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Foreword

Maria Caterina Baruffi* and Laura Calafà**

This special issue of the journal *Papers di diritto europeo* collects the proceedings of the conference organized within the project «Identities on the move. Documents cross borders - DxB» (selected under the call for proposals «Action grants to support judicial cooperation in civil and criminal matters» – JUST-JCOO-AG-2020, co-funded by the European Union within the Justice Programme 2014-2020). The project is coordinated by the University of Verona and the Consortium is composed of the University of Graz, the Aristotle University of Thessaloniki, the European Association of Registrars (EVS) and the Italian Association of Civil Status Officers and Registrars (ANUSCA), at whose premises the final conference took place on 23 and 24 June 2022.

The final event has provided the opportunity to deepen the analysis of Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union, which was at the core of the research and scientific activities of the DxB project. The idea of focusing on this Regulation comes from the limited knowledge that both practitioners and citizens still have of it, despite its being a valuable instrument to bring people closer and make the European Union more integrated thanks to the simplification of administrative formalities. The issues related to the mutual recognition of public documents and their circulation across Member States are among the most important and urgent challenges in a globalized society. The aim of the project, then, is to raise awareness among registrars and legal practitioners and gain a more extensive expertise on how and to what extent the Regulation is actually applied in national practices, ultimately ensuring a better understanding of this tool.

Against this background, the conference's speakers contributed to give an extensive overview of this EU act in the context of national civil status systems, the free movement of persons and the Charter of fundamental rights of the European Union. Presentations also provided specific information regarding how the Regulation addresses the problematic aspects and deficiencies of the current legal framework, under both interpretative and operational perspectives.

The conference has been a truly international event that effectively encouraged the development of a concrete cooperation among the participants, i.e. scholars, registrars,

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public administrators, and practitioners from all over Europe. To all of them goes our gratitude for accepting to taking part in the DxB project as well as to the authors of this special issue. We are also thankful to Alexander Schuster for his input in managing the project and organizing the conference. Thus, the proceedings collected in the following pages represent both a final output and a starting point to further debates and exchange of views on the application of the Public Documents Regulation.

Lastly, the contents of all the papers, which are published in alphabetical order, are the sole responsibility of the respective authors and do not reflect the views of the European Commission.

Transcription of foreign civil status documents of children of same-sex parents in Polish law

Małgorzata Balwicka-Szczyrba[*], Anna Sylwestrzak[**] and Dominik Damian Mielewczyk[***]

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1. Introduction.

At present, the dynamics and evolution of social relations, as well as social and cultural differences of individual states, intensely influence the shape of legal regulations and the practice of law application. Additionally, the process of globalisation and increased social migration creates many new and fundamental legal problems of cross-border and international nature. Often these problems arise from family law regulations valid in a particular country. There is a growing number of hard cases, including those with a foreign element (going beyond one legal system), resulting from difficulties in mutual adjustment of state regulations or the scope of recognition of certain legal events and their extraterritorial effectiveness.

Differences in the view of legal regulations concerning family relations recognised in individual legislations are the source of many doubts concerning the admissibility of the transcription of foreign civil status records to the national register of civil status. This problem grows especially at the junction of legislations respecting the traditional family model and those promoting a liberalised model of family relations, including the so-called same-sex unions. On the one hand, transcription is of fundamental importance for the protection of rights relating to the identity of an individual, as well as for demonstrating the features which individualise a person. On the other hand, the transfer of a foreign civil act with a content that does not correspond to the principles of law of the state that did not issue the document carries the risk of disturbing the stable system of family relations in its legal order and the values represented in it.

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This paper will analyse the issue of admissibility of the transcription of foreign civil status documents of a child of same-sex parents who are Polish citizens to the Polish civil status register. The Polish law makes no distinction between the presence of two mothers or two fathers in a given configuration. However, in practice, transcription cases will mostly concern the situation of two mothers. The following will be presented: the meaning of transcription in Polish law and the consequences of its omission, the essence of the legal problems arising in the Polish legal system concerning the transcription of a foreign birth certificate of a child of same-sex parents who are Polish citizens. A review of the judicial and doctrinal positions on this issue will be made, and also such a solution will be proposed which, within the limits of the legal order in force, will realise the principle of the child's good as broadly as possible.

2. Essence of transcription of civil status records.

The civil status registration system in Poland is primarily regulated by the Law of 28 November 2014 – Law on Civil Status Records (hereinafter: c.s.r.)[1]. Civil status is, according to Art. 2(1) of the c.s.r., the legal situation of a person expressed by the characteristics that individualize him, shaped by natural events, legal actions, court decisions or decisions of the authorities, stated in a civil status record. On the other hand, a civil status record is an entry in the civil status register kept in the ICT system (Art. 5(1) of the c.s.r.). Civil status records have a declaratory character. They do not create a new reality in legal circulation, but only confirm certain events, being the sole evidence of the events they confirm (Art. 3 of the c.s.r.)[2]. Their inconsistency with the truth may be proved only in court proceedings.

It should be emphasised that the disposition of the referred Art. 3 c.s.r. also includes foreign civil status records, which is confirmed by the wording of Art. 1138(1) of the Act of 17 November 1964 – Code of Civil Procedure[3]. On its basis, foreign public documents have the same evidentiary value as Polish public documents. This position is generally accepted in doctrine, and it has also been established within the line of rulings of the Supreme Court, according to which a civil status record drafted abroad constitutes the sole evidence of the events stated therein, also when it has not been entered into Polish

[1] Dz.U. 2014, position 1741.

[2] See A. CZAJKOWSKA, *Commentary on Article 3*, in A. CZAJKOWSKA, I. BASIOR, D. SORBIAN (eds,), *Prawo o aktach stanu cywilnego z komentarzem. Przepisy wykonawcze i związkowe oraz wzory dokumentów*, Warsaw, 2015; on the specific features of a civil status record as qualified evidence see J. DOBKOWSKI, *Preponderancja aktów stanu cywilnego*, in *Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego*, 2011, no. 2, pp. 15-33, available *online*.

[3] Dz.U. 1964, no. 43, position 296.

civil status books[4]. A non-transcribed foreign civil status document will therefore enjoy a special evidentiary value.

The transcription regulated by Arts. 104-107 of the c.s.r., together with additional mentions and footnotes, is one of the three key ways of disclosing in the Polish register information on events which occurred abroad, as defined by law. Art. 104(2) of the c.s.r. provides that transcription consists in a faithful and literal transfer of the content of a foreign civil status document (linguistically and formally), without any interference in the spelling of the names and surnames of the persons indicated therein. This is an expression of the Polish legislator's confidence in the findings of the foreign authority that has prepared the civil status record. The Polish head of a civil status office may not reassess the civil status of a person interested in making a transcription. The control of the content of a foreign civil status document is therefore carried out only on the basis and within the limits of legal norms defining a closed catalogue of grounds for refusal of transcription[5], and it may be expressed in the form of an administrative decision refusing transcription (Art. 2(6) of the c.s.r.).

The object of transcription may only be a foreign civil status document that is proof of an event and its registration (Art. 104(1) of the c.s.r.). However, the preconditions for transcription are: that the document is recognised in the state of issue as a civil status document, that it has the status of an official document, that it was issued by a competent authority and that there are no doubts as to its authenticity (Art. 104(3) of the c.s.r.). The legal nature of transcription is expressed, as accepted in doctrine, by its so-called reproductive character, which is limited only to reproducing a foreign civil status record in the Polish register. Transcription is not, therefore, the recognition of a legal relationship whose existence is confirmed by a foreign civil status document, nor is it the decision of the authority issuing such a document[6]. This makes it impossible to attribute to transcription a registration character, since it consists only in transposing, in its linguistic and formal aspect, a foreign civil status record into the official language applicable in Poland and a form of registering births, marriages and deaths[7]. The transcription does not therefore have direct legal (substantive) effects, and the circumstances arising from the foreign document are not covered by *res judicata*.

It is therefore important to underline that a Polish citizen concerned by a foreign civil status record may use both this record and the transcribed one, and that transcription is obligatory only in clearly defined cases (which will be discussed further below). So

[4] Cf. Supreme Court (seven judges), resolution of 20 November 2012, III CZP 58/12, OSNC 2013/5/55.

[5] M. WOJEWODA, *Transkrypcja aktu urodzenia dziecka, które zostało uznane za granicą*, in *Kwartalnik prawa prywatnego*, 2017, pp. 337-361, at p. 340.

[6] M. ZACHARIASIEWICZ, *Transkrypcja aktów urodzenia dzieci par jednopłciowych*, in *Studia prawno-ekonomiczne*, 2019, pp. 143-170.

[7] See together with the judgments cited therein: Supreme Court (seven judges), resolution of 20 November 2012, cit.

why should a foreign civil status record be transcribed if the civil status can be proven by a foreign record? The advisability of making such a transcription is expressed in a number of advantages for the person using a Polish document in Poland[8].

Firstly, the lack of a transcription makes it more difficult or even impossible to achieve certain legal effects when the law provides for an obligatory transcription (Art. 104(5) of the c.s.r.). This issue will be further discussed in the next point.

Secondly, it should be noted that the participants in legal transactions trust the content of a Polish document stating civil status, the form of which society has become accustomed to and naturally treats as reliable. A foreign document may sometimes arouse uncertainty as to its veracity, validity and evidentiary value, which in turn may translate into further inconvenience, e.g. in terms of timing, when dealing with a case requiring the establishment of civil status. The lack of necessity for the Polish authority to check the authenticity of the foreign record each time therefore also appears to be an advantage in favour of transcription.

Thirdly, the convenience of being able to obtain copies of the transcribed record in any civil status office should be highlighted[9]. This is particularly true if the document in one's possession has been lost or destroyed, and it is possible to obtain a new document if it has already been transcribed, in any Polish civil status office, whereas it is not possible to obtain a foreign document in this way, which puts a person residing in Poland at a disadvantage.

Fourthly, the transcribed document does not require translation into Polish by a sworn translator. At the same time, it is rightly pointed out by M. Zachariasiewicz[10], that this argument loses its significance due to the possibility of using multilingual abridged civil status records issued on the basis of the ICCS (International Commission of Civil Status) Convention (No. 16) drawn up in Vienna on 8 September 1976[11] and multilingual standard forms drawn up on the basis of Regulation (EU) 2016/1191[12].

Fifthly, transcription ensures the correspondence between the status revealed in the civil status register and the actual legal status. The appearance of an entry in the Polish civil status register as a result of transcription determines the possibility of carrying out certain actions in the field of civil law, especially those of a subsequent nature, such as

[8] In Poland, civil status documents take the form of copies of the civil status record (abridged or complete) and certificates on civil status and on the data entered or not entered in the civil status register (Art. 44 of the c.s.r.).

[9] See, together with the argument of M. WOJEWODA cited there: M. ZACHARIASIEWICZ, *Transkrypcja*, cit., pp. 148-149.

[10] M. ZACHARIASIEWICZ, *Transkrypcja*, cit., p. 149.

[11] Convention (No.16) on the issue of multilingual extracts from civil status records.

[12] Regulation (EU) 2016/1191 of the European Parliament and of the Council, of 6 July 2016, on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012. According to Art. 2(4) this Regulation does not apply to the recognition in a Member State of legal effects relating to the content of public documents issued by the authorities of another Member State.

the entry of a supplementary note. The lack of transcription makes it necessary to rely only on foreign civil status records, the disclosure of which depends on the will of the party[13].

3. Obligatory transcription and consequences of failure to transcribe.

According to Art. 104(5) of the c.r.s. transcription is obligatory if a Polish citizen concerned by the foreign civil status document has a civil status record confirming previous events established on the territory of the Republic of Poland and requests the performance of civil status registration actions or applies for a Polish identity document or a PESEL number[14]. In these cases, a refusal to make a transcription of the birth certificate of a child whose parents are, according to the foreign birth certificate, persons of the same sex, has negative consequences for the child in the form of the impossibility or difficulty to carry out actions concerning the registration of civil status, obtaining a Polish identity document, assigning a PESEL number or issuing a passport. This results in a situation where a Polish citizen[15] cannot obtain documents confirming his/her Polish citizenship due to the lack of a Polish birth certificate, the reason for which lies in the fact that he/she has data concerning his/her parents which are not provided for in Polish law and which, according to the currently prevailing view (see the considerations *infra*, para. 4), constitute a basis for refusing the transcription. In turn, the lack of the mentioned documents or PESEL number translates into further inconvenience wherever it is necessary to prove the identity of the child. For example, we can mention the procedure of enrolling a child in the care institution (*kindergarten*, nursery) and school or travelling within the Schengen area requiring an identity card[16].

In the described situation there is in fact a collision of the child's interest in obtaining a Polish birth certificate with the aim to maintain the homogeneity and coherence of the Polish registration system. The lack of appropriate statutory solutions aimed at protecting the child's interest has been negatively assessed by some doctrine and judicature[17]. In fact, this phenomenon may be seen as a manifestation of discrimination against a certain category of children under Polish law, due to the life decisions taken by their parents (a homosexual couple). On the other side, among the supporters of sealing

[13] M. ZACHARIASIEWICZ, *Transkrypcja*, cit., p. 149.

[14] Universal Electronic System for Registration of the Population number (PESEL number) is the national identification number in Poland consisting of 11 digits and identifying solely one person.

[15] Polish citizenship is acquired in this case *ex lege* pursuant to Arts. 14-16 of the Act of 2 April 2009 on Polish Citizenship (Dz.U. 2012, position 161) in relation with Art. 34 ust 1 Konstytucji RP (Dz.U. 1997, nr 78, position 483).

[16] Voivodeship Administrative Court in Poznan, judgment of 5 April 2018, II SA/Po 1169/17, LEX no. 2478177.

[17] See, e.g. Supreme Administrative Court, judgment of 10 October 2018, II OSK 2552/16, LEX no. 2586953; M. ZACHARIASIEWICZ, *Transkrypcja*, cit., p. 152.

the Polish system of registration of civil status against the intrusion of structures unknown to the national law[18], arguments are raised pointing to alternative ways of protecting the interests of such children than transcription, among which the possibility of using a foreign civil status record in the Polish legal system is emphasised. The problem is, however, that the evidentiary value of a foreign birth certificate respected in Polish law (Art. 1138 of the Code of Civil Procedure) does not ensure sufficient protection to the child, making it difficult for him/her to participate in the legal system, and in some areas even depriving the possibility of realizing fundamental civil rights.

4. Refusal of transcription on grounds of public order.

In the light of current Polish regulations, and especially due to the lack of legal instruments in Polish law allowing the legalization of same-sex unions, the prevailing practice is to refuse to draw up a birth certificate of a child born of such a couple. This standpoint is predominant in judicature[19], only occasionally single dissenting opinions can be noted[20]. The position on the legitimacy of the refusal to transcribe the act also prevails in doctrine[21].

[18] See, e.g. B. CZECH, *Z rozważań nad orzecznictwem sądów dotyczącym Prawa o aktach stanu cywilnego. Wypowiedź na Konferencji 70 lat USC*, in *Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego*, 2016, no. 2, pp. 67-69.

[19] See in particular Supreme Court (seven judges), resolution of 2 December 2019, II OPS 1/19, ONSAiWSA 2020/2/11; Supreme Administrative Court, judgments of 17 April 2019, II OSK 1330/17, LEX no. 2681568; 11 February 2020, II OSK 1330/17, LEX no. 3053191; Voivodship Administrative Court in Szczecin, judgment of 19 March 2020, II SA/Sz 1075/19, LEX no. 2956995; Supreme Administrative Court, judgment of 22 June 2021, II OSK 2608/19, LEX no. 3197834.

[20] Particulary the judgement of the Voivodeship Administrative Court in Poznan, judgment of 5 April 2018, cit.; Supreme Administrative Court, judgment of 10 October 2018, cit.

[21] I.a. M. WOJEWODA, *O przypadkach dokonanej transkrypcji aktów urodzenia dzieci jednopłciowych*, in *Problemy Prawa Prywatnego Międzynarodowego*, 2021, pp. 135-160; M. WOJEWODA, *Uznanie rozstrzygnięć organów państw obcych a przesłanki transkrypcji zagranicznych aktów stanu cywilnego*, in *Studia prawno-ekonomiczne*, 2018, p. 171 ff.; M. WOJEWODA, *Małżeństwa jednopłciowe i związki partnerskie w polskim rejestrze stanu cywilnego?*, in *Studia prawno-ekonomiczne*, 2017, pp. 146-147; J. GAJDA, *Transkrypcja zagranicznego aktu urodzenia dziecka, w którym jako rodzice zostały wpisane więcej niż dwie osoby*, in *Prawo i Więź*, summer 2020, no. 2, pp. 45-46; P. MOSTOWIK, *O żądaniu wpisu w polskim rejestrze stanu cywilnego zagranicznej fikcji prawnej pochodzenia dziecka od „rodziców jednopłciowych"*, in *Forum Prawnicze*, 2019, no. 3, pp. 24-27; P. MOSTOWIK, *Problem obywatelstwa dziecka prawdopodobnie pochodzącego od obywatela polskiego niebędącego mężem surrogate mother. Uwagi aprobujące wyroki NSA z 6 maja 2015 r. (II OSK 2372/13 I II OSK 2419/13)*, in *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, 2018, pp. 57-74; P. KASPRZYK, in P. KASPRZYK (ed.), *Podręcznik urzędnika stanu cywilnego, Obrót prawny z zagranicą w zakresie rejestracji stanu cywilnego*, Lublin, 2019, vol. 2, pp. 311-312. In contrast, however, that transcription should be allowed: G. HAJDUK, *Transkrypcja aktu urodzenia dziecka pary jednopłciowej*, in *Rocznik administracji publicznej*, 2021, no. 7, pp. 15-21; J. KARAKULSKI, *Problematyka dopuszczalności transkrypcji aktu urodzenia dziecka rodziców jednopłciowych – uwagi nakanwie najnowszego orzecznictwa Naczelnego Sądu Administracyjnego*, in *Przegląd Prawa Konstytucyjnego*, 2021, no. 2, pp. 387-391; G. KRAWIEC, *Transkrypcja zagranicznego aktu urodzenia dziecka osób tej samej płci pozostających w związku*, in *Studia Prawnicze. Rozprawy i Materiały*, 2019, no. 2, pp. 12-13; M. ZACHARIASIEWICZ, *Transkrypcja*, cit., pp. 157-168; M. ZACHARIASIEWICZ, *Nowa ustawa o prawie*

The legal basis for the refusal to transcribe a birth certificate of a child born of same-sex parents is the regulation of Art. 107(3) of the c.r.s. in relation with Art. 7 of the Act of 12 November 1965 – Private International Law[22]. The first of the abovementioned provisions sets out three grounds for the obligatory refusal to make a transcription by the head of the civil registry office, and the grounds for refusal with regard to the issues in question stem from point 3. In its light, such a necessity occurs in this case when the transcription would be contrary to the fundamental principles of the legal order of the Republic of Poland. The clause of compliance with the fundamental principles of public order is also expressed in Art. 7 of the Private International Law: it provides that foreign law shall not be applied if its application would have consequences contrary to the fundamental principles of the legal order of the Republic of Poland. The provision of Art. 7 of the Private International Law is used as a supplement to the regulation of the c.r.s., as it should be assumed that both regulations understand the phrase «fundamental principles of the public order of the Republic of Poland» in the same way. This conclusion results in particular from the function of both regulations.

The public order clause (German: *Vorbehaltsklausel*; French: *ordre public*) is a general clause[23]. It applies against foreign substantive law and not against conflict-of-law rules[24]. It should be pointed out that this construction should not be understood as an action against the legal norms of foreign law themselves, but against the legal effects of their application within the area where Polish law is in force. Since the transcription of foreign civil status records is based on trust in documents based on foreign legal norms[25], its refusal is justified by the impossibility of accepting such trust in every case. Consequently, the clause in question is a kind of fuse which protects the Polish legal order against the influence of constructions stemming from foreign law in a situation of their incompatibility with the Polish legal order and the principles stemming from it. It should be also explained that the compliance with Polish legal order should be understood in a broad way, as the compliance both with constitutional principles and principles governing particular fields of law, and especially civil, family, labour and procedural law[26]. In the case of the problem of the transcription of a foreign birth certificate stating same-sex parenthood, what is particularly highlighted is the incompatibility with the provisions of the Polish family law which precisely define the issues related to the child's origin, according to which the mother is the woman who gave birth to the child (Art. 61 of the

prywatnym międzynarodowym a małżeństwa i związki osób tej samej płci, in *Problemy Prawa Prywatnego Międzynarodowego*, 2012, no. 11, pp. 94-96.

[22] Dz.U. 1965, no. 46, position 290.

[23] See, e.g. E. PRZYŚLIWSKA, *Kolizyjna i procesowa klauzula porządku publicznego*, in *Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego*, 2017, no. 1, p. 71.

[24] E. PRZYŚLIWSKA, *Kolizyjna*, cit., p. 71.

[25] J. GAJDA, *Klauzula porządku publicznego w prawie o aktach stanu cywilnego z 29 września 1986 r. oraz 28 listopada 2014 r.*, in *Administracja: Teoria. Dydaktyka. Praktyka*, 2015, no. 4, pp. 5-46, at p. 30.

[26] Compare with Supreme Court, judgement of 21 April 1978, IV CR 65/78, LEX no. 2280.

Act of 25 February 1964 – Family and Guardianship Code[27]) and the provisions concerning paternity always indicate a man in this role. Thus, the different sex of parents belongs to the essence of parenthood and it is also manifested on the grounds of other institutions, e.g. adoption, which can be carried out jointly only by persons of different sex. In addition, it is pointed out that the c.r.s. also uses the notions of father and mother in the sense accepted in Polish family law. In view of this, the birth certificate does not have a separate section for «parent», which would make it possible to include a parent of the same sex[28].

Analysing the function of the public order clause it is worth emphasising its guarantee character. Undoubtedly, it is an exceptional regulation which secures the Polish legal system in the case of contact with foreign regulations[29], guaranteeing the maintenance of coherence of legal solutions. The application of the indicated instrument allows for two types of actions. Firstly, it makes it possible to «impose» the application of Polish law. Secondly, it leads to exclusion of the application of regulations of foreign law due to the necessity of giving priority to the principles of Polish legal order[30]. Hence, refusal to apply foreign law is the primary function of the clause in question. It is the second of the indicated mechanisms that is applied with respect to the refusal to transcribe the birth certificate of a child of a same-sex couple.

In studies, doubts arise as to the scope of application of the clause in question, and in particular its application to certain legal institutions. Some authors assume that the legal construction in question is the ultimate means of resolving the most serious tensions occurring in a situation of interaction between different legal systems[31], as a result of which its application would be sporadic, exceptional. It is pointed out that the court must each time (*in concreto*) assess the legitimacy of invoking the public order clause, taking into account all circumstances of the case[32]. The perception was expressed, however, that in view of the collision of a foreign law institution with the fundamental principles of the legal order of the Republic of Poland the role of the clause in question cannot be overestimated. It has been pointed out, inter alia, that for the purposes of application of the public order clause, Art. 18 of the Constitution[33] and the resulting rule requiring that in Poland only a heterosexual union be treated as marriage should be taken into account[34].

[27] Dz.U. 1964, no. 9, position 59.

[28] Extensive argumentation on this point is contained in the judgement of the Voivodship Administrative Court in Gliwice, of 6 April 2016, II SA/Gl 1157/15, LEX nr 2035383.

[29] M. SOŚNIAK, *Klauzula porządku publicznego w prawie międzynarodowym prywatnym*, Warsaw, 1961, p. 5 ff.

[30] M. ZACHARIASIEWICZ, *Klauzula porządku publicznego jako instrument ochrony materialnoprawnych interesów i wartości fori*, Warsaw, 2018, p. 1 ff.

[31] M. WOJEWODA, *Transkrypcja*, cit., p. 348 ff.

[32] *Ibidem*.

[33] The Constitution of the Republic of Poland of 2 April 1997; Dz.U. 1997, no. 78, position 483.

[34] In this way M. PAZDAN, *Nowa ustawa o prawie prywatnym międzynarodowym*, in *Państwo i Prawo*, 2011, no. 6, p. 28.

Similarly, it is argued that the public order clause expressed in Article 7 of the Private International Law is sufficient to block the possibility for persons who have not reached a certain age to marry and for the recognition of child marriages contracted in another country[35]. Consequently, it is assumed that basic institutions of family law, if differently shaped in foreign law, cannot be considered compatible with the Polish legal order and, applying the public order clause, should not have legal effect in Poland.

According to Art. 18 of the Constitution, marriage as a union between a man and a woman, family, maternity and parenthood remain under the protection and care of the Republic of Poland. It is worth noting, however, that the jurisprudence indicates that this provision does not prohibit nor prejudge the impossibility of legal regulation of same-sex unions, but emphasises the special protection of marriage as a union of a man and a woman. The fulfilment of this constitutional principle is provided by Polish statutory provisions. It follows that it is not so much a constitutional understanding of the institution of marriage, but rather a guarantee that the institution of marriage is subject to special protection and care by the state, but only on the assumption that it is a union between a man and a woman. The content of Art. 18 of the Constitution cannot constitute a self-imposed obstacle to the transcription of a foreign marriage certificate if the institution of marriage as a same-sex union was provided for in the domestic order. As indicated above, the provision of the Constitution in question does not prohibit the statutory regulation of same-sex unions. Nevertheless, the legislator has not chosen to provide such a regulation. Entering the applicants' marriage certificate in the Polish register of civil status would be incompatible with Art. (1)(1) of the Family and Guardianship Code[36].

5. Directions of protection of the interests of the child of a same-sex couple in the sphere of civil status registration. Postulates *de lege lata* and *de lege ferenda*.

The application of the public order clause as a basis for refusing the transcription of the civil status record of a child born of same-sex parents has important legal consequences that may threaten the interests of the child and infringe the principle of the protection of his or her welfare. It therefore appears that the practice currently adopted in Poland needs to be reviewed not only from the perspective of the public order clause, but more broadly, taking into account other principles of private law and family law, as well as in the light of the commitments made by the Polish State with respect to the protection of human rights. Such an extensive analysis makes it possible to indicate as the leading

[35] In this way E. KAMARAD, *Kolizyjnoprawne aspekty małżeństw dzieci*, in *Problemy Prawa Prywatnego Międzynarodowego*, 2019, pp. 77-107, at p. 106, available *online*.

[36] See, e.g. Supreme Administrative Court, judgment of 6 July 2022, II OSK 2376/19, LEX no. 3395450.

principle the protection of the child's welfare. It is expressed in Art. 72 of the Constitution, which emphasises that the Republic of Poland shall ensure the protection of the rights of the child and everyone has the right to demand from public authorities the protection of the child against violence, cruelty, exploitation and demoralisation. Further norms contained in Art. 72 of the Constitution provide for the child's right to care and assistance by public authorities in the event that he or she is deprived of parental care.

The principle of the welfare of the child has strong roots in international law. As early as in the Declaration on the Rights of the Child, adopted on 20 November 1959 by the General Assembly of the United Nations[37], it was indicated that «humanity owes the child the best it can give». This thought is continued in the Convention on the Rights of the Child adopted on 20 November 1989[38], which introduces in Art. 3 the so-called «best interests of the child» standard. Both the Constitution, as well as acts of a lower order, including in particular the Family and Guardianship Code, make it possible to reconstruct the principle of the good of the child[39]. At the same time, this principle is usually regarded as the most important one, which means that the good of the family and the interests of other persons must give way to the good of the child[40]. As a result, it should be assumed that the good of the child constitutes a kind of constitutional general clause, the reconstruction of which should be carried out by referring to the constitutional axiology and general system assumptions[41]. It is also stressed that the constitutional directive for the protection of the best interest of the child requires respecting it not only in the process of applying, but also in the process of lawmaking[42]. It should also be noted that the order to protect the good of the child constitutes the basic, overriding principle of the Polish system of family law, to which all regulations in the sphere of relations between parents and children, including legal mechanisms concerning filiation issues, are subordinated[43]. All this leads to the conclusion that it is now necessary to take *de lege lata* such a direction in interpreting the current norms which will ensure protection of the interest of children who are Polish citizens and who have a foreign birth certificate showing same-sex parenthood. It would be advisable to adopt a compromise solution and to reject a strictly formalistic approach sealing the Polish system of registering civil status in relation to legal relationships unknown to Polish law. This compromise may be achieved in several ways, and sample directions of solutions are presented below according to the criterion

[37] Available *online*.

[38] Available *online*.

[39] See more: M. BALWICKA-SZCZYRBA, *Konstytucyjne zasady prawa rodzinnego na tle rozważań o zasadach prawnych*, in A. GAJDA, K. GRAJEWSKI, A. RYTEL-WARZOCHA, P. UZIĘBŁO, M.M. WISZOWATY (eds.), *Konstytucjonalizm polski. Refleksje zokazji jubileuszu 70-lecia urodzin i 45-lecia pracy naukowej profesora Andrzeja Szmyta*, Gdańsk-Sopot, 2020, p. 103 ff.

[40] In this way i.a. T. SOKOŁOWSKI, *Prawo rodzinne. Zarys wykładu*, Poznan, 2013, p. 13.

[41] Cf. Constitutional Tribunal, judgment of 28 April 2003, K 18/02, LEX no. 78052.

[42] L. GARLICKI, M. DERLATKA, in L. GARLICKI, M. ZUBIK (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw, 2016, pp. 780-788.

[43] See more M. BALWICKA-SZCZYRBA, *Konstytucyjne zasady*, cit., p. 103 ff.

of the degree of interference in the Polish system of registering civil status, starting with the least intrusive measures.

Firstly, following the current line of rulings by administrative courts[44], it may be stated that despite the inadmissibility of transcription of the birth certificate, it must be possible for a Polish citizen to obtain an identity document and a PESEL number, as a consequence of which there is an exemption from the obligatory transcription in the case under consideration[45]. The basis for applying for an identity document and a PESEL number would then have to be a foreign civil status record. It should be noted that this concept does not solve the existing problem, but only shifts it from the sphere of civil status registration, thus freed from facing the problem of transcription, to the sphere of population registration, where an analogous problem of admissibility of entering data unknown to Polish law will arise. It is also in conformity with the current line of case law of the Court of Justice of the EU, according to which 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[46].

Secondly, acknowledging the obligatory and at the same time necessary transcription, one could propose that a foreign civil status record be transcribed only in the part admissible under Polish law, while the data inadmissible under the national system would be replaced by so-called «obscuring data», that is fictitious father's data entered into the birth record on the basis of Art. 61(2) of the Family and Guardianship Code. This concept, however, also has serious disadvantages: the fictitious father's data resulting from such a document could be misleading in legal transactions as to the child's real marital status; a contradiction between the content of the Polish birth certificate and the foreign certificate, which still retains evidentiary value, would also be undesirable.

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[44] See in particular Supreme Court (seven judges), resolution of 2 December 2019, cit.; Supreme Administrative Court, judgment of 17 April 2019, cit.; Supreme Administrative Court, judgment of 11 February 2020, cit.; Voivodship Administrative Court in Szczecin, judgment of 19 March 2020, II SA/Sz 1075/19; Supreme Administrative Court, judgment of 22 June 2021, cit.

[45] M. WOJEWODA, *Konstrukcje rodzinnopawne nieznane prawu polskiemu a krajowa rejestracja zdarzeń z zakresu stanu cywilnego*, in *Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego*, 2020, no. 2, p. 86. A *de lege ferenda* proposal for the introduction of optional transcription in the case under consideration was put forward by P. MOSTOWIK, *Problem rejestracji w polskich aktach urodzenia pochodzenia dziecka od „rodziców jednopłciowych" na tle orzecznictwa sądów administracyjnych w 2018 r.*, Warsaw, 2019, pp. 37-38.

[46] See Court of Justice (Grand Chamber), judgment of 14 December 2021, case C-490/20, *V.M.A.* v *Stolichna obshtina, rayon "Pancharevo"*, EU:C:2021:1008; order of 24 June 2022, case C-2/21, *Rzecznik Praw Obywatelskich*, EU:C:2022:502.

Moreover, the obscuring data may, in Polish law, include only the father's data, not the mother's[47], which means that a fictitious man would be indicated in place of one of the women appearing on the foreign birth certificate as the «second parent»; however, this would not be possible if the foreign birth certificate indicates two men as the child's parents.

Thirdly, partial transcription of a foreign civil status record could consist in omitting inadmissible data during transcription and leaving these spaces blank. Such a birth record could fulfil its proper function in the market and the missing data could be demonstrated, if need be, by supplementary use of a foreign birth record.

Fourth and most far-reaching is the idea of a full transcription of the foreign birth certificate, which would reflect on the Polish birth certificate the content of the foreign certificate by including both single parents. Its weak point, however, would be to create in this way a proof which does not reflect the real marital status of the child, that one of the women entered on the certificate has the status of father, or that the man has the status of mother, since such a status is not provided for by the foreign birth certificate which, depending on the solutions adopted in the particular legal system, places one of these parents in an identical role (two mothers) or in the role of «the other parent»[48]. For this reason, this proposal must be rejected.

The review of possible solutions presented above together with the postulate of a child-friendly solution to the problem can, however, only be a temporary measure aimed at solving the problem until the introduction of optimal statutory solutions on this subject. A thorough amendment of the regulations in force concerning the admissibility of transcribing a foreign birth certificate of a child of a same-sex couple should specify in detail the scope of data entered in such a situation on the Polish civil status record and the status of these entries. Perhaps it would be appropriate in such a case to place data unknown to Polish law in a special field with an indication of the foreign legal system in which the data is recognised. This proposal is far-reaching and less invasive solutions could also prove effective, such as including the other unisex parent in the content of an additional note or a «note» created for this purpose and placed under the birth certificate. These data could then be included either in the content of a copy of the birth certificate, or only in the content of a separate certificate which would be issued together with the transcribed birth certificate and which does not contain legal figures unknown in Poland.

6. Conclusions.

[47] A child's descent from its father shall be considered as derived from its descent from its mother, in this way J. HABERKO, T. SOKOŁOWSKI, in H. DOLECKI, T. SOKOŁOWSKI (eds.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warsaw, 2013, p. 528.

[48] See factual situation in the judgement of the Voivodship Administrative Court in Gliwice, of 6 April 2016, cit.

The growing number of cases of requests for the transcription of a foreign birth certificate of a child indicating a same-sex couple as parents points to the growing number of persons who are Polish citizens and hold such a birth certificate, whose rights are not sufficiently protected under the current legal system. The conviction, currently dominant in practice, that transcription of such a birth certificate is inadmissible has been criticized in the doctrine and important arguments have been put forward, such as, among others, unequal treatment of Polish citizens. The far-reaching legal implications of the refusal of transcription in the child's legal sphere give rise to reflection on the need to ensure legal protection for the child at the level of Polish law.

On the one hand, it should be assumed that *de lege lata* positions refusing transcription of such an act find normative justification in view of the existing contradiction with a clause of the legal order in force in Poland. On the other hand, it would be advisable to consider and adopt a compromise solution, rejecting the strictly formalistic approach that seals the Polish system of registering civil status against family law relationships. This would not, however, mean the introduction into the Polish legal system of a new institution of same-sex parenthood, but only the recognition and confirmation that under a foreign civil status record a child has the status of a child descended from parents of the same sex. This compromise solution requires the principle of the good of the child, which is the fundamental principle of Polish family law, as well as Poland's obligations under international law, including the need to protect fundamental human rights.

The legal measures presented and structured in this paper which counteract the rigorous application of Art. 107(3) of the c.s.r. in the case of transcriptions of civil status records of children from same-sex unions constitute a proposal which requires further debate within the academic community, but they are a good starting point for the discussion on developing solutions to protect the interests of children from same-sex unions without excessive interference in traditional legal institutions shaped by Polish law, particularly marriage. Consequently, further academic discussion on this important practical issue is recommended.

ABSTRACT: In the Polish legal system marriage is a formal union of a man and a woman. Due to a different definition of marriage in some foreign legislations doubts arise as to the transcription of foreign civil status records in which spouses or same-sex parents are registered. Entry in the Polish register has far-reaching consequences, both public law and private law. Civil status records constitute the sole evidence of the events contained therein, and their incompatibility may be proven in court proceedings and sometimes by administrative action. Civil status records are intrinsically linked to personal and family law, and any refusal to transcribe them will have consequences in terms of the legal situation of the person concerned.

The study analyses the positions of jurisprudence and doctrine relating to the problem under examination. It was found that on the basis of applications for the transcription of birth certificates of children of same-sex parents, two disputable positions have developed in the jurisprudence. Public administration bodies and administrative courts generally refuse the transcription. However, 2018 marked a break in the previous line of rulings of the Supreme Administrative Court, which allowed for such a possibility. However, the reasoning raised in the justification of the court's decision attracted widespread criticism, which resulted in the lack of consolidation of this view.

The research carried out into the problem of the transcription of foreign civil status documents of children of same-sex parents under Polish law has shown that the Polish legal system is not adapted to the transcription of foreign civil status documents of children of same-sex parents.

In conclusion, it should be stated that in view of the noticeable conflict between the fundamental principles of the Polish legal system (including the public order clause) and the rights of the child (including personal rights), the lack of the possibility of making transcriptions of foreign civil status documents of children of same-sex parents unduly violates the principle of the welfare of the child. In particular, it results in a far-reaching diminution of the rights of the child, i.a. due to the impossibility of obtaining an identity card. This state of affairs requires urgent intervention either through a change in the direction of interpretation of the existing provisions of the Act on Civil Status Records, or through amendments to this Act.

KEYWORDS: Transcription; same-sex parents; child welfare; civil status records; hard case.