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Challenges of the Polish Law Concerning Marriage and Same-Sex Relationships Against the Background of the Spanish Experience

[Wyzwania polskiego prawa odnoszącego się do małżeństw i związków osób tej samej płci – na tle doświadczeń hiszpańskich]

Abstrakt

Małżeństwo i rodzina są chronione na poziomie konstytucyjnym. W celu zabezpieczenia podmiotowego kształtu małżeństwa polski ustawodawca w Konstytucji RP z 1997 roku zdefiniował małżeństwo jako związek kobiety i mężczyzny (art. 18). Regulacja ta – a zwłaszcza sposób jej sformułowania – jest jednak źródłem wątpliwości co do możliwości instytucjonalizacji małżeństw osób tej samej płci (czy ewentualnie innych związków). Rodzi się bowiem pytanie: czy możliwa jest regulacja prawa powszechnego dopuszczająca małżeństwa (czy ewentualnie inne związki) par tej samej płci, czy też norma konstytucyjna wyklucza taką możliwość? Pojawiają się również dalsze pytania – o możliwość jakiejkolwiek innej formy instytucjonalizacji związków osób tej samej płci. Celem niniejszego artykułu jest zatem ukazanie wpływu przepisów konstytucyjnych na możliwość ustawowego uregulowania małżeństwa lub innych związków osób tej samej płci. Na tym tle rozważono, czy w Polsce istnieje konstytucyjny zakaz zawierania małżeństw lub innych związków osób tej samej płci, który uniemożliwiałby ich ustawową instytucjonalizację. Przedstawiono, jak wpływają na tę kwestię uregulowania międzynarodowe, w tym europejska Konwencja praw człowieka i podstawowych wolności oraz Międzynarodowy pakt praw obywatelskich i politycznych, a także regulacje unijne zawarte w Karcie praw podstawowych.

Ustawodawstwo hiszpańskie stanowi dla prawodawcy polskiego punkt odniesienia i możliwy wzór do naśladowania w kontekście rozwiązywania tego typu dylematów legislacyjnych; przy stosunkowo zbliżonych do polskich rozwiązaniach konstytucyjnych małżeństwa i związki partnerskie osób homoseksualnych są tam bowiem od dawna zinstytucjonalizowane.

Słowa kluczowe: pojęcie małżeństwa, konstytucyjna ochrona małżeństwa, rodzina, związki osób tej samej płci, małżeństwa osób tej samej płci.

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Introduction

The issues concerning the family and its protection find a place in many contemporary constitutions. This is the case e.g. in Spain (art. 39 and art. 32 of the Spanish Constitution), this is also the case of the Polish Constitution of 2 April 1997[1]. In the latter act in the text of art. 18 we can read that 'marriage as a union of a man and a woman, family, maternity and parenthood are under the protection and guardianship of the Republic of Poland'. Such constitutional provisions may also e.g. define marriage and at the same time guarantee legal protection and protection of the state to the couple. The doctrine of constitutional law often indicates that such regulations are a consequence of other constitutional norms, including the provision of Article 1 of the Polish Constitution, which stipulates that 'the Republic of Poland is a common good of all citizens'[2], or the provision of Article 2 of the Spanish Constitution, which stipulates that 'the Republic of Poland is a common good of all citizens'. On the other hand, it is argued that their justification may be found in such norms as Article 30 of the Polish Constitution or Article 10 of the Spanish Constitution, which refer to inherent and inalienable dignity as a source of freedom and human and civil rights. [3]

These constitutional solutions are often detailed in the constitutions themselves, which is the case in Poland for example, where the provisions of Article 70 paragraph 3, Article 71 or Article 72 of the Constitution of the Republic of Poland are a kind of *lex specialis* in relation to the content of Article 18 of the Constitution.[4] Obviously, the influence of constitutional solutions on the status of a family may be much broader, and lead from the solutions establishing the principle of equality of rights of a man and a woman in family life, through the legal protection of family life and parental rights, the right to provide children with upbringing and education,

[1] Constitution of the Republic of Poland of 2 April 1997 [Konstytucja Rzeczypospolitej Polskiej], Dz.U. 1997 nr 78, poz. 483.

[2] P. Bucoń, *Konstytucyjne podstawy wspierania rodziny przez władze publiczne w Polsce*, „Przegląd Prawa Konstytucyjnego", 2019, 4, p. 114.

[3] M. Bidziński, M. Chmaj, *Konstytucyjne gwarancje ochrony małżeństwa, rodziny i rodzicielstwa oraz równości a Konwencja Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej* [in:] H. Izdebski, M. Komorowski, M. Pisz (ed.), Gwarancje ochrony konstytucyjnych praw i wolności jednostki, Warszawa 2016, p. 3.

[4] *Ibidem*.

protection of children's rights or guarantees of inheritance. Such broad regulation of the family at the constitutional level proves one thing – the issue of the family and safeguarding its status is one of the priority issues for the legislator. It also appears to be firmly rooted in the constitutional law of individual states, lying in principle at the foundation of their constitutional traditions.

Currently, however, in contemporary Europe, including Spain and Poland, there are tendencies to expand the catalogue of rights and to grant institutional protection to other, less traditional unions of natural persons, including same-sex unions. The discussion in this respect, at least for the past dozen years, has given rise to various doubts which reach, in the first place, to constitutional norms and their interpretation and, further, to provisions of a lower rank than the constitutional one. In this context the question arises as to whether the constitutional regulations allow for e.g. marriages and other institutionalised same sex unions to be regulated by an ordinary law or whether the constitutional norms exclude such a possibility. This problem has still not been unambiguously solved in Poland, while an interesting legal regulation was introduced in Spain a dozen or so years ago. For this reason, in this paper the authors will consider the admissibility of the institutionalization of same-sex unions in Polish law and the Spanish legislation will be used as a reference point for the Polish legal system.

Marriage, same-sex unions and the Constitution of the Republic of Poland

Reflections within the specified scope should begin with an indication that resolving the above dilemmas requires first of all a discussion on the definition of marriage and its scope of meaning because only in this way will it be possible to examine to what extent the constitutional norms may limit the legislator in the scope of the possibility to institutionalise marriages and other same-sex unions.

Marriage is the subject of research of many scientists, mainly psychologists and sociologists. Other scholars, including demographers, ethnologists, historians, educators and, of course, lawyers, also conduct their research on this topic. The wide interest in issues related to marriage is

due to the many consequences that are associated with the formalisation of a union.[5]

On the grounds of constitutional law, the notion of marriage as defined in the provisions of the Constitution, such as Article 18 of the Polish Constitution, has been controversial in doctrine and judicature. They are primarily rooted in the definition itself and its impact on the possibility of standardising marriage and homosexual unions.[6]

Three positions remain the most widespread in this area.

The first, conservative position, defines marriage as a union of the opposite sexes – a man and a woman[7], while excluding the formalisation of homosexual unions.[8] It is based on one of the opinions that "a same-sex union cannot be a marriage and it is not only about reserving the very name 'marriage' for the union of a man and a woman, but about the prohibition of equating a same-sex union with marriage; a union between persons of different sexes who have not married and a union between persons of the same sex cannot 'be protected and safeguarded by the Republic of Poland'; a union between persons of different sexes who have not married cannot have the same effects as marriage or similar effects as marriage, in particular as a result of preferential treatment of marriage".[9]

The supporters of such a view emphasise that it is a consequence of the legislator's actions who, by introducing into the Constitution a provision defining marriage as a union of a man and a woman, at the same time introduced a mechanism that 'was to play the role of an instrument preventing the introduction of such a regulation into the Polish law'. In this way, the legislator secured the system of law against legal regulation of the possibility of concluding same-sex marriages and various types of unions which (regardless of their name) were to fulfil the role of marriage.[10] Therefore, the introduction of such a regulation into the legal or-

[5] A. Kotlarska-Michalska, *Małżeństwo jako związek, wspólnota, instytucja, podsystem i rodzaj stosunku społecznego*, „Roczniki Socjologii Rodziny", 1998, 10, p. 49 and nn.

[6] P. Tuleja, *Komentarz do art. 18 Konstytucji RP* [in:] P. Tuleja (ed.) Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warszawa 2019, p. 81.

[7] More on this subject: E. Ozorowski, *Małżeństwo jako związek mężczyzny i kobiety*, „Rocznik Teologii Katolickiej", 2003, 2, pp. 7–24.

[8] I. Kleniewska, Zarejestrowane związki partnerskie i małżeństwa osób tej samej płci za granicą a prawo polskie, Warszawa 2008, p. 26.

[9] Opinia Biura Studiów i Analiz SN 10.05.2012, BSA SN I-021-123-124/12, p. 8.

[10] A. Mączyński, *Konstytucyjne podstawy prawa rodzinnego* [in:] P. Kardas, T. Sroka, W. Wróbel (ed.), Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla, Warszawa 2012, p. 772.

der by the legislator would go beyond the obligation to protect the freedom and privacy of persons in same-sex unions and, moreover, would privilege them on the basis of the fact of remaining in a relationship, the costs and burdens of which would remain borne by society as a whole.[11]

The second – moderate – position on the issue recognises marriage only as a union between a man and a woman, but, importantly, approves of homosexual unions. The essence of this view is the thesis that the provisions of the Constitution concretise only the culturally and socially established notion of marriage as a union of a man and a woman. Consequently, on the one hand, the legislator has defined the possible personal variant – a man and a woman – for the purpose of marriage, and thus ruled out the possibility of concluding homosexual marriages.[12] On the other hand, the argument that the change of social conditions and legal environment would enable entering into homosexual marriages is denied. Thus, the possibility to perform homosexual marriages would only be admissible after the amendment of the constitutional provisions.[13] On the other hand, unions other than marriage, and moreover unions between two or more people, are not prohibited by law.[14]

On the other hand, the third – liberal – standpoint in its approach to the issue of homosexual marriages and partnerships does not exclude either the former or the latter. Its idea is based on the assumption that the institutionalization of same-sex unions is not prohibited by the Constitution, and what is more, it is supported by the axiology and the principles of the Polish Constitution. Therefore, "The institution of same-sex partnership or same-sex marriage could not violate constitutional regulations firstly because it concerns an autonomous legal issue, and secondly because it does not exclude and does not affect the scope of care and protection to which marriage as a union between a man and a woman is entitled."[15] In Poland, against the background of the provision of Article 18 of the Con-

[11] B. Banaszkiewicz, Problem konstytucyjnej oceny instytucjonalizacji związków homoseksualnych, „Kwartalnik Prawa Prywatnego", 2004, 2, pp. 382 and 383.

[12] P. Winczorek, Komentarz do Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r., Warszawa 2008, p. 54.

[13] P. Tuleja, Komentarz... op. cit., p. 81; M. Nazar, *Projekt kodeksu rodzinnego i postulaty gałęziowego wyodrębnienia prawa rodzinnego*, „Przegląd Sądowy", 2019, 7–8, p. 20.

[14] W. Borysiak, *Komentarz do art. 18 Konstytucji RP* [in:] M. Safjan, L. Bosek (ed.) Konstytucja RP, tom 1, Warszawa 2016, p. 484.

[15] M. Drapalska-Grochowicz, *Kilka uwag na tle statusu prawnego związków jednopłciowych w polskim ustawodawstwie*, „Młody Jurysta", 2019, 2, p. 71.

stitution, E. Łętowska and J. Woleński point out, for example, that firstly, the interpretation of Article 18 viewing marriage as a union of a man and a woman does not exclude marriages with a different structure of subjects. Secondly, the quoted provision orders to treat heterosexual marriages, family, maternity and parenthood in a special way because they are under a kind of qualified protection guaranteed by the highest act in the state – the Constitution of the Republic of Poland. What is important, the authors stress that the content of Article 18 of the Polish Constitution has been incorrectly formulated, which is evidenced by the question of what alternative forms of maternity or parenthood may exist which do not benefit from this special state protection. This line of reasoning allows the indicated representatives of science to build the thesis that Article 18 of the Polish Constitution is in its essence a programmatic norm addressed to public authorities, justifying the postulates of expanding or not reducing the level of protection. At the same time, no prohibition arises from this norm, nor from its location, to grant legal protection to competitive or alternative associations, either at the constitutional level or at the level of ordinary laws. Thus, the authors deny any prohibition built upon the provision of Article 18 of the Polish Constitution, stressing that the norms of this provision indicate only a preference for the family built upon a heterosexual union in the form of protection by the Republic. Protection is in fact inherent in every right, freedom or status stemming from statutory law. In this light, the status of marriage as a union of a man and a woman is constitutionally privileged and should be given special protection in case of conflict with other norms.[16]

The above views of science have become a reference point for several observations. Undoubtedly, by formulating Article 18 of the Polish Constitution, the legislator has unambiguously determined the subjective form of marriage. In other words, the literal wording of this norm does not leave any doubts. However, in the assessment of the scope of this content, the intention of the legislator as regards the formula included in the Constitution of the Republic of Poland should also be taken into account. It should be remembered that work on the political system in Poland continued in the 1990s. Those in turn brought about the beginnings of legal regulations and protection of homosexual marriages, civil partnerships

[16] E. Łętowska, J. Woleński, *Instytucjonalizacja związków partnerskich a Konstytucja RP z 1997 r.*, „Państwo i Prawo", 2013, 6, pp. 22 and 23.

and LGBT rights in many European countries.[17] Based on the above, the question arises: Why did the legislator include the definition of marriage in the Constitution of the Republic of Poland when it was a stagnant concept in the social consciousness? The only answer to the question posed in this way is the desire to prevent the possibility of concluding marriages with other than male-female subjectivity. In other words, the introduction of the provision of Article 18 to the Constitution of the Republic of Poland was the fulfilment of a kind of social expectations regarding the protection of marriage as a union of a man and a woman.

The above allows us to state that the second position presented above is the most convincing one. The intention of the legislator, by defining the subjectivity of marriage in the text of Article 18 of the Polish Constitution, was to prevent the legal possibility to conclude marriages with a different subjectivity than that of a man and a woman. Thus, it gives grounds to derive a ban within this scope. Nevertheless, this ban does not cover unions in a different form than marriage. In science, one can come across the expression that the legal state "tolerates" them within the protection guaranteed to citizens for their private sphere of life.[18] The possibility of entering into such unions should be considered in Poland on the basis of other norms of constitutional rank, including the provisions of Article 31 Section 1 and Article 47 of the Polish Constitution. In doctrine, these provisions are the basis for the formulation of the State's obligation to guarantee to every individual the right to develop and realise their private life freely. These guarantees, in turn, require a certain degree of institutionalisation of relations in both heterosexual and homosexual relationships.[19]

The Polish Constitution, as it may be assumed, allows for the institutionalization of same-sex relationships other than marriage. However, constitutional permission is not tantamount to the possibility of institutionalization itself. In this respect, a law is necessary which would regulate this issue as *lex specialis*. Thus, if Poland decided on such institutionalisation, an appropriate law would have to be passed. However, this has not happened to date. The legislator has not decided to institutionalise such unions.

[17] P. Tuleja, Komentarz..., *op. cit.*, p. 81.
[18] W. Borysiak, *Komentarz...*, *op. cit.*, p. 484.
[19] P. Tuleja, *Komentarz...*, *op. cit.*, p. 82.

The international and EU aspects

In the discussion on the future of the possibility of concluding same-sex unions in Poland it should be borne in mind that their guarantor is not only constitutional provisions. International solutions related to the protection of human rights must be taken into account. Undoubtedly, in Europe the most important act in this respect is the European Convention on Human Rights.[20] The issue of institutionalisation of same-sex unions in the domestic law of the Constitution is therefore not without international legal protection. In this regard, the European Court of Human Rights has also expressed its opinion in a comprehensive manner. Some arguments against this background should be examined.

It may be recalled that the first case in which the content of the Convention was interpreted in the direction of a deeper acceptance, and thus legal protection of homosexuals, is the case of *Schalk and Kopff v. Austria* (application no. 30141/04 of 24 June 2010). The applicants were a couple of homosexual men who, due to the lack of national legislation in Austria, were not granted a marriage licence. In its 2010 judgment, the ECtHR took the view that Article 12 of the Convention protects the right of a man and a woman to marry and consequently the right to found a family. Thus, it did not accept the applicants' argument that Article 12 of the Convention should be a guarantee of the right to marry for same-sex couples. On the contrary, even though the Court considered that Article 12 had not been violated, it found that the applicants' relationship fell within the concept of "family life" on an equal footing with a relationship between two persons of different sexes. At the same time, it also gave priority to the States parties to the Convention to assess the needs of their society, in particular taking into account the important status of marriage in the culture of the country concerned. However, it is worth mentioning that already during the proceedings before the ECtHR, Austria introduced legal regulations allowing for the possibility of entering into homosexual unions.[21]

[20] Convention of Human Rights and Fundamental Freedoms done at Rome on 4 November 1950, as amended by Protocols Nos 3, 5 and 8 and supplemented by Protocol no. 2, Dz.U. 1993 nr 61, poz. 284.

[21] ECTHR judgment of 21 October 2015 in the case of Oliari and Others v. Italy, applications no. 18766/11 and 36030/11. P. 35. Wider commentary in this regard: A. Grabarczyk, *Prawo strony do przeniesienia do rejestru stanu cywilnego małżeństwa jednopłciowego – uwagi na tle orzecznictwa Europejskiego Trybunału Praw Człowieka w Strasburgu*, „Studenckie Zeszyty Naukowe", 2019, XXII, 40, p. 33 and nn.

With time, however, the European Court of Human Rights decided that the lack of regulations on same-sex unions is a violation of Article 8 of the ECHR. This was the position taken by the ECtHR in its judgment in *Oliari v Italy* (judgment of 21 July 2015, application no. 18766/11). It should be emphasised here that the aim is not so much to standardise same-sex marriages, but to introduce legal regulations that would allow for the formalisation of same-sex relationships, not necessarily in the form of marriage.

It should be recalled that in this case, three homosexual couples tried unsuccessfully before the Italian courts to assert their right to marry. The complainants argued that Italian law prevents them from marrying, in violation of the Italian Constitution and the ECHR. They based their position on the allegation of discrimination on grounds of sexual orientation, justifying it by the impossibility to conclude a formal union between persons of the same sex. It is worth noting that Italy has recognised the right of same-sex couples to enter into civil unions, but this was not possible in all regions, only in selected ones. In addition, even in regions where such a possibility existed, it had only a symbolic meaning. The Court resolved this issue in favour of the applicants, thereby upholding the position expressed in *Schalk and Kopff v. Austria*, holding that Italy had violated Article 8 as regards the right to private and family life. It was reasoned that there was a deepening will in European society for the increasingly full realisation of the rights of homosexuals, including the protection of private and family life. In the judgment, the Court pointed out that homosexual unions form a family which, in accordance with the provisions of the Convention, requires the protection and legal recognition of the States Parties to the Convention. By the same token, these states no longer have the same broad discretion in this area as before. This freedom is restricted by Article 8 of the Convention. Therefore, the lack of legal regulation allowing for the formal conclusion of same-sex partnerships, in accordance with the interpretation of the ECtHR, constitutes a violation of the right to private and family life. It was in this respect that the Court considered that Italy had failed to comply with its positive obligation to respect the applicants' right to family and private life. This obligation should be fulfilled by Italy by introducing appropriate legal regulations regarding the possibility of institutionalizing civil partnerships. It is worth supplementing that this judgment became the basis for

the introduction in Italy in 2016 of a law allowing same-sex partnerships, with which Italian law was brought into line with Convention standards.[22]

Another case in which the Court has replicated the above position is *Orlandi v Italy* (judgment of 14 December 2017, Chamber (Section I), Application no 26431/12). This case is treated as a result of the judgment of the ECtHR, in the case described above, *Oliari*. The complainants in the dispute were 6 same-sex couples who had married outside Italian territory. Before filing the complaint, the applicants had made unsuccessful attempts to register their union in Italy, and had been refused by the authorities. However, what is important in this case is that this refusal occurred before the introduction of the legislative changes resulting from the *Oliari* case. In that case, the Court reiterated the need to protect homosexuals' right to private and family life so that they can enjoy the full rights guaranteed under the ECHR. It was argued that a homosexual couple has the right to formalise their relationship, and that the opposite – leaving the relationship outside the framework of the law – would constitute a violation of the Convention in terms of Article 8.[23]

It follows from the above that against the background of the Council of Europe's law and the provisions of the ECHR, the institutionalisation of same-sex unions poses a legislative challenge, and the lack of an applicable normative solution in a given state may violate the provisions of the ECHR.

In turn, it should be noted that in European Union law there are no legal regulations which would oblige the Member States to institutionalise same-sex unions. In this respect, Member States have autonomy in family law. The provision of Article 9 of the Charter of Fundamental Rights of the European Union formulates only the guarantee of the right to marry and to found a family according to the relevant national regulations. The Convention Secretariat has made it clear that the Charter does not require the recognition of same-sex marriages. A similar conclusion was drawn by the Human Rights Committee on the basis of the jurisprudence developed on the basis of the International Covenant on Civil and Political Rights and the jurisprudence developed by the Committee on Economic Rights based on the International Economic Pact. In the light of both covenants,

[22] Judgment of the ECTHR of 21 October 2015 in Oliari and Others v. Italy, Application nos. 18766/11 and 36030/11. Wider commentary in this regard: A. Grabarczyk..., *op. cit.*, p. 34.
[23] Wider commentary in this regard, A. Grabarczyk..., *op. cit.*, p. 34.

the definition of the family is based on internal national regulations. However, it is worth noting that the legal regulation of same-sex unions by a given state in a discriminatory way in relation to heterosexual marriages must remain fully justified from the point of view of possible discrimination, since such unions are protected by Article 10 of the Economic Covenant and Article 23 of the Covenant on Civil and Political Rights.[24]

The above comments allow us to conclude that international standards of human rights and their protection unambiguously indicate that partners of same-sex unions have the right to institutionalise such unions. However, this is not tantamount to a requirement that individual states regulate same-sex relationships in the form of marriage. Such a requirement does not exist either under the ECHR or EU law. States may adopt appropriate regulations in this respect at their own discretion.

The regulation of same-sex relationships in Spain

An interesting approach to the issue of same-sex unions can be observed, for example, in Spain. Currently Spanish law provides for two types of same-sex unions: same-sex marriages (*matrimonio igualitario*) and partnerships (*parea de hecho*). It is worth looking in more detail at the issue of same-sex marriage in particular, where the process of passing and implementing the law institutionalising same-sex marriage was accompanied by many legal problems.

The process of adopting a law authorising same-sex marriages in Spain was initiated in 2004 by the Socialist party. After coming to power, the party, as part of its election promises, tabled a bill introducing same-sex marriages. This project was approved by the Spanish Council of Ministers on 1 November 2004 and was tabled in the General Cortes (*Las Cortes Generales*) on 31 December of the same year. The lower house of the General Cortes, the Congress of Deputies, passed the bill on 21 April 2005, but it was rejected by the Senate, which was dominated by the conservative party. The law went back to the Congress of Deputies, which rejected the Senate's objection and passed the law on 30 June 2005, *Law* 13/2005.[25] The

[24] J. M. Łukasiewicz, Zasady małżeństwa [in:] J. M. Łukasiewicz, R. Łukasiewicz, Prawo rodzinne, Warszawa 2021, pp. 98 and 99.

[25] Ley 13/2005 1 de Julio, por la que se modifica el Codigo Civil en materia de derecho a conrater matrimonio, BOE de 2 de Julio de 2005, 157.

law came into force on 3 July 2005.[26] Spain was thus the 3rd country in the world, after the Netherlands and Belgium, to legalise same-sex marriage throughout the country. *Law 13/2005* provides for the access of same-sex spouses to inheritance, nationality, adoption of the child of the other spouse, tax benefits and divorce rights. This regulation has led, among other things, to a change in the Spanish Civil Code regulating in positive law the institution of marriage. After its entry into force, it changed, among other things, the provision of Article 44 of the *Spanish Civil Code*, according to which now "marriage will have the same obligations and consequences regardless of whether the spouses are of the same or opposite sex".[27]

Law 13/2005 provides access for same-sex married couples to rights of inheritance, residence, adoption of the other spouse's children, tax benefits, and to divorce rights.[28]

The entry into force of the *Law 13/2005* has raised many questions.[29] The *Law 13/2005* was heavily criticised for extending the definition of marriage to include same-sex couples and the accompanying adoption of children. It was pointed out, among other things, that the Constitution did not require such an extension and that the elimination of legal discrimination against gays and lesbians could be achieved by, among other things, increasing the privileges available to same-sex couples within the framework of civil partnerships. Shortly after the entry into force of the law, the problem of the legal status of same-sex marriages to citizens of countries that do not recognise such unions also arose. This problem arose in relation to the refusal to marry a Spaniard and an Indian. The Catalan judge reasoned that Indian law did not recognise same-sex marriages. Notwithstanding the disagreement of this judge, the same year, also in Catalonia (22 July 2005), the wedding of a Spanish woman and an Argentinean woman took place (it was the first same-sex marriage in the country). The judge in charge of the case stated that Spanish law takes precedence over Argentinian law, and that Spanish nationals have the right to marry a foreigner. The (*Junta*

[26] C. Martínez de Aguirre, *Same-sex marriage in Spanish law*, „Prawo w Działaniu. Sprawy Cywilne", 2016, 25, pp. 207 and 208.

[27] R. L. Platero Méndez, *Love and the State: Gay Marriage in Spain*, „Feminist Legal Studies" 2007, 15, 3, p. 335.

[28] *Ibidem*.

[29] More about them, M. Martín Sánchez, *Los derechos de las parejas del mismo sexo en Europa. Estudio comparado. The Rights of Same-Sex Couples in Europe. Comparative Study*, „Revista Española de Derecho Constitucional", 2016, 107, pp. 225 and 226.

de Fiscales de Sala) Council of Attorneys of the Chamber, as a body of the Attorney General's Office, has also ruled on the issue, stating that LGBT Spaniards can marry citizens of countries that do not recognise same-sex marriages. Such marriages remain valid under Spanish law, which is not the same as recognising them in the foreigner's country.[30]

There were also many doubts concerning the compatibility of the *Law 13/2005* with the Spanish Constitution. As it was pointed out, the provision of Article 32 of the Spanish Constitution served as a potential barrier. It appeared to contemplate marriage as an exclusively heterosexual institution. This provision states that "men and women have the right to marry with full legal equality." Based on this Article, a complaint was addressed to the Spanish Tribunal Constitucional regarding the *Law 13/2005*. However, the outcome of these proceedings prejudged the constitutionality of same-sex marriage. The Spanish Constitutional Tribunal used interesting reasoning in upholding the *Law 13/2005*. It emphasized the need to guarantee full equality in marriage regardless of sexual orientation because of the constitutional protection of dignity and personality (Article 10 of the Spanish Constitution). According to the Spanish Constitutional Court, Article 32 of the Spanish Constitution served a particular historical purpose in 1978 in establishing legal equality between men and women. However, since that time the institution of marriage has developed in a different and more liberal framework. As the Court pointed out, the evolution of the social concept of marriage, its detachment from the right to create a family, and the parallel legislative acknowledgement of same-sex marriage in the vast majority of European legal orders all required a changed interpretation of the Spanish Constitution, which should not be considered "frozen" in time. Using similar reasoning, the Court upheld adoption by married same-sex couples, underlining that adoption has to be considered exclusively on the basis of the child's best interest and should not based on the parents' sexual orientation.[31]

[30] I. Kleniewska, *op. cit.*, ss. 13–15. More about statistic one-sex marriage: Á. Arjona Garrido, J. C. Checa Olmos, A. Ainz Galende, M. J. González Moreno, *Same sex marriages in Spain: The case of international unions*, „Anthropological Notebooks", 2012, 18, 1, p. 28.

[31] C. M. Akrivopoulou, *The Spanish Constitutional Tribunal's Same-Sex Marriage Decision*, „International Journal of Constitutional Law Blog", July 19, 2013, available at: http://www.iconnectblog.com/2013/07/the-spanish-constitutional-tribunals-same-sex-marriage-decision.

The example of Spain thus shows that the introduction of a normative regulation has not solved the legal problems concerning same-sex marriages. At the same time, as it can be assumed, the problems that arose in practice were solved on an ongoing basis. Therefore, if the Polish legislator decided to introduce the regulation of same-sex marriages, he would have to take into account, inter alia, the need to solve also the problems faced in practice by Spaniards, of course if the Polish law allowed such a possibility. Certainly the judgment of Spanish Constitutional Tribunal may serve as a paradigm for other countries that still hesitate to expand the institution of marriage to same-sex couples.

In addition to the presentation of Spanish law it should be noted that Spanish law, apart from the regulation of same-sex marriages, also includes same-sex partnerships (unions). However, there are no uniform regulations in Spain in this respect. Some Autonomous Communities have their own regulations, while there is no single nationwide regulation. Civil partnerships may be heterosexual or homosexual, registered or unregistered. In some autonomous communities, the law on civil partnerships also includes legal provisions on the existence of a register of such unions. The effects of registration also vary, ranging from a mere declaration to, in principle, equivalence with marriage. At the same time, there are no specific legal provisions that regulate property issues in such unions. It is essentially up to the partners to decide on the property regime, with the possibility of choosing rules analogous to those applicable in the case of marriage.

It follows from the foregoing that Spanish law broadly incorporates European standards on same-sex unions. Partners have a choice as to which institution to use. The provisions of the Spanish Constitution do not preclude such solutions. In this respect, therefore, Spanish law may serve as a model for legislators seeking to resolve the problem outlined in this text.

Possible scope of regulation of same-sex unions in Poland

The discussion so far has first of all raised the question about the scope and shape of regulations concerning the possible institutionalization of same-sex unions, obviously in the context of Polish law. Naturally, doubts

arise as to whether the status of homosexual unions under Polish law may be equalised to the status of marriage in the future, and to what extent such unions may resemble marriage.

It needs to be emphasised here that in this respect the legislator by no means enjoys full regulatory freedom. It remains constrained by Article 18 of the Polish Constitution, from which the prohibitions in this scope should be read. The first prohibition concerns the possibility to enact regulations providing for the same regulation of homosexual relationships as in the case of marriage. The second one, on the other hand, prohibits the introduction of more favourable regulation of homosexual relationships, e.g. increasing the rights or decreasing the obligations of persons in such relationships, than in the case of spouses. However, in order to assess the constitutionality of such regulations, the degree of their similarity and convergence with the regulation on marriage, as well as the scope and direction of possible differentiation of the two regulations would be crucial. The provision of Article 18 of the Polish Constitution, therefore, excludes the possibility of granting homosexual unions the protection and protection enjoyed by married couples.[32] However, it does not exclude the regulation of partnerships with different content than marriage.

In this context it is important to note that Polish doctrine has long denied homosexual unions the protection and care that is due to the family. This results from the fact that public authorities have the duty to support and guarantee certain privileges to marriage, i.e. the union of a man and a woman, so that it can fulfil its fundamental social function, which is giving birth to children and bringing them up. This function cannot be performed by same-sex unions.[33] Therefore, a distinction should be made between the definition of a family on the grounds of the Constitution of the Republic of Poland, statutory references to persons close to each other or related to each other and the colloquial meaning of the term family. The latter includes elements of persons connected with each other not only by blood ties (grandparents and grandchildren), but also emotional ties (thus, for example, one can speak of a family even in the situation of successive marriages of former spouses – a patchwork family). As far as the statutory definition of a family is concerned, there is no such definition. The legislator either uses compensatory phrases or, for example, it may be indicated

[32] A. Mączyński, Konstytucyjne podstawy..., *op. cit.*, p. 776.
[33] Z. Strus, *Znaczenie artykułu 18 Konstytucji Rzeczypospolitej Polskiej*, „Palestra", 2014, 9, p. 245.

that in accordance with Article 115 § 11 of the Polish Penal Code of 1997[34] the closest person is a spouse, ascendant, descendant, sibling, relative in the same line or degree, a person in an adoption relationship and their spouse, as well as a person living in cohabitation.[35] In the light of the Act of 6 November 2008 on Patients' Rights and Patient Ombudsman[36], a close relative is defined as a spouse, relative to the second degree or affinity in the direct line, legal representatives, a person in cohabitation or a person indicated by the patient; or it treats family implicitly. In the Family Code[37] we can read that 'The spouses (...) are obliged (...) to work together for the good of the family which they have created by their union' (Article 23) and that 'both spouses are obliged (...) to contribute to satisfying the needs of the family which they have created by their union. "(Article 27). The above allows us to state that the legislator has unambiguously determined in the Family Code as *legis specialis*, that the spouses form a family. In the doctrine, however, it is emphasised that it refers to a one-generation family, while in relation to other relatives it uses the formula "relatives".[38]

A different view of the family can be found in constitutional law. Here, the child plays a key role. The Polish Constitutional Tribunal has expressed itself exhaustively in this respect, stating that "In the light of the constitutional provisions, 'family' should therefore be considered as any lasting relationship of two or more persons, consisting of at least one adult and a child, based on emotional, legal and usually blood ties. A family can be "complete", including "extended", or "incomplete". A "full" family consists of two adults who share a household and are bound together by emotional ties, and the child(ren) they are raising together. An "incom-

[34] Act of 6 June 1997 – Penal Code [Kodeks karny], Dz.U. 2021, poz. 2345.

[35] An example in this respect may be fiancées living together, who form a joint household, which means that they live together. From the point of view of the criminal law, the mere fact of being engaged to be a fiancée does not, however, make it possible to recognise a person as belonging to the circle of the closest relatives, despite the fact that they share an extremely close personal relationship, usually even stronger than with other family members. It is worth pointing out, however, that the assessment whether or not in a given situation we are dealing with the closest person is made by the authority conducting the proceedings – e.g. the prosecutor – on the basis of statements or testimonies respectively. Cf *Osoba najbliższa to nie to samo co osoba bliska*, „Gazeta Podatkowa", 2015, 47, 1192 [11.06]; http://www.prawnik-rodzinny.pl/artykul,1645,9521,osoba-najblizsza-to-nie-to-samo-co-osoba-bliska.html [26.01.2022].

[36] Act of 6 November 2008 on Patient's Rights and Patient's Rights Ombudsman [Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta], Dz.U. 2009 nr 52, poz. 417.

[37] Act of 25 February 1964 – Family and Guardianship Code [Kodeks rodzinny i opiekuńczy], Dz.U. 2020, poz. 1359.

[38] J. M. Łukasiewicz, *Stosunki rodzinnoprawne a rodzina* [in:] J.M. Łukasiewicz, R. Łukasiewicz, Prawo rodzinne, Warszawa 2021, pp. 26 and 27.

plete" family, on the other hand, consists of one adult and the child(ren) they are raising".[39]

The presented arguments allow us to state that homosexual unions in Poland cannot enjoy the protection and care afforded to families. Such a union, just like childless spouses, does not have the status of a family, and therefore, it is not entitled to that qualified constitutional protection and care (however, this does not change the fact that childless spouses may benefit from that special protection and care based on the special status of marriage).[40]

The above does not mean that civil partnerships cannot be regulated in Poland, nor does it prejudge whether they should be registered or not. It only means that they cannot be an institution analogous to marriage, at least in the light of the current wording of the Polish Constitution. Any potential regulation of civil partnerships must take into account the above, possibly preceded by an amendment to the provisions of the Polish Constitution.

Conclusions

Summing up the above discussion it should be emphasised that the Polish fundamental law treats marriage and family as a priority. Their regulation in the Constitution of the Republic of Poland is extensive and multi-threaded. It is for their protection that the provision treating marriage as a union of a man and a woman was introduced at the stage of works on the Constitution. By taking such a decision, the legislator wanted to prevent the possibility of concluding same-sex marriages in Poland, which has so far been successfully achieved. Nevertheless, the exclusion of the possibility to perform same-sex marriages does not rule out the possibility to institutionalise same-sex unions in Poland in a form other than marriage. The status of such unions could not, however, be equal, let alone privileged, to that of marriage. Marriage as a union of a man and a woman and a family enjoy special constitutional protection, which has provided

[39] Wyrok TK z 12 kwietnia 2011 r., SK 62/08, Dz.U. 2011 nr 87, poz. 492.

[40] More about that: A. Mączyński, *Konstytucyjne i międzynarodowe uwarunkowania instytucjonalizacji związków homoseksualnych* [in:] M. Andrzejewski, Z. Kuniewicz (ed.) Związki partnerskie – debata na temat projektowanych zmian prawnych, Toruń 2013, pp. 84, 90 and 91.

for a qualified form of protection for them. In the current constitutional status in Poland, marriage is the only union permitted by the Constitution which can enjoy the protection provided for therein.

The introduction of appropriate regulation of same-sex unions other than marriage to the Polish law seems necessary in the future. Especially that such a solution is supported by the interpretation of the ECHR (to which Poland is a party) expressed in the case law of the ECtHR. Thus, introducing into the Polish legal system regulations on same sex relationships would be a way out of meeting international standards. Here, however, it is worth bearing in mind the example of Spain, which created the legal basis not only for civil partnerships, but went much further. Certainly the Spanish experience may be helpful in solving the dilemma of institutionalising same-sex unions in Polish law.

Abstract
Marriage and family are protected at the constitutional level. In order to secure the subjective shape of marriage the legislator in Poland, in the Constitution of 1997, defined marriage as a union of a man and a woman (Article 18). However, this regulation, especially its formulation, is a source of doubts concerning the possibility of institutionalisation of same-sex marriages (and possibly other unions). The question arises whether it is possible to regulate the ordinary law allowing for marriage (and possibly other unions) of same sex couples or the constitutional norm excludes such a possibility. There are also further questions about the possibility of any other form of institutionalization of same-sex unions. For this reason, the aim of this article is to show the impact of constitutional provisions on the possibility of regulating marriage or other same-sex unions by law. Against this background, the paper considers whether there exists in Poland a constitutional ban on marriage or other same-sex unions which would prevent their statutory institutionalization. The influence of international regulations on the issue of such regulations, including the European Convention on Human Rights and the International Covenant on Civil and Political Rights, as well as EU regulations contained in the Charter of Fundamental Rights, is presented. The Spanish legislation serves as a point of reference and a possible model to follow in the context of resolving this type of legislative dilemma for the Polish legislator, where with constitutional solutions relatively similar to those in Poland, homosexual marriages and partnerships have been institutionalised for a long time.

Keywords: concept of marriage, the constitutional protection of marriage, the family, same-sex relationships, same-sex marriages.

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