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The Work of the Civil Reform Committee on the New Regulation of Catholic Marriages in 1814^{1}*

Abstract

As Henryk Konic observed in 1903 in his study of the marriage law in the Kingdom of Poland, a profound dispute on the nature of marriage split Polish society in the 19th century into two camps. In his words, “while one of these camps wanted to give marriage an exclusively religious character and remove the civil authorities from any participation or influence in the matrimonial sphere, the other camp was against such an approach to the institution of marriage. In short, the history of this dispute reflects the battle around the foundations of the family arrangement”. The aim of this study is to explore the roots of that dispute in the debates and the work of the 1814 Civil Law Reform Committee, when Adam Bieńkowski’s project of marriage law was disputed. The discussions in that forum, which included the outstanding Polish lawyers and dignitaries of the time, are of great importance for the understanding of the essence of the controversy that flared up after the collapse of the Napoleonic Duchy of Warsaw. While the traditionalists wanted to bring back old Polish law, a party of moderate reformers headed by Antoni Bieńkowski sought to modernize the Polish legal system. One of the key issues in the reformers’ draft legislation regarding marriage was the transfer of jurisdiction in matrimonial cases to ecclesiastical courts. On the whole, the abolition of provisions of the French civil code of 1804 and the redefinition of matrimony as a sacrament were beyond question as was the general intention to do away with all French legislation. This article supplies ample evidence for the claim that the main idea guiding Antoni Bieńkowski and another members of the Committee was for the new law to act as a safeguard against society’s inclination to dissolve the bond of matrimony for reasons that were not serious enough, i.e. that failed to meet the criteria for the annulment of marriage set by the laws of the Church.

Keywords: Catholic marriage, Kingdom of Poland, marriage law, ecclesiastical courts, codification, civil law, French civil code of 1804, modernization, national legal identity

* Polish text: *Prace Komitetu Cywilnego Reformy nad nową regulacją małżeństw katolickich w 1814 r.*, “Cracow Studies of Constitutional and Legal History” 2017, vol. 10, issue 3, p. 467–491; DOI 10.4467/20844131KS.17.020.80.74

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[...] this was in essence a dispute over principle, led by two camps of the same society. While one of these camps wanted to give marriage an exclusively religious character and remove the civil authorities from any participation or influence in the matrimonial sphere, the other camp was against such an approach to the institution of marriage. In short, the history of this dispute reflects the battle around the foundations of the family arrangement.

Henryk Konic²

The Civil Reform Committee³ was appointed by the decree of Alexander I of 18 May 1814, with the charge to prepare a package of legal system reforms on the eve of the transformation of the Napoleonic Duchy of Warsaw into the constitutional Kingdom of Poland. Among other tasks, the tsar ordered the committee to take preliminary steps toward the abrogation of the Napoleonic Code and preparation of new codes on the basis of pre-1795 law.⁴ According to the interpretation of the will of the tsar made by the members of the Committee themselves, this was to mean that parts of the Napoleonic Code required immediate replacement with “national law”, and in this area proceed with drafting amendments.⁵ For all those taking part in deliberations there was no doubt that the first item to change was secularized matrimonial law. This article focuses on this topic with an analysis of the course of the discussion surrounding the planned reform as well as the content of the draft by Antoni Bieńkowski, which was prepared to bring this reform to fruition.⁶ To be verified is the assertion made by Maciej Mycielski that the

² H. Konic, *Dzieje prawa małżeńskiego w Królestwie Polskiem (1818–1836)*, Kraków 1903, foreword.

³ The Civil Reform Committee is also known in the literature as the Civil Organizing Committee. See J. Przygodzki, *Komitet Organizacyjny Cywilny i jego prace nad reorganizacją administracji Księstwa Warszawskiego*, “Acta Universitatis Vratislaviensis” 1994, no. 2144, pp. 151–168. It conclusively suspended its activity at its final meeting which convened on June 1815. Biblioteka Książąt Czartoryskich [BKC], MS. 5241 IV, fol. 121. The protocol of this session has not been preserved in the files of the Committee. Preparation of a new draft of matrimonial law had been completed six months earlier, however, on 30 October 1814, along with acceptance of the draft of Chapter I of *O małżeństwie* [On Marriage], submitted by Antoni Bieńkowski.

⁴ According to the text of the tsar’s decree: *Le Code Napoléon civil et de procédure judiciaire devrait être aboli le plus tôt possible. On pourrait intérimalement y substituer les lois polonaises, le Statut de Lithuanie, ainsi que les formes judiciaires usitées avant l’introduction de la procédure française. Le Comité discutera si les codes doivent être abolis entièrement ou en partie, et à quelle époque cette abolition pourrait avoir lieu. Il proposera aussi un plan et la composition d’une Commission séparée à créer qui sera chargée de la rédaction d’un nouveau Code civil, criminel et de procédure, de même que l’organisation définitive de l’ordre judiciaire [...].* Text of the decree: S. Askenazy, *Zagrożenie Kodeksu Napoleona przy utworzeniu Królestwa Polskiego* [in:] *idem, Szkice i portrety*, Warszawa 1937, p. 375.

⁵ BKC, MS. 5233 IV, fols. 14, 17–18, 197. The perturbation which the Civil Reform Committee had with the implementation of this directive has been discussed in detail in M. Gałędek, *The Problem of Non-Adaptability National Legal Heritage. Discussion on the Reform of Civil Law in Poland in the Course of Work of Reform Committee in 1814*, “Romanian Journal of Comparative Law” 2017, no. 8, pp. 7–31.

⁶ Owing to spatial limitations for this work, the analysis has been confined to only fundamental question of the development of the legal regulations applying to Catholic marriages (entered into by couples among whom at least one of the spouses was Roman Catholic). The primary source basis is the remaining records of the activity of the Committee, which is preserved in the collections of the Biblioteka Książąt Czartoryskich Muzeum Narodowego [The Princes Czartoryski Library, National Museum] in Kraków (MSS. 5233, 5236). The debate over the reform of matrimonial law and the draft of Antoni Bieńkowski have to date not been analysed in the literature, in particular in publications focusing their attention on the work on civil law of the Civil Reform Committee (H. Grynwaser, *Kodeks Napoleona w Polsce* [in:] *idem, Pisma*, vol. I, Wrocław 1951;

work of the Civil Reform Committee constituted “the peak of the activity of landowning conservatives, the moment at which they achieved the opportunity to go beyond only criticism and to formulate a positive program”.⁷ What has been adopted as the gauge of conservative views of the members of the Committee is a desire to base matrimonial law on the principles of canon law and to transfer jurisdiction in these matters to ecclesiastical courts, while an alternative solution advanced in the forum of the Committee was to follow the Austrian model and retain the civil judiciary. None of the members of the Committee sought to retain the fully secularized institution of marriage. The abolition of this form was regarded as a foregone conclusion. Especially hostile to the Napoleonic Code were the clergy and wealthy landowners, who were strongly represented on the Committee. In particular, the Galicians Stanisław Zamoyski and Franciszek Grabowski, even before the committee had been assembled, actively engaged in the fight against French law. Next, “the influential element from the Russian Partition, which had long been averse to the Code” was represented on the Committee by Tomasz Wawrzecki. Among the opponents of French law were also the former Jacobin Józef Kalasanty Szaniawski who, as Hipolit Grynwaser writes, “had transformed himself in the end into a fervent lackey of the conservative views of the high nobility”.⁸

The Civil Reform Committee was in constant deliberation, usually meeting twice weekly, beginning on 4 July 1814, when the first session took place, until 18 June 1815, completing its work after ninety-two sessions. Taking part in the sessions of the Committee were those members who had been appointed by the monarch: Prince Adam Jerzy Czartoryski as chairman, vice-president of the Supreme Provisional Council (*Rada Najwyższa Tymczasowa*) of the Duchy of Warsaw Mikołaj Nowosilcow, who substituted for Czartoryski in the role of chairman during the Prince’s absence, voivode and president of the Senate of the Duchy of Warsaw Tomasz Ostrowski, in whose home the sessions took place and who chaired the proceedings in the absence of Czartoryski or Nowosilcow, state counsellor and attorney in Lublin Franciszek Grabowski, appellate judge Antoni Bieńkowski, member of the Supreme Provisional Council “directing the ministries of justice and war” Tomasz Wawrzecki, former minister of the treasury of the Duchy of Warsaw and state counsellor Tadeusz Matuszewicz, senator and voivode Stanisław Zamoyski, Fr. Józef Koźmian, prosecutor in the Court of Cassation Józef Kalasanty Szaniawski, state counsellor Aleksander Linowski, as well as state referendary and chief adviser to the Chamber of Accounts Andrzej Horodyski. The remaining

A. Zarzycka, *Próby zmian Kodeksu Napoleona w Księstwie Warszawskim w latach 1814–1815*, “Krakowskie Studia z Historii Państwa i Prawa” 2004, vol. 1, pp. 173–178.

⁷ M. Mycielski, “*Miasto ma mieszkańców, wieś obywateli*”. *Kajetana Koźmiana koncepcje wspólnoty politycznej (do 1830 roku)*, Wrocław 2004, p. 133. Corresponding to this is the statement by Hipolit Grynwaser that “joining the Committee were people known for their dislike of French legislation”. H. Grynwaser, *Kodeks...*, p. 71. Influential on the choice of the members of the Civil Reform Committee was an opponent of the Napoleonic Code, Prince Adam Jerzy Czartoryski, chairman of the Committee, who however only participated in several meetings of the Committee at the end of August and early September 1814, before travelling to the Congress of Vienna and returning only for the final meeting of the Committee in June 1815. See A. Kraushar, *W setną rocznicę Kodeksu Napoleona*, “Gazeta Sądowa Warszawska” 1908, vol. 36, no. 22, p. 332.

⁸ *Ibidem*, p. 69. Hipolit Grynwaser also described Andrzej Horodyski in a similar manner, but analysis of the content of the protocols indicates that he represented a more moderate position.

individuals named as members of the Committee – Dominik Kuczyński, Jan Ossoliński (deceased in 1812) and Tadeusz Mostowski (who was in France) – did not take part in any of the sessions.⁹ Other invited individuals, although sporadically, appeared, such as Prince Franciszek Ksawery Drucki-Lubecki, or the appellate judge Jan Nepomucen Wolicki.

The basic issues of organization and a plan of action for the Committee were settled in the second and third sessions on 7 and 8 July. At that time, the Committee was divided into four sections: Administration, Treasury, Education and Clergy, as well as the Section of Courts and Towns (also called the Courts or Legislative Section).¹⁰ This last section was responsible for the reform of law not only in the area of civil law and procedures, but also of the judicial system and criminal law, which it in the end did not take up.¹¹ The scope and direction of the work of the section were determined in the plenary sessions of the Committee, which was reflected in its “internal ordinance”, in which it was stipulated that “in developing each particular subject, no section may diverge from the general principles indicated by the Committee”.¹² The Committee members who joined the Legislative Section were state counsellor and attorney in Lublin Franciszek Grabowski as chairman, former prosecutor in the Court of Cassation Józef Kalasanty Szaniawski,¹³ as well as appellate judge Antoni Bieńkowski,¹⁴ who from the very beginning distinguished himself in the forum of the Committee both for his activity during the discussions of topics to related different legal issues, and for his measured position in evaluating French legislation.¹⁵

⁹ Missing from the list nominating members were the names of the members of the Supreme Provisional Council, who joined the Committee, Nowosilcow and Wawrzecki.

¹⁰ The name of the section (Pol. *Sekcja Sądowa*) resulted from the fact that its work was to be in *prawo sądowe* (Pol.), *prawo* – law, *sąd* – court. Developed and applied over the course of several centuries, the term *prawo sądowe*, which is used in contemporary Polish to describe the areas of law with the greatest application in the work of the courts (i.e. substantive and procedural criminal law, substantive and procedural civil law, the judicial system) does not have an equivalent in English, although some authors try to translate it as “judiciary law” or “court law”, which however does not entirely render its meaning to readers who are not speakers of Polish.

¹¹ BKC, MS. 5233 IV, fol. 15.

¹² *Ibidem*, fol. 9.

¹³ *Ibidem*, fol. 15.

¹⁴ *Ibidem*.

¹⁵ Cf. S. Askenazy, *Zagrożenie...*, p. 375; H. Grynwaser, *Kodeks...*, p. 70. It may seem surprising that Tomasz Wawrzecki did not join the Legislative Section, even though he led at that time the Ministry of Justice under the Supreme Provisional Council. In this context, it is important to cite Wojciech Witkowski’s observation that “Wawrzecki [...] was already and elderly and infirm man, who more passively accepted events than he helped to shape them”. W. Witkowski, *Komisja Rządowa Sprawiedliwości w Królestwie Polskim 1815–1876*, Lublin 1986, p. 6. One may consider this in the context of the lack of closer cooperation between the activity of the Committee and the initiatives taken up by the Supreme Provisional Council. At the first stage of the work of the Committee, an attempt to forge such cooperation was made by Mikołaj Nowosilcow and Franciszek Ksawery Drucki-Lubecki, by presenting at the forum of the Committee reorganization projects which they had drafted, respectively for financial administration and the accounting system (Nowosilcow) as well as the department of internal affairs along with the organization of local administration (Lubecki). Neither project was opened for discussion, nor were they taken into consideration in the further work of the Committee, which in the case of Drucki-Lubecki’s project entailed the de facto rejection of his proposal. For more, see M. Gałędek, *Projekty i koncepcje nowego ustroju administracji dla przyszłego Królestwa Polskiego. Studium z dziejów myśli administracyjnej*, Gdańsk 2017, pp. 115–117. Perhaps because of these cases, the key reform introduced in the pre-constitutional period, which was the creation of the Supreme

In order to assist the sections, the Committee could bring on people from outside of its membership.¹⁶ In this way, a number of eminent lawyers in the Grand Duchy of Warsaw were appointed to the Legislative Section in the persons of the former prosecutor in the Court of Cassation Michał Woźnicki, the aforementioned Jan Nepomucen Wolicki, Jan Kanty Borakowski, Tadeusz Skarżyński, Fr. Franciszek Ksawery Bohusz, attorney in the Court of Cassation Kajetan Kozłowski as well as professor in the School of Law, notary, and future dean of the Faculty of Law and Administration of the University of Warsaw, Jan Wincenty Bandtkie.¹⁷ Members of the Section, with the exceptions of Grabowski, Bieńkowski, Szaniawski, as well as Wolicki and Skarżyński (mainly involved in work on a new organizational structure of the judiciary¹⁸), did not take part in the plenary sessions of the Committee. One may also doubt whether all members actively participated in the work of the Section.¹⁹

Court (*Sąd Najwyższej Instancji*) (and consequently, the Committee's acceptance of the idea of the elimination of the Ministry of Justice – for more, see *ibidem* p. 259) was completed on Wawrzecki's initiative without submission of a draft for the committee to evaluate. This proposal was ready in July 1815. W. Witkowski, *Komisja Rządowa Sprawiedliwości...*, p. 9. Jan Nepomucen Wolicki, preparing a proposal for the reform of the judicial system under the Legislative Section of the Civil Reform Committee also posited replacing the Court of Cassation with the Supreme Court. See BKC, MS. 5233, fol. 201. The sole initiative implemented by the Committee using governmental-administrative structures dependent on the Supreme Provisional Council was the introduction of the so-called peasant poll on Czartoryski's initiative, who turned to Drucki-Lubecki, who "directed the Ministry of Internal Affairs" to engage the local authorities in the matter. For more, see M. Gałędek, *Projekty i koncepcje...*, pp. 379–380.

¹⁶ BKC, MS. 5233 IV, fol. 10.

¹⁷ *Ibidem*, fol. 16.

¹⁸ *Ibidem*, fols. 56, 175, 185, 199, 207, 281. In light of the content of the protocol, one may get the impression that aside from Skarżyński, who was involved in the work of the Legislative Section until August 1814, the entire workload fell on the backs of three individuals – Grabowski and Bieńkowski, who antagonized one another, and Wolicki, who cooperated with Grabowski.

¹⁹ This observation is particularly significant in the context of the work of the future Codification Committee, to which Woźnicki from Legislative Section was appointed, but also Bandtkie, who prepared the Memorandum dated 7 December 1815. In the documentation of the activity of the Civil Reform Committee no trace is found of information about any activity of Bandtkie in regard to his being named to the Legislative Section, while the Memorandum was only prepared after the conclusion of the Committee's work at the request of Czartoryski after his return from Vienna in the summer of 1815. At the same time, however, Bandtkie's memorandum as well as that of Antoni Wyczechowski, which was written following the same request, both indicate that Bieńkowski's stopgap defense efforts (at very least against the attacks of Grabowski and other traditionally-inclined members of the Committee), did not go unnoticed and resonated in legal circles. Consequently, opposition began to form against taking radical steps in regard to French legislation. For more on the topic of Bandtkie's Memorandum, see W. Sobociński, *Jan Wincenty Bandtkie obrońcą Kodeksu Napoleona (Przyczynki biograficzno-naukowe i memorial z 1815 r.)*, "Rocznik Lubelski" 1960, vol. III, pp. 157–176. The link between the work of the Civil Reform Committee and the memoranda by Bandtkie and Wyczechowski is discussed in M. Gałędek, A. Klimaszewska, *Controversial Transplant? The Debate on the Adaptation of the Napoleonic Code on Polish Territory in the Early Nineteenth Century* (the article has been accepted by "The Journal of Civil Law Studies" and is scheduled to appear in volume 11, issue 2 [2018]). There is also no information regarding involvement in the reform work of the Committee by Woźnicki, Skarżyński, Borakowski, Bohusz, or Kozłowski. One should note, however, that there are certain gaps in the source material in the area of the work of the sections of the Committee. In particular, the protocols of the deliberations of the Legislative Section have not survived, the existence of which was mentioned in the protocols of the plenary sessions. It emerges from those that the Courts Committee protocols were "submitted to vote by each member that was conscious [i.e. present] at the session, as well as those remitted from those unconscious". BKC, MS. 5233 IV, fol. 282. However, what at the same time is important for the reconstruction of the work done in the Legislative Section are Bieńkowski's remarks regarding the lack of cooperation

The Legislative Section, inaugurating its work, first decided to concentrate on the preparation of proposals for the reorganization of the judiciary and civil procedures. However, the question of substantive civil law was taken up by the Clergy Section (Education and Clergy), which was entirely dominated by representatives of conservative clerical circles. The chairman of the Section was Józef Kalasanty Szaniawski, who combined the functions of chair of this Section with his membership in the Legislative Section. Joining the members of the Committee in the Clergy Section was also the leader of the conservative landowners of Galicia, Stanisław Zamoyski, as well as Fr. Józef Koźmian from the Lublin area.

At the session of the Committee that was held on July 21, 1814, Józef Kalasanty Szaniawski, on behalf of the Clergy Section, submitted the motion that

[...] the legal regulations regarding divorces be subject to revocation, and that jurisprudence on this matter be returned to the clerical estate, with the condition however of certain improvements in the divorce laws, which the future national council may discuss, even with the condition of the addition of a lay arbiter in the ecclesiastical court, whenever a divorce case occurs.²⁰

Szaniawski's demand divided the members of the Committee, but they did agree regarding the point that the secular character of marriage was not in agreement with the national character of Poles. The need to abolish divorce was not questioned by any of those taking part in the deliberations. Contentious, however, was the question of the possibility of adjudication of the nullity of marriage and its dissolution by civil courts. The debate on this topic was conducted on July 28. In the first group of world views were those members of the Committee who over the course of the debate presented a generally more measured evaluation of the Napoleonic legacy – Antoni Bieńkowski, Andrzej Horodyski,²¹ Tadeusz Matuszewicz and Aleksander Linowski. They took the position that

[...] although the clergy base their law for administering divorces [the term was used at that time with the meaning of “annulment of marriage”²²] on the notion that marriage is a sacrament. Delving into the nature of divorce, it appears that in the dissolution of marriage nothing religious arises, but solely civil considerations, because even ecclesiastical courts cannot dissolve a marriage in such

among members of the Section (“Bieńkowski as a member of that Section made the observation that there are in [the proposal for the organization of the judiciary] such circumstances that were arranged differently than those in this exposition” – *ibidem*, fol. 174); “Bieńkowski reiterated his comment that the judiciary system which was introduced in the name of the Section, did not proceed through this Section” – *ibidem*, fol. 184). The remark made by Bieńkowski indicates that during Szaniawski's absence from the country, the work of the Section was conducted unofficially in a small gathering of selected members of the Section and may have been limited to cooperation between Grabowski and Wolicki. Also telling is that the counterproposals to their thoughts were formulated by Bieńkowski acting – on instructions of the Committee – individually, and thus not in the name of the Section.

²⁰ *Ibidem*, fols. 26–27. Since the problem was solved only regarding the Roman Catholic Church, the Committee instructed the Legislative Section to resolve this question also in regard to divorces for married couples from other faiths. *Ibidem*, fol. 47.

²¹ In the protocol the following mention is found: “Horodyski put pen to paper with the reasons for his opinion”. BKC, MS. 5233 IV, fol. 48. In the archival repository in which the materials of the Committee are held, this document is not currently found.

²² Cf. P. Pomianowski, *Z problematyki rozwodów w Księstwie Warszawskim*, CPH 2013, vol. 65, no. 2, p. 104, note 5.

a manner as to abrogate a sacrament, which is never erased, but only determine whether the premarital capacity and affirmations of the spouses were in accordance with the prescribed laws, for only those grounds should be valid for a divorce which preceded the marriage, which thus was not yet a sacrament, but not those, which occurred after the marriage was concluded. Thus, an ecclesiastical court, granting a divorce as above, does not abrogate a sacrament, but only recognizes that there was no valid marriage, and thus there are no religious aspects which would exclude divorce proceedings in the ordinary national courts and require a separate ecclesiastical court. In this respect, one may cite the example of countries remaining under Austrian rule, which is Catholic, and where all divorce proceedings belong to the civil courts and where it comes to incomparably fewer divorces than was the case in our country during the time of the ecclesiastical courts.²³

The advocates of reform in this form tried to prove that if the Napoleonic institution of divorce were abolished and replaced with solutions based on those in effect in Austria, restricting the jurisdiction of the courts to simply declaring the nullity of marriage based on the existence of a reason determined under canon law, then such cases could remain under the jurisdiction of the civil courts. They argued that while “in the dissolution of marriage nothing religious will arise, but solely civil considerations”,²⁴ in particular civil courts would not rule on matters associated with the receipt of a sacrament, because when there existed grounds for the annulment of a marriage, one could not speak of its valid conclusion in the first place.

Among the members of the Committee opposed to ability of secular courts to rule on the nullity of a marriage were Józef Kalasanty Szaniawski, Fr. Józef Koźmian, Franciszek Grabowski, Tomasz Ostrowski, Stanisław Zamoyski, Tomasz Wawrzecki and Mikołaj Nowosilcow. They argued that “although in divorce a sacrament is never abrogated, but only the nullity of a marriage is recognized, whereby it must be understood that the sacrament between those entering into such a marriage was not valid, and thus no court can be the proper one other than an ecclesiastical court”.²⁵ In their opinion then court judgements, whether they would declaratively confirm the validity or nullity of the sacrament of marriage, should be issued by an ecclesiastical court. Supporters of this solution assumed that marriage, in every aspect, “is entirely religious in nature” for it was “counted among the sacraments” and therefore may “rely [exclusively] on the blessing of the Church”.²⁶ Everything associated then with the conclusion of marriages, “which has always given such a union its sanctity and solemnity in all nations confessing the Catholic religion” should rely on the Church and its institutions.²⁷ The justification for adopting this solution had a clear ideological foundation, which dictated the necessity of preserving the traditional system in which the significant role of religion and the Church, emphasized by giving it full autonomy and a role in deciding about some social matters, had to be maintained as the guarantee of the proper functioning of society, in which a particular – in this case, Roman Catholic – faith clearly was dominant. For this reason, the supporters of the right of ecclesiastical courts to rule on the nullity of marriages emphasized that

²³ BKC, MS. 5233 IV, fols. 42–43.

²⁴ *Ibidem*, fol. 43.

²⁵ *Ibidem*.

²⁶ *Ibidem*.

²⁷ *Ibidem*.

[...] in the sanctity of this union the social order, morality, and purity of our mores are grounded. Experience has taught that the ill effects which resulted from when the [Napoleonic] Code sought to impart a secular nature to this union, but could not raze the religious traits of it, and only appalled the conscience which, not satisfied with civil offices and courts, commanded residents to turn to spiritual authorities in cases of marriage and in divorce; this dissociation only caused many outrages, destroyed our mores and led to the licentiousness of those who, finding easy divorce in the civil courts, avoided the clergy, and thus resulted in the clergy refusing to grant a second wedding to those with a civil divorce, and for those who abided by marriages concluded in offices, such marriages could not be sacramental.²⁸

Advocates of granting jurisdiction in marriage annulment cases to ecclesiastical courts were however not entirely extreme in their postulate of imparting a confessional nature to the institution of marriage. They regarded it as advisable to “add to the composition” of such courts secular people,²⁹ recognizing that

[...] in the nature of marriage, both civil and spiritual considerations are combined, so that it is impossible to unharness them and thus separate one from the other, so as to appoint an ecclesiastical or a secular court solely, and so it is appropriate that this court must be blended: having established such a principle concerns the manner and form of such a court.³⁰

Only Stanisław Zamoyski took a more extreme position, arguing that from his viewpoint, since marriage is a sacrament, “only clergy can make judgements regarding it”.³¹ He thus proposed that a secular person be “adopted” by an ecclesiastical court as an observer, not as a judge.³²

In response to these ideas, Antoni Bienkowski, Andrzej Horodyski, Tadeusz Matuszewicz and Aleksander Linowski advanced the counterproposal that clergy be “added to ordinary civil courts”.³³ Speaking in favour of the choice of this solution in their view was the need for the introduction of a unified judiciary in the country. They advanced the argument that

If the order and welfare of society [demand] that there be a single judiciary, independent and exercised by authorities designated to this end, one may not then create a separate ecclesiastical court for divorce cases but should leave these before the only judiciary in the country, and only add members of the clergy to this on occasions when such cases appear for judgement. In this manner, clergy will only participate in the judiciary when this is demanded by necessity of which anyone can be easily convinced, otherwise giving them influence beyond necessity would rouse the old fears of usurpation and excess which gave cause for distrust of the clergy, for complaint and estrangement from it, and which in past centuries preceded religious reforms.³⁴

The tenacious insistence on assigning matrimonial cases to the jurisdiction of civil courts was thus justified by the need to ensure the sovereignty of the state in the execution of public authority, and thus resulted from the acceptance by the supporters of this solution of a more modern conception of the state. Moreover, supporters of civil courts

²⁸ *Ibidem*, fols. 44–45.

²⁹ *Ibidem*, fols. 43–44.

³⁰ *Ibidem*, fol. 45.

³¹ *Ibidem*.

³² *Ibidem*, fol. 47.

³³ *Ibidem*, fol. 45.

³⁴ *Ibidem*.

argued that granting too much power to the Church would harm it in a long-term perspective, jeopardize its image and breed temptation to commit excesses.

On the other hand, their adversaries feared that if “the manner in which clergy are added to civil courts would not have such solemnity as is required for adjudicating religious matters, then of course the clergy would only be put on display for derision”.³⁵ The supporters of civil courts did not agree, emphasizing that they did not understand how

the addition of clergy to secular courts in cases applying to religious unions could [possibly] compromise the dignity of those clergy, particularly if they are granted primacy in seating on the judicial bench, and the more solemn the matter will seem by making it visible to people that the national law regards marriage as a religious institution, since those same courts which adjudicate all cases in their ordinary form assume an extraordinary and higher form when it comes to the dissolution of marriage.³⁶

Thus, the Civil Reform Committee remained divided over this issue and had to resort to voting to resolve it. The view for the jurisdiction of ecclesiastical courts in cases of marriage annulments prevailed, which may be seen as confirmation of the preponderance of conservatives and clericalists on the Committee. Endorsing this solution were all the members named above – Szaniawski, Koźmian, Grabowski, Ostrowski, Zamoyski, Wawrzcki and Nowosilcow. This concluded the first opening debate over the direction in which the Committee was to reform matrimonial law.

Responsible now for the preparation of a proposal was the Legislative Section. Regarding the course of its further work we know nothing more than that three months later, on 23 October 1814, Antoni Bieńkowski submitted at the plenary session of the Committee a completed draft of a new matrimonial law.³⁷ As the materials from the Committee indicate, he was the main, if not the sole author, and prior to it being presented at the plenum, the draft was “shaken down” in the Legislative Section and likely revised on the basis of the comments of its members.³⁸ We do not, however, have any information regarding how the section work proceeded.

The debate over the draft lasted over the next several sessions, from 23 to 30 October. The draft began with a definition of marriage (Art. 1) as “a consensual and solemn union of one single man and one single woman with the aim of conceiving and raising children and giving one another succour in their mutual life”.³⁹ However, the members of the Committee thought it a superfluous proposition to define the aims of marriage “which ensue from the nature of this union itself”.⁴⁰ Nevertheless, Antoni Bieńkowski instead upon his proposal, “mustering as examples all kinds of legislation other than French”.⁴¹ He indicated that in all other legal codes, “the meaning of marriage is defined

³⁵ *Ibidem*.

³⁶ *Ibidem*, fol. 46.

³⁷ This source material will be published in a subsequent issue of “Cracow Studies of Constitutional and Legal History”.

³⁸ BKC, MS. 5233 IV, fol. 207. Cf. A. Zarzycka, *Próby...*, p. 176; H. Grynwaser, *Kodeks...*, pp. 73–74.

³⁹ BKC, MS. 5233 IV, fol. 208.

⁴⁰ *Ibidem*.

⁴¹ *Ibidem*. Cf. (among others) § 44 of the Austrian Civil Code of 1811 (further ABGB): “[...] In den Eheverträge erklären zwey Personen verschiedenen Geschlechtes gesetzmäßig ihren Willen, in unzertrennlicher Gemeinschaft zu leben, Kinder zu zeugen, sie zu erziehen und sich gegenseitigen Beistand zu leisten”; *Allgemeines Bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Mon-*

along with its aims in the same manner, for to define items without expressing their aims would be incomplete”.⁴² These arguments did not convince the remaining members of the Committee, who subscribed to the view of the sole Russian among the members of the Committee, Mikołaj Nowosilcow. According to him,

Such a definition [as was proposed in the draft] would seem to demand fulfillment in each marital union every one of the associated aims and to not admit the possibility of conclusion of such a marriage, or to render null one already concluded, in which even one of these aims was unfulfilled, that is, all those marriages entered into solely for the purpose of life together, especially among people of advanced age.⁴³

In this context, it should be pointed out that removal of the aims from the definition of marriage would be an original choice by the members of the Committee, who did not intend to follow in the footsteps of other countries, and to leave the solution close to the French one, for it seemed to them senseless to regulate such material. They were thus inclined toward the logical justification of Mikołaj Nowosilcow, which was characteristic for a modern way of thinking about the art of legislation, to limit normative content with the aim to avoid problems of interpretation. This was done, despite the full awareness of the social significance of the institution of marriage and the ideological possibilities which were provided by definition of the aims of marriage, for example, to emphasize Polish links to Catholicism.

However, the Committee approved without reservation the construction of engagement as “a premarital pledge to enter into marriage”, which “under no ensuing conditions whatsoever absolutely obliges one to the conclusion of marriage, nor does it oblige either party to give payment or compensation to the other in the event of withdrawal from the pledge” (Art. 2).⁴⁴

Also accepted was the proposal to declare as incapable of entering into marriage those who were “mad”, those “of confused mind”, as well as “immature” women under the age of 14, and men under the age of 18 (Art. 5).⁴⁵ Greater controversy was aroused

archie, I Theil, Wien 1811, p. 17. The Polish translation of ABGB: *Powszechna księga ustaw cywilnych dla wszystkich krajów dziedzicznych niemieckich Monarchji austryjackiej. Z późniejszymi odnośniami ustawami i rozporządzeniami*, ed. M. Zatorski, F. Kasperek, Cieszyn 1875; as well as Pt. II, Title I, § 1 of the *Landrecht* (further ALR): “*Der Hauptzweck der Ehe ist die Erzeugung und Erziehung der Kinder*”, § 2: “*Auch zur wechselseitigen Unterstützung allein kann eine gültige Ehe geschlossen werden*”; *Allgemeines Landrecht für die Preußischen Staaten, Dritter Band*, Berlin 1863, p. 1. The Polish translation of ALR: *Powszechna Prawo Kraiowe dla Państw Pruskich. Nowe wydanie*, Poznań 1826; as well as Book I, Title V of the Napoleonic Code; *Code civil des Français, Nouvelle Édition stéréotype, Conforme à l'édition originale de l'imprimerie de la République ; à laquelle on a ajouté les lois transitoires, et une table analytique et raisonnée des matières*, Paris 1804, pp. 28 ff. One of the Polish translations of the French Civil code was: *Kodex Napoleona z przypisami. Xiąg trzy*, Warszawa 1811. The edition of the French Civil Code of 1804 translated by Franciszek Ksawery Szaniawski published in 1808, was republished also in K. Sójka-Zielińska, *Kodeks Napoleona. Historia i współczesność*, Warszawa 2008, pp. 295 ff. (Book I, Title V, pp. 316 ff).

⁴² BKC, MS. 5233 IV, fol. 208.

⁴³ *Ibidem*, fols. 208–209.

⁴⁴ BKC, MS. 5236 IV, fol. 255. In Art. 3 it is stipulated, however, that “a party who after betrothal gives no grounds for withdrawal from the intended marriage, and through refusal of the second party suffers costs and damages, may receive from that second party those damages and costs”. *Ibidem*. Cf. § 45 ABGB; *Allgemeines Bürgerliches Gesetzbuch...*, p. 17.

⁴⁵ BKC, MS. 5236 IV, fol. 255.

by the question of “those whose age is greater than the legal age for marriage, but who according to general law are minors”.⁴⁶ The members of the Committee pointed out that “the proposal to prohibit these to enter into marital unions without the consent of their parents or guardians, left them the freedom to appeal to the court if they felt unjustly impeded” (Art. 6).⁴⁷ The Committee decided however to modify the draft so that in the event that the father did not give his permission, then his will should be fully respected and court intervention could not be expected, as paternal authority “was intended to be in this respect unlimited and subject to no court whatsoever”,⁴⁸ which corresponded with other regulations which granted a husband and father the dominant position in the family.⁴⁹ However, in regard to every other form of guardianship (“a mother with custody” or “all other guardians after the father”), the Committee confirmed the proposal by Antoni Bieńkowski that, in the event of legal grounds detailed in the draft⁵⁰ the court could give permission to a minor petitioning to enter into marriage, despite not having obtained the permission of the legal guardian.⁵¹ The Committee decided however to extend the wardship of the court also in situations in which the tribunal found that the legal guardian had agreed to allow a minor to enter into marriage, despite that decision being harmful for that minor. It was argued that since “the court for [existing] grounds [outlined in the draft] must recognize the validity of the refusal of a guardian to give permission for marriage, so too when those same grounds occur which are recognized as harmful for a minor, accordingly a guardian should be permitted to give consent”.⁵² In other words, “the grounds listed in [the draft] for prohibiting marriage involving a minor apply both to the court, if minors go to it against their guardians, as well as for guardians, if the matter does not come to court”.⁵³ Finally, the Committee made the decision that among the grounds detailed in the draft for which a legal guardian or court were to refuse approval for a marriage, there should also be “inequality of status”, which however was only to be recognized as an impediment to marriage for women. “For she [the Committee thus justified its decision] in such a case would reduce herself to the condition of the husband, whereas a man marrying a woman of a lower status raises her to his”, and thus the problem of inequality of status *de facto* did not apply.⁵⁴

⁴⁶ *Ibidem*.

⁴⁷ *Ibidem*.

⁴⁸ BKC, MS. 5233 IV, fol. 209.

⁴⁹ Cf. Arts. 376 and 389 of the French Civil code; *Code civil des Français...*, pp. 68 and 70 as well as the remarks by K. Sójka-Zielińska regarding paternal authority in the French code: *eadem, Kodeks Napoleona...*, pp. 92 ff; *eadem, Wielkie kodyfikacje cywilne. Historia i współczesność*, Warszawa 2009, pp. 205 ff. Cf. also “*Besondere Rechte des Vaters: Väterliche Gewalt*”, §147 ff. ABGB, *Allgemeines Bürgerliches Gesetzbuch...*, pp. 57 ff; K. Sójka-Zielińska, *Wielkie kodyfikacje cywilne...*, pp. 112–113.

⁵⁰ These were defined in Art. 8, including: (1) “insufficient means to support the life of that person who wishes to enter into marriage with the minor”; (2) “poor and indecorous habits, known or established, of that person, who is to be joined with the minor”; (3) “infectious disease in the person engaged to the minor”; (4) “age impropriety with the minor, that is when the engaged woman is 10 years older than the minor or the age of the engaged man is more than one and a half times that of the minor”; (5) “if the engaged person is divorced”. BKC, MS. 5236 IV, fol. 256.

⁵¹ According to Art. 7, “if a minor is denied permission, he or an interested party is permitted to approach the appropriate court for permission to conclude a marriage”. *Ibidem*.

⁵² BKC, MS. 5233 IV, fols. 209–210.

⁵³ *Ibidem*.

⁵⁴ *Ibidem*, fol. 210.

The declaration as unfit to enter into marriage “all those who have been sentenced to life in prison for their crimes” (“if clemency for those crimes has not been granted” – Art. 9), did not arouse any controversy. The Committee also confirmed the next proposal that “among those unfit to enter into marriage” were “soldiers without the prior permission of their superior” (Art. 10),⁵⁵ after verifying that this was in accordance with “the regulations of military affairs”.⁵⁶ Also accepted without discussion was that men could demand annulment of a marriage if “after conclusion of the marriage it is found that the woman was pregnant by another man, and that the former, when entering into marriage with her, did not know of this” (Art. 13).⁵⁷ Similarly, “bodily infirmity, or the inability to fulfil marital obligations” was recognized as an “impediment to marriage, if it preceded the wedding”, while “temporary impotence or which appeared during the time of marital life” could not constitute grounds for the nullity of a marriage (Art. 14).⁵⁸ The prohibition on bigamy rendered null any marriage “concluded between people, of whom one or both are still obliged by a prior marriage” (Art. 15),⁵⁹ such as “between people, of whom one or both are obliged by religious vows of chastity” (art. 16).⁶⁰ Also raising doubt from no one was the question of the prohibition of valid marriage between Catholics and people who did not profess a Christian faith (Art. 17).⁶¹ Finally, the Committee also approved without reservation the regulation prohibiting marriage between people who had “committed adultery with each other or of whom the judges were persuaded have done so” (Art. 21).⁶²

On the other hand, the attention of the Committee was riveted by Art. 11, which declared null marriages between persons of whom “one or both without their consent were compelled to enter into marriage”.⁶³ It was ordered thereby that the compulsion would be “perceived in accordance with the circumstances of the status, sex, and age of the person compelled”.⁶⁴ The members of the Committee came to the conclusion that these grounds should be “for a certain specified period”.⁶⁵ Clarifying this position, it was argued that

[...] it does happen that one or the other spouse is compelled, but then lives peacefully and does not seek to break the union even when no considerations can cause the constrained person to be subject to further compulsion, for example after the death of parents or relatives from whom the compulsion came, and could be kept silent out of consideration for them as long as they lived, or when the fear ceased of any other side that caused the compulsion. Only after a long time after all that he or she acquires from other circumstances a desire for change, and under the pretence of that

⁵⁵ BKC, MS. 5236 IV, fols. 256–257.

⁵⁶ BKC, MS. 5233 IV, fols. 210–211, 213.

⁵⁷ BKC, MS. 5236 IV, fol. 257.

⁵⁸ *Ibidem*.

⁵⁹ *Ibidem*. This prohibition was also to apply “even when a person bound by a prior marriage proved the invalidity of that prior marriage”, only if “the verdict declaring the nullity of the first marriage was not given legally and validly”. *Ibidem*, fols. 257–258.

⁶⁰ *Ibidem*, fol. 258.

⁶¹ *Ibidem*.

⁶² *Ibidem*, fol. 259.

⁶³ *Ibidem*, fol. 257.

⁶⁴ *Ibidem*.

⁶⁵ BKC, MS. 5233 IV, fol. 218.

prior compulsion, the cause of which is long over, breaks off the marriage with its life together and their common offspring.⁶⁶

The Committee thus took the position that a marriage should not be annulled after the end or loss of the real significance of the impediment that would have prohibited it being concluded. Otherwise these could be misused and serve as a surrogate for the institution of divorce.

Thus, so as to prevent such abuse of the grounds arising from compulsion outlined in the draft, when the cause which brought about the compulsion has passed, and the party who felt compelled takes no legal action in this matter within one year afterward, then after one year of the cessation of the above cause, such person may not seek dissolution of the marriage.⁶⁷

Controversy arose over the article establishing “that an error regarding the person only renders a marriage null when this arises in regard to the essence [of the person], not in regard to the incidental circumstances of that person” (Art. 12). One of the members of the Committee pointed out that “in this manner, deception in marriage would be sown, because at least in regard to the essence it will be the same person”, and considering the presentation of false circumstances, one could “thereby seduce the second party, which would not have been inclined to enter into a marital union if not for the deception of cleverly concealed falsehood”.⁶⁸ The matter was settled in the next session, deciding that the article in question

[...] shall be expanded in such a manner that although the person in essence would be the same, if however consciously, with intent to deceive, that person assumes another name, surname or status, the marriage concluded with that person is invalid. For it is believed that a person may have been falsely convinced of all or part of this may have been held falsely since childhood, and in such a case one may not ascribe guilt of deception to such a person and declare the marriage of that person null in the absence of any other legal grounds.⁶⁹

Next the Committee assumed as the subject of debate impediments to marriage proceeding from blood relations and kinship. The draft proposed to acknowledge blood relations or kinship to the second degree,⁷⁰ while at the forum of the Committee a request was submitted that “this impediment be extended to four degrees with the allowance of a legal dispensation”.⁷¹ In response, Antoni Bieńkowski explained that

⁶⁶ *Ibidem*.

⁶⁷ *Ibidem*, fol. 219.

⁶⁸ *Ibidem*, fol. 211.

⁶⁹ *Ibidem*, fol. 213.

⁷⁰ Article 18 declared invalid “any marriage between persons related by blood in the following lines: (1) in a direct line, between ascendants and descendants; (2) between brothers and sisters, full or half, either by the father or the mother; (3) between the children of brothers and sisters, both full and half; (4) between brothers and sisters from one and the children of a brother or sister, full or half, from the other side”. BKC, MS. 5236 IV, fol. 258. Other the other hand on the basis of Art. 19 regarding in-laws, forbidden to marry were “a husband to the relations of his wife in the degrees expressed above, or a wife to the relations of her husband to the same degrees”. *Ibidem*, fols. 258–259.

⁷¹ BKC, MS. 5233 IV, fol. 214.

It would be better if civil legislation gave a general dispensation to the third and fourth degrees, rather than placing them together with the first two degrees would pose them with unnecessary difficulty in seeking particular dispensations, even more so since few, especially among common people, are aware of relations to such a distant degree whereby many married couples, who lacking this knowledge had not sought a dispensation, would be exposed to dissolution.⁷²

He also pointed to the example of civil law in Catholic Austria,⁷³ from which the third and fourth degree of blood relations had been removed from the list of impediments to marriage. This did not persuade the majority of the Committee, which

[...] wishing to preserve the concordance of civil and canon law on this subject, which is linked with religious considerations through the sacrament that is marriage, as well as wishing to maintain the peace of conscience of all, this abovementioned impediment is extended to four degrees of blood relations and kinship, with the stipulation that a dispensation in such cases which are allowed under canon law, shall depend on the national clerical authorities and shall be granted free of charge.⁷⁴

Antoni Bieńkowski's substantive arguments that this principle be simplified thus did not convince the majority of the members of the Committee, who believed that full alignment of matrimonial law with ecclesiastical regulations was a paramount value.⁷⁵

"A marital union concluded without any of the impediments expressed above" was recognized as "forever valid".⁷⁶ In the event of there being none of these, a marriage could be dissolved "by the death of one of the spouses alone" (Art. 55).⁷⁷ In particular, under no circumstances were the spouses entitled to "voluntarily rend" the ties of marriage (Art. 45).⁷⁸ A court could only rule on the nullity of a marriage on the basis of existing grounds or ex officio "upon a report by someone or receipt of notification" (of a minor in a marital union, of a person bound by religious vows of chastity, of a person of a non-Christian faith, of a relation or kin), or upon petition (Art. 44).⁷⁹ The Committee did recognize, however, that leaving the initiative to investigate to the court was not

⁷² *Ibidem*.

⁷³ A very useful discussion of Austrian matrimonial law in the context of the relationship between the state and the Catholic Church can be found in A. Dziadzio, *Osobowe prawo małżeńskie w Austrii na tle stosunków państwo-Kościół katolicki (XVIII–XIX wiek)*, "Cracow Studies of Constitutional and Legal History" 2004, vol. 1, pp. 137–145.

⁷⁴ *Ibidem*. It was also indicated that "the government, upon agreement with the Holy See, may obtain a bull of dispensation once and for all for the third and fourth degrees, even for those which require an appeal for dispensation to the Holy See itself may obtain a general authorization for the national ecclesiastical authorities, as the Catholic Church has in Russia". *Ibidem*.

⁷⁵ The impediments of blood relations and kinship also extended to illegitimate children (Art. 20), which however did arouse controversy over the agreement of this impediment with canon law. *Ibidem*, fol. 218. Only "after review of ecclesiastical law", the Committee took the decision that in accordance with confessional law it should be accepted that "blood relationship and kinship arising from illegitimate relations" shall constitute "an impediment to valid marriage, the former to the fourth, the latter to the second degree", in accordance with the principle that "kinship is recognized only between a husband and his wife's relations, or between a wife and her husband's relations, but not between the relations of one spouse with the relations of the other". *Ibidem*, fol. 225.

⁷⁶ BKC, MS. 5236 IV, fols. 265–266.

⁷⁷ *Ibidem*, fol. 266.

⁷⁸ *Ibidem*, fol. 263.

⁷⁹ *Ibidem*. The draft did not specify which court was "proper" (i.e. had jurisdiction) to adjudicate the invalidity of marriage. According to the earlier decisions of the Committee, it was an ecclesiastical court.

a proper solution in a civil procedure.⁸⁰ The fear was expressed that this could lead to the situation in which it could “appear” to the court that it may “seek and establish cases”, whereas according to the contradictory principle, “in convening, [the court] should only judge those which come to it”.⁸¹ In order to avoid this, the Committee made the decision to “invest these obligations in the public authorities”,⁸² in other words the prosecutor, who according to Art. 83 of the Code of civil procedure had the right to active participation in court proceedings.⁸³

The circle of people who could request initiation of proceedings for the declaration of nullity of marriage was narrowed to those who “judge themselves to be injured by a marriage concluded with some impediment” (Art. 44).⁸⁴ It was additionally stipulated in the draft that “as a generality, injury by an existing impediment” may be suffered by only one of the spouses, namely “the one from whom the grounds for nullity did not proceed” (Art. 47).⁸⁵

Thus, both the substantive and the procedural provisions were oriented toward limiting the possibilities for and the “rending” of marriages, the intention of which the Committee gave expression to several times during various discussions over the shape of matrimonial law.⁸⁶ This was to be additionally served by the rules of evidence, according to which “a declaration of nullity of marriage [only] with full evidence” could “be supported”, with the significant limitation that “evidence through a declaration by one or both of the spouses, or by a sworn statement by the spouses, has no place”, as well as with the categorical stipulation that “in case of insufficient clear evidence, the court shall

⁸⁰ *Ibidem*.

⁸¹ BKC, MS. 5233 IV, fol. 216.

⁸² *Ibidem*.

⁸³ Cf. W. Witkowski, *Uwagi o urzędzie prokuratora w Księstwie Warszawskim i Królestwie Polskim do 1876 r.* [in:] *W kręgu historii i współczesności polskiego prawa. Księga Jubileuszowa dedykowana Profesorowi Arturowi Korobowiczowi w siedemdziesięciolecie urodzin*, ed. W. Witkowski, Lublin 2008, pp. 337–351.

⁸⁴ BKC, MS. 5236 IV, fol. 263.

⁸⁵ *Ibidem*, fol. 264. In particular, the draft prohibited the demand for a declaration of nullity of marriage by a spouse claiming that his husband or wife was forced to enter into the marriage (Art. 48). Similarly, a wife could not demand a declaration of nullity of marriage to a man who was not the father of her child (Art. 49). In the draft there was a range of detailed regulations limiting the possibilities for declaring the nullity of marriages entered into by minors. It was decided that “a minor, who unintentionally concealed that he was a minor, or contrived the permission of his father or guardian, may not demand a declaration of nullity of marriage on the grounds of his minority or permission not given” (Art. 50). “Minors coming of age and living over a year in the marriage does not constitute grounds to demand a declaration of nullity on the basis of the absence of consent” (Art. 51). Similar limitations in his rights to demand a declaration of nullity of marriage were to be placed on a father or guardian without whose permission a minor child entered into marriage. In accordance to the draft, he could do so only if (1) “he did not know that his minor child was to enter into marriage, and did not report the impediment where it should be reported”; (2) he is the father or guardian of a minor girl who had not yet become pregnant by her husband; (3) “within six months of his acquiring knowledge of the wedding, he did report the invalid marriage where it should be reported” (Art. 52). *Ibidem*, fols. 264–265. The committee did decide, however, to fully strike out this article, acknowledging that the absence of permission of the father or guardian should not be grounds for dissolution, but only for prohibition. *Ibidem*, fol. 265.

⁸⁶ On the popularity of divorce in the Kingdom of Poland in connection with the “relatively widespread practice of declarations of nullity of marriage for Catholic marriages in the Polish-Lithuanian Commonwealth”, see P. Pomianowski, *Liczba rozwodów orzeczonych na ziemiach polskich na podstawie Kodeksu Napoleona*, CPH 2016, vol. 68, no. 1, pp. 51–65.

uphold the validity of the marriage” (Art. 53).⁸⁷ Finally, however, the Committee decided to allow one departure from these rigorous rules, resolving that “a vow [that the marriage was contracted] under duress in the absence of other evidence” may be accepted as a means of evidence.⁸⁸

Yet controversy was aroused by the situation that the draft “did not permit any sworn statement by the parties but in case in incomplete evidence, declares a marriage valid”.⁸⁹ The Committee came to the conclusion that the draft had gone too far in the restriction of evidence. It was reasoned that as long as “in other civil cases, the law permits parties to make sworn statements, when the evidence speaks for it”, then “however, if compulsion is given as grounds, a sworn statement by the party who felt under duress should be permitted in support of other incomplete evidence, and if there is none, then the sworn statement along shall not be taken”.⁹⁰ It was argued that granting this exception was necessary, for it was difficult to establish compulsion only with full evidence and without a sworn statement, this, while it most strongly affects the conscience, does not so much instruct one to fear divorce, as it becomes, as it had once been, a brake holding one back from it.⁹¹

The discussion conducted proves that the intention both of the draft’s author and the Committee was that evidentiary proceedings in matrimonial cases would not open a gate (much as in the case of the temporal limitation regarding the premise of compulsion) to evading the prohibition on divorce by pleading the ostensible existence of grounds for a declaration of nullity. Antoni Bienkowski recognized as particularly suspicious those cases in which annulment of marriage was demanded on account of “bodily infirmity, or the inability to fulfil marital obligations”.⁹² In order to counter the abuse of the dissolution of marriage, the regulation was introduced that “especially” when declaring such grounds

[...] evidence provided by expert witnesses of both sexes, if necessary, should be used. If the infirmity cannot be demonstrated with certainty whether it is temporary or permanent, the spouses shall live together for one full year and if that infirmity lasts over the course of that entire year [only] at that time does nullity of marriage occur. (Art. 54).⁹³

In the context of the concern for the permanence of marriages, one should also examine the discussion initiated by Tadeusz Matuszewicz in the Committee. He drew attention to the regulation in the Napoleonic Code which ordered that “married parties who by mutual consent seek a divorce are obliged to relinquish half of their assets to the children born of their marriage, retaining for themselves the use thereof only until those children reach the age of maturity”.⁹⁴ In his view, this provision contained “wise legal thought, which on one hand keeps a marriage which is inclined toward divorce above

⁸⁷ BKC, MS. 5236 IV, fol. 265.

⁸⁸ *Ibidem*.

⁸⁹ BKC, MS. 5233 IV, fol. 216.

⁹⁰ *Ibidem*, fols. 216–217.

⁹¹ *Ibidem*, fol. 217.

⁹² BKC, MS. 5236 IV, fol. 254.

⁹³ *Ibidem*.

⁹⁴ BKC, MS. 5233 IV, fol. 220. This regarded Art. 305; *Code civil des Français...*, pp. 55–56.

water, and on the other secures the fate of children of a divorced couple”.⁹⁵ He explained that “although according to the new draft law mutual consent to divorce has no significance whatsoever”, it is “always [...] a useful and just thing” to take advantage of this type of regulation, regardless of the source from which it arose and “to include a similar regulation for all divorces [i.e. dissolutions of marriage declared null] with the modification that the parents are not obliged to relinquish half of their assets to their children, but shall provide for them, while remaining able to make use of the assets until death”.⁹⁶ Tadeusz Matuszewicz thus strove for a creative transplanted one of the norms of French law, and his motion “found broad support in the Committee”.⁹⁷ The course of this discussion and its conclusion proves that achieving a social purpose regarded as particularly important, in this case using the instruments of law to buttress the permanence of marriage, could be a priority for the Committee. In this situation, the need to use foreign legal solutions did not provoke any reluctance.

Nevertheless, the author of the draft, Antoni Bieńkowski, criticized the proposal,

[...] submitting a distinction: that this regulation in the code, for divorced parties with mutual consent only, does not violate the law of property, but when divorce hangs on the good faith of both, then the relinquishment of assets to the children also becomes voluntary. Yet here if mutual consent to divorce does not take place, if only the impediments proceeding from the law can determine the nullity of the marriage, and if only the one of the parties to whom the legal impediment properly applies may demand the dissolution of their marriage, it would be an injustice to penalize that party with half of their assets for suffering injury to his person by a violation of the law. That would be in principle to infringe upon the sacred right to property by taking half because it pleased the law to indicate an impediment, even if it may have been unknown to each of the spouses as they concluded the union, and then after its discovery by going to a public office, the union is broken, even if both wish to remain in it. Thus, in either the first or the second case, punishment of the innocent would occur, and private property impinged upon.⁹⁸

However, “as regards protection of children after divorce” Antoni Bieńkowski referred “to the end of the draft, where there are pertinent articles that do not violate the right to property”.⁹⁹

“In reflection of the above view” those supporting the motion responded that

[...] one cannot accept the idea that it would be a penalty for parents to preserve assets for their own children, if the assets of the parents upon their death go by law to the children, and one may also not see in that a violation of property rights, but naturally a confirmation that parents retain these fully

⁹⁵ *Ibidem.*

⁹⁶ *Ibidem.*

⁹⁷ *Ibidem*, fols. 220–221.

⁹⁸ *Ibidem*, fol. 223.

⁹⁹ *Ibidem.* A casuistic example of what kind of problems would be caused by this solution was cited by Stanisław Zamoyski, who nevertheless did not object to Tadeusz Matuszewicz’s proposal. He only drew particular attention “to such a case when a single woman is violently abducted and forced into marriage, and thus it came to divorce and securing of half of her property for the child born of that marriage, and that child subsequently died, the felonious father would unjustly benefit from that inheritance, not having any real claim to those assets”. *Ibidem*, fol. 223. The remaining members maintained that consideration of matters in this context, in disregard of any other laws, is incorrect. “It is thought [namely], that this circumstance which is different from the general intention of the article, adjoins criminal law regarding rapists, as well as laws regarding inheritance and may be duly considered there”. *Ibidem.*

for their lifetime, and when that ends, these go to the children. For in the case of the extravagance of parents, the government has the right to intervene to protect assets on behalf of the children, and this is not read as a violation of property rights. Why should similar care not be extended to children orphaned by divorce? For although in the newly drafted law mutual consent has been removed [i.e. divorce], nonetheless by use of the remaining grounds for nullity of marriage parties may agree among themselves to a divorce, and without telling the court that they are operating with mutual consent, one will give grounds to the other which the other agrees to. The greater part of the impediments given in the law are of such a nature that a marriage would not be dissolved when the parties would wish to remain in. And even in cases when public office [i.e. prosecutor] public agencies, for example, discover blood relations or kinship, the parties may easily seek a dispensation and confirm their union if they do not wish it dissolved, and thus most often divorce would depend on the will of the parties, because there are means in their power to avoid it. Thus, the avoidance of divorce can be most effectively be ensured by imposing an obligation on every divorced couple to reserve half of their assets for the children.¹⁰⁰

This argumentation deserves emphasis because of how it indicates the awareness among many of the members of the Committee that introduction of a prohibition on divorce while retaining the possibility for dissolution of marriage on grounds sanctioned by the Church would not necessarily radically limit the number of dissolved marriages, for with the agreement of the spouses and a church dispensation, it might not be sufficiently watertight.

Bieńkowski, however, did not agree to accept that in principle it does not matter to whom property rights belong, whether to the parents or to the children, as long as they remained in the family. In an enlightened and liberal spirit, he indicated that these must be ascribed to a person individually and constitute a natural right of the individual, not of the family, even the closest family. Consequently, he argued that

although the matter runs between parents and children, and although it may seem that it should make no difference that use of assets remains with the first until their death, and then passes on to the children as the natural owners, it nonetheless violates the essence of the property rights of the parents because they may no longer otherwise dispose of that half of their assets, while no law restricts them for life, even if they outlive all of their assets. That which remains, they may dispose with as they wish upon their death, as long as they designate as prescribed by law the mandatory part for children.¹⁰¹

However, Bieńkowski's opponents took a more traditionalist position – according to which familial rights (through lineage or bonds based on blood ties) should in some cases be given priority over individual rights – when they posed the rhetorical question “and so it is moral and in the well understood interest of the parents that so as to not constrain their freedom to lose all of their assets, to leave their children orphaned without securing for them at least half for when their parents are no longer alive and can no longer use it?”¹⁰²

After listening to the arguments of both sides, the Committee decided to accede to Tadeusz Matuszewicz's view, acknowledging “as a just thing, and at the same time the most effective for reining in divorces that are ruthless toward the orphaned children”

¹⁰⁰ *Ibidem*, fols. 221–222.

¹⁰¹ *Ibidem*, fols. 223–224.

¹⁰² *Ibidem*, fol. 224.

was to add to the draft regulation a condition that “in every case of divorce in which children remain, a result shall be securing for them half of the assets of the father and of the mother who are divorced, retaining for the parents the free use of those assets until the end of their lives”.¹⁰³ Thus, Antoni Bieńkowski’s liberal and individualistic reservations did not turn out to be sufficient and the Committee decided to transplant into native soil the solution drawn from French law, in order (in accordance with Polish Catholic tradition) to limit connivance to circumvent the prohibition on divorce through misuse of the institution of declarations of nullity of marriage by imposing a particular type of financial penalty on such activity.

Confirmed by the Committee without discussion was the form of the celebration of marriage proposed in the draft, according to which for a marriage to be validly concluded, necessary were “banns and a wedding celebrated according to the rules of the parties’ religious faith” (Art. 22).¹⁰⁴ In regard to the banns, it was decided that they

[...] are to be made known in the parishes of both members of the engaged couple three times on Sundays or holidays one after the other, after the ordinary lesson, with mention of the name, status and place of residence of those who are to marry and with the monition to all that if he who knows of any impediment, shall report it (Art. 23).¹⁰⁵

The wedding and blessing were to be celebrated “by the parish [priest] of one of the two spouses, according to the religious rules of their faith or by someone equally empowered to do so with the express permission of their own rector” (Art. 27).¹⁰⁶

The proposal regarding the establishment of mutual rights and responsibilities did not raise significant doubts. Among the general responsibilities of marriage named in the draft were “completion of the duties of the marital state”, fidelity, “respectable and agreeable” life together, the diligent raising of children as well as providing one another with mutual succour “in all events” (Art. 29).¹⁰⁷ In the proposed articles at the same time conferred upon the husband the dominant role in the marriage and in the family. It was specified that “the husband is ruler of the home and head of the family. He has the right to manage the finances of the home and of the family in accordance with his will” (Art. 30).¹⁰⁸ Accordingly, the wife’s duty was “to submit to the opinion and will of her husband in managing the finances of the home and of the family, to provide him with succour, to follow his instructions in this regard and to ensure that his instructions are followed by all domestics [persons] (Art. 34).¹⁰⁹ The wife was to be obliged to assume the name and status of her husband’s family and to use “the rights and honours ascribed to her husband’s name” (Art. 32).¹¹⁰

¹⁰³ *Ibidem.*

¹⁰⁴ BKC, MS. 5236 IV, fol. 259.

¹⁰⁵ *Ibidem.*

¹⁰⁶ *Ibidem*, fol. 260.

¹⁰⁷ *Ibidem*, fol. 261.

¹⁰⁸ *Ibidem.*

¹⁰⁹ *Ibidem.*

¹¹⁰ *Ibidem.*

Similarly as under the rules of the Napoleonic Code and in accordance with pre-1795 Polish law, a wife was to still be regarded by the law as a “perpetual minor”,¹¹¹ a result of which was that the husband was charged with the responsibility of supporting her properly and appropriate to the status” as well as to appear or provide representation in all court proceedings, should the need arise (Art. 31).¹¹² A wife, then, could not appear in court independently without the authorization of her husband,¹¹³ “even if she herself engages in trade and manages her own assets” (Art. 35).¹¹⁴ Without authorization from her husband she could not “take out loans, even against her own assets, nor mortgage or dispose of her own real estate” (Art. 36).¹¹⁵ For each matter a separate authorization was required, with the exception of the possibility of providing a general authorization to the wife to manage her own assets (Art. 43).¹¹⁶ The draft intended to make one exception to these principles incapacitating women in matrimonial unions, namely to grant a wife the right to “accept the obligations proceeding from her trade and business”.¹¹⁷ However, the Committee decided to dispense with even this possibility, holding that this could “give cause for wives and husbands to separate or to receive under the auspices of trade a person whom the husband would not wish to have in the home”.¹¹⁸ A similar argument underlay the decision to remove the regulation from the draft which prohibited a father or guardian from “dissolving the marriage of a minor girl, if, even without his knowledge, she has become pregnant by her husband”, arguing that would give cause for “the loosening of morals, the seduction of underage girls and disdain for parental or guardian authority”.¹¹⁹ A wife was left however with the right to independently “make dispositions regarding her final will” (Art. 37).¹²⁰ In case a husband refuses to provide her with authorization, a wife may appeal to the court, which may authorize her to the stated action, but only after hearing out the husband (Art. 39).¹²¹ However, in case a wife committed some act without her husband’s authorization, this did not render it invalid under law. It could only be annulled on petition of the husband or “the heirs of both the husband and wife” (Art. 44).¹²²

¹¹¹ S. Kowalska-Glikman, *Kobiety w procesie przemian społecznych w Królestwie Polskim w XIX wieku* [in:] *Kobieta i społeczeństwo na ziemiach polskich w XIX w.*, eds. A. Żarnowska, A. Szwarc, Warszawa 1990, pp. 10–15.

¹¹² BKC, MS. 5236 IV, fol. 261. The topic of the legal position of women in the family under pre-1795 law and the Napoleonic Code we discuss more widely in the introductory part of M. Gałędek, A. Klimaszewska, “Crippled Equality”: *The Act of 1 July 1921 on Civil Rights for Women in Poland*, “Acta Poloniae Historica” 2016, vol. 113, pp. 235–238.

¹¹³ Without the authorization of her husband, a wife could only be held criminally responsible “in cases of a crime or misdemeanour of police interest” (Art. 38). BKC, MS. 5236 IV, fol. 262.

¹¹⁴ *Ibidem*, fols. 261–262.

¹¹⁵ *Ibidem*, fol. 262.

¹¹⁶ *Ibidem*, fol. 263.

¹¹⁷ *Ibidem*.

¹¹⁸ BKC, MS. 5233 IV, fols. 215–216.

¹¹⁹ *Ibidem*, fol. 216.

¹²⁰ BKC, MS. 5236 IV, fol. 262.

¹²¹ Authorization to undertake legal actions was to be issued by the court in particular situations: if a husband had been sentenced to prison (Art. 40), remained in custody or was absent (Art. 41), or also if he was a minor (Art. 42). *Ibidem*, fols. 262–263.

¹²² *Ibidem*, fol. 263. On the limitations in old Polish law, see Z. Kaczmarczyk, *Oligarchia Magnacka* [in:] *Historia państwa i prawa Polski*, ed. J. Bardach, vol. 2: *Od połowy XV wieku do r. 1795*, Warszawa

The draft also regulated the institution of legal separation. This was permitted under Art. 56, stipulating that “if serious grounds arise that render living together by the spouses impossible, the spouses or one of them may request legal separation by the court”.¹²³ These serious grounds were enumerated in Art. 61, including (1) adultery, (2) commission of a crime subject to criminal penalties, (3) “malicious abandonment”, (4) “licentious habits”, which raised the risk of loss of assets of exposed “the proper morals of the home” to danger, (5) “threatening the life or health” of the other spouse, (6) committing “serious insult and injury to the honour” of the spouse, (7) “quarrelsome behaviour” with the spouse or “poor treatment”, (8) “infectious disease or one unpleasant in their marital life” (9) “irreconcilable enmity” between the spouses.¹²⁴

“Separation” could be adjudicated solely following mediation by the parish priest. The spouses were obligated to “explain” to him “the intent to separate” and its causes, and next to go to him regularly, “at least three times each month”.¹²⁵ “The rector’s duty” was to be “to incline the parties through the strongest persuasion possible to live together in harmony”.¹²⁶ Only “if the admonitions and persuasions of the rector remain ineffective and both parties shall [still] remain in their intent to separate, then the rector shall issue his attestation which both are to submit to the court along with their request for legal separation”.¹²⁷

Antoni Bieńkowski’s draft, like all other drafts of the Civil Reform Committee, did not enter into force. However, comparing its content with that of the corresponding articles finally accepted under Title V, *On Marriage [O małżeństwie]*, of the Civil Code of the Kingdom of Poland of 1825, one can discern a certain similarity between the provisions of both versions,¹²⁸ which makes it possible to advance the thesis that Bieńkowski’s draft may constitute one of the reference points in the course of further codification work

1966, pp. 274, 285, 293. Cf. also M. Bogucka, *Women in Early Modern Polish Society, against the European Background*, Aldershot 2004, p. 14; J. Hurl-Eamon, *Women’s Roles in Eighteenth-Century Europe*, Santa Barbara 2010, pp. 66–67; B.C. Smith, *Changing Lives: Women in European History Since 1700*, Lexington 1989, pp. 121–122.

¹²³ BKC, MS. 5236 IV, fol. 266. Spouses requesting legal separation were required to provide for the children they had together “appropriate maintenance”. If they did so, the court “after meeting these conditions” would issue “an order of separation, not entering into the causes” (Art. 58). A minor spouse, however, required the permission of a guardian “to contribute to the maintenance of children” (Art. 59). *Ibidem*, fol. 266–267. In Bieńkowski’s draft, it was also stipulated that “disputes between spouses over assets caused by separation, as well as in regard to the provision of support to spouses as well as their children”, the court should “strive for [...] an agreement” (Art. 62), but “if the parties cannot agree, then the court shall submit the dispute over assets to the legal channels in which this dispute over assets shall be considered according to the chapters regarding matrimonial contracts” (Art. 63). *Ibidem*, fols. 268–269.

¹²⁴ *Ibidem*, fol. 268.

¹²⁵ *Ibidem*.

¹²⁶ *Ibidem*.

¹²⁷ *Ibidem*. In case “separated spouses” desired “to join one another again” they were obliged to inform the parish priest from whom they received the “order of separation”. “After such reunification” they were again to be “obliged to live together” and could not “voluntarily separate again” (Art. 64). But if again there arose “causes for a renewed separation, on requesting such a renewed separation all was to be retained as it had been in the first” separation (art. 65). *Ibidem*.

¹²⁸ Cf. J. Walewski, *Kodeks Cywilny Królestwa Polskiego (prawo z r. 1825) objaśniony motywami do prawa i jurysprydencyą*, book I, Warszawa 1872, pp. 60–65, 96–105; see also *Powody urzędowe do księgi I kodeksu cywilnego Królestwa Polskiego*, ed. M. Godlewski, Warszawa 1875.

on matrimonial law in the Kingdom of Poland.¹²⁹ This needs to be confirmed, however, by analysis of the source material directly indicating the sources of inspiration for the framers of the Code of 1825, as well as comparative research of the content of the 1814 draft and Title V of the final version of the Code adopted.

The decisions taken in the forum of the Civil Reform Committee and the draft that arose from them prove that they unanimously agreed on the necessity of verification of the provisions of matrimonial law under the Napoleonic Code. The secular nature of marriage could not be retained. The paramount aim of the Committee and of Antoni Bieńkowski's draft was to establish a strict prohibition on divorce involving at least one Catholic in such a way that "nullity of marriage would be restricted in the draft only to such impediments as are specified".¹³⁰ In cases in which these did not occur, every Catholic marriage was to be "forever valid", and "dissolution [...] by mutual consent alone may not [ever] take place".¹³¹ The dissolution of marriage was to be permissible solely for reasons justifying a declaration of nullity of marriage, which was to occur in harmony with the regulations of canon law. In one of the declarations submitted before the detailed analysis of Antoni Bieńkowski's draft, the Committee *expressis verbis* stated that above all it would seek "to preserve the concordance of civil and canon law on this subject, which is linked with religious considerations through the sacrament that is marriage".¹³² Moreover, Fr. Józef Koźmian declared that he would personally ensure that "nothing would enter into the draft to be decided upon by the Committee which would contradict the laws of the Church", and prior to the thorough discussion of the draft, he presented to the assembled members "the impediments to marriage which he took from the laws of the Catholic Church".¹³³ The course of the discussion proved, however, that the submitted draft met these expectations and only once (in the case of the impediment of blood relations or kinship) did the need arise to verify whether its content was in agreement with canon law. In agreement with this guiding principle, both Antoni Bieńkowski in his draft and other members of the Committee in their conclusions proved that the new law was above all to prevent the rise of opportunities to break the sacred ties of matrimony without truly justified grounds in accordance with religious law for the unconditional annulment of marriage. The Committee also spoke in favour of the jurisdiction of ecclesiastical courts, although this question did divide its members. No particular doubts were raised by the question of the dominance of the husband and father in the family and the limitation of the legal capacity of married women, nor did the principles on which legal separation might be declared, which it attempted to limit by the introduction of the obligatory mediation of the parish priest as well as enumeration of the grounds which could lead to a declaration of legal separation.

¹²⁹ Not addressing this topic in his work is Henryk Konic, *Prawo małżeńskie obowiązujące w b. Królestwie Kongresowym*, Warszawa 1924.

¹³⁰ BKC, MS. 5233 IV, fol. 217.

¹³¹ *Ibidem*.

¹³² *Ibidem*, fol. 214.

¹³³ Fr. Koźmian indicated that the impediments he described were divided among those deriving from (1) "natural and divine law", meaning that "those which even the highest clerical authorities may not remove"; (2) "laws of the Church, where cases are described in which clerical authorities may grant a dispensation"; (3) "civil laws, which the Church respects, accepting the impediments to marriage indicated therein". *Ibidem*, fol. 211.

In all of these respects we believe that both the content of Antoni Bieńkowski's draft and in particular the discussions surrounding it in the forum of the Civil Reform Committee confirm the thesis regarding the conservative approach to matrimonial law of essentially all of its members. The belief that Polish matrimonial law should be closely adapted to canon law, for the essence of Polishness was the immanent link between the nation and Catholicism, did not provoke any reservations. Regarding the institution of marriage, this view should be regarded as a basic component of Polish conservative thought, much as the closely related concept that the paramount aim of matrimonial law is to preserve the indissolubility of matrimonial ties and also – in regard to conservative view of the family – the conviction of the necessity of guaranteeing the dominant position of the husband and father. As the decisive moment in the complete victory of the conservative approach in the Committee should be seen, however, as when the belief in the restoration of ecclesiastical courts prevailed among its members and more moderate ideas were rejected, in order to – finding inspiration especially from the way taken by Austria¹³⁴ in reforming the assumptions on which the system of matrimonial law were based – leave jurisdiction in matrimonial cases with the civil courts, but involving members of the clergy in the adjudication of such cases.

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¹³⁴ For more, see A. Dziadzio, *Osobowe prawo...*

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