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CRIMINAL LAW ASPECTS OF BIGAMY IN THE INTERWAR POLAND

PRELIMINARY REMARKS

The presented study focuses on bigamy, construed in the legal sense as double marriage.[1] During the interwar period, bigamy was a phenomenon recognized under both civil and criminal law. In the light of both civil law and canon law,[2] bigamy constituted

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[1] R. Krajewski, *Bigamia w prawie polskim i w prawie kanonicznym* (Włocławek: Włocławskie Wydawnictwo Diecezjalne, 2003), 9. The term derives from Latin *bi* (two) and Greek *gamos* (wedding, marriage). In combination, the two denote "double marriage", which is taken to mean being in two marital relationships simultaneously, subject to a proviso that if the first relationship was contracted in accordance with the law, the other cannot validly exist, *Słownik łacińsko-polski terminów teologiczno-moralnych*, ed. S. Olejnik (Warsaw: Akademia Teologii Katolickiej, 1968), 34–35; *Słownik małżeństwa i rodziny*, ed. E. Ozorowski (Warsaw: Wydawnictwo Akademii Teologii Katolickiej, Łomianki: Fundacja „Pomoc Rodzinie", 1999), 34. Therefore anyone who has a legal interest in the non-existence of a bigamous relationship has a right to claim its invalidation. Licit remarriage is possible only if the first marriage has ceased by reason of divorce, death of either spouse, or its invalidation.

[2] Canon 1085 of the Code of Canon Law of 1917 provided for protection of an existing marriage, indicating that when a person who is bound by the knot of matrimony remarries, this invalidates the previous marriage, even if it was not consummated, *Codex Iuris Canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papæ XV auctoritate promulgatus*, May 27, 1917, *AAS* 9 (1917), pars II, 1–539. In accordance with canon 2356, "bigamists, that is, those who, notwithstanding a conjugal bond, attempt to enter another marriage, even a civil one as they say, are by that fact infamous; and if, spurning the admonition of the Ordinary, they stay in the illicit relationship, they are to be excommunicated […]", S. Biskupski, *Prawo małżeńskie Kościoła rzymskokatolickiego* (Warsaw: Pax, 1956),

an impediment to marriage, whereas under criminal law it satisfied the criteria of a proscribed act constituting a crime. Penalisation of bigamy reflected the primary social and moral principle, the one of monogamy of marriage – a state legally joining one woman and one man; as a consequence, bigamy constituted a prohibited act which infringed the legal institution of marriage. All criminal law regulations related to this phenomenon were intended to protect the lawfulness of an existing marriage, understood to be a monogamous relationship, which had neither been dissolved nor declared null.[3] Given the foregoing, bigamy was treated as an assault on the principle of monogamy,[4] hence the legislator guaranteed observance of provisions of civil law concerning the indissolubility of marriage by employing provisions of criminal law. In the criminal codes of the 19th century, bigamy was typically dealt with in a chapter concerning offences against family or principles of morality. As a rule, it was linked with adultery.[5]

1. CAUSES OF BIGAMY IN POLAND AFTER 1918

The beginnings of the independent Poland were characterised by a legal patchwork, as regards both civil and criminal law, systems which were inherited from the legislations of the former partitioning states. The legal systems to date that were applicable in the Polish territory were treated as Polish provincial legislation.[6] However, the legal regimes of the partitioning powers had different origins, and consequently different sources and systems of justice. In practice, it would give rise to tremendous problems in the application of procedural and substantive law.[7]

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the English version used here is quoted after Edward Peters, ed. and trans., *The 1917 Pio-Benedictine Code of Canon Law: in English Translation with Extensive Scholarly Apparatus* (San Francisco: Ignatius Press, 2001). Krajewski, *Bigamia*, 63–64; A. Gościmski, "Przestępstwo bigamii w Kodeksie Prawa Kanonicznego," *Prawo Kanoniczne* 16, nos. 3–4 (1973): 301–306.

[3] J. Koredczuk, "Przestępstwa przeciwko rodzinie w ujęciu dwudziestowiecznych kodyfikacji karnych," in *Rodzina i jej prawa*, ed. J. Rominkiewicz (Wrocław: Kolonia Limited, 2012), 171; A. Ratajczak, "Przestępstwa przeciwko rodzinie, opiece i młodzieży," in *O przestępstwach w szczególności*, vol. 4, bk. 2, chap. 8, of *System prawa karnego,* ed. I. Andrejew, L. Kubicki, and J. Waszczyński, (Wrocław: Zakład Narodowy im. Ossolińskich, 1989), 261.

[4] W.M. Borowski, *Część specjalna. Przestępstwa przeciwko religii, państwu, władzy państwowej i porządkowi publiczno-społecznemu*, vol. 2 of *Zasady prawa karnego* (Warsaw: M. Arct, 1923), 426.

[5] D. Charko, "Bigamia w polskim prawie karnym," *Studia Ełckie* 14 (2012): 486; *Wielka Encyklopedia Prawa*, ed. E. Smoktunowicz (Białystok–Warsaw: Prawo i Praktyka Gospodarcza, 2000), 88.

[6] Ruling of the Supreme Administrative Tribunal dated November 23, 1925, file ref. no. Rej. 1547/23, J.M., "Jurysprudencja Najwyższego Trybunału Administracyjnego. Przewłaszczenie majątków instrukcyjnych," *Gazeta Sądowa Warszawska* 26 (1926): 360–362.

[7] Major problems arose in connection with the probative value of public and private documents as well as the jurisdiction of the competent courts – see X. Fieriech, "Kilka uwag w sprawie obecnych zadań ustawodawstwa polskiego," *Gazeta Sądowa Warszawska* 15 (1919): 142–43.

The most severe effect of legal chaos reigning in the sphere of matrimonial law, felt especially acutely in the post-Russian provinces where civil jurisdiction was exercised by clerical courts, was a phenomenon which the contemporary juridical science termed "legal bigamy."[8] The lack of clarity in determining the legal status of particular citizens resulted from the widespread migration between the provinces of the Republic that affected the jurisdiction of courts competent to adjudicate on matrimonial cases.[9] Therefore, the most frequent model was a situation in which a husband had abandoned his wife and moved to another district, where he would live for a certain period of time in order to acquire entitlements proper to that area. Then, he would change his denomination to the one enabling him to request divorce on more advantageous terms, only to petition for divorce before a clerical court.[10] It should be stressed that under art. 113 and 115 of the Polish Constitution of 1921,[11] religious courts recognised internal ecclesiastical legislation as proper to and binding for the clerical courts of particular denominations which were acknowledged by the state; hence when the constitutional provisions were construed, the principle that denominational regulations must not be contrary to the law provided by statutes governing internal private relations and external private relations was ignored.[12] In practice, individual religious courts, which had civil jurisdiction over matrimonial cases, frequently breached the limits of their substantive-material competence granted by statute. As a result, common courts recognised the rulings of clerical courts dissolving or annulling marriages as producing no civil effects. However,

[8] Z. Radwański, "Prawo cywilne i proces cywilny," in *Historia państwa i prawa Polski 1918-1939*, ed. F. Ryszka, vol. 2 (Warsaw: Państwowe Wydawnictwo Naukowe, 1968), 173; H. Świątkowski, "Problem legalnej bigamii w Polsce przedwrześniowej," *Nowe Prawo* 10 (1959): 1150–58; Sz. Paciorkowski, "Problem tzw. legalnej bigamii w II RP w świetle spraw małżeńskich toczonych przed Sądem Okręgowym w Poznaniu," *Przegląd Prawniczy Uniwersytetu im. Adama Mickiewicza* 2 (2013): 15–28; S. Płaza, *Okres międzywojenny*, vol. 3 of *Historia prawa w Polsce na tle porównawczym* (Kraków: Księgarnia Akademicka, 2001), 87.

[9] The competence of common courts was governed by the provisions of the Regulation of the President of Poland of 6 February 1928 – Law on the organisation of common courts, Journal of Laws No. 12, item 9; and the Act of 2 August 1926 on law proper to internal, private relations, Journal of Laws No. 101, item 580,

[10] See M. Allerhand, "Jurysdykcja władz wyznaniowych w sprawach małżeńskich," *Czasopismo Sędziowskie* 3 (1937): 113–123, and 3 (1937): 176–82; A. Fastyn "Jurysdykcja sądu konsystorskiego w świetle przepisów prawa małżeńskiego z 1836 roku," *Czasopismo Prawno-Historyczne* 1 (2010): 111–132; J. Gł., "Z praktyk jednego z konsystorzy ewangelickich," *Gazeta Sądowa Warszawska* 8 (1932): 109–110; H. Świątkowski, "Z praktyki sądów konsystorskich," *Głos Sądownictwa* 2 (1938): 107–114.

[11] Act on 17 March 1921 – Constitution of the Republic of Poland, Journal of Laws No. 44, item 267.

[12] See ruling of the Supreme Court dated June 9, 1933, file ref. no. C II R 351/33; *Zbiór Orzeczeń Sądu Najwyższego* (1934), item 108; cf. ruling of the Supreme Court dated January 25, 1928, file ref. no. C 758/26, OSP 1929, item. 56.

civil courts were unable to pronounce the invalidity of a second marriage if it had been entered into by either party based on a defective ruling issued by a religious court. Such a state of affairs led to spouses remaining in two simultaneous marital relationships.[13]

By reason of his conduct, a bigamist husband not only would create civil effects, but primarily by violating provisions of the national law he would perpetrate bigamy (art. 412 PCR;[14] §171 PCP;[15] and §206 PCA[16]). The role of criminal law was to force a person, subject to a penal sanction, to respect the rules provided by the regulation of civil law, hence internal regulations of particular denominations had no force in respect of penal legislation; if, then, the judgements passed by clerical courts were at odds with civil law, they constituted a breach of norms of criminal law and therefore the perpetrator was held criminally liable. Interestingly, in Poland some situations that actually indicated bigamy appeared not so in the light of civil law due to the complexities of matrimonial law, and as such were not punishable under criminal law. An example of such "virtual" marriages were religious marriages which had not been reported to registry offices, also referred to as ritual.

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[13] More on this in Paciorkowski, "Problem," 15; cf. J. Gwiazdomorski, "Skuteczność orzeczeń sądów duchownych b. Król. Kongr. w sprawach małżeńskich wobec prawa państwowego," *Przegląd Prawa i Administracji* 1 (1932): 5; idem, "Trudności kodyfikacji osobowego prawa małżeńskiego w Polsce," a reprint from *Czasopismo Prawnicze* (1935): 177; S. Tylbor, "Dzisiejsze prawo małżeńskie w b. Królestwie Kongresowym," *Głos Sądownictwa* 7–8 (1939): 587–588.

[14] N. Tagancev, *Kodeks karny (22 marca 1903 r.)*, trans. L. Konic, vol. 4 (Warsaw: F. Hoesick, 1922), 402; *Kodeks karny obowiązujący tymczasowo w Rzeczypospolitej Polskiej na ziemiach b. zaboru rosyjskiego z dodaniem 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*, ed. W. Makowski, vol. 2 (Warsaw: Biblioteka Polska, 1921), 413–414. [hereafter referred to as PCR denoting the penal code applicable in the former Russian partition – Translator's note]

[15] *Kodeks karny obowiązujący na Ziemiach Zachodnich Rzeczypospolitej Polskiej z uwzględnieniem najnowszego ustawodawstwa i orzecznictwa Sądu Najwyższego*, ed. J. Kałużniacki and R.A. Leżański (Warsaw–Poznań: Drukarnia św. Wojciecha, 1925), 90–91, §171. [hereafter referred to as PCP denoting the Penal Code applicable in the former Prussian partition area – Translator's note]

[16] *Ustawa karna z dnia 27 maja 1852 r. I. 117 dpp.: z uwzględnieniem wszelkich zmieniających ją ustaw austriackich i polskich wraz z najważniejszymi ustawami dodatkowemi*, ed. Willaume, 5th edited and revised by M. Bodyński (Lviv: Maksymiljan Bodek, 1929), 75, §§206–207. [hereafter referred to as PCA denoting the penal code applicable in the former Austrian partition area – Translator's note].

2. LEGAL CONDITIONS FOR THE OFFENCE OF BIGAMY IN THE LIGHT OF THE PENAL CODES OF THE PARTITIONING STATES

The offence of bigamy involved an activity that aimed to violate one of the most profound principles underlying the social order and based on the monogamy of marital relationship, the latter forming the basis of family.[17] A judgement in criminal proceedings was issued on condition that the existence of a previous marriage was demonstrated objectively, which implied that such a marriage needed to be compliant with applicable regulations in a particular province of the Republic of Poland. First of all, it had to be concluded in a lawful manner and had to formally persist.[18] No declaration of nullity or dissolution of marriage by divorce resulted in liability for bigamy.[19]

The punishability of bigamy hinged upon the wilfulness of the fault. A perpetrator incurred criminal liability if he or she acted with a deceitful or conceivable intent, that is when they were conscious of the possibility of an offence being committed and consented to this.[20] The awareness of the existence of a previous marital relationship blocking the conclusion of a new marriage was based on factual rather than legal circumstances because the idea of a crime relied upon the knowledge of the one to be married regarding the fact of being married to another person, notwithstanding the knowledge of the validity of the first marriage.[21] The bigamist's

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[17] A. Wrzyszcz, "Przestępstwo bigamii w kodeksach karnych obowiązujących na ziemiach polskich w dobie zaborów," in *Bigamia. Lubelskie Seminarium Karnistyczne*, ed. M. Mozgawa (Lublin: Oficyna Wydawnicza Verba, 2010), 70.

[18] "[…] punishable state is created, which persists until either of these relationships has not been annulled or dissolved" and "the offence of bigamy persists until a simultaneous marital relationship exists", item 136; cf. the ruling of the Supreme Court dated March 20, 1936, file ref. no. I K 1366/35; see also *Zbiór Orzeczeń Sądu Najwyższego* (1936), item 377. Of significance was the fact that a marriage had been entered into in a manner provided for by law, therefore the issuance of a marriage certificate was of secondary importance.

[19] Cf. *Kodeks karny*, ed. Makowski, 415–416; Borowski, *Część specjalna*, 431–433.

[20] The lack of freedom and awareness was due to physical or mental coercion as well as an error as to the future spouse or circumstances affecting the validity of the marriage. W. Makowski, *Prawo karne. O przestępstwach w szczególności. Wykład porównawczy prawa karnego austrjackiego, niemieckiego i rosyjskiego, obowiązującego w Polsce* (Warsaw: F. Hoesick, 1924), 356–358.

[21] Ruling of the Supreme Court dated January 21, 1930, file ref. no. II K. 1. K 1357/29; *Zbiór Orzeczeń Sądu Najwyższego* (1930), item 136; cf. ruling of the Supreme Court dated March 15, 1922 r., file ref. no. Kr 144/21; *Ruch Prawniczy i Ekonomiczny* (1922): 825. The relationship, however, could have ceased on account of the spouse's death. More on this in Borowski, *Część specjalna*, 431–432; A. Pasek, "Dwużeństwo (bigamia) w kodeksach karnych obowiązujących w Drugiej Rzeczypospolitej," *Acta Universitatus Wratislaviensis*. *Prawo*. *Studia Historycznoprawne* 3180 (2009): 188.

awareness should reflect the real conditions and life circumstances of the person to be married, therefore should doubts arise as to his or her marital status, it was necessary to clarify all facts related to the existence of the previous marriage.[22] A justified error in assessing the situation would remove criminal liability if the perpetrator acted in good faith.[23] In such a case, the court was forced to pronounce the defendant not guilty of bigamy. If, however, the examination of the substantial validity of the submitted document permitted a conclusion that the defendant had falsified them or acquired them by means of threat or by deceit, this would lead to a concurrence of provisions and holding the person criminally liable for bigamy.[24]

In the light of the above, we can conclude that the very fact of entering into a bigamous marriage used to be penalised in Poland. The offence was committed as soon as the marriage ceremony was over rather than after the marriage was consummated.[25] Unlawfulness resulted from a single action producing lasting effects since the criminal condition persisted as long as two marriages co-existed.[26] Interestingly, under the Austrian criminal law no bigamy occurred if the prior marriage was judicially pronounced to be void.[27] In this way, a bigamous marriage was given the appearance of a lawful relationship for the duration of judicial proceedings. Only a final sentence determined the fate of an adulterous relationship and the guilt of bigamy.[28] In the light of the foregoing, it would be argued that the allegation that the prior marriage was void should cause the bigamy criminal proceedings to be suspended, otherwise a person would be convicted of bigamy before a judgement

[22] "If, in turn, the defendant resolved to marry for the second time, even considering the possibility of dissolving the first marriage despite certain doubts in that respect, and accepting the possibility of that situation giving rise to an offence, i.e. the conclusion of a new marriage, even in spite of the original marriage still in force, one would speak of conceivable intent [...]," ruling of the Supreme Court dated September 9, 1926, file ref. no. K 312/26, OSP 1926, item 535. In this context, it can be validly argued that conceivable intent resulted in criminal liability, on a par with criminal intention.

[23] Pasek, "Dwużeństwo," 183–84; Borowski, *Część specjalna*, 431–32.

[24] Z. Papierkowski, "Sąd karny a kwestja nieważności małżeństwa," *Czasopismo Sędziowskie* 3 (1936): 153–55.

[25] "[…] the offence of bigamy shall be committed as soon as the ceremony of marriage is complete, i.e. the solemnisation of the new marital relationship, even if the newly wedded partners immediately go separate ways and never meet afterwards." Ruling of the Supreme Court dated July 10, 1930, file ref. no. II. 1. K 500/30, "Zbiór Orzeczeń Sądu Najwyższego" (1930), item 93.

[26] This view evolved along the lines of the cited ruling (II. 1. K 500/30), and then it was upheld in the case law of the Supreme Court and the doctrine, see the ruling of the Supreme Court dated January 7, 1956, file ref. no. IV K.Rn. 1162/55.

[27] Pasek, "Dwużeństwo," 186.

[28] Cf. the quoted ruling of the Supreme Court dated March 15, 1922, file ref. no. Kr 144/21.

voiding the prior marriage had been passed.[29] However, irrespective of the judicial decision, the perpetrator could be held liable for sexual intercourse with the second spouse conducted by reason of deception.[30]

It should be pointed out that in the territory of the former Austrian partition, the limitation of criminal liability began its course from the moment the first marriage ceased or sexual intercourse in the bigamous relationship was discontinued,[31] whereas under the PCP, prosecution became time-barred on the day when either marriage was declared void or dissolved.[32] Also, it must be added that in the light of the PCA, the commencement of the ceremony of marriage entailed an attempt to commit offence, while the act of proposing, engaging or even the publication of banns constituted a preparatory activity which was not subject to criminal liability.[33] In the former Prussian and Russian partitions, an attempt or preparation were not penalised. Interestingly, under the PCR, the offence of bigamy was persecuted at the request of the aggrieved party; if the spouse who had been misled, deceived or coerced to contract marriage did not request the marriage to be annulled or the other party to that legal relationship punished, the marriage remained in force. Only when statutory guarantees were infringed, prosecution was instituted ex officio regardless of a spouse's will.[34]

Criminal liability for letting a bigamous relationship be solemnized was extended onto civil registrars or representatives of ecclesiastical authority who took part in the ceremony and those who participated in the marriage ceremony of the witnesses (art. 413 of the Russian Penal Code and §338 of the German Penal Code).

3. CONCURRENCE OF PROVISIONS AND OFFENCES EXEMPLIFIED

A situation in which a perpetrator's conduct fulfilled the criteria of several offences under different articles of a penal code demonstrated a concurrence of offences.[35] For a legal qualification of an act it was necessary to ascertain whether a given behaviour constituted a single act breaching several provisions of penal law (§73 PCP),

[29] Wrzyszcz, "Przestępstwo," 65.

[30] Borowski, *Część specjalna*, 427–28; Ratajczak, *Przestępstwa*, 262.

[31] Pasek, "Dwużeństwo," 186.

[32] Cf. Makowski, *Prawo*, 417.

[33] E. Krzymuski, *Wykład prawa karnego ze stanowiska nauki i prawa austryackiego*, 2nd ed., vol. 2. (Kraków: L. Frommer, 1902), 505–6.

[34] Makowski, *Prawo*, 361.

[35] W.M. Borowski, *Część ogólna*, vol. 1 of *Zasady prawa karnego* (Warsaw: M. Arct, 1922), 70.

or whether the said behaviour involved several self-contained acts which separately met the criteria of several crimes or offences (§74 PCP). In the former situation, one could speak of an ideal concurrence of offences, which could be divided into an apparent concurrence of legal provisions or that of offences.[36] An ideal concurrence of offences was exemplified by a case in which the description of statutory criteria of a proscribed act relating to one of the offences contained all circumstances that were characteristic for a particular behaviour of the perpetrator; in other words, the attributes of an offence provided for in one of the violated articles consumed the content of the other provisions, thereby creating a whole which satisfied the unlawful nature of the said conduct.[37] On the other hand, a situation when each of the committed offences constituted a separate type of punishable behaviour which produced inherent liability, that is liability independent of the other acts punishable under the penal code, one could speak of a real concurrence of offences,[38] also referred to as a multi-act concurrence encompassing both homogeneous and heterogeneous acts.[39]

The Austrian and Russian penal codes did not address the question of concurrence of offences, yet in practice they resolved the collision of statutory provisions by acknowledging only a multi-act concurrence.[40]

When analysing the issue under discussion, it is worth looking at the content of §170 PCP,[41] because it indicates criminal liability for contracting marriage as a result of deception which was achieved by misleading a person about the circumstances of the conclusion of the marriage. Here, we are speaking mainly of impediments to marriage, and since they are not annihilated or deception continues despite the existence the second marital relationship, this gives rise to criminal liability if the deceived spouse requests that the marriage be dissolved or declared null.[42] The offence referred to in §170 PCP remained in a multi-act concurrence with §171

[36] For more on the concurrence of offences, see IBID, 70–77.

[37] «§73 PCP concerns the so-called ideal, or single-act, concurrence of offences, that is to say a case when several offences result from one and the same criminal activity» – the ruling of the Supreme Court dated September 25, 1920, file ref. no. 60/20; *Kodeks karny*, ed. Kałużniacki and Leżański, 48.

[38] "The very wording of §74 of the Penal Code expressly demonstrates that it applies only to a person who has committed several offences through several independent acts. Therefore, the reference made in the judgement to this paragraph ultimately highlights the independence of the concurring offences." – the ruling of the Supreme Court dated September 3, 1921, file ref. no. 85/21, OSP 1924, item 249; *Kodeks karny*, ed. Kałużniacki and Leżański, 48.

[39] Ruling of the Supreme Court dated February 19, 1921, file ref. no. 7/21; *Kodeks karny*, ed. Kałużniacki and Leżański, 52.

[40] J. MAKAREWICZ, *Prawo karne ogólne* (Kraków: L. Frommer, 1914), 189.

[41] It was systematised in Chapter 12 entitled *Crimes and offences related to civil status*.

[42] MAKOWSKI, *Prawo*, 359–60.

thereof. However, we need to bear in mind the ruling of the Supreme Court which says that "the single-act concurrence of an attempted bigamy pursuant to §43 and §171 PCP with an offence under §273 PCP must be taken into consideration should the alleged widower use under the death certificate of the allegedly deceased wife obtained under §271 PCP with a view to entering into marriage anew. If the marriage becomes solemnised, bigamy is in a single-act concurrence with §272 PCP."[43] Under these circumstances, it must be assumed that the use of a false document in order to become married did not constitute an independent act because it initiated the offence of bigamy, and therefore was related to an ideal concurrence of offences. Another example of an ideal concurrence of offences in the light of art. 410 PCR was a concealment of the information about being bound by matrimony. Therefore, the offender who arranged to enter into a bigamous marriage by deceiving the other party was subject to a penal sanction solely under art. 412 PCR. Lastly, bigamy was associated with adultery (§171 PCP; art. 418 PCR; §502 and §503 PCA. For bigamy to exist it was not necessary to enter into sexual intercourse since – as demonstrated above – the moment when a deed fulfilling the criteria of a proscribed act was committed was the conclusion of marriage. A bigamous marriage was regarded as a relationship which was essentially invalid, only the Austrian law envisaged a possibility of its convalidation. Therefore, primarily with respect to §172 PCP, the subsequent sexual intercourse contravened the duty of marital faithfulness towards the previous spouse, to which one of the spouses was still tied by matrimony. Hence, the perpetrator who persisted simultaneously in two marital relationships, both entered into in accordance with the prescribed manner and the first not having been declared null or dissolved by a judicial decision, fulfilled the criteria of two independent prohibited acts, which reflected a real concurrence of offences, while – under the provision of §206 PCA – could constitute the only basis to hold the bigamous spouse criminally liable upon the convalidation of the marriage. In the context of art. 412 PCR, the recognition of such a real concurrence of offences was not obvious due the lack of clarification whether bigamy was a lasting offence or an offence producing lasting effects. The notes of the drafting committee made with respect to the motives for the code of 1903 raised some doubts. The notes suggested that the drafters perceived the offence referred to in art. 412 as a breach of the state-imposed principle of monogamy if a bigamous marriage was entered into or such a condition was maintained.[44] The second variant would unequivocally exemplify

[43] Ruling of the Supreme Court dated December 5, 1923, file ref. no. 218/23, *Ruch Prawniczy i Ekonomiczny* 4 (1924): 497.

[44] Pasek, "Dwużeństwo," 186.

an ideal concurrence of provisions of the law because in such circumstance the conduct of a bigamous spouse would also involve sexual intercourse with the new spouse.

It must be emphasised that a bigamist also was separately liable for each bigamous marriage entered into. In consequence, anyone who committed polygamy was not criminally accountable for one type of offence but every time for the offence of bigamy.[45]

4. POLISH REGULATIONS RELATED TO BIGAMY

Initially, the conception of unification of substantive criminal law was underpinned by the idea to adopt the Russian Penal Code of 1903.[46] Ultimately, the reconstruction of the Polish state was linked with the necessity to codify the law[47] based on own legal solutions.[48] This was dictated by ambitions and political considerations. Polish jurists intended to establish both a uniform and original legislation for Poland, which would gradually supplant the existing provincial laws, since only this scheme would not jeopardize the continuity of the existing social system and it would fully respect the patriotic sentiments of the Polish people.[49]

The issue of bigamy was first raised at a meeting of the Criminal Law Section of the Codification Committee, held on May 28, 1923[50] on the occasion of discussing the

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[45] Borowski, *Zasady*, 427.

[46] Official Journal of the Department of Justice of the Provisional Council of State in the Kingdom of Poland, of August 19, 1917, items 4 and 6; more on this in A. Lityński, *Wydział karny Komisji Kodyfikacyjnej II Rzeczypospolitej. Dzieje prac nad częścią ogólną kodeksu karnego* (Katowice: UŚ, 1991), 18–23. Cf. E.S. Rappaport, "Zagadnienie kodyfikacji prawa karnego w Polsce," *Kwartalnik Prawa Cywilnego i Karnego* 3, nos. 1–4 (1920): 101–2; S. Car, "Pilne zadanie prawnictwa," *Kwartalnik Prawa Cywilnego i Karnego* 1, nos. 1–4 (1918): 444–45; A. Lityński, "Dwa kodeksy karne 1932. W osiemdziesiątą rocznicę," *Roczniki Administracji i Prawa. Teoria i Praktyka* 12 (2012): 212; S. Grodziski, "Komisja Kodyfikacyjna Rzeczypospolitej Polskiej," Czasopismo Prawno-Historyczne 33, no. 1 (1981): 68.

[47] More on the activity of the Codification Committee in M. Mohyluk, "Porządkowanie prawa i II Rzeczypospolitej: Komisja Kodyfikacyjna i Rada Prawnicza," *Czasopismo Prawno-Historyczne* 51, nos. 1–2 (1999): 285–300; S. Płaza, "Kodyfikacja prawa w Polsce międzywojennej," *Czasopismo Prawno-Historyczne* 57, no. 1 (2005): 219–30.

[48] Grodziski, "Komisja," 47; Lityński, "Dwa kodeksy," 212–13.

[49] Z. Radwański, "Kształtowanie się polskiego systemu prawnego w pierwszych latach II Rzeczypospolitej," *Czasopismo Prawno-Historyczne* 21, no. 1 (1969): 33; cf. J. Bekerman, "Dwa poglądy," *Palestra* 10 (1927): 474–79; Idem, „Czy kodeks, czy nowele," *Gazeta Sądowa Warszawska* 7 (1920): 50; J. Pieracki, "Komisja Kodyfikacyjna w Parlamencie Polskim," *Gazeta Sądowa Warszawska* 52 (1928): 827.

[50] Codification Committee of the Republic of Poland, Criminal Section, *Protokół posiedzenia Sekcji Prawa Karnego Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej*, Komisja Kodyfikacyjna Rzeczypospolitej Polskiej. Sekcja Prawa Karnego, vol. 2 (Lviv: Wydawnictwo urzędowe Komisji Kodyfikacyjnej, 1925), 139–59.

papers of the chairman of the Section, J. Makarewicz, and S. Glaser. The aim of the paper by J. Makarewicz was to provide an introduction to the issue of bigamy. The speaker highlighted the the attempts of contemporary legislations to remove bigamy from the set of offences against the morals and to place it among offences against the institution of marriage, family life and personal status. Also, J. Makarewicz wondered whether due to the widespread disrespect for the institution of marriage it was necessary to penalise all those cases where null marriages were contracted in the eyes of civil law, including those which were null due to blood relationship or kinship.[51] It should be added that the speaker expressed the opinion that due to theoretical considerations the substantive nullity of the first marriage did not lead to a criminal condition of bigamy; however, due to practical considerations, he supported the claim that bigamy was to be ruled out in cases where the first marriage was formally null.[52]

S. Glaser, on the other hand, delivered his paper in a different vein to examine the terms associated with bigamy. In the first place, he endorsed the term "polygamy" since its scope includes cases where the perpetrator entered into more than one marriage. Also, he objected to seeing bigamy as a durable offence. Rather, if polygamy violates the legally protected principle of monogamy of marriage, the state order is breached the moment another marital relationship is entered into, giving rise to a commission of an offence. Glaser argued that the maintenance of such an unlawful state of affairs was not the essential aspect of the offence, therefore the substantive validity of the first marriage was immaterial for the spirit of the act. He admitted that entering into another marriage when the first marriage was not lawfully dissolved, even though substantially null, is an offence because the order laid down by the law has been disregarded. In the light of the above, Glaser claimed that the period of limitation for the offence should start the moment the new marriage is contracted.

During the session of the penal section, A. Mogilnicki opted for the adoption of the term "bigamy,"[53] which was ultimately accepted. It was also resolved that bigamy be regarded as an offence against family law and not placed in the chapter devoted to offences against morality;[54] also, a decision was taken not to incorporate into the penal code any reference to a period of prescription with respect to bigamy.[55]

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[51] Codification Committee, *Protokół posiedzenia*, 2:145; Pieracki, *Komisja Kodyfikacyjna*, 827.

[52] Ibid., 139–48.

[53] Codification Committee, *Protokół posiedzenia*, 2:147.

[54] Ibid., 147. Cf. K. Czałczyński, "Dwużeństwo. Wnioski Zgłoszone Komisji Opinjodawczej Polskiego Towarzystwa Ustawodawstwa Kryminalnego na posiedzeniu w dniu 1 czerwca 1931 roku," *Gazeta Sądowa Warszawska* 33 (1931): 459. The author requested that bigamy be included in the "group of offences infringing marriage by abusing the forms of contracting marriage."

[55] Codification Committee, *Protokół posiedzenia*, 2:148.

During the next sitting of the Section of Criminal Law of the Committee, J. Makarewicz presented his paper concerning the verification of nullity of marriage, in which he concluded that "bigamy creates a relationship which is impossible in monogamous societies: the existence of families based on the marriage of one man. " He also contended that a person who is responsible for a dissolution of marriage should incur criminal liability as well as anyone whose conduct during the conclusion of the marriage causes its nullity and dissolution.[56] In a follow-up discussion of the paper, bigamy was included in the category of offences related to marriage.[57] The question which court is to adjudicate the nullity of marriage was also deliberated. Kałużniacki and Rappaport defended the view that nullity of marriage should be adjudicated by civil courts, and only when the judgement determining the legal status has become final, a criminal court can issue a respective judgement. Otherwise criminal courts would have to examine the impediments to marriage, independently of civil courts, while the issued judgements would be completely different, which was definitely to be avoided in nullity cases. Mogilnicki presented an opposite view, arguing that criminal courts themselves should solve all civil matters because referring a case to a civil court beforehand would prolong the criminal proceedings, which would give rise to a situation in which the person guilty of bigamy dies before the the judgement of a civil court is issued preventing prosecution.[58]

The resolutions passed in the sessions of the Section so far were confirmed in *A preliminary draft of the detailed part of the penal code* and edited by the lead editor, prof. J. Makarewicz.[59] The offence of bigamy was placed in Chapter 10, entitled *Offences related to marriage.* The resolutions passed in 1925 were reflected in art. 144, while those of 1926 found their expression in art. 145. It should be added that the proceedings of the Section paved the way for the construal of bigamy laid down by art. 111 §1 of *A preliminary draft of the detailed part of the penal code* edited by

[56] See Codification Committee of the Republic of Poland. The Criminal Law Section, *Protokół posiedzenia Sekcji Prawa Karnego Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej. Sekcja Prawa Karnego*, Komisja Kodyfikacyjna Rzeczypospolitej Polskiej, Sekcja Prawa Karnego, vol. 3, bk. 2 (Warsaw: Wydawnictwo urzędowe Komisji Kodyfikacyjnej, 1926), 125–26.

[57] Ibid., 127. Mogilnicki agreed to such a classification of bigamy, but he voiced his concern that the group of such offences would be too small. In reply to that, Rappaport said that the size of the group had no importance and that small groups were better because it would be easier to classify offences.

[58] Cf. Codification Committee, *Protokół posiedzenia*, 3/2:127–28. The questions of procedural economy were also of relevance.

[59] Codification Committee of the Republic of Poland, *Projekt wstępny części szczególnej kodeksu karnego, Komisja Kodyfikacyjna Rzeczypospolitej Polskiej, Sekcja Prawa Karnego*, vol. 4, bk. 2 (Lviv: Komisja Kodyfikacyjna R.P., 1926), 58.

W. Makowski.[60] However, despite the resolutions passed by the Section, Makowski added §2 (art. 111 §2) which provided that the period of prescription starts as soon as a marriage is dissolved or declared null.[61] The debate on the draft penal code was joined by K. Czałczyński, who claimed that the inclusion of a separate provision referring to the period of prescription was superfluous due to the sufficiency of the provisions of the general part. He also noted that an additional term would create unnecessary restrictions in relation to bigamy.[62] Czałczyński also expressed the view that the formula "anyone who enters into..." should be used on account of inconsistency of terminology used in the draft matrimonial law. He added that the substantive nullity of one marriage "does not annihilate the fulfilment of the criminal condition of bigamy. For the criminal condition to become fulfilled, the simultaneous existence of two formally valid marital relationships."[63] This editorial formula was contained in art. 144 in the version prepared by J. Makarewicz, which was subsequently repeated in art. 102[64] of Chapter 14 entitled *Offences against marriage*.[65] It is worth noting that nullity of marriage which was declared in a court judgement excluded criminal liability for bigamy because the criteria of bigamy were met only if two marriages existed formally at the same time. The substantive invalidity of the first or second marriage did not affect the criminal liability for the said offence.[66] For those reasons every case of an abused form of marriage should

[60] "Anyone who enters into marriage despite remaining in a previously contracted marriage or enters into marriage with a person who remains in a previously contracted marriage is liable to imprisonment for up to three years." *Projekt wstępny część szczególna kodeksu karnego opracowany z polecenia Sekcji Prawa Karnego Komisji Kodyfikacyjnej przez Profesora Wacława Makowskiego*, Komisja Kodyfikacyjna Rzeczypospolitej Polskiej, Sekcja Prawa Karnego, vol. 4, bk. 1 (Warsaw: Wydawnictwo urzędowe Komisji Kodyfikacyjnej, 1926), 35.

[61] Codification Committee, *Projekt wstępny część szczególna kodeksu karnego*, 35, art. 111 §2.

[62] Czałczyński, "Dwużeństwo," 492.

[63] Ibid., 474.

[64] "Anyone who enters into marriage despite his previous marriage not being dissolved or declared null or anyone who enters into marriage with a person whose previous marriage has not been dissolved or declared null is liable to imprisonment for up to 5 years." A. Mogilnicki opted for a rejection of the phrase "declared null", claiming that no bigamy exists where a marriage has been unconditionally null due to impediments to marriage, *Protokół posiedzenia*, 2:143–48. This position was opposed by K. Czałczyński, who underscored that the adoption of such reasoning would exclude bigamy in the case of a person "who is married to someone of the same sex or remains in an incestuous marital relationship," Czałczyński, "Dwużeństwo," 474.

[65] Codification Committee of the Republic of Poland, *Projekt kodeksu karnego w redakcji przyjętej w pierwszym czytaniu przez sekcję Prawa Karnego Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej*, Komisja Kodyfikacyjna Rzeczypospolitej Polskiej, Sekcja Prawa Karnego, vol. 4, bk. 3 (Lviv: Wydawnictwo urzędowe Komisji Kodyfikacyjnej, 1929), 23.

[66] Cf. Czałczyński, "Dwużeństwo," 474.

be penalised, even if the first marriage was unconditionally invalid in substance.[67] Hence every marriage was under protection as long as it had not been annulled or dissolved by a court decision. The draft provided for wilful fault of the perpetrator, that is acting with a direct intent to commit an offence, and conceivable intent, that is when the perpetrator anticipated the possibility of a criminal result or the unlawfulness of an act and accepted that.[68] The draft code did not provide for criminal liability for attempting and preparing the offence.[69] Eventually, the offence of bigamy was included in art. 197 or Chapter 30 entitled *Offences against marriage*.[70]

It must be remarked that in the light of the Penal Code of 1932, it was immaterial for criminal liability under art. 197 whether the perpetrator entered into a second marriage knowing that the first marriage was substantially null and the second was soon dissolved, or the perpetrator entered into a second marriage trusting that the first marriage persisted albeit substantially null, while prior to the conclusion of the second marriage the first one had been declared null; in both cases the perpetrator was aware of the existence of the previous marriage, i.e. knew that it persisted at the time, and this fact provided the legal basis for criminal liability under art. 197 PC.[71] However, the perpetrator could avoid this liability if he used his acting in good faith as an excuse, and argued that he had supposed that a prerequisite for the penalisation of bigamy was the substantial validity of the first marriage.[72] Such reasoning of the court stemmed from the fact that the criminal conduct consisted in concluding marriage anew despite the knowledge that the previous marriage had not been formally dissolved or declared null, while the ignorance of the criminality of this conduct or his persistence in the condition which satisfied the material criteria excluded criminal liability. The other party's awareness of the existence of another marriage which still bound the first party gave rise to criminal liability of both spouses involved in

[67] See Codification Committee of the Republic of Poland, *Projekt kodeksu karnego w redakcji przyjętej w drugim czytaniu przez Sekcję Prawa Karnego Komisji Kodyfikacyjnej R. P.*, Komisja Kodyfikacyjna Rzeczypospolitej Polskiej, Sekcja Prawa Karnego, vol. 5, bk. 2 (Warsaw: Wydawnictwo urzędowe Komisji Kodyfikacyjnej, 1930), art. 187.

[68] Cf. Czałczyński, "Dwużeństwo," 506. The court could take into consideration a justified unawareness of the unlawfulness of the act as a reason for an extraordinary mitigation of the penalty.

[69] Cf. ibid., 491; see also J. Makarewicz, *Kodeks karny z komentarzem*, ed. A. Grześkowiak and K. Wiak (Lublin: Wydawnictwo KUL, 2012), 476; Makowski, *Kodeks*, 461.

[70] See Regulation of the President of Poland of 11 July 1932 – Penal Code, Journal of Laws No. 60, item 571 [herafter PC]; cf. Pasek, "Dwużeństwo," 193–194; Ratajczak, "Bigamia," 263; *Kodeks*, ed. Makowski, 460–461; Makarewicz, *Kodeks*, 476.

[71] Papierkowski, "Sąd," 153.

[72] Ibid.

the bigamous relationship.[73] The perpetrator was not liable to penalty if, during the conclusion of the first marriage the prescribed form had not observed. The lack of formal requirements related to the conclusion of a marriage caused that the marriage did not exist in the light of criminal law.[74] Despite persisting in a non-registered religious marriage, a perpetrator would not be held liable for bigamy when entering into another formal marriage since the state authorities recognised solely the second marriage.[75]

5. PREJUDICIALITY OF JUDGEMENTS ISSUED BY CRIMINAL COURTS

During the interwar period, the question of prejudiciality of judgements issued by criminal courts, referred to as pre-judgement, was a debatable issue. In the dispute concerning the prejudiciality of penal judgements, Z. Papierkowski was in favour of total independence of criminal courts in respect of adjudicating all kinds of legal issues emerging in the course of judicial proceedings, including the civil aspects of the case. He presented a view that a practising criminal judge was as fit for that profession as a civil judge since both were obliged to have a knowledge of both civil and criminal law, or "at least an ability to understand and properly construe the entirety of law of their country."[76] To defend his view, Papierkowski argued that it was necessary to make judges respect the principle of material truth, which he defined as "a duty of equal consideration for all circumstances which shed light on the actual state of affairs", adding that civil proceedings rely too heavily on the will of the parties.[77] A similar view was presented by Glaser, who invoked the principle of instructionality as enabling a judge to "use initiative and be unhindered in action with respect to evidence." He stressed that an in-depth examination of a case lay in the interest of the State in the first place, and in the interest of an individual in the second. The precedence of the State's interests – the protection of the wedlock was no doubt among them – could not be restricted merely to an evaluation of the

[73] Makarewicz, *Kodeks*, 476.

[74] See the ruling of the Supreme Court dated March 20, 1936, file ref. no. I K 1366/35. Of significance was the fact that a marriage had been entered into in a manner provided for by law, therefore the issuance of a marriage certificate was of secondary importance.

[75] W. Makowski calls informal marriages apparent. "Feigning a marriage which in reality has no right-creating character, indispensable for this category of acts, does not fulfil the condition provided for in art. 197," *Kodeks*, ed. Makowski, 461.

[76] Papierkowski, "Sąd," 149–50.

[77] Ibid., 150.

evidence adduced by the parties, as it happened in a civil case, but, if necessary, supplementary evidence was to be supplied.[78]

The legislator removed the uncertainty indicated above by means of the following provision of art. 7 of the Code of Civil Procedure:[79] "The civil court is bound by the resolution made in a criminal judgement in respect of a perpetration or non-perpertration of an offence unless it has been disproved in proceedings before this court," and art. 7 of the Code of Criminal Procedure,[80] under which "The criminal court autonomously adjudicates all legal issues arising during the proceedings, and is not bound by a ruling of another court or office." A more thorough interpretation of art. 7 of the said code in respect of bigamy was carried out by Papierkowski. He indicated that the word "adjudicates" suggests its total autonomy and independence of a criminal court. Papierkowski also underscored the fact that the criminal court was not bound by another ruling which had been issued in the same case, but it could treat that as a proof at best; that ruling need not affect the judge's conviction in adjudicating a particular criminal case.[81] Therefore the judgement of a civil or religious court adjudicating marital cases was not binding for the criminal court. Its autonomy arising under art. 7 CCRP gave it its own leeway regarding specific legal issues, different than the discretion of civil courts and, above all, religious courts; this is why the criminal court could declare a void marriage valid upon the conclusion of another marriage and, given such circumstances, decide that the criteria of bigamy were fulfilled.[82] In bigamy cases, any restriction imposed on the criminal court would render it unable to settle the question of substantive validity of the first marriage and thereby preclude the determination of a condition for presuming the second marriage to be bigamous.[83]

Additionally, the judgement of the criminal court acquitting the defendant charged with bigamy would not bind the civil court if the judgement had been quashed in the proceedings (art. 7 CCIP). So, in a situation when the perpetrator claimed his ignorance of bigamy being committed, and the criminal court had to take that

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[78] S. Glaser, "Prejudycjalność wyroków karnych," *Polski Proces Cywilny* 12 (1934): 353–63.

[79] Regulation of the President of Poland of 29 November 1930, Code of Civil Procedure, Journal of Laws No. 83, item 651 [herafter CCIP].

[80] Regulation of the President of Poland of 19 March 1928, Code of Criminal Procedure, Journal of Laws No. 33, item 313 [herafter CCRP].

[81] Papierkowski, "Sąd," 151

[82] Cf. ibid., 154.

[83] Cf. ibid., 151–52. Interestingly, the administrative authorities were not entitled to examine the substantive validity of judgements issued by religious courts, therefore they assumed the factual state to be the legal situation and accorded the second (bigamous) wife the rights which were reserved for the first, defectively divorced wife.

circumstance into consideration and discontinue the prosecution as a result, the judgement of the criminal court had no meaning for the civil court if the documents presented by the party confirmed the nullity of either marriage under civil law. Acquitted under criminal law, the spouse was found to be a bigamist under civil law and responsible for the civil effects of his conduct.[84]

CONCLUSION

In the period between the wars, criminal courts showed a great deal of leniency towards perpetrators of bigamy. Penalties awarded for this offence were usually in the lower limit of statutory sanction for bigamy. In practice however, the sentences were up to one year of imprisonment, which in the penal codes constituted the lower limit and therefore determined the minimal punishment for this sort of criminal conduct.[85] It must be stressed that proceedings to establish the rights resulting from a particular marriage carried out before civil courts took years, and in was only before the Supreme Court that those cases found their conclusion;[86] for that reason and due to the intricacy of provisions of matrimonial law, the ascertainment of the substantive status in the criminal court, that is proving the inadequacy of a judgement issued by a religious court was extremely difficult. Another factor affecting the amount of penalty was probably the family situation of the bigamist, that is to say the necessity to provide maintenance for the wife, and in practice two wives, as well as the children born in both marital relationships. Nonetheless, low penalties awarded by criminal courts to bigamists did not function as a deterrent for potential perpetrators of this forbidden act, and therefore would not fulfil an adequate preventive function.

[84] L. Peiper presented the view that the civil court was bound by the resolution of the final judgement of the criminal court as to the perpetration of an offence. In such a situation, the findings of the criminal court became the findings of the civil court, even if the defendant had disproved them in a civil process. However, Peiper claimed that the civil court should verify the extent of those findings, because all findings extending beyond the scope of the criminal court's findings would not hinder the civil court. In the same publication, Glaser argued that the court must not change the legal classification of a deed as determined by the criminal court, S. Glaser and L. Peiper, "Zakres wpływu wyroku karnego na wyrok cywilny. Przyczynek do wykładni art. 7 kpc," *Polski Proces Cywilny* 20 (1935): 617–24.

[85] Czałczyński, "Dwużeństwo," 458 and 507.

[86] Cf. Sz. Paciorkowski, "Problem," 18–27.

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CRIMINAL LAW ASPECTS OF BIGAMY IN THE INTERWAR POLAND

Summary

The interwar period was marked by a lack of uniform laws regulating the institution of marriage. Particular districts had different legal regulations as a legacy of the former legislation binding in the partitioned Poland. Depending on the professed faith or place of residence, the legislator imposed on inhabitants of particular districts specific provisions pertaining both to entering into and dissolution of marriage. However, it should be noted that in central and eastern Poland, entrusting civil jurisdiction in matrimonial cases to ecclesiastical courts contributed to the phenomenon of bigamy spreading in the interwar period, which proved an enormous challenge to the legislative authorities and primarily to the judiciary.

Key words: bigamy; polygamy; prejudicial character of judgements; marriage; monogamy.

Translated by Tomasz Pałkowski

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