RAPPORTS POLONAIS

XXe CONGRÈS INTERNATIONAL DE DROIT COMPARÉ

XXth INTERNATIONAL CONGRESS OF COMPARATIVE LAW

Fukuoka, 22–28 VII 2018

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SECTION II A

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CONDITIONS OF THE RECOGNITION OF THE CIVIL STATUS OF TRANSSEXUAL AND TRANSGENDER PEOPLE IN POLAND

1. Introduction – the Polish legal system

The Republic of Poland is a parliamentary democracy with the written Constitution (of April 2, 1997[1]) being the superior law. The other sources of binding rules in Poland are: ordinary statutes, regulations based on statutory delegation, acts of local law (in limited areas) as well as international conventions and the law of the European Union (to which Poland has belonged since 2004).

Any change of the Constitution requires the involvement of both chambers of the Parliament (the Sejm and the Senate) acting with special majority. In certain cases, a national referendum may be organized to approve (or reject) the change of the Constitution adopted by the Parliament.

The consistency of the legal system in Poland is controlled by the Constitutional Tribunal. Acting upon the motion of various official bodies, the Tribunal reviews the compliance of normative acts with acts of higher rank and, in particular, the compliance of statutes with the Constitution. Another way of involving the Constitutional Tribunal is a constitutional complaint which may be filed by any person whose constitutional rights or freedoms were infringed and they were not made good by the decision of a competent public authority despite the exhaustion of appropriate procedures (Art. 79 of the Constitution). The rulings of the Constitutional Tribunal are binding upon their publication.

With the exception of the sex equality principle, as envisaged in Art. 33, the Polish Constitution of 1997 devotes no special rules to the problem of civil status, gender or sexual identity. Still, any such issues should always be seen in the light of the overarching wording of Art. 30 that guarantees the respect of personal dignity of every

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[1] *Official Journal* [O.J.] 1997, No. 78, item 483.

human being and Art. 47 of the Constitution concerning the protection of private and family life. The impact of these constitutional provisions on the promotion of the rights of transsexuals shall be presented in some detail in the course of the discussion.

2. Regulation of the civil status in Poland

The legal definition of the civil status can be found in the Law on Civil Status Acts of November 28, 2014.[2] Article 2 section 1 of the 2014 Law reads as follows:

> The civil status is a person's legal situation, expressed by the individual personal characteristics, as shaped by natural events, legal actions or judicial decisions, or decisions of the authorities, which is demonstrated in civil status acts.

The analysis of other provisions of the 2014 Law, which name the components of the three types of civil status acts drawn up under Polish law (birth, marriage and death acts) leads to the conclusion that the civil status notion embraces the following elements: first name(s), surname, family name, date and place of birth, sex, names and surnames of parents as well as the indication of marital status. Accordingly, in the light of current legislation, the dominant view in the Polish legal doctrine is that **the civil status is a private law notion reflecting both personal as well as family aspects of the individual's legal position**.[3]

The civil status as such – being a collective term including various elements – is considered to be one of the so called 'personal goods' i.e. strictly personal values commonly recognized and respected in society, which are protected by the law.[4] It does not preclude the possibility of treating some of the civil status components as independent personal goods deserving separate protection. This concerns, in particular, names and surnames but also the (sense of) sex identity.

The civil status of natural persons is recorded in the Civil Status Register which – as from March 1, 2015, when the new Law on Civil Status Acts came into force – is run in an electronic version. The Register has a national reach. Individual entries are made by the Civil Registrars in any of the Civil Registry Offices scattered throughout the country. Such offices are run by local authorities. There are more than 2200 Civil Registry Offices in Poland.

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[2] Consolidated text: O.J. 2016, item 2064.

[3] See M. Wojewoda, "Kilka uwag o definicji 'stanu cywilnego' w nowej ustawie Prawo o aktach stanu cywilnego" [Some remarks on the definition of 'civil status' in the new Law on Civil Status Acts], *Metryka* 2014, No. 2, p. 17 *et seq.*

[4] The examples of personal goods are given in Art. 23 of the Polish Civ.C. The list is not exhaustive and includes: health, freedom, dignity, freedom of conscience, surname or pseudonym, image, confidentiality of correspondence, inviolability of home as well as scientific, artistic and inventive activities.

SECTION II A

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MULTICULTURAL CHALLENGES IN FAMILY LAW (POLAND)

A. Introduction

1. The background information on Polish jurisdiction

Polish legal system has the Constitution from 1997[1] as the fundamental source of law. The high position of the Constitution caused a strong position of the Polish Constitutional Court (CC) which plays an essential role as a control body upon legislation, explaining contradictions in legal acts or ruling upon constitutionality or unconstitutionality of provisions of legal acts.[2] Because of the division of powers (Montesquieu concept) Polish legal system do not have a system of precedence. The judgements of the Supreme Court (SC) or European Court of Human Rights (ECtHR) have not a value of legal source because we haven't the system of case law. However many of those judgements are widely discussed by the Polish doctrine.

Since Poland has ratified many international treaties which refer to family law matters and is a member of the European Union, appropriate international agreements and other applicable statutory instruments creating European law, currently constitute elements of the Polish legal system, and therefore are also sources of family law. First of all the European Convention on Human Rights (ECHR) and Convention on the Rights of the Child are recognized as a legal source of the Polish legal system and theirs provisions can be directly applied.[3]

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[1] Act on 2rd April 1997, Journal of Laws [J. of L.] 1997, No. 78, item 483.

[2] M. S a f j a n, "The Constitutional Court as a positive legislator," [in:] *Rapports Polonais. Présentés au XVIIIe Congrès International de Droit Comparé*, ed. B. Lewaszkiewicz-Petrykowaka, Łódź 2010, p. 247 *et seq*.

[3] E. Ł ę t o w s k a, "Human rights – universal and normative? (a few remarks from the Polish perspective)", [in:] *Rapports Polonais…*, p. 267 *et seq*.

Family law constitutes a separate branch of civil law regulating legal relations resulting from matrimony and parenthood. This relations are assembled in a separate legal act: Family and Guardianship Code (F.G.C.) from 1964.[4]

The F.G.C. has no special part of general provisions. In consequence, Polish family law uses, to a significant extent, the civil law method of regulations, although with significant exceptions. Several general clauses are characteristic of family law.

In particular the most important clause on 'a child's well-being' (welfare of the child, the best interest of the child) creates a system of state control, which demonstrates much more of a feature of an administrative method of regulation than of a private law method.

This same feature characterises the area of a child's origin, parental authority, child's adoption and alimony duties. On the other hand, in all these areas of regulation there exist certain contractual possibilities, which – upon court control – can be arranged by spouses or parents of the child.

The autonomy of the family law method of legal regulations is also based on the fact that family relations are not always equal – in comparison to civil law relations – as children are subordinated to their parents.

The provisions of the first book (General part) of the Civil Code (Civ.C.) from 1964[5] are also of fundamental importance for Polish family law. Some institutions of general civil law are directly applicable in family law matters. Some other general civil law institutions, however, are not, due to certain differences in approach, such as a different conception of the contents and meaning of an act in law such as the conclusion of marriage, or the declaration of fathering of a child or a different interpretation of the general conception of a defect in a declaration of will or intention to marry.

2. The historically grown acknowledgement of other normative systems?

It necessary to be strictly underlined that Polish legal tradition was purely "multicultural" and, can be said: "multi-legal."

Poland has different tradition that many other European countries, because of our **long experience of full scale tolerance and coexistence of various religion**, cultural and philosophical groups of our society. We have more than 700 years of experience of the presence of huge Jewish minority,[6] more than 500 years of

[4] Act of 5 of March 1964, J. of L. 2012, item 768.

[5] Act of 23 of April 1964, J. of L. 1963, No. 16, item 93, largely amendmented after 1990.

[6] First regulation was the Act of Calisia (Statut Kaliski), second the Privileges of King Casmir the Great from 1356 and other acts, which were carefully observed until the end of independence the First Polish Republic. It is a reason the largest on world group of Jewish lived in Poland since Partition of its territory at 1795, and survived until German Holocaust of II World War.

SECTION II A

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INFORMATION OBLIGATIONS AND DISINFORMATION OF CONSUMERS INCLUDING NEGOTIATION (POLAND)

1. General characteristics of the consumer information model

1.1. Introductory remarks

Polish tradition of consumer protection is, for historical reasons, considerably less established compared to the countries, which joined the European Union prior to 2004, not to mention its founding members. Although instances of transactional imbalance had already been discussed in the early 1980s, the need for a more systematic framework of consumer protection was recognized only after the political and economic transformation from 1989 onwards.[1] Critical from this point of view was the adoption of the Constitution of 1997,[2] in which the protection of consumers from activities threatening their health, privacy and safety and from dishonest market practices was identified as a task of public authorities. Over subsequent years reform measures were introduced in order to align national framework with international – particularly European – standards.[3] Up until today the law of the European Union remains of principal relevance to

[1] See generally: E. Łętowska, *Prawo umów konsumenckich* [Consumer contract law], Warszawa 2002, pp. 2–10; B. Gnela, *Umowa konsumencka w polskim prawie cywilnym i prywatnym międzynarodowym* [Consumer contract in the Polish civil law and in the private international law], Warszawa 2013.

[2] Article 76 of the Constitution of the Republic of Poland of 2 April 1997, *Journal of Law* [J. of L.] 1997, No. 78, item 483.

[3] Implementation of a considerable body of consumer law directives was a condition for Poland's accession to the European Union in 2004.

the Polish consumer protection system, even though several legislative initiatives were also recently adopted at the national level.[4]

Economic orientation of the consumer notion in Poland is perceived as inherent to the overall consumer protection framework. It should be recalled that consumer law puts pressure on the fundamental distinction between private and public law, on which many continental legal systems, including the Polish one, traditionally rely. Special treatment of business-to-consumer (B2C) relationships does not sit easily with the underlying assumptions of the civil law, in which all legal subjects are supposed to be placed on equal legal footing. Certain protective adjustments to this general model have nevertheless been accepted due to a perceived factual inequality of consumers and traders – attributed precisely to economic reasons.[5] Rules on consumer information, regarded as least intrusive to the traditional private law method,[6] are among key measures employed by the legislator in order to re-establish the contractual balance. At the same time, an essentially market-related approach of the EU consumer law has not been without effect on the national legal framework. From this perspective, consumer's ability to take transactional decisions, which can be seen as genuinely free, is recognized as vital to the proper functioning of the market economy.[7]

Besides the substantive level, economic orientation of the Polish consumer law is also visible at the enforcement stage. It is worth noting that the relevant public authority, the President of the Office of Competition and Consumer Protection [President of UOKiK], is responsible not only for the protection of consumers, but also of the competition. On a more general note, the importance of public enforcement in the analysed field is one of the remarkable particularities of the Polish framework and will be addressed in more detail further below.

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[4] As evidenced by the adoption of the Act of 5 August 2015 amending the Act on competition and consumer protection and other legal acts, J. of L. 2015, item 1634, which entered into force in 2016, and the Act of 16 September 2011 on the protection of the rights of the buyer of a residential unit or a single family home, J. of L. 2016, item 555 (codified version). See generally: *Ustawa o zmianie ustawy o ochronie konkurencji i konsumentów z 5.08.2015 r. Komentarz* [Act amending the Act on competition and consumer protection of 5.08.2015. A commentary], eds. A. Piszcz, M. Namysłowska, Warszawa 2016; R. Strzelczyk, *Umowa deweloperska w systemie prawa prywatnego* [Real estate development contracts in the system of private law], Warszawa 2013.

[5] See e.g. judgment of the Court of Appeals in Warsaw of 28 April 2015 (VI ACa 775/14).

[6] The right to be informed might, in particular, be aligned with the general principles guiding the performance of contractual obligations set out in Art. 354 of the Civ.C., see: Act of 23 April 1964 – Civil Code, J. of L. 2017, item 459 (codified version); B. Pachuca-Smulska, "Prawo do informacji i edukacji podstawą ochrony interesów konsumenta" [Right to information and education as the basis for protecting consumer interests], [in:] *Ochrona konsumenta w prawie polskim i Unii Europejskiej* [Consumer protection in the Polish and European Union law], eds. M. Królikowska-Olczak, B. Pachuca-Smulska, Warszawa 2013, p. 44.

[7] See e.g. judgment of the SC of 4 March 2014 (III SK 34/13).

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THE ANTI-SUIT INJUNCTION IN ARBITRAL AND JUDICIAL PROCEDURES (POLAND)

1. Introductory remarks

In the Polish legal system there is no explicit regulation relating to the admissibility of court decisions limiting the admissibility of commencement or continuation of proceedings in the same case before other courts, corresponding to the Anglo-Saxon construction of anti-suit injunction (hereinafter ASI). This does not mean, however, that this construction is absent in the Polish legal discourse. It is of particular interest to representatives of the doctrine.[1]

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[1] See: M. C i e m i ń s k i, A. P r o k o p, "Anti-suit injunctions w Polsce" [Anti-suit Injunctions in Poland], *e-Przegląd Arbitrażowy* 2011, No. 4, p. 22 *et seq*.; P. N o w a c z y k, E. B o g u c k a, "Anti-suit injunctions w Polsce – możliwości i perspektywy" [Anti-suit injunctions in Poland – Possibilities and Perspectives], [in:] *Arbitraż i mediacja. Księga jubileuszowa dedykowana doktorowi Andrzejowi Tynelowi* [Arbitration and Mediation. A Jubilee Book Dedicated to Dr. Andrzej Tynel], ed. M. Łaszczuk, Warszawa 2012, p. 346 *et seq*.; J. B a l c a r c z y k, "Anti-suit injunction a prawo europejskie: Wielka Brytania a reszta Europy na tle rozporządzenia 44/2001" [Anti-Suit Injunction and European Law: Great Britain and the Rest of Europe in the Light of 44/2001], *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 2012, Vol. X, p. 33 *et seq*.; M. K i e r s k a, "Anti-suit injunctions wydawane przez sądy polubowne" [Anti-suit Injunctions Issued by Arbitral Courts], *ADR. Arbitraż i Mediacja* 2017, No. 2, p. 77 *et seq*.; e a d e m, "Anti-suit injunctions w świetle europeizacji prawa prywatnego międzynarodowego" [Anti-suit Injunctions in the Light of Europeanisation of Private International Law], *Przegląd Prawa*

Nevertheless, they are focused on commenting on the approach of the EU Court of Justice expressed in judgments regarding the admissibility of the application of anti-suit injunctions in EU countries. The attempt of application of an anti-suit injunction by a Polish court met with a negative assessment of a higher instance court.[2] The essence of this attempt was the prohibition of continuation of arbitration procedure (anti-arbitration injunction, hereinafter AAI) in the same case.[3]

The initiation of other proceedings in the same case is an undesirable phenomenon that leads to a significant increase in the costs of proceedings. In addition, in the case of multiplication of proceedings, there is a risk of issuing conflicting judgements, which undermines the authority of the administration of justice, and above all conflicts with the principle of legal certainty. The aforementioned principle shall result in ensuring the stability of the legal situation determined by a judgement. Finally, there is also the risk of conducting several enforcement proceedings. In practice, the problem of the collision of two judgments in the same case may not always be able to be solved at the stage of execution of the ruling in the way that prevents any damage. Taking into account the above, it is completely justified to look for solutions that could prevent the initiation and continuation of other proceedings at the earliest possible stage, so that no further substantive ruling on the same matter (judgement or arbitration award) can be issued.

The lack of explicit regulation of the admissibility of anti-suit injunction in the Polish civil procedure obviously does not determine the impossibility of practical application of this procedural institution in the Polish legal system. Therefore, it is necessary to indicate detailed statutory regulations that speak for or against this admissibility. At least three general issues should be considered here:

1. the legal nature of the examined institution and the possibility of its location in the Polish legal system (see further remarks in the point 2);
2. an impact of the examined institution on the application of the right to a court (p. 3);
3. international conditions related to Poland's membership in the EU (p. 4).

Handlowego 2017, No. 6, p. 36 *et seq*.; P. M a r c i s z, A. O r z e ł, "*Anti-suit injunctions* wydawane przez sądy polubowne w świetle wyroku Trybunału Sprawiedliwości z 13.05.2015 r., C-536/13" [Anti-suit Injunctions Issued by Arbitral Tribunals in the Light of the Court of Justice's Judgement of 13 May 2015, No. C-536/13], *Polski Proces Cywilny* 2017, No. 3, p. 379 *et seq*.

[2] The decision issued by Court of Appeal in Kraków on November 22, 2017, signature I ACz 1997/16, http://orzeczenia.krakow.sa.gov.pl/content/$N/152000000000503_I_ACz_001997_2016_Uz_2016-11-22_001.

[3] See further remarks in the point 2.2.