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The Importance of the Principles of Social Coexistence for Divorce in the Context of Cultural and Social Changes A Polish Perspective

Abstract: Cultural and social changes may affect the methodology adopted by the courts at a certain time in interpreting and applying the law, in particular provisions containing general clauses. These clauses make the law more flexible, enabling it to adapt to changing conditions. They are treated as a kind of “safety valve” to avoid solutions that are unjust, or ethically and morally unacceptable in society. From this perspective, this article will consider the significance of the general clause of the principles of social coexistence in adjudicating a divorce from the perspective of Polish law. The purpose of this article is to answer the question whether, and in what direction, the cultural and social changes that may be taken into account through the general clause of Article 56 of the Family and Guardianship Code affect the dissolution of a marriage by divorce, namely whether or not they hinder the pronouncement of a divorce where the other prerequisites for divorce are met.

Keywords: divorce, divorce rates, general clauses, principles of social coexistence, interpretation, family law, cultural and social context

In omnibus quidem, maxime tamen in iure, aequitas spectanda sit.¹

¹ “In all things, but especially in law, equity must be observed” — D. PAULUS, 17,90.

1. Introduction

Since the second half of the 20th century, we have observed both a decrease in the number of marriages and the increasing divorce rate in Poland,² which is also in line with the tendencies observed in other countries with a similar degree of civilisation development³ (including other EU member states, where, incidentally, there is a clear tendency to liberalise the law on divorce in an attempt to harmonise European family law⁴). According to an analysis prepared by the Public Opinion Research Centre⁵ (CBOS),⁶ data from Statistics Poland (GUS⁷) indicates that, after an intensive increase in the number of divorces pronounced in Poland, recorded until 2015, this tendency has slowed down and has remained relatively stable in recent years (for several years, courts have been adjudicating approximately 65,000 divorces per year in Poland).⁸ On the other hand, the number of concluded marriages decreased significantly

² GŁÓWNY URZĄD STATYSTYCZNY: *Rocznik Demograficzny / Demographic Yearbook of Poland*. Warszawa 2022, pp. 181, 230, 491—496 (data for 1980—2021), available online: <https://stat.gov.pl/en/topics/statistical-yearbooks/statistical-yearbooks/demographic-yearbook-of-poland-2022,3,16.html> [accessed 3.03.2023].

³ See Eurostat data: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics [accessed 3.03.2023].

⁴ See, regarding the attempts made in Europe at the unification of substantive family law as regards divorce by the Commission on European Family Law (CEFL), K. BOELE-WOELKI: “The principles of European family law: its aims and prospects.” *Utrecht Law Review* 1/2 (2005), p. 164. See also, as mentioned by K. BOELE-WOELKI, “soft law,” namely: *The Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses*, Chapter III: Divorce Without The Consent of One of The Spouses, <http://ceflonline.net/wp-content/uploads/Principles-English.pdf> [accessed 22.03.2023]. This chapter covers much more liberal divorce provisions than Polish law (Art. 56 FGC). According to its Principle 1:8. Factual separation. “Divorce should be permitted without consent of one of the spouses if they have been factually separated for one year.” Principle 1:9. Exceptional hardship to the petitioner, in turn, states: “In cases of exceptional hardship to the petitioner the competent authority may grant a divorce where the spouses have not been factually separated for one year.”

⁵ CBOS’s (Centrum Badań Opinii Społecznej — Public Opinion Research Centre) official website: <https://www.cbos.pl/EN/home/home.php>.

⁶ Within the Public Opinion Research Centre (CBOS) R. BOGUSZEWSKI prepared a report based on data included in: GŁÓWNY URZĄD STATYSTYCZNY: *Rocznik Demograficzny 2018*. Warszawa 2018 — “Raport — Stosunek Polaków do rozwodów [Report — Poles’ attitudes to divorce].” *Komunikat z badań* 7 (2019), p. 1.

⁷ GUS’s (Główny Urząd Statystyczny) — Statistics Poland official website: <https://stat.gov.pl/en/>.

⁸ See footnote 6. Please note that in 2019, a total of 65,341 divorces were decreed, while 2020 saw a sharp decline in divorces due to COVID-19, as 51,164 divorces were decreed, see: GŁÓWNY URZĄD STATYSTYCZNY: *Rocznik Demograficzny / Demographic*

after 2008. Although the downward trend in this respect has slowed down in recent years, the number of marriages concluded annually remains one of the lowest in history.⁹ Reasons for these circumstances should be looked for on various levels, in particular:¹⁰ social, demographic, economic,¹¹ cultural¹² and religious,¹³ as well as legal.¹⁴ In many countries, the impact of various factors on the increase in divorce is a subject of ongoing studies. Some of these studies even address factors whose impact on divorce rates may not seem obvious. In China, for example, studies have been carried out on how the use of the internet and smartphones influences the increase in divorce rates in various areas of the country, which differ from each other in terms of development, access to various types of goods and the importance attached to culture and tradition.¹⁵ Factors affecting the increase in the number of divorces include: increased affluence, women's financial independence and emancipation, greater moral freedom, individualism, the decreasing importance (authority) of religion in social life, cultural changes resulting

Yearbook of Poland. Warszawa 2021, p. 230. Again in 2021, the number of divorces went up to more than 60 thousand.

⁹ R. BOGUSZEWSKI: "Raport — Stosunek Polaków do rozwodów...", p. 1.

¹⁰ See *ibidem*, *passim*.

¹¹ See research made by V. HILLER, M. RECOULES: "Changes in divorce patterns: Culture and the law." *International Review of Law and Economics* 34 (2013), pp. 77—87, who states that "[e]conomic shocks can destabilise the low-divorce equilibrium: through cultural evolutions, divorce rates increase and divorce law may be modified."

¹² See W. KULBAT: "Społeczno-kulturowe aspekty rozwodów." *Łódzkie Studia Teologiczne* 13 (2004), pp. 127—135.

¹³ See S. CRETNEY: "Breaking the shackles of culture and religion in the field of divorce." In: *Common Core and Better Law in European Family Law*. Ed. K. BOELE-WOELKI. Utrecht 2005, p. 14, who in context of the project of European Family law states that "'shackles' restricting freedom in relation to divorce law and its reform are no longer primarily those of religion and culture; they are those of the psychology of individuals and of groups"; W. KULBAT: "Społeczno-kulturowe aspekty rozwodów...", p. 131; also two reports of CBOS developed by R. BOGUSZEWSKI: "Religijność Polaków i ocena sytuacji Kościoła Katolickiego [Religiousness of Poles and assessment of the situation of the Catholic Church]." *Komunikat z badań* 147 (2018), pp. 2—5 and "Rozwody w osobistych doświadczeniach Polaków [Divorce in the personal experience of Poles]." *Komunikat z badań* 15 (2019), pp. 3, 5.

¹⁴ M. ROTH: "Future divorce law. Two types of divorce." In: *Common Core and Better Law in European Family Law*. Ed. K. BOELE-WOELKI. Utrecht 2005, pp. 53—54, 56—57 shows briefly the divorce law in European national legal orders from comparative perspective in the context of The principles of European family law (see footnote 3).

¹⁵ S. ZHENG, Y. DUAN, M. R. WARD: "The effect of broadband internet on divorce in China." *Technological Forecasting and Social Change* (2019), vol. 139, pp. 99—114; J. ZHANG, M. CHENG, X. WEI, X. GONG: "Does Mobile Phone Penetration Affect Divorce Rate? Evidence from China." *Sustainability* 10 (2018), 3701, <https://www.mdpi.com/2071-1050/10/10/3701> doi:10.3390/su10103701 [accessed 22.03.2023].

in greater acceptance of non-formalised relationships and divorce (reflected in various statistics), and population migration. According to a 2019 CBOS report entitled *Poles' attitudes to divorce*, divorce rates in Poland are mostly influenced by worldview, religiosity as measured by participation in religious practices, and political views. The unconditional supporters of divorce include: nearly three-fifths of those who do not practise religion, nearly half of those who practise it several times a year and almost every second respondent declaring left-wing political views. Opposition, on the other hand, is far more often associated with right-wing political orientation and more frequent participation in religious practices.¹⁶

In this context, a question arises whether legal regulations may facilitate dissolving marriages through divorce¹⁷ by taking into account extra-legal issues (values) stemming from cultural contexts, social or economic conditions, and other factors. General clauses are a kind of gateway through which these elements may enter the law. In Polish law, in the case of pronouncing a divorce, the principles of social coexistence, which are included in Articles 56 § 2 and § 3 of the Polish Family and Guardianship Code (FGC), are relevant.¹⁸ Such a clause was applied in the two

¹⁶ R. BOGUSZEWSKI: "Raport — Stosunek Polaków do rozwodów...", p. 3.

¹⁷ See the details of the research provided by L. GONZÁLEZ, T. K. VIITANEN: "The effect of divorce laws on divorce rates in Europe." *European Economic Review* 53/2 (2009), pp. 127—138, who analysed the effect on divorce rates of the legal reforms leading to "easier divorce" and estimated that the introduction of no-fault, unilateral divorce increased the divorce rate. However, see C. COELHO, N. GAROUPA: "Do Divorce Law Reforms Matter for Divorce Rates? Evidence from Portugal." *Journal of Empirical Legal Studies* 3/3 (2006), pp. 525—542, who came to different conclusions. They find that the introduction of a modern divorce law in the 1970s had a significant effect on the divorce rate, but the changes of the 1990s that effectively implemented a generalised no-fault regime had no statistically significant impact. Their observations suggest that the reforms in the 1990s were likely the response of the legislature to growing divorce rates rather than the cause. Similar results observes K. MAMMEN: "Effects of Divorce Risk on Women's Labour Supply and Human Capital Investment." *Psychology* 06/11 (2015), pp. 1385—1393, who states that changes in the law in the USA were not a major driver of the divorce rates; see also J. WOLFERS: "Did Unilateral Divorce Laws Raise Divorce Rates? A Reconciliation and New Results." *American Economic Review* 96/5 (2006), pp. 1802—1820, who concludes that changes in family law in this direction explain very little of the rise in divorce over the past half-century; and M. KORHONEN, M. PUHAKKA: "The Behaviour of Divorce Rates: A Smooth Transition Regression Approach." *Journal of Time Series Econometrics* 13/1 (2021), pp. 1—19, <https://doi.org/10.1515/jtse-2019-0018> [accessed 22.03.2023].

¹⁸ Ustawa z dnia 25 lutego 1964 r. — Kodeks rodzinny i opiekuńczy [The Polish Family and Guardianship Code of 25 February 1964]. *Dziennik Ustaw* (Dz.U.) No 9, item 59, in force from 1 January 1965 (hereinafter: FGC), uniform text, *Dziennik Ustaw* (Dz.U.) 2020 item 1359 as amended.

last paragraphs of Article 56 of the FGC. In this article, I will deliberate on whether and to what extent the general clause applied to take into account non-legal issues affects adjudicating a divorce (namely whether it hinders or facilitates dissolving a marriage by divorce as long as other premises are met). In other words, my study contemplates whether a more liberal approach to marriage in society has been reflected in the methodology of Polish courts interpreting and applying the law and the application of Articles 56 § 2 and § 3 of the FGC since its coming into force on 1 January 1965. The divorce law has survived to this moment in its initial wording, though there have been three attempts already to amend it. The purpose of the attempted amendments was to radically simplify the marriage dissolution procedure. However, none of them were adopted by the Sejm.¹⁹ It should also be added that in the 1960s, when the FGC was adopted, a conviction prevailed that W. Wolfram Müller-Freienfels expressed clearly in words: “[f]amily law concepts are especially open to influence by moral, religious, political and psychological factors; family law tends to become introverted because historical, racial, social and religious considerations differ according to country and produce different family law systems.”²⁰ Three decades later, this view was also referred to by the EU institutions in the context of the harmonisation of family law.²¹

¹⁹ The first attempt to amend Article 56 of the FGC was the parliamentary draft of 16 February of the Act on Amending the Family and Guardianship Code and the Code of Civil Procedure of 28 September 1994, Druk Sejmowy II kadencji No 800, stenographic report from the 43rd Session of the Sejm of the Republic of Poland, Warsaw 1995; discussed critically, among others by E. HOLEWIŃSKA-ŁAPIŃSKA: “Uwagi o poselskim projekcie nowelizacji prawa dotyczące rozwodów.” *Przegląd Sądowy* 5 (1996), pp. 17–28; W. STOJANOWSKA: “Poselski projekt prawa rozwodowego a zasada trwałości małżeństwa i rodziny.” *Jurysta* 12 (1995), pp. 13–15. The second attempt was the parliamentary draft of the Act on Amending the Family and Guardianship Code and the Law on Civil Status Records, filed on 22 June 2012 to the Sejm of the 7th term (no Sejm print number was assigned and the bill was withdrawn on 18 June 2013); critical of this project were J. HABERKO: “Rozwiązanie małżeństwa w drodze ‘umowy’? Uwagi na tle projektu zmian Kodeksu rodzinnego i opiekuńczego oraz z ustawy — Prawo o aktach stanu cywilnego.” *Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu* 2 (2013), pp. 11–24. The third attempt was the parliamentary draft Act on Amendments to the Family and Guardianship Code, submitted on 12 June 2013 to the Sejm of the 7th Term (no Sejm print number assigned and the draft was withdrawn on 10 April 2014).

²⁰ W. MÜLLER-FREIENFELS: “The Unification of Family Law.” *The American Journal of Comparative Law* 16 (1968), p. 175.

²¹ At the beginning of the 21st century, the European Council stated that family law (as with the marriage law and the law of succession) is “very heavily influenced by the culture and tradition of national (or even religious) legal systems, which could create a number of difficulties in the context of harmonisation.” Draft Council report on the need to approximate Member States’ legislation in civil matters of 16 November 2001, 13017/01 JUSTCIV 129, p. 3.

Firstly, the divorce law may be liberalised by legislative change (where this is the legislator's clear intention, which is usually politically conditioned²²). The amendment of the law going in this direction may reflect various types of social changes, namely it may result from these changes or may initiate them. The Polish legislator has not, so far, expressed any such intention to liberalise the law since the date of the Polish Family and Guardianship Code entering into force.²³ Secondly, liberalisation can be achieved by adopting a methodology of interpretation and application of the law in force that serves this purpose. Liberalisation through the interpretation of the law is possible in particular thanks to general clauses. The interpretation of provisions containing general clauses which may change over time, reflecting various types of changes occurring in the society in the country. The second of these issues is the subject of the article and is approached from a Polish perspective.

2. General clauses as a tool that makes the law flexible

General clauses have been the subject of numerous papers from the fields of the theory and philosophy of law, as well as in dogmatic sciences (both in the Polish²⁴ and foreign doctrines²⁵). The Polish doctrine does not offer any consistency as far as the methods of applying general clauses are concerned, nor the type of source pointed by reference from general clauses. Defining a "general clause" as a term and providing its scope is not a simple task either, given the existing discrepancies in the doctrine in this respect. In effect, it is quite questionable whether any uniform, generally adopted definition of general clause exists at all.²⁶ In any case,

²² See M. AN TOKOLSKAIA: "Family law and national culture — Arguing against the cultural constraints argument." *Utrecht Law Review* 4/2 (2008), pp. 25—34, who concludes that "[p]ertinent national family laws are determined by political, rather than cultural factors, and these are fluid."

²³ See footnote 19.

²⁴ See footnote 12; I also discuss this issue in the monograph, E. ROTT-PIETRZYK: *Klauzula generalna rozsądku w prawie prywatnym* [General clause of reasonableness in private law]. Warszawa 2007, pp. 277 ff.

²⁵ See e.g. S. GRUNDMANN: "General standards and principles in European contract law: a survey" and H. BEALE: "General clauses and specific rules in the principles of European contract law: the 'Good Faith' clause." In: *General clauses and standards in European contract law: Comparative law, EC law and contract law codification*. Eds. S. GRUNDMANN, G. MAZEAUD. The Hague 2005, pp. 205—218.

²⁶ See in particular A. DOLIWA: *Funkcje zasad współżycia społecznego w prawie cywilnym*. Warszawa 2021, Chapter 2 §1. L. LESZCZYŃSKI: "Pojęcie klauzuli generalnej."

this article has a somewhat different subject. Here, I assume a slightly simplified approach whereby general clauses are indeterminate phrases found in legal texts. One approach in the doctrine, attempting to explain how general clauses understood in this way operate, stipulates that they express certain evaluations functioning in a certain social group, to which a certain provision refers, by ordering that these clauses are taken into account when determining the facts regulated by the norm in question.²⁷ This involves moral judgements or other measures, for instance economic and cultural ones. I am closer to a different way of looking at general clauses, whereby legal provisions containing general clauses do not meet the characteristics of a reference. This is because they constitute orders to evaluate independently *in concreto* the actual status, directed to the bodies exercising the law. In other words, these regulations include orders to formulate assessments of the cases at hand and determine the legal effects in line with these assessments, which are reflected in the issued resolution (judgment, decision).²⁸

The principles of social coexistence constitute one of many general clauses and are mentioned in many provisions of Polish private law, performing various functions.²⁹ They appear outside the family law provisions (e.g. regarding marriage) and their application is much wider than simply family law, though the mechanism of applying the provisions containing general clauses is identical. It is worth quoting Władysław Wolter, who stated that the legislator, through the introduction of a general clause (“an unclear statement”), “does not (sometimes cannot) deliberately want to specify the meaning in advance, but only designates a more or less more or less precisely defined ‘field’ of meaning that is to be filled in only by judicial practice with its individual assessment.”³⁰

Annales Universitatis Mariae Curie-Skłodowska 1991, no. XXXVIII, pp. 157 ff.; J. NOWACKI: *O przepisach zawierających klauzule generalne. Studia z teorii prawa*. Kraków 2003; K. WÓJCIK: “Klauzule generalne a pojęcia prawne i prawnicze (zasady prawa i społeczne niebezpieczeństwo czynu).” *Studia Prawno-Ekonomiczne* XLV (1990), p. 63; also K. WÓJCIK: “Teoretyczna konstrukcja klauzuli generalnej.” *Studia Prawno-Ekonomiczne* XLIV (1990), pp. 48, 63.

²⁷ Z. RADWAŃSKI: *Prawo cywilne — część ogólna*. Warszawa 2003, p. 51.

²⁸ J. NOWACKI: *O przepisach...*, p. 141. Similarly, M. PAWEŁCZYK: “Uwagi o odsyłającym charakterze klauzul generalnych.” *Studia Iuridica Silesiana* 9 (1984), pp. 94, 95. See also T. GIZBERT-STUDNICKI: “Zasady i reguły prawne.” *Państwo i Prawo* 3 (1988), pp. 21, 25. F. STUDNICKI: “Znajomość i niezajomość prawa.” *Państwo i Prawo* 4 (1962), p. 593.

²⁹ More on this subject in my article E. ROTT-PIETRZYK: *Klauzula generalna rozsądku...*, pp. 379 ff., with regard to the general clause of reasonableness and principles of social coexistence.

³⁰ W. WOLTER: “Uwagi o znamionach wymagających ilościowej oceny.” *Państwo i Prawo* 6 (1976), pp. 25 ff.

There can be little doubt that the law would be unable to survive without an instrument like general clauses, as they belong to a wider category of “indeterminate phrases” (Polish *zwroty niedookreślone*). General clauses allow the law to be more flexible, which is particularly important when applying regulations to non-typical situations, in particular taking into account special circumstances, and primarily taking into account the criteria of reasonableness and equity. These criteria may be perceived differently depending on the external context, for instance cultural, social, economic and political changes. The execution of general clauses may also be described in the following words of Descartes: “[...] I would have seen myself as sinning against good sense if, having once approved of something, I should have found myself obliged to take it to be good later on, when it might have ceased to be so, or I might have ceased to consider it so.”³¹ An extremely important function of general clauses is, therefore, to correct solutions dictated by the law that are too rigid in some cases (*ius strictum* — *ius aequum*) and to be able to respond to changing circumstances (external context).³² This phenomenon was accurately reflected, with respect to equity (*aequitas*, Greek *epieikeia*, *ἐπίκεια*) by Aristotle in *The Nicomachean Ethics*.³³ He understood equity as a measurement of the fair application of a general legal norm in a single matter, according to the circumstances of the specific case.³⁴ His approach was in opposition to formalism and strict adherence to the law.

Significantly, general clauses, including the principles of social coexistence, are situational by nature. This means it is not possible to designate their content in a manner that is either general or constant in time. Their content is designated *in concreto*, pursuant to the factual status to which the provision containing a general clause is applied. Legislators do not dictate the criteria that a judge should consider while applying such provisions. The Dutch legislator proved to be an exception here, as it formulated guidance on completing a general clause with content in Article 3:12 of the NBW, stipulating that “when specifying requirements for reasonableness and equity, one must refer to generally accepted principles of law, current legal beliefs in the Netherlands and specific social and individual interests.”³⁵ This provision indicates three criteria

³¹ R. DESCARTES: *A Discourse on the Method*. Trans. I. MACLEAN. Oxford 2006, p. 22; see also Polish version *Rozprawa o metodzie właściwego kierowania rozumem i poszukiwaniu prawdy w naukach*. Trans. T. BOY-ŻELEŃSKI. Kraków 2004, p. 21.

³² See J. NOWACKI: *O przepisach...*, pp. 135, 136 and the authors cited there.

³³ ARISTOTLE: *Etyka nikomachejska*. Trans. D. GROMSKA. Warszawa 1956, vol. 5.

³⁴ *Ibidem*, 1137 b 10—30.

³⁵ See Article 1374 paragraph 3 and Article 1375 *et seq.* of the Dutch Civil Code of 1838.

of specifying what is reasonable and fair (equitable). Firstly, generally accepted principles of law should be taken into account, understood as non-codified rules that may be derived from the law as a whole, and from the axiology on which the whole legal system is based. These principles should at the same time enjoy general social recognition. In other words, they should be generally accepted by society. Secondly, current legal beliefs should be taken into account. This directive includes doctrinal beliefs, jurisdictional opinion and legal beliefs of certain groups of people or social circles that may be of significance in the case at hand. Thirdly, the adjudicating party should take into account specified social and individual interests to which the reviewed case pertains. The criteria formulated normatively in the Netherlands can be used more generally when interpreting provisions containing general clauses also in other legal systems. When interpreting the principles of social coexistence, courts in Poland are guided by similarly general criteria when justifying judgments made on the basis of provisions containing general clauses.

3. General clauses and the methodology of law interpretation and application — general remarks

The methodology of interpreting and applying the law concerning provisions that consist of a general clause is special. It is strongly linked to the discretionary power of the judge, who, in applying such provisions, has a greater degree of discretion.

These clauses are related to moral, ethical and rational behaviour. The morality associated with acting according to the law of nature, seen as equity (*aequitas*), morals (*mores*) and good manners (*boni mores*), already played an important role for the Romans, which can be compared to the function that general clauses perform in today's legal systems.³⁶ In contrast, rationality, practical reasoning and reason allowed for the establishment of basic fundamental values. The search for this was marked by programmatic objectivity. Basic and fundamental values were found with reference to opinions, views and beliefs generally accepted by all

³⁶ More in P. STEIN: "Equitable Principles in Roman Law." In: *Equity in the World's Legal Systems. A Comparative Study*. Ed. R. A. NEWMAN. Brussels 1973, pp. 75 ff. See also W. LITEWSKI: *Jurysprudencja rzymska*. Kraków 2000, pp. 127, 128.

reasonable (rational) people, or by particular social groups.³⁷ In adjudication, it has often been argued that choosing a different outcome *in concreto* would lead to absurd results that go against common sense.³⁸ Already the ancient Greeks said that, “one should not consider important the opinions of people who lack common sense.”³⁹ Analysing the good faith clause in Roman law, Wojciech Dajczak, sees the benefit in the continuing consideration of “objective reasonableness” to determine the content of *bona fides*.⁴⁰ Good faith, or any different-sounding equitable idea supplied with objective reasonableness, if it is equated with reason, makes it possible to avoid “legal trickery,” “legal ingenuity,” and the arbitrariness of judgements.⁴¹ The circumstance that it is not easy (and some even believe that it is not possible) to establish what is objective, should not prevent us from making attempts to this effect. This is because any “decision-making loophole,” if stripped of what is objective, due to various arguments, is not conducive to the certainty of law. A number of benefits are associated with the use of objective criteria programmatically provided with impartiality. The overriding benefit is connected with the assumption and postulate (as practice may differ from theory here) that those applying the law should not make arbitrary judgements (which they are at least programmatically forced to do by objective criteria), but should instead take into account the interpretative paradigm adopted in a certain legal system. Postulates formulated in this way lead directly to the status of legal certainty. This interpretative paradigm consists, among other things, of values and moral norms generally accepted in society as a whole, or in particular social groups (e.g. entrepreneurs or consumers), which may be expressed in the legal system (in particular, in the Constitution) and which follow from the legal system or remain outside

³⁷ W. LITEWSKI: *Jurysprudencja rzymska...*, p. 124; in this context, See the judgment of the Supreme Court of 1 June 2000, I CKN 569/98, Legalis no 210849, in which the Supreme Court referred to the criterion of a “healthy part of the population.”

³⁸ *Ibidem*.

³⁹ FOCJUSZ: *Biblioteka. Tom II “Kodeksy” 151—222*, 113 a., covering the J. Strobaŭs’s excerpts of sentences, online edition, <http://biblioteka.kijowski.pl/sredniowiecze/focjusz%20-%20kodeksy%20-2.pdf> [accessed 10.03.2023].

⁴⁰ W. DAJCZAK: “Problem ‘ponadczasowości’ zasad prawa rzymskiego. Uwagi w dyskusji o ‘nowej europejskiej kulturze prawnej’”. *Uniwersytet Kardynała Stefana Wyszyńskiego, Zeszyty Prawnicze* 5/2 (2005), p. 21; W. DAJCZAK: *Dobra wiara jako symbol europejskiej tożsamości prawa*. Poznań 2006, p. 23.

⁴¹ See R. N. SNYDER: *Natural Law and Equity...*, p. 43, who takes the view that it is not possible to make an equitable ruling without taking into account the element of reason. In his view, proper knowledge and an appropriate degree of reason are necessary to recognise and apply what is right. See also W. LITEWSKI: *Jurysprudencja rzymska...*, pp. 127, 128.

the system. Therefore, it is not a question of individual judgements made by individuals (including judges), but of judgements linked to the system of values generally accepted in a particular society or environment.⁴² As Józef Nowacki has pointed out many times,⁴³ it is true that there is no reliable method that would allow a judge to determine what the public, or particular groups of the public, really believe, and no way of verifying the judge's findings in this regard. It must be agreed that the judge will determine these beliefs to the best of their ability and knowledge. By contrast, a judge cannot programmatically afford the comfort of acting solely according to their own subjective feelings. Even if they do so, and if their feelings lead to the values covered by the interpretive paradigm, this is irrelevant from a practical point of view. If, on the other hand, the judge's beliefs fall outside of this paradigm, they should, by definition, be verified in an instance review. In this case, the assessment that the judge's subjectivism is the reason for an arbitrary and erroneous decision will take the form of an allegation that the judge has violated the free assessment of evidence, or has misinterpreted a rule. What use the adjudicator will make of the discretion granted to them in terms of values will be verified through an instance supervision. Therefore, this loophole is a "controlled" one. The independence of the adjudicating judge cannot be, by any means, treated as a tool for transferring subjective assessments to the law, while omitting existing standards in this regard.⁴⁴

It is worth noting that within each legal culture there are different — often incompatible — rules of interpretation, as well as different sets of values and different beliefs about the principles of social coexistence. In this sense, the context of legal texts within one legal system and one legal culture is heterogeneous. The question therefore arises as to which values and beliefs and which people the legislator takes into account when formulating legal acts, if different people accept different beliefs and values. This question must, of course, also be posed with regard to the bodies applying the law in the administration of individual justice. Tomasz Gizbert-Studnicki finds that discrepancies regarding beliefs and values of recipients of a legal text have limits. Despite these discrepancies, one can

⁴² See Z. ZIEMBIŃSKI: "Teoria prawa a filozofia prawa i jurysprudencja ogólna." In: *Filozofia prawa a tworzenie i stosowanie prawa*. Ed. B. CZECH. Katowice 1992, pp. 87—89.

⁴³ J. NOWACKI: *O przepisach zawierających klauzule generalne. Studia z teorii prawa*. Kraków 2003, pp. 136 ff.

⁴⁴ See L. LESZCZYŃSKI: "O aksjologii stosowania prawa." In: *Filozofia prawa a tworzenie i stosowanie prawa*. Ed. B. CZECH. Katowice 1992, pp. 150, 151, according to whom the practical subjecting of these assessments to scrutiny in the course of instance supervision should sensitise the judge to the results of future scrutiny and the practice of justifying the decision as rational and only accurate.

assume the existence of an “interpretation paradigm”⁴⁵ that is different for various legal cultures, as well as being historically variable within one legal culture. In Poland, this paradigm changed at the beginning of the 1990s, while since 1 May 2005 our system has become a multi-centric one, which affects the interpretation of its regulations.⁴⁶ The interpretive paradigm consists of the commonly accepted and applied interpretive and inferential directives, as well as the commonly accepted values and beliefs on which the application of the interpretive directives is based. If an interpretation of a provision by a law practitioner violates the paradigm (“exceeds the tolerance of the paradigm”) it will be considered contrary to reason and impermissible, which will have a certain effect according to accepted procedural norms.⁴⁷ Still, establishing the limits of paradigm tolerance is not simple in practice. When a court acts within the framework of a discretionary power expressed in general clauses, it is always assumed to be about an opinion that is common and universally accepted for a community. The objective, on the other hand, is “what is common to the majority of thinking beings and could be common to all,”⁴⁸ and “what irresistibly imposes itself on all.”⁴⁹ In this context, it is worth remembering that the sense of the Greek word *εὐλογος*, which translates as ‘generally accepted’ or ‘worth adopting’, has a quality character and is quite close to the term “reasonable.”⁵⁰

4. The principles of social coexistence in divorce law

The principles of social coexistence were introduced into Polish legislation in relation to the changes in political system in our country intro-

⁴⁵ See T. GIZBERT-STUDNICKI: “Język prawny z perspektywy socjolingwistycznej.” *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Nauk Politycznych* 26 (1986), p. 89.

⁴⁶ See E. ŁĘTOWSKA: “‘Multicentryczność’ systemu prawa i wykładnia jej przyjazna.” In: *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*. Eds. L. OGIEGŁO, W. POPIOŁEK, M. SZPUNAR. Kraków 2005, pp. 1127 ff.

⁴⁷ See in particular Articles 368 and 3931 of the Polish Code of Civil Procedure.

⁴⁸ See H. POINCARÉ: *Wartość nauki*. Trans. L. SILBERSTEIN. Warszawa 1908, p. 6 (quoted after C. PERELMAN: *Imperium retoryki. Retoryka i argumentacja*. Trans. M. CHOMICZ. Warszawa 2004, p. 36).

⁴⁹ See C. PERELMAN: *Imperium retoryki...*, p. 36. According to the author, language and common sense define objective elements that are irresistibly imposed on all with the words “truth” and “fact.”

⁵⁰ I refer to the linguistic analysis carried out in C. PERELMAN: *Imperium retoryki...*, p. 14.

duced after the Second World War.⁵¹ An indication of upcoming changes in the state of general clauses in Polish law was the Decree of 18 July 1950 — the General Provisions of Civil Law (POPC). The principles of social coexistence appeared for the first time in Article 3 of the POPC,⁵² then in Article 90 of the Constitution of the People's Republic of Poland from 1952, according to which citizens of the People's Republic are obliged to “respect the principles of social coexistence.” The initial template for this clause originated from the “principles of socialist coexistence,” which citizens of the Soviet Union were ordered to obey and respect under Article 130⁵³ of the Constitution of the USSR from 1936.⁵⁴ This clause was included in the Civil Code from 1964 and in the Family and Guardianship Code of 1964 and even after many amendments to these codes, the principles of social coexistence have not been removed from the private law codes, despite their Soviet origin. However, they have come to be considered a general clause, deprived of any ideology and equal to other equity clauses, such as the principle of good conduct. These days, they are no longer identified with their ideological roots from the 1950s and 1960s. An ideology-based perception of this general clause was manifested in the guidelines of the justice system and court practice regarding the applica-

⁵¹ See T. DYBOWSKI: “Zasady współżycia społecznego i społeczno-gospodarcze przeznaczenie prawa a prawo własności.” *Nowe Prawo* 6 (1967), pp. 723 ff. S. GRZYBOWSKI, in: *System prawa cywilnego*. T. I. *Część ogólna*. Ed. IDEM. Wrocław 1974, pp. 120—124 and literature quoted there; A. WOLTER, J. IGNATOWICZ, K. STEFANIUK: *Prawo cywilne. Zarys części ogólnej*. Warszawa 1996, pp. 67 ff.; I. C. KAMIŃSKI: *Sfuszność i prawo. Szkic porównawczy*. Kraków 2003, pp. 62 ff.; B. JANISZEWSKA: “O potrzebie zmiany klauzuli zasad współżycia społecznego (głos w dyskusji).” *Przegląd Ustawodawstwa Gospodarczego* 4 (2003), p. 7 ff. D. SZMYT-BINIAŚ: “Klauzula zasad współżycia społecznego.” *Gdańskie Studia Prawnicze XIV* (2005), p. 868; M. PYZIAK-SZAFNICKA: “Prawo podmiotowe.” *Studia Prawa Prywatnego* 1 (2006), p. 108 ff.

⁵² See Articles 41 § 1, 47 § 1 and 82 of the General Provisions of Civil Law of 18 July 1950, *Dziennik Ustaw* (Dz. U.) No 34, item 311 as amended.

⁵³ See also Article 1 of the Civil Code of the Russian Federal Socialist Republic of Councils of 1922, as well as Article 5, sentence 2 of the Principles of Civil Legislation of the USSR and the Union Republics of 1961 and Article 5, sentence 2, of the Civil Code of the RSFR of 1964, the wording of which was identical. According to the regulation therein, “In exercising their rights and duties, citizens and organisations are obliged to observe the laws, the principles of socialist coexistence and the moral principles of the society building communism.” Polish translation by W. KURYŁOWICZ: *Zasady ustawodawstwa cywilnego ZSRR i Republik Związkowych. Kodeks cywilny Rosyjskiej Federacyjnej Socjalistycznej Republiki Radzieckiej*. Ossolineum 1977.

⁵⁴ See S. GRZYBOWSKI: “Struktura i treść przepisów prawa cywilnego odsyłających do zasad współżycia społecznego.” *Studia Cywilistyczne VI* (1965), pp. 17, 42; J. LITWIN: “Zasady współżycia społecznego w orzecznictwie Sądu Najwyższego.” *NP* 1953, no. 12, p. 4; S. SZER: *Prawo cywilne. Część ogólna*. Warszawa 1955, pp. 26, 27; A. WOLTER: *Prawo cywilne. Część ogólna*. Warszawa 1955, pp. 62, 63.

tion of Articles 56 and 58 of the Family and Guardianship Code (a resolution of the full quorum of the Supreme Court).⁵⁵ This is because the guidelines assume that the principles of social coexistence are “an expression of a particular stage of historical development and will undergo further changes and transformations as socialism progresses. The content of the principles of social coexistence in the People’s Republic of Poland is defined by the idea of humanism, fundamental for building society through socialism, and the principles of mutual assistance and conscious social discipline serving its implementation.”⁵⁶ It may seem quite surprising in this context that, even in the 20th century, courts refer to the standpoint of the Supreme Court included in these guidelines. However, after the social, economic, political and legislative changes in Poland after 1989, these references no longer have any ideological context,⁵⁷ while many opinions expressed by the Supreme Court in these guidelines are considered quite valid by courts.

Nowadays, it could be said that the principles of social coexistence should be understood as basic principles of ethical and honest conduct in a social, economic, and cultural context. These are the basic principles of equity, morality and fairness, setting the standards for ethical and honest behaviour in civil law relations.⁵⁸ According to the opinion prevailing in the doctrine, the principles of social coexistence can be described in the most concise manner as moral norms referring to relationships between people.⁵⁹ The doctrine also stresses that they should be interpreted in line with the principles of the rule of law and human freedoms respected by them, taking into account values constituting both heritage and a component of European culture.⁶⁰ With reference to Article 2 of the Constitution of the Republic of Poland, it is assumed that the application of the principles of social coexistence means referring to the idea of equity in law and to the values generally recognised in the culture of our society.⁶¹

⁵⁵ Resolution of the full quorum of the Supreme Court of 18 March 1968, III CZP 70/66, OSNCP 1968 No 5, item 77.

⁵⁶ *Ibidem*.

⁵⁷ This is pointed out, among other things, by K. GROMEK: “Rozwód *de lege lata* i *de lege ferenda*.” *Monitor Prawniczy* 2 (2004), p. 66.

⁵⁸ See the statement of reasons of a judgment by the Court of Appeal in Szczecin of 25 April 2018, I ACa 1022/17, Legalis No 1856585.

⁵⁹ See M. PYZIAK-SZAFNICKA: “Rozdział XI. Prawo podmiotowe.” In: *Prawo cywilne — część ogólna. System Prawa Prywatnego*. Vol. 1. Ed. M. SAFJAN. Warszawa 2012, pp. 801—802 and the literature quoted therein.

⁶⁰ K. GROMEK: “Rozwód *de lege lata*...,” p. 66.

⁶¹ Z. RADWAŃSKI, M. ZIELIŃSKI: “Rozdział VIII. Stosowanie i wykładnia prawa cywilnego.” In: *Prawo cywilne — część ogólna. System Prawa Prywatnego*. Tom 1. Ed. M. SAFJAN. Warszawa 2012, p. 395.

As already mentioned, the essence and function of general clauses is the possibility to take into account different types of factual circumstances that cannot be assessed universally, identically or in isolation from the circumstances of a specific factual situation. The rationale is related to the need to take into account special situations that the legislator does not intend to normalise specifically, as it is not able to cover them all in advance in normative regulations. The role of the principles of social coexistence is to synchronise the rules of law with the precepts of morality and custom, to make the law more flexible and to prevent a state to which the maxim *summum ius — summa iniuria* applies.⁶² On the basis of this maxim, it must be concluded that justice that is too formally administered often becomes injustice, which is precisely what the legislator intends to prevent with the general clause in Article 56 FGC. This regulation specifies positive and negative grounds for divorce.⁶³ This article uses the general clause of the principles of social coexistence in two ways. Firstly, it is relevant when assessing situations where, despite the complete and irretrievable breakdown of the marriage, and despite the absence of another negative reason for divorce mentioned in this provision (namely the welfare of minor children of both spouses),⁶⁴ the principles of social coexistence stipulate against adjudicating a divorce (§ 2 *in fine*). In light of this provision, despite the complete and permanent breakdown of the marriage, divorce is not permissible if its pronouncement would be contrary to the principles of social coexistence. This premise is absolute. The legislator has not laid down any exceptions that would allow a divorce to be adjudicated, despite the fact that it would be contrary to the principles of social coexistence.⁶⁵ In this case, this clause creates further negative grounds for divorce. When interpreting this provision, it is disputed in the doctrine whether the court assessing if a divorce is contrary to the principles of social coexistence should examine the reasons for the marriage breaking down. Two extreme positions and an intermediate one have emerged in this respect. Those in favour of the latter accept the examination of these grounds if the spouses request the court not to pronounce fault, or if

⁶² See Article 4 of the resolution of the full quorum of the Civil Chamber of the Supreme Court of 18 March 1968, III CZP 70/66, OSNCP No 5/1968, item. 77.

⁶³ A. OLEJNICZAK: *Materialnoprawne przesłanki udzielenia rozwodu*. Poznań 1980, pp. 14 ff.

⁶⁴ With regard to one of the negative premises — the welfare of the joint minor children, also in the context of the principles of social coexistence, see R. TANAJEWSKA: “A ban on an ex-spouse’s contact with a minor child in the presence of third parties. Considerations from the perspective of family case-law.” *Studia Prawnicze Katolickiego Uniwersytetu Lubelskiego* 4 (2020), pp. 121 ff.

⁶⁵ See R. DUBOWSKI: *Materialnoprawne przesłanki rozwodu — analiza krytyczna i postulaty de lege ferenda*. Warszawa 2017, p. 145.

the signs of the marriage breaking down are sufficient to prove that it is complete and permanent.⁶⁶ It should be noted that the wording of the provision does not prevent an interpretation to the effect that divorce is also contrary to the principles of social coexistence if the complete and permanent marriage breakdown was caused by such grounds, which also affect the moral assessment of the divorce itself.⁶⁷

Secondly, this clause is relevant in assessing the legitimacy of one spouse's refusal to consent to divorce (principle of recrimination).⁶⁸ Pursuant to Article 56 § 3 of the FGC, the court examines whether the refusal in the given circumstances is a breach of the principles of social coexistence. Breaching this principle would lead to the spouse's refusal being dismissed, and in such circumstances the refusal does not prevent adjudicating a divorce. Therefore, a divorce will be granted if all the positive premises of divorce (provided for in Article 56 § 1 of the FGC⁶⁹) are met and no negative premises (described in Article 56 § 2 *in fine* of the FGC) are found.

Due to the general clause being situational by nature, based on the regulations listed above it is not possible to state generally and universally what breaching the principles of social coexistence actually means. The answer to this question must be sought in the body of case law and in the accepted interpretation of the norms of Articles 56 § 2 and § 3 of the FGC, referring to the values represented by these clauses. The guidelines of the judiciary and judicial practice on the application of Articles 56 and 58 of the Family and Guardianship Code remain largely valid.⁷⁰ Polish courts continue to invoke them, ignoring the axiology underlying the socialist system.

Polish courts have often discussed the circumstances in which it is not possible to adjudicate a divorce due to a conflict with the principles of social coexistence (Article 56 § 2 *in fine* of the FGC). One of the general issues referred to by the Supreme Court in the 1968 guidelines (which

⁶⁶ These opinions are presented by R. DUBOWSKI, *ibidem*.

⁶⁷ A similar position is presented by A. OLEJNICZAK: *Udzielenia rozwodu...*, pp. 84—86.

⁶⁸ More in: K. KAMIŃSKA: "Zasada rekryminacji jako negatywna przesłanka rozwodu." *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 1 (2019), pp. 89—120.

⁶⁹ A permanent and complete marriage breakdown constitutes positive grounds for divorce.

⁷⁰ In the resolution of the full quorum of the Civil Law Chamber of 18 March 1968, III CZP 70/66, OSNCP 1968 No 5, item 77 — Wytoczne wymiaru sprawiedliwości i praktyki sądowej w zakresie stosowania przepisów art. 56 oraz 58 kodeksu rodzinnego i opiekuńczego — Justice and judicial practice guidelines for the application of Articles 56 and 58 of the Family and Guardianship Code (hereinafter: Guidelines of the Supreme Court of 1968).

still remains fundamentally valid) concerns the exclusion of the premise that the divorce is contrary to the principles of social coexistence. This is the case if the spouse who opposes the divorce is solely at fault, or if, in cases of joint fault, it cannot be assumed that the fault of the spouse seeking the divorce is significantly more severe.⁷¹ In principle, therefore, it may be assumed that the principles of social coexistence are not violated if the divorce is requested by a spouse who is innocent, or whose fault is lesser, or whose fault is the same or only slightly greater.⁷² Still, it must be stressed that the gravity of fault does not decide about the positive or negative application of Article 56 § 2 *in fine* of the FGC. The fault constitutes one of the criteria based which the court makes a comprehensive assessment of all the circumstances of the case.

Harm to a spouse caused by divorce is an issue that appears in many court judgements applying Article 56 § 2 *in fine* of the FGC. One of the latest, namely the judgement of the Court of Appeal in Poznan of 12 February 2020,⁷³ who assumed, in line with guidelines of the Supreme Court from 1968,⁷⁴ that this obstacle for adjudicating a divorce exists when these principles would be contrary to the resulting in **gross harm** to the spouse protesting against the divorce, or if serious social and educational considerations exist preventing the divorce, resulting from bad treatment and a malicious attitude of the spouse or children, or due to other demonstrations of disregard for the institution of marriage and the family or for family responsibilities.⁷⁵ It has been accepted in the doctrine that considerations of a socio-educational nature may militate against the adjudication of divorce if such a judgement would sanction a factual state created by ill-treatment and malice towards the spouse or children, or other manifestations of disregard for the institution of marriage and the family or family responsibilities.⁷⁶

In the same vein — also on the basis of the previous legal status⁷⁷ — in 1947, the Supreme Court adjudicated that the valid principles of ethics and Polish law defending the principles and the welfare of the family, do not allow for a breach of legal obligations to be, if not directly supported,

⁷¹ Guidelines of the Supreme Court of 1968, point II.

⁷² See R. DUBOWSKI: *Materialnoprawne przesłanki rozwodu...*, p. 147.

⁷³ See the judgment of the Supreme Court in Poznan of 12 February 2020, I ACa 230/19, Legalis No 2467650.

⁷⁴ Guidelines of the Supreme Court of 1968.

⁷⁵ Ibidem.

⁷⁶ Similarly, K. FLAGA-GIERUSZYŃSKA, A. ZIELIŃSKI: *Rozwód. Materialnoprawne podstawy rozwodu oraz postępowanie odrębne w sprawie o rozwód. Komentarz praktyczny wraz z wzorami pism procesowych*. Warszawa 2021, 3 Edition, Legalis.

⁷⁷ See Article 24 Marriage Law Decree of 25 September 1945, *Dziennik Ustaw* (Dz.U.) No 48, item 270.

then at least sanctioned, by adjudicating a divorce to the detriment of the other spouse and the family.⁷⁸ Even in the historical context when this judgement was made, and still in today's context, it is somewhat surprising that this judgement contains a statement about, "combatting the evil of marriages in which matrimonial life has ceased by other means, by making citizens aware of their State and social obligations, and of the nature, aims and social significance of the institution of marriage."⁷⁹ The court explained that the failure to take into account a refusal to consent to divorce of an innocent spouse (and thus a breach of the principles of social coexistence) could be said to result in the continuation of a "dead" marriage, which is regarded as socially undesirable.⁸⁰

According to Supreme Court guidelines from 1968, gross harm to a spouse should be assessed on the basis of the principles of humanity, taking due account of criteria such as the duration of the marriage, the distribution of its burdens, the situation of both spouses and, in particular, their age, state of health, ability to meet their personal needs and other circumstances that may characterise the material and moral living conditions of both spouses.⁸¹ In the context of Article 56 § 2 of the FGC, the courts have repeatedly referred to the ill health of an injured spouse. It has been accepted in the jurisprudence that a negative prerequisite for divorce can occur when one of the spouses is terminally ill, requires material and moral care from the other, and where divorce would constitute gross harm to the ill spouse.⁸²

⁷⁸ See the statement of reasons for the judgment of the Supreme Court of 15 February 1947, C III 913/46, OSN 1948, No 2, item 37, Legalis No 1326562.

⁷⁹ *Ibidem*.

⁸⁰ See the judgment of the Court of Appeal in Katowice of 22 August 2018, V ACa 589/17, unpublished.

⁸¹ In guidelines of the Supreme Court of 1968, the court shared the view expressed in case law against the background of the previous state of the law, whereby the illness of one spouse not only does not and should not cause a permanent breakdown of conjugal life, but places an obligation on the other spouse to use all means to restore the sick spouse's health and ability to fulfil conjugal duties. Conduct contrary to these principles is contrary to the generally accepted principles of morality, see ruling of the Supreme Court of 1 September 1948, ToC 184/48, OSN 1949, Nos 2—3, item 38. Prior to the entry into force of the FGC, the position that it would be contrary to the principles of morality to consider the incurable illness of a spouse as a reason for the dissolution of conjugal life, when their condition requires material and moral assistance, was also part of this note. However, this principle may not be applied in the case of mental illness of the spouse (see ruling of the Supreme Court of 2 July 1962, 1 CR 491/61, OSPiKA 1963, No 3, item 68). The exclusion of this rule in cases of mental illness has been criticised by R. DUBOWSKI: *Materialnoprawne przesłanki rozvodu...*, pp. 148, 149.

⁸² See the judgment of the Supreme Court of 25 May 1998, I CKN 704/97, Legalis No 336437, in which the court accepted that negative grounds for divorce may arise

The jurisprudence has also considered the situation where the spouse seeking divorce grossly neglects their parental duties, shifting the burden to the other spouse or to other people or social welfare authorities. In such a case, the request for divorce may be contrary to the principles of social coexistence, if even granting the divorce would not further deteriorate the situation of the common minor children of the spouses.⁸³

On the other hand, the criterion of age or length of time together were generally not taken into account as circumstances supporting the contradiction of a divorce decree with the principles of social coexistence. The Poznan Court of Appeal held that it is not contrary to the principles of social coexistence to pronounce a divorce on the grounds that the parties are elderly and have been married for a long time (20 years). By requesting a divorce, the husband is not harming his wife, but merely exercising his right. Even if the wife declares her feelings for the claimant, stating that she forgives him and wants to continue to live with him, cannot constitute an argument for dismissing the action on the grounds of the general clause.⁸⁴

The jurisprudence has tended to take the view that not every harm to the spouse is relevant in the context of the principles of social coexistence, but only “gross harm” that would be suffered by the spouse as a result of the dissolution of the marriage.⁸⁵ This concept has been further defined in the doctrine, by stating that a spouse may be said to be grossly prejudiced in particular if, as a result of their affliction, they are wholly or partly incapable of gainful employment and living independently. It should be assumed that the negative prerequisite of Article 56 § 2 in fine of the FGC does not, in principle, apply if the spouse who does not consent to divorce is solely at fault, or if, in the event of joint fault, it cannot be assumed that the fault of the spouse requesting divorce is significantly greater.⁸⁶ A distinction should be made between situations where, on the one hand, an incurably ill spouse who is wholly or mainly guilty of divorce is opposed to divorce, and, on the other hand, an incurably ill spouse who is innocent or only slightly guilty of divorce is opposed to divorce. It is worth noting, however, that the dismissal of the action (axiologically justified through the general clause) may have the opposite effect. The spouse filing for divorce, instead of showing compassion and

where one of the spouses is terminally ill, in need of material and moral support from their spouse, and where divorce would cause them gross harm.

⁸³ Guidelines of the Supreme Court of 1968.

⁸⁴ Judgment of the Court of Appeal in Poznan of 5 October 2004, I ACa 683/04, *Wokanda* 2005, No 12, p. 43.

⁸⁵ Guidelines of the Supreme Court of 1968, point II.

⁸⁶ *Ibidem*.

providing assistance to the ill spouse, will resent them and show hostility towards them for standing in the way of divorce.⁸⁷ In this type of situation it is difficult to find the best solution.

The courts have also expressed their opinion on several occasions with regard to the interpretation of the principles of social coexistence relevant to the refusal of one spouse to grant a divorce on the grounds of Article 56 § 3 of the FGC (recrimination principle).⁸⁸ The effectiveness of a refusal to grant a divorce must be assessed in practice, taking into account in particular the grounds of the divorce and the circumstances and events arising after the marriage ends, in particular relationships outside the marriage and the children born of them, as well as the social desirability of legalising those unions.⁸⁹

In the jurisprudence of the Supreme Court, the view has become established that a refusal to consent to a divorce of an innocent spouse is a right and the exercise of this right cannot, in principle, be qualified as being contrary to the principles of social coexistence. Here, the jurisprudence adopts the construction of a presumption that anyone who exercises this right does so in a manner compatible with the principles of social coexistence (a presumption of compliance with the principles of social coexistence). Only the existence of special circumstances may speak in favour of rebutting that presumption and qualifying a certain behaviour as an abuse of the right, not deserving support from the point of view of the principles of social coexistence.⁹⁰ In this context, it has been held within the case law that a spouse who is solely responsible for the permanent and absolute breakdown of the parties' relationship and seeks divorce is obliged to prove facts that would provide sufficient grounds to assess that the lack of consent to the dissolution of marriage is morally reprehensible for reasons not worthy of social approval on the basis of an objective assessment made from the outside. At the same time, the fact that the innocent spouse exercises their statutory right not to

⁸⁷ This is rightly pointed out by R. DUBOWSKI: *Materialnoprawne przestanki rozwodu...*, p. 151.

⁸⁸ The principle of recrimination is analysed in more detail by K. KAMIŃSKA: "Zasada rekryminacji jako negatywna przesłanka rozwodu." *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 1 (2019), pp. 89 ff.

⁸⁹ See the judgment of the Supreme Court of 10 May 2000, III CKN 1032/99, OSNC No 7—8/2001, item 102.

⁹⁰ See the judgment of the Supreme Court of 26 October 2000, II CKN 956/99, MoP 2001, No 6, p. 352. Similarly the judgment of the Supreme Court of 17 May 1967, III CR 54/67, OSP 1968, No 3, item 57; the judgment of 7 December 1965, III CR 278/65, OSNC 1966, No 7—8, item 130; the judgment of the Supreme Court of 26 October 2000, II CKN 956/99, *Monitor Prawniczy* (2001), No 6, p. 352; the judgment of the Supreme Court of 26 February 2002, I CKN 305/01, Legalis No 76551.

consent to the divorce of the marriage requested by the spouse who is solely responsible for the breakdown of the marriage cannot be regarded in itself as contrary to the principles of social coexistence.⁹¹ However, the Supreme Court has held that a conflict of interest does not, as a general rule, arise where the spouse opposing the divorce is solely at fault for the breakdown of the marriage or where, in the case of joint fault, there are no grounds to assume that the spouse who seeks divorce is significantly more at fault.⁹²

Initially (immediately after the FGC entered into force), the jurisprudence exposed subjective elements from the perspective of moral principles when assessing a refusal to consent to divorce on the grounds of it being contrary to the principles of social coexistence. Within this line of jurisprudence, in principle, the only necessary condition for declaring a refusal as contrary to principles of social coexistence was a negative moral assessment of the motives driving the spouse refusing to consent to the divorce. This assessment was justified, for example, by not granting divorce, which takes the form of harassment, revenge or an attempt by the spouse to obtain some material benefit in exchange for the consent.⁹³ Significant weight was then given to ethical issues, including assessments of whether or not the motives for refusal merited moral condemnation. This line of interpretation significantly limited the court's ability to consider a refusal to consent to a divorce as contrary to the principles of social coexistence.⁹⁴

Subsequently, however, the jurisprudence began to move clearly towards the concept of an objective assessment of the behaviour of the spouse entitled to refuse divorce.⁹⁵ Nowadays, according to the predomi-

⁹¹ The judgment of the Court of Appeal in Krakow of 10 May 2016, I ACa 85/16, Legalis No 1470082.

⁹² Resolution of the full quorum of the Civil Chamber of the Supreme Court of 1 March 1968, III CZP 70/66, OSN 1968, No 5, item 77.

⁹³ See judgments of the Supreme Court of 18 August 1965, III CR 147/65, OSPiKA No 4/1966, item 93 and of 7 December 1965, III CR 278/65, OSNCP No 7—8/1966, item. 130); see also, most recently, the judgment of the Supreme Court in Katowice of 8 April 2019, I ACa 241/18, Legalis No 2259616, which stated that it is impossible to see harassment in the refusal to consent to divorce on the part of a wife betrayed and abandoned by her husband, who still subjectively believes that the parties' relationship can be reactivated. See also S. KALUS, M. HABDAS: *Family and Succession Law in Poland*. Alphen aan den Rijn 2016, p. 84, who also note that spouses who refuse to consent to divorce may do so out of revenge, harassment or personal gain, in the absence of rational and morally acceptable reasons for the refusal.

⁹⁴ K. KAMIŃSKA: "Zasada rekryminacji jako negatywna przesłanka rozwodu." *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 1 (2019), p. 100.

⁹⁵ See the judgment of the Supreme Court of 17 May 1967, III CR 54/67, OSPiKA No 3/1968, item 57, in which the court accepted that the assessment of the innocent

nant opinion of the jurisprudence, a negative moral qualification of the spouse does not necessarily have to be linked to considering a refusal to divorce as contrary to the rules of social coexistence. According to general arguments, a refusal to consent to a divorce may be dismissed as being contrary to the principles of social coexistence if, under certain circumstances, there are no grounds to assume that a divorce would produce undesirable socio-educational consequences. The most important argument is that the purpose of divorce is to eliminate the harm caused by maintaining a formal marriage when the marriage has broken down. The assessment of the effectiveness of the refusal to consent to divorce is made with reference to the causes of the marriage breakdown between the spouses and taking into account the situation that arose after that breakdown. The jurisprudence draws attention to the existence of extramarital relationships and the children born in them, as well as to the social desirability of legalising these relationships.⁹⁶ In this context, the Supreme Court pronounced a judgement that only specific circumstances justifying the advisability of legalising an informal relationship may justify the assessment that the refusal by the innocent spouse to grant the divorce is contrary to the principles of social coexistence.⁹⁷

Thus, in practice, subjective elements and strictly ethical criteria, such as feelings of harm demonstrated by the non-consenting spouse and children, have been given lesser importance. Instead, objective elements have been emphasised, above all the fact that the relationship between the parties has completely ceased, for instance, that the other spouse has left home, is in an informal relationship with another person and has broken off contact with the children, and that this state of affairs is permanent, so that there is no prospect of a return to cohabitation. The courts accept that, although the abandonment of a spouse is not accepted, it is — from a social point of view — difficult to approve the long-term existence of dead marital relationships that do not seem possible to be revived, espe-

spouse's refusal to consent to divorce, as referred to in Article 56 § 3 FGC, must be carried out first and foremost not in terms of the innocent spouse's subjective feeling, but to clarify whether there are objective grounds justifying this refusal in light of the principles of social coexistence. Crucial to this line of case law was the resolution of the full quorum of the Civil Chamber of the Supreme Court of 18 March 1968, III CZP 70/66, OSNCP No 5/1968, item 77 (namely the Guidelines of the Supreme Court of 1968).

⁹⁶ See the judgment of the Supreme Court of 27 October 1999, III CKN 412/98, unpublished.; the judgment of the Supreme Court of 10 May 2000, III CKN 1032/99, OSN 2001, nos 7—8, item. 102; the judgment of the Supreme Court of 28 February 2002, III CKN 545/00, Legalis No 59257.

⁹⁷ The judgment of the Supreme Court of 26 February 2002, I CKN 305/01, Legalis No 76551.

cially when one spouse has established a new informal relationship. The prevailing view is that the essence of the rules of social coexistence is that they are objective rules of conduct for assessing what deserves or does not deserve approval “from the point of view of the views of society, and not of the person concerned.”⁹⁸ The jurisprudence has endorsed the view that the assessment of the innocent spouse’s refusal to consent to grant a divorce should refer to evaluative norms of an objective nature, namely to “those observed by the morally sound part of society.”⁹⁹ At present, the courts assume that divorce is aimed at eliminating the harm that, from a social point of view, would be caused by maintaining formal marital ties when the marriage has already broken down irretrievably. In one of its judgements, the Supreme Court clearly expressed its disapproval of situations in which the spouse’s refusal to consent to divorce stems from their reluctance to legalise the other spouse’s *de facto* relationship with another person, without rational reasons justifying the need to protect the interest of the non-consenting spouse. The Supreme Court has taken the view that, when considering the refusal to consent to divorce, it is necessary to take into account the situation created from the point of view of the “social harm” caused by maintaining formal marriages that have no chance of actually functioning, while at the same time there are extramarital relationships that deserve to be legalised.¹⁰⁰

In this context, it is accepted in the case law that the grounds for refusing a divorce at the request of a spouse who is solely responsible for the breakdown of the family structure are socio-educational reasons that do not allow divorce to be pronounced when it could provide an incentive for the arbitrary breaking up of marriages¹⁰¹ or would lead to a disregard for family responsibilities (namely in relation to children¹⁰²).

⁹⁸ Guidelines of the Supreme Court of 1968, point IV.

⁹⁹ The judgment of the Supreme Court of 1 June 2000, I CKN 569/98, Legalis No 210849.

¹⁰⁰ Judgment of the Supreme Court — the Civil Law Chamber of 24 October 2000 V KCN 129/00, Legalis No 290146.

¹⁰¹ See judgment of the Court of Appeal in Białystok of 2 February 1995, I ACr 13/95, OSA 1997, No 4, item 22), which shared the view presented in the jurisprudence that a specific punishment imposed on a spouse who has wilfully broken off marital relations or disregarded family duties may be neither absolute nor indefinite.

¹⁰² Pursuant to Guidelines of the Supreme Court of 1968, point IV, the effectiveness of a refusal to consent to divorce on the grounds that it is contrary to the principles of social coexistence should not only be assessed on the basis of a comprehensive explanation and consideration of the circumstances of the innocent spouse, but should also take into account the situation of the children of the marriage, taking into account their living conditions, as well as the situation of individuals bound with the spouses.

Situations where there are no children from the marriage, or where the children are already independent, are assessed differently. A refusal to consent to a divorce under such circumstances, which leads to preventing the legalisation of a new harmonious relationship involving minor children (where their interests cannot be weighed against the equal interests of the children of the marriage) is, in principle, not justified by principles of social coexistence. On the other hand, if there are minor children in the marriage, the assessment of the effectiveness of the refusal to consent to divorce depends on a comparison between the position and living conditions of the innocent spouse and the children of the marriage, and the situation of the spouse at sole fault and their *de facto* family. Only the result of this comparison, taking into account other circumstances, in particular the duration of the marriage breakdown or the separation of the spouses, can provide an answer to the question whether the refusal to consent to divorce is compatible with the principles of social coexistence. It could be said that the assessment of a spouse's refusal to divorce concentrates less on the motives driving the innocent spouse and more on the presence or absence of negative consequences of the divorce. In other words, if the dissolution of marriage does not lead to undesirable socio-educational consequences, then divorce is permissible if its effects are judged to be positive, or at least neutral, and thus also approved in the moral perception of society.¹⁰³

Moreover, when considering the incompatibility of a refusal to consent to a divorce with the principles of social coexistence, the criterion of the duration of the marriage, on the one hand, is considered against the duration of the marriage breakdown, on the other. The jurisprudence assumes that the long-term existence of dead marital relationships without prospects of reconciliation should not be approved, especially when one of the spouses has established a new informal relationship.¹⁰⁴ For instance, in a judgement dated 21 November 2002,¹⁰⁵ the Supreme Court assumed that, even though the rights of the innocent party should be respected, this party's attitude (refusing to give consent to a divorce despite

¹⁰³ See R. DUBOWSKI: *Materialnoprawne przesłanki rozvodu...*, p. 199.

¹⁰⁴ See K. GROMEK: "Rozwód *de lege lata* i *de lege ferenda*." *Monitor Prawniczy* 2 (2004), theses 2—5 and literature quoted by the author.

¹⁰⁵ See the judgment of the Supreme Court of 21 November 2002, III CKN 665/00, Legalis No 58465. A different view was taken in the judgment of the Supreme Court of 26 February 2002, I CKN 305/01, Legalis No 76551; the judgment of 12 September 1975, III CR 226/75, unpublished.; the judgment of the Supreme Court of 18 August 1965, III CR 147/65, OSP 1966, No 4, item 93, with the glosses of S. SZER, and A. WOLTER: *Orzecznictwo Sądów Polskich* 4 (1966), item 93.

the extensive duration of the break down in their marriage¹⁰⁶) may raise doubts as to its compliance with the principles of social coexistence. In the opinion of the Supreme Court, the refusal to consent to a divorce aimed only at bringing an advantage over the spouse seeking the divorce and preventing the other spouse from legalising a new relationship, is not worthy of approval. It is contrary to the principles of social coexistence to refuse to consent to a divorce simply to create an obstacle to the legalisation of a *de facto* relationship of the other spouse, or in order to harass or take revenge on the other spouse. The case law also indicates that it is contrary to the principles of social coexistence to refuse to consent to a divorce where there is no emotional bond between the spouses, they have not been in contact for many years, and where one of the spouses seeks to formalise a relationship of several years with another person. The mere duration of the separation of the spouses is not considered to be a circumstance that, in light of Article 56 § 3 of the FGC, would allow the refusal of the innocent spouse to consent to divorce to be assessed as contrary to the principles of social coexistence. Nor does the prolonged separation of the spouses create any presumption that the innocent spouse refusing to consent to the divorce is motivated by a desire to harass the spouse at fault.¹⁰⁷

When assessing the incompatibility of the refusal to consent to divorce with the principles of social coexistence, the position of the jurisprudence concerning the religious grounds for such a refusal were established, especially in the 1990s. The courts were asked to assess a refusal to consent to divorce in the context of the religious convictions of the refusing spouse. In the reasoning of the judgment of 10 September 1997, the Supreme Court expressed the position that “the religious motivation of the other spouse, who is a believer and practicing person and cannot be reconciled with the divorce of a marriage concluded in a religious form, cannot be regarded as contrary to the principles of social coexistence.”¹⁰⁸ The Supreme Court did not share the view that the moral and religious motives for refusing to consent to a divorce should be considered contrary to the principles of social coexistence. The argument that a person who is

¹⁰⁶ In this case, the parties’ marriage lasted nearly four decades. The parties had raised and educated children who already have families of their own. The spouses had been separated for more than seven years due to the fault of the claimant.

¹⁰⁷ See the judgment of the Supreme Court of 18 August 1965, III CR 147/65, OSPiKA 1966, No 4, item 93; the judgment of the Supreme Court of 12 December 1975, III CR 226/75, unpublished; the judgment of the Court of Appeal in Lublin of 3 March 1999, I ACa 11/99, 1999, No 2, item 7; judgment of the Supreme Court of 26 February 2002, I CKN 305/01, Legalis No 76551.

¹⁰⁸ See judgment of the Supreme Court of 10 September 1997, II CKN 292/97, Legalis No 343289.

a believer and who got divorced through no fault of their own is not discriminated against in the exercise of their religious practices does not justify considering the refusal to consent to a divorce as contrary to the principles of social coexistence. The Supreme Court also ruled to this effect on 24 April 1997, stating that a spouse's refusal to consent to a divorce on religious grounds cannot be considered contrary to the principles of social coexistence.¹⁰⁹ A similar view was taken by the Court of Appeal in Gdansk in its judgment of 16 June 1999, stating that "a spouse's refusal to consent to a divorce on religious grounds cannot be considered contrary to the principles of social coexistence (Article 56 § 3 of the FGC)."¹¹⁰ The view has been expressed in the doctrine that, if consent to divorce is refused by a spouse, who requests a decree of separation,¹¹¹ justifying this decision on the basis of religious beliefs, such refusal cannot, as a general rule, be regarded as contrary to the principles of social coexistence.¹¹²

The jurisprudence has also outlined a position in which religious convictions did not lead to an effective refusal to consent to divorce. This is because the refusal was either deemed to be contrary to the principles of social coexistence or, despite the refusal being justified on religious grounds, in addition to other reasons for refusal, the religious grounds were not taken into account. This is what the Supreme Court stated in its judgment of 6 November 1998,¹¹³ adjudicating that "religious beliefs declared by the defendant may be important for her feelings but cannot result in excluding the application of the law." A similar assessment was made in the justification of the judgement dated 8 December 1999. The Supreme Court considered a plea by the defendant, claiming that a divorce judgement was morally and religiously unacceptable for her and would deprive her of the opportunity to practice as a religious education teacher in the future. The Provincial Court and the Court of Appeal accepted that refusal on religious grounds is contrary to principles of social coexistence. The Supreme Court declared in this case that the defendant's refusal to consent to the divorce on other grounds as being contrary to the prin-

¹⁰⁹ The judgment of the Supreme Court of 24 April 1997, II CKN 109/97, Legalis No 336017.

¹¹⁰ The judgment of the Court of Appeal in Gdansk of 16 June 1999, I ACa 290/99, Legalis No 52343.

¹¹¹ Separation was introduced into Polish law by the Act amending the Family and Guardianship Code, the Civil Code, the Civil Procedure Code and certain other acts of 21 May 1999. *Dziennik Ustaw* (Dz.U.) of 1999, No 52, item 532 (in force from 16 December 1999).

¹¹² See J. GAJDA, in: *Kodeks rodzinny i opiekuńczy. Komentarz*. Ed. K. PIETRZYKOWSKI. Warszawa 2012, p. 607; P. KASPRZYK: *Separacja prawna małżonków*. Lublin 2003, p. 203.

¹¹³ The judgment of the Supreme Court of 6 November 1998, III CKN 9/98, Legalis No 335205.

ciples of social coexistence. It found that the defendant's refusal to consent to the divorce "did not result from positive feelings, but was caused by the belief that divorce would be an undeserved reward for the claimant, and so is contrary to the principles of social coexistence."¹¹⁴ In line with this position, an assessment was expressed in the justification of the judgment of the Supreme Court of 26 May 2000¹¹⁵ (dismissing the cassation), in which the said court presented the assessment of the Provincial Court, accepted by the Court of Appeal, concerning a situation in which the spouses had no ties for nine years, apart from a negative and mutually hostile attitude. In this factual situation, the refusal to consent to the divorce, which was dictated by religious considerations and out of a fear that her financial situation would deteriorate, was judged by the courts to be contrary to the principles of social coexistence.

In the doctrine, the opinion that the negative features of the principle of recrimination expressed in Article 56 § 3 of the FGC outweigh the positive ones has become very strong. According to this opinion, de facto non-existent marriages cause social harm, as they prevent the legalisation of actually existing relationships and preserve the inconsistency between the legal and factual status. In addition, the existence of a "dead marriage" sustains conflict between spouses and a state of tension within the family, both the one with the spouse and the "new" one. It seems illusory to expect that the regulation contained in Article 56 § 3 of the FGC can prevent the violation of the obligations arising from marriage.¹¹⁶

It should be added that the interpretation of Article 56 § 3 of the FGC was also referred to by the European Court of Human Rights (ECHR) in the case of *Babiarz v. Poland*.¹¹⁷ In this case the applicant alleged that his right to respect for family life and his right to marry and start a family had been breached. In the case pending before the Polish court, the applicant's wife effectively refused to give consent to the divorce under Article 56 § 3 of the FGC. The applicant complained under Articles 8 and 12 of the Convention that, by refusing to grant him a divorce, the Polish authorities had prevented him from marrying the woman with whom he had been living. The ECHR considered that there had been no violation of the applicant's right to marry and that, in the circumstances of the

¹¹⁴ The judgment of the Supreme Court of 8 December 1999, II CKN 606/98, *Legalis* No 357729.

¹¹⁵ The judgment of the Supreme Court of 26 May 2000, I CKN 1139/99, *Legalis* No 278876.

¹¹⁶ See K. KAMIŃSKA: "Zasada rekryminacji jako negatywna przesłanka rozvodu." *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 1 (2019), p. 114 and the literature to which the author refers.

¹¹⁷ The ECHR judgment from 10 January 2017, ECHR 13, [2017] 2 FLR 613.

case, the positive obligations arising under Article 8 of the Convention did not impose on the Polish authorities a duty to accept the applicant's petition for divorce.¹¹⁸

5. Concluding remarks

The achievements of Polish jurisprudence concerning divorces, as well as the data of Statistics Poland (GUS) and the reports prepared within the framework of the Public Opinion Research Centre (CBOS) justify the statement that the refusal to adjudicate a divorce (including on the grounds of its incompatibility with the principles of social coexistence, or a spouse's refusal to grant a divorce being incompatible with these principles) may have constituted some kind of instrument of repression in the 20th century, when living in an informal relationship (cohabitation) was treated with a kind of social ostracism.¹¹⁹ Nowadays, on the other hand, informal relationships are widely accepted in society and this kind of sanction no longer has the repressive function it had when the Polish Family and Guardianship Code was enacted. At present, the number of divorce petitions dismissed on the grounds of sole fault of the spouse requesting a divorce, the refusal by the innocent spouse to consent to the divorce

¹¹⁸ See one of the two dissenting opinions of Judge Pinto Dealbuquerque, who states that, "[...] the Convention is a religion-friendly text, but it does not permit the state imposition of religious or moral values, even when they are shared by the majority of the population. The belief in the sanctity and religious indissolubility of the matrimonial bond, which many millions of Poles and many more millions of Europeans share, may not be imposed by state policy, namely by force of legislative or judicial policy. It could not be otherwise in contemporary, democratic societies, built upon the pillars of State neutrality and religious and moral pluralism." See also position of Judge Sajó, who says: "It might be morally reprehensible that the applicant left his wife after all that she had had to undergo and the conditions under which he left her, but denial of divorce cannot be a punishment for immorality. Of course, the law may determine adverse consequences for such behaviour, but these are unrelated to the possibility of divorce." He also believes that "[t]here is no evidence that the grave interference with the applicant's family life was necessary in a democratic society. Even if one applies a balancing approach the same conclusion is inevitable given that the domestic courts' perception borders on the arbitrary." Both opinions are annexed to the judgment (see footnote 117).

¹¹⁹ See data relating to the ratio of the total number of divorces in Poland to the number of grounds for divorce dismissed on the grounds of the sole fault of the spouse requesting divorce, the absence of consent of the innocent spouse and the incompatibility of his or her refusal is incompatible with the principles of social life R. DUBOWSKI: *Materialnoprawne przesłanki rozwodu...*, p. 207.

and the conflict of that refusal with the principles of social coexistence is insignificant in relation to the total number of divorces in Poland.¹²⁰ Data provided by Statistics Poland (GUS), along with the review of the case law, also illustrates that the specific sanction of Article 56 § 2 and 3 of the FGC is rarely applied. Considering the number of divorces¹²¹ (apart from cases where the petition for divorce was dismissed on other grounds), it should be noted that the sole fault of the spouse seeking divorce (linked to their conduct, which can be regarded as contrary to the principles of social coexistence) constitutes an obstacle to divorce only exceptionally. An analysis of the case law shows that even in the 1990s and until the mid-2020s, the regulation constituted an obstacle to the pronouncement of divorce only in rare cases.¹²² Over the past decade and a half, this regulation was used as the basis for a judgment incidentally.¹²³ Given the number of judgments, it is therefore difficult to confirm the thesis that the liberalisation of social views with regard to divorce, or cultural changes, in particular the more widespread social acceptance of informal relationships, have had a significant impact on making divorce easier to obtain through the interpretation of Article 56 § 2 and 3 of the FGC. These provisions do not constitute either a significant impediment or a special facilitation when divorce is pronounced, in view of the small scale of their use in divorce cases. As a general rule, a petition for divorce will be dismissed on grounds other than its being contrary to the principles of social coexistence. This is the case when, firstly, there are no positive grounds for the divorce, namely there is no permanent and complete breakdown of the marriage. Secondly, another of the negative grounds for divorce listed in Article 56 § 2 of the FGC has occurred, meaning that the welfare of the joint minor children of the spouses would suffer as a result. Similarly, the principle of recrimination in Article 56 § 3 of the FGC is now of marginal importance. Even if the regulations in question were much more widely applicable, the liberalisation of social and cultural norms in recent decades would not lead to an interpretation that would make it significantly more difficult to adjudicate a divorce. Opinion polls regarding socially acceptable behaviours (reflected in the general clauses)

¹²⁰ Ibidem.

¹²¹ According to the Central Statistical Office (GUS), 60687 divorces were adjudicated in 2021.

¹²² For example in 2014, out of 65,761 divorces, only 102 (no data available for 2015) actions were dismissed altogether on the grounds that the spouse requesting divorce was solely at fault, that the innocent spouse did not consent and that his or her refusal was not incompatible with the principles of social coexistence; according to a summary provided by R. DUBOWSKI: *Materialnoprawne przestanki rozwodu...*, p. 207.

¹²³ Based on the judgments available in the database Legalis.

undoubtedly lead to a liberal approach to divorce law in Poland. However, this has not so far been reflected in a liberalisation of the divorce provisions of the Polish Family and Guardianship Code in a direction that would support attempts to harmonise European family law.¹²⁴ With the current direction of social and cultural changes, a reversal of the tendency to liberalise divorce law should not be expected. Already in the 1980s, a correlation was generally observed between increasing number of divorces in societies with more liberal, secular, non-religious (especially non-Christian) living patterns. On the other hand, incidents of divorce decrease as the level of religious practice of the spouses increases.¹²⁵

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¹²⁴ See footnote 4.

¹²⁵ H. J. RASCHKE: "Divorce." In: *Handbook of Marriage and the Family*. Eds. M. B. SUSSMAN, S. K. STEINMETZ. Boston 1987, p. 606. R. BOGUSZEWSKI arrives at identical conclusions when analysing GUS data in his report for CBOS: "Raport — Stosunek Polaków do rozwodów...", p. 3.

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Importance des règles de la coexistence sociale lors du prononcé du divorce dans le contexte des changements culturels et sociaux — une perspective polonaise

Résumé

Les changements culturels et sociaux peuvent affecter la méthodologie d'interprétation et d'application du droit adoptée par les tribunaux à un moment donné, en particulier des dispositions impliquant des clauses générales. Ces clauses rendent le droit plus flexible et lui permettent de s'adapter aux conditions changeantes. Elles sont considérées comme une sorte de “soupape de sécurité” permettant d'éviter des solutions erronées, éthiquement et moralement inacceptables dans la société. Dans cette perspective, le présent article examine la signification de la clause générale des règles de coexistence sociale lors du prononcé du divorce du point de vue du droit polonais. L'objectif de cet article est de tenter de répondre à la question suivante : les changements qui peuvent être pris en compte par le biais de la clause générale de l'article 56 du code de la famille et de la tutelle affectent-ils, et dans quel sens, la dissolution du mariage par le divorce, c'est-à-dire entravent-ils ou, au contraire, n'entravent-ils pas la prononciation du divorce, lorsque les autres conditions préalables au divorce sont remplies ?

Mots-clés : divorce, taux de divorce, clause générale, principes de coexistence sociale, interprétation, droit de famille, contexte culturel et social

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L'importanza dei principi della convivenza sociale nella sentenza di divorzio nel contesto dei cambiamenti culturali e sociali: la prospettiva polacca

Sommario

I cambiamenti che si verificano nella cultura e nella società possono influenzare la metodologia di interpretazione e applicazione della legge, in particolare delle disposi-

zioni contenenti clausole generali, adottate dai tribunali in un dato momento. Queste clausole rendono la legge più flessibile, permettendole di adattarsi al mutare delle condizioni. Sono trattati come una sorta di “valvola di sicurezza” per evitare soluzioni ingiuste e inaccettabili eticamente e moralmente nella società. In questa prospettiva, l’articolo considera l’importanza della clausola generale dei principi della convivenza sociale nel pronunciare il divorzio dal punto di vista del diritto polacco. Lo scopo del presente articolo è il tentativo di rispondere alla domanda: se e in che direzione i cambiamenti che possono essere presi in considerazione tramite la clausola generale dell’art. 56 del Codice della famiglia e della tutela, incidono sullo scioglimento del matrimonio mediante divorzio, ossia ostacolano o, al contrario, non impediscono la pronuncia del divorzio quando sono soddisfatte le altre condizioni per il divorzio?

Parole chiave: divorzio, tassi di divorzio, clausola generale, principi di convivenza sociale, interpretazione, diritto di famiglia, contesto culturale e sociale