding the situation of marriage institution in general and the many challenges faced by its doctrine of indissolubility in particular and, on the other hand, the Church’s commitment to provide structures that are able to assist those affected by the issue of failed marriage and ask for her help.

This third chapter will bring us back to our initial question that is concerned with the actual state of the established canonical process for nullity of marriage, after it has underwent all these processes of renovation and reform carried out in the name of the Church’s faithfulness to her mission that is ordered to the salvation of souls, and her commitment to promote the dignity of marriage institution, while helping those who question their marriages to ascertain the truth about the validity of their marital bond. The answer to this initial question is found through a critical analysis and remarks that we are going to offer in this chapter about the newly reformed nullity process, its context, the impact of its fundamental changes and its suitability, in the effort to bring our little contribution to the ongoing reflection over the delicate issue of marriage nullity process and to the Church’s commitment to offer to her children a suitable process whose purpose will not be to favor nullity of marriage, but to ascertain the truth about the validity of their once celebrated marriage.

III.1. Mitis Iudex and the Relevance of the Introduced Fundamental Changes

Pope Francis’ reform of the nullity process has brought lots of hopes and optimism to the Church and particularly to those who are concerned with marriage nullity issue, finally to see their pain-causing situation of failed marriages and endless nullity process be given a concrete answer within a considerable period of time; needless of extra formalities and without exaggerated cost; which has on many occasions kept ordinary people from approaching the tribunal to request for the nullity of their failed marriages, even when they were convinced that this has considerably failed and that the nullity was the only remedy to their situation.

Nevertheless, given the real dynamic of judicial praxis in the Church, particularly in countries where dignity of marriage is challenged by the increasing divorce oriented mentality, where divorce is seen as the only way to handle situations related to failed marriages, some...

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²⁰ John Paul PP. II, Address to the Tribunal of the Roman Rota, January 24, 1981, no.3: “It is well known how, since the beginnings of its magisterium, the Church—confirmed by the Gospel (cf. Mt.19:5; 5:32)—has always taught and confirmed explicitly the precept of Jesus on the unity and indissolubility of marriage...” in: http://w2.vatican.va/content/john-paul-ii/en/speeches/1981/january/documents/hf_jp-ii_spe_19810124_roman-rota.html (accessed on 15-12-2017).
of the new provisions introduced by the reform, if they are not carefully implemented, could deeply affect the Church’ s teaching on marriage institution and its doctrine of the indissolubility of the sacred bond of marriage that the Church with pastoral zeal has always promoted and protected. Even without renovating the whole special process of marriage nullity as established by canons 1671-1691 of the 1983 code however, Mitis Iudex with its reform has introduced some fundamental and unexpected changes which, while answering to the very spirit of the reform characterized by the need for the “speed and the simplicity of the nullity process”167, gives the impression of making the nullity too easy to obtain, with the risk of compromising the doctrine of the indissolubility of the marital bond. Here we present three of what we consider to be the most controversial points of the reform in relation to the nullity process that was established by the 1983 code and renovated by Dignitas Connubii 22 years later. The relevance of these fundamental changes helps us to form a general idea about the suitability of the reform and the general state of the process declaring the nullity of marriage as it appears to us today.

III.1.1. On the Prevalence of Favor Celeritatis over Favor Matrimonii

While talking about speed as the spirit that characterizes the reform, one very important confusion we need to avoid is to take the “speed” for the “hurry” and so, to make things done the fastest possible as the way to avoid people’s patience to be tasted and so, to choose the unlawful path. Between the speeding up of the process and the hurrying up of the process there is an ontological distinction to be taken into consideration. We consider it dangerous and scandalous if the idea of celerity or speed suggested by the reform will be taken for the hurry up of the process, leaving aside some necessary criteria only to get the process concluded within a short time; as if the purpose of the process was only to grant nullity and so, to satisfy the hearts of those petitioning for the nullity of their marriage.

This, we believe, is not Pope Francis’ intention nor the true spirit of the reform. However, the prevalence of the principle of celerity over favor matrimonii clearly noticeable in the work of the reform might lead to this confusion. This is the attitude that Saint John Paul II denounced and criticized as easy and swift granting of nullity, whose consequences make it difficult for the Church not only to proclaim with credibility her teaching on the indissolubility of marriage, but as well to prepare couple to the sacrament of marriage168. We believe that the time frame suggested by canon 1453 is more that reasonable, and would not cause a problem to the parties to wait for a year, the normal time period required for the process in the first instance, and the extra six months it might take the higher instance to examine and confirm or reject the decision of the first instance. Unless contracting new marriage is then the hidden and main reason behind the request for nullity. Time changes people, we believe.

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168 John Paul PP. II, Address to the Tribunal of the Roman Rota, January 24, 1981, n.4:“...the preparation for matrimony itself could be negatively influenced by declaration or judgments of matrimonial nullity if these would be too easily obtained....we must also fear that judgments of declaration of matrimonial nullity, if they were to multiply as easy and hasty pronouncements, would add to the same existential and psychological perspective”, in: http://w2.vatican.va/content/john-paul-ii/en/speeches/1981/january/documents/hf_jp-ii_spe_198101124_roman-rota.html. (Accessed on September, 2017).
From the opening of the process to its conclusion people might also change their minds and reconsider their decisions; despite the previously failed pastoral attempt for reconciliation (c.1676).

In one of his articles regarding the canonical nullity of the marriage process, Cardinal Burke wrote: “if a tribunal gives the impression that its main purpose is to enable those in failed marriage to remarry in the Church, then a party who has doubts about the alleged nullity of the marriage can feel that the tribunal itself considers the person an obstacle to be overcome”\(^{169}\). If speed really matters for the good of the process and of all those who are concerned, as clearly suggests canon 1453 of the 1983 Code, however, this should not be converted into the first aim of the process; since speed without thoroughness will result very damaging to the sacred bond of marriage and to the Church’s doctrine of indissolubility. In this respect, late Pope John Paul II talking about the need for a correct jurisprudence, he clearly stated: “It is true that the entitlement to timely justice is also part of the concrete service to the truth and constitutes a personal right. Yet false speed to detriment of the truth is even more seriously unjust”\(^{170}\).

Let us remember that favor matrimonii, which is the essence of the process itself, never ceases till the opposite is proven. And the agreement between both spouses to request for the nullity of their marriage is not enough guarantee to declare or consider null a validly celebrated marriage. From this perspective, the need for celerity must not deny the favor matrimonii which is intrinsically connected to the search for truth. And should not compromise the seriousness and thoroughness of the process. In his January 28th, 1978’s last discourse to the Roman Rota about the prevalence of justice, the late Pope Paul VI clearly warned those in charge of justice: “Celerity...is certainly desirable and is to be constantly required. But always as a method that is subordinated to the primary objective, which is justice, toward which it must be oriented”\(^{171}\). We hope that our tribunal ministers will always keep in mind that the purpose of the process is beforehand to ascertain the truth of the sacred bond of marriage and that the real need for celerity must remain subordinated to it.

**III.1.2. On the Abrogation of the Required Double Conforming Sentences**

In the renewed canon 1679 we read: “The sentence that first declare the nullity of marriage, once the terms as determined by cann. 1630-1633 have passed, becomes executive”\(^ {172}\). Here is to say that, unless there is a true need for an appeal, the affirmative sentence from the first instance tribunal needs no longer the confirmation by the higher instance for its execution as it is established in canon 1682\(^ {173}\) of the 1983 Code. The elimination of the requirement for

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172 See Mi. (2015), c.1679.
double conforming sentences following on the supreme legislator’s intention of speeding the process while making it simple, helps certainly to avoid time-consuming between the decision, its confirmation and its execution. Once the positive sentence is given and communicated according to canon 1687,2 of the reform, the parties will have only to wait for the peremptory time of fifteen (15) full days to elapse, and no longer couple of months or may be a little bit more it takes the Appellate tribunal to confirm the positive sentence, before they can enter new canonical marriage; in case they have planned to do so and that there is no impediment imposed on them.

**III.1.2.1. Reason for the Abrogation**

Justifying the reason behind such fundamental change, Pope Francis explains: “First of all, it seemed that a double conforming decision in favor of the nullity of a marriage was no longer necessary to enable the parties to enter into a new canonical marriage. Rather, moral certainty on the part of the first judge in accord with the norm of law is sufficient” 174.

What is understood here is that on the one hand the suppression of the requirement for double conforming sentences, given as an answer to the special request from some of the 2014’s synod fathers who requested for the simplicity of the process, relies on the judge’s moral certainty as required by canon 1687,1 of the reform. The holy father shows full trust to the judges to accomplish faithfully with the great responsibility entrusted to them, especially while dealing with such delicate matter. And on the other hand, the Holy Father speaks convincingly about the double conforming sentences which was no longer necessary; an argument that probably refers to the so-called “American Norms (1971-1983)”, “by which the conference of bishops in the United States was granted the faculty to declare an affirmative first instance decision for the nullity of marriage immediately executive” 175. This exception which was granted only in cases where the defender of the bond and the ordinary judged superfluous the second instance, as comments Daneels, was then adopted by other conferences of bishops, till finally the exception was transformed into a general rule with the granting of hundreds of thousands of first instance affirmative sentences without appeal to the higher instance 176.

It was certain with the American experience that the requirement for double conforming sentences was relaxed and has become a simple formalism in number of tribunals. Nevertheless, since this was not really the case for all ecclesiastical tribunals, therefore, this particular situation would not be sustainable as a leading argument to justify the suppression of the mandatory double conforming sentences which, in many different ways has protected marriage bond against any possible mistake and risk of being wiped away for some wrong reasons. Speaking about the issue, Frans Daneels, after explaining the whole context of the traditional mandatory requirement for double conformity of sentences and its implementation in different parts of the world comes to this conclusion: “To conclude from

176 Ibid.
this fact, [...], that the obligatory second instance had become pure formalism in a great percentage of cases, seems to me an exaggeration.”\(^{177}\) Daneels with his many years ‘experience working with the tribunal of Apostolic Signatura, sincerely acknowledged that despite the laxism of some tribunals that converted the required double conformity of sentences into pure formalism however, “there has been also some significant improvement in recent years as the result of the patient work of the Apostolic Signatura”\(^{178}\)

Now, despite all the advantages the suppression of the requirement for double conforming sentences offers in speeding up the process while making it simple and agile, this decision is seen as one of the most controversial points of the reform. Not only because it exposes the doctrine of indissolubility of the marriage bond now left without its stronghold, but because it as well breaks with a traditional and historical norm that had governed the cause of nullity of marriage for around 300 years. Below is the short history about this old tradition.

### III.1.2.2. Short History About Double Conforming Sentences

Introduced by Pope Benedict XIV 1741’s constitution “Dei Miseratione”\(^{179}\) “to protect the indissolubility of marriage against the shoddy jurisprudence of several tribunals”\(^{180}\), this norm has ruled the nullity process for 274 years as it was confirmed in canon 1986 of the old Code, then reaffirmed by Paul VI 1971’s causas matrimoniales, “despite simplifying the procedure, rendering it possible to confirm an affirmative first instance sentence by decree”\(^{181}\). The norm related to the mandatory double conformity of sentences that was reaffirmed by Causas matrimoniales, was then codified by the 1983 Code under canon 1682 and, twenty-two years later, reaffirmed by the Instruction Dignitas Connubii in its articles 264-267. The goal of keeping with the requirement of the double conforming sentences was not only to avoid error in matter of such great importance, but as well to assure that justice is rendered accordingly and that the dignity of marriage and its properties are protected. Because, as reminds Frans Daneels, “even in good faith, an error is [always] possible”\(^{182}\). And this is as true for the nullity process even when carried out by expert and in the name of the Church.

### III.1.2.3. Possible Consequences of the Abrogation

Trusting the judges’ moral certainty, as does the Holy Father, is a very positive way to encourage and support them in their ministry. Moreover, this gives not enough guarantee to allow for the suppression of the requirement for double conforming sentences which was not simply about confirming the sentence from the first instance tribunal, but as well, even more

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178 Ibid. p.128.
importantly, to foster a sound jurisprudence within the Church’s judicial system and to assure that the indissolubility of the bond of marriage is well protected. And moral certainty and the jurisprudence do not oppose each other.

To help us understand that the mandatory double conformity of sentences is not all about confirming the decision of the first instance, in one of his articles, William L. Daniel presents a short statistic which shows that “in the case of the Roman Rota, in charge to foster sound jurisprudence in the Church, 75% of all the positive sentences that were transmitted to that supreme tribunal for confirmation, were not confirmed by decree, rather admitted to ordinary process”\(^\text{183}\). Which means, in all these cases, “the nullity of marriage was unjustly declared, whether because of a defect of proofs or a lack of foundation for the claim of nullity”\(^\text{184}\). With the suppression of the double conforming sentences, we will not be surprised if in the future, something that we do not wish to happen, a kind of laxism will rule again over our ecclesiastical tribunals; as it was the case with the so-called “American Norms” (July 197-August 1983)\(^\text{185}\) mentioned here above.

It is unfortunate that with the lack of oversight on the first instance tribunal’s decision, the role that was particularly assigned to the mandatory requirement for double conforming sentences, not because of lack of trust in the decision of the first instance tribunal, but to help in increasing the jurisprudence of the Church and the seriousness required to handle such issue, “first instanced tribunal decision may gradually grow weather sloppy”\(^\text{186}\), which will be then a real debut of granting divorce with Church’s complicity. With this way of acting, rather than to increase the Church jurisprudence and so protect the Church’s doctrine of indissolubility, which is the principal aim of the reform, the suppression of the mandatory double conforming sentences will turn then somehow damaging to the sacred bond of marriage as it is now left without its stronghold and almost totally exposed.

There is no doubt that with the suppression of the mandatory double conforming sentences, the process might move faster than it used to, and the extra few months it takes for the higher instance to confirm the sentence will be avoided. That is a good advance so far. But our question is: how safe is still favor indissolubilitatis now clearly subordinated to favor celeritatis and deprived of the extra security it has been procured to by the mandatory requirement for double conforming affirmative sentences? Here again a huge responsibility is left to our tribunal ministers and all those who are entrusted with the ministry of enacting justice in the Church to remain faithful to the Church jurisprudence and mission of protecting marriage institution and its properties of unity and indissolubility.


\(^{184}\) Ibid.


III.1.3. On the Abbreviated Process before the Bishop

The need for the protection of the dignity and sacramentality of marriage has always been one of the principle commitments of the Church, conscious of her sacred mission to accompany Christians faithful on their journey to personal salvation. This awareness is founded in the word of the one who made of marriage a sacrament to represent in this reality the image of the covenant between God and his people and, the participation of the faithful in the love of Christ 187, such making of marriage a permanent union when he clearly declared: “…therefore, what God united, may human not separate…” (Mt. 19,6). In the prologue to Mitis Iudex Pope Francis clearly expresses himself:

“Through the centuries, the Church, having attained a clearer awareness of the words of Christ, came to and set forth a deeper understanding of the doctrine of indissolubility of the sacred bond of marriage, developed a system of nullities of matrimonial consent, and put together a judicial process more fitting to the matter so that ecclesiastical discipline might conform more and more to the truth of the faith she was professing” 188.

III.1.3.1. Protecting the Sacred Bond

This same awareness and essential need for the protection of the dignity and sacramentality of marriage as referred in the above citation, have always been emphasized in the Church’s doctrine and papal allocutions to the Roman Rota in charge of fostering the unity of the jurisprudence within the Church 189. In this respect, any work of reform of the procedural governing causes of nullity that has been carried out in the Church, has always been done with this finality of ascertaining the objective truth regarding the sacred bond of marriage while protecting its properties of unity and indissolubility, threatened by the modern understanding of marriage and the official institution of divorce as the only solution to situations of failed marriage.

Animated by the zeal for the salvation of souls and conscious of its sacred mission in the world, the Church has always emphasized the highest value of protecting the indissolubility of marriage 190 to prevent man from separating what God has united. In its introduction, the instruction Dignitas Connubii, renovating the teaching of the Church translated into canonical language within the Codex, deeply reaffirms: “The dignity of marriage which, between baptized is an image and participation in the covenant of love of Christ and the Church, demands that the Church with the greater pastoral solicitude promote

189 Sacred Congregation for the discipline of the Sacraments, Instruction Provida Matter Ecclesia, August 15,1936: AAS 28 (1936) 313: “In order that the provident Mother Church may protect the dignity and look after the salvation of souls, she employs her continuous solicitude by constitutions and instructions, prescribing rules pertaining, among other things, to causes concerning the validity of marriage, lest what God has joined man may dare to separate or, on the other hand, declare as valid the same bond suffering from nullity”; translated by: W.L. Daniel, An Analysis… p.447.
190 Ibid.
marriage and the family founded in marriage, and protect and defend them with all the means available”.

III.1.3.2. Controversial Decision!

Today however, we welcome with some surprises the institution of the abbreviated process before the bishop, which sounds like moving the nullity process toward a different direction and so, together with the suppression of the mandatory requirement for double conformity of affirmative sentences, give the impression that not only we are dealing now with a somehow weakened nullity process, but as well that the nullity of marriage is now easy to obtain. The briefer process which is all about shortening the process in case the consent of both spouses requesting the nullity of their marriage is supported by clear argument and facts, pushes forth the idea that nullity is now easily obtainable, and that the bond of marriage made possible by the consent of both spouses can now easily be wiped away, even for just a simple reason, if both spouses agree to do so and bring forth some clear arguments.

The structure of the abbreviated process and its application within the juridical system of the Church, we believe, might bring along the risk that not only would contribute in encouraging divorce mentality among the faithful, especially if they failed to fully and clearly understand the supreme legislator’s intention; but as well would compromise the whole teaching of the Church regarding marriage and, particularly, its sacred doctrine of indissolubility. These risks are eminent, and the holy father in his prologue to the Motu Proprio, admitted to be aware of them.

III.1.3.3. Favor matrimonii at risk

We believe that the conditions given to start a briefer process are just not safe enough to justify such risky choice. Until the opposite is not yet proven through thorough investigation and evident proofs, no marriage can be admitted as null. The consent from both spouses to request for the nullity of their marriage is not a guarantee and evident proof that the celebrated marriage is invalid. Because, like in the case when spouses hate each other, the simple solution they would find will certainly be not to continue living together. And in this case, the agreement of both to request for nullity will cause no problem to each other. On the other hand, the presence of some clear arguments and facts given as the second condition to initiate the abbreviated process does not a-priori or automatically suppress the favor of law (Favor matrimonii) that marriage enjoys because of its nature, being this a divine institution, as well established by canon 1060 and as we can read in the introduction to Dignitas Connubi mentioned previously.

192 See MI., (2015), Prologue, p.2: “…For indeed, in simplifying the ordinary process for handling marriage cases, a sort of briefer process was devised – besides the current documentary procedure – to be applied in those cases where the alleged nullity of marriage is supported by particularly clear arguments....”.
193 Ibid.: “...Nevertheless, we are not unaware of the extent to which the principle of the indissolubility of marriage might be endanger by the briefer process...”.
With the abbreviated process before the bishop, *favor matrimonii* is denied on the expenses of the principle of celerity; and thus, some marriages are already declared null even before the beginning of the process; because to admit a case for abbreviated process means that it is already somehow considered null. In this case, the aim of the process will no longer be for the petitioners to prove the nullity of the marriage they accused, but for the defender of the bond and the promotor of justice to prove the validity of a marriage that is already considered null. Here there is a kind of inversion of the normal procedure. What one gets as first impression, despite Pope Francis’ intention not to favor nullity, but speed and simplicity, is that with briefer process, the finality of the juridical process of nullity has moved from the preservation of the indissolubility of the sacred bond of marriage to the wildly opened possibility of granting nullity, now apparently easier to obtain.

We have no doubt that the reform is done with every good intention “toward the goal of transmitting divine grace and constantly promoting the good of the Christian faithful as the Church’s essential end”¹⁹⁴, and if carefully implemented, the new provision will largely contribute to accelerate some special cases while avoiding extra and unnecessary formalities. And in this way, the satisfaction will be mutual. However, the voluntary choice of exposing the doctrine of indissolubility to such risk that comes along with the institution of the abbreviated process before the bishop, the risk which means that sometimes the complicity between the parties and the apparently evident facts may lead to the destruction of an existing sacred bond, would not only endanger the teaching of the Church regarding marriage institution, but as well might create more confusion to what already exists in our modern mentality regarding the indissolubility of the sacred bond of marriage. And in this way, it will certainly contribute in weakening, rather than invigorating the Church judicial system. This is the kind of risk that Cardinal Herranz once referred to in his press conference on the presentation of the Instruction Dignitas Connubii as he simply reminded:

“In the context of a divorce oriented mentality, canonical proceeding of annulment can also easily be misunderstood as no more than a means to obtain a divorce with apparent Church approval…. By skillful manipulation of the causes of nullity, every failed marriage would be annulled”¹⁹⁵.

We must always remember, as John Paul II clearly stated, that the false speed only to get the process done to the detriment of the truth is even more seriously unjust and very damaging of the Church and her doctrine and teaching¹⁹⁶. We hope that the abbreviated process will not bring us as far and that our bishops and those assisting them in this process will not compromise the favor matrimonii even while applying the principle of celerity in handling cases of marriage nullity.

¹⁹⁶ John Paul II PP., Allocutions to Roman Rota, January 29,2005.
III.1.3.4. Bishop’s Personal Involvement and its limitations

The requirement for the diocesan bishop, as guarantor of Catholic unity in faith and discipline, to be established as judge to handle the processus brevior and so, to minimize the risks which are eminent in this kind of process\textsuperscript{197}, can be seen as the restoration of the principle of proximity between the Church and the faithful in need; since it is established that the diocesan bishop in the context of his local Church represents validly the universal Church. Commenting on this very issue, Bernard H. Hebda explains: “By requiring the bishop to be directly involved at least in the processus brevior, Pope Francis is bringing the diocesan bishop face-to-face not only with his tribunal staff, but also with the realities met by those whose lives are so affected by the work that goes on in our tribunals…”\textsuperscript{198} This, we believe, will certainly reestablish the trust between the Church and her children who expect from her maternal love, understanding and personal attention. And the Holy Father just gives a big challenge to our dear bishops to be more active than they used to, especially in matter related to the organization of local tribunals and the enactment of justice which “is not an option, but the bishops’ s sacred duty”\textsuperscript{199}.

Nevertheless, the central role of the bishop in cases of abbreviated process, as suggested by new canon 1687.1, may not solve the whole problem related to the full protection of the sacred bond of marriage now denied of the favor of the law (c.1060) it has always enjoyed; since the reality shows that not only not every bishop has enough canonical formation, but as well it is “often the case that diocesan bishop do not have adequate preparation to exercise their judicial power”\textsuperscript{200}. And in case the bishop to judge the abbreviated process has no canonical formation, that may become even more risky and a real danger for the sacred bond since, to reach out the final decision it is always required thorough study of the acts of the process; which will be a big challenge for a bishop without canonical preparation. Even when the bishop will have to rely on the judicial vicar, the instructor, the assessor and the opinion of the defender of the bond however, he still needs to reach moral certainty and a personal conviction before dictating the last sentence. In this case, the role of the Diocesan Bishop solemnly promoted by the reform to assure the success of the abbreviated process and to minimize the eminent risk to which the doctrine of indissolubility is now exposed to, will be just a formality and, the abbreviated process will not be different from the kind of administrative/simple process that was proposed by number of Synod Fathers during the III extraordinary General Assembly\textsuperscript{201}, to which the Holy Father did not concede.

Even though when other authors, like Bernard H. Hebda, will argue that the required role “does not really mean that the bishop will always take part in the process and decide, but to show more concern and closeness toward the ongoing work of the tribunal”\textsuperscript{202}, it remains

\textsuperscript{197} See MI. (2015), Prologue, p.2.
\textsuperscript{199} Ibid., p.148.
\textsuperscript{200} F. Daneels, A First Approach...,p.130.
\textsuperscript{201} Synod of Bishops, XIV Ordinary General Assembly..., No.47: “They proposed, among others,...the possibility of establishing an administrative means under the jurisdiction of the diocesan bishop...”
obvious that in most of our diocesan tribunals such role, especially in the context of the nullity process, will remain no more than a formality. And in this respect, Mitis Iudex does not make much difference from the traditionally insistence on the role of the bishop as head of the diocesan tribunal already encouraged by the canon 1419, 1 of the new code and emphasized in the art. 22, 1-2 of the instruction Dignitas Connubii that, prudently did not encourage bishops, despite their canonical formation, to exercise their judicial power personally, unless there are special causes that demand it\textsuperscript{203}; which we find more prudent, realistic and safer be it for canonical or pastoral reasons.

Another very important element to be taken into consideration while promoting personal involvement of the diocesan bishop as main judge in the abbreviated process is factor age. In most of the countries in the world the age for retirement vary between 60 and 65, while our bishop only can retire after they have reached 75 years old (can. 401,1). This means, based on the established by the reform, until 74 years old our bishops as first judges of their dioceses should continue to intervene personally in cases to be treated with processus brevior. Now, we all know how sometimes is demanding the weight of the age at this stage. Here is the question: would that be suitable and just to require from our old bishops to continue handling those difficult cases related to marriage nullity, which requires from them not only to pronounce or sign the last sentence, but as well a thorough evaluation of the acts and the proofs, the phase which John Paul II declared to be “the most demanding and delicate phase of the trial”\textsuperscript{204}? We think this will be asking too much from our bishops, despite the good will they may have to render such a valuable service to the Church and to the faithful affected by nullity cases.

However, our objective reflection on the limitations surrounding the personal involvement of the diocesan bishop in cases of abbreviated process, as encouraged by the reform, does not mean the Diocesan Bishops should not personally be involved in the day to day functioning of their tribunals. Al contrary, since this will certainly “bring them into that ward of the field hospital not only to see by themselves the pain of those wounded by broken marriage and crying out for help, but as well to realize the urgency of effective tribunal ministry”\textsuperscript{205}, totally dedicated to the service of the faithful.

\textbf{III.2. On the Suitability of the Reform}

It is obvious that the new reform that responds to the Church commitment of providing to her children appropriate structures to serve the need for the salvation of their souls, has brought lots of renovations in the handling of the process for the declaration of marriage nullity. This is what wished Pope Francis and the majority of the 2014’s synod fathers who have spoken not on their own name, but on behalf of the local churches they were representing and, based on their pastoral experience and the responsibility they carry with them of taking good care of the people of God entrusted under their care. No one today ignores the real need and

\textsuperscript{204}John Paul PP. II, Allocutions to the Roman Rota, February 4,1980.
necessity, that was clearly manifest in our Church, to render our ecclesiastical tribunals more accessible to the needs of the faithful who, not only have the right to be given a concrete answer to their situations, but as well to be answered within a reasonable period of time; to avoid “the cloud of doubt overshadows their hearts because of a delayed sentence” 206, as clearly reminds Pope Francis. In this second part of our third chapter, following on the critical analysis we have presented about the reform and the relevance of the novelties it has introduced, which we believe did not really invigorate, but weakened the nullity process, leaving the indissolubility of the sacred bond almost totally exposed; we would like to reflect now on the suitability of the reform, which means the necessity of the changes operated in respect to the nullity process and the way it influences today the Church judicial system in respect to this delicate and complicate matter. Was there a real need for change? And if yes, what really needed to be change?. These are the questions to be answered in this last part of our research which is concerned now with offering some simple suggestions in respect to the work of reform.

**III.2.1. Not the Law but the Structure**

While we appreciate all the many positive changes effected by Mitis Iudex in respect to the handling of the nullity process and all the many efforts finally to make the process quicker and simpler however, we felt that what really needed to be reformed in this particular moment for the Church to reach out such an objective, may not be the procedural law as established by the 1983 code and renovated and wildly explained by Dignitas Connubii; but the requirement for the concrete application of the existing procedural law by ministers of justice who are in charge of the ecclesiastical tribunals; since the experience teaches us that the true challenges come not from the law itself, but first of all from its full and correct implementation by those in charge to implement them.

Without having any clear idea in this early stage on how the new reform is today welcomed and implemented in our diocesan tribunals around the world, and how successfully it is in keeping the balance between the declaration of nullity and the protection of the sacred bond of marriage, we believe that the promulgation of a new instruction with norms supporting and requiring the full implementation of some of the key-norms as suggested by the Instruction Dignitas Connubii, without the risky choice on the one hand of suppressing the required double conforming sentences and , on the other hand, of instituting the abbreviated process, could have been “as well” suitable and may be efficient to establish a kind of balance with respect to the canonical process of nullity, to facilitate and encourage ministers of justice to the full understanding and knowledge of the related norms and the method for their correct implementation and, in this way, to carry out the process with professionalism and expertise. This, we believe, would enormously contribute to the celerity and seriousness of the process; while keeping in mind the pastoral dimension of the process, which is a service of charity toward those who need Church’s help in order not to obtain the divorce nor the dissolution

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206 Francis PP., MI. (2015), *Prologue*, p.2
of the existing bond of their failed marriages, but to ascertain the objective truth about the validity of those failed marriages.

Laws have always been present in the Church, and the Church through Councils and Popes' magisterium and allocations, has always and deeply shown special interest in avoiding unnecessary delay in matter of ecclesiastical trial, as clearly establishes in canon 1453. The 1983 Code seems to have taken diligent care to provide appropriate laws that fully reflect the teaching of the Church in general and the teaching related to the institution of marriage as redefined by the Vatican Council II in particular, as clearly expressed Saint John Paul II in one of his addresses to the Roman Rota. Even the law related to the principle of celerity which now characterizes the spirit of the new reform is clearly present in the Code that requires all cases to be completed as soon as possible (can.1453); even though in reality the situation has been almost totally different. In respect to this situation, myself, in 2012, met a couple from Macau who have been waiting already for five (5) years for the nullity process about their marriage to be concluded and so to be given the official permission to marry in the Church. If the trial is not yet concluded till now, which I doubt, they would be waiting already for 10 years; and that is just damaging to the faith of the faithful, who do not only deserved the Church's support to ascertain the truth regarding the validity of their marital bond, but as well to be given a concrete answer within a reasonable period of time.

To show the contrast between the existence of appropriate laws in the Church and the failure from those in charge to apply them correctly, as we have referred to above, the late Pope John Paul II in his January 26, 1984’s allocution to the Roman Rota clearly insisted:

“In reforming canonical procedural law, an effort was made to meet a very frequently uttered criticism, which is not entirely unfounded and which concerns the slowness and excessive duration of causes. . . . An effort was made to make the administration of justice more agile and functional by simplifying procedures, by expediting formalities, by shortening terms, by increasing the judge’s discretionary powers, etc. This effort must not be rendered vain by delaying tactics or lack of care in studying cases, by an attitude of inertia, distrustful of entering upon the new fast lanes, and by lack of professional skill in applying procedures”.

We found in this quote full support of what we have been trying to suggest in the above point, that the real problem does not lie on the laws themselves, but as well and primarily on those who carry with them the mission to apply them. And because of that, changes and novelties in law will have no effectiveness as long as those entrusted with the mission to implement them are not deeply formed in critical knowledge of those existing norms, nor are

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207 See CIC (1983), c.1453: “Without prejudice to justice, judges and tribunals are to take care that all cases are completed as soon as possible and that in tribunal of first instance they are not prolonged beyond a year and in a tribunal of second instance beyond six months”.

208 John Paul PP. II, Address to the Tribunal of the Roman Rota, January 24, 1981, no.4: “...To the comfort of all pastors, we can say that the new canonical codification is making provision with wise juridical norms to translate everything that has emerged from the last Ecumenical Council in favor of matrimony and family...” in: http://w2.vatican.va/content/john-paul-ii/en/speeches/1981/january/documents/hf_jp-ii_spe_19810124_roman-rota.html (Accessed on 15-12-2017).

seriously committed to apply them accordingly as insistently repeated Pope John Pau II in his above-mentioned address. This is where the true work of reform should start, encouraging our tribunal ministers to the full implementation of those existing norms that were effected with enough effort to meet that very frequently uttered criticism which is concerned with the slowness and excessive duration of causes, as well reminded the late Pope in the above-mentioned citation. The time frame suggested by canon 1453 requiring no more than a year in the first instance tribunal and no more than six months in the higher instance, is more than reasonable to avoid unnecessary delays. The only thing that is needed to be done is to implement it.

III.2.2. Reviving Dignitas Connubii as an Alternative!

Changes in law within the Church are unavoidable, especially when this [law] becomes an obstacle for the salvation of the souls entrusted under the Church’s pastoral ministry. However, the full and proper implementation of some of the existing laws that are carefully conceived to meet people’s spiritual need, is one of the most important service that the Church, through the ecclesiastical tribunals, can render to those who seek justice from her. Following on John Paul II’s mandate to prepare an instruction able to handle abuses against the application of the norms of the new Code, particularly those related to the process declaring the nullity of marriage, but without the real need to make new laws, Cardinal G. Agustoni, then prefect of the Supreme Tribunal of the Apostolic Signatura, wisely acknowledged: “are not the norms that are lacking: is the lack of critical knowledge of the norms and their correct and rigorous application that are the basis of the denounced situation [abuses of the Code]…”.

That is the reason why we believe that the promulgation of a new instruction to promote and encourage the full implementation of the existing norms related to nullity process, substantially renovated by Dignitas Connubii, as we have it presented with all details in the first chapter, could have been also a very suitable alternative to the full reform of the nullity process. Since, according to our understanding, Dignitas Connubii that collected the experience of 22 years of the application of the new process established by the 1983 Code, has suggested a canonical process that not only insists on the traditionally and highly recommended juridical dimension for nullity process to be concluded with seriousness and speed required by their very nature, as suggested by the previously cited Art.72 based on canon 1453 of the Code, but as well strongly supports mandatory requirement for double conforming affirmative sentences (Art. 290-294/c.1682), now abrogated, to assure extra protection to the sacred bond of marriage against any possible wrong jurisprudence and remaining error from the first instance. In addition, it has even introduced the equivalent conformity; also abrogated by Mitis Iudex, that gives to the judges from the appellate tribunal the freedom to explore other paths leading to the same truth; while strongly insisting on the

211 Prot. n. 25956/95 VAR, doc. 2., “non sono le norme che mancano: e la mancata conoscenza critica delle norme e la loro corretta e rigorosa applicazione che sono alla base della situazione denunciate [...].” Cf. F. Daneels, Storia Della Redazione Della Dignitas Connubii..., p. 175.
active participation of the defender of the bond in the process and the many functions he/she has to accomplish (Art. 56, 1-6) to assure that justice is always done to the validity of marriage.

While some of these dispositions may appear not to facilitate the needed speed of the process wished by all, as suggests Peña García, for whom Dignitas Connubii and its provisions have not in themselves the finality to make the process agile\textsuperscript{212} however, we believe that they guarantee better protection of the sacred bond while assuring that favor matrimonii and favor veritatis will always be and remain the pillars of the nullity process to which favor celeritatis is to be always subordinated, as clearly reminded Paul VI\textsuperscript{213}.

\textbf{III.3. Conclusion}

It is obvious that the work of reform effected by Pope Francis has a deep pastoral foundation that not only tries to render the nullity process more agile and so, accessible to all those who are affected by situation of failed marriage; but as well aims to renew the face of the Church as a good and generous mother that manifests a true concern for her children in need, by showing them mercy and the gratuity of the love of Christ, especially through a process that has to be carried out with speed, simplicity and free of charge\textsuperscript{214}. This pastoral dimension of the reform is built upon the great virtue of mercy that the Church as a generous mother is required to offer to each one her children, especially those who are separated from her, as well reminds Pope Francis\textsuperscript{215}. Nevertheless, the need for mercy in the context of pastoral ministry, especially while handling causes of marriage nullity, must not overlook the need for true justice, which is to it not as stranger, but as another side of the same coin; since mercy without true justice, as once reminded Pope John Paul II, “is in itself only pastoral in appearance”\textsuperscript{216}.

The prevalence of favor celeritatis, clearly noticeable in the work of the reform, particularly through the suppression of the mandatory requirement for double conforming affirmative sentences and the introduction of the abbreviated process before the bishops, to be applied in the context where nullity appears to be evident, seems to bring more problems than the expected solution. Problems to affect not only the credibility of the ecclesiastical judicial system, making celerity as the main purpose of the process dealing with such a contentious and delicate matter; but as well will compromise the Church’s doctrine of the indissolubility of the sacred bond, which seems now less protected and highly exposed.

\textsuperscript{212} C. Peña García, \textit{Derecho a una Justicia Eclesial Rápida}, p.744: “…Desde la perspectiva del principio de celeridad de los procesos, debe tenerse en cuenta, a la hora de valorar la instrucción Dignitas Connubii, que, pese a la relevancia y extensión de esta norma…lo cierto es que la misma no tiene por finalidad directa la de agilizar los procesos de nulidad sino simplemente clarificar como debe aplicarse la ley vigente”.

\textsuperscript{213} Paul PP. VI, Discours à la Rote Romaine, Janvier 28, 1978.

\textsuperscript{214} Synod of Bishops, XIV Ordinary General Assembly, Lineamenta, Nn. 47-48.


III.4. General Appreciation

Process declaring the nullity of marriage, as we have inherited from the Church’s tradition is not primarily about the speed, nor about the obligation to grant nullity at any cost. It is first of all about a service of charity to be rendered with true justice to ascertain the objective truth in cases of failed marriages. In this respect, a balanced nullity process to be concluded with the speed and the seriousness required by the nature of the process, is not necessarily reached through the suppression of the mandatory requirement for double conforming affirmative sentences which, as clearly supported Frans Daneels, far from being an unnecessary formalism, “has in many situations contributed to avoiding a considerable number of mistakes in the remaining percentage of cases and so, protecting the doctrine of indissolubility of marriage against the wrong jurisprudence of several tribunals”\textsuperscript{217}. Even when it was poorly applied, like in the context of the United States, as William Daniel clearly demonstrated in his article referring to the recently published statistics\textsuperscript{218}, the mandatory requirement for double conforming affirmative sentences was still one of the very important pillar to support the Church’s jurisprudence in the regulation of the nullity process, especially in the context of the Tribunal of the Roman Rota, “whose example has demonstrated that affirmative sentences are often not suitable for immediate confirmation”\textsuperscript{219}.

Nor a truly balanced process is necessarily obtained with the institute of the abbreviated process before the diocesan bishop, especially considering the risk to which the doctrine of indissolubility is exposed to with the institution of the abbreviated process. Not only because of the limited canonical formation of some bishops, but as well because of their unavailability due to their many commitments; to which we can add age issue that can make it difficult for the bishop keep up with the exercise of his judicial power. Another danger with the abbreviated process is the risk to encourage divorce related mentality, given the fact that the nullity seems now very easy to obtain if only both spouses agree to request for the process that they accompany with “evident” proofs.

Without denying the reform’s contribution in making the nullity process more agile, we believe that the balanced, speed and serious nullity process is rather better obtained through the expertise and professionalism of those who carry with them the responsibility to apply the laws. Their critical and full knowledge of the existing laws and faithful commitment to apply them accordingly, is the key to make the process move smoothly to its very purpose, while avoiding any unnecessary delay. In this respect, Dignitas Connubii presented as “Vademecum” to the judge and faithful companion to the universal law, whose norms regarding the nullity process it ordered, and deeply explained, while giving the proper context for their application, is still a valuable instrument to help our judges to carry on the nullity processes with speed and seriousness required by its very nature. This is the view that is also expressed in Pope Francis’ discourse delivered on the occasion of the celebration of the tenth anniversary of the instruction Dignitas Connubii, as the holy father convincingly reminded:

“...it is, in fact, a modest but useful vademecum (handbook) that really takes the ministers of the tribunals by the hand toward the implementation of a process that is both sure

\textsuperscript{217} F. Daneels, A First Approach, p.128.
\textsuperscript{219} W.L. Daniel, An analysis...,pp.451-452.
and expeditious...an expeditious process because – as common experience teaches – those who know well the road to travel, go more quickly...”

In this respect, a document encouraging the full implementation of the nullity process in its renovated form or a new instruction following on the same criteria as Dignitas Connubii, without the need to reform the 1983 Code’s established nullity process, could have been as well highly appreciated and may be more suitable than the full reform of the process and some of its effected fundamental changes.

GENERAL CONCLUSION

The high number of Catholics requesting for the nullity of their marriages due to marital breakdown, as it is clearly reported in the 2002’edition of the Annuario Statistico della Chiesa cited by Cardinal De Paolis221, presents a big challenge to the Church, committed to remain faithful to the teaching of the Lord who, not only elevated marriage to the dignity of sacrament between the baptized (c.1055) to become the image of the covenant between God and his people, and the participation to the love of Christ for the Church, but as well promoted the divine origin of marriage and its irrevocability when He said: “...so, they are no longer two, but one flesh. Therefore, what God has united, let no man separate”222. The clear understanding of Jesus’ teaching and the zeal for the salvation of souls, have always served as the real motivation behind the Church’s commitment to establish structures able to promote this divine institution and to protect its essential property of indissolubility threatened today by a wrong and limited conception of marriage seen as a private contract that man and woman establish at will and break at will. As the fruit of many centuries of pastoral experience and the commitment to protect the sacred bond of marriage, the Church came to the understanding that “the juridic dimension of marriage was not something opposed nor foreign to the interpersonal reality of marriage, but a truly intrinsic dimension of it”223.

This is the understanding that has grown with the Post conciliar period that brought a broader vision of the Church doctrine that helped not only to renew the teaching of the Church, but as well reformed the Church legislative system of which, the most important, as mentioned in the introduction, was the promulgation of the 1983 Code of Canon Law which, while translating into canonical language the renovated teaching of the Church, has established a renewed canonical proceeding whose aim is not to facilitate the granting of nullity to those affected by failed marriages situation, but to ascertain the objective truth about the existence or the nonexistence of the bond of their marriage. In one of his many discourses to the Roman Rota, John Paul II, referring to the structure of the ordinary process and its purpose, declared:

220 Francis PP., Speech on Dignitas Connubii, January 24, 2015.
221 V. De Paolis, Op. Cit.
222 See Matthieuw, 19,5-6.
To limit as much as possible the margins of error in fulfilling the precious and delicate service performed by you, the Church has elaborated a procedure which, with the intention of ascertaining the objective truth will, on the one hand, ensure the parties the greatest security in advancing their own arguments, and on the other, consistently respect the divine command: “Therefore what God has joined together, let no one separate” (Mk 10:9)\(^{224}\)

As we reach out the conclusive phase of our work, which comes along after a detailed presentation on the one hand of the instruction Dignitas Connubii and its work of renovation of the nullity process established by the 1983 Code, and on the other, the canonical reform of the established nullity process carried out by the Motu Proprio Mitis Iudex Dominus Iesus, introducing changes and novelties that shook the ground of the nullity process, before then critically assessing the work of the reform, the relevance of its fundamental changes and the suitability of the reform in its relation to the nullity process as established by the 1983 Code of Canon Law. What does remain today of that established process following the renovation and the reform? Or in other words: what is today the state of the canonical nullity process compared to its original intention and purpose? is the main question that guided the spirit of our research.

Referring to all the details given in the above chapters, particularly about the novelties and changes brought by the Instruction and the Motu Proprio and their relevance, we had no doubt to express that till recently the norms regulating the nullity process established by the 1983 Code, thanks to the renovation and the interpretation realized by Dignitas Connubii following on its nature and function of being an instruction, had kept their forces of the law, keeping it clear that the aim of the established canonical process was not to facilitate the granting of nullity at any cost, but to establish the objective truth about the existence or the nonexistence of the sacred bond of marriage and at the same time, to protect the doctrine of indissolubility against divorce oriented mentality of our modern world and the false jurisprudence of some tribunals. That is why Dignitas Connubii not only insisted on the juridical dimension of the process, but as well strongly supported mandatory requirement for double conforming sentences, introducing even the equivalent conformity, while strongly insisting on the active participation of the defender of the bond in the process and the many functions he/she must accomplish. These provisions of Dignitas Connubii may not all appear to favor the celerity of the process, as suggested some authors, among them Professor Carmen G. Peña, we have referred to in the above chapter. Nevertheless, they appear to assure extra protection to the indissolubility of the marital bond that is to be the motivation behind any nullity process.

The Instruction Dignitas Connubii with its provisions has governed the nullity process for around ten (10) years till the coming of Pope Francis’ Motu Proprio Mitis Iudex, by which the canonical nullity process was reformed. Considering the work of reform in general and those fundamental changes it has introduced, especially by abrogating some of the norms that assured real security and protection to marriage institution and its property of indissolubility,

Mitis Iudex, it appears to us, offers today an apparently weakened regulation and jurisprudence which, for some concrete reasons, we believe, compromises the dignity of marriage institution and the Church’s teaching about the indissolubility of marriage. With the elimination of the double conforming sentences we believe, it is somehow the seriousness of the nature of marriage nullity cases that is left behind on the expenses of the principle of celerity, with all the risks that speed without seriousness may cause to the nullity process.

The derogation of the mandatory requirement for double conforming sentences have left the doctrine of indissolubility without its stronghold and somehow unsafe; which means a little mistake from first instance may end up declaring null a validly contracted marriage, and so destroying the sacred bond. And with the introduction of the processus brevior, it is the presumption of the law/favor matrimonii that marriage always enjoyed which is denied to it. Since evidence must be collected even before the instruction of the case begins, this reverses the normal procedure. In this case, the aim of the process seems to be no longer to establish the objective truth about the bond of marriage, but a struggle to prove the validity of a marriage that is already considered null, even before the starting of the real process, only by the fact that it is submitted to the abbreviated process. Commenting on this seemingly reversal of the process, Page’ complains:

“If we were to do otherwise, we would have to seriously consider if we are passing from the presumption of validity of marriage of canon 1060 to the presumption of its invalidity in virtue of a number of different types of presumption of fact?...the proper use of the briefer process would seems to beg urgent consideration of this question”225.

In this context of predominance of the principle of celerity over favor matrimonii, as it can clearly be observed with the institution of the processus brevior, William Daniel reminds us that even “when spouses confront difficulties in their common life leading even to their separation, the favor matrimonii does not cease”226. That means, even the agreement of both spouses imposed as condition sine qua non to initiate processus brevior, is not enough guarantee to deny any marriage from the presumption of the law as well established by canon 1060.

Despite the insistence of Pope Francis not to confuse the reform with the granting of catholic divorce however, this is the impression that one gets from these norms shortening the process by abrogating norms which are strongly connected to the protection of the sacred bond. Today the indissolubility eloquently defended by Magisterium and Francis’ s predecessors, can now be wiped away by a short process which, by simplifying too much the process, not only gives the impression that nullity is now easier to obtain, but as well risks to encourage divorce oriented mentality and to end up compromising the true meaning and understanding of the indissolubility the catholic doctrine attaches to marriage as one of its sacred properties.

We acknowledge that in reforming the procedural law for the declaration of nullity of marriage bond, Pope Francis did not only intend to shorten the process, making it “accessible to everyone, less-time consuming and at no expenses”\(^\text{227}\), but as well wished to promote the image and mission of the Church as a “generous mother that makes herself closer to her children who consider themselves separated from her”\(^\text{228}\).

This is a highly encouraging attitude which, assuredly, will establish great trust and closeness between the Mother Church and her children. However, as well said Daneels, commenting on Pope Francis’ intention:

“the suitable way for the Church to be closer to her children is not by making it all easier in the name of mercy; rather, it is by giving them a chance for a due process, which will have as the only finality not to grant them nullity at any cost, but to establish the objective truth about their situation within a reasonable period of time”\(^\text{229}\).

And to get there, what is needed is certainly well-structured tribunals and well prepared and competent justice ministers, who are able to handle cases of nullity with professionalism and expertise, while remaining faithful to the Church’s doctrine. Based on this conviction, we openly share William L. Daniel’s observation who, questioning the capacity of the newly reformed process and its suitability, suggests that “what was needed to be reformed may not be the procedural law, but its concrete application and full implementation by ministers of justice around the world, given the fact that each nation, each tribunal has its own challenges in applying those laws regulating the cause for declaring the nullity of marriage”\(^\text{230}\). And to this very end, the instruction Dignitas Connubii has still a very important role to play, as a document that has re-ordered, actualized and promoted the authentic interpretation of the procedural law of the Church, giving measurement for their right implementation. Dignitas Connubii or a similar Instruction will help our tribunal ministers of justice to remain focused on the objective truth. It will help bring clarity to judicial proceedings and will ensure that our judicial ministers will handle smoothly the nullity process with the required speed and seriousness.

Even though it is still early to give a final judgment about the reform however, we believe that in this very particular moment of the history of our Church and fully aware of the many challenges marriage institution is going through in our modern world, the aim for such an important reform could have been to provide an instrument, of the same type as Dignitas Connubii, that contains norms requiring the full implementation by ecclesiastical tribunal ministers of the norms regulating the process declaring the nullity of marriage established by the 1983 Code and which the Church has thoroughly and seriously prepared to handle this complicate matter related to the nullity of marriage and so, to ascertain the validity of the celebrated marriage, while protecting the indissolubility of the sacred bond. It is not the

\(^{227}\) Synod of Bishops, XIV Ordinary Genera Assembly, nn.47-48.
\(^{228}\) See MI. (2015), Prologue, p.2.
\(^{229}\) F. Daneels, A First Approach..., p. 125.
proper laws that are missing, as once reminded Cardinal G. Agustoni, cited above, but the implementation of those laws to give concrete solution to concrete problems.

By giving our view, though somehow critical to the spirit of the reform however, we do not mean neither that the reform was not needed, nor that it was not important; because it is done with good faith and lots of considerations for the Church’s pastoral commitment, as it insists in some particular elements to help establishing real proximity between the judge and the faithful and so, to make the process accessible to everyone, so that no faithful will be kept away from the service of the tribunal for whatever reason it may be. Changes, as reforms, are necessary for the development of any society and, “issuing new legislation, insists L. Daniel, is a governing activity that is subject to the prudent judgment of the competent legislator” for the good of the Church and the development of its mission. Nevertheless, before any action will be taken, a fundamental question is always to be asked: “If there is a real need for legislation reform?” or what is really needed to be reformed? That’s why we suggest, in respect to Mitis Iudex, that the promulgation of new Instruction explaining and requiring full implementation of the existing norms related to the nullity process, that has been “in its modern form diligently prepared with lots of care, gradual development and much consultations” and as they are deeply renovated and actualized by the instruction Dignitas Connubii, could have resulted on our tribunals handling the nullity process not only with speed, but as well with the seriousness required by the nature of the process. In this way, those who are affected by situation of failed marriages will see the objective truth about their marriage bond established within a reasonable period of time (c.1453) and at no exaggerated cost. Furthermore, the marriage institution and the doctrine of indissolubility would be even safer than they are now highly exposed and apparently weakened with the elimination of the required mandatory double conforming of positive sentences and the institution of the abbreviated process before the diocesan bishop.

The critical analysis is not an argument against the reform, whose aim we support and encourage. It is rather the way to call the attention of those who are entrusted with the ministry of enacting justice in the Church to be aware of those realities and eminent risks connected to the newly reformed canonical process for the declaration of the nullity of marriage and to which the Church’s doctrine of indissolubility seems to be exposed to since, as reminds John Paul II: “the roads leading away from [true] justice and truth end up in serving to distance people from God, thus yielding the opposite result from that which was sought in good faith”. Whatever it may be, we wish all good lucks to the reform made for the good of the faithful and the salvation of the souls, which is the infinite goal of the Church and all its institutions.

232 Ibid.
233 Ibid., p.430.
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SHORT LIST OF ABBREVIATIONS

-AAS: Acta Apostolicae Sedis

-Art: Article

-c.: Canon

-CIC: Codex Iuris Canonici

-DC: Dignitas Connubii

-MI: Mitis Iudex