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Does the Polish constitution define marriage only as an union between a man and a woman, or is another interpretation possible? Polemic with the previous jurisprudence.

Introduction

The change of approach to homosexuality and to the homosexual relationship took place gradually. In the interwar period and in the first two decades after the Second World War, depenalization of homosexual acts took place in developed countries. The culmination of this stage was the official deletion of homosexuality from the list of mental disorders by the American Psychiatric Association in 1973, and in 1990 by WHO from the International Classification of Diseases and Health Problems¹.

Currently all over the world there are 30 countries where same-sex marriage is legal. Among them 21 countries have legalized same-sex marriage nationally through legislation. However, Australia, Ireland and Switzerland legalized same-sex marriage through legislation only after nation-wide votes. Another 7 countries have legalized same-sex marriage nationally through court decisions (Austria, Brazil, Colombia, Costa Rica, Ecuador, Mexico, South Africa, Taiwan and the United States of America), and 2 countries (South Africa and Taiwan), enacted legislation legalizing same-sex marriage after courts mandated them to do so².

Regarding the same-sex marriage legal regulations, Europe is both, the leader in the number of states that allow same-sex marriage (16) as well as the pioneer, as the first countries that allowed the same-sex marriage were the Netherlands in 2001 and Belgium in 2003. Other countries, such as Germany, Croatia, Estonia, Hungary, Slovenia, the Czech Republic and Italy recognise civil unions, or registered partnership, or unregistered cohabitation³. At the same time, six EU countries, i.e. Poland, Lithuania, Latvia, Slovakia, Bulgaria and Romania, do not provide for any legal sanctioning of same-sex couples.

Article 18 of the Polish Constitution⁴ states: **Marriage, being a union of a man and a woman**, as well as the family, motherhood and parenthood, **shall be placed under the protection and care of the Republic of Poland**. As a consequence, article 1 of the of the Family and Guardianship Code (hereinafter: the Code) in the wording "A marriage is contracted when a man and a woman who are present at the same time submit declarations to the head of the registry office that they are entering into marriage with each other, has remained unchanged so far⁵.

The courts, including the constitutional tribunal, have so far consistently indicated in their rulings that in the Polish legal system the requirement of being differentiated by sex is undoubtedly a substantive prerequisite for marriage.

Such an interpretation leads to: refusal to transcribe a same-sex marriage certificate concluded abroad⁶, the impossibility of compulsory health insurance in Poland covering the

¹ World Health Organisation <https://www.who.int/bulletin/volumes/92/9/14-135541/en/> (accessed: 12.01.2019).

² <https://www.hrc.org/resources/marriage-equality-around-the-world> (accessed: 28.11.2021).

³ E. Kuźelewska, Same-Sex Marriage – A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriage in Europe, *Białostockie Studia Prawnicze* 2019, vol. 24, no 1, p. 15.

⁴ As adopted by the National Assembly on 2nd April 1997 (Journal of Laws 1997, No 78, pos. 483 with amendments).

⁵ This is a normative act that is the basic source of Polish family law, comprehensively regulating family relations, passed by the Sejm of the People's Republic of Poland on February 25, 1964, in force from January 1, 1965.

⁶ Judgment of Provincial Administrative Court in Warsaw of 18 September 2019, case IV SA / Wa 1638/19.

partner of a woman remaining in a same-sex civil partnership concluded in Great Britain⁷, refusal to change the surname acquired as a result of entering into same sex marriage⁸, refusal to transcribe a child's foreign birth certificate in which same-sex persons are entered as parents⁹.

Constitutional definition of marriage in the statements of the constitutional court

Common and administrative courts adjudicate on the basis of statutes and are therefore bound by the above-mentioned definition of marriage. On the other hand, the constitutional court is not bound by statutes. In its jurisprudence this court may make an interpretation of the constitution that is consistent with the aims of its authors (historical and legal interpretation), or interpret the Basic Law in accordance with the principle of a democratic state ruled by law, which requires the preservation of minorities rights as a necessary condition for the functioning of democracy.

The Polish constitutional tribunal, following the views of the majority of Polish constitutionalists and the will of the ruling party - also in the rulings passed in 2021¹⁰ - chose a different path, maintaining the current status quo.

Both in the previous rulings and in the rulings issued in July 2021, the constitutional court raises the following arguments leading to the conclusion that recognizing a homosexual relationship as marriage would require an amendment to the constitution.

1. axiology of the constitution of 1997

Including article 18 among the general principles of Polish statehood is primarily aimed at emphasizing the role of the family in society. This principle is elaborated on in subsequent provisions of the Constitution - Art. 47¹¹, art. 48¹², art. 53 paragraph 3¹³, art. 71¹⁴, art. 72¹⁵. Their interpretation should, to the greatest extent possible, guarantee the implementation of the values indicated in Art. 18 of the Constitution. The commented provision is addressed primarily to public authorities. It expresses the program norms ordering the implementation of the values expressed in it as much as possible.

⁷ Judgment of the Supreme Administrative Court of 25 October 2016, case II GSK 866/15

⁸ Judgment of the Supreme Administrative Court of October 10, 2017, case II OSK 293/16.

⁹ Resolution of the 7 judges of the Supreme Administrative Court of 2 December 2019, case II OPS 1/19.

¹⁰ Cases: SK 4/19, SK 15/17.

¹¹ Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.

¹² 1. Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions. 2. Limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment.

¹³ Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48, para. 1 shall apply as appropriate.

¹⁴ 1. The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances - particularly those with many children or a single parent - shall have the right to special assistance from public authorities. 2. A mother, before and after birth, shall have the right to special assistance from public authorities, to the extent specified by statute.

¹⁵ 1. The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense. 2. A child deprived of parental care shall have the right to care and assistance provided by public authorities. 3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child. 4. The competence and procedure for appointment of the Commissioner for Children's Rights shall be specified by statute.

The discussed provision is an element of setting the goals and tasks of public authorities, because it imposes on these authorities the obligation to "protect and care" the values and institutions indicated in this provision. This affects the legal nature of Art. 18. The dominant view is that it should be treated as a "program norm"¹⁶. Thus, this provision does not create individual rights, so "it cannot constitute the basis for an individual pursuit of claims (...) and may not (...) be the basis for a constitutional complaint"¹⁷.

However, there are no obstacles to the fact that Art. 18 constituted an independent basis for the assessment of constitutionality in a specific or abstract control of norms, because statutory regulations that would destroy the existing system of protection and care of family values may - only for this reason - be considered unconstitutional¹⁸. In practice, there are judgments of the Constitutional Tribunal stating non-compliance with Art. 18, but always with a parallel declaration of non-compliance with other (other) constitutional provisions¹⁹. Sometimes the Tribunal treats Art. 18 only as appearing "in connection with" the provision, the violation of which is adjudged to be²⁰.

Nevertheless in one passage, namely in establishing the heterosexual definition of marriage, Art. 18 takes on a more specific character, taking the form not so much of the principle of the system as of a legal norm²¹.

This article is the only one a provision of the Constitution in which the term "marriage" appears. Art. 18 of the Constitution, while defining marriage, does not allow for "dilution" of its content in ordinary legislation. The concept of marriage is there thus uniform throughout all public and private law. The lack of a clear indication of this in Art. 18 can be only considered as relationship concluded in compliance with the requirements of art. 1 of the above-cited Code.

2. shaping the content of art. 18 during the legislative procedure regarding the constitution of 1997

During the work on the Basic Law the institutionalization of homosexual marriages in some countries - were taken into account and were rejected.

Despite the lack of such an indication directly in the provision previously of the binding Constitution there was no doubt that marriage is a union between a man and a woman. That was the view it is obvious that it was not given much attention in the reference works to the definition of marriage and the rules governing marriage. Adoption of the gender distinction in the Polish Constitution for the constitutive determinant of the existence of a marriage resulted directly from the will of the constitution-shapers, and then the will of the nation expressed in the referendum. That led to exclusion in Polish law the possibility of the ordinary legislator to introduce unions of same sex person.

Including in art. 18 the definitional "relationship between a woman and a man" was a reaction to the appearance in foreign countries of a regulation that subjected the relationships of the same sex persons of a regulation similar to or coinciding with the institution of marriage. The discussed constitutional provision was to play the role of a preventive instrument introducing such a regulation into Polish law. The essence of this regulation was normative determination not only about the impossibility of regulating in the law Polish "same-sex

¹⁶ See judgments of the Constitutional Tribunal, cases: K 1/98; SK 21/99; SK 11 / 09; SK 24/01.

¹⁷ Constitutional Tribunal judgment SK 21/99; see also the judgment of the Supreme Administrative Court of March 19, 2009, case II FSK 151/08.

¹⁸ especially the judgment of the Constitutional Tribunal in case P 18/06

¹⁹ E.g. judgments of the Constitutional Tribunal in case: K 8/03; K 16/04 and P 18/06, as well as P 41/07

²⁰ E.g. judgments of the Constitutional Tribunal in case: SK 11/09; P 40/12

²¹ E.g. judgment of the Constitutional Tribunal in case K 18/04. See also the decision of the Supreme Court of July 7, 2004, case II KK 176/04.

marriages", but also other relationships that, even though they would not be defined as marriage, would have perform functions similar to it.

3. legislative omission

Legislative omission means the legislator deliberately and intentionally leaves a given issue unregulated. According to the established jurisprudence of the Polish constitutional court, the examination of a legislative omission is not subject to the examination of the Constitutional Tribunal. At the same time, the Constitution does not contain an order addressed to the legislator, obliging the legislator to introduce a regulation allowing marriage between persons of the same sex. The legislator is bound by the unambiguous wording of Art. 18 of the Constitution, defining marriage as a union of a woman and a man. Without an amendment to the Constitution, it is not permissible to introduce the institution of homosexual marriage into ordinary legislation.

Polemics

The arguments cited above, repeated in every ruling of the constitutional court concerning same-sex marriages, in the opinions of experts analyzing the bills submitted to parliament in this regard and quoted by politicians of the currently ruling majority, are selective and, above all, do not take into account the international legal environment shaping Polish domestic law. At the same time they stand in opposition to the concept of a living constitution, which is a directive interpreting the constitution that protects the rights of individuals and minorities in the most effective manner.

1. arguments omitted in the jurisprudence of the constitutional court

Firstly, in the work on the adoption of the Constitution of 1997, the topic of same-sex marriage was not overlooked. One of the experts of the Constitutional Committee of the National Assembly – Professor Kazimierz Działocha (judge of the Constitutional Tribunal in 1985-1993), referring to Art. 54 sec. 2 of the draft (ie the current Article 18 of the Basic Law), stated that the normative content of the proposed (and finally adopted) regulation “boils down to the fact that the state protects marriage as a union of a woman and a man. Marriage understood in this way is under the protection of the state, and the dogmatic interpretation of par. 2 does not preclude another marriage. If marriage is understood primarily as a civil contract between two persons - a man and a woman, then another marriage is not excluded.

Secondly, the administrative courts see the possibility of a different interpretation of Art. 18 of the Constitution. In one ruling it was indicated that the above constitutional principle implies not so much the constitutional understanding of the institution of marriage, but the guarantee of granting special protection and state protection to the institution of marriage, but only on the assumption that it is a relationship between a man and a woman. The above provision does not prohibit the legislator from institutionalizing the status of same-sex or other-sex unions, which for obvious reasons do not want to contract marriage in its traditional meaning. The court points out, however, that the decisive factor in this respect is the will of the legislator, who is the only entity competent to implement the provisions of the Constitution, and for this purpose it is a relevant law in the form of acts of a lower order. Currently, however, the Polish legislator has not decided to introduce this type of solutions, sticking to a certain minimum limit set by the content of Art. 18 of the Polish Constitution²².

²² judgment of the Provincial Administrative Court in Warsaw of January 8, 2019, case IV SA / Wa 2618/18.

2. acts of international law and their interpretation that should change the current view on Article 18 of the Constitution

According to the Polish constitution, an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes (article 92 paragraph 2).

The European Convention on Human Rights (hereinafter: ECHR) is a genuine constitutional fundamental charter - civil and political - rights and freedoms for countries within the Council Europe. This document is the common value of European democracies. Creates in fact, a set of criteria that should be met by political systems in order to they could be considered truly democratic. There is no exaggeration in saying that thanks to the Convention there is now a European legal order in the sphere of protection rights of an individual, including not only the catalog of protected rights, expanded by additional protocols and interpretations of its bodies, but also unique on a global scale the mechanism of their implementation.

Today, all member states of the Council of Europe are parties to the European Convention Human Rights. Accession to the Convention is one of the fundamental and indispensable terms of membership in this organization. Poland has signed the Convention on November 26, 1991, and ratified on January 19, 1993.

Accession to the Convention means that the state undertakes to respect and guarantee the following human rights and fundamental freedoms: right to life; freedom from torture and other inhuman treatment or punishment; freedom from slavery and servitude and forced or compulsory labor; the right to freedom and personal safety; the right to a fair, public trial, within a reasonable amount time limit, in criminal and civil matters; freedom from punishment without grounds legal; the right to respect for private life, family life, home and correspondence; freedom of thought, conscience and religion; freedom of expression, including freedom press; freedom of peaceful assembly and association, including the right to create and joining trade unions; marriage and establishment rights families; the right to effective remedies, freedom from discrimination.

The European Court of Human Rights (hereinafter: ECtHR), the guardian of the Convention, is currently the only international court directly accessible to all victims of human rights violations after meeting certain conditions. The right to an individual complaint is the most important part of this system and one of the important elements of modern European legal culture. On the one hand, the Tribunal examines specific charges against the state by the aggrieved, on the other - creates common rules and standards in the sphere of human rights and determines the minimum level of their protection that European countries are obliged to provide.

In the case of *Orlandi and Others v. Italy*²³, The European Court of Human Rights indicated that it does not meet the requirements of Art. 8 of the Convention, a situation where the state does not provide minimum standards of protection for same-sex marriages, as they cannot be refused the status of "family" under the Convention.

This ruling – in my opinion – should lead to a change in the interpretation of Article 18 of the Polish Constitution. Nevertheless, in the opinion of the Tribunal: “Marriage (as a union of a woman and a man) obtained in the domestic law of the Republic of Poland a separate constitutional status determined by the provisions of Art. 18 of the Constitution. The change of this status would be possible only under the rigors of the procedure of changing the Constitution, defined in Art. 235 of this act. In no event, also for formal and legal reasons, a

²³ judgment of the ECtHR of 21 July 2015, application no. 18766/11.

change in the nature or status of marriage in the Polish constitutional legal system could not take the form of a ratified international agreement (even if ratified in a qualified manner)"²⁴.

In June 2020, the ECtHR communicated 7 cases (19 joined complaints) to the Polish government. In all three cases to which the Ombudsman joined, citizens living in relationships with persons of the same sex accuse Poland of violating their right to private and family life by preventing them from legalizing their relationship. In *Przybyszewska and others v. Poland* (10 complaints) the applicants were refused in the Registry Offices to accept a declaration of no obstacles to marriage in Poland, and these decisions were later upheld in court proceedings. In *Formela v. Poland*, the applicants, who entered into a civil partnership abroad and later married, tried to avail themselves of the legal privileges enjoyed by spouses in Poland. In administrative and court proceedings regarding the right to joint taxation, the right to care allowance in connection with caring for a family member and the right to cover the spouse with health insurance, they were refused these rights. It was pointed out that they were reserved only to spouses and immediate family members, whom the applicants were not under Polish law. They were also refused a transcription ("transfer" to Polish civil status registers) of their marriage certificate concluded abroad. On the other hand, in the *Szypuła and other v. Poland* case, the applicants - citizens of the Republic of Poland wanted to marry in another country with persons of the same sex, but were refused a certificate of the possibility of marriage abroad in accordance with Polish law.

In the written comments submitted to the ECtHR, the Polish Ombudsman presented an analysis of the provisions of Polish law and the legal and social situation of people living in same-sex relationships in Poland, in the context of the human rights standard resulting from the ECHR and the Court's jurisprudence. In the opinion of the Ombudsman, there is no doubt that in view of the European consensus and the well-established jurisprudence of the Tribunal, the member states of the Council of Europe are obliged to provide same-sex couples with the possibility of legalizing their relationship. If the state does not decide to open up marriage to same-sex couples, it must introduce an alternative institution of civil partnerships. Meanwhile, Polish regulations - despite numerous legislative initiatives - still do not provide for any form of institutionalization of civil partnerships (both for people of the same and different sexes). At the same time, the marriage institution in Poland remains available only to people of different sexes. In the opinion of the Ombudsman, such a legal status leads to the necessity to breach the positive obligation of the state under Art. 8 ECHR. This unjustifiably differentiates the legal situation of persons remaining in a stable same-sex relationship from persons remaining in a relationship of different sexes, for whom the possibility of contracting marriage and exercising the related rights remains open. Regardless of the debate on the possibility of introducing same-sex marriage in Poland in the light of the wording of Art. 18 of the Constitution, in the Ombudsman's opinion it is indisputable that the Constitution does not prevent the legal possibility of institutionalizing same-sex unions. On the contrary - both Art. 18 of the Constitution, pointing to the special protection of the family, and Art. 47 of the Constitution, which guarantees everyone the legal protection of private and family life, oblige the state to ensure this protection also to persons living in same-sex relationships. Their legalization would thus implement the provisions of the Constitution, and not violate them. Moreover, public support for the legalization of same-sex relationships in Poland is high and is constantly growing. Regardless of the homophobic actions of part of the society and some public figures, repeating prejudices and stereotypes about non-heterosexual people, the results of two different studies from 2019 indicate that over half of Poles are in favor of granting same-sex couples the right to enter into partnerships. This answer was given by 56% of respondents in the IPSOS survey for OKO.press from February 2019 and 57% in the Kantar survey for Wyborcza in

²⁴ judgment of the Constitutional Tribunal of 11 May 2005, case K 18/04 (a ruling on the conformity of the accession treaty to the European Union with the Constitution).

November 2019). Such social changes must be noticed and taken into account by the state, as the Court has repeatedly pointed out in its jurisprudence. The Ombudsman emphasized that the unjustified differentiation of the legal situation of same-sex couples in relation to couples of different sexes results in indirect discrimination based on their sexual orientation. He discussed the legal privileges reserved in Poland only to spouses or immediate family members, which persons living in same-sex relationships cannot use in any way. At the same time, the Ombudsman emphasized that although the change of relevant provisions - so that rights under inheritance law, family law or social security were available to informal partners, including the same sex - would have a positive impact on their legal situation and avoid discrimination, it would not invariably constitute fulfillment of the state's obligation to ensure the protection of the right to private and family life. The latter requires legal recognition of same-sex unions, e.g. through the institutionalization of civil unions²⁵.

It should also be noticed that, the European Union does not have any legal instruments to force the revision of national family law in the Member States, but in the resolution adopted on September 14, 2021, the European Parliament presses for the enforcement of common standards in relation to the principle of free movement of persons. In practice, it would mean that, for example, that for a daughter of a Bulgarian born in Spain and a British woman from Gibraltar (they were married in Spain), Bulgaria - after recognizing the child as a Bulgarian citizen - should issue an identity card or other travel document indicating, according to the Spanish birth certificate, a Bulgarian and a British for the parents. This is because it is related to freedom of movement within the EU and would allow the child to travel with either mother. However, Bulgaria may at the same time refuse to enter both mothers on the Bulgarian birth certificate for the purposes of its national law²⁶. The above mentioned resolution also states that marriages or registered partnerships concluded in one Member State should be recognized uniformly in all Member States and that same-sex spouses and partners should be treated in the same way as their counterparts of the opposite sex.

3. living constitution

The interpretative activism that determines the result of the interpretation of the constitution is the protection of individual rights - the doctrine of interpretation that finds justification in the core of the assumptions of constitutionalism. Protection understood as ensuring the coexistence and equal vote to unrepresented entities in the majoritarian discourse typical of legislative bodies, it is a forum for legal guarantee of the significance of neglected individual interests. At the same time, the interest of the individual and the will of the majority are dynamic categories subject to reinterpretation, thus constituting on the volatility of constitutional concepts (living constitution). Changing the constitution through judicial interpretation motivated by the behavior of the essence of constitutionalism does not have to be viewed as a process indeterminate and thus contested as a threat to the immutability of the constitutional text. At the same time, the invariability of understanding the concepts of the constitution does not always constitute a guarantee against democracy's turning against itself.

Therefore, the change in social conditions and the legal environment should justify a change in the understanding of marriage formulated by the authors of the Constitution even when adopted by way of a referendum.

Conclusion

²⁵ <https://bip.brpo.gov.pl/pl/content/rpo-nieuregulowanie-zwiazkow-jednoplciowych-narusza-prawo-do-zycia-prywatnego>, accessed 29.11.2021.

²⁶ A key issue before the CJEU in *V.M.A. v Stoliczna Obsthina* (C-490/20). See also CJEU judgment of 5 June 2018, case C-673/16.

The concept of marriage under Art. 18 of Polish Constitution is controversial in the doctrine and jurisprudence. These controversies concern the definition of marriage and its impact on the admissibility of introducing homosexual marriages and civil partnerships. Several positions are formulated. Under the first, used in art. 18 the formulation defines marriage only as a union between a man and a woman, excludes same-sex marriage and the institutionalization of civil partnerships. The second and most widespread position also defines marriage as a union between a man and a woman, excludes same-sex marriage, but allows for the institutionalization of civil partnerships. The third position assumes that Art. 18 of the Constitution prescribes special care and protection of heterosexual marriages, which, however, does not exclude the institutionalization of homosexual marriages, and even more civil partnerships.

The arguments raised by the supporters of each of these positions however, do not take into account the evolution of views on the notion of marriage and partnership in international law binding Poland. Although it is impossible to question the highest legal force of the Polish constitution²⁷, such an interpretation significantly weakens the presented arguments.

The right to marry (Article 12 of the ECHR), in accordance with the current case law of the European Court of Human Rights, concerns traditional marriage between persons of different sexes. Where national law does not provide for the registration of same-sex partnerships or cohabiting partnerships, the state should consider providing same-sex couples with certain legal remedies to deal with the practical problems arising from the lack of such legal recognition without discrimination. Nor should it result in discriminatory treatment of different-sex couples when they have similar needs. In 2000, the Parliamentary Assembly of the Council of Europe called on the Member States to adopt legislation providing for the registration of same-sex partnerships²⁸. The European Court of Human Rights has repeatedly emphasized that same-sex couples living in permanent relationships are under the protection of Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and enjoy the protection of their family life. Moreover, the Court found that same-sex couples had a need for legal recognition and legal protection of such a relationship²⁹. Determination by the legislator of the rights and obligations of non-married couples should take place in a manner free from discrimination against couples of the same or different sex. The distinction based on sexual orientation requires each time to be justified with particularly important reasons. The state has a narrow margin of appreciation in this respect. In such a case, the principle of proportionality does not only require that the measure chosen is appropriate to the attainment of the objective in question, but must be necessary in the circumstances. Thus, if the reasons presented to justify the difference in treatment are based solely on the applicant's sexual orientation, it amounts to discrimination under the Convention³⁰.

The provisions of Polish law do not currently provide for the possibility of contracting marriage by persons of the same sex, nor do they provide for any form of institutionalization of partnerships. Same-sex couples enter into partnerships and marriages abroad, then attempting to transcribe - transfer to the Polish registry of marital status - a foreign marriage certificate.

²⁷ According to article 8 of the Constitution: 1/ The Constitution shall be the supreme law of the Republic of Poland. 2/ The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.

²⁸ Recommendation 1474 (2000) of the Parliamentary Assembly of the Council of Europe of 30.6.2000 on the situation of lesbians and gays in the member states of the Council of Europe, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16829&lang=en> (accessed: 2.10.2018).

²⁹ Judgment of ECtHR of 24.6.2010, Schalk and Kopf v. Austria, application no. 30141/04, § 99.

³⁰ Judgments of the ECtHR: of January 22, 2008, E.B. v. France (Grand Chamber), application no. 43546/02, § 91 and 93; Smith and Grady v. the United Kingdom of 27.9.1999, application no. 33985/96 and application no. 33986/96, § 89 and 94; of 24.7.2003. Karner v. Austria, application no. 40016/98, § 37 and 41.

In the judgment of February 28, 2018, the Supreme Administrative Court dismissed the cassation appeal against the refusal to transcribe the foreign marriage certificate of two women³¹. The Supreme Administrative Court referred to Art. 12 of the ECHR, according to which men and women of marriageable age have the right to marry and to found a family, in accordance with the national laws governing the exercise of this right. In the opinion of the Supreme Administrative Court, the transcription of the marriage certificate of two women would be contrary to the fundamental principles of the legal order of the Republic of Poland. The basic principle of the legal order is, according to the Supreme Administrative Court, Art. 18 of the Constitution, which "defines marriage as a relationship between a woman and a man, and thus results from it the principle that in Poland, only a heterosexual relationship should be treated as marriage", as well as Art. 1 of the Code.

The line of jurisprudence determined in this way by the Supreme Administrative Court is to this day consistently implemented by provincial administrative courts that refuse to transcribe foreign marriage certificates. Only in the justification of one of the judgments in such a case, the Administrative Court in Warsaw, however, presented an opinion contrary to the previous jurisprudence, which has been already quoted above.

The case law clearly states that the provisions of domestic law prevent marriage by same-sex couples. Although the impossibility of concluding a same-sex marriage in Poland, one can try to justify the wording of Art. 18 of the Constitution, it is difficult with the same provision to justify the refusal to issue Polish citizens with a certificate enabling them to marry a person of the same sex abroad³².

As there is no possibility of any institutionalization of same-sex partnerships, the courts grant protection to same-sex couples in a situation where the provisions of national law grant certain powers to informal partnerships. For example, the Supreme Court found that a person remaining in cohabitation with a tenant is a person connected with him by an emotional, physical and economic bond, also if it is a person of the same sex³³. The Supreme Court also recognized a person remaining in common life as a partner of the same sex within the meaning of Art. 115 § 11 of the Criminal Code³⁴. The above-mentioned jurisprudence of the ECtHR, as well as the jurisprudence of the Supreme Court, clearly indicate that whenever the provisions of Polish law grant any right - as a closest person - to partners remaining in an informal relationship, this right is granted to partners regardless of their sex.

However many of the rights reserved to spouses do not apply to partners in informal relationships - same or different sex. Partners of different sexes have a chance to gain access to it through marriage, same-sex partners are deprived of this possibility. In this regard, courts are reluctant to grant same-sex partners access to such rights, without seeing any indirect discrimination here. For example, the Supreme Administrative Court dismissed a cassation appeal regarding the refusal to cover a same-sex partner with health insurance as a family member - the applicant entered into a partnership with her partner in Great Britain³⁵. The Supreme Administrative Court took the position - unlike the dominant jurisprudence of common and administrative courts - that Art. 18 of the Constitution and Art. 47, "do not provide a basis for building a legal definition of the family". The Supreme Administrative Court only concluded that "family relationships based on marriage between a man and a woman, as well as motherhood and parenthood deserve protection". This provision also does not provide grounds for "reducing the concept of the family to relationships anchored in marriage as defined in it". Since the Constitution does not define the concept of the family, it is therefore up to the

³¹ Case II OSK 1112/16.

³² Decision of the District Court in Warsaw dated October 28, 2015, case VI Ca 435/15.

³³ Resolution of the Supreme Court of November 28, 2012, case III CZP 65/12.

³⁴ Resolution of the Supreme Court of February 25, 2017, case I KZP 20/15.

³⁵ Judgment of the Supreme Administrative Court dated October 25, 2016, case II GSK 866/15,

ordinary legislator to determine the group of persons belonging to the family. Within the meaning of the ordinary legislation family members are spouses, thus within the meaning of Art. 18 of the Constitution and Art. 1 of the Code, two people of different sex. The institution of a partnership is not recognized by the Polish legal order and it is also an institution different from a marriage union. According to the Supreme Administrative Court, the basis for the differentiation of the situation of persons remaining in civil partnerships and married couples is their formal status, and not their sex. Equal treatment is given to "heterosexual and homosexual partners". The Supreme Administrative Court then explains that even if "the inability to obtain the status of a spouse by a person remaining in a homosexual relationship is hidden under Art. 18 of the Constitution, the prohibition of marriage between persons of the same sex, one could not see indirect discrimination in this. This would require proving that Art. 18 of the Constitution is of a discriminatory nature".

The indicated jurisprudence and the problems resolved therein clearly demonstrate the urgent need to undertake legislative actions aimed at legalizing formal relationships of persons of the same sex. There is also no doubt that there is no political will to be able to introduce the institution of same-sex marriage into the Polish legal system. The issues related to international standards of protection of the human rights of LGBT people in Poland have been, are and will continue to arouse controversy among politicians fighting for support, not only voters (but above all of the Catholic Church). As it seems, and as the polls show, the majority of voters do not have such conservative views. However, it is not the voters who directly shape the laws.