‘Listening to the Winds’ of Europeanisation?

The Example of Cross-Border Recognition of Same-Sex Family Relationships in Poland

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Abstract
The uneven speed of family law developments results in the phenomenon of ‘limping family relationships’, which are family relationships legally recognised in one State but not in another. One example of this would be that of a same-sex couple who had validly married in a State with gender-neutral marriage laws. If the couple then moves temporarily or permanently to Poland, will their marriage be recognised, considering the latest landmark decisions of the supranational European courts on cross-border recognition of same-sex formalised relationships? The Private International Law Act of Poland provides that the law of nationality should apply to determine the substantial validity of a marriage. However, even if both of the spouses are nationals of a State that allows a gender-neutral marriage, the issue of incompatibility with the heteronormative concept of marriage in the Constitution of Poland arises. The paper analyses private international law in Poland and the relevant practice in light of the new European human rights standards.

The findings of this paper are twofold. On the one hand, under Polish law, Polish nationals are expected not to enter into same-sex marriages, wherever they live. On the other, several developments regarding European human rights standards have softened the traditional approach to same-sex marriages and same-sex parenthood in Poland, and opened some room for cross-border recognition of family status in Poland.

Keywords
private international law, same-sex marriages, same-sex parenthood, cross-border recognition, Poland

1. Introduction
Globalisation has increased the numbers of people moving across borders in Europe. For instance, the biggest group of immigrants in Norway are currently Poles (98,700 in 2019) and Lithuanians (39,300).¹ Both Poland and Lithuania prohibit same-sex marriages, whereas Norway allows them. Poland is one of the biggest countries in the European Union, with a population of 38.4 million and a significant impact in the European Parliament and Council. Its policies feature a strong support for traditional family values and a conservative view of gender roles. What happens with the substantial validity of the civil status of same-sex Polish couples, who are validly married abroad, when they return to their country of

origin, and why? The paper analyses this question, which is relevant for both human rights and private international law.

The paper draws attention to the fact that the issue of cross-border recognition of the effects of the civil status of a couple needs to be considered separately. There have not been cases of cross-border recognition of effects in family law or related areas (e.g. succession) in Poland. Depending on the particular effect of marriage and the rights of third persons, future cases can be highly complex. Currently, it is only possible to stress the distinction between the recognition of civil status and the recognition of a particular effect, and provide a short outlook into the future.

Human rights have had a revolutionary impact on private international law, and at the same time, both disciplines continue to lack awareness of each other and harmonisation. The paper is grounded on the premise that the ethical basis of private international law is tolerance, hospitality, responsivity, and that the development of human rights standards enriches rather than challenges these values. My normative position is that all persons have equal value, regardless of their gender or sexual orientation, and also that democratic legal systems have equal value. Considering the technical character of the private international law method, it is significant to define what is meant by ‘recognition’ in this field. The word is often used to mean an ideal of gradual realisation of substantive equality, but in private international law ‘recognition’ means the acceptance of validity of a marriage lawfully concluded abroad. Regarding the construction of the contents of public policy on same-sex family relationships, it is also significant to highlight the interrelation of nationalism and gender-roles in different State policies.

The paper focuses only on the cross-border recognition of statuses already validly obtained abroad. The paper does not analyse the right to marry of the Polish (nationals or habitually resident in Poland) same-sex couples abroad, the stage of conclusion of marriage, nor the Polish rules on formal marriage validity of marriages. The connecting factor of law applicable to substantive marriage validity in Poland is that of nationality. Even if the law of nationality of both spouses allows couples of the same sex to marry, the negative function of the ordre public reservation can be applied excessively to same-sex marriages, both in Poland and in many other countries. The principle of ordre public should be reserved to

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6. Nira Yuval Davis, Gender and Nation (SAGE 1997). Poland could be classified as using the discourse of ‘people as power’ that focuses on increasing fertility rates by policy means.
7. Marriages abroad are also complicated by the Polish authorities’ refusal to issue certificates of no impediments, if they are aware that the future spouse is of the same sex. This procedural problem is solved by receiving other civil status documents confirming that a person is not married.
8. Marriages are valid in Poland as to the form, if they comply with the formal requirements of the law of nationality, or the permanent or habitual residence of both spouses (Article 49(1) of Private International Law Act, adopted 4 February 2011, Dziennik Ustaw 2011, No 80, 432). This should in principle catch most of the situations, even though the principle of celebration of marriage, more usual in this area, would have been more favourable to validity. Nevertheless, it is the substantial validity that is the real battlefield and not the formal validity.
exceptional situations, namely those in which the application of a foreign rule would manifestly contradict the fundamental principles of law in that country.\textsuperscript{9}

The paper further addresses the impact of two relevant landmark decisions from the European Court of Justice and the European Court of Human Rights on Polish private international law. The paper first introduces these two most relevant cases and a narrative of same-sex spouses in Poland (section 2). It then looks into the confusion caused by the definition of ‘recognition’ in this area (section 3). In the subsequent section (section 4), the analysis connects Polish private international law and the ideology on gender roles, explaining how such ideology permeates private international law. Section 5 explains how the ‘wind of change’ can be observed in the relevant court practice in Poland after the recent decisions of European supranational courts, while section 6 looks into the potential development in the area of recognition of the effects of the civil status. Finally, section 7 provides conclusions.

2. Three case studies

2.1 The Coman case

A married couple considered moving to Romania, a State of nationality for one of the spouses. European Union (EU) citizens should be ensured the right to move freely with their family members, but the American spouse was denied entry and residence permit in this case. The reason was that the spouses are both men. Marriages of two men or two women may signify affection, intimacy, love and belonging for the couples, and these are considered values deserving the protection under the public policies in many European States. From the point of view of Romania, however, same-sex marriages were considered to threaten its national identity and contradict its public policy.\textsuperscript{10} A similar stance has been taken in five other EU Member States: Poland, Lithuania, Latvia, Slovakia, and Bulgaria.\textsuperscript{11}

In 2018, the European Court of Justice (ECJ) ruled against the reliance on ‘national identity’ as justifying the prohibition on recognising same-sex marriages:

\begin{quote}

an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned.\textsuperscript{12}
\end{quote}

From this paragraph alone, it can be grasped that the ECJ limited the effect to free movement of EU citizens, who had been married with third-country nationals, and had a so-called ‘genuine residence’ in the State of marriage, which was also different to his/her national-

\textsuperscript{10} See the rule on non-recognition of same-sex marriages lawfully concluded abroad under Romanian private international law (Article 227(2) of the Civil Code of Romania, Law no 287/2009). In the Coman case, the central legal issue was whether national identity and public policy can be used as a justification for non-recognition of a same-sex marriage. See Case C-673/16, Coman and Others, judgment of 5 June 2018 (Grand Chamber) (ECLI:EU:C:2018:385) paras 42–46.
\textsuperscript{11} The listed States provide no legal protection of same-sex couples’ family rights, embrace constitutional definitions of marriage in explicitly heterosexual terms, and provide for prohibitions of same-sex marriages. The discourse used is that homosexuality and national identity of the State are ‘mutually exclusive’. See Richard C M Mole, ‘Nationalism and homophobia in Central and Eastern Europe’ in Koen Slootmaeckers and others (eds), The EU Enlargement and Gay Politics (Palgrave Macmillan 2016) 99.
\textsuperscript{12} Case C-673/16, Coman and Others, judgment of 5 June 2018 (Grand Chamber) (ECLI:EU:C:2018:385) para 46.
Nevertheless, one can expect that the judgment should have significant effects on the recognition of family statuses of EU citizens in other contexts, where EU primary law is concerned. In other words, it is plausible to expect that human rights be protected not only with respect to third-country nationals but also with respect to married same-sex spouses who are EU citizens. If the justification of national identity was not acceptable with respect to third-country national’s rights, there is even less ground to consider it acceptable vis-à-vis EU citizens’ rights.

2.2 The Orlandi case
Six married couples asked their lawfully concluded marriages to be included into the civil registry in Italy. The Italian authorities refused because the couples are of the same sex and Italy at that time did not allow formalisation of same-sex relationships. According to Italian courts, same-sex marriages that had been lawfully concluded abroad did not have any effects in Italy and hence could not be registered.

In 2017, the European Court of Human Rights (the ECtHR) did not agree. The Court considered that Italy violated Article 8 on the right to private and family life of the European Convention on Human Rights (ECHR).14 At the same time, the ECtHR reiterated that ‘States are still free … to restrict access to marriage to different-sex couples.’15 The breach of the Convention concerned only the registration of marriages validly concluded abroad. Furthermore, the Court found that, due to a lack of consensus, States have a wide margin of appreciation to decide in which form they can include into civil registry the same-sex marriages.16 It is acceptable to downgrade such marriages to registered partnerships, accordingly. Note that registering a foreign marriage as a registered partnership does not necessarily constitute downgrading in all States. For instance, in Sweden prior to its gender-neutral marriage reforms, registered partnerships and marriages resulted in the same set of rights.17 In the Italian context, civil unions are associated with fewer rights and effects on civil status than marriages.18 Symbolical implications of the availability of registered partnerships, but not gender-neutral marriages, are also seen as implying a status that is less significant than a marriage.19

It must be underlined that both the ECJ in the Coman case and the ECtHR in the Orlandi case did not address the question of substantial marriage validity, but focused solely on specific issues in front of them. In the Coman case, the issue was the refusal to grant the residence permit on the basis of the lawful marriage concluded abroad, and in the Orlandi case, the issue was refusal to include the marriages lawfully concluded abroad into the civil registry.

2.3 A same-sex couple in Poland
The third case study is a narrative. It contains elements of various cases in Poland, most of which have been unsuccessful. This narrative is chosen because it is representative of the

13. Ibid, para 53.
14. Orlandi and others v Italy, Nos 2643/12, 26742/12, 44057/12 and 60088/12, ECHR 2017.
15. Ibid, para 192.
16. Ibid, para 205.
18. See Italian Law no.76/2016 on Same-Sex Civil Unions and De Facto Cohabitants. For literature in English on this legislation, see Marilisa D’Amico and Constanza Nardocci, ‘Homosexuality and human rights after Oliari v. Italy’ in Katharina Boele-Woelki and Angelika Fuchs (eds), Same-Sex Relationships and Beyond: Gender Matters in the EU (Intersentia 2017) 165–166.
19. Caroline Sörgjerd (n 17) 228–231.
cases so far. In the future, many more varied problems are likely to arise (see part 6 of this paper).

A same-sex couple applied to include their marriage concluded abroad and their child’s birth certificate in the Polish civil registry, and were refused by the State authorities. In such cases, the courts rely on the *ordre public*, a concept of private international law that is designed to protect against effects of application of foreign law that are incompatible with the basic principles of domestic law. In Poland, the Constitution is considered of crucial importance and its definition of the marriage is traditional or heteronormative. Marriage is only the union between the man and the woman (Article 18).20 Transcription of same-sex parenthood is considered as contravening *ordre public* in Poland, as well as an impossible ‘legal fiction’ due to heteronormative formulations in the civil status registry rules, which describe the child’s parents as the ‘father’ and the ‘mother.’21

3. What is cross-border recognition?

3.1 The great confusion

When reading the *Orlandi* case, one could get an impression that neither the applicants nor the judges were sure what the recognition for the purposes of this case entails. Some applicants claimed the registry of marriage will have *no effects*, and others that it will have *all effects* in Italy. The Court accepted that the registry will have no relation to substantial validity and no effects. Judge Koskelo had doubts about this, however, especially considering that effects of the civil status should be what really matters to people. Similarly, the *Coman* case left readers wondering whether the recognition that ‘the obligation to recognise does not undermine national identity’ was meant to extend to an interpretation under EU primary law.22 If that is so, that would mean that traditional family values can no longer be used to justify non-recognition of same-sex marriages that originate in other EU Member States. Alternatively, the effect of the case could be interpreted as restricted to residence permits, and that can barely be called ‘recognition.’ Both cases raise the same crucial question that the European supranational courts left aside: what does the cross-border recognition of marriage in private international law (PIL) actually entail?

3.2 Recognition of substantial validity of status is key in PIL

The lack of a common understanding among European States is arguably the reason why the European supranational courts ignored the issue of substantial validity of status, while at the same time using the vague concept of ‘recognition.’

In Poland, inclusion into the population registry of ‘foreign’ marriages lawfully concluded abroad has very little legal effects23 but it has a strong evidentiary power.24 The successful registration entails a *presumption* of substantial validity, which is validity as to the sub-

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22. Notably, the Free Movement Directive (Directive 2004/38/EC) did not apply to the situation in question *directly*, whereas EU primary law always applies to EU citizens moving across borders.
23. The inclusion into the registry has no legally constitutive or binding value, but it could be claimed to have the minimal civil status effects due to the fact that the civil status validly concluded abroad continues to be seen as a civil status in Poland.
stance of the marriage in the territory of the State. The presumption of validity can only be reconsidered by a court of law.\textsuperscript{25} Therefore, the transcription of a same-sex marriage as a ‘marriage’ in the Polish registry of civil status acts is still considered to be too risky.\textsuperscript{26} This is because the Government and many influential lawyers in Poland consider that same-sex marriage is an ‘absurd’ phenomenon that allegedly disrupts legal certainty.\textsuperscript{27} Once the civil status is included into the registry, it shall constitute an acknowledgement that, at least to a certain extent, the same-sex marriage validly concluded abroad should not remain a ‘legal fiction’ or ‘legal absurdity’ but it should be presumed to be a ‘truth.’

The acknowledgement of substantial – not just formal – validity of marriage is precisely the core thing that can be called ‘cross-border recognition.’ This recognition of marriages validly concluded abroad concerns only the situations with foreign elements. This area of private international law in principle allows toleration of institutes that could not be concluded within the country of recognition, for a greater purpose of harmony of solutions and international cooperation. For instance, a polygamous marriage validly concluded abroad may be recognised, although it cannot be concluded in that State, and the marriage concluded when spouses were under age can also be concluded.

Furthermore, private international law separates the recognition of civil status and the effects of that status. It can happen that the effects of that lawfully concluded status may be allowed, even though the status itself is not recognised as such or that question is not even considered. For instance, a polygamous marriage or a same-sex marriage can be refused recognition as a status but for the purposes of justice, it may be necessary to allow the succession or maintenance in case of need. An opposite situation (recognition of status but not of the effects) is not likely. That is to say, recognition that a marriage concluded abroad is a valid marriage should result in civil status effects in that State.

3.3 Determination of marriage validity differs from qualification

As a first step, it is necessary to determine whether the relation at stake is a marriage, an informal cohabitation (which is called ‘concubinage’ in Poland), or another type of civil rapport. Depending on such determination, different choice-of-law rules will apply. Judge Koskelo in the \textit{Orlandi} case considered that it was not possible to qualify same-sex marriages as marriages under Italian private international law, because Italy had no same-sex marriages in its substantive law. Hence, same-sex marriages could be expected to limp in private international law, as a ‘corollary’ to the substantive law.\textsuperscript{28}

My conceptual interpretation is different, even though the result may not be that different for the purposes of the \textit{Orlandi} case. I do not consider that private international law is simply a corollary to the substantive law of a country. Qualification for the purposes of private international law is never the recognition of a marriage concluded abroad. It is plausible to apply the choice-of-law rules on marriage validity to marriages that could not have been legally concluded under domestic law. In fact, even if the marriage is very faulty at first

\textsuperscript{25} Ibid, Article 3, second sentence.
\textsuperscript{26} According to Michał Wojewoda, direct transcription of same-sex marriages would result in an ‘internal explosion’ of the Polish system of civil status registration. He suggests, nevertheless, the inclusion of the same-sex formalised relationships in order to reflect the social and legal reality, only in the form of the non-binding additional notes, to be added to birth certificates in the Polish registry. See Michał Wojewoda, ‘Małżeństwa jednopłciowe i związki partnerskie w Polskim Rejestrze Stanu Cywilnego?’ (2017) 103 Studia Prawno-Ekonomiczne 146.
\textsuperscript{27} This has been stated, for instance, by a Judge of the Constitutional Court of Poland. See Marian Zdyb, ‘Pewność Prawa’ (2018) 11(1) Teka Kom Praw 428 and 443.
\textsuperscript{28} \textit{Orlandi} (n 14), concurring opinion of Judge Koskelo, para 17.
glance, choice-of-law rules on marriage validity are still normally applied (e.g. in cases of forced marriages, child marriages, etc.). The application of the choice-of-law rule by itself does not mean that the marriage will be found valid as to its substance, at the end of the day. That is for the applicable law to determine. Therefore, qualification in private international law does not provide the answer to the key question formulated in my paper: what happens with the substantial validity of the civil status of same-sex couples when they return to their country of origin?

If a Polish court would apply choice-of-law rules on marriage validity to a same-sex marriage (as it should, as with all statuses that appear to be marriages), it needs to distinguish between the formal and substantial validity of a marriage. The first substantial requirement for a marriage is the difference of sexes of the spouses (Article 1(1) of the Family and Guardianship Code). Article 48(1) of the Private International Law Act of Poland provides that substantial marriage capacity ‘shall be determined for each of the parties by the law of his or her nationality at the time of concluding the marriage.’ There are no separate rules on marriage validity for marriages concluded abroad. This means that if one of the spouses is a Polish national, the law of Poland is considered applicable, wherever he or she lives and concludes the marriage.

Article 7 of the Polish Private International Law Act provides that ‘foreign law shall not apply, should the effects of its application be contrary to the fundamental principles of the legal system of the Republic of Poland.’ This means that even if foreign law applies to the assessment of substantial marriage validity, it could be decided that the application of this law would bring to a result that contradicts ordre public. The court would then refuse to apply it and apply the Polish law requirements instead, which would mean that the marriage would have no effects. Section 5 further explains this reasoning in more detail.

4. How is nationality gendered in Poland?

4.1 The socio-political context

According to the Pew Research Centre, 32 per cent of Polish respondents supported same-sex marriage in 2017, and 47 per cent thought that homosexuality should be rejected by society. Hence, Polish society is polarised rather than united on the issue of homosexuality. Rejection of same-sex couples might be due to deeper and historical levels of culture. Historically, patriarchal family organisation has been much higher in Poland than in Northern and Western Europe. This ‘patriarchy index’ is the crucial factor for understanding the changes – or the lack thereof – in this region.

A correlation between heteronormative State policies with public attitudes is also possible. In sociological research, it has been found that heteronormative State policies have an impact on populations. People tend to internalise them when homosexuality is projected

as a threat to national identity.\textsuperscript{35} It should also be kept in mind that the majority of the population in Poland is Roman Catholic. This religion bears significance for the construction of national identity in Poland\textsuperscript{36} and is instrumentalised in State policies. In the Catholic ideology, the man and the woman complete each other through submission of the woman to the husband, just as the people submit to the State and to God. In contrast, a gender-neutral marriage is based on the idea that men and women are equal and they do not have inborn functions. Roles of spouses in the family are hence freely chosen and interchangeable rather than predetermined by gender.

4.2 The concept of marriage in the constitution

Article 18 of the Polish Constitution describes marriage in heterosexual terms. Consideration of the hierarchy of legal sources would result in direct application of Article 18 of the Polish Constitution. At the same time, this would not really help the courts to solve the problems at hand, where effects of civil status are concerned. For instance, if there is a matrimonial property dispute, an application of the constitutional norm and finding that the marriage has ‘no effects’ in Poland does not solve the dispute. The issue may need to be requalified as a dispute over contractual or non-contractual relations, if the court decides it does not concern family matters.

From the perspective of public international law, even constitutions are ‘domestic law’ and countries cannot rely on domestic law to refuse their international obligations. It is not self-evident that the Polish Constitution should reign over all private international law situations, when European public policy no longer protects the exclusively heteronormative concept of the marriage. As noted by Advocate General Wathelet in his Opinion on the Coman case:

\textit{The fact that marriage — in the sense exclusively of the union of a man and a woman — is enshrined in certain national constitutions cannot alter that approach.}\textsuperscript{37}

In private international law, differentiation of marriages concluded abroad from local marriages with some foreign element is very important.\textsuperscript{38} Public policy tolerance of the marriages already lawfully concluded abroad should be much higher. If only the institutes mirroring local family law and ideology are acceptable, the purpose of private international law is lost. Some Polish courts are already starting to understand that the constitutional definition is not the answer, as the case practice shows.\textsuperscript{39} It can also be stressed that the Polish Constitution provides for the marriage between ‘a man and a woman’ – one man and one woman, but that was not seen by scholars as a problem for the recognition of polygamous

\textsuperscript{35} Homosexuals and bisexuals are undermining the nation State and could even pose a threat to humanity, claimed Lech Kaczyński, former President of Poland, who died in a plane crash in 2010 and is treated as a national hero. Kaczyński’s legacy is continued by his twin brother Jarosław, de facto leader of Poland and influential politician in the region. For contextualisation of similar movements in Europe, see Roman Kuhar and David Paternotte (eds), Anti-Gender Campaigns in Europe: Mobilizing against Equality (Rowman & Littlefield 2017).

\textsuperscript{36} Lucian Turcescu, ‘Poland’ in Lavinia Stan and Lucian Turcescu (eds), Church, State, and Democracy in Expanding Europe (Oxford University Press 2011) 117, 133.

\textsuperscript{37} See Opinion of Advocate General Wathelet in case C-673/16, Coman and Others, delivered on 11 January 2018 (ECLI:EU:C:2018:2) para 39.


\textsuperscript{39} Supreme Administrative Court of Poland, judgment of 10 October 2018, ref no OSK 2552/16. See further in this paper for an analysis of this case.
Heteronormativity is the key reason why polygamous foreign marriage can be seen as acceptable and same-sex marriage is not. The polygamous marriages do not challenge traditional gender roles in the way that same-sex marriage does. They comply with the traditional social norms that fill in the legal gaps left for interpreting whether or not to recognise ‘foreign’ forms of marriages.

4.3 The gendered rationale in Polish private international law

The Private International Law Act was adopted in 2011, and at the time of adopting the rule on nationality, same-sex marriages were discussed. The prevalent opinion was that the recognition of same-sex marriages needs to be prevented at all costs, and even the rule on nationality was seen as too flexible. A legal rule that would deny even primary characterisation of same-sex marriages as ‘marriages’ was discussed. However, the choice-of-law rule referring to the law of nationality was finally adopted as a compromise. Ordre public analysis could still apply in the cases where the Polish choice-of-law rule would point to a foreign law of nationality that allows same-sex marriages.

These heated discussions were driven by concerns regarding the protection of traditional family values in Poland, which tend to permeate recent discussions on family and gender roles. The whole geopolitical region has been affected by the image of a clashing civilizational conflict between ‘the decadent West v the moral East’. According to the traditionalist view that is used for nationalist-populist purposes in Poland, men and women have ‘natural’ gender roles that complete each other, and one of their functions is to ensure the continuity of the nation by procreation. It must be stressed that Poland has one of the lowest fertility rates in Europe. This could explain why the future of the nation is seen as dependent on procreation, while gender equality is increasingly seen as a threat to pronatalist policies. For instance, as formulated by Polish bishops, the European project involves a superimposed ‘gender ideology’, a part of which is the legalisation of a same-sex marriage. In his 2016 address to the Polish bishops in Krakow, the Pope also warned about the ‘ideological colonization’ of gender. Jarosław Kaczyński, de facto leader of Poland in

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41. Ibid, 71.
42. Ibid, 71–72.
43. Slightly differently from the Romanian legal rule on non-recognition of same-sex marriages, it was suggested to include a substantive law definition in the Private International Law Act of Poland. The rule was supposed to create two effects: first, to repeat that marriage can only be constituted between a man and a woman; and second, to ensure that the choice-of-law rule on substantial validity (referring to nationality) does not apply to same-sex couples. See Maria Anna Zachariasiewicz (n 40) 72.
45. Mole (n 11) 100.
46. Yuval Davis (n 6) 29.
48. Pronatalist policies are the policies aimed at fostering fertility rates in the relevant State.
50. The address of Pope Francis in Poland stated: “In Europe, America, Latin America, and in some countries of Asia, there are genuine forms of ideological colonization taking place. And one of these – I will call it clearly by its name – is the ideology of ‘gender’”. See Address of His Holiness Pope Francis (Kraków, 27 July 2016) <http://www.vatican.va/content/francesco/en/speeches/2016/july/documents/papa-francesco_20160727_polonia-vescovi.html> accessed 3 March 2020. The term ‘gender ideology’ is used widely in debates over family values, and in documents of the Russian Orthodox and Roman Catholic churches.
2019, also connected ‘gender’ and ‘that entire LGBT movement’ with a foreign threat: ‘This is imported, but they today actually threaten our identity, our nation, its continuation, and therefore, the Polish state.’

This post-colonialist style, as used by the State leaders, the Church, and the Pope, is an instrument for the refusing the recognition of human rights to the minority group (LGBT). Needless to say, it goes against the very purpose of the post-colonialist critique that is designed to protect human rights. The normative idea is that all Polish nationals must be heterosexual and Polish marriage laws should always apply to them, in order to ensure that all Polish nationals are heterosexual, at least in the eyes of the law.

5. The winds of change after the Coman and Orlandi cases

5.1 First restriction of ordre public
In its judgment of 10 October 2018, the Supreme Administrative Court of Poland adopted an interesting decision regarding the status of the child with two same-sex parents. The case concerned the transcription of a birth certificate of a four-year-old boy with two mothers, in accordance with a birth certificate issued in United Kingdom. The court ruled that this inclusion of the birth certificate into the Polish registry should not be considered against the Polish ordre public. It was obligatory to transcribe the birth certificate in the registry of Poland, in order for the child to receive various rights and freedoms. In order to receive a passport and be eligible to social security, the child had to be included in the civil status registry, in accordance with the new version of the Law on Civil Status Acts in force from March 2015. This is a first positive decision after a long series of cases where children with same-sex parents were simply refused inclusion into the registry in Poland.

The reasoning of the Supreme Administrative Court of Poland was based on the principle of the best interest of the child and non-discrimination. The court considered that Polish law does not allow children to become ‘illegal persons’ due to their parents’ homosexuality. The key elements for such reasoning clearly rested on the Polish law and its basic values. The decision lacked a more elaborate analysis of private international law, but instead focused on administrative law (on the fact that transcription is mandatory) and the best interests of the child, as understood in Poland. The decision also was restricted to establishing ties between the child and the birth-giving mother. The birth certificate was transcribed with only one mother, while the second parent in the registry remained ‘anonymous.’ The second mother was mentioned only in the margins of the entry in the registry.

The Polish court also based its reasoning on the EU law (EU Charter on Fundamental Rights) and the European Convention on Human Rights. The Coman case, described in the second case study above, was also directly relied upon. This is an example of how human

52. Judgment of Supreme Administrative Court of Poland, 10 October 2018, ref no OSK 2552/16.
53. See n 24. Note that the Law was amended in 2018 (Dziennik Ustaw 2019, 2294). However, the relevant articles analysed in this paper did not change.
54. For a discussion of these older cases, as well as more recent ones with a negative outcome, see Anna Wysocka-Bar, ‘Same-sex parentage and surrogacy and their practical implications in Poland’, ConflictofLaws.net (12 February 2020) [http://conflictoflaws.net/2020/same-sex-parentage-and-surrogacy-and-their-practical-implications-in-poland/] accessed 23 February 2020. At the time of writing, the Supreme Administrative Court of Poland adopted a resolution in the case of cassation (2 December 2019, II OPS 1/19), in which it denied, on ordre public grounds, the transcription of a birth certificate of a child with same-sex parents.
rights have an impact on changing court practice. At the same time, human rights standards were internalised rather than treated as an external ‘stick’ forcing Polish courts to change position.

5.2 The constitution is no longer the answer
Registration of same-sex couples’ marriages lawfully concluded abroad has not been successful so far. However, I consider that some shift in reasoning is occurring. Prior to the Coman and Orlandi cases, courts in Poland simply relied upon the constitutional provisions to invoke the ordre public exception. After these cases, there is a rising awareness that the provision of the Constitution that privileges the heterosexual marriage in Poland should not be applied in a policing manner. In classical private international law theory, even prior to the evolutionary impact of human rights’ developments, the ordre public safeguard in Poland was considered to be reserved to extreme cases. The difference in content of foreign law from the local law and the difference in values than those in the local ideology should not automatically invoke the ordre public exception. In contrast, it should apply in casu, on a case-by-case basis, and not in a systematic and policing manner.

In 2019, the Regional Administrative Court ruled on a case concerning a same-sex couple who requested the registration of their marriage lawfully concluded in Madeira. The court in principle agreed with the applicants that the heteronormative definition of marriage in the Polish Constitution (Article 18) should not preclude the registration of same-sex formalised relations. A longer citation might be useful for understanding the change of reasoning:

In this context, the content of Article 18 of the Constitution does not constitute an independent obstacle to the transcription of a foreign marriage certificate, if the foreign law provides for the institution of same-sex marriage. The above-mentioned provision does not prohibit the legislator to legislate on the status of same-sex or different-sex couples, who for personal reasons do not want to enter into a marriage in its traditional meaning. The court notes, however, that the decisive factor in this respect is the [political] will of the legislator, which is the only competent institution to adopt the relevant legislation in order to implement the provisions of the Constitution.

As the Polish legislator has so far not adopted any rules that would allow the transcription of same-sex marriages as, for instance, registered partnerships, and State authorities can only act in accordance with the existing law (Article 7 of the Constitution), the transcription was impossible, according to the Polish court.

The fact that, under Polish law, the concept of same-sex registered partnership does not exist, could have also spoken for the transcription of same-sex marriages as ‘marriages’. Note that the lack of any registration was considered as a breach of a positive obligation under Article 8 of the European Convention on Human Rights in the Orlandi case. If we accept that same-sex marriages need to be registered in some form, as the ECtHR has already established, and the domestic law provides no other means (registered partnership or civil union), then they should be registered as marriages.

55. See Anna Wysocka-Bar (n 54).
57. In this regard, literature on the use of ordre public in Poland builds on ideas that are common in private international law of Western European countries. See, for instance, Maksymilian Pazdan, Prawo Prywatne Miedzynarodowe (Wolters Kluwer 2017) 283.
58. Judgment of the Regional Administrative Court in Warsaw, ref n IV SA/Wa 2618/18 (author’s translation).
To my understanding, despite the negative conclusion of the case, it is significant that the Polish Constitution was no longer seen as trumping the recognition of same-sex marriages that are lawfully concluded abroad. This shift in reasoning means that, in principle, Article 18 does not constitute the blanket norm on non-recognition. It remains to be seen whether this Regional Administrative Court’s decision, which is not a binding precedent, will be upheld in the future case practice. It must also be understood that with the current Government and Parliament in Poland, it is not likely that the legislator will adopt same-sex registered partnership or civil union law. While it does not exist, the courts are unlikely to fill in the legislative omission.

6. Outlook to the future: what about the effects?

6.1 Significance of the effects of civil status

The significance of the effects of limping family relationships cannot be overestimated. A limping marriage by itself is not necessarily problematic when couples continue to live together, their relationship is flourishing, and neither of the spouses is sick or dying. Refusal to include a marriage into the local registry is not a question of a lost family home or a connection with one’s child or partner (yet). In law, harm is understood in a narrow sense. Vulnerability of same-sex relationships only translates into a problem that the law might potentially acknowledge, when something happens – for instance, a relationship comes to an end and the need for protection of rights becomes necessary.

Effects in different fields of law, for instance, family law effects (name, matrimonial property, divorce) need to be decided upon separately under specific rules on that situation. There are different choice-of-law rules and connecting factors for their determination in Poland, for instance, on matrimonial property, names, and so on. Although such cases have not arisen in the Polish court practice, I consider it significant to present a short outlook to future problems that are inevitable.

Usually, it might be expected that the effects of the civil status will follow the determination of such status. However, paradoxes are possible. A marriage may have some separate effects even without the recognition of the status itself. For instance, the surviving spouse of a limping marriage may be allowed to succeed after their spouse, provided that they had legitimate expectations and acted in good faith. Even in spite the lack of the legal protection of same-sex relations as family, the current Polish substantive law provides a homosexual surviving partner the right to succession of tenancy.59 In private international law, recognition of status and recognition of the effects of the status are two different questions. Certain choice-of-law rules exist to regulate the validity of status and other choice-of-law rules are used to determine the law applicable to effects, such as family name, personal relations, or matrimonial property relations.

6.2 Incidental question on marriage validity

In Polish private international law doctrine, it has been consistently suggested that in cases when the issue of marriage validity arises as an incidental question, *ordre public* should not apply.60 These commentaries were not provided in the context of same-sex couples, but in the general theory on the so-called incidental question, a doctrine in private international

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59. This happened after the decision against Poland of the ECtHR, see Kozak v Poland, no 13102/02, ECHR 2010.
60. Maria Anna Zachariasiewicz (n 40) 102.
law that becomes relevant when certain conditions are met. First, the main question in the
dispute (eg division of matrimonial property) should not be regulated by Polish substan-
tive law, and private international law rules of Poland and the foreign law applicable to the
main issue should point to different connecting factors regarding marriage validity, and
finally, relevant substantive family laws need to reach different results, such as allowing or
prohibiting same-sex marriage.

Therefore, in future cases that relate to incidental question of the substantial validity
same-sex marriages, there are certain theoretic arguments that ordre public should not apply.
That does not mean that all effects will automatically be granted. Still, if the Polish courts
follow the general theory on private international law also in the case practice to come,
same-sex marriages should have some effects in Poland.

6.3 Court decisions on effects
Another possibility for some effects of same-sex marriages in Poland comes through the
recognition of court decisions. There is no space to elaborate in detail in this paper. Never-
theless, it must be kept in mind that in the EU, the principle of mutual recognition applies
and is implemented in the area of civil matters. A number of EU Regulations are directly
applicable in Poland – for instance, in the area of maintenance61 and succession.62 Although
these Regulations do not apply to substantial validity of marriages, they also do not allow
undertaking the substantive review of a court decision coming from another EU Member
State. Therefore, provided that a Member State court adopts a decision on inheritance or
maintenance, and it needs to be enforced in Poland, in principle, it should not be con-
tested.

6.4 Attenuated ordre public
There is a lot of room for development in the future in realising that the effect of ordre public
needs to be attenuated in many situations. That applies not only to same-sex parenting, but
also to recognition of same-sex marriages lawfully concluded abroad. For instance, a same-
sex couple could be merely tourists in Poland, and a denial to recognise their marriage as
valid could result in denial of justice. In certain cases, litigation in another country can be
impossible due to jurisdictional rules and practical reasons.

If neither of the spouses are nationals of Poland, it is not reasonable to claim recognition
of the marriage for the purpose of legal remedy could breach the basic principles of Polish
law. Both European supranational courts have already confirmed, albeit in different con-
texts, that the recognition of a same-sex marriage for a specific purpose does not infringe
the public policy of the State concerned, even if the spouses are nationals of the State where
the recognition is sought.63
7. Concluding remarks
My main goal in this article was to look at the impact of the European supranational courts’
decisions on same-sex marriages from the perspective of private international law in a State
like Poland that prohibits same-sex marriage. Admittedly, the development of European
human rights standards could use some awareness of the private international law method
and what the recognition in PIL actually entails. Issuing a residence permit on the basis of
marriage is a very limited recognition, if any. Inclusion of the same-sex marriage lawfully
concluded abroad into the civil registry may imply de facto recognition in some States, but
not all. Qualification in private international law is not recognition, but the very first step of
the analysis, which may involve the analysis under the ordre public safeguard in cases where
foreign law is deemed applicable. Recognition for the purposes of private international law is
the confirmation of the validity of the status acquired abroad as to its substance. In addition,
a certain effect can be recognised in situations where the status validity was not disputed, or
the analysis concluded that the particular effect does not manifestly infringe ordre public.

Despite the lack of coordination of private international law and human rights, the
gradual development of the case law of the European supranational courts has already
impacted this field. This is true even in Poland, which ‘protects’ the privileged position of
heterosexual marriage in its legal system. The Polish policy has an effect of gendering nation-
ality by implying that Polish nationals cannot possibly conclude same-sex marriages, where-
ever they live. In so doing, Polish law imposes a rationale of traditional gender roles to all
nationals. It is not possible, from the perspective of Poland, to be Polish and gay, lesbian,
bisexual at the same time, even if the same-sex marriage was perfectly lawfully concluded
abroad. However, the justifications for national identity and public policy exception as the
basis for non-recognition of marriages lawfully concluded in another State need to comply
with the European ordre public. After the Coman and Orlandi cases, the traditional privi-
leging of heterosexual marriage as a matter of public policy in domestic law has been chal-
lenged. It is no longer acceptable as a systemic and general justification of non-recognition
of the status lawfully acquired abroad.

The change of approach in Polish case practice is rather subtle and the European law and
case practice of the European supranational courts is used as only an external argument, in
addition to the domestic law and reasoning. Although the civil status of same-sex marriage
or same-sex parenthood is still not recognised in Poland, same-sex couples’ children can at
least no longer be treated as illegal persons in Poland. There is also a growing realisation that
the ordre public safeguard should not be used in a policing manner, and that the constitu-
tional provision on marriage in Poland does not justify a principled refusal to recognise all
lawfully concluded same-sex marriages, no matter the circumstances.

It remains to be seen whether courts in Poland will be able to adopt more nuanced and
elaborate decisions in the future. At least in theory, private international law allows the rec-
nognition of certain effects of the civil status, even if the status itself is limping in Poland. For
instance, the ordre public safeguard should not apply when the substantial marriage validity
arises as an incidental question. Furthermore, provided that close proximity to Poland does
not even exist – for instance, a couple is only in Poland as tourists or are foreign nationals
– there are no grounds to refuse recognition of all effects of the status, where such recogni-
tion of the particular effect is needed for considerations of justice.

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