Małgorzata Koterba

Proofs acquired illicitly in processes declaring the nullity of marriage

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Małgorzata Koterba
UKSW – Warszawa

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It is not easy to prove in process the nullity of marriage.[1] These proceedings inherently pertain to the public good and they also affect any interests of spouses, family, offspring and the entire community of the Church. Therefore, in this case, it is important to bear in mind the primary principle of the Church law specified in can. 1752 of the Code of Canon Law: *salus animarum suprema lex*. Furthermore, the aim of proofs gathered and furnished in the process is to present the truth about the contracted and analysed marriage in a way that the judge achieves the moral certitude in terms of its validity or nullity.[2]

1. Proofs in the process declaring the nullity of marriage

The term "proof" (Latin "*probatio*") is a polysemous word in both a common and a legal language. The most frequently, the term "proof" means argumentations, the aim of which is to submit to a judge arguments that cause him to believe that any questionable or disputable circumstances are true. The proof in a proper meaning aims to cause the judge to be morally con-

[1] Cf. *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus fontium adnotatione et indice analytico-alphabetico auctus*, Libreria Editrice Vaticana 1989. Polish translation: *Code of Canon Law. The Polish translation approved by the Episcopal Conference in 1984* [here in after referred to as the "1983 CCL"), can. 1691.

[2] Cf. 1983 CCL, can. 1608 §1.

vinced that arguments expressed by the party in litigation are true. The means of proof enables the judge to become convinced of the existence or non-existence of facts to which the party in litigation applies. The principle of objective truth is the most essential for the proof proceedings.[3] The mode of proving and means of proof in ordinary disputes set forth in the Code of Canon Law of 1983 are specified in cann. 1526–1586. The legislator mentions the following means of proof: declarations of the parties, proofs by documents, witnesses' testimonies, experts' opinions, judicial examination, judicial inspection and presumptions. The aim of the proofs and the nullity of marriage is to establish the historical truth that confirms or negates the validity of the contracted marriage. The specific process, i.e. the nullity of marriage, does not practically apply all of the aforesaid means of proof. The key and the most popular means of proof applied in processes concerning the nullity of marriage proceedings is the parties' declarations, witnesses' testimonies, experts' opinions and proofs by documents.

Before discussing the first means of proof, i.e. the parties' declarations, it is noteworthy that this notion includes three types of declarations: ordinary testimonies of the parties in litigation, judicial confession and extrajudicial confession.[4] However, each of them ceases to be legally effective, and consequently they are not proofs any longer, if they have been made as a result of the factual error or were coerced by force or grave fear.[5] The parties' testimonies, despite the fact they are specified in the Code of Canon Law among the norms applying to means of proof, are considered as non-standard means of proof. In cases concerning the validity of marriage the parties perfectly know the truth about facts to be proved. It is essential to remember, however, that the parties are personally interested in the result of proving, hence their testimonies may frequently be biased. In the light of the foregoing the testimonies of the parties in litigation may be considered as an auxiliary means of proof. Therefore, the judge should not attribute the force of full proof to the parties' testimonies as, pursuant to can. 1536 §2, such force may only be a judicial confession or declarations of the parties made in the so-called non-suspicious period (until attempts are made to ascertain the nullity of marriage and not later than filing the complaint by the petitioner). Pursuant to can. 1530 the judge is exceptionally obliged to question the parties in two cases: at the request of one party or to prove a fact which the public interest requires to be placed beyond doubt. Moreover, in cases concerning the state of persons, that is in cases for the nullity of marriage, the parties are strictly obliged to testify.

[3] Cf. T. Pawluk, *Kanoniczny proces małżeński*, Warszawa 1973, pp. 104–105.
[4] Cf. 1983 CCL, can. 1530, 1535, 1537.
[5] Cf. 1983 CCL, can. 1538.

The party questioned is obliged to tell the whole truth and this obligation – under can. 1532 – is emphasized by the party's oath.[6]

A judicial confession is specified in can. 1535. Such judicial confession is only made by one party concerning the matter of the process, in writing or orally, before a competent judge. The confession includes such facts that may be proven at the process by its parties. It does not matter whether the parties make such confessions spontaneously or while being questioned by the judge. The essential feature of this confession and, at the same time, it is necessary that the party ascertaining a given fact does it against oneself.[7] It follows that in cases concerning the nullity of marriage the judicial confession will confirm the appealed nullity ground.[8] It seems to be right that such means of proof is more powerful than the ordinary declarations of the parties. However, the final decision is made by the judge.[9]

The extrajudicial confession as set forth in can. 1538 is the written or oral assertion of the parties in litigation concerning the object of the process and made outside the tribunal where the process is conducted. Therefore, such confession may be made prior commencement of the process and when the process is pending. The extrajudicial confession is usually the party's ordinary declaration when the party applies to the same in the process. Since the legislature does not specify who may furnish this type of proof, it is therefore appropriate to adopt that such proof may be furnished by anyone. The force of this means of proof largely depends on the time when it is furnished and criteria set forth in can. 1572. The exceptionally essential may be the declaration made in the so-called non-suspicious period.[10]

Pursuant to can. 1679 the declarations of the parties, even if they are supported by premises proving their truth, are not the sufficient proof against the validity of marriage. The proof by means of witnesses is a result of the testimony given by the witness in the process. The following individuals are exempted from the obligation to respond: clerics regarding what has been made known to them by reason of sacred ministry; civil officials, people bound by professional secrecy and those who fear that from their own testimony will befall them.[11] Minors below the fourteenth year of age and those of limited mental

6 Cf. R. Sztychmiler, *Oświadczenia stron jako środek dowodowy*, in: *Ecclesia et status. The jubilee book on the 40th anniversary of the scientific work of prof. Józef Krukowski*, ed. A. Dębiński, K. Orzeszyna, M. Sitarz, Lublin 2004, pp. 565–568.

7 Cf. L. del Amo, *Dowody*, in: *Kodeks Prawa Kanonicznego. Komentarz*, ed. P. Majer, Kraków 2011, p. 1155.

8 Cf. T. Rozkrut, *Dowody*, in: *Komentarz do Instrukcji procesowej "Dignitas connubii"*, Sandomierz 2007, p. 258.

9 Cf. R. Sztychmiler, *Oświadczenia stron jako środek* dowodowy, work cited, p. 575.

10 Cf. ibid., p. 577.

11 Cf. *Dignitas connubi Instruction to be followed in diocesan and inter diocesan tribunals in cas-*

capacity are not allowed to give testimony under the applicable laws.[12] Witnesses (relatives, friends and individuals whom the parties in litigation trust) are obliged to tell the truth not about their own opinions but about facts pertaining to the contested marriage. When assessing such testimonies the judge should request the qualification certificate for each of the witnesses issued by the witnesses' vicar or pastor. Furthermore, it is necessary to take into account the witness' personality (age, education, devotion, mentality and the like), his/her trustworthiness and coherence of testimonies. In evaluating the witnesses' testimonies it is necessary to consider whether their testimony derives from what has been seen or heard personally, or whether from opinion, rumour, or hearsay. In marriage processes it is also necessary to consider whether the witness' testimony is based on knowledge acquired in the so-called non-suspicious period. The criterion essential for evaluating this type of proof is also whether the witness' testimony has co-witnesses to the testimony or is supported or not by other elements of proof.[13]

Pursuant to can. 1680 in cases of impotence or defect of consent because of mental illness, the judge is to use the services of the expert unless it is clear from the circumstances that it would be useless to do so; in other cases the prescript of can. 1574 is to be observed. This canon provides that "the assistance of experts must be used whenever the prescript of a law or of the judge requires their examination and opinion based on the precepts of art or science in order to establish some fact or to discern the true nature of some matter." Therefore, it is assumed that the expert's opinion is used, most notably in marital matters contested due to impotence, mental illness or personal disorders (e.g. neuroses, psychoses, psycho and sexual anomalies, etc.). The Code does not clearly specify the characteristics of the expert. It is rational, however, that the expert should be best prepared technically or scientifically as such expert makes the opinion on a very specific issue that refers to his/her knowledge in which the judge is not competent. The expert's other crucial features are honesty and impartiality. The expert should also consider in his/her opinion the principles of Christian anthropology and the teaching of the Church regarding to the marriage. The expert's opinion should pertain to the psycho and physical structure of the person at the moment of contracting his/her marriage. The evidentiary value of the expert's opinion appointed by the judge is very high. The opinion is considered as a more objective means of proof because the expert is not associated with the parties in litigation.[14]

es concerning the nullity of marriage, 25 January 2005 [here in after the "DC"], Art. 194 §2.

[12] Cf. DC Art. 196.

[13] Cf. T. Rozkrut, *Dowody*, work cited, p. 276.

[14] Cf. G. Leszczyński, *Wartość dowodowa opinii biegłego w procesie o stwierdzenie nieważności*

The proof through documents is the last means of proof applied in the marriage processes. Both public and private documents are acceptable.[15] Public documents are executed by a public ecclesiastical person or a state authority and are deemed to be authentic and truthful.[16] Other documents are considered private. The proof force of private documents is the same as the extrajudicial confession or the parties' declarations.[17] The documents may become an essential form of the proof, especially when they contain information not available in other means of proof. Concurrently, the judge must with great caution and prudence evaluate the value of such proof, its authenticity and whether information included in the document is true and explicit.[18] Finally, the judge, based on the principle of the unfettered evaluation of proof, decides whether such means of proof is approved or rejected.[19] However, it is not identical with the judge's lawlessness. The canon law contains many evidentiary orders, e.g. can. 1526 §2 laying down that facts are alleged by one of the contending parties and admitted by the other, unless the law or the judge nevertheless requires proof.[20] There are also documents that are considered by the legislature as the evidentiary prohibition.[21] This prohibition mainly aims at protecting such values as the secrecy of confession, professional and state secrecies, risks of economic loss etc.

The legislature allows the application of means of proof different than those discussed above. This is set forth in can. 1527 §1 of the Code of Canon Law. This is the judge who as the chairman of a collegiate tribunal is obliged by the law to prudently allow each of means of proof furnished by the party in litigation. However, it should be remembered that, on the one hand, the parties' right to prove their points should not be limited, but, on the other hand, proofs that bring very little to the case and only extend the process should not be multiplied.[22] The superior aim of the process declaring the nullity of marriage is to find out the truth about the contracted marriage.

małżeństwa, in: "Ius Matrimoniale" 2004, No 9, pp. 137–145.

15 Cf. DC Art. 183.

16 Cf. 1983 CCL, can. 1540–1541.

17 Cf. 1983 CCL, can. 1542.

18 Cf. C. A. Cox, *The contentious process*, in: *New Commentary on the Code of Canon Law*, ed. J.P. Beal, J.A. Coriden, T.J. Green, New York 2000, p. 1675.

19 Cf. 1983 CCL, can. 1527 §2.

20 Other evidentiary orders for the Code of Canon Law of 1983, can. 1536 §1, 1585, 1541.

21 Cf. 1983 CCL, can. 1546 §1, 1548 §2.

22 Cf. R. Sztychmiler, *Dowody*, in: *Komentarz do Kodeksu Prawa Kanonicznego*, vol. V, chapter VII. *Procesy*, ed. J. Krukowski, Poznań 2007, pp. 178–179.

2. The judge's moral certitude in the process declaring the nullity of marriage

In can. 1608 §1 the legislator specifies that for the pronouncement of any sentence, the judge must have moral certitude about the matter to be decided by the sentence. It is not true, however, that the judge must have moral certitude to pronounce each judgment. Such moral certitude is only required, if the judge makes the judgment that acknowledges that the petitioner is right or admits the right sought by such party. Such moral certitude does not need to occur, if the judge pronounces the judgment contrary to the petitioner.[23] Therefore, what is moral certitude and how can it be achieved by the judge?

The canon literature defines *moral certitude* (Latin *moralis certitudo*) as the judge's opinion based on the conviction that facts or objects are true or false. It differs from the doubt and even the achieved moral certitude excludes the judge's doubt about the learned truth. It is also not identical with the judge's subjective opinion, his convictions or empirical and physical certitude. The moral certitude is placed between the absolute certitude (completely unachievable by the man) and the doubt. Can. 1608 §2 provides that the judge achieves moral certitude from the acts and the proofs. The same canon in par. 3 specifies that the judge must appraise the proofs according to the judges own conscience and the applicable laws concerning the efficacy of certain proofs. Therefore, the judge cannot accept any information contained in case files indiscriminately and must make every endeavour to assess the credibility of individual proofs. Hence, the judge must read through the case files. If the judge is privately convinced about the nullity of marriage but this fact does not arise from the case files, the judge cannot declare its nullity. The judge, however, should endeavour to supplement the proofs – under the applicable laws – with those proofs that acknowledge such nullity. However, if the opposite arises from the case files, the judge would not be obliged to declare the nullity of marriage because according to Saint Thomas the judge should adjudge only on the basis of public knowledge.[24] The judge's ruling is a result of the thinking process consisting in allocating findings of facts and the law. The process assertion concerning the nullity of marriage is not frequently based on the irrefutable facts and uncontested means of proof. The fundamental difficulty in adjudicating by the judge is the application of norms resulting from allocating two protected elements: marriage identity and the person's right to

[23] Cf. Z. Grocholewski, *Pewność moralna jako klucz do lektury norm procesowych*, in: "Ius Matrimoniale" 1998, No 3, pp. 9–10.

[24] Cf. P. Sadowski, *Pewność moralna wymogiem wydania wyroku*, in: "Biuletyn Stowarzyszenia Kanonistów Polskich" 2003, No 16, pp. 57–64.

contract marriage. None of them can be emphasized at the cost of the other.[25] The judge's conscience concerning the formulation of the judgment should be based on the general principles of the divine law, canon law, guidelines of case-law, as well as his own experience, prudence and the tribunal's accuracy. When the judge cannot achieve moral certitude, he should follow the idea of the false sympathy.[26]

3. The notion of liceity in canon law

In the Code of Canon Law *liceity* occurs over thirty times as *liceitas, honestas* or *dignitas*. With reference to the procedural law and the subject of dignity, this term is included in can. 1527 §1. The dignity is expressed by the Latin term *"liceitas"*.

Dictionaries define this term as permission or authorization. As the text of the canon applies the adverbial form of this Latin word, hence the word *"licite"* means: permitted, legal, legitimate. On the other hand, the canon that interests us includes the adjective, i.e. *licitus, -a, -um,* which is translated as: permitted, permitted by law or custom, legal, fair.[27] The legal and moral definition of this term is specified in *Dictionarium morale et canonicum*[28]. *Licitum et illicitum* etymologically mean such actions of the person that are prohibited, ordered, permitted or banned by divine or human law. Therefore, everything what is illegal is also wicked. *Licitum* and[29] illicitum are terms from the border of law and morality and they refer to the moral evaluation of a given act of the person. The law of the Catholic Church applies the terms: *licit – illicit*, and hence it applies to ethical qualifications of a given act. It is impossible to understand the canonical *liceity* autonomously without referring to philosophy of morality or ethics and the human being is always in their centre. The acting party directs his/her acts towards it. Therefore, the acts or deeds are good, legitimate, and hence licit, if the agent respects in its activity the dignity of the human person.[30] The question arises, therefore, what affects liceity – human deed, the intention of the acting person or both of these elements. The answer

[25] Cf. R. Sobański, *Uwagi o tożsamości sędziego kościelnego*, in: "Prawo Kanoniczne" 2002, No 3–4, pp. 10–11.

[26] Cf. P. Sadowski, *Pewność moralna wymogiem wydania wyroku*, work cited, pp. 64–67.

[27] J. Sondel, *Słownik łacińsko-polski dla prawników i historyków*, Kraków 1997, p. 577.

[28] *Dictonarium morale et canonicum*, ed. P. Palazzini, vol. III, Romae 1966, p. 94.

[29] Cf. A. Buonotempo, *Licitum et illicitum*, in: *Dictionarium morale et canonicum*, work cited, p. 94.

[30] Cf. I. Staniszewski, *Godziwość jako kategoria kanoniczna*, in: *Kościelne prawo procesowe. Prawo rodzinne. Materiały i studia*, vol. IV, ed. A. Dzięga, M. Greszata, P. Telusiewicz, Lublin 2007, pp. 388–389.

to the posed question is included in the cited book: "Nihil, enim, contra legem per se licitum erit, nec illicitum ex sola intentione agentis quod lex non prohibeat, nec intrinsece malum ex lege licitum fiet unquam (...) Omne, enim, id quod externe est licitum ita praesumendum est etiam interne, nisi actus externus et intentio agentis contrarii per legitimas probationes appareant."[31] The activity that is illegal or contrary to the law, at the acting person's motives, cannot be illicit. Moreover, the activity that seems to be licit outside (and hence it corresponds to the agent's motives), without justified proofs, should not be considered as contrary. What is more, since the times of Saint Thomas the theologians and canonists believed that the Church statute fundamentally only described external acts, whereas the internal ones only when they were absolutely associated with the external act (the last act would not exist without the first one as the free human act) or if without the internal act, the external one could not be described by the law (e.g. intention while christening).[32]

As a conclusion of the etymological considerations the term *licitum et illicitum*, this term directly refers to the person's acts, not to his/her intentions. The act is *licit*, if it complies with divine or human law, i.e. the Church statute, and does not affect the dignity of the person against whom such act is directed. Therefore, the mode of action – the person's external act – is assessed.

4. Illicit and licit proofs in the process declaring the nullity of marriage

Proofs in the canon process declaring the validity of marriage are used to find out the truth about a given marriage, in particular whether such marriage was contracted validly or not. Therefore, it is necessary to furnish each proof that might help come to the truth and the judge should have moral certitude about the validity or nullity of the examined marriage. The canon law lays down how far one can go while furnishing *each* proof in the process. Pursuant to can. 1527 §1 proofs of any kind may be useful for adjudicating the case. Theoretically, the proofs may also include, except for the aforesaid and discussed ones, audio recordings, videos or private documents. In the same sentence, the legislature unequivocally emphasizes that the furnished proof must – besides its usefulness to respond to the procedural *dubium* – be *licit*. What does the term *licit* proof mean? Does it only refer to the object of the proof or also (or exclusively) to the way of obtaining it? Or maybe there is another element?

New Commentary on the Code of Canon Law published and edited by J.P. Beal, J.A. Coriden and T.J. Green scantily analyses can. 1527. The author of

[31] *Dictonarium morale et canonicum*, work cited, p. 94.

[32] Cf. R. Sobański, *Nauki podstawowe prawa kanonicznego*, Warszawa 2001, pp. 100–101.

the chapter entitled: *Proofs* – J. Gordon – describes the liceity of the proof: "Ruling on the liceity and utility of any particular proof, however, is the responsibility of the judge. For example, a judge could refuse to admit a proof obtained by any immoral means."[33] The judge is obliged to evaluate the liceity and utility of the submitted proof. For example, the judge may (but the author of the commentary emphasizes that the judge is not obliged to do so) reject any proof obtained by any immoral means. The significance of the liceity of the proof in the process is thoroughly described in the Spanish Commentary on the Code of Canon Law published by the Faculty of Canon Law, the University of Navarra in Pamplona. Jean-Pierre Schouppe commenting can. 1527 translates the adjective licit as legal, including the moral one.[34] Therefore, the admission of licit proof must correlate with the moral principle of the catechism according to which the end does not justify the means. Not all means are permitted to determine the judicial truth. The judge admitting such proof must consider the human dignity that may be violated by such proof in accordance with natural law and the Church Magisterium. Moreover, pursuant to 1546 §1 no one is bound to present those which cannot be communicated without danger of violating an obligation to observe secrecy. However, this is the judge who decides about admitting or rejecting such proof and hence about assessing it. This decision is exceptionally difficult, if the proof that raises doubts whether it is licit will shine a completely new light onto the object of the dispute. The judge should, particularly when the interest of the party may be violated following the disclosure of such proof, ask for permission to furnish this proof in the process. Otherwise, it is necessary to pronounce the judgment on the basis of the heretofore collected and admitted proofs, even if it is contrary to the judgment that indicates the illicit proof. The Italian legal and pastoral Commentary by Luigi Chiappetta very superficially refers to can. 1527. The author claims that the analysed canon directly suggests that the proofs in the process are not and cannot be freely provided by the parties, but this must be done in compliance with the law in terms of legality of such proofs and compliance with process procedures. He does not directly refer to the meaning of the word "licit" as he associates this term with the legal proof.[35] The German Commentary analyses can. 1527 §1 and lays down that in the proceedings there may be used all those proofs that are useful to explain any procedural doubts and are also *erlaubt* (Latin: *licitae*), i.e. permitted. The au-

[33] *New Commentary on the Code of Canon Law*, work cited, p. 1669.

[34] J.P. Schouppe, *Comentario exegetico al Codigo de Derecho Canonico*, ed. A. Marzoa, J. Miras, R. Rodriguez-Ocana, vol. IV/2, Pamplona 1996, p. 1283.

[35] L. Chiappetta, *Il Codice di Diritto Canonico. Commento giuridico-pastorale*, vol. II, Napoli 1988, p. 637.

thor emphasizes that the term *permitted* was not used in a legal sense (it would be tautology) but in a moral sense. By analysing the history of this canon, we are able to understand which method of acquiring a means of proof may be rejected because of being *illegal:* coercion (e.g. tortures) and moral impermissible conduct (e.g. examining whether the man is able to ejaculate in case of the legal doubt concerning his impotency, decree of the Congregation for the Doctrine of the Faith dated 19 May 1977). All the means of proofs that may help thoroughly understand the state of affairs, including those specified in the CIC of 1917 and those using the state-of-the-art technologies (sound and video carriers) are useful. The judge has the right to decide (can. 1677) which proofs, upon the request of the parties, may be admitted in the process.[36]

The Polish Commentary edited by Józef Krukowski does not refer to the liceity of proofs brought forward. In one sentence the author of the Commentary indicates that pursuant to 1527 §1 proofs of any kind which seem useful and are licit can be brought forward.[37] In the Polish version of Pamplona Commentary edited by Rev. Piotr Majer, the author of the chapter about the Proofs in the disputable process, in the commentary on can. 1527, does not completely refer to the liceity of proofs.[38] The author only refers to Art. 157 of the *Instruction Dignitas connubi:* "Proofs of any kind which seem useful for understanding the cause and are licit can be brought forward. Proofs which are illicit, whether in themselves or in the manner in which they are acquired, are neither to be brought forward nor admitted (cf. can. 1527, §1)."[39] The original version of the Instruction made in Latin uses the code term: *licitae.* First of all, the Instruction explains that the illiceity of proofs may arise from themselves and from the way they are acquired. The Polish Commentary on the Instruction emphasizes that in this provision illicit proofs are unequivocally inadmissible. However, some canonists hold that the rejection of such proofs restricts the way to find the truth. The Instruction, however, takes the side of the moral principle reminded by Jean-Pierre Schouppe in his commentary on can. 1527: the end does not justify the means.[40]

The presented Commentaries on the Code of Canon Law in very few cases deal with the meaning of the term *liceity* of proofs under can. 1527 §1. The Commentaries that even little dealt with this topic may be summarised in the following way:

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[36] *Munsterischer Kommentar zum Codex Iuris Canonici. Der kirchliche Ehenichtigkeitsprozeß nach dem Codex Iuris Canonici von 1983. Normen und Kommentar*, ed. K. Ludicke, Essen 1996, p. 149.

[37] Cf. R. Sztychmiler, *Dowody*, work cited, p. 177.

[38] L. del Amo, *Dowody*, work cited, p. 1151.

[39] Cf. DC Art. 157 §1.

[40] Cf. T. Rozkrut, *Dowody*, work cited, p. 258.

1) *Illecity* means the immoral mode of acquiring a given proof, contrary to the moral law, violating the person's dignity.

2) *Illecity* may refer not only to the mode of acquiring the proof, but also to the proof itself.

3) The judge always decides about assessing and bringing forward the proof.

Here, it is also necessary to mention the issue concerning the person privacy protection. Pursuant to can. 220 of the Code of Canon Law: "No one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy." Each person's right to good reputation does not arise from baptism, but from natural law and this right is vested with each human being.[41] The canon doctrine refers to the speech of Pope Pius XII who held that the human intimacy covered everything what was considered as human psyche, human personality and was not disclosed outside, on the contrary, it was protected against any third party's interference.[42] This provision is also used to assess means of proofs applied in the process. Hence, such proofs that entail the risk of harming either party's good reputation or that would violate the protection of such person's intimacy cannot be admitted, either.

The only Polish monograph concerning this subject is the book authored by Aleksandra Brzemia-Bonarek entitled: *Dopuszczalność dowodów zdobytych w sposób niegodziwy w kanonicznym procesie o stwierdzenie nieważności małżeństwa* ("Admissibility of proofs acquired illicitly in the canon process declaring the nullity of marriage"). Among the analysed legal books, this book also includes case-law of ecclesiastical tribunals, i.e. the practice of applying can. 1527 §1. In 1991 the Metropolitan Tribunal in Katowice was filed with the case for the nullity of marriage due to the incapacity to undertake the essential marital duties by both parties. Following the publication of case files the petitioner provided the tribunal with a copy of his wife's diaries. The diaries shed a completely new light on the woman's incapacity to undertake the essential marital duties, which had not been proven during the previous examinations conducted by the expert. The way the man acquired this proof is likely to be considered illicit. The proof included the woman's very intimate confessions, including her hatred for men, and hence her personality. Due to this proof, the tribunal ordered to re-publish the case files and requested the respondent in writing to refer to the provided proof. Since the woman did not respond at all, the tribunal, presuming that the woman agreed to use the proof, decided to admit the copy of the diary as the means of proof. The final

[41] Cf. J. Hervada, *Obowiązki i prawa wszystkich wiernych*, work cited, p. 213.

[42] Cf. P. Majer, *Ochrona prywatności w kanonicznym porządku prawnym*, in: *Ochrona danych osobowych i prawo do prywatności w Kościele*, ed. P. Majer, Kraków 2002, p. 95.

judgment nullified the marriage due to the woman's incapacity to undertake the essential marital duties.[43]

Thanks to the monograph authored by A. Brzemi-Bonarek we learn that similar situations were held, among others, in tribunals in Germany, France and Spain. The German tribunal confronted with a question whether the woman's diary brought forward by the man in the process due to her consensual incapacity. The defender of the marriage bond held that the admissibility of that proof violated can. 220, the more so that she claimed to be robbed of the diary. The way the man acquired the proof violated can. 1527 §1. The judges stated, however, that the rejection of the furnished proof would restrict the petitioner's right to prove his rights. They argued that according to the ecclesiastical legislature the panel of judges was responsible for evaluating the proofs. This is possible, however, only when all circumstances of a given case are considered through freely admitting means of proof. According to the experts' opinion, the diary answered the question whether the respondent, at the moment of contracting the marriage, was psychically able to undertake the essential marital duties, hence it was essential to come to the truth. The defender of the marriage bond spoke again, claiming that the use of information from the diary was illegal until the respondent does not express her consent to do so, and appealing to the women to disclose her diaries in the name of the truth. Moreover, the tribunal took into consideration other issues that arose while acquiring this proof, viz: the woman's locker was constantly unlocked, the notes also referred to the petitioner, the woman directly specified in her notes that she was considering the publication of those notes. The man also testified under oath that copies of the diaries were submitted to the woman's friends in order use them in the civil divorce proceedings. The judges decided to include the diary as a means of proof and gave it the force of proof of the extrajudicial confession (under can. 1542). The tribunal adjudicated the nullity of marriage due to the woman's consensual incapacity. The case was appealed to the appellate tribunal. However, the appellate tribunal did not agree with the tribunal of first instance, indicated the evident violation of can. 220 and can. 1527 §1 and disagreed with the arguments of the tribunal of first instance under which the proof had been admitted. The petitioner appealed against the judgment of the appellate tribunal. The Apostolic Signatura indicated one of the German tribunal as the tribunal of third instance. The petitioner, however, did not take any acts in legal proceedings and the proceedings were suspended.[44]

[43] *Judgment of the Metropolitan Tribunal coram Sobański concerning the incapacity to undertake the essential marital duties*, in: "Ius Matrimoniale" 1996, No 4, pp. 103–109.

[44] Cf. A. Brzemia-Bonarek, *Dopuszczalność dowodów zdobytych w sposób niegodziwy w kanonicznym procesie o stwierdzenie nieważności małżeństwa*, Katowice 2007, pp. 60–85.

It is necessary to draw attention to one more case that was resolved by the Roman Rota. It did not directly refer to the assessment of the way the aforesaid means of proof had been acquired, but it may help us see the direction of admitting such kind of proofs. The respondent's defence counsel submitted to the Roman Rota via the Appellate Tribunal a proposal of a new means of proof, i.e. the tape recording and written transcript of the respondent's therapeutic session. The Roman Rota judge issued a decree laying down that neither tape nor transcript might be included in the case files. The responded appealed. The auditors withheld their decisions, substantiating that the tape recording or transcript should not be available due to the professional secrecy. Moreover, doubts about the authenticity of the document were under a big question mark. The judges held the infringement of can. 1548 §2, No 1 and can. 1544 as the authenticity of that proof was not acknowledged at all by the respondent. Therefore, this proof became the anonymous document, and such document is worthless in the process. What is more, the recording of the therapeutic session did not refer to the object of the process (exclusion of offspring and dignity of sacrament).[45] The auditors did not directly apply to the liceity of the furnished proof, but rather to its authenticity and usefulness.

The case law concerning the nullity of marriage include opinions for and against the admission of proofs acquired in an illicit way. Let us take a closer look at arguments of both stances. The opponents of the admission of proofs acquired in an illicit way refer to the moral law. The procedural doubts cannot be resolved through injustice and the judge is required to be extremely sensitive to the course of the entire process according to the law and morality. Further, the judges refer in their arguments to can. 220 and to each person's fundamental right to good name and to protect personal intimacy. Since this principle derives from natural law, hence it prevails over the norms of the procedural law. If following the admission of such proof, the judgment nullified or validated the marriage, then, technically, the refusal to admit the illicit proof would cause that the nullity of marriage would not be proved due to a lack of proofs. In this way the parties are deprived of the right to contract another marriage in the Church but it does not mean that they will not be saved and salvation is the most crucial.

The judges advocate the possibility to use in the process the proofs acquired illicitly and they claim that it is not relevant to reject private documents on account of adjudicating under fiction. They also emphasize that the truth and justice pertaining to marital cases seem to be more essential than the

[45] Ibid., pp. 60–85.

norm of can. 220. Moreover, the presentation of such proof does not aim to harm the party, but it aims to come to the objective truth about the marriage. However, the valid and respected confidentiality of the process arising from the Code should be taken into account. Moreover, jurists differentiate between the proof material content and the mode of its acquisition. The judge should examine the value of such proof due to the general good of the Church. The tribunal is primarily obliged to pronounce a fair sentence in line with the objective truth. Failure to admit the proof, even the illicit one, that considerably affects the judgment – according to the proponents of the admission of such proofs – would disturb the fundamental aim of the marital process. Moreover, voices are being raised analysing the illiceity of proofs on account of time when they were "acquired", i.e. within the period of cohabitation or separation or civil divorce.[46]

The information is acquired illicitly when it is done without its possessor's will. The willingness to keep it confidential does not need to be explicit, but it is assumed on the basis of the possessor's conduct. The acquisition of such proof illicitly entails the illiceity of its further submission. The proof content, even the most intimate, must not substantiate the refusal of such proof due to its illiceity. The party furnishing such proof enforces the right to seek his/her rights, holding proofs acquired in a legal and licit manner. It is more complicated when the furnished proof is e.g. stolen or wangled. Pursuant to can. 1527 §1 they should not be admitted. The submission of such proofs, however, reflects their physical existence and process usefulness. The judge is legally and morally obliged to find out and present the objective truth, i.e. it excludes the justified and reasonable doubt. If such proof, even illicit one, is submitted, such doubt arises. The judge faces a moral dilemma that is directly associated with his fundamental obligation towards the truth as the judge and the pastoral assistance, within the limits of the law, for those people whose marital situation is complicated. If there are real suspicions that the aim of the furnished proofs is not to find out the truth about the examined marriage, but to e.g. defame or ridicule, etc., such proof must not be absolutely admitted. Whereas, if the proofs are acquired and furnished to show the truth, the judge should be interested in such proofs. Bearing in mind the principle that the end does not justify the means, it is necessary to make attempts to ensure that the proof acquired illicitly becomes the licit through approving it by the party who was robbed of such proof and expressing the consent of such party to use it in the process. If the latter element is not fulfilled, the judge makes the final and absolute decision. It seems that in this case the judge may reject the proof, only if the submission of this proof risks defamation or other serious harm for either party.[47]

[46] Ibid., pp. 60–85.

[47] Cf. R.Sobański, *Czy dokumenty prywatne zdobyte w sposób niegodziwy są dopuszczalne jako*

When assessing the liceity of the proof brought forwarded by the parties in the process and, at the same time, deciding about the approval or refusal of it, it is necessary to examine an array of elements, among others, the usefulness of the proof in the process, the way the party has acquired the proof, whether it was in the period of the marriage and what is the goal of furnishing such proof (e.g. disclosure of confidential content, unknown to anyone, etc.). The issue concerning the rejection or approval of the illicit proof is not so simple as set forth in can. 1527. Except for the assessment and examination of the method and content of the furnished proof, it is also necessary to consider the good of the Church community, towards which a specific marriage is contracted.

dowody w kanonicznym procesie o nieważność małżeństwa, in: "Ius Matrimoniale", No 8, 2003, pp. 139–140.

Streszczenie

Dowody zdobyte w sposób niegodziwy w procesach o stwierdzenie nieważności małżeństwa

Dowodzenie w procesach o stwierdzenie nieważności małżeństwa nie należy do najłatwiejszych spraw. Procesy te z natury swej dotyczą dobra publicznego, dotykają również interesów małżonków, rodziny, potomstwa, jak i całej wspólnoty Kościoła. Dlatego też w tej materii należy pamiętać o naczelnej zasadzie prawa kościelnego zawartej w kanonie 1757 KPK: *salus animarum suprema lex*. Co więcej, dowody zebrane i przedstawione podczas trwania procesu mają za zadanie ukazać prawdę o zawartym i badanym sakramencie małżeństwa w ten sposób, iż mają prowadzić u sędziego do osiągnięcia pewności moralnej co do jego ważności lub jej braku. Oceniając godziwość przedłożonego przez strony dowodu w procesie i jednocześnie decydując o jego przyjęciu lub odrzuceniu, należy zbadać szereg elementów, m.in. przydatność dowodu w procesie, to, w jaki sposób strona weszła w posiadanie tego dowodu, czy był to okres trwania wspólnoty małżeńskiej oraz jaki jest cel jego przedstawienia (np. ujawnienie treści objętych tajemnicą, nikomu dotychczas nieznanych, itd.). Kwestia odrzucenia lub przyjęcia dowodu n i e g o d z i w e g o nie jest bynajmniej tak prosta, jak by wskazywał na to kanon 1527. Prócz oceny i zbadania sposobu, jak i samej treści przedstawianego dowodu, należy brać również pod uwagę dobro wspólnoty Kościoła, wobec której zawierane jest konkretne małżeństwo.

Małgorzata Koterba – katechetka i adwokat przy Sądzie Metropolitarnym w Krakowie. Wykształcenie wyższe magisterskie na kierunku teologia uzyskała w 2007 roku na Papieskiej Akademii Teologicznej w Krakowie. W 2012 roku uzyskała tytuł licencjata prawa kanonicznego oraz obroniła pracę licencjacką pisaną pod kierunkiem ks. prof. dra hab. Tomasza Rozkruta. Od roku akademickiego 2012/2013 kontynuuje naukę w zakresie prawa kanonicznego na studiach doktoranckich na Wydziale Prawa Kanonicznego Uniwersytetu Kardynała Stefana Wyszyńskiego w Warszawie.