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THE ROLE OF ADMINISTRATIVE COURTS IN ENSURING LEGAL SECURITY FOR MARRIAGE AND FAMILY: COMMENTS IN THE CONTEXT OF ARTICLE 18 OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

Abstract

The article is devoted to the role of administrative courts in ensuring the legal security of an individual in the area of family law. The aim of the analysis is to demonstrate the guarantee of the preservation by the Polish constitutional legislator of the traditional form of marriage as a union of a woman and a man and the family created on this basis (Article 18 of the Constitution of the Republic of Poland). The article discusses the essence of legal security and the role of administrative courts in ensuring it, as well as the guarantee nature of the regulations of Article 18 of the Constitution of the Republic of Poland. Against this outlined background, the thesis on the inadmissibility of institutionalization of same-sex unions is argued. Problems resulting from the judicial practice of administrative courts related to the transcription of a child's birth certificate are also discussed.

The scientific research was conducted by using traditional methods of jurisprudence, primarily the formal-dogmatic method. The linguistic, systemic and teleological interpretation of Article 18 of the Constitution of the Republic of Poland was applied. The directions of operational interpretation resulting from the case law of administrative courts were discussed. The views found in the literature on the subject (doctrinal interpretation) were taken into account, too. According to the author, the perspective of legal security strengthens the arguments stemming from the linguistic and historical interpretation of Article 18 of the Constitution and allows for a better justification of the inadmissibility of institutionalizing same-sex unions by means of a statute. Such a procedure seems particularly useful in the face of the growing tendencies in the law of other countries to eliminate the traditional form of marriage as a union of a woman and a man.

Keywords: *legal security, administrative courts, marriage, family, same-sex unions, Constitution of the Republic of Poland*

Introduction

In the catalogue of the most important tasks of a democratic state, such as the Republic of Poland, ensuring the safety of citizens, including legal security, takes a prominent place. The proper fulfillment of obligations by public authorities in this sphere of relations with the individual guarantees that the determination of the legal situation through acts of applying the law will not be arbitrary in nature, not supported by the letter of the applicable law. Administrative courts play a particularly important role in ensuring legal security. Traditionally, they are the guardians of civil rights and freedoms, which is visible in the situation

in which they assess the legality of administrative decisions, i.e. acts whose essence is the possibility of authoritative (unilateral) determination of the legal position of an individual by a public administration body.

This study characterizes the role that administrative courts are to play in ensuring the legal security of an individual in the area of family law. The aim of the analysis is to demonstrate in this context the guaranteeing significance of Article 18 of the Constitution of the Republic of Poland of 2nd April, 1997 (Journal of Laws 1997.78.483), which expresses respect for and recognition of the traditional form of marriage and the family created with its conclusion. It should be assumed that the perspective of ensuring legal security may constitute a reinforcement of arguments stemming from the linguistic and historical interpretation of the indicated provision of the Polish Constitution. Such a procedure seems particularly useful in the face of the strengthening tendencies in the law of other European countries (and outside Europe) to erase the traditional form of marriage as a union between a woman and a man (Bucoń, 2022, 35-44).

Based on the above assumption, the author of this study characterizes the essence of the legal security of an individual and the role of administrative courts in ensuring it. In the main part of the analysis, he discussed the guarantee nature of the regulations of Article 18 of the Constitution of the Republic of Poland. Against this outlined background, the thesis on the inadmissibility of institutionalization of same-sex unions is argued. Problems resulting from the judicial practice of administrative courts related to the transcription of a child's birth certificate are also discussed. The research results are achieved by using traditional methods of jurisprudence, primarily the formal-dogmatic method. The linguistic, systemic and teleological interpretation of Article 18 of the Constitution of the Republic of Poland is applied. The directions of operational interpretation resulting from the case law of administrative courts are also discussed. In addition, the views appearing in the literature on the subject (doctrinal interpretation) are taken into account.

Administrative justice as a guarantee of the legal security of an individual

The conviction that public authorities must ensure security is so strong that it forms the basis of an individual's bond with the state. The state is the guarantor of an individual's security, but also, by shaping the system of legal norms, determines the scope of the individual's ability to exercise his or her freedom. In this way, the entire social structure is protected by public authority. The state, through the law established by itself, determines the limits of human freedom, the possibilities of his or her free conduct, in the name of values that justify the interference of state authority in the sphere of human freedom (Potrzeszcz, 2019, 19-29).

Law is the basic tool that the state has at its disposal in shaping social reality. However, it cannot use this tool arbitrarily. A democratic state ruled by law (Article 2 of the Constitution of the Republic of Poland: *The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice*) is expected to properly define the limits of human freedom, in the name of the legal security of the individual. In particular, it cannot conduct legislative activity, the effects of which will surprise the addressees of legal norms and prevent them from adapting to their compliance within a reasonable time. In the formal and legal dimension, the implementation of rules derived from the principle of citizens' trust in the state and the law it establishes, based on Article 2 of the Constitution of the Republic of Poland, serves to ensure the legal security of the individual. This concerns such basic issues as respect for the principle of *lex retro non agit*, implementation of the order of appropriate *vacatio legis* or recognition of rights rightfully acquired (Kasiński, 2018, 156-164). In a broader sense, the legal security of an individual should be linked to all the devices of a democratic state, thanks to which, on the one hand, the natural freedom of an individual is ensured, and on the other hand, the interest of the state as a community constituting the common good of all citizens (cf. Article 1 of the Constitution of the Republic of Poland: The Republic of Poland shall be the common good of all its citizens; Boć, 2009, 151-154).

The basic guarantee of the legal security of an individual is the judicial power independent of the legislature and the executive. An individual can

feel safe only thanks to the protection provided by courts and tribunals in the form of judgments constituting a manifestation of the application of the law. Administrative courts, established specifically for to exercise control over the legality of the activities of the public administration, play a particularly important role. In accordance with Article 184 of the Constitution of the Republic of Poland, the Supreme Administrative Court and other administrative courts exercise, to the extent specified in the act, control over the activities of the public administration. This control also includes ruling on the compliance with the acts of resolutions of local government bodies and normative acts of local government bodies.

The protective role of administrative courts has become particularly visible in the area of family law, which in the past quarter of a century has fallen victim to tendencies that undermine the traditional social arrangements characteristic of European civilisation based on three great pillars: Greek philosophy, Roman law and the Christian religion (cf. Insadowski, 1935, 73-78; Gajda, 2009, 127). In particular, there is a tendency to undermine the monogamous and heteronomous form of marriage in modern states. The need to provide legal protection for civil partnerships has taken the form of legal solutions that eliminate the recognition of marriage as a union of a woman and a man. Following in the footsteps of national legislators, both European courts (the European Court of Human Rights and the Court of Justice of the European Union) are inclined to impose on the states of the Council of Europe and the European Union obligations in the field of family law that have no basis in the treaties, undermining the traditional form of marriage as a union of a woman and a man (cf. Wojewoda, 2022, 259-275).

The guarantee nature of the provisions of Article 18 of the Constitution of the Republic of Poland

In the light of Article 18 of the Constitution of the Republic of Poland: *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*. The constitutional provision is expanded in Articles 1-2 of the Family and Guardianship Code: *A marriage is concluded when a man and a woman, present at the same time, make declarations before the head of the registry office that they are entering into a marriage. A marriage is also concluded when a man and a woman entering into a marriage subject to the internal law of the church or another religious association, in the presence of a clergyman, declare their will to simultaneously enter into a marriage subject to Polish law and the head of the registry office then draws up a marriage certificate* (The Act of 25th February 1964 – Family and Guardianship Code, Journal of Laws 2023.2809 consolidated text).

Against the background of these rules, administrative courts issued a number of rulings protecting the Polish legal order from the undue influence of European tribunals aimed at weakening the guarantees resulting from the said provision. According to the view dominant in the doctrine, the constitutional concept of marriage as a union of a woman and a man excludes the possibility of redefining marriage at the statutory level. By pointing out the essence of marriage as a union of a woman and a man, the legislator did not intend to make changes to the applicable legislation, but to protect against such changes (Banaszkiewicz, 2016, 41). Since marriage is an existing concept, its meaning cannot be understand in different ways, e.g. by recognizing same-sex unions as marriages (Sitek, 2022, 98-99).

With the conclusion of marriage between a woman and a man, in accordance with Article 18 of the Constitution, a family is created, consisting of spouses and their common children born in marriage. The family understood in this way, similarly to the formally concluded marriage constituting its foundation, is under the care and protection of the Republic of Poland. Nevertheless, from other constitutional regulations, a broader concept of family results than that which is associated with the traditional form of marriage. First of all,

there is no basis for excluding from the constitutional formula of the family children of both spouses, born before they entered into marriage. Solutions that indicated the legal disability of children born out of wedlock are a thing of the past (cf. Mooney Cotter, 2012, *passim*). From the point of view of the constitutional values of a modern democratic state, especially the principle of equality of all before the law, it is inadmissible to differentiate the legal position of children born in wedlock and out of wedlock. Therefore, members of a family created on the basis of a formally concluded union of a woman and a man are, on the same basis, the common children of the spouses born not only during the marriage, but also before it.

The family, subject to the protection of the Republic of Poland in accordance with the provisions of Article 18 of the Constitution, may also include children from only one of the spouses (Kosior, Łukasiewicz, 2018, 10). This application is supported by important axiological arguments, and above all, the good of the child raised in this family. The Supreme Court of the Republic of Poland indicated the superiority of the child's best interests over other values arising from Article 18 of the Constitution (Decision of the Supreme Court of 6th October 2021, I NSNc 357/21, OSNKN 2021.4.33; cf. Herzog, 2022, 67-80; Mendecka, 2023, *passim*). Moreover, in the context of constitutional regulations, an even broader concept of family should be adopted than that resulting from the aforementioned constitutional values and Article 18 of the Polish Constitution. Namely, it concerns a situation in which an informal monogamous relationship between a woman and a man raises their common children. In this case, the moment of creation of a family is difficult to determine – there is no formal and legal basis, as is the case with marriage. Nevertheless, it should be recognized that the child's welfare is such an important constitutional value that doubts of a strictly legalistic nature must be relegated to the background (cf. Uerpmann-Wittzack, 2005, 66; Lamprecht, 1987, 857-868).

In this context, every family, regardless of whether its foundation is a formally concluded marriage between a woman and a man, deserves the help and care of public authorities (cf. Bucoń, 2020, 13-28). This finding has particularly significant practical consequences for the social assistance system (cf. Dobrowolski, 2008, 328-335). The need to equalize the rights to obtain care benefits for spouses and people who are not formally married was indicated

by the Provincial Administrative Court in Kielce in its judgment of 9th March, 2022 (II SA/Ke 64/22, LEX No. 3327172). This view is consistent with the position of the Supreme Administrative Court expressed in its judgment of 8th February 2022 (I OSK 2768/19, LEX No. 3328006). The Court ruled that the concept of family for the purposes of the Family Benefits Act of 28th November 2003 (Journal of Laws 2024.323 consolidated text) must be understood relatively broadly and be based on several criteria that do not prefer a specific legal form of family organization, as all of its forms should be recognized as equal. This is the understanding of family in accordance with Article 18 of the Constitution of the Republic of Poland (cf. Szulc, 2016, 83-92; Andrzejewski, 2021, 164-165).

Inadmissibility of institutionalization of same-sex unions

In connection with the guarantee nature of the regulation resulting from Article 18 of the Constitution of the Republic of Poland, the creation of any legal regulation recognizing homosexual relationships or relationships violating the principle of monogamy as *marriage* would be a violation of this rule. A similar contradiction with the constitutional norm would occur if civil partnerships were covered by a similar sphere of legal regulation as marriages, in particular in the area of the rights and obligations of persons creating such relationships (Smyczyński, 2005, 461-467). An exceptionally important issue in this context is the problem of institutionalization of same-sex unions. According to the author of this study, the statutory regulation of these unions postulated by some groups in the public discussion is incompatible with the provisions of Article 18 of the Constitution. In any case, they could not be recognized as marriages. This is not only because they do not correspond to the essence of this institution, but also because of the constitutional definition of marriage as a union between a woman and a man.

The above-mentioned direction of interpretation of Article 18 of the Constitution of the Republic of Poland has remained compatible with the development of the case law of the European Court of Human Rights for many years. The Strasbourg Court held that the issue of recognition of so-called

same-sex marriages is a matter of free discretion of individual states. In the meantime, in many European (and non-European) countries, a far-reaching favor of the legislator could be observed not only towards the institutionalization of same-sex partnerships, but also towards creating the possibility of entering into so-called same-sex marriages. Following this trend, the direction of the case law of the European Court of Human Rights was modified. In its ruling in the case Oliari and Others v. Italy (Judgment of 21st July of 2015, 18766/11 and 36030/11, ECLI:CE:ECHR:2015:0721JUD001876611), the European Court of Human Rights accused Italy of negligence in the area of statutory definition of the legal status of same-sex partnerships, which resulted in the failure to ensure an adequate level of protection of the interests of persons forming such partnerships (Tunia, 2018, 61-70). In this way from the Polish point of view, a dangerous phenomenon has emerged, where external entities impose a specific position on the model of marriage and family, which is in clear contradiction with Article 18 of the Constitution of the Republic of Poland.

In light of the above, a question arose about the procedure of judicial authorities and public administration authorities (or other entities applying the law) in a situation in which they encounter a case not regulated by Polish law, and in particular a so-called homosexual marriage concluded by a Polish citizen abroad, in a country whose law allows for the conclusion of such unions. In the practical functioning of civil registry offices, and consequently in the judicial practice of administrative courts, the problem of transcribing civil status records, the content of which is in conflict with Art. 18 of the Constitution of the Republic of Poland, defining marriage as a union of a woman and a man, emerged against this background. Only a marriage concluded in this way can constitute the basis for making an entry in the civil status register. Hence the logical conclusion that a marriage certificate issued by a foreign state authority can become the subject of transcription in the civil status register in Poland only and exclusively when the spouses are a woman and a man. However, if the spouses are persons of the same sex, transcription is inadmissible due to its inconsistency with the fundamental principles of the legal order of the Republic of Poland (cf. Dunaj, 2022, 81-92). This view was ultimately approved by the administrative courts (see, *inter alia*, the judgment of the Voivodship Administrative Court in Gdańsk of dnia 14th January 2016 r., III SA/Gd 835/15, LEX No. 1997031).

The constitutional inadmissibility of legalising same-sex unions took on particular significance when the issue of transcribing a child's birth certificate, in which a foreign authority entered persons of the same sex as the parents, appeared in judicial practice (Banasik, 2023, 272). The admission of such cases to the docket resulted in the administrative courts taking an unequivocal position. They recognized – in an unambiguous manner – the inadmissibility of transcribing a child's birth certificate in which persons of the same sex were listed as parents (Krawiec, 2019, 5-14; Gajda, 2020, 32-48). This view, initially appearing incidentally in the case law of administrative courts (see, *inter alia*, the judgment of the Supreme Administrative Court of 20th June 2018, II OSK 1808/16, LEX No. 2513922; judgment of the Supreme Administrative Court of 10th October 2018, II OSK 2552/16, LEX No. 2586953), gained final approval in the resolution of the Supreme Administrative Court of 2nd December 2019 (II OPS 1/19, LEX No. 2746435; see: Jagoda 2022, 141-157; Łukasiewicz, 2022, 203-221).

The Supreme Administrative Court upheld the rulings in cases related to the transcription of a child's birth certificate, as long as the issue of determining parenthood of same-sex persons by a foreign authority is on the docket. In one of the latest judgments the Supreme Administrative Court refused to issue an identity card due to the impossibility of entering two persons of the same sex as parents of the document holder (judgment of the Supreme Administrative Court of 28th February 2024, II OSK 1303/21, LEX No. 3705334). The court emphasized that no country can impose its legal order on another country. Poland recognizes the legal status resulting from the child's birth certificate, but is not obliged to introduce analogous legal structures and unify its law with other countries, especially those outside the European Union.

The position of the Supreme Administrative Court in the presented cases is an expression of the exercise of the role of a guarantor of compliance with the Constitution of the Republic of Poland. It is extremely important in the face of deepening European integration and the growing activity of international tribunals, whose case law is characterized by interference in the sphere of family law in the sphere of the Polish legal order. It should be noted that the possible adoption of a law institutionalizing same-sex unions could not have a direct impact on the direction of the case law of administrative courts, specified

in particular in the aforementioned resolution of the Supreme Administrative Court of 2nd December 2019. In other words, a possible intervention by the legislator could not relieve administrative courts of responsibility for the direction of the interpretation of Article 18 of the Constitution.

Conclusions

The directions of the case law of administrative courts presented in this study, recognizing the guarantee nature of the regulations of Article 18 of the Constitution in relation to respect for the traditional model of marriage and family, are an expression of the performance by the Supreme Administrative Court and Voivodship Administrative Courts of the role of guarantor of compliance with the Constitution of the Republic of Poland. It is extremely important in the face of deepening European integration and the growing activity of international tribunals, whose case law is characterized by interference in the sphere of family law in the sphere of the Polish legal order. An exceptionally important issue in this context is the problem of institutionalization of same-sex unions. According to the author of this article, the statutory regulation of these unions postulated by some circles in the public discussion is incompatible with the disposition of Article 18 of the Constitution. In any case, they could not be recognized as marriages. This is not only because they do not correspond to the essence of this institution, but also because of the constitutional definition of marriage as a union of a woman and a man.

Administrative courts, sharing the majority view of the doctrine that marriage is exclusively a union between a woman and a man, significantly contribute to strengthening the legal security of citizens. They prevent situations of legal uncertainty as to the legal assessment of various forms of cohabitation of adults. At the same time, which should be clearly emphasized, the recognition of the traditional model of marriage is not opposed by the tendency in the case law of administrative courts to broadly define the family in the name of protecting the property interests of the persons who form it, and in particular minor children.

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