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Legal Recognition of Same-Sex Couples in Poland

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Summary. Poland is one of the few European states that lack any legal recognition of same-sex couples, which is contrary to the standards of the European Court of Human Rights, as decided in the case *Przybyszewska and others v. Poland*. The aim of the article is to analyse the reasons for this situation as well as the legal aspects of this issue. The starting point for the deliberations will be the European standard on same-sex couples. Then the article will examine, whether the Polish law, especially the Constitution, permits the formal recognition of same-sex couples. Lastly, the article will focus on legal consequences of the lack of recognition of same-sex couples, with reference to parental rights and childcare, inheritance rights, taxation and other issues.

Prawne uznanie związków osób tej samej płci w Polsce

Słowa kluczowe: związki jednopłciowe, prawo do życia rodzinnego i prywatnego, niedyskryminacja, prawa dziecka

Streszczenie. Polska jest jednym z niewielu państw europejskich, które nie przewidują żadnej formy prawnego uznania dla związków osób tej samej płci. Jest to sprzeczne ze standardami Europejskiego Trybunału Praw Człowieka, o czym orzeczono w sprawie *Przybyszewska i inni przeciwko Polsce*. Celem artykułu jest analiza przyczyn tej sytuacji oraz aspektów prawnych tej kwestii. Punktem wyjścia do rozważań będzie europejski standard dotyczący związków jednopłciowych. Następnie w artykule zostanie zbadane, czy polskie prawo, w szczególności Konstytucja, zezwala na formalne uznanie związków osób tej samej płci. Na koniec artykuł skupi się na konsekwencjach prawnych braku uznania związków jednopłciowych, w odniesieniu do praw rodzicielskich i opieki nad dzieckiem, praw spadkowych, kwestii podatkowych oraz innych zagadnień.

1. Introduction

Legal situation of same-sex couples in Poland is a complex issue. On the one hand, the state enjoys in this area a certain margin of appreciation, however it is not acting in a legal vacuum, as also international standards are binding upon Poland. For this reason, the deliberations of this article will start with the presentation of the European standard on rights of same-sex couples. Here the European Convention on Human Rights (ECHR) is essential. At the same time also the EU law

provides, but in a very restricted way, for some rules relating to legal recognition of homosexual unions. Once these issues are discussed, the article will focus on the current legal situation of same-sex couples in Poland. The deliberations will concern decriminalisation, legal recognition of same-sex unions and the situation of children raised in such unions. Lastly, some conclusions will be made on the possibility of changes in the analysed area in the nearest future.

2. European Standard on Rights of Same-sex Couples

On the basis of Article 9 of the Constitution, Poland is obliged to respect international law binding upon it. Special regard within the issue of rights of same-sex couples has to be taken to the European Convention on Human Rights and the European Union law.

a. European Convention on Human Rights

Under the European Convention on Human Rights the recognition of same-sex couples raises issues on the basis of Article 8, Article 12 and Article 14 of the Convention, however currently these issues seem to be sufficiently explained by the European Court of Human Rights (ECtHR) in its case-law.

In the first place, the ECtHR noticed that the penalisation of homosexuality constitutes a violation of Article 8 ECHR. Protection of public morals cannot serve as a justification for such an interference in the individual's right to privacy, as it concerns a most intimate aspect of private life. There existed no pressing social need to make such acts criminal offences, despite the fact that some members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts¹.

For the same reasons, contrary to the ECHR is a discharge of homosexual people from service in the army for the sole reasons of their homosexuality and irrespective of their personal conduct. Such interferences in the sphere of private life are grave and exceptionally intrusive, and at the same time there exist no evidence that homosexuality causes any damage to morale and fighting power².

According to the case-law of the ECtHR, a different treatment of same-sex couples in relation to heterosexual couples may on different occasions constitute an unacceptable discrimination. That is why homosexual partners should succeed

¹ ECtHR, case *Norris v. Ireland*, app. no. 10581/83, judgment of 26 October 1988, at 39-47. ECtHR, case *Modinos v. Cyprus*, judgment of 22 April 1993, pp. 17-24.

² ECtHR, case *Smith and Grady v. the United Kingdom*, apps. nos. 33985/96 and 33986/96, judgment of 27 September 1999, at 87-112. ECtHR, case *Lustig-Prean and Beckett v. the United Kingdom*, apps. nos. 31417/96 and 32377/96, judgment of 27 September 1999, pp. 83-105.

to the deceased partner's tenancy just like heterosexual partners do, as different treatment in this regard has no objective and reasonable justification. Definitely, protection of the family in the traditional sense does not justify such different treatment³.

At the same time, the access of homosexual couples to simple adoption might be restricted, yet this issue requires an additional explanation. In *Gas and Dubois v. France* the court noticed that the situation of a recognised homosexual couple was different to marriage and it could be compared with that of an unmarried heterosexual couple, as the latter, just like a homosexual couple, can enter into a civil partnership. Moreover, this approach to adoption, which entails the severing of the existing parental tie between the adopted person and his or her biological parent, is valid for minors⁴. It has to be added that Article 14 and Article 8 ECHR did not oblige the Contracting States to grant same-sex couples equal rights as married couples in respect of second-parent adoption⁵.

An unjustified discrimination can also happen regarding eligibility of a same-sex partner for a residence permit on family grounds, especially if a state does not provide any way for a legal recognition of a same-sex couple, as in such a case individuals might have no legal means of obtaining recognition of their status as "family member", and yet they are a family. Such situation might require a different treatment from the one of unmarried heterosexual couple⁶.

Lastly, on the basis of the ECHR the member States have a positive obligation to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship. At the same time, they are not obliged to make marriage available to same-sex couples. On the one hand, due to the particular situation of same-sex couples and their interests at stake, as well as due to the fact that the legal recognition of same-sex couples by many of the member states of the Council of Europe, the states' margin of appreciation in this area is significantly reduced when it comes to affording same-sex couples the possibility of legal recognition and protection. On the other hand, states have a more extensive margin of appreciation in determining the exact nature of the legal regime to be made available to same-sex couples, yet the protection of the rights of same-sex couples should be practical and effective and thus adequate⁷.

³ ECtHR, case *Karner v. Austria*, app. no. 40016/98, judgment of 24 July 2003, at 34-43. ECtHR, case *Kozak v. Poland*, app. no. 13102/02, judgment of 2 March 2010, pp. 91-99.

⁴ ECtHR, case *Gas and Dubois v. France*, app. no. 25951/07, judgment of 15 March 2012, pp. 61-73.

⁵ ECtHR, case *Boeckel and Gessner-Boeckel v. Germany*, decision of 7 May 2013.

⁶ ECtHR, case *Tadeucci and McCall v. Italy*, app. no. 51362/09, judgment of 30 June 2016, pp. 87-99. ECtHR, case *Pajić v. Croatia*, app. no. 68453/13, judgment of 23 February 2016, pp. 61-86.

⁷ ECtHR, case *Schalk and Kopf v. Austria*, app. no. 30141/04, judgment of 24 June 2010, pp. 87-110. ECtHR, case *Valliantos and others v. Greece*, apps. nos. 29381/09 and 32684/09, judgment of

Taking the above-mentioned criteria into consideration, the ECtHR in *Przybyszewska and Others v. Poland* concluded that Poland violated Article 8 ECHR by the lack of any legal recognition of same-sex couples. Exercising some of the rights by entering private contractual agreements is not enough to fill the lacuna in the systemic lack of recognition of same-sex couples and moreover not all aspects can be positively regulated by such private contracts, this includes: property, maintenance, taxation and inheritance. Moreover, the level of approval of the Polish society for same-sex couples should not be decisive in deciding on regulation of their rights and a legal recognition of same-sex couples cannot in any way harm families constituted in traditional way nor compromise their future or integrity, and thus the Court rejected the arguments put forward by the Polish government⁸.

It results from the case-law of the ECtHR that up to a certain point, the legal situation of same-sex couples should be comparable to heterosexual couples. Apart from indiscriminatory treatment, currently the most important is the issue of legal recognition of homosexual couples and states' positive obligation to provide for some sort thereof.

b. European Union Law

The EU law would be applied to laws on family matters only exceptionally, as the regulation of family unions is an exclusive competence of the EU member states. The rules of EU law will come into play when the right to the free movement of persons is at stake. For this purpose, the directive 2004/38⁹ defines "family member" as *i.e.*, the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage, and in accordance with the conditions laid down in the relevant legislation of the host Member State. Article 7 of the directive 2004/38 regulates the right of residence for more than three months, which is also granted to family members as defined above. The Court of Justice interpreted this provision together with Article 21(1) TFEU as precluding the competent authorities of the Member State of which

7 November 2013, pp. 75-92. ECtHR, case *Oliari and Others v. Italy*, apps. nos. 18766/11 and 36030/11, judgment of 21 July 2015, pp. 159-194. ECtHR, case *Fedotova and others v. Russia*, apps. nos. 40792/10, 30538/14 and 43439/14, judgment of 17 January 2023, pp. 152-182. ECtHR, case *Przybyszewska and others v. Poland*, app. no. 11454/17, judgment of 15 December 2023, pp. 97-102.

⁸ ECtHR, case *Przybyszewska and others v. Poland*, app. no. 11454/17, judgment of 15 December 2023, pp. 108-124.

⁹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

the Union citizen is a national from refusing to grant a third-country national, being a family member of a same-sex, a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same-sex and therefore a third-country national of the same-sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. Moreover, such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex¹⁰.

The Court of Justice had also an occasion to decide on the rights of a child whose parents are a same-sex couple. In its judgment in the case *V.M.A.* the Court concluded that in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States. That is due to the fact that the relationship of the said child with both same-sex parents is protected under Article 7 of the EU Charter of Fundamental Rights, which must be read in conjunction with the obligation to take into consideration the child's best interests, as enshrined in Article 24(2) of the Charter and with regard taken to the Convention on the rights of the child¹¹. It results thereof that a child cannot be deprived of the relationship with one of his or her parents¹².

It can be concluded that the EU law provides for recognition of same-sex unions although in a very restricted manner, namely when it influences the freedom of movement of persons. Contrary to the European Convention on Human Rights, the EU law does not impose on the member states an obligation to provide for some sort of formal legal recognition of homosexual unions, which is due to the fact that the European Union has no competence in this area.

¹⁰ CoJ, case C-673/16 *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, judgment of 5 June 2018, ECLI:EU:C:2018:385.

¹¹ Convention on the rights of the child, UN General Assembly resolution no. 44/25, 20 November 1989.

¹² CoJ, case C-490/20 *V.M. A. v. Stolichna obshtina, rayon „Pancharevo”*, judgment of 14 December 2021, ECLI:EU:C:2021:1008. Similarly: CoJ, case C-2/21 *Rzecznik Praw Obywatelskich v K.S. and Others*, judgment of 24 June 2022, ECLI:EU:C:2022:502.

3. Legal Situation of Same-sex Couples in Poland

The deliberations of this part of the paper will focus on the compatibility of Polish law with the European standard, as discussed above. Three issues will be analysed, namely decriminalisation, recognition of same-sex unions and rights of children raised by homosexual couples.

a. Decriminalisation

Apparently, the decriminalisation of same-sex relationships was not a problematic issue in Poland. To present it briefly, for 123 years Poland lost independence and was under partitions until 1918. After the resumption of independence Poland started creating its own laws, however until that happened the laws of the possessive states were still in force. That is why in the first years of independence homosexual acts were penalised in Poland on the basis of § 175 of the German penal code¹³ and of § 129 of the Austrian penal code¹⁴, that penalised homosexual acts as acts contrary to nature¹⁵. At that time, the homosexual relationships were decriminalised under Russian law¹⁶. In 1932, the new Polish penal code¹⁷ entered into force and it prohibited only homosexual prostitution (Article 207). After the 2nd World War, a new penal code¹⁸ entered into force in 1970 and it provided for a complete decriminalisation of homosexual acts. In this regard, Polish law is fully compatible with the ECHR.

b. Legal Recognition of Same-sex Unions

In Poland, there exist no formal legal recognition of same-sex couples, so they cannot enter any registered union, being it called marriage or otherwise. From the constitutional perspective, however, there exist no legal obstacles to introduce a relevant regulation that would settle the conclusion of a formal union, partnership or marriage. Article 18 of the Polish Constitution stipulates only that marriage understood as a union between a man and a woman is placed under the protection and care of the Republic of Poland. Placing such marriage under the protection of

¹³ Strafgesetzbuch of 1871.

¹⁴ Strafgesetzbuch of 1852.

¹⁵ Jakub Hanc, *Homoseksualizm a prawo karne. Analiza synoptyczna*, Czasopismo Prawno-Historyczne, 2021, Tom LXXIII, pp. 364-366, 376.

¹⁶ Mal Priestley, *Analysing the treatment of queer people within the early Soviet Union*, Australian and New Zealand Journal of European Studies 2023, No. 15(1), p. 95.

¹⁷ Order of the President of Poland of 11 July 1932 Penal code, Dz. U. 1932 Nr 60, poz. 571.

¹⁸ Act of 19 April 1969 Penal code, Dz. U. 1969 Nr 13, poz. 94.

Poland does not exclude a regulation on other types of unions¹⁹. Article 18 of the Constitution is only a programmatic declaration, it sets aims and tasks of public authorities, what excludes it as a legal basis for specific norms defining rights for individuals²⁰. At the same time the Polish Constitution contains the principle of non-discrimination (Article 32) and the right to private and family life (Article 47) and it can be deduced thereof, that homosexual couples are discriminated on the basis of their sexual orientation, as they are treated differently from heterosexual couples regarding their right to formalise their unions²¹. Taking into consideration that Poland shall respect international law binding upon it (Article 9), the interpretation of the above-mentioned provisions should include case-law of the ECtHR, obliging states to introduce formal regulations of same-sex unions. The lack of legal recognition of same-sex couples can be even considered to be a deprivation of a human dignity and thus contrary to Article 30 of the Polish Constitution²². As it was stated by the ECtHR in *Przybyszewska and others v. Poland*, this situation amounts to a violation of Article 8 ECHR.

It has to be added that numerous Polish citizens concluded same-sex marriages outside Poland, for example in other EU member states. In Poland, they applied for the transcript of their marriage certificates into the Polish civil status records. They were refused, as the Polish secondary legislation does not provide for a formal recognition of same-sex marriages²³. Thus, such marriages are called limping legal relationships, as they are fully effective in some states, whereas in the other states

¹⁹ Supreme Administrative Court, case no. II OSK 2376/19, judgment of 6 July 2022. Karolina Rokicka-Murszewska, Kamil Wojciechowski, *Wokół dopuszczalności transkrypcji aktu urodzenia dziecka rodziców tej samej płci*, *Studia Iuridica Toruniensia*, 2022, no. XXXI, pp. 356-357. Natalia Woszczyk, *Konstytucja a małżeństwo: studium komparatystyczne na przykładzie Polski i Hiszpanii*, *Studia Iuridica*, 2018, no. LXXVI, p. 403. Krzysztof Michałek, *Art. 18 Konstytucji w odniesieniu do możliwości wprowadzenia instytucji małżeństw jedнопłciowych w Polsce*, *Roczniki Administracji i Prawa*, 2023, no. XXIII, vol. 4, pp. 57-58. Tomasz Litwin, *Instytucja związków partnerskich w świetle przepisów Konstytucji z 1997 roku*, *Miscellanea Historico-Iuridica*, 2014, no. XIII, vol. 2, pp. 177-180. Ewa Łętowska, Jan Woleński, *Instytucjonalizacja związków partnerskich a Konstytucja RP z 1997 r.*, *Państwo i Prawo*, 2013, no. 6, pp. 22-24, 29.

²⁰ Constitutional Tribunal, case no. K 1/98, judgment of 27 January 1999. Constitutional Tribunal, case no. SK 21/99, judgment of 10 July 2000. Constitutional Tribunal, case no. SK 11/09, judgment of 11 May 2011.

²¹ Tomasz Litwin, *Instytucja związków partnerskich w świetle przepisów Konstytucji z 1997 roku*, *Miscellanea Historico-Iuridica*, 2014, no. XIII, vol. 2, p. 172. Ewa Łętowska, Jan Woleński, *Instytucjonalizacja związków partnerskich a Konstytucja RP z 1997 r.*, *Państwo i Prawo*, 2013, no. 6, pp. 17-18.

²² Gabriela Hajduk, *Transkrypcja aktu urodzenia dziecka pary jedнопłciowej*, *Rocznik Administracji Publicznej*, 2021, no. 7, pp. 11-12.

²³ Supreme Administrative Court, case no. II OSK 2376/19, judgment of 6 July 2022. Voivodship Administrative Court in Warsaw, case no. IV SA/Wa 2982/19, judgment of 1 July 2020. Voivodship Administrative Court in Warsaw, case no. IV SA/Wa 2618/18, judgment of 8 January 2019.

they do not have any effect or only some partial effects²⁴. Inserting into the Polish civil registrar information on same-sex marriages or partnerships should not be *per se* excluded, if they influence marital status of a person, as crossing state borders should not influence the recognition of this status, this, however, should not take the form of a transcript but of an additional statement (*wzmianka dodatkowa*) or a note (*przypisek*)²⁵. At the same time, it has to be highlighted that foreign civil status acts have the same evidence value as the Polish ones²⁶, so a same-sex couple can effectively use on the Polish territory a foreign act²⁷.

Because of the lack of recognition of same-sex unions, same-sex couples are deprived of certain laws and privileges granted to married couples. This is the case with inheritance law. Under Polish law a succession can be a statutory succession and then a spouse is among the heirs (Article 931 and Article 932 of the Civil code), whereas a homosexual partner is excluded from statutory succession. Of course, a homosexual partner can inherit after the testator on the basis of a testament (Article 926 § 1 of the Civil code), but this solution has its further consequences, as on the basis of Article 991 § 1 of the Civil code such a partner, as a beneficiary of a testament, will be obliged to pay a reserved portion to the descendants, the spouse and the parents of the testator, if there were any. At the same time a spouse is exempted from inheritance tax²⁸ whereas a homosexual partner has to pay a full tax, as appropriate for the third taxation group, so in the highest possible amount²⁹.

The same rules apply equally to donations, so a heterosexual spouse is exempted from tax on donations from another spouse, whereas homosexual partners have to pay the tax in the highest possible amount. As it was emphasized by the Supreme Administrative Court, the provisions relating to married persons cannot be applied to cohabiting partners, even when their relationship corresponds in substance to marriage. A lawfully contracted marriage is a legal institution protected by the Polish Constitution, whereas a cohabitation is a specific factual state to which the provisions of civil law do not attach specific consequences in terms of property

²⁴ Michał Wojewoda, *W zagranicznym małżeństwie jedнопłciowym, czyli... stanu wolnego? Uwagi na temat międzynarodowego uznawania stanu cywilnego*, *Przedsiębiorczość i Zarządzanie* 2018, vol. XIX, no. 9, part II, p. 322.

²⁵ Michał Wojewoda, *Małżeństwa jedнопłciowe i związki partnerskie w polskim rejestrze stanu cywilnego*, *Studia Prawno-Ekonomiczne*, 2017, vol. CIII, pp. 143, 146-151.

²⁶ Supreme Court, case no. III CZP 58/12, resolution of seven judges of the Supreme Court of 20 November 2012.

²⁷ Michał Wojewoda, *Małżeństwa jedнопłciowe i związki partnerskie w polskim rejestrze stanu cywilnego*, *Studia Prawno-Ekonomiczne*, 2017, vol. CIII, p. 147.

²⁸ Article 4a(1)(1) of the act of 28 July 1983 on tax on inheritance and donations, *Dz. U.* 2024, poz. 596.

²⁹ Article 14(3)(3) and Article 15(1) of the act on tax on inheritance and donations.

relations. The protection of marriage manifests itself, *i.e.*, in the fact, that the legal effects of marriage do not apply to other unions³⁰.

When it comes to personal income tax, spouses are also entitled to file one tax report concerning both of them, whereas same-sex couples do not have a similar privilege. It was confirmed by the Supreme Administrative Court that persons living in cohabitation are not entitled to joint taxation. Due to the lack of a formal registration, a union of homosexual persons living in cohabitation cannot be compared to the institution of marriage³¹. Currently, the legal situation of same-sex couple living in cohabitation should be compared with the legal situation of a heterosexual couple living in cohabitation³², so the same rules should apply to both of these types of union without any discrimination³³.

After the death of a spouse, a widower or a widow is entitled to a family pension³⁴. Persons living in cohabitation, whether hetero- or homosexual, are deprived of this privilege, as such cohabitation, according to the case-law, is lacking a legal importance³⁵. Even the long duration of the cohabitation, common household, children or principles of social coexistence do not have significance for granting a family pension³⁶.

A person in same-sex union is not entitled to change his or her family name for the one of his or her partner, as such situation does not constitute an important reason as enshrined in Article 4 of the act on the change of names and surnames³⁷. As it was stated by the Voivodship Administrative Court in Łódź, a change of the family name can, as a rule, only take place upon marriage. Permitting the change of name for a person being in stable partnership would be misleading in social contacts and legal dealings as to the type of family ties linking the partners and it would also constitute a circumvention of the law, as it would be a form of substitute for marriage³⁸.

It is raised that the deprivation of same-sex couples of the above-mentioned rights and privileges is the realisation of aims enshrined in Article 18 of the Constitution, which cannot be contradicted by other provisions of the Constitution such

³⁰ Supreme Administrative Court, case no. II FSK 1682/14, judgment of 11 March 2016.

³¹ Supreme Administrative Court, case no. II FSK 2082/10, judgment of 20 March 2012.

³² Supreme Court, case no. II USK 648/21, order of 23 November 2022.

³³ Voivodship Administrative Court in Warsaw, case no. III SA/Wa 239/21, judgment of 26 May 2021.

³⁴ Article 67(1)(3) of the act of 17 December 1998 on retirement pension and other pensions from Social Security Fund, Dz. U. 2024, poz. 1251.

³⁵ Supreme Court, case no. II UK 98/18, judgment of 2 October 2019.

³⁶ Warsaw Court of Appeal, case no. III AUa 1007/06, judgment of 17 November 2006.

³⁷ Act of 17 October 2008 on change of names and surnames, Dz. U. 2021, poz. 1988.

³⁸ Voivodship Administrative Court in Łódź, case no. III SA/Łd 679/15, judgment of 21 October 2015. This judgment was upheld by the Supreme Administrative court in case no. II OSK 293/16, judgment of 10 October 2017.

as Article 32 (principle of non-discrimination). It is Article 18 of the Constitution that determines granting to heterosexual marriages protection and facilities, which would not be granted to couples who do not want or cannot enter into marriage³⁹. Some scholars approve such interpretation underlining the role of marriage for the society, namely reproduction⁴⁰, whereas others indicate that even some heterosexual couples cannot for biological reasons, realise the function of procreation, so the biological factor should not be decisive for recognition of the most basic human rights, such as the right to decide on one's private life⁴¹.

Nevertheless, in some aspects, Polish law provides for a partial protection of the same-sex unions. For example, in case of tenancy, a same-sex partner of a deceased tenant, who has lived with the tenant in *de facto* cohabitation, has the right of succession to the tenancy agreement⁴². As it was emphasized by the Supreme Court, a person living in cohabitation in the meaning of Article 691 is a person who has an emotional, physical and economic bond with the tenant, including a person of the same sex⁴³. In its judgment of 2014, the Warsaw Court of Appeal underlined that there are no convincing reasons in the case-law or any sociological or psychological arguments in favour of distinguishing on a legal basis between effects resulting from heterosexual and homosexual cohabitation. The emotional, physical and economic bonds arising from such cohabitation are the same in both cases and can create an equally strong bond. The concept of cohabitation refers to the permanent common life of two persons, regardless of their sex. Constitutional considerations on the principle of non-discrimination on the grounds of *i.e.*, sexual orientation support the recognition that a refusal to provide insurance cover to same-sex persons who are cohabitating constitutes discrimination on grounds of sexual orientation⁴⁴. Yet, it has to be added that such interpretation is the result of the ECtHR's judgment in *Kozak v. Poland*. Also, for the purposes of the act on

³⁹ Supreme Court, *Opinion on the parliamentary project on partnership*, 4 August 2011, [https://orka.sejm.gov.pl/Druki6ka.nsf/0/D04003AF581A7633C12578EE0028B6BB/\\$file/4418-001.pdf](https://orka.sejm.gov.pl/Druki6ka.nsf/0/D04003AF581A7633C12578EE0028B6BB/$file/4418-001.pdf) [Accessed on: 16.05.2024]. Tomasz Litwin, *Instytucja związków partnerskich w świetle przepisów Konstytucji z 1997 roku*, *Miscellanea Historico-Iuridica*, 2014, no. XIII, vol. 2, pp. 184-187. E. Łętowska and J. Woleński consider this interpretation to be erroneous and surrealistic: Ewa Łętowska, Jan Woleński, *Instytucjonalizacja związków partnerskich a Konstytucja RP z 1997 r.*, *Państwo i Prawo*, 2013, no. 6, pp. 22, 24-25.

⁴⁰ Dominik Kwitliński, *Związki partnerskie w świetle konstytucyjnej definicji małżeństwa*, *Kortowski Przegląd Prawniczy*, 2015, no. 2, p. 16.

⁴¹ Natalia Woszczyk, *Konstytucja a małżeństwo: studium komparatystyczne na przykładzie Polski i Hiszpanii*, *Studia Iuridica*, 2018, no. LXXVI, pp. 400, 407.

⁴² Article 691 of the act of 23 April 1964 civil code, Dz. U. 2023, poz. 1610.

⁴³ Supreme Court, case no. III CZP 65/12, resolution of 28 November 2012.

⁴⁴ Warsaw Court of Appeal, case no. I ACa 40/14, judgment of 26 June 2014. Similarly: Supreme Court, case no. III CZP 99/09, resolution of 20 November 2009.

housing benefits⁴⁵ as a person residing in and running a household with a person applying for household allowance can be considered persons in *de facto* relationships with the applicant, regardless of their sex⁴⁶.

A same-sex partner is the closest person in the meaning of Article 115(11) of the Polish penal code⁴⁷ if he or she is a person living in cohabitation. On the basis of Article 182 of the code of criminal procedure⁴⁸, a person close to the accused is entitled to refuse to testify against him or her. Polish courts acknowledge, that these provisions apply both to heterosexual and homosexual couples⁴⁹.

Sometimes Polish law is inconsistent. On the one hand, an employee is entitled to two-day leave in case of the death of a spouse, whereas in such case an employee being in same-sex union is not entitled even to one-day leave⁵⁰. On the other hand, an employee in substitute military service is entitled to two-day leave in case of death of a spouse and to one-day leave in case of death of person with whom he or she lives in cohabitation⁵¹, which includes same-sex partners.

To sum up, the most essential problem of Polish law is the lack of any form of legal recognition of same-sex couples and the impossibility to formalise their unions. Issues relating to inheritance law or taxation could be changed as a follow-up of legalisation of same-sex unions. As long as this does not change, homosexual couples will be treated equally to unmarried heterosexual couples living in cohabitation.

c. Children

It is a fact that in Poland there are children raised by same-sex couples⁵². For these children, the homosexual couples are parents, although legally only one of the partners is recognised as a parent. Currently, the other partner cannot adopt such child as long as the partner being a parent is alive. This situation raises serious doubts from the perspective of the rights of the child and the child's best interest. If

⁴⁵ Act of 21 June 2001 on housing benefits, Dz. U. 2023, poz. 1335.

⁴⁶ Voivodship Administrative Court in Gliwice, case no. IV SA/GI 534/07, judgment of 10 January 2008.

⁴⁷ Act of 6 June 1997 penal code, Dz. U. 2024, poz. 17.

⁴⁸ Act of 6 June 1997 code of criminal procedure, Dz. U. 2024, poz. 37.

⁴⁹ Supreme Court, case no. I KZP 20/15, resolution of 25 February 2016. Supreme Court, case no. III KK 268/12, judgment of 21 March 2013. Regional Court in Słupsk, case no. II K 78/17, judgment of 19 March 2018. Regional Court in Częstochowa, case no. VII Ka 727/16, judgment of 16 September 2016.

⁵⁰ § 15 of the ordonnance of the Minister of Labour and Social Policy of 15 May 1996 on justification of absences from work and granting employees time off work, Dz. U. 2014, poz. 1632.

⁵¹ Article 586 of the act of 11 March 2022 on the defence of homeland, Dz. U. 2024, poz. 248.

⁵² Marlena Drapalska-Grochowicz, *Kilka uwag na tle statusu prawnego rodzin z wyboru*, Studia Iuridica Toruniensia, 2018, vol. XXIII, p. 32.

the partner-parent dies, a legal lacuna and uncertainty regarding the child custody arises, as there is no guarantee that the living partner would be granted parental rights, despite the fact that he or she has participated in the child's upbringing for several years. As a result, such a child, after losing one parent because of death, might lose another parent, if the custody would be granted to some other people. At the same time, currently, almost 70% of the Polish citizens declares support for the possibility of adoption of the child by a same-sex partner in case the biological parent dies⁵³.

Polish citizens living abroad and having regulated formal status with their same-sex partners or spouses also raise children together with them. It often happens that in the birth certificates of such children both same-sex partners are registered as the child's parents. Children born from Polish parents or a parent acquire *ex lege* Polish citizenship (Article 34(1) of the Constitution)⁵⁴. Citizenship, as a public-law institution, is not subjected to private law regulations. While deciding on citizenship, human dignity must be granted an utmost importance and no discrimination is allowed, including a discrimination on the basis of the status of the child's parents. That is why a child cannot be refused Polish citizenship, if the parents are a same-sex couple and one of them is a Polish citizen⁵⁵.

At the same time same-sex parents tried to transcript children's birth certificates into the Polish civil status records. However, the Supreme Administrative Court decided that such a transcript is not allowed under Polish law as it would be contrary to the basic (constitutional) values accepted in the Polish legal system⁵⁶. The Court deduced from Article 18 of the Constitution and from numerous provisions of the family and custody code⁵⁷ that the names of same-sex parents cannot be inserted into a birth certificate, as the relevant sections permit to insert only a mother and a father. According to the Court such an interpretation does not violate the European Convention on Human Rights nor relevant rules of the EU law on the freedom of movement of persons⁵⁸. The Voivodeship Administrative Court in Łódź went even further and concluded that the term "parents" always

⁵³ Anton Ambroziak, *Sensacyjny sondaż: nawet wyborcy PiS za prawem do przysposobienia dziecka w parach jednopłciowych*, *Oko Press* of 10 April 2024, <https://oko.press/sondaz-nawet-wyborcy-pis-za-prawem-do-przysposobienia-dziecka> [Accessed on: 16.05.2024].

⁵⁴ Although it is raised in the literature, that only biological bonds should be taken into consideration: Michał Wojewoda, *Rodzicielstwo osób tej samej płci w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej – glosa do wyroku TSUE z dnia 14 grudnia 2021 r. w sprawie C-490/20*, *Białostockie Studia Prawnicze*, 2022, vol. 27, no. 3, p. 271.

⁵⁵ Supreme Administrative Court, case no. II OSK 1868/16, judgment of 30 October 2018.

⁵⁶ Article 107 (3) of the act of 28 November 2014 on civil status records, *Dz. U.* 2023, poz. 1378.

⁵⁷ Act of 25 February 1964 family and custody code, *Dz. U.* 2023, poz. 2809.

⁵⁸ Supreme Administrative Court, case no. II OPS 1/19, resolution of 2 December 2019. Supreme Administrative Court, case no. II OSK 2284/28, judgment of 17 February 2021.

refers to persons of different sex and not to same-sex couples⁵⁹. Currently, there are proceedings initiated against this interpretation before the ECtHR and the case has been communicated to the Polish government⁶⁰.

The interpretation of the Supreme Administrative Court cannot be accepted. The result of the mentioned case law is that one of the child's parents, after crossing a state's border, stops being recognised as a parent and the legal bond between this child and this parent is broken. Such a result is contrary to the right to respect for private and family life, and even the right to family reunification might be triggered. It is definitely contrary to child's best interest. As the ECtHR noticed in case *Kroon and others v. the Netherlands*, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter, the child's integration in his or her family⁶¹. This situation has to be distinguished from the one in the case *Boeckel and Gessner-Boeckel v. Germany*, as it does not concern adoption but the recognition of the effects of adoption proceeded in another state. In its judgment concerning surrogation in *Labasse v. France* the ECtHR concluded that the lack of transcript of a birth certificate can constitute a violation of the child's rights under Article 8 ECHR and France could not validly refer to the protection of public interest clause⁶².

The argumentation of the Supreme Administrative Court can also be reversed, as violation, caused by the Court's case-law, of the right to private and family life, as well as the principle of non-discrimination, as enshrined in the Polish Constitution, would be contrary to the basic values accepted in the Polish legal system. As a result of the Court's case-law, the interest of the child, as well as of the entire family is comprised⁶³, and they are as well constitutional values (Article 47 and Article 72 of the Constitution).

Moreover, the interpretation of the Supreme Administrative Court might be striking, as the transcript of any civil act is of purely technical nature and it bears no consequences in the meaning of substantive law, it is only formal and linguistic

⁵⁹ Voivodship Administrative Court in Łódź, case no. III SA/Łd 1100/12, judgment of 14 February 2013.

⁶⁰ ECtHR, case *A.D.-K. and others v. Poland*, app. no. 30806/15, information available at: <https://hudoc.echr.coe.int/eng?i=002-12391> [Accessed on: 14.05.2024].

⁶¹ ECtHR, case *Kroon and others v. the Netherlands*, app. no. 18535/91, judgment of 27 October 1994, at 32.

⁶² ECtHR, case *Labasse v. France*, app. no. 56941/11, judgment of 26 June 2014.

⁶³ Gabriela Hajduk, *Transkrypcja aktu urodzenia dziecka pary jedнопłciowej*, *Rocznik Administracji Publicznej*, 2021, no. 7, pp. 8-9.

reproduction of a foreign civil act⁶⁴. At the same time a child, a Polish citizen, is deprived of its most basic rights and, as a consequence, he or she might have a problem with issuance of identity documents, like an identity card or a passport⁶⁵, as transcript is obligatory when a Polish citizen applies for a Polish identity document⁶⁶. However, taking into consideration the EU law, especially the freedom of movement of persons, as well as the right of every citizen to obtain identity documents, it is raised that a transcript should not be a condition for issuance of the document, if the transcript is not allowed under Polish law⁶⁷. At the same time Polish administrative courts indicate, that in such situation the name of the parent who is not a biological parent, should not be inserted in the document, as Polish law acknowledges that a child can be descendant of only a woman and a man⁶⁸. Such interpretation might be conformed to the exigencies of the EU law, which requires only issuance of documents permitting free movement between the EU member states, but it raises doubts from the perspective of the ECHR.

It is worth mentioning that there was one case (no. II OSK 2552/16) in which the Supreme Administrative Court detached from its constant case-law and ordered the transcript of the birth certificate. The Court placed the child's rights and interests in the centre of its decision and noticed that the refusal of transcript places the child in a situation of uncertainty regarding the child's legal status. For these reasons, the transcript of birth certificate of a child whose parents are a same-sex couple does not contradict the basic values accepted in the Polish legal system⁶⁹. This interpretation is more convincing from the perspective of children's rights and regrettably it has been rejected in subsequent judgments.

⁶⁴ Gabriela Hajduk, *Transkrypcja aktu urodzenia dziecka pary jedнопłciowej*, Rocznik Administracji Publicznej, 2021, no. 7, p. 11. Karolina Rokicka-Murszewska, Kamil Wojciechowski, *Wokół dopuszczalności transkrypcji aktu urodzenia dziecka rodziców tej samej płci*, Studia Iuridica Toruniensia, 2022, no. XXXI, p. 354. Michał Wojewoda, *Transkrypcja aktu urodzenia dziecka, które zostało uznane za granicą*, Kwartalnik Prawa Prywatnego, 2017, no. XXVI, vol. 2, p. 340.

⁶⁵ Gabriela Hajduk, *Transkrypcja aktu urodzenia dziecka pary jedнопłciowej*, Rocznik Administracji Publicznej, 2021, no. 7, pp. 16-17. Michał Wojewoda, *Rodzicielstwo osób tej samej płci w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej – glosa do wyroku TSUE z dnia 14 grudnia 2021 r. w sprawie C-490/20*, Białostockie Studia Prawnicze, 2022, vol. 27, no. 3, p. 267.

⁶⁶ Article 104(5) of the Act on civil status record.

⁶⁷ Supreme Administrative Court, case no. II OSK 1303/21, judgment of 28 February 2024. Voivodship Administrative Court in Warsaw, case no. IV SA/Wa 1618/20, judgment of 20 November 2020. Michał Wojewoda, *Rodzicielstwo osób tej samej płci w orzecznictwie Trybunału Sprawiedliwości Unii Europejskiej – glosa do wyroku TSUE z dnia 14 grudnia 2021 r. w sprawie C-490/20*, Białostockie Studia Prawnicze, 2022, vol. 27, no. 3, pp. 267-268.

⁶⁸ Supreme Administrative Court, case no. II OSK 1303/21, judgment of 28 February 2024.

⁶⁹ Supreme Administrative Court, case no. II OSK 2552/16, judgment of 10 October 2018.

4. Conclusions

Although desirable, the change of the legal situation of same-sex couples might not come in the nearest future. Unfortunately, quite an essential part of the Polish society is not only sceptical towards the rights of same-sex couples, but their attitude cannot be described otherwise than hostile. The Law and Justice party has still around 30% of social support in Poland, and the representatives of this party have attacked same-sex couples or LGBTQ+ persons on numerous occasions.

In presidential elections in 2020 Andrzej Duda, as a candidate, stated that LGBTQ+ persons are not people but ideology. He also emphasized that his parents did not fight with the communist ideology in order to allow another ideology to come, an ideology which is more destructive and intolerant and which aims at exclusion of every person, who is opposing thereto⁷⁰. Przemysław Czarnek, a former Ministry of Science and Education, said in his statement to the public television on LGBTQ+ persons the following:

We need to defend families from such a corruption, deprivation and absolutely immoral conduct. We need to defend us from LGBT ideology and we need to stop listening to the idiocies on some human rights or equality. These people are not equal to normal people and we should stop this discussion right now⁷¹.

Some local and regional communities, ruled by far-right politicians, adopted a series of resolutions counteracting LGBT ideology. In this case, however, the administrative courts annulled the said resolutions in numerous judgments⁷². The Supreme Administrative Court underlined that these resolutions are a *de facto* negation of equality and anti-discrimination activities in the public space. The State is a community of all citizens, irrespective of their nationality, gender, social position, religion or political convictions. They must all have the same personal, political, and social rights and the same obligations towards the State. No one in

⁷⁰ Przemysław Malinowski, *Andrzej Duda o LGBT: Próbuja mówić, że to ludzie. To ideologia*, Rzeczpospolita of 13 June 2020, <https://www.rp.pl/wydarzenia/art8909311-andrzej-duda-o-lgbt-probuja-wmowic-ze-to-ludzie-to-ideologia> [Accessed on: 16.05.2024].

⁷¹ Dominika Sitnicka, *Słowa Czarńka o LGBT „ci ludzie nie są równi ludziom normalnym” wyrwane z kontekstu? Akurat*, Oko Press of 5 October 2020, <https://oko.press/czarnek-o-lgbt-studio-polska> [Accessed on: 16.05.2024].

⁷² For example: Supreme Administrative Court, case no. III OSK 2204/22, judgment of 12 October 2023. Supreme Administrative Court, case no. III OSK 1932/22, judgment of 12 October 2023. Supreme Administrative Court, case no. III OSK 1932/22, judgment of 12 October 2023. Voivodship Administrative Court in Rzeszów, case no. II SA/Rz 1221/23, judgment of 13 March 2024. Voivodship Administrative Court in Warsaw, case no. I SA/Wa 1951/23, judgment of 6 February 2024. Voivodship Administrative Court in Warsaw, case no. VIII SA/Wa 812/23, judgment of 25 January 2024. Voivodship Administrative Court in Lublin, case no. III SA/Lu 553/23, judgment of 11 January 2024. Voivodship Administrative Court in Lublin, case no. III SA/Lu 550/23, judgment of 11 January 2023.

Poland may be discriminated against for any reason⁷³. Nevertheless, locally, these resolutions were supported by politicians and a vast part of local communities.

For these reasons, legal recognition of same-sex couples in Poland is confronted with a noticeable opposition. Apparently, Poland will continue to violate Article 8 ECHR, as decided by the ECtHR in case *Przybyszewska and Others v. Poland*, until political reality in Poland changes.

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⁷³ Supreme Administrative Court, case no. III OSK 3746/21, judgment of 28 June 2022.