"Social Transformations in Contemporary Society", 2013 (1)
ISSN 2345-0126 (online)

THE DEBATE OVER PROPOSED NEW MARRIAGE LAW AS AN EXAMPLE OF THE SOCIAL CHANGES IN THE INTERWAR POLAND

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Abstract

Purpose - the article aims to present the arguments used in the debate over the proposed new matrimonial law in the interwar Poland. The new codification was prepared in order to replace the previously existing regulations, that were completely different in the various parts of the country. Due to the opposition to the new legislation it never came into force. It should be noted that this opposition had a mass character, that was induced by the attitude of the conservative circles and the dominant religious groups. The author aims to show the various types of the arguments used in the debate (related i. e. to the position of the family, the development of the nation) and to indicate the usefulness of the analysis of the discussion on the law of marriage to reflect on contemporary discussions over controversial legal projects.

Design / methodology / approach - research for the article was based on the analysis of the selected papers issued in the interwar period that referred to the proposed new marriage law.

Findings – the goal of the research is to show that both proponents and opponents of the new matrimonial law used an extremely wide range of arguments. These arguments were not only of a religious nature. Legal and sociological arguments were also used during the debate.

Research limitations/implications – the article focuses only on the selected sources from the analyzed period, so it is only an introduction to the further research, that can also involve studies on the marriage law in the interwar Europe.

Practical implications - article may serve as a contribution to the discussion on the changing views regarding the nature of the marriage, its secular and religious implications as well as the role of the family in the state policy in the 20th century Europe.

Originality/value – the problem of the codification of the marriage law in the Second Polish Republic has been already widely discussed by the researches (Godlewski 1967; Krasowski 1994; Górnicki, 2000), so the aim of the article is to concentrate mostly on the diversity of the arguments raised during the debate over the proposed new marriage law.

Keywords: marriage law, Second Polish Republic

Type of research - literature review

Introduction

The unification of the various legal systems that had been left behind by the former Prussian, Russian and Austrian authorities was a major issue for the Polish government

ISSN 2345-0126 (online)

after Poland's resumption of independent statehood in 1918. It was particularly important to create a new marriage law. Until then this matter was regulated by five different legal jurisdictions, based on three different systems of marriage law: secular, mixed and denominational. The secular system of the matrimonial law was represented in the former Prussian sector by the regulations of the German Civil Code of 1896 (BGB). In this system civil marriages were obligatory and the divorces were allowed, regardless of spouses' religious affiliation. Similar regulations, based on the Hungarian provisions of 1894, were in force in the small enclave of Spisz and Orawa. The regulations of the Austrian Civil Code of 1811 (ABGB) prevailed in the former Austrian sector. In this jurisdiction the marriage could be entered into a mixed, alternative form – both denominational and secular. However, the divorces were not granted to the Roman Catholics. Finally, the denominational system of marriage law was represented by the Russian matrimonial legislation of 1832 and 1836 that were in force in the central and eastern parts of the country. In these regions the complete jurisdiction in marital cases belonged to the ecclesiastical courts[1]. Contradictory legislations in various parts of the country led to a state of legal uncertainty and chaos, including cases of the so-called "legal bigamy" [2].

Therefore, almost from the beginning of the Second Republic development works on the new marriage law were carried out by the Codification Commission. After years of struggle the proposal of the new marriage law, authored by the principal referent – prof. Karol Lutostański – was finally adopted by the Subcommittee of the Codification Commission on the 9th March 1929[3]. The proposal was subsequently approved by the Codification Commission on the 28th May 1929, sent to the Ministry of Justice in December 1929, and finally published in 1931, together with the principles of the proposal[4]. According to the proposal marriage could be optionally concluded before the head of the registry office or in the presence of a cleric of one of the state-recognized denominations. The provisions in the Chapter 8th of the proposal provided for separation and divorce. The proposal allowed a judgment of divorce that had to be preceded by an obligatory period of separation. According to the proposal the jurisdiction in the marital cases would belong to the common courts[5].

The publication of the proposal led to a wave of criticism, that would eventually block the legislative process and postpone the codification of the Polish marriage law,

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1 Godlewski (1967), p. 750-753; Krasowski (1994), p. 467-474; Ordyński (1925); Zarzycki (2010), p. 29-104, 117-164

2 Godlewski (1967), p. 754-756; Krasowski (1994), p. 475-487; Radwański (1968), p. 169-175; Świątkowski (1959), p. 1150-1158.

3 On the development of the proposal *cf.* Gołąb (1932), Górnicki (2000), p. 194-202; Krasowski (1994), p. 487-490; Radwański (1968), p. 158-162

4 *Projekt prawa małżeńskiego uchwalony przez Komisję Kodyfikacyjną w dniu 28 maja 1929* (1931); Lutostański (1931).

5 On the principles of the proposal *cf.* Górnicki (2000), p. 206-218; Krasowski (1994), p. 490-492.

ISSN 2345-0126 (online)

which continued to vary from region to region until the outbreak of World War II[1]. The problem of the failure of the unification efforts became a subject of extensive scientific literature after 1945. The publications issued in the PRL period contrasted the modern character of Lutostański's proposal with the backwardness of its critics[2]. Also the contemporary scientific literature tends to concentrate in the first place on the fierce opposition of the Roman Catholic Church and the conservative circles towards the proposal of the new marriage law[3]. In this discussion the most extreme examples of the arguments used by the opponents of Lutostański's proposal are often mentioned[4]. However, the purpose of this short paper is not to focus on the most controversial views presented by the opponents of the secular marriage law in the Second Polish Republic. It tends rather to show on the examples of various publications the most frequent arguments used in this heated debate, that influenced the Polish political life in the fourth decade of the 20th century.

I. Arguments related to the legal order and religious tradition

Prof. Karol Lutostański, speaking in support of the Codification Commission proposal – while appealing also to the Polish March Constitution of 1921 – expressed the opinion, that the regulation of the marriage law, including the jurisdiction of the courts ruling in the marital cases, should belong to the state authorities: "The role of non-governmental organizations, such as churches, in state, can be only of only concurrent, not substitute or guiding nature in those areas, that attract the social and public life of the country. This view on the relation of the state and its laws to the church laws is reflected in the Constitution and the codification of the marriage law must stick to the Constitution"[5]. In his further statements Lutostański emphasized the necessity of unifying the marriage law and the right of the citizens to conclude the marriage optionally in denominational or secular way, which derived from the constitutional equality principle. It was also raised that the spouses' right to terminate the marriage should not be restricted when it is consistent with his beliefs. Consequently the necessity of giving the exclusive jurisdiction in marital cases to the common courts was underlined: "Finally, concerning the court jurisdiction, the transfer of marital cases to the common courts (...) doesn't interfere in any way with the citizens' right to submit the case to the consistory court of proper denomination, which would examine it within its ecclesiastical power"[6].

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1 For a detailed list of publications on the codification of the Polish marriage law see also: Płaza (2001), p. 82-98.

2 As an example of such approach *cf.* Godlewski (1967), p. 757.

3 Górnicki (2000), p. 203-205, 218-220; Krasowski (1994), p. 492-501, Zarzycki (2010), p. 176-185. For a feminist perspective *cf.* Kraft (2004), p. 311-327.

4 For example: Cieślak (1931), Trzeciak (1932).

5 Lutostański (1931), p. 27.

6 Lutostański (1931), p. 41.

ISSN 2345-0126 (online)

The necessity of introducing a modern marriage law appeared also in statements of numerous lawmakers and scholars that supported the legislation proposed by the Codification Commission. In my article I'd like to present an example of such opinions – a rather unusual one. Sylwia Bujak – Boguska, a lawyer and a feminist, published a short article about the new marriage law in 1932[1], in which she stated: "The high moral level and the justice of the principles of the new marriage law are undisputed, and the overall construction of the new marriage law proves clearly, that the Polish legislators – while referring with great talent to the most rational monuments of the Polish legal thought – were at the same time capable of detecting the citizens' moral and legal needs of utmost importance, that are related to probably the most important institution of common life, which is marriage"[2].

Because it is impossible for this short paper to present the enormous number of publications issued against Lutostański's proposal, let's focus on some significant statements. An interesting example of such collection of polemical articles is a survey prepared by the Polish Association of Catholic Intellectuals (*Związek Polskiej Inteligencji Katolickiej*) for some prominent scholars and politicians. The main question in the survey was following: "Are the principles, on which the proposal [of new marriage law] is based on, fair and healthy, as well as consistent with the beliefs and customs of the Polish society? What would be the influence of the proposed new marriage law on the moral, national and public life of Poland, if it comes into force?". With such an overall question, the survey contained a whole range of arguments invoked against the proposed law[3].

To no surprise, first of all the respondents pointed at the conflict between the proposed marriage law and the religious beliefs of the vast majority of the Polish society. Citing legal arguments, some of the respondents in the survey stated, that the proposal was unconstitutional and inconsistent with the provisions of the Polish Concordat of 1925[4]. The necessity of respecting the opinion of this majority ruled out the legal permission for civil marriages and divorces (O. Balzer, O. Halecki, L. Piniński). One of the respondents, Dr. M. Thullie wrote: "Because for both the Roman Catholics and Eastern Orthodox (…) marriage is a sacrament, which granting can't be interfered by the government, the proposal of the Codification Commission, that transfers the whole jurisdiction to the state, is a provocation against the Catholic and Orthodox population of Poland, which must be firmly condemned"[5]. Some authors opted to combine the identity of the Polish nation with the Catholic religion. Noted architect Stefan Bryła stated: "Our nation is Catholic and deeply tied to faith and – on the other hand – the Catholic religion is the

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1 Boguska-Bujak (1932).

2 Boguska-Bujak (1932), p. 15

3 *Ankieta w sprawie projektu prawa małżeńskiego uchwalonego przez K.K.* (1932, further: *Ankieta…*). About the survey *cf.* Krasowski (1994), p. 495-499. Example of another collection of articles on this subject: Wiślicki *et. al. (*1932).

4 *Ankieta…* (1932), p. 29-30 (E. Dubanowicz). This argument was often cited by various opponents of the Lutostański's proposal – *e.g.* Karłowski (1932), p. 29-49.

5 *Ankieta …*(1932), p. 34.

ISSN 2345-0126 (online)

strongest bond that connects and consolidates the nation"[1]. Another respondent considered the proposal as inconsistent with "the spirit and tradition of Polish nation"[2]. Similar opinions appeared also in the other publications. As Zygmunt Sitnicki noticed in his article published in "Głos Sądownictwa", the percentage of non-denominational persons in Poland was so small, that introducing civil marriages, inconsistent with the religious principles of the overwhelming majority of citizens, might even become a threat to the Polish state: "99% of the Polish population is strongly tied to the religion. (...) If we also take into consideration the low cultural level of the masses in Poland and the neighbourship with the Soviet Union, we must come to the conclusion that **any** loosening of the powerful social brake, which is religion, seems dangerous and harmful"[3].

The necessity of respecting the legal traditions of the Polish society appeared also in two private proposals of the new marriage law, prepared by the researchers who rejected the Lutostański's proposal. Zygmunt Lisowski, the author of the first proposal, was a noted Professor of Law at the Poznań University[4]. Already in the introduction to his proposal Prof. Lisowski pointed that the future marriage law should comply with the beliefs of the majority of the society: "The reform of the marriage law (...) should not consist in the complete destruction of the existing order, but rather in its improvement, that would be based on the rules provided by the beliefs and customs of the society. (...) It rarely happens for a new legal system, that is different in its essential points from the previous system and unfamiliar to the society, to be met with the recognition and acceptance by this society"[5]. That's why Prof. Lisowski proposed that the members of the Roman – Catholic Church (and other state-recognized denominations) should follow the provisions of the internal law of their church with respect to the conclusion of marriage and the ways of its termination. Another proposal, authored by Rev. Jerzy Jaglarz, also opted for the denominational marriages[6]. Rev. Jaglarz was also an author of other publications, in which he argued against the new marriage law[7].

II. Arguments related to the condition of the family

The aforementioned survey also revealed arguments related to the various aspects of the condition of the Polish family. The acceptance of legal separation and then divorce based on spouses' mutual consent was considered by some scholars as the introduction of so-called trial marriages (O. Balzer), the proposal was also accused of setting forth to many grounds for separation, that sometimes could led to termination of marriage in

[1] *Ankieta...* (1932), p. 41.
[2] *Ankieta...* (1932), p. 38 (J. Janota – Bzowski).
[3] Sitnicki (1932), p. 364-365.
[4] Lisowski (1934).
[5] Lisowski (1934), p. 5.
[6] Jaglarz (1934). On both Lisowski's and Jaglarz's proposals *cf.* Górnicki (2000), p. 205-206; Gwiazdomorski (1935), p. 204-220; Krasowski (1994), p. 500-501.
[7] Jaglarz (1931), Jaglarz (1932).

ISSN 2345-0126 (online)

ridiculous situations (O. Halecki)[1]. Although the authors of the proposal emphasized, that it favored the spouses' equality, its critics pointed out that the relatively easy way to be granted a divorce would cause the victimization of women. Prof. Leon Piniński stated: "Such marriage law would be indeed very comfortable for those men, who would be glad to find in the institution of marriage a comfortable way of satisfying their own selfish desires and sensual lust, but would also prefer to be easily liberated from the heavier responsibilities, which are united with the marriage and the family life. On the other hand such legislation would be generally very unfavorable for women, except for those, who are already experienced in immorality, or would quickly become so"[2]. Sometimes the reasons for the rejection of the new marriage law proved to be very far-reaching. For example, according to an article published by the Supreme Court Judge Jan Hroboni the allowance of the separation by mutual consent for the childless couples would led to increase in the number of abortions[3]. Basing on his own observation of divorced couple, J. Hroboni persuaded, that it was impossible for them to achieve happiness: "I couldn't find happiness in those new marriages, that were concluded by previously divorced spouses. The first relationship was often a dissonance, because one can't erase from the book of life and treat as neutral events such prominent facts, as the first marriage vows and the first sunny days of living together"[4]. Economic reasons against the new marriage law were also mentioned. For example, Prof. O. Balzer pointed out that the divorces would cause additional difficulties in providing financial support for children born in subsequent relationships and may deprive the children from the divorced families of moral models. On the other hand Prof. L. Piniński argued that complete taking over the function of maintaining the civil registrations by the governmental authorities would become an additional burden for the state budget[5]. In his already mentioned publication in "Przegląd Sądowy" Zygmunt Sitnicki criticized Lutostański's proposal from "the practical point of view", claiming, that the proposed procedure of conclusion of marriage is too complicated and maintaining the whole civil registration by the government would result in additional and excessive costs[6].

III. Arguments related to the development of the country and the nation

Arguments of demographic nature were also used. Some researchers compared the effects of the introduction of the civil marriages and divorces in various countries. Statistical data (gathered for example by Rev. Stanisław Podoleński[7]) supplemented by various research were provided for this subject. The aforementioned survey for the Polish

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1 *Ankieta…* (1932), p. 5, 31-33.
2 *Ankieta…* (1932), p. 25. Prof. Piniński partially based his article on the views of the noted Polish legal scholar – Prof. W. Abraham (1929).
3 Hroboni (1932), p. 6.
4 Hroboni (1932), p. 7
5 *Ankieta…* (1932), p. 7-8 (O. Balzer), p. 17-18 (L. Piniński)
6 Sitnicki (1932), p. 362-364.
7 Podoleński (1926)

ISSN 2345-0126 (online)

lawmakers also contained similar arguments. Prof. Leon Piniński stated: "There are countries where the divorces are condemned and considered a reprehensible move by the traditional public opinion. In such countries divorces, albeit permitted by law, are treated as rare exceptions. (…) However, in the other cases – for example in France – the allowance of divorces led to the moral corruption, even though a significant part of the Catholic provincial population strongly condemns divorces for religious and ethical reasons"[1]. Piotr Dunin – Borkowski, a conservative politician, watched with concern the decline of the marriage institution in the United States: „At the same time the matter of the indissolubility of marriage is not treated seriously enough in this country. The staggering divorce rates growing with each year (...) lead to the assumption that it would be very difficult for the American society to keep the puritan moral high ground after the rejection of the indissolubility of marriage". Prof. Oswald Balzer reminded of the connection between the religious structure and the allowance of divorces: „It is so: [the divorces] were recognized by many other countries; but for the most part these are the countries with predominantly Orthodox, Lutheran or Protestant population. It is possible to fully explain the allowance of divorce from their position: they accepted the standard, that is recognized by the majority of their population"[2].

Two countries were particularly often referenced as an element of discussion with the foreign marriage laws: Italy and the Soviet Union. Some authors cited the Italian legislation of 1929 as an example of modern codification, respecting the rights of the Catholic Church members, although this Act was nevertheless considered too liberal in conservative circles[3]. On the other hand, the Soviet way to regulate the marriage law was presented in a very negative manner, for example in this opinion by J. Hroboni: "In the Soviet Russia, where marriage is based only on contract, and therefore can be dissolved at any time even with the consent of only one spouse, the statistics show that an average marriage lasts only for three months"[4]. Piotr Dunin-Borkowski also underlined: "The Bolshevism attempted, without the support of the tradition, to base the social life on a different platform than the family life"[5]. It should be noted, that in many pamphlets the equation of the marriage law in the Soviet Union to the Lutostański's proposal served as an insult to the latter.

An article by Dr. Ignacy Czuma from the Catholic University of Lublin, published in 1931, can be regarded as another interesting example of diverse arguments raised against the new marriage law[6]. In his argumentation he appealed of course to the aforementioned issues of the discrimination of the Catholic part of the Polish society, as well as to the possible inconsistency between the provisions of Lutostański's proposal and the Constitution or the Concordat of 1925. The main part of Dr. Czuma's article was devoted to the negative influence of the liberalization of the marriage law on the Polish family and the

[1] *Ankieta…* (1932), p. 21-23.
[2] *Ankieta…* (1932), p. 12 (O. Balzer), p. 28 (P. Dunin-Borkowski).
[3] *Cf.* Górnicki (2000), p. 205; Jaglarz (1931), p. 3-10.
[4] Hroboni (1932), p. 8.
[5] *Ankieta…* (1932), p. 27.
[6] Czuma (1931)

ISSN 2345-0126 (online)

Polish society: "Morality of divorces, trial marriages, generally: the morality of loosening the sexual discipline means for Poland a morality of the predominance of the sexual consent and sexual satiety over the good of the country"[1]. Therefore the future development of Poland was especially important as the country was endangered by the neighboring countries: "If our family is disciplined and firm, if our family houses are not converted into trysting places, our nation will be more capable of sacrifice, perseverance and efforts. It will be inclined to sacrifice and work, not to mindless comfort and weakness of the will and the soul (...) Within the next decades our future for the next centuries will probably be determined, therefore Poland has to become a camp of moral discipline, intensified order of our will and the readiness to systematic and sustained effort"[2]. The proposal of new marriage law didn't meet the requirements of such legislation, particularly in terms of its liberal approach to the stability of marriage: "In this way the Polish legal system is to obtain a uniformed, universal and extremely broad divorce law (...) and – moreover – it will receive a novelty in the form of legalizing and favoring the trial marriages"[3]. In the conclusion Dr. Czuma spoke unfavorably of the new proposal: "Weakness and meanness are coming to voice in Poland with the provisions of the new marriage and divorce laws (...)[4].

IV. New generation of scholars = new approach?

The discussion on the new marriage law lasted till 1939. A new generation of the legal professionals continued to engage in this dispute. Symptomatic for this situation were two articles published by two researchers shortly before the outbreak of the World War II in "Współczesna Myśl Prawnicza", a legal magazine edited by young lawyers. This dialogue started with a short article by Bohdan Sałaciński[5]. Considering the shape of the future codification of the Polish marriage law, Sałaciński spoke in favor of the secular concept of the regulation of this matter. First of all Sałaciński reflected on the history of the marriage law and stated that its secularization was an effect of "natural evolution". He recalled the legal chaos occurring in Poland in this matter and pointed that "the strongest order in marital cases" could be observed in the former Prussian sector, where the civil marriages were obligatory. In Sałaciński's opinion the necessity of creating a unified and universal marriage law for the entire country was the reason to support the secular legislation: "The educational (…) role [of the government] doesn't rely on breaking the uniformity of law and creating thousands of opportunities of getting around the regulations. Because the reality of law means the morality of law and honesty of law"[6]. Sałaciński continued with citing other reasons for the necessity of the secularization of the marriage law: the problem of evading the regulations of the ecclesiastical law, the

[1] Czuma (1931), p. 8.
[2] Czuma (1931), p. 10.
[3] Czuma (1931), p. 17.
[4] Czuma (1931), p. 18.
[5] Sałaciński (1938), p. 5-9.
[6] Sałaciński (1938), p. 7.

ISSN 2345-0126 (online)

need of unifying the citizens with a universal law, finally the assurance of the Constitutional principle of equality. In the conclusion Sałaciński encouraged other young lawyers to join the debate over the shape of the future marriage legislation in Poland.

Opposite point of view was presented by a 30-year-old scholar Dr. Juliusz Sas – Wisłocki in an article published in „Współczesna Myśl Prawnicza" in May 1939[1]. In his article Dr. Sas – Wisłocki defended the denominational regulation of marriage law and emphasized: „It is obvious that in the system of the future Polish national law also the marriage law has to comply with the spirit of the Polish nation, and because Polish nation is a Catholic nation, its laws and its government can not be inconsistent with the regulations of the Catholic religion and the canon law. Lutostański's proposal does not meet these requirements"[2]. In his further reflections Dr. Sas – Wisłocki stated that only the denominational legislation introduced in the former Congress Poland was „an achievement of Polish legal thought that truly flows out (...) of the spirit of the Polish Nation" and the future marriage law should refer to it. To no surprise, Dr. Sas – Wisłocki strongly opposed the Lutostański's proposal. What's interesting, he also spoke unfavorably of the unofficial proposals by Prof. Lisowski and Rev. Jaglarz, claiming that they were insufficient. Finally, in June 1939 Dr. Sas – Wisłocki published in „Współczesna Myśl Prawnicza" his own proposal of marriage law, based on the denominational system[3].

Conclusions

Probably no other legal issue provoked such heated debates in the interwar Poland, as did the problem of the codification of the marriage law. It is particularly important to note that this debate never had a chance to lead to a conclusion, because it was brutally interrupted by the outbreak of the World War II. The unification of the legal system (including the marriage law) proceeded quickly in 1945 after the seizure of power in Poland by the Communist Party. The civil marriages were finally implemented, leaving no place for further discussions.

Is it justified to use the example of the debate from over 80 years ago while analyzing changes in contemporary society and discussing contemporary legal acts? In my opinion – yes. Although the issue of the admissibility of the civil marriages and divorces doesn't raise such controversy any more, it seems that the current discussions over the definition of the marriage or legalizing civil unions may bear some resemblance to the debate over the Lutostański's proposal. Also in the current debate both supporters and the opponents of the new liberal solutions are appealing to a very broad set of arguments, some of which haven't changed that much since the interwar period. This paper aimed to give examples of such arguments. As indicated, only some authors sought to support their statements with a logical line of argumentation, or with references to the

[1] Wisłocki-Sas, Wytyczne… (1939), p. 8-13.
[2] Wisłocki-Sas, Wytyczne… (1939), p. 8.
[3] Wisłocki-Sas, Prawo małżeńskie (1939), p. 10-15.

legal systems or social research. Nevertheless, even they frequently resorted to personal attacks, envisioning the grim consequences of the introduction of the new marriage law. Such effects can be easily observed also during the contemporary debates over controversial legal subjects. It is obvious that the balanced opinions raised in the public discourse remain frequently overshadowed by populist statements. This second type of criticism was described by Prof. K. Lutostański in one of his polemical articles, as relying on: "an apparent distortion of opponent's texts and thoughts, on attributing him intentions, that he didn't harbor at all, on disgraceful tracing of the mischievous deceptions in a serious public work, that was undertaken in search of the best forms of the national legislation. In resorting to this method, the critics of the proposal prove conclusively that they can't afford a serious scientific criticism (…)"[1].

In conclusion, I would like to add that the subject of the marriage law in the interwar Poland is related to my planned Ph.D. dissertation, that will be devoted to the rulings in the divorce cases in the former Prussian district of the Second Polish Republic. The planned dissertation will concentrate on the issue of sustainability and stability of the civil marriage in a predominantly Catholic society in the context of the social changes in the last years before the outbreak of the World War II.

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[1] Lutostański (1932), s. 289.

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