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Legal Protection of the Institutional Value of Marriage

Ecumeny and Law 2, 157-169

2014

Artykuł został opracowany do udostępnienia w internecie przez Muzeum Historii Polski w ramach prac podejmowanych na rzecz zapewnienia otwartego, powszechnego i trwałego dostępu do polskiego dorobku naukowego i kulturalnego. Artykuł jest umieszczony w kolekcji cyfrowej **bazhum.muzhp.pl**, gromadzącej zawartość polskich czasopism humanistycznych i społecznych.

Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

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Legal Protection of the Institutional Value of Marriage

Keywords: family and marriage, Charter of the Rights of the Family, human rights, cohabitation, transsexualism, in vitro fertilization

Marriage is an accepted formal union between a man and a woman. Its importance is recognized and it enjoys approval and continues to be a desirable and expected relationship both at the level of an individual and in its social aspects. Marriage is a manifestation of permanent and legal bond between two people, created of their own free will, in order to achieve the common good of the spouses and their offspring. Therefore, marriage is an institution leading to establishing a family as a basic unit of social life, and consequently, it is a subject of interest and concern of many entities, including the state and the Church.

The contents of Art. 1 of the Charter of the Rights of the Family declares that every man and every woman, after reaching marriageable age and having the necessary capacity, has the right to marry and that a marriage contracted according to the law should be protected by public authorities, which shall not place it on a par with extramarital relationships. However, in observing the social transformations taking place in our times and new styles of quasi-marital life under the influence of various intellectual trends which question the traditional views on marriage and the family, there arises a question of whether the law actually protects the institutional value of marriage. This article is, therefore, an attempt to answer the question of whether, and to what extent, the institution of marriage is protected by public authorities. The search for

an answer to this question involves an analysis of both Polish and the European law.¹

1. The Polish law

The institution of marriage protected by law

At first glance, the Polish legislation apparently protects the institution of marriage. An expression of this protection is provided, first of all, in Art. 18 of the Constitution of the Republic of Poland, which clearly specifies that marriage is a union of a man and a woman.² Also, as it explicitly follows from Art. 1 and 23 of the Family and Guardianship Code, a marriage can be concluded only by a woman and a man, and a family is established by contracting marriage.³ In the light of the norms quoted, neither cohabitation, that is — as commonly adopted in the literature, and⁴ judicatory⁵ — the permanent community of a man and a woman characterised by their living together, management of their common household and physical intercourse — nor a relationship formed by same-sex partners, nor sharing household among students or unions of multiple relations living in communes can be regarded as a marriage.⁶ In no

¹ L. ŚWITO: "Ideologia gender a różnica płci w aspekcie prawa do rodziny — zarys regulacji prawnych." *Studia Warmińskie* 49 (2012), pp. 255—270.

² Art. 18 of the Constitution specifies that "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."

³ Art. 1 § 1 of the Family and Guardianship Code: "A marriage is concluded when a man and a woman are both present before the head of the registry office and make a statement that they take each other in marital union." Art. 23 of the Family and Guardianship Code: "Spouses have equal rights and obligations in marriage. They are obliged to live together, assist each other and remain faithful, and to work together for the good of the family their marriage has created."

⁴ M. NAZAR: "Konkubinat a małżeństwo — wybrane zagadnienia." In: *Księga jubileuszowa Profesora Tadeusza Smyczyńskiego*. Ed. M ANDRZEJEWSKI. Toruń 2008, pp. 219—237; T. SMYCZYŃSKI: "Czy potrzebna jest regulacja prawnia pożycia konkubenckiego (heteroseksualnego i homoseksualnego)." In: *Prawo rodzinne w Polsce i w Europie. Zagadnienia wybrane*. Ed. P. KASPRZYK. Lublin 2005, pp. 462—467.

⁵ See Judgement of the Supreme Court of 16 May 2000 in case IV CKN 32/00, OSNC 2000, No. 12, item 222; Judgement of the Supreme Court of 5 March 2003 in case III CZP 99/02, OSNC 2003, No. 12, item 159; Judgement of the Supreme Court of 12 January 2006 in case II CK 324/05, Mon. Praw. 2006, No. 4, p. 172.

⁶ Systematization of quasi-marriages as alternative lifestyles was taken by: R. RUBIN: "Alternative lifestyles revisited, or whatever happened to swingers, group marriages, and

aspect does the Polish legislation apply any analogy concerning married couples to these forms of living together.⁷

However, this apparently obvious (and commonly accepted in the doctrine) position reveals certain doubts upon a more thorough analysis, which require reflection on whether the Polish law has remained a monolith in this regard, and whether the first signs of a departure can be observed in this area. This question has gained particular meaning in the aspect concerning the possibility of legal acknowledgement of homosexual relationships on the same level as heterosexual cohabitation.

Approval of same-sex cohabitation in the judgement of the Appellate Court in Białystok

Doubts in this regard were raised by the Judgement of the Appellate Court in Białystok of 23 February 2007, which explicitly ruled that “the notion of cohabitation should be understood as a stable, actual, personal and material community of two persons. In the above-mentioned aspect, gender is of no significance. There are no grounds to apply separate principles in mutual settlements in the homosexual cohabitation than those applied with regard to the heterosexual cohabitation.”⁸ Although this ruling met with voices of criticism in the press,⁹ in aspect of the importance of the court in formulating this thesis, and the fact that this view was expressed by the judge and having a significant effect on the interpretation and application of legal regulations directly in life — it cannot be considered non-existent.

Approval of the same-sex partnership in the Tenancy and Housing Benefits Act

Doubts regarding the efficient protection of marriage have also been raised by some legislative changes that do not directly refer to the institu-

communes?” *Journal of Family Issues* 22 (2001), pp. 711—726; A. KWAK: *Rodzina w dobie przemian. Małżeństwo i kohabitacja*. Warszawa 2005, pp. 70—96.

⁷ Although in certain dimensions, cohabiters are granted rights similar to those vested in spouses.

⁸ Case I Ca 590/06, OSA 2007, No. 1, item 10.

⁹ Kodeks rodzinny i opiekuńczy. Komentarz. Ed. H. CIEPŁA. Warszawa 2009, p. 56.

tion of marriage, yet due to their regulation indirectly affect the image of marriage and family.

An example is the Tenancy and Housing Benefits Act of 2 July 1994. Insofar as Art. 8.1 of this Act used the term of a person remaining in “conjugal life,”¹⁰ with the moment of its repealing and entry into force of the Act on Protection of the Rights of Tenants, Municipal Residential Resources and on the Amendment to the Civil Code of 21 June 2001,¹¹ Art. 691 § 1 uses only the notion of “common life,” without the adjective “conjugal.” Although the Supreme Court in its ruling of 21 May 2002¹² still recognized that the term “common life” cannot be used in any other meaning than to denote the link binding two persons remaining in such relations as spouses, it is difficult to categorically exclude that in the future the term “common life” will be extended to include the common life of non-heterosexual pairs.

Approval of same-sex cohabitation in the local law

The practice of applying the extended interpretation referring to the term “common life” can be also found in the acts of local law, which ensure a specific “approval” of same-sex cohabitation. For example, homosexual cohabitation was approved by the authorities of Warsaw, by granting in 2004 the right to use free rides by city transport to the employees of the City Transport and their partners¹³ and in 2007 the Municipal Social Welfare Centre in Chorzów also sanctioned the right of a homosexual pair to seek social assistance.¹⁴

Transsexualism

While considering the issue of protection of the institution of marriage in the Polish law, we must refer to the problem of transsexual-

¹⁰ Dz.U. 1998 nr 120 poz. 787.

¹¹ Dz.U. 2005 nr 31 poz. 266.

¹² Case III CZP 26/02, OSNC 2003 nr 2 poz. 20.

¹³ Resolution No. XLIII/1040/2004 of the Council of the Capital City of Warsaw of 16 December 2004 as amended

¹⁴ “Sytuacja prawnia i społeczna osób LGBT w Polsce.” *Gazeta Wyborcza* (Katowice supplement) of 17 June 2007.

ism.¹⁵ In light of Art. 1 § 1 of the Family and Guardianship Code, it is beyond all doubt that a difference in the gender of marriage candidates as shown on their birth certificates is of significant importance for contracting a marriage, and it must occur during the conclusion of marriage. This means that neither transexualism itself nor a possible medical and legal sex “change” create — as a matter of principle — a barrier to effectively contract a marriage if a transsexual marries a person of an opposite sex than that stated on a transsexual’s birth certificate. However, a serious problem emerges when the procedure of sex change of one of the spouses takes place during the marriage.

The Supreme Court in its ruling of 11 June 1989,¹⁶ having the force of the rule of law, expresses the opinion that the change of gender does not affect, by itself or automatically, an already contracted marriage as a legal institution. Consequently, it cannot provide a basis to correct or make null and void a birth certificate or a marriage certificate, since it occurred after those documents had been made, or to cancel the marriage, since the Family and the Guardianship Code does not provide for such a basis of annulment. Also, it cannot be claimed that as a result of sex-change operation of one of the spouses, the marriage was not contracted, since — as emphasised in the literature¹⁷ — this difference existed when the marriage was concluded. A change in the sex of one of the spouses can be analysed only in the context of circumstances indicating the existence of the breakdown of marriage/cohabitation, thus the premises justifying divorce or separation. However — in case of the lack of such a will of the parties — nothing will change in the status of marriage. This means that in the light of the law in force, it cannot be excluded that unions of two women or two men with the legal status of marriage, enjoying full protection under this title will *de facto* appear in Poland.

Children adoption

Finally, the example of the lack of protection in the Polish law of the institution of marriage as a union of a man and a woman, legitimatized

¹⁵ Understood as a variety of disorders related to gender identification and role, manifesting in disagreement between a psychological feeling of gender and a biological body build (see K. IMIELIŃSKI, S. DULKO: *Przekleństwo Androgynie. Transseksualizm: mity i rzeczywistość*. Warszawa 1988, pp. 118—119).

¹⁶ Case III CZP 37/89, OSNCP 1989 nr 12 poz. 188.

¹⁷ H. CHWYĆ: *Zawarcie małżeństwa w prawie polskim. Poradnik dla kierowników Urzędów Stanu Cywilnego*. Lublin 1998, p. 11.

by their bonds of matrimony, are the regulations concerning adoption, as well as the lack of any regulation concerning application of the in vitro fertilization method.

The norm of Art. 115 § 1 of the Family and Guardianship Code provides that joint adoption can be made only by spouses. Therefore, neither heterosexual cohabitants nor persons remaining in homosexual relations can adopt jointly.¹⁸ However, against all appearances, it does not mean that homosexual pairs cannot jointly bring up an adopted child, since in the light of Art. 114 § 1 of the Family and Guardianship Code, each person with full legal capacity may individually adopt a child.

Even more “parenthood possibilities” are provided in this regard by the in vitro fertilization method, which in Poland is regulated only by principles of medical practice, the Medical Ethics Code and general requirements concerning health care institutions. Polish clinics specialising in artificial fertilisation do not require their future parents to remain in a formal relationship. This means that if the conception of a child to a pair other than homosexual is not in conflict with the conscience of the physician conducting the procedure — there is no basis to prevent such a procedure. The possibilities in this extent are additionally broadened so far that in the Polish law there is no prohibition on trading in reproductive cells and there are also no regulations which would specify the right to make arrangements concerning the embryo. Therefore, clinics can treat the embryo arbitrarily and, for instance, may implant them to any selected persons applying for such a procedure. Thus, in view of the lack of legal regulations in this matter, potential possibilities of abuse are, basically, unlimited. This means that the heterosexual idea of parenthood is not subject in the Polish law to such protection as it would result from its assumptions.

2. The European law

The European Convention on Human Rights

Even more doubts as to the efficient protection of the institution of marriage can emerge while analysing the European law. Although the

¹⁸ Judgement of the Supreme Court of 30 March 1962 in case 3 CR 124/62, OSNCP 1963 nr 2 poz. 47.

European Convention on Human Rights made on 4 November 1950,¹⁹ mentioning the right to contract a marriage and set up a family explicitly specifies in Art. 12 that this is the right vested in a man and a woman,²⁰ this type of statement is not included in the Treaty of Lisbon²¹ ratified in 2009, or especially, in the Charter of Fundamental Rights²² making up an integral part of this Treaty. This document, as a set of fundamental human rights, providing an official interpretation of values of the contemporary Western culture towards gender differentiation of people, merely specifies in Art. 9 that the right to marry and the right to establish a family are guaranteed in accordance with the national laws governing the exercise of these rights. While taking into account the fact that legislations of European states permit registration of partnership unions of same-sex persons²³ or contracting a homosexual marriage,²⁴ or even legalisation of the adoption of a child of a partner from the previous relationship,²⁵ the provision of Art. 9 of the Charter of Fundamental Rights explicitly legitimates homosexual relationships, providing in an obvious manner departures from the “traditional” formula of marriage specified in the above-mentioned Convention of 1950.

¹⁹ In the version encompassing amendments by Protocols No. 3, 5 and 8 and after supplementation with Protocol No. 2, Dz.U. 1993 nr 61 poz. 284.

²⁰ The European Convention on Human Rights, Art. 12: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

²¹ The Treaty of Lisbon signed on 13 December 1997 in Lisbon is an international agreement, providing for, among others, a reform of the European Union institutions. In relation to states-parties to the Treaty, including Poland, it became effective on 1 December 2009 (Dz.U. 2009 nr 203 poz. 1569). Its structure includes The Treaty of the European Union (TUE) and the Treaty Establishing the European Community (TWE).

²² The Charter of Fundamental Rights was passed and signed on 7 December 2000 during the summit of the European Council in Nice. The document was made binding by the Treaty of Lisbon. The Charter was accepted by all EU countries except the United Kingdom, the Czech Republic and Poland, which reserved restriction of its protection for their citizens.

²³ For instance, in Denmark, the Netherlands, France, Germany, Portugal, the United Kingdom, the Czech Republic, Hungary, Slovenia and Austria, see C. OPALACH: “Rodzina wobec adopcji dzieci przez pary homoseksualne...”. In: *Idea gender...*, Ed. M. MACHINEK, p. 142.

²⁴ For instance, in the Netherland, Belgium and Spain, see *ibidem*.

²⁵ For instance, in Germany, France and Sweden, see *ibidem*.

The Resolution of the European Parliament

The fact that contemporary European legislation sanctions same-sex relationships and the lifestyle model for such relationships, it also results explicitly from the Resolution of the European Parliament passed in Strasbourg on 16—19 January 2006. In this resolution, the European Parliament urged Member States to ensure respect, dignity and protection for same-sex partners as the rest of society, as well as to end discrimination faced by same-sex partners in such fields as inheritance rights, property arrangements, tenancy right, pensions, tax, social security, etc. The call was addressed to the European Commission to pressure Member States into carrying out such education, as well as applying administrative, judicial and legislative means to effectively fight against homophobia.²⁶

European judicial decisions in Strasbourg

While mentioning the acts of the European laws, we cannot omit the role of judicial decisions issued by the European Commission of Human Rights and the European Court of Human Rights in Strasbourg, which have significantly shaped this law in practice. In this judicial practice, over the last dozen years, a trend towards broadening the sphere of rights of homosexual and transsexual relationships in the aspect of broadly understood family life can be clearly observed, and this is despite the fact that for a long period the Commission unambiguously held the position that homosexual and lesbian pairs do not fit into the notion of “family life.”²⁷

The case of X.Y.Z. v. the United Kingdom concerning a refusal to register a post-surgery transsexual as a parent of a child born by his partner as a result of artificial insemination should be regarded as characteristic demonstration of those trends.²⁸ In this case, the Commission by the ruling of 22 April 1997 expressed the opinion that although there was not any common European standard with regard to parental rights of transsexuals, and consequently, there were no basis to impose on the state an obligation to formally recognise as the father of a child a person who is not a biological father, yet the notion of “family life” should not be

²⁶ S. EWERTOWSKI: “Karta Praw Podstawowych UE w kontekście gender mainstreaming.” In: *Idea gender...,* p. 191.

²⁷ M. NOWICKI: *Europejski Trybunał Praw Człowieka.* Vol. 2. Kraków 2002, p. 593.

²⁸ Application No. 21830/93, RJD 1997-II.

limited only to families based on marriage and it can include other real relationships.²⁹ Therefore, if a transsexual lives as in a traditional family relationship with a partner representing his former sex, legal recognition of such a relationship should be presumed.³⁰

The judgement of the European Court of Human Rights of 22 January 2008 in case E.B. v. France³¹ is also equally characteristic. In this judgement, the Tribunal recognised³² that the refusal to grant a request to adopt a child on account of her sexual orientation violates Art. 14 in conjunction with Art. 8 of the European Convention of Human Rights and ordered France to pay to the applicant €10,000 for non-pecuniary damage. It should be mentioned that, in this case, the applicant E.B. who applied for the adoption, remained in a permanent and publicly disclosed homosexual relationship and her partner “did not feel committed to the adoption.”³³

The above-presented perspective of the European Court of Human Rights as regards legal and family regulations does not leave any doubt as to the direction of further evolution of the European law and the course of transforming legal orders of individual Member States of the European Union.

Conclusion

Pursuant to the postulate of Art. 1 of the Charter of the Rights of the Family, the right to marry and establish a family is one of the fundamental human rights, which should be protected in legislative acts of the legal systems in force. However, an analysis of the order of Polish and European law leads to the conclusion that although each of them includes a declaration referring to the protection of marriage and family, they do not ensure this protection.

Although the Polish law appears to be a quite strong anchor of the “traditional” family concept (especially as compared to regulations of other European countries), it clearly reveals echoes of intellectual trends

²⁹ M. NOWICKI: *Europejski Trybunał Praw Człowieka...*, p. 771.

³⁰ Ibidem, p. 594.

³¹ Application No. 43546/02.

³² Completely different than in Judgement of 26 February 2002 in case Frette vs. France, Application No. 36515/97.

³³ M. NOWICKI: *Europejski Trybunał Praw Człowieka. Wybór orzeczeń 2008*. Warszawa 2009, p. 161.

requesting an extension of the sphere of marital and parental rights of homosexual partners. Given the lack of legal regulations concerning such a significant domain as in vitro fertilization, as well as the lack of any norms governing the social status of transsexual persons after the sex-change surgery, the question of whether the status quo of the family will remain in the Polish legislation in an unchanged form raises serious doubts.

Nevertheless, a high degree of relativism concerning the protection of the institution of marriage is observed in the European law, which not only has explicitly extended the notion of “family life” to include any forms of relationship, but also sees the guarantee of the concept of equality in the pluralism of the concepts and models of the family. The redefinition of marriage and the family in the European law has already become a fact and its acquisition into legal orders of other Member States (even those as conservative as Poland) may only be a question of time.

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Wyrok ETPC z 22.01.2008 w sprawie E.B. przeciwko Francji, skarga nr 43546/02.

Wyrok SA w Białymostku z 23.02.2007 w sprawie I Ca 590/06, OSA 2007 nr 1 poz. 10.

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Wyrok SN z 5.03.2003 w sprawie III CZP 99/02, OSNC 2003 nr 12 poz. 159.

LUCJAN ŚWITO

Legal Protection of the Institutional Value of Marriage

Summary

The Charter of the Rights of the Family states that the right to marriage and family is one of the fundamental human rights, which should be protected by legislation within legal systems. This paper attempts to assess how the institution of marriage is protected by the public authorities under European and Polish law. An analysis of the Polish and European legal systems shows that although each of them declares protection of the marriage and family, neither actually provides such protection.

Although the Polish law appears to be a quite strong anchor of the "traditional" family concept (especially as compared to regulations of other European countries), it clearly reveals echoes of intellectual trends requesting an extension of the sphere of marital and parental rights of homosexual partners. Given the lack of legal regulations con-

cerning such a significant domain as in vitro fertilization, as well as the lack of any norms governing the social status of transsexual persons after sex-change surgery, the question of whether the status quo of the family will remain in the Polish legislation in an unchanged form raises serious doubts.

Nevertheless, a high degree of relativism concerning the protection of the institution of marriage is observed in the European law, which not only has explicitly extended the notion of "family life" to include any forms of relationship, but also sees the guarantee of the concept of equality in the pluralism of the concepts and models of the family. The redefinition of marriage and the family in the European law has already become a fact and its acquisition into legal orders of other Member States (even those as conservative as Poland) may only be a question of time.

LUCJAN ŚWITO

Protection juridique de la valeur institutionnelle du mariage

Résumé

La Charte des droits de la famille stipule que le droit au mariage et à la famille est l'un des droits fondamentaux de l'homme qui devrait être protégé dans les actes législatifs des systèmes juridiques en vigueur. Le présent article essaye de répondre à la question dans quelle mesure l'institution conjugale est protégée par le pouvoir public dans les actes en vigueur du droit européen et polonais. L'analyse de l'ordre juridique polonais et européen conduit à la conclusion qu'ils n'assurent point cette protection bien que chacun d'entre eux contienne les déclarations concernant la protection du mariage et de la famille.

Le droit polonais apparaît toujours, surtout par rapport aux réglementations des autres pays européens, comme un bastion soi-disant de la conception « traditionnelle » de la famille. On peut toutefois y apercevoir les échos des courants intellectuels exigeant l'élargissement de la sphère des pouvoirs conjugo-parentaux des partenaires homosexuels. Étant donné l'absence des solutions légales concernant un domaine si important comme la procréation *in vitro* et l'absence de quelconques normes réglementant le statut social des personnes transsexuelles après l'opération de « changement de sexe », la question si le statu quo de la famille ne subira aucune modification dans la législation polonaise fait naître des doutes sérieux.

Cependant, le plus grand relativisme lié à la protection de l'institution conjugale figure dans le droit européen qui n'a pas seulement élargi d'une façon univoque et directe la notion de « vie maritale » tout en acceptant différentes formes d'unions mais, qui plus est, aperçoit le garant de l'idée de l'égalité dans le pluralisme des conceptions et des modèles familiaux. La redéfinition du mariage et de la famille dans le droit européen est déjà devenue un fait, et son introduction dans le système législatif de certains pays membres (même dans ceux, comme la Pologne, qui passent pour conservatifs) n'est probablement qu'une question de temps.

Mots clés : famille et mariage, Charte des droits de la famille, droits de l'homme, concubinage, transsexualisme, *in vitro*

LUCJAN ŚWITO

Tutela legale del valore istituzionale del matrimonio

Sommario

La Carta dei Diritti della Famiglia stabilisce che il diritto al matrimonio ed alla famiglia è uno dei diritti fondamentali dell'uomo che deve essere tutelato negli atti legislativi vigenti nei sistemi giuridici. L'articolo presentato è un tentativo di risposta alla domanda riguardante la misura in cui l'istituzione del matrimonio è tutelata dall'autorità pubblica negli atti vigenti del diritto europeo e polacco. L'analisi eseguita dell'ordine giuridico polacco ed europeo porta alla conclusione che, sebbene ciascuno di essi contenga dichiarazioni che parlano della tutela del matrimonio e della famiglia, quella tutela non viene da loro garantita.

Il diritto polacco, specialmente sullo sfondo delle norme degli altri paesi europei, appare ancora come un baluardo abbastanza saldo della concezione "tradizionale" della famiglia; vi si possono comunque scorgere già chiaramente gli echi delle correnti di pensiero che esigono l'espansione della sfera dei diritti matrimoniali-genitoriali dei partner omosessuali. Considerata la mancanza di norme giuridiche riguardanti un campo così essenziale come la procreazione *in vitro*, come pure dinanzi alla mancanza di qualsivoglia norma che regoli lo status sociale delle persone transessuali che hanno subito l'intervento di "cambiamento di sesso", la domanda se lo status quo della famiglia rimarrà in forma invariata nella legislazione polacca, suscita seri dubbi.

Il relativismo più grande nella tutela dell'istituzione del matrimonio si manifesta però nel diritto europeo che, non solo ha esteso esplicitamente la nozione di "vita familiare" a tutte le forme di legami, ma vede addirittura nel pluralismo delle concezioni e dei modelli della famiglia il garante dell'idea di uguaglianza. La ridefinizione del matrimonio e della famiglia nel diritto europeo è ormai diventata un dato di fatto e la sua acquisizione negli ordini giuridici dei vari paesi membri dell'Unione Europea (anche di quelli che sono ritenuti abbastanza conservatori come la Polonia) può essere ormai soltanto una questione di tempo.

Parole chiave: famiglia e matrimonio, Carta dei Diritti della Famiglia, diritti umani, concubinato, transessualismo, *in vitro*