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## A NEW APPROACH TO THE FUNCTIONS OF ASSESSOR IN MOTU PROPRIO *MITIS IUDEX DOMINUS IESUS*

Law must keep pace with reality. Therefore, given the social change, evolving life conditions and circumstances, the *processus matrimonialis* was subject to reform. On September 8, 2015, the highest ecclesiastical authority promulgated *Motu Proprio Mitis Iudex Dominus Iesus*<sup>1</sup> and introduced a special type of procedure: a briefer process before the bishop (*processus brevior*) [Góralski 2017, 6]. Introduction of the briefer process was intended to expedite and streamline the procedure in marriage nullity trials.<sup>2</sup> This reform also led to the revival of the function of assessor.

### 1. About the function of assessor

Assessors have been present in the Church procedures for centuries. Although originally termed differently, the assessor was a person who would assist the bishop or judge with his advice and experience in reaching the material truth and issuing a fair judgement. As individuals with a juridical background, assessors would assist judges in passing the judgement [Góralski 2019, 179]. The function of assessor goes back to Roman law, and, since *Ecclesia vivit lege Romana*, it was transferred into canon law. Over centuries, the role of assessor evolved [Pawlak 2007, 345-67], and the MIDI offered a new look at this institution.

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<sup>1</sup> Franciscus PP., *Litterae apostolicae motu proprio datae Mitis Iudex Dominus Iesus* quibus canones Codicis Iuris Canonici de causis ad matrimonii nullitatem declarandam reformantur (15.08.2015), AAS 107 (2015), p. 958-70 [henceforth cited as: MIDI].

<sup>2</sup> See Leszczyński 2017, 137-45.

In etymological terms, the term “assessor” (Latin *assessor*, *-oris* or *adessor*) derives from the verb *assideo*, *-ere*, *-sedi*, *-sessum*, *ad sideo*, which is interpreted as to stand aside, sit next to someone, hold an office together with someone else, assist a judge. The expressions listed above suggest that the assessor’s role is to accompany someone with a greater authority. The development of the assessor’s institution was much influenced by the ancient Roman concept of council (*consilium*) which was appointed by the ruler to serve as a team of experts, chiefly priests, conversant with the law (*iuris periti*). They helped the ruler to make proper decisions [ibid., 347-53].

The standards regulating the assessor’s role in canon law date back to early Christianity. This is one of the reasons that justifies the establishment of the function of an educated lawyer who offered advice to the judge, i.e. the assessor. A major argument for placement of the position of assessor in the 1983 Code of Canon Law<sup>3</sup> was to embody the basic principle of justice, e.g. to establish the objective truth. If a judge were to hand down judgements on his own, he might be reproached for subjectivism and might lack an objective overview of the case. The assessor is there to protect him from this and help him to look at the case in a holistic manner. For the assessor to provide his service properly, he or she must display certain qualities and meet specific requirements established by the ecclesiastical legislator [ibid., 345-56]. It should also be stressed that the assessor’s opinion is only of auxiliary nature, and they themselves do not enjoy any jurisdiction, nor do they compose the tribunal together with the judge [Pieronek 1970, 170].

## 2. Participation of assessor in the briefer process

In the briefer process, the bishop may approve persons who have been appointed by the decree of the judicial vicar in a specific case but have not yet been approved. The *Dignitas connubii* instruction orders that assessors be approved by the bishop.<sup>4</sup> However, the principle of procedural economy requires that a tribunal have a list of persons at its disposal pre-approved by

<sup>3</sup> *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317 [henceforth cited as: CIC/83].

<sup>4</sup> Pontificium Consilium de Legum Textibus, *Instructio servanda a tribunalibus dioecesanis et interdioecesanis in pertractandis causis nullitatis matrimonii Dignitas connubii* (25.01.2005), “Communicationes” 37 (2005), p. 11-92 [henceforth cited as: DC], Art. 52.

the bishop, who are eligible to perform the functions of an assessor. The assessor must be proficient in juridical and human sciences as well as supporting the judge in delivering a fair judgement. However, he or she does not act as a member of the college of judges. They may share their opinion in writing [Sosnowski 2015, 74-75]. While in an ordinary trial the presence of assessors depends on the judge's decision (can. 1673 § 4), in the *processus brevior* there is an obligation for an assessor to participate in the court's session (can. 1685). He or she is appointed at the moment when the judicial vicar issues a decree to determine the formula of the doubt [Rozkrut 2015b, 99-101].

P. Monet's position seems flawed when he claims that due to the consultative nature of their function, assessor's participation in the session is optional. He proves his point by referring to the *ubi fieri possit* clause of the ordinary trial, no such clause is present in the *processus brevior* [Moneta 2018, 59]. The same clause is not found in the *sussidio applicativo*,<sup>5</sup> either [Del Pozzo 2016, 95-96]. Given that the legal norms governing the briefer process require that the bishop, instructor, and assessor be consulted, and they further envisage the possibility of requesting the assessor's presence at evidence hearing, this proves the need for assessor's participation in the briefer process. Additionally, considering the requirements for candidates, finding a person fit for the position of an assessor should not be too challenging [Góralski 2017, 110-11].

The judicial vicar, if he decides to accept the complaint, issues one decree which establishes the formula of the doubt, appoints an assessor and instructor, and then cites the parties, the defender of the bond and witnesses to a session, which must be held within thirty days [García Martín, Remedía, and Remedía 2016, 191-92]. When accepting a complaint, the judicial vicar may also decide that the case will be held using the ordinary method. Then he should decide whether the case will be handled by a college of judges or a single judge supported by two assessors [Wenz 2016, 314-15].

## 2.1. Assessor's Qualification

Only a natural person may be appointed assessor. A juridical person cannot be one. The candidate must be member of the community and have legal

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<sup>5</sup> Tribunale Apostolico della Rota Romana, Sussidio applicativo del Motu pr. *Mitis Iudex Dominus Iesus*, Città del Vaticano 2016.

capacity in the Church, in other words, they must be baptized. That the candidate for an assessor should be in full communion with the Roman Catholic Church seems a reasonable conclusion. When choosing the candidate, their age should also be taken into account. The legislator has not set any limitations as to the age, so any person of age is capable of being accepted. The only question is whether such a young person will be an expert in juridical or human sciences. Therefore, the bishop is empowered to lay down specific criteria regarding the candidate, e.g. minimum age. The assessor is expected to be of upright life, spotless reputation, and good morals. However, the legislator fails to provide any criteria to verify these [Pawlak 2007, 359-60].

In the *processus brevior*, the judicial vicar, by the same decree which determines the formula of the doubt, names an instructor and assessor and cites all who must take part to a session, which in turn must be held within thirty days (can. 1685). The assessor acts as an advisor to the judge and does not need to have formal legal qualification. However, they must be proficient in the law or the humanities. They must also be approved by the bishop and enjoy a fine reputation [Nunez 2016, 146]. Both a clerical and lay person, a woman and a man, can be named assessor. Pope Paul VI admitted a lay man to the office of assessor in 1971 in his Motu Proprio *Causas matrimoniales*<sup>6</sup> [Pawlak 2007, 358-59]; women were admitted in the CIC/83 [Góralski 1985, 49-60]. Prior to approving a person as an assessor, the bishop should verify their competence so as to make sure that the assessor, as a competent advisor, can properly fulfil their role in the process [Majer 2015, 177]. As the one in charge of the administration of justice, the bishop may define detailed requirements for assessor candidates in the rules of the court [Napolitano 2015, 561].

## 2.2. Assessor's powers

In the *processus brevior*, while there is no obligation for the judicial vicar to do so, it would be advisable for him to consult his choice of an assessor with the bishop before officially appointing the former. The assessor is requested to attend a session of taking of evidence; it would be beneficial for

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<sup>6</sup> Paulus PP. VI, Litterae apostolicae motu proprio Normae quaedam statuuntur ad processus matrimoniales expeditius absolvendos *Causas matrimoniales* (28.03.1971), AAS 63 (1971), p. 441-46.

them to accept the appointment [Majer 2015, 178]. The assessor needs to form an opinion on the case, so they should start examining the details of the case as early as possible; the taking the evidence is a good opportunity to do so. The fact that the bishop, assessor and instructor are consulted later also favours of such a solution. The legislator fails to explain how the assessor is to participate in the taking of evidence, however, it can be concluded that it is his or her right to participate. They may also assist the instructor in the said evidence session. Assessors have no authority to directly interfere with the course of a process [Bianchi 2016, 78-80]. They should, however, be able to support instructors in their task, i.e. to accept evidential requests and help clarifying doubtful matters with a view to seeking the material truth [Jarota 2017, 79]. The role of the assessor in a process should not be limited to the sole reading of the case files and participating in consultations with the bishop [Góralski 2017, 127-28].

His or her participation in the *processus brevior* is obligatory, and they should support the instructor in the taking of evidence and partake in consultation with the instructor and the bishop before the judgement is delivered. Assessor's participation in the briefer process is of consultative and supportive nature. That the assessor will properly fulfil their role is guaranteed by their competence and preparation and the requirement of pre-approval by the bishop. Assessors should have adequate knowledge of how to act in the instruction phase and in the decision-making phase of a case where particular emphasis is laid on consultation with the bishop. The proper use of an assessor and instructor in the *processus brevior* is the very nature of this process [ibid., 110-11].

In the briefer process, the judge, i.e. the diocesan bishop, having examined the entire case, is to consult the instructor and the assessor (can. 1687 § 1). Because the process is to be brief, the time limit for the consultation and final decision should not be extended. Depending on the bishop's decision, the assessor may share their opinion on the case in writing. The opinion is then attached to the files of the case. If there are any doubts arising in connection with the case, the bishop's consultation with the assessor and instructor can help resolve them. Based on the assessor's experience, the bishop may be able to clarify doubtful issues, examine the case more carefully and expose the material truth. The consultation may protect the bishop from too subjective a decision in the case, but it should be kept in mind that the asse-

ssor's opinion, even if correct, does not bind the bishop. The consultation held among the bishop, assessor, and instructor is not collegial by nature, and only the bishop as a shepherd-judge has the right to issue a decision in a case. In the briefer process, if the bishop has moral certainty, he determines the nullity of a marriage, and if he still has any doubts, he refers the case to an ordinary trial [Majer 2015, 185-86].

The bishop's consultation with the assessor and instructor in the *processus brevior* is obligatory and can be considered a violation of the procedure if omitted. The legislator also failed to specify the form of the consultation. The assessor and instructor are perfectly familiar with the case as they participate in the taking of evidence. It would be beneficial for the case if the bishop, having heard the opinion of the defender of the bond and the defence of the parties, were able to clear any possible doubts by consulting the assessor and instructor. Therefore, it is important that the consultation takes place after the bishop has studied the entire case because through a single consultation with the assessor and instructor the bishop may remove all doubts and expose the material truth, which will expedite the passing of the judgement [Del Pozzo 2016, 201-202]. However, it is not prohibited legally for such consultations to be held several times and the nullity of a particular marriage to be debated in detail [Nunez 2016, 151; Mingardi 2016, 59]. However, such debates must not limit the bishop's independence, as it is clearly against the nature of the *processus brevior* [Góralski 2017, 150-52; Wenz 2016, 365-67].

Apart from the bishop, the judgement may also be signed by the assessor and instructor. If this is the judge's will, the assessor may announce the judgement to the parties of the *processus brevior*. This depends on the bishop's will, and he will ultimately decide whether the assessor will inform the parties about the invalidation of their bond. When the bishop decides that, due to his numerous duties, he is not able to announce the judgement to the parties, he may entrust it to someone else, e.g. an assessor. If an assessor makes such an announcement to the parties, he or she must remember to deliver the judgement in such a way that there is no doubt that it was issued by a judge [Góralski 2017, 153-54]. Assessors cannot substitute other offices when accepting a complaint, giving instructions of a case or issuing a judgement [Del Amo 2011, 1065].

Cooperation and trust between assessors and the bishop are essential. The diocesan bishop's bears personal responsibility for a judgement. In the *processus brevior*, he is the single judge and is to independently decide on a specific case [Leszczyński 2017, 141-42]. The participation of an assessor in the briefer process is auxiliary and consultative. He or she is expected to share a non-binding opinion to support the bishop in exposing the material truth and, thus, making the right decision. An assessor can help fill gaps in the bishop's legal education [Rybaczek 2017, 195]. Careful examination of the case by an assessor, bishop, and instructor, as well as their thorough consultation intended to clear any doubts, are to guarantee that the bishop will properly perform the role of a shepherd-judge while exposing the truth about the nullity of a particular marriage [Góralski 2017, 153-54]. While exercising his auxiliary powers, an assessor is to express his or her opinion on the case and submit it opinion to the judge who will issue a judgement [Jarota 2017, 77-78]. An assessor cannot act as a judge single-handedly, but they assist the shepherd-judge in seeking the truth by serving him with their experience and advice [Rozkrut 2015a, 41-47; Pawlak 2007, 365-67].

### Conclusion

Assessors have supported the Church from its early days, although initially they were not known by their contemporary name. Over the centuries, they underwent a gradual evolution, so at the time of promulgation of the MIDI and the reform of the matrimonial process, a new approach to the role of assessors was adopted. Until then, their participation in an ordinary trial had been optional and had depended on the judge's decision. Now, the participation of an assessor in the *processus brevior* is mandatory, and failure to appoint them is considered a procedural error. Additionally, the reform imposed an obligation of consultation between the bishop and the assessor involved in a case. The assessor's main tasks in the briefer process are to assist the seeking of the truth and offering advice.

The assessor enters the proceedings upon the judicial vicar's issuing of the decree determining the formula of the doubt. It is advisable for assessors to go deep into the case and establish as many facts as possible, so that during consultation with the bishop any doubts may be cleared. Adequate competence and proper performance of their duties will allow them to perform

the auxiliary function well and effectively. The main powers that assessors enjoy are participation in the taking of evidence and participation in consultations with the bishop and instructor. Their role is to protect the bishop from being too subjective in judging the case by offering advice. Although their powers are not too extensive, if exercised properly, they are able to ensure the objectivity of the bishop's decision in the case. However, the assessor cannot issue a judgement. In the *processus brevior*, this is the role of the bishop as a shepherd-judge, and the assessor, by offering their non-binding opinion, is to help the bishop expose the truth about a specific marriage, approach moral certainty, and issue a fair judgement. The assessor may, however, indirectly influence the decision by consulting the bishop and instructor before closing the case.

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## A New Approach to the Functions of Assessor in *Motu Proprio Mitis Iudex Dominus Iesus*

### Summary

The purpose of this article is to present the role of the assessor in the *processus breviar coram Episcopo*. *Processus breviar* was introduced in 2015 in *motu proprio Mitis Iudex Dominus Iesus*, which establishes the legal obligation to appoint an assessor. The assessor's role in the process comes down to advising the judge and pointing out various options for settling them with specific arguments. The assessor has the right to support the instructor in his task and the assessor's participation in the process is auxiliary. The assessor may present his opinion in written and oral form. Proper substantive preparation and accurate performance of their duties will allow the assessor to properly and effectively perform his auxiliary function. In *processus breviar*, the bishop as a shepherd-judge is to make a decision, and the assessor as a non-binding voice is to help him come to the truth in a specific marriage, achieve moral certainty and give a just judgment. The assessor may, however, have an indirect impact on the decision being made by consulting the bishop and instructor before the judgment is issued.

**Key words:** judge, *processus breviar*, canonical trial, canon law

## Nowe spojrzenie na funkcję asesora w *motu proprio Mitis Iudex Dominus Iesus*

### Streszczenie

Celem artykułu jest przedstawienie, jaką rolę w *processus breviar coram Episcopo* spełnia asesor. *Processus breviar* został wprowadzony w 2015 r. w *motu proprio Mitis Iudex Dominus Iesus*, w którym ustanowiono obowiązek prawny powołania asesora. Rola asesora w procesie sprowadza się do doradzania sędziemu oraz wskazywaniu różnych możliwości rozstrzygnięcia przy poparciu ich konkretnymi argumentami. W *processus breviar* to na biskupie diecezjalnym spoczywa obowiązek wydania rozstrzygnięcia, a przed jego wydaniem ma obowiązek konsultacji z instruktorem i asesorem. Asesor ma prawo wspierania instruktora w jego zadaniu, a udział asesora w procesie ma charakter pomocniczy. Asesor swoją opinię może przedstawić zarówno w formie pisemnej, jak i ustnej. Odpowiednie przygotowanie merytoryczne i dokładne wykonywanie swoich obowiązków pozwoli asesorowi właściwie i skutecznie realizować funkcję pomocniczą. W *processus breviar* biskup jako pasterz-sędzia ma wydać rozstrzygnięcie, a asesor jako niewiążący głos ma pomóc mu dojść do prawdy w konkretnym małżeństwie, osiągnięciu pewności moralnej i wydaniu sprawiedliwego wyroku. Asesor może mieć jednak pośredni wpływ na wydanie rozstrzygnięcia poprzez konsultację z biskupem i instruktorem przed wydaniem wyroku.

**Słowa kluczowe:** sędzia, *processus breviar*, proces kanoniczny, prawo kanoniczne

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