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Poland: Between Family and Foster Care

The origins of Polish childcare system: Unification and codification of family law in the years 1945–1964

The post-war era and the sovietisation of the law

In 1945, the legal system of substantive civil law in Poland was very complicated. Apart from the 1933 Code of Obligations, civil law had not yet been unified, despite the advanced work of the Codification Commission established in 1919. Therefore, partition laws were still in force in individual districts. With regards to family law, the draft matrimonial law developed in 1929 was particularly controversial. It was challenged by the Catholic Church due to the proposed optionality of civil weddings and the possibility of divorce. Completing the unification of civil law became the task of the new communist authorities. The problem was pressing due to migration and the change of state borders after the Second World War, and it was decided to carry out this process with haste. Informal unification work began in the spring of 1945 (Fiedorczyk, 2014, pp. 29–30).

By the Decree of the Presidium of the National Council of January 22, 1946 – Family Law entered into force on July 1, 1946. It was a complete unification of those sections of Polish civil law that regulated the relations between parents and children, the institution of adoption and the maintenance obligation between relatives. As Piotr Fiedorczyk (2014, p. 49) emphasises,

> This decree was given the not quite appropriate name of "family law," which, as we know today, encompasses all family relations. Thus, the terminology proposed by the Codification Commission in the Second Polish Republic, according to which the regulation of the discussed sections was to be called "the law on legal relations between parents and children," was not used. The current Family and Guardianship Code includes the discussed sections in Title II: Kinship …

Another legal act that was adopted as part of the unification of civil law and should be mentioned when discussing the origins of family law in Poland was the Decree of the Presidium of the National Council of May 14, 1946 – Guardianship Law, which introduced universal legal protection. According to its provisions, every child who was not under parental authority and every completely incapacitated person needed to have an appointed guardian. Contemporary legal literature greatly appreciated the decree's solutions concerning guardianship over a child conceived but not yet born, emphasising the modern approach to the premises justifying the establishment of this type of guardianship. While the provisions of the decree did not raise any interpretative doubts, its implementation created many problems. This was due to the fact that it required several dozen legal acts of the partitioning states to be repealed, and even the Ministry of Justice did not have full knowledge about some of them. After the new regulations had been in force for six months, it turned out that judges were still not acquainted with them, which meant that the principle of universal guardianship was not implemented.

The proposal to quickly undertake work on the codification of uniform civil law was first put forward in December 1946 by Minister Henryk Świątkowski.[1] In the legal community, however, opinions were voiced that a substantive amendment of the law contained in the Code of Obligations and the unification decrees would be premature and that changes should be limited only to technical aspects, i.e. the introduction of a systematic arrangement of the matter and the elimination of errors. In the years 1947–1949, intensive work was carried out on the creation of a Polish civil code, which was to complete the work of

[1] Henryk Świątkowski (1896–1970) – Polish lawyer, barrister and specialist in ecclesiastical and agricultural law, member of the academic staff of the University of Warsaw, Minister of Justice in the years 1945–1956.

unifying the law by combining previously issued decrees into a single legal act. Even though in February 1947, Minister Świątkowski issued a decree on the establishment of a committee for the organisation of a uniform Polish civil code, the work on the code was never completed, despite the preparation of highly rated drafts. This was due to political circumstances, i.e. the progressing dependence on the USSR and the phenomenon of the sovietisation of the law. For these reasons, the Family Code was the result of cooperation between Polish and Czechoslovak lawyers, which was undertaken after Minister Alexej Čepička's[2] visit to Warsaw in January 1949. At the meeting of the Presidium of the Polish-Czechoslovak Permanent Legal Committee on January 22 of the same year, attended by the Ministers of Justice of both countries, it was agreed that the text of the common Family Code would be drafted in just six weeks. It is noteworthy that after the communist coup d'état in Czechoslovakia in 1948, extensive Polish-Czechoslovak cooperation was established in many areas of political, social and economic life as part of an "imposed friendship."

It should be pointed out that the Czechoslovak draft of the code did not include such an important premise for divorce as the welfare of minor children, which was present in the Polish draft. In turn, the Polish draft did not introduce the institution of extension of parental authority but, in addition to the institution of termination of parental authority, provided for the possibility of its suspension, which was absent from the Czechoslovak code. As for the premise of the welfare of minor children, it should be emphasised that the Czechoslovak side indicated during the course of the work that the public opinion in their country would see this provision as an impediment to divorce, which would consequently lead to the indissolubility of marriage. Meanwhile, the Polish side stressed that the protection of "child's welfare" was a demand of women's organisations. It was assumed, therefore, that the equivalent of the Polish suspension of parental authority would be the temporary withdrawal of parental authority provided for in the Czechoslovak code. The Polish side also agreed, in the course of further work, to include the following provision in the draft: "Parents are

[2] Alexej Čepička (1910–1990) – Czechoslovak politician and army general, Minister of Justice in the years 1948–1950 and Minister of National Defence in the years 1950–1956.

obligated to take care of the physical and spiritual development of their children. In particular, they should strive to maintain and educate them so that they are properly prepared to work for the good of society in accordance with their talents and inclinations." In addition, a review of the provisions of the two drafts regarding the rights and responsibilities of parents towards their children revealed no major discrepancies. Finally, work on the joint text was completed after three months on April 29, 1949, and continued separately thereafter. Due to the need to amend other provisions, including the Civil Code, and adopt provisions introducing the Family Code, the Council of Ministers did not pass the draft Family Code until March 3, 1950.

Family law and the Constitution of the Polish People's Republic

The Family Code was the first code of the Polish People's Republic and was enacted more than two years before the passing of its Constitution,[3] which was to indicate the basic principles of family law. The provisions of the Basic Law directly relating to family law were contained in Chapter VII on the fundamental rights and duties of citizens. The laws concerning family were primarily social in nature. Of fundamental importance was Article 67(1) of the Constitution, according to which "Marriage and the family are under the care and protection of the Polish People's Republic. Families with many offspring are to be given special care by the state." The adoption of the Family Code was a breakthrough in the field of Polish family law, although it was assessed differently by specialists. As Fiedorczyk notes, positive opinions come from the period immediately following the codification, while its shortcomings were emphasised later. It was pointed out that the generality of its provisions – resulting from the need to unify the text with Czechoslovakia – made it necessary to supplement them with judicial decisions. However, the drafting of the Code also had the very positive effect of producing important monographs on family law that built on the content of the Code and called attention to its shortcomings. These publications

[3] Constitution of the Polish People's Republic passed by the Legislative Assembly on July 22, 1952 (Journal of Laws of 1952 No. 33 item 232).

contributed significantly to the development of family law doctrine and further amendments to the Code.

Family law and the 1956 October events

The development of family law in Poland was also influenced by the so-called Polish October 1956 when the Codification Commission of the Minister of Justice began its work. It was tasked with, among others, drawing up a civil code. Aleksander Wolter,[4] the author of the project, suggested a change in the formulation of the premise of the welfare of minor children. According to his proposal, a divorce could be pronounced if the child's welfare required it, whereas the existing Code of 1950 provided that the child's welfare could not be affected. The purpose of this proposal (as well as several others) was to make it more difficult to obtain a divorce. The revision of Wolter's draft was prepared by Seweryn Szer,[5] who submitted the prepared document to the Codification Commission on November 6, 1957. In his paper, he defended the existing solutions, in particular pointing out that statistical data did not confirm the need for stricter divorce laws. Szer stressed that socialist law should maintain a balance between the principle of the permanence of marriage and the principle of the permissibility of divorce in socially justified situations, the negation of which would be the artificial, forced maintenance of a marriage between two people when the union had become a sham. As a result of further work and discussions, the above-mentioned wording of the negative premise for divorce in the form of the welfare of minor children was maintained in the wording of Article 29(1) of the Code.

The proposed Article 83 was amended to read:

> In a judgement pronouncing a divorce, the court, taking into account the best interests of the child, shall entrust the exercise of parental authority to one of the parents, shall determine the powers of the other parent in relation to the person of the child, in particular with respect

[4] Aleksander Wolter (1905–1967) – Polish lawyer, specialist in civil law, Supreme Court judge from 1948 to 1951.

[5] Seweryn Szer (1902–1968) – Polish lawyer, professor of law, a specialist in civil law. From 1945 to 1953, he was employed at the Ministry of Justice, among others as a Deputy Director of the Department of Legislation.

> to the supervision of the child's upbringing and maintaining personal relations with the child, and shall decide to what extent each parent is obliged to bear the costs of the child's upbringing and maintenance.

It is worth noting that Article 85 of the draft provided for the possibility of amending the ruling on the suspension and termination of parental authority in the event of a change in circumstances if the best interests of the child so required. The proposed Article 122 of the draft, which was an expansion of Article 56(2) of the Family Code, was adopted without amendments. According to Paragraph 1, if one of the parents was deceased, did not have full legal capacity, had been deprived of parental authority, or had had his or her parental authority suspended, parental authority was vested in the other parent. The same applied when paternity had not been established or had been established by the court, but the parental authority had not been granted to the father. The next paragraph indicated that if neither parent had parental authority or if the parents were unknown, custody of the child should be established.

Article 124 of the draft did not raise controversy during the work. According to it, parents were obligated to bring up the child under their parental authority, care for his or her physical and spiritual development and prepare him or her properly to work for the good of society in accordance with his or her talents. There was some discussion, however, about the proposed wording of Article 125 of the draft, which provided that a child under parental authority owed obedience to his or her parents and that the parents could discipline the child if proper upbringing required it but without detriment to the child's physical and moral health. A similar provision was contained in the Family Law Decree of 1946, but it was not included in the Family Code of 1950 due to opposition from the Czechoslovak side. After a vote by the Commission, the wording of proposed Article 125 was retained, although Jan Wasilkowski[6] submitted a dissenting vote.

Similarly uncontroversial was Article 134 of the draft. According to it, if parental authority was vested in both parents who were not married, the guardianship authority could – taking into account the

[6] Jan Wasilkowski (1898–1977) – Polish lawyer, politician, rector of the University of Warsaw (1949–1952), the First President of the Supreme Court (1956–1967).

best interests of the child and the public interest – entrust its exercise to one of them, specifying at the same time the rights of the other parent in relation to the child, in particular, with respect to supervising his or her upbringing and maintaining personal relations with him or her. As a result of the Commission's work, Paragraph 2 was added to this provision, stating that it was to be applied mutatis mutandis if the married parents were separated.

The Commission also adopted the provision on the suspension of parental authority in the event of a temporary obstacle, which was governed by Article 135 of the draft, but amended the next article, which regulated the institution of termination of parental authority. It read as follows:

> If parental authority cannot be exercised due to a permanent obstacle, or if the parents abuse parental authority or grossly neglect their duties towards the child, the guardianship authority shall deprive the parents of parental authority. Deprivation of parental authority may also be pronounced against one of the parents. The court may also terminate parental authority in a judgment declaring a divorce or annulling a marriage. If the reason that gave rise to the termination of parental authority ceases to exist, the guardianship authority may restore parental authority.

The provisions for the deprivation of parental authority were thus greatly expanded compared to the law in effect at the time.

Finally, Article 137 of the draft stated (following the model of the existing Article 63 of the Code) that if the child's welfare so required, the guardianship authority could prohibit parents who were deprived of parental authority from having personal contact with the child.

The adoption of the Civil Code in 1959 and its separation from the Family Code

In the spring of 1959, work on the preliminary reading of the Civil Code was completed, and the Chairman of the Commission, Wasilkowski, argued for family law to be included in it. The draft Civil Code was passed on September 12, 1959. In turn, in December of that year, the organisation and procedures of the Commission were changed, which

facilitated public discussion after the first reading of the adopted draft. The second reading of the draft lasted from March to May 1960, during which time only one systematic comment was made on Book IV. The third reading of the draft Civil Code took place between October 1960 and May 1961. In the course of this work, it was decided in December 1960 to exclude family law from the Civil Code and to codify it separately. It should be noted that as part of the work carried out during the third reading, the proposed provision in Book IV concerning the right of parents to discipline children was removed, which had also been postulated in the public discussion of the draft. On the other hand, with regard to the issuing of appropriate orders by the guardianship court, the phrase "if the parents do not exercise parental authority properly" was replaced with "if the child's welfare is endangered by the improper exercise of parental authority." It should be noted, however, that the Commission did not choose to introduce anonymous consent for adoption, which was advocated by social organisations and the Supreme Court.

Government work on the draft Family and Guardianship Code

In a letter dated July 31, 1961, the Chairman of the Commission forwarded to the Minister of Justice the final draft of the Family and Guardianship Code (FGC), together with an explanatory memorandum and draft derivative provisions. Government work slowed down in mid-1962 because work on the six times more extensive Civil Code had to be completed. It was decided that both these drafts should be considered simultaneously by the Council of Ministers and referred to the Sejm (the lower chamber of the Polish Parliament). Particularly noteworthy at this stage of work was the introduction to the FGC of a reference to the possibility of placing a child in a foster family, which marked the beginning of the statutory empowerment of this institution. At the same time, however, as emphasised by Fiedorczyk, in the wording of Articles 149(3) and 150 FGC, the possibility of establishing institutional custody was introduced. The provision of Article 150 FGC remained a dead letter; it was repealed only in 2008, and the wording of Article 149 FGC was amended accordingly. As a result of many discussions and several years of work, the government bill on the Family and Guardianship

Code and introductory provisions to the Family and Guardianship Code were adopted at the plenary session of the Sejm on February 25, 1964.

The creation of the Family and Guardianship Code was made possible by the 1956/1957 decision to incorporate family law into the Civil Code. Without it, and if a draft book containing family law had not been drafted, the legislators would probably have been content to amend the existing Code. The FGC was thoroughly revised in 1989 following the collapse of the communist system and the departure from socialist ideology. Moreover, it has seen more than a dozen amendments between 1985 and 2017, and it is believed that the current version of the Code is, in fact, an entirely new regulation.

Legal considerations of child custody under current law

Polish Constitution

The protection of the child's welfare is a fundamental principle of family law under Article 72 of the Constitution of the Republic of Poland, according to which "The Republic of Poland shall ensure the protection of the rights of the child. Everyone has the right to demand that the public authorities protect the child against violence, cruelty, exploitation and demoralisation." This principle is also sanctioned in Article 48 of the Constitution, which formulates the principle of family protection. The family, family life and the right to raise children in accordance with one's beliefs are therefore values subject to constitutional protection. Article 48(2) of the Constitution allows for the limitation or termination of parental rights only in cases specified by law and only on the basis of a final court decision. The legislator gives high priority to the protection of the family and the welfare of the child, providing in Article 72 certain measures for its implementation (Smyczyński, 2005, p. 45). This provision imposes an obligation on the state to ensure the protection of the rights of the child, guarantees the right to care and assistance by public authorities to a child deprived of parental care and shapes the state's obligation to protect the child from violence, cruelty, exploitation and demoralisation, as well as the obligation of public authorities and persons responsible for the child to hear and, as far as possible, take into

account the opinion of the child when determining his or her rights. In the current legal system, the state's obligation to guarantee care for the child when, for various reasons, it is not provided by the parents is realised in an appropriately chosen form of foster care – family or institutional (Resolution of the Supreme Court of November 14, 2014, Ref. III CZP 65/14). In turn, according to Article 40 of the Constitution, no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. Corporal punishment is prohibited.

The principle of the child's welfare in the Family and Guardianship Code

The principle of the child's welfare is concretised in the provisions of the Act of February 25, 1964 – Family and Guardianship Code (FGC) and the Act of November 17, 1964 – Code of Civil Procedure (CCP), to the extent to which they regulate separate proceedings in matrimonial matters and matters of relations between parents and children, as well as non-litigious proceedings in family and guardianship law cases. Attention should also be paid to the provisions of the Act of June 9, 2011, on Family Support and the Foster Care System (FSFCSA) and the Act of July 29, 2005, on Counteracting Domestic Violence (CDVA).

The Family and Guardianship Code is the primary source of family law in Poland. It was adopted to expand and complete the regulation of family law in relation to the 1950 Family Code, in view of its many shortcomings and the proliferation of case law. Its enactment was also the final stage in the unification of Polish family law in the post-war period. The Code consists of titles, sections, chapters and subchapters. The concept of "child's welfare" is mentioned several times in its provisions, i.e. in Articles 58(1) and (1a), 61^{16}, 86, 93(2), 95(2) and (3), 96(2), 106, 107(1) and (2), 109(1), 112^{3}(1), 113^{2}(1), 113^{5}, and 120. In addition, the Code uses the concept of "welfare of common minor children" in the wording of Articles 56 and 61^{1}. Finally, the concept of "child's welfare" appears in the provisions of the Code of Civil Procedure and the Law on the System of Common Courts. Nevertheless, an analysis of the FGC shows that, in particular, the provisions of the entire Title II "Kinship" are intended to guarantee an order that protects the welfare of the child. In this Title, Section Ia regulates issues such as the parentage of the child (Chapter I), relations between parents and