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Pozytywne i negatywne przesłanki orzeczenia rozwodu w prawie cywilnym w świetle orzecznictwa Sądu Najwyższego i sądów powszechnych – zarys problematyki

Positive and negative reasons for judgement the divorce according to the civil law in light of the Supreme Court and common courts judgements - an outline of the issues

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Introduction

Marriage is a union between a man and a woman incorporating both spiritual (sacramental) and civil law elements. The existing principle of the secularity of state and law means that even a religious marriage is subject to two separate legal regimes - canon law and civil law (and thus both church and civil jurisdiction). Naturally, the decision of the ecclesiastical court on the validity of a canonical form of marriage cannot have a preliminary effect on the decision of the state court on the validity or termination of a secular marriage[1] and vice versa. Furthermore, as opposed to canon law, secular law allows for the dissolution of

[1] *Wyrok SN z dnia 17 listopada 2000 r.*, *V CKN 1364/00*, OSNC 2001/9/126.

a marriage through divorce[2]. Although it is obvious that the topic of this paper cannot have even an indirect effect on the jurisprudence of ecclesiastical courts and the practice of canon law experts, it can still serve as an interesting comparative novelty for theoreticians and practitioners of canon law.

The relevant regulations under the Polish legal order are contained in article 56 of the Family and Guardianship Code[3] (hereinafter referred to as FGC). The Code provides for the possibility of granting a decree dissolving a marriage in case of two positive reasons and the absence of any of the three negative ones. All of the reasons for divorce mentioned above are detached from property claims, such as eviction of the spouse, division of joint property or alimony. These claims are considered only after the dissolution of the marriage[4].

The normative regulation seems to be straightforward, however, it contains a number of general clauses, the application of which in a specific factual situation may raise reasonable doubts. The extensive case law of both the Supreme Court and common courts concerning the regulation in question facilitates the interpretation of the discussed issue.

1. Complete and irretrievable breakdown of marriage

First of all, two positive reasons should be considered in order to proceed to a detailed analysis of the grounds for granting a divorce, the cumulative occurrence of which determines whether a divorce is granted. Pursuant to Article 56 § 1 of the FGC, the court may dissolve the marriage through divorce if there is a complete and irretrievable breakdown of marriage

[2] European legislations governing divorce vary in terms of the divorce systems adopted, some of which allow for the dissolution of marriage on the basis of various positive reasons for divorce (multi-system legislation). There are four basic divorce systems: 1) Absolute reasons for divorce – he court shall grant a divorce after identifying any of the circumstances specified by the legislator in a closed catalogue (e.g. adultery, abandonment of the spouse, attempted murder or harm); the dissolution of marriage is a sanction for violating basic conjugal duties; 2) the system of clauses pertaining to the breakdown of marriage - the dissolution of the marriage takes place when the bonds that make up marital life cease to exist; divorce is an instrument that allows the legal bonds to be removed in such a situation, leading to the cessation of a dead or at least malfunctioning marriage; 3) the system of divorce by mutual consent of the spouses - the authority grants a divorce following a consensual declaration of the spouses that they no longer intend to be married; the dissolution of marriage without an assessment of the state of the marriage is a consequence of respecting spouses' personal freedom; 4) the hybrid divorce system - the legislator modifies the typical divorce system, supplementing it with elements characteristic of other systems, e.g. the system of clauses pertaining to breakdown of marriage, accompanied by the presumption of the existence of breakdown in case of certain circumstances. H. DOLECKI, T. SOKOŁOWSKI (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, wyd. II, LEX 2013, thesis 7 for art. 56 of the FGC.; see also: A. OLEJNICZAK, *Współczesne europejskie systemy rozwodowe. Zarys charakterystyki*, PiP 1982, vol. 3–4, p. 58-67).

[3] *Ustawa z dnia 25 lutego 1964 r. Kodek rodzinny i opiekuńczy*, Dz. U. 1964, nr 9, poz. 59 z póź. zm.).

[4] G. JĘDREJEK, *Kodeks rodzinny i opiekuńczy. Komentarz aktualizowany*, LEX/el. 2018, thesis 2 for art. 56 of the FGC.

between the spouses. Therefore, conjugal life consists in the existence of mental communication and positive feelings (love, respect, trust) between the spouses, includes physical cohabitation, and in economically viable areas it is expressed primarily in the running of a common household, living together, and sometimes in being engaged in gainful or economic activities together[5]. Irretrievable breakdown of is only complete when all of the above mentioned ties between the spouses have been severed. The breakdown in question is a lengthy process, not an incidental event[6]. The irretrievable character of breakdown of marriage means that there is no chance that the spouses will re-establish the relationship. The existence of at least one of the ties, such as the economic relationship, makes it impossible to speak of a positive reason for a divorce. Similarly, the existence of physical ties, despite the lack of spiritual and economic ties, indicates that the breakdown of marriage is not complete and the divorce claim should be dismissed[7].

However, it is worth noting that while upholding the basic premise for divorce under the old law, namely the complete and irretrievable breakdown of marriage, the Family and Guardianship Code ignored the previously applicable reservation (under Article 29 § 1 of the 1950 Family Code[8]) that made the effectiveness of a divorce request dependent on whether such complete and irretrievable breakdown resulted from valid reasons. The substance of this change comes down to the fact that when determining whether breakdown of marriage is complete and irretrievable, the court is under no obligation to assess the validity of the claimant's reasons, i.e., it is not required to examine whether it can be regarded as sufficiently substantiated in the light of the principles of general social coexistence[9]. If there are indications for a divorce, the motives that the spouse ultimately follows when he or she applies for divorce are irrelevant[10]. It is quite clear that even trivial issues can lead to a complete and irretrievable breakdown of marriage. Yet, in such cases, they usually indicate the immaturity of one or both

[5] K. PISECKI (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, wyd. V, LexisNexis 2011, thesis 27 for art. 56 of the FGC

[6] See w*yrok SN z dnia 22 października 1999 r., III CKN 386/98*, LEX nr 1217913

[7] G. JĘDREJEK, *Kodeks…,* op. cit., thesis 5 for art. 56 of the FGC; It occasionally happens that the parties that wish to get a divorce, underestimate the ties existing between them, pointing out, for example, that the relationship was merely the result of partner's physical attractiveness or the abuse of mind altering substances, and not the actual marital ties. Such an attitude, however, requires an assessment by the court as to whether the physical ties between the parties actually do exist or whether diminishing the importance of physical intercourse is not credible. J. WIERCIŃSKI (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, LexisNexis 2014, thesis 28 for art. 56 of the FGC

[8] *Ustawa z dnia 27 czerwca 1950 r. Kodek rodzinny*, Dz.U. 1950, nr 34, poz. 308.

[9] See *uchwała SN z dnia 18 marca 1968 r., III CZP 70/66*, OSNC 1968/5/77.

[10] See *wyrok SN z dnia 17 grudnia 2002 r., III CKU 47/98*, LEX nr 1162958.

spouses, which constitutes the real reason for the breakdown[11].

Next, the question may arise as to how long it takes for the spouses not to be involved in living together as husband and wife, be it emotionally, economically or physically, in order for marriage to be regarded as a completely and irretrievably disintegrated. Naturally, there is no rule for this. Each case must be considered individually, but the Supreme Court noted in one of its decisions that the period in which the parties do not live together for more than two years suggests that there is no prospect of the parties resuming their relationship[12]. On the other hand, the Supreme Court considered that the short period of time since the date of young people's entry into marriage and the relatively short period of breakdown of marriage do not preclude a divorce per se on the grounds that the breakdown for these reasons is not complete and irretrievable if there is no other negative reason for a divorce[13].

2. Contradiction of a decree of dissolution of marriage with the welfare of minor child of the family and the principles of social coexistence

As far as the negative reasons for divorce are concerned, i.e. reasons that prevent the court from dissolving the marriage, the welfare of minor child of the family should be given the highest priority. Article 56 § 2 states that, despite the complete and irretrievable breakdown of marriage, divorce is not admissible if the welfare the minor child of the family is to be compromised. Naturally, there is no legal definition of the welfare of the child and it is not possible to develop one. For this concept encompasses various tangible and intangible assets, a set of activities and behaviours which contribute to proper care of the child and which ensure the child's healthy development, sense of stability, security and readiness to live independently in harmony with society[14]. It is worth noting that there is neither a presumption that a divorce

[11] J. WIERCIŃSKI (ed.), *Kodeks…*, op. cit., thesis 23 for art. 56 of the FGC; The doctrine classifies the causes of the breakdown of marital life under three basic categories: a) culpable conduct (e.g., threats made against the other spouse, unethical behaviour, idle lifestyle, alcohol abuse, drug addiction, aggressive behaviour, refusal of assistance, humiliation of the spouse, marital infidelity, inappropriate attitude towards children, bad attitude towards the spouse's family), b) non-culpable (e.g. a long-lasting, incurable illness which makes it impossible or highly difficult to perform the marital duties, serious mental illness, irreconcilable differences in character, sexual deficiency), c) may be considered as culpable or non-culpable depending on the circumstances (e.g. infertility, misbehaviour of the spouse's family, difference in worldview, difference in positions with regard to raising children, considerable age difference between spouses), K. PISECKI (ed.), *Kodeks…,* op. cit., thesis 31 for art. 56 of the FGC.

[12] See *wyrok SN z dnia 14 grudnia 1984 r., III CRN 290/84*, LEX nr 852456.

[13] See *wyrok SN z dnia 14 grudnia 1984 r., III CRN 272/84*, OSNC 1985/9/135.

[14] J. WIERCIŃSKI (ed.), Kodeks…, op. cit., thesis 36 for art. 56 of the FGC

will adversely affect the welfare of minor child nor a presumption to the contrary. Thus, court's determination of whether a divorce will not be contrary to the best interests of the minor child of the family does not imply a rebuttal of one or the other presumption, but a scrupulous assessment of the best interests of the minor child of the family in the context of a particular case.

In its resolution of 18 March 1968, the SC stated that, when assessing whether the welfare of the spouses' minor child does not oppose a divorce, it should first of all be considered whether the divorce will not weaken the bond between the child and the spouse that leaves the household to the extent that might adversely affect the performance of his or her parental duties. One of the circumstances that are of importance in this regard is remarriage of one or both spouses, which in turn frequently constitutes a significant motivation factor in applying for divorce. However, where a divorce concerns a family with several children, in which the maintenance duty and upbringing of the minor children fully exhausts the spouses' earning capacity and financial resources, consideration of the welfare of those children may be an argument against granting a divorce and thus refusing the parents the opportunity to start new families[15]. The Supreme Court used the aforementioned resolution to express the thesis that minor children can find themselves in detrimental position when the facts presented in divorce decree do not allow the situation of the children to be resolved in a way that ensures that their material and moral needs are satisfied, at least to the extent that those needs have been met till this point. This is particularly true where actual joint custody of both parents is necessary under the established circumstances and exercised to a certain extent, and the existing relationship between the spouses does not offer any chance of maintaining this state of affairs after the divorce. In another decision, however, the SC expressed the view that „the economic aspect that is a part of the divorce and the emphasis [...] on the deterioration of the situation of the child in this financial context, cannot determine on its own that the welfare of the child of the family opposes the divorce"[16].

The implication that the welfare of the child will be affected by divorce may be supported by the spouses' unwavering stance regarding the exercise of parental authority in the future and, in particular, by each parent's insistence that the child be entrusted to him or her with the exclusion of any interference on the part of the other spouse. This is particularly relevant where there are grounds for assuming that maintaining the status quo in the relationship between parents will be more favourable to their underage children. Children's age, their

[15] See *uchwała SN z dnia 18 marca 1968 r., III CZP 70/66*, OSNC 1968/5/77.
[16] See *wyrok SN z dnia 17 grudnia 1999 r., III CKN 850/99*, LEX nr 50737.

relationship with their parents so far, as well as their health and their degree of vulnerability, may also play an important role in assessing whether the welfare of the children will be affected by the divorce[17].

The second negative condition for granting the divorce decree defined in Article 56 § 2 of the FGC is its non-compliance with the principles of social coexistence. This provision takes into account exceptional situations in which, despite the complete and irreversible death of the marriage and in the absence of other negative reasons, the principles of social coexistence speak against granting divorce. Such situations may be considered mainly where those principles cannot be followed due to blatant disadvantage experienced by the spouse who objects to the request for divorce, or where there are serious socio-educational reasons against divorce which do not allow a divorce decree to sanction facts arising out of mistreatment and malice towards the spouse or children or other disregard for the institution of marriage and family or family duties[18]. A divorce decree would stand in contradiction to the principles of social coexistence if one of the spouses is terminally ill, needs the financial and moral assistance of the spouse and the divorce would constitute serious disadvantage for him or her[19]. At times there may be socio-educational reasons preventing a divorce decree from sanctioning facts arising from malice towards the spouse or from other disregard for marriage and family[20]. However, the spouses' old age does not automatically mean that a divorce would stand in opposition to the principles of social coexistence[21].

3. Request for a divorce by spouse at fault for the breakdown of marriage versus the objection of the innocent spouse

The third negative reason, most controversial and most challenging in terms of jurisprudence has been defined in Article 56(3) of the FGC. It stipulates that divorce is not admissible if it is requested by the spouse who exclusively at fault for the breakdown of marriage, unless the other spouse consents to divorce or if the refusal to give his or her consent to divorce violates the principles of social coexistence under the given circumstances. As the Court of Appeal in Białystok noted, the grounds for refusing a divorce at the request of a spouse exclusively at fault for the breakdown of marriage include certain social and educational

[17] See *uchwała SN z dnia 18 marca 1968 r., III CZP 70/66*, OSNC 1968/5/77.
[18] See *uchwała SN z dnia 18 marca 1968 r., III CZP 70/66*, OSNC 1968/5/77.
[19] See *wyrok SN z dnia 25 maja 1998 r., I CKN 704/97*, LEX nr 529702.
[20] See *wyrok SN z 9 października 1998 r., III CKN 573/98*, LEX nr 1214449.
[21] See *wyrok SA w Poznaniu z dnia 5 października 2004 r., I ACa 683/04*, Wokanda 2005/12/43.

aspects. However, this specific punishment imposed on a spouse who arbitrarily broke up the marriage or disregarded family obligations cannot be of an absolute character[22]. However, divorce will be admissible (in situation when the spouse requesting it is exclusively at fault of breakdown of marriage and the innocent spouse refuses to consent to divorce) when refusal to give consent to divorce stands against the principles of social coexistence under these circumstances. Right from the outset, it should be noted that the innocent spouse's exercise of his or her right not to consent to the divorce requested by the spouse exclusively at fault of breakdown cannot be regarded as contrary to the principles of social life in itself[23]. The reasons for an innocent spouse's objection to a divorce may include a sense of injustice, a feeling of love for the other spouse and even financial motives, since a spouse who has not displayed any negative behaviour and has shown loyalty and love for his or her partner cannot be forced by a unilateral declaration of the will of the spouse at fault, to renounce the enjoyment of the material possessions of the spouse at fault, or even a possible inheritance[24]. The innocent spouse's refusal to give consent to divorce benefits from the presumption of conformity with the principles of social coexistence. This presumption can be rebutted by proving specific circumstances that indicate the opposite[25]. The duration of separation alone cannot be considered as such circumstances which, in the light of Article 56 § 3 of the FGC, would justify acceptance of the innocent spouse's refusal to give consent to a divorce as being contrary to the principles of social coexistence, and moreover, the duration of the separation does not give rise to a presumption that the innocent spouse, when refusing consent to divorce, is guided by the desire to harass the spouse at fault[26]. The assessment of the effectiveness of the refusal to give consent to a divorce should be performed with special regard to the reasons for the breakdown and the circumstances and events that followed the discontinuation of conjugal life (e.g. extramarital relationships and the children born thereto, as well as the social purposefulness of legalizing these relationships)[27]. Nevertheless, a relatively long period of breakdown of marriage accompanied by actual separation alone cannot provide sufficient grounds for divorce if it is requested by the spouse exclusively at fault for the breakdown of marriage and the innocent spouse does not give consent to the divorce, and this refusal cannot be considered

[22] See *wyrok SA w Białymstoku z dnia 2 lutego 1995 r., I ACr 13/95*, OSA 1997/4/22.
[23] See *wyrok SA w Krakowie z dnia 10 maja 2016 r., I ACa 85/16*, LEX nr 2056679.
[24] J. WIERCIŃSKI (ed.), *Kodeks…*, op. cit., thesis 50 for art. 56 of the FGC.
[25] See *wyrok SN z dnia 26 października 2000 r., II CKN 956/99*, M. Prawn. 2001/6/352, see also: *wyrok SN z dnia wyrok z dnia 7 grudnia 1965 r., III CR 278/65*, OSNC 1966/7-8/130.
[26] See *wyrok SN z dnia 26 lutego 2002 r., I CKN 305/01*, LEX nr 53924.
[27] See *wyrok SN z dnia 10 maja 2000 r., III CKN 1032/99*, OSNC 2001/7-8/102.

contradictory to the principles of social coexistence if there are no grounds for suggesting that the spouse who refuses to give consent to the divorce should do so out of vengeance, harassment or personal gain[28]. At this point, it is also worth pointing out the view of the CoA in Gdańsk that the spouse's refusal to give consent for a divorce on religious grounds cannot be considered to be against the principles of social coexistence[29]. One summary of the above considerations may be the judgment in which the Supreme Court took the position that in assessing whether the innocent spouse's refusal to give his or her consent to a divorce, when it is requested by the spouse exclusively at fault, one should take into account the innocent spouse's feeling of being wronged, but at the same time, when considering the refusal, we should think about the situation that has arisen from the point of view of the social disadvantage caused by the continuation of formal marriages that do not have a real chance to actually function while at the same time there are extramarital relationships that deserve to be legalized[30].

4. An overview of the divorce process

Divorce cases are handled in separate proceedings, regulated in Article 425-446 of the FGC[31]. Due to the subject matter of such cases, they do not belong to the category of cases that require to be conducted hastily. In divorce proceedings, the principle of concentration of evidence weakens in favour of examining the actual situation of the couple and their children at each stage of the proceedings[32].

Pursuant to Article 441 of the Code of Civil Procedure, the purpose of evidentiary

[28] See *wyrok SN z dnia 12 września 1975 r., III CR 226/75*, LEX nr 7750, see also: *wyrok SN z dnia 18 sierpnia 1965 r., III CR 147/65*, LEX nr 4503. A slightly different view was expressed by CoA in Lublin in its judgment of 3 March 1999, I ACa 11/99, LEX No. 36300, in which it was stated that when assessing the circumstances, whether the refusal to give consent to divorce is not against the principles of social coexistence, the lapse of time from the moment of discontinuance of the spouses' conjugal life is of considerable importance.

[29] See *wyrok SA w Gdańsku z dnia 16 czerwca 1999 r., I ACa 290/99*, LEX nr 50098.

[30] See *wyrok SN z dnia 28 lutego 2002 r., III CKN 545/00*, LEX nr 55136. In its judgment of 27 October 1999, III CKN 412/98, LEX No 78208, the SC expressed a similar view by stating that „A refusal to give consent to divorce as being inconsistent with the principles of social coexistence should therefore be omitted if, under the circumstances, there are no grounds for assuming that a divorce decree may produce undesirable social and educational effects. The thesis that the purpose of divorce is to eliminate the harm which, from a social point of view, would be to uphold formal marriages when the marriage does not actually exist and there is no real chance of its continuation is of fundamental importance here. In this situation, the assessment of the effectiveness of the refusal to give consent to divorce should be made especially in the context of the causes of the breakdown and taking into account the situation that occurred during the non-existence of the conjugal life, such as extramarital relationships and the children born to them, as well as the social purposefulness of legalizing these relationships.

[31] *Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego*, Dz. U. 1964, nr 43, poz. 296.

[32] See *postanowienie SA w Katowicach z dnia 25 października 2004 r., I S 3/04*, LEX nr 193668.

proceedings is to determine the circumstances of the breakdown of marriage, as well as the situation concerning the children of the parties and, if the claim is accepted, the reasons that led the applicant to do so. This provision lists the circumstances that are to be identified in divorce cases in the first place, which obviously does not exempt the court from identifying others that may be relevant in a particular case[33]. However, it must be emphasized that under Article 431 of the Code of Civil Procedure the court cannot base its decision in divorce cases solely on accepting the claim or acknowledging the facts, and in each divorce case the court orders examination of the parties for use as evidence (Article 432 of the Code of Civil Procedure). In matrimonial cases, the evidence from the hearing of the parties plays a crucial role. By their very nature, the parties are the best source of information about the problems related to their marital life, therefore the legislator has made the hearing of the parties in a divorce case obligatory[34].

Nevertheless, pursuant to Article 442 of the Code of Civil Procedure, if the defendant recognizes the request and the spouses share no minor children, the court may limit the evidentiary proceedings to hearing the parties only. The absence of minors in the family means that they do not have underage children coming from both spouses, from one of them and adopted by the other or adopted by both of them[35]. The limitation of the evidentiary proceedings to the hearing of the parties is, of course, optional, and such evidence is taken when it is sufficient to establish that the breakdown of marriage that has occurred is complete and irretrievable or just irretrievable[36]. In view of the wording of Article 442 of the Code of Civil Procedure, it is questionable whether the court can limit its actions to hearing the parties if they share minor children. Given the unambiguous content of the provision, it seems that in this case it is not acceptable to limit the evidentiary proceedings only to hearing of the parties and the court should take other evidence, in particular assess whether the divorce will not be contrary to the welfare of the parties' underage children. CoA in Łódź took a slightly different stance and it stated in the decision of 13 December 1995, that the provision of Article 442 of the Code of Civil Procedure does not constitute an additional negative reason for a divorce in the form of a prohibition of granting the divorce if no other evidence is presented in the case pending between spouses having common minor children apart from evidence taken from the hearing

[33] T. ERECIŃSKI (ed.), *Kodeks postępowania cywilnego. Komentarz*. *Tom III. Postępowanie rozpoznawcze*, wyd. V, WK 2016, thesis 2 for art. 441 CCP.
[34] T. ERECIŃSKI (ed.), *Kodeks…,* dz. cyt., thesis 1 for art. 432 CCP.
[35] A. JAKUBECKI (ed.), *Kodeks postępowania cywilnego. Komentarz aktualizowany*. Tom I. art. 1-729**,** LEX/el. 2018, thesis 3 for art. 442 CCP.
[36] A. JAKUBECKI (ed.), *Kodeks …,* op. cit., thesis 4 and 5 for art. 442 CCP.

of the parties[37]. However, this view does not seem to be relevant, since it interprets the cited provision in a way that is manifestly contrary to its literal wording.

Summary

Civil law, as opposed to canon law, allows for the dissolution of a marriage by divorce. The legal reasons for granting a divorce decree include both positive (complete and irretrievable breakdown of marriage) and negative reasons (the best interests of the child, the principles of social coexistence, the request for divorce by the spouse exclusively at fault for the breakdown). Clearly, these reasons include imprecise phrases, which, on the one hand, equip the law with desired flexibility, but on the other hand, it may give rise to serious interpretative doubts regarding the specific factual state of affairs. The extensive case law of the Supreme Court and common courts may be of considerable value in interpreting code terms.

The procedure in divorce cases is particularly directed to an in-depth study on the existence of positive reasons for a divorce and the absence of any negative reasons. Therefore, the court is not allowed to give a decision in divorce cases solely on the basis of the recognition of the claim (which is, after all, acceptable in most civil cases) and the court is obliged to at least take evidence from the hearings of the parties.

[37]See *wyrok SA w Łodzi z dnia 13 grudnia 1995 r., I ACr 557/95*, OSA 1997/3/19.