

Przemysław Kusiak

ANNULMENT AND DIVORCE OF MARRIAGES WITHIN THE POLISH LEGAL SYSTEM

Introduction

The aim of this paper is the institution of marriage within the legal system in Poland. The problem of jurisprudence on the invalidity of marriage in the law of the Catholic Church and the lack of recognition of the verdicts of the Bishops' Court on the forum of the Polish State is addressed. The Polish Concordat¹ as a ratified international agreement caused changes in the order of civil law in Poland. The Family and Guardianship Code introduced "the possibility for a marriage governed by the internal law of this church [...] to have the same effects as a marriage contracted before the head of the register office. [...] a marriage is considered to have been celebrated at the moment the declaration of will is made in the presence of a clergyman".² By exercising the right, the nuptial couple express their will to obtain civil effects. From the moment their marriage is entered in the register of the Registry Office, it has civil effects. There is one marriage valid in the forum of the Church and civil law in Poland. The logic of this reasoning is confirmed by particular law, i.e. the Instruction for pastors concerning concordat marriages of 22.10.1998.³ "The Polish Bishops' Conference, at its plenary meeting of 4 June 1998, adopted the following resolution: Faithful of the Catholic Church in Poland entering into a canonical marriage are obliged to obtain for it the civil effects ensured in the Concordat (Art. 10). Therefore, without the consent of the Ordinary of the place, it is not allowed to assist at marriages

PRZEMYSŁAW KUSIAK, M.A., Ph.D. student at Dolnośląska Szkoła Wyższa in Wrocław, ul. Strzegomska 55, 63-511 Wrocław, Poland; e-mail: imprzemyslaw@gmail.com; <https://orcid.org/0000-0003-2218-4114>

¹ Concordat between the Holy See and the Republic of Poland, signed at Warsaw on 28 July 1993, Journal of Laws of 1998, No. 51, item 318 [henceforth cited as: the Concordat].

² Act of 25 February 1964, Family and Guardianship Code, Journal of Laws of 2019, item 2086 [henceforth cited as: k.r.o.], Art. 1, para. 2-3.

³ "Bulletin of the Catholic Press Agency" 46 (1998), II. 3, p. 15-17.

of nupturients who do not want their marriage to have effects in Polish law (cf. can. 1071 § 1, no. 2 of the Code of Canon Law)” [Majer 2000, 169]. Therefore, there is no question of two marriages subject to separate legal orders. This does not mean, of course, that the Concordat abolishes the principle of separation and independence of courts: episcopal and civil. On the contrary, an element of separateness of proceedings for two legal orders has been preserved, however, defining the competencies of the parties in the scope of adjudicating on marriage matters, which is regulated in Art. 10, points 3 and 4 [Góralski 1998, 163-64]. The competence of the Church includes adjudication about the validity of marriage, while the competence of the Polish State has been limited to rule on matters of civil effects. The separation of the powers of the courts, episcopal and civil, means that in juridical practice a marriage with civil effects cannot be treated as purely confessional or purely civil. This would be a violation of the norms of the legal system in each case.

1. Ecclesiastical annulment of marriage versus divorce

In juridical practice, divorce judgements occur. This institution is present only in civil law. Divorces do not cause the cessation of marriage on the grounds of the Church law but they violate the principle of indissolubility of marriage adopted in the Concordat. The conduct of civil judiciary violates Art. 56 § 1 k.r.o. in relation to the principle of complete decomposition of marriage in a formal and legal sense. Civil judges adjudicating and passing judgments, having knowledge of the indissoluble nature of marriage, without the judgment of the Bishop’s court (declaring the marriage invalid), have no possibility to assume by systematic logical interpretation that the existence of marriage has completely decomposed. Divorce, which is a civilly admissible exception to the principle of marriage for life, cannot therefore be applied if only the premise of a permanent breakdown of relations between those forming the marriage is met. The validity, i.e. the existence of the marriage under ecclesiastical law, is an essential element that deserves protection but is also known to the civil court. Violation of this legal fact by a civil court should be understood as a violation of Concordat law [Dalecki and Sokołowski 2010, 330-31]. In principle, a civil court should dismiss an action for divorce, even on a consensual request of the parties to the marriage. In fact,

this does not mean that there is no possibility to turn to a civil court on the issue of the existence of the marriage, because there is a correct way to regulate the issue of the existence of the marriage, in accordance with the principles of the ratified Concordat. Due to the mutually symmetrical approach of the parties to the Concordat and division of competencies, the validity of marriage is to be decided by an episcopal court. If an episcopal court declares a marriage invalid, the judgement will constitute a basis for recognition that civil effects could not arise. This is a situation of marriage ineffectuality which should result in removal from the civil-status register. A union that did not exist cannot have civil effects. The maintenance of a fiction cannot take place. In the current legal situation, the removal from the register of the civil status must be preceded by a civil judgment ordering the removal. The ruling on civil effects is for it is the exclusive prerogative of a secular court: divorce is not a civil consequence. The attachment to divorce proceedings, resulted from the legal order from the period before the ratification of the Concordat and introduction of relevant changes in the secular law (Art 10, para. 6). By concluding the Concordat, the Polish state agreed to recognize a religious marriage. Therefore, if an episcopal court declares this marriage invalid, this fact may be evidence in a civil case for cancellation of the marriage from the register of civil status, after the verdict of a civil court and transferring the decision to the appropriate Registry Office where the marriage was registered. This possibility was already provided for in the Act of 29 September 1986, Civil Status Records.⁴ Art. 55, para. 3 was replaced by the following: “A copy of a final court ruling establishing the non-existence of a marriage is evidence of the non-existence of the marriage.” A similar position is expressed by the legislator in the Act of 28 November 2014, Civil Status Records,⁵ where in Chapter 6: “Types of Civil Status Records,” we read in Art. 78, para. 4 that “a copy of a final court decision establishing the non-existence of marriage is a document confirming the declaration of non-existence of marriage.” The importance of this provision is momentous, since it indicates the legal possibility of regulating a citizen’s civil status in a manner consistent with conscience, the system of the Concordat, canonical and secular law. In practice, this means that it is possible and appropriate to

⁴ Journal of Laws of 1986, No. 36, item 180.

⁵ Journal of Laws of 2015, item 1741.

obtain the civil status before marriage subject to a final court decision; a bishop's and then a civil court decision. In other words, for a civil marriage, the effects of which result from a marriage celebrated in the presence of a clergyman, in view of the competence of the Catholic Church to pronounce on the validity of the marriage, a referral to the competent episcopal court will be required. For a marriage contracted under the law of the Concordat, only a judgment of a church court may be evidence constituting a basis for demanding before a civil court a judgment ordering the deletion of an entry in the register of marriage certificates of a civil registry office. Such a conclusion can be drawn after a systemic analysis of the law. Holders of a judgment declaring a marriage invalid may put in order an important issue of their civil status. The pronouncement of divorce is not correct from the perspective of the system of law. It remains for the civil court to regulate matters from the period during which the marriage was considered to exist. This is the area of civil consequences, e.g. matters of property, dowry, inheritance, maintenance, etc. These matters are part of the exclusive jurisdiction of the civil court. However, this aspect is not considered in detail in this thesis.

2. Inconsistency of norms

It is necessary to raise the existence of the socio-cultural context of the system of law, which is understood as the principles of social coexistence. It is reasonable to recall: "Principles of social coexistence are extra-legal norms, rules of conduct with axiological justification, referring to universally recognized values. It is therefore about moral norms, and moral norms only if they have an axiological justification at the same time. Their importance is particularly evident at the stage of law application. [...] The provision of Art. 56 § 2 of the Family and Guardianship Code, making the pronouncement of divorce dependent on its assessment in the light of the principles of social life, has a controlling function." [ibid., 370-71]. It is a truism to state that the Concordat is a part of the legal order: ecclesiastical and national. One of the fundamental principles of a properly functioning legal system is the inconsistency of norms. In the case of matrimonial law, there is a praxeological and axiological contradiction between specific norms [Krukowski 2004, 127]. This contradiction can be seen in k.r.o. in relation to Art. 11 of the Concordat, which is binding on a secular state; provisions on divorce versus the principle

of marital indissolubility. The Concordat promotes the feature of marital indissolubility in the absence of the possibility to divorce, as the contradiction of these norms would be and is irreconcilable. There is no provision for the right to divorce. We read in Art. 11 that “the Contracting Parties declare their will to cooperate with and respect the institution of marriage and the family as the foundation of society. They underline the value of the family, whereby the Holy See, for its part, reaffirms Catholic teaching on the dignity and indissolubility of marriage.” Given the axio-normative differences between the civil and the religious and denominational law it is not surprising that divorce is upheld in the provisions of k.r.o. However, this does not mean that it is legitimate to apply these provisions to marriages concluded under the law of Concordat. Maintaining the provisions allowing to pronounce divorce, in the light of logical, systemic interpretation; is provided for purely civil marriages. Decreeing a permanent and complete dissolution of marriage was introduced before the Concordat was concluded and ratified in 1993 (1998). For marriages based on the Concordat law the conflict rule of the hierarchical order of norms is decisive.

In accordance with the rule *Lex superior derogat legi inferiori* – “a hierarchically higher legal norm overrules a norm of a lower rank” [Krukowski 2004, 127]. Similarly, J. Piechowicz claims after J. Krukowski: “It should also be noted that the Concordat is a bilateral agreement aimed at protecting human rights to religious freedom in the individual and community dimension. and community dimension. In the hierarchy of sources of law, this agreement takes precedence over the law” [Piechowicz, 888]. The legal basis for the reasoning adopted is Art. 9 of the Constitution of the Republic of Poland, stating that the Republic of Poland and its authorities shall observe international law, by incorporating norms into the system of national law. There is no exception to the above.⁶ The Concordat is an act in force since its publication. It is therefore undisputed that it is a ratified international agreement. It forms part of the domestic legal order. Its application is obligatory from the moment of the issuance of the act and it takes precedence over k.r.o., as far as the provisions and norms that cannot be reconciled with the agreement are concerned (Art. 91, para. 1-2 of the Constitution of the Republic of

⁶ The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 2009, No. 114, item 946 [henceforth cited as: the Constitution of the Republic of Poland].

Poland). Juridical divorce discourse is not supported, it violates systemic norms. There is support in law for the claim that divorce judgments of civil courts, in proceedings against marriages concluded in the presence of a clergyman, which produced civil effects, are issued without legal basis, in violation of the legal system. Componential designation specifically limits and authorizes the pronouncement of civil effects under Polish law. This function means that the Polish State is obliged to protect the marriage, if these effects were to be violated, e.g. by bigamy. However, by pronouncing a divorce, it is a civil court that violates civil effects, i.e. it acts contrary to the role for which it was created. Only a bishop's court can decide on the validity of a marriage (Art. 10 of the Concordat). Moreover, divorce today does not fulfil the premise "If a civil divorce remains the only possible way of securing certain legitimate rights, the care of children or the defense of property, it may be tolerated, without constituting a moral offence."⁷ There is separation on canonical grounds and in civil law: *de facto* and formal, which make it possible to protect legitimate rights and persons.

3. Constitutional guarantees

The constitutional right of religious freedom must not be violated in public in the public space. Juridical discourse must not harm the right to live according to with one's own religious convictions, and the state cannot induce behavior contrary to freedom of conscience. A civil divorce cannot be a tool for a secular court to question the existence of a valid marriage in a public space, especially against the will of a person who does not consent on religious grounds. The assertion that divorce does not mean the non-existence of a marriage in a religious sense is correct, but downplaying the legal significance of divorce is unacceptable. It is right to point out that, as the law stands at present, "Christians cannot separate the marriage contract from the sacrament of marriage" [Pawluk 1996, 25-26]. Any divorce is a breach of the Concordat agreement, which is not an act of divorce compromise on the part of the Church. The tacit, passive consent of the party to the Concordat, based on the reasoning that the Polish State (within the framework of civil

⁷ *Catechismus Catholicae Ecclesiae*, Libreria Editrice Vaticana, Città del Vaticano 1997 [henceforth cited as: CCE], no. 2383.

matters) has the right to pronounce divorces, is wrong from the perspective of the system of law and the canonical norm. There is an obligation in canon law to care for and help the married couple. This norm refers to the general teaching and active attitude of the Catholic Church (in particular of canonists) indicating the duty of care, protection and assistance (can. 1063).⁸ The application of this is also possible on the basis of the Concordat, in which the parties may eliminate disputable issues by means of Art. 27, which reads as follows: “Matters requiring new or additional solutions shall be regulated by new agreements between the Contracting Parties or arrangements between the Government of the Republic of Poland and the Polish Episcopal Conference authorized for this purpose by the Holy See.”

It is worth recalling the Convention guarantees of freedom of conscience in public space in relation to the indissoluble character of marriage. This is an area of law which strengthens the protection of the private sphere. “The Convention guarantees of freedom of conscience are accepted and referred to also in the case-law of the Court of Justice of the European Union (CJEU), for example in the recent cases *Germany v. Y* (C-71/11) and *Germany v. Z* (C-99/11). In these cases, the Advocate General issued an opinion on the interpretation of Article 9 of the Convention, stating that if the guarantees of freedom of conscience are placed only in the private sphere of the individual without any guarantee of respect for the «external manifestation of that freedom», freedom of conscience would be a dead construction under the Convention. Ultimately, the CJEU held that the right to act in accordance with one’s religious or moral convictions clearly extends to the public manifestation of those convictions. Also the Committee The Council of Europe’s Committee of Ministers reaffirms the existence of the right to freedom of conscience and related rights.”⁹ It is important to note that the concern for the permanence of marriage is expressed in Art. 11 of the Concordat, while the declarative character of the norm has a general, constitutive character. Cooperation of the Church and the Polish State at the legal and judicial level is also expressed in CIC/83. Responsibility and care for marriage and family,

⁸ *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317 [henceforth cited as: CIC/83].

⁹ “Prawo do sprzeciwu sumienia w orzecznictwie ETPCz.” <https://ordoiuris.pl/wolnosc-sumienia/prawo-do-sprzeciwu-sumienia-w-orzecznictwie-etpcz> [accessed: 03.07.2021].

shared between the ecclesiastical community and the political community “[...] The responsibility and care for marriage and the family, shared between the ecclesial community and the political community (within the scope of autonomy of these communities) lie at the basis of the norm of can. 1071 § 1. [...] The Church’s concern that no marriage should be deprived of civil effects is derived from the general obligation to protect the institution of marriage” [Majer 2009, 166, 171]. The Constitution of the Republic of Poland in Art. 53 constitutes the pillar of legal protection in the subject matter of the discussed issue. The affirmation of religious freedom, as a positive value, in the light of the supreme law is unquestionable. It provides legal support for the protection of the principle of the indissolubility of marriage. CCE and CIC/83 reflect the position of the Catholic Church on the indissolubility of marriage, referring to biblical teaching. Moreover, the possibility of divorce has not been written into the Concordat.¹⁰ This would be a contradictory construction regarding the indissolubility of marriage.

Conclusions

The essence of the issue is to keep in mind that marriage does not belong to the Catholic Church or the Polish State. The right to contract it belongs to the persons contracting it (Art. 18 of the Constitution of the Republic of Poland). In the process of declaring a religious marriage invalid with civil effects, interested parties face the issue of sorting out their situation in the forum of the law of the Catholic Church and the Polish State. Some people have a situation which is not regulated in a coherent way within the order of the legal system in Poland. This is an incorrect situation. Currently, the popular reasoning is that bishop’s courts take into account the situation of divorce, and civil divorce judgments are dealt with in the forum of the Catholic Church in ecclesiastical trials. This has its basis in the provision which reads: “The judge, before accepting the case, must be satisfied that the marriage has broken down irretrievably so that there is no possibility of the resumption of the community of life” (can. 1675 CIC/83). In this title, the episcopal court is usually interested in the content of the divorce decree. This document is important already at the stage of the decree accepting the complaint for exa-

¹⁰ Cf. Mt 5:31-32; 19:3-9; Mk 10:9; Lk 16:18; 1 Cor 7:10-11; Mt 19:7-9.

mination, since it allows to discern to a large extent the situation in relation to the marriage. The opposite is true of civil courts, which completely disregard the question of the factual and legal situation in the forum of the Catholic Church in divorce proceedings. This is a grossly inappropriate behavior, which constitutes a contradictory and asymmetrical approach to the Catholic Church from the perspective of the concluded Concordat agreement. In the broader context of marriage law, the asymmetry is also apparent at the pre-marriage stage. The Catholic Church awaits assurances that there are no impediments to marriage, issued by the Registry Office. In the divorce process of a marriage contracted under the law of Concordat, those obtaining a divorce are considered as persons whose status does not exclude entering into another civil union. Thus, a civil court, issuing a divorce verdict, paves the way to real polygamy, because despite the complete dissolution of marriage (with the validity of marriage in the religious sense), it enables and allows to legalize another civil marriage with another person. This example shows the difference in the level of legal culture in favor of the Catholic Church. Its propaganda function is momentous. Suffice it to mention the example of the institution of marital sepulture, which was first introduced in the law of the Catholic Church and then found its reception in civil law. Taking care of the legal order within the system of matrimonial law in the relations between the State and the Church, with the high popularity of divorce, is especially needed. The Church has a just law and a moral duty to strive for the best possible functioning of the law and protection of the legal order in relation to marriage. This is a particularly difficult challenge for Polish canonists, e.g. in terms of advising the Polish Episcopate, in which perhaps not lawyers often have the majority or simply the decisive voice. The issue of separation of powers between the State and the Catholic Church in the scope of ruling in matrimonial disputes on the protection of marriage should be the subject of special interest of lawyers defending the matrimonial knot. It should be borne in mind that it is precisely in the civil sphere that attacks on the matrimonial knot are ruthless nowadays and in the secular sphere marriage must be defended, because there it is it is violated. The general aim is to order the affairs of lay members of the Church, citizens of the secular state. The way of thinking proposed in this paper is not popular and is not practiced in terms of understanding the system of law, the separation of legal orders and competences of the parties to the Concordat. There is a division of positions

among canonical authorities, as some even maintain that there are two marriages of the same persons as a result of concluding an agreement based on the regulations of the Concordat. Therefore, the discussion remains open and its subject does not lose its topicality, with particular attention to the coherence of the legal system. There is no doubt that proceedings before a civil court without proceedings before a bishop's court have serious consequences. As a result, the situation of persons considered married remains unregulated in a uniform way if we compare the issue on the grounds of the Polish State and the Catholic Church. The problem is a civil divorce, with the simultaneous unregulated situation in the forum of the Church. This is a consequence of tolerating the practice of disorder in matters of adjudicating marriages concluded on the basis of Concordat rights, as if they were exclusively civil. The procedure has been practiced for decades. It should be noted that the conviction of the separation of legal orders, giving an alleged right to pronounce divorce, since the ratification of the Concordat in 1998 is only an unreflective consent to creating disorder in the matter of existence of marriages and violates the sense of division of competences of the parties to pronounce marital disputes. This issue requires immediate reflection.

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Annulment and Divorce of Marriages within the Polish Legal System

Abstract

The article presents an analysis of the marriage law system in Poland. It reflects on the possibility to recognize the verdicts of the Bishop's Court pronouncing on behalf of the Catholic Church, which enjoys subjectivity in international law as the Holy See. The aim of the article is to encourage consideration of the possibility of the reception of a judgment of the Episcopal Court as evidence allowing the erasure of a marriage from the register of the Registry Office. Currently practiced, the concept of separation of legal orders cannot ignore the division of powers and disregard the authority to pronounce a marriage. The Catholic Church in Poland, in particular the canonists, have a duty to revise their own position in order to eliminate the disorder. In this context the considerations concern the essence of the principle of bilateralism of the concordat agreement, its sense. A lack of publications, especially of canonists acting as defenders of the matrimonial knot is astonishing. For it expresses a total lack of reflection and discernment that precisely on the civil field the institution of marriage is being violated. Lack of validity of a civil divorce in the legal sense, as understood by the Church, directly proves that the Church realizes that divorces do not make sense on the grounds of the system of concordat law concerning adjudication on marriage. Therefore, one cannot justify the passivity of canonists towards proceedings, in which a civil court acts without jurisdiction. It seems necessary to revise the approach to the system of law in order to eliminate the irregularities. The aim is, in fact, only such a procedure which will make it possible to pronounce the invalidity of marriage in a correct way, producing effects also in civil law through the civil court and proper recognition of the judgments of the episcopal court.

Keywords: concordat, canon law, annulment of marriage, civil effects

Orzekanie nieważności i rozwodu małżeństw na forum systemu prawa w Polsce

Streszczenie

Artykuł prezentuje analizę systemu prawa małżeńskiego w Polsce. Stanowi rozważanie dotyczące możliwości uznania wyroków sądu biskupiego orzekającego w imieniu Kościoła katolickiego, cieszącego się podmiotowością w prawie międzynarodowym jako Stolica Apostolska. Artykuł ma na celu zachęcenie do rozważań nad możliwością recepcji wyroku sądu biskupiego jako dowodu umożliwiającego wykreślenie małżeństwa z rejestru Urzędu Stanu Cywilnego. Obecnie praktykowana koncepcja rozdzielności porządków prawnych nie może pomijać podziału kompetencji i lekceważyć uprawnień do orzekania w spawach małżeństwa. Przed Kościołem katolickim w Polsce, w szczególności na kanonistach spoczywa obowiązek

dokonania rewizji własnego stanowiska w celu likwidacji nieładu. W tym kontekście rozważania dotyczą istoty zasady dwustronności umowy konkordatu, jej sensu. Zdumiewający jest brak publikacji, w szczególności kanonistów pełniących funkcję obrońców węzła małżeńskiego. Wyraża to bowiem brak refleksji i rozeznania, że właśnie na polu cywilnym dochodzi do naruszania instytucji małżeństwa. Brak ważności rozwodu cywilnego w sensie prawnym, w rozumieniu Kościoła, wprost dowodzi, że Kościół zdaje sobie sprawę, iż rozwody nie mają sensu, na gruncie systemu prawa konkordatowego w przedmiocie orzekania o małżeństwie. Nie sposób zatem usprawiedliwić pasywności kanonistów wobec postępowania, w którym sąd cywilny działa bez kompetencji. Wydaje się konieczne zrewidowanie podejścia do systemu prawa w celu wyeliminowania nieprawidłowości. Celem jest bowiem wyłączenie takie postępowanie, które w sposób prawidłowy umożliwi orzekanie o nieważności małżeństwa wywołując skutki także w prawie cywilnym. Można słusznie oczekiwać właściwego uznania dla wyroków sądu biskupiego przez Państwo Polskie, za pośrednictwem sądu cywilnego.

Słowa kluczowe: konkordat, prawo kanoniczne, stwierdzenie nieważności małżeństwa, skutki cywilne

Informacje o Autorze: Mgr PRZEMYSŁAW KUSIAK, doktorant w Dolnośląskiej Szkole Wyższej we Wrocławiu, ul. Strzegomska 55, 63-511 Wrocław, Polska; e-mail: imprzemyslaw@gmail.com; <https://orcid.org/0000-0003-2218-4114>