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DISSOLUTION AND SEPARATION OF MARRIAGE
AND THEIR EFFECTS AS ENVISAGED BY DRAFTS
OF MARRIAGE LAW IN INTERWAR POLAND

INTRODUCTION

The interwar period in Poland was characterized by the confrontation of two political camps that supported totally divergent solutions regarding the construction and nature of future marriage law in Poland. A group of conservative politicians who deemed marriage to be a religious institution demanded that a religious type of marriage be introduced in the whole territory of the State, and therefore that the jurisdiction in matrimonial cases be handed over to ecclesiastical courts. The other group was in favour of the optional form of marriage and exclusive civil jurisdiction that would put an end to the chaos created by spiritual consistories adjudicating in the territory of the former Russian Partition in violation of their competences granted to them by the State, which led to the phenomenon of legal bigamy (GODLEWSKI 1967, 750–759; RULIKOWSKI 1932, 161–170; CZERWIŃSKI 1936, 11–12; GWIAZDOMORSKI 1935, 176; IDEM 1932, 4–23; DWORAS-KULIK 2017, 109–129; IDEM 2019, 99–155; ŚWIĄTKOWSKI 1959, 1150–1158; IDEM 1938, 107–114; IDEM 1934, 67–69; ALLERHAND 1925; IDEM 1937, 113–123 and 176–182; FASTYN 2010, 111–132). In 1920, Władysław Leopold Jaworski expounded the principles of marriage law in 15 items. In view of the position of the Catholic bishops, who were against the optionality of civil marriage and divorce, and for fear of conflict with the Holy See and an inevitable social conflict Jaworski's draft law was abandoned (GOŁĄB 1932,

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20–31; IDEM 1925, 593–595; KRASOWSKI 1994, 467–487; SZCZEPANIAK 2015, 96–104; WOŹNICZEK 2011, 132–141; BISKUPSKI 1930, 13–39; IDEM 1932; BILCZEWSKI 1924). In 1924, a special subcommittee for marriage law was appointed. Karol Lutostański became the chief reporter, and for this reason the draft of the personal marriage law was called with his name. His draft law was opposed by Polish bishops, and although the Codification Committee finished its work on it in 1929 and the explanatory memorandum was published in 1931, the draft did not become law (*Projekt prawa małżeńskiego uchwalony przez Komisję Kodyfikacyjną w dniu 28 maja 1929*, 1931; BISKUPSKI 1932, 15–16; LUTOSTAŃSKI 1932a, 289–292; IDEM 1932b, 525–530, 541–546, 557–562; idem 1932c, 29–31; GÓRNICKI 2018, 171–201; DWORAS-KULIK 2019, 198–211; *Katolicyzm, kapitalizm, socjalizm. List pasterski biskupów austriackich*, 1928; *W sprawie projektu ustawy o małżeństwie. Orędzie Episkopatu Polski*, 1931, 206–208; X, 1932, 375–377). An alternative to Lutostański's draft marriage law was that prepared by Zbigniew Lisowski, considered by a Vatican special pontifical committee as one of the best in Europe. In 1934, Polish bishops decided to endorse it officially, and in 1939 the Polish Bishops' Conference resolved to submit this draft to the Sejm (*Prawo małżeńskie (projekt ustawy)* 1934; MIKA 2007, 79–85; KRASOWSKI 1992, 197–198; IDEM 1994, 500–501; GÓRNICKI 2000, 195–206), but it did not meet with approval of the parties at dispute. The last private draft of marriage law that is worth mentioning had a religious basis and was prepared by Father Jerzy Jaglarz (JAGLARZ 1934, 47–71). Incidentally, there was also a non-official draft authored by Stanisław Gołąbek, who proposed a solution once used in the Austrian Partition and consisting in making the application of canon or civil law dependent on the chosen form of marriage (GODLEWSKI 1967, 759; DWORAS-KULIK 2019, 211–212). The conflict over the secularisation of marriage law made it impossible to unify this branch of law throughout the interwar period. This article discusses issues related to divorce and separation in the drafts of marriage law prepared by Lutostański, Jaglarz and Lisowski, and in a synopsis of Jaworski's draft.

1. DIVORCE AND ITS CONDITIONS

According to the rules provided in Jaworski's draft of marriage law, a marriage becomes dissolved when divorce is declared between the spouses. If the spouses were in agreement, the grounds for divorce were not examined. However, if only one spouse petitioned for divorce, it would be

granted in the cases of qualified adultery, abuse, severe imprisonment, permanent mental illness or a permanent threat (GOŁĄB 1932, 23; IDEM, 1925, 596, principles 9 and 10).¹ In both Jaglarz and Lisowski's drafts, it was inadmissible to declare a divorce if the marriage was celebrated before a Catholic priest (Article 59 and Article 102 of the two drafts, respectively). Moreover, the marriage law developed by Lisowski provided for divorce declared for secular marriages and those celebrated in a religious rite that allows dissolution of marriage. However, the absence of minor children and satisfaction of certain divorce criteria was prerequisite (§§ 103–104). These included adultery, unless the spouse agreed to it, made it happen or forgave unfaithfulness. The presumption of forgiveness became effective after 6 months of becoming aware of a spouse's adultery or after 3 years of committing this act (§ 79). The reasons for demanding a marriage to be dissolved was also the following:

- a mental illness lasting more than 3 years and without prospects for the future, according to an expert opinion;
- threatening the life of the spouse or children, or repeatedly insulting or actively abusing the spouse, unless forgiveness was shown within 6 months of the last culpable act against the spouse;
- maliciously leaving the place of cohabitation (2 years without good reason or 3 years without known whereabouts) and failing to respond for another 6 months to a private or public court order to return (§§ 80–82). The catalogue of grounds for divorce also included the spouse's addictions, immoral conduct and the risk of spreading an infectious disease that posed a health risk to the spouse or the children, and a final conviction for a disgraceful crime or another non-political crime punishable by no less than 5 years' imprisonment (§ 83–84). The passage of three years from the occurrence of the aforementioned events made them time-barred if they were invoked as reasons for divorce claims (§ 85) (Lisowski's draft of marriage law, 43–45).²

As regards the grounds for divorce, Jaglarz's project took into account a permanent adulterous relationship, a final conviction for practising prostitution or for threatening the life of the spouse or children. At the same time, the right to petition for divorce expired as soon as the guilty spouse was forgiven, on condition that one year had passed since the judgement became final or if the other spouse had also proved to be unfaithful or allowed the

¹ Likewise, regulations on child custody were laid down for cases where separation was granted.

² The above conditions were also applicable where a request for separation was made.

spouse's adultery to happen (Articles 60–61). Each time after the expiry of this period forgiveness was presumed, and also in a situation where, despite the circumstances mentioned above, the spouse maintained conjugal relations (Article 62). According to Article 63 of this draft, when granting a divorce, the well-being of minor children was taken into account and the actual breakdown of the marital union that occurred in connection with an adultery or crime. Instead of divorce, the court could order temporary or even unlimited separation of the spouses if the well-being of the children so required or if there was a chance for the spouses to reconcile (JAGLARZ 1934, 59–60).³

Lutostański's draft provided for the separation of spouses in the first place. A judicial decision granting a divorce could be sought after 3 years of the ruling on separation, and this period would be shortened under special circumstances.⁴ Under Article 77 of this draft, a transition from separation to divorce followed from the well-being of minor children.

It should be noted that Lutostański and Jaglarz's draft laws provided for the jurisdiction of common courts (Article 64 and Article 81, respectively) (JAGLARZ 1934, 61–62); as envisaged by Jaglarz, the presence of the defender of the bond was requisite during the divorce hearing, who had all rights and obligations pertaining to a party in the case. A judgement handed down without hearing the defender rendered judicial orders ineffective. Moreover, the defender of the bond was allowed to appeal the divorce decree (Articles 65–66 in Jaglarz's version). Divorced spouses had the right to have their divorce decree set aside and its consequences cancelled by a court of appeal. The restoration of the previous state was possible unless the parties contracted new marital unions (Article 67). Lisowski's draft indicated the jurisdiction of the civil court only in separation cases and in relation to secular marriages (§ 112). Otherwise matrimonial cases were subject to the jurisdiction of religious courts. Within 30 days of the conclusion of first-instance proceedings, spiritual consistories submitted a judgement declaring marriage nullity or dissolution of marriage to the locally competent court of

³ In interwar Poland, the institution of separation was referred to as “divorce from bed and board” (*rozłączenie od stołu i łóża*). In the drafts of marriage law, chapters devoted to this institution were titled “Rozłączenie.” The court ruled on temporary or unlimited separation of spouses, which prevented them from remarrying.

⁴ In accordance with Article 97 of Lutostański's draft, the shortening of this time limit could be sought by civil action or applied for separately. No means of recourse against a judicial decision was available in this regard.

appeal, which recognised its validity by making it effective under civil law (§ 110) (Lisowski's draft of marriage law, 52–55).⁵

2. INTERWAR LEGAL SOLUTIONS CONCERNING SEPARATION

In his rules of the draft marriage law, Jaworski indicated that a separation granted by the ecclesiastical court was to be respected by the state (GOŁĄB 1932, 23; IDEM 1925, 596). Similar regulations were included in Article 70 Jaglarz's version. The author added a proviso that in such a case the common court ruled only on the material consequences of the separation. The institution of separation was regulated by Jaglarz in Articles 68–74. In line with his draft, the court ruled on divorce from bed and board at the request of one or both spouses, if the welfare of the minor children did not hinder this and the marriage was broken down through the fault of one or both spouses. However, before the final separation decree was handed down, the court attempted mediation between the parties with a view to reconciling them. The lack of agreement resulted in a separation being decreed for one year. If no reconciliation ensued after that period, despite a renewed attempt to reconcile the spouses, the court ruled on separation for an unlimited period. At the same time, the court issued a final decision on the property relations and the fate of the children (Articles 68 and 69) (JAGLARZ 1934, 62). Earlier, this solution was envisaged by Lutostański's draft, since under Articles 56 and 57, the court would rule on the separation of spouses for a period of one year if they upheld their request to abolish their community of marital property during the trial; then, after the completion of that period, in accordance with the will of the parties, the court ruled on unlimited separation without recognising the fault of either spouse (Article 57). Under Lutostański's draft marriage law, separation with the spouses' consent was granted when they had been married for more than three years, if they were over 25 years old and had no children (Article 54). On the other hand, when only one spouse sought separation, the court was obliged to consider the well-being of the minor children and determine whether there had occurred a permanent breakdown of the conjugal life by reason of: committing adultery, making attempts at the petitioner's or their child's life, grave verbal

⁵After the divorce decree became final, the court adjudicating at first instance was obliged to notify the civil registry office (§ 109). Reconciled spouses had to remarry.

abuse, insults or slanders against the spouse. Furthermore, if the respondent had been deprived of parental authority, refused to support the family, had left the place of cohabitation (one year without good reason or five years with good reason) and did not return to the family after being summoned directly or publicly (unless there was force majeure justifying non-compliance with this deadline invoked by the spouse),⁶ had been sentenced to more than 5 years' imprisonment, or had committed a disgraceful crime, or led a riotous or dissolute life, exercised or profited from disgraceful occupations, was an alcoholic or a drug addict, suffered from a mental illness lasting more than three years, or had an STD or contagious disease and thus dangerous for the spouse, and if he or she was affected by impotence (unless the respondent was under 50 years of age or the marriage lasted less than 50 years) or persuaded the petitioner or their children to lead an immoral life. The above catalogue of reasons for separation also included a threat giving rise to fear for one's life, health or reputation of the petitioner or their closest relatives, an error existing on the day of the marriage celebration regarding the spouse, his marital status, nationality or religion, or the occurrence of circumstances threatening the health of the petitioner or their children, or the occurrence of circumstances that are commonly considered to be damaging to the honour of the spouse, and also when consent was not granted to have church ceremony despite a relevant statement recorded in the marriage certificate before the civil registrar (Article 58). The petitioner could not plead adultery if they tolerated it or forgave their spouse, or if 6 months had passed since they became aware of the spouse's marital infidelity or if 3 years had passed since it happened. A similar period of time made it impossible to make reference to the above-mentioned attempts at life, grave verbal abuse, insults and slanders. A period of six months was also binding if an error became known or coercion ceased; a three months period of the drawing up of a marriage certificate when requesting the completion of ecclesiastical celebrations (Lutostański's draft of marriage law, 17–19. See: JĘDREJEK 2001, 57–65).⁷

Pursuant to Articles 73 and 74 of Jaglarz's draft, spouses could at any time notify the competent court of their withdrawal from separation, therefore if their children had been entrusted to a third party for upbringing at the request of the reconciled spouses, after hearing the legal guardian of those

⁶ In accordance with Article 93 of Lutosławski's draft, the spouse who left their place of cohabitation was sent a summons to return accompanied by a petition for separation.

⁷ It should be pointed out that the reasons for separation in Lisowski's draft were the same for divorce.

children, the court decided to return them to their parents within a specified period of time. The above regulation was compatible with Article 76 of the Lutostański's draft (JAGLARZ 1934, 62).⁸

3. CONSEQUENCES OF DIVORCE AND SEPARATION

In accordance with Jaworski's draft, in a divorce judgement a decision was made about the spouses' fate, after the court had established the facts about the spouses arrangements concerning the upbringing and care of their children. What is more, if was declared at the request of only one of the parties, the spouse at no fault retained their entitlement to maintenance and other rights arising from matrimonial property contracts. Similar legal solutions for matrimonial property relationships had to be applied when deciding on spousal separation (GOŁĄB 1932, 23; IDEM 1925, 596–597, principles 10 and 13). In Lutostański's project, the filing of an application for separation entitled the spouses to temporarily leave their place of residence (Article 59). At the first hearing, the court ruled on the question of living separately for the duration of the pending case, mutual obligations concerning the maintenance of the spouses and matrimonial property relations, and the manner of taking care of their children (Article 60). A similar solution was provided for in § 86 of Lisowski's draft with the difference that leaving the shared place of residence would have to result from a threat to the safety of either spouse. The draft law prepared by Jaglarz, in turn, filing for divorce gave a spouse the right to temporarily leave the shared place of residence, but with the court's consent. In addition, after hearing both parties, the court would issue a temporary order concerning their marital relations and custody of the children (Article 75). The final ruling on matrimonial property relations, the court took into account the degree of guilt or shared guilt of the spouses for the breakdown of their marriage (Article 69). In Lutostański's draft law the degree of the spouses' guilt was also significant in granting separation for an unlimited period of time, as long as the claim was not based on sexual im-

⁸ The content of § 101 of Lisowski's draft as well as Articles 63 and 65 of that by Lutostanski also indicated the possibility of withdrawing from separation, but the latter provided that the parties were bound by the statutory marital union if there was no new marriage contract.

potence or mental illness of the defendant (Article 61) (Lutostański's draft of marriage law, 19–20).⁹

In drafts of marriage law developed in interwar Poland, a judgement's becoming final resulted in the cessation of the spouses' mutual rights and obligations, the abolition of the succession rights of the surviving spouse and the benefits of the marriage contract or those resulting from wills drawn up before the separation of the spouses (Article 64 of Lutostański's draft, Article 76 of Jaglarz's draft, and § 90 of Lisowski's draft).¹⁰ Under Lutostanski's project, the abolition of the community of marital property resulted in the joint property getting divided, which consisted in taking away personal property as well as profits and losses produced during the marriage from the joint property proportionally to the spouses' personal property (Article 64). In both Lutostanski's and Jaglarz's drafts, the spouse who is not guilty of the breakup of the marriage could claim compensation, including moral damages for the damage caused by the separation and for the loss of benefits resulting from the matrimonial contract, or in connection with acts that led to the judicial decision justifying the dissolution of the community of marital property (Article 66 of Lutostanski's and Jaglarz's drafts).¹¹ Similarly, both drafts featured regulations providing that marriage agreements relating to relations holding between spouses and rights and obligations towards their children were in force if they had been confirmed by the court's judgement (Articles 71 and 76 of Jaglarz's draft and Article 74 of Lutostański's version).

On the basis of the draft adopted by the Codification Committee, the court awarded maintenance to the non-guilty spouse taking into account the property status and needs of both parties. In exceptional cases, though, this right could be granted to the spouse who shared the blame for the breakdown of the marriage. The amount of the maintenance benefit was subject to change if the financial, personal and family situation of both parties to the contractual relationship changed (Articles 67–68 of Lutostański's draft). The court also ruled on the custody of children and administration of their property, giving preference in this respect to the non-guilty spouse or even a third

⁹ In accordance with § 80 of Lisowski's draft, a judgement granting separation also included a determination of the degree of the spouses' culpability.

¹⁰ Under Lisowski's version, separated spouses could to contractually regulate their marital relations. Besides, the no-fault spouse was allowed to revoke any donations made to the spouse at fault during their marriage (§ 90).

¹¹ § 91 of Lisowski's draft indicated that the non-guilty spouse had the right to claim monetary compensation if their financial situation had deteriorated significantly or if they had been deprived of financial benefits which they could expect in the future.

party if the interest of the child so required. At the same time, the court determined the parents' share of the upbringing of their children and established the pattern of parent-child contact, possibilities of supervision over the upbringing process, and the education of a child by a parent who was not deprived of parental authority and who did not have the direct custody of the minor (Articles 72 and 73 of Lutostański's draft and §§ 96–97 and 99 of Lisowski's version).¹² In Jaglarz's draft, the court also granted maintenance to the non-guilty spouse and child, taking into account their social and financial status, as well as the spouse's earning capacity. Likewise, by way of exception, the above entitlements were available to the spouse who shared the blame (Article 82). In the case of new circumstances arising, the court could change not only the decision concerning the matrimonial property relationships, but also the situation of the children.¹³ Lisowski's draft in § 92 provided for similar legal regulations, but the payable cash benefit was defined as allowance which, based on § 93 of this draft, was paid in the form of a cash pension. It is worth noting that at the request of the debtor, the court had the option to turn the pension into a single severance pay.¹⁴

The maintenance or pension obligation was transferred onto the heirs. However, it ceased upon remarriage (Articles 67–69 of Lutostański's version and § 94 of Lisowski's draft). We should also note that presumption of paternity did not apply to a child conceived during the period of separation (Article 71 of Lutostanski's draft). The above solutions were also reproduced in Jaglarz's version in its Articles 84 and 79. The only modification used in this draft law was to allow the heirs' obligation to pay maintenance benefit by the court's decision to be replaced with a one-off high compensation at the request of a beneficiary (Article 83).

The question of the divorced wife's surname was regulated differently in each of the draft marriage laws. For Jaglarza, a wife who was solely guilty of the dissolution of the marriage would lose the right to use her husband's surname (Article 80). In Lutostański's draft, however, the divorced wife could keep her husband's surname if she had minor children (Article 79),

¹² Lisowski's draft permitted the possibility of placing the child in an educational institution if both spouses were guilty of the separation and granting custody of the child to either of them could violate the minor's moral well-being.

¹³ Similar possibilities regarding the normalization of the relationship of spouses with their children would arise under Article 75 of Lutostański's draft and § 98 of Lisowski's draft.

¹⁴ In the case of a separation pronounced as a result of a mental illness of one of the spouses, a cash allowance was granted to the ill spouse if their financial assets were insufficient to cover their livelihood.

while under Lisowski's draft the divorcee would always revert to the surname she had before the marriage (§ 107). Lisowski's version also envisaged that the lapse of 2 years (6 months in Jaglarz's draft) after the divorce decree became final provided an entitlement to remarry (Article 77 of Jaglarz's draft and § 106 of Lisowski's version).¹⁵

CONCLUSION

Many legal solutions envisaged by Lutostanski's draft marriage law, criticised in the media by the conservative circles, were reproduced in Lisowski and Jaglarz's drafts. Among the most important reasons for divorce and separation, all the drafts mentioned adultery, mental disease lasting longer than 3 years, an infectious disease posing a risk to the spouse or children's health, threats to the spouse's life, exercise of a disgraceful occupation, desertion, a final conviction and sentencing to 5 years' imprisonment, addictions or immoral conduct. Lutostański's draft was primarily intended to safeguard the permanence of marital union, hence a divorce was possible only after a certain statutory period of separation elapsed. The other drafts allowed divorce instead of separation as long as it did not apply to Catholics. Each time, when ruling on a dissolution or separation of marriage, courts were guided by the well-being of minor children and the degree of the parents' guilt, which had an impact on the marital property and the custody of their children. In each of the drafts, either the innocent spouse or the one to blame for marriage breakdown was entitled to a financial benefit if his or her financial and material situation justified that. Divorced or separated spouses who were reconciled were allowed to petition for a change of the judicial decision and this change would be recorded in their civil status records. It should be added that with the dissolution of marriage the presumption of paternity ceased, therefore the drafts introduced "quarantine" periods, as it were, after which a new marriage could be contracted—in order to avoid problems with determining the paternity of the child conceived.

¹⁵ For more on this, see: J. JAGLARZ, *Projekt prawa*, pp. 62–64. Article 78 of Lutostański's draft also entitled divorcees to enter into a new marriage without setting any statutory period after which re-marrying would be possible.

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DISSOLUTION AND SEPARATION OF MARRIAGE AND THEIR EFFECTS
AS ENVISAGED BY DRAFTS OF MARRIAGE LAW IN INTERWAR POLAND

Summary

The essence of marriage was the stability of conjugal life with a view to helping each other and to give birth to and raise children. The society of interwar Poland was polarised over the nature of matrimonial law, which was why this branch of law was not never unified in the interwar period. The civil-law consequences caused by the legal mosaic of that time were still felt in the era of Polish

People's Republic. The draft of the Codification Committee, which was announced and submitted for public scrutiny in the form of questionnaires and public discussions, was criticized by the legal conservative circles. Two representatives of this community prepared their drafts of marriage law: Zygmunt Liskowski, whose draft marriage law was based on religious law and enjoyed the support of the Polish Bishops' Council, and Father Jerzy Jaglarz, whose draft largely reproduced the legal solutions envisaged by Karol Lutostański's draft. Since the aim of this article is to present the institution of divorce and separation and their effects as proposed by the above-mentioned drafts of interwar marriage law, it relies mainly on the historical-legal and comparative methods.

Keywords: Lutostański's draft; Lisowski's draft; Jaglarz's draft; marriage law; divorce; separation; codification of marriage law

ROZWIĄZANIE I ROZŁĄCZENIE MAŁŻEŃSTWA ORAZ ICH SKUTKI W PROJEKTACH PRAWA MAŁŻEŃSKIEGO W DRUGIEJ RZECZYPOSPOLITEJ

Streszczenie

Istotą małżeństwa była stałość wspólnego pożycia małżeńskiego mająca na celu wzajemną pomoc oraz zrodzenie i wychowywanie dzieci. Podzielone społeczeństwo Drugiej Rzeczypospolitej toczyło spory wokół charakteru prawa małżeńskiego, przez co nie doszło do ujednoczenia tej gałęzi prawa w okresie międzywojennym. Konsekwencje na gruncie prawa cywilnego wywołane międzywojenną mozaiką prawną były odczuwane jeszcze w okresie Polski Ludowej. Projekt Komisji Kodyfikacyjnej ogłoszony publicznie i poddawany opinii społecznej w postaci ankiet oraz publicznych dyskusji został skrytykowany przez środowisko konserwatywne. Dwóch przedstawicieli tegoż środowiska przygotowało swoje projekty prawa małżeńskiego. Byli nimi Zygmunt Liskowski, którego projekt prawa małżeńskiego oparty na systemie wyznaniowym poparł Episkopat oraz projekt księdza Jerzego Jaglarza w dużej mierze powielający rozwiązania prawne zawarte w projekcie Karola Lutostańskiego. Z uwagi na to, że celem niniejszego artykułu jest przedstawienie instytucji rozwodu i separacji oraz ich skutków w powyższych projektach prawa małżeńskiego okresu międzywojennego, zastosowano tu przede wszystkim metodę historyczno-prawną oraz komparatystyczną.

Słowa kluczowe: projekt Lutostańskiego; projekt Lisowskiego; projekt Jaglarza; prawo małżeńskie; rozwód; separacja; kodyfikacja prawa małżeńskiego