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**Badanie przedprocesowe czyli duszpasterskie, w świetle motu proprio „Mitis Iudex Dominus Iesus”**

**The pre-judicial or the priestpriestly inquiry in the light of the motu proprio “Mitis Iudex Dominus Iesus”**

**Introduction**

The promulgation of the motu proprio „Mitis Iudex Dominus Iesus” has led to many discussions on the procedure for declaring the nullity of marriage, both on a publicist level and among canonists. According to some publicists, issuing the document is intended to make it easier for divorced persons to enter into a new sacramental union. This way of thinking, however, is contrary to the logic of the document. It should be noted that one of the fundamental principles of this motu proprio is to protect the indissolubility of marriage<sup>1</sup>. Pope Francis four times referred to this principle in his motu proprio<sup>2</sup>. This document contains provisions that introduce innovation in the procedure for nullifying a marriage. An important innovation is the creation of the institution of a pre-trial examination for people experiencing the breakdown of sacramental marriage. One of the aims of this study is to determine the canonical situation of these people and the possibility of starting a marriage nullification process. This pre-trial examination is called parish „priestpriestly”, which indicates that it cannot be reduced to legal and canonical advice alone. It cannot be ignored that in 2015, the Synod Fathers called for the parish priestpriestly care of people experiencing the breakdown of a marriage in the following words: „It seems particularly urgent to serve those whose marriage has broken up. The drama of separation often comes at the end of long years of conflict, which causes most suffering to

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<sup>1</sup> Cf. FRANCISZEK, *List apostolski motu proprio „Mitis Iudex Dominus Iesus”, reformujący kanony Kodeksu Prawa Kanonicznego dotyczące spraw o orzeczenie nieważności małżeństwa. Wstęp*, AAS 107 (2015), p. 958.

<sup>2</sup> Cf. W. GÓRALSKI, *Wprowadzenie do motu proprio „Mitis Iudex Dominus Iesus”*, in: J. KRAJCZYŃSKI (ed.), *Proces małżeński według motu proprio „Mitis Iudex Dominus Iesus”*, Płock 2015, p. 16.

children. The loneliness of an abandoned spouse, or one who has been forced to stop living a life of constant and serious abuse, requires special care from the Christian community”<sup>3</sup>. A proper pre-trial examination may be one of the forms of assistance to people who have experienced the drama of breaking up a sacramental marriage. L. Adamowicz emphasised that pre-trial examination is an „ordinary parish priestpriestly work, and not activities of an additional, complementary and extraordinary nature”<sup>4</sup>.

### **1. The duties of the diocesan bishop towards people who have experienced the breakdown of sacramental marriage**

Pope Francis, in his *proprio motu proprio* „*Mitis Iudex Dominus Iesus*”, emphasised that the obligation to take care of people whose sacramental relationship has broken up results from the provisions of can. 383 § 1 of the CIC<sup>5</sup>. From the content of the quoted canon, it follows that the diocesan bishop should surround all persons in his diocese with his parish priestpriestly care. In the light of can. 383 § 1, a diocesan bishop may not discriminate against certain persons or groups of persons among which the legislator literally lists categories such as age, position or nationality. It should be noted that this catalogue is not exhaustive, and therefore the diocesan bishop may not, in his parish priestpriestly ministry, disregard other groups of people.

The ecclesiastical legislator has stressed that the diocesan bishop should provide parish priestpriestly care to those who, because of their living conditions, cannot sufficiently benefit from the ordinary form of parish priestpriestly care and those who do not. It is precisely those who have experienced the break-up of the sacramental marriage that can be classified as one of the above mentioned groups of people. Neglects in the religious practices of these people are conditioned by numerous reasons. In some cases, people after the break-up of a sacramental marriage feel subjectively rejected and stigmatised by the Church. They therefore abandon their religious practices. In his exhortation „*Amoris Laetitia*”, Pope Francis encouraged „that divorced persons living in new relationships feel that they are part of the Church, that they „are

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<sup>3</sup> XIV ZWYCZAJNE ZGROMADZENIE OGÓLNE SYNODU BISKUPÓW, *Misja i powołanie rodziny w Kościele i w świecie współczesnym*, p. 78, AAS 107 (2015), p. 1161-1221.

<sup>4</sup> L. ADAMOWICZ, *Okoliczności osób i rzeczy zezwalające na prowadzenie procesu skróconego*, w: J. KRAJCZYŃSKI (ed.), *Proces małżeński według motu proprio*, op. cit., p. 95

<sup>5</sup> Can. 383 of the CIC § 1: „In exercising the function of a pastor, a diocesan bishop is to show himself concerned for all the Christian faithful entrusted to his care, of whatever age, condition, or nationality they are, whether living in the territory or staying there temporarily; he is also to extend an apostolic spirit to those who are not able to make sufficient use of ordinary pastoral care because of the condition of their life and to those who no longer practice their religion”.

not excommunicated” and are not treated as such because they always form the church community. These situations require careful discernment and accompaniment with great respect, avoiding any language and attitude that would give them the feeling that they are being discriminated against and encouraging their participation in the life of the community. „For the Christian community, concern for these people is not a weakening of its faith and its testimony of its marital integrity, but rather an expression of its love for them”<sup>6</sup>. The Pope's call should mobilise parish priestpriestly workers so that people experiencing a broken marriage can find their place in the community of the Church. The diocesan bishop should propose solutions so that this demand can be put into practice.

Priestly care should also be given to religiously sensitive people, because they often feel they are guilty of breaking the marriage bond and do not feel worthy of participating in religious practices. Other people participate in religious practices, but some are unable to attend the sacrament of the Holy Communion because of their entry into another relationship. Such people usually want to regulate their canonical situation and want to ask the Church to examine the validity of their failed sacramental marriage.

Pursuant to Article 1 of the „Rules of Proceedings for Declaring the Nullity of Marriage”<sup>7</sup>, the diocesan bishop should take care of separated and divorced spouses. The legislator, in the aforementioned provision, does not refer explicitly to people whose sacramental marriage has broken up, although this is due to the context of the whole document. Taking into account, however, the fact that the legislator in can. 383 § 4 of the CIC obliges the diocesan bishop to include the unbaptised in his ministry, the provisions of this canon should also be extended to non-Catholics and unbaptised persons. This is due to the fact that the bishop should also take care of these people if they ask him to do so. This may be the case when a person has doubts about the validity of a previous marriage and wants, as a non-Catholic, to join the full community of the Church or, as an unbaptised person, to be baptised in the Catholic Church. In both cases, the bishop should help to establish such a person's canonical situation in the Church. The diocesan bishop usually does not have much direct contact with the faithful and therefore his task may be limited to organising the structures, issuing appropriate regulations and appointing persons responsible for assisting such faithful, although this does not exclude the personal involvement of the bishop himself. The initiatives presented are intended to help people experiencing the breakdown of a marriage to find themselves in this situation.

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<sup>6</sup> FRANCISZEK, *Posynodalna adhortacja apostolska „Amoris laetitia”*, p. 243, AAS 108 (2016), p. 311-446.

<sup>7</sup> FRANCISZEK, *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, art. 1, AAS 107 (2015), p. 967-970.

The legislator has obliged the Ordinary of the place to appoint suitable persons to conduct the pre-trial examination<sup>8</sup>. When analysing the content of Article 3 of the „Rules of Proceedings for Declaring the Nullity of Marriage”, the question arises whether this is inconsistent with the legislator when Article 1 of the „Rules of Proceedings for Declaring the Nullity of Marriage” refers only to the diocesan bishop. It seems, however, that this is an intended decision of the legislator. A careful analysis allows us to note that the diocesan bishop in this case is responsible for all separated or divorced persons who question the validity of the marriage, and the local bishop should only take responsibility for the organisation of the structures responsible for conducting the process. Thus the Church legislator has imposed more obligations on the diocesan bishop than on the local bishop. It should be stressed that the diocesan bishop is always the chief bishop of the place. The legislature could therefore use the term „bishop of the place” for two reasons. Firstly, people who have experienced the disintegration of unions are not only in areas with diocesan structures, but are also present in ecclesiastical structures that are assimilated to a diocese. Therefore, the legislator used the term Ordinary of the place to designate the persons responsible for the pretrial examination to also make the Apostolic Administrator, the Apostolic Vicar, the Apostolic Prefect, the Territorial Prefect and the Territorial Abbot<sup>9</sup>. The Vicar General and the Vicar Bishops is also the Ordinary of the place<sup>10</sup>. It can be presumed that the legislator used the term Ordinary of the place to relieve the diocesan bishop of this duty. Therefore, the Vicar General and the bishops may appoint persons responsible for the pre-trial examination. This is precisely the second reason for using the term Ordinary of the place. It should be stressed, however, that even if the task of designating the persons responsible for this examination is ceded to the Vicar General or Bishop, care for the proper functioning of the structures rests with the diocesan bishop or a person equal in law to the diocesan bishop. In the context of these analyses, the conclusion is that a diocesan bishop, or a person assimilated to him in law and headed by a particular church, could appoint a permanent representative to carry out the pre-trial examination, who would be responsible for the entire organisation of the structures in a particular unit of church administration.

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<sup>8</sup> Cf. *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, art. 3.

<sup>9</sup> Cf. can. 370-371 of the CIC.

<sup>10</sup> Cf. can. 134 of the CIC.

## 2. Tasks of a parish priest

The bishop carries out parish priestly initiatives through presbyters and, in a special way, this is done through the cooperation with parish priests<sup>11</sup>. The diocesan bishop is entitled to impose his will on the parish priest<sup>12</sup>. Parish priest, on the other hand, is obliged to take action in accordance with the line of parish priestly work designated by the diocesan bishop<sup>13</sup>. For this reason, the second entity designated by the ecclesiastical legislature to assist persons who are separated or divorced is the parish priest<sup>14</sup>. This task also stems from can. 529 §1 of the CIC, provision of which reads as follows: „In order to fulfill his office diligently, a parish priest is to strive to know the faithful entrusted to his care. (...) with particular diligence he is to seek out the poor, the afflicted, the lonely, those exiled from their country, and similarly those weighed down by special difficulties. He is to work so that spouses and parents are supported in fulfilling their proper duties and is to foster growth of Christian life in the families (...)” The parish priest is obliged to get to know his parishioners and the situation in which they find themselves. The Church legislator points out that the parish priest should be sensitive to the situation of people in difficulty and to Christian life in families. People who have experienced the break-up of a sacramental marriage are particularly eligible for the parish priest to take an interest in their fate and help to discern their canonical situation. As far as the diocesan bishop can help people who are separated and divorced mainly by organising assistance structures or by issuing appropriate regulations, the parish priest can help directly with their specific situation.

## 3. The role of diocesan and parish structures

The provision of Article 1 of the „Rules of Proceedings for Declaring the Nullity of Marriage” sets out the situations which are the subject of the rule. These include believers who live in a separation established by canon law and those whose divorce has been ordered in a state forum<sup>15</sup>. The pre-trial examination also includes other believers who, after the dissolution of their marriage, are married in a civil marriage, living without a formal relationship or living alone. The Church legislature has decided that the diocesan bishop should

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<sup>11</sup> Cf. can. 529 § 2 of the CIC.

<sup>12</sup> Cf. P. KROCZEK, *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, in: P. SKONIECZNY (ed.), *Praktyczny komentarz do Listu apostolskiego motu proprio „Mitis Iudex Dominus Iesus” papieża Franciszka*, Tarnów 2015, p. 42.

<sup>13</sup> Cf. G. SHEEHY (ed.), *The Canon Law, Letter & Spirit: a Practical Guide to the „Code of Canon Law”*, can. 519, n. 1029.

<sup>14</sup> Cf. can. 529 § 2 of the CIC.

<sup>15</sup> Cf. P. KROCZEK, *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, op. cit., p. 42.

take up the priestly care of people who have experienced the break-up of their sacramental marriage with the parish priest. This is to be done by setting up special parish and diocesan structures<sup>16</sup>. The legislator therefore gives the bishop the choice to determine which system will better serve the purpose of helping these people. Taking into account Article 1 of the „Rules of Proceedings for Declaring the Nullity of Marriage”, it should be stated that the bishop should consult the parish priests, who should have a good understanding of the situation of the people living in their parishes, before deciding how to establish these structures. It is the opinions of parish priests that can help to diagnose whether there is a need for such structures in every parish, or whether it is sufficient for them to exist only at diocesan level. Although the legislator did not foresee such a situation, it can be proposed that in some situations an intermediate structure between the parish and the diocesan level could be set up, for example at the level of the deanery or the priestly area.

The ecclesiastical legislature, in Article 2 of the „Rules of Proceedings for Declaring the Nullity of Marriage”, decided that the structures mentioned above should be aimed at knowing the situation of separated or divorced persons who question the validity of their marriage or are convinced of its nullity. Persons responsible for familiarising themselves with the situation of the faithful should know the circumstances in which the spouses get to know each other, their decision to marry and how the marriage works. It should be noted, however, that this cannot be a one-sided look from the point of view of those who have doubts as to the validity of the marriage. It should be recalled that, according to can. 1060 of the CIC, a marriage enjoys the benefit of the law<sup>17</sup>. The examination of cases of people whose marriage has broken up must therefore not overlook arguments that prove its validity. The structures set up must also uphold the permanence and sanctity of the marriage knot in the performance of their tasks.

The legislator has defined pre-trial studies as „priestly”. P. KroczeK believes that such a legislative procedure is intended to reject the direct association of this legal institution with pre-trial examinations relating to the criminal process<sup>18</sup>. However, this justification is not entirely convincing. The use of such an expression underlines the important dimension of this behaviour, which should be of priestly nature.

P. KroczeK states that „the purpose of the pre-trial examination is to obtain information which may be of assistance in the court proceedings for nullity of a marriage, regardless of the

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<sup>16</sup> *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, art. 1.

<sup>17</sup> Cf. can. 1060 of the CIC.

<sup>18</sup> Cf. P. KROCZEK, *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, op. cit., p. 44.

form of those proceedings”<sup>19</sup>. However, the aim indicated by the author can only be described as the main one. Since the legislator in can. 1675 of the CIC orders a judge, before accepting a case, to make sure that there is no possibility of resuming a community of marital life, this is all the more important for the pre-trial examiner. Moreover, if the priestly study was only about finding grounds for nullity of the marriage, the legislator would not place it within the diocesan ministry of marriage<sup>20</sup>, but within the framework of specialist legal advice.

Therefore, the pre-trial examination with a separated or divorced person must not be limited to seeking possible grounds for invalidity of the marriage. The interview to find the grounds for invalidity of the marriage may be conducted in a court advisory centre or by a lawyer. The provision of assistance by a court counselling centre or by a lawyer was practised by the Church before the reform of Pope Francis, and pre-trial examination is a new institution. It must therefore be concluded that the intention of the legislator was not to replace the existing forms of judicial assistance with the faithful, but to complement it with a priestly dimension. Although the ecclesiastical judiciary is part of the priestly activity of the Church, it should be noted that the legislator, when mentioning the priestly dimension of the pre-trial examination, did not rule out extrajudicial forms of influence.

The main objective of ecclesiastical law is the salvation of souls<sup>21</sup>, and pre-trial testing fits in perfectly with its implementation. Pope John Paul II, in his speech to the Roman Rota, pointed out that a church judge is a parish priest who should bend over a lost and hurt sheep<sup>22</sup>. The allegory used by Pope John Paul II towards a church judge can be referred to in a very broad sense to the attitude of the person conducting the pre-trial examination. He or she should be able to bend over and understand the situation in which the faithful find themselves. The priestly researcher should not, however, look at a person who has experienced the breakdown of a marriage solely from the point of view of the judge, who evaluates such a faithful person and his situation, but should be more like a shepherd who leans over a hurt sheep.

The priestly dimension of this study is important for another reason. It should be assumed that not every time a person asks for help, they will obtain a satisfactory solution. In the situation of people who have experienced the breakdown of their sacramental marriage, it will not always be possible to find grounds for challenging its invalidity. It is then very important that such

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<sup>19</sup> Cf. IBID.

<sup>20</sup> *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, art. 2.

<sup>21</sup> Cf. R. SOBAŃSKI, *Nauki podstawowe prawa kanonicznego. Teologia prawa kanonicznego*, Warszawa 2001, p. 115.

<sup>22</sup> Cf. IOANNES PAULUS II, *Allocutio ad Romanae Rotae praelatos auditores*, 17.01.1998, AAS 90 (1998), p. 781-782.

a person is surrounded by priestly assistance, as John Paul II called for in the following way: „ (...) Together with the Synod, I urge the shepherds and the entire community of the faithful to help the divorced, to make loving efforts to ensure that they do not feel disconnected from the Church, since they can, yes, as baptised, participate in her life. May they be encouraged to listen to God's word, to attend Mass, to persevere in prayer, to multiply works of love and community initiatives for justice, to raise children in the Christian faith, to nurture the spirit and penance, so that they may ask grace of God from day to day. May the Church pray for them, may she give them courage, may she be a merciful mother, sustaining them in faith and hope (...)”<sup>23</sup>.

The leading priest should, above all, make people experiencing the breakdown of their marriage aware that he or she is not rejected and excluded from the community of the Church. It is necessary in this situation to arouse hope and show the sense of involvement in the life of the Church, because in such situations people loosen or break the bonds with that community by neglecting Sunday practices or personal prayer. Those who have not entered into another relationship should be reminded that they do not have a closed way to enjoy the sacraments of Penance and the Eucharist. It sometimes happens that people in such a situation, feeling guilty of breaking up a marriage, do not know the possibility of receiving these sacraments.

Another way to help is to propose in the apostolic exhortation „*Familiaris consortio*”<sup>24</sup>. In this document, Pope John Paul II made it possible for people who live in a non-sacramental relationship to enjoy the sacraments of penance and the Eucharist under certain conditions. Above all, spouses should acknowledge Christ's teaching on the inseparability of marriage, knowing that they have misappropriated it because they have broken the sacramental covenant and are living in new civil unions. Furthermore, this applies only to those spouses who cannot give up their relationship with a second partner solely for important reasons, such as raising children or providing mutual care. Another important condition is that such people should be obliged to live in complete, unconditional and permanent sexual abstinence. Those who decide to act in this way should be reminded that there must be no threat of being offended. In practice, this means that they should receive the sacraments outside their parish. The person conducting such a pre-trial examination should give the faithful relevant information in this regard.

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<sup>23</sup> Cf. JAN PAWEŁ II, *Adhortacja apostolska O zadaniach rodziny chrześcijańskiej w świecie współczesnym „Familiaris consortio”*, p. 84, AAS 74 (1982), p. 82-191.

<sup>24</sup> JAN PAWEŁ II, *Adhortacja apostolska O zadaniach rodziny chrześcijańskiej w świecie współczesnym „Familiaris consortio”*, p. 84: „(...) Reconciliation in the sacrament of Penance - which would open the way to Eucharistic communion - can only be available to those who, regretting that they have violated the sign of the Covenant and faithfulness to Christ, are sincerely ready for a form of life that does not conflict with the inseparability of marriage. Specifically, this means that when a man and a woman who, for important reasons - such as bringing up children - cannot fulfil their obligation to part, „decide to live in complete abstinence, that is, to refrain from acts which only the spouses are entitled to. (...)”.



In 2015, the Synod Fathers pointed out that those who experienced the breakdown of a marriage should be formed into an attitude of forgiveness. „It is not easy to forgive for injustice suffered, but it is a process that grace allows. Hence the need for priestly care for conversion and reconciliation, including through specialised counselling and mediation measures to be established in dioceses. It is also necessary to promote justice for all parties involved in a failed marriage (spouses and children). The Christian community and its shepherds have a duty to demand that the separated and divorced spouses treat each other with respect and mercy, especially for the sake of the children, who should not cause further sufferings”<sup>25</sup>. The content of the synod document clearly indicates that it is the responsibility of parish priests to guide people to reconciliation, even if it is not possible to resume the marriage. An important method is spiritual and moral formation, in which it should be stressed that one of the key attitudes of a Christian is forgiveness. The Synod Fathers, however, have pointed out that in addition to relying on God's grace, specialised counselling and mediation centres should be used for this purpose. This complements and completes the formation for forgiveness. The document of the Synod of Bishops of 2015 shows that the motive for leading people experienced in breaking up a marriage to forgiveness is not only the relationship between spouses but also the welfare of children. In the context of caring for children, spouses should be reminded of the obligations of natural parties towards their children to support them and bring them up. In certain situations, where the spouses are unable to perform their parental duties properly, it would also be appropriate to refer them to an appropriate institution to help correct the dysfunction. Such a place could be a family counselling centre, where the person would receive professional help from a specialist. The parish priest should only highlight the problem and indicate the source of the solution. This is also in line with the principle of subsidiarity which the Church has developed and calls for it to be applied<sup>26</sup>. In response to the call of the Synod Fathers, procedural examiners should also take into account as an objective of their action the awakening of an attitude of forgiveness and concern for the welfare of children in their spouse.

The pre-trial investigator may offer participation in the priestly care of non-sacramental couples if he does not see grounds for challenging the marriage. Participation in such a community helps to recognise that there are other spouses affected by a similar problem, but above all it motivates greater involvement in the Church and gives new meaning to their lives.

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<sup>25</sup> XIV ZWYCZAJNE ZGROMADZENIE OGÓLNE SYNODU BISKUPÓW, *Misja i powołanie rodziny w Kościele i w świecie współczesnym*, op. cit., p. 79.

<sup>26</sup> Cf. CCC, n. 1883.

The above mentioned forms of assistance and priestly care for people experiencing the break-up of their sacramental marriage cannot be carried out by the person conducting the pre-trial examination, because it requires time and appropriate measures. For this reason, the Church legislature proposes that the examination should take place within the framework of a uniform diocesan ministry of marriage<sup>27</sup>. Diocesan family ministry usually has extensive structures and competent specialists to adequately help people with specific problems. In addition to the typical priestly offers, it can also provide ad hoc forms of assistance such as the assistance of a psychologist or therapist. In this context, consideration should be given to whether it is not appropriate to try to bring about reconciliation and a resumption of community life for spouses during the pre-trial examination. The Church legislator did not foresee such a situation in the „Rules of Proceedings for Declaring the Nullity of Marriage”, but did not rule it out. It therefore seems appropriate to make a real attempt to reconcile the spouses during the pre-trial examination.

In the context of the pre-trial procedure under consideration, reference should be made to its relationship with the preliminary examination prior to the adoption of the complainant's complaint. On the grounds of Polish canon studies, a supporter of conducting the preliminary examination was priest W. Padacz<sup>28</sup>. Such an examination was carried out in many church tribunals in North America and Germany<sup>29</sup> even before the promulgation of the *Dignitas connubii* Procedural Instruction. Another canonist, R. Sobański, was strongly opposed to such an examination. He believed that if a judge has doubts as to the legitimacy of a complaint, then he should ask the claimant to supplement or clarify their complaint<sup>30</sup>. However, the legislator, in Article 120 of the *Dignitas connubii* Procedural Instruction, gave the opportunity to conduct a preliminary examination before accepting the complaint of the claimant. This procedure is fundamentally different from that proposed by the „Rules of Proceedings for Declaring the Nullity of Marriage”. The first difference is that the preliminary examination follows the filing of the complaint of the claimant and the pre-trial examination is carried out before it is filed. The preliminary examination examines the court's competence, the procedural capacity of the claimant and the existence of grounds for lodging a complaint. The pre-trial examination, on the other hand, has a broader scope, as it helps the applicant to identify possible grounds for

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<sup>27</sup> Cf. *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, art. 2.

<sup>28</sup> Cf. W. PADACZ, *Zagadnienie konieczności badania przedsądowego*, *Homo Dei* 28 (1958), p. 55.

<sup>29</sup> Cf. R. CAMPISI, *I motivi di reiezione del libello. Prassi dei Tribunali Ecclesiastici Regionali Italiani e giurisprudenza della Rota Romana*, p. 53; R. SOBAŃSKI, *Przyjęcie skargi o orzeczenie nieważności małżeństwa*, *Ius Matrimoniale* 6-7 (1996) No. 1, p. 150.

<sup>30</sup> Cf. R. SOBAŃSKI, *Przyjęcie skargi o orzeczenie nieważności małżeństwa*, op. cit., p. 151.

invalidity of the marriage, but also provides him with priestly support, as already mentioned above. A competent pre-trial examination, for the most part, makes it superfluous to conduct a preliminary examination before accepting the complaint.

#### **4. Competence of the responsible persons for conducting a pre-trial examination**

The Church legislator has defined in a succinct way the qualities of people who can be appointed as pretrial investigators. According to the „Rules of Proceedings for Declaring the Nullity of Marriage”, these are to be competent persons, even if not necessarily legal and canonical. The absence of a pre-trial examination procedure prescribed by the legislator makes it possible to appoint responsible persons without canonical training. The legislator puts the parish priest or the person preparing for marriage at first. This is because these people should have a better understanding of the circumstances of marriage. Therefore, they can more fully assess the situations in which people living in separation or after the break-up of a marriage find themselves. In addition, this study has a priestly dimension. Thus the parish priest, as a priest, can directly and immediately surround such people with his priestly assistance. The person or team of persons responsible for the preparation for marriage is usually the clergy, and therefore the legislator has identified them as the first person to be responsible for the examination and provision of priestly assistance. Other people who have been involved in the preparation for marriage or have the right predisposition, whether clergy, consecrated persons or laity, can contribute to other forms of assistance that are closely related to priestly care. An example of such support can be psychological, therapeutic or legal and canonical assistance.

According to Article 3 of the „Rules of Proceedings for Declaring the Nullity of Marriage”, the persons who may be entrusted with the task of examination may be priests, persons of consecrated life or laymen approved by the Ordinary of the place. The competence of these persons cannot be certain and therefore each of them should have the approval of the Bishop of the place. P. KroczeK stated that the form of approval can be *nihil obstat*, which is simpler and less authoritative than a *mandatum* or *missio canonica*<sup>31</sup>.

Given the complexity of the situation of people who have experienced the breakdown of a marriage, the most sensible solution is to set up a team of people, each of whom can help in a specific case using their own competences. People who have experienced the drama of breaking up a marriage may have different needs and therefore such a team should have a wide range of offers. Some people are more in need of spiritual help and therefore a parish priest

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<sup>31</sup> Cf. P. KROCZEK, *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, op. cit., p. 46.

who will lead the conversation will be useful. Otherwise, a psychologist will be more needed, because the person will not be able to find themselves in a new situation and take on existing responsibilities. In special situations, you may need the help of a family therapist or another specialist. In addition, it may also be the case that people whose marriage can be rescued and reconciliation can be brought about. In this case, it will make sense to have an interview with a person who is able to conduct conciliation therapy or to refer them to an institution which will provide appropriate assistance. However, the assistance of a canonist may prove necessary in a situation where there is no chance of reconciliation between the parties and there are indications that the marriage was entered into in an invalid way.

### **5. Formation of persons responsible for pre-trial examination**

Persons who are to be appointed to conduct a pre-trial examination or are part of the team carrying out such an examination should be subject to appropriate formation. Although this is not explicitly mentioned by the legislator, the matter to be dealt with requires a constant formation. These people must, above all, have a Christian worldview, and the formation that they are going to receive must remind them of this and make them aware of it. It should be about shaping the spiritual sphere. This can take place during special retreats. Such people should benefit from the sacrament of Penance and Reconciliation, the Eucharist and engage in religious life in a comprehensive manner. In addition to their spiritual formation, they should improve themselves in those areas that are of help in pre-trial examination. It would be worthwhile to organise workshops for such people to help them direct their knowledge in a proper way in order to make the most of this in priestly examination.

The ecclesiastical legislature has proposed that a diocese or several dioceses should jointly set up a structure and develop a vademecum in order to carry out the pre-trial examination as appropriately as possible<sup>32</sup>. Article 3 of the „Rules of Proceedings for Declaring the Nullity of Marriage” reiterates after Article 2 that a diocese is to create permanent structures responsible for conducting pre-trial examinations. However, the legislator has suggested that several dioceses should, as spatially as possible, cooperate in the creation of a common structure. Dioceses are created on a permanent basis, so the term permanent structure does not refer to the institution of a given diocese, but to an interdiocesan institution<sup>33</sup>. P. Kroczek stresses that the word diocese should be understood in a broad sense and therefore the provisions of the legislator refer to structures that are equal in law to a diocese, i.e. the territorial prelature,

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<sup>32</sup> Cf. *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, art. 3.

<sup>33</sup> Cf. *IBID.*

territorial abbey, apostolic vicariate, apostolic prefecture and apostolic administration that is permanently erected<sup>34</sup>.

It seems that the legislator has deliberately left some leeway for the diocesan bishops to decide on the establishment of the structures, taking into account the needs and possibilities arising from the specificities of the territory in which they are composed. The reflection on Article 3 of the „Rules of Proceedings for Declaring the Nullity of Marriage” leads to the conclusion that such a structure should be created in each diocese, however. Cooperation between several dioceses, on the other hand, may concern two matters and it seems most appropriate that this should take place at the level of the same Episcopal Conference.

The first requirement is that the structure responsible for the priestly examination in each diocese belonging to the same Conference of Bishops should be organised in the same way. Such uniformity will then enable the faithful who belong to different dioceses of the same Conference of Bishops to count on a similar way of solving the situations in which they find themselves.

The second point refers to the *vademecum*, which may be helpful in conducting such a procedure. It would be advisable for the same conference of bishops to have the same rules of conduct and the same ways of helping people who have experienced the breakdown of their marriage. Close cooperation of dioceses between themselves in developing the organisation of structures and the conduct vademecum may contribute to the exchange of experience, which in turn may lead to the improvement and achievement of optimal results in priestly research.

P. KroczeK postulated that the vademecum should contain information on legal and procedural issues of pre-trial examination, as well as basic information on the marriage nullification process<sup>35</sup>. The author emphasises that omission of the procedure to be indicated in the promulgated document does not result in the invalidity of the material collected<sup>36</sup>. It seems that in addition to information on canonistic issues, a proposal should be offered to those who need other forms of assistance. Some of these people may receive support in the priestly care of families, but there may be situations that require a new offer from the Church.

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<sup>34</sup> Cf. P. KROCZEK, *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, op. cit., p. 46.

<sup>35</sup> Cf. IBID., p. 47.

<sup>36</sup> Cf. IBID.

## 6. Collection of evidence for trial purposes

The legislator, in Article 4 of the „Rules of Proceedings for Declaring the Nullity of Marriage”, decided that during the pre-trial examination, useful information should be collected for the possible opening of a case before the competent court<sup>37</sup>. It is clear from the content of the article that, although this procedure has a priestly dimension, the typically legal aspects cannot be overlooked. The persons responsible for carrying out this examination, in addition to spiritual care, are also to gather material at this stage to serve as evidence in the marriage nullification process. Such information may include various documents available to persons. The investigators could, with the consent of the petitioners, draw up notes which would contain relevant information on the various circumstances surrounding a marriage that has broken up. Such a record could be helpful in the process when the parties are unable to recreate from memory the various relevant facts.

The legislator, in Article 4 of the „Rules of Proceedings for Declaring the Nullity of Marriage”, has obliged the pre-trial examiners to determine whether the parties are in agreement on an application for nullification of a marriage<sup>38</sup>. This task is important for subsequent proceedings, as it helps to determine which type of process should be used and to determine the legal basis for possible nullity of the marriage. This is particularly important when there are grounds for conducting a shortened trial before a bishop. According to can. 1683 of the CIC, such a process may be conducted only if the request was made by both spouses or by one of them with the consent of the other and the evidence indicates the evident nullity of the marriage. M. Greszata-Telusiewicz believes that the term determining the compliance of spouses should be understood in a maximalist way<sup>39</sup>. It is therefore not sufficient to agree on declaring a marriage null and void, but it is necessary for the parties to remain fully at the disposal of the court in seeking objective truth and to agree on the title of nullity of the marriage<sup>40</sup>. For the reasons set out above, at this stage of the priestly examination it is most appropriate that proceedings be conducted by a canonist or at least an expert in canon law.

The collection of useful information for initiating a trial before a church tribunal should result in the drawing up of an action for nullity of the marriage<sup>41</sup>. The legislator's provision should be interpreted in a broader way. A person who has experienced the break-up of

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<sup>37</sup> Cf. *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, art. 4.

<sup>38</sup> Cf. IDEM.

<sup>39</sup> Cf. M. GRESZATA-TELUSIEWICZ, *Processus brevior*, in: J. KRAJCZYŃSKI (ed.), *Proces małżeński według motu proprio*, op. cit., p. 83.

<sup>40</sup> Cf. IDEM.

<sup>41</sup> Cf. *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, art. 4.

a marriage should be given all information concerning the complaint. A person responsible for this part of the priestly process should indicate the tribunals competent to accept a lodged a complaint and the reasons for nullity that could be considered in the process. Persons experiencing the breakdown of their marriage should be informed that they may be assisted by a patron, who may be a lawyer or an attorney in fact<sup>42</sup>. In some situations, it should be proposed that the parties ask for a shortened process or use the dispensation procedure from an unfulfilled marriage. Presenting different options to the claimants and helping them to choose the best solution requires canonistic knowledge. In addition, assistance should be provided in drawing up the complaint itself. Therefore, at this stage of the procedure, it is most justified to entrust this task to a canonist or an expert in canon law. In the absence of competent persons in this field, such claimants should be referred to a church lawyer or an adviser who works at the church tribunal. In this case, the task of the last stage of the priestly examination is transferred to another subject. The legislator has provided for this in the pre-trial procedure to place the gathering of evidence and the drawing up of a complaint, so the assignment of this task to another subject should not be the rule, but only in a particularly justified case. The aim of such a rule is that a person who has experienced the breakdown of their marriage should not have to seek a solution to his or her life situation again. In this way, they can save time seeking help and do not have to present their life situation to another person again, which often requires emotional and psychological effort. In addition, such a petitioner will save costs which he would have to spend on a lawyer's fee.

### **Conclusion**

The pre-trial or priestly examination is a new legal institution, which was established under the amendment of the Code of Canon Law. It is a response to the challenges of the problems of people after the breakdown of their marriage concluded in the Church. This procedure is intended to improve access to information for people about their current canonical situation in the Church and to help them to regulate it in accordance with the provisions of canonical law in a justified case. The aim is to set up special structures and responsible persons to help identify the possibility and grounds for conducting nullity of marriage process. However, those who have experienced the breakdown of their marriage should be reminded, at a time of increasingly widespread impermanence and divorce mentality, that the nullity of marriage process is an exceptional procedure in the community of the Church, which is obliged

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<sup>42</sup> Cf. P. KROCZEK, *Zasady proceduralne w sprawach o stwierdzenie nieważności małżeństwa*, op. cit., p. 48.

to defend the sustainability of a marriage<sup>43</sup>. One should bear in mind that not all situations of people who ask for a pre-trial examination will be eligible to start process of the nullity of marriage. Then those responsible for conducting the pre-trial examination should propose a priestly solution which will help such believers to find their place in the community of the Church.

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<sup>43</sup> Cf. T. ROZKRUT, *Wprowadzenie i instrukcja sprawy*, in: *Praktyczny komentarz do Listu apostolskiego motu proprio „Mitis Iudex Dominus Iesus” papieża Franciszka*, (ed.) P. SKONIECZNY, Tarnów 2015, 42.