

Fr. Rafał Kamiński
Wydział Prawa Kanonicznego UKSW

Udział biegłego w procesie do dyspensy od małżeństwa zawartego a niedopełnionego

The participation of an expert in the process for the dispensation of a marriage *ratum et non consummatum*

Introduction

Experts appearing before ecclesiastical courts are mostly associated with a marriage nullity process common in judicature. Depending on a ground on which a case is heard, the participation of an expert will be either obligatory or will depend on the decision of a judge. A report prepared by an expert is, besides testimonies of parties and witnesses and other documents, a primary proof whose value is assessed in connection with other proofs and all circumstances disclosed therein.

The process for the dispensation of a contracted marriage that was never consummated requires, in most cases, the participation of an expert whose role is particularly useful when providing the so-called „physical proof”. This study focuses on the participation of *peritus* in a special process that needs to be conducted to petition for *super rato* dispensation

1. Characteristics of the process for the dispensation *super rato*

The essence of the considered process is to obtain a dispensation whose purpose is a dissolution of a validly contracted marriage which however was not completed with an act of conjugal love performed in a human fashion (*humano modo*) which is suitable in itself for the procreation of offspring (cf. can.1061 § 1 of the CIC).

The process for obtaining such a dispensation is original for a number of reasons. What is most important here, is the proper understanding of the term „process” used in this case. The reason for its initiation is not a complaint made by the petitioner but rather a petition

(*oratio*) made by at least one spouse for the favor of a dispensation from a marriage (cf. can. 1697 of the CIC). He/she is petitioner in the case (*orator*). A judge that would solve the dispute is absent. The conduct of the process is the responsibility of an instructor who collects proofs required to obtain a dispensation. Thus, it is an administrative process which ends with an affirmative or negative decision regarding the granting of a dispensation which is a grace.

Also the term „dispensation” is used in a different sense than the one arising from can. 85 of the CIC. Whereas in the „General Norms” of the Code, the legislator expressly resolves that merely ecclesiastical law is subject to dispensation, in this case it is the law of God, which includes the dogmatic norm regarding the indissolubility of marriage, that is relaxed. Therefore such grace may only be granted by the Bishop of Rome by virtue of the ordinary power of the Vicar of Christ on earth, exercised freely and related to his primacy¹.

Contrary to the declaration of the invalidity of marriage effective *ex tunc*, which means that a marriage did not exist from the moment of its contraction, dispensation *super rato* has legal force *ex tunc* which results in the termination of marriage with the granting of the papal grace².

Material norms which regulate the process for the dispensation of a marriage contracted but not consummated are presented in can. 1061 § 1 and 1142 of the CIC. Whereas provisions regulating the process were presented in can. 1697-1706 of the CIC³.

The direct source of chapter III, part III Book VII of the CIC, where the process norms are set out, is the Instruction of the Congregation for the Discipline of the Sacraments of March 7, 1972⁴.

The last document of the Apostolic See prepared by the same Congregation is the Circular Letter of December 20, 1986 which is still used in process practice today⁵.

¹ Cf. J. KRUKOWSKI, *Proces o uzyskanie dyspensy od małżeństwa zawartego i niedopełnionego*, in: J. KRUKOWSKI (ed.), *Komentarz do Kodeksu Prawa Kanonicznego. Ks. VII. Procesy*, t. 5, p. 378-379.

² *IBID.*, p. 379.

³ Norms of the currently effective Code of 1983 are an extension of the previous Code of 1917, and thus: can. 249, can. 1962-1963, can. 1966-1968, can. 1973, can. 1976, can. 1978, can. 1985. Cf. *Codex Iuris Canonici Pii X Maximi iussu digestus Benedicti Papae XV auctoritatae promulgatus*, Typis Polyglottis Vaticanis, Romae 1927. Regulations are also included in other normative acts of the Apostolic See from the period 1923-1953. Cf. L. DEL AMO, *Proces do dyspensy od małżeństwa zawartego a niedopełnionego*, in: P. MAJER, *Codex Iuris Canonici. Kodeks Prawa Kanonicznego. Komentarz*, Kraków 2011, p. 1272-1273.

⁴ SACRA CONGREGATIO DE DISCIPLINA SACRAMENTORUM, *Instructio de quibusdam emendationibus circa Normae in processu super matrimonio rato et non consummato servandas*, AAS 64 (1972), p. 244-252.

⁵ SACRA CONGREGATIO DE DISCIPLINA SACRAMENTORUM, *Litterae Circulares „De processu super matrimonio rato et non consumato”*, Communicationes 20 (1988), p. 78-84.

Process for the dispensation of a marriage contracted but not consummated is a two-stage procedure.

During the first stage of the process before a diocesan bishop it is necessary to examine the justness of the petition proposed through him but addressed directly to the Bishop of Rome. If it meets the requirements of *fumus boni iuris*, bishop requests case instruction⁶. At a later stage of the process it is necessary to collect proofs that will confirm the non-consummation. The Circular Letter of 1986 divides them into those that provide a moral argument (confirmed by true testimonies of parties, their confession, witness testimonies, circumstantial evidence and presumptions), and physical argument (expert examinations), and in some cases the *de coarctata tempora* argument indicating that spouses were not together for a period necessary to consummate the marriage (they were actually separated right after contracting marriage or did not find themselves in conditions that would create favorable conditions for marriage consummation)⁷.

At the end of the instruction, the instructor issues a decree and the defender of the bond, whose participation in the proceedings is obligatory, presents his remarks prepared in writing. The instructor edits a detailed account of the entire process and presents it to a bishop. Having obtained an objective assessment of the veracity of the facts, the bishop prepares his duly justified *voto* in which he presents information on the non-consummation, just cause for the dispensation, and the suitability of the favor. Acts including all proofs collected and the aforementioned documents, prepared in this manner, should be sent to the Roman Rota Tribunal which, since 2011, has been competent in such cases⁸.

At the second stage („the Roman stage”), the Apostolic See proceeds the case as appropriate: it may request the bishop to supplement the case instruction (once this is done, the supplement should be submitted); it may reject the petition and deem the arguments presented insufficient to grant the dispensation, or state that the fact of the non-consummation was not properly proven (should this be the case, a party may re-submit the petition if he/she is

⁶ If a given case is the so-called („difficult case” such as: onanistic use of marital intercourse, penetration without ejaculation, artificial insemination and other related modern conception methods offered by medicine, existence of offspring, absence of an intercourse performed in a human fashion (*humano modo*), risk of a scandal related to the grace granted, economic damage, to resolve difficulties, a bishop may consult the Apostolic See. Cf. SACRA CONGREGATIO DE DISCIPLINA SACRAMENTORUM, *Litterae Circulares*, op. cit., n. 2.

⁷ Cf. G. ORLANDI, *Recenti innovazioni nella procedura „super matrimonio rato et non consummato”*, in: *Il processo matrimoniale canonico*, Studi Giuridici XVII, Città del Vaticano 1988, p. 451-454.

⁸ Earlier, such cases were considered by the Congregation for Divine Worship and the Discipline of the Sacraments. Following amendments to the Constitution „Pastor Bonus”, Pope Benedict XVI transferred those competences to the Roman Rota Tribunal. Cf. BENEDICTUS XVI, *Litterae Apostolicae motu proprio datae „Quaerit semper”*, 30 augusti 2011, art. 2 § 2, AAS 103 (2011), p. 570.

able to provide new proofs); or may present the case to the Bishop of Rome who is the only person competent to grant the favor. If the dispensation is granted, the rescript of the dispensation is sent to the bishop who directs the parish priest of the place in which the parties have a domicile or the place where the marriage was contracted, and the parish priest of the place where baptism was received, to make a note of the granting of the dispensation in the registers of marriage and baptism (cf. can. 1706)⁹.

Reference to a situation when a petition for a dispensation *super rato* is connected with a complaint of nullity brought before the tribunal, or when the possibility that the marriage in question was not consummated emerges during the process of *nullitatis matrimonii*, is an important addition. In principle, should this be the case, the tribunal, to which the complaint of nullity was presented, is entrusted with both cases (can. 1700 of the CIC). The case in question is clearly regulated by can. 1678 § 4 amended by Pope Francis: („Whenever, during the instruction of a case, a very probable doubt arises as to whether the marriage was ever consummated, the tribunal, having heard both parties, can suspend the case of nullity, complete the instruction for a dispensation *super rato*, and then transmit the acts to the Apostolic See together with a petition for a dispensation from either one or both of the spouses and the votum of the tribunal and the bishop”¹⁰.

Should the parties still be interested to obtain the declaration of nullity, they may freely continue the process or bring the marriage nullity case before a competent tribunal¹¹.

What is of particular importance for our study in the synthetically presented characteristics of the process for the dispensation of a contracted but non-consummated marriage, is the „physical argument” used when proving that a marriage was not consummated since it requires the involvement of an expert.

⁹ Cf. J. KRUKOWSKI, *Proces o uzyskanie dyspensy od małżeństwa zawartego i niedopełnionego*, op. cit., p. 389.

¹⁰ FRANCISZEK, *List apostolski motu proprio „Mitis Iudex Dominus Iesus”, reformujący kanony Kodeksu Prawa Kanonicznego dotyczące spraw o orzeczenie nieważności małżeństwa (Polish-Latin text)*, Tarnów 2015, p. 23; This provision makes it possible to change the judicial procedure for an administrative procedure of obtaining a dispensation. In order to decide whether to choose a judicial or an administrative route, it will be helpful to study the following principles: if antecedent and perpetual impotence was proven (can. 1084), the judicial route should be chosen; if antecedent and temporary impotence was proven, the route to obtain a dispensation should be chosen; if only impotence that occurred during the marriage was proven, there is no room for either process, if the impotence is doubtful, or, on the contrary, well-motivated, either process can be implemented. Cf. SACRA CONGREGATIO DE DISCIPLINA SACRAMENTORUM, *Litterae Circulares sec. quotation, no. 3*. Thus, sexual impotence may be the cause of non-consummation or nullity of marriage. Sometimes it may cause a collision of the two canonical institutions. To avoid it, it is necessary to remember the principle: dispensation is granted from a validly contracted marriage. It is also worth noting that after the 2015 amendment, the consent of the parties (*consensus partium*) is no longer required to transform the judicial process into an administrative procedure, only the hearing of their opinions is necessary (*auditus partibus*). Cf. P. SKONIECZNY (ed.), *Praktyczny komentarz do Listu apostolskiego motu proprio „Mitis Iudex Dominus Iesus” papieża Franciszka*, Tarnów 2015, p. 115.

¹¹ Cf. SEGRETERIA DELLO STATO, *Prot. n. 99510*, Notiziario della Conferenza Episcopale Italiana, 1983, p. 130

2. The need to appoint an expert

Common law requires the involvement of an expert in marriage cases related to impotence and mental illness of a party as stated by the legislator in amended can. 1678 § 3 of the CIC: „In cases concerning impotence or defect of consent by reason of mental illness or an anomaly of a psychic nature, the judge is to use the services of one or more experts, unless from the circumstances this would obviously serve no purpose [...]”.

In the process for dispensation *super rato*, we are looking at the first case when the examination may prove beyond doubt the absolute impotence of a man, or when the examination may prove that the integrity of the woman was not violated by a conjugal act¹².

And thus when conducting the physical argument, the instructor is to use the services of one or more experts¹³. However, not in all cases, a medical examination, either andrological in case of a man or gynecological in case of a woman, will be necessary. Circular Letter of 1986 states that a physical examination is obligatory whenever it could prove the fact that marriage was not consummated¹⁴. It may be omitted however if the judge has full proof obtained based on the „moral argument” conducted mainly through unanimous testimonies of the parties¹⁵.

A gynecological examination of a woman should not be demanded if she refuses to undergo such an examination, and the andrological examination of the man indicates beyond any doubt that he is unable to perform a conjugal act due to impotence. However, should this be the case, the woman should be advised of the possible legal consequences of her refusal¹⁶.

In case of a conflict in the testimony of the parties, the physical argument will be decisive and conclusive since without it, it will not be possible to prove that marriage was not consummated.

Appointment of an expert is the responsibility of a judge who appoints him/her based on a decree which also defines the scope of the examination (can. 1575 of the CIC). An expert should be a specialist in his/her field and a decent and mature person of an unblemished reputation. Experts who refuse to take an oath (can. 1576 of the CIC) are excluded. Those who already examined spouses prior to the beginning of the process *super rato* may not be *ex officio*

¹² Cf. P. AMENTA, *La procedura amministrativa in materia di matrimonio canonico. Storia, legislazione e prassi*, Studi Giuridici LXXIX, Città del Vaticano 2008, p. 158.

¹³ Cf. SACRA CONGREGATIO DE DISCIPLINA SACRAMENTORUM, *Litterae Circulares*, op. cit., n. 15.

¹⁴ *IBID.*, n. 18

¹⁵ *IBID.*

¹⁶ Cf. SUPREMA SACRA CONGREGATIO SANCTI OFFICII, *Decretum Qua singularis*, 11 iunii 1942, AAS 34 (1942), n. 1, 4, p. 200-201.

experts. However, they may be involved in the process as ex-officio witnesses. Examinations performed privately may be included in the acts of the case. If need be, they should be clarified and their value should be assessed by the judge¹⁷.

The appointed expert should accept the entrusted assignment and take an oath to perform it in a reliable and secret manner¹⁸.

3. Tasks of an expert in the process for the dispensation *super rato*

Code of Canon Law does not include norms that would define the examination to be performed by an expert involved in a process for the dispensation of a marriage that was not consummated. Thus regulations referring to the collection of proofs in an ordinary contentious process and in marriage nullity cases are to be followed provided that they can be reconciled with the character of those processes, as required by can. 1702 of the CIC. Norms of can. 1574-1581 of the CIC (*De peritis*) and the corresponding can. 1255-1262 of the CCEO are applicable here. Moreover, norms included in the process instruction „Dignitas connubii”, with art. 203-213¹⁹ devoted to the role of experts, must also be taken into account. Tasks of an expert in the process *super rato* are specified in detail in art. 15-20 of the Circular Letter of 1986.

Prior to the performance of an examination, an expert should personally verify the identity of the person examined (can. 1578 § 2 of the CIC). The examination should be performed based on the knowledge, method and conscience of the expert fulfilling the task. The expert is to be given access to the acts of the case, and any documents and other proofs needed for the proper and faithful discharge of his or her duty²⁰.

Depending on a case requiring the involvement of an expert, examination is to be performed by an expert in gynecology, urology, andrology, sexology, psychology or psychiatry. The appointment of a specific person to prepare an expert report should be based on the knowledge of anatomy and physiology of male and female sexual organs and related sexual functions, as well as the knowledge of the canonical concept of marriage consummation²¹. Whereas the „moral argument” in proving the non-consummation of marriage is based on the credibility of individuals, the „physical argument” is based on the result of a medical examination and

¹⁷ Cf. SACRA CONGREGATIO DE DISCIPLINA SACRAMENTORUM, *Litterae Circulares*, op. cit., n. 19.

¹⁸ IBID., n. 16.

¹⁹ Cf. T. ROZKRUT, *Biegli*, in: T. ROZKRUT (ed.), *Komentarz do Instrukcji procesowej „Dignitas connubii”*, Sandomierz 2007, p. 278-292.

²⁰ IBID.

²¹ Cf. B. MARCHETTA, *Scioglimento del matrimonio canonico per inconsumazione*, Padova 1981, p. 20-21.

an objective opinion of an expert regarding sexual organs of a man or a woman or both spouses.

In „difficult cases” referred to in the Circular Letter of 1986, the physical argument will have to be conducted. In line with the practice, guidelines indicated in the *Plenaria* of the Congregation for Divine Worship and the Discipline of the Sacraments of April 18, 1970, approved by Pope Paul VI on May 23, 1970: „The Fathers present agree that it is wrong to grant dispensation in the alleged non-consummation by onanistic or sodomitic marriage, at least if this is the regular custom of the couple. They find it very difficult to prove the lack of ejaculation despite penetration, and propose that individual cases be presented to the Holy Father only when opinions of more experts give full clarity”²². Another „difficult case” is an alleged non-consummation of marriage despite conception and birth. This may be the case when, in the absence of canonical intercourse, conception takes place through the absorption of semen that was not deposited in the woman's vagina by ejaculation. Should this be the case, apart from the need to conduct a reliable „moral argument”, it is also necessary to involve an expert to conduct a „physical argument” which is a *sine qua non* element to obtain the favor of dispensation. In such case, the physical integrity of a woman, preserved and maintained until birth, must be proven.

The passive subject of the examination is a woman, man or both spouses. The purpose of the examination of a woman is to demonstrate physical integrity or the lack thereof. It is therefore about the presence of hymen called the „mirror of virginity” (*velum seu signaculum et sigillum verginitas*), which indicates whether or not an intercourse, during which hymen is usually broken, took place. However, Piero Amenta justly points out that nowadays the examination is not as reliable as it used to be as the development of plastic surgery created the possibility of hymen reconstruction. Besides, it does not always have to be torn at the first intercourse due to its varied structure. However, as the reconstruction techniques develop, so do research techniques that make it possible to establish the integrity or natural state of the hymen²³.

Thus, it is the task of the expert to examine the existence and the condition of the hymen. Hymen, which was not broken (*virgo intacta*) after contracting marriage and living in a marriage, is an almost irrefutable proof of non-consummation.

The expert should take into account the following diagnostic activities: visual observation

²² Cf. CONGREGATIO DE CULTU DIVINO ET DISCIPLINA SACRAMENTORUM, *Collectanea documentorum ad causas pro dispensatione super „Rato et non consummato” et a lege sacri coelibatus obtinenda*, Città del Vaticano 2004, p. 102.

²³ Cf. P. AMENTA, *La procedura amministrativa in materia di matrimonio canonico*, op. cit., p. 158, ref. 142.

of the hymen, its structure (integral or broken), observation of its nature (ordinary or flexible giving a hypothetical possibility of not getting torn during an intercourse), observation of its authenticity (natural or reconstructed; should the latter be the case, dispensation granted would be invalid). The examination should also indirectly confirm changes in the woman's sexual organs indicating that a sexual intercourse took place²⁴.

Furthermore, the examination may not only concern the presence of hymen but also possible difficulties related to the woman's sexual abnormalities such as vaginismus, absence or severe deformation of sexual organs, genital infantilism, other psychophysical problems²⁵.

In the case of a man, an expert is responsible primarily for observation which is by nature much less symptomatic than in the case of a woman. In the case of a man, the principle of *nullum est signum virginitatis* is verified. Therefore, there remains a way of deduction and reflection to obtain certainty of non-consummation due to antecedent absolute and permanent impotence caused by organic or functional abnormalities such as the absence of a penis or its anomalous form, absence of erection or erectile dysfunction caused by mental or physical reasons, premature ejaculation etc.²⁶

The above reasons of non-consummation are only examples and obviously cannot constitute a taxative catalogue. Particular difficulties may arise with respect to mental causes that prevent intercourse on a cause-effect basis. This is the field of activity of an expert who must prove it in his/her report. Thus, it is a supporting proof.

Based on the conducted examination, an expert prepares a written report containing information on the place, date and technique used for conducting the examination, and formulates answers to questions set out in the decree which should precisely describe the condition of sexual organs of a woman and/or man, possible psycho-physical abnormalities, and avoid the ambiguity related to virginity. A judge may question the expert in order to obtain the necessary precise explanations related to the prepared expert report²⁷.

A judge can appoint one or more experts as required in a given case²⁸. Each of the experts is to prepare a report separate from the others unless the judge decrees otherwise (cf. can. 1578 § 1 of the CIC). The opinion should be confirmed before the instructor. If there are differences in the formulated expert conclusions, the instructor may use the help of another expert, or the

²⁴ Cf. G. ORLANDI, *Recenti innovazioni nella procedura „super matrimonio rato et non consummato”*, op. cit., p. 459-460.

²⁵ Cf. P. AMENTA, *La procedura amministrativa in materia di matrimonio canonico* op. cit., p. 161.

²⁶ *IBID.*, p. 159-160.

²⁷ Cf. SACRA CONGREGATIO DE DISCIPLINA SACRAMENTORUM, *Litterae Circulares*, op. cit., n. 17.

²⁸ *IBID.*, n. 15.

so-called „super expert” who should settle the controversy²⁹.

It is also possible to include the results of examinations conducted by a physician of a party or an expert opinion in a civil divorce process. Such documents also have a probative value evaluated by the instructor³⁰.

If the physicians of the parties or court experts (in a civil process) are credible, competent and recognized, they can also confirm their opinion before an ecclesiastical judge. It will then receive the value of an *ex officio* opinion (cf. can. 1575, 1581 of the CIC).

The result of an expert examination may reveal the absence of the „physical argument”. This will particularly be the case when a woman is not physically integral. If a woman declares herself a virgin but the examination shows her defloration, the expert must determine whether her hymen was broken as a result of a sexual intercourse or some other event. Information obtained in this way should be included in the acts in order to leave no doubts to those who will evaluate proofs at the decision-making stage. During the proof collection process it is also necessary to provide useful information on possible premarital relations, sexual abuse, satisfaction other than through penetration by a spouse who is incapable thereof, relations with other persons before and during marriage, or during the period of separation, contraction of a civil marriage, refusal to undergo an examination etc. Such information can and should be obtained by the expert during an interview³¹.

If the instructor, convinced of non-consummation, of which he was informed during the testimony of the parties and witnesses, did not recommend a physical examination, it should be reflected in the acts of the case (at least in the final report of the instructor).

4. A proof value of an expert report

The report provided by the expert should contain specific conclusions regarding the consummation of marriage which are a result of a conducted examination.

The importance of the report requested by the instructor from an expert who conducts an almost „technical examination” is profound. It is to supplement the „moral argument”. In some cases, however, the „physical argument” will have the determining and decisive value. Even if the „moral argument” is considered the *argumentum princeps*, the „physical argument” may obtain high probative value, particularly when the „moral argument” is of poor quality.

²⁹ IBID., n. 20.

³⁰ IBID., n. 19.

³¹ Cf. P. AMENTA, *La procedura amministrativa in materia di matrimonio canonico*, op. cit., p. 160.

For, if the expert finds that the woman is *virgo intacta*, or that the man is incapable of an intercourse, moral certainty regarding the non-consummation can undoubtedly be achieved.

Thus, according to Gregorz Leszczyński, we have a distinction between legal and technical judgment here. The role of an expert is *munus consulendi*, while the instructor plays the *munus iudicanti* role in the process. The scope of the judgment made by the instructor is thus much broader than that of an expert³².

The instructor, taking into account the entire complexity of the situation, basing on the testimony of the parties and witnesses, as well as on the expert report, considers whether a validly contracted marriage was consummated through a conjugal act performed in a human fashion. Interpretation of the expert report is one of the most important moments of the process³³. Based thereon, the instructor obtains the moral certainty necessary to reliably present the matter to the diocesan bishop writing the *voto*, and, consequently, also to the Bishop of Rome who has the power to grant the dispensation *super rato*.

Conclusion

The participation of an expert in the process for the dispensation of a validly contracted but unconsummated marriage is not a requirement. An instructor can achieve moral certainty regarding the consummation of marriage or the absence thereof based on the testimony of the parties and witnesses which is the main element of the so-called „moral argument” of the process. He may, therefore, present the acts of the case to his bishop without an expert report, and the bishop, together with his *votum*, may transmit them to the Roman Rota which will evaluate the proofs, and following a positive evaluation thereof, will present a request for dispensation to the Bishop of Rome.

However, there are situations in which the „physical argument” provided by expert examination not only supports the „moral argument”, but is an argument that prevails and is decisive for the fact of non-consummation. Properly applied medical knowledge can be of great help in discerning the delicate matter of marriage consummation through an act performed in a truly human fashion which is by its nature capable of producing offspring.

Professional opinion of an expert, reached through a reliable fulfillment of tasks entrusted by virtue of a decree of the instructor is thus of a profound importance for resolving

³² G. LESZCZYŃSKI, *Sędzia wobec opinii biegłego^[1] w procesie o stwierdzenie nieważności małżeństwa*, Łódzkie Studia Teologiczne 10 (2001), p. 77-78

³³ IBID.

whether or not a marriage, in which at least one of the spouses is requesting papal dispensation dissolving the marriage bond, was consummated.