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Intercountry Adoption in the United States and Poland – Comparative Law Perspective**

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SUMMARY
The article discusses the institution of intercountry adoption in American and Polish law with special attention to two basic principles of adoption, *i.e.*the the principle of the child's best interest and the principle of subsidiarity.This article presents the legal regulations (international and national) as well as the current trends of the intercountry adoptions in both countries. Attention is drawn to the fact that the United States is a *global leader* in intercountry adoptions, especially as a receiving country, including the adoption of children from Poland. The nature of intercountry adoption in the United States and Poland is different, although both countries ratified the Hague Convention of 29 May 1993 on *Protection of Children and Co-operation in Respect of Intercountry Adoption*, which is one of the most fundamental source of international law in the field of intercountry adoption. This convention introduces an international procedure for intercountry adoptions and currently it regulates issues related to international adoption the most. The analysis of American and Polish regulations raises doubts whether the current standards properly secure the best interests of the child in international adoption and eliminate the risk of illegal forms of this legal institution.

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I. INTRODUCTION

Both the United States (hereinafter the US) and Poland have ratified the Hague Convention of 29 May 1993 on *Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter the Hague Convention, HC), which currently is the most important international agreement on intercountry adoption at the global level[1]. So far, the Hague Convention is the only common multilateral agreement between the US and Poland, which directly applies to intercountry adoption[2].

The most fundamental and universal international document on the protection of the children's rights[3] is the UN Convention of 20 November 1989 on *the Rights of the Child* (hereinafter UNCRC)[4]. That convention is often treated as the "world constitution of the children rights"[5] because of its legal nature, extensive subject matter and global coverage. However, the US, unlike Poland[6], only signed the UNCRC[7], but did not ratify it[8]. Nevertheless, the US is a party to the Optional Protocol of 25 May 2000 of the Convention on the *Rights of the Child – on the sale of children, child prostitution and child pornography*[9], and the American courts apply the UNCRC provisions in case law.

Given the above, both the US and Poland respect some common international principles for intercountry adoption, and these are mainly: the principle of the

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1 The HC entered into force on 1.05.1990. At present, 96 countries (including the US and Poland) ratified the HC. The HC in Poland entered into force on 1.10.1995, and in the US it entered into force on 1.04.2008. *See* the website of the Hague Conference on Private International Law, https://www.hcch.net/, (dostęp: 24.05.2019 r.).

2 Both Poland and the US ratified the *International Covenant on Civil and Political Rights* of 16 December 1966, which in the Article 23 protects the family life and in the Article 24 protects against child's discrimination. *See* the website of the Office of the High Commissioner for Human Rights, https://www.ohchr.org/, (dostęp 24.05.2019 r.).

3 *See* D. Sharon, *A Commentary on the United Nations Convention on the Rights of the Child*, (Kluwer Law 1999), pp. 1-4.

4 At present, 196 countries are State Parties to the UNCRC. See the website of the Office of the United Nations High Commissioner for Human Rights, https://www.ohchr.org/, (dostęp 24.05.2019 r.).

5 *E.g.* A. Łopatka, *Dziecko. Jego prawa człowieka*, (Iuris 2000), p. 19.

6 The UNCRC in Poland entered into force on 7.07.1991. See the website of the Office of the United Nations High Commissioner for Human Rights, https://www.ohchr.org/, (dostęp 24.05.2019 r.).

7 The US signed the UNCRC on 16.02.1995. See the website of the Office of the United Nations High Commissioner for Human Rights, https://www.ohchr.org/, (dostęp 24.05.2019 r.).

8 The US same with the *Convention on the Elimination of all Forms of Discrimination Against Women* of 18 December 1979 and the *International Covenant on Economic, Social and Cultural Rights* of 16 December 1966, whereas Poland both ratified them.

9 The CRC Optional Protocol entered into force on 18.01.2002. The CRC Optional Protocol, in the US entered into force in 2002, in Poland in 2005. See the website of the Office of the United Nations High Commissioner for Human Rights, https://www.ohchr.org/, (dostęp 24.05.2019 r.).

child's best interest , the principle of subsidiarity (the primacy of national adoption over intercountry adoption), the principle of a suitable family environment, the principle of illegal and financial gains. These principles are universal but in accordance with one of the main principle of international law, *i.e.* the respect of the rule of law of the States Parties, some discretion in their application is guaranteed for countries in the field of law and with respect to their different cultural, legal, political and social traditions. Therefore, the domestic regulations and interpretation of intercountry adoption of the US and Poland vary significantly.

The aim of this article is to compare intercountry adoption in the US and Polish law to highlight the most important issues and doubts in this regard. This is particularly important due to the significant amount of adoptions of Polish children by Americans in recent years[10], and also due to the fact that the US is a *world leader* in intercountry adoptions. In doing so, the developments and current trends as well as legal practices of that institution in the two chosen countries will be analyzed and compared, with special attention to two overriding principles, *i.e*. the principle of the child's best interest and the principle of subsidiarity.

II. THE DEFINITION AND THE REGULATION OF INTERCOUNTRY ADOPTION IN THE US AND POLAND

Intercountry adoption is an ambiguous concept in the US and Polish law. In the legal doctrine and jurisprudence of the two countries that institution is also known as *international*, *transnational*, *overseas*, *foreign* or *cross-country* adoption. What is more, in American federal law there is the term – *outgoing adoptions,* which is exclusively used for adoptions from the US[11]. All of the terms mentioned above may distinguish various types of intercountry adoption, in such a way that intercountry adoption can include a cross-border element or otherwise only with a civiic element, excluding the cross-border element[12]. Considering, however, that *intercountry adoption* is a term used under the international conventions, which particularly indicate the nature and extent of this legal institution, this term will be also used for the purposes of this article.

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10 In 2016, 98 children were adopted in this way, in 2015 – 60 children, in 2014 – 53 children, in 2013 – 49 children, in 2012 – 35 children, in 2011 – 52 children and in 2010 – 50 children. Among them, there are adoptions by relatives of children residing in the US. *See* the website of the U.S. Department of States, https://www.state.gov/, (dostęp 24.05.2019 r.).

11 See s. 104 (b)(2), 303 of the American Intercountry Adoption Act of 2000. It usually refers to Black or Biracial children. See the website of the United States Government Publishing Office, https://www.govinfo.gov/, (dostęp 24.05.2019 r.).

12 *See* UNICEF, *Innocenti Digest No. 4. Intercountry Adoption*, (Italy 1999), p. 2.

According to international conventions, intercountry adoption is the type of adoption which establishes a legal relationship, similar to the one which exists in natural families but contrary to domestic adoption, between a minor adoptee and adopters who have different states of origin, so with a cross-border element. That element involves changing a child's place of residence from one State to another, mainly due to the lack of opportunities for the child to grow up in a suitable family environment in his or her country of origin. Therefore, given the nature of this institution, the child deserves a very particular legal protection.

In international law, as in most countries, including Poland and the US (except the California State[13]), there is no legal comprehensive definition of intercountry adoption. The only partial definition in this regard is mentioned in the Hague Convention. The HC in its Article 2 (s. 1, 2) related to the scope of the convention, states that "the Convention shall apply where a child habitually resident in one Contracting State (the State of origin) has been, is being, or is to be moved to another Contracting State (the receiving State) either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin" (s. 1) and "The Convention covers only adoptions which create a permanent parent-child relationship" (s. 2). Thus, the Hague Convention restricts intercountry adoptions to adoptions which involve a change in the place of the child residence, regardless of the nationality of the adoptive parents. The HC draws special attention to the obligatory elements of intercountry adoption, which are the cross-border element and the ability to provide a child with a stable, substitute family environment. On the basis of current international regulations, only the adoption that meets these two conditions, can be recognized as a legal intercountry adoption.

Under Polish law, the main regulation of intercountry adoption is the Act of 25 February 1964 – The *Family and Guardianship Code*[14](hereinafter the FGC, the

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[13] See California Code, Family Code – § 8527: "Intercountry adoption means the adoption of a foreign-born child for whom federal Intercountry adoption law makes a special immigration visa available, includes completion of the adoption in the child's native country or completion of the adoption in this state". See the website of the California Legislative Information, https://leginfo.legislature.ca.gov/, (dostęp 24.05.2019 r.).

[14] Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy, *See* http://prawo.sejm.gov.pl/ (dostęp 24.05.2019 r.).

Polish Family Code). However, this is not the only legal source in this regard[15]. It should also be noted that, The Constitution of the Republic of Poland of 1997 in some articles[16], directly refers to the protection of the family and the child, which is also particularly important in intercountry adoption.

Polish law does not contain a legal definition of intercountry adoption, however the meaning and the scope of this legal institution have been fully adapted from conventional regulations. According to the Polish FGC, Article 114^2 § 1 in relation with Article 114 § 1 (that article refers to the adoption in general) defines intercountry adoption as the legal relationship between adopters and an adoptee (minor), which causes the adoptee to change residence from Poland to another state. Furthermore, intercountry adoption is permissible only when it is in the best interests of a child and it is the only way to ensure a suitable and substitute family environment for an adoptee.

Under American law, the regulation of intercountry adoption is not so uniform throughout the US. The US belongs to the common law system and what is more the US domestic law is divided additionally into the federal law and the States law[17]. M. K. O'Connor and K. S. Rotabi rightly pointed out that "in the USA, the child welfare policies are layered in complex ways that include federal regulations, State laws, and human service agency policy and procedures; all of these have been shaped by differing professional and personal ideologies"[18].That is also the case in the regulation of adoption because that institution in American law is regulated in federal law as well as within the legislative powers of each State.

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[15] There are other documents such as: the Act of 9 June 2011. – *on the family support and foster care system* (Ustawa z dnia 9 czerwca 2011 r. – *o wspieraniu rodziny i systemie pieczy zastępczej*); The Act of 25 July 2014 – amending the act on support family and foster care system and some other acts (Ustawa z dnia 25 lipca 2014 r. – *o zmianie ustawy o wspieraniu rodziny i systemie pieczy zastępczej oraz niektórych innych ustaw*); The notice of the Minister for Labor and Social Policy of 30 January 2012. – *on the list of adoption centers authorized to cooperate with other central bodies of the other states or with other government-approved adoption organizations or centers* (Obwieszczenie Ministra Rodziny, Pracy i Polityki Społecznej z dnia 13 stycznia 2017 r. – *w sprawie listy ośrodków adopcyjnych upoważnionych do współpracy z organami centralnymi innych państw lub z licencjonowanymi przez rządy innych państw organizacjami lub ośrodkami adopcyjnymi*); the Act of 4 February 2011. – *International private law* (Ustawa z dnia 4 lutego 2011 r. – *Prawo prywatne międzynarodowe*). *See* http://prawo.sejm.gov.pl/ (dostęp 24.05.2019 r.).

[16] This mainly concerns the regulations of the human dignity (Article 30) and regulations on family (Article 18, Article 23, Article 33 s. 1, Article 41 s. 2, Article 47 and Article 71).

[17] *See* L. Carlson, *American Business Law: A Civil Law Perspective*, (Iustus 2004), pp. 15-17.

[18] M.K. O'Connor, K.S. Rotabi, *Perspectives on Child Welfare: Ways of Understanding Roles and Actions of Current USA Adoption Agencies Involved In Intercountry Adoptions*, (in:) *Intercountry Adoptions: Policies, Practices and Outcomes*, J.L. Gibbons, K.S. Rotabi eds., (Ashgate 2012), p. 78.

Under the American federal law, there are two basic written sources which may apply to intercountry adoption: the *Intercountry Adoption Act of 2000*[19](hereinafter the IAA) and the 14th Amendment of the US Constitution[20] which states that "no person shall be denied the equal protection of the laws". These regulations are the core of the US law and States statutes must be absolutely in accordance with them.

The IAA is a fundamental regulation of intercountry adoption in American law. This document was written with a view to prepare the American adoption law for the ratification of the HC. According to Section 2 of the IAA, the purposes of the act are as follows:

"(1) to provide for implementation by the United States of the Convention;

(2) to protect the rights of, and prevent abuses against children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children's best interests;

(3) to improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States."

The IAA although not including a legal definition of intercountry adoption, regulates the main duties and responsibilities of the *adoption service* and includes legal requirements for accreditation, approval and recognition of intercountry adoption in the US.

Under most of the various States laws, there is as well no direct reference to intercountry adoption. However, the States laws include specific regulations for recognition and enforcement of intercountry adoption orders. Nevertheless, the recognition of intercountry adoption orders is not the same in every State, because they differently regulate domestic adoptions[21].These differences mainly refer to the

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19 Intercountry Adoption Act of 2000, P.L. 106-279, Oct. 6, 2000, 114 Stat. 825. See the website of the United States Government Publishing Office, https://www.govinfo.gov/, (dostęp 24.05.2019 r.).

20 The 14th Amendment to the Constitution was ratified on July 9, 1868, See the website of the United States Government Publishing Office, https://www.govinfo.gov/, (dostęp 24.05.2019 r.).

21 *See* e.g.: Arizona Revised Statutes, Title 8 – Child Safety, Chapter 1 – Adoption; Arkansas Code, Title 9 – Family Law, Chapter 9 – Adoption; California Family Code, Division 13. Adoption; Colorado Revised Statutes, Title 19, Parts 2-4; Delaware Code, Title 13, Chapter 9.Adoption; Georgia Code, Title 19, Chapter 8 – Adoption; Idaho Statutes, Title 16, Chapter 15. Adoption of Children; Illinois Complied Statutes, Families (750 ILCS 50/) Adoption Act; Mississippi Code, Title 93 – Domestic Relations, Chapter 17 – Adoption, Change of Name, and Legitimation of Children; Montana Code Annotated, Title 42. Adoption; Nevada Revised Statutes, Title 11, Chapter 127 – Adoption of Children and Adults; New Jersey Permanent Statutes, Title 9 – Children-Juvenile and Domestic Relations Courts; New York Consolidated Laws, Domestic Relations, Chapter 14, Article 7; Oklahoma State Statutes, Title 10: Children, Chapter 75-Oklahoma Adoption Code, Articles 1- 6; Utah Code, Chapter 30 – Adoption; Code of Virginia, Title 63.2 -Welfare (Social Services), Chapter 12 – Adoption.

ways of expressing consent to adoption, the age limits between adoption parties, the health conditions and property status of adoption parties and the permission to the adoption by homosexual couples[22].

III. THE OUTLINE OF THE DEVELOPMENTS AND CURRENT TRENDS OF INTERCOUNTRY ADOPTION IN THE US AND POLAND

Intercountry adoption has been one of the most significant issues in child law since the beginning of the 20th century, largely because of stormy politics and social transformations, mainly due to the effects of the First and the Second World Wars, which have created a great need to provide care for orphaned children after the wartime. However, the reasons for intercountry adoptions have changed in the second half of the 20th century on the wave of social and economic transformations in more developed and richer countries. These changes led mainly to the negation of the traditional family model, the popularity of abortion, and in general the change of the lifestyle of people. Regarding these transformations, Z. Węgierski exhaustively notes that "in the 1960s, the United States and Western Europe have started to proclaim slogans that denied the idea of marriage, there had appeared the first feminist organizations, the problems of gender equality (…)"[23]. Thus, these drastic demographic, social, political and legal changes in developed countries made intercountry adoption the only rescue for family crisis and decline in fertility. That is why, in this time, intercountry adoptions have started to rely on the adoption of children from underdeveloped countries by adults from developed countries[24]. All of these reasons have created the need for international regulation of intercountry adoption[25].

The current practices of intercountry adoption in the US and Poland have been shaped in different ways. It arose from the fact that adoption has been a legal solution to different politico-social problems in these countries. It means that intercountry adoption, although protected internationally, in fact has played a different role and has had other social functions in the two countries. In order to understand

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[22] *See* s. 5. of the article.

[23] Z. Węgierski, *Opieka nad dzieckiem osieroconym. Teoria i praktyka*, (Wydawnictwo Edukacyjne „AKAPIT" 2006), p. 48.

[24] P. Selman, *Intercountry adoption: developments, trends and perspectives*, (British Agencies for Adoption and Fostering 2000), p. 15.

[25] Next to the UNCRC and the HC, the centerpiece of international regulations for intercountry adoption determines the documents of the Council of Europe, such as: the European Convention on the Adoption of Children of 1967 (in Poland it entered in force on 22.09.1996), and the European Convention on the Adoption of Children (Revised) of 2008. See the website of the Council of Europe, https://www.coe.int/, (dostęp 24.05.2019 r.).

the legal nature of intercountry adoption, it is necessary to briefly present the development of the current adoption practices in the US and Poland.

The flourishing of intercountry adoption in the US has occurred in the 1940s[26]. Since then, the US has become the *world leader* in intercountry adoptions. Over the last 30 years, the US has adopted internationally over 300,000 minors from around the world[27]. However, during this time, the nature of the intercountry adoption has changed. Intercountry adoption in the US can be divided into four main periods[28]. The first is the adoption of orphans from Europe after the Second World War, the next was adoption after the US war with Korea in the 1950s[29], then the adoption of minors from Central and South America in the 1970s, and finally the adoption in the countries of Central and Eastern Europe (including Albania, Bulgaria, Poland, Russia and Romania) after the fall of the communist governments by the end of the 20th century. Thus, intercountry adoptions in the US has also had the nature of multicultural (interracial) adoptions[30].

Nowadays, the US is still a *world leader* in intercountry adoptions. However, since 2002 the number of adoptions has been gradually declining, in such a way that in 2002 there were 21,459 internationally adopted, while in 2015 only 5,647[31]. The US is both a receiving and sending country. Since the beginning of the 21st century, the US has adopted children mainly coming from China, Ethiopia, Russia, South Korea and Ukraine. On the other hand, in recent years, the American children have been mainly adopted by people living in Canada, Netherlands, Switzerland and Ireland[32].

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26 L.M. Friedman, *A History Of American law*, (Simon & Schuster 2004), pp. 148-149.However, in the US, the adoption for the first time was regulated in the Massachusetts Act to Provide Adoption of Children of 1851. In the following years, adoption was regulated in Mississippi in 1846, Alabama and Texas in 1850. At the federal level, it was under The Child Welfare Act of 1980. *See* E. W.Carp, *Adoption in the United States*, (in:) *Encyclopedia of children and childhood in history and society*. *Vol. 1, A-E.*, P.S. Fass, ed., (Macmillan Reference USA 2004), pp. 22-23.

27 *See* the website of the U.S. Department of States, https://www.state.gov/, (dostęp 24.05.2019 r.).

28 H. Altstein, R.J. Simon, eds., *Intercountry Adoption: A Multinational Perspective*, (Greenwood Publishing Group 1991), pp. 21-23., L.M. Friedman, *American Law in the 20th Century,* (New Haven: Yale University Press 2002), pp. 446-447.

29 More in T. Hübinette, *The adoption issue in Korea: diaspora politics in the age of globalization*, (The Stockholm Journal of East Asian Studies 2002), pp. 141- 153.

30 The first legal transracial adoption was in Minnesota in 1948. Moreover, internationally adopted minors are 37 % of the interracial adoptions in the US. *See* R.Fong, R. McRoyeds, *Transracial and Intercountry Adoptions: Culturally Sensitive Guidance for Professionals*, (Columbia University Press 2016), pp. 238-239.

31 See the website of the Travel. State. Gov., https://travel.state.gov, (dostęp: 24.05.2019 r.), which is the part of the Bureau of Consular Affairs of the U.S. Department of State.

32 *Ibid.*

In Poland, the first registered intercountry adoptions begun in the early 1970s even though intercountry adoptions were performed in previous years, as a consequence of the Second World War[33]. However, considering that these adoptions were of a different nature, they will not be subject to further discussion.

In Poland since the 1970s, the number of legal adoptions increased year on year. Until 1982, the number of intercountry adoptions remained more than 50 but less than100 children per annum. Since 1983 there has been a significant increase in intercountry adoptions, in such a way that in 1989 –412 children were adopted, and in the 1990s more than 500 children per year. Since the beginning of the 21st century, in Poland, intercountry adoption has gained considerable popularity. However, Poland has always mainly acted as a sending state. Since the beginning of the 21st century, more than 4,500 Polish children have been adopted internationally and they have been mostly adopted by adoptive parents from Italy and the US, but there are also adopters from Sweden, Netherlands, France and Germany[34].

Undoubtedly, a big influence of the development of intercountry adoption in Poland has been subsequent ratifications of international conventions on this issue. The ratification by Poland of international regulations has *opened the door* for legal intercountry adoptions. However, interestingly, intercountry adoption in the Polish Family Code was established only in 1995[35] and by this time, all intercountry adoptions had been made under the UNCRC rules as well as the HC provisions, but always including, in particular the principle of the child's best interest.

IV. THE TWO GUIDING PRINCIPLES IN INTERCOUNTRY ADOPTION: THE PRINCIPLE OF THE CHILD'S BEST INTEREST AND THE PRINCIPLE OF SUBSIDIARITY

In intercountry adoption there are two overriding principles, the principle of the child's best interest and the principle of subsidiarity. These two principles signify the basis for all the remaining principles of intercountry adoption[36].They constitute the essence of adoption, with particular regard to its function and role.

The principle of the child's best interest, also known in legal doctrine as *the controlling principle*, *the principle of great importance* or *the overarching principle*,

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[33] *See* S. Knuiman, C.HAM Rijk, R.AC Hoksbergen and A.L van Baar, *Children without parental care in Poland: Foster care, institutionalization and adoption*, "International Social Work", 2015, vol. 58,pp. 143-144.

[34] See the website of the Polish Ministry of Family, Labour and Social Policy, https://www.gov.pl/web/rodzina/, (dostęp: 24.05.2019 r.).

[35] In 1995, the FGC introduced the Article 114^2, which directly relates to intercountry adoptions. *See* http://prawo.sejm.gov.pl/ (dostęp 24.05.2019 r.).

[36] *See* s. 1 of the article.

has the highest value in intercountry adoption. R. Zegadło underlines that this principle must be treated as a prerequisite for resolution[37]. In general, it means that in the situation of competing interests (*i.e.* the interests of the child, the interests of the parents/legal guardians or the social interests), the interests of the child must always be considered a priority. K. Bagan-Kurluta notes that although intercountry adoption inevitably depends on the interest of the States involved in the adoption, the States must exercise due diligence to correctly interpret the best interests of the child[38].

In the context of the priority of the best interests of the child over the interest of the parents, the Polish Supreme Court rightly pointed out in the resolution of 13-20 November 1953,C 1964/52[39] that: "the welfare of the child is an essential foundation of the initial interpretation of the law relating to the relationship between parents and children". The particular protection of the child in intercountry adoption (and in general in law) is mainly due to the child's dependence and immaturity. Moreover, as D. M. Smolin observes, the child deserves special protection due to the fact that "intercountry adoption intrinsically involves multiple deprivations of the child and human rights. These include deprivations of the child's identity and relational rights with their original family, community and nation, including the child's culture, language, and opportunity to know and be cared for by his or her parents"[40].

The principle of the child's best interest in intercountry adoption is indicated in international conventions as well as in the domestic family laws of the US and Poland. In all of them the best interests of the child is always a general clause. This is primarily because the best interests of the child "is a malleable concept, shaped by culture, economic circumstances, and religious norms. Countries give different emphasis to the importance of sole or shared care giving. In addition, when a choice has to be made, the question of which factors may justifiably be considered in determining a child's best interests in a custody dispute is one that plague decision-makers. Decision-makers give different emphasis to factors like gender,

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[37] R. Zegadło (in:) *Kodeks rodzinny i opiekuńczy. Komentarz.*, J. Wierciński ed., (LexisNexis 2014), p. 784.

[38] K. Bagan-Kurluta, *Przysposobienie międzynarodowe dzieci*, (Temida2 2009), p. 13.

[39] Supreme Court resolution issued on 20 September 1953,C 1964/52 (Uchwała Sądu Najwyższego z dnia 20.11.1953 r. C 1964/52), Legalis nr 637350.

[40] D.M. Smolin, *The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties*, "Journal of Law & Family Studies & Utah Law Review", 2013, p. 85.

religion, culture, and race. Legal systems also differ in their treatment of the child's own preference, and solicit it variously if it is actively sought."[41]

In Polish legal doctrine, according to one theory, the lack of legal definition of the child's best interest is explained by the fact that this concept belongs to the specific legal notions that are not definable, because they have no semantic reference and do not mean neither facts nor relationships or processes. Therefore, a definition of the best interests of the child could limit the scope of interpretation of this concept[42]. There are two significant definitions of the best interests of the child. According to the first one, the concept of J. Marciniak, the child's best interest should be primary understood as the child's personal interests, which relate to his or her physical and spiritual developments, including child's talents, and then it should refer to the public interest, as well as the property interests of the child[43]. On the other hand, according to the definition of W. Stojanowska, the best interests of the child is treated as the "complex of material and immaterial values necessary for proper physical and spiritual development of the child (…) and these values are determined by many different factors, which structure depends on the specific legal rules, the currently existing situation of the child, assuming the convergence of the interests of the child with the public interest"[44].

According to the US States laws, the factors that affect the scope of the child's best interest can be divided as follows: "The emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers (fifteen States and the District of Columbia)[45]; The capacity of the parents to provide a safe home and adequate food, clothing, and medical care (ten States)[46]; The mental and physical health needs of the child (nine States and the District of Columbia)[47]; The mental and physical health of the parents (nine

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[41] D. M. Blair, M.H. Weiner, B. Stark, S. Maldonado, *Family Law in the World Community: Cases, Materials, and Problems in Comparative and International Family Law*, (Carolina Academic 2015), p. 449.

[42] H. Ciepła, B. Czech (in:)*Kodeks rodzinny i opiekuńczy z komentarzem*, K. Piasecki ed., (Wydawnictwo Prawnicze 2000), p. 302.

[43] J. Marciniak, *Treść i sprawowanie opieki nad małoletnim*, (Wydawnictwo Prawnicze 1975), p.10.

[44] W. Stojanowska, *Rozwód a dobro dziecka*, (Wydawnictwo Prawnicze 1979), p. 27.

[45] Connecticut, Delaware, Florida, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Michigan, North Dakota, Ohio, Oregon, Tennessee, Vermont, Virginia.

[46] Florida, Georgia, Hawaii, Illinois, Maryland, Michigan, North Dakota, Texas, Vermont, Wisconsin.

[47] Connecticut, Delaware, Florida, Georgia, Kansas, Maine, Michigan, Nevada, Virginia.

States and the District of Columbia)[48]; The presence of domestic violence in the home (nine States)"[49].

Both the UNCRC (the Article 21) and the HC (the Article 4 (b), the Article 16 (d)) protect the best interests of the child in intercountry adoption. However, the Hague Convention expands the Article 21 of the UNCRC, which refers *sensu stricto* to intercountry adoption. Moreover the HC clarifies other UNCRC regulations which refers to the best interests of the child in intercountry adoption[50].This is mainly the case in the preamble of the UNCRC, which refers to the importance of the rights and the fundamental values of the child and his or her family, the Article 3 (1) of the UNCRC which states that "the best interests of the child shall be a primary consideration" and the Article 20 (3) of the UNCRC, which determines that state parties shall pay particular attention to "the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background".

In American law, the principle of the child's best interest is respected in both federal and states laws. In federal law, the best interests of the child in intercountry adoption is protected by the *International Adoption Act 2002*, which expressly provides that intercountry adoption should be in the best interests of the child (*see* section 2 b (2) of the IAA). This principle mainly refers to the work of *adoption service* and courts in adoption proceedings (*see* Section 3 (3) (D), 204 (c) (1) (B), 303 (a) of the IAA). In all states laws, the best interest of the child is the most important premise in all cases relating to children rights, and hence in intercountry adoption[51].

The Article 114 § 1 of the Polish Family Code clearly provides that adoption (regardless of the type of adoption) can be only for the best interests of the child. Polish law, unlike American law, does not directly refers to the child's best interest in intercountry adoption, however in accordance with the Article 114 [2] § 1 of the Polish Family Code, the best interests of the child in intercountry adoption must be understood as providing for the child a suitable family environment and that

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48 Delaware, Georgia, Kentucky, Michigan, North Dakota, South Dakota, Tennessee, Texas, Virginia.

49 Delaware, Georgia, Kentucky, Michigan, North Dakota, Oregon, Tennessee, Texas, Virginia. See Child Welfare Information Gateway, Determining the Best Interests of the Child, (State Statutes March 2016), p. 2., https://www.childwelfare.gov/pubPDFs/best_interest.pdf(dostęp 24.05.2019 r.).

50 T. Buck, *International Child Law*, (Routledge 2011), pp. 245-247.

51 *See e.g.* Alaska Stat. § 47.10.082, Alaska Stat. § 47.05.065(4)-(5), Arkansas Ann. Code § 9-27-102, California Welf. & Inst. Code § 16000(a), California Fam. Code § 175 (a),(b), Colorado Rev. Stat. § 19-1-102(1), (1.5), Connecticut Gen. Stat. § 45a-719, Delaware Ann. Code Tit. 13, § 722, District of Columbia Ann. Code § 16-2353, Massachusetts Gen. Laws Ch. 119, § 1, Mississippi Ann. Code § 43-21-103, New York Soc. Serv. Law § 384-b(1), Northern Mariana Islands Commonwealth Code Tit. 6, § 5311, Texas Family Code § 263.307(b), Washington Rev. Code § 13.34.020.

also applies to the appropriate cooperation of the authorities (public and private) which are involved in the adoption process.

According to the laws of the two countries, the best interests of the child in intercountry adoption must determine the factual and the legal family situation of the child. For example, in the case of a child who has been placed in an orphanage, it is important to determine whether the child has been abandoned, whether biological parents of the child have still parental responsibility or whether there are realistic chances for the child to "come back home".

Under the universal international regulations, the best interests of the child in intercountry adoption especially refers to the creation of a suitable and permanent family environment for the child in the spirit of peace, tolerance, freedom, equality and solidarity, including also the child's situation for the future[52]. Undoubtedly, the best environment for the development of the child is his or her natural family, therefore, in accordance with the principle of subsidiarity, as a rule, intercountry adoption must be treated as an *ultima ratio* solution. What is more, an argument of poverty or bad material status of a family cannot unambiguously indicate the inadequacy of the family environment. The Polish Supreme Court in the decision of 15 September 1951, C 715/51[53], rightly pointed out that the assessment of compliance of an adoption with the child's best interest should not be made only from the perspective of the material (financial) situation of adopters, but also by assessing if the child's upbringing by adopters better prepares the child for its future life, for the good of society and according to its talents. Similarly, the Polish Supreme Court in the decision of 30 September 1952, C 1513/52[54] underlined that the assessment of material (financial) situation of child's biological family cannot be the only decisive argument for the establishment of the adoption.

In the US, due to many intercountry, including also interracial adoptions, the best interests of the child sometimes touch a dilemma of proper development of the child of other race, culture, and tradition than the adopters. H. Jacobson pointed out that despite the many positive advantages of intercountry adoptions, a worrying trend has appeared in intercountry and interracial adoptions, especially with regard to children from China, which led to *must-have accessory* or just *fashion*

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[52] E. Holewińska-Łapińska (in:) *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. T. 12.*, T. Smyczyński ed., (C. H. Beck: Instytut Nauk Prawnych PAN 2011), pp. 531-532.

[53] Supreme Court decision issued on 15 September 1951, C 715/51(Orzeczenie Sądu Najwyższego z dnia 15.09.1951 r., C 715/51), Legalis nr 683936.

[54] Supreme Court decision issued on 30 September 1952, C 1513/52; (Orzeczenie Sądu Najwyższego z dnia 30.09.1952 r., C 1513/52), Legalis nr 179798.

trend[55]. On the other hand, D. Roberts argues that interracial adoption may be the only solution for the African American or Latino children for a loving home provided by US adopters, thus such adoptions should not be bound by the policy (or other) prism, but more through an analysis of whether candidates for adopters could provide a suitable family environment for the child and with respect for his or her national identity[56]. Similarly T. L. Perry notes that in fact "for some children, transracial or international adoption may be the option that is in their best interests at the particular time"[57].

The best interests of the child require proper cooperation between public and private social welfare institutions as well as administrative authorities[58].The court in each case is obliged to investigate whether a child should be adopted internationally and thoroughly verify if there is no chance of a stable family in his or her country of origin. The best interests of the child in intercountry adoption requires a detailed, complete and solid determination of his or her family and legal situation as well as his or her real care needs for proper physical and emotional development. The Court of Appeal of Louisiana, In *re Morris*[59], stated that „the basic purpose of an adoption is the welfare, protection, and betterment of the child, and adoption courts ultimately must rule on that basis". Adequate assessment of the child's situation and needs is intended to prevent any form of illegal adoption, including primarily illegal financial benefits, illegal transfers of children abroad, trafficking in children, and any other risks to the life and health of the child.

Given the protection of the child's best interest, it is necessary to ensure that the adoption process is made in accordance with the law, especially through competent and specialized bodies cooperating with the relevant international organizations on the basis of the applicable multilateral or bilateral agreements. The Polish Supreme Court, in the resolution of 12 June 1992, III CZP 48/92[60], stressed that any commercial adoptions are of course unacceptable. Currently, the procedure and standards for intercountry adoption are regulated under the Hague Convention.

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[55] H. Jacobson, *Culture keeping: white mothers, international adoption, and the negotiation of family difference*, (Nashville, Tenn.: Vanderbilt University Press 2008), p. 42.

[56] *See* D.Roberts, *Adoption Myths and Racial Realities in the United States*, (in:) *Outsiders Within: Writing on Transracial* Adoption, S.Y. Shin, J.J. Trenka, J.C. Oparah, eds., (South End Press 2006), pp. 49-55.

[57] T.L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, "Yale Journal of Law & Feminism", 1998, vol. 10, p. 108.

[58] *See* Article 3 of the UNCRC.

[59] In re Morris, 2005 WL 156823, (Louis. App., 2005).

[60] Supreme Court resolution issued on 12 June 1992, III CZP 48/92 (Uchwała Sądu Najwyższego z dnia 12.06.1992 r., III CZP 48/92), Legalis nr 27726.

The HC indicates a system of co-operation between Contracting States in order to ensure the best interests of the child in intercountry adoption, to respect fundamental rights of children and to prevent illegal adoptions, mainly such as abduction, sale and trafficking of children (the Article 1 of the HC). The HC regulates the main requirements for a proper cooperation between the authorities of the child's country of origin and the receiving country, which mainly include obtaining a necessary and freely consent to adoption from entitled persons, institutions and authorities, a determination that adoptive parties (prospective adopters and a child) are eligible and suited to adopt (the Chapter II of the HC). The HC points out the need to establish Central Authorities[61] and Accredited Bodies in each State Parties which are responsible for any exchange of information in the adoption process, making adoption decisions and the prevention of illegal adoptions (the Chapter III of the HC). Finally, the HC includes the procedural requirements in intercountry adoption (the Chapter IV of the HC) and the regulations of recognition and effects of the adoption (the Chapter V of the HC). This indicates that the regulation of intercountry adoption in the HC is comprehensive.

On the other hand, the principle of subsidiarity in intercountry adoption, otherwise known as the principle of the primacy of domestic adoption over intercountry adoption, is next to the principle of the child's best interest, the key principle in intercountry adoption. The main aim of the principle of subsidiarity is to protect the child's best interest with the right to be raised in a suitable family environment. The principle of subsidiary plays a special role in intercountry adoption because it is in a very close relationship with the values protected under the conventions. The principle of subsidiarity in intercountry adoption is expressed explicitly in international conventions but also in both the US and Polish domestic laws.

With regard to international law, the principle of subsidiarity is in both the UNCRC (the Article 21 (b)) and in the Hague Convention (the Article 4 (b)), however under the two documents, the scope and the legal nature of that principle are different. Undoubtedly, both conventions protect the best interests of the child as the highest value in intercountry adoption but in the light of these conventions there are different ways to secure this interest. The Hague Convention provides that the purpose of the intercountry adoption is to create a permanent family for the child, and the UNCRC indicates that it is the only and the last from among the "alternative means of child's care" such as a foster or an adoptive family or any suitable manner to be cared for in the child's country of origin. According to R. Carlson

[61] In the US it is the U.S. Department of State (Bureau of Consular Affairs, Office of Children's Issues), in Poland it is the Minister of Family, Labour and Social Policy.

the regulation of that principle in the UNCRC should be understood as discouragement or limitation of intercountry adoptions[62].The Hague Convention, as *lex specialis* to the UNCRC, instead of a "suitable care" uses the term a "permanent family" which clearly highlights the right of the child to family and the right to be brought up in the family environment[63].

Under American federal law the principle of subsidiarity is regulated in a broad sense in the Section 2 (2) of the IAA, which ensures the protection of the child's best interest and the rights of his or her birth families. However, due to the nature of American law, the principle of subsidiarity has many implications in case law.

In *re Christopher B.*[64] the intercountry adoption order has been established for seven siblings, because it was considered that the biological parents of the minors had not been able to exercise their parental authority and that the previous attempts to domestic adoptions had been unsuccessful. In this regard, the court particularly took into account the poor financial situation of the biological parents as well as their lack of predispositions to raise the children (mainly because of their addictions). The court pointed out that the simultaneous adoption of all siblings was a unique opportunity for creating a stable and loving home for children by adopters who have the appropriate personal qualifications and assets-earning possibilities to take care for all siblings.

In an other case, In *re G.R.*[65] the intercountry adoption order has been established for a minor girl by the biological father of her half-sister, who lived in Mexico. In this case, the Court took into account the best interests of the children, the deprivation of maternal parental power, and the principle of the non-separating siblings, which have always grown up together. These two cases confirm the direct and inseparable connection between the principle of the best interests of the child and the principle of subsidiarity.

In Polish law the principle of subsidiarity is expressed *sensu stricto* in the Article 114^2 of the FGC. The basis for this regulation was the resolution of the Polish Supreme Court of 12 June 1992, III CZP 48/92[66], which stated that the intercountry adoption of a Polish child may only take place if it is not possible to place the child on equal conditions with the foster family in Poland. Thus, in Polish law the essence

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[62] R. Carlson, *A child's right to a family versus a state's discretion to institutionalize the child*, „Georgetown Journal of International Law", 2016, vol. 47, p. 976.

[63] E. Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, „Annals of the American Academy of Political and Social Science", 2011 (January), vol. 633, p. 96.

[64] In re Christopher B., 2008 WL 946221 (Cal.App. 4 Dist.,2008).

[65] In re G.R., 2006 WL 147587 (Cal.App. 2 Dist.,2006).

[66] Supreme Court resolution issued on 12 June 1992, III CZP 48/92, Legalis nr 27726.

of the principle of subsidiarity is mostly the same as it is stated in the international law, especially in the UNCRC.

Due to the principle of the best interests of the child, the principle of subsidiarity cannot be treated mechanically. Sometimes, the best interests of the child may require to leave the child in its current situation in its home country. It can happen, for example when a minor is very emotionally involved with his or her current educational, caring environment, when there is no possibility for the simultaneous intercountry adoption of his or her siblings, or when it is justified by the child's age or health conditions. As it has already been mentioned, the best interests of a child in intercountry adoption require particularly special examination of the child's factual and legal situation, including its real needs for proper development. In both American cases, In *re Kristina P.*[67] and In *re Adoption of M.S.*[68] adoptive parents demanded a termination of intercountry adoptions because of some health problems of the adoptee, which had not been sufficiently considered by adopters before the establishment of adoption order in the child's states of origin. It appears that the child's needs and caring predispositions of adoptive parents were not sufficiently well-researched and the principle of subsidiarity has been applied inadequately what led to the violation of the best interests of the child.

In some situations, the child's best interest could justify exclusion of the principle of subsidiarity in intercountry adoption. It may be related to *intra-family adoption*, for example in adoption by relatives of the child, in a situation of the earlier adoption of its siblings, or when the child has been under the care of the adopters for a long time and has created a strong bond towards them. It also depends on the child's psychophysical features and adaptability in new family environment. The Polish Supreme Court in the decision of 5 July 2006, IV CSK 127/06[69] concluded that according to the direct meaning of the Article of 114 ^{2} of the FGC, sometimes the best interests of the child may require the rejection of the principle of the primacy of national adoption. This case concerned the intercountry adoption of Polish child who had been in foster care for a long time with a French adoptive couple though the close relative of the child (the mother's sister) had the desire to adopt a child in accordance with national law. According to the court, the French couple gave a greater guarantee of creating a suitable family environment for the child. The Court took into account that the mother's sister, rarely visited the child in a foster care, and over she did not pay attention to his real needs and development

[67] In re Kristina P., 2001 WL 206140 (Conn.Super.,2001).

[68] In re Adoption of M.S., 2010 (Cal.App. 3 Dist.,2010).

[69] Supreme Court decision issued on 5 July 2006, IV CSK 127/06 (Postanowienie Sądu Najwyższego z dnia 5.07.2006 r., IV CSK 127/06), Legalis nr 173826.

problems. According to the Court, the aunt of the child did not give enough guarantee of creating a proper family environment for the child. The Polish Supreme Court in the decision of 22 June 2012, V CSK 283/11[70] underlined that an adoption is an optimal measure, that should be understood as to provide a child identical conditions to those in the full natural family.

V. SOME FORMAL REQUIREMENTS FOR INTERCOUNTRY ADOPTION IN THE US AND POLAND

Although both the US and Poland respect the international rules for intercountry adoption, there are some differences in regulating these issues in domestic laws of these countries. These differences mainly relate to the requirements of adoptee and adopters capacity.

Polish law, in respect of the FGC regulations[71], allows only the adoption of a minor child (below 18 years), as it is under the international conventions, however it is not always the same in the US States laws (*e.g.* in Arizona an adoptee can be under 21 years of age, moreover in some States adoption of adults is also permitted[72]). In both countries, usually adopters must have full legal capacity and appropriate qualifications, what in general means: suitable caring predispositions, good physical and mental health. The Polish Supreme Court in the resolution of 9 June 1976, III CZP 46/75[73] stressed out that the assessment of personal qualifications and educational abilities of adopters is particularly important in the adoption process. In some of the US States there are strictly defined conditions for being able to adopt, as it is for example in New York, where one of the circumstances excluding adoption order is a serious illness (*e.g.*cancer). In Illinois there is a distinguished list of reasons for disqualifying prospective adopters and amongst them: a child abandonment, an abuse of alcohol, drugs, an inability to perform parental duties *etc.*

Polish law, contrary to the American States laws, does not specify the age difference between adopters and adoptee, however the Polish Supreme Court in the

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70 Supreme Court decision issued on 22 June 2012, V CSK 283/11 (Postanowienie Sądu Najwyższego z dnia 22.06.2012 r., V CSK 283/11), Legalis 544269.

71 *See* S. Kalus, M.Habdas, *Family and Succession Law in Poland*, (The Netherlands: Kluwer Law International 2011), pp. 129-138; L. Frendl, *Adoption* (in:) *Polish family law*, D. Lasok ed., (Leyden 1968), pp. 177- 195; E. Holewińska – Lapińska, *The Legal Procedures for Adopting Children in Poland by Local Citizens and by Foreign Nationals* (in:) *Intercountry adoptions: laws and perspectives of "sending" countries*, E.D. Jaffe ed., (Dordrecht; MartinusNijhoff 1995), pp. 73-94.

72 *E.g.* in: Arkansas, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York, Ohio, Texas, West Virginia, Wyoming, Washington.

73 Supreme Court resolution issued on 9 June 1976, III CZP 46/75 (Uchwała Sądu Najwyższego z dnia 9.06.1976 r., III CZP 46/75), Legalis nr 19477.

decision of 18 November 2003, II CK 199/02[74], pointed out that it must be similar to that which occurs in natural families. In most US States, the age difference is precisely defined (*e.g.* in Idaho and Virginia, the age difference between an adopter and an adoptee is at least 15 years, and in Nevada, New Jersey, Utah at least 10 years).

According to Polish law (Article 119 of the FGC and next), there is a general rule that the adoption can be established only after consent is given by biological parents of a child or his or her legal guardian. Such consent, may be issued after 6 weeks from the birth of the child and as far as possible given by both parents, which is particularly important in the case of illegitimate child. In some US States, there is a very short period for giving consent to adoption (*e.g.* in Arizona and Ohio it is 72 hours, in Massachuset – 4 days) and what is more, some of the US States give the right to fathers to consent to adoption before the child is born (*e.g.* Oklahoma, North Carolina)[75].

A consent to adoption is one of the most important prerequisites in intercountry adoption, because it touches upon the best interests of the child and his or her respect for family life. Therefore, it is important that the *adoption service* involved in the adoption process give both parents of the child an ability to freely and consciously consent to adoption. The Oregon Court of Appeal in *Gruett v. Nesbitt*[76] stated that the lower court had passed a judgment on the basis of erroneous findings of facts. The adoption decision was passed without the consent of the biological father due to procedural negligence on the part of the intermediary adoption agency, which did not properly inform the biological father of the adoption proceedings and the manner of giving his consent to adoption. As a consequence, the father of the child did not prevent the adoption within the prescribed period of time, which was treated as the father's permission for the mother's decision for the adoption. The child was given to the adoption immediately after his birth in the hospital, thereby the father did not have any contact with the child. The Court of Appeal stated that the biological father of the illegitimate child, has the same parental rights as the husband of the child's mother. The Court of Appeal noticed that the father of the child has sufficiently demonstrated that he wanted to take care of the child and he definitely did not consent to the adoption, therefore the adoption decision should have been annulled.

Polish law allows both a single adoption and a joint adoption by the spouses, with particular preference for this second form. Therefore, the joint adoption is not

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[74] Supreme Court decision issued on 18 November 2003, II CK 199/02 (Postanowienie Sądu Najwyższego z dnia 18.11.2003 r., II CK 199/02), Legalis nr 64961.

[75] D. M. Blair, M.H. Weiner, B. Stark, S. Maldonado, *Family Law…*p. 762.

[76] Gruett v. Nesbitt, 2001 WL 147587, (Or.App.,2001).

allowed for siblings, homosexual or concubine couples. However, in practice, it is acceptable for the person in a concubinage to adopt a child. The Polish Supreme Court in the decision of 25 October 1983, III CRN 234/83[77], noted that the consent of the biological parents to such adoption must be given knowingly. It confirms the principle of the best interests of the child in intercountry adoption. Some of the US States laws clearly allow for adoption by homosexual couples (*e.g.* California and Mississippi), nevertheless, it does not definitely exclude such adoptions in other States, because this may result from case law.

The Court of Appeal in Indiana, In *re Adoption of M.M.G.C.*[78] disagreed with the lower court, which refused to recognize the intercountry adoption by homosexuals in Indiana State law due to the current lack of legal grounds for such recognition. In this case, Shannon Crawford-Taylor during her homosexual relationship with Amber, had adopted, as one parent, three children: one from Ethiopia and two from China because the laws of these countries did not allow joint adoption by homosexuals. After that, Shannon Crawford-Taylor and Amber had applied to the Indiana Court for joint adoption of these three children. The court refused them such adoption, recognizing that the adoption ruled in another state cannot lead to a modification of the adoptions. That court further stated that the joint adoption by Shannon and Amber is incompatible with State regulations because under Indiana law the adoption by illegal relationship is unacceptable. The Court of Appeal disagreed with the lower court recognizing that Indiana's State law does not explicitly stated that the adoption by a couple from a homosexual union was forbidden. The Court of Appeal noticed that one of the most important requirements for adoption is for the potential adopters to have a place of residence in Indiana. Thus, the Court of Appeal decided that, according to State law, there were no obstacles to the refusal of Shannon Crawford-Taylor and Amber's joint adoption. Moreover, the Court stated that the decision on joint adoption was in line with the best interests of the children. The Court noticed that both Shannon Crawford-Taylor and Amber had appropriate care predispositions and financial ability to take care for the children.

VI. COMPARISON AND DISCUSSION OF THE US AND POLAND

Based on the above considerations, it is possible to distinguish some differences and similarities between intercountry adoptions in the US and Poland. Generally speaking, the differences are mainly due to the current practices of intercountry

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[77] Supreme Court decision issued on 25 October 1983, III CRN 234/83 (Postanowienie Sądu Najwyższego z dnia 25.10.1983 r., III CRN 234/83), Legalis nr 24427.

[78] *See* In re Adoption of M.M.G.C., 2003 WL 1228087, (Ind.App.,2003).

adoptions in these two countries, while the partial similarities are the result of the ratification of the international legal provisions. The US and Poland are countries with different legal and social traditions. Without any doubts, this has a big impact on the current developments and trends of intercountry adoptions.

Contrary to Poland, current intercountry adoptions in the US have a multicultural and interracial character. Moreover, the US is both a sending and a receiving state, whereas Poland is only a sending state. Undoubtedly, the US has much more experience and a much longer tradition regarding intercountry adoptions. This is supported by the statistical data which indicates the great number of international adoptions each year. The current legal practice in Poland in intercountry adoptions has developed nearly 50 years later than in the US. Moreover, it has not been related to multicultural and interracial adoptions. This may mean that the US has naturally more experience in international adoptions.

However, besides that, Poland is a State Party of the UNCRC and of the HC, whereas the US is only bounded by the HC because the UNCRC has no significant importance for the US. Moreover, the US law distinguishes intercountry adoptions which are deriving from the HC Party States and the Non-HC Party States. The international protection of the child in the adoption from the Non-HC Party States is automatically weaker. It undoubtedly may undermine the best interests of the child.

What is more, in US adoptions it is not quite clear whether the best interests of the child is enough respected. A high number of intercountry adoptions in the US could lead to the paradox that international children are more *attractive* than domestic children for American adopters. This would mean that the interest of adults is primary to the interests of the child. Moreover, a huge annual number of international adoptions can simplify the adoption process, and consequently cause a violation of the best interests of the child. In this regard, it is doubtful whether the US respect the basic principle of intercountry adoption, the principle of subsidiarity.

Moreover, in US law, adoptions are recognized separately in each State law. Thus, it may happen for example that the prohibition of the adoption by homosexual couples in Polish law will be circumvented by the recognition in one American State, where it is allowed. Hence this could mean that the law is more adapted to the needs of adopters.

According to the current law and social practice in Poland, international adoption is regarded as a definitive solution. This is mostly influenced by deeply rooted Christian traditions as well as maintaining family ties. The respect of the principle of subsidiarity in Polish law means that those internationally adopted are usually older or disabled children. Intercountry adoption gives such children a last chance

to get a family environment. In practice in American law, the principle of subsidiarity is not always used as a last resort, but is more adjusted to the circumstances of the case.

VII. CONCLUSION

It seems that both the US and Poland respect the international rules in intercountry adoption in their respective domestic laws. Nevertheless, different current legal and social practices in the intercountry adoptions practice of the two countries, lead to different consideration in relation with the protection of the child's best interest and respect for his or her family life. Therefore, some settlements in the US law may sometimes raise concerns from the perspective of Polish law and *vice versa*.

Considering the legal nature of intercountry adoption, the child's best interest deserves a very particular legal protection. Intercountry adoption must always be treated as the type of adoption which establishes a legal relationship, like in natural families, and provides the appropriate family environment for the child. With a view to good intercountry adoption practices, the principle of the child's best interest, and also the principle of subsidiary must always be the overarching principles.

The best interests of the child in intercountry adoption should also require more attention to the child's situation after the adoption decision, which in the current international and the US and Polish laws are often overlooked issues. This would avoid many scandals, abusive and illegal practices in intercountry adoptions. This mainly refers to the US, due to the significant global part of this country in intercountry adoptions.

BIBLIOGRAFIA

Literatura

Altstein H., Simon R.J. (eds.), *Intercountry Adoption: A Multinational Perspective*, Greenwood Publishing Group 1991.

Bagan-Kurluta K., Przysposobienie międzynarodowe dzieci, Temida2 2009.

Bartholet E., *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, „Annals of the American Academy of Political and Social Science", 2011 (January), vol. 633.

Blair D.M., Weiner M.H., Stark B., Maldonado S., *Family Law in the World Community: Cases, Materials, and Problems in Comparative and International Family Law*, Carolina Academic 2015.

Buck T., *International Child Law*, Routledge 2011.

Carlson L., *American Business Law: A Civil Law Perspective*, Iustus 2004.

Carlson R., *A child's right to a family versus a state's discretion to institutionalize the child*, „Georgetown Journal of International Law", 2016, vol. 47.

Child Welfare Information Gateway, Determining the Best Interests of the Child, State Statutes March 2016.
Fass P.S. (ed.), *Encyclopedia of children and childhood in history and society. Vol. 1, A-E.*, Macmillan Reference USA 2004.
Fong R., McRoyeds. R., *Transracial and Intercountry Adoptions: Culturally Sensitive Guidance for Professionals*, Columbia University Press 2016.
Friedman L.M., *A History Of American law*, Simon & Schuster 2004.
Friedman L.M., *American Law in the 20th Century,* New Haven: Yale University Press 2002.
Gibbons J.L., Rotabi K.S. (eds.) *Intercountry Adoptions: Policies, Practices and Outcomes*, Ashgate 2012.
Hübinette T., *The adoption issue in Korea: diaspora politics in the age of globalization*, The Stockholm Journal of East Asian Studies 2002.
Jacobson H., *Culture keeping: white mothers, international adoption, and the negotiation of family difference*, Nashville, Tenn.: Vanderbilt University Press 2008.
Jaffe E.D. (ed.), *Intercountry adoptions: laws and perspectives of "sending" countries*, Dordrecht; Martinus Nijhoff 1995.
Kalus S., Habdas M., *Family and Succession Law in Poland*, The Netherlands: Kluwer Law International 2011.
Knuiman S., Rijk C.HAM, Hoksbergen R.AC and van Baar A.L, *Children without parental care in Poland: Foster care, institutionalization and adoption*, "International Social Work", 2015, vol. 58.
Lasok D. (ed.), *Polish family law*, Leyden 1968.
Łopatka A., *Dziecko. Jego prawa człowieka*, Iuris 2000.
Marciniak J., *Treść i sprawowanie opieki nad małoletnim*, Wydawnictwo Prawnicze 1975.
Perry T.L., *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, "Yale Journal of Law & Feminism", 1998, vol. 10.
Piasecki K. (ed.), *Kodeks rodzinny i opiekuńczy z komentarzem*, Wydawnictwo Prawnicze 2000.
Selman P., *Intercountry adoption: developments, trends and perspectives*, British Agencies for Adoption and Fostering 2000.
Sharon D., *A Commentary on the United Nations Convention on the Rights of the Child*, Kluwer Law 1999.
Shin S.Y., Trenka J.J., Oparah J.C. (eds.), *Outsiders Within: Writing on Transracial* Adoption, South End Press 2006.
Smolin D.M, *The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties*, "Journal of Law & Family Studies & Utah Law Review" 2013.
Smyczyński T. (ed.) *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. T. 12.,* C. H. Beck: Instytut Nauk Prawnych PAN 2011.
Stojanowska W., *Rozwód a dobro dziecka*, Wydawnictwo Prawnicze 1979.
UNICEF, *Innocenti Digest No. 4. Intercountry Adoption*, Italy 1999.
Węgierski Z., *Opieka nad dzieckiem osieroconym. Teoria i praktyka*, Wydawnictwo Edukacyjne „AKAPIT" 2006.
Wierciński J. (ed.) *Kodeks rodzinny i opiekuńczy. Komentarz.*, LexisNexis 2014.

Orzecznictwo

Orzeczenie Sądu Najwyższego z dnia 15.09.1951 r., C 715/51, Legalis nr 683936.
Orzeczenie Sądu Najwyższego z dnia 30.09.1952 r., C 1513/52, Legalis nr 179798.
Uchwała Sądu Najwyższego z dnia 20.11.1953 r., C 1964/52, Legalis nr 637350.
Uchwała Sądu Najwyższego z dnia 9.06.1976 r., III CZP 46/75, Legalis nr 19477.
Postanowienie Sądu Najwyższego z dnia 25.10.1983 r., III CRN 234/83, Legalis nr 24427.
Uchwała Sądu Najwyższego z dnia 12.06.1992 r., III CZP 48/92, Legalis nr 27726.
Postanowienie Sądu Najwyższego z dnia 18.11.2003 r., II CK 199/02, Legalis nr 64961.

Postanowienie Sądu Najwyższego z dnia 5.07.2006 r., IV CSK 127/06, Legalis nr 173826.
Postanowienie Sądu Najwyższego z dnia 22.06.2012 r., V CSK 283/11, Legalis 544269.

Gruett v. Nesbitt, 2001 WL 147587, (Or.App.,2001).
In re Kristina P., 2001 WL 206140 (Conn.Super.,2001).
In re Adoption of M.M.G.C., 2003 WL 1228087, (Ind.App.,2003).
In re Morris, 2005 WL 156823, (Louis. App., 2005).
In re G.R., 2006 WL 147587 (Cal.App. 2 Dist.,2006).
In re Christopher B., 2008 WL 946221 (Cal.App. 4 Dist.,2008).
In re Adoption of M.S., 2010 (Cal.App. 3 Dist.,2010).

Akty

Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 (Konwencja o prawach dziecka, przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r., Dz.U. 1991 nr 120 poz. 526.).
Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 (Konwencja w sprawie likwidacji wszelkich form dyskryminacji kobiet przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 18 grudnia 1979 r., Dz.U. 1982 nr 10 poz. 71.).
European Convention on the Adoption of Children (Revised) of 2008, Strasbourg, 27.11.2008.
European Convention on the Adoption of Children of 1967, Strasbourg, 24.04.1967 (Europejska Konwencja o przysposobieniu dzieci, sporządzona w Strasburgu dnia 24 kwietnia 1967 r., Dz.U. 1999 nr 99 poz. 1157.).
Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Konwencja o ochronie dzieci i współpracy w dziedzinie przysposobienia międzynarodowego, sporządzona w Hadze dnia 29 maja 1993 r., Dz.U. 2000 nr 39 poz. 448.).
Intercountry Adoption Act of 2000, P.L. 106-279, Oct. 6, 2000, 114 Stat. 825.
International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (Międzynarodowy Pakt Praw Obywatelskich i Politycznych otwarty do podpisu w Nowym Jorku dnia 19 grudnia 1966 r., Dz.U. 1977 nr 38 poz. 167.).
International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (Międzynarodowy Pakt Praw Gospodarczych, Społecznych i Kulturalnych otwarty do podpisu w Nowym Jorku dnia 19 grudnia 1966 r., Dz.U. 1977 nr 38 poz. 169.).
Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz.U. 1997 nr 78 poz. 483.
Obwieszczenie Ministra Rodziny, Pracy i Polityki Społecznej z dnia 13 stycznia 2017 r. – w sprawie listy ośrodków adopcyjnych upoważnionych do współpracy z organami centralnymi innych państw lub z licencjonowanymi przez rządy innych państw organizacjami lub ośrodkami adopcyjnymi, (M.P. 2017 poz. 35.).
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 (Protokół Fakultatywny do Konwencji o prawach dziecka w sprawie handlu dziećmi, dziecięcej prostytucji i dziecięcej pornografii, przyjęty w Nowym Jorku dnia 25 maja 2000 r., Dz.U. 2007 nr 76 poz. 494.).
Ustawa z dnia 25 lipca 2014 r. – o zmianie ustawy o wspieraniu rodziny i systemie pieczy zastępczej oraz niektórych innych ustaw, Dz.U. 2014 poz. 1188.
Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy, Dz.U. 1964 nr 9 poz. 59.
Ustawa z dnia 4 lutego 2011 r. – Prawo prywatne międzynarodowe, Dz.U. 2011 nr 80 poz. 432.

Ustawa z dnia 9 czerwca 2011 r. – o wspieraniu rodziny i systemie pieczy zastępczej, Dz.U. 2011 nr 149 poz. 887.
Constitution of the United States of America of 17 September 1787 with the 14th Amendment of 9 July 1868.

Źródła internetowe:

California Legislative Information, https://leginfo.legislature.ca.gov/
Hague Conference on Private International Law, https://www.hcch.net/
Ministry of Family, Labor and Social Policy (Ministerstwo Rodziny, Pracy i Polityki Społecznej), https://www.gov.pl/web/rodzina/
Office of the United Nations High Commissioner for Human Rights, https://www.ohchr.org/
Polish Legal Database (Internetowy System Aktów Prawnych – ISAP), http://prawo.sejm.gov.pl/
United States Department of State, https://www.state.gov/
United States Government Publishing Office, https://www.govinfo.gov/

Adopcja międzynarodowa w Stanach Zjednoczonych i w Polsce – perspektywa prawnoporównawcza

STRESZCZENIE

Artykuł omawia instytucję adopcji międzynarodowej w prawie amerykańskim i w prawie polskim, ze szczególnym zwróceniem uwagi na dwie podstawowe zasady adopcji, tj. zasadę dobra dziecka oraz zasadę subsydiarności. Przedstawione są regulacje prawne (międzynarodowe i krajowe) oraz dotychczasowa praktyka w ustanawianiu adopcji międzynarodowych w obu tych państwach. Zwrócona jest uwaga, że Stany Zjednoczone są *światowym liderem* w przysposobieniach międzynarodowych, zwłaszcza jako państwo przyjmujące, w tym także dla adopcji dzieci z Polski. Inny jest charakter adopcji międzynarodowej w Stanach Zjednoczonych i w Polsce, pomimo że oba te państwa ratyfikowały *Haską konwencję* o *ochronie dzieci* i *współpracy* w *dziedzinie przysposobienia międzynarodowego z 29 maja 1993 roku*, która stanowi jedno z najbardziej podstawowych źródeł prawa międzynarodowego w zakresie adopcji zagranicznych. Konwencja ta wprowadza procedurę międzynarodową dla przysposobień zagranicznych i obecnie najpełniej reguluje kwestie związane z adopcją międzynarodową. Analiza amerykańskich i polskich regulacji daje pod wątpliwość, czy obowiązujące standardy faktycznie zabezpieczają nadrzędny interes dziecka w adopcji międzynarodowej i eliminują ryzyko nielegalnych form tej instytucji prawnej.

Słowa kluczowe: Adopcja, adopcja międzynarodowa, adopcja zagraniczna, prawa dziecka