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Monetary compensation for marital infidelity and damages resulting therefrom in comparative perspective

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Abstract: The way the law regulates marriage and marital relations stems, at least to a certain extent, from the common beliefs of the society concerning these issues. The same can be said of the law of torts, whose norms arise from the social convictions regarding who and to what extent shall bear certain damages, including the fundamental issue of whether such damages should be subject to compensation at all or should they be incurred by the (at least allegedly) injured party. This paper aims to present a brief comparative analysis of the admissibility of seeking monetary compensation for marital infidelity in legal systems close to Poland (German, Austrian), as well as in common law systems, and then present the possible legal grounds for such claims under Polish law, *acquis* of case-law and legal academics, namely — the claims related to the infringement of personal rights (Article 23, 24 and 448 of the Polish Civil Code). The Polish approach is discussed in the context of a recent landmark Polish Supreme Court decision, where it has been ruled that the abovementioned provisions cannot be construed as to provide monetary relief for non-material damages suffered by betrayed spouses. The authors employ legal comparative and historical methods, supplanted by formal-dogmatic ones, to describe and show the evolution of the law concerning monetary liability for marital infidelity, in light of the statutory law and jurisprudence of Poland.

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Pieniężne zadośćuczynienie za krzywdę spowodowaną przez niewierność małżeńską — perspektywa komparatystyczna

Abstrakt: Sposób, w jaki prawo reguluje małżeństwo i relacje między małżonkami, jest silnie zakorzeniony w powszechnych osądach moralnych dotyczących tych kwestii. Podobnie rzecz się ma z wynagrodzeniem szkody, w którego wypadku zasadniczą rolę odgrywa społeczne przekonanie co do tego, kto, czy i w jakim stopniu powinien ponosić odpowiedzialność za jej wyrządzenie. Niniejszy artykuł ma na celu ukazanie możliwości dochodzenia pieniężnej rekompensaty za niewierność małżeńską w perspektywie komparatystycznej, analizując pokrótce możliwości istniejące w tym zakresie zarówno w systemach bliskich polskiemu (niemiecki, austriacki), jak i w systemach *common law*. W dalszej kolejności prezentowane są potencjalne prawne podstawy dla tego rodzaju roszczeń w prawie polskim, mając na uwadze tezy doktryny i orzecznictwa, w szczególności na gruncie przepisów o ochronie dóbr osobistych (art. 23, 24 i 448 k.c.). Autorzy odnoszą się zwłaszcza do niedawnego wyroku Sądu Najwyższego wyłączającego zastosowanie przepisów o ochronie dóbr osobistych do konstruowania roszczenia o zadośćuczynienie za krzywdę wyrządzoną zdradą małżeńską. Autorzy używają metod komparatystycznej i historycznej, wspartych analizą dogmatyczną, by ukazać różnorodność i ewolucję norm dotyczących majątkowej odpowiedzialności za zdradę małżeńską, w szczególności w świetle polskiego prawa i orzecznictwa.

1. Introduction

In recent years the issue of monetary compensation for non-material damages has been dynamically developing in Polish law — both in terms of academic interest, as well as the volume of actions brought in courts and amounts awarded subsequently. Discussing the numerous, complex and intriguing dogmatic problems related thereto falls beyond the scope of this article.¹ The authors intend, however, to focus on one specific issue that sparks lively debates and is a subject of controversies both in case-law as well as between legal academics, in the microcosm of Polish civil law and beyond — namely, the admissibility of constructing a civil claim for monetary compensation for non-material damages (i.e., physical and psychological suffering) arising from marital infidelity, adultery or, to put it more broadly, for causing the dissolution of marriage.

The perception of this issue varies significantly in different jurisdictions and has evolved considerably due to the privatization of family law over the last two centuries.² The change of the socio-legal paradigm, especially with respect to criminal law, has fundamentally changed the attitude of lawmakers toward (im-)moral behavior

¹ Among the abundant literature of the subject, Readers should pay particular attention to: A. Szpunar, *Zadośćuczynienie pieniężne za szkodę niemajątkową*, Bydgoszcz 1999; M. Sekuła, “Problematyka odszkodowania pieniężnego za szkodę niemajątkową,” *Radca Prawny* 2008, no. 2, pp. 17 ff.; J. Matys, *Model odszkodowania pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym*, Warszawa 2010.

² See A. Gulczyński, “Cywilnoprawne skutki cudzołóstwa na ziemiach polskich w XIX i XX wieku,” *Studia z Dziejów Państwa i Prawa Polskiego* 2002, no. 7, pp. 235–255.

and intimate relationships.³ Adultery — understood narrowly as extramarital sex (i.e., where at least one of the partaking persons is married, not in a religious sense, where due to neither of the parties being in a conjugal relationship their relationship is frowned upon) — has always, up until the 20th century, been treated in European civilization, based on Christianity, as a morally reprehensible and socially harmful act, and as such — had been classified as a criminal offence.⁴

In most Western European societies, adultery had been a criminal act until the second half of the 20th century. For instance, in Italy it had been so until 1969, in France until 1975, in Spain until 1978, in Switzerland until 1989 and in Austria until 1997. In the United States, the classification of adultery in a criminal context remains a matter of state law; presently (early 2019) adultery laws remain in force in 19 states.⁵ In England and Wales, adultery was the only admissible grounds for divorce until 1937.⁶

This paper aims to present a brief comparative analysis of the admissibility of seeking monetary compensation for marital infidelity in legal systems close to Poland (German, Austrian), as well as in other legal cultures stemming from the common European root, where a possibility of claiming monetary compensation for marital infidelity exists (common law systems). Developing on this discussion and Polish law, the authors will try to answer the question whether in Polish law pursuing such claims has (or could have) legal grounds.

2. Common law

In common law a whole range of remedies furthering the non-material interests of the betrayed spouse have been developed.⁷ Given the evolutionary nature of the legal system based on the *stare decisis* principle, such a development may be considered a sign of a long-running, generally socially accepted belief that there exist fair reasons to award financial compensation for non-material damages related to marital infidelity.

In Anglo-American law, adultery was also a tort known as *criminal conversation*;⁸ it was the basis for a husband's claim against the lover for the breach of

³ See K. Banasik, "Bigamia w polskim prawie karnym," *Prokuratura i Prawo* 2010, no. 9, pp. 58–77.

⁴ See H. Brook, *Conjugal Rites: Marriage and Marriage-Like Relationships Before the Law*, New York 2007, particularly Chapter 4. "Union: Adultery and other sexual performatives" (pp. 69–95).

⁵ *U.S.A. Laws on Infidelity and Adultery*, <https://infidelityrecoveryinstitute.com/u-s-a-laws-on-infidelity-and-adultery/> (accessed: 8.05.2019).

⁶ Till the Matrimonial Causes Act 1937 was passed, adding to the catalogue of grounds for divorce, the following: unlawful desertion for two years or more, cruelty, and incurable insanity, incest or sodomy

⁷ See J.D. Weinstein, "Adultery, law, and the state: A history," *Hastings Law Journal* 38, 1986, pp. 195 ff.

⁸ Conversation in this case should be understood as an archaic euphemism for sexual intercourse; see <https://www.collinsdictionary.com/dictionary/english/conversation> (accessed: 8.05.2019).

fidelity of the plaintiff and his wife; originally only a husband was entitled to pursue such claims, and only against the third party in extramarital relations (i.e., the wife's lover).⁹ In England, such actions were widespread in the 18th and 19th centuries, arousing widespread public interest, also due to the often unusually high amounts of compensation awarded.¹⁰ In England and Wales the tort was abolished in 1857, in Ireland, however, as late as in 1981. In the 20th century, the tort in question has been abolished in most U.S. states by statute or precedent. Nowadays, *criminal conversation* trials in North Carolina are particularly high-profile.¹¹

In common law, it is not only adultery that is treated as a tort; there are numerous *actions* that give rise to claims for monetary compensation for non-material harm caused both by physical spousal infidelity as well as the breaking of marriage ties. These include *alienation of affections*, which is the basis for monetary compensation claims encompassing damages to the spouses' feelings, usually leading to divorce.¹² A similar tort is the *breach of promise*, which involves a man breaking off his engagement, which in turn gives rise to a claim for monetary compensation in the form of *heart balm*.¹³

3. German law

The admissibility of pursuing financial compensation for moral damages for adultery or abandonment is not an exclusive invention of common law systems. Legal provisions regulating this matter exist (or have existed until only recently) also in civil (continental) law. German law is a particularly interesting example as a system both geographically and historically very close to Polish law.

The German Civil Code of 1900 (BGB), still in force today,¹⁴ addresses the issue of engagement (*Verlöbnis*) in the primary provisions of its Book 4 (generally covering family law). There exists a particular law (§ 1298 BGB) providing for the possibility of seeking compensation for revoking the engagement (i.e., an institution similar to the Anglo-American *heart balm*); another provision (§ 1301 BGB) pertains to the return of property given as a present or as a sign of the engagement, under the provisions on the return of unjust enrichment.

⁹ *Criminal Conversation*, Black's Law Dictionary (9th ed., 2009), p. 430; see also Ł. Jaroszewski, "Prawo rodzinne. Zadośćuczynienie za zdradę małżeńską," <http://ljlegal.pl/prawo-rodzinne-zadoścuczynienie-za-zdrade-malzenska/> (accessed: 8.05.2019).

¹⁰ B. Overton, *Fictions of Female Adultery, 1684–1890: Theories and Circumtexts*, Basingstoke 2002, p. 127.

¹¹ See e.g. <https://abcnews.go.com/GMA/Business/wife-wins-million-husbands-alleged-mistress/story?id=10177637> (accessed: 8.05.2019).

¹² H. Hunter Brunton, "The questionable constitutionality of curtailing cuckolding: Alienation of affection and criminal conversation torts," *Duke Law Journal* 65, 2016, pp. 759 ff.

¹³ "Heart Balm Acts," [in:] *West's Encyclopedia of American Law*, 2nd ed., 2008, <http://legal-dictionary.thefreedictionary.com/Heart+Balm+Acts> (accessed: 8.05.2019).

¹⁴ *Bürgerliches Gesetzbuch*, Act of 18.08.1896 (RGBl. S. 195).

With respect to the subject matter of this article, the content of § 1300 BGB, which has since been abolished, is particularly interesting. It provided an action for the so-called *Kranzgeld* (literally *wreath money*), i.e., monetary compensation for the “loss of innocence.”¹⁵ It applied in cases where a woman (but only an *unbescholtene* one, i.e., one enjoying a good reputation) decided to have intercourse with her fiancé and then the engagement was broken. The provision in question concerned a problem other than infidelity or adultery, but touched upon a related situation; it provided for monetary compensation in connection with a *sui generis* tort, whose result was the disgrace of a woman, facilitating her humiliation in public opinion and a significant deterioration of her prospects (especially her matrimonial prospects) in future. Characteristically, there is no provision for a similar possibility in the event of the abandonment of the spouse.

In the newly-created communist German Democratic Republic, § 1298 BGB was abolished as early as 1952, when it was declared unconstitutional. It should not be deemed controversial to observe that such a provision is hardly compatible with the customs and morality of modern Western Europe either. In the second half of the 20th century, German case-law gradually narrowed down the admissibility of awarding *Kranzgeld*; it was also claimed that this provision blatantly violated Article 3 of the 1949 Constitution¹⁶ by granting the right to claim compensation only to a woman. It was on that basis that the district court (*Amtsgericht*) of Münster dismissed the action for *Kranzgeld*¹⁷ in 1993; the constitutional complaint (*Verfassungsbeschwerde*) to VfGH against that decision was dismissed,¹⁸ which completed the de facto elimination of § 1300 BGB from the law.

The German legislature ultimately abolished the possibility of awarding *Kranzgeld* with a major family reform law on 4 May 1998.¹⁹ Nowadays, hence — just like in Poland — German law may only allow for a compensation claim to be pursued further to the general provisions of the law. However, this does not seem realistic, given that the unconstitutionality of a claim was the reason for the deletion of the provision from BGB.

German jurisprudence also states that compensation for abandonment, adultery or marital infidelity is not permissible under the general provisions of the law.²⁰

¹⁵ See “Kranzgeld,” [in:] *Rechtslexikon.net*, <http://www.rechtslexikon.net/d/kranzgeld/kranzgeld.htm> (accessed: 8.05.2019).

¹⁶ *Grundgesetz für die Bundesrepublik Deutschland (GG)* of 23.05.1949 (BGBl. S. 1).

¹⁷ Judgment of 8.12.1992, AZ. 50 C 628/92.

¹⁸ Order of the Chamber of 5 February 1993, AZ. 1 BvR 39/93, FamRZ 1993, 662.

¹⁹ *Gesetz zur Neuordnung des Eheschließungsrechts (Eheschließungsrechtsgesetz — Eheschließungsrechtsgesetz)*, Bundesgesetzblatt No. 25 from 8.05.1998.

²⁰ The wording of § 253 BGB, which limits the possibility to seek compensation for non-material damage (*immaterieller Schaden*) in situations which are not provided for in the law and which do not relate to personal injury, health or freedom (including sexual), is also opposed to this.

The repeal of § 1300 BGB thus seems to have removed the only existing possibility of pursuing such claims under German law.

4. Austrian law

Austrian law, fundamentally based on the Austrian Civil Code of 1811 — ABGB,²¹ is a system close to both German and Polish law. In contrast to German law, ABGB has nowhere and never explicitly provided for a possibility of seeking monetary compensation for harm caused by marital infidelity, adultery or abandonment.

The issue of monetary compensation for marital infidelity has, however, been dealt with in the case law of the Austrian Supreme Court — OGH.²² In the precedential judgment of 20 February 2003 (Case No 6 Ob 124/02g),²³ OGH ruled out such a possibility by dismissing the arguments of the appellant, who had based his claim on § 90 and § 1325 of the ABGB.²⁴ However, the Court found that “A spouse who becomes aware of their spouse’s infidelity has the opportunity to revoke the marriage and, thus, the suffering caused by the unfaithful [spouse] and the humiliation associated with it;”²⁵ it was stressed that such a decision is also in line with the case law of the German BGH.²⁶

In the judgment of 12 April 2011 (case no. 4 Ob 8/11x)²⁷ OGH granted monetary compensation for the non-material damage suffered by a betrayed spouse, against whom the ex-wife had biased their common children. As a result, the children no longer wanted to see their father, who had inevitably lost touch with them. It was this decision that another appellant relied on in a case brought before the OGH shortly thereafter (judgment of 1 August 2012 case no. 1 Ob 134/12f),²⁸ where the appellant demanded direct monetary compensation for marital infidelity. However, the court found that the analogy drawn by the applicant was too far-fetched, as the spousal relationship cannot be equated with that between parent and a child.

²¹ *Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie*, JGS Nr. 946/1811.

²² *Oberste Gerichtshof*, the Austrian equivalent of the Supreme Court.

²³ Full text of the judgment: https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JIT_20030220_OGH0002_0060OB00124_02G0000_000 (accessed: 8.05.2019).

²⁴ Provisions concerning, respectively, mutual obligations of the spouses and compensation for wide-ranging personal injury (*Körperverletzung*).

²⁵ “Der Ehepartner, der von einer Eheverfehlung des anderen erfährt, hat es in der Hand, die Ehe und damit den Leidenszustand, der durch die Untreue des anderen und die damit verbundenen Demütigungen hervorgerufen wird, zu beenden”; own translation.

²⁶ *Bundesgerichtshof*, Federal Court of Justice; Supreme Court of Germany.

²⁷ Full text of the judgment: https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JIT_20110412_OGH0002_0040OB00008_11X0000_000 (accessed: 8.05.2019).

²⁸ Full text of the judgment: https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JIT_20120801_OGH0002_0010OB00134_12F0000_000 (accessed: 8.05.2019).

As a result, Austrian law now considers inadmissible a claim for monetary compensation of damage caused by adultery.²⁹ It is worth noting, however, that this inadmissibility of compensation does not derive from the ABGB rules, but rather from case-law, which may, moreover, have its origins in the restrictive treatment of non-material damage, which is characteristic of the Austrian legal tradition.³⁰

5. Contemporary Polish law

5.1. Possible grounds for liability

Polish jurisprudence and legal academia perceive marriage as an institution of outstanding social significance, the basis of the family in the sociological sense, which in turn is the basis of an elementary social order. This is also reflected in the legal system. The Polish law of marriage is built upon the notion of marriage's permanence,³¹ and creates instruments for the protection of this permanence and of the marriage as such.³²

In light of the³³ previous considerations, taking into account the fact the Polish law is rooted and stems from European legal culture, the matter at hand being temporarily regulated in a similar manner would not seem odd, but, given the changes to morality and sexual customs in Europe, neither seems the recent evolution of Polish law.

Polish law enumerates the positive obligations of the spouses (to cohabit, to assist and help each other, to remain faithful, to cooperate for the benefit of the family

²⁹ M. Streitmayer, *Ehebruch und Schadenersatz*, Graz 2011, p. 69.

³⁰ On the basis of the original 1811 version of ABGB, the granting of compensation for non-material damage was regarded as an exception, admissible only in situations exhaustively listed in the law.

³¹ About permanence as a defining element of marriage, see K. Gromek, [in:] K. Gromek (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Legalis/el. 2018, remarks on Article 1, marginal number 2.

³² For example, one can mention here: the legal prerequisites for divorce and separation, characterized by the requirement of an objective element (thus differing from a purely volitional concept of divorce), procedural aspects of divorce and separation proceedings, which are built upon the concept of far-reaching judicial verification of that the prerequisites for divorce or separation exist, obligatory court hearing with obligatory interrogation of the parties (Article 432 clause 1 of the Polish Code of Civil Procedure [CCP, Act of 17.11.1964, consolidated text: Journal of Laws of the Republic of Poland of 2018 item 1360 as amended], admissibility of sending the parties to forced mediation (Article 436 § 1 CCP), the option for the court to order a stay of proceedings at the court's discretion if the court is convinced that there are prospects for the marriage (Article 440 § 1 CCP).

³³ Another example of statutory regulation of liability for the breakdown of marriage (often resulting from infidelity) was Article 27 § 1 of the Family Code of 1950 (Act of 27.06.1950, Journal of Laws of the Polish People's Republic of 1950, No. 34, item 308 as amended), pursuant to which the spouse responsible for the divorce could have been deprived, at the request of the other spouse, of his or her share of the joint property, in whole or in part, if he or she contributed to it only slightly or not at all.

formed by their union; Article 23 clause 2 of the Polish Family and Guardianship Code³⁴). The duty of fidelity being anchored in the law places marital infidelity in the class of unlawful behaviors.³⁵ However, there is no clear legal basis in contemporary Polish family law for claims for compensation of damage caused by marital infidelity. In academic contexts as well as in legal practice, including case-law, attempts have been made to construe relevant claims on the basis of other, general provisions of the law concerning monetary compensation for non-material damage. However, a recent, significant ruling of the Polish Supreme Court, based on a completely different approach, seems to abolish, at least temporarily, cancel the existing *acquis* of academia and jurisprudence.

When considering *de lege lata* the possible grounds for liability for non-material damage caused by marital infidelity, one need focus on liability for infringement of personal rights (Articles 23 and 24 and Article 448 of the Polish Civil Code (PCC)³⁶).³⁷

The broad and constantly developing catalog of personal rights³⁸ includes the right to family life,³⁹ which also includes the right to marry and the right to remain in marriage.⁴⁰ Consequently, marital infidelity, leading to family breakdown, can be considered conduct that violates or diminishes these rights (especially should

³⁴ The Act of 25 February 1964 — Family and Guardianship Code (consolidated text: Journal of Laws of the Republic of Poland of 2017, item 682, as amended).

³⁵ Where a behaviour in question is directly in contradiction with a relevant legal norm, it is in principle an automatic statement, not requiring the use of arguments arising from the generally broad concept of unlawfulness (illegality) adopted in Polish civil law.

³⁶ Act of 23 April 1964 — Civil Code (consolidated text: Journal of Laws of the Republic of Poland of 2018, item 1025, as amended).

³⁷ The admissibility of claims based on the violation of personal rights in connection with infidelity has been proposed by: A.S. Tokarz, “Zdrada małżeńska. Zadośćuczynienie za zerwanie więzi rodzinnych,” *Przebieg Sądowy* 2011, no. 4, pp. 102–117; B. Sygit, *Cudzołóstwo (zdrada i kara)*, Toruń 1992, pp. 155–156; R. Krajewski, *Prawa i obowiązki seksualne małżonków. Studium prawne nad normą i patologią zachowań*, Warszawa 2009, p. 346; seems to accept such an interpretation, but is doubtful as to the effectiveness of pursuing claims before courts due to the lack of proper judicial tradition. Against such a concept: S. Szer, *Prawo rodzinne*, Warszawa 1966, p. 80; S. Grzybowski, *Prawo rodzinne. Zarys wykładu*, Warszawa 1980, p. 78.

³⁸ Understood, in the absence of a statutory definition, as certain essential values of emotional or psychological significance to humans, commonly accepted in society, born to an individual — see: P. Sobolewski, [in:] K. Osajda (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Legalis/el. 2019, commentary to Article 23, theses 1–6; J. Regan (Balcarczyk), [in:] M. Załucki (ed.), *Kodeks cywilny. Komentarz*, Legalis/el. 2019, commentary to Article 23, marginal number 1–2; S. Dmowski, S. Rudnicki, *Komentarz do kodeksu cywilnego. Księga pierwsza. Część ogólna*, Warszawa 2009, p. 106; J. Panowicz-Lipska, [in:] M. Gutowski (ed.), *Kodeks cywilny*, vol. 1. *Komentarz do art. 1–352*, Legalis/el. 2018, commentary to Article 23, marginal number 1–6.

³⁹ See e.g. the Court of Appeals in Lublin (*Sąd Apelacyjny w Lublinie*) in the judgment of 16 January 2013, case no. I ACa 694/12.

⁴⁰ A.S. Tokarz, *op. cit.*, pp. 104, 107.

divorce subsequently happen).⁴¹ The possibility of a breach of the right to privacy and intimacy is sometimes also mentioned.⁴² The damage to the wronged spouse may consist of them suffering from humiliation, longing for the lost affection and the values associated therewith, depression, loss of joy of life, undermining of self-esteem. These effects translate directly into mental (psychological) and sometimes even physical suffering. Therefore, as per the interpretative standpoint shared also by the authors of this text, such circumstances may give rise to monetary liability for the infringement of the above-mentioned personal rights. Interestingly, however, it is also proposed that liable for violation of the personal rights mentioned above, and therefore obliged to pay compensation, could be also the third party (the lover of one of the spouses).

5.2. The Supreme Court's position

The above position was followed by lower courts,⁴³ oftentimes awarding compensation in cases of marital infidelity. One such case ultimately was referred to the Polish Supreme Court (as a result of the Polish Ombudsman filing a so-called plea of illegality of a non-appellable ruling⁴⁴). The Court, similarly as in the Austrian case, delivered a judgment⁴⁵ which, at least for the time being, seems to rule out the possibility of claiming compensation for damage caused by marital infidelity. In the discussed case the lower courts in two instances awarded damages in favor of the plaintiff who had sued his ex-wife and his acquaintance, with whom the plaintiff's ex-wife had a long-running affair. In addition, it had appeared that the colleague turned out to be the biological father of four children born during the plaintiff's marriage, who were raised by the plaintiff as his own offspring (the plaintiff mentioned his sudden awareness that the children were not his as one of the factors multiplying his suffering). The District Court found that the plaintiff's reputation, good name and right to family life had been violated and awarded compensation. The Regional Court, having heard the case as a result of appeals agreed with this position, and changed the judgment only by increasing the amount awarded against the appellant-respondent (plaintiff's acquaintance), affirming the rest. The unappealable judgment of the Regional Court was then a subject of the Ombudsman's plea. In it, it had been argued that the judgment in question violates the substantive law

⁴¹ *Ibidem*, p. 109.

⁴² *Ibidem*, p. 114.

⁴³ Cf. judgment of the Court of Appeals in Katowice of 30 April 2015, case ref. no. I ACa 60/15.

⁴⁴ A procedural remedy which operates in such way that it does not allow previous unappealable decisions in a case to be quashed, but allows the pleading party — subsequent to a judgment pronouncing the illegality of an unappealable ruling — to bring action against the State Treasury, demanding redress of damages incurred because of the unappealable ruling.

⁴⁵ Judgment of 11 December 2018, File No: IV CNP 31/17.

on personal rights as well as Articles 31(1)⁴⁶ and 47⁴⁷ of the Polish Constitution — clauses that guarantee personal freedom and the right to privacy, which includes, *inter alia*, the right to make decisions about family and personal life.

The Supreme Court agreed with these remarks and stated that the decision of the Regional Court was issued in violation of the law (the same can be applied to the judgment of the first instance court). In its opinion, the Supreme Court acknowledged the existence of personal rights whose violation was argued by the plaintiff — therefore, noticing the conflict of values — but argued that in a situation of marital infidelity these rights should not be protected by compensation claims. The Supreme Court also pointed out that only relevant for the assessment of the examined situation should be the provisions of the family law, among which *de lege lata* there are none that could constitute the basis for the plaintiff's claims. Furthermore, the lack of such specific provisions alone does not allow, according to the Supreme Court, the application of general norms of the Civil Code. All legal consequences of infidelity are provided for within the legal framework of divorce, including the vindictive formulation of maintenance obligations of a spouse responsible for marital breakdown. Finally, the Supreme Court found that the decisions of the lower courts grossly violated the constitutional principles of freedom (Article 31 of the Constitution) and the right to privacy (Article 47 of the Constitution).

The reasoning of the Supreme Court may be subject to serious criticism which, alas, goes beyond the scope of this text. Given the considerable convincing weight of the Supreme Court's decisions, its opinion in the discussed case will certainly be thoroughly read and taken into account by the lower courts of the land. Hence, in spite of a formal non-existence of the law of precedent and the *stare decisis* principle in the Polish legal system, the positions taken in the Supreme Court's opinions play a vital role for the judiciary and lawyers' reasoning — especially in controversial issues.

6. Discussion and conclusions

In the history of European law — both stemming from the Germanic tradition as well as from Anglo-American common law — there existed various legal instruments whose aim was to grant relief to a betrayed spouse by allowing him or her to claim monetary compensation for the breach of marital vows, and non-material (moral) damages resulting therefrom. These, as is the case with most legal institutions, resulted from widespread social beliefs, where marriage was treated — following the Christian tradition — as a sacred union, and infidelity was gravely frowned upon.

⁴⁶ “Freedom of the person is protected by law.”

⁴⁷ “Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation, and to make decisions about his personal life.”

However, the law has evolved just as public morals and customs have evolved in the societies of the Western legal tradition. As marital vows have stopped being perceived as permanent and unbreakable, so has the social significance of legal norms allowing for compensation of harms resulting from marital infidelity. That in effect lead to the subsequent abolishing of the relevant laws. The same may be said of Polish law with respect to the issue in question.

Nevertheless, there exist solid arguments that support the admissibility of claims for monetary compensation for non-material damages arising from marital infidelity on the basis of the general provisions of Polish civil law. These arguments are grounded both in the purely textual interpretation, as well in a purposive approach — however, they have not found their way to the judicature so far.

As long as marriage exists and is entered into by virtue of taking marital vows, it is not an institution to be taken lightly. If there exists freedom not to marry (which is hardly arguable in the contemporary context) and if marriage brings about certain legal and social advantages to both spouses and to each of them separately, it should not be deemed an excessive intrusion into the spouses' freedoms and privacy that their observance of marital duties be required and expected of them. Both spouses enter into a marital relationship not only because they want to follow these requirements in their own right, but also because they rely on the other spouse for the future observance of marital duties.

Ours nowadays is a social order where a person may bring an action against a tourist operator to compensate for non-material damages sustained because of the operator's breach of obligations arising from a package holiday agreement, mainly due to the fact that non-material damage is a frequent occurrence in that field⁴⁸ — would it not seem only proper that similar principles be applied to marriages, in the case of whose decomposition resulting from infidelity and adultery non-material damage is also very likely to occur? The question remains open. Whatever the answer to it, it may be beneficial to acknowledge that nowadays in Europe marital vows seem to be put to much lighter standards than package holiday agreements.

References

- Banasik K., "Bigamia w polskim prawie karnym," *Prokuratura i Prawo* 2010, no. 9.
- Brook H., *Conjugal Rites: Marriage and Marriage-Like Relationships Before the Law*, New York 2007.
- Dmowski S., Rudnicki S., *Komentarz do kodeksu cywilnego. Księga pierwsza. Część ogólna*, Warszawa 2009.
- Domański M., *Orzeczenie o winie rozkładu pożycia w wyroku rozwodowym. Raport z badania pilotażowego*, Warszawa 2017.

⁴⁸ See the judgment of the European Court of Justice of 12 March 2002, Case C-168/00, Simone Leitner v TUI Deutschland GmbH & Co. KG, para. 21.

- Drożdż A., „Zdrada dramatem człowieka i złem moralnym,” *Śląskie Studia Historyczno-Teologiczne* 42, 2009, no. 2.
- Gromek K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Legalis/el. 2018.
- Grzybowski S., *Prawo rodzinne. Zarys wykładu*, Warszawa 1980.
- Gulczyński A., „Cywilnoprawne skutki cudzołóstwa na ziemiach polskich w XIX i XX wieku,” *Studia z Dziejów Państwa i Prawa Polskiego* 2002, no. 7.
- Gutowski M. (ed.), *Kodeks cywilny*, vol. 1. *Komentarz do art. 1–352*, Legalis/el. 2018.
- Hunter Brunton H., „The questionable constitutionality of curtailing cuckolding: Alienation of affection and criminal conversation torts,” *Duke Law Journal* 65, 2016.
- Jaroszewski Ł., „Prawo rodzinne. Zadośćuczynienie za zdradę małżeńską,” <http://ljlegal.pl/prawo-rodzinne-zadoszczynienie-za-zdrade-malzenska/>.
- “Kranzgeld,” [in:] *Rechtslexikon.net*, <http://www.rechtslexikon.net/d/kranzgeld/kranzgeld.htm>.
- Krajewski R., *Prawa i obowiązki seksualne małżonków. Studium prawne nad normą i patologią zachowań*, Warszawa 2009.
- Matys J., *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym*, Warszawa 2010.
- Młynarski T., „Zadośćuczynienie pieniężne z art. 448 k.c. w razie śmierci osoby bliskiej w kontekście postanowienia Sądu Najwyższego z dnia 27 czerwca 2014 r. (III CZP 2/14),” *Rozprawy Ubezpieczeniowe* 2, 2014, no. 17.
- Młynarski T., „Zadośćuczynienie za krzywdę dla rodziny i osób w stałych związkach,” *Rzeczpospolita* 24.02.2015.
- Nawracała J., „Zadośćuczynienie za śmierć osoby bliskiej — wybrane zagadnienia,” *Rozprawy Ubezpieczeniowe* 2, 2011, no. 11.
- Osajda K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Legalis/el. 2019.
- Overton B., *Fictions of Female Adultery, 1684–1890: Theories and Circumtexts*, Basingstoke 2002.
- Pietrzykowski (ed.), *Kodeks cywilny*, vol. 1. *Komentarz. Art. 1–449¹⁰*, Legalis/el. 2018.
- Sekuła M., „Problematyka zadośćuczynienia pieniężnego za szkodę niemajątkową,” *Radca Prawny* 2008, no. 2.
- Stolarek D., „Cudzołóstwo. Uwagi na tle regulacji rozwodowej kodeksu rodzinnego i opiekuńczego,” *Palestra* 2013, no. 9–10.
- Streitmayer M., *Ehebruch und Schadenersatz*, Graz 2011.
- Sygit B., *Cudzołóstwo (zdrada i kara)*, Toruń 1992.
- Szer S., *Prawo rodzinne*, Warszawa 1966.
- Szpunar A., *Zadośćuczynienie pieniężne za szkodę niemajątkową*, Bydgoszcz 1999.
- Tokarz A.S., „Zdrada małżeńska. Zadośćuczynienie za zerwanie więzi rodzinnych,” *Przegląd Sądowy* 2011, no. 4.
- Weinstein J.D., „Adultery, law, and the state: A history,” *Hastings Law Journal* 38, 1986.
- Zalucki M. (ed.), *Kodeks cywilny. Komentarz*, Legalis/el. 2019.