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Punishing the Conclusion of an Invalid Marriage in Poland in 1918–1932

Karalność zawarcia nieważnego małżeństwa w Polsce w latach 1918–1932

ABSTRACT

The goal of the article is to provide on the theoretical area, above all, a legal historical and a legal comparative analyzes of the criminal-law aspects of contracting marriage in an unlawful manner. As an institution, marriage invalidity functioned both in civil law and criminal law during the interwar period. The role of the criminal law of that time was to enforce the rules following from civil law, so the legislator provided for a criminal sanction against those who violated legally protected interests. Protecting the permanence of marriage was in the interest of not only the individual but also the state. At that time marriage was becoming the basis of the family, the fundamental social structure, upon which society and the state were being built. The family was in charge of public peace and morals, therefore any violation of the permanence and indissolubility of marriage union was tantamount to attacking the rules of social intercourse, which in turn led to an erosion of statehood. Given the foregoing, this article discusses the prerequisites under the marriage law for a marriage to be challengeable, as well as penal sanctions against culprits responsible for the conclusion of a statutorily invalid marriage. The choice of the topic was dictated by the fact that the literature of the subject lacks studies of this issue.

Keywords: conclusion of an invalid marriage; civil law; criminal law; marriage; marriage invalidity; interwar period

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INTRODUCTION

The beginnings of independent Poland were complicated by the existence of a legal mosaic in the areas of civil law[1] and criminal law. Individual districts applied different regulations, which were the legacy of the previous legislation. The regulations – inherited from the partitioners – were treated not as foreign but as Polish provincial laws.[2] While adopting foreign legislation to be used as its own, Poland had no regulations on offences that gave rise to conflicts between concurrent laws and regulations. Polish legislators tried to replace those with the internal legislation of the partitioners and jurisdiction of the Supreme Court.[3] Despite there

[1] The interwar period was characterized by the absence of uniform civil-law regulations governing the institution of marriage. The system of marriage law was made up of five legal areas. Depending on a person's declared faith or residence, the legislator imposed on the inhabitants of a particular area specific regulations concerning marriage impediments and the conclusion, appealability and dissolution of marriage. See A. Stawecka-Firlej, *Małżeńskie prawo osobowe ustawodawstw porozbiorowych obowiązujących w Rzeczypospolitej Polskiej w dwudziestoleciu międzywojennym*, "Acta Universitatis Wratislaviensis. Prawo" 2013, no. 2, pp. 75–94; J. Dworas-Kulik, K. Moriak-Protopopowa, *Projekt Lutostańskiego a bolszewickie regulacje prawa małżeńskiego okresu międzywojennego*, "Kościół i Prawo" 2020, no. 1, pp. 193–195; J. Dworas-Kulik, *Prawne regulacje dotyczące bigamii w Polsce w latach 1918–1939*, Warszawa 2019, pp. 20–49; K. Przybyłowski, *Znaczenie prawa obowiązującego w miejscu zawarcia małżeństwa przy ocenie materialnych wymogów jego ważności*, "Czasopismo Sędziowskie" 1932, no. 3–4, pp. 1–31; M. Allerhand, *Prawo małżeńskie obowiązujące na Spiszu i Orawie*, "Przegląd Prawa i Administracji" 1926, no. 10–12, pp. 1–39; J. Gwiazdomorski, *Osobowe prawo małżeńskie obowiązujące w b. dzielnicy austriackiej*, Poznań 1932; H. Konic, *Prawo małżeńskie obowiązujące w b. Królestwie Kongresowym*, Warszawa 1924.

[2] Judgement of the Supreme Administrative Court of 23 November 1925, Rej. 1547/23, [in:] *Jurysprudencja Najwyższego Trybunału Administracyjnego. Przewłaszczenie majątków instrukcyjnych*, "Gazeta Sądowa Warszawska" 1926, no. 26, pp. 360–362, pp. 360–62. Cf. judgement of the Criminal Chamber of the Supreme Court of 25 February 1922, 204/21, OSP 1922, no. 356, and judgement of the Criminal Chamber of the Supreme Court of 17 January 1923, 358/22, OSP II 1923, no. 360, [in:] *Kodeks karny obowiązujący na Ziemiach Zachodnich Rzeczypospolitej Polskiej z uwzględnieniem najnowszego ustawodawstwa i orzecznictwa Sądu Najwyższego*, eds. R.A. Leżański, J. Kałużniacki, Warszawa–Poznań 1925, p. 5. The Polish legislator has made only minor, necessary changes and additions. At the same time, regulations that were contrary to the Polish raison d'état ceased to be in force (see Decree on some changes to the Criminal Code and the Criminal Procedure Act, Journal of Laws 1918, no. 20, item 57). See also J. Makarewicz, *Projekt rządowy o zakresie działania kodeksów karnych obowiązujących w Polsce*, "Przegląd Prawa i Administracji" 1919, no. 44, pp. 40–61; S. Czajkowski, *Moc obowiązywania przepisów karnych przedkodeksowych*, "Głos Sądownictwa" 1936, no. 6, pp. 478–481; E.S. Rappaport, *Nowela karna z dn. 9 grudnia 1918, jej braki i skutki*, "Kwartalnik Prawa Cywilnego i Karnego" 1918, no. 1–4, pp. 521–536.

[3] Demands were made to enact a system of inter-district criminal law, which would be based on the uniform principle that an offender would be subject to the criminal law in force in the place of detention. Should a concurrence of offences be revealed after a retrial of one of the cases, the criminal regulations of the district where a final sentence had been rendered would be applied or those of the place where the offender had been serving his sentence. Disputes over jurisdiction between courts of different districts were to be settled by the Supreme Court. See E.S. Rappaport, *Prawo karne mię-*

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being separate district chambers, the Supreme Court each time based its decisions on the principles enshrined in the general part of the Russian Code of 1903, thus striving for a uniform interpretation of criminal law in the Polish lands.[4] Thanks to this, the post-partition codes of criminal law were sufficient to combat crime in the territory of now independent Poland despite their diverse levels and origins. The system of criminal law was comprised of three legislative areas. The scope of application of individual criminal laws segmented the Polish lands into areas of influence for Russian, Austrian and Prussian criminal law.[5]

Each of the legal regimes in force in the Polish Republic provided protection of marriage and the family, securing the observance of relevant rules resulting from civil law by means of a criminal sanction. The enforcement of state regulations through criminal legislation was an adequate response to the social tendencies of the time, stemming from the treatment of the family as the fabric of society. It was believed that the protection of the permanence of marital union, which was the foundation of a self-contained social structure represented by the family, was in the interest not only of individuals but also of the state. The family was considered

dzydzielnicowe, "Ruch Prawniczy i Ekonomiczny" 1922, no. 2, pp. 244–245. Cf. 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. 109–110; eadem, *Prawne regulacje…*, pp. 61–68; X. Fieriech, *Kilka uwag w sprawie obecnych zadań ustawodawstwa polskiego*, "Gazeta Sądowa Warszawska" 1919, no. 5, pp. 142–143; I. Homola-Skąpska, *Wspomnienia Fryderyka Zolla (1865–1948)*, Kraków 2000, pp. 314–315.

[4] *Kodeks karny z 1903 r. (przekład z rosyjskiego) z uwzględnieniem zmian i uzupełnień obowiązujących w Rzeczypospolitej Polskiej z dn. 1 maja 1921*, Warszawa 1922, hereinafter: PCR. Cf. J. Jamontt, *Podstawowe zasady prawa karnego obowiązujące w b. zaborze rosyjskim*, vol. 1: *Część ogólna*, Warszawa 1929. See also A. Mogilnicki, E.S. Rappaport, *Tezy z orzeczeń Sądu Najwyższego Rzeczypospolitej Polskiej od 1 września 1917 r. do 17 marca 1921 r., stanowiących wykładnię ustaw karnych tymczasowo obowiązujących na ziemiach b. zaboru rosyjskiego*, vol. 1, Warszawa 1921.

[5] *Ustawa karna z dnia 27 maja 1852 r. I. 117 dpp.: z uwzględnieniem wszelkich zmieniających ją ustaw austriackich i polskich wraz z najważniejszymi ustawami dodatkowymi*, ed. J. W. Willaume, amended and supplemented by M. Bodyński, Lwów 1929; *Kodeks Karny Rzeszy Niemieckiej z dnia 15 maja 1871 r., z późniejszymi zmianami i uzupełnieniami po roku 1918 wraz z ustawą wprowadzającą do Kodeksu Karnego dla Związku Północno-Niemieckiego (Rzeszy Niemieckiej z dnia 31 maja 1870 r.)*, [in:] *Ustawy byłej Dzielnicy Pruskiej*, vol. 1, Poznań 1920. See also S. Płaza, *Historia prawa w Polsce na tle porównawczym*, vol. 3: *Okres międzywojenny*, Kraków 2001, pp. 332–334; W. Witkowski, *Prawo karne na ziemiach polskich w dobie zaborów i w pierwszych latach II RP (1795–1932)*, [in:] *System Prawa Karnego*, vol. 2: *Źródła prawa karnego*, ed. T. Bojarski, Warszawa 2011, p. 114; J. Koredczuk, *Zaborcze kodyfikacje prawa karnego materialnego w Polsce w okresie przejściowym w latach 1918–1932*, [in:] *Okresy przejściowe – ustrój i prawo*, ed. J. Przygodzki, Wrocław 2019, pp. 151–162. Cf. A. Mogilnicki, *Prawo karne w pierwszym dziesięcioleciu odrodzonego Państwa Polskiego*, "Gazeta Sądowa Warszawska" 1928, no. 46, pp. 723–728; E.S. Rappaport, *Zagadnienie kodyfikacji prawa karnego w Polsce*, "Przegląd Prawa i Administracji" 1920, no. 45, pp. 31–45; A. Lityński, *Wydział Karny Komisji Kodyfikacyjnej II Rzeczypospolitej. Dzieje prac nad częścią ogólną kodeksu karnego*, Katowice 1991.

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the mainstay of public order, hence all crimes against it were treated as detrimental to the public and society.[6]

In 19th-century criminal law, the unlawful contraction of an invalid marriage was ignored or downplayed.[7] However, the criminal legislation of the time formed the ground for draft codifications of criminal law that would take shape in the 20th century, in which causing the invalidity of marriage was deemed as culpable as bigamy.[8] This article is a continuation of the research on criminal legislation of causing nullity of marriage in Polish criminal legislation of the interwar period. The issue of codification and unification of criminal law provisions in this matter was developed in a separate article, which the author cites. Consideration of the practice application of the law will be included in a separate publication.

CRIMINAL-LAW ASPECTS OF THE UNLAWFUL CONCLUSION OF AN INVALID MARRIAGE IN OF THE FORMER PRUSSIAN PARTITION

In the 1871 Penal Code of the German Reich, in force in the former Prussian Partition, conduct leading to the invalidity of marriage was treated as an offence against civil status.[9] This idea found its embodiment when prohibited acts liable to penalty were systematized in chapter 12 titled "Crimes and Misdemeanors in Respect of the Civil Status". Pursuant to § 170 PCG, a spouse who was aware of

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[6] See W.M. Borowski, *Zasady prawa karnego. Część specjalna. Przestępstwa przeciwko religii, państwu, władzy państwowej i porządkowi publiczno-społecznemu*, vol. 2, Warszawa 1923, pp. 402–404; A. Tobis, *Główne przestępstwa przeciwko rodzinie*, Poznań 1980, pp. 33–34. J. Jaglarz, *Problem kodyfikacji prawa małżeńskiego w Polsce*, Poznań 1934, pp. 5–8; J. Przeworski, *O przyszłym pawie małżeńskim w Polsce*, "Palestra" 1926, no. 12, p. 532.

[7] In the 20th-century codifications of criminal law the penal sanction for this crime was toughened. Moreover, the catalogue of offenders against whom a penal sanction could be used was also extended. For example, in Article 198 of the Penal Code of 1932 the Polish legislator envisaged a punishment of up to 3 years of imprisonment for causing the contraction of an invalid marriage of one's own or someone else's due to the existence of a diriment impediment causing the nullity of marriage. Bringing about marriage nullity is addressed in chapter 30, titled "Crimes against Marriage". For more on this topic, see J. Dworas-Kulik, *Spowodowanie nieważności małżeństwa w polskim ustawodawstwie karnym okresu międzywojennego*, "Studia Prawnoustrojowe" 2020, no. 49, pp. 27–37.

[8] Culpability was also associated with the requirement that marriage be actually dissolved, as well as with the application to punish the perpetrator filed by the wronged party. The basis of the criminal conduct was concealment of a marital impediment, misrepresentation likely to justify annulment of marriage, or duress. The dissolution of marriage depended on the wronged party's application. See *Komisja Kodyfikacyjna Rzeczypospolitej Polskiej. Sekcja Prawa Karnego*, vol. 3, no. 2, Warszawa 1926, p. 126; J. Dworas-Kulik, *Spowodowanie nieważności…*, pp. 28–29. Cf. K. Czałczyński, *Wyłudzenie nieważnego małżeństwa*, "Gazeta Sądowa Warszawska" 1932, no. 42, pp. 623–625.

[9] *Kodeks Karny Rzeszy Niemieckiej…*, § 170; *Kodeks karny obowiązujący na Ziemiach Zachodnich…*, p. 90, hereinafter: PCG.

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there being grounds for challenging the validity of the marriage and wilfully concealed them to enter into matrimony unlawfully was liable to imprisonment for at least three years.[10] It was punishable to deceitfully induce the other party to enter into a marriage which was concluded as a result of deception, or to deceitfully conceal from the spouse-to-be a statutory marital impediment, recognised by the civil legislation in force in the area. A marital impediment was understood as the absence of a requirement essential for a proper and valid conclusion of marriage (see § 1303–1329 the German civil law).[11] Impediments to marriage were classified as diriment and prohibitive. The first impediments rendered a marriage invalid. These were divided into impediments under public law, on the basis of the invalidity of the marriage was sought *ex officio*, and ones under private law, examined at the request of persons bearing the legal consequences of a defectively contracted marriage.[12] Marital impediments were closely connected with the grounds for marriage contestability. A given marriage was qualified as valid or invalid on the basis of the factual and legal situation existing at the time when the marriage was contracted. Subsequent removal of an impediment through dispensation or changes made to the factual situation would not typically restore the validity of the marriage. Convalidation was necessary; however, it was impossible if the marriage was affected by a diriment impediment. Thus, depending on the kind of impediment, a marriage was subject to absolute or relative annulment. In the latter case, the marriage remained in force until it was annulled by way of a decision issued by the court competent for a particular form and religion.[13]

The punishability of the misdemeanor under § 170 PCG was conditional upon the annulment of the marriage contracted despite the existence of a circumstance making it invalid. The premise upon which a marriage was dissolved at the same time determined the nature of the act (action or omission) giving rise to a penal sanction under the provision of § 170 PCG. As long as the marriage was not annulled by a judgement of a civil court, it remained valid and binding on both parties to that legal relationship, and the spouse who was guilty of entering into an invalid

[10] W. Makowski, *Prawo karne. O przestępstwach w szczególności. Wykład porównawczy prawa karnego austriackiego, niemieckiego i rosyjskiego, obowiązującego w Polsce*, Kraków 1924, pp. 359–360. Cf. K. Czałczyński, *op. cit.*, p. 624.

[11] For more on this topic, see A. Stawecka-Firlej, *op. cit.*, pp. 87–88; A. Piegzik, *Przeszkody małżeńskie w ustawodawstwie dzielnicowym II RP*, "Folia Iuridica Universitatis Wratislaviensis" 2016, no. 1, pp. 42–44; J. Dworas-Kulik, *Prawne regulacje…*, pp. 32–37; R. Longchamp de Bérier, *Zawarcie i rozwiązanie małżeństwa według prawa cywilnego, obowiązującego w Polsce*, Lublin 1928, pp. 43–45.

[12] J. Gwiazdomorski, *Osobowe prawo…*, pp. 35–36.

[13] M. Allerhand, *Prawo małżeńskie…*, p. 16; J. Gwiazdomorski, *Osobowe prawo…*, pp. 37–42; J. Dworas-Kulik, *Prawne regulacje…*, pp. 37–42.

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marriage was not criminally liable.[14] Prosecution of a crime under § 170 PCG was initiated only by an application made by the wronged spouse. Without a formal consent of the applicant, that is, the spouse not guilty of marriage annulment, it was impossible to institute criminal proceedings and hold the perpetrator criminally responsible. The innocent spouse's wish not to have the dissolved marriage publicized was taken into account. The essence of the criminal act was marriage annulment resulting from an act or omission. The conduct took place when the marriage was annulled, which was a procedural prerequisite for prosecution. For the legislator, it was more important to retain a defectively contracted marriage than to punish one for illegally entering an invalid marriage. The conduct punishable under § 170 PCG represented an offence with permanent effects because, as long as the marriage was not annulled, it produced effects under civil law.[15]

PENALISATION OF THE CONCLUSION OF AN INVALID MARRIAGE IN THE FORMER AUSTRIAN PARTITION

In the southern provinces, the punishability of concluding a statutorily invalid marriage was systematised in chapter 3 of the Austrian criminal law titled "On Misdemeanors and Transgressions against Public Morals".[16] In § 507 PCA, the Austrian legislator penalised conduct consisting in deliberately concealing a marital impediment and then entering into marriage without first obtaining a dispensation making the marriage valid in light of the applicable marriage law binding on the prospective spouses. A penal sanction was also applied to conduct involving circumventing the troublesome provisions of the marriage law that prevented marriage by contracting marriage outside the scope of the Code. In light of the foregoing, criminal liability for entering an invalid marriage could be incurred by one spouse only or both if the two resolved to contract the marriage despite the circumstances leading to its invalidity. If both prospective spouses were cognizant of the invalidity of their marriage, then their culpable conduct was intended to gain social approval for extra-marital sex life, which indirectly contributed to the collapse of the institu-

[14] A marriage was considered non-existent if the proper form of its conclusion was not observed and it was not entered into the marriage register. In this case no proceedings were necessary. However, if a change was made to the civil status records despite the invalidity, the marriage had to be annulled by way of a court judgement. See A. Stawecka-Firlej, *op. cit.*, p. 82. Cf. J. Dworas-Kulik, *Spowodowanie nieważności…*, pp. 33–34.

[15] Cf. J. Dworas-Kulik, *Spowodowanie nieważności…*, pp. 33–35. The legislator did not provide for the punishability of an attempt or preparation with an intention to commit a crime under § 170 PCG. It is worth adding that the crime under this paragraph concurred with the crime under § 171 PCG, that is bigamy.

[16] *Ustawa karna…*, pp. 169–170, hereinafter: PCA.

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tion of the family based on marriage.[17] Pursuant to § 508 CPA the abuse of parental authority consisting in forcing children to contract a statutorily invalid marriage was penalised.[18] This act was punishable only when the marriage was concluded. The perpetrators of the crime under §§ 507–508 CPA were subject to custody of 3 to 6 months, and the seducing spouse was to receive a more severe punishment. The punishment was augmented if one spouse, through no fault of their own, was induced to enter into an invalid marriage, therefore having no knowledge of there existing a marital impediment.

In the area of the former Austrian Partition there were two systems of personal marriage law, in which circumstances there were two distinct catalogues of impediments to marriage (see §§ 48–75, 119, 124–131 the Austrian civil law, §§ 6, 8, 11–13, 28–37, 39–40, 53–55 the Hungarian marriage law).[19] The religious form of marriage was governed by canon law, since in Austrian legislation the rules of canon law were applicable as rules of civil law.[20] The civil form of marriage, except

[17] Cf. J. Dworas-Kulik, *Spowodowanie nieważności…*, p. 28.

[18] Such as deliberate use of physical or psychical (moral) duress, which had taken place before the wedding ceremony. The nature of such influence must have exceeded the limits of normal parental or guardianship authority, and thus caused physical or mental distress making as a result the prospective spouse, fearing for further severe consequences, gave consent to the marriage. Consequently, giving advice, making promises or assurances, even if deceitful, were not grounds for holding a person liable under § 508 PCA.

[19] See the regulation of the Council of Ministers of 14 September 1922 on the organisation of the judiciary in Spiš and Orava and extending the validity of certain acts and regulations to this area (Journal of Laws 1922, no. 90, item 833). In Spiš and Orava, Hungarian marriage law was in force until 1922, providing for a civil form of marriage celebration. Pursuant to this regulation, the Austrian law was introduced, which allowed the religious form of marriage, leading to optional civil marriages. Depending on the chosen form of marriage, the newly wedded parties were subject to different regulations of marriage law and thus were covered by different catalogues of marriage impediments. We should note at this stage that pursuant to § 5 of the regulation, marriages considered invalid became valid from their beginning as long as the spouses, on the date of entry into force of the regulation, remained in community of marital property and their marriage met the corresponding Civil Code conditions, which in this case were necessary for the assessment of the personal relations between the spouses. Outside Spiš and Orava, the Austrian marriage law was in force providing for civil marriages contracted of necessity. For more on this topic, see M. Allerhand, *Prawo małżeńskie…*, pp. 1–12; J. Dworas-Kulik, *Prawne regulacje…*, pp. 21–23; J. Przeworski, *op. cit.*, p. 533; J. Gwiazdomorski, *Osobowe prawo…*, pp. 4–5; A. Stawecka-Firlej, *op. cit.*, p. 86; A. Piegzik, *op. cit.*, pp. 36–42; R. Longchamp de Bérier, *op. cit.*, pp. 32–33.

[20] Canons 1082–1094 of the Code of Canon Law, translated into Polish by S. Biskupski (see S. Biskupski, *Prawo małżeńskie Kościoła Rzymskokatolickiego*, Warszawa 1956, pp. 271–317). It is worth paying attention to the provisions of can. 1133–1137 on the convalidation of an ordinary marriage, and the prescriptions of can. 1138–1140 relating to the sanation of marriage. Cf. judgement of the Supreme Court of 20 January 1925, Rw. 1939/24, "Przegląd Prawa i Administracji" 1925, no. 50, item 310; judgement of the Supreme Court of 12 January 1927, Rw. 24/27, "Przegląd Prawa i Administracji" 1927, no. 52, item 99; judgement of the Supreme Court of 21 February 1928, Rw. 2436/27, "Przegląd Prawa i Administracji" 1928, no. 53, item 210; judgement of the Supreme Court

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in Spiš and the region of Orava, was possible only in the case of inadmissibility of a religious marriage, provided that the Austrian Civil Code did not provide for a marriage impediment based on which the conclusion of a religious marriage under canon law would was impossible. Disputes over the dissolution of marriage were settled by common courts.[21] However, the annulment of marriage was irrelevant to the sentence handed down in connection with the perpetration of an offence under §§ 507–508 PCA and, therefore, the criminal court examined the substantive requirements of marriage by legal proceedings. In comprehensively explaining the case, the court was able to disclose circumstances unavailable to a judge of the civil court. This entailed the risk that fact-finding and the taking of evidence might follow different paths in the same case, which could lead to two incompatible yet binding judgements.[22]

The prosecution of the criminal conduct under §§ 507–508 PCA was instituted *ex officio*. The social interest in protecting the family as the mainstay of public order was more important for the legislator than the private interest of either or both spouses in not disclosing the prohibited act liable to a penal sanction, as a result of which, for example, the earning capacity to support the family was limited.

CAUSING A MARRIAGE TO BE INVALID IN THE CRIMINAL LAW OF THE FORMER RUSSIAN PARTITION

In the central and eastern areas of independent Poland, a Russian Code from 1903 was in force, adapted to the reality of the time, called the Tagancev Code. Offences that brought about the invalidity of marriage were systematized in sec-

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of 23 September 1931, III 1 RW 1485/31, "Przegląd Prawa i Administracji" 1932, no. 57, item 3. For more on this topic, see S. Biskupski, *op. cit.*, pp. 437–466; T. Gromnicki, *Nowy Kodeks Prawa Kanonicznego o małżeństwie w zestawieniu z prawem dotychczasowym*, "Polonia Sacra" 1918, no. 2, pp. 1–95; J. Fijałek, *Tekst kanonów o małżeństwie w nowym kodeksie prawa kanonicznego w przekładzie polskim*, "Polonia Sacra" 1918, no. 2, pp. 96–145; J. Gwiazdomorski, *Osobowe prawo*…, pp. 36–39.

[21] In the case of relative invalidity of a marriage, the party entitled to challenge it was the spouse who did not conceal or falsify the consent of their legal guardian to the marriage to their marriage, or the spouse who, having become aware of the existing impediment to the marriage, neither confirmed the defective marriage nor waived their right to annul it, and ceased to be in the marital community. Further, the entitlement to appeal a marriage was reserved for a person exercising paternal authority or guardianship over one of the spouses if the marriage was concluded without this person's consent. Cf. J. Dworas-Kulik, *Prawne regulacje*…, pp. 40–42.

[22] Cf. Z. Papierkowski, *Sąd karny a kwestia nieważności małżeństwa*, "Czasopismo Sędziowskie" 1936, no. 3, pp. 148–155; S. Glaser, *Prejudycjalność wyroków karnych*, "Polski Proces Cywilny" 1934, no. 12, pp. 353–368; J. Dworas-Kulik, *Prawne regulacje*…, pp. 242–247. A similar solution was adopted in the Russian Penal Code of 1903.

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tion 19 titled "On Crimes against Family Laws".[23] The legislator considered the social impact of the institution of marriage and the family, therefore the category of prohibited acts aiming to infringe the family law that served to protect the institution of marriage came to include culpable behaviours consisting in making a marriage invalid by forcing to marry through violence or threat (Article 408 PCR), the conclusion of marriage with a mentally ill person, mentally disabled or unconscious person (Article 409 PCR) and contracting marriage through deceit (Article 410 PCR).

According to Article 408 PCR, a spouse who was aware that the conclusion of the marriage was contracted when the other spouse was forced to marry through objectively established physical duress[24] that was in a causal relationship with the marriage, or through a real threat justifying the objective and subjective fear for the life or health of that spouse or a member of his or her family in connection with grievous bodily harm, was liable to severe imprisonment of 4 to 8 years or a prison sentence of one to 6 years. The same penalty applied to anyone who was partner in crime or exerted the unlawful coercion described above on one or both spouses. The legislator provided for a choice of penal sanctions depending on the circumstances of the case.

The offence under Article 408 PCR could be committed by the spouse forcing the other to marry in the manner described above or members of the prospective spouses' family, the clerics marrying the couple or keeping the parish records as prescribed by the marriage law binding on the parties, the lay clerks who drew up the marriage certificate or married non-religious couples, witnesses or other members of the public. Criminal liability for participation or complicity in a crime was the result of intentional action involving not only a direct intent to take part in unlawful coercion but also the mere knowledge of this practice, as well as support for this action by attending the wedding ceremony or drawing up the marriage certificate, but the conclusion of the marriage as a result of duress (which was a means to achieve that) had to be objectively established.[25] In order to hold the necessary

[23] Articles 408–410 PCR.

[24] Physical coercion (violence) involved the use of force and violation of bodily integrity, thus excluding the possibility of the victim's resistance. That, however, need not cause bodily harm to the coerced person. It was accepted in the doctrine that physical coercion might occur before and during the wedding ceremony. See *Kodeks karny obowiązujący tymczasowo w Rzeczypospolitej Polskiej na ziemiach b. zaboru rosyjskiego: z uwzględnieniem przepisów przechodnich i ustaw zmieniających i uzupełniających postanowienia karne kodeksu; odpowiednich przepisów Kodeksu Karnego Niemieckiego i Ustawy Karnej Austrjackiej, obowiązujących w pozostałych dzielnicach Rzplitej oraz Komentarza i orzeczeń Sądu Najwyższego*, vol. 2, part 2: *XIX K.K.*, comp. W. Makowski, Warszawa 1921, pp. 406–407; W.M. Borowski, *op. cit.*, pp. 410–411; W. Makowski, *op. cit.*, pp. 356–357.

[25] See *Kodeks karny obowiązujący tymczasowo w Rzeczypospolitej Polskiej…*, pp. 404–405. The marital union had to be established in compliance with the law binding on the prospective spouses, thus complying with the formal requirements essential for the validity of marriage. We should note

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participants criminally liable, that is, the clerics or clerks performing the wedding ritual, the existence of conceivable intent was sufficient. As in the Austrian penal law, prosecution took place *ex officio*. The commission of this crime occurred when the marriage was celebrated, and thus the consummation of the marriage was irrelevant to criminal liability under Article 408 PCR.[26]

The offence under Article 409 PCR consisted in knowingly and intentionally entering into a marriage with a person who did not understand the essence and significance of the act or who, due to an intellectual disability, unconsciousness or mental retardation resulting from a physical (bodily) defect or illness, could not control their actions during the marriage ceremony. The spouse guilty of an invalid marriage was liable to one to 6 years' imprisonment. One important element of the perpetrator's criminal liability was, on the one hand, entering into marriage pursuant to regulations of the marriage law in force in a particular area and, on the other, taking advantage of the other party's lack of sanity without their consent to effect the marriage.[27] The prospective spouse's insanity could be permanent or temporary. In the latter case, the constituent elements of the offence under Article 409 PCR were not satisfied if a spouse in a normal mental state and with a full capacity of expressing their will consented to the marriage, since there had to be a direct causal relationship between their symptoms of mental illness, mental retardation or un-

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that a knowledge of the marriage law in the area of central and eastern Poland involved exploring both the regulations of civil law and religious regulations of the denominations recognised by the state, all related to matters of marriage. In the territory of the former Russian Partition, a religious form of marriage applied. The legislator regarded the regulations applicable in individual denominations and related to the conclusion and dissolution of marriage as state rules. This entailed the impossibility for the common court to declare a religious marriage invalid if it had been contracted in violation of civil law. For more on this topic, see J. Gwiazdomorski, *Skuteczność orzeczeń sądów duchownych b. Król. Kongr. w sprawach małżeńskich wobec prawa państwowego*, "Przegląd Prawa i Administracji" 1932, no. 1, pp. 4–23; M. Allerhand, *Jurysdykcja władz wyznaniowych w sprawach małżeńskich*, "Czasopismo Sędziowskie" 1937, no. 3, pp. 113–123, no. 4, pp. 176–182; H. Świątkowski, *Niektóre aspekty prawne stosunku państwa do wyznań w Polsce przedwrześniowej*, "Państwo i Prawo" 1959, no. 1, pp. 24–43; H. Konic, *op. cit.*, pp. 54–198; J. Dworas-Kulik, *Prawne regulacje…*, pp. 100–132; eadem, *Przyczyny i skutki legalnej bigamii…*, pp. 111–121.

[26] According to W. Makowski, the initiative and conditions for prosecuting offences under Articles 408–410 PCR were the same as in the German Penal Code, although did not mention them explicitly. It was implied, then, that the invalid marriage had to be dissolved first and then the culprit or culprits had to be prosecuted at the request of the aggrieved spouse (see W. Makowski, *op. cit.*, pp. 360–361; *Kodeks karny obowiązujący tymczasowo w Rzeczypospolitej Polskiej…*, p. 413). Activities preceding the marriage involved preparation to commit a crime, and participation in the wedding ceremony involved an attempt to do so. The Russian Penal Code, like the German and Austrian counterparts, did not provide punishments for these stages of the crime under Articles 408–410 PCR. See *Kodeks karny obowiązujący tymczasowo w Rzeczypospolitej Polskiej…*, p. 408; W.M. Borowski, *op. cit.*, p. 417.

[27] *Kodeks karny obowiązujący tymczasowo w Rzeczypospolitej Polskiej…*, pp. 408–409. Cf. W.M. Borowski, *op. cit.*, pp. 414–416.

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consciousness, which would prevent them from directing their conduct or affected their understanding of the nature and significance of what they were doing, and the fact of contracting the marriage. The court adjudicating the case had to determine in each case whether there was such a direct cause-effect link.[28]

In Article 410 PCR the legislator penalised conduct whereby a marriage was effected by a person wilfully misleading their fiancée or fiancé about themselves or concealing a circumstance making the marriage invalid for material reasons.[29] An error about the person, that is, conclusion of a marriage with a person who was not the one consented to brought about the invalidity of the marriage under civil law, giving rise to criminal liability from one to 6 years' imprisonment. Misrepresentation consisting in an objectively false representation of circumstances that were crucial for the validity of the marriage had to relate to the past or present and be causally linked to the fact of the marriage. Assurances for the future and an error about personal qualities, such as education, occupation, work position or family connections did not give rise to a penal sanction.[30] The object of an offence was just as the one provided for in Article 408 PCR, with the will of the prospective spouse excluded through deceit consisting in lying to the other part or withholding the truth that affected the validity of the marriage. The subject of the offence, similarly to Article 409 PCR, was the spouse guilty of contracting an invalid marriage. Criminal liability was conditional upon the use of deception as a method of effecting a marriage.[31]

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[28] W.M. Borowski, *op. cit.*, pp. 416–417. Unconsciousness induced by alcohol or drug intoxication excluded punishability under Article 409 PCR unless it resulted from a deceitful act aimed at bringing the victim into the state of unconsciousness and then, against their will and ability to resist, concluding a marriage with them.

[29] Article 410 PCR corresponded with § 170 PCG, hence the circumstances rendering a marriage invalid were deemed to be marital impediments arising from the personal marriage law. Impediments to marriage were necessary to exist before the marriage was concluded and constitute grounds for its inadmissibility. See Articles 8–9, 11–13, 14, 22–40 and 51 of the 1836 ukaz of Tsar Nicholas I (Journal of Laws of the Kingdom of Poland 1836, vol. 18, no. 64–65). See also 62, 64 i 85 of the Svod Zakonov Rossiĭskoĭ Imperii, vol. 10, part 1. Cf. judgement of the Supreme Court of 17 January 1933, III. 1. Rw. 2575/32, "Zbiór Orzeczeń Sądu Najwyższego" 1933, item 28; judgement of the Supreme Court of 31 May 1933, C. II. Rw. 1150/33, "Zbiór Orzeczeń Sądu Najwyższego" 1934, item 79. For more on this topic, see A. Stawecka-Firlej, *op. cit.*, pp. 85–86; A. Piegzik, *op. cit.*, pp. 28–36; D. Wiśniewska-Jóźwiak, *Unieważnienie małżeństwa i jego skutki majątkowe w świetle prawa o małżeństwie z 1836 r.*, "Studia z Dziejów Państwa i Prawa Polskiego" 2011, vol. 14, p. 135; R. Longchamp de Bérier, *op. cit.*, pp. 12–13, 26–27.

[30] W.M. Borowski, *op. cit.*, pp. 418–422. The error had to be caused by the conduct of the other party, who would make assurances, false verbal or written statements, present falsified evidence or conceal impediments giving rise to an annulment. Moreover, if one party misled themselves about the other party, the other party's silence confirming that error was punishable.

[31] The liability of third parties involved in an invalid marriage was based on the specific provisions of Article 413 CPR.

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Article 420 (3) PCR is worthy of note, which corresponded to the criteria of the offence under Article 508 PCA. In Russian legislation, duress exerted on a minor through an abuse of parental or guardian's authority was punishable by a much lighter penal sanction than the offences under Articles 408 to 410 PCR, where the sentence was up to one year of imprisonment.[32]

CONCLUSIONS

Offences of unlawfully obtaining an invalid marriage involved disregard for state marriage regulations. In every case, the perpetrator was aware of the existence of a marriage impediment or other grounds resulting in the possibility of challenging the validity of the marriage, and yet led to its conclusion through their action or omission. In the western provinces of Poland, criminal liability was attached only to the spouse who was guilty of the prior marriage annulment. In the southern provinces, criminal liability for obtaining an invalid marriage was extended to both spouses and the parents coercing them to marry, and the sentence for this type of criminal behaviour was no less than 3 months of imprisonment, both in the German and Austrian criminal law. That the problem of statutorily invalid marriages was downplayed, apart from the measure of the penal sanction, was also demonstrated by the classification of these offences as misdemeanour against the civil status, or public morals. Only in the Russian legislation behaviours bringing about the invalidity of marriage were treated as offences against family-oriented regulations. The Russian Penal Code was the newest and most modern of all, created in the spirit of the latest European trends. This involved an extension of the catalogue of criminal behaviours to include those unknown in the criminal legislation of the other districts, a substantial increase in penalties for perpetrators, and recognition of criminal liability not only of the guilty spouses and their parents but also, for example, witnesses, family members, legal guardians, state officials who drew up the marriage certificate, and clerics marrying the prospective spouses.

[32] See *Kodeks karny obowiązujący tymczasowo w Rzeczypospolitej Polskiej*..., pp. 423–425; W.M. Borowski, *op. cit.*, pp. 412–414.

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ABSTRAKT

Celem artykułu jest historyczno-prawna oraz prawno-porównawcza analiza prawnokarnych aspektów wyłudzenia nieważnego małżeństwa w aspekcie teoretycznym. Nieważność małżeństwa w okresie międzywojennym funkcjonowała zarówno w prawie cywilnym, jak i w prawie karnym. Zadaniem ówczesnego prawa karnego było egzekwowanie zasad wynikających z prawa cywilnego, stąd prawodawca przewidział sankcję karną wobec sprawcy naruszającego dobra prawnie chronione. Ochrona trwałości związku małżeńskiego pozostawała w interesie nie tylko jednostki, lecz także państwa. Małżeństwo stawało się początkiem podstawowej komórki społecznej, jaką była rodzina, w oparciu o którą budowano społeczeństwo i państwo. Rodzina odpowiadała za spokój i moralność publiczną, dlatego naruszenie trwałości i nierozerwalności związku małżeńskiego utożsamiano z zamachem na zasady współżycia społecznego prowadzącym do osłabienia państwowości. Uwzględniając powyższe, w niniejszym artykule zostały omówione przesłanki prawa małżeńskiego warunkujące wzruszalność małżeństwa oraz sankcje karne wobec sprawców odpowiadających za zawarcie ustawowo nieważnego małżeństwa. Wybór tematu uzasadnia brak opracowania w literaturze przedmiotu niniejszego zagadnienia.

Słowa kluczowe: zawarcie nieważnego małżeństwa; prawo cywilne; prawo karne; małżeństwo; nieważność małżeństwa; okres międzywojenny