Biuletyn Stowarzyszenia Kanonistów Polskich XXX (2020), no. 33, p. 7-21
https://doi.org/10.32077/skp.2020.33.1-1en

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EMERGENCE OF CONTRADICTION IN THE PROCESS TO DECLARE THE NULLITY OF MARRIAGE*

Marriage processes, including *de nullitate matrimony* cases, are ranked as the so-called special processes, which means that, apart from their own norms, in matters that go beyond such norms, the relevant canons on general trials and ordinary contentious trial should be applied if the nature of the matter does not preclude it and while following special norms for cases the status of persons and cases pertaining to the public good (can. 1691 § 3 MIDI).[1] A dictionary definition of litigation understood as court proceedings, "in which the parties confront each other with specific and contradictory demands,"[2] clearly indicates that the conditions *sine qua non* for cases to declare the nullity of marriage include not only the existence of the parties to the process but also the different statements made by each of them, i.e. contradiction.[3]

Yet, the mere initiation of the trial by identifying its parties and their interests is insufficient to describe the model of the canonical process in cases for the nullity of marriage, known in the doctrine as *iudicium cum principiis*.[4] Next to structural and procedural elements, the model is made up by general

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* This article was produced as part of research project No. UMO-2017/25/N/HS5/02554, financed by the National Science Centre.

[1] Franciscus PP., Litterae apostolicae motu proprio datae *Mitis Iudex Dominus Iesus* quibus canones Codicis Iuris Canonici de causis ad matrimonii nullitatem declarandam reformantur (15.08.2015), AAS 107 (2015), p. 958-70 [henceforth cited as: MIDI].

[2] *Słownik Języka Polskiego*, https://sjp.pwn.pl/szukaj/sporny.html [accessed: 28.04.2020].

[3] The literature on the subject indicates that submitting a case of possible nullity of marriage to the ecclesiastical judge means establishing a formal contradiction [Greszata 2003b, 244].

[4] See Greszata 2008.

directives of court proceedings known as process rules. On the other hand, out of the three principles governing the parties, the principle of bilateralism and the adversarial principle are of importance for the emergence of contradiction, which will be discussed below. The subject of the analysis, however, will not be the principle of the equality of the parties, which becomes relevant only after contradiction has been established, when there are two parties to a trial submitting adversarial statements about its subject.

1. The nature of the principle of bilateralism

Any court proceedings *in abstracto* require the presence of two parties, which remain in a special relationship with each other, and an entity appointed to issue a decision in the case. It can also be based on the convergence of process roles, meaning the concentration of various process functions within one entity. The theory of law provides that the initiation of court proceedings should allow for its bilateral (two-party) nature or be based on the participation of interested entities, yet these rules do not necessarily need to be qualified as process rules [Rylski 2017, 22-23]. It is also possible to institute proceedings as a unilateral (one-party) process, i.e. without any parties and the process overseen only by the entity heading the procedure [Grzegorczyk and Tylman 2014, 111].

The principle of bilateralism should be understood as instituting the process with only two litigants: the petitioner and the respondent, irrespective of how many participants will ultimately appear on each of the sides [Jodłowski, Resich, Lapierre, et al. 2009, 187]. The specific relationship between the parties to a trial, or precisely the opposition of represented interests, is also manifested in the very definition of a party as "adversary in a litigation."[5] This relation is different when it comes to the rule for participation, in which the proceedings are carried out in such a way that the position of the interested entities were autonomous and independent from others. What seems particularly important is that, when describing this principle, it is not necessary to take a position between the supporters of conflicting positions, especially assuming that only one participant may take part in the process [ibid., 188]. On the other hand, the investigation principle means conducting a process in

[5] *Słownik Języka Polskiego*, https://sjp.pwn.pl/sjp/strona; 2524638.html [accessed: 28.04.2020].

which the entity interested in resolving the case is not capable of "fighting" for their own interest before the court. The absence of the adversary's position excludes relations of an adversary nature [Cieślak 2011, 206-207].

Keeping that in mind and moving on to the process in cases for the nullity of marriage, it should be emphasised that, although it is a special process, the final decision is made by a tribunal. Importantly, also Pope Francis confirmed in the procedural reform of 2015 that the process in cases for the nullity of marriage should be held in a judicial rather than administrative way in order to safeguard the truth of the sacred bond, which is best ensured by the judicial order (Preamble, MIDI).

It should also be kept in mind that a marriage is brought into being by the lawfully manifested consent of persons who are legally capable (can. 1057 § 1),[6] thus a man and a woman mutually give and accept one another by an irrevocable covenant (can. 1057 § 2). The doctrine of canon law notes that due to the special subject matter of a marriage nullity process, however, it does not constitute just any controversy dependent on the parties. Due to the existing sacrament, or the spiritual good of the Church, the character and nature of this process should be taken into account when determining the position of the party [Dzięga 1994, 93]. The marriage covenant by which a man and a woman establish a partnership of their whole life was elevated by Christ the Lord to the dignity of a sacrament between the baptized (can. 1055), therefore the process in cases for the nullity of marriage is a process involving the public interest.

A marriage nullity process, like any other trial, requires the presence of two parties, the petitioner and the respondent [Llobel 2015, 177]. In the canonical marriage nullity process, bilateralism has gained the rank of a process principle, included among the rules governing *iudicium* and of significance for the parties, as well as relating to the examination of the case within its framework [Greszata-Telusiewicz 2014, 6]. The doctrine rightly points out that the existence of *iudicium* depends on the existence of the principle of bilateralism in marriage nullity proceedings, assuming that the two parties address the same subject, and this is justified [Greszata 2008, 279]. Hence, the consequence of existence of the principle of bilateralism is the inability

[6] *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].

of a single party to institute a process acting on two opposite sides. At the same time, this means that this process cannot be held with either more or fewer parties, and all entities appearing in the proceedings are grouped on two different sides [Rylski 2017].

The petitioner is a person who requests the judge to conduct proceedings, and the respondent is a person summoned by the judge, at the petitioner's request, to appear and participate in the proceedings [Dzięga 1994, 93]. It is noteworthy that, in line with the principle of *nemo iudex sine actore*, the judge cannot institute proceedings *ex officio* because only the submission of a plea in accordance with the canonical norms by an interested party or by the promoter of justice authorises the judge to investigate the case (can. 1501). A court judgement is null with a nullity which cannot be remedied if a trial takes place without the plea by one of the parties or failure to initiate a trial against the respondent (can. 1620, 4º). The canons referred to above undoubtedly testify to the importance that the legislator attaches to the presence of two parties in a trial. If we also take into account the instruction which says that any person, baptized or unbaptized, can plead before a court, and it is the responsibility of the respondent to respond in accordance with the law (can. 1476), the relevance of the principle of bilateralism in the canonical trial may not be questioned.

The principle of bilateralism was also upheld in many provisions of the code, for example in can. 1504, 2º-4º, 1505 § 2, 2º, 1524 § 1. It seems, however, that this principle was most explicitly expressed in the norm of can. 1476 [Greszata 2008, 279], which points to entities that may be parties to trials before ecclesiastical tribunals. At this point, however, CIC/83 attaches more attention to entities that may assume specific roles in a trial than to the definition of the parties as such [Krukowski 2007, 97-98].

In cases for the nullity of marriage, the bilateral dimension is addressed in a greater detailed. It seems obvious that due to the nature of trials regarding matrimony not all of the entities indicated in can. 1476 can take part in proceedings to declare the nullity of marriage, especially as a petitioner and respondent. It should be added that the very determination of the parties to the process of marriage nullity is one of the most controversial issues in the doctrine of canon law and goes beyond the scope of this paper, considering, for

example, the number of proposed concepts.[7] For the sake of this study, it is assumed that two parties, petitioner and respondent, appear before an ecclesiastical judge who, by way of proper right, can investigate cases of the baptized (can. 1671 § 1 MIDI). The division into the petitioner and respondent side is the basic criterion for all authors because each process requires their participation. First, the relation to the subject of the trial is exposed, while the relations of the parties to the judge and to each other, as well as the scope of their rights and obligations, are of secondary importance to the basic criterion of differentiation of the parties [Greszata 2003a, 105].

Depending on the legal situation, in a marriage nullity trial, various legal entities are entitled to initiate it, thus obtaining the status of a party to the trial. There is also no doubt that the *locus standi* of the party has a fundamental influence on the status of the case as it empowers the party to bring a case to declare the nullity of marriage. In can. 1674 § 1 MIDI, the legislator clearly named entities that are qualified to challenge a marriage; at the same time, it stressed that gain the status of petitioner [Stawniak 2007, 179-80]. The persons qualified to challenge a marriage are, above all, the spouses. This means that the relevant petition may be brought by either of the spouses, in some cases jointly by them, and in a special situation the promoter of justice who can also become qualified. Given that, it should be noted that depending on whether the petition is filed jointly by the spouses or is submitted to the ecclesiastical tribunal only by one of them or by the promoter of justice, the status of the party will be different. From this point of view, the following ways of framing a bilateral procedural relationship can be distinguished.

In principle, the persons entitled to challenge a marriage are the spouses who find that there is a serious doubt as to the validity of their marriage and decide to bring the case to court to be decided by an ecclesiastical judge [Greszata 2003b, 243]. A common example of how parties are constituted in marriage nullity cases is by the filing of a petition by one of the spouses. Then, the spouse who initiated the proceedings becomes the petitioner, while the

[7] After P. Majer, it is worth referring to the concepts of respondent proposed by such canon law researchers as C. Danisi; Z. Grocholewski; C. Halbig and B. Ries; or I. Zunazzi. The author is of the opinion that the respondent is the spouse who is to be summoned in accordance with can. 1507 § 1 [Majer 2002, 167]. Some views on the position of the respondent in Polish canon studies were collated by M. Greszata, who referred to such authors as: F. Bączkowicz, M. Fąka, T. Pawluk, A. Dzięga [Greszata 2003a, 101-105].

other spouse is considered the respondent. In this way, the proceedings embody the principle of bilateralism.

The other option is for both spouses to apply to an ecclesiastical judge to declare the nullity of marriage (Art. 102 DC).[8] It therefore seems that in this case both spouses have the status of petitioners as they file the petition jointly. In such a case, the respondent is the defender of the bond [Erlebach 2007, 337]. A similar situation also occurs in the *coram Episcopo* process because a prerequisite for the commencement of a briefer process before a bishop is that both spouses, or one having received the other's consent, request that the marriage be declared invalid (can. 1683, 1º MIDI). The petitioner in such a briefer process is both spouses who unanimously bring the case, and the respondent is the defender of the bond [Majer 2015, 166].

The right to challenge a marriage is also vested with the promoter. This is true in all situations where the nullity of the marriage has already been announced, and the marriage cannot be made valid or it is not advisable to do so (can. 1674, 2º MIDI). If the marriage has been challenged by the promoter of justice, they have the same powers as the petitioner, unless stipulated otherwise due to the nature of the matter or under the law (Art. 58 DC). In such a trial, the promoter of justice acts as the petitioner, while the spouses are the respondents [Erlebach 2007, 337].

The principle of bilateralism is inherently linked to the adversarial principle. Only the presence of two litigants who strive to prove their point before an ecclesiastical judge can lead to a procedural "fight" that underlies the principle of contradiction [Greszata 2008, 275]. In other words, the determination of the positions of the parties to a trial determines how the adversarial principle will be implemented in a specific process in a case for the nullity of marriage.

2. The nature of the adversarial principle

The literature on the subject demonstrates that the adversarial principle is linked to "protagonism of the parties," and thus their leading role in a process

[8] Pontificium Consilium de Legum Textibus, Instructio servanda a tribunalibus dioecesanis et interdioecesanis in pertractandis causis nullitatis matrimonii *Dignitas connubii* (25.01.2005), "Communicationes" 37 (2005), p. 11-92 [henceforth cited as: DC].

[Ariano 2017, 168]. What follows, the presence of the parties forms a *iudicium* where two parties confront each other in front of a judge, and their opposing arguments frame the trial on the basis of the adversarial principle. The petitioner's claim can be called named *dictio* while the argument of the other party opposing the petitioner's argument is known as *contra dictio.* Upon mounting opposing arguments, a process is framed based on the adversarial principle [Greszata 2003b, 241]. It should also be noted that natural law underpinning the right of defence requires that the parties have a chance to defend themselves as no judgement can be passed without observing the adversarial procedure [Pompedda 1995, 91]. Indeed, there is a close relationship between the principle of the right of defence and the adversarial principle while stressing that the right to defence consists in *ius ad contradictorium* and *ius ad auditionem iudicialem* [Acebal Luján 1993, 31]. Therefore, for a process respecting the adversarial principle to occur, it is necessary not only for two parties to be present but for the parties' arguments to be contradictory.

The literature on the subject explains the adversarial nature of a canonical trial as "a directive that the parties have the right to fight to secure a favourable outcome of the trial for themselves" [Pikus 2009, 296]. Therefore, the definition referred to above assumes that the parties to a marriage nullity trial have the right to exercise their procedural rights in line with the applicable provisions of canon law, among them the right to "battle" for such a judge's decision that will benefit them. Dzięga is right noticing that that the question of winning a marriage nullity trial is not the parties' first priority. The point is that the words and act of the parties should be truthful because every action of a Christian must be illuminated by faith [Dzięga 2007, 177]. Therefore, it seems that the parties' "fight" should take the form of *razionalitá dialogica* because it reflects equal dignity of the parties and guarantees full and symmetrical dynamics in the implementation of the adversarial principle [Arroba Conde 2016, 97]. The need for all trial participants to seek the truth about marriage in *de nullitate matrimonii* processes is rested on the principle of *salus animarum suprema lex*, while the adversarial principle ensures that the truth can be uncovered in the best way [Andrzejewski 2019, 116].

The literature on the subject points to two aspects of the adversarial principle in marriage nullity cases. The first aspect is related to the presumption of validity of marriage, that is, marriage enjoys the favour of law; therefore,

if in doubt, it should be considered valid until proven otherwise (can. 1060). The controversy arises from proposing an argument against what the Church claims about a particular marriage. The other aspect of the principle in question is the contradiction of the claims presented and defended by the spouses and concerning the validity or invalidity of their marriage [Greszata 2003b, 245; Greszata-Telusiewicz 2014b, 13].

Given that there are three entities entitled to challenge the validity of a marriage, first of all, the case of one challenging spouse will be discussed who claims invalidity in their plea. The adversarial principle is in a way related to the content of the plea and the motives that justify the judgement passed in the case brought by the petitioner [Leone 2018, 46]. An important step after the petitioner has filed their petition, which at the same time guarantees the adversarial character of the procedure, is *citatio* [Dotti 2005, 77]. It is vital because it enables the constitution of the parties to the trial, the petitioner and the respondent. Next, *iudicium* begins and the parties assume rights and obligations towards each other, the subject matter of the controversy and the judge [Greszata-Telusiewicz 2013, 10].

The process *contradictorium*, with regard to the discussed method of challenging a marriage, may arise through the respondent's presentation of an opposite claim. This claim can be advanced in two ways. First, the respondent is entitled to make a claim about the validity of the marriage, which essentially relieves them from taking part in the process. As a general rule, the onus of proof rests with the party who makes an allegation (can. 1526 § 1), and in cases for the nullity of marriage there is a norm that presumes its validity (can. 1060). Consequently, the respondent does not have to show any excessive procedural activity, as it is the petitioner's responsibility to prove the opposite claim. Second, the respondent may claim the nullity of marriage but on a different ground than the petitioner, which will also lead to the institution of an adversarial case. Should this be the case, the respondent will have to submit evidence to prove their claim. Third, the respondent may disagree with the claim made by the petitioner not only as to the nullity of their marriage but also its ground. In accordance with the law, a judicial confession and declarations by the parties in cases which concern the public good can have a probative value unless there are other elements which wholly corroborate them (can. 1536 § 2). Then, the respondent should also provide evidence in order to overturn the presumption of the validity of the ma-

rriage, thus, in a way, cooperating with the petitioner. What follows, apart from the respondent making a claim of the validity of marriage and depending on the configuration, both the petitioner and the respondent essentially put forward a claim that is opposite to the presumption of the validity of the marriage, thus leading to the active participation of both spouses.

Fourth, it is possible to deem the respondent absent from the trial and, still, conduct it until the final judgement in a situation where they do not appear before the court without sufficient justification or fail to respond, as requested by the judge, in writing or to appear in person in order to enable the joinder of the issue (can. 1592 § 1). In such a case, there is no contradiction arising between the respondent and the plaintiff because the latter does not present a claim to the contrary of the petitioner's. For this reason, there is no controversy emerging between the spouses. In such a situation, there is a contradiction between the petitioner's claim of the invalidity of the marriage and the Church's claim of the presumption of its validity, which is put forward in the trial by the defender of the bond. If the respondent thereafter appears before the judge, or replies before the trial is concluded, they can bring forward their conclusions and proofs, without prejudice to the provisions of can. 1600 (can. 1593 § 1).

Another way to challenge a marriage is seen in the *coram Episcopo* process in which a diocesan bishop decides in cases for the nullity of marriage whenever a relevant petition was filed both spouses or by one of them acting upon the other's approval (can. 1683, 1º MIDI]. If the *libellus* was presented to introduce the ordinary process, but the judicial vicar believes that the case may be treated with the briefer process, he is, in the notification of the *libellus*, to invite the respondent who has not signed the *libellus* to make known to the tribunal whether they intend to enter and take an interest in the process (Procedural Rules, Art. 15).[9] The literature on the subject indicates that in a briefer trial before the bishop it is possible to indicate only one and the same ground for the nullity of marriage. Otherwise, the prerequisites for the trial, i.e. the obvious nature of the invalidity and easy and quick gathering of proofs, will not be met [Majer 2015, 166].

[9] The New Procedural Rules for the Substantiation of Marriage Nullity Cases are an integral part of the MIDI [henceforth cited as: Procedural Rules].

With regard to the briefer trial before the bishop, it should be noted that by the very nature of the process, i.e. by requiring both spouses or one of them with the consent of the other to submit a petition, the scope of the adversarial principle will be reduced to the issue occurring between the spouses and the defender of the bond. This requirement is characteristic of the discussed process because the petitioner participates actively. A similar case is when both spouses apply to an ecclesiastical judge to declare the nullity of marriage (Art. 102 DC).

The third way of establishing contradiction in marriage nullity trials is to have a marriage challenged by the promoter of justice. The promoter of justice enjoys the rights of the petitioner rights related only to formal disposition. Therefore, they may submit evidential requests, resign from the trial or make an appeal, yet, they cannot act through material disposition, that is, be questioned as a party, which means that their declarations will still be treated as a witness testimony [Sztychmiler 2007, 112]. In the event of challenging a marriage by the promoter of justice, an adversarial process to declare the nullity of marriage is instituted in a different procedural configuration than when the petition comes from the spouses. Here, the promoter of justice as the petitioner is obliged to bring both spouses to trial, and they will appear as the respondent on the basis of participation. In this case, depending on the reaction of the respondent spouses, the following procedural configurations are possible.

First, the spouses may agree with the claim put forward by the promoter of justice by making a judicial confession or submitting relevant statements, which means that the adversarial nature of the process will be ensured through participation of the defender of the bond. Otherwise, each party may indicate a different ground for the nullity of the marriage than that provided by the promoter of justice, which will lead to contradiction between the promoter of justice, each of the spouses, and the defender of the bond. Moreover, one of the parties may agree with the ground proposed by the promoter of justice. Then, contradiction occurs between the claims of the promoter of justice and one of the spouses and the defender of the bond and the other spouse. The same situation takes place when one of the spouses claims that their marriage is valid. There can also be a situation when the spouses support the claim of the validity of their marriage, and then their statements, supported by the defender of the bond, will constitute counterclaims to the petition for-

mulated by the promoter of justice. Finally, if the spouses are deemed absent from the trial, contradiction will occur between the promoter of justice and the defender of the bond.

Regardless of how the petitioner responds, the defender of the bond takes part in the marriage nullity process and is obliged to present and expound everything that may reasonably be argued against the nullity or dissolution of the marriage (can. 1432). The defender of the bond is an official representative of the Church, guarding the durability and sacramentality of marriage, thus embodying the principle of *favor matrimonii* [Leszczyński 2006, 52]. Before the entry into force of CIC/83, Rotal decisions suggested that "ad essentiam iudicii sufficiunt actoris petitio et contradictio defensoris vinculi" [Villeggiante 1984, 9]. Currently, it is regarded as the guarantor of the adversarial principle in cases for the nullity of marriage [Schöch 2018, 233].

The participation of the defender of the bond ensures an adversarial nature of the process in all those cases where the respondent either agrees with the ground of nullity advanced by the petitioner or cooperates with them in order to prove the claim of nullity of the marriage. The same is true when the petitioner and the respondent prove the marriage invalidity on various grounds. A similar situation occurs when the respondent does not take part in the trial and is deemed absent. However, if the respondent makes a claim about the validity of marriage, the party that is *pro vinculo* is the one participating. Nevertheless, the law imposes different obligations on the petitioner and the defender of the knot. The defender is obliged to submit all kinds of evidence, objections and charges that will contribute to the defence of the bond while seeking the truth (Art. 56 § 3 DC). Their duty is to act *pro vinculo*; therefore, they can never seek the nullity of marriage, and when they have nothing to propose or expound against nullity, they can rely on a fair judgement of the tribunal (Art. 56 § 3 DC).

Conclusion

The following conclusions should be drawn from the discussion outlined above:

1) The principle of bilateralism and the adversarial principle are closely related as they both are at the very core of the process and are linked to a structural element of *iudicium*, i.e. the petitioner and the respondent in ca-

ses for the nullity of marriage. The presence of two parties representing opposing procedural interests leads to the institution of a process based on the principle of adversary claims made by the parties before the judge. Without the principle of bilateralism, a process for the nullity of marriage based on contradictory claims would not be instituted.

2) The principle of bilateralism is a necessary yet insufficient condition for an adversarial issue to occur between the parties to a marriage nullity trial because a constitutive element necessary for the occurrence of the adversarial principle is to make a claim challenging the validity of marriage. The emergence of an adversarial procedural relationship between the parties depends primarily on the entity that challenged the validity of a marriage, on the one hand, and, on the other, on the activity of the spouses who, through a rational dialogue under the *iudicium*, should seek to verify the claim as to the validity of their marriage.

3) By introducing the institution of the defender of the bond, the Church ensures that an adversarial process takes place for the nullity of marriage in all cases where the spouses demand a *pro nullitate* decision, or the respondent does not take part in the trial. The defender of the bond acting *pro vinculo* does not only promote the incorporation of the adversarial principle but also contributes to the discovery of the truth about marriage, which helps harmoniously achieve the final goal of canon law, i.e. *salus animarum*.

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Emergence of Contradiction in the Process to Declare the Nullity of Marriage

Summary

The article presents the underlying assumptions related to the theoretical aspects of emergence of contradiction in a matrimonial nullity trial as a result of the marriage being challenged by one of the spouses, both spouses, or a promoter of justice. In this context the discussion concerns the essence of the principle of bilateralism and the adversarial procedure, as contradiction can only emerge where there are two sides in a trial presenting contradictory positions. In all cases where both spouses request a *pro nullitate* decision, or where the respondent does not participate in the

trial, the presence of contradiction in matrimonial nullity trial is ensured by the institution of the defender of the bond.
Key words: canon law, principle of adversarial trial, nullity of marriage

Powstanie kontradykcji w procesie o nieważność małżeństwa

Streszczenie

Artykuł prezentuje podstawowe założenia dotyczące teoretycznych aspektów powstania kontradykcji w procesie o nieważność małżeństwa poprzez zaskarżenie małżeństwa przez jednego z małżonków, oboje małżonków albo rzecznika sprawiedliwości. W tym kontekście rozważania dotyczą istoty zasady dwustronności oraz zasady kontradyktoryjności, bowiem dopiero, gdy istnieją dwie strony procesu o przeciwstawnych stwierdzeniach, możliwe jest powstanie kontradykcji. Natomiast instytucja obrońcy węzła małżeńskiego zapewnia powstanie kontradykcji procesu o nieważność małżeństwa w tych wszystkich przypadkach, gdy obydwaj małżonkowie domagają się wydania wyroku *pro nullitate* albo strona pozwana nie bierze udziału w procesie.

Słowa kluczowe: prawo kanoniczne, zasada kontradyktoryjności, nieważność małżeństwa

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