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PROOF IN PROCEEDINGS FOR THE DECLARATION OF NULLITY OF MARRIAGE

For centuries canon law has underlined that marriage, including non-Catholic marriages, enjoys the favour of law. This means that marriage is regarded as valid until something to the contrary has been demonstrated [Witkowski 2014, 87]. A process must therefore be held according to the procedure under canon law. When doing so, a procedural principle of Roman law is applied, namely – *actori incumbit probatio* – the burden of proof weighs on the plaintiff. This principle was also embedded in the 1983 Code of Canon Law[1] in can. 1526 § 1: *Onus probandi incumbit ei qui asserit*, i.e. The onus of proof rests upon the person who makes an allegation [Bartczak 2013, 3]. The marriage annulment process begins with a petition (can. 1674) where the plaintiff must put forward the legal grounds for their petition and the minimum proof and general facts to justify the plea. Thus, from the very beginning, the plaintiff [Greszata 2002, 167-90] is obliged to prove their plea (can. 1060). This strengthens the view of the doctrine, indicating that the plaintiff's attitude can in no case be passive [Sztychmiler 2007, 175-76], and their role in the process is to produce relevant proof, as listed in the CIC/83. These proofs are witnesses' testimonies, expert opinions, declarations of the parties, documents, inspection, and presumptions.

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[1] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317 [henceforth cited as: CIC/83].

1. The general concept of proof

At the outset, the concept of proof must be clarified. L. Peiper explained proof as "persons or things that are presented to convince the court about whether a specific factual, significant and contentious circumstance is true or not" [Peiper 1934, 553; cf. Budniaczyńska 2017, 180]. The term of proof fall under the broader concept of evidence [Pawluk 1973, 243], which may also refer to evidence-finding, evidentiary items, or evidence result [Sztychmiler 2007, 172]. However, it is thanks to proofs that the judge can have moral certainty as to the intended verdict in the case.

The canonical doctrine has developed several categories of proofs. The first category covers direct evidence that directly proves the so-called main fact, i.e. obligatory to resolve the case, and indirect evidence which only indirectly lead the judge to draw relevant conclusions [Pawluk 1973, 244]. There is also personal evidence, the source of which is the person. It takes the form of the questioning of the parties, witnesses and experts; there is also material evidence, such as things. There is also another distinction made, namely into complete (sufficient) and incomplete (insufficient) evidence, primary and secondary evidence, and main and contrary evidence [Idem 1971, 251]. Sufficient evidence, in principle, furnishes full evidence while insufficient one necessitates doubtful facts that are only probable to be supplemented with further arguments. Primary evidence, of first-hand evidence, come from an eyewitness or authentic instrument; secondary evidence in only auxiliary. Is covers copies of documents or testimonies of witnesses who have obtained information from another person [Idem 1973, 244-45].

According to can. 1527 § 1, any type of proof may be admitted if useful for the investigation and lawful. Apart from the six types of proof permitted in the procedure, also other decent evidence can be admitted supported by the modern knowledge and technology [Peiper 1934, 553]. The choice of material is assessed by the judge who issues a decision on the taking of evidence [Pawluk 1973, 247]. The judge is unrestrained in his or her assessment of submitted proofs [Greszata 2007, 156], and therefore relies primarily on his own experience. The main reason for rejecting evidence is the apparent intention of the party to prolong the proceedings, but also

some evidence may be irrelevant for the case or does not help explain the circumstances at a satisfying level [Pawluk 1973, 247]. In can. 1527 § 2, the legislator underlines that the judge who rejected some proof is obliged to re-consider the rejection at the request of the party.

It should be noted that proof is only collected after the subject and scope of the dispute have been established, i.e. when it becomes clear what doubt the court is supposed to resolve and what facts are conducive to the institution of the proceedings. The exception is when proof should be secured against loss (*ne pereant probationes*) where it may not be possible, or may be seriously hindered, to use the proof at a later time, or if there is a real threat to the witness's life [Pawluk 1973, 248]. As regards the questioning of witnesses, can. 1528 provides that a lay person, appointed by the judge, may perform the questioning if a party or witness fails to appear in court. This solution is available to people who, due to religious views, refuse to testify before a Catholic clergyman. This is to emphasize the principle of freedom of conscience [ibidem, 248].

2. Individual proofs

As already mentioned elsewhere, the CIC/83 provides for six types of proof, each of which will be discussed in detail below.

2.1. Testimony of witnesses

According to can. 1547, proof by means of witnesses is admitted in all cases, under the direction of the judge. The doctrine of canon law approaches the witness in two ways, namely *sensu largo* and *sensu stricto*. A witness *sensu largo* is a person who can provide relevant information based on their personal observations; it can also be a person present while drawing up or performing a legal act [Grochowska 2018, 174]. A witness *sensu stricto*, in the procedural sense, is a person who can provide the court with information about facts or circumstances that may determine the outcome of the proceedings [Sztychmiler 2009, 183]. In principle, anyone who is not prohibited to do so by the law may be a witness (can. 1549). The legislator recognizes persons under 14 years of age and mentally deficient persons as incapable to testify. They can, however, be heard if the judge declares by a decree that it would be appropriate to do so (can. 1550 § 1).

Unfit to act as witnesses are the parties and those appearing on their behalf, the judge and their assistants, the advocates and others assisting in the case as well as priests, in respect of everything which has become known to them in sacramental confession (can. 1550 § 2).

Witnesses are primarily appointed by the parties, which does not rule out a situation in which witnesses can also be called in by the defender of the bond or the promoter of justice [Pawluk 1973, 265]. A witness is summoned by the judge who issues a relevant decree (can. 1556); a properly summoned witness is to appear or provide the reason for absence (can. 1557).

If appearance in person is hindered, a judge may be delegated to hear the witness. As proposed by the legislator, it will be the parish priest having jurisdiction over the witness's place of domicile (can. 1558). As already mentioned, witnesses are heard by the judge, his delegate or an auditor attended by a notary. The presence of advocates and procurators is allowed, provided that there is no risk of divulging procedural secrets (can. 1559, 1678). However, the presence of the parties during the questioning is excluded [Lempa 2013, 99]. Each witness should be questioned individually and separately, and the judge should ensure that the witnesses do not share the content of their testimonies with one another [Grochowska 2018, 177]. One of the most important elements of the questioning is to remind the witness of the grave obligation to tell the whole truth (can. 1562 § 1); in exceptional cases, the witness may also be requested to make a promise or swear an oath. The judge asks general questions about the witness, but, in the main part, they ask about the case. It should be noted that the judge is obliged to adapt the questions to the level of mental development of the witness and his or her mentality [Kazimierski 2014, 427]. Witnesses testify orally; if they are dumb or deaf, they use the assistance of a certified translator or, if possible, submit the testimony in writing. The notary takes the minutes of the hearing which is read out to the witness afterwards. After minor adjustment and corrections, the minutes is signed by the witness, notary and the judge holding the hearing [Pawluk 2016, 269]. In principle, the hearing of a witness should be a one-time activity; however, can. 1570, provides for an exception if the judge considers a re-examination necessary

to decide the case, and there is no danger of collusion or inducement [Kazimierski 2014, 428].

In weighing evidence, the judge may, if necessary, seek testimonial letters (can. 1572). Such letters are usually issued by a parish priest and contain three types of questions: about the witness's morals, truthfulness, and religion. The letters are said to be of importance for the judge when passing a sentence [Witkowski 2014, 103]. The judge also takes into account the condition of the person, i.e. education and marital status, as well as the degree of uprightness (can. 1572 § 1). Can. 1572 § 2 requires the judge to take account of the source of witness's knowledge, particularly if it was something seen or heard personally. It is also necessary for the judge to verify whether the witness is constant and consistent in the testimony or varies (can. 1572 § 3), as well as whether there is corroboration of the testimony and whether it is confirmed in other items of evidence (can. 1572 § 4).

The deposition of one witness amount to full proof. However, in the absence of other witnesses, the testimony of one witness should be relied upon, provided they are sufficiently corroborated by a number of other evidence-bearing circumstances (can. 1573).

2.2. Declarations of the parties

Declarations of the parties are depositions or answers to questions given by the parties to a trial during the proceedings that may have a probative value. Not all of them have this value but prove helpful in strengthening the judge's moral certainty [Leszczyński 2000, 108]. In-trial declarations can have four forms: *confessio*, i.e. confession, questioning, oath and other declarations of the parties.

2.2.1. *Confessio* – confession

Confessio or confession is an assertion of fact against oneself, made verbally or in writing, by a party regarding the subject matter of the case (can. 1535). A characteristic element of *confessio* is, in a sense, a desire to uncover the truth, even at the cost of aggravating one's own situation in a trial [Leszczyński 2015, 122]. The CIC/83 provides for two types of *confessio*: judicial and extra-judicial.

A judicial confession is an assertion of fact against oneself, concerning a matter relevant to the trial, which is made by a party before a judge; this is so whether the assertion is made in writing or orally, whether spontaneously or in response to the judge's questioning (can. 1535). Thus, a judicial confession is a declaration that what the other party says is true [Pawluk 1973, 251]. If the dispute is private and the case does not concern the public good, a judicial confession relieves the other parties from the onus of proof (can. 1536 § 1). The judicial confession itself is full proof. However, if the public good is at stake, it will not be sufficient but can have a probative value if it is weighed by the judge in association with the other circumstances of the case (can. 1536 § 2). The CIC/83 does not determine the probative value of a judicial confession and leaves its assessment to a judge who should consider if against the motives and circumstances of the case (can. 1538).

The other type of *confessio* is an extra-judicial confession. This term describes a declaration made out of court and regarding essential facts of the case and having a negative effect for the confessing party [Pawluk 1973, 254]. The probative value is this kind of confession, if used in a trial, is to be weighed by the judge who has to consider it in connection with all circumstances (can. 1537). Admittedly, in cases for the declaration of nullity of marriage, an extra-judicial confession prevails. However, this kind of declaration does not offer the judge with full proof [Pawluk 1973, 254-55].

2.2.2. Questioning of the parties

The questioning of the parties is also to elicit their declarations. It is a set of answers that the parties give during the evidence-taking phase of the proceedings and aims to clarify any doubts around the dispute [Leszczyński 2000, 108]. The judge may always question the parties the more closely to elicit the truth. He must do so if requested by one of the parties, or in order to prove a fact which the public interest requires to be placed beyond doubt (can. 1530). Certainly, the testimony of the parties should be considered as having probative value, however, it is only incomplete and auxiliary. This means that the value of testimony depends on the type and circumstances of the case because if all doubts have been

removed, no questioning of the parties seems unnecessary [Pawluk 1973, 249]. The range of questions asked to the questioned party is broad and is not limited only to the facts stated in the petition but also addresses other evidence [Arroba Conde 1993, 356].

2.2.3. Oath

Another type of declarations of the parties is an oath. It is said to encourage a party to answer questions truthfully and to highlight that perjury is offensive to God (can. 1199 § 1, 1200 § 1). In cases of declaration of nullity of marriage, the parties should swear an oath. However, the judge cannot force it because this obligation may be ignored if there is an important reason, e.g. lack of religious denomination or membership in a non-Christian religious system. The fact of refusing to take an oath should be recorded in the questioning minutes [Pawluk 1973, 250].

2.2.4. Other declarations

The doctrine also mentions other declarations, such as any statements made by private parties in the process, auxiliary declarations and such that reinforce other proofs. As G. Leszczyński points out, the declarations contained in a petition may be treated as an extra-judicial confession [Leszczyński 2000, 109].

2.3. Documentary proof

According to the doctrine, the concept of document is twofold. *Sensu largo*, a document is any medium containing information about events relevant to the case. *Sensu stricto*, however, it is an item, most often a piece of paper covered with writing and conveying some thoughts, a statement or description [Sitarz 2004, col. 42]. In can. 1540 the ecclesiastical legislator makes a distinction between public ecclesiastical documents, public civil documents, and private documents. Public ecclesiastical documents are those drawn up by an official person in the exercise of his or her function in the Church. The doctrine primarily points to papal and episcopal documents as well as those of the Roman Curia. Public civil documents are

those so named by secular law.[2] All other documents have the private status, for example, contract, last will and testament, letter, family documents, and all kinds of records notes [Bartczak 2013, 6-7].

In can. 1544 the legislator provided guidance on the submission of documents. Namely, in court, documents do not have probative force unless they are submitted in original form or in authentic copy and are lodged in the office of the tribunal, so that they may be inspected by the opposing party. Only documents admitted to the case are considered. The judge can decide that a document common to each of the parties is to be submitted in the process (can. 1545). Such documents are drawn up in the best interest of both parties, for example, last will and testament and various contracts. It should be remembered, however, that none of the parties will be obliged to submit such documents if there is a danger of harm (can. 1548 § 2) or a danger of violating a secret (can. 1546 § 1). Harm may occur as a loss of reputation or other grave evil while the binding secret should be understood as professional or official secret [Pawluk 1973, 259].

In can. 1541, the legislator stresses that public documents constitute acceptable evidence of those matters which are directly and principally affirmed in them, unless it is otherwise established by contrary and clear arguments. Therefore, a public document does not promise any evidentiary effectiveness because, like all proofs, it is subject to an independent review by the judge. The opposite objection regarding the lack of authenticity of a specific document must, however, be fully substantiated [ibidem, 257].

According to can. 1536 § 2, a private document accepted by a party or judge has such a probative value as a judicial confession in relation to its author or signatory but also to those who are linked to their case. In relation to others, it has the same significance as the parties' declarations other than confessions. Therefore, a private document does not enjoy the power of full proof in relation to the public good, unless its credibility can be corroborated in the light of other unchallenged circumstances [ibidem].

[2] Act of 17 November 1964, *Code of Civil Procedure*, Journal of Laws of 2019, item 1460 as amended, Art. 244, para. 1.

If documents have been damaged, corrected, blurred or have other defects, the judge will have to assess their probative value and usefulness in the case [Bartczak 2013, 7-8].

2.4. Experts

Under canon law, expert is a professional or specialist with professional qualifications acquired through specialist studies or many years of experience [Sztychmiler 2007, 229]. From the court's perspective, an expert is a specialist who, having been instructed by the judge and relying upon their professional knowledge or experience, issues an opinion – for judicial purposes – on establishing a fact or the actual nature of some matter [Pawluk 1973, 276]. The obligation to appoint an expert rests with the judge [Ramos 1998, 364]. The judge may designate an expert himself, either at the request of the parties or after hearing their opinions or suggestions. It is also possible to admit reports already made by other experts (can. 1575). The parties may suggest experts, but they must be approved by the judge (can. 1577). The parties and those who appear in court on their behalf, as well as the judge and his assistants, an advocate and others who in the same case assist or have assisted the parties are deemed unable to appear as witnesses (can. 1550 § 2).

The judge, taking into account the request of the parties or of the defender of the bond, should specify the subject of the expert's examination by issuing a relevant decree (can. 1551). After hearing the request, the judge should offer the expert sufficient time to prepare a report and, if necessary, ensure access to the files of the case (can. 1577 § 2; cf. can. 1577 § 2).[3] If several experts have been appointed, each of them draws up their own report, independent of the others, unless the judge has order that a joint report be prepared and signed by each expert. If this is the case, such a joint report should indicate any differences of opinion (can. 1578 § 1).

When preparing a report, an expert relies on moral certainty which is rested on the completed examination, expert knowledge and experience [Pawluk 1973, 278]. In the report, the expert should avoid authoritative

[3] It should be remembered that also the so-called private experts proposed by the parties and approved by the judge have the right to inspect the files of the case (can. 1581 § 2).

judgements or arguments that go beyond the limits of his competence [Sobczak 2010, 122]. If the report is not clear to the judge, he may request the expert to provide explanation, if necessary (can. 1578 § 3).

When deciding the case, the judge is not bound even by the joint expert evaluations. He weighs the report in the light of all the circumstances of the case, considering all contradictions and ambiguities and stating whether the evaluations are specific and convincing [Pawluk 1973, 279]. When is giving the reasons for his adjudication settlement, the judge must state on what grounds he accepts or rejects the conclusions of the experts (can. 1579 § 2).

2.5. Judicial inspection

Judicial inspection is when a judge carries out a direct examination of a location, i.e. a place or thing, to determine facts that are relevant to the case. If possible and not entailing excessive costs, the inspected item should be delivered to court. Otherwise, the judge will inspect the item where it is located. The judge may order inspection to a delegate or auditor [Pawluk 1973, 280].

The legislator orders that a detailed inspection report be drawn up and signed by the judge and a notary. The signature of other persons participating in the inspection, e.g. a witness or expert sharing their opinion with the judge (can. 1583), may also be needed.

At this point, also procedural experiment should be mentioned, which is somewhat different from inspection. A procedural experiment is an experiment or reconstruction of the course of events that are examined by the judge. Such an experiment is thought to make the witness's deposition more reliable [Pawluk 1973, 280].

2.6. Presumptions

As defined by the legislator, a presumption is a probable conjecture about the authenticity of a fact on the basis of other facts or circumstances already proven (can. 1584). If the presumption has been adopted by the law, it is referred to as a legal presumption, but if the judge accepted it, it is known as a judicial or actual presumption [Dullak 2016, 2]. In cases of the declaration of nullity of marriage, presumptions usually relate to the defects

of matrimonial consent. When relying on a presumption, a judge refers to the circumstances that preceded the contracting of marriage, were present at the time of contracting, or were revealed after entering into marriage [Wenz and Wróblewski 2007, 151-52]. It should be borne in mind, however, that a judge, when declaring nullity of marriage, must achieve moral certainty and exclude any error instead of relying only on evidence and presumptions [ibidem, 281]. It should be noted that the legal presumptions under the CIC/83 are challengeable, which means that they can be rebutted by evidence to the contrary. On the other hand, judicial presumptions do not appear in the CIC/83 because they can be inferred by the judge only during the trial.

A party having a legal presumption at their disposal is freed from the onus of proof, which then falls to the other party (can. 1585). However, the opposing party may challenge the legal presumption by demonstrating its spuriousness. The judge can do the same *ex officio*. If there are no legal presumptions to support a disputed fact, the judge may put forward his own presumptions while keeping in mind that they related to the disputed fact (can. 1586). Judicial presumptions are of auxiliary character compared to other proofs. However, judicial presumptions can still play a key role as they can significantly influence the process of judge's acquisition of moral certainty. No doubt, they must create a rational set of dependable and complementary conclusions so as to give a complete picture of the truth [Pawluk 1973, 282].

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Proof in Proceedings for the Declaration of Nullity of Marriage

Summary

The question of proof in the proceedings for the declaration of nullity of marriage is quite extensive and multidimensional at the same time. We should keep in mind that the process permits evidence that is not mentioned in the 1983 Code of Canon Law, but which arises due to the progress of modern technologies and observed increase of public involvement in the 'virtual world'. Therefore, in the future, one should expect only an upward trend in this matter. However, not only the evolving catalogue of proofs affects the extent of the issue. We should also look at the probative value of each of them, as well as their assessment by the judge. These elements are relevant from the procedural point of view, because thanks to the disclosure of the probative and free force and a reasonable assessment of evidence, the judge will obtain, or not, moral certainty that will enable him to resolve the case and pass a sentence. Therefore, it seems necessary to study the issue of proof while keeping a certain balance and maintaining focus on its probative value and assessment by the judge in trial.

Key words: marriage, declaration of nullity of marriage, proof, canon law, procedural law

Dowód w procesie o stwierdzenie nieważności małżeństwa

Streszczenie

Zagadnienie środków dowodowych w postępowaniu o stwierdzenie nieważności małżeństwa jest dość rozległe, a ponadto wielowymiarowe. Należy pamiętać, że w procesie dopuszcza się środki dowodowe, również niewymienione w Kodeksie Prawa Kanonicznego z 1983 r., a które pojawiają się dzięki rozwojowi nowoczesnych technologii i obserwowanemu wzrostowi zaangażowania społeczeństwa w 'świat wirtualny'. Zatem, w przyszłości, wypada się spodziewać jedynie tendencji wzrostowej w tej kwestii. Jednak nie tylko ewoluujący katalog środków dowodowych wpływa na rozległość zagadnienia. Należy pochylić się również nad mocą dowodową każdego z nich, a także na ich ocenie sędziowskiej. Są to elementy istotne z punktu widzenia procesowego, ponieważ dzięki ujawnieniu mocy dowodowej i swobodnej oraz rozsądnej ocenie tych środków, sędzia uzyska, bądź nie, pewność moralną pozwalającą na rozstrzygnięcie sprawy i wydanie wyroku. Dlatego też niezbędnym wydaje się badanie zagadnienia środków dowodowych, jednak przy zachowaniu pewnej równowagi, zapewniającej skupienie się również na ich mocy dowodowej i kwestii oceny sędziowskiej już podczas procesu.

Słowa kluczowe: małżeństwo, stwierdzenie nieważności małżeństwa, środki dowodowe, prawo kanoniczne, prawo procesowe

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