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Fr. Marcin Czujek
Metropolitalny Sąd Duchowny w Poznaniu

Zasada zachowania integralności prawa do obrony. Analiza przypadków

Principle of preserving the integrity of the right of defense. Case analysis

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Introduction

The aspect of the fundamental right of defense in a canonical process has a wide range of various references. Regardless of the type of process, the principle guaranteeing inviolability and integrity of this right remains unchanged. Practical application of the right of defense could be analyzed at every stage of the canonical marital process which remains the biggest area of church tribunals' activity. This study, however focuses on two aspects which are obvious and appear in each ordinary canonical process for a declaration of marriage nullity but may, through incorrect application of related norms, be fraught with consequences.

1. The essence and nature of the right of defense

The right of defense analyzed in detail in the doctrine and Rota judicature[1], defined as the actual right to intervene and influence the result of the proceedings through one's own

[1] Cf. G. ERLEBACH, *La nullità della sentenza giudiziale „ob ius defensionis denegatum" nella giurisprudenza rotale*, Città del Vaticano 1991, p. 49-54.

activity[2], is the most real mechanism that guarantees and enforces rights to which a person is entitled[3]. As pointed out by G. Erlebach, can. 221 of the CIC refers to two rights i.e. *agire in iudicio* – the right to appear before a judge to present one's own arguments, and *ius defensionis* – the right to protect one's own rights, which ranges from technical support to the elimination of all difficulties, including economic ones[4]. In his analysis of the nature of this right, Erlebach states that both the way in which the origin of the right of defense is recognized in natural law and in the fundamental rights of a human person, leads to a conclusion that both those perspectives show a deep convergence of this right with the very nature of a human person[5]. All the more so - apart from the specificity of the process structure in which this right is to be exercised, the judge needs to be prudent and considerate in taking each subsequent process decision so as not to pass too easily over certain attitudes of persons towards the process in order not to violate, or even worse, deny their right of defense. Apart from the two dimensions of the right of defense i.e. the objective level which is a requirement for the adversarial structure of the process, and the subjective one - included in can. 221 of the CIC, doctrine and jurisprudence also distinguish between inviolable elements of this right so as to always ensure the justice of court proceedings, and elements that can be established by the legislator to ensure the integrity and quality of the proceedings[6]. At this point it is worth recalling the crucial position of G. Erlebach, when considering in his publication the legal significance of total or partial negation of the right of defense, he notes that using, as a criterion, the significance that a decision of a judge regarding the rights of the parties to the process, could have on the maintenance of the true contradictory character of the process, the total negation of the right of defense would in this case include not only the exclusion of all fundamental rights of a party in this scope but also a full exclusion of at least one of them which would at some point of the

[2] Cf. I. ZUANAZZI, *Lo ius ad probationes come espressione del diritto di difesa nel processo matrimoniale canonico*, Ius Ecclesiae (11) 1999, p. 72, where gives the definition: „Alle parti della causa si riconosce così una posizione soggettiva globale di difesa, che si traduce nell'attribuzione di una serie complessa ed eterogenea di situazioni giuridiche in ordini agli atti processuali, idonee a garantire nei confronti reciproci e di fronte al giudice, tenuto a mantenere una condizione di imparzialità, un'eguale capacità di agire e di contraddire nello sviluppo del dibattto processuale, unitamente ad una pari rilevanza delle rispettive iniziative nella determinazione di una giusta soluzione".

[3] Cf. IBID., p. 73: „(…) il concorso degli interessati alla formazione della decisione rappresenta il mecchanismo maggiormente umano ed equo di applicare il diritto nelle relazioni che toccano più profondamente la vita intima di ciascuno".

[4] Cf. G. ERLEBACH, *La nullità della sentenza*… op. cit., p. 52.

[5] Cf. IBID., p. 44-53.

[6] Cf. I. ZUANAZZI, *Lo ius ad probationes*… art. cit., p. 74. A relevant example could be the necessity to appoint a curator or an advocate if a person is believed not to be capable of appearing before tribunal, or in a situation in which a tribunal resolved to classify a specific proof; as for the „quality" of the legal proceedings, one may refer to the case of granting an advocate access to process acts while giving the parties priority to personally inspect proofs.

process result in the lack of the contradictory character[7]. Speaking of sentence invalidity, one may refer to the clear explanation given by the already mentioned Rota auditor who underlines that the lack of knowledge of the acts resulting in the irremediable nullity of a sentence arises from essential elements of a legal act, whereas defects regarding the publication (although proofs may be somehow known), include the elements required under can. 124 of the CIC - resulting in the remediable nullity of a sentence[8]. Thus, referring to the scope of marital cases, one may not completely agree with the stipulation included in the Commentary on the Instruction *Dignitas Connubii*, according to which, in cases pertaining to the public good, „the right of defense is not considered sufficiently important"[9]. Next, while referring only to two process moments i.e. the publication of acts and the conclusion of evidence proceedings, it will be shown how sometimes ordinary decisions which are however made too hastily may effectively negate the essence of the process itself.

2. Publication of the acts of the case

Publication of the acts of the case aimed at providing the parties with a possibility to inspect proofs and arguments submitted is to support the parties in the preparation of their defense and presentation of counter arguments. Essential elements of this process act are thus the right of the parties to know (*ius cognoscendi*), and the right to be heard (*ius ad auditionem*)[10]. As underlined in the doctrine, act publication includes first of all documents

[7] Cf. G. ERLEBACH, *La nullità della sentenza*… op. cit., p. 195: „La negazione totale (…) riguarderebbe in questa ipotesi non la negazione di tutte le facoltà essenziali del diritto di difesa, ma l'esclusione piena di almeno una delle facoltà essenziali del diritto di difesa, per cui viene a mancare ad un certo punto in contraddittorio ed il processo stesso". While describing essential rights of the parties related to exercising their rights to defense, the author refers to the sentence of 17.01.1978 which indicates four such rights: the right to present proofs, to inspect the proofs of the opposing party, to present one's own comments and objections and to respond to comments and objections of the opposing party.

[8] Cf. G. ERLEBACH, *La nullità della sentenza*… op. cit., p. 258-269; also C. GULLO, A. GULLO, *Prassi processuale nelle causa canoniche di nullità del matrimonio*, Città del Vaticano 2009, p. 222-223: „(…) la mancata conoscibilità degli atti provoca nullità insanabile della sentenza perché la conoscibilità è un elemento essenziale dell'atto giuridico, in quanto questo è tale perché vive ed è regolato dalla società e per difetto di diritto di difesa, perché se un atto non è conoscibile non ci si può neppure difendere da quanto in esso affermato; al contrario, il mero difetto di pubblicazione degli atti (chi siano aliunde noti: ad es. perché sia esercitato il diritto di cui al can. 1678 § 1 n. 2) - [presently 1677 CIC/MIDI – author's note] - configura mancanza di una solennità richiesta dalla legge *ad validitatem* (can. 124 § 1) e quindi provoca nullità della sentenza in quanto questa dipende da atti nulli (can. 1622 n. 5). Questa interpretazione sembra oggi da accettarsi necessariamente atteso il tenore dell'art. 231 dell'Instr. *Dignitas Connubii*"; cf. also A. CONDE*, Diritto processuale canonico*, Roma 2006, p. 497.

[9] M. GRESZATA, *Komentarz do art. 270 DC*, in: T. ROZKRUT (ed.) *Komentarz do Instrukcji procesowej Dignitas Connubii*, Sanomierz 2007, p. 365.

[10] Cf. A. MENDONÇA, *The Right of the Parties to Inspect the Acts and Its Relation to the Validity of a Definitive Sentence in a Marriage Nullity Process*, Studia Canonica (33) 1999, p. 297.

linked to a given stage of ecclesiastical proceedings, in particular, proofs admitted by the judge[11]. The obligation to publish acts does not apply to documents attached to defense presented by the parties during the stage of case discussion, and those documents which are not included in the litigation, or do not bring anything new to the subject of the proceedings; or are well-known to both parties[12]. However, the opinion that the same key should be used for analyzing documents created prior to the *libellum*, as claimed by M. Hilbert[13], cannot be fully supported. Such documents may and very often are a very valuable material used among others for the verification of the credibility of theses made before the tribunal. The entities to which the publication of acts is addressed are the parties, their advocates and procurators[14]. Depending on the configuration of individuals involved in the process, if a party appoints a procurator, it is enough to make the acts available to this person; if the function of a procurator and advocate is held by two separately appointed persons, it is necessary to notify them both of the publication of acts, as is the case when a party only has an advocate appointed by him/her or one given ex-officio[15]. It must be noted however, that the possibility on the part of advocates to obtain copies of the acts does not authorize them to provide such documents to the parties[16].

2.1. Place of the publication in the process dynamics

In the further part of this paper we can also raise a question regarding the place of the publication of acts in the process dynamics. It is commonly assumed that „the publication of process acts should take place only when a case is sufficiently prepared for settlement"[17]. However, is the almost final stage of the proof instruction the only „place" for the publication of acts? When analyzing art. 159 DC, the equivalent of can. 1677 of the CIC/MIDI, J. Llobell

[11] Cf. G. ERLEBACH, *La nullità della sentenza*… op. cit., p. 267.
[12] Cf. G. ERLEBACH, *La nullità della sentenza*… op. cit., p. 267; also M. HILBERT, *De publicatione actorum*, Periodica (81) 1992, p. 524.
[13] Cf. M. HILBERT, *De publicatione*… art. cit., p. 524.
[14] Cf. A. MENDONÇA, *The Right of the Parties*… art. cit., p.. 301 i 305.
[15] IBID., p. 305: „A party may have mandated only a procurator without an advocate. In such a situation, it is sufficient to permit the procurator to inspect the acts. If a party has appointed two persons, one as an advocate and the other as a procurator, then the acts must be published to the advocate and to the procurator cumulatively, there is no obligation to invite the party to inspect the acts. If a party legitimately appoints one person to fulfill the function of advocate and procurator (advocate/procurator), it is sufficient to publish the acts only to this person. If a party has only an advocate either mandated by the party or given ex officio, then the acts must be published cumulatively to the party and to the advocate"; it should be made a point of A. MENDONÇA, that lawyers do not replace the parties that are the main protagonists of the trial – cf. IBID., p. 329, ref. 90.
[16] Cf. M. HILBERT, *De publicatione*… op. cit., p. 525.
[17] T. PAWLUK, *Prawo Kanoniczne* t. IV, Olsztyn 1990, p. 286.

points out that the structure of this norm indicates that it does not completely limit the possibilities of the parties to inspect proofs earlier than at the end of the case instruction stage[18].

According to the Spanish scholar, the process act which was to be only a moment of ultimate verification and an opportunity for the parties to make sure that they presented everything which in their opinion was necessary to clarify the case, became a starting point to (only) communicate all collected proofs. He therefore claims that from the point of view of the process economy, it is more appropriate to inform parties about proofs and statements obtained by the tribunal on a regular basis which in turn ensures higher and direct process dynamic and at the same time allows to save a lot of time[19]. The very technical solution to this demand seems not to give rise to any major difficulties. The easiest thing is to notify the parties of the fact that the opposing party and then witnesses gave their testimonies, and of the possibility to inspect them. This practice followed by some tribunals in Poland generates only two additional letters sent to the parties, and in some cases actually makes it possible to save weeks or months, when following the publication of acts after all originally submitted proofs have been collected, it is necessary to repeat the case instruction in order to interview additional witnesses. As for the notifications regarding the publication of acts that is to take place following the collection of all submitted proofs, a good solution, suggested also by the Rota practice, would be to notify the parties of the useful time for submitting their defense arguments which is of additional importance in a situation when a party does visit the tribunal office where he/she is usually informed about the said right that he/she is entitled to.

2.2. Decree *coram* Erlebach of 16.07.2015

[18] Cf. J. LLOBELL, *I processi matrimoniali nella Chiesa*, Roma 2015, p. 218: „(…) n. 2 del § 1 (…) riconosce ai difensori del vincolo ed avvocati di prendere visione degli atti giudiziari, benché non ancora pubblicati, e di esaminare i documenti prodotti dalle parti. In questo caso, diversamente da quanto disposto nel § 1 n. 1, anche i coniugi potranno esercitare questo diritto giacché il § 2 nega ai coniugi soltanto la possibilità di cui al § 1 n. 1, non anche quell'altra di cui al § 1 n. 2"; C. GULLO writes also: „(…) il § 2 del can. 1678 [presently 1677 CIC/MIDI – author's note] (e similmente l'art. 159 dell'Instr. *DignitasConnubii*) intfatti esclude solo che le parti – per facilmente intuibili motivi – possono assistere agli interrogatori, mentre non proibisce di esaminare gli atti ancora non pubblicati; *e contrario sensu* quindi si deve ritenere che le parti hanno questa facoltà giacché *ubi lex voluit* (e cioè dove ha voluto escludere certe facoltà, come quella di assistere alle udienze) *dixit*", C. GULLO, A. GULLO, *Prassi processuale…* op. cit., p. 224; and I. Zuanazzi: „In questo modo viene consentita ai sogetti di esercitare un controllo anche sulla legittimità o sulla importanza delle iniziative di controparte, cui si collega la possibilità, qualora ne ricorrano i presupposti, di chiedere la loro esclusione o ricusazione, ovvero di insistere per l'assunzione se chi le ha sollecitate vi abbia poi rinunciato", and further: „(…) un riconoscimento limitato alla sola fase successiva di dibattito sugli esiti dell'istruttoria ridurrebbe le possibilità di tutela e renderebbe peggiore la posizione degli istanti, che si troverebbero a dover confutare *ex post* un risultato già acquisito agli atti", I. ZUANAZZI, *Lo ius ad probationes…* op. cit., p. 80 and 84.

[19] Cf. J. LLOBELL, *I processi matrimoniali…* op. cit., p. 219.

In view of the above, there is no doubt that denying a party the right to inspect the acts, or providing such a possibility only seemingly through practical restriction of access to the acts is a practical negation of the right of defense[20]. The situation in question is analyzed among others by the decree *coram* Erlebach of 16.07.2015[21] which declares sentence nullity due to the absence of effective publication of acts to the petitioner.

After providing his testimony, the petitioner, who was actively involved in the process, provided a new correspondence address to which the tribunal was to sent information. The petitioner's place of residence also changed following his move abroad. Despite the said information regarding the place of residence and the correspondence address, the tribunal of the first instance kept sending information regarding the publication of acts to the former address that was no longer valid although the tribunal of the place of the petitioner's residence received a request for appointing an expert and holding consultations. The petitioner did not receive a decree on the conclusion of evidence proceedings either, and the acts of the case suggest - as the ponens of the Rota decree notes - that even the new procurator appointed by the petitioner did not take any action or effort in the interest of his client which the ponens sums up with the following statement: *Agitur ergo probabiliter de procuratore viri actoris pro aliis negotiis*. The author of the adjudication also points out that the decree on the publication of the acts of the case sent to an invalid address only included a time limit regarding the inspection of the acts i.e. two weeks, at the seat of the tribunal, when it was known that the petitioner lives abroad. Despite the physical absence of correspondence, the petitioner contacted the Tribunal and informed it that it was impossible for him to appear for the publication, thus in the decree conclusion, the ponens states that the tactic used by the Tribunal of the first instance only granted an apparent possibility to inspect the acts – *constituebat concessionem facultatis impossibilis fruitionis*, and there were no obstacles preventing the Tribunal from sending the acts of the case to a tribunal of the petitioner's place of residence.

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[20] I. ZUANAZZI, *Lo ius ad probationes…* op. cit., p. 89 ref. 62: „In giurisprudenza si ritiene invalido il decreto di pubblicazione sia quando abbia sottratto totalmente alle parti lo spazio di esercizio del diritto, sia quando abbia talmente ristretto i termini da renderlo moralmente impossibile: «*sententiam insanabiliter nullam esse ob iuris defensionis denegationem, si termini pro exhibitione probationum et argumentorum illustratione „*siano stati totalmente sottratti alle parti*" ... aut tam coarctata, ut parti conventae moraliter impossibile fuerit suas probationes exhibere* » (decisio c. Faltin, *Olomucen*, 27 giugno 1991, in *II diritto ecclesiastico* CIV (1993), 149, n. 8). Si consultino anche i decreti c. Burke, *Ruremunden*, 16 novembre 1989, in *Monitor ecclesiasticus*, CXV (1990), 268, n. 6-8; c. Davino, *Ruremunden*, 16 maggio 1991, in *II diritto ecclesiastico*, CII (1991), 174, n. 6. Per garantire l'esercizio effettivo di questo diritto, si afferma anche il dovere di permettere l'esame degli atti presso il tribunale nella cui circoscrizione la parte convenuta ha il domicilio, qualora le sue condizioni economiche non le permettano di sostenere un viaggio troppo lungo (decretum c. Burke, *Angelorum in California*, 14 dicembre 1989, p.n. 15.685, in *Ius canonicum et iurisprudentia rotalis*)".

[21] Dec. c. Erlebach of 16.07.2015 Prot. N. 22.555, B. Bis 102/2015 – unpublished.

3. Proof classification

Publication of acts is linked to the possibility of classifying individual proofs while preserving the right of defense intact. The instruction of can. 1598 of the CIC and art. 229 and 231 DC includes three conditions which, as emphasized by A. Conde, must be fulfilled jointly for a judge to be able to apply this special process solution[22]. The said conditions are as follows: the case must pertain to public good, grave danger must be avoided and the right of defense must remain intact. In the wide range of rights of a person, in the context of the tension between the right to discretion and the right to inspect all proofs, priority is given to the latter[23]. As emphasized by M. Moodie in his article in which he comments among others on the Rota decree *coram* Burke of 15.11.1990[24], the right of defense in marital cases pertaining to public good and the status of persons, becomes increasingly important and relevant[25].

Canonist doctrine also points to three elements regarding *grave danger* threatening a party(ies) or witnesses who request that their testimony or proofs submitted be classified. Therefore, what is usually mentioned, are the concerns about the possible deterioration of relations between persons participating in the process concerns about future civil trials for violation of reputation, as well as situations in which the Church is persecuted and the religious freedom is significantly limited[26]. C. Gullo however assumes an attitude of considerable reserve or criticism when stating that both parties and witnesses should be aware and responsible for their actions and when testifying the truth, they will not be so easily faced with real and specific danger[27]. The reality of imminent danger, which is the basis for classifying a proof, is also

[22] Cf. A. CONDE*, Diritto processuale*… op. cit., p. 495.
[23] Cf. M. MOODIE, *Fundamental Rights nad Access to the Acts of a Case*, Studia Canonica (28) 1994, p. 148-149.
[24] DEC. C. BURKE of 15.11.1990, Studia Canonica (25) 1991.
[25] Cf. M. MOODIE, *Fundamental Rights*… op. cit., p. 150.
[26] Cf. M. HILBERT, *De publicatione*… op. cit., p. 530; also C. GULLO, A. GULLO, *Prassi processuale*… op. cit., p. 228-229.
[27] Cf. C. GULLO, A. GULLO, *Prassi processuale*… op. cit., p. 228-229. The author additionaly refers to situations of persons associated with criminal organizations who may appear in canonical proceedings, and notes that in such cases the guarantee of discretion and safety is indeed jutified. In the present context when it happens more and more frequently that a person is harassed e.g. by stalking, taking into account the growing possibility of defense offered by the state law, a sufficient solution seems to be, for instance, only the classification of the personal data

emphasized by another decree *coram* Burke of 21.06.1990 r.[28]. Furthermore, in the commentary on the said decision, A. Mendonça points to the necessity of justifying and explaining the nature of the imminent danger in a decree classifying a certain proof whereas any other arbitrary action of a judge in this scope - as the author notes - is a blatant violation of law[29]. As for more recent Rota decisions, one could indicate the decree *coram* McKay of 27.10.2007 B.103/07 which states that the said justification of a judge's decree is required to ensure validity so that it would be possible to appeal such a decree by virtue of can. 1617 of the CIC[30]. While maintaining the overriding principle of keeping the right of dense intact, it is clearly emphasized that if a proof admitted in a case presents a clear and significant value for the resolution of the case, it should not be withheld from the parties[31]. According to art. 234 DC, if a judge decides that some act is not to be shown to the parties, advocates of the parties, having first taken an oath to observe secrecy, may study the same act. However, it is noted in the literature that even if an advocate is appointed ex officio in a situation when a party represented himself/herself before the tribunal earlier and was faced with a tribunal decision to classify a document of the case, the solution does not always fully guarantee that the integrity of the right of defense will be kept. Rafael Chacón, in his article, mentions a case in which one of the elements violating the right of defense was the passivity of an advocate appointed ex officio for the purpose of inspecting a document classified by the judge[32]. Thus, it can be stated that in situations when a judge observes such a passive attitude of a person entitled to inspect a classified process document, he should take action to cause such a person to take any action so that the guaranteed integral right of defense is indeed real and not illusory.

Referring to specific examples, one may mention the case which following an affirmative decision issued by one of the tribunals was transmitted to a second instance for

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of a person, or other parts of a testimony which indicate relations between a witness and a party(ies) and could thus reveal the identity of the witness. J. Llobell claims the same: „(…) tensioni, imbarazzi, situazioni spiacevoli, ecc. sono parte integrante le normali difficoltà di un processo, non potendo pertanto essere ritenuto come veri *pericoli*, tanto meno *gravissimi*" - J. LLOBELL, *I processi matrimoniali*… op. cit., p. 220.

[28] DEC. C. BURKE of 21.06.1990, in: A. MENDONÇA, *The Right of the Parties*… op. cit., p. 328.

[29] „(…) iudex aliquomodo naturam periculi, eiusque gravitatis rationem indicare debet. Insignis abusus foret si iudex modo arbitrario in hac materia egisset" - DEC. C. BURKE of 21.06.1990, in: A. MENDONÇA, *The Right of the Parties*… op. cit., p. 330.

[30] „ (…) periculum in decreto ad eius validitatem specificari debet quia ex canone 1617 parti patet recursus contra iudicis iussum non mere ordinatorium (…)" - DEC. C. MCKAY of 27.10.2007 B.103/07, in: AA.VV, *L'istruttoria nel processo di nullità matrimoniale*, Città del Vaticano 2014, p. 270.

[31] Cf. J. LLOBELL, *I processi matrimoniali*… op. cit., p. 221.

[32] R. R. CHACÓN, *La publicación de las actuaciones. Intervención de las partes y los abogados*, Revista Española de Derecho Canonico (68) 2011, p. 67, ref. 101: „En la *Relazione sull'attività della Rota Romana nell'anno giudiziario 2007* (Quaderni dello Studio Rotale 2008 p. 83) ya citada en nota 27, se hece referencia a un decreto rotal que declaró la nulidad, por denegación del derecho de defensa, de la sentencia recaída en un proceso en el que, entre otras circunstancias, la posibilidad de conocer las actas se había reservado al abogado nombrado de officio *che peraltro non aveva svolto alcuna attività* (B. 20/07)".

the purpose of possible confirmation thereof by a decree. The conduct of the case showed that the petitioner challenged the validity of his marriage to the respondent. On 17.02.2013, tribunal of the first instance accepted the marriage nullity claim, and on 10.02.2014 asked a process question whether the said marriage is null on the ground of a *simulation of marital consent by the respondent* (can. 1101 of the CIC), *exclusion of marital fidelity, insolubility and the good of offspring by the respondent* (can. 1101 § 2 of the CIC). Following the conducted case instruction, the sentence of 17.09.2015 proved the nullity of that marriage on the ground of the exclusion of fidelity and indissolubility of marriage by the respondent.

All process acts were sent to the Tribunal of the second instance by letter of 24.09.2015, and on 08.10.2015 turnus admitted the case for proceedings and, having analyzed the documentation of the case, stated that the sentence issued in this case was null.

First, the decree made a reference to the obligation to publish acts. The necessity to perform this process act under penalty of nullity is emphasized by can. 1598 § 1 of the CIC. It should have been noted in the case in question that following the respondent's failure to respond to the pending suit and to appear at the hearing at the place of her residence, she was declared absent on 10.02.2014. However, on 01.08.2014 the respondent actively participated in the trial and thus under art. 139 § 1 DC obtained the right to information regarding tribunal activities, including the right to inspect acts of the case and the publication of the sentence. The letter of 21.10.2014 addressed to the respondent shows however that the reservation made by the respondent to *make her testimony available only to the ecclesiastical tribunal and no one else*, was treated as an intention to „relinquish" further participation in the case and access to the aforementioned information on the conduct of the process. Two issues need to be clarified at this point.

First, as regards the classification of the testimony of the respondent, despite her reservation regarding its publication, the decision with respect thereto may only be made by a judge in order to avoid a most grave danger (can. 1598 § 1 of the CIC). As indicated in the doctrine, the right to classify a specific process proof remains with the judge, once it is decided whether there are premises for the application of the exception from the general rule concerning the publication of acts of the case to the parties involved in the process as provided in the said cannon. The possibility to apply it is not however an absolute right of the party making such a request[33]. Furthermore, it must be indicated that the parties lived in different countries and

[33] Cf. P. BIANCHI, *La pubblicazione degli atti di causa can. 1598*, Quaderni di diritto ecclesiale (12) 1999, p. 84.

were quite far away from each other, and thus there was no risk of any danger, nor was it indicated by the respondent.

The treatment of the respondent's will to have her testimony classified as if it was an intention to relinquish all information on the conduct of the process is another issue. The said letter of 21.10.2014 gave the respondent an alternative i.e. she either agrees to the publication of her testimony or will be declared absent. It must be noted that according to the above-mentioned stance, the tribunal was not absolutely bound by the respondent's stance on the matter in question, and even when it agreed to classify her testimony, there were no grounds justifying the failure to inform the respondent about her right to inspect the acts and to withhold the publication of the sentence with respect to her. As a result of the absence of those elements, the respondent was denied the right of defense[34]. The said decision was the only possible decision in this case since *quod non existit nec confirmari potest*[35].

4. Conclusion of evidence proceedings

Conclusion of evidence proceedings, as indicated in jurisprudence, is a point of transition from the stage of instruction to the stage of case discussion. Can. 1599 of the CIC and art. 237 DC present three possible bases for the chief judge of the college to issue a decree closing evidence proceedings: the parties declare that they have nothing else to add, the useful time prescribed by the judge to propose proofs has elapsed, or the judge declares that the case has been instructed sufficiently. As noted by M. Mingardi, the most frequent circumstance that occurs in the ordinary practice is the second situation when the useful time for the presentation of defense arguments or new proofs, set during the publication of the acts of the case, elapses without any activity of the parties[36]. Even though an absence of the decree closing evidence proceedings is not sanctioned with the penalty of nullity, G. Erlebach notes however that it may impact the implementation of the right of defense, in particular in the case of parties who act without the support of an advocate, and are granted the possibility to inspect proofs of the opposing party only during the publication of acts[37], particularly when the useful time for the

[34] Cf. Akta Trybunału II instancji w Poznaniu, sygn. akt 44/15 W.
[35] DEC. C. JAEGER of 23.03.2012 B. 41/12, in: AA.VV, *L'istruttoria*… op. cit., p. 295. To some extent it also applies to situations when an appeal is lodged by the defender of the bond or one of the parties at a point when the sentence has, for various reasons, not yet been published to the other party, unless he/she was legally declared absent.
[36] Cf. M. MINGARDI, *Conclusione e riapertura dell'istruttoria*, in: AA.VV, *L'istruttoria*… op. cit., p. 186.
[37] Cf. G. ERLEBACH, *La nullità della sentenza*… op. cit., p. 271; also C. GULLO, A. GULLO, *Prassi processuale*… op. cit., p. 234.

parties to present their defense arguments is not set[38]. A good practice suggested by the Rota is, as mentioned above, to set the useful time already in the letter informing parties of the publication of acts; it often happens that one of the parties - and sometimes both - waive this right to inspect the acts. However, such a decision is not tantamount to an absolute relinquishment by the party(ies) of the right of defense; as G. Erlebach notes in one of his decrees „integrity of the right of defense includes the possibility for the parties to present their own remarks and replies – *Restrictus iuris et facti*, as is the case for the defender of the Bond to present his *Animadversiones*"[39]. Ponens is of the opinion that in the judgment in question one could not have any reservations regarding the conduct of the trial at the first instance until the issue of the decree closing the evidence proceedings. Analysis of information provided to the parties as regards the publication of acts and the conclusion of evidence proceedings, as well as the discussion stage of the case led however to a conclusion that the sentence of the first instance was null. Decree on the publication of acts issued on 07.12.2010 included only a general information on the possibility of inspecting acts of the case in a period from 10.01.2011 to 31.01.2011, and the possibility of supplementing the case instruction (thus two constitutive elements of the right of defense were indicated - the right to inspect acts of the case and the right to present new proofs). However, as noted by the defender of the bond of the Rota Tribunal, the letter regarding the publication of acts did not inform the parties about the possibility of presenting defense arguments, nor were they notified of the decree concluding the evidence proceedings. The respondent, who in his reply to the first summons relied on the justice of the Tribunal and did not appear to give his testimony, or for the consultation with the expert, was not denied the right of defense; however, the situation was different in the case of the petitioner who was active during the trial[40]. An indirect proof thereof was an information including a response to the petitioner's question of April 2013 regarding the status of the case, when she was assured that the sentence would be published by the end of 2013 which confirmed, as the Ponens notes, the conclusion of the discussion stage and thus violation of the petitioner's right of defense. The same date of the decree concluding the evidence proceedings and the transmission of acts to the judges so that each of them could prepare the votum, was, in the opinion of the promoter of justice of the Roman Rota, an additional premise indicating that it was a deliberate action which by definition excluded the petitioner's right of defense.

[38] Cf. G. ERLEBACH, *La nullità della sentenza*… dz. cyt., p. 221; also C. GULLO, A. GULLO, *Prassi processuale*… op. cit., p. 234.
[39] DEC. C. ERLEBACH, of 26.06.2016, Prot. N. 22.406 B. Bis 55/16 – unpublished.
[40] „(…) ex omissa notificatione decreti conclusionis in causa scatet essentialis violatio iuris defensionis saltem mulieris atricis" – DEC. C. ERLEBACH of 26.06.2016, n. 6.

Ratio nullitatis – as noted in the decree by G. Erlebach – was thus *substantalis laesio principia contraditorii in phasi discussoria*[41].

Conclusion

The cases referred to above show that not only matters related to correct understanding of the doctrine of the integrity of the right of defense but also ordinary situations related to informing parties of their rights may pose a constant challenge. Even though the knowledge of canonical law regarding marriage is clearly increasing among petitioners, transparent communication and information provided by tribunals with respect to the parties' right of defense may save a lot of time and prevent difficult situations. The principle of preserving the integrity of the right of defense shows that in cases regarding the status of persons, this right is neither less important nor treated more leniently.

[41] DEC. C. ERLEBACH of 26.06.2016, n 8.