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Personal Marriage Law of the Second Polish Republic in the Eastern Lands of the Former Russian Partition

Prawo małżeńskie osobowe Drugiej Rzeczypospolitej na ziemiach wschodnich dawnego zaboru rosyjskiego

ABSTRACT

The article describes the problems facing the marriage law in the eastern parts of the Second Polish Republic. These issues are mainly due to the lack of codification of matrimonial law throughout the territory of the Republic of Poland and the fact that exclusively civil jurisdiction in matrimonial matters was not implemented, as it was envisaged in Lutostański's proposal. The decisions of ecclesiastical courts led to the creation of substantially invalid marriages and the spreading of legal bigamy. Failure to observe state regulations concerning the jurisdiction of ecclesiastical courts in dissolution or nullity cases, as well as mutual non-recognition of judgments of the ecclesiastical courts contributed to the creation of areas called "divorce meccas". These designations referred to the Eastern Orthodox and Calvinist Church existing in the eastern territories of the Second Polish Republic. Taking into account the above, the article is intended to compare factors destabilising marriage law in the areas in question. To analyze this issue, primarily the historical and legal method was used.

Keywords: legal bigamy; Russian Partition; divorce mecca; marriage; divorce; ecclesiastical court

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INTRODUCTION

Marriage law in the eastern parts of the former Russian Partition underwent profound changes in the 19th century. In the newly created Duchy of Warsaw,[1] the Napoleonic Code was in force, which provided for the institution of civil marriage contracted before a civil servant, competent for the place of residence of one of the parties. Marriage became effective under civil law upon the entry of the deed of marriage into the civil status records, yet for the lack of dedicated civil registrars this function was assigned to pastors. The civil character of marriage was linked to the assignment of jurisdiction over marital matters to civil courts. The Napoleonic Code provided for divorce and separation, where dissolution of marriage was conditional upon the occurrence of grounds indicated in this code.[2] The concept of marriage as a lay institution subject to law and lay courts was opposed by the Catholic Church. Pastors, pointing to its incompatibility with the Catholic faith, refused to perform obligatory civil weddings and grant divorce. As a consequence, by the monarch's decree in 1809, they were relieved of those obligations. Until 1818, only three civil marriages were contracted, and state courts granted only seven divorces. After the decline of the Duchy of Warsaw, the demands of the Catholic Church concerning personal marriage law were partly satisfied. In the Congress Poland (Kingdom of Poland), created from some lands of the Duchy of Warsaw and governed by the Russian Empire, an interfaith type of marriage was in force, which implied a religious form of celebration and exclusive jurisdiction of state courts in marital cases.[3] After the defeat of the November Uprising, work on the reform of marriage law resumed. As a result, in 1836, Tsar Nicolas I imposed the Marriage Law on the Kingdom of Poland.[4] The Tsar's ukaz introduced a religious type of marriage, modelled on the one enforced in Russia, favouring the Eastern Orthodox faith. Under the religious system, marriage law was regulated by an act of state legislation accommodating denominational norms. Civil law adopted the regulations of individual denominations as its own, assigning them the status of state law, which in practice resulted in a complete limitation of supervision over the

[1] Under the Treaty of Tilsit of 1807, the Bialystok oblast was attached to Russia as an administrative unity of the Russian Empire. The oblast was made up of the former Prussian counties, including Bialystok, Bielsk or Sokolka poviats. In addition, by virtue of the Treaty, the Duchy of Warsaw was created, which covered nearly the entire territories of the second and third Prussian Partition (except for the said Bialystok oblast) and the southern part of the first Prussian Partition.

[2] H. Konic, *Dzieje prawa małżeńskiego w Królestwie Polskim (1818–1836)*, Kraków 1903. Cf. idem, *Prawo małżeńskie obowiązujące w b. Królestwie Kongresowym*, Warszawa 1924.

[3] The 1825 Civil Code of Kingdom of Poland (Journal of Laws of the Kingdom of Poland, vol. 10, no. 41) also abolished the institution of civil death.

[4] The 1836 Marriage Law (Journal of Laws of the Kingdom of Poland, vol. 10, no. 64–65). Cf. H. Konic, *Dzieje…*, pp. 57–141; A. Fastyn, *Problem powstania i charakteru prawa małżeńskiego z 1836 roku*, "Czasopismo Prawno-Historyczne" 2012, vol. 64(2), pp. 193–209.

legal acts taken by the authorities of denominations or their members. Moreover, the personal issues of marriage law were regulated separately for the Catholic, Eastern Orthodox, Evangelical-Augsburg, Evangelical-Reformed, and Uniate Churches as well as for interfaith marriages. Jurisdiction in matters of marriage was officially subordinated to ecclesiastical courts.[5] After 1918, the territory of the former Kingdom of Poland constituted Poland's central regions, whereas the remaining area of the Russian Partition was referred to as eastern lands. This area encompassed the following voivodeships: Wilno, Nowogrodek, Polesie, and Wolhynia; and the poviats of Bialystok Voivodeship: Grodno, Wolkowysk, Bialystok, Bielsk, and Sokolka. From 1840, in this territory – the so-called Western Governorates (*gubernias*) of the Russian Empire – the Svod zakonov Rossiĭskoĭ Imperii was in force,[6] which contained regulations on marriage law that were similar to those provided by the 1836 ukaz.

Having regained independence, Poland kept the legal systems of the partitioning powers in order to retain continuity of law,[7] so in the eastern lands that had once been partitioned by Russia kept the religious character of marriage mentioned above.[8] The laws were inherited from the partitioners, so they were treated not as foreign

[5] Having crushed the January Uprising in 1864, the authorities of the Russian Empire abolished the institutional autonomy of the Kingdom of Poland, which in practice meant suppression of the Kingdom's distinctiveness. In interwar Poland, the designation "lands of the former Russian Partition" referred to the territory of both central and eastern Poland. Cf. Z. Łączyński, *Prawo cywilne obowiązujące w województwach centralnych*, Warszawa 1937 (reprint: Warszawa 1997).

[6] The secular law that applied in the eastern territories of the Second Polish Republic was laid down largely in vol. 10 part 1 of the Svod zakonov Rossiĭskoĭ Imperii (Digest of Laws of the Russian Empire, amended and supplemented; hereinafter: Svod), Articles 1–108, and partly in vol. 11.

[7] See A. Dziadzio, *Austriacki kodeks cywilny ABGB na ziemiach polskich w XX wieku*, [in:] *Ustrój i prawo w przeszłości dalszej i bliższej*, eds. J. Malec, W. Uruszczak, Kraków 2001, p. 501; M. Dyjakowska, *Prawo cywilne – część ogólna*, [in:] *Synteza prawa polskiego 1918–1939*, eds. T. Guz, J. Głuchowski, M.R. Pałubska, Warszawa 2013, pp. 263–264.

[8] The secular law, which was applicable in the eastern territories of the Second Polish Republic was first and foremost vol. 10 part 1 Svod. See Regulation of the President of the Republic of Poland of 26 March 1927 on the normalization of the legal status in the following provinces: Vilnius, Novgorod, Polesia and Volhynia, as well as the counties: Hrodna, Vaukavysk, Bialystok, Bielsk and Sokolskie voivodships in Bialystok (Journal of Laws 1927, no. 31, item 258); Z. Rymowicz, W. Święcicki (eds.), *Prawo cywilne Ziem Wschodnich, t. X Cz. I Zwodu praw rosyjskich, tekst podług wydania urzędowego z roku 1914 z uwzględnieniem zmian wprowadzonych przez ustawodawcę polskiego oraz ustawy związkowe, tudzież judykatura Sądu Najwyższego i b. Senatu rosyjskiego*, vol. 1, Warszawa 1932, pp. 8–31. For more on this topic, see A. Piegzik, *Przeszkody małżeńskie w ustawodawstwie dzielnicowym II RP*, "Folia Iuridica Wratislaviensis" 2016, vol. 5(1), pp. 28–36; Z. Radwański, *Prawo cywilne i proces cywilny*, [in:] *Historia państwa i prawa Polski 1918–1939*, ed. F. Ryszka, vol. 2, Warszawa 1968, pp. 169–170; P. Fiedorczyk, *Prawo rodzinne ziem wschodnich II Rzeczypospolitej*, [in:] *Wielokulturowość polskiego pogranicza. Ludzie – idee – prawo*, eds. A. Lityński, P. Fiedorczyk, Białystok 2003, pp. 509–513.

but as the laws of the Polish provinces.[9] The very long duration of the partitions was partly responsible for the fact that Poland did not have its own normative acts that could replace the post-partition legal codes. The old system in Poland was obsolete and utterly inadequate for the social conditions of the time; besides, it was largely forgotten, so it appeared foreign to the Polish population. The division into provinces and the legal systems used there shaped the awareness of Polish citizens living in individual areas of Poland, which was led to problems with codifying the marriage law used on the territory of the Polish Republic. It should be noted that the third reading of Lutostański's draft of marriage law took place on 23–29 October 1926, and the draft was adopted by the Codification Committee on 4 October 1927. However, under the pressure of the public, especially of the conservative circles,[10] the government gave up the draft law as the basis for the marriage law

[9] The former Prussian Partition was governed by a secular system regulated by the German Civil Code (§§ 1303–1362, §§ 1564–1588 BGB). Just like in the Hungarian marriage law of 1984 in force in the regions of Spiš and Orava, it provided for a secular form of marriage celebration, divorce and the jurisdiction of secular courts in matrimonial cases. The interfaith marriage regulations applicable in the former Austrian Partition (§§ 44–136 of the Civil Code of Austria, ABGB) treated marriage as a civil-law agreement subject to regulations of civil law and secular jurisprudence, while respecting the religious norms related to the form of marriage celebration and the ban on granting divorce to Catholics. The ABGB permitted the so-called civil marriage of necessity, which was a civil marriage between non-religious persons and those to whom marriage was refused by the cleric on grounds not provided for by civil law. Following 1922, in the villages of Spiš and Orava the possibility was introduced to choose the form of marriage celebration, which would require civil marriage to be contracted under Hungarian marriage law or Austrian marriage law if an inter-faith marriage was to be celebrated. In the lands of central and eastern Poland, the above-mentioned faith-based system was in force, regulated by Tsar Nicolai I's ukaz of 1836 and the Svod. For more on this topic, see Z. Radwański, *op. cit.*, pp. 169–175; H. Świątkowski, *Jeszcze o działalności sądów konsystorskich*, "Gazeta Sądowa Warszawska" 1934, vol. 62(5), p. 68; M. Allerhand, *Stosunek prawa państwowego do prawa religijnego*, "Głos Prawa" 1927, no. 5–6, p. 170; idem, *Prawo małżeńskie obowiązujące na Spiszu i Orawie*, Lwów 1926. Cf. S. Gołąb, *Polskie prawo małżeńskie w kodyfikacji*, Warszawa 1932; K. Krasowski, *Próby unifikacji osobowego prawa małżeńskiego w II Rzeczypospolitej*, "Kwartalnik Prawa Prywatnego" 1994, no. 3, pp. 467–502; L. Domański, *O małżeństwie. Studium społeczno-prawne omawiające kwestie małżeństw religijnych i cywilnych oraz rozwodów*, Warszawa 1932; A. Stawecka-Firlej, *Małżeńskie prawo osobowe ustawodawstw porozbiorowych obowiązujących w Rzeczypospolitej Polskiej w dwudziestoleciu międzywojennym*, "Prawo. Studia Historycznoprawne" 2013, vol. 105(2), pp. 75–94; J. Gwiazdomorski, *Osobowe prawo małżeńskie obowiązujące w b. dzielnicy austriackiej*, Poznań 1932.

[10] See P. Fiedorczyk, *Unifikacja prawa rodzinnego na tle stosunków pomiędzy państwem a Kościołem katolickim w Polsce (1944–1964)*, [in:] *Cuius regio, eius religio. Zjazd Historyków Państwa i Prawa. Lublin, 20–23 IX 2006 r.*, eds. G. Górski, L. Ćwikła, M. Lipska, Lublin 2006, pp. 415–416; idem, *Echa projektów unifikacji osobowego prawa małżeńskiego w II RP na terenie województwa białostockiego*, [in:] *Regnare, gubernare, administrare. Prawo i władza na przestrzeni wieków. Prace dedykowane Profesorowi Jerzemu Malcowi z okazji 40-lecia pracy naukowej*, eds. S. Grodziski, A. Dziadzio, Kraków 2012, pp. 269–277. For more on this topic, see J. Godlewski, *Problem laicyzacji osobowego prawa małżeńskiego w Polsce międzywojennej*, "Państwo i Prawo" 1967, no. 11, pp. 756–759; L. Górnicki, *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej*

to be implemented in Poland. As a result, martial law in the inter-war period was not made homogeneous.[11]

THE JURISDICTION OF ECCLESIASTICAL COURTS AND DIVORCE MIGRATION OF THE POLISH POPULATION

Ecclesiastical courts (earlier known as courts spiritual) were subject to the internal regulations observed by a particular religious organisation or association, and the judicial competence over their followers was exercised by civil common courts. Civil law adopted the regulations of individual denominations as its own, assigning them the status of state law, which in practice resulted in a complete limitation of supervision over the legal acts taken by the authorities of religious organisations or associations and their members, and primarily over matrimonial jurisdiction entrusted to ecclesiastical courts. Legal fragmentation entailed separate indications for dissolution of marriage in individual denominations.[12]

In the eastern territories of interwar Poland, the regulations of the Russian Imperial Svod favoured the Orthodox faith,[13] so in this area Orthodox Christianity was

w latach 1919–1939, Wrocław 2000, pp. 195–206; J. Dworas-Kulik, *Debate Over Secularisation of the Marriage Law in the Second Polish Republic*, "Prawo Kanoniczne" 2020, vol. 63(3), pp. 141–157.

[11] A unification of marriage law occurred as late as in 1945 by the Decree of 25 September 1945 – Marriage Law (Journal of Laws 1945, no. 48, item 270) and the Decree of 25 September 1945 – regulations introducing the Marriage Law (Journal of Laws 1945, no. 48, item 271). During the codification work, the achievements of the interwar Codification Commission were used to streamline the process of unification. The introduction of the secular form of marriage and civil jurisdiction did not fully eliminate the problem of legal bigamy due to the failure to introduce the so-called Bismarck's paragraph in the 1945 Marriage Law. For more on this topic, see S.M. Grzybowski, I. Różański, *Prawo małżeńskie. Komentarz. Wyciągi z motywów Komisji Kodyfikacyjnej, tezy polityczne, wzory*, Kraków 1946; J. Gwiazdomorski, *Polskie prawo małżeńskie*, Kraków 1946; P. Fiedorczyk, *Unifikacja i kodyfikacja prawa rodzinnego w Polsce (1945–1964)*, Białystok 2014; idem, *Rozwód w zunifikowanym prawie małżeńskim z 1945 r. Geneza, konstrukcja, orzecznictwo*, "Miscellanea Historico-Iuridica" 2004, vol. 2, pp. 93–108; idem, *Kościół katolicki i opozycja polityczna wobec unifikacji osobowego prawa małżeńskiego w 1945 r.*, "Czasopismo Prawno-Historyczne" 2004, vol. 56(1), pp. 97–111.

[12] See Articles 24, 61 and 72[1] Svod. In the case of the Evangelical Lutheranism, Article 300 Svod provided for the obligation to enter into religious marriage also in the areas of other Polish districts under the pain of nullity. See also A. Fastyn, *Problem…*, pp. 198–199; H. Świątkowski, *Problem legalnej bigamii w Polsce przedwrześniowej*, "Nowe Prawo" 1959, vol. 15(10), pp. 1150–1151.

[13] "The vows of persons of the Eastern Orthodox faith with those of the Roman Catholic faith, taken only before a Roman Catholic priest, shall be considered invalid until the marriage is blessed by an Orthodox cleric" (Article 72 Svod). Such a position of the Eastern Orthodox Church was contrary to the legislator's intent, who in Article 114 of the Act of 17 March 1921 – Constitution of the Republic of Poland (Journal of Laws 1921, no. 44, item 267; hereinafter: the March Constitution) indicated that the leading position among the confessions recognized by the state was that of the Roman Catholic denomination. The Orthodox Church justified its position in Article 115 of the March Constitution and

the most widely cultivated religion. The temporary regulations (essentially assumed to be provisional), which were intended to regulate the situation of the pro-Russian Orthodox Church, for many years were the only legal basis for Poland's relations with that Church, which as a result gave the Orthodox administrative authorities a great deal of latitude. This resulted in the tendency to isolate the Orthodox Church in Poland as autocephalous,[14] which would not be subordinate to Moscow's authority.

The provisions of Articles 73 and 74[1] Svod provided for important legal rules affecting the legal situation of spouses in the Orthodox Church. The first of them provided that if either spouse was of the Orthodox faith, the jurisdiction to settle cases concerning the existence and dissolution of a marriage belonged to an ecclesiastical court of the Orthodox Church. The other one referred to Christian mixed marriages (non-Orthodox). Under this provision, the court competent to determine the existence and validity of a marriage was one of the religion in which a cleric first married the couple, whereas in dissolution cases the competent court was one of the respondent.[15] Judgments passed under this regime were binding on both spouses. These decisions were not respected by the Catholic Church, which settled all matters based on the baptismal status of the spouses. Any change of denomination was irrelevant; what mattered to the Catholic cleric was the very fact of being married.

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therefore did not respect the superiority of the Catholic Church. It is worth noting, however, that in line with the ruling of the Supreme Court of 8 November 1926, I C 260/25 ("Collection of Judgments of the Supreme Court" 1926, item 172), the provisions that manifested the supremacy of the Eastern Orthodox denomination over other faiths became ineffective when Polish statehood was postponed. For more on this topic, see M. Papierzyńska-Turek, *Kościół prawosławny w Polsce w latach 1918–1927 – sytuacja prawna i konflikty wewnętrzne*, "Dzieje Najnowsze" 1976, vol. 8, pp. 15–32.

[14] By way of a decree, the Polish President defined the relationship between the Polish state and the Polish Autocephalous Orthodox Church (Decree of the President of the Republic of Poland of 18 November 1938 on the relations of the State with the Polish Autocephalous Orthodox Church, Journal of Laws 1938, no. 88, item 597). The provisions contained therein confirmed the previous state of affairs (the provisions of the Holy Synod of the Russian Orthodox Church of 1918 and the resolutions of the Holy Synod of the Polish Autocephalous Orthodox Church of 1925 and 1928). The Polish Autocephalous Orthodox Church maintained its unity in dogmatic and canonical matters with the Ecumenical Eastern Orthodox Church while remaining independent of any supranational ecclesiastical or civil authority. See H. Świątkowski, *Stan prawny Polskiego Autokefalicznego Kościoła Prawosławnego (w zarysie)*, "Głos Sądownictwa" 1939, vol. 11(7–8), pp. 599–605.

[15] J. Gwiazdomorski, *Skuteczność orzeczeń sądów duchownych b. Król. Kongr. w sprawach małżeńskich wobec prawa państwowego*, "Przegląd Prawa i Administracji" 1932, vol. 57(1), p. 5; idem, *Trudności kodyfikacji osobowego prawa małżeńskiego w Polsce*, Kraków 1935, p. 177; J. Osuchowski, *Prawo wyznaniowe Rzeczypospolitej Polskiej 1918–1939*, Warszawa 1967, pp. 396–397; S. Tylbor, *Dzisiejsze prawo małżeńskie w b. Królestwie Kongresowym*, "Głos Sądownictwa" 1939, vol. 11(7–8), pp. 587–588. Cf. Articles 34 and 35 Svod. See also J. Dworas-Kulik, *Civil Registration in the Interwar Period in Poland*, "Scientific Challenges: Economic and Legal Challenges" 2017, vol. 1, pp. 72–74; K. Krasowski, *Prawo o aktach stanu cywilnego w II Rzeczypospolitej*, "Kwartalnik Prawa Prywatnego" 1995, no. 2, pp. 239–240; J. Osuchowski, *op. cit.*, pp. 502–503; J. Litwin, A. Rżewski, *Rejestracja stanu cywilnego*, Warszawa 1931, pp. 176–177, 356, 405–406.

Thus, Catholic ecclesiastical courts dealt with cases falling under the jurisdiction of other ecclesiastical clerical.[16] They also extended their civil jurisdiction onto unions celebrated between Catholics and non-Christians. In such cases, they each time pronounced the annulment of a marriage concluded before a non-Catholic clerical. Quite frequently there were also situations where episcopal courts – despite their subject-matter and material jurisdiction – refused to consider actions for the dissolution of a marriage, considering themselves incompetent to adjudicate on a particular case on the basis of internal regulations. In practice, a petitioner who had his or her legal path obstructed for reasons beyond their control submitted the divorce case to the jurisdiction of another ecclesiastical court, while accepting the actual dissolution of the marriage, albeit illegal under civil law.[17]

At this point, it is also worth looking at the rules of adjudicating on marriage dissolution cases, which were observed by the consistory of the Vilnius Evangelical Reformed Church in Poland (Lithuanian Unity), because its operation also contributed to the growth of the phenomenon of "legal bigamy" in interwar Poland. The ecclesiastical court of the Lithuanian Unity heard dissolution cases concerning marriages concluded in the form prescribed by law if at least one of the parties was Calvinist.[18] It follows from the foregoing that the Vilnius consistory extended its civil jurisdiction to persons of other faiths, who was bound by different religious regulations in force. In the judicial practice of this ecclesiastical court, it was not important in what religion the marriage was contracted but only whether at least either of the spouses was a member of the Evangelical Reformed Church while petitioning for divorce. Most often, competence dispute would result from a divorce ruling for Catholic spouses who entered into matrimony in the Roman Catholic Church, after which either of them changed the confession to the Evangelical Reformed faith and petitioned for dissolution of his marriage to a Catholic wife by way of divorce before the Vilnius consistory. The Vilnius consistory maintained that the area of the Vilnius Evangelical Reformed Church of the Republic of Poland was the western *gubernya* of the Russian Empire, so extensive jurisdictional powers resulted from the provisions of the March Constitution of 1921, which guaranteed equality of rights of different confessions, and from the 1925 concordat with the Holy See, which regarded canon law as a set of legal norms which formed the basis for jurisdiction and exercise of ecclesiastical

[16] See T. Szymański, *Skutki prawne wyroków sądów duchownych*, "Głos Sądownictwa" 1932, vol. 4(10), p. 596; Z. Radwański, *op. cit.*, p. 172; H. Świątkowski, *Problem legalnej bigamii…*, p. 1155.

[17] See J. Dworas-Kulik, *Przyczyny i skutki legalnej bigamii w Polsce w okresie międzywojennym*, [in:] *Pogranicza w historii prawa i myśli polityczno-prawnej*, eds. D. Szpoper, P. Dąbrowski, Gdańsk–Olsztyn 2017, pp. 112–113; H. Świątkowski, *Z praktyki sądów konsystorskich*, "Głos Sądownictwa" 1938, vol. 10(2), p. 112.

[18] The Lithuanian Unity's consistory was guided by provisions of law contained in the Great Agenda and canon 2 of the 1928 synod on the jurisdiction of the ecclesiastical court. Cf. H. Świątkowski, *Problem legalnej bigamii…*, pp. 1153–1154.

authority, which, in the opinion of the Vilnius consistory, enabled individual denominations that were recognised by the state to apply their internal canon laws without restriction.[19] Nevertheless, in a situation where the other spouse was a Roman Catholic, an ecclesiastical court of the Reformed Evangelical confession would notify the competent episcopal court of a divorce process concerning a marriage concluded in the Catholic rite. In response to such information, the Roman Catholic Church delegated its representative (deputy) to participate in the divorce process, who typically included his *votum separatum* in the divorce decision due to the inadmissibility of granting divorce with a Catholic.

Undoubtedly, ecclesiastical courts did not respect the judgments passed by courts of other faiths, which resulted in conflicts between the judgments issued by these courts. They would "snatch" one another's cases falling within the jurisdiction of other courts, a situation which made their judgments legally invalid under civil law. Ecclesiastical courts would rule on the same case passing different judgments thus violating the principle of *res judicata*.[20] This led to a situation in which a formally dissolved or annulled marriage remained substantially valid, since the Supreme Court, in a precedential ruling of 8 November 1926, took the position that there can be no question of *res judicata* in the case of a judgment that does not exist under civil law, and such was a judgment issued in violation of state competence regulations.[21] The conflict rule existing for mixed marriages was explained by the Supreme Court in the ruling of the General Assembly of the Supreme Court of 24 November 1928,[22] indicating that when the petitioner was Catholic and the respondent was Evangelical, the court having the competence to adjudicate on divorce was the Evangelical court that admitted the divorce. On the other hand, if the petitioner was a spouse who had been converted to an evangelical confession, the diocesan tribunal would have the right to adjudicate in the case. A divorce was not granted because canon law did not provide for such a dissolution of a marital union. The Supreme Court clearly stated

[19] K. Ostachiewicz, the Vilnius consistory, was expelled from the Church for accepting Polish citizens who were changing their faith only for the purpose of obtaining a divorce, i.e. without the need for spiritual involvement in the newly adopted religion. In his expulsion, the consistory was accompanied by his followers – the faithful of the Vilnius Church. The pastor, after joining the Warsaw Unity, set up an establishment in Vilnius in 1933.

[20] Z. Hahn, *Powaga rzeczy osądzonej*, "Polski Proces Cywilny" 1935, vol. 3(9), pp. 257–260. See also A. Fastyn, *Zawarcie małżeństwa mieszanego wyznaniowo według prawa małżeńskiego z 1836 roku*, "Czasopismo Prawno-Historyczne" 2013, vol. 65(1), pp. 229–247.

[21] Ruling of the Supreme Court of 8 November 1926, I C 260/25. Entrusting civil jurisdiction to ecclesiastical courts without a simultaneous supervision of their decisions resulted in the emergence of fictitious legal states, which in fact did not produce the legal effects intended by the parties. Unfortunately, civil courts did not have the authority to overturn defective judgment issued by ecclesiastical courts. The latter were neither common nor special courts since they used to be independent institutions subordinate to the authority of individual churches. See J. Dworas-Kulik, *Przyczyny…*, p. 116.

[22] O Z 1/23, "Jurisprudence of Polish Courts" 1928, no. 3, item 133.

that judgments violating the subject-matter jurisdiction "do not constitute grounds for any civil action. If the dissolution of a marriage is both a religious act and a civil-law act creating certain rights, a divorce, pronounced in this state of affairs, must be considered as devoid of any legal effects". Moreover, the Supreme Court added that an ecclesiastical court cannot go beyond the limits strictly outlined by the provisions of secular law, because otherwise "the judgment of an ecclesiastical court would not be protected by the authority of the state". The Supreme Court also pointed out that the examination of the jurisdiction of an ecclesiastical court adjudicating in a given case carried out by state courts should not be regarded as an interference with the sphere of civil jurisdiction of religious courts, since civil courts did not assess the legitimacy of the judgment issued by the ecclesiastical courts, but only checked whether the applicable provisions of civil law, which made judgments thus issued effective under civil law, were not infringed.[23]

The main reason for ambiguity arising when the legal status of individual citizens was determined with respect to marriage law was caused by the widespread migration of the population between individual districts of Poland, as it affected the competence of the jurisdiction of the courts competent to adjudicate on matrimonial cases.[24] It should be noted that at that time in Poland there were no regulations regarding norms giving rise to conflict between the concurring laws and regulations, which rather clumsily tried to replace the regulations of private international law applicable in the partitioning states.[25] The existing legal loophole was filled by the judicature of the time, mainly the rulings of the Supreme Court. It was not until the Act of 2 August 1926 on the law applicable to private internal relations (Private Inter-District Law),[26] whereby the applicable regulations of the international law of the partitioning states were repealed.

[23] See J.G., *Z praktyki jednego z konsystorzy ewangelickich*, "Gazeta Sądowa Warszawska" 1929, vol. 57(8), p. 120; J. Godlewski, *op. cit.*, pp. 751–754.

[24] The jurisdiction of civil courts was governed by the provisions of the Regulation of the President of the Republic of Poland of 6 February 1928 – Law on the system of common courts (Journal of Laws 1928, no. 12, item 9).

[25] "The difference between the substantive and procedural legislation concerning marital issues, existing in different districts of the State, gives rise to a situation where jurisprudence based on laws applicable in one district impinges on the legislation applied in another district. Therefore, extending the binding force of a judgment issued on the basis of the laws applicable in one district, must lead to chaos, which is demonstrated by the fact that the principles recognised by the Post-Austrian Code related to the indissolubility of the marriage bond between Catholics and the impossibility of handling a divorce case for such a marriage at all, have in fact been repealed on the basis of the judgment issued by an ecclesiastical court, issued on the basis of the laws in force in the Post-Russian district" (ruling of the Supreme Court of 8 June 1933, C II R 351/33, "Collection of Judgments of the Supreme Court" 1934, item 108).

[26] Journal of Laws 1926, no. 101, item 580, hereinafter: PIDL. According to the ruling of the Supreme Court of 23 October 1936 (III C 888/36, "Collection of Judgments of the Supreme Court" 1937, item 174), the PIDL, as intrinsically regulating certain legal issues, cannot be applied by analogy

Pursuant to Article 2 PIDL, the spouse would acquire new rights under the Family Law one year after the change of residence, and pursuant to Article 3 (1) and (2) PIDL, the wife's place of residence was that of her husband. Therefore, the laws that were binding on the husband applied also to the wife.[27] The husband, as the privileged party, was allowed to move independently to another district, where he would acquire new, more favourable rights, applicable to both spouses, which, within the meaning of Article 17 (1) and (2) PIDL, were the last commonly binding law that provided grounds for divorce. It should be stressed that a civil action arising out of a marital relationship in which at least one of the spouses was of Polish nationality was brought before the court with jurisdiction over their last place of cohabitation,

to contracts concluded before its entry into force; principles of private international law, however, must be applied to these contracts as provided for in the civil codes in force in Poland at the time. See J. Dworas-Kulik, *Przyczyny…*, pp. 110–111; R. Jastrzębski, *Prawo prywatne międzydzielnicowe. Zarys problematyki*, "Krakowskie Studia z Historii Państwa i Prawa" 2015, vol. 8(3), pp. 278–288. It should be added that already on 10 January 1920, Fryderyk Zoll presented to the Presidium of the Civil Law Section drafts of the international and inter-district law, which were then amended following discussion in the Krakow Legal Society. The critical remarks conveyed during a session of the Section on 15 March 1920 prompted Zoll to submit five days later another draft. A counterproposal was put forward by Henryk Konic. The first reading of both drafts took place between 25 March and 2 April 1920; the two drafts were amended in substance and editorially several times; much later, on 17 April 1923, a first reading of a draft law took place, whereupon the two drafts were returned to the Sejm Legal Commission. Discrepancies relating chiefly to the scope of marriage law in inter-district relations caused that the drafts were referred from the Sejm back to the Commission to reach a consensus between the Commission and the Codification Commission on marriage law. A draft was sent for the second and third reading, which rejected, i.a., the previous position of the Commission on the non-deterioration of the legal situation of citizens seeking to be married or divorced after relocation to a different district. On 18 February 1926, the Senate Legal Commission adopted both drafts after further stylistic and terminological amendments. The two acts were legislated during the Sejm session of 2 August 1926. For more on the work of the Codification Commission, see *Protokoły obrad Sekcji Prawa Cywilnego Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej. Prawo prywatne międzynarodowe i międzydzielnicowe – II i III czytanie*, Kraków 1921; S. Szczerbic, *Prawo prywatne międzynarodowe i międzydzielnicowe. Ustawy, rozporządzenia, przepisy związkowe, orzecznictwo*, Kraków 1935; W. Dbałowski, J. Przeworski, *Ustawy o prawie międzynarodowym i międzydzielnicowym*, Warszawa 1928; J.J. Litauer, *Rzut oka na polskie projekty ustawodawcze norm międzynarodowego i międzydzielnicowego prawa prywatnego*, Warszawa 1925; P. Dąbkowski, *Prawo prywatne polskie*, vol. 1, Lwów 1910; idem, *Prawo prywatne polskie*, vol. 2, Lwów 1911. Cf. V. Dvorský, *Międzydzielnicowe prawo prywatne w międzywojennych Polsce i Czechosłowacji*, "Forum Prawnicze" 2020, no. 5, pp. 70–79; L. Górnicki, *Prawo prywatne międzydzielnicowe z 1926 r.*, [in:] *Okresy przejściowe – ustrój i prawo*, ed. J. Przygodzki, Wrocław 2019, pp. 163–162.

[27] The wife had the right to have a separate residence in a location indicated by the court if separation had been granted to the spouses; also if her husband's place of residence was unknown, or if the husband had been incapacitated, who for this reason would be placed under guardianship and lose his domicile (see ruling of the Supreme Court of 26 April – 4 May 1929, I C 777/28, "Collection of Judgments of the Supreme Court" 1929, item 85).

provided that at least one of the spouses was still residing in that place.[28] Otherwise, the jurisdiction of the court was determined by the respondent's address or ultimately the petitioner's place of residence (Article 43 of the Civil Procedure Code[29]).[30] The provisions of the inter-district law covered marriages concluded before a civil registrar after the date of its into force as well as marriages of Polish citizens personally subject to Russian legislation, which were concluded in a civil form before the date of entry into force of those inter-district regulations, as long as the marital union between the parties still existed and had not been annulled or dissolved.[31]

The Supreme Court argued that a request for a divorce not only occurs the moment the complaint is filed, but also when the complaint continues to be sustained during the proceedings. Therefore, the change of residence and transition to another district law before the court delivers a judgment in this case will change the legal regime under which such a judgment will be made. In addition, the Supreme Court reasoned that it was sufficient for the statutory period of one year to expire at the time of the ruling rather than at the time of filing a suit.[32]

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[28] M. Allerhand*, Miejscowa właściwość sądu dla spraw ze stosunku małżeństwa*, "Polski Proces Cywilny" 1936, no. 20–21, p. 614.

[29] Regulation of the President of the Republic of Poland of 29 November 1930 – Civil Procedure Code (Journal of Laws 1930, no. 83, item 651), hereinafter: CPC.

[30] See J. Dworas-Kulik, *Przyczyny…*, p. 111.

[31] S. Tylbor, *op. cit.*, p. 596. It should be added that on 25 June 1929 Poland became a party to the international Hague Conventions concerning the conflict of legislations on marriage and the conflict of legislations and jurisdictions regarding divorce and separation with respect to table and bed (Government declaration of 14 September 1929 on the accession of the Republic of Poland to the Convention concerning the regulation of conflicts of laws on marriage, signed at The Hague on 12 June 1902, Journal of Laws 1929, no. 80, item 594; Government declaration of 14 September 1929 on the accession of the Republic of Poland to the Convention on the regulation of conflicts of laws and jurisdiction relating to divorce and separation as regards matrimonial matters, signed at The Hague on 12 June 1902, Journal of Laws 1929, no. 80, item 595; Government declaration of 14 September 1929 on the accession of the Republic of Poland to the Convention on the conflicts of laws relating to the effects of marriage on the rights and obligations of spouses in their personal and property relations, signed at The Hague on 17 July 1905, Journal of Laws 1929, no. 80, item 597). In the Polish legal system, the conventions were equivalent to those laws and derogating in relation to the Private International Law, but only in relation to the contracting parties. Although the Hague Conventions were incorporated into the Polish legal order three years after the Private International Law entered into force, owing to their earlier enactment they provided a model for the Polish legislature when drafting Polish international regulations on marriage law. Under both regulations, we clearly see an analogy in the way provisions and solutions concerning similar situations are worded. Therefore, when comparing the provisions of the Hague Conventions with the Polish Act on Private International Law, the differences between the two are apparent only in detail.

[32] Ruling of the Supreme Court of 9 December 1935, C III 836/35, "Collection of Judgments of the Supreme Court" 1936, item 287. See also J. Dworas-Kulik, *Przyczyny…*, pp. 111–112; Z. Radwański, *op. cit.*, p. 171.

Here, the wife's residence is an issue worth looking at. Under the law, she used to be obliged to follow her husband and live with him in the place designated by him. The official residence of the wife was that of her husband, so any rights that he acquired were also applicable to his wife, even if she actually resided in another place. Here, we are faced with a legal void because, for a divorce to be granted, the provisions of the private inter-district law required that the spouses cohabited under the same law. The wife might not have known about her husband's acquisition of new rights and the divorce, as he might have abandoned her and left without her earlier on. His new marriage under state legislation was a bigamy. Failure to observe the period indicated in the PIDL was also caused by the judicature, which permitted the period of one year to have expired on the day of issuing a decisive judgment, which implied that the petitioner, when requesting a divorce, did not need to exercise new rights available in the place where the complaint was filed. The entry of the inter-district regulations into force led to a situation where marriages concluded in a secular form in accordance with the secular type of marriage, were subject to dissolution under the religious law as a result of changing residence and settling in the post-Russian area.[33]

THE PROBLEM OF JURISDICTION OVER CIVIL MARRIAGES AND THE EFFECTS OF A DIVORCE OR MARRIAGE ANNULMENT

The internal regulations of various Churches would not apply to a civil marriage if it had not been solemnised by means of religious ceremony, which prevented the parties to such a legal relationship from following any judicial path.[34] Only common courts were competent to adjudicate on those marriage cases that were concluded in a civil form, since a marriage solemnised before a civil registrar constituted a civil contract. Therefore, only civil courts had the authority to annul or dissolve a secular marriage. The resulting legislative law was partly filled by the judicial decisions of the Supreme Court, pointing out that the state authorities granted ecclesiastical courts the competence to deal with matrimonial disputes arising in marriages where the conclusion of marriage had a religious character. Civil marriages did not have this property, therefore the settlement of a dispute falling within the subject-matter jurisdiction of civil courts by an ecclesiastical court had no legal force. Therefore, it had to be assumed that civil courts, which are common courts, had the authority to

[33] See ruling of the Supreme Court of 12 June 1929, I N 7/29, "Jurisprudence of Polish Courts" 1931, item 300.

[34] See J. Dworas-Kulik, *Przyczyny…*, pp. 115–116; E. Prądzyński, *Zagadnienie ważności małżeństw cywilnych*, "Palestra" 1937, vol. 14(5), p. 439. See also Z. Radwański, *op. cit.*, pp. 170–171; M. Allerhand, *Międzydzielnicowe prawo procesowe w państwie polskim z uwzględnieniem stosunków przejściowych*, Warszawa 1920, p. 18.

settle all disputes arising out of a civil-law relationship. As a consequence, with the emergence of such civil jurisdiction, the competence of ecclesiastical courts conferred on them by the State ceased to exist. The Supreme Court added that a marriage concluded before a civil registrar was a civil contract, therefore only civil courts had the authority to annul or dissolve a secular marriage.[35] State authorities gave ecclesiastical courts powers to deal with marital disputes arising from marriages in which the marriage celebration had a religious character. Civil marriages did not have this property, therefore the settlement of a dispute falling within the subject-matter jurisdiction of civil courts by an ecclesiastical court had no legal force. It should be stressed, however, that a judgment handed down by an ecclesiastical court that was not competent to rule on a given case, despite its invalidity produced civil effects until it was overturned by an ecclesiastical court entitled to do so. A person seemingly released from the marital bond was still in a valid marriage under civil law, and the next marriage was treated by the state as bigamous.[36] Such arbitrariness of ecclesiastical courts contributed to the situation where two marriages existed at the same time, leading directly to "legal bigamy".

It should be pointed out that according to Article 40 Svod, individuals whose cohabitation was severed on account of another marriage being contracted despite a previous marriage that had not been legally dissolved and terminated by the death of either spouse could resume cohabitation with the spouse from the previous marriage, providing that the abandoned spouse consented to that. Contracting a new marriage despite the death of the spouse was forbidden by law. Furthermore a spouse who had been wronged by an adverse judgment of the ecclesiastical court had the right to request full exercise of his or her rights and thus benefits resulting from the solemnised marriage.[37] Most often, the assertion of spousal claims on an incorrectly

[35] See ruling of the Supreme Court of 12 April 1929, [in:] *Ważność ślubów cywilnych wziętych za granicą przez obywateli polskich, mieszkańców b. zab. ros.*, "Gazeta Sądowa Warszawska" 1929, vol. 57(32), pp. 498–499. Cf. M. Allerhand, *Jurysdykcja władz wyznaniowych w sprawach małżeńskich*, "Czasopismo Sędziowskie"1937, no. 3, pp. 114–115.

[36] "So long as the union entered into by the parties before a civil registrar in 1925 has not been annulled or dissolved by the competent civil court, it shall remain in force under civil law and shall have all legal consequences" (ruling of the Supreme Court of 14 January 1933, I C 701/31, "Collection of Judgments of the Supreme Court" 1932, item 10). See J. Dworas-Kulik, *Przyczyny…*, pp. 109–129; S. Tylbor, *op. cit.*, p. 590; H. Świątkowski, *Z praktyki sądów…*, pp. 111–112; Z. Radwański, *op. cit.*, p. 173; H. Świątkowski, *Problem legalnej bigamii…*, pp. 1150–1158; S. Paciorkowski, *Problem tzw. legalnej bigamii w II RP w świetle spraw małżeńskich toczonych przed Sądem Okręgowym w Poznaniu*, "Repozytorium Uniwersytetu im. Adama Mickiewicza" 2013, vol. 2, pp. 15–28.

[37] Ruling of the Supreme Court of 8 November 1926, I. C. 260/25. As S. Tylbor (*op. cit.*, p. 590) argues, "in cases of dispute, the state authority is confronted with two formally valid marriage acts, separated by a divorce decision issued by an ecclesiastical court. The question arises as to why the state authority should treat the second wedding certificate as conclusive while the first is formally binding. The fact that a divorce decision stands between the first and the second marriage certificates is irrelevant if this decision has been issued by an ecclesiastical court, having the power of absolute proof of

divorced marriage was pursued under Article 3 CPC.[38] As a rule, the wife from the previous marriage would bring an action before a civil court against the second wife so that the civil effects of the second marriage might be nullified. In practice, such a statement by the Supreme Court provided grounds for the first wife to refuse to validate and thus make effective the second (formally concluded) marriage and entitled her to claim the benefits of her own marriage.[39]

A dissenting view was presented by the Supreme Administrative Tribunal, which expressed an opinion that it does not fall within the competence of the administrative authority to examine the substantive validity of a certificate issued after the first marriage had been annulled or dissolved by a legally incompetent ecclesiastical court. The verification of the legality of a judgment dissolving a marriage was treated by the Supreme Administrative Tribunal as a breach of the law, therefore, based on the guidelines proposed by the Supreme Administrative Tribunal, the administrative authorities granted retirement or disability pension entitlements only to the second wife of the late husband, while denying them to the first defectively divorced wife.[40] However, if the wife from the first marriage, pursuant to Article 3 CPC, first established her legal status before a civil court, the administrative authority had to take this into account when adjudicating on the legal effects of the marriage, and therefore they had to recognise the claims of both wives, treating them as equally entitled to benefits of the deceased husband.[41]

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marriage dissolution only in so far as it was handed down in compliance with civil law. If a judgment has no binding force, it constitutes a document of no value, as if there had been no divorce at all".

[38] "Everyone may seek judicial protection not only when his right has been infringed, but also when, preventing the infringement of this right, he has a legal interest in establishing a legal relationship or a right" (Article 3 CPC). See also the announcement of the Minister of Justice of 1 December 1932 on the publication of the consolidated text of the Civil Procedure Code (Journal of Laws 1932, no. 112, item 934).

[39] Cf. ruling of the Supreme Court of 1 October 1937, N C I 1443/37, [in:] W.Ś., *Jurysprudencja cywilna. Powództwo w trybie art. 3 k.p.c. o uznanie za pozbawiony skutków prawnych wyroku rozwodowego*, "Gazeta Sądowa Warszawska" 1938, vol. 65(35–36), pp. 503–504; ruling of the Supreme Court of 9 March 1938, C I 1708/37, "Collection of Judgments of the Supreme Court" 1939, item 31. Cf. ruling of the Supreme Court of 23 May 1936, C II 308/36, "Collection of Judgments of the Supreme Court" 1937, item 36; ruling of the Supreme Court of 1 December 1927, I C 1041/27, "Collection of Judgments of the Supreme Court" 1927, item 168. For more on this topic, see J. Dworas-Kulik, *Przyczyny…*, pp. 116–121.

[40] See ruling of the Supreme Administrative Tribunal of 22 November 1937, L Rej. 2222/35, [in:] J.M., *Jurysprudencja Najwyższego Trybunału Admnistracyjnego. Pensje wdowie – ocena ważności wyroku sądowego*, "Gazeta Sądowa Warszawska" 1938, vol. 65(16), pp. 246–248. Cf. ruling of the Supreme Administrative Tribunal of 12 December 1931, L. Rej. 4267/30, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1932, no. 19, p. 471.

[41] Cf. ruling of the Supreme Court of 15 November 1932, I C 1648/32, "Collection of Judgments of the Supreme Court" 1932, item 233. See J. Dworas-Kulik, *Przyczyny…*, pp. 118–119.

The bigamous husband, through his conduct, not only caused consequences under civil law, but above all, became a perpetrator of the crime of bigamy by violating the provisions of state law. The role of criminal law was to force, under the pain of a criminal sanction, to respect the principles stemming from the regulations of civil law, therefore, from the perspective of criminal legislation, the internal regulations of individual denominations were irrelevant, so if judgments delivered by consistories were in conflict with the civil law, they violated the rules of the criminal law and thus held the perpetrator of bigamy criminally responsible.[42]

CONCLUSIONS

From the perspective of civil law, a marriage as a union between a man and a woman was a contract of a significant value to the public, and therefore regulations and sanctions relating to the institution of marriage were intended to protect both the individual and public interests. The spouses' unawareness of the fact that a judgment without a sufficient legal grounding was an element of legal transactions further complicated their legal status, as it often would lead to successive marriages being contracted, which were deemed bigamous by the state authorities. The spouse who – because of his or her ignorance as to the legitimacy of the divorce judgment, did not bring an action before the Supreme Court against an ecclesiastical court for exceeding its competence, accepted a divorce devoid of legal force, thus depriving themselves of the rights resulting from the marriage. New marriages contracted under these circumstances had civil effects, which state court had to adjudicate on; however, they could not, either explicitly or incidentally, declare a marriage null and void as contracted illicitly or as having no civil effects. Under civil law, a person seemingly released from the marital bond continued to be in a valid and continuing marital union; however, the inability of an ecclesiastical court to effect a change in the ruling gave rise to the situation in which there were no grounds under criminal law for a conviction for bigamy. Also, the state authorities could not hold clerics dealing with marriage cases and keeping civil-status records criminally responsible because they were not civil servants who were criminally responsible for failure to fulfil their duties. The implementation of Lutostański's draft could have markedly reduced the phenomenon of bigamy, so widespread in interwar Poland, but resistance from conservative circles prevented the unification of marriage law.

[42] J. Dworas-Kulik, *Prawnokarne aspekty bigamii w Polsce w okresie dwudziestolecia międzywojennego*, "Roczniki Nauk Prawnych" 2017, vol. 27(2), pp. 17–39.

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ABSTRAKT

W artykule opisane zostały problemy prawa małżeńskiego na ziemiach wschodnich Drugiej Rzeczypospolitej. Wynikają one przede wszystkim z braku kodyfikacji prawa małżeńskiego na całym obszarze Rzeczypospolitej oraz z braku wprowadzenia wyłącznie jurysdykcji cywilnej w sprawach małżeńskich, którą przewidywał projekt Lutostańskiego. Praktyka sądów wyznaniowych skutkowała tworzeniem małżeństw materialnie nieważnych oraz szerzeniem się zjawiska legalnej bigamii. Nierespektowanie przepisów państwowych dotyczących właściwości sądu wyznaniowego w sprawach

o rozwiązanie małżeństwa bądź stwierdzenie jego nieważności, a także wzajemne nieuznawanie wyroków sądów duchownych przyczyniły się do powstania obszarów zwanych „mekkami rozwodowymi". Określenia te dotyczyły Kościoła prawosławnego i kalwińskiego, funkcjonującego na terenach ziem wschodnich Drugiej Rzeczypospolitej. Biorąc to pod uwagę, celem artykułu jest próba zestawienia czynników destabilizujących prawo małżeńskie na tych ziemiach. Do analizy tego zagadnienia wykorzystano przede wszystkim metodę historyczno-prawną.

Słowa kluczowe: legalna bigamia; zabór rosyjski; mekka rozwodowa; małżeństwo; rozwód; sąd duchowny