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LEGAL STATUS OF LGBT PERSONS

I. HISTORICAL BACKGROUND

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1. SAME-SEX MARRIAGES

1.1 POLAND

In the early modern period, there were no laws regarding same-sex marriages in Poland. The only source of law was German law, which was applied in many cities. According to its provisions, homosexual acts were punishable by death. After World War I, three different criminal codes coexisted in the three former partitions of Poland until 1932, and the regulations concerning LGBTQ+ individuals were as follows:

- In western Poland, around Poznań, the German code (Art. 175) criminalised only sexual relations between men.
- In the centre, the Russian code criminalised only anal intercourse between men (referred to as pederasty/мужеложство).
- In the south, the Habsburg criminal code (Art. 129b) penalised all same-sex relations as fornication (Unzucht/nierząd).

After parliamentary debates and legislative work, the 1932 Penal Code was introduced, ultimately decriminalizing homosexual acts. This meant that Poland became the second country in Europe to decriminalize consensual homosexual acts between adults, which occurred precisely in 1932.

The current legal status regarding same-sex marriages in Poland does not provide for the possibility of such unions. According to the 1997 Constitution of the Republic of Poland (Art. 18), marriage is defined as a union between a man and a woman, which is often interpreted as excluding the possibility of same-sex marriages. Although there are interpretations within the current legal system suggesting that same-sex marriages could be concluded, citing the fact that they are not explicitly prohibited in the existing provision, such an interpretation is not applied in practice.

1.2 FRANCE

France has a rich history of legal regulations concerning LGBTQ+ individuals, encompassing many groundbreaking moments. Here are some key events and legal changes:

- In 1791, the revolutionary penal code decriminalised homosexuality in France, which had previously been criminally prohibited.
- Significant changes occurred in the 1980s and 1990s. In 1981, François Mitterrand legalised homosexual relations between adults, and in 1999, the age of consent was unified for same-sex couples.
- France became one of the first countries to introduce civil unions for same-sex couples. This allowed homosexual couples to legally cohabit and access certain rights and benefits, although they were not fully equivalent to marriage.
- In 2013, the Marriage Equality Act of May 17, 2013, introduced same-sex marriages in France, allowing homosexual couples to enter into civil marriages with all the rights and obligations arising from marriage. Alongside same-sex marriage, this law also enabled homosexual couples to adopt children.

1.3 THE LEGAL SITUATION IN POLAND

Currently, the only way to formalise a relationship in Poland is through marriage. It is worth describing the situation in our country by referring to the case of Przybyszewska and others against Poland, brought before the European Court of Human Rights at the request of 5 same-sex couples in long-term relationships. These same-sex unions independently wanted to complete the formalities at registry offices and be joined in marriage.

In accordance with the legal situation in Poland, the authorities rejected their applications on the grounds that marriage can only be between a woman and a man. This means that there is no form of legal recognition and protection for same-sex relationships. The situation is unfavourable when one considers that there is no proper recognition of their unions, for example in terms of taxation, social rights and family law. Accusers in the process proved various statistics which show growing Polish people's fellow for same-sex couples and legislative gaps regarding same-sex couples which relate to material aspects such as maintenance, taxation, inheritance but also those immaterial such as rights and obligations of mutual help.

The European Court of Human Rights made it clear that the Member States were free to define the nature of the legal arrangements that should have been available to same-sex

couples. Member States cannot refuse legal recognition and protection. This means that they are obliged to provide adequate protection. The Polish legal framework can't be considered to meet the basic needs of recognition and protection for same-sex couples in stable, long-term relationships. Partners cannot regulate essential issues related to their life together, such as property issues, maintenance, taxation or inheritance. In most cases, same-sex unions are meaningless when it comes to the judiciary or administrative authorities.

The European Court of Human Rights consistently does not support policies and decisions that reinforce the heterosexual majority's prejudices against sexual minorities. Homophobic stereotypes or dominant social attitudes adopted in state tradition cannot legitimise and reinforce differences in treatment on the grounds of sexual minority. Negative or even hostile attitudes of the heterosexual majority cannot deprive same-sex relationships of fundamental recognition and legal protection.

The European Court of Human Rights did not deny the government's assertion that protecting the traditional family is generally a justified reason for different treatment. It also ruled that there are no grounds to believe that providing legal recognition and protection to same-sex couples in stable and long-term relationships would harm traditional families, their future, or their integrity.

According to the "Rainbow Europe Map and Index," which shows the legal and political situation of the human rights of lesbians, gays, bisexuals, transsexuals, and intersex people (LGBT) in Europe, prepared by the organization ILGA-Europe, Poland ranks 41st out of 49 European countries. In the Przybyszewska and others ruling, it is stated that Poland breached the Convention and has an obligation to provide legal protection for same-sex couples. The form of protection should be appropriate and effective. In relation to this, it is hoped that many positive changes can begin in Poland regarding queer rights.

2. SAME-SEX ADOPTIONS

2.1 EUROPE

Over the last few years the European Commission has prepared multiple bills regarding LGBT+ persons within the so-called „EU Equality package”. The package consisted of plenty of opinions, recommendations, resolutions and regulations, including a resolution concerning the rights of LGBT+ people. In December 2022 the Commission adopted a proposal for a regulation

aimed at harmonising the rules of private international law relating to parenthood within the European Union. As it is stated: „[o]ne of the key aspects of the proposal is that the parenthood established in a Member State of the EU should be recognised in all the other Member States, without any special procedure". These regulations were supposed to be a solution for the, unfortunately still present, lack of laws regulating adoptions made by same-sex couples in countries of the European Union. Unfortunately the legislative process was not proceeded and the laws never came into force.

However, the European Court of Human Rights in 2012 in a judgement („Adoption, Homosexuality and the European Convention on Human Rights: Gas and Dubois v France") ruled that conditioning the right to adopt on sexual orientation is a violation of the European Convention on Human Rights. Since the Court's judicature is binding only upon countries which have ratified the Convention, it does not directly influence neither the EU's legislature, nor the Court of Justice of the European Union's judgments, as the Union is not one of the signatories. Nonetheless, taking into consideration the solemnity of the Convention itself and the significance of the judgments of the Court of Human Rights, they are a vital source of inspiration for the EU legislation and they set an example for resolving cases concerning human rights.

The first country in Europe, and at the same time in the world, which has legalised same-sex adoptions were the Netherlands in 2001. Since that moment, this honourable circle has been enlarged by: Sweden, Spain, Belgium, Norway, Denmark, France, Malta, Luxembourg, Austria, Portugal, Finland and Germany, and by countries from outside of the European Union: the United Kingdom, Iceland, Andora and Ireland. It is also worthy to mention Slovakia, Croatia, Estonia, Italy and Switzerland, in which, although adoption by same-sex couples is not allowed by law, it is lawful to adopt one's partner's child in such relationships. In all the cases mentioned, the right to adopt is directly linked with the process of legalising same-sex marriages or establishing civil partnerships, which would be available for such couples.

2.2. POLAND

According to the studies conducted on recommendation of the European Parliament the Polish appear to be one, after the British and the German, of the most willing to choose the adoption method out of all the citizens of the EU. However these statistics should not only be a source of pride, but also a wake-up call to reflect on the laws regulating adoption. In Polish legislation the process whereby a person assumes the parenting of a biologically not their own

child is called ‘przysposobienie’ and it is regulated in the Family and Guardianship Code in the articles 114-127. According to Polish law, adoption can be made by either one person or two people, but they have to remain married (‘przysposobienie wspólne’).

At this point a question ‘is there a place in the polish legal system for same-sex couples?’ arises. Unfortunately the answer is really pessimistic. In Poland marriages between people of the same gender are not allowed and what follows is that they cannot adopt children together, as a couple. The only way for them to be able to create a family is for one of them to adopt a child. However, in the eyes of the law solely the person adopting would be acknowledged as a legal guardian, while their partner would remain a stranger deprived of any parental rights.

Additionally, troubles remain when same-sex couples adopt children outside Poland, in a country, where it is legally allowed and they are trying to get it recognised in Polish documents. Unfortunately, there are no legal instruments, based on which a guardianship court could rule such adoption valid, because it could not support its judgement with adequate laws, clearly stating that only a man and a woman are perceived as parents.

The Latest study conducted by IPSOS shows that 41% of Poles support the legalisation of same-sex adoptions, whereas 44% are strongly against. It is, however, an 8 percentage point increase in support compared to data from 2021. Regrettably, insofar as the situation seems to be getting more optimistic when it comes to the society’s views, this cannot be said about the politicians, because over the recent years all the bills regulating same-sex adoptions were rejected before they could reach the Senate. The new governing powers seem to have a more favourable approach towards legalising civil partnerships and same-sex adoptions, which can be well-illustrated by the amount of bills currently being put on the back burner. Notwithstanding, one of the powers in the governing coalition has openly stated their unwillingness to support such regulations, which is putting in doubt the probability of them being passed.

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II. SAME-SEX PARTNERSHIP

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1.PARTNERSHIP VERSUS MARRIAGE

The general differences between a civil partnership and a marriage can be divided into several categories. It is worth bearing in mind, however, that civil partnerships do not exist everywhere, and in each country where they can be concluded there may be some discrepancies in terms of the formalities, the entitlements associated with the conclusion of such a union.

The first category is formality and registration. Marriage is a formal legal union that requires registration before a registrar or before a clergyman. It requires a marriage certificate. The registration of a civil partnership often requires going to an office and drawing up a civil partnership certificate, and entering it in the register (requirements vary from country to country). In terms of rights and obligations, the spouses have a default community of property, unless they have established a prenup. They automatically inherit from each other according to the law, are entitled to alimony in the event of divorce/separation, can make medical decisions on behalf of their spouse, and can often benefit from joint health insurance or other benefits. In a civil partnership, joint property ownership is usually not automatic, the partners regulate these issues themselves, as in inheritance - they are not automatic heirs, a will is necessary. Alimony usually does not accrue to the partner after separation. There is also no automatic right as to medical decision-making, if partners wish to access such information they must agree to share medical information, or give a power of attorney which also entitles them to make medical decisions access to joint health insurance is also limited.

The dissolution of a marriage requires a formal divorce, whereas a civil partnership can be dissolved without court proceedings. The social context is also relevant to this topic. Marriage is considered the traditional form of relationship, which is widely accepted. Partnerships, on the other hand, are sometimes taken less seriously than marriage and are considered by some to be a modern invention.

2. WHAT DOES BEING IN A PARTNERSHIP PROVIDE?

The formalisation of a relationship through marriage provides a number of important benefits that significantly improve the life situation, as well as the legal situation of the partners.

The introduction of civil partnerships into the Polish legal order would bring such possibilities to people who, for various reasons, cannot or do not want to get married, but who would like their relationships to be recognized under Polish law.

The basic rights and privileges of those in formal partnerships are familiar from the legislation of other countries, including France and the United Kingdom. In France, a civil partnership is called a "Pacte Civile de Solidarité" (PACS). It does not require a lot of paperwork and can be entered into by the couple at the civil registry office, or by making an appropriate consensual declaration to a notary public. The main benefits are the ability to settle taxes jointly, which is advantageous when the partners' incomes differ. In addition, they can take advantage of tax benefits provided for married couples. Partners can also inherit from each other (if so stipulated in their wills) and jointly purchase real estate, and a PACS agreement between them specifies the rules for the division of assets in the event of separation. Nevertheless, they are also obliged to support each other materially - as in marriage, spouses have maintenance obligations to each other. In addition, they can also enjoy social benefits, such as leave in case of illness or death of a partner. And in the case of hospitalisation, they have the right to access medical information, to visitation, and to be a medical representative, and ultimately to make medical decisions.

It should be noted, however, that partners who are in a PACS relationship do not have automatic inheritance rights unless specified in a will, and do not have the same rights to adopt children as married couples.

In the current discussion in Poland on the legalisation of this form of unions, perhaps the most frequently voiced argument is that the main beneficiaries of this solution would be primarily those in homosexual partnerships, however, these rights and privileges could also be enjoyed by those in heterosexual unions who, for various reasons, would not yet wish to marry. Thus, legalising civil partnerships would benefit everyone regardless of gender and sexual orientation.

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4. LEGAL SITUATION IN THE EUROPEAN UNION

Despite the lack of possibility in Poland to formalise a relationship without marriage, many European countries provide for such regulations in their legal systems. Country-specific regulations on partnerships vary. For example, issues such as what such a relationship entitles to and whether a particular country recognizes partnerships concluded abroad are regulated differently. In some EU Member States, registered partnerships are treated as equivalent or comparable to marriages. Typically, countries that recognize same-sex marriage also recognize same-sex registered partnerships, which are contracted in other countries. However, in countries that do not allow same-sex marriages, but which have introduced some form of formal partnership, the, same-sex marriage abroad usually provides the same rights as a registered partnership.

The first country to legalise partnerships was Denmark in 1989. This process naturally began to include other European countries. To this day, they have been successively introduced by Sweden, Iceland, the Netherlands, France, Belgium, Germany, Finland, Portugal, Luxembourg, the United Kingdom, Slovenia, Andorra, the Czech Republic, Switzerland, Hungary, Austria, Ireland, Liechtenstein, Malta, Croatia, Andorra, Cyprus, Greece, Estonia, Italy, San Marino, Monaco, Montenegro.

Although Latvia is still mentioned among the member states that do not accept partnerships alongside Poland, Bulgaria, Lithuania, Romania and Slovakia, it should be pointed out that while Latvia has legalised partnerships, the rules have not yet entered into force. On November 9, 2023, the Latvian parliament voted for changes in the notarial law legalising the conclusion of a partnership by people of the same sex. It is a contract concluded with a notary public, which is not tantamount to marriage. The provisions allowing for the conclusion of a partnership between persons of the same sex will enter into force on July 1, 2024.

In France, as already mentioned, the partnership operates under the name “Pacte Civile de Solidarite” (PACS), a civil solidarity agreement. It is reported that less than a month and a half

after the legalisation of the law, 6,211 such unions were registered throughout France. Although the French legislator wanted to give the opportunity to formalise same-sex relationships, today, the vast majority of existing PACS are heterosexual couples. Despite statistics indicating that partners part a little more often than spouses, it is the desire to marry (between the same people) that is the main reason. In common use, there is even the phrase “se pacser” used as an alternative to “get married”, and PACS itself is described as a civil engagement for heterosexual couples.

In Spain, civil partnerships may be homosexual or heterosexual, registered or unregistered. There are no national regulations. However, there is a Home Partnership (“Pareja de hecho”), which is a stable relationship between two people who are not united by marriage. This involves certain rights similar to those of spouses (for example, the right to obtain information about the health of a partner in a hospital). Domestic Partnership is in the act under the name ‘union de hecho’ and is considered as a union of two people, regardless of their gender, living together, with an emotional relationship analogous to marriage. Persons entering it may not be married at the same time and must be entered in the register of the autonomous community concerned. Each autonomous community has different rules on the register, and the effects of registration vary, from the ordinary declaration to the actual equivalence with marriage. Some autonomous communities do not provide for such a regional register.

In Croatia, a partnership is the union of an unmarried woman and an unmarried man, which lasts at least three years, or provided that during their life together at least one child was born from it. If these conditions are met, the provisions of the Family Act to which the spouses are subject also apply to the partnership of a woman and a man. Croatian law does not provide the possibility of registering a partnership. The court decides each time before determining the nature of the partnership, whether all its conditions have been met. Same-sex relationships are governed by the Life Partnership Act. According to this Act, a life partnership is a family relationship of two persons of the same sex entered in the register kept by the competent authority.

Until September 30, 2017, in German law, according to the law on registered partnerships, there was an institution of a registered partnership, which was the equivalent of a marriage for people of the same sex. By virtue of the act of 20 July 2017, the possibility of same-sex marriage was allowed, so the institution of a registered partnership became superfluous. The same rules apply to these marriages as to heterosexual marriages.

On 1 November 2004, the law on the legal effects of certain partnerships entered into force in Luxembourg. The declaration of partnership creates rights and obligations between the partners, which in many respects resemble the rights and obligations of the spouses. The provisions of the 2004 Act were supplemented by the act of 3 August 2010, which provides for the recognition of partnerships concluded abroad, granting them the same rights, partnerships concluded in Luxembourg.

In Norway, partnership issues are regulated by samboere law. It applies to people who live together, and therefore registered in the Norwegian register of population records at the same address. Samboere is a union of “two people over the age of 18 who have not married or run a joint household with third parties but live together in a relationship that resembles a partnership". It is reported that every fourth couple in Norway is a samboere. However, Norwegian law does not treat civil partnerships on an equal footing with marriage.

In Hungary, the rules on property relations between spouses apply accordingly to registered partnerships (only possible between persons of the same sex). Since 1 January 2010, unions between persons of the same sex and different sexes have equal rights to register a union with a notary public. However, such registration does not create new rights and obligations, but makes it easier to prove the existence of a relationship.

In Greece, Law 3719/2008 introduced the concept of “free partnership agreements”, which can be concluded only by adults of different sexes. However, in Austria and Slovenia, registration of heterosexual partnerships is not provided for. Same-sex couples can register a civil partnership that produces the same effects in property relations as marriage. In the Netherlands, two persons of the same or different sex can enter into marriage and form a registered partnership.

The provisions of the Lithuanian Civil Code on living without marriage registration and registered partnerships have not yet entered into force. Romanian law also does not recognise or regulate registered or unregistered partnerships. Similarly, registered and unregistered partnerships are not recognised in the Slovak legal order.

Of course, we must not forget that in Poland, over the years, too, there have been draft laws on partnerships. At the end of 2003, a project was presented that would regulate the issue of partnerships, following the example of the French PACS law. It predicted the possibility of entering into partnerships by both same-sex and opposite-sex couples. In 2011, after a year of activity by the Initiative Group for Partnerships, another proposal for a law was created. This

project provided for two natural persons, remaining “actually in common life” specifying “their mutual obligations of a property or personal nature, in order to organise a common life”. In 2012, the Sejm received three more draft laws on civil unions, and in 2018, the draft law on a partnership for same-sex couples was the first to provide for the possibility of adopting a partner/partner's child. In 2020, however, not only another draft law on civil unions was submitted, but also the first draft law on marriage equality.

III. LEGAL GENDER RECOGNITION

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1. EUROPEAN UNION - SELECTED COUNTRIES

Legal gender recognition is available in all European Union member states (with the exception of Hungary - since 2020). Both the form and criteria for the recognition vary from country to country. The change of gender designation by transgender people in official documents can be done through self-determination or through a judicial or administrative procedure.

Self-determination is considered to be the approach that reflects the highest human rights standards - applicants can correct their metric sex through a written statement, application or declaration submitted to a competent authority (such as a municipal registrar). This accessibility of the procedure, along with the absence of medical requirements or third-party intervention, strongly favours streamlining the gender recognition process. The approach was first introduced in Denmark in 2014, followed by Malta and Ireland in subsequent years. Belgium, Luxembourg and Portugal have also enabled similar procedures.

By contrast, the judicial procedure is longer, more costly and more complicated, especially in countries such as Bulgaria, Cyprus, Lithuania, Latvia, Romania, Italy and Poland, where the laws do not specify specific requirements for changing metric sex. In the case of the last two countries, over the years judicial jurisprudence has developed some criteria for such an arrangement, while in the other countries the judge is left with a wide margin of discretion. In contrast, countries offering an administrative procedure include Slovakia and Slovenia.

Both forms, however, often involve medical and psychological requirements. Some countries, including Slovenia, Germany, Croatia, Sweden and the Netherlands, require a psychological diagnosis, the opinion of a psychiatrist and sometimes other medical specialists

(such as an endocrinologist). Countries such as Slovakia, the Czech Republic, Poland, Finland, Austria, Estonia, Spain and Italy, in addition, require physical intervention - sex correction surgery, sterilisation or the initiation of hormone therapy.

Among other requirements, the aspect of marital status also stands out. In countries where same-sex marriages are not recognized, a divorce case must first be conducted - a situation that applies to Poland, Greece and Italy. Although Bulgaria, Lithuania, Latvia and Romania do not explicitly stipulate formal divorce requirements, in practice, unions prior to gender adjustment lose their legal force, as national law also does not recognize same-sex marriages (or other formal partnerships).

2. POLAND

There are no regulations in Polish law that directly address the procedure for legal gender recognition. This does not mean, however, that transgender people are deprived of the legal possibility of correcting their metric sex - they can pursue this in a civil lawsuit, suing their parents.

This possibility is provided by Article 189. of the Code of Civil Procedure, which states that "the plaintiff may demand that the court determine the existence or non-existence of a legal relationship or right, if he has a legal interest in it." ." What can be derived from this provision is that anyone who needs it can go to court to determine gender, however, two parties to the dispute are necessary in such proceedings. Therefore, it is necessary to sue one's own parents (regardless of the age of the plaintiff), and if neither parent is alive, the court appoints a guardian - usually a complete stranger to the plaintiff.

This practice, in the absence of adequate regulations, has been developed by the courts, and such cases in Polish courts function under the name of sex determination cases.

In principle, there is no top-down medical documentation that must be presented. The basis of the lawsuit, however, is "the diagnosis by a sexologist of a gender identification disorder, defined as the incompatibility of mental sex with a person's anatomical sex characteristics. "[1]

Throughout the proceedings, the court examines whether the transgender person's sense of belonging to the gender being determined is permanent. Thus, it very often turns out that it is necessary for the plaintiff to present additional medical documentation, i.e. opinions

of sexologists and psychologists. Courts may also appoint additional expert witnesses for this purpose, who can confirm the diagnosis of permanent belonging of a transgender person to the established gender.

However, it should be noted that gender determination processes are governed solely by previous court decisions, as well as the individual approach of judges - for this reason, it is impossible to predict the course and length of the process. There are cases where a transgender person has succeeded in agreeing on metric data only on the basis of the psychological opinion presented, but the course of the cases and the required documents vary significantly depending on the court and the experts the court may appoint, as well as on the parents or legal guardians - the parents, as a party to the case, may try to prolong the course of the case to the detriment of their child (for example, by requesting the inclusion of additional medical opinions)

After obtaining a civil court ruling in a gender determination case, a transgender person can exchange documents for those containing a changed gender designation and, consequently, new personal information (such as a change of name, surname and PESEL number). A problem, however, is the lack of an obligation for employers to exchange employment certificates, which translates into difficulties in documenting one's past career.

Importantly, a transgender person can undergo the relevant surgical operations only after the judgement establishing gender becomes final. These procedures are not possible to carry out before the verdict, as they result in serious damage to a person's health (as defined in Criminal Code), and the mere consent of the patient concerned will not exempt the doctor from criminal liability. On the other hand, the initiation of hormone therapy is possible once the diagnosis of gender dysphoria itself has been obtained from a sexologist psychiatrist.

The diagnostic process itself has not been regulated either. It has become customary to go for a sexologist's opinion in order to get a diagnosis, however, psychological and psychiatric opinions will be needed first. Specialists require various additional tests - blood, urine, EEG, MRIs, visits to a urologist, gynaecologist and so on. Moreover, sexology itself is not reimbursed by the National Health Service so the whole process generates additional costs. The way the specialists themselves work also varies. It still happens that doctors rely on outdated knowledge or approach the patient with unfounded prejudice. A transgender person may hear, for example, that "she is not a transgender woman at all, but a "female gay." Hormone therapy can be started with a treating physician (sexologist) with an endocrinology specialty, or with

an endocrinologist himself after diagnosis. Hormone drugs can be prescribed, but the procedure itself has not been standardised in any way, so the endocrinologist may refuse such therapy. There are also cosmetic procedures that a transgender person can undergo. Such a practice does not require medical documentation and can be widely used.

The legal gender recognition procedure developed by Polish courts, undoubtedly violates the dignity of individuals, by not respecting international criteria of speed and respect of the private and family life of transgender people. The legal procedure itself was the most frequently cited reason for not attempting legal gender correction (25% of respondents)[2] In 2014-2015, a law simplifying the process of legal gender correction was drafted to introduce a less complicated procedure, eliminating the requirement to sue one's own parents, in order to provide greater psychological comfort to those going through the process, but it was nevertheless vetoed by the President in the fall of 2015. To this day, no legislation has been introduced to regulate the issues in question, pushing transgender people to the margins of society.