Decree c. Erlebach. 30 March 2006 (USA); Prot. No. 19.600. English trans. by Rev. Augustine Mendonça, JCD. Translated and published with permission of the Dean of the Roman Rota.

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Failure to Publish the Sentence/ Irremediable Nullity of the Confirmatory Decree (can. 1620, 7°, DC art. 270, 7°)

Decree *coram* Erlebach

30 March 2006 (USA)[1]

The undersigned Auditors of the *Turnus*, legitimately convened on 30 March 2006 at the seat of this Tribunal of the Roman Rota, issued the following decree in response to the proposed question: *whether there is proof of nullity of the confirmatory decree issued by the local appeal tribunal on 30 June 2005.*

1 – The Facts

1. Raymond Smith accused his marriage which was celebrated on 9 September 1991 with Rita Saunders, of nullity before the tribunal of first instance. As soon as the process was commenced the woman respondent vehemently opposed the treatment of the cause before that tribunal, which in fact did not have the competence because the woman was living within territory of another diocese. Therefore, after hearing the petitioner the cause was transferred to the first instance tribunal competent by reason of the place of celebration of the marriage.

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The woman respondent first of all expressed her intention to participate in this process and gave mandate to Sister Paula, JCD, to act as her procurator and advocate, who was working in a different tribunal. This mandate was in fact accepted by the mandated advocate/procurator. But then the respondent changed her mind, although she did not revoke the mandate of procurator, therefore she was declared absent from trial.

After completing the requirements of law, the judicial college of first instance pronounced a definitive sentence on 9 Mary 2005 by which it declared the nullity of marriage on the ground of defect of discretion of judgement on the part of both parties.

The woman appealed against this decision to the Roman Rota. Because in the meantime the woman raised the question about her faculty to know the entire text of the sentence and then she did not comply with the instruction of the judicial vicar on the matters to be dealt with the case, the acts of the cause were sent to the local appeal tribunal. The tribunal that was approached confirmed the sentence by decree of 30 June 2005.

In the meantime the respondent's advocate wrote directly to the Dean of the Roman Rota; therefore, after obtaining the procedural files, a Rotal *Turnus* was constituted to examine the case.

The defender of the bond immediately impugned the confirmatory decree of nullity; the promoter of justice also agreed with this plaint. The Rotal *Turnus* in fact immediately suspended the execution of the confirmatory decree and ordered that the parties not be admitted to a new marriage.

After an *ex officio* advocate was assigned for the petitioner, the undersigned *Ponens* decreed that the question concerning the nullity of the confirmatory decree issued by the appeal tribunal on 30 June 2005 should be resolved through written briefs. After the written briefs had been exchanged, the undersigned Auditors today have the task of responding to the question stated above.

2 – In iure

2. Vigens Codex Iuris Canonici firmiter requirit ut "sententia quam primum publicetur" (can. 1614). Cum in foro canonico quam maxime interest bonum christifidelium et eorum rationabilis adhaesio sententiae emissae a legitima auctoritate ecclesiastica, etsi aliunde requiritur etiam sensus christianae oboedientiae erga Ecclesiae pastores (cf. can. 212, §1), can. 1614 ita extollit necessitatem publicationis sententiae pro partibus ut statuat quod sententia «ante publicationem vim ullam habet, etiamsi dispositiva pars, iudice permittente, partibus significata sit».

Non quaevis tamen publicatio seu intimatio sententiae est legitima, sed illa solummodo quae fit ad normam legis, scilicet "tradendo exemplar sententiae partibus aut earum procuratoribus, vel eisdem transmittendo idem exemplar ad normam can. 1509" (can. 1615; art. 258, §1, *DC*).

Modus operativi (itaL "*modalità operative*") sunt ergo duo, sed

2 – The Law

2. The present Code of Canon Law firmly requires that "the sentence is to the published as soon as possible" (can. 1614). Because in the canonical forum, the good of the Christian faithful is of paramount importance and their reasonable acceptance of a sentence pronounced by a legitimate ecclesiastical authority, although from another source also a sense of Christian obedience is required of them toward pastors of the Church (cf. can. 212, §1), canon 1614 considers the necessity of publication of the sentence so important that it determines that a sentence "has no force before the publication even if the dispositive part was made known to the parties with the permission of the judge."

Not any kind of publication, that is, intimation of the sentence is legitimate, but only that which is done in accord with the norm of law, namely "by giving a copy of the sentence to the parties or their procurators or by sending them a copy according to the norm of can. 1509" (can. 1615; art. 258, §1, *DC*).

The operative methods (in Italian: "*modalità operative*") therefore are

eadem substantia: in utroque casu necesse est ut pars vel eiusdem legitimus raepresentans obtineant textum integrum sententiae. Non amplius ergo admissae sunt a lege hodie vigente potiores rationes in Codice Piano-Benedictino statutae, nempe citatio partium "ad audiendam sententiae lectionem sollemniter factam a iudice pro tribunali sedente" vel transmissio partibus notitiae «sententiam esse penes canceliariam tribunalis," cui sequebatur facultas sententiam "legendi et eiusdem exemplar petendi" (can. 1877, *CIC 1917*).

two, but the substance is the same: in both cases it is necessary that the party or his or her legitimate representative obtains a complete text of the sentence. Therefore, the preferred reasons stated in the Pio-Benedictine Code are no longer allowed by the present Code, namely the citation of the parties "to hear the reading of the sentence solemnly done by the judge sitting for the tribunal" or transmission to the parties of the notice "that the sentence is at the tribunal chancery," which was followed by the faculty "to read and to ask for a copy of the same" sentence (can. 1877, *CIC 1917*).

Notificatio textus integri sententiae est omnino essentialis pro exercitio iuris defensionis partium hac in phase processus, nempe in ordine ad impugnationem sententiae, praesertim ope appellationis. Ad rem admonuit Ioannes Paulus II in Allocutione ad Rotam Romanam diei 26 ianuarii 1989: "infatti, come potrebbe una delle parti difendersi in grado d'appello contro la sentenza del tribunale inferiore, se venisse privata del diritto di conoscerne la motivazione sia in iure che in facto? Il Codice esige quindi che alla parte dispositiva della sentenza

The notification of the complete text of the sentence is absolutely essential for the exercise of the right of defence of the parties in this phase of the process, namely for the purpose of challenging the sentence, especially by means of an appeal. John Paul II warned with regard to this matter in his Allocution to the Roman Rota on 26 January 1989: "How could one of the parties defend himself or herself in the court of appeal against the judgement of the lower tribunal if deprived of the right to know the reasons, both *in law* and *in fact*, supporting it? The Code therefore

siano premesse le ragioni sulle quali essa si regge (cf. can. 1612, §3), e ciò non soltanto per rendere più facile l'obbedienza ad essa, qualora sia diventata esecutiva, ma anche per garantire il diritto alla difesa in un'eventuale ulteriore istanza" (Ioannes Paulus II, Allocutio ad Romanam Rotam, 26 ianuarii 1989, in *AAS*, 81 [1989], p. 924, n. 7).

requires that the dispositive part of the judgement must be prefaced by the reasons on which it is based (cf. can. 1612, §3). This is not only to render its acceptance easier when it goes into effect, but also to guarantee the right of defence in the event of an appeal" (John Paul II, Allocution to the Roman Rota, 26 January 1989, in *AAS*, 81 [1989], p. 924, n. 7).

3. Contra notificationem integri textus sententiae quis obiicere potest quod in aliquibus Statibus non est opportunum partibus, praesertim parti sese opponenti, tradere textum sententiae completum ob periculum institutionis causae poenalis vel et civilis apud tribunalia Status. Quidquid est tamen de reali proponibilitate talis impropriae et indirectae impugnationis seu actionis contra iudicem ecclesiasticum, testes vel peritos, in alio ordine iuris (ital. "*ordinamento*"), ante omnia iudices magni facere debent praescriptum art. 254 Instr. *Dignitas connubii*, praesertim §2 eiusdem articuli, de prudentia adhibenda in sententia redigenda: "Expositio [...] factorum, prout natura rei postulat, prudenter et caute fiat, remota qualibet offensione partium, testium, iudicum aliorumque ministrorum

3. Someone may object to the notification of the complete text of the sentence because in some States it is not safe for the parties, particularly to the opposing party, to give the complete text of the sentence due to danger of instituting penal or even civil case before the courts of the State. Whatever may be the real possibility of instituting such improper and indirect challenge, that is, action against an ecclesiastical judge, witnesses or experts, in some other court of law (in Italian: "*ordinamento*"), the judges should above all make best use of the prescript of art. 251 of the Instruction *Dignitas connubii*, especially §2 of the same article, about the prudence to be used in composing the sentence: "The presentation of the facts, however, as the nature of the matter requires, is

tribunalium." Immo, si casus ferat, motiva facti sufficienter exponi possunt sine citatione depositionum et sine indicatione nominum testium; satis est ut iudices pandant qua ratione devenerint ad partem sententiae dispositivam (cf. art. 254, §1, *DC*). Pro iudicibus superioris gradus sufficit si praecipua loca indicentur insuper per numeros paginarum vel et per numeros internos singulorum actorum.

to be done prudently and cautiously, avoiding any offense to the parties, the witnesses, the judges and the other ministers of the tribunals." In fact, if it is necessary the factual reasons can be sufficiently exposed without citing the depositions and without indicating the names of witnesses; it is sufficient that the judges explain by what reason they arrived at the dispositive part of the sentence (cf. art. 254, §1, *DC*). For the judges of the higher court it is sufficient that the principal places are indicated through the page numbers or even through internal numbers of individual acts.

4. Ut publicatio seu intimatio sententiae sortiatur effectum in ordine ad impugnationem, ideoque sit pleno titulo legitima, non sufficit mera traditio exemplaris sententiae. Necesse est etiam ut indicentur modi quibus sententia impugnari potest (can. 1614), quod addendum est ipsi textui sententiae (art. 253, §5, *DC*). Insuper, "si locus est appellationi, una cum publicatione sententiae, explicita mentione facta de facultate adeundi Rotam Romanam praeter tribunal appellationis loci, indicandus est modus quo appellatio interponenda et prosequenda est" (art. 257, §2, *DC*).

4. In order that the publication or intimation of the sentence may be effective for the purpose of challenging, therefore with full legitimate title, simple handing over a copy of the sentence is not sufficient. It is also necessary that the means by which the sentence can be challenged must be indicated (can. 1614), and this must be added to the very text of the sentence (art. 253, §5, *DC*). Moreover, "if there is the possibility for an appeal, information is to be provided at the time of the publication of the sentence regarding the way in which an appeal is to be placed and pursued,

with explicit mention being made of the faculty to approach the Roman Rota besides the local tribunal of appeal" (art. 257, §2, *DC*).

Revera, iam publicatio ipsius sententiae est magni momenti in tuendo iure defensionis partium. Attamen "per garantire ancora di più il diritto alla difesa, è fatto obbligo al tribunale di indicare alle parti i modi secondo i quali la sentenza può essere impugnata" (Ioannes Paulus II, Allocutio ad Rotam Romanam, 26 ianuarii 1989, in *AAS*, 81 [1989], p. 925, n. 7).

In fact, the publication of the sentence itself is of great importance in protecting the right of defence of the parties. However "to guarantee still more the right of defence, the tribunal is bound to indicate to the parties the ways in which the judgement can be challenged" (John Paul II, Allocution to the Roman Rota, 26 January 1989, in *AAS*, 81 [1989], p. 925, n. 7).

Notetur quod nulla fit a lege hac in re distinctio inter habitam vel minus adsistentiam advocati, qua re censendum est quod ad mentem Legislatoris etiam in casu legitimae constitutionis advocati interest ut pars ipsa (personaliter vel ope procuratoris) certior fiat a iudice de iuribus quibus gaudet in exercitio sui iuris defensionis.

It should be noted that no distinction is made in this matter by the law between whether or not there was assistance of an advocate, wherefore one must consider that according to the mind of the Legislator even in a case of legitimate constitution of an advocate, it is important that the party him/herself (personally or through the help of a procurator) is informed by the judge of the rights he or she has in the exercise of his or her right of defence.

5. Quod attinet pressius ad effectus legitimae notificationis sententiae, ante omnia currere incipiunt termini ad appellandum pro singulis

5. As far as more precise effects of legitimate notification of the sentence are concerned, first of all the time period for appeal for each party