

THE APPEAL ACCORDING TO MOTU PROPRIO *MITIS IUDEX DOMINUS IESUS* – SELECTED ISSUES

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Summary. The legislator in can. 1680 MIDI provides new appealing rules, which cause many new issues requiring detailed clarification. First of them is reference to cases ended in first instance with so-called positive or negative sentence. Further is an appealing duty by the defender of the bond. Very interesting and requiring to detail issue is the appeal for deferment. Also, many difficulties with the interpretation raises appeal in the briefer process before the bishop.

Key words: Pope Francis’s reform, canonical process, process regarding the nullity of marriage, *Mitis Iudex Dominus Iesus*, canon law, appeal

The legislator in can. 1680 § 2 of *Mitis Iudex Dominus Iesus*¹ provides, that after the time limits established by law for the appeal and its prosecution have passed, and after the judicial acts have been received by the tribunal of higher instance, a college of judges should be established, the defender of the bond should be designated, and the parties should be admonished to put forth their observations within the prescribed time limit. After this time period has passed, a college of judges should evaluate if the appeal appears merely dilatory, in such situation the collegiate tribunal should confirm the sentence of the prior instance by decree. If the tribunal admits an appeal, so evaluates that the appeal is not for a delay, it should be proceeded in the same manner as the first instance, with the appropriate adjustments (MIDI, can. 1680 § 3). In view of the above, the following question should be asked: does the statement of can. 1680 relate to all sentences or just to positive ones? Furthermore: what is the role of the defender of the bond in appeal procedure? Does one have right/duty to submit an appeal? What does it mean that the appeal is *mere dilatoria*?

¹ Franciscus PP., Litterae apostolicae motu proprio *Mitis Iudex Dominus Iesus* quibus canones Codicis Iuris Canonici de Causis ad Matrimonii nullitatem declarandam reformatur (15.08.2015), AAS 107 (2015), p. 958–67 [henceforth cited as: MIDI].

How should one refer to appeal proceedings in *brevior* process, which undoubtedly has very specific character [Zambon 2018, 276]?

1. DIFFERENCES IN THE APPEAL PROCEEDING CONCERNING CASES ADJUDICATED IN POSITIVE AND NEGATIVE WAY

The issue being discussed in the doctrine, which has no consensus yet, is if new rules of the appeal procedure, with limitation for the appeal and its prosecution and possibility confirming or non-confirming the sentence of the prior instance by decree, apply to all sentences or there are differences between cases adjudicated positively and cases adjudicated negatively [Zambon 2018, 276–77].²

Some authors claim that regulations related to an appeal contained in can. 1680 MIDI refer to either positive sentences or negative ones [Erdö 2016, 628; Zambon 2018, 277], as with time limits for appeal and confirming the first sentence by decree. Erdö claims that under previous can. 1682 § 2 there was possibility of confirming only the positive sentence of prior instance, while on the ground of new regulation, one may confirm in the same way either negative sentence, what facilitate “accelerating” appeal procedure [Erdö 2016, 628].³ What speaks in favor of this theory is, that the regulations in can. 1680 MIDI do not distinguish between positive and negative sentences. Furthermore, it would strengthen favor matrimonii (cf. can. 1060 of the 1983 Code of Canon Law⁴). In accordance with can. 1680 § 1 MIDI, there is a possibility of an appeal from the promoter of justice who, due to the nature of his position, could challenge a negative judgment, finding, in his view, the nullity has already become public (can. 1674 § 1, 2° MIDI) [Moneta 2017, 7–16; Zambon 2018, 277]. Another matter to look out for is an attitude of defendant, if one appeals against the sentence in favour of nullity: if deadlines are not applied to negative sentences, the defendant could find oneself in a situation of constant uncertainty, knowing that negative sentence could be challenged after a very long time [Zambon 2018, 277].

Other authors – in Zambon’s opinion – confirm in a convincing way that can. 1680 refers only to positive sentences [Erlebach 2017b, 661–79; Montini 2016a, 110; Peña García 2017, 311]. This position is favoured by the context in which this canon fits, and that is Art. 4 MIDI, which is dedicated to regulating judgments. Art. 4 starts with can. 1679, where an enforceability of the first nullity sentence is declared [Erlebach 2017b, 664–65; Zambon 2018, 277].

² For more on appeal, see: Kasprzyk 2003, 161–83; Greszata 2006, 229–39.

³ Cf. Zambon 2018, 277.

⁴ *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1–317 [henceforth cited as: CIC].

Distinct character of collegiate decision is presented in more expressive way, which decision, in relation to positive sentence requires reaching moral certitude about the nullity of marriage, whereas in relations to negative sentence there is no necessity reaching the moral certitude, taking into account fact that this is not a decision establishing validity of a marriage, because a marriage is valid until the opposite is proven. So we are dealing with due recognition of a positive sentences' different nature relative to negative sentences, because only the first ones changes legal status of person [Zambon 2018, 277].

It is not groundless, that in Art. 4 there is no exemplary and simplified regulations relating to positive judgments, or decisions in favour of the nullity of a marriage. This allows to clear observation that case of nullity of marriage is initiated only because of mover's interest, despite the fact that one has of course no right to it. This is even more required by the legal status of a positive sentence, in which the judge reached the moral certainty about the nullity of a marriage, which excludes the possibility of something contrary to a negative sentence, in which the judge did not reach moral certainty about the nullity of a marriage, but the possibility of finding it is not excluded. The principle of simplification of sentences in favor of the nullity of marriages is not the only derogation from *favor nullitatis* or unjust discrimination of negative sentences, but it is due recognition of a positive sentences' different nature [Montini 2016a, 114; Zambon 2018, 277–78].

P. Moneta [Moneta 2017, 6–16], in summarizing opposed positions, to end reminds that the second view is the majority in doctrine and it has been taken by the Tribunal of the Roman Rota in several rulling, in which these issues were considered for the first time. It follows from the above that only for positive sentences it is required to do direct preliminary checking to reject appeal clearly appearing merely dilatory and to confirm the sentence of the prior instance by decree. Furthermore, time limits for appealing apply only to positive sentences. In case of negative sentence, the appeal may be submitted on the grounds of general regulations of the Code of Canon Law, not on the grounds of can. 1679–1682 [Zambon 2018, 278].

Negative sentences are still examined, as previously, without adherence to the deadlines for filing an appeal or without the possibility of confirming the prior negative sentence by a decree. In relations to such sentences, still apply regulations of Apostolic Signatura Decree of 3 June 1989, according to which *the only negative sentence* can be re-examined before the competent tribunal any time, without the need to provide "new and grave proofs or arguments" in accordance with can. 1644, which would be bonding, exclusively, if there were *a double conforming decision* [Peña García 2017, 333–34; Zambon 2018, 278].

2. DOES THE DEFENDER OF THE BOND APPEALING DUTY EXIST?

The appeal settled in Code of Canon Law provided that after the acts and positive sentence were sent to the appellate tribunal (CIC, can. 1682 § 2) the defender of the bond⁵ lost possibility to appellate and this potentiality was forgotten. However, in the documentary process, it was said that the defender of the bond should have challenge the sentence “prudently thinks that either the flaws mentioned in can. 1688 or the lack of a dispensation are not certain” (CIC, can. 1687; MIDI, can. 1689), so recognizing that sentence was insufficiently justifiable. As a matter of fact, there was no shortage of references to the situations when the defender of the bond was obligated to appeal. The Pontifical Council for Legislative Texts in *Dignitas connubii*⁶ in Art. 279 § 2 reminds that “the defender of the bond is bound by office to appeal, if he considers the sentence which first declared the nullity of the marriage to be insufficiently founded,” precisely beginning with “bounding to propose and explain everything which reasonably can be brought forth against nullity or dissolution” (CIC, can. 1432) and “the obligation to propose any kind of proofs, responses and exceptions that, without prejudice to the truth of the matter, contribute to the protection of the bond” (DC, Art. 56 § 3) [Zambon 2018, 279].

Pope Francis has recently reminded this in his speech to participants in the plenary assembly of the Supreme Tribunal of the Apostolic Signatura on 8 November 2013: “The Defender of the Bond’s faithful and complete fulfilment of his duty does not constitute a claim, that challenges the prerogatives of the ecclesiastical judge, who alone is responsible for the definition of the cause. When the Defender of the Bond exercises his duty to appeal, even to the Roman Rota, against a decision he considers detrimental to the truth of the bond, his task does not prevail over the judge’s. Indeed, as an aid to their own work, judges may make use of the careful research provided by the defender of the marriage bond.”⁷

It must be emphasized, that in current regulations, in certain situations the defender of the bond has conscious duty to appeal against sentence in favour of nullity of marriage without sufficient reasons, at least one has a duty to careful assessment if the appeal should be submitted [Erdö 2016, 628–29; Zambon

⁵ For more on the knot defender, see: Góralski 2008, 79–90; Greszata–Telusiewicz 2015a, 33–42.

⁶ 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].

⁷ Francesco, *Discorso del Santo Padre Francesco ai Partecipanti alla Plenaria del Supremo Tribunale della Segnatura Apostolica* (8.11.2013), http://www.vatican.va/content/francesco/it/speeches/2013/november/-documents/papa-francesco_20131108_plenaria-segnatura-apostolica.html [accessed: 16.11.2019]; cf. Zambon 2018, 279.

2018, 279]. Erdö notices: “Due to the necessary review of a positive judgment by a higher instance court, which was established by the previous requirement of duplex conformis, the reform of the process causes that the behaviour of the defender of the bond in this proceeding takes on particular importance and meaning, because the public prosecutor has a serious duty *not to appeal, but to consider whether it needs to be brought*” [Erdö 2016, 628–29; Zambon 2018, 279].

There were suggested typical situations when the defender of the bond should appeal, even as “remedy to present institutional weakness of the defender of the bond” [Montini 2017, 304], starting with a few facts, which would make the positive sentence unjustifiable. In court practise it would happen: 1) when a new ground of the nullity of marriage has never been presented or the sentence referred to unforeseen grounds; 2) when a new ground of the nullity of marriage won't be formulated in traditional way but it will be modernised or modified in its interpretation; 3) when we will interpret grounds of the nullity of marriage condemned or rejected by the Tribunal of the Roman Rota or the Signatura; 4) when there is evident imbalance or inconsistency between facts and given ground of nullity of a marriage; 5) or when in order to achieve positive sentence rules of evidence are ignored or distorted [Montini 2017, 337–38; Zambon 2018, 280].

If these situations are clear, it seems to be obvious, that the defender of the bond should consider appealing to Tribunal of the Roman Rota, instead of ordinary appealing tribunal. “This is required both by the ecclesiological significance and the process of accepting the appeal to the Roman Rota and by the affinity in the choice that should be between public good protected by the office of the defender of the bond and the function of the Tribunal of the Roman Rota ensuring consistent of jurisprudence” [Montini 2017, 313].

Commenting on Art. 279 § 2 DC, it should be noted that: “Therefore, the basic function that a formal appeal can fulfil is to appeal to the Roman Rota. Emphasizing the duty of the defender of the bond to submit an appeal, one can read a hidden call to careful consideration the possibility of appealing to the apostolic tribunal, making full use of this special right given by procedural order” [Moneta 2008, 605]. It should not be forgotten, that “the local court of appeal in current canon law is not considered more important, because of the nature of the jurisprudence and the appointment of judges, either actually or formally” [Montini 2017, 377; Zambon 2018, 280].

The last issue which should be considered is the possibility for the defender of the bond in appealing tribunal of resignation from appealing. Indeed “the defender of the bond for himself is usually not *a natural* person who holds office from the proceedings at the first instance to appeal, but is *an office*. Therefore, after an appeal has been submitted by the defender of the bond, being the *a qua* applicant, one will be the applicant's office of the defender of the bond in *ad*

quam proceedings, who will continue to act as the appealing party” [Zambon 2018, 280–81].

The defender of the bond in appeal procedure could resign from appealing (cf. CIC, can. 1632 § 2), although this decision – concerning character of the appeal and office of the defender – should be “at least materially justified” [Montini 2017, 318]. Seems that this applies more to resign in order to continue *prosecutio* of the appeal, than resignation after the appeal court took the case [Zambon 2018, 281]. Instead, in situation when the renunciation was done after the appeal court had brought own case, we are not about disclaimer of the appeal, but about resignation from the motion, so to its application should be implemented clauses and persons from can. 1524 § 3 CIC [Zambon 2018, 281].

3. THE MERELY DILATORY APPEAL

The legislator in can. 1680 § 2 in case of the ordinary trial and can. 1687 § 4 in case of *brevior* process, invoke to acting only for a delay, by using following expression: *Si appellatio mere dilatoria evidenter appareat* [Montini 2016a, 116]. There are differences in terminology because can. 1680 § 2 provides that if the appeal clearly appears merely dilatory, the sentence of the prior instance is confirmed by decree. On the other hand can. 1687 § 4 provides that, the appeal *a limine* is rejected, if it clearly appears merely dilatory and the case is remitted to the ordinary method. Besides the differences in terminology, seems we deal with the same decision and procedure as foreseen by the ordinary trial [Montini 2016a, 116; Zambon 2018, 281]. That is why we should stay with meaning of expression *Si appellatio mere dilatoria evidenter appareat*?

Preliminarily we can notice that can. 1634 § 1 states that to pursue an appeal it is required to point reasons why the appeal is introduced. It refers more to re-presenting evidences, which have been offered earlier in prior instance, than to new proofs and justification of sentence [Maragnoli 2003, 871–81].

Referring to specialized scientific publications to deepen the subject [Montini 2016b, 663–99], it must be remembered about new and unprecedented emphasis on words, at least in canon procedural law [Montini 2016b, 667–68; Zambon 2018, 282]. Montini lists three interpretations for this clause, for the ordinary trial and the *brevior* process. The first interpretation – it is the intention of the appellant, reasons why one challenges against the negative sentence. If this reasons concerned slowdown or dilatoriness of the sentence that declared the nullity of the marriage execution, there would be the appeal appearing merely dilatory. The second interpretation – it is the motives presented in appealing proceeding and evaluation if they are justified. If it is so, in this case the appeal does not act for delay; but if they are incoherent or they are not offered in spite of formal persuasion of the appeal, in this case the

appeal aims a delay. The third interpretation, which is widely argued by author [Zambon 2018, 283], says that judges in appeal procedure should consider not only motives offered in the appeal, but also records of first instance and confirm the positive sentence, if they reach necessary moral certainty [ibidem].⁸

Referring to this third interpretation, Recchia notices: “According to the letter of the law, the court of appeal, after considering the libellus and the parties comments, should take it for granted that the above proposals are intended solely for delay, namely that there is no argument among those presented which could justify reconsideration of the case, and thus allow the case to be heard in the ordinary trial with the new instruction of the case. In this regard, the intention of the appellant is clearly to delay publication of the sentence by being based on irrelevant justification.” Further the author reminds that the colleague tribunal should make “a general assessment of the reasons necessary to appeal, the parties’ comments, and, above all, justification of the challenged sentence, which leads to the necessary moral certainty about the validity of an earlier sentence, and thus to be considered as groundless reconsideration of the case and the initiation of evidence procedure” [Recchia 2016, 108–13; Zambon 2018, 283].

In this regard, the key to correct interpretation this clause, necessary and required, is not in its contents, but the text of can. 1680 § 1 MIDI, which follows after in provision: *Tribunal collegiale, suo decreto, sententiam priori instantiae confirmet*. Explaining, if the result of checking clause is confirmation from prior instance judge, this clause may tautologically mean that a judge did not find grounds being an obstacle to immediate *confirmation* the first sentence. This is nothing else – although spoken differently – than the clause which was in force until 7 December 2015 and defined in can. 1682 § 2 [Montini 2016, 675].

So, why was the clause of the appeal merely dilatory implemented? Mentioned clause, regardless of implementation intention, has two functions: 1) adjudicating function, referring to conditions of confirmation of the sentence of the prior instance; 2) calling function, referring to appellant’s admonishing to put forth own and more convincing reasons of appealing against challenged sentence [Zambon 2018, 284].

Similar position holds Erlebach: every appeal acts for a delay, because it prolongs length of proceeding, but acting *merely* for a delay would be this appeal, which is not supported with evidence, for which challenged sentence should be changed. This kind of reasons are not limited only to this pointed by the appellant. Also, points of other parties, including the defender of the bond, should be considered, and evidences which were not offered by the parties, but they emerge clearly from the case files, either from the sentence or from *acta causae*

⁸ Cf. Recchia 2016, 108–13.

[Erlebach 2017a, 83–87].⁹ “Despite the fact that the canon refers to the appeal *mere dilatoria*, the interpretation of the norm, consistent with the principle of legal certainty and the required legal protection of the institution of marriage seem to require that the determining factor of the possibility of confirming the sentence by a decree is not a subjective intention of person, who submits the claim – acting on delay or not – but its *lack of justification*, which allows the appellate court – always collegial – to obtain the moral certainty necessary to confirm in the form of a decree a positive sentence of the prior instance” [ibidem].

4. THE APPEAL IN BRIEFER PROCESS

The appeal in briefer process requires, first of all, determination of the competent tribunal. It depends on the diocesan bishop,¹⁰ who issued the positive sentence. The legislator in can. 1687 § 3 MIDI provides that if the diocesan bishop: 1) is the suffragan, the competent tribunal will be the metropolitan or the Roman Rota; 2) is the metropolitan, *appellatio datur ad antiquiorem suffraganeum or to the Roman Rota*; 3) does not have a superior authority below the Roman Pontiff, the appeal court will be the bishop selected by him in a stable manner or the Roman Rota [Zambon 2018, 285].

As far as in the first case, there is no problem with establishing of appeal court, in the second and third case may appear interpretation problems. For example, you can ask a question if the bishop who has no superior authority below Roman Pontiff needs Holy See approval. Some Authors confirm that clearly [Montini 2016a, 115], similarly to provisions of can. 1438, 2° [Zanetti 2017, 1335]. However, there is no shortage of different opinions, which authors conclude that there is no such necessity [Del Pozzo 2016, 218].

Another dispute is determination of the bishop for the metropolitan’s appealing proceeding. Is it the bishop of the metropolitan oldest capital? Is it the bishop the oldest in calling? Or is it the bishop who stays the longest in the suffragal diocese? There is no single and common position at the moment, although it seems to be the bishop of the oldest capital [Zanetti 2017, 1335].¹¹ In this direction Pontifical Council for Legislative Texts went.¹² Another opinion has *Sussidio applicativo* of the Roman Rota,¹³ which points the criteria of the oldest suffragan in office [Zambon 2018, 286]. It should be also noted that,

⁹ Cf. Zambon 2018, 285.

¹⁰ For more on the diocesan bishop as a judge, see: Nowicka 2012, 85–95; Greszata–Telusiewicz 2015b, 49–57.

¹¹ Cf. Zambon 2018, 286.

¹² Lettera circolare del 30 gennaio 2016 della Segnatura Apostolica (Prot. n. 51324/16 VAR).

¹³ Tribunale Apostolico della Rota Romana, *Sussidio applicativo del Motu pr. «Mitis Iudex Dominus Iesus»*, Città del Vaticano 2016.

both in § 3 of can. 1687 MIDI and in § 4 do not relate to the oldest capital, but to the diocesan bishop in § 4 and to the dean of the Roman Rota [ibidem].

On the other hand, different consequences of recognizing an appeal as mere *dilatoria* do not constitute special interpretational problems. Can. 1687 § 4 MIDI states that “if the appeal clearly appears merely dilatory, the metropolitan or the bishop mentioned in § 3, or the dean of the Roman Rota, is to reject it by his decree at the outset; if the appeal is admitted, however, the case is remitted to the ordinary method at the second level.” It might seem that rejection a *limine* is something different than a decree which confirms the sentence of the prior instance [Zambon 2018, 286], but it is considered that a decree of rejection a *limine* issued by a second instance judge not always would be a decree of ordinary appeal refusal, but it could concern justification, so the substance of the challenged sentence. Otherwise, the judge to whom the appellate was submitted, had no possibility to go to *meriti*, thereby there would not be a chance to a double conforming decision *pro nullitate* [Recchia 2016, 119].

Recchia emphasizes: “In my opinion, a decree of rejection a *limine* issued by a single judge adjudicating in the second instance would not always be a decree on the inadmissibility of an appeal, but of its groundlessness. Because, when the appeal is declared as groundless, the decree on the unfounded application releases from deciding about the merits of the proceedings, stating or not, the existence of the disputed right, depending on the party who lost in the prior instance” [Recchia 2016, 119].

CONCLUSION

The analysis of issues relating to the submission of an appeal reveals matters that deserve special attention, such as the deadlines for filing and supporting an appeal. Other problems are still under consideration or are gradually finding interpretations more and more consistent in doctrine. In addition, it seems very important to notice the emerging judicature guidelines and how this is relevant to the practice of individual courts, taking into account the different situations that may occur. This requires, among other things, the ability to confront and dialogue between church court employees and those dealing with in-depth analysis of existing legislation.

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APELACJA WEDŁUG MOTU PROPRIO *MITIS IUDEX DOMINUS IESUS* –
ZAGADNIENIA WYBRANE

Streszczenie. Ustawodawca w kan. 1680 MIDI stanowi o nowych zasadach apelacji, które powodują wiele nowych zagadnień wymagających szczegółowych wyjaśnień. Pierwszym z nich jest odniesienie się do spraw zakończonych w pierwszej instancji tzw. wyrokiem pozytywnym lub negatywnym. Kolejnym, jest obowiązek apelowania ze strony obrońcy węzła. Bardzo interesującym i wymagającym uszczegółowienia problemem jest apelacja na zwłokę. Również wiele problemów interpretacyjnych nasuwa apelacja w procesie skróconym przed biskupem.

Słowa kluczowe: reforma papieża Franciszka, proces kanoniczny, proces o nieważność małżeństwa, *Mitis Iudex Dominus Iesus*, prawo kanoniczne, apelacja

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