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The evolution of the principle of equal rights of spouses in Europe – selected issues on the example of Poland and Spain*

Introduction

Marriage as the union of two persons, usually a man and a woman, has been in existence since the beginning of human civilisation, and in particular cultural circles it regulates the common rights and duties of the spouses, their relationship to their children and the general rules of functioning in society. One of the rules that is immanent to the modern institution of marriage in European legislation is the principle of equality of spouses. It is guaranteed by international and regional standards and protected in the laws of individual states. In fact, the feature of equality only became common in Europe, as well as worldwide, in the second half of the 20th century as a result of changes in the societies and laws of the time. Under Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the so-called European Convention on Human Rights)¹ drawn up in Rome 1950² men and women of marriageable age have the right to marry and found a family, in accordance with the national laws governing the exercise of this right. However, it is only in Article 5 of Protocol No. 7 of 1984³ to that Convention that the principle of equality of spouses is explicitly expressed.

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¹Hereinafter also as the „Convention”.

²Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950, as amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (O.J. 1993, No. 61, item 284, as amended).

³Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Strasbourg on 22 November 1984 (O.J. 2003, No. 42, item 364).

The aim of this article is to examine selected aspects of the evolution of the principle of equality of spouses in Europe over the years. Particular attention is paid to landmark legal regulations related to the problem in question. Attention is also paid to the operation of the principle of equality of spouses within the framework of the European Convention on Human Rights, as well as to its development resulting from the case-law of the European Court of Human Rights⁴. The existence of this principle in Polish and Spanish legislation over the years is also analysed.

Historical background

According to ancient and barbarian peoples, woman was considered a weaker being, incapable of independent action and in need of constant male care⁵. By the full Middle Ages⁶, on the other hand, although inequality remained, the way women were perceived had changed and this was due to more practical considerations – in the knightly state, for political-military reasons, equality remained at a lower level, while in the bourgeois state, based mainly on economic activity, there was a greater tendency towards equality⁷. However, it was not until Enlightenment thought, the slogans carried by the Great French Revolution and social changes in the 19th century that there was hope for an improvement in the legal position of women.

The regulations of the so-called French Civil Code (also known as the Napoleonic Code), introduced in 1804 in France, were innovative. It had an enormous impact on civil legal thought in the 19th and 20th centuries, and its solutions were modelled on by many countries around the world, such as Poland and Spain, among others. Section VI of Title 5 of the Code, entitled *On the reciprocal rights and duties of spouses*, stands out from other legislation of the period. Although the articles contained therein limit the wife's capacity to sue (Article 215) or restrict the disposal of jointly held property (Article 217), they contain landmark regulations ordering the spouses to be faithful, supportive and helpful to each other (Article 212). The imposition of an obligation

⁴ Hereinafter also as „the Court”.

⁵ For more information: R. Krajewski, *Sexual rights and obligations of spouses in a legal-historical perspective* [Prawa i obowiązki seksualne małżonków w perspektywie prawnohistorycznej], [in:] idem, *Sexual rights and duties of spouses. A legal study on the norm and pathology of behaviour* [Prawa i obowiązki seksualne małżonków. Studium prawne nad normą i patologią zachowań], Warsaw 2009; idem, *Sexual rights and obligations of spouses according to ancient Greek legislation* [Prawa i obowiązki seksualne małżonków według ustawodawstwa starożytnej Grecji], [in:] idem, *Sexual rights...; H. Insadowski, Roman marriage law and Christianity* [Rzymskie prawo małżeńskie a chrześcijaństwo], Lublin 1935 and D. Nowicka, *Some remarks on the legal situation of women in ancient Rome* [Kilka uwag o sytuacji prawnej kobiety w starożytnym Rzymie], „Kobieta w Prawie i Polityce” 2007, Vol. IX, pp. 33–41.

⁶ For more information: R. Krajewski, *Legislation of the Middle Ages vis-à-vis the rightful sexual obligations of spouses* [Ustawodawstwo wieków średnich wobec prawi obowiązków seksualnych małżonków], [in:] idem, *Sexual rights...; R. Kamprowski, The place and role of women in the family through the ages. From Antiquity to the First World War. Outline of issues* [Miejsce i rola kobiety w rodzinie na przestrzeni wieków. Od antyku po I wojnę światową. Zarys problematyki], „Refleksje” 2011, No. 4, pp. 33–41.

⁷ K. Dunin, *Women's rights in the Swiss Civil Code (compared to other legislation)* [Prawa kobiet w kodeksie cywilnym szwajcarskim (w porównaniu z innymi prawodawstwami)], Warsaw 1909, pp. 8–9.

on the husband to provide for the defence of his wife (Article 213) and the obligation on him to accommodate his wife by providing her with everything she needs to live according to the husband's means should also be considered pioneering. Also noteworthy is Section V *On the Obligations Arising from Marriage*, which at the very outset regulates the joint obligation of husband and wife to feed, maintain and bring up their children⁸. This codification, however, did not fully address the principle of equality of spouses, but was only the first to introduce regulations aiming at equality. For the Code, a woman continued to be a „perpetual minor”, i.e. incapable of legal action without the consent or authority of a man⁹. It should also be added that, against the background of the major codifications, the German Civil Code of 1896 and the Swiss Code of 1907, which were modelled on it, are notable for having made progress in the area of women's civil rights, in particular by introducing equality in matrimonial relationships in property matters¹⁰.

International standards

The emancipation movement of the nineteenth and twentieth centuries had a not insignificant impact on the development of equality between men and women. In addition, the tragic aftermath of the First World War, in the form of the deaths of millions of soldiers, forced the world to replace men with women in many everyday jobs. Subsequently, the inter-war period was a time when women gained the right to vote in many countries. The world was slowly moving towards equality between the sexes, and this was also reflected in the increasing equality of spouses, also expressed in acts of international law. At this point, it should be pointed out that international documents do not explicitly regulate this issue, respect for the rights and duties of spouses derives from the fundamental directive on the equality of man and woman in relations between spouses themselves, and between them and their joint children¹¹.

Already the 1945 UN Charter in its preamble reaffirms the belief in the fundamental beliefs of man and especially in the equal rights of men and women, the equal right to marry, the same conjugal rights and obligations and the identical consequences of the cessation of marriage. These issues are also captured by the 1948 Universal Declaration of Human Rights, as well as the 1966 Covenants on Human Rights, i.e. the Covenant on Civil and Political Rights¹². The issue was developed in depth by the

⁸https://www.bibliotekacyfrowa.pl/dlibra/publication/3661/edition/6697/content?format_id=2 (accessed: 11.06.2023).

⁹A. Korzeniewska, J. Słyszewska, *Marriage law in the Napoleonic Code* [Prawo małżeńskie w Kodeksie Napoleona], „*Studia Prawnoustrojowe*” 2004, No. 3, p. 192.

¹⁰For more information: K. Dunin, *op. cit.*

¹¹T. Smoczyński, *Family and guardianship law* [Prawo rodzinne i opiekuńcze], Warsaw 2009, p. 63.

¹²For more information: M. Fras, *Commentary on Article 23* [Komentarz do art. 23], [in:] M. Habdas (ed.), *Family and Guardianship Code. Commentary* [Kodeks rodzinny i opiekuńczy. Komentarz], Warsaw 2021; M. Jadczyk-Żebrowska, *Rights and obligations of spouses* [Prawa i obowiązki małżonków], Białystok 2014, pp. 77–80.

United Nations Convention of 18 December 1979 on the Elimination of All Forms of Discrimination against Women, which in Art. 5 requires States Parties to take all appropriate steps to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs or other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotypes of the roles of men and women, and to ensure that education within the family fosters a proper understanding of motherhood as a social function and a sense of shared responsibility between men and women for the upbringing and development of their children, bearing in mind that the best interests of the children are always a primary consideration¹³.

European Convention on Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome in 1950, provides in Article 8 that everyone has the right to respect for his or her family life and that no interference by public authority with the exercise of this right is permitted except in cases provided for by law and necessary in a democratic society. For a long time, the concept of „family life” was considered to refer to a set of interpersonal relationships, arising only from a permanent bond of blood or law (marriage, adoption)¹⁴. Currently, many factors determine whether a relationship constitutes „family life”, such as the degree of consanguinity, the nature of the relationship, including mutual interest, attachment and dependence, and even whether the couple has lived together for how long¹⁵. A landmark case in defining this concept was *Schalk and Kopf v. Austria*, where the European Court of Human Rights, in a 2010 judgment, made it clear that a stable and de facto same-sex relationship falls under the concept of „family life”, as does a similarly situated opposite-sex couple¹⁶.

Undoubtedly, the fundamental manifestation of „family life” is marriage, but marriage itself is subject to the special protection of the Convention under, inter alia, Article 12 of the Convention, which guarantees that men and women of marriageable age have the right to marry and to found a family, in accordance with the national laws

¹³Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations General Assembly on 18 December 1979 (O.J. 1982, No. 10, item 71).

¹⁴L. Garlicki, *Commentary on Article 8* [Komentarz do art. 8], [in:] L. Garlicki, P. Hofmański, A. Wróbel (eds.), *Convention for the Protection of Human Rights and Fundamental Freedoms*, Vol. I-II: *Commentary* [Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, t. I-II: Komentarz], Warsaw 2010, thesis 58; M.A. Nowicki, *Commentary on Article 8* [Komentarz do art. 8], [in:] idem, *Around the European Convention. Commentary on the European Convention on Human Rights* [Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka], Warsaw 2021.

¹⁵M.A. Nowicki, *Commentary on Article 8...*

¹⁶Idem, *Schalk and Kopf v. Austria – ECHR judgment of 24 June 2010, application no. 30141/04* [Schalk i Kopf przeciwko Austrii – wyrok ETPC z dnia 24 czerwca 2010 r., skarga nr 30141/04], [in:] idem, *European Court of Human Rights. A selection of judgments 2010* [Europejski Trybunał Praw Człowieka. Wybór orzeczeń 2010], 2010, Lex, p. 263.

governing the exercise of that right¹⁷. Although Article 12 clearly reflected the original conception of marriage and the family, the Court stated as early as 2002 in *Christine Goodwin v. the United Kingdom* that „since the adoption of the Convention, the institution of marriage has undergone profound changes resulting from the evolution of societies”¹⁸. This takes into account, among other things, the enormous development of medicine since the ratification of the Convention and science in the field of transsexualism, so that gender cannot, according to the Court, be determined by biological factors alone. However, this does not change the fact that the legislator’s main aim in introducing this article was to protect marriage as the basis of the family, thus a situation in which some states allow forms of same-sex unions treating them as marriage does not mean that we are then dealing with a situation under Article 12. Hence, an obligation for states to allow homosexual couples to marry can also not be derived from this article¹⁹. The change in the perception of Article 8 as well as Article 12 of the Convention is due to the evolutionary interpretation, which implies an injunction to interpret the law in the light of ‚present day conditions’. It follows that it is not so much a question of argumentative technique, but rather of the objective assigned to the process of interpretation²⁰.

Protocol 7 to the Convention

It was not until Protocol No. 7 of 22 November 1984 to the Convention for the Protection of Human Rights and Fundamental Freedoms that the question of the equality of spouses was explicitly expressed in Article 5. According to this, spouses are entitled to equal rights and obligations under civil law in their relations arising out of marriage, both between themselves and in their relations with their children, during the marriage and in connection with its dissolution. While it is true that the prohibition of discrimination has previously been expressed in Article 14 since the inception of the Convention, it is limited only to the fact that the enjoyment of the rights and freedoms enumerated in the Convention should be ensured without discrimination based on, inter alia, sex. It is questionable why the principle of equality for spouses was clearly articulated so late in the additional protocols and why it was not included in the Convention itself. However, it should be noted that after the drafting of the Convention, the predominance of the husband in the legal relationship between spouses and the father in the legal relationship with the marital child

¹⁷L. Garlicki, *Commentary on Article 12* [Komentarz do art. 12], [in:] L. Garlicki, P. Hofmański, A. Wróbel (eds.), op. cit., thesis 63.

¹⁸*Ibidem*, thesis 2.

¹⁹M.A. Nowicki, *Commentary on Article 12* [Komentarz do art. 12], [in:] idem, *Around the European Convention...*

²⁰B. Soloch, *Evolutionary interpretation of the European Convention on Human Rights and the principle of consensus. An attempt at analysis* [Wykładnia ewolucyjna Europejskiej Konwencji Praw Człowieka a zasada konsensusu. Próba analizy], „Zeszyty Prawnicze” 2014, Vol. XV, p. 124.

persisted in Western Europe for many years. It was not until repeated amendments to the family law of European states, especially those in the 1960s and 1970s, that the legal position of husband and wife was made equal. The impetus for such changes came from acts of international human rights law and, in particular, acts of the Council of Europe²¹. Reference is made, inter alia, to Council of Europe Committee of Ministers Resolution 78(37) of 1978 on the equality of spouses in civil law, which recommends to the national legislator that civil law should not give preference to one spouse over the other²².

It should also be noted that the jurisprudence has already emphasised that Article 5 of Protocol No. 7 must be seen as an appendix to the Convention, thus taking into account Article 8 of the Convention²³. By contrast, in its decision of 18 January 1966 in *Klöpffer v Switzerland*, the Court stated that the equality of spouses relates only to relationships governed by civil law, i.e. their personal relationships and property rights. In contrast, the equality of spouses does not take into account other areas of law, such as administrative, tax, criminal, social or labour law²⁴. Importantly, the Court emphasised that equality concerns both the relationship between spouses and their relationship with their children. It concerns in particular the equal treatment of both parents in their rights to have contact with their children. Furthermore, the principle of equality applies not only during the marriage, but also after its dissolution. However, protection in relation to the period before the marriage is excluded. Similarly, protection is excluded for unmarried partners²⁵. Also with regard to the legal equality of spouses, an evolutionary interpretation of the Convention's provisions is apparent, especially in the context of parental leave benefits. As recently as in the *Petrovic v. Austria* judgment of 27 March 1998, the Court held that a difference based on sex in the use of parental leave does not violate the prohibition of discrimination. It was only as a result of the amendments introduced in European countries and the changing perception of women as the main carers of children, which was linked to the equal sharing of responsibility for child-rearing between men and women, that the *Weller v. Hungary* judgment of 31 October 2009 held that depriving the father of the possibility to take parental leave should be regarded as discrimination²⁶.

Polish regulations

From the Old Polish period there are no detailed regulations concerning the position of spouses in marriage. Certainly, the social position of women was linked to the institution of marriage, which had a patriarchal form from the beginnings of the Polish

²¹ M. Jadczyk-Żebrowska, op. cit., p. 72.

²² Ibidem, p. 81.

²³ ECHR judgment of 22 February 1994, No. 16213/90, *Burghartz v. Szvajcaria*, Lex No. 80538.

²⁴ J. Bucińska, *Protection of the institution of marriage at international level* [Ochrona instytucji małżeństwa na płaszczyźnie międzynarodowej], Warsaw 2018, pp. 23–24.

²⁵ Ibidem, p. 24; M. Frasz, op. cit.

²⁶ J. Bucińska, op. cit., p. 25.

state. Already in the 16th century, marriage was considered the basis of the social order, and the model family for the thinkers of the time was the family headed by a husband-father. The ideal wife was defined as the mistress of the home, the mother of children, a housewife obedient to her husband, but also a wife who could have her own opinion and give her husband advice²⁷. This theory, thanks to research, has been confronted with practice, which shows that the position of the woman-wife among the Polish bourgeoisie in the 16th–18th centuries was not as bad as is commonly believed. In many cases, wives enjoyed a fairly high degree of property independence, especially in Warsaw and Poznan, where they could dispose of their own property themselves or even appear before the town council and bench. They could also dispose of the family's property in the event of their husband's illness or old age. This does not change the fact that the general rule at the time was that the husband was the head of the family. On the other hand, court records also indicate that the husband was expected to be loyal to his wife²⁸.

On the other hand, at the beginning of the 19th century, when the Duchy of Warsaw was established on the territory of modern Poland during the Napoleonic Wars, the civil law regulations contained in the Napoleonic Code of 1804 were introduced into the Duchy by the Constitution of 22 July 1807, including regulations on marriage law²⁹. These provisions did not stand the test of time and were replaced first by the Civil Code of the Kingdom of Poland of 1825, which introduced modifications to the law relating to persons. In turn, further modifications to marriage and spousal relations were introduced by the Marriage Law of 1836³⁰ ordering the husband to love his wife, be faithful to her and provide for her defence (Article 208) and the wife to be obliged to love, be faithful and obey her husband (Article 209). The law maintained the necessity for a wife to obtain authorisation from her husband to undertake various acts of civil life (Article 214)³¹.

Although the Constitution of the Republic of Poland of 17 March 1921 expressed the principle of equality of all citizens before the law in Article 96³², it was not until after the Second World War that the principle of equality was introduced into unified family law in Poland, i.e. in the decrees of 1945 and 1946, and then in the Family Code of 1950³³. In the new Family Code, the issue of the rights and duties of spouses was regulated by Section II of the Code. According to Article 14, husband and wife have equal rights and duties in marriage. They are obliged to live together, to be faithful to each other, to help each other and to work together for the good of the family they have founded by their union. Subsequent articles also imply joint decision-making on

²⁷ For more information: A. Wyrobisz, *Old Polish models of the family and the woman – wife and mother* [Staropolskie wzorce rodziny i kobiety – żony i matki], „Przegląd Historyczny” 1992, No. 83/3, pp. 405–421.

²⁸ For more information: M. Bogucka, *The family in the Polish city of the sixteenth and seventeenth centuries: an introduction to the issues* [Rodzina w polskim mieście XVI–XVII wieku: wprowadzenie w problematykę], „Przegląd Historyczny” 1983, No. 74(3), pp. 495–507.

²⁹ R. Kamprowski, op. cit., p. 39.

³⁰ K. Dunin, op. cit., p. 7.

³¹ <https://crispa.uw.edu.pl/object/files/376431/display/Default> (accessed: 9.12.2023).

³² Act of 17 March 1921 Constitution of the Republic of Poland (O.J. No. 44, item 267 as amended).

³³ M. Jadczyk-Żebrowska, op. cit., p. 72.

important family matters (Article 15) and the obligation that each spouse, according to his or her strength and in accordance with his or her earning and property capacity, contributes to the satisfaction of the needs of the family that he or she has established by their union (Article 18). Significantly, the satisfaction of this obligation may also consist in whole or in part of personal efforts to bring up the children and work in the joint household³⁴.

At this point, it is important to highlight the influence of Soviet law and doctrine on the principle of equality of spouses³⁵. As early as 1918, as a result of the Russian Revolution, a family code was issued introducing the principle of equality of spouses. On the other hand, it has been repeatedly demonstrated in Polish literature that the Polish Family Code of 1950 was based on Soviet legal doctrine and the resulting family legislation, in which we can distinguish the principles of, inter alia, equal rights for men and women in all social relations, including family relations, as well as state custody of the mother and child and comprehensive protection of their interests and support of motherhood³⁶. These principles were common to all countries of the communist bloc, which is why some scholars speak of the existence of socialist family law and not just the family law of socialist countries. On the other hand, contemporary literature is beginning to move away from this position by demonstrating the progressiveness of the aforementioned code and the lack of Soviet models, which shows the need for further research on this issue³⁷.

A repetition of the 1950 regulations is contained in the currently binding Family and Guardianship Code of 1964 in Articles 23, 24 and 27 respectively. In addition, Article 33 of the Constitution of the Republic of Poland of 2 April 1997 clearly indicates that a woman and a man in the Republic of Poland have equal rights in family, political, social and economic life³⁸. Contemporary Polish legal doctrine emphasises that the postulate of equality of rights and duties of spouses does not imply that one should strive to equalise and unify the social functions performed by women and men in individual marriages³⁹. Instead, it follows from the current Code that not only do spouses not have legally prescribed social functions or roles in marriage (the first dimension of the principle of equality of rights and duties of spouses), but also one spouse may not require the other to perform specific (e.g. „traditional”, „modern”) functions and roles (the second dimension of the principle of equality of rights and duties of spouses)⁴⁰. Polish regulations do not create a universal family model, imposing a top-down

³⁴ Act of 27 June 1950 Family Code (O.J. 1950, No. 34, item 308).

³⁵ P. Fiedorczyk, *Soviet family law as an object of reception in Poland and other Central and Eastern European countries* [Radzieckie prawo rodzinne jako przedmiot recepcji w Polsce i innych państwach Europy Środkowo-Wschodniej], „Studia nad Faszyzmem i Zbrodniami Hitlerowskimi” 2009, Vol. XXXI, p. 364.

³⁶ *Ibidem*, pp. 371–375.

³⁷ *Ibidem*, pp. 355–356.

³⁸ Constitution of the Republic of Poland of 2 April 1997 (O.J. 1997, No. 78, item 483).

³⁹ M. Antas, *Commentary on Article 23* [Komentarz do art. 23], [in:] M. Załucki (ed.), *Family and Guardianship Code. Commentary* [Kodeks rodzinny i opiekuńczy. Komentarz], Warsaw 2023, thesis 5.

⁴⁰ J. Pawliczak, *Commentary on Article 23* [Komentarz do art. 23], [in:] M. Domański, J. Słyk (eds.), *Family and Guardianship Code. Commentary* [Kodeks rodzinny i opiekuńczy. Komentarz], Warsaw 2022.

division of roles between spouses. It is the spouses themselves, within the autonomy of the family and respecting the principle of equality of their rights and duties, who should work out the principles on which their daily life is based, in particular which of the spouses performs particular social roles and to what extent⁴¹.

Spanish regulations

As a result of the growth of the Reformation movement in the 16th century, the Catholic Church responded by developing arguments in defence of Catholic doctrine at the Council of Trent (1545–1563), which it included in the provisions of the Tametsi Decree. Adopted on 11 November 1563, the Council document defined, among other things, the prohibition of divorce, the definition of the ecclesiastical form of marriage and the compulsory form of canonical marriage, the observance of which made the validity of the marriage conditional. In Spain, by Royal Decree (cédula real) of Philip II of 12 July 1564, the decrees of the Council of Trent, including the Tametsi Decree, were incorporated into Spanish legislation⁴². In this way, the Spanish Crown recognised the competence of the Catholic Church with regard to marriage doctrine and legislation⁴³. This marriage remained in force until the enactment of the Spanish Constitution of 1978, with the exception of two brief periods during which there was compulsory civil marriage (1870–1875 and 1932–1939)⁴⁴.

Article 43 of the Constitution of the Spanish Republic, adopted by the Spanish Legislative Cortes on 9 December 1931, indicates that marriage is based on equal rights for both sexes and that parents have a duty to nourish, assist, educate and teach their children. The state will also ensure that these duties are respected and is obliged to fulfil them⁴⁵. In Spain, compared to other European countries, marriage equality was sought at an exceptionally early stage, thanks in part to the socialist and communist influences presented by the new Spanish government. Unfortunately, this regulation and the entire Constitution ceased to be valid in 1939, when the Republican troops surrendered to the Nationalist troops of General Francisco Franco. Today, Article 32 of the Spanish Constitution of 27 December 1978 states that a man and a woman have the right to marry with full equality before the law. Issues of equality are further clarified in Chapter Five of the Spanish Civil Code. Article 66 clearly establishes the principle of equality of spouses by stating that spouses are equal in rights and obligations. It further obliges the spouses to respect each other, help each other and

⁴¹M. Antas, op. cit., thesis 6.

⁴²In Poland, the decrees of the Council of Trent were adopted in 1577.

⁴³P. Rygula, *Conducting a canonical and civil marriage in Spanish law – an outline of a historical perspective* [Zawarcie małżeństwa kanonicznego i cywilnego w prawie hiszpańskim – zarys perspektywy historycznej], „Studia z Prawa Wyznaniowego” 2021, Vol. XXIII, pp. 188–189.

⁴⁴M. González, J. María, *Sistema matrimonial español*, „Revista Jurídica” 2001, Vol. V, p. 139.

⁴⁵https://www.cervantesvirtual.com/obra-visor/constitucion-de-la-republica-espanola-de-9-de-diciembre-1931/html/eb011790-baf1-4bac-b9bd-b50f042667ad_2.html#I_5_ (accessed: 11.06.2023).

act in the interests of the family (Article 67), and it is stated that the spouses must share domestic duties and the care and custody of ascendants, descendants and other dependent persons in their care (Article 68)⁴⁶.

Conclusion

Marriage law in Europe had to come a long way before the principle of equality of spouses became a universally applicable rule. *De facto*, this only happened in the second half of the 20th century. An analysis of the historical background to this issue leads to the conclusion that further research is needed on these issues, but not only in the field of law. For a complete view of the problem at hand, research in the field of social history is also needed to help confront the legal regulations in force at the time with social practice. The novelty of the regulations of the Napoleonic Code in terms of introducing the first regulations on the equality of spouses, which were subsequently repeated in other codifications, should be emphasised.

Undoubtedly, in the 20th century, the development of the principle of equality of spouses was widely influenced by acts of international law. In Europe, the European Convention on Human Rights did not express this principle explicitly at first. It only did so in Article 5 of Protocol No. 7 of 1984, after spousal equality had become commonplace in the legislation of European states as a result of the amendments of the 1960s and 1970s. The changes introduced in matrimonial law over the years are noticeable in the jurisprudence of the European Court through the evolutionary interpretation of the Convention. Poland and Spain took relatively early steps to implement this principle in their legislation, which they can certainly boast of in the European and international arena. The Polish measures proved to be very durable and have been in place since the 1950s, while the Spanish regulations were earlier, but did not survive the period of General Franco's dictatorship. The common factor linking the introduction of these changes was the influence of communist and leftist ideas represented by the Polish and Spanish authorities of the time.

⁴⁶ Spanish Civil Code, [https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Spanish_Civil_Code_\(Codigo_Civil_Espanol\).PDF](https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Spanish_Civil_Code_(Codigo_Civil_Espanol).PDF) (accessed: 11.06.2023).

BIBLIOGRAPHY

Literature

- Antas M., *Commentary on Article 23* [Komentarz do art. 23], [in:] M. Załucki (ed.), *Family and Guardianship Code. Commentary* [Kodeks rodzinny i opiekuńczy. Komentarz], Warsaw 2023.
- Boguicka M., *The family in the Polish city of the sixteenth and seventeenth centuries: an introduction to the issues* [Rodzina w polskim mieście XVI–XVII wieku: wprowadzenie w problematykę], „Przegląd Historyczny” 1983, No. 74(3).
- Bucińska J., *Protection of the institution of marriage at international level* [Ochrona instytucji małżeństwa na płaszczyźnie międzynarodowej], Warsaw 2018.
- Dunin K., *Women’s rights in the Swiss Civil Code (compared to other legislation)* [Prawa kobiet w kodeksie cywilnym szwajcarskim (w porównaniu z innymi prawodawstwami)], Warsaw 1909.
- Fiedorczyk P., *Soviet family law as an object of reception in Poland and other Central and Eastern European countries* [Radzieckie prawo rodzinne jako przedmiot recepcji w Polsce i innych państwach Europy Środkowo-Wschodniej], „Studia nad Faszyzmem i Zbrodniami Hitlerowskimi” 2009, Vol. XXXI.
- Fras M., *Commentary on Article 23* [Komentarz do art. 23], [in:] M. Habdas (ed.), *Family and Guardianship Code. Commentary* [Kodeks rodzinny i opiekuńczy. Komentarz], Warsaw 2021.
- Garlicki L., *Commentary on Article 12* [Komentarz do art. 12], [in:] L. Garlicki, P. Hofmański, A. Wróbel (eds.), *Convention for the Protection of Human Rights and Fundamental Freedoms, Vol. I-II: Commentary* [Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, t. I-II: Komentarz], Warsaw 2010.
- Garlicki L., *Commentary on Article 8* [Komentarz do art. 8], [in:] L. Garlicki, P. Hofmański, A. Wróbel (eds.), *Convention for the Protection of Human Rights and Fundamental Freedoms, Vol. I-II: Commentary* [Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, t. I-II: Komentarz], Warsaw 2010.
- González M., María J., *Sistema matrimonial español*, „Revista Jurídica” 2001, Vol. V.
- Insadowski H., *Roman marriage law and Christianity* [Rzymskie prawo małżeńskie a chrześcijaństwo], Lublin 1935.
- Jadczak-Żebrowska M., *Rights and obligations of spouses* [Prawa i obowiązki małżonków], Białystok 2014.
- Kamprowski R., *The place and role of women in the family through the ages. From Antiquity to the First World War. Outline of issues* [Miejsce i rola kobiety w rodzinie na przestrzeni wieków. Od antyku po I wojnę światową. Zarys problematyki], „Refleksje” 2011, No. 4.
- Korzeniewska A., Słyszewska J., *Marriage law in the Napoleonic Code* [Prawo małżeńskie w Kodeksie Napoleona], „Studia Prawnoustrojowe” 2004, No. 3.

- Krajewski R., *Legislation of the Middle Ages vis-à-vis the rightful sexual obligations of spouses* [Ustawodawstwo wieków średnich wobec praw i obowiązków seksualnych małżonków], [in:] idem, *Sexual rights and duties of spouses. A legal study on the norm and pathology of behaviour* [Prawa i obowiązki seksualne małżonków. Studium prawne nad normą i patologią zachowań], Warsaw 2009.
- Krajewski R., *Sexual rights and obligations of spouses according to ancient Greek legislation* [Prawa i obowiązki seksualne małżonków według ustawodawstwa starożytnej Grecji], [in:] idem, *Sexual rights and duties of spouses. A legal study on the norm and pathology of behaviour* [Prawa i obowiązki seksualne małżonków. Studium prawne nad normą i patologią zachowań], Warsaw 2009.
- Krajewski R., *Sexual rights and obligations of spouses in a legal-historical perspective* [Prawa i obowiązki seksualne małżonków w perspektywie prawnohistorycznej], [in:] idem, *Sexual rights and duties of spouses. A legal study on the norm and pathology of behaviour* [Prawa i obowiązki seksualne małżonków. Studium prawne nad normą i patologią zachowań], Warsaw 2009.
- Nowicka D., *Some remarks on the legal situation of women in ancient Rome* [Kilka uwag o sytuacji prawnej kobiety w starożytnym Rzymie], „Kobieta w Prawie i Polityce” 2007, Vol. IX.
- Nowicki M.A., *Commentary on Article 8* [Komentarz do art. 8], [in:] idem, *Around the European Convention. Commentary on the European Convention on Human Rights* [Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka], Warsaw 2021.
- Nowicki M.A., *Commentary on Article 12* [Komentarz do art. 12], [in:] *Around the European Convention. Commentary on the European Convention on Human Rights* [Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka], Warsaw 2021.
- Nowicki M.A., *Schalk and Kopf v. Austria – ECHR judgment of 24 June 2010, application no. 30141/04* [Schalk i Kopf przeciwko Austrii – wyrok ETPC z dnia 24 czerwca 2010 r., skarga nr 30141/04], [in:] idem, *European Court of Human Rights. A selection of judgments 2010* [Europejski Trybunał Praw Człowieka. Wybór orzeczeń 2010], 2010, Lex.
- Pawliczak J., *Commentary on Article 23* [Komentarz do art. 23], [in:] M. Domański, J. Słyk (eds.), *Family and Guardianship Code. Commentary* [Kodeks rodzinny i opiekuńczy. Komentarz], Warsaw 2022.
- Ryguła P., *Conducting a canonical and civil marriage in Spanish law – an outline of a historical perspective* [Zawarcie małżeństwa kanonicznego i cywilnego w prawie hiszpańskim – zarys perspektywy historycznej], „Studia z Prawa Wyznaniowego” 2021, Vol. XXIII.
- Smyczyński T., *Family and guardianship law* [Prawo rodzinne i opiekuńcze], Warsaw 2009.

Soloch B., *Evolutionary interpretation of the European Convention on Human Rights and the principle of consensus. An attempt at analysis* [Wykładnia ewolucyjna Europejskiej Konwencji Praw Człowieka a zasada konsensusu. Próba analizy], „Zeszyty Prawnicze” 2014, Vol. XV.

Wyrobisz A., *Old Polish models of the family and the woman – wife and mother* [Staropolskie wzorce rodziny i kobiety – żony i matki], „Przegląd Historyczny” 1992, No. 83/3.

Legal acts

Act of 17 March 1921 Constitution of the Republic of Poland (O.J. No. 44, item 267 as amended).

Act of 27 June 1950 Family Code (O.J. 1950, No. 34, item 308).

Constitution of the Republic of Poland of 2 April 1997 (O.J. 1997, No. 78, item 483).

Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950, as amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (O.J. 1993, No. 61, item 284, as amended).

Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations General Assembly on 18 December 1979 (OJ 1982, No. 10, item 71).

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Strasbourg on 22 November 1984 (O.J. 2003, No. 42, item 364).

Case law

ECHR judgment of 22 February 1994, No. 16213/90, *Burghartz v. Szwajcaria*, Lex No. 80538.

Online sources

<https://crispa.uw.edu.pl/object/files/376431/display/Default>.

https://www.bibliotekacyfrowa.pl/dlibra/publication/3661/edition/6697/content?format_id=2.

https://www.cervantesvirtual.com/obra-visor/constitucion-de-la-republica-espanola-de-9-de-diciembre-1931/html/eb011790-baf1-4bac-b9bd-b50f042667ad_2.html#I_5_.

[https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Spanish_Civil_Code_\(Codigo_Civil_Espanol\).PDF](https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Spanish_Civil_Code_(Codigo_Civil_Espanol).PDF).

The evolution of the principle of equal rights of spouses in Europe – selected issues on the example of Poland and Spain

Summary

Today, the principle of equality of rights and obligations of spouses is a fundamental element of the international standard of marriage. It has evolved over the years, even in the pre-state period. Until the last century, the feature of equality was not common and only appeared in global and European legislation. According to the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome in 1950, men and women of marriageable age have the right to marry and found a family according to national law. However, it was not until Protocol No. 7 of 1984 that the equality of spouses in marriage was guaranteed. The very evolution of the principle of equality is also evident in the case law of the European Court of Human Rights. The evolutionary interpretation of the Convention, which implies an injunction to interpret the law in the light of the „conditions of today”, is the result of changes introduced in the national legislation of the parties to the Convention. In Poland, the principle of equality was introduced into family law as a result of Soviet influence in the decrees of 1945 and 1946, and later in the Family Code of 1950. In Western Europe, on the other hand, the equalisation of the legal situation of spouses did not occur until the 1960s and 1970s through numerous amendments. Poland and Spain were among the first countries to introduce the principle of equality of spouses into national legislation.

Keywords: human rights, equal rights of spouses, marriage law, history of equal rights

Ewolucja zasady równouprawnienia małżonków w Europie – wybrane zagadnienia na przykładzie Polski i Hiszpanii

Obecnie zasada równości praw i obowiązków małżonków jest podstawowym elementem międzynarodowego standardu małżeństwa. Ewoluowała ona na przestrzeni lat, jeszcze w okresie przedpaństwowym. Aż do ubiegłego wieku cecha równości nie była powszechna i pojawiła się dopiero w prawodawstwie światowym i europejskim. Zgodnie z Konwencją o ochronie praw człowieka i podstawowych wolności, sporządzoną w Rzymie w 1950 r., mężczyźni i kobiety w wieku małżeńskim mają prawo do zawarcia małżeństwa i założenia rodziny zgodnie z prawem krajowym. Jednak dopiero protokół nr 7 z 1984 r. zagwarantował równość małżonków w małżeństwie. Sama ewolucja zasady równości jest także widoczna w orzecznictwie Europejskiego Trybunału Praw Człowieka. Ewolucyjna wykładnia konwencji, która zakłada nakaz interpretacji prawa

w świetle „warunków dnia dzisiejszego”, wynika ze zmian wprowadzonych w ustawodawstwie krajowym stron konwencji. W Polsce zasada równouprawnienia została wprowadzona do prawa rodzinnego na skutek wpływów radzieckich w dekretach z 1945 i z 1946 r., a następnie w kodeksie rodzinnym z 1950 r. Z kolei w Europie Zachodniej zrównanie sytuacji prawnej małżonków nastąpiło dopiero w latach 60. i 70. ubiegłego wieku w drodze licznych nowelizacji. Polska i Hiszpania były jednymi z pierwszych krajów, które wprowadziły zasadę równości małżonków do ustawodawstwa krajowego.

Słowa kluczowe: prawa człowieka, równouprawnienie małżonków, prawo małżeńskie, historia równouprawnienia