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MARRIAGE AND THE FAMILY IN THE FACE OF SOCIO-CIVILIZATION THREATS. LEGAL CONTEXT

The protection of marriage and family is a multidimensional issue, and the goals related to it can be realized on many levels. One of the basic levels that significantly affects the assessment of the level of family protection is the normative one. There is no doubt that whether the family and its interests are protected depends fundamentally on the solutions adopted in the applicable law.

According to Art. 18 of the Polish Constitution,[1] 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. This provision, as well as a number of other regulations contained in statutes and acts of a lower level, impose certain obligations on public authorities related to the implementation of the objectives of the activities of these authorities indicated by the legislator, and these obligations come down not only to repelling threats external to the family, but also undertaking various activities aimed at supporting the functioning of marriage and family and strengthening the bonds between spouses and family. The state, in accordance with the principle of subsidiarity expressed in the Preamble to the Polish Constitution, should not overly interfere with the autonomy of the family and deprive it of the ability to decide about its own affairs, but should support the family wherever it cannot cope on its own.

This nobly expressed principle of the state's subsidiarity to the family in the era of socio-civilization transformations that we are witnessing, however,

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[1] The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 2009, No. 114, item 946 [henceforth cited as: Polish Constitution].

raises the fundamental question whether contemporary Polish law contains – apart from the declaration – actual mechanisms protecting marriage and family? Does the shape of the law in force in Poland really protect the family as a whole, or is it – paradoxically – a threat to it?

Trying to deal with such a general question, the article will indicate examples of problems that relate to three fundamental aspects of family functioning: upbringing, intimate life and the nature of family ties. Bearing in mind the above-mentioned legal context, the conducted analysis will focus on three detailed questions: 1) Can maintaining *Sharia* law in foster families in Poland be an obligation? 2) Are we in danger of legalizing incest, i.e. does Polish criminal law in its current form really not allow for any (apart from marital or *quasi*-marital) sexual behaviour within the family? 3) Can the child's mother legally be the child's father later on?

1. *Kafala*, the problem of protecting a child's religious identity

The first question is related to the influx of immigrants from Muslim countries to Europe (and inevitably also to Poland), and therefore the possibility of interfering in one of the most fundamental parental rights, which is expressed in bringing up children in accordance with one's own convictions.[2] Although the phenomenon of migration of Muslims raises a number of various social problems, attention will be focused only on the issue of caring for Muslim children deprived of parental care, for whom – naturally – care should be provided.

1.1. The right to foster care

In accordance with the provisions of international law adopted by Poland, a child who is temporarily or permanently deprived of his or her family envi-

[2] The Polish Constitution, Art. 48: "1. Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions. 2. Limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment." Upbringing means instilling and strengthening in children a specific worldview, beliefs, system of values, moral, and ethical principles through conscious actions of parents. Parents have freedom of action and freedom from any outside interference. As long as the transmission of certain content is to qualify as demoralization, state authorities may step in to protect the child.

ronment has the right to special protection and assistance from the state.[3] This care is expressed, *inter alia*, by the obligation to provide him with foster care.[4]

1.2. Foster care in Polish law

In family law in Poland, there are many solutions that regulate the issue of providing a child – deprived of a family environment – with broadly understood foster care. It should only be mentioned that it will be an adoption, i.e. an adoption which may be fully dissolvable,[5] fully unsolvable, i.e. complete (Art. 125^1 § 1 k.r.o.)[6] and incomplete [Smyczyński 2005, 247], as well as the establishment of legal care in the form of a family or institutional foster care [ibid., 203-22].

Without going into details about foster care and adoption regulated in Polish law, it should be noted that Muslim law – similarly to Polish law – also gives children deprived of parental care the opportunity to grow up in a fa-

[3] Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly of the United Nations resolution of 20 November 1989, Journal of Laws of 1991, No. 120, item 526, Art. 20, para 1.

[4] Ibid., Art. 20, para 2.

[5] Act of 25 February 1964, Family and Guardianship Code, Journal of Laws of 2019, item 2086 [henceforth cited as: k.r.o.], Art. 121-123: "The essential effect of the adoption is the creation of an artificial relationship between the adopter and the adopted. Accordingly, any legal effects normally associated with kinship will also exist between the adopter and the adopted. This essential effect of the adoption cannot be changed by the will of the parties. Therefore, neither the mutual relations between the adopting parents, nor the agreement of the adopting spouses to release one of them from the obligations arising from joint adoption have no impact on the statutory scope of rights and obligations arising from adoption, both for the adopted and for each of adopters." See also: the Judgment of the Supreme Court of 4 December 1968, II CR 375/68, OSNCP 1969, No. 10, item 174. A characteristic feature of full adoption is that it extends not only to the adopter and the adopted, but to the entire family of the adoptive parent, as if the adopted had been born as the natural child of the adoptive parent. As a result of full adoption, cease the rights and obligations of the adopted deriving from kinship terms of its relatives, as well as the rights and obligations of those relatives. The effects of adoption, the descendants of the adopted (Art. 121 § 3 k.r.o.).

[6] It is an adoption to which the parents consented without indicating the adopter. It is a specific type of full adoption and is primarily characterized by its unsolvable. In a full adoption, the adoptive parents become the natural parents of the child in the light of the law, and the fact of adoption cannot be proved.

mily.[7] In the Muslim world, however, foster care is understood in a way that is significantly different than in the tradition of European law.

Above all, Islam does not allow adoption. Although the term "adoption" is used in Arabic (*tabannin*), the *Quran* prohibits adoption, which would consist in establishing a legal-family relationship identical to that which exists between biological parents and a child.[8] Foster care for a child is possible only in the form of *kafala.* It can be compared to an agreement between the biological parents of a child and its future guardians [Świto 2016, 221-34; Tomkiewicz 2017, 149-64].

Admitting a child to a family in this formula does not mean that the legal bond between him and his biological parents has ceased. There is no relationship of kinship between the child and the parents who adopt him for upbringing. The child keeps the biological father's surname and does not inherit from foster "parents."[9] Under *kafala*, the guardian takes care of the pupil and is obliged satisfy his needs, care for his maintenance, and – which must be strongly emphasized – is obliged to raise him in the spirit of Islam.

1.3. *Kafala* in the order of Polish law

It would seem that since *kafala* is an institution of Islamic law and the *Quran* does not belong to the sources of Polish law,[10] there is no legal basis for respecting the solutions adopted in the *Sharia* law in Polish law. The above conclusion is not wrong, however – as it seems – it does not mean that the thesis about the existence of references between this institution and Polish law should be completely ruled out. The point is that *kafala* is "recognized"

[7] In Islam, children are considered orphans (*jatim*) if they do not have a father, whether or not their mother is alive. After the father's death, even if the mother is alive, the responsibility of providing for the child's support rests with the closest male relative. See Piwko 2010, 157-73.

[8] This prohibition stems from the Koranic parable of the marriage of the Prophet Muhammad with the ex-wife of his adopted son Zaid. The recognition that accepting a child for upbringing did not create a family bond allowed Muhammad to enter into the aforementioned marriage, which was thus no longer an impure relationship.

[9] Although they can donate or bequeath 1/3 of their property to him.

[10] Set out in Art. 87, para. 1 and 2 of the Polish Constitution.

by the provisions of acts of international law to which Poland is a party, and *kafala* is not excluded also by Private International Law.[11]

1.4. International law ratified by Poland

Kafala mentions the Hague Convention of 19 October 1996, i.e. the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children.[12] The provision of Art. 3, pt. e of this Convention states that measures for the protection of a child's person or property (Art. 1) may, in particular, refer to "the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution."

Kafala also mentions *expressis verbis* the Convention on the Rights of the Child.[13] The provision of Art. 20 of this Convention expressly states that States Parties are to provide, in accordance with their domestic law, foster care for a child temporarily or permanently deprived of their family environment, which should take into account the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background. Therefore, states can do this in several ways: through foster placement, through adoption, through placement in an institution established to care for children, and through *kafala* in Islamic law.

Both international agreements – without raising objections or declarations to the provisions in question – were ratified by Poland, which in the light of Art. 91 of the Polish Constitution means that they constitute part of the domestic legal order and should be directly applicable.[14]

[11] Act of 4 February 2011, Private International Law, Journal of Laws of 2015, item 1792.

[12] Ratified on 8 June 2010, Journal of Laws, No. 172, item 1158.

[13] Ratified on 7 June 1991, Journal of Laws, No. 120, item 526.

[14] Unless its application depends on the enactment of a statute (para. 1); an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes (para. 2).

1.5. Private International Law

The obligation to take into account *kafala* when deciding on the custody of a Muslim minor can also be derived from Private International Law.[15]

The provision of Art. 56 and 59 of this Act stipulate that the law applicable to matters of parental responsibility and contact with a child as well as guardianship and curatorship is defined by the above-mentioned 1996 Hague Convention. In the light of Art. 16 of this Convention, parental responsibility which exists under the law of the state of the child's habitual residence subsists after a change of that habitual residence to another state.[16] It follows from the above that if there are children on the territory of Poland who were cared for in the form of *kafala* in their place of habitual residence, this fact should be respected by Polish law.[17]

1.6. The limits of respecting *kafala*

Recognizing, therefore, that Polish law does not exclude the possibility of respecting *kafala* in guardianship solutions, it is impossible not to ask how far this institution should be respected and whether the obligation to take into account the specificity of *kafala* can be reconciled with the principle of religious freedom in Poland?

1.7. The principle of religious freedom

Referring to this aspect, first of all, it should be remembered that the *kafala* care system, although it may differ in details from one country to another, in principle obliges kafalic guardians to raise a child in the spirit of Islam, and Islam excludes the possibility of changing the religion.

The European model of human rights, including the right to religious freedom, is not practiced in Islam. In the doctrine of Islam, the rights of the indi-

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[15] Act of 4 February 2011, Private International Law.

[16] Whereby – in accordance with Art. 1, para. 2 of this Convention – the term "parental responsibility" includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

[17] Thus, this means, for example, that in the event of the death of a person who cared for a minor in the form of *kafala*, it will be necessary to take appropriate care activities in relation to this child, even if the biological mother of the child was staying in Poland.

vidual come from God and his revelations – the *Quran* – and are not inherent to humans by the law of nature. The human person is treated not as a subject of rights, but as an individual obliged to appropriate behaviours, attitudes and actions towards his commune, and above all towards God [Baecker 2005, 89]. Therefore – according to this doctrine – Muslim society should be governed according to God's law as defined by the *Quran* and *Sharia*.[18] In the application of religious law, Muslim countries differ from each other, but as far as religion is concerned, in promulgated joint declarations of human rights they explicitly refer to *Sharia* as their basis [Armor 2004, 95-100].

Without going into the full depth of the issues related to the concept of human rights in Islam,[19] it should only be noted, for example, that the Islamic states not only did not accept the 1948 Universal Declaration of Human Rights, but on August 5, 1990, they developed the Cairo Declaration on Human Rights in Islam,[20] which states that all humanity is Muslim by nature, and therefore freedom of religion cannot be accepted.[21]

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[18] The system of Muslim law developed by Muslims over the centuries, see Armor 2004, 35-36.

[19] See Bisztyga 2013, 77-92; Mrozek-Dumanowska 1999; Jabłoński 2005.

[20] The declaration was signed by 45 foreign ministers from the Organisation of Islamic Cooperation.

[21] Already in the preamble, the Cairo Declaration states that Islam is above other religions: "Reaffirming the civilizing and historical role of the Islamic Ummah which God made the best nation that has given mankind a universal and well-balanced civilization in which harmony is established between this life and the hereafter and knowledge is combined with faith; and the role that this Ummah should play to guide a humanity confused by competing trends and ideologies and to provide solutions to the chronic problems of this materialistic civilization." The same preamble also emphasizes the prohibition of opposition to what is required by *Sharia* law: "Believing that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one as a matter of principle has the right to suspend them." Art. 10 of the Cairo Declaration states: "Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism," while pursuant to Art. 19 of the Declaration, "There shall be no crime or punishment except as provided for in the Sharia." This means accepting corporal punishments under *Sharia* law, including the death penalty for apostasy. The *Quran* does not explicitly require the death penalty for apostates. However, many hadiths recommend the death penalty for apostates, including some recognized by all schools of Islam. The apostate should be punished with death in accordance with the teachings of the three Sunni schools (Hanbali, Maliki, and Shafi'i), while the Sunni Hanafi school and the Shia Jafari

In the light of the above comments, there is no doubt that *Kafala*, in the aspect in which it obliges the child to raise in the spirit of Islam, cannot be reconciled with the principle of religious freedom in force in the Polish law.

1.8. Practical solutions

What does this mean in practice? The signalled problem of foster care in relation to underage Muslims and the resulting duty of care in the form of *kafala* pose a real threat to those families undertaking foster care that represent a different world view than Islam. It may therefore happen that parents – e.g. Christians – taking care of children of Muslim origin, will be obliged to educate them according to *Sharia*, and not the Gospel.

Bearing in mind the content of the indicated Art. 20, para. 2 of the Convention on the Rights of the Child, it can be stated that since this provision requires States-Parties to provide a child deprived of a family environment with foster care in accordance with his domestic law, and the provisions in force in Poland do not provide for *kafala*, there is no doubt that the courts in Poland ruling in the matter of foster care for a minor adherent of Islam, they will not adjudicate it in the form of the *kafala* system. However, can we conclude from this fact that *kafala* is a completely irrelevant institution in the Polish legal order and the courts are in no way obliged to include it in their decisions? No such conclusion can be drawn from the provisions indicated. Polish law does not exclude the possibility of respecting *kafala* in care solutions, which means that if it is necessary to provide foster care for a child who was cared for in the form of *kafala*, Muslims may demand that this care be continued taking into account the specificity of *kafala*. Such an interpretation, which requires the respect of the *kafala* system in the internal law order, also results from the jurisprudence of the European Court of Human Rights.

1.9. Practical solutions

The example of Spain can be used to illustrate the seriousness of the problem. This country, due to its geographical proximity to Morocco, is the main place for the adoption of Moroccan children (in Morocco many children are

school provide for imprisonment until the apostate "returns to the bosom of Islam," although also in this case the death penalty is not excluded.

abandoned as Art. 490 of the Penal Code provides for a one-year prison sentence for sexual relations outside of wedlock). On September 19, 2012, the Moroccan Minister of Justice issued a circular prohibiting the transfer of Moroccan children to non-Moroccan families because, he said, when the children leave the country, it is impossible to monitor whether *kafala* law is respected and the children are raised as Muslims. In response to this circular, the Spanish minister announced that he would submit to Moroccan demands and amend Spanish law on international adoption to make it subject to *kafala* law. Following these announcements, an agreement was reached in 2012 between the Spanish government and the Moroccan authorities, under which the Spanish government undertook to establish "control mechanisms" that will enable the Moroccan clerical authorities to monitor children until they reach the age of majority and to check whether they did not convert to Christianity. It should be left without comment that the described situation takes place in the heart of Europe, in a country with a deep Christian tradition.

2. Incest and the criminal law protection of the family in Poland

Another problem that needs attention, which concerns social and civilization phenomena that pose a threat to marriage and the family, is the danger of legalizing incest and the problem of the limits of incest in Polish criminal law. As it turns out, this topic does not seem purely abstract at all. It is favoured by the recently observed very lively public discourse aimed at lifting the penalisation of the ban on sexual contacts with relatives, which is the aftermath of the so-called "New human rights," as well as the lack of a coherent and clear vision of this crime in Polish law.

2.1. New human rights

There is no need to develop this about what human rights are, to whom they belong, and what they express. Based on the supra-ideological consensus and the basic and common values belonging to the general heritage of mankind, it should only be stated that they are inalienable, inviolable and independent of any legislative power, because they are prior and superior to it, and the direct source of these rights is the dignity of the human person.

This classic concept of human rights, expressed in the Universal Declaration of Human Rights signed in Paris on December 10, 1948,[22] has been subject to reinterpretation over the past fifty years, which is significantly evidenced by the appearance of the so-called "New rights" of human [Świto 2019, 117-32]. The term is derived from the concept of "reproductive and sexual rights" that emerged at the end of the 1960s in the wake of the women's liberation movement and the sexual revolution, during the 1968 Proclamation of Tehran. Although the term itself was officially introduced into international discourse only in 1994 at the International Conference on Population and Development in Cairo,[23] the concept of reproductive and sexual rights first appeared in 1968 in the Proclamation of Tehran.[24] Currently, this term has been implemented into the language used by international organizations, such as the European Union.

What is the meaning of the term "new rights" and what is specifically meant by "reproductive and sexual rights," this is not entirely clear.[25] The vagueness of this term, however, is not accidental. These rights are subject to constant changes, depending on the emerging opportunities related to the development of the so-called assisted reproduction or artificial insemination. It is commonly accepted that reproductive and sexual rights mean, *inter alia*, the right of "couples and individuals"[26] to decide about having children and their number, the right to choose sexual orientation and sexual partners, the

[22] Among the universal human rights, the Declaration mentions, *inter alia*, the right to life, liberty and security of person, the right to property, the right to freedom of thought, conscience and religion. The declaration of these rights does not grant, but recognizes their existence as inscribed in the essence of the human person. See Gremiuk 2010, 16-17.

[23] International Conference on Population and Development Programme of Action adopted at the International Conference on Population and Development Cairo, 5-13 September 1994 – 20th Anniversary Edition, http://www.unfpa.org/publications/international-conference-population-and-development-programme-action#sthash.DrDJT1pf.dpuf, 58-74 [accessed: 25.06.2019].

[24] Pt. 16 of the Declaration of Tehran, document adopted on April 2, 1968 during the United Nations World Conference on Human Rights in Tehran, ref. U.N. Doc. A/CONF. 32/41 at 3, https://www1.umn.edu/humanrts/instree/l2ptichr.htm [accessed: 25.06.2019].

[25] See Dobrowolska 2016, 163-81.

[26] World Population Plan of Action, August 1976, Adopted by the World Population Conference Bucharest, 1974, Agency for International Development Washington, D.C. 20523, http://www.population-security.org/27-APP1.html#C.1.f, pkt. B(f) [accessed: 25.06. 2019].

right to contraception, sterilization and, above all, the right to freedom to choose sexual behaviour, that is, the right to freely use one's sexuality.

The change in the perception of human sexuality, the affirmation of sexual liberation and consent to overcome social taboos in the name of "new rights" of human undoubtedly strikes at the traditional family model based on Christian values, and in fact prompts reflection on how the concept of sexual rights relates to the prohibition of sexual contacts between related persons, which until recently was clearly and fairly commonly grounded in the social consciousness, not only in Christianity. Does the prohibition of incest in contemporary realities lose its mainspring and its criminalization only becomes a symptom of an oppressive anachronism? Are the currently binding normative solutions in this matter clear and free from questions and controversies? Finally, it is impossible not to ask whether sexual contacts between relatives are no longer part of the "new rights" of human?

2.2. The prohibition of incest[27] in public discourse

The abolition of the criminalization of incest is not a purely abstract topic, but an issue that has recently been vigorously discussed in public space, and has even been the subject of widely advertised films.[28] The catchy titles of publiccations appearing in the press or on the Internet almost beat the eyes: "Kazirodztwo – co w tym złego?" ["Incest – what's wrong with that?"],[29] "Z siostrą to nie grzech" ["It's not a sin with a sister"],[30] "Karać czy nie karać za kazirodztwo w XXI wieku?" ["To punish or not to punish for incest in the

[27] It should be noted that the term "kazirodztwo" occurs in everyday language, even in legal terms, but is not part of the legal language. It has an Old Polish origin, and the synonym of this word is *incest*, a word derived from Latin, referring to the term *incestum* meaning "impurity," "dirtiness," "flaw," used not only to describe the mating of relatives.

[28] In Poland, a film on this subject was e.g. 2012 "Bez wstydu" ["Without Shame"], directed by Filip Marczewski.

[29] https://www.wiatrak.nl/57127/kazirodztwo-co-w-tym-zlego [accessed: 25.09.2018].

[30] https://www.wprost.pl/tylko-u-nas/334836/Z-siostra-to-nie-grzech.html [accessed: 25.09.2018].

21st century?"],[31] "W Niemczech chcą zalegalizować kazirodztwo" ["In Germany they want to legalize incest"].[32]

Focusing on the latter title, it is worth noting that at the end of September 2016, the German Ethics Council operating at the Bundestag expressed the view that "the provisions of criminal law are not an appropriate means to consolidate a social taboo." Therefore, in a comprehensive report on incest, it recommended a partial amendment of para. 173 of the Penal Code (existing in German law since 1871, i.e. from the beginning of the Bismarck era), according to which in Germany sexual intercourse with a family member was punishable by 3 years in prison, even if it happened by mutual consent.

The reason for these changes and the wave of discussions that swept through Germany was provided by a specific case of Patrick Stübing and his sister Susan Karolewski, who, separated in their childhood, were found after many years and started an affair that gave birth to four children. "Para. 173 goes against the spirit of the 21st century. You cannot define morality with the help of the Penal Code,"[33] said Jerzy Montag, legal expert of the parliamentary the German Green Party, in defence of siblings.

German history is no exception. In 2012, a similar discussion, but in Denmark, was sparked by siblings Niklas and Sofie from Aarhus, to whom a daughter was born. Also then, the legitimacy of punishing two adults who consciously decided on such a relationship for sexual relations was questioned. "The government should not be watching over who has children and with whom" – Pernille Skipper told the daily newspaper "Politiken." She called punishment for sexual relationships between relatives "an old-fashioned and grotesque approach to sex and the family."[34]

Similar arguments were also raised in the debate that took place in Switzerland. In 2010, Simonetta Sommarugi, the minister of justice from the So-

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[31] http://wyborcza.pl/1,76842,12858518,Karac_czy_nie_karac_za_kazirodztwo_w_XXI_wieku W.html [accessed: 25.09.2018].

[32] https://wiadomosci.wp.pl/w-niemczech-chca-zalegalizowac-kazirodztwo-6027652193174 145a [accessed: 25.09.2018].

[33] https://www.newsweek.pl/swiat/kazirodztwo-czy-kazirodztwo-jest-scigane-wypowiedz-hartmana-newsweek/78vxvrb [accessed: 25.09.2018].

[34] http://wyborcza.pl/1,76842,12858518,Karac_czy_nie_karac_za_kazirodztwo_w_XXI_wiekuW.html [accessed: 25.09.2018].

cial Democratic Party said that the incest ban "deprives people of their autonomy" and launched a proposal to amend the rules.

The discussion in a similar, "European" spirit also took place in Poland. In 2014, on the "Polityka" blog, Prof. Jan Hartman – still a member of the Ethics Committee operating at the Ministry of Health (!) – wrote: "If it is possible to combine harmoniously maternal or brotherly-sister love with erotic love, then a new, higher quality of love and relationship is achieved." And he asked: "In the age of effective contraception, it is time to ask yourself: what can actually be used to justify the prohibition of incest today?"[35]

2.3. The prohibition of incest in the penal doctrine

Stopping at the Polish discourse, it is worth noting that it takes place not only on the media level, but also in the criminal doctrine. This is due to the fact that *ratio legis* of the incest prohibition is not clearly defined and has been construed in various ways for years. While until the second half of the twentieth century, the main arguments justifying the criminalization of incest were eugenic reasons and decency in the field of sexual relations, now these reasons have lost their importance and are relegated to the background.[36]

In the doctrine, one can meet, for example, the views today that "fear for the moral and physical health of society supports only legislative paternalism and does not serve members of society, who most often know how to take care of themselves. […] The need to protect the family also does not speak in favour of maintaining the prohibition of incest, as family dysfunction is almost never the result of incestuous relationships that appear only as a consequence of other pathological factors. […] The prohibition of incest should therefore be regarded as a completely unnecessary criminal law regulation of consensual sexual relations between adult family members" [Warylewski 2001, 66-97], because "the reasons for the criminality of incest are of an emotional nature, and the reason for this emotion is not bright end" [Gardocki 1998, 243].

[35] https://wyborcza.pl/1,75398,16721990,Prof__Hartman_chce_dyskusji_o_zwiazkach_kazirodczych_.html [accessed: 25.09.2018].

[36] See Tomkiewicz 2013, 25-44.

Some even claim that "the prohibition of incest is a violation of sexual freedom" or "a violation of the right to privacy" (as defined in Art. 8 of the European Convention on Human Rights), and that "the criminalization of consensual incest relations is an example of criminal law entering the sphere of privacy and giving primacy to the phenomenon of statutory paternalism."[37]

2.4. The prohibition of incest in canon and Polish law

What is the legal status of the incest ban? With regard to canon law, relationships between relatives have been the subject of the Church legislator's attention for centuries, and care for the purity of family relationships and sexual life occupied and still occupies a considerable place in the teaching of the Church Fathers [Archibald 2001, 20]. This concern was manifested primarily in determining the degree of kinship as an absolute marital obstacle that does not provide for the possibility of validation.

The prohibition of incest also has a long tradition in Polish law. Both the 1932,[38] 1969,[39] and 1997 Penal Code[40] included this prohibition. In the current Polish criminal law, the prohibition of incest is defined in Art. 201 of the Penal Code: "Whoever has sexual intercourse with an ascendant, descendant, or a person being an adopted, adopting relation or brother or sister shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years" and – as it might seem – is clear and understandable. The problem, however, is – which is rightly pointed out by Małgorzata Tomkiewicz – that the penalisation of incest as defined in this way has clear limitations, both objective and subjective [Tomkiewicz 2013, 27].

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[37] See Banasik 2012, 37-46; Eadem 2011, 65-72.

[38] Ordinance of the President of the Republic of Poland of 11 July 1932, Penal Code, Journal of Laws, No. 60, item 571, Art. 206: "Whoever has a direct relationship with a relative, brother or sister, is subject to a prison sentence of up to 5 years."

[39] The Act of 19 April 1969, the Penal Code, Journal of Laws, No. 13, item 94, Art. 175: "Whoever has sexual intercourse with a relative in a straight line, brother or sister or with a person who is in the relationship of adoption, shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 5 years."

[40] The Act of 6 June 1997, the Penal Code, Journal of Laws of 2020, item 568 as amended [henceforth cited as: k.k.].

Without elaborating on this topic, it should only be emphasized that the prohibition resulting from the quoted Art. 201 k.k. concerns only "sexual intercourse." However, "other sexual act" are outside the scope of criminalization of this provision. This means that stimulating and satisfying the sexual drive between the closest family members – as long as it does not exceed the limit of sexual intercourse – is legally irrelevant. Thus, such sexual behaviour as, for example, making – by mutual consent – masturbation acts between parents and adult children, or between siblings, is permissible in Polish law and is not subject to any criminal law reaction.

Referring to the subjective boundaries of the analysed prohibition, it should be noted that the incest crime was reduced by the legislator to a very small group of family members, and the key of this reduction is not fully understood. In the light of the applicable provisions, sexual intercourse with, for example, a father-in-law with a daughter-in-law or a mother-in-law with a son-in-law is not punishable, nor is it the sexual intercourse of an adult stepson with a stepmother or stepfather, or sexual intercourse with a person adopted by the spouse. The analysed prohibition of incest also does not apply to sexual intercourse between unrelated persons adopted by the same person, or between the natural child of the adopter and the adopted person.

2.5. Conclusions

The debate launched over fifty years ago at the UN Conference in Tehran on the dangers of world overpopulation and the need to control the increase in births contributed – as the following years showed – to the consolidation of anthropological changes, leading to the formation of a new cultural model of man. A man characterized by radical individualism and subjectivism, for whom only what brings benefit or pleasure becomes a value, and who recognizes the right to satisfy individual desires as his fundamental right, demanding that they be approved by positive law [Schooyans 2002, 53-54]. They are expressed in the "new rights" of human mentioned here, which hit the traditional model of marriage and family.

"New rights" are created without reference to objective norms, only on the basis of the subjective beliefs of the people who create them. These individual choices become the benchmark for the "new" legal system. The postmodern principle of freedom of choice creates a climate in which one can

think, speak and act outside the framework of logic, morality and tradition. In order to be able to exercise this right of choice, man must free himself from all normative, ontological, ethical, cultural and religious restrictions. In this "liberation" his freedom is expressed. He may even choose a sexual orientation and family form. He can also change their shape depending on his current needs [Bassa 2012, 363-77].

It is impossible not to notice that the "new rights" of human understood in this way strike the traditional model of marriage and family, "softening" both the doctrine and the law, which are expressed not only in tolerance, but even in increasing approval for incestuous behaviour. Therefore, the social taboo related to incest is becoming more and more boldly the subject of public debates, and the purposefulness of maintaining its prohibition is increasingly clearly and categorically questioned, all under slogans concerning human autonomy and freedom.

In the context of the above remarks, it is impossible not to notice that "new rights" constitute a distorted form of human rights [Schooyans 2002, 49], are contrary to natural law and, in fact, are only an expression of hedonism. What should be of particular concern is the fact that reproductive and sexual rights increasingly penetrate the structure of societies and lead to behavioural changes, set new priorities, lead to reform of school curricula, government policies and various types of organizations and applicable law. It seems – and this should be clearly stated – that the above-mentioned "softening" of both doctrine and laws, expressed not only in tolerance but even in increasing approval for incestuous behaviour, is an activity that is intended to weaken families.

3. Parenthood of people after the so-called sex change

Staying in the climate of the so-called "New rights" of human, the last remark concerns the threats to marriage and family, which is caused by the shape of Polish legislation that allows for a formal change in the record gender.[41]

[41] Act of 17 November 1964, the Code of Civil Procedure, Journal of Laws of 2020, item 288 as amended.

3.1. Procedure

Without going into the entire complexity of the drama of people experiencing the problem of gender identity it should be noted that there are no provisions in the Polish legal system that would comprehensively regulate the so-called sex change. The applicable normative solutions only allow for the possibility of changing the marking of legal gender, i.e. the sex entered in the birth certificate.

It consists in the fact that the plaintiff first – pursuant to Art. 189 of the Code of Civil Procedure – requests that the sex be determined in court. If the claim is successful, the court's judgment has *ex nunc* effect, which means that the transgender belongs to the sex determined by the judgment from the date of its validation. Then the plaintiff submits an application to the head of the Registry Office to enter the so-called an additional note.

Formal gender reassignment is the starting point for medical adjustment procedures, but does not necessarily go hand in hand with such treatments. Making such a change does not require that the affected person has previously or subsequently undergone any medical intervention (e.g. hormone therapy) or surgery.

In practice, therefore, a person recognized by law as belonging to a different sex, e.g. male, may still have all female sexual characteristics, and thus may be able to procreate in his "previous" sex. Likewise, a man, already formally recognized as a woman, can – using still preserved male sexual organs – have a child.

Such a situation, as well as the lack of a ban on sex change for people who already have offspring, raises a number of doubts and questions, including about how the relationship between parents and children is shaped in a situation of legal gender change by a parent? As a rule, sex change causes a change not only in the personal life of a transsexual person, but also in life of his relatives.

3.2. Cases

For example, if a woman who, after being judged as a man, but before the surgical modification of the genital organs, gives birth to a child – who will be for the born child: a father (because at the time of childbirth this will be

marked with a record) or a mother (because the fact of the birth of a child is the only necessary and sufficient condition for motherhood)?

Or if a man who, after being judged as a woman, but before the modification of the genital organs, fathered a child and is entered in the child's birth certificate as his father, will be able to apply for a denial of paternity while already being a woman in the record?

You can also imagine a situation where the same person in a marriage will be the mother for one child and the father for the other. This will be the case if a woman judged to be a man, but before the modification of the genital organs, conceives a child and then marries a woman who will also give birth to a child (e.g. as a result of undergoing *in vitro* fertilisation). Therefore, in relation to the child she gives birth to, she should be considered a mother (despite the fact that the childbirth took place after the judicial change of sex), while in relation to a child from a joint marriage, she will be considered a father.

3.3. Conclusions

Such a factual and legal situation creates many situations that destabilize intra-family relationships, and leads to a deconstruction of the concept of motherhood, especially if the child was born before the parent's sex change. For if a child was a mother for a child for some time, then it may not be natural and easy for a child to consider a person who in the meantime has become a formal man and looks like a man as the mother. Similarly, it can be difficult for each of the siblings – depending on whether they were born before or after the change – to have either a father or a mother in the same parent.

The lack of a ban on determining the sex of people with offspring and the permissibility of changing the sex identification while maintaining the reproductive capacity in the "current" sex means the introduction of "divisibility" of the parental role. The fact that one and the same person can fulfil the role of father and mother is hardly a socially desirable phenomenon.

Summary

Summing up the above remarks and returning to the fundamental question posed at the beginning, it should be stated first of all that the law in Poland undoubtedly contains a number of appropriate and necessary solutions that serve to protect the family.

The point, however, is that the Polish legal system has solutions that "blur" the traditional, culturally and historically conditioned concept of the family, implicitly introducing its "mental" redefinition. Under the banner of "the right to privacy" and "the right to freedom of sexual expression," not only the multiple forms of coexistence are protected, including – in line with the LGBT approach to gender – same-sex relationships, but most of all the natural family ties are depreciated. Treating only sexual intercourse in terms of a crime legitimizes all other forms of sexual engagement between family members, which is difficult to reconcile with both the axiology of family functioning and decency. If decency is understood as basic moral principles in the field of experiences and sexual contacts,[42] deeply rooted in social consciousness [Piórkowska-Flieger 2008, 388], it cannot be assumed that practicing other sexual activities between family members (e.g. mutual masturbation) belongs to socially acceptable behaviour and within the limits of culturally established norms. This aspect is worth remembering especially in the discourse on paedophilia.

It is also impossible not to note that the normative solutions currently in force clearly lead to the deconstruction of the notions of motherhood and paternity, disturbing the child's right to determine the origin of certain parents. These solutions even challenge truths such as that man comes from a woman and a man.

Finally, it is also worth bearing in mind that the legal status currently in force with regard to foster care for underage Muslims is not clear and may give rise to demands, the satisfaction of which would lead to the adoption of solutions alien to the Polish family law tradition. In the era of clear demographic transformations, Poland should clearly define whether – and if so, to what extent – respects the *kafala* care system. There is probably no need

[42] Judgment of the Supreme Court of 13 April 1977, ref. VIIKZP 30/76, OSKW 1977, No. 6, item 58.

to convince anyone that the *kafala* care system can be a tool for the Islamization of law in Europe.

Summing up, the current state of affairs indicates that – in the normative areas presented above – resulting from Art. 18 of the Polish Constitution, the order to protect marriage and family is not a constitutional norm which has been sufficiently implemented in practice.

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Marriage and the Family in the Face of Socio-Civilization Threats. Legal Context

Summary

Polish legislation contains a number of legal regulations that declare the protection of marriage and the family. This is mainly expressed in the norm of Art. 18 of the Constitution of the Republic of Poland. This protection – based on the principle of state subsidiarity towards the family – imposes obligations on public authorities that oblige to resist external threats to the family, as well as to undertake actions supporting the functioning of marriage and the family and strengthening the bonds connecting the spouses and the family. However, the question arises whether in the era of socio-civilization transformations, modern Polish law – apart from declarations – contains actual mechanisms protecting marriage and the family, or maybe it paradoxically poses a threat to it? The article, by analyzing three aspects of family functioning (upbringing, intimate life and the nature of family ties), tries to answer this question.

Key words: family, marriage, human rights, *kafala*, *sharia*, incest, transsexualism, sex change

Małżeństwo i rodzina wobec zagrożeń społeczno-cywilizacyjnych. Kontekst prawny

Streszczenie

Ustawodawstwo polskie zawiera szereg regulacji prawnych, które deklarują ochronę instytucji małżeństwa i rodziny. Wyraża to przede wszystkim norma art. 18 Konstytucji Rzeczpospolitej Polskiej. Ochrona ta – oparta na zasadzie pomocniczości państwa wobec rodziny – nakłada na władze publiczne obowiązki, które zobowiązują do odpierania zagrożeń zewnętrznych wobec rodziny, a także do podejmowania działań wspierających funkcjonowanie małżeństwa i rodziny oraz umacnianie więzi łączących małżonków i rodzinę. Rodzi się jednak pytanie, czy w dobie przeobrażeń społeczno-cywilizacyjnych współczesne prawo polskie – oprócz deklaracji – zawiera faktyczne mechanizmy chroniące małżeństwo i rodzinę, czy też może paradoksalnie stanowi dla niej zagrożenie? Artykuł poprzez analizę trzech aspektów funkcjonowania rodziny (wychowania, pożycia intymnego i charakteru więzi rodzinnych) próbuje odpowiedzieć na to pytanie.

Słowa kluczowe: rodzina, małżeństwo, prawa człowieka, *kafala, szariat,* kazirodztwo, transeksualizm, zmiana płci

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