Ius Matrimoniale
28 (2017) No. 2
DOI:10.21697/im.2017.28.2.06

Fr. Wojciech Góralski
Wydział Prawa Kanonicznego UKSW

Poważny brak rozeznania oceniającego (kan. 1095 n. 2 KPK) u powoda i wykluczenie przezeń nierozerwalności małżeństwa (kan. 1101 § 2 KPK) w wyroku Roty Rzymskiej c. Erlebach z 21.07.2016 r.

Serious lack of discretion of judgement (can. 1905 n. 2 of the CIC) of the complainant and exclusion of the indissolubility of marriage because of it (can. 1101 § 2 of the CIC) in in the light of the judgment of the Roman Rota c. Erlebach of 21 July 2016

On July 21, 2016, a (positive) judgement was passed in the Roman Rota. c. Erlebach (the other judges were: J. Ferreira Pen and G. McKay) in the case of *Romana*, in two titles *gravis defectus discretionis iudicii* and *exclusio boni sacramenti* on the complainant's side[1]. As can be seen, these titles of marriage nullity have proved to be compatible, which means that a serious lack of discretionary judgement concerning the essential matrimonial rights and obligations to be mutually given and accepted does not exclude the subject's ability to take the positive act of will, as is the simulation of the said consent, in this case partial.

It is precisely the question of the compatibility of the titles of nullity that constitutes the most original thread in the c. Erlebach ruling.

1. State of the case

The case concerns a marriage concluded on 13 June 1987 in the church of St. Nicholas San Gemini in the Diocese of Interamnen.-Narnien.-Amerinae by 37-year-old Paul (Paweł) and 27-year-old Maria, who met seven months earlier at a disco. The proposal to get

[1] *R.P.D. Gregorio Erlebach. Romana. Nullitatis matrimonii. Sententia definitiva diei 21 iulii 2016* (mps); I would like to express my gratitude to the great-auditor, Dr. Grzegorz Erlebach for making the judgement available to me.

married came from Maria, to which Paul, influenced by her mother's insistence, agreed not without jealousy, otherwise the fear that the fiancée would not prove unfaithful.

Married life, enriched by the birth of a son in March 1988, initially went well. However, after several years of community, a man, tormented by doubts about his wife's loyalty, after receiving certain confirmation of her unfaithfulness, decided to separate, but still lived with his wife. This strange way of life was finally interrupted after a few years by a woman who applied to the state court for separation, which she received on 21 May 2004. At that time, the man applied for a divorce, which was declared by a state court on 28 November 2008[2].

On 22 December 2009, Paul turned to the church tribunal competent for Maria's permanent residence, asking for a declaration of invalidity of his marriage on the grounds that he had excluded the indissolubility of the marriage.

Following the establishment of the tribunal and the summons of the defendant, who relied on the court's justice, on 1 February 2010, the formula of doubt was determined, according to the complainant 's request. After the instructions of the case, in which the complainant and five witnesses were interviewed (including an ex-officio witness in the person of advocate S., a permanent patron of the Regional Court N., whose consultation was used by the complainant about three years before the case was brought) and certain documents were obtained, the file was published. At that time, the complainant's patron asked for a supplementary hearing of the man, which, however, the judge instructor did not approve.

The Court accepted another request from the complainant's patron: to extend the applicant's petition for an annulment title in the form of a serious lack of discretion of judgement as to the essential rights and obligations of the couple on his side. Consequently, a new decree was adopted on 25 June 2010, setting out the following formula for doubt: „[If the nullity of the marriage proves to be proven] because of the complainant 's consensual inability to marry at the time of the marriage, according to the can. 1095, n. 2 of the CIC". The complainant thus gave a new testimony, while the defendant, informed of the addition of a new title of nullity and summoned to a hearing, stated in a letter of 1 September 2010 that she was not available to give testimony, but again relies on the justice of the court; she did not make any statement. Subsequently, the court accepted an expert psychologist's opinion on the complainant, drawn up by Dr. A. After completion of the other procedural formalities, on 28

[2] IBID., p. 1.

October 2011, the court issued a *pro vinculo* verdict on both grounds of invalidity, and the complainant immediately appealed to the Roman Rota.

After the court's turn was constituted, on August 2, 2012, the rotal ponens defined the following formula of doubts: „Is it known that the marriage is null and void due to the complainant's lack of discretion of judgement and his exclusion of indissolubility".

At the request of the complainant's patron, the latter was questioned again (for the third time). One of the witnesses was also questioned again, as well as, for the first time, another witness. Prof. B., an expert appointed *ex officio*, presented his psychological and psychiatric opinion on the complainant to the Tribunal. After the end of the discussion phase, on 21 July 2016, the rotal turnus, answered the question posed earlier: „Affirmative, seu constare de nullitate matrimonii, in casu, ob defectum discretionis iudicii ex parte Actoris et ob exclusum bonum sacramenti ex parte eiusdem viri actoris, vetito eidem transitu ad alias canonicas nuptias inconsulto Ordinario loci"[3].

2. Legal motives

His rather concise argument ponens begins with the statement that a truly human act (*„actus vere humanus"*) has a person as its source. Referring to the work of G. Zuanazzi[4] they note that although the unity of the subject is rightly emphasised in terms of its mental dimension (the author of the decision is the person, not the will or reason; the person who performs the completely original synthesis), nevertheless, because of the practical benefit, the discretionary judgement, which should be proportional to the marriage, is usually clarified by reference to the necessary interaction between the intellectual power and the volitional power of the contracting party in the act of marriage consent, i.e. in an internal process that leads to self-determination for a *hic et nunc* marriage with a particular person. This last aspect necessarily implies internal freedom, at least of importance[5]. This is also recognised in rotal jurisprudence, as can be seen *inter alia* from the following excerpt from judgement of c. Ragni of 12 July 1994: „The discretion of judgement is based on three assumptions, i.e. - on the part of the nupturient: a) sufficient intellectual knowledge of the subject of marriage

[3] IBID., p. 1-2.
[4] G. ZUANAZZI, *La capacità intellettiva e volitiva in rapporto al matrimonio canonico: aspetti psicologici e psichiatrici*, in: *L'incapacità di intendere e di volere nel diritto matrimoniale canonico (can. 1095, n. 1-2)*, Città del Vaticano 2000, p. 301.
[5] Ponens calls the following work in this place: A. STANKIEWICZ, *La relazione tra mancanza di libertà interna e discrezione di giudizio*, in: H. FRANCESCHI, M.A. ORTIZ (ed.), *Verità del consenso e capacità di donazione*, Roma 2009,p. 221-240.

consent; b) critical discretionary judgment of the subject of marriage and its rights and obligations; c) internal freedom, i.e. the ability to decide freely to marry"[6]. Following the Roman Rota jurisprudence, the „Dignitas connubii" instruction recognises the basis of discretionary judgement in the critical capacity and concerning the choice to take serious decisions, in particular those relating to the free choice of life status[7].

However, not every decrease in the discretionary judgement, as continued by ponens, results in invalidity of the marriage. The incapacity of the subject in this area is only recognised within the limits set out in can. 1095, n. 2 of the CIC, and therefore incapable of marrying are those „who have a grave lack of discretionary judgement concerning the essential matrimonial rights and obligations to be mutually given and accepted".

The editor of the jurisprudence does not consider it necessary to indicate after commonly accepted rotal jurisprudence the essential elements of the norm specified in the above mentioned canon. In order to declare a marriage null and void, it is required that: a) it is a real incapacity, and not just a difficulty, and therefore the lack of discretionary judgement should be serious; b) the object of the incapacity should be the essential elements of the marriage, i.e. the essential matrimonial obligations indicated within the scope of the legal norm; c) there should be an appropriate cause, i.e. a mental anomaly.

With regard to proving the invalidity of a marriage based on *gravis defectus discretionis iudicii*, ponens states that this is done primarily through the testimony of the parties and witnesses and documents suitable for proving whether historical facts or perhaps past treatments and through the psychological-psychiatric expertise that is normally always required[8].

The principles of law regarding the title of exclusion of *bonum sacramenti* are also known, as we read in the ruling. Since indissolubility is an essential element of marriage, its exclusion has an annulling effect only if it effectively falls within the scope of the formal consent of the couple, and this through a positive act of will, according to the can. 1101 § 2 of the CIC. To put it another way, marriage consent is not nullified by the very ideas against

[6] „Discretio iudicii […] fundatur super tribus praerequisitis, i. e.: ex parte nupturientis: a) sufficienti cognitione intellectuali circa obiectum consensus; b) critica cognitione aestimativa de negotio matrimoniali atque de eiusdem iuribus ac oneribus; c) libertate interna seu capacitate libere sese determinandi ad matrimonium ineundum", *Dec. c. Ragni z 12.07.1994*, RRD 86 (1994), p. 380, n. 3.

[7] See PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS, *Instructio, 25 ian. 2005, Romae, ex aed. Consilii, Instructio servanda a tribunalibus dioecesanis et interdioecesanis in pertractandis causis nullitatis matrimonii,* Civitas Vaticana 2005*;* Polish and Latin text in: T. ROZKRUT (ed.), *Komentarz do Instrukcji procesowej „Dignitas connubii"*, Sandomierz 2007, art. 209 § 2, n. 2.

[8] *R.P.D. Gregorio Erlebach. Romana. Nullitatis matrimonii*. *Sententia definitiva diei 21 iulii 2016*, op. cit., p. 2-3.

indissolubility, an error in the same attribute of marriage or a mentality conducive to divorce. The marriage is contracted invalidly by those who enters into a marriage temporarily or strongly reserves the power to terminate the marriage if certain circumstances occur, such as an unhappy outcome of the marriage or a breach of loyalty by a co-contractor.

The proof of the exclusion of *bonum sacramenti*, i.e. indissolubility, is added in judgement of coram Erlebach, is usually provided by direct evidence when the simulating party confesses this fact before a judge, and this is reinforced, if possible, by out-of-court confessions and credible witnesses. Indirect evidence requires the indication of the reason for the simulation (closer and further) and the reason for the marriage. All this should be considered in the context of the circumstances[9].

In turn, when addressing the issue of the incompatibility of the titles of invalidity, ponens again refers to the judgement of c. Funghini of 24 May 1995, in which they were described as those „which can be challenged and rejected at the same time as long as they could allow the annulment of the marriage in an alternative way"[10]. Usually, as Erlebach is called, the doubt formula is not adopted, which simply refers to these kinds of titles. As a justification thereof it is usually indicated the order for prohibiting the use of multiple mutually incompatible actions[11], according to an effective assumption: „If the titles are contradictory, or, which is the same case, if the incompatible actions are concerned, they may not be cumulative [...], as set out in the can. 1669 § 1 of the CIC of 1917"[12]. Hence the rule, as ponens concludes, of accepting in a subordinate (*subordinate*) manner the so-called titles incompatible in the determination of the formula of doubt.

However, when this issue is considered in more detail, we read in the judgment, this well-established judicial practice cannot be based on the aforementioned prohibition of the use of contradictory actions, because incompatible titles are not the same as actions. All titles of nullity of a marriage merely define a *petitum*, and the same *petitum* simultaneously, that is, nullity of a marriage, and it is by no means appropriate for a judge to determine certain titles *a priori* in a decree setting out the formula for doubt[13].

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[9] IBID., p. 4.

[10] „[…] dum simul accusari et reici possunt, dumtaxat alternativo modo nullitatem matrimonii declarandam sinunt", *Dec. c. Funghini z 24.05.1995*, RRD 87 (1995), p. 312, n. 2.

[11] See can. 1493 of the CIC: „A complainant can bring several complaints simultaneously, concerning either the same matter or different matters, provided they do not go beyond the competence of the tribunal to which he has referred". Cf. can. 1669 § 1 of the CIC of 1917.

[12] This is a quote from the paper: L. MADERO, *Incidencias y orden procesal en la pluralidad de „capita nullitatis"*, Ius Canonicum 13 (1983), p. 156.

[13] *R.P.D. Gregorio Erlebach. Romana. Nullitatis matrimonii. Sententia definitiva diei 21 iulii 2016*, op. cit., p. 4.

As a justification for the thesis formulated in this way, the ponens quotes the following reasons: a) it is not uncommon for certain titles, abstractly considered incompatible, that they do not to turn out to be incompatible in a specific case, when you go deeper in the evidence instruction into the material obtained; then a judgement declaring a marriage invalidity under one and second title is not ruled out; b) even if the judges had to consider at the time of closure of the case that, after proving the invalidity of the marriage of the first title, the second title is in fact incompatible *in concreto*, they could already have issued a judgment *pro vinculo* under the second title; c) whatever the cases may be as regards compatibility between two or more titles of nullity, it is not forbidden to have a combined instruction of the case and the subsequent discussion of all the titles; d) if a judge would determine certain titles attributed in the decree establishing the formula for doubt, after considering that the main title has subsequently been proved to be the proven title, he should respond nonetheless to the second title, even if *in concreto* these titles are in fact compatible. In the latter case, even today, after the obligation to obtain two compatible judgements for the conclusion of a new canonical marriage has been repealed, the result may be that the case will last unnecessarily long if the Court of Appeal does not confirm a positive judgement under the first title, and vice versa: if it passes a judgement declaring the marriage null and void by virtue of the subordinate adopted, but in this case at first instance[14].

Ponens believes that one conclusion follows from this: it is always possible to indicate simply the titles of invalidity in the decree setting out the formula of doubt, including those that have hitherto been declared incompatible, and it will be up to the Tribunal to consider, at the time of the resolution of the case, which answer to the accepted doubt should be given. There is therefore no obligation, Erlebach points out, to identify certain titles in subordinate

[14] „Re tamen pressius perpensa, hic inveteratus usus forensis fundari nequit in praefato vetito utendi actionibus inter se confligentibus quia capita haud componibilia non idem sunt atque actiones conflingentes. Omnia capita nullitatis matrimonii nonnisi specificant petitum et quidem idem petitum, nempe matrimonii nullitatem, et haud expedit ut a priori iudex statuat subordinate quaedam capita in decreto concordationis dubii ob sequentes saltem rationes: a) haud raro accidit ut quaedam capita, in abstracto habita uti haud componibilia, non ita evadant in concreto, pressius perpensis in phasi instructoria obtentis, quo in casu non excluditur sententia pro matrimonii nullitate ex utroque capite; b) etsi iudices agnoscere deberent in sede definitionis causae quod probata matrimonii nullitate ex primo capite, alterum revera est haud componibile in concreto, nam hanc ob rationem ferre possent sententiam pro vinculo ex altero capite; c) quomodocumque res se habeant de componibilitate inter duo vel plura nullitatis capita, non vetratur unitaria instructio causae et subsequens discussio circa omnia capita; d) si iudex statuat quaedam capita in subordine in decreto concordationis dubii, agnita dein probatione capitis principalis, respondere tenetur <non proponi> ad alterum, etsi in concreto haec capita essent revera componibilia. Hoc ultimum etiam hodie, remota obligatione consequendi duplicem sententiam conformem in ordine ad novas canonicas nuptias, uti effectum habere potest inutilem longiorem cursum causae, si tribunal appellationis non confirmet sententiam affirmativam latam ex priore capite et, vive versa, ferat sententiam pro matrimonii nullitate ex capite subordinate posito, hac vice tamen in prima instantia !", IBID., p. 4-5.

(*subordinate*) form, although it cannot be denied that this route can sometimes be advised by certain practical reasons[15].

3. Factual motives

In the ruling, its editor refers first of all to the adopted formulae identifying the doubts. Thus, in the final decree containing the formula of the doubt issued in the first instance, the exclusion of indissolubility was adopted in a way that is ascribed to the main title in the form of a serious lack of discretionary judgement. In turn, the ponens in the rotal instance, according to what he presented in the last fragment of the judgment *in iure*, simply indicated the two titles mentioned in the rota instance.

Ponens states that the complainant brought the case solely for the sake of remedying his conscience, and that there is no issue with regard to economic obligations between the parties. The defendant, who has been summoned to court on several occasions, has not testified, relying on the court's justice, and there are no witnesses on her part. However, the case has been sufficiently highlighted. Three times the complainant's testimony is consistent: he has presented and explained certain issues. There is also no objection to the witnesses he has indicated, whose testimony agrees with his assertions on the substance. Some comments should be made to the witness appointed ex officio in the first instance - in relation to the title of the exclusion of indissolubility[16].

As far as the complainant's credibility is concerned, we read in the judgement, it is confirmed, among other things, by the opinions of experts submitted to the rotal instance. So, prof. N., who conducted the complainant's psychodiagnostic examination (MMPI-2 test), stated that the man did not try to present his idealised image or exaggerate his psychological disorders. In turn, Prof. B. (*peritior*) stressed that during the interview with Paul (lasting two and a half hours), in full compliance with the testimony contained in the case file, he presented precisely, with details and authenticity, his relationship with the defendant. Therefore, despite this, as the editor of the judgement concludes, that the testimony – apart from that which was obtained *ex officio* – come from only the complainant, there is no problem [17].

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[15] Ponens quoted the following work here G.P. MONTINI, *La funzione processuale del capo di nullità matrimoniale*, Ephemerides Iuris Canonici 51 (2011), p. 458-459 and 460.
[16] *R.P.D. Gregorio Erlebach. Romana. Nullitatis matrimonii. Sententia definitiva diei 21 iulii 2016*, op. cit., p. 5.
[17] IBID.

3.1. Serious lack of discretion of judgement

After the general statements quoted, ponens focuses his attention on the title of a serious lack of discretion of judgement; his argument is quite extensive in this respect.

He notes at the outset that already in his first testimony, when it was not yet about the title *gravis defectus discretionis iudicii* (originally it was only about the title of exclusion of indissolubility), Paul revealed very important elements concerning his own personality. Thus, first of all, he described the context in which he grew up, mentioning that he lived in a family environment full of suspicion from his father about his mother and vice versa. In their disputes, the motive was often hypothetical betrayal of one of the spouses. Under these conditions, similar behaviour was given also to the complainant who formed at oneself a strong tendency to be possessive of girls with whom he had an emotional relationship and, later on, to persist in constant doubt and fear that they might betray him. He gave his third testimony in a similar vein. This was confirmed by the brother (Piotr) of a complainant, and other witnesses also spoke of the complainant's jealousy and possessiveness.

Paul's patron, as Erlebach notes, maintains that this suspicion generated a real disease which manifested itself as increased jealousy, which deprived him of the internal weather. Whatever one might say about the qualification of this form of jealousy, the evaluation of which is the responsibility of the expert, the complainant has quoted some really serious facts, including the fact that he was controlling his mother on the suspicion that his father was right; he thought that he might be „before and after" cheated by women, which later affected him from his wife. The complainant also confessed that his suspicion was a kind of „anguish" that kept harassing him on the inside and that he fought against in order not to „make scenes". The conviction that was „flashing" in his head was always that a woman could be unfaithful in any case[18].

On the other hand, as is stated in the ruling, the complainant confesses that in his childhood he felt great affection and support from his parents, which over time turned into an overdependence on his mother and at the same time a certain distance relationship with his father, because he was always very impulsive. Ponens notes that something very important in this relationship between the complainant and his mother was the illness that affected him when he was five years old. He testified to this in a second hearing, when he stated that he had diphtheria, which required long and careful care. The mother, who was a nurse, did not allow her son to be treated in hospital, but kept him at home, and for this reason caring for

[18] IBID., p. 6.

him was very expensive (also because the doctor came from afar). Of course, as Paul stated, during the period of his illness all the mother's attention was focused on him, so he felt overwhelmed by her care. Over time, these „fetters" of his mother gradually diminished, but she always remained very attached to him and she was a reference point for him[19].

Another aspect of a man's personality, we read in the judgement, is his disposition difficulties. Among other things, he testified that he was primarily impulsive, which was particularly evident when he was convinced that he was right. He raised his voice in his way, and when a problem arose, his reaction, including in modulating his voice, was quicker. He added that his nervousness was primarily emotional, and therefore it would take little to make itself known. Ponens concludes that all this reveals the complainant's problematic personality in psychological terms.

Moving on to indicating the type of relationship that Paul had with other women before meeting the defendant, the editor of the judgement states that already in adulthood the complainant was involved in many successive love relationships with different women, but without real and proper love, perhaps because of the fear he himself described. He said that he had always been passionately involved in relationships, albeit with one great and constant fear that he might be betrayed. Unfortunately, in past experiences, in so many cases, there has always been fear and suspicion left to him, but in others, too, he left the girls confident that they were betraying him. These relationships, as the ponens states, have never been mature, sometimes even Libertine in nature (characterised by a solitude); they have been accurately depicted by him in a Rota instance. One of the witnesses characterising them stressed that Paul had many other girls before he had a relationship with his future wife, but that these relationships always ended because of the same motive, that is, his obsessive jealousy and his desire to take over his partners. Such relationships were broken off many times at Paul's initiative, and in other cases, due to the girls themselves.

This kind of behaviour by the complainant, as Erlebach states, is in line with what was said earlier about his totally abnormal jealousy and possessiveness. However, the case is not limited to love relationships. For Paul, who, perhaps because of his work performed for twenty years, was a university student and was constantly in his father's house, testified at first instance: „It was [...] as if within myself I was experiencing a kind of constant uncertainty in my relations with others", and in the second (Rota) instance he added: „My jealousy has always conditioned me: persons, friends, objects and everything that is close to

[19] IBID., p. 6-7.

me, I want to possess; my character of possession has conditioned me and sometimes continues to condition me in the social, friendly, affective and emotional fields"[20].

Taking up the issue of the complainant's relationship with the defendant, the Rota judge notes that as regards the formation of his decision to marry Maria, on the one hand we can see the internal evolution of Paul, who has gone from initial liberalism to a higher and more noble understanding of love (slowly, over time, as he said himself, he experienced a deeper and more appealing feeling in his relationship with Maria), but on the other hand, it is also seen that in this relationship, there was also the inherent uncertainty which led Maria to offer him a marriage. The complainant confessed that he was not thinking of a „definitive step". However, he accepted this proposal despite repeated doubts during his engagement (he doubted her good faith in certain circumstances). Directed towards Mary by opposing feelings, that is, love and joy and uncertainty (he could not completely trust Mary), the complainant spoke about the lack of internal freedom in the decision to get married („I did not feel free to make an important choice, which is the choice of marriage")[21]. He also spoke of his mother's insistence, expressed both in certain forms of behaviour (e.g. not washing and ironing his belongings, which made it clear to him that his wife should do it) and in the words addressed to him.

In a particular way, however, the ruling stresses that the complainant's uncertainty was due to his uncertainty about the defendant's fidelity expected in the marriage. In his second testimony, Paul confessed that in a period close to the celebration of the marriage, he met Maria having a rather intimate conversation with another man, which made him try to postpone the date of the wedding (the defendant then assured him that his fears were wrong, letting him know that he was morbidly jealous without a motive). But, as the complainant stated, a few weeks before the marriage took place, there were a few moments which, contrary to each other, led him to the marriage. He testified that he had tried not to imitate his father in his „possessive" attitude, among others by not wanting to turn out to be a childish person in Maria's eyes, and he never dared to make his mother so sorry by giving up the marriage. He remained silent, despite the anguish of jealousy that did not leave him; he sought positive thoughts, such as that he would be able to have a son from whom he would receive love regardless of the fate of his marriage to Maria, and that he would arouse in her a responsibility that would not allow her to turn her attention to other men.

[20] „La mia gelosia mi ha sempre condizionato: persone, amici, oggetti e tutto ciò che mi è vicino io tendo a possererlo, il mio essere possessivo mi ha condizionato e a volte mi condiziona ancora nel campo sociale, amicale, affettivo e sentimentale", IBID., p. 7.
[21] „Non mi sentivo libero per una scelta importante come quella matrimoniale", IBID., p. 8.

The question therefore arises, as Erlebach concludes, above all, as to whether or not the man had sufficient internal freedom in deciding to marry[22].

Ponens therefore first quotes excerpts from the testimony of five witnesses concerning the complainant's decision to marry Maria. Those witnesses (the complainant's brother and his friends and acquaintances) stated that Paul's decision to get married was not free, because despite his suspicions he entered into that relationship wanting to start a family (when he was already old), he was subjected to pressure from his mother, he was very jealous, he had doubts about Maria's loyalty in the future, he was distrustful[23].

The editor of the ruling, in turn, refers more broadly to expert opinions. He states, therefore, that Dr A., appointed *ex officio* in the first instance, who conducted a direct examination of the complainant by means of, among other things, psychodiagnostic tests, about which (including the methods used) there should be no objections, quoted conclusions, which may, however, be surprising. On the one hand, she recognises that Paul's personality is characterised by neurotic signs of anxiety: obsessive and depressing; the personality picture of the complainant drawn by the expert is very close to the disorder of anxiety. The source of this anomaly refers to Paul's first years. The expert has no doubt that this psychological and affective picture of the person examined was verified during the period of his marriage conclusion, but here too, as ponens points out, the question begins: according to which, given Paul's age and the time that has elapsed since the conclusion of marriage, it is very difficult to determine to what extent this has affected his intellective, volitional and affective processes of that complainant in the act of marriage consent[24].

In the face of this difficulty, we read in the ruling that Dr A. presented a different key of interpretation, stating that more than the clinical picture, other factors that are likely to have led the subject to marry without proper assessment of who is being married should be taken into account. For a jealous and suspicious person, it is particularly important to marry a woman who is 10 years younger, which seems to indicate the complainant's carelessness, not some anomaly that could cause a serious lack of discretionary judgement on the part of the assessor. But in the expert's further explanation, ponens notes, there are again elements that show the presence of a certain anomaly of a mental nature. The expert states that what she has ascertained leads her to believe that the reason for the marriage was first and foremost not to disappoint the expectations of the mother, the person with whom he has always been

[22] IBID.
[23] IBID., p. 8-9.
[24] IBID., p. 9.

associated, and in order to make a life for himself, given his advanced age. In this sense, the hypothesis of a neurotic anomaly in the Oedipus phase (Oedipus complex) highlights the affective dependence on the mother, as the Rorschach test well shows. Ponens notes that the expert opinion ends with this statement, so it lacks conclusions, if not contradictory at all[25].

When the complainant's patron, Erlebach continues, criticises the expert opinion presented above and requests certain explanations on its part, the chairperson of the college (who is also the judge instructor) has caused that opinion to be recognised by means of a written answer given by the expert. In her explanations, the expert assumed that the complainant certainly presented affective problems, which were, however, described as not difficult from the point of view of a significant influence on his or her intellective, volitional and affective processes related to the act of marriage consent.

No wonder as the editor of the judgement concludes that the court of first instance, under the influence of this opinion, which was judged to have been „excellent" and, above all, in view of the expert's answers to the questions put by the complainant's patron, came to a *pro vinculo* verdict with can. 1095, n. 2 of the CIC[26].

In the next part of the judgement, it was stated that in the Rota instance, after the applicant and two witnesses had given their testimony, an expert was appointed (prof. B.), a psychiatrist, who prepared an expert opinion on the basis of the case file and the interview with the complainant. The psychodiagnostic examination of the complainant was conducted by Prof. N.

Ponens points out that the defender of the marital knot, appointed *ad casum* in the Rota instance, maintains in her remarks that Prof. B. reached his conclusions by omitting facts and using the deterministic method, without taking Christian anthropology into account. Such a qualification of Professor B.'s opinion, was strongly opposed by the complainant's patron. He considered that the assessment of the defender of the marital knot appointed *ad casum* contained „injurious arguments". This objection, as we read in the judgment, must of course be accepted, because the defender of the marital knot gives such a qualification of the expert's opinion completely unjustifiably, without indicating the basis for such a harsh judgment; moreover, he considers Professor B.'s assessments to be „conjectures", adding that it is clear that he solved the issues apodictically. Perhaps, as pointed out by the ponens, the defender of the knot for this very reason felt that it was not necessary to explain her own claims.

[25] IBID., p. 10.
[26] IBID.

This type of action by the defender of the marital knot was met with the unequivocal disapproval of the ponens, who considered it to be contrary to judicial logic, because the defender of the bond should indicate the basis - *in iure* and *in fact* - of his own claims, otherwise they are completely unfounded. Moreover, oratory sentences do not serve the marriage knot in everything, because everything that is undertaken by the defender should be done in a reasonable manner, according to the can. 1432 of the CIC, as well as with respect to the truth, in accordance with Article 56 § 3 of the „Dignitas connubii". There is no need to quote anything that binds public parties when it comes to certain deontological rules, not excluding those appointed *ad casum*, adds Erlebach[27].

Returning to the expert opinion of Prof. B. as being in accordance with the procedural documents and drawn up in accordance with the correct method, and to the psychodiagnostic report of Prof. N., who thoroughly presented the activities and their results of the personality test, with the protocols attached, the editor of the judgment states that Prof. B. considered the complainant in his conclusion to be affected by a personality disorder characterized by serious affective immaturity, strong dependence on the mother, as well as significant uncertainty, which arouses feelings of distrust, suspicion and jealousy with a connotation very close to the idea of delusion. More specifically, this expert explains that this is a personality picture characterised by traces of various personality disorders (dependencies, obsessive-pulsive, paranoid), as well as severe affective immaturity (a diagnostic category not included in DSM), without sufficient criteria for one particular personality disorder; therefore, we should speak (in the sense of DSM-5) of a personality disorder with a different specification, i.e. It should therefore be referred to (within the meaning of DSM-5) as a personality disorder with a different specification, i.e. (in this type of case) with the characteristics of a „mixture" in which the manifestations characteristic of the different personality disorders are perceived.

The expert has no doubt, he resounds in the judgement as to the internal severity of the anomaly found, accompanied by significant, pathological and structural neurotic elements, of which the subject has only very little awareness.

As regards the determination of the external severity of this anomaly, as the ponens notes, the rotal expert concluded that the personality disorder and affective immaturity diagnosed as occurring in the complainant at the time of the marriage, due to their nature and severity, undermined the subject's internal freedom, making him incapable of free

[27] He again refers here to work: A. PEREGO, *Principia di deontologia riguardanti il promotore di giustizia ed il difensore del vincolo*, in: *Deontologia degli operatori dei tribunali ecclesiastici*, Città del Vaticano 2011, p. 129-145.

determination and depriving him of the ability to judge, so that he was unable to express a sufficiently critical and responsible judgement and make a choice based on a real life project[28].

If we do, as is stated in ruling of the prof. c. Erlebach, that the critical remarks made by the counsel for the *ad casum* - designated marriage node are unacceptable, then there is no difficulty at all in allowing the turnout to accept the expert's assessment presented, which is in any case consistent with the case file. In view of the serious consequences of the internally serious anomaly as well, it must be considered proven that the complainant's serious lack of discretional judgement at the time of the marriage, and above all his insufficient internal freedom, is proven[29].

At the same time, the judgment points out that Prof. B. conducted a critical examination of the opinion drawn up in the first instance. With great precision, he only revealed reservations - in relation to the conclusions of the expert in that instance. If in this conclusion, on the one hand, the expert does not take into account the results of his psychodiagnostic examination, on the other hand, it shows a completely artificial assessment of the examined person's conduct, as an expression of rather serious affective immaturity and traces of a disturbed personality (an attempt to get a woman to confirm her own human and male attitude and to compensate for basic structural uncertainty; an unpleasant feeling of inferiority; excessive and conflicting dependence on the mother)[30].

Expert B., we read in the verdict, also considered the advice of Dr A. to the complainant to continue on the Christian path of maturing, which has already begun for some time, and thanks to which, as I believe Prof. B. - the complainant recognised in later years a gradual evolution towards improvement and still ongoing, aiming at a psychoemotional order as more conscious and responsible and less marked by roughness and imbalance.

As far as the complainant's structural anomaly is concerned, Prof. B. and Prof. N. consider that at present the general situation seems to be stabilised in the form of a characteropathy concerning an anxiety that tends to worry (worrying) and discussing, against a background of basic uncertainty. So, at least *ad cautelam*, as stated by the ponens, a clause should be added (to the judgment) prohibiting the complainant from entering into

[28] *R.P.D. Gregorio Erlebach. Romana. Nullitatis matrimonii. Sententia definitiva diei 21 iulii 2016*, op. cit., p. 11-12.

[29] „Si excipiamus haud admissibiles notas criticas ex parte Tutricis vinculi ad casum hac in instantia deputatae, nulla adest difficultas ut ab Infrascriptis admitti possit relata aestimatio Peritioris, coherens ceterum cum tabulis processualibus, quam ob rem attentis gravibus effectibus intrinsece etiam gravis anomaliae, agnoscendus videtur uti probatus gravis defectus discretionis iudicii in viro actore tempore nuptiarum, praesertim ob insufficientem libertatem internam", IBID., p. 12.

[30] IBID.

a new canonical marriage, pursuant to Article 251 § 1 of the „Dignitas connubii" Instruction, although not necessarily reserved to the Roman Rota, because it does not state that this incapacity is permanent, that is to say that it is undoubtedly also permanent at present [31].

With regard to the circumstances of the case, the judgement focuses on the circumstances of the post-marriage period. It thus points out the defendant's real or alleged infidelity between 1992 and 1994. Whatever the case, the complainant's serious suspicions, broadly reported in his first testimony, were above all considered important for the outcome of the case. Then, as the complainant mentioned, he was always suspicious, and at the end of their marriage, the situation was so tense that in 2003 they decided to separate, although it had already been said since 2000, when the spouses had not yet agreed on economic matters. The rotal turnus sees this circumstance as consistent both with the suspicious nature of the complainant and with the importance, before marriage, attributed to the son who was to be born of this marriage, which would be significant, above all, in the event of the failure of the marriage because of his wife's infidelity.

In concluding on this point, the ponens points out that he omits the less significant evidences presented above by both the patron of the complainant and the defender of the marital knot, as it does not change the established status quo[32].

3.2. Exclusion of the indissolubility of marriage

The second of the contested titles of annulment, examined in the context of the data relating to title one, relates to the complainant's persistent claim that he should break with the community of life and resort to separation and divorce if the defendant is not faithful, as he expressly stated in his application. He stated the same in his first testimony: „If I discover, during the marriage, a possible infidelity to my wife, I will not hesitate to leave her"[33]. He also confirmed this in a rotal instance, stating that he did not rule out the possibility, in the event of a possible collapse of their marriage, of applying for separation and divorce. He added that his position was well „rooted" in him.

[31] IBID.
[32] IBID., p. 12-13.
[33] „Se avessi scoperto durante il matrimonio una eventuale infedeltà di mia moglie, non avrei esitato a lasciarla", IBID., p. 13.

The cited Paul's statements was assumed by Rotal turnus as *confessio iudicialis simulantis.* These statements, as we read in the ruling, were confirmed by witnesses, thus referring *confessiones extraiudicialies simulantis*[34].

So I.F. testified without hesitation that Paul confessed to him many times that he was marrying Maria, but that if he was betrayed, he would apply the solution of divorce. It was his conviction that was clear and decisive. He also confessed to the witness that if he was certain of the betrayal, he would leave the defendant immediately.

A similar testimony was given by R.A., indicating the motives of the complainant to marry the defendant. She added, however, that Paul, going to the wedding, had some „bite" in him. The complainant said to the witness's husband, that if he discovered his wife's infidelity, he would not hesitate for a moment to appeal to separation and divorce.

The witness, Mr P., the complainant's brother, told the judge that he was trying to explain to Paul the responsibility („responsabilitates") he was taking on when he got married. In response, he heard that because of the love he had for Mary, the complainant hoped that everything would „go smoothly"; however, if he made sure during the marriage that things were „not going well", each (of the spouses) would then regain his freedom. The witness also said that Paul seemed to him determined and clear.

The new (second instance) witness S. testified: „I know that Paul had doubts about the fate of the relationship, but seeing the preparations that had already been made for the celebration of the marriage, he „went" to the marriage in the hope that with the birth of his son the relationship [of the spouses - W.G.] would strengthen. He told me that if things do not go well, he will divorce"[35].

These testimonies, which are proclaimed in the judgment, recall the complainant's extrajudicial confession from the „unsuspected" period and confirm the unanimous testimony of the complainant. It is clear from these testimonies that „this is not only about some idea of the claimant opposing the indissolubility of the marriage, but about true and in the strict sense of the word conditional exclusion, that is to say a hypothetical attribute of the marriage, by a positive act of intent, in the event of a lack of loyalty on the part of the wife"[36].

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[34] IBID.

[35] „So che Paolo aveva dei dubbi sull'esito dell'unione, ma visti i preparativi già attivati per la celebrazione, andò lo stesso al matrimonio con la speranza che con la nascita di un figlio il rapporto si sarebbe rafforzato. Mi disse che se anche così le cose non fossero andate bene, avrebbe divorziato", IBID., p. 14.

[36] „Et ex qualificationibus ab eis [testibus – W.G.] factis clare patet quod agebatur non solum de quibusdam ideis viri actoris, indissolubilitati matrimonii contrariis, sed de vera et propria exclusione condicionata seu hypothetica istius matrimonii proprietatis, actu positivo voluntatis facta, in casu fractae ab uxore fidelitatis", IBID.

The ponens states that only the witness V. did not receive any declaration from the complainant that there was some objection to the indissolubility of the marriage knot, but according to her (that witness) personal opinion, the opposite was not unlikely, because on the basis of the image she has made of Paul, she believes that if he felt betrayed in his convictions towards the other party, he would not bear it. In the absence of this witness's knowledge, he mentions ponens, but it is not possible to build evidence to the contrary, yes, he deserves credit for properly presenting this case, and that is why the testimonies of the witnesses are becoming stronger[37].

Referring then to the comments made by the defender of the marital knot concerning the abovementioned court accounts of the complainant and witnesses, the editor of the rotal judgement notes that, in this case too, she allows herself an oratory style when she states that, in fact, at first sight, it appears that either the complainant or some witnesses cite the same „story" („fabula"), holding the memory. But, Erlebach states, as you know, *quod gratis asseritur* („fabula"), *gratis negatur* (what has been claimed without reason can be denied), given the principle that parties and witnesses deserve faith, unless the contrary is proved or at least sustained by sufficient evidence. It is therefore necessary, as continued by ponens, to see whether the opposite evidence from the testimony of the advocate S., the permanent patron of the Regional Tribunal, which was cited by the defender of the knot in her final *animadversiones*, is sufficient, which deserves special attention.

As has already been said above, we then read in the ruling that, as regards bringing the case, the complainant initially consulted advocate S., as permanent patron of the Regional Tribunal N. That patron had a short (30-40-minute) conversation with the complainant (at least that is what the latter claims), and whatever the scope of the investigation was, in which the patron and the complainant differ, the complainant 's complaint was not drafted because it is clear that the permanent patron did not see the title of invalidity that deserves to be considered. It was only about three years later that the complainant turned to today's patron of trust, with the help of whom the case for invalidity of the marriage began.[38].

„So far", as stated by the ponens, nothing strange is seen here. However, the question arises from the complainant's first testimony, in which the judge instructor, after stating that the complainant had been consulted beforehand, asked him a question *ex officio*: does he not mind if the court questioned (ex officio) Mr S.'s permanent lawyer, releasing him from

[37] IBID., p. 13-14.
[38] IBID., p. 14-15.

professional secrecy with regard to that consultation interview with the complainant? The complainant did not object, after which the lawyer in question was released from secrecy.

The editor of the rotal ruling explains that Mr S.'s lawyer was interviewed at first instance (*ex officio*) on 10 March 2010, presenting to the court his own notes made on the occasion of that interview with the complainant, but signed on 10 March 2010. These notes contained almost exclusively the complainant's biographical information as well as elements relating to the history of his marriage with the defendant. There was nothing specific about the simulation of Paul's marriage consent, although in his testimony, advocate S. confessed that he did not think that the complainant excluded one or more of the essential qualities of marriage, as he usually poses such a question during consultations. He added that the complainant did not tell him about any doubts or uncertainties regarding the aforementioned title of invalidity in relation to the marriage which he intended to enter into *illo tempore*. In the form of a final remark, the witness then stated that what he said in this case was based on the notes he had made and that he considered it impossible not to note something important regarding the possible invalidity of the marriage. And he added: „It is possible, however, that the complainant might have missed telling me something"[39].

As we then read in the judgement, the patron of the claimant in the rotal instance cites strong statements in which the court of first instance responded in the text of the judgement, strongly defending both the general validity of the permanent patron of S. in his provision of assistance to clients (his care in every consultation he gives) and the legal validity of his court testimony (his release from professional secrecy by the claimant, but in this case the can. 1548 § 2 n. 1 and 1550 § 2 of the CIC could not be applied; both canons refer to the person who was appointed with the correct mandate for the function of patron). What is more, in this judgement, in the conclusion of the resolution of this issue, it was said that precisely because of the „deontological correctness", advocate S. felt obliged to present the case in order to learn the truth (*pro rei veritate*), which - as it was recalled - remains *regula aurea* in every proceeding on the part of both the subjects in the case and the witnesses interviewed[40].

The complainant's patron (in the rotal instance) did not stop there, and in his defensive voice (*Restrictus iuris et facti)* presented many arguments to weaken the legitimacy of the hearing of S.'s lawyer or to diminish the strength of that testimony. At the end of that letter, the complainant's patron claims that this is a matter of principle and deontology, or at least of appropriateness of action.

[39] „Può darsi invece che l'Attore possa avere omesso di dirmi qualcosa", IBID., p. 15.
[40] IBID., p. 16.

As far as the principle is concerned, as proclaimed in the judgement of c. Erlebach, it was the complainant's patron who formulated it, saying that a permanent patron is not only subject to can. 1548 § 2, n. 1 of the CIC, but also can. 1550 § 2, n. 1 of the CIC, and this after an initial discussion, before he even accepts the mandate to perform his duties. To put it another way, according to this thesis, a permanent patron would be incapable of testifying as a witness in that case, even before he receives his mandate. However, we must not forget the need for strict interpretation (can. 18 of the CIC), because can. 1550 § 2 of the CIC contains at least an exception to the can. 1549 of the CIC principle (everyone can be a witness). It is therefore necessary to adopt a doctrinal opinion that, as G.P. Montoni says[41] - there is no incapacity (to give testimony) for lawyers who have not been mandated, although they have advised the party to bring the case and continue to do so. This opinion is based on an earlier (traditional) doctrine[42], as well as on rotal decree c. Davino of 15 January 1990[43]. Such a legal principle presented by the complainant's patron cannot therefore be accepted[44].

On the subject of deontology, on the other hand, this patron put forward the thesis that it is not appropriate for a lawyer to give testimony in court that concerns a person whom he has assisted in court or when he has consulted them on the initiation of a case without a mandate, which should be the rule of deontology. The patron has therefore entered here, as ponens comments, into a deontological area, more specifically an unspecified one, to which, moreover, he attributes less power (speaking of inappropriateness) than a strictly legal prohibition.

The rotal judges, as stated in the ruling, believe that a distinction should be made precisely. They therefore accept that, in terms of keeping a simple secret, the issue does not exist at all, as in the case at hand, where the person concerned „releases" the person keeping of the secret (in this case a lawyer) from keeping it, which would otherwise be taken out of the obligation to reply (cf. can. 1548 § 2, n. 1 of the CIC). The case, on the other hand, is different in terms of a different deontological principle, according to which a lawyer should be faithful[45], so he cannot betray his own client. This applies from the beginning of his own task undertaken to provide prior consultation, even without receiving a formal mandate to initiate the case. A lawyer cannot be relieved of this duty by the will of the person he assists.

[41] See G.P. MONTINI, *De iudicio contentioso ordinario. De processibus matrimonialibus*; II: *Pars dynamica. Ad usum auditorum*, Romae 2015, p. 242.
[42] See M. CONTE A CORONATA, *Institutiones iuris canonici*, t. 3: *De processibus*, Romae 1948, p. 196.
[43] See *Decetum c. Davino of 25.01.1990*, RRDecr. 8 (1990), p. 2.
[44] *R.P.D. Gregorio Erlebach. Romana. Nullitatis matrimonii. Sententia definitiva diei 21 iulii 2016*, op. cit., p. 16.
[45] He again refers here to work: A. GULLO, *Principia deontologii riguardanti gli avvocati*, in: *Deontologia degli operatori dei tribunali ecclesiastici*, Città del Vaticano 2011, p. 195.

Therefore, as far as the case is concerned, not only was it inappropriate, but also totally forbidden (because of the aforementioned deontological principle) the court testimony of the advocate S. in the part in which he confessed that he had not received information from the complainant about the basis on which the case was to be examined (as far as the complainant's exclusion of indissolubility was concerned), although he mitigated this by stating that it was possible that the complainant had omitted to confess something to him in terms of simulation. For this reason, as the ponens concludes, this part of S.'s lawyer's testimony should be considered as not having been submitted[46].

As far as the above thesis of the court of first instance defending the testimony of the permanent patron S. is concerned - as the judgement states - for reasons of deontological validity, i.e. the obligation to act *pro rei veritate*, defined as a *regula aurea*, which is also binding for witnesses, and a distinction should be made once again. Each lawyer, as the aim of his own action in the procedural area, should have „the discovery, verification and legal confirmation of the truth about an objective fact"[47]. This is one of the deontological principles, and it is very important, that binds the lawyer. In more general terms, the lawyer should defend - making a proper distinction between the duties of a trustee and an ex officio lawyer - the person whom he assists, while preserving the truth. It is therefore not acceptable for a lawyer to act *pro rei veritate* if, at the same time, he or she violates a slightly different deontological principle that he or she is bound by. There is adagium in this scope too *bonum ex integra causa, malum ex quocumque defectu* (good from the whole matter, evil from any lack).

Therefore, as stated by the ponens, from the principle of faithful *patrocinium*, that is, the duty not to betray one's own client, one should not make any difficulties regarding the testimony of the court lawyer S., completely ignoring the explanations given by the complainant and his patron of trust. For this reason, the objection of the marital knot defender mentioned above also definitely falls[48].

As regards indirect proof of the claimant's exclusion of the indissolubility of the marriage, the ponens notes that the reason for the continuation of the simulation is very clear, and had twofold in nature : a) characterological, as shown above (the claimant's deep fear that his wife would not turn out to be unfaithful), for which reason Prof. B. recognised the man's

[46] *R.P.D. Gregorio Erlebach. Romana. Nullitatis matrimonii. Sententia definitiva diei 21 iulii 2016*, op. cit., p. 17.
[47] „Quivis advocatus uti finem propriae actionis in ambitu processuali habere debet «lo scoprimento, l'accertamento, l'affermazione legale della verità, del fatto oggettivo» (Pius XII, *Allocutio ad S. Romanam Rotam diei 2 octobris 1944*, AAS 36 /1944/, p. 286, n. 2 d)", IBID.
[48] IBID.

suspicion and jealousy with a connotation very close to delusion; b) concerning the complainant's idea of the opposite indissolubility; moreover, the complainant maintained the idea of divorce, as confirmed by witnesses. This does not change the fact that he was originally raised in religion, since Paul, in his youth, moved a little away from the Church and its doctrine. This fact at least has a clear origin in the overly harsh and unjust reprimand given to him by the pastor when the complainant was twelve years old[49].

The reason for this simulation seen by the editor of the rotal judgement is what Paul stated in his second testimony. Namely, he said that in the vicinity of the marriage („when he had a wedding «on his neck»"), it happened that he saw Maria in a too friendly conversation (according to his assessment) with a boy who, as it later turned out, was her ex-fiance. So, a „sharp" suspicion has born at the complainant soon. All the more so because it was at a time when the defendant was over-absorbed by the over-absorbing preparations for the wedding, undertaken primarily by her family, and in the meantime, that evening she kindly chatted with another boy. The doubts and worries that arose in Paul because he could not trust Maria completely, made him so overwhelmed that on the day of his wedding, his friends told him that he had a „funeral" rather than „wedding" look.

This reason, which is closer to simulation, was mentioned in the judgement, confirmed by the complainant's brother and two other witnesses.

For the ruling turnus, the reason for the simulation is very obvious, even though the defender of the marital knot considered that there is no clear *causa simulationis*[50].

The judgement does not overlook *causa contrahendi* either. In this respect, the rotal judges are keen to accept the thesis of the defender of the marital knot on the complainant's love and desire to marry, as his willingness to marry Maria cannot be called into question, as this was motivated by various motives: not only of an affective nature, but also by the appropriateness of this step. However, if the case file was studied carefully and thoroughly, it would be very difficult to consider the complainant's love as natural and strong enough to overcome the causes leading to the exclusion of indissolubility. Therefore, indirect proof leads much more to the recognition of indissolubility exclusion than to its denial.

The ponens makes one more statement when they say that, at least in the vicinity of the celebration of the marriage, the complainant has „combined" abnormal jealousy with a desire to get married or at least not to leave once everything was ready for marriage. He did so by reserving mentally the recovery of his freedom if the wife proves unfaithful. So, in his

[49] IBID., p. 18.
[50] IBID.

own way, he solved an internal struggle when he „combined" the will to marry with the hypothetical exclusion of the indissolubility of the marriage knot[51].

The judgement, on the other hand, argues that there is a circumstance that can be pointed out as being against the hypothetical exclusion of the indissolubility of the marriage by the complainant: this is the fact that the marriage has lasted for many years, as pointed out by the defender of the marital knot. This objection, as Erlebach states, was aptly answered by the complainant's patron (in his *Restrictus iuris et facti*). He stated that the marriage lasted for many years only formally, because the man did not want to lose his home and his son because of the separation. The complainant himself, as added by the ponens, explained broadly and extensively the position he took towards his wife when he became certain that her faithfulness had been broken, and for this reason he initiated the separation from the bed, still living 'under the same roof' for many reasons, as some witnesses have confirmed.

Thus, we read in the conclusion, the complainant's thesis must be accepted in the aspect under consideration (exclusion of indissolubility by the complainant)[52].

In the final part of the judgement there is a concise explanation concerning the possibility of „coexistence" of the invalidity of marriage consent under both titles (a grave lack of discretionary judgement and exclusion of *bonum sacramenti*). The ponens sees no difficulty here: although the complainant did not have sufficient discretionary judgement to validly marry, he was nevertheless able to exclude from his consent an indissolubility of marriage, by a positive act of will (hypothetical exclusion), which has been sufficiently proven.

Operative part of the judgement (already cited above): The *constare de nullitate* of both titles ends with an extensive rotal judgement of c. Erlebach, to which a clause prohibiting the complainant from entering into a new marriage without the consent of the local ordinary is added[53].

4. Final remarks

Presented ruling by Roman Rota, c. Erlebach, which was delivered in the second instance, concerns an interesting case identified by two titles of nullity (on the complainant's side) which, *prima facie*, could be considered incompatible. The case was about the exact

[51] IBID.
[52] IBID., p. 18-19.
[53] IBID., p. 18.

leaning over of both titles, which required knowing both the real consensual capacity of the man (in relation to *discretio iudicii*) and the real direction of his will (in relation to *bonum sacramenti*), of course, in both cases, during the period of the marriage.

The rotal turnus has fairly penetrated the evidence gathered in the first instance tribunal, supplemented by the complainant's subsequent testimony, the testimony of one of the witnesses, the testimony of a new witness and the opinions of two experts An in-depth analysis of this material, which lacked the testimony of the defendant, allowed the judges to decide the case positively, for both titles. Thus, the decision (negative on both titles) made by the court of first instance was deemed unjustified.

As regards the title of a grave lack of discretionary judgement concerning the essential matrimonial rights and obligations to be mutually given and accepted (can. 1095, n. 2 of the CIC), it is significant to recall the three elements of this legal figure in the *in iure* part (in a positive aspect), which are: sufficient intellectual knowledge of the subject matter of marriage consent (essential matrimonial rights and obligations); the ability to discretionary judgement of those rights and obligations; internal freedom, otherwise the ability to freely decide to marry. It was also important to recall that the legal norm is about a real inability to *discretio iudicii*, and thus a lack of sufficient discretionary judgement, and not about any difficulty in this respect, which also applies to the third form of consensual inability (can. 1095, n. 3 of the CIC)[54]. Similarly, it was necessary to mention the need for an appropriate cause of *gravis defectus discretionis iudicii*, i.e. mental anomalies. Attention was also drawn to the way of proving the lack of necessary

It should be emphasized the longer ponens' argument in the *in facto* part in which they skilfully „extracted" everything that clearly spoke in favour of the complainant's lack of sufficient discretionary judgement in the body of evidence he obtained. A closer knowledge of the conditions and circumstances of the family environment in which the complainant grew up, as well as a careful examination of the subsequent stages of his biography, allowed the ponens to make a number of significant findings concerning the personality of this man. Thus, Paul's silhouette appears as a young man who was largely dependent on his mother and developed a strong tendency to be suspicious, overly emotional, uncertain, possessive of girls, constant doubt and fear, nervousness, lack of maturity in relations with others and, above all, increased jealousy and constant fear of betrayal of women with whom he had affection. The following confessions, among others, proved to be significant for the assessment of the

[54] This was pointed out by John Paul II in his speech to Roman Rota of 5 February 1987, AAS 79 (1987), p. 1457, n. 7.

claimant's disposition and personality: „My jealousy has always conditioned me [...] in the social, friendly, affective and emotional field".

For understandable reasons, it was important for the judges to learn more about the shaping of the complainant's decision to marry the defendant, in which the ponens saw Paul's internal evolution (from the idea of far-reaching moral freedom to a more personal understanding of love), but at the same time remaining in constant uncertainty and hesitation (hence the defendant proposed marriage).

Such symptoms of a mental anomaly, confirmed by the complainant's confession (considered credible) that he „did not feel free to make an important marital choice", and that when he got married, he continued to experience uncertainty as to the loyalty expected of Maria, and that his mother insisted on marrying, made it possible to assume that Paul, when getting married, did not have sufficient internal freedom, which, as has already been said above, is one of the elements of the discretionary judgement[55]. Witness testimony has also played an important role here.

The opinions of second instance experts have also become convincing for judges However, the ponens was critical of the incomprehensible findings of the expert's opinion at first instance: considering the complainant's personality as neurotic (obsessive-depressive)

[55] The jurisprudence of Roman Rota assumes that internal freedom (*libertas interna*), besides the intellectual knowing of object of marriage consent and critical capabilities, i.e. an evaluation proportional to the marriage being celebrated, is one of the elements of *discretio iudicii*. See *Dec. c. Pompedda z 14.11.1991*, RRD 83 (1991), p. 728; The judgement of c. Stankiewicz of 22 July 2005 confirms *expressis verbis* that rotal jurisprudence adopts the constitutive elements of a discretionary judgement of the assessing person according to disturbances or dysfunctions of intellectual, volitional and emotional activities which together take part in the creation of the conjugal consent. *Dec. c. Stankiewicz of 22.07.2005*, RRD 97 (2005), p. 439; The following definition of the essence of discretionary judgement of the assessing person (with the same elements) contained in decision c. Yaacoub of 14 July 2005 is also worth noting: „The contracting party should be able to understand, evaluate and consider, and freely determine to enter into a matrimonial community, durable and exclusive, directed towards the birth and upbringing of offspring, a will that is intact, i.e. free not only from external coercion but also from internal mental constraint, i.e. with full power of choice, so that marital rights and obligations are undertaken consciously and voluntarily"; *Dec. c. Yaacoub of 14.07.2005*, p. 386. See also the definition *discretio iudicii* w *Dec. c. Defilippi of 26.07.2005*, RRD 97 (2005), p. 451 (cited after *Dec. c. Pompedda of 14.11.1991*, RRD 83/1991/, p. 728); The criteria developed by rotal jurisprudence for determining the minimum internal freedom necessary to obtain marital consent (in particular the criterion of proportionality in relation to the subject matter of the marriage consensual) make it possible to determine, in a given case, whether or not there has been a lack which has seriously infringed *libertas essentialis* or *libertas effectiva*. In the first case, it is necessary to indicate the reason for this absence. It is noteworthy here that there is a broad reference to the most recent literature and the case law of Roman Rota in judgment c. Stankiewicz of 26 June 2003 (RRD 95 /2003/, p. 424-438). This judgement assumes that not every lack of internal freedom makes the marriage consent invalid, but only one that seriously violates the essential freedom, i.e. the ability of a critical, reflective function and the very desire. The ponens notes that the task of a church judge in dealing with cases due to a grave lack of discretionary judgement as regards the essential rights and obligations of marriage in relation to *defectus libertatis internae* is undoubtedly not easy, as it requires, on the one hand, a good knowledge of rotal case-law and, on the other hand, particular insight into the assessment of the evidence gathered, in particular the opinion of the expert in the case; See W. GÓRALSKI, *Gravis defectus discretionis iudicii in the published judgments of Roman Rota in 2005*., part. II, Ius Matrimoniale 25 (2014), p. 40-41.

and referring not only to his early years but also to the period of his marriage to the defendant, she questioned the impact of that personality on the marriage record. A thorough analysis of this expertise has also allowed the rotal ponens to see a contradiction in it (in the second part), when the expert attributes the complainant marrying Maria more to a lack of prudence than to any anomaly causing *gravis defectus discretionis iudicii*, and then speaks again of an observed mental anomaly (dependence on the mother). The disadvantage of this opinion, as Erlebach sees it, is also the lack of conclusions. It is also no wonder that this ponens is critical of the overly praiseworthy assessment of this opinion (including its explanation by the author) made by the judges of the first degree tribunal, who undoubtedly based their decision on it.

On the contrary, the opinion of Prof. B. drawn up in the second instance has met with appreciation of the rotal turnus, as well as the psychodiagnostic relation presented in that instance by Professor N., confirming, among others, the credibility of the complainant. The opinion of prof. B.'s, in which the complainant was considered to be burdened - at the time of the marriage - with a personality disorder in the form of serious affective immaturity, strong dependence on the mother and uncertainty giving rise to mistrust, suspicion and jealousy with proximity to the idea of delusion, was accepted by the Tribunal as authoritative. All the more so because it stated that this disorder deprived the complainant of the internal freedom necessary for his self-determination in a free manner (to marry the defendant). The critical assessment the conclusion of the expert's opinion in the first instance made by Prof. B.'s was also significant for rotal judges.

Characteristic for the ruling is the replica of the ponens in relation to the *aninadversiones* of the defender of the marital knot appointed *ad casum*, who was very critical of the expert opinion, of Prof. B., making serious accusations against him, such as abandoning the principles of Christian anthropology and being apodictic in formulating her own assessments. The editor of the rotal judgement, sharing the complainant's patron's opposition to the accusations made by the advocate of the junction, was right to show strong disapproval of her unfounded claims, as well as of her violation of deontological principles.

The *pro nullitate* solution of the case under the grave lack of discretionary judgement as to the essential rights and obligations of the married couple was therefore carefully and comprehensively proven, and there was no shortage of any element in the extensive Ponens' argument that the complainant was deemed to be devoid of that *discretio iudicii* with regard to his internal freedom.

Nevertheless, the rotal turnus of the second of the contested titles of annulment, i.e. the applicant's exclusion of the indissolubility of the marriage, was approached with care. After a brief reminder of the basic principles *in iure*, there is a longer text in the *in facto* part, that justifies, in this case too, the positive decision of the rotal auditors

Paul's thesis about the hypothetical exclusion of *bonum sacramenti*, which he firmly held in both instances, was fully proven by the „classic" evidences commonly used by rotal jurisprudence for any form of simulation of marriage consent.

Thus, the ponens has convincingly used the confession of the simulant (*confessio simulantis*) first - both judicial and extrajudicial. Full of jealousy about Maria, as well as anxiety and fear about the fate of his marriage, Paul consistently testified that he had decided to marry the defendant, but made the reservation that if he was betrayed by her, he would not hesitate to divorce her. What is more, he spoke of his decision to other people (*in tempore non suspecto*), who, as witnesses in the case, confirmed this his *confessio extraiudicialis*. In the light of the testimony of both the complainant and the witnesses, there could be no doubt that it was not just a matter of simply favouring the institution of divorce or merely considering the possibility of resorting to divorce, but one required by the can. 1101 § 2 of the CIC a positive act of will to exclude, yes, a hypothetical one (in the case of the defendant's failure to observe loyalty), but nevertheless to exclude, an essential attribute of marriage, which is *indissolubilitas*.

Words of criticism, and this time rightly so, were directed at the defender of the marital knot, who tried to unjustifiably question the truth of what the complainant and witnesses testified, based on the testimony of advocate S., a permanent patron of the Regional Tribunal, with whom the complainant consulted the case before bringing it before the court (this patron did not see any grounds for filing a complaint). Lawyer S. gave testimony (in the first instance) and presented his notes from these consultations to the court, released from professional secrecy by Paul. Although in his testimony, the witness mentioned that he did not make any mention of the simulation of the complainant in those notes, he added that, perhaps, the latter did not inform him about something that would indicate the possible invalidity of the marriage.

In showing the position of the court of first instance, which defended the legal basis for the testimony of this lawyer S., as well as the view of the complainant in the rotal instance, according to which the importance of this testimony should be minimised, the ponens made a distinction, assuming that when it comes to the maintenance of ordinary secrecy, there is no question (when the client has released the lawyer from secrecy), whereas

from a deontological point of view (loyalty of the lawyer to the client), the court testimony of the said lawyer (revealing the fact of the complainant's lack of information on the exclusion of *bonum sacramenti*) should be recognised *per non est*. This statement served to overturn the objections to the testimony of S. court lawyer nourished by the defender of the marital knot in the second instance.

It is worth noting the fully convincing indication in judgment of c. Erlebach of the reason for further simulation of the marriage consent (the complainant's fear of unfaithfulness on the part of the defendant, as well as the ideas he revealed which favour divorce) and the reason of a closer one (suspicion of betrayal of the defendant when - in the vicinity of the celebration of the marriage - he saw her in a friendly conversation with her former fiancé). It may be surprising that the defendant's failure to see the reason for the simulation by the defender of the marriage knot (of course, even if she had seen it, she would not have had to say so in her pre-trial remarks).

He also had no difficulty in determining *causa contrahendi* (the complainants's love for the defendant), which, according to the defender of the bond, was supposed to prove against the simulation of a marriage consensual.

The complainant's exclusion of the indissolubility of the marriage did not take the form of an absolute, but a hypothetical, otherwise conditional one, because his positive act of will had a reference to a situation of possible betrayal by Maria. The ponens rightly speaks of a coincidence of the Paul's will to marry the defendant with a hypothetical exclusion of the indissolubility of the marriage by him.

The ruling sufficiently clarifies a circumstance that could speak against the simulation of the claimant's marriage consent, i.e. the duration of the marriage between 1987 and 2004, i.e. 17 years, a circumstance that was raised by the defender of the marriage knot in her remarks. In fact, however, the marriage community only lasted formally, as the parties had been separated much earlier.

As has already been mentioned, something very significant for a case decided by judgment c. Erlebach is the definition of a formula of doubt which includes two titles of invalidity: a serious lack of discretionary judgement as to the essential rights and obligations of the marriage that are mutually transmitted and accepted, and the simulation of partial marriage consent by ruling out the indissolubility of the marriage, with no indication of the main title and the title attributed, and therefore included subordinate. The *pro nullitate judgment* was given on both titles. This their coexistence that ponens explains by that

someone who does not have enough *discretio iuduicia* for a valid marriage may, however, be able to exclude the indissolubility of the marriage[56].

It is important to note that in a decree setting out a formula for doubt, titles of nullity can always be accepted, even if they have so far been considered incompatible. It will, after all, be up to the Tribunal to consider what kind of response to the previously accepted doubt should be given. It is free to reiterate the statement of insightful ponens already cited: „There is therefore no obligation, to identify certain titles in subordinate (*subordinate*) form, although it cannot be denied that this route can sometimes be advised by certain practical reasons"[57].

Undoubtedly, the presented judgment c. Erlebach is a valuable contribution of an outstanding rotal auditor to the work of shaping jurisprudence not only in the area of compatibility of *defectus discretionis iudicii* and *simulatio consensus*.

[56] In the former rotal case-law, the title *simulatio consensus* in relation to the title *gravis defectus discretionis iudicii* is (in the formula of doubt) subordinate. This is the case, for example, in the judgment c. Sabattani judgment of 14 March 1961 reads: „Quod vero attinet ad procedendi modum, animadvertendum est coëxsistentiam aeque principalem capitum defectus discretionis iudicii et simulationis admitti non posse, cum matrimonium non possit simul nullum esse in eadem persona ex duplici hoc capite, ita ut eadem persona eodem tempore incapax eliciendi consensus et simul capax sua voluntate excludendi matrimonium aut restringendi vel limitandi obiectum consensus matrimonialis", SRRD 53 /1961/, p. 163. Similarly, in ruling c. Stankiewicz of 11 March 1980: „Quare, consensus simulatus et consensus defectu discretionis iudicii vitiatus, inter se contradictoria sunt et nonnisi subordinate tractari possunt. Qui enim actum humanum ponere nequit, etiam facultatem simulandi amittit, nam caret libertate (c. Bejan, sent. 14 martii 1964, n. 6, SRRD, vol. LVI, p. 195), RRD 72 /1980/, p. 170. On the other hand, in more recent judgements, there are cases where the title of simulation *subordinate* is included in relation to the title of serious lack of discretionary judgement, as well as the two titles of *aequaliters*. This is the case, for example, in the case decided by judgment c. Monier of 18 March 2005, the formula for doubts was defined as follows: „An constet de matrimonii nullitate, in casu, ex capite defectus discretionis iudicii ex parte Actoris (can. 1095 n. 2 of the CIC) aut subordinate ex capite exclusionis matrimonii ipsius vel exclusionis indissolubilitatis ex parte eiusdem Actoris", RRD 92 /2005/, p. 145. Similarly, the formula for doubt in the case ending with judgment c. Sciacca of 10 May 202 has been defined: „Utrum confirmanada sit sententia rotalis diei 18 novembris 1999, seu an constet de nullitate matrimonii, in casu, ob defectum libertatis internae ex parte Actricis, in tertio iurisdictionis gradu et, subordinate, ob simulationem totalem ex parte eiusdem Actricis, in secunda instantia, RRD94 /2002/, p. 314. On the other hand, in the case concluded by judgment c. Caberletti ruling of 20 November 2007, an analogous formula was used: „An constet de matrimonii nullitate, in casu, ob defectum discretionis iudicii, ob incapacitatem assumendi obligationes matrimoniales essentials et ob exclusum bonum fidei ex parte conventi", RRD 99 /2007/, p. XXVII – *Index omnium sententiarum*, judgment not published.

[57] *R.P.D. Gregorio Erlebach. Romana. Nullitatis matrimonii. Sententia definitiva diei 21 iulii 2016*, op. cit., p. 5.