A Prematurely Hailed Victory

Trojan's Limited Effects of Same-Sex Marriage Transcription Without Legal Recognition

Aleksandra Dzięgielewska

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Last year, the Court of Justice of the European Union (CJEU or the Court) issued a seminal ruling concerning cross-border recognition of same-sex marriages contracted within the EU, obliging Poland to acknowledge such unions in the civil register. The ruling polarized the country's already heavily divided society, leading to both conservative backlash and increased mobilization of pro-LGBTQ human rights community. Although the gravity of *Trojan* is undeniable and the ruling marks a significant addition to the recent advancements in same-sex couples' protection by the European Court of Human Rights (ECtHR), given Poland's legal architecture, marriage transcription alone will not enhance protection of same-sex couples. No rights granted to heterosexual couples by virtue of marriage will be conferred on same-sex couples following the transcription. For this to happen, recognition of same-sex marriages in the civil register must go in tandem with the adoption of a (long overdue) statutory regulation of same-sex unions.

The aftermath of Trojan

The ruling in the case *Trojan* was groundbreaking for several reasons. First, the CJEU obliged Poland to recognize in its civil register same-sex marriages legally contracted in another EU Member State by Union citizens exercising their freedom to move and reside. It did so, even though Poland's domestic law not only does not allow for same-sex marriages but does not provide for any form of recognition or protection of such relationships. The implications of such refusal of recognition were considered broadly by the CJEU, as infringing not solely upon the exercise of the rights granted by EU law, but as causing "serious inconvenience for those citizens at administrative, professional and private levels" (para 51), impeding both regulation and further enjoyment of their family life strengthened abroad (para 53). In this vein, the Court reiterated at several points in the ruling that the absence of same-sex marriage recognition deprived one of the applicants of a derivative right to health insurance and precluded an update of his surname in a land register.

Second, by comparing the situation of same-sex couples seeking transcription of their marriage certificate to that of different-sex couples (paras 74-75), the CJEU considered the case through the lens of discrimination on the grounds of sexual orientation. The Court expanded its previous case law by declaring the prohibition of such discriminatory treatment, following from Article 21(1) of the Charter of Fundamental Rights, to constitute a general principle of EU law (para 70).

The ruling did not come as a surprise to anyone familiar with the recent jurisprudence of the ECtHR repeatedly condemning Poland for its refusal to transcribe foreign marriage certificates and its denial of issuing marriage eligibility certificates to same-sex couples intending to marry abroad. The decision was nevertheless welcomed as confirming the binding nature of Poland's transcription responsibilities under EU law and rendering them directly applicable.

On the conservative side of the political scene, the ruling's intentionally misleading interpretation suggesting that Poland is now forced to introduce same-sex marriages has caused widespread backlash. Similarly, the decision seems to have caught the government off guard given the mutually exclusive positions expressed by its members concerning the "if" and "how" of the ruling's implementation.

The amendment

Eventually, in mid-January, the government put forth a draft executive regulation amending the official forms of civil status documents, introducing gender-neutral formulation of "the first spouse" and "the second spouse" instead of the previous gendered "husband" and "wife" in marriage certificates.

As a sidenote, a corresponding amendment to birth certificate forms with respect to parent-related data could solve a similar issue pertaining to the transcription of birth certificates of same-sex couples' children. Being refused such recognition now, they face obstacles in obtaining identity documents.

Notably, the official justification enclosed to the draft executive regulation does not mention the CJEU's ruling, claiming instead that the amendment is necessary to bring the regulation in line with the Law on Civil Registry. The relevant provisions of the latter contain gender-neutral formulations which means the gendered expressions introduced on the lower, regulatory level contradict the statutory law. It is striking that the true reason for changing the executive regulation is not addressed, as if the government feared the public reaction to it being voiced explicitly.

While the CJEU's ruling is directly enforceable and can be relied upon by same-sex couples in front of the relevant domestic authorities, the amendment is nevertheless needed for the transcription to be technically feasible. As of now, it is not possible to enter the personal identification number (PESEL) of two persons of the same sex into the digitized civil registry system because gender is encoded in PESEL, and the system – which is designed to allow data of two people of the opposite sex to be entered – does not permit a man's PESEL to be typed in the field where a woman's PESEL should appear, and the other way around.

What remains ambiguous is the envisioned personal scope of transcription obligation, that is, which marriage certificates will be transcribed in the domestic civil register. The most intuitive answer would be all of them, but such a solution is questionable given the substance of the CJEU ruling and the government's approach. Specifically, this question concerns marriages contracted abroad by persons with a permanent residence in Poland. In *Trojan*, the CJEU ruled on the recognition of a marriage concluded in another Member State in which the couple has "created or strengthened a family life" (para 78). The question is whether a same-sex couple who travel abroad solely to get married also "create or strengthen" their family life there. The Court stated that contracting a marriage is indeed relevant in this context (para 50), but it is not clear whether it is sufficient. On the other hand, the *Trojan* ruling is not clear enough on that matter to unequivocally exclude such cases from transcription.

That said, some government officials have already announced that transcription would not extend to the cases of so-called "same-sex marriage tourism". Had such an approach developed in administrative practice, it could be considered as amounting to discrimination on the grounds of sexual orientation by allowing transcription of marriage certificates of different-sex couples that do not permanently reside outside of Poland while refusing such recognition to same-sex couples. Such handling of transcription seems especially problematic given that opposite-sex couples can get married legally in their country of residence, while same-sex couples do not.

Marriage certificate transcription is not enough

When allowed, regardless of its scope and application, marriage certificate transcription will have negligible effects in the Polish legal order and will not substantially advance the rights of same-sex couples. Given the absence in Polish law of any form of legal recognition or protection of same-sex couples, whether through marriage or by means of a registered partnership, transcription does not automatically confer any derivative rights on same-sex couples and thus takes on a merely symbolic meaning. Hence, contrary to what might be suggested by the CJEU's broad framing of the negative implications of transcription refusals, even when transcription is granted, same-sex couples will not be able to rely on the legal status resulting from marriage.

In *Trojan*, the CJEU emphasized repeatedly that recognition extends to enabling married same-sex couples to pursue their family life and continue benefiting from their legal status (para 52). The Court hinted at the concrete domains adversely affected when recognition is denied: access to health insurance, registration of surnames (para 50), and enforceability of obligations between spouses and third parties (para 52). While the amendment to the regulation on civil documents will enable transcription, it will not allow same-sex couples to pursue family life and benefit from the legal status conferred by marriage to the extent indicated in the ruling. This is because the legal effects of the ruling are limited to requiring transcription for the purpose of securing enjoyment of the rights granted by EU law (para 61) and do not extend to securing marriage-related rights as such.

For same-sex couples to be able to enjoy such legal protection domestically, statutory regulation of (at least) civil unions must be adopted. This is where the recent ruling of the CJEU converges with the rich jurisprudence of the ECtHR, specifically with the requirement formulated therein obliging Poland to establish an appropriate legal framework for the recognition and protection of same-sex couples. In the cases *Przybyszewska and Others v. Poland*, *Formela and Others v. Poland*, *Andersen v. Poland*, and *Szypuła and Others v. Poland*, the Strasbourg Court ruled that the lack of any form of domestic recognition of same-sex couples amounts to noncompliance with a positive obligation stemming from Article 8 of the European Convention on Human Rights. The Court has also stated that the protection of same-sex couples must be "adequate" and clarified, in broad brushstrokes, that the statutory regulation must cover such areas as maintenance, inheritance, taxation and mutual assistance. Consequently, implementation of the *Trojan* must go hand in hand with the introduction of registered partnerships into the domestic law.

The adoption of the relevant law was among the ruling coalition's leading electoral promises and must be considered long overdue. The latest draft was submitted to the Sejm at the end of December, and the parliamentary proceedings were scheduled for January but have been postponed. Even though Poland remains one of the last four EU countries where the status of same-sex couples remains unregulated, the adoption of the law is still considered controversial, even among the ruling coalition. This is evident when considering the fuss around the name of the law. Initially, the title of the act referred explicitly to registered partnerships but, as a concession to the conservative part of the coalition, it was changed to an act of "status of the closest person", hiding the core purpose of the regulation.

Finally, it must be highlighted that while the implementation of the *Trojan* ruling and the adoption of the law on civil unions are necessary to guarantee basic protections to same-sex couples, they also have a profound symbolic meaning in the broader context of Poland's protracted transition from illiberalism back to the rule of law. Public assessment of the government's overall agency hinges on its ability to deliver on the promise to finally recognize same-sex relationships and grant them legal protection at least comparable to that enjoyed by heterosexual couples.

ABOUT THE AUTHOR

Aleksandra Dzięgielewska

Aleksandra Dzięgielewska is an Assistant Professor in the Department of Constitutional Law at Kozminski University in Warsaw.Aleksandra Dzięgielewska is an Assistant Professor in the Department of Constitutional Law at Kozminski University in Warsaw.

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