

PASTORAL OR PRE-JUDICIAL INVESTIGATION: A CANONICAL PROVISION FOR THE LAY PARTICIPATION IN THE SYNODAL CHURCH

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Abstract

The article analyses the scope of walking together by the inclusion of the lay persons in the pastoral and judicial ministries. In 2015, Pope Francis reformed the procedural law related to the matrimonial nullity by means of two *Motu proprio*, *Mitis Iudex Dominus Iesus* for the Latin Church and *Mitis et misericors Iesus* for the Oriental Churches. One of the provisions of the reformed laws was the introduction of a pastoral or pre-judicial investigation given as a pastoral follow-up for those who live in irregular marriage unions. In deserving cases, it may be taken as a pre-trial step to approach the tribunal for declaration of the nullity of marriage. As per the new norm lay persons are also competent be admitted to head this mission whereby, they become part of the judicial proceedings indirectly. Unfortunately, the scope of this provision has not yet been properly explored. Therefore, this article exposes the possibility and different nuances of giving space for the lay experts in this mission. It also presents an Indian model of the project.

Keywords: *Mitis et misericors Iesus*, Synodal Church, lay participation, pastoral or pre-judicial investigation, a model for Indian Church

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Introduction

The Second Vatican Council, in dialogue with the time, took up a prophetic mission to reshape the Church, and in the pursuit of an *aggiornamento*, the Council redefined the Church as a people of God.¹ It was, in fact, an original vision for a synodal Church. In this synodal Church, the Council wanted to situate the lay people in their proper place, demolishing the pyramidal structure of a Clerical Church. The Codes of Canon Law, CIC 1983 and CCEO, imbibing the spirit of the Conciliar challenge, tried to legally translate this vision into the juridical language. However, even after more than three decades of experiments with these legal provisions, until now, in the practical sphere, the vision remains unrealized which made Pope Francis think of a synod on synodality to discuss the scope of a Synodal Church that can journey together in a communion to fulfill Her mission in the world. In other words, this Papal commitment to resituate the marginalized faithful in the mainstream of the Church calls forth the collaboration of other lay members of the local Church.

1. A Synod on Synodality

“For a synodal Church - Communion, Participation and Mission” is the theme for the XVI Ordinary General Assembly of the Synod of Bishops, the upcoming synod on synodality, to be concluded in Rome in two phases, 2023 and 2024. The *Vademecum* of 07 September 2021, unfolds the idea of a synodal church: “A synodal Church walks together in communion to pursue a common mission through the participation of each and every one of her members.”² The synodal process that started with the diocesan phase was intended to hear the living voice of the people of God from the grassroots level. Now, after having finished the continental phase, an *Instrumentum laboris*, agenda for the discussion in the first session of the synod of bishops in October 2023, is published.

1.1 The Vision of a Synodal Church

In the wake of this synod on synodality, the role and mission of laity, and the concept of a participatory Church regain the focus of attention. *Instrumentum laboris* says that baptism creates a true co-

¹ Vatican Council II, Dogmatic Constitution on the Church, *Lumen gentium*, no.9, 21 November 1964, AAS 58 (1966), 1025-1120.

² *Vademecum* for the Synod on Synodality, 7 September 2021, <https://www.synod.va/content/dam/synod/document/common/vademecum/Vademecum-EN-A4.pdf>. Accessed on 3 June 2023.

responsibility among all the members of the Church, which is manifested in the participation of all, with the charisms of each, in the mission of the Church and the building up of the ecclesial community.³ Pope Francis wants the Church to walk together, and this exhortation is an indirect invitation to integrate laity into the ministry and the Church's decision-making process according to the norms of law.⁴ The spirit of the Papal exhortation is that any process leading to decision-making in the Church should be reflecting the voice of the people of God from the ground level, and this process must find fresh space that lay persons may be incorporated more effectively into the ministries and mission of the Synodal Church. However, this can take place only as per the norms of the law. The legal norms of the Codes allow the lay involvement in the mission of the Church in various ways. It is a question to be discussed whether these provisions are sufficient to accommodate the lay persons in the ministries of the Church. But a more relevant question is whether we properly discuss the scope of the existing provisions to incorporate the lay persons and utilize their expertise for making a participatory Church. Hence, in this study, our concern is to analyse a legal provision, pastoral or pre-judicial investigation, which allows the participation of the laity in pastoral and judicial matters. This provision has its legal root in the documents MP, *Mitis Iudex Dominus Iesus*, and *Mitis et misericors Iesus*, two *motu proprio* published in 2015. This article discusses the canonical and pastoral nuances of the provision, pastoral or pre-judicial investigation, proposing a different model of a participatory Church that is more viable for finding due space for the laity.

1.2 *Mitis et misericors Iesus* and *Ratio procedendi*

Pope Francis published the reformed norms on the matrimonial process of nullity through two Apostolic Letters in the form of *Motu proprio*, *Mitis Iudex Dominus Iesus* for the Latin Church and *Mitis et*

³ *Instrumentum Laboris* for the first session, October 2023, XVI Ordinary General Assembly of the Synod of Bishops, 20 June 2023, no.20, <https://www.synod.va/en/news/instrumentum-laboris-a-document-of-the-whole-church.html>, Accessed on 18 July 2023.

⁴ The objective of this Synodal Process is not to provide a temporary or one-time experience of synodality, but rather to provide an opportunity for the entire People of God to discern together how to move forward on the path towards being a more synodal Church in the long-term. *Vademecum* for the Synod on Synodality, <https://www.synod.va/content/dam/synod/document/common/vademecum/Vademecum-EN-A4.pdf>. Accessed on 3 June 2023.

misericors Iesus for the Oriental Churches. They came into force on 8 December 2015. The *Motu proprio. Mitis et misericors Iesus* (MMI) substituted with its new norms, the title XXVI of CCEO, chapter I, *the matrimonial process*, Article I, *Le cause per la dichiarazione della nullità matrimoniale* (cann. 1357-1377). As an integral part of this reformed text, MMI added another section of Procedural Rules (*Ratio procedendi*) as the guidelines for applying these norms. This section introduced the new provision of Pastoral or Pre-judicial Investigation.

MMI has introduced several practical measures for expediting the marriage nullity process, like abrogating double conformity sentences, introducing a briefer judicial process, etc.⁵ Another provision that was very significant but eluded the attention and discussion of the canonists was the pastoral or pre-judicial investigation. It was meant to make the process faster, easier, and more accessible to couples in need. This was, in fact, a pastoral tool and, at the same time, a quasi-judicial step, and it invites the laities to utilize their expertise and goodwill for the Church, especially for helping the divorced and civilly remarried persons.

2. Genesis of the provision-Pastoral or Pre-Judicial Investigation

The pastoral or pre-judicial investigation is a project to be designed and implemented by the eparchial bishop at diocesan and parish levels as a pastoral follow-up or as a necessary pre-trial step. *Ratio procedendi*⁶ (art. 1-5/RP), a legal document attached to the *motu*

⁵ For an in-depth study refer, Velacherry Alex, *Briefer Judicial Process of Matrimonial Nullity*, Dharmaram Canonical Studies-29 (Bengaluru, Dharmaram Publications, 2022), 463.

⁶ *Ratio procedendi* is the document annexed to the new canons for the correct and accurate application of the reformed norms, with the same legislative force. The legal nature of RP though disputed by some, it is asserted that along with the norms of *Motu proprio* it creates one and the same legal unit. "Le RP costituiscono un "unico documento" con i canoni del *Motu proprio* e, in pratica, sotto la veste formale di "articoli" raddoppiano i canoni di ogni codice sulle cause per la dichiarazione di nullità del matrimonio. In tal modo si è evitato di dover fare ricorso all'uso del "bis," "tris" ecc. nella numerazione dei canoni. In effetti, dette regole hanno natura legislativa *stricto sensu*, sono cioè vere leggi in quanto prodotte e promulgate dal Legislatore ed innovatrici dei codici. Il fatto che le regole siano poste in seguito alla firma di Francesco è irrilevante, giacché il Papa le fa sue prima di apporre la firma. Francesco non riserva il termine *Motu proprio* ai 21 nuovi canoni perché anche le RP ne fanno parte. Al presente documento vengono unite delle regole procedurali, che ho ritenuto necessarie per la corretta e accurata applicazione della legge rinnovata." Joaquín Llobell, "Alcune questioni comuni ai tre processi per la dichiarazione di

proprio MMI gives a general notion about the nature, aim, and skeleton of such a project.⁷ According to these guidelines, the eparchial bishop is to frame the project as per the needs of the diocese. Though this is born out of a pastoral need, it is also a pre-judicial instrument.

The III Extraordinary General Assembly of the Synod of Bishops held in 2014, while discussing the situation of the faithful who are separated or divorced and living in irregular marital situations, suggested an urgent need for a pastoral follow-up for them.⁸ This anxiety of the synodal fathers was shared in the discussion on the necessity of streamlining the procedure for marriage nullity since the nullity process was very long and time-consuming. This lengthy process often kept the couple in irregular marital unions out of the Church's spiritual benefits, denying them access to the sacraments of confession and eucharist. Since they had to wait a long time to get a declaration on the nullity of their marital status, many of them had sought other ways or were made indifferent and inactive in the parish spiritual activities. In such a context, the project of pastoral or pre-judicial investigation was proposed as a pastoral accompaniment to such couples. The synod suggested a preliminary idea of this pastoral follow-up:

This work could be done through specially trained counselors who would be able to offer free advice to the concerned parties on the

nullità de matrimonio previsti dal M.P. "*Mitis Iudex*," *Ius Ecclesiae* 28 (2016), 29; Response of the Pontifical Council for Legislative Texts also affirms the same: "Le Regole procedurali sono state "promulgate dal *Motu proprio Mitis Iudex Dominus Iesus*" e le etichetta senza indugio come "una norma universale." Pontifical Council for Legislative Texts, *Risposta*, Prot. no. 15157/2015, 13 Ottobre 2015, in www.delegumtextibus.va (<https://bit.ly/2AhjR73>). Accessed on 10 January 2017. Hereafter *Ratio procedendi* would be indicated in the text as RP.

⁷ Cf, Velacherry Alex, *Briefer Judicial Process of Matrimonial Nullity*, p.122.

⁸ "The necessity for courageous pastoral choices was particularly evident at the Synod. Strongly reconfirming their faithfulness to the Gospel of the Family and acknowledging that separation and divorce are always wounds that cause deep suffering to the married couple and to their children, the synod fathers felt the urgent need to embark on a new pastoral course based on the present reality of weaknesses within the family, knowing often that these are more "endured" with suffering than freely chosen." The Synod of Bishops, III Extraordinary General Assembly, 2014, *Relatio Synodi*, nos. 44, 45. http://secretariat.synod.va/content/synod/en/synodal_assemblies/2014-third-extraordinary-general-assembly--pastoral-challenges-o.html, Accessed on 3 June 2023.

validity of their marriage. This work could be done in an office or by qualified persons.⁹

Though it was suggested as a pastoral action, it is to be seen in the broader framework of streamlining the judicial process of matrimonial nullity. Therefore, on the practical level, it becomes a pre-judicial phase of the nullity process on certain occasions. Hence, it can be said as a semi-judicial process in the broader sense because, at least for certain couples who are living with other partners after the civil divorce, this pastoral venture might help them to approach the proper tribunal in order to introduce a *libellus* for getting their prior marriage bond declared null. Therefore, it is not merely pastoral or spiritual counselling; instead, it is a pre-judicial investigation in the sense that those who accompany the couple in crisis also seek the possibility of a future declaration of the nullity of the broken marriage. In such cases, this project is meant to collect the useful elements for helping the parties to prepare a *libellus* for presenting their case in the tribunal, whether it is the ordinary or briefer judicial process.¹⁰

2.1 Pastoral or Pre-Judicial Investigation- As Ministry of Listening and Accompaniment with Lay Involvement

Instrumentum laboris (IL) for the first session of the synod on synodality poses a question for discernment: “Walking together means not leaving anyone behind and remaining alongside those who struggle the most. How are we building a synodal Church capable of promoting the belongingness and participation of the least within the Church and society?”¹¹

For prayer and reflection, IL also suggests: “Walking together with the poor and marginalized requires a willingness to listen. Should the Church recognize a specific ministry of listening and accompaniment for those who take on this service? How can a

⁹ The Synod of Bishops, III Extraordinary General Assembly, 2014, *Relatio Synodi*, no. 48.

¹⁰ “This path of “accompanying” will aid in overcoming in a more satisfying manner matrimonial crises, but it is also called to verify, in concrete cases, the validity or non-validity of the marriage and to gather the material useful for the eventual judicial process, be it the ordinary or the briefer one.” The Apostolic Tribunal of the Roman Rota, *Subsidium* for the application of M.p. *Mitis Iudex Dominus Iesus*, January, 2016, 14.

¹¹ *Instrumentum laboris*, B-1, P.32

synodal Church form and support those offering such accompaniment?"¹²

Those who live in irregular marital unions are marginalized in a spiritual frame to whom we must listen and provide accompaniment. In this sense, the pastoral or pre-judicial investigation is an adequate response to the suggestion mentioned above. This is a specific ministry that the Church already recognized or highly recommended by the Holy Father.

In this attempt, the involvement of the lay people is very significant. Those with proper training and minimum knowledge of canon law and counselling can head the mission at the parish levels. The proposed law gives only some guidelines in this respect. Hence, ample freedom is given to the eparchial bishop to design and execute such a mission¹³. This article is intended to provide a model for such a project, locating the laypeople in their proper place within this structure.

2.2 Pastoral or Pre-judicial Investigation? - Terminological Clarification

The terminological confusion regarding this project, *Pastoral or Pre-judicial Investigation*, is not an academic issue, rather, it is a superficial debate. The debate arose from the use of the term in RP. Art. 2/RP uses the term pre-judicial or pastoral investigation, and the art. 3/RP uses the term investigation and art. 4/RP uses the term pastoral investigation in view of collecting useful information for introducing the case before the competent tribunal.¹⁴

However, suppose we understand the mind of the legislator, we can come to know that in this case, be it pastoral or pre-judicial follow-up, as the different names mention, are the dual dimensions of one and the same reality and that both dimensions are interrelated and subservient to each other. But in reality, in the art. 2/RP, with regard

¹² *Instrumentum laboris*, B-1, P.32

¹³ Velacherry Alex, *Briefer Judicial Process of Matrimonial Nullity*, 115.

¹⁴ While Costantino analyses the terminological nuances and its ambiguity, he is of the opinion that we could have thought of two different types of investigations, pastoral and judicial, complementary to each other, because the concern of the Church is always to safeguard a matrimonial bond which is validly celebrated. Cf. Costantino-M. Fabris, "Indagine pregiudiziale o indagine pastorale nel *Motu proprio Mitis Iudex Dominus Iesus*: novità normative e profili problematici," *Ius Ecclesiae* 28 (2016),), 479-504, at pp. 489-490.

to its course of proceedings and finality, it may denote two separate investigations apparently.¹⁵ In fact, we cannot separate both these dimensions as two watertight compartments.¹⁶ Pope Francis, who is the legislator, had in his mind a deep conviction of this inseparability between the pastoral and juridical dimensions of the ministry of the Church:

The juridical dimension and the pastoral dimension of the Church's ministry do not stand in opposition; instead, both contribute to realizing the Church's purpose and unity of action. In fact, the juridical work of the Church which represents a service to truth in justice has a deeply pastoral connotation, because it aims both to pursue the good of the faithful and to build up the Christian community.¹⁷

2.3 The Necessity of the Bishop to Implement Such a Project.

CCEO reminds the bishop of his duty to take care of all the faithful entrusted to his care:

In the exercise of his pastoral function, the eparchial bishop is to show that he is concerned for all the Christian faithful who are committed to his care, regardless of age, condition, nation or Church *sui iuris*, both those who live within the territory of his eparchy and

¹⁵ Cf. Costantino-M. Fabris, "Indagine pregiudiziale o indagine pastorale nel *Motu proprio Mitis Iudex Dominus Iesus*: novità normative e profili problematici," *Ius Ecclesiae* 28 (2016), 489-490. They further observe that the legislator could have used a more suitable term to denote the investigation in question, because the term prejudicial investigation implies a starting point of the judicial process for the nullity of marriage in the tribunal while the pastoral investigation implies a solution other than that of the nullity for the crisis of a broken marital bond.

¹⁶ "The juridical and the pastoral dimensions are united inseparably in the Church, pilgrim on this earth. Above all, they are in harmony because of their common goal – the salvation of souls. But there is more. In effect, juridical-canonical activity is pastoral by its very nature. It constitutes a special participation in the mission of Christ, the shepherd (pastor), and consists in bringing into reality the order of intra-ecclesial justice willed by Christ himself. Pastoral work, in its turn, while extending far beyond juridical aspects alone, always includes a dimension of justice. In fact, it would be impossible to lead souls toward the kingdom of heaven without that minimum of love and prudence that is found in the commitment to seeing to it that the law and the rights of all in the Church are observed faithfully." John Paul II, *Papal Allocutions to the Roman Rota*, 18 January 1990, AAS 82 (1990), 872-877; English translation in William H. Woestman, (ed.), *Papal Allocutions to the Roman Rota*, 1939-2011, at pp. 210-211.

¹⁷ Francis, *Papal Allocutions to the Roman Rota*, 24 January 2014, AAS 106 (2014), 88-89; English translation in *Origins*, 13 February 2014, 43/36, 588.

those who are staying in it temporarily; he is to extend his apostolic spirit also to those who cannot sufficiently make use of ordinarily pastoral care due to their condition in life as well as to those who no longer practice their religion.¹⁸

The new provision is to be read in line with this canonical mandate. Understanding the spirit of the canon, the bishop is asked to implement this project to extend his pastoral care to the divorced and civilly remarried faithful who are kept aloof from the sacramental nourishments of the Church.

2.4 Target Group of the Project

In parishes, there are couples who may be living separately after getting a civil divorce or ecclesiastical decree of separation or even without obtaining any of these. Still, there are couples who are living in irregular marital unions after the civil divorce. That is, those living together without having civil registration or those who have registered their marriage under the Christian Marriage Act of 1857. We say they are in irregular marital unions because they are living together without having solemnized the marriage properly. Civilly divorced people cannot contract a marriage in the Church without getting a declaration of nullity of their marriage from the proper ecclesiastical tribunal. This may happen due to a variety of reasons, like their lack of awareness about the need and possibility of approaching an ecclesiastical tribunal, their lack of faith, their indifference, and so on. Only after having made the personal visits and understanding each couple's situation can we make a strategy to proceed with. These people are the beneficiaries of the project.

Those living in irregular marital unions may have different attitudes towards the Church. There may be persons who attend the mass and prayers regularly, accepting the fact that they cannot access the sacraments of confession and holy communion. They may be active in communitarian and charitable activities. However, most of those living in such unions keep themselves aloof from the community. Eminent canonist, Eugino Zanetti points out that this can happen because of different reasons. For him, this may be because of the shyness or defiance of the faith or a critical mind to the pastors. There may also be cases where they might have discarded the religious practice. However, he suggests that in whatever situations they are

¹⁸ Can. 192 §1 CCEO.

found, the Church is to extend her pastoral care to them so that they may confront their crisis with discretion, respect, and courage.¹⁹ In short, the beneficiaries of this project comprise all those faithful in crisis who need a pastoral follow-up in such a way that they may be re-integrated into the life of the Church.

2.5 Designing a Model Project for Pastoral or Pre-Judicial Investigation

Since RP is simply giving a Skelton of such a project in 5 procedural rules, canonists have tried to present their own models incorporating these necessary elements to serve the purpose of this project. Among them, a sensible model is that of Eugenio Zanetti, who has suggested a blueprint for this pastoral accompaniment with three levels. However, it is a general structure without considering particular situations peculiar to a diocese or a region.

He thinks it is to be started with the intervention of the parish priest, consecrated person, or a lay expert who listens to the couple in crisis. In this first level, hearing the case and analysing the situation, they make a judgment about the second level whether they need spiritual help, they should be helped with psychological counselling, or they can be enlightened with a canonical counselling. He holds that if the separation has happened due to an eventual problem developed in the marital life (for example, a single instance of cheating), it may not bring a challenge of nullity. But, after hearing the stories, if it seems that the marriage was celebrated with such a defect that nullifies the consent, naturally, it needs still deeper and more specialized canonical help.²⁰

In the second level, he suggests the service of a team of experts. RP says it can be formed by an individual diocese or a group of dioceses.²¹ There should be a benevolent and expert team visiting the couple in crisis to hear them and provide them with a deeper insight into their problems. They should have a pastoral sensitivity and a

¹⁹ Cf. Eugenio Zanetti, "La consulenza previa all'introduzione di una causa di nullità matrimoniale," in AA. VV., *La riforma dei processi matrimoniali di Papa Francesco, una guida per tutti*, Milano, Ancora, 2016, 9-27, at p. 10.

²⁰ Cf. Eugenio Zanetti, "La consulenza previa all'introduzione di una causa di nullità matrimoniale," in AA. VV., *La riforma dei processi matrimoniali di Papa Francesco, una guida per tutti*, 18-19.

²¹ "One eparchy or several together, according to the present groupings, can form a stable structure through which they provide this service [...]." Art. 3/RP.

minimum knowledge of canon law concerning the divorced and remarried couple. If, after having weighed all the facts, the team thinks there exists a ground of nullity or some proof to start a marriage nullity process, they are to be directed to the third level.²²

In the third level, Zanetti believes that we should have the service of a canonical advocate who helps the party initiate a process with a *libellus* properly prepared and collecting the necessary evidence as documents, etc. However, this is to be an extended service of the tribunal for helping the faithful to have easy access to the tribunal, offered either freely or at a minimum cost.²³

Whatever be the suggested models, it is the eparchial bishop who is to design a structure suited for his eparchy, considering also the pastoral situation and the cultural background of the faithful of the diocese, to best serve the aim proposed by the new provision.

3 A Pastoral or Pre-Judicial Investigation for the Indian Church

As we enter into this discussion, certain basic notions are to be explained at the very outset. The first one is to state the vision of an Indian Church in the context of the Synodal idea of a Church that walks together with the motto of communion, participation, and mission.

Vademecum says:

"The mission of the Church is to better witness the Gospel in the world especially with those who live in the peripheries. Participation aims at including all especially, those who feel excluded and in the margins."²⁴

Instrumentum laboris asks a question in this regard:

"What steps can a synodal Church take to imitate ever more closely its Master and Lord, who walks with all in unconditional love and proclaims the fullness of the Gospel truth?" discussing this question, for a reflection, IL suggests:

²² Cf. Eugenio Zanetti, "La consulenza previa all'introduzione di una causa di nullità matrimoniale," in AA. VV., *La riforma dei processi matrimoniali di Papa Francesco, una guida per tutti*, 19-20.

²³ Cf. Eugenio Zanetti, "La consulenza previa all'introduzione di una causa di nullità matrimoniale," in AA. VV., *La riforma dei processi matrimoniali di Papa Francesco, una guida per tutti*, 21-22.

²⁴ *Vademecum* for the Synod on Synodality, 1.4, p.13. Accessed on 3 June 2023.

“How can we create spaces where those who feel hurt by the Church and unwelcomed by the community feel recognised, received, free to ask questions, and not judged? In the light of the Post-Synodal Apostolic Exhortation *Amoris Laetitia*, what concrete steps are needed to welcome those who feel excluded from the Church because of their status or sexuality (for example, remarried divorcees, people in polygamous marriages, LGBTQ+ people, etc.)?”²⁵ Therefore, the vision of a Synodal Church in India also should share the spirit of this reflection. The Church should find space to welcome all marginalized people, and that mission should be accomplished through the participation of lay persons.

Hence, the Church in India should redefine Her priorities proper to a synodal journey. A synodal church is a listening church. Listening creates the space for a dialogue. Jesus was always committed to listening to the marginalized and having open dialogue with them, as in the case of the Samaritan woman.²⁶

Therefore, the Church in India should be a communion who mutually listens to each other and sits together for a dialogue. Nobody should feel that they are excluded. This is much more relevant with the miserable lot in the peripheries of the Church. Divorced and remarried are those faithful in the spiritual peripheries of the Church. They need to be listened to urgently since they are denied the right of the sacraments and care of the Mother Church, and it will create space for a dialogue. Here begins the pastoral and pre-judicial investigation as a new mission for the Church: getting prepared to walk together. Therefore, one of the priorities for making a synodal Church in India must be to include these marginalized lot in the journeying together with the help of the other lay faithful.

3.1 Can We Propose a Common Model for the Indian Church

Subsidium notes that this pastoral follow-up is destined to help the couple in crisis who are separated or divorced, and it becomes a pre-judicial step when it reaches the extent of supporting them for an eventual introduction of the judicial process for nullity where it seems possible. That is, it concludes with the drawing up of the details or with the presentation of a *libellus* to the competent

²⁵ *Instrumentum laboris*, B.1.2, P.34.

²⁶ *Instrumentum laboris*, A.1, P.12.

tribunal.²⁷ But, for all those who are divorced or separated, we may not be able to find proper grounds to request a nullity. In such cases, pastoral outreach should first help the alienated persons to come back to the life of the Church as their conditions permit.²⁸ They should be further accompanied to help them solve their crisis through counselling and other means.

Before sorting out the question, can we propose a common model for the Indian Church we must pin point the nature of this special mission in the context of the Indian Church. First we have to understand and distinguish the situation of the couple in crisis and suggest a pastoral follow-up suitable for each of them. In India, we see people in various situations: Some people live separately once the marriage is broken, getting or without getting a decree of separation. There may be different reasons, like cheating, domestic violence, or simple ego clashes. For them, there is a scope for reconciliation and reunion. Some people may live separately after a civil divorce without having another partner. In these cases, they are not denied any sacraments. But they may not be involving in religious activities since the wounds of a marital failure haunt them. Also, there may be people living in concubinage or other irregular marital unions, such as not having celebrated any marriage or married civilly with a member of different religions. However, the worst situation we face is with those who are divorced and civilly remarried who did not get any declaration of nullity. Therefore, a pre-judicial investigation in the Indian Church should aim at listening to those in crisis, having a constant dialogue with them, and helping them discern through critical reflection, assessment, and a decision for a fresh beginning. For each one, this fresh beginning would be different. This mission requires a structure suitable to serve these purposes. That is to say, we need an indigenous model of pastoral or pre-judicial investigation, which will, of course, vary as per the diversity of the culture of the nation.

Indian culture is very diverse, with many peculiarities as we go through different regions. There are three main Rites regarding faith practices: Latin, Syro-Malabar, and Malankara. The way of living faith and local customs differ from region to region. When dealing

²⁷ Apostolic Tribunal of the Roman Rota, *Subsidium* for the Application of the M.p. *Mitis Iudex Dominus Iesus*, 15.

²⁸ Cf. John P Beal, "Mitis Iudex Canons 1671-1682, 1688-1691: A Commentary," *The Jurist* 75 (2015), 527.

with the issue of those living in irregular marital situations, we must address the local customs and related problems. Therefore, we may be unable to suggest an Indian model valid for all. However, we can propose a general structure for a pastoral follow-up viz, a pastoral or pre-judicial investigation for the Indian Church. It is up to each bishop to adopt these elements and design a project for his own diocese.

3.2 Designing the Structure for the Diocese Involving the Lay Persons

The procedural rule, art. 3 entrusts the bishop with a duty to make a proper structure to work out this plan at the eparchial or parish levels. Also, it can be a joint endeavour consisting of more than one diocese.²⁹ At the diocesan level, what we need is a group of experts to give the training to the parish teams and to coordinate the parish activities. Bishops should find skilled and knowledgeable persons competent to do this work. They need not be exclusively from the canonical domain. Yet it is a must that they should have some basic awareness regarding the substantive and procedural rules since, at times, they would be compelled to direct those in need to the tribunal.

The diocesan team should be a well-trained group to form the parish teams on a forane basis. They are to be the experts in canon law, pastoral ministries, and spiritual and psychological counselling. The diocesan training team should prepare a curriculum that will give necessary knowledge of canon law and catholic doctrines related to marriage and nullity to the chosen members of the parish team. Further, they are to be given counselling skills to deal with problems related to marriage and family life. Here, the bishop should use the lay faithful's expertise and leave them free to design the structures suitable to give the proper training. The Clerics and consecrated persons can also share the responsibilities as per their specialization.

The counselling service can also be organised in the form of a special institute or as a stable organization. The bishop can inform the details, addresses and phone numbers of these members approved by him to all the faithful of his diocese.³⁰ Once the parish teams are given the basic training, they are to be convened together at each

²⁹ One eparchy, or several together, according to the present groupings, can form a stable structure through which they provide this service and, if appropriate, a handbook (*vademecum*) also can be given containing the elements essential to the most appropriate way of conducting the investigation. Cf. Art. 3/RP.

³⁰ Cf. Péter Erdő, "Osservazioni sulla nuova regolamentazione del processo matrimoniale," *Periodica* 105 (2016), 621-661, at p. 660.

interval to better equip them with advanced training based on their responses from the parishes. In each diocese, advanced training will be different according to the diocese's nature and the people's lifestyle.

3.3 A Parish Team Including the Lay Experts

In India, faith life is centered around the parishes and mission stations. Where there are priests, usually couples in crisis first approach the parish priests, or while making the house visits, parish priests come to know of the problems. The role of the parish priest is very important here since, in such difficult situations of separation, usually the faithful come to their parish priest, and therefore, he must listen to them attentively and should make them aware of the possibility of approaching a tribunal.³¹ Hence, while designing a structure for the parish, the parish priest is necessary to be included.

Other members of the team may be consecrated persons or lay persons. There are a lot of Christian faithful who are experts in counselling and psychology or experts in other scientific discipline. If there are lay experts, their service is to be used for the benefit of the Church. Those who are leading a catholic life and are faithful to the catholic doctrines can be selected by the parish priests and sent for training conducted by the diocese.

When suitable persons are nominated to do this mission, they need special approval from the eparchial bishop of the place.³² This is not a condition stipulated by law. However, such a measure will ensure the quality of the team members employed for this mission. The obtaining of the certificate of the diocesan course can satisfy this requirement.

3.3.1 Mode of Functioning at the Parish Level

After having heard the couple in crisis, the parish priest or other parties concerned can suggest the intervention of the parish team for the follow-up when necessary. Once the intervention of the team is requested, they have to come together to discuss the issue and fix the

³¹ Cf. Vincent Pereira, "*Episcopus, parochus, christifideles* and then some in *Mitis Iudex Dominus Iesus*," *Newsletter* 190 (2017), 92-103, at p. 101.

³² Cf. Costantino-M. Fabris, "Indagine pregiudiziale o indagine pastorale nel *Motu proprio Mitis Iudex Dominus Iesus*: novità normative e profili problematici," *Ius Ecclesiae* 28 (2016), 492.

time for further meetings with the parties. Often several sessions would be needed.

First, the team should listen to the couple in crisis and identify the actual situation, problems, and the way out. For those who are separated only, they can be helped by seeking the possibility of a reunion by way of counselling by the team. If professional counselling is needed, they can be referred to the diocesan centres. In certain situations, they can be brought back to normal life with spiritual and psychological counselling either to continue conjugal living or to be active in the community of the faithful. Those who live alone after the divorce, the team should take special care to support them in all ways possible.

In the case of those who are divorced and remarried, the parish team should see if there is any possibility of getting a declaration of nullity from the Church. In such situations, this pastoral mission should necessarily be unfolded with canonical counselling. For such counselling, the counsellors should discern the motivation of the people who request for a nullity (problem of conscience, civil advantages or regularization of the marriage), and also, they must be able to identify their real situations (spiritual, moral, psychological or juridical). A canonical counselling should seek whether all the essential elements needed for the validity of a marriage were present at the celebration of their marriage. Hence, those engaged in such a mission should have a basic knowledge regarding the grounds of nullity.³³ In complex situations, they can get the help of the diocesan team.

This mission ultimately aims at collecting the “useful elements” for the introduction of a petition. These useful elements could be: a complete statement by the potential petitioner, if possible by the other spouse also, baptism certificates, civil and ecclesiastical marriage records, divorce decrees if any, records of counselling or psychiatric treatments, or releases authorising the tribunal to get these records and other documentary evidence that are readily available. Besides, the parish team can also help the parties to

³³ Cf. Eugenio Zanetti, “La consulenza previa all’introduzione di una causa di nullità matrimoniale,” in AA. VV., *La riforma dei processi matrimoniali di Papa Francesco, una guida per tutti*, 14-17.

identify witnesses who can testify on the proposed subject and even interview useful witnesses who may not be available in the future.³⁴

In cases where there is no possibility of getting such a declaration, they are to be helped to be active in the community by giving them proper support. *Amoris latitiae* suggests a pastoral discernment to be used in necessary circumstances to assure that they are not deprived of the spiritual benefits of the Church. For example, A man and a woman who cannot satisfy the obligation to separate, for the children's upbringing, if they decide to live in complete continence, that is, by abstinence from the acts proper to married couples, and they repent of having broken the sign of the covenant and of fidelity to Christ by acting against the indissolubility of marriage, the pastor after having given proper instruction and evaluating the real situations can admit them also to the communion at the occasion of their child's first holy communion.³⁵

4 Pastoral or Pre-judicial Investigation- How does it help the Synodal Church?

Synodal Church is a participatory Church. The lay persons are invited to give their share in moulding the communion and

³⁴ Cf. John P Beal, "Mitis Iudex Canons 1671-1682, 1688-1691: A Commentary," *The Jurist* 75 (2015), 527.

³⁵ "Those who, repenting of having broken the sign of the Covenant and of fidelity to Christ, are sincerely ready to embrace a way of life that is no longer in contradiction to the indissolubility of marriage. This means, in practice, that when for serious reasons, for example, for the children's upbringing, a man and a woman cannot satisfy the obligation to separate, they "take on themselves the duty to live in complete continence, that is, by abstinence from the acts proper to married couples." Congregation for the Doctrine of the Faith, "Letter to the Bishops of the Catholic Church Concerning the Reception of Holy Communion by the Divorced and Remarried Members of the Faithful," September 14, 1994; AAS 86 (1994), 976.

"Finally, where the nullity of the marriage bond is not declared and objective circumstances make it impossible to cease cohabitation, the Church encourages these members of the faithful to commit themselves to living their relationship in fidelity to the demands of God's law, as friends, as brother and sister; in this way they will be able to return to the table of the Eucharist, taking care to observe the Church's established and approved practice in this regard. This path, if it is to be possible and fruitful, must be supported by pastors and by adequate ecclesial initiatives, nor can it ever involve the blessing of these relations, lest confusion arise among the faithful concerning the value of marriage." Benedict XVI, *Sacramentum Caritatis: Post-Synodal Apostolic Exhortation on the Eucharist as the Source and Summit of the Church's Life and Mission*, February 22, 2007, no. 29; AAS 99 (2007), 129.

accomplishing the mission of the Church in a better way. This provision, in two ways, helps the synodal journey of the Church:

Implementing such a project will help the divorced and remarried persons to get back to communion as their condition permits.

This provision incorporates the lay people into the Church's pastoral mission as active ministers. They also indirectly become a part of the tribunal process in certain circumstances when it becomes a pre-trial phase.

Being a pre-trial step, it helps the worthy parties to have speedy access to and effective result from the tribunals. It also helps the tribunals in many ways. Due to this process, the judicial vicar who accepts the case gets a moral certainty about the irreparability of the bond, and consequently the reconciliatory step can be avoided³⁶. Collection of the available documents will help the tribunal to speed up the case.

Implementing it at the parish level will serve as a means to have easy access to justice for the faithful even though the diocese is geographically large³⁷ That is to say; it is a means to put into practice the principle of proximity under the guidance of the bishop. Moreover, this provision harmoniously blends the pastoral and judicial dimensions related to marriage and family life.

Conclusion

Concluding this reflection, I would like to highlight a very much relevant observation of the eminent canonist, John P. Beal who held that if the pastoral or pre-judicial investigation precedes all the petitions of the nullity, it will serve to accelerate the initial procedural formalities and will ensure a positive outcome of the trial.

John P. Beal describes that there was a time when the service of expert advocates was made available to furnish the petitions for marriage nullity. Those petitions drafted with necessary details often helped the parties to go through the process successfully and finally to get a declaration of the nullity of their marriage the lack of which left the poor couples, though worthy, without availing that

³⁶ A legal consequence of this new norm is that it abrogates the provision (can.1362/CCEO) for a mandatory pastoral reconciliation by the judge before accepting a petition for the nullity.

³⁷ Cf. Alexander M. Laschuk, "*Mitis Iudex* and the Conversion of the Ecclesiastical Structures," *Studia Canonica* 51 (2017), 535.

advantage.³⁸ Recognizing this fact, certain tribunals, especially in North America, began the pre-judicial inquiry to help the needy. However, such a practice was rejected by the Pio-Benedictine Code, CIC, CCEO, and DC.³⁹

According to Beal, "art. 2/RP constitutes a frank acknowledgment that if the marriage nullity process is to be realistically accessible to divorced Catholics worldwide, they will need more or less professional assistance to navigate the tribunal process."⁴⁰ Thus, this provision of a pastoral or pre-judicial investigation fulfils this

³⁸ Beal refers to Cardinal Rauscher of Vienna, in 19th century, who managed to secure the promulgation of an instruction related to the matrimonial procedure, with the approval of the Apostolic See for the Austrian empire, by which he introduced a preliminary investigation, done by a team consisting of an auditor, notary and defender of bond. Then existed situation was that due to the lack of trained service of the canon lawyers, many of the worthy petitions were rejected or were not able to be presented at all. Thus, the team reached out to the pastoral field, met such people. Oral petitions were transcribed by the notary, and sent to the tribunal with the result of their preliminary investigations. Having found that this brought about a successful result, France, US and Spain later adopted this method. Cf. John P Beal, "Mitis Iudex Canons 1671-1682, 1688-1691: A Commentary," *The Jurist* 75 (2015), 467-538, at pp. 523-524.

³⁹ Can. 1529/CIC and Can. 1210/CCEO were the reiterations of the norm introduced by 1917 Code which prohibited the collection of proofs before the joinder of the issue except for a grave cause. DC suggests: "Without prejudice to art. 120, the tribunal is not to proceed to collecting the proofs before the formulation of the doubt has been set in accordance with art. 135/DC, except for a grave reason, since the formulation of the doubt is to delimit those things which are to be investigated." But, the so called preliminary investigation in exceptional situations as suggested by DC is as follows: Art. 120 §1/DC states: "The president of the college can and must, if the case requires, institute a preliminary investigation regarding the question of the tribunal's competence and of the petitioner's legitimate standing in the trial." §2: "In regard to the merits of the cause, he can only institute an investigation in order to admit or reject the *libellus*, if the *libellus* should seem to lack any basis whatsoever; he can do this only in order to see whether it could happen that some basis could appear from the process." Cf. John P Beal, "Mitis Iudex Canons 1671-1682, 1688-1691: A Commentary," *The Jurist* 75 (2015), 523-524. The preliminary investigation was denied by the norms of law under the suspicion that such an attempt to collect the proofs before the trial and outside the court would taint the quality of the evidence.

⁴⁰ Cf. John P Beal, "Mitis Iudex Canons 1671-1682, 1688-1691: A Commentary," *The Jurist* 75 (2015), 523. Art. 113/DC provides for an office or person who can explain the tribunal process, But, there was no provision for the preparation of the writ or petition as in MIDI. The function of giving help to petitioners and respondents in the tribunal process including the preparation of juridic acts such as the *libellus* belonged to the competency of the advocate. Cf. Alexander M. Laschuk, "Mitis Iudex and the Conversion of the Ecclesiastical Structures," *Studia Canonica* 51 (2017), 535.

objective at the concrete level besides making the lay people involved in the mission of the synodal Church. Whatever good be said about the project, if diocesan bishops are not taking the initiatives to implement the same in their dioceses, the synodal vision will remain only as a fine dream.