

Determination of  
the Formulation of the Doubt  
and Conformity of the Sentence

**Prof. Paolo MONETA**

**Faculty of Law  
University of Pisa**

*Studies on the Instruction Dignitas Connubii*, Patricia M. DUGAN and  
Luis NAVARRO (Editors), Proceedings, Gratianus Series, Montréal,  
Wilson & Lafleur Ltée, 2006, pages 91–113.

## Determination of the Formulation of the Doubt and Conformity of the Sentence

SUMMARY: I. The procedural rules for the formulation of the doubt. – II. The content of the formulation of the doubt. – III. Correspondence between the formulation of the doubt and the sentence. – IV. The conformity of sentences: formal conformity. – V. Equivalent or substantial conformity. – VI. Substantial conformity and canonical equity.

### I. The procedural rules for the formulation of the doubt

At a preliminary stage, the procedural rules set out by the Instruction *Dignitas connubii* should be outlined in order to arrive at the determination of the formulation of the doubt.

Following the indications of the Code, the Instruction outlines two procedural methods, one faster and more essential, while the other more complex and solemn.<sup>1</sup> If we take into account the nature of matrimonial causes and the procedures by which they are usually introduced, it is certainly the first procedure that must be adopted in principle. It sets out that the president of the tribunal, previously designated, issues a decree by which he admits the *libellus* [suit] and arranges the summons (*vocatio in iudicium*) of the respondent. In this same decree (which must also be communicated to the other party and to the defender of the bond) the president must already suggest (propose) to the parties the formulation of the doubt, as it may be gathered from the *libellus*, and invite them to present any observations on it within fifteen days after the notification of the said decree. After this deadline, the judge (after this moment, the president of the

1. Cf. A. STANKIEWICZ, commentary on canon 1513, in Á. MARZOA, J. MIRAS, R. RODRÍGUEZ-OCAÑA, *Exegetical Commentary to the Code of Canon Law*, Vol. IV/2, Montréal/Chicago, Wilson & Lafleur/MTF, 2004, pp. 1151-1158.

tribunal may be replaced by the *ponens*), taking into account the petitions and opposing arguments that might have been presented by both parties, determines the formulation of the doubt with another decree, which is also communicated to the parties. Within ten days of the communication of this decree, the parties may appeal to the judicial college to ask the modification of formulation of the doubt. The college must ("expeditissime" ["as promptly as possible"], therefore with an irrefutable decision) settle the question as quickly as possible.

The other procedure, which should be adopted only in cases that present particular difficulties or anomalies with respect to the current praxis, provides that the determination of the doubt be established at the end of a hearing specially called for this purpose, where all parties are invited to attend. This type of procedure may be requested by the petitioner in the *libellus* or by an immediate, subsequent petition: in such a case the presider will set the hearing in the same decree that admits the *libellus*, summoning the respondent to appear in the judicial hearing on that date (then the decree assumes the nature of a true and proper *subpœna* and not of a generic *vocatio in iudicium* [summons]) and also summoning the petitioner and the defender of the bond. The need of holding a special hearing to *agree* (as may properly be said) *the doubt may* also emerge from the replies that the parties forward to the tribunal after the notification of the first decree (in which the presider, as we have seen, already presents a *formula dubii* [formulation of the doubt]): in such a case the judge, instead of determining the doubt *ex officio*, summons the parties by a decree to take part in a hearing set for this purpose. The decree of determination of the doubt issued at the end of the hearing must be communicated to the parties who were not present. Against this decree, an appeal to the judicial college treating the cause is admitted within ten days, provided that the parties, in the course of the same hearing, have not expressed their agreement to the established formulation.

## II. The content of the formulation of the doubt

With respect to the content of the formulation of the doubt, the Instruction reproduces the prescription of the Code requesting the determination "quo capite vel quibus capitibus nuptiarum validitas impugnetur" ["by which ground or grounds the validity of the marriage is challenged"] (c. 1677, § 3).

The prescription is clear in the sense that one should refer to the hypotheses of nullity set out abstractly by the legislator, without

any reference to the concrete facts on which these are founded. There may be uncertainty in the determination of such hypotheses, especially when they present a certain complexity and an internal diversity of profiles. In such cases, the determination of the *caput nullitatis* [ground of nullity] may take place in a more analytic manner, selecting with accuracy the specific profile that fits the concrete case, or in a more comprehensive and synthetic manner.

Focusing on the more concrete, the same legislative provisions delineate, at times, diverse and more precise hypotheses within a more general type of nullity. This is the case for the incapacity to consent to matrimony that is subdivided into three more specific hypotheses or subspecies (c. 1095) or as well for the condition added to the matrimonial consent, that is subdivided into *de futuro* [future] condition and *de præterito vel de præsentis* [past or present] condition (c. 1102). In other cases, the determination of more specific hypotheses of nullity derives from the concrete applications made by jurisprudence or doctrinal definitions. Thus, within the scope of error of personal qualities of the contracting party, beside the type expressly codified as error on a quality "quæ directe et principaliter intendatur" ["which is intended directly and mainly"] (c. 1097, § 2), an error of *substantial or determinant* qualities in the determination of the person has been defined (this error is based on an extensive interpretation of the *error of person* set out in § 1 of the same canon 1097<sup>2</sup>); and finally, within the area of the invalidating vice of moral violence (c. 1103), has been recognized, and at times considered independently, the *metus reverentialis qualificatus* [qualified respectful fear].<sup>3</sup>

2. On this interpretation, and on the position that the jurisprudence of the Roman Rota has assumed on this issue, see P. MONETA, *Il matrimonio nel nuovo diritto canonico*, 3rd ed., Genoa, 1996, pp. 154 ff; *id.*, "Un intervento risolutivo della Rota Romana in tema di errore sulla persona?," *Il Diritto Ecclesiastico* II [1995] 234 ff.

3. At times the opposite may also be verified with respect to the examples now indicated, that is, that hypotheses of nullity set out in various legislative provisions can be traced back to the same type. It is as much as occurs for the error of law "determinans voluntatem [determining the will]" defined by canon 1099 and for the *intentio contra bona matrimonii* [intention against the goods of the marriage] or partial simulation dealt with in canon 1101, § 2. On occasion there are jurisprudential and doctrinal definitions that tend to distinguish the two hypotheses and others that assimilate one to the other (see, *inter alia*, in the first sense P. A. BONNET, "L'errore di diritto sulle proprietà essenziali e sulla sacramentalità," in *Error determinans voluntatem (Canon 1099)*, Vatican City, 1995, pp. 60 ff; A. STANKIEWICZ, "L'errore di diritto nel consenso matrimoniale e la sua autonomia giuridica," in *ibid.*, pp. 75 ff.; in the second sense, P. MONETA, *Il matrimonio nel nuovo diritto canonico*, *op. cit.*, footnote 2, pp. 122 ff.). Especially in hypotheses of this type, during formulation of the doubt reference should be made to a single type of *caput nullitatis* [ground of nullity].

I consider that, at least in principle, the orientation that refers to a broader and comprehensive definition of the *caput nullitatis*, should be adopted. I believe this may be deduced by the specific function peculiar to the formulation of the doubt. That is, on one hand, defining the limitations within for the suit to take place, with respect to the instruction activity, that is directed along predefined directives, and to the final decision, that will have a precise reference for its reasoning. On the other hand, the preliminary determination of the scope of the controversy corresponds to a requirement to protect the rights of the parties, who are enabled to present and sustain their reasons more consciously.

I think that none of these aspects requires an analytical determination of the *caput nullitatis* [ground of nullity]. What matters is to identify a hypothesis of nullity which requires substantially homogeneous proceedings and to safeguard the right of the parties to start a proper debate. If one goes beyond these fundamental requirements, one risks curbing the treatment of the cause within too narrow limits and falling into an excessive formalism that may undoubtedly harm a faithful reconstruction of the facts.

### III. Correspondence between the formulation of the doubt and the sentence

A formulation of the doubt that does not dissect the single hypotheses of nullity is also useful for the final decision of the suit. The sentence, as confirmed by the *Dignitas connubii*, must define the question referred to the tribunal "data singulis dubiis congrua responsione" ["with an appropriate response given to each doubt"]. (c. 1611; art. 250). In giving this reply it is appropriate that the judge should not be constrained within too-restricted limits to ensure the correspondence of the decision itself to the previously defined doubt, but that he can have some autonomy in framing the instance within the juridical case in point.

In this matter the problem of the *congruity* of the decision arises, whether the judge must rigorously and unflinchingly conform to the ground of nullity contained in the formulation of the doubt, or whether he can recognize a certain freedom of modification or at least of interpretation.

On this point it is appropriate to remember that the *caput nullitatis* established in the formulation of the doubt may be modified in the course of the suit by a new judicial decree, which moreover may

not be issued *ex officio*, but always *ad instantiam partis* [at the request of a party] (c. 1514, confirmed by article 136 of the *Dignitas connubii*). The necessity of a petition by a party flows from the basic rule that only the spouses are authorized to present an action of nullity of their own marriage. Such an action is not intended in generic terms, but is also precisely identified by the *causa petendi* [cause of the petition], by the reason on which the petition of nullity is based. It pertains only to the spouses, as holders of the action, to bring such a cause and determine the concrete modalities to indict the marriage itself. The judge may not supersede them in determining the reason on which the decision itself should be based; even if he were convinced he could better meet their interests in obtaining a declaration of nullity.

Keeping firmly to this principle, the judge is undoubtedly acknowledged to have the power to interpret the petitions endorsed by each of the two spouses in strict juridical terms. Even more so if the petitions are presented in not strictly technical form, as may occur when the party does not avail itself of the services of an advocate, or of a juridical expert. This power of interpretation is recognized in the phase of determining the formulation of the doubt within whose limits the judge may undoubtedly modify the ground of nullity formally presented by the petitioner, in order to make it more faithful to the real occurrence and, if necessary, more in line with the juridical definition commonly followed by the jurisprudence.<sup>4</sup> In this case there is no danger that the judge's determination will overpower the wishes of the parties, because the modification has to be accepted, at least implicitly (by not exercising the right of opposition) by the interested party.

Even in the conclusive, decisional phase, when it is no longer possible to obtain any agreement of the parties it has to be acknowledged that the judge has the power to interpret the original determination of the *caput nullitatis* [ground of nullity] in more adequate juridical terms.

4. Wishing to add some examples on this latter aspect, the judge could consider it preferable to determine the doubt with reference to the exclusion of the *bonum fidei*, rather than to the exclusion of the *bonum coniugum* as pointed out by the party, the event being more commonly framed by the jurisprudence in the first ground of nullity. In the same way, the judge could substitute for the *caput nullitatis* [ground of nullity] of impotence that of the incapacity to assume conjugal obligations, taking into account the restrictive orientation adopted by the jurisprudence in the determination of the first of the two grounds of nullity.

This is a principle often admitted by the jurisprudence of the Roman Rota, based on the very clear formulation contained in a 1964 decision c. De Iorio to which the succeeding jurisprudence will often be referred: "Animadverterunt quoque Patres iudicum esse speciem iuris tribuere factis ab alterutra vel utraque parte allatis, si actor vel actrix id non præstiterit aut verum non tribuerit" ["The Fathers also noted that it belongs to the judges to give a juridical species to the facts brought by either party, if the petitioner did not give it or gave a not true one"]. It follows from this that the judges, kept exemplifying the decision, "posse matrimonium nullum declamare ob simulationem totalem, etiamsi partes id nullitatis accusassent ob exclusum boni sacramenti et versa vice" ["to be able to declare the marriage null due to total simulation, even if the parties brought charges because of the exclusion of the *boni sacramenti* and vice versa"]. "Aliis verbis [in other words]—the judges of the Roman Rota concluded—ratio habenda est factorum, quæ partes attulerint atque comprobaverint, non nominum iuris, quæ eisdem tribuerint ["consideration is to be given to the facts which the parties brought and proved, not of the legal qualification which they attributed to them"].<sup>5</sup>

There remains however, the necessity that this power to attribute a legal qualification different from that adopted during the formulation of the doubt should not become a superimposition *ex officio* of an action different from that requested by the petitioner. It is true that in general the spouse's prevalent interest is that of obtaining the nullity of the marriage, leaving out of consideration the justification that is at its base, but this may not justify a violation of the principle that it pertains only to the spouse to outline the concrete application of the action of nullity.

Focusing on a practical application, a different qualification of the reason of nullity may certainly be admitted when there is continence between two cases of nullity. This is if the new ground determined during decisional stage is included in the one indicated in the *formula dubii* [formulation of the doubt] (for example, exclusion of indissolubility with respect to total simulation, *defectus discretionis iudicii* [lack of discretion of judgment] with respect to the insufficient use of reason). Some perplexity may nonetheless occur on a cause of inverse continence, when the judge decides to apply a broader ground including the one originally formulated. The

5. SRR Dec. 1974, pp. 353-354.

petitioner could in fact dislike a more serious and invasive ground of nullity against his person, than the one on which he had planned to base the cause. Thus he is substantially prejudiced in his right to challenge the marriage on the basis of a precise cause of nullity chosen by himself. The judge's power to attribute a *nomen iuris* [legal value] different from that originally presented should, in those cases, take into good account the position of the parties and their presumable attitude in the face of the new ground of nullity that it is intended to assert.

In the relationship between initial formulation of the doubt and decision, these considerations lead us to exclude the use of the criterion of substantial conformity, set out with regard to two sentences of nullity. According to this criterion, as we shall soon see more clearly, the different juridical qualification adopted by the two sentences finds its justification in the identity of the concrete fact on which they are based. But, applied to the case that we are considering, the criterion of substantial conformity could lead to a declaration of nullity undesired by the petitioner and therefore, according to the principle previously recalled, not be admissible by the judge during the decision. Not considering the risk of compromising the right of defense of the other party, would the party unable to assert his own reasons with respect to the new *caput nullitatis* [ground of nullity] determined by the judge.<sup>6</sup>

In any case, whenever there might be the risk of an undue superimposition of the judge's determination on the expectation of the petitioner, in the definition of the ground of nullity, it seems more correct to delay the decision, in order to modify, with the agreement of the petitioner (and the possible concurrence of the respondent), the original formulation of the doubt in a way considered more adequate by the judicial college. This is even more so,

6. On the basis of these considerations a Rotal decision *Clevelanden* may not be shared, cf. 18 October 1973 c. Bejan (SRR Dec., 1973, pp. 655 ff), which considered that the marriage could be declared null "ex defectu in muliere actrice consensus consulti ac liberi" ["due to a lack of considered and free consent in the woman petitioner"], although the agreed doubt was on simulation and *vis et metus* [force and fear]. On the subject, see also the critical observations of S. VILLEGIANTE, "La conformità equivalente delle sentenze affermative nel processo canonico di nullità matrimoniale," in A. G. URRU (ed.), *Miscellanea in onore del Prof. José Manuel Castaño O.P.*, Rome, 1997, pp. 225 ff (the article is also published in *Monitor ecclesiasticus* [1998] 295 ff).

because this solution does not involve disadvantages of particular importance or create serious delays in the procedure.

#### IV. The conformity of sentences: formal conformity

We can now move to the central theme of my presentation, that of the conformity of sentences, or more precisely of two decisions of nullity issued by tribunals of different instance, so as to render the declaration concerning the nullity of the marriage fully executed and no further capable of being appealed. This is one of the major points on which the *Dignitas connubii* does not limit it to making the provisions of the Code explicit, or to integrating them with further applicative norms, but attributes to them a meaning that does not seem directly deducible from their literal content. This does not represent a real innovation with respect to the provisions of the Code, such as to make one think that the Instruction is departing from its intent, clearly made explicit in its preface, of maintaining unaltered the provisions of the Code ("leges processuales Codicis Iuris Canonici [...] manent in toto suo vigore" ["the procedural laws of the Code of Canon Law [...] remain in their full force"]). It is in fact observed that this conservative intent is accompanied by the requirement, likewise clearly made explicit in the same preface, of taking into account doctrinal progress and the evolution of jurisprudence, in particular of the apostolic tribunals, which have been in existence for more than twenty years since the promulgation of the Code.

Thus it can be easily observed that the Instruction assumes an interpretation adopted by a consolidated jurisprudence of the Roman Rota, repeatedly confirmed, in the light of a new provision of the 1983 Code (c. 1641, 1°), that could have been interpreted in a stricter way.<sup>7</sup> The *Dignitas connubii* has aligned itself with what civil law jurists call the *living law*, in other words, the law that is

7. Canon 1641, 1° better specifying the requirements for a *duplex sententia conformis* ("si duplex intercesserit inter partes sententia conformis de eodem petito et ex eadem causa petendi," seems not to allow room for extensive interpretations of such a concept. See, on the subject, S. VILLEGGIANTE, "La conformità equivalente," *op. cit.*, footnote 6, pp. 232-233; J. L. LÓPEZ ZUBILLAGA, "La conformidad de decisiones en el Código de 1983," *Revista Española de Derecho Canónico* [2002] 673 ff.

actually applied in legal practice, regardless of the theoretical basis that it may find in the literal content of a legislative provision.

The jurisprudential (orientation) tendency adopted by the Roman Rota is therefore the necessary reference for understanding the content of the norms included in the Instruction. It is appropriate to bear in mind that the assumption of a jurisprudential tendency at the normative level inevitably involves some adaptation, a more precise determination, inflexibility and at times, a stiffening of the preceptive content. In our case as well, transposing from the jurisprudential level to the legislative one, *Dignitas connubii* undoubtedly assumes a scope which is to some extent, innovative, and needs to be clarified and correctly interpreted.

We now examine more analytically the text of article 291 of the Instruction. It contains two definitions of the concept of "duplex sententia conformis" indicated in the preceding article 290, as a situation precluding an appeal: that of *formal* conformity and that of *equivalent or substantial* conformity. Even if the article does not state it expressly, the case of "duplex sententia conformis," in other words, of a decision that makes definitive and fully executed the judicial decision on the validity or nullity of the marriage, is produced when either the one or the other hypothesis of conformity concurs. We shall therefore better clarify each of these two hypotheses, that of formal conformity, and that of equivalent or substantial conformity.

The first one takes place when the two sentences "intercesserint inter easdem partes, de nullitate eiusdem matrimonii et ex eodem capite nullitatis, eademque iuris et facti ratione" ["issued between the same parties, concerning the nullity of the same marriage, and on the basis of the same ground of nullity and the same reasoning of law and of fact"] (art. 291, § 1). Therefore the two sentences should concern the same parties and the nullity of the same marriage and should be based on the same ground of nullity. To these traditional requirements, that do not seem to raise any particular issue of interpretation, the provision adds a further clarification that does not appear in the corresponding canon of the Code (c. 1641, 1°) and that seems to add to it some restriction: the decisions must also be based on "eadem iuris et facti ratione" ["the same reasoning of law and of fact"].

This phrase seems to indicate the need of not limiting oneself to considering the cause of nullity indicated in the sentence, but of also taking into account the logical reasoning that has prompted the judge

to consider such an existing cause of nullity, as shown by the justification of the sentence. It could thus happen that the same *caput nullitatis* were based on a juridical interpretation or on actual facts that present a substantial diversity in the two sentences. In such a case, the two decisions would not be formally in conformity, but only *seemingly* in conformity, and therefore would not allow the permanent condition to arise with respect to the declaration of validity or of nullity of the marriage.

The requirement of taking into account the justification of the decision, to verify the effective correspondence of the statement, contained in the respective decisions, beyond having been put forward in doctrine, also presents some precedents in the jurisprudence of the Roman Rota. Thus is often quoted a decision of 5 August 1950 c. Felici, in which the principle is affirmed with the usual crystal clarity: "Substantia sententiæ non solum ex nudis partis dispositivæ verbis eruenda est sed etiam ex substantia partis motivæ, quæ dispositivam cum induxerit, eamdem complet, perficit et absolvit" ["the substance of the sentence is not only brought to light from the bare words of the dispositive part but also from the substance of the justification part, which when it brings in the disposition, completes, perfects and finishes it"]. Therefore, the decision continued, they cannot be said to be in conformity<sup>8</sup> "sententiæ quæ licet in parte dispositiva materialiter concordent, *motivis inducuntur ita substantialiter diversis* ut Iudices, qui eas in successivis instantiis tulerunt, prorsus aliter de re proposita sentiisse dicendi sunt" ["decisions which are materially concordant in the dispositive part, but are introduced by such substantially diverse justifications that the Judges, who made them in successive instances, are to be said to disagree absolutely concerning the matter presented"]. Moreover it has to be pointed out that this decision did not concern a cause of nullity of marriage, but of separation between spouses. Its nature was not therefore merely declarative (like that of nullity), but constitutive of a juridical situation, that of a separated spouse. In this case, the right that is asserted undoubtedly presents a closer connection with its constitutive basis than what occurs in merely declarative decisions. It should also be considered that the reasons to lead to separation are not as precisely typified as those that involve nullity,

8. SRR Dec., 1950, p. 542.

with the consequence that the same final declaration, reached by the two decisions, may be based on a factual reality extremely different or even contradictory.

The same principle also appears to be contained in a decision on the subject of nullity of marriage, that of the *Romana* on 6 May 1974 c. Pinto,<sup>9</sup> where it is clearly affirmed that "Conformes et contra non sunt duæ sententiæ nullitatis quorum una negat facta juridica ab altera admissa, quæ tamen concordant in parte dispositiva quoad caput ab utraque reiectum. Conformitas hæc est tantummodo apparens." ["Two sentences of nullity are, on the contrary, not concordant, if one of which denies the legal facts admitted by the other, but which agree in the dispositive part as a ground rejected by both. This conformity is only barely apparent."] Based on these principles the judges of the Roman Rota considered two sentences that had rejected the petition of nullity of the marriage because of a condition signed by the man,<sup>10</sup> only in apparent conformity.

In both of these examples it is not difficult to perceive the intent to arrive at justice which takes into account the personal requirements of those who turn to the ecclesiastical tribunals. Conformity is in fact denied, not to restrict the rights of the parties, but to support their desire to see their request recognized: they are in fact placed in a position to file an appeal judgment (the *duplex sententia conformis* not being formed), without the necessity of taking the more difficult and at times impractical route of the *nova causæ propositio*.

9. SRR Dec., 1974, pp. 339 ff.

10. More precisely the negative decision in the first sentence is based on the emphasis that the case did not involve a true and proper condition but a mere *prerequisite*, the second sentence instead considers that it does not involve a condition but exclusion of the *bonum sacramenti*, even if in the justification it contradicts the arguments that had prompted the first judges to identify a mere *prerequisite*. A negative *duplex sententia conformis* [double concordant sentence] not being formed on the ground of the condition, the judges consider they can still deal with it, arriving at an affirmative decision, that is declared to be substantially in concordance with the preceding one that had declared nullity for partial simulation. The principles contained in the quoted 1950 sentence c. Felici are also expressly recalled in a decision of the Apostolic Signatura of 4 May 1974 (in *Periodica* [1975] 149), but in this case the diversity of justification is invoked, not for the purpose of defining a merely apparent concordance, but as an element that may justify a *nova causæ propositio* [new presentation of the cause].

The reference to the “*eadem iuris et facti ratione*” [“the same legal and factual reasoning”] contained in *Dignitas connubii* seems to be linked to these jurisprudential precedents. It is precisely the consideration of fairness that they undoubtedly present that leads us to think that the provision under examination has a residual value, being a kind of safety valve for particularly worthy situations. Only in exceptional cases, in the presence of a radical diversity or of an incurable contradiction, the justification of the decision may emphasize the inconsistency of two sentences having the same ground of nullity. In conclusion, the Instruction does not intend to completely preclude the possibility of an in-depth examination of the justification of the two decisions. This then allows identification of a radical diversity of the reasons on which they are based, leaving unprejudiced, the power of one of the parties to appeal one of them, to better satisfy his aspiration to obtain justice from the Church tribunals.

The diversity referred to should pertain to the essential core of the event, on which the declaration of nullity is based, not to the single elements or aspects of which it is composed. Once again, wishing to adduce concrete examples, there would not be a diversity of presumptions such as to deny concordance in the case of two sentences that both declare the nullity of the marriage for fraud as per canon 1098, but on the basis of two diverse qualities of the person (for example, sterility in one case, drug dependency in the other), or even for impotence or psychical incapacity to be ascribed to a pathology of a different nature (for example, organic and psychical in the case of the impotence, permanent psychosis or temporary disorder in the case of the incapacity). In these and similar cases the diversity would pertain to partial and non-essential components of the case in point, to which the nullity of the marriage is traced back. Instead, it would involve the essential core of nullity in the case of defect of form, pertaining to two radically diverse facts, such as the lack of delegation of the priest present at the marriage or the suspension from office of the parish priest who had been present.<sup>11</sup>

11. Taking these examples from J. LLOBELL, “Il concetto di «conformitas sententiarum» nell’istr. «Dignitas connubii» e i suoi riflessi sulla dinamica del processo,” in H. FRANCESCHI, J. LLOBELL, M. Á. ORTIZ (eds.), *La nullità del matrimonio: temi processuali e sostantivi in occasione della «Dignitas connubii»*. Il Corso di aggiornamento per operatori del diritto presso i tribunali ecclesiastici, Roma, 13-18 settembre 2004, Roma, 2005, pp. 215-216. Only in the last of the examples used do I feel, however, that I share this author’s position; in the other he considers he perceives a lack of concordance (or an apparent concordance) of the sentences.

The expression used by the provision that we are examining (“*eademque iuris et facti ratione*” [“the same reasoning of law and of fact”]) seems to refer to two profiles of possible relevance of the justification of the decision. The one regards the more proper, juridical framework, while the other is based on the concrete results provided by the procedural acts. I consider, however, that the expression should be understood in a singular sense, with reference to the facts as they are interpreted and framed in their juridical relevance. It is difficult to imagine that two sentences which agree on recognizing the same ground of nullity can be based on radically diverse juridical arguments.<sup>12</sup>

At the conclusion of the analysis of this first provision of *Dignitas connubii* regarding *formal conformity*, it may be observed that a strongly restrictive tendency in the determination of any hypotheses of merely *apparent conformity* is imposed by the same relevance that the Instruction confers on substantial or equivalent conformity of the decision. It would be contradictory to require in the case of formal conformity a greater degree of coincidence between the two decisions than the one required in the case of substantial conformity.

## V. Equivalent or substantial conformity

As we have already mentioned, the concept of equivalent or substantial conformity is based on an abundant and consolidated jurisprudence of the Roman Rota. The same literal expression used in the Instruction to indicate the common basis that the two decisions should contain, though referring to formally diverse grounds of nullity—“*super iisdem factis matrimonium irritantibus et probationibus*” [“on the same facts rendering the marriage null and the same proofs”]—is drawn from the jurisprudence.

This same jurisprudence though, presents a great variety of applications to concrete cases, at times very different and far, one

12. Also the author to whom we are most often referring (not only because of his usual acuity, but also because he was one of the members of the pontifical commission that prepared the *Dignitas connubii*) does not hide his difficulty in attributing a precise meaning to the requirement of the “*eadem ratio iuris*” [“the same reasoning of law”] and merely risks adducing a fairly unconvincing concrete example of a juridical interpretation that can present radical diversity by the two judicial bodies (cf. J. LLOBELL, “Il concetto,” *op. cit.*, footnote 11, p. 217).



from the other, and therefore requiring evaluations and criteria not always uniform.

The concept of substantial conformity, at the normative level requires a more precise determination, even though—as we shall see below—it deals with a concept which originates mainly from requirements of equity, and therefore, however much we try to explain it, may not completely lose its original nature.

In reference to the provision of *Dignitas connubii* (art. 291, § 2), it is essential to specify the meaning attributed to the expression “*iisdem factis matrimonium irritantibus*” [“the same facts rendering the marriage null”].

The nullity of a marriage originates from an event or a series of linked events that interfere negatively on the situation and on the dynamics that lead a person to enter into marriage. In most cases such events have a univocal direction; that is, they lead to defining a single reason of nullity of marriage. Sometimes, though, they are susceptible of assuming directions with respect to the grounds of nullity, which potentially may find different outcomes at the juridical level. In these cases we should not be surprised that a judge, within the scope of his independent evaluation and conviction, should give prevalent emphasis to one of these directions and arrive at a cause of nullity different from the one reached by another judge, with a different emphasis.

In this case the decisions should be considered in substantial conformity because the fact (or all the facts together) that brought on the cause of nullity is the same, though having developed a different juridical configuration. What is required therefore for substantial conformity of two decisions is that the different grounds of nullity to which each of them refers should have its origin in the same human event, episode or lived situation that has assumed a determining causal effect in altering the process of adhering to the marriage.

When this unitary basis exists, it does not matter that there is a particular contiguity or affinity between the various *capita nullitatis* [grounds of nullity] to which the two decisions refer, as in the various hypotheses of simulation (total and partial) or of consensual incapacity. There could be a declaration of conformity even in the presence of grounds that have a different place in the legislative system (as, for example, the impediment of impotence and consensual incapacity to assume the essential obligations of the

marriage), that formally and logically appear incompatible (like simulation and consensual incapacity) or such as to affect the matrimonial consent in a different way (like the defect of *vis vel metus* [force or fear] and the more radical defect of consensus deriving from simulation).<sup>13</sup>

Naturally the event or group of facts to refer to should be the one that is more directly linked to the case of the nullity. It must be the *principal* fact to which such nullity is traced back. The need for this connection of causality is clearly expressed in the provision of *Dignitas connubii* that we are examining, where it is indicated that facts should be “*matrimonium [...] irritantibus*.” This latter term (“*irritantibus*”) is not found expressly in the earlier jurisprudence, but it does not appear to imply a more restrictive tendency: the Instruction has intended only to reaffirm a concept that has always been significantly kept in mind by the judges who have declared the substantial conformity of two decisions.

Article 291 of *Dignitas connubii* requires a further requisite, relative to the equivalence of the fact on which the nullity of the marriage is based. That is the requisite of the equivalence of the proofs: “*super iisdem factibus [...] et probationibus*” [“on the same facts [...] and proofs”]. The reference to the proofs is also present in many pronouncements of the Roman Rota that have made the principle of substantial conformity their own. This is often done with a formulation almost identical to that retained by the Instruction: “*quoties utraque sententia eiusdem factis et probationibus nitatur*” [“when each sentence relies on the same facts and proofs”]; “*si duæ decisiones [...] super iisdem factis et probationibus nitantur*” [“if two decisions are based [...] on the same facts and proofs”]. The expression under examination (or others of the same type) is commonly repeated in the decisions, but it does not seem

13. The diversities that we elucidated did not prevent a jurisprudence that may henceforth be considered firm in declaring the concordance of the two decisions. For a review of the many pronouncements that have been made on the subject, cf. S. VILLEGIANTE, “La conformità equivalente,” *op. cit.*, footnote 6; N. SCHÖCH, “Il principio della duplice conformità delle sentenze nella giurisprudenza rotale,” in *Verità e definitività della sentenza canonica*, Vatican City, 1997, pp. 101 ff; *id.*, “Criterios para la declaración de la conformidad equivalente de dos sentencias según la reciente jurisprudencia rotal,” in *Anuario Argentino de Derecho Canónico*, 2004, pp. 267 ff; A. STANKIEWICZ, “La conformità delle sentenze nella giurisprudenza,” in *La doppia sentenza conforme nel processo matrimoniale*, Vatican City, 2003, pp. 147 ff. Among the decisions of the Roman Rota that have given the greatest impulse to this jurisprudential current, *Bononien*, 24 October 1986 c. Serrano, also published in *Monitor Ecclesiasticus* [1989] 283 ff, remains fundamental.

to have been adequately examined with reference to the proofs and to the relevance that these may assume in relation to an evaluation of conformity of the decisions.

What may be gathered from the meager indications contained in the jurisprudence is that mainly, the occurrence, to which the nullity of the marriage is traced back, should emerge on the basis of the proofs deduced in the trial. That is, it should be that same fact that is gathered from the procedural documents on which the judges have conducted their evaluation. We normally read in the decisions<sup>14</sup> "[d]ummodo decisio lata esset iisdem factis et probationibus innixa" ["provided the decision is based on the same relied-on facts and proofs"], "dum eadem appareant facta juridica comprobata" ["while the same juridical facts appear demonstrated"]. Making more specific reference to the requirement that there should be correspondence between the proofs used by the two decisions, the jurisprudence seems to intend this requirement as a confirmation and a reinforcement of the effective equality of the event at the basis of the nullity. This is as an element that allows a more secure evaluation of its unity. In other words, the fact that the proofs that have produced in each of the two judges the moral certainty concerning the nullity of the marriage are the same is a significant confirmation that we are in the presence of a same life occurrence, to which the decision of each of the judges is substantially traced back.

I do not believe that the reference to the proofs contained in *Dignitas connubii* could assume a different meaning from the one obtained out of the jurisprudence that has elaborated the concept of substantial conformity. Undoubtedly, such a reference may not be intended in a rigorous sense, to exclude any concordance whenever the second judge has based his own decision on proofs not used in the previous instance. Such an occurrence is quite common. In the majority of the cases, the second judge arrives at a different juridical qualification by virtue of further and more convincing elements of proof, that he is able to find in favor of it. If in such a case the concordance of the decisions were denied, in practice the rule of substantial conformity would be meaningless, arriving to an outcome totally opposing the jurisprudence on the matter and, consequently, also to the norm that it accurately refers to.

14. The expressions cited are taken from the sentence *Cenipontana* of 21 December 1988 c. Palestro, in *Monitor Ecclesiasticus* [1989] 270.

It follows that the conformity may not be precluded by the fact that the second judge has based his conviction in favor of a different ground of nullity on a new deposition by the parties, or on the depositions of witnesses not heard in the previous instance, or on documents that were not exhibited. Even the use of an expert for the first time, a proof of a very different nature from that used in the preceding instance is not such as to preclude the conformity in itself, if it is limited to integrating and clarifying the probative material already acquired.<sup>15</sup> If, for instance, it served to clarify the psychological situation of the subject who entered into marriage under the influence of pressures and threats, leading the judge to perceive not so much a defect of *vis vel metus* [force or fear], which prompted him to enter into a marriage against his wishes, but rather a *defectus discretionis iudicii* [lack of discretion of judgment] that prevented him from entering into the marriage freely and knowingly.

We should however reach a different conclusion when the new examination brings to light a mental illness that has no relation to the situation of constraint, with the state of fear with which the subject entered into the marriage. In this case it is not the diversity of proofs that impacts negatively on the conformity of the decision, but the diversity of the human fact that has caused the nullity. The diversity of proofs is only a symptom, a significant sign of a diversity that concerns, more deeply and substantially, the constitutive event of the nullity.

Therefore, the equality of the proofs does not in itself constitute a requirement necessary to reach a verdict of conformity of the decisions, but only an element from which the equality of the fact constituting the nullity may be deduced. The diversity of the proofs cannot bring the judge to deny the conformity. It can only make him conscious of the effective equality of the fact constituting the nullity and to lead him to verify more carefully that behind such probative diversity there is not a more substantial diversity affecting the basic core of the case.

A final point to be brought out is that the fact that the second decision looks at a ground of nullity added for the first time in the appeal judgment and is therefore dealt with in this phase

15. Of this view is also the position of J. LLOBELL, "Il concetto," *op. cit.*, footnote 11, p. 220, according to which "[w]hat one should take into account is that the two probatory sets of elements are shared by both decisions in their substance."

"tamquam in prima instantia" ["as in the first instance"] does not impede the possibility of declaring substantial conformity. It has to be observed that at the time of the admission of the new item, the appeal judge may not evaluate whether it is compatible with the one dealt with in the preceding instance, providing a substantial conformity with it. This might emerge only at the end of the examination of the cause, when the judge will be in possession of all the elements to verify that the two grounds have their basis in the same complex of events to which the nullity of the marriage is traced back. When the assumptions for a declaration of substantial conformity exist, the decision is not of first instance, but to confirm the preceding one and therefore to be considered, to all effects, a decision of appeal. The handling "tamquam in prima instantia" ["as in the first instance"] has to be considered precautionary and protective, called to disappear when it becomes clear that the judge—given the equality of the assumptions—could in reality exercise his specific powers as judge of appeal.<sup>16</sup>

## VI. Substantial conformity and canonical equity

Two recent decisions of the Roman Rota give me the opportunity for some conclusive remarks.<sup>17</sup> The life occurrence presented to the attention of the judges was very similar: in both cases the woman had assured the future husband that she would have followed him to the country where he greatly wanted to establish the matrimonial life. In both cases the woman had then refused to do so, showing that she had misled the man as to her true intentions. The second decision declares the nullity of the marriage in both cases because of the condition placed by the man. It declares the conformity with the preceding ruling that had considered the marriage null in the first case for simulation, in the second for fraud, by the woman. It is in fact observed that "prima et altera decisio iisdem nuntitur factis iuridicis etsi diversa sub luce conspectus" ["the first

6. Of this view also J. LLOBELL, "Il concetto," *op. cit.*, footnote 11, pp. 207 ff. The jurisprudence has never had any difficulty in declaring substantial concordance in the case of dealing with the new ground of nullity *tamquam in prima instantia* [as in the first instance].

7. This concerns the decisions *Urbis Beninen* of 22 October 1996 c. Pompedda (in *SRR Dec.* 1996, pp. 630 ff) and the *Interregionalis Beneventani* of 22 November 2002 c. Turnaturi, published in an appendix to the essay by N. SCHÖCH, "Criterios para la declaración," *op. cit.*, footnote 13, pp. 333 ff.

and second decisions rely on the same juridical facts even if diverse in appearance".<sup>18</sup>

As one can easily see, the concept of substantial conformity is used here with great extent, to the point of being applied with respect to grounds of nullity that do not involve the same spouse, but first the wife (simulation and fraud), then the husband (condition). This different imputation of the two grounds makes it difficult to perceive at their base a single event constituting the nullity, a complex of facts to which the two juridical grounds, that have rendered the marriage invalid, can be uniformly traced back.<sup>19</sup> A rigorous application of the norms contained in *Dignitas connubii* should therefore lead to a different evaluation from the one adopted by the judges of the Roman Rota, that is, to deny the conformity of the two decisions.

I do not believe that this kind of result would correspond to the requirements and the genuine spirit of ecclesiastical justice. If we examine carefully the life occurrence dealt with by the decisions of the Roman Rota, we notice that its basic core is, in both cases, the behavior of the woman. She, being well aware of how much the husband wanted to establish the conjugal life in a certain place, first misled him as to her true intentions, and then refused to follow him and set up the marital life with him. It is therefore this lived *fragment*, this chip of life occurrence that has impeded the fulfillment of the marriage: it is its failure at the human level, and

18. This is the meagre juridical justification adopted in the second decision (that c. Turnaturi). In the first they do not go beyond a generic reference to the procedural acts ("quæ decisio, attentis causæ actis, habenda est conformis sententiæ primi gradus" ["which decision, paying attention to the acts of the cause, is to be considered in concordance with the decision of the first grade of jurisdiction"]). It is also specified that in the case decided by this last verdict the man had set as a condition not only the fact that the woman, once she had finished her studies in Canada, should follow him to Nigeria, where he intended to establish the marital life, but also that she should convert to the Roman Catholic faith, leaving the Seventh Day Adventist Church.

19. This difficulty is clearly experienced in the decision c. Pompedda, to the point of inserting in the purview an unusual (and non-technical) reference to the simulating behavior of the woman: "affermative, seu constare de matrimonii nullitate, in casu, ob condicionem a viro apposita et simulate a muliere acceptam" ["affirmative, or stating the nullity of the marriage, in this case, because of a condition placed by the man and accepted with simulation by the woman"] (our italics). It also has to be observed that the diversity of imputation of the ground of nullity in the decision c. Turnaturi was less radical, because the fraud committed by one of the parties caused an error, and therefore an alteration of the consent, in the other.

its radical invalidity, at the juridical level, which are substantially traced back.

This close attention to the matter of the case legitimizes a declaration of conformity, even when the facts that more directly support the two declarations of nullity do not seem to refer to the same context. It is precisely the concern for the truly human content of the juridical experience, which characterizes ecclesiastical justice, making effective that principle of *equity* which is its basic and irremovable component.

We are now back to my prior consideration. The substantial or equivalent conformity arises from the requirement of ensuring effective justice to the parties, even beyond what can be deduced from a rigorous interpretation of the legislative provisions, without burdening them pointlessly with further and tiring procedural fulfillments. It originates from an equitable spirit in the application of justice (as the decisions of the Roman Rota have often emphasized), that undoubtedly continues to permeate the substantial or equivalent conformity, even now that it has found more precise rules in *Dignitas connubii*.

In determining the requirements of these rules (which maintain a wide margin of elasticity and flexibility) we may not be confined within the narrow limits of a merely logical and formal evaluation, but rather, we should penetrate into the life occurrence and gather from it the effective core of lived event, which has prejudiced the valid constitution of the marriage.

There is still an important clarification to be made. The necessary openness to *æquitas canonica* [canonical equity] should not make us forget that in the process of nullity of marriage fundamental rights of the person (spouse) are at stake which at times could be in conflict with one another, leading one spouse to challenge the petition of nullity advanced by the other. These rights require adequate protection, even when the conformity of two decisions has to be evaluated and decided. The recourse to canonical equity should not justify their violation, since in this case its specific function of ensuring true justice would be altered: "the *ratio æquitatis* [reasoning of equity] must go together with the *ratio iustitiæ* [reasoning of justice] which latter may not exist if the rights of the other party are violated."<sup>20</sup>

20. S. VILLEGIANTE, "La conformità equivalente," *op. cit.*, footnote 6, p. 262.

This principle is also present in *Dignitas connubii*, in the final paragraph of article 291, which we have not yet studied. In specifying the judge to whom it pertains to decide on the conformity of the decisions (the same tribunal of appeal that issued the second decision or the higher tribunal to which the interested party may have recourse), the provision is concerned, above all, by safeguarding the rules set out for the modification of the originally determined doubt, in the course of hearing ("salvo art. 136" ["except for article 136"]). These rules always require the petition of the concerned party and the hearing of the other. The adoption of the principle of substantial conformity may not therefore lead to superimposing, in the determination of the *causa nullitatis* [cause for nullity], the judge's opinion to the one pertaining to the interested parties. What is more important is that this provision prescribes leaving the right of defense unimpaired ("integro manente iure defensionis" ["the right of defense remaining unimpaired"]).

The protection of this right is therefore a specific responsibility which the judge must take into consideration in deciding on the conformity of his decision with the one previously issued.<sup>21</sup> It is this protection that constitutes the principal limitation to an excessive and unfair use of the concept of substantial conformity.

This is not the case of a merely formal limitation to compromise the equity that characterizes this concept. Rather, this is a limitation imposed by the respect due to each individual, the more so if this person was tried and marked by an unfortunate marriage.

21. The reference to the integrity of the right of defense would also confirm the right of the spouse who considers that he has been adversely affected by it to challenge the declaration of concordance before the superior judge (cf. J. LLOBELL, "Il concetto," *op. cit.*, footnote 11, p. 214). This however does not take away the responsibility of the judge of appeal to safeguard the rights of the parties when he makes the decision to declare the concordance of his verdict with the one previously pronounced.

PROCEEDINGS



2006



COFOUNDERS  
ERNEST CAPARROS  
MICHEL THÉRIAULT (†)

# Studies on the Instruction *Dignitas Connubii*

Proceedings of the Study Day Held at the  
Pontifical University of the Holy Cross  
Rome, January 19, 2006

Edited  
Patricia M. DUGAN and Luis NAVARRO



Library and Archives Canada Cataloguing in Publication

Main entry under title:

Studies on the instruction Dignitas Connubii: proceedings of the study day held at the Pontifical University of the Holy Cross, Rome, January 19, 2006

(Collection Gratianus = Gratianus series)

Includes bibliographical references and index.

ISBN 2-89127-782-1

1. Marriage — Annulment (Canon law) — Congresses. 2. Matrimonial actions (Canon law) — Congresses. 3. Catholic Church. Codex Juris Canonici (1983) — Congresses. I. Dugan, Patricia M. II. Navarro, Luis. III. Series: Collection Gratianus.

BU3897.S78 2006

262.9'4

C2006-942297-4

Orders to:

**Wilson & Lafleur Ltée**

40, Notre-Dame Est

Montréal (Québec) Canada H2Y 1B9

Tel: 514-875-6326 / 1-800-363-3227

Fax: 514-875-8356

[www.wilsonlafleur.com](http://www.wilsonlafleur.com)

USA:

**Midwest Theological Forum**

1420 Davey Road

Woodridge, IL 60517 U.S.A

Phone: 630-739-9750

Fax: 630-739-9758

e-mail: [mail@mwtf.org](mailto:mail@mwtf.org)

[www.CanonLawBooks.com](http://www.CanonLawBooks.com)

62 East Allegheny Avenue

Philadelphia, PA 19134-5115

Telephone: 215-634-2355

Fax: 215-634-2373

© 2006, Wilson & Lafleur Ltée

All rights reserved. Without limiting the right under copyright reserved above, no part of this publication may be reproduced, stored in or introduced into a retrieval system, or transmitted, in any form or by any means (electronic, mechanical, photocopying, recording, or otherwise), without the prior written permission of both the copyright owners and the above publishing of this book.

ISBN 2-89127-777-5

Legal deposit, 4<sup>th</sup> quarter 2006, Bibliothèque nationale du Québec

Legal deposit, 4<sup>th</sup> quarter 2006, Bibliothèque du Canada

Printed in Canada, April 2009

Printed in Canada

## Table of Contents

|  |     |
|--|-----|
| <i>Presentation of the Study Day on the Instruction Dignitas Connubii</i> . . . . .                                | vii |
| Patricia M. DUGAN, J.D., J.C.L. and Luis NAVARRO, J.C.D., J.D.   |     |
| <i>Acknowledgements</i> . . . . .  | ix  |
| Patricia M. DUGAN, J.D., J.C.L. and Luis NAVARRO, J.C.D., J.D.   |     |
| <i>The Juridical Nature of the Instruction Dignitas Connubii and Reaction to It in the Church</i> . . . . .        | 1   |
| Prof. Msgr. Joaquín LLOBELL, Faculty of Canon Law, Pontifical University of the Holy Cross                         |     |
| <i>Some Indications About Canon 1095 in the Instruction Dignitas Connubii</i> . . . . .                            | 33  |
| His Excellency Antoni STANKIEWICZ, Titular Bishop of Novapetra, Dean of the Tribunal of the Roman Rota             |     |
| <i>The Declarations of the Parties and Moral Certitude</i> . . . . .   | 51  |
| Rev. Prof. Miguel Ángel ORTIZ, Faculty of Canon Law, Pontifical University of the Holy Cross                       |     |
| <i>Determination of the Formulation of the Doubt and Conformity of the Sentence</i> . . . . .                      | 91  |
| Prof. Paolo MONETA, Faculty of Law, University of Pisa   |     |
| <i>The Challenge of the Sentence and the Transmission of the Cause Ex Officio to the Appeal Tribunal</i> . . . . . | 115 |
| Very Rev. Msgr. Grzegorz ERLEBACH, Auditor of the Tribunal of the Roman Rota                                       |     |