

CROSS-BORDER RECOGNITION OF FORMALIZED
SAME-SEX RELATIONSHIPS

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CROSS-BORDER RECOGNITION
OF FORMALIZED SAME-SEX
RELATIONSHIPS

The Role of *Ordre Public*

Laima VAIGÈ



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Cross-Border Recognition of Formalized Same-Sex Relationships. The Role of *Ordre Public*

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PREFACE

Poland and the Baltic States are known for their opposition towards any legal recognition of same-sex relationships. This book argues that explanations are found in these States' social and cultural situations after the Second World War. First, there was the oppression by the Soviet Union, then the sudden liberation following the fall of the Iron Curtain in 1990 and nation-building in the new world. Religion continues to play an important role in people's everyday lives, as well as in relation to the expression of "national identity". Likewise, the notion of the "complementarity of biological sexes" continues to be strong and competes with the notion of "gender equality". This is a phenomenon that can be observed in many other parts of the world. In cross-border cases, the access to the diffuse but powerful concept of public policy has enabled protection of each State's alleged fundamental values both in law, and in normative societal convictions.

This book proposes a *holistic approach to justice in private international law* in respect of cross-border recognition of formalised civil status, legally acquired in another jurisdiction. It equals to a "whole status" recognition approach, meaning the cross-border recognition of the substantive validity of the civil status and its legal effects. In this respect, the European Court of Justice continues to follow a more cautious and narrower approach, the so-called "sole purpose approach", limited to the elimination on an obstacle to free movement within the Union. The ECJ confirmed this position in its recent decision in the case of *V.M.A.*, C-490/20, concerning the prospects of and limits for recognition of a same-sex couple as parents. The consequences of the proposed "whole status" recognition approach, as contrasted with the narrower approaches, are analysed from the perspectives of supranational, national and personal identity.

Society and attitudes change, and in 2016 Estonia introduced the institution of registered partnership for same-sex couples in its legislation. Similar motions are currently under consideration in both Latvian and Lithuanian parliaments. The approach proposed in this book, however, should retain its relevance even if all Baltic States and Poland decide to open registered partnerships for same-sex couples in the future.

I want to extend my sincere thanks to numerous wonderful researchers and experts in private international law and international family law, who have

helped in writing this book. In particular, I wish to thank Professor Maarit Jänträ-Jareborg, the former supervisor of my doctoral thesis on the same topic, for her thoughtfulness and attentiveness including both the big picture and details, in combination with empathy and curiosity. I am also very thankful to Associate Professor Mosa Sayed, my second supervisor, and to Professor Michael Bogdan, who acted as the opponent of the thesis in the final seminar. The final opponent of the thesis, Associate Professor Máire Ní Shuilleabháin, and the examining committee consisting of Professor Dieter Martiny, Professor Masha Antokolskaia, Associate Professor Marie Linton, and Professor Jens M. Scherpe, all contributed with invaluable comments. I am also grateful to the advisory board of national experts in private international law of the Baltic States and Poland, who either reviewed parts of this text or whom I consulted with during my research.

This research was made possible due to a generous grant by the Torsten Söderberg Foundation, Sweden, and the generous help by the Department of Law at Uppsala University.

The opinions expressed in this book are my own and do not necessarily reflect those of the organisations I have worked for, the organisations that funded the research, or the experts who have commented on this work.

Laima Vaigé
Uppsala, April 2022

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LIST OF ABBREVIATIONS

Brussels I bis — Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Brussels II bis — Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

Brussels II bis Recast — Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

CEDAW — UN Convention on the Elimination of All Forms of Discrimination against Women of 1979.

Directive 2004/38/EC — Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States.

ECJ — European Court of Justice (Court of Justice of the EU).

ECHR — European Convention on Human Rights.

ECtHR — European Court of Human Rights.

ECLI — European Case Law Identifier.

EC Treaty — Treaty establishing the European Community.

FRA — European Union Agency for Fundamental Rights.

Hague Marriage Convention — The Hague Convention on Celebration and Recognition of the Validity of Marriages of 1978.

HCCH — Hague Conference on Private International Law.

HUDOC — database which provides access to the case-law of the ECtHR.

ICCS — International Commission on Civil Status.

IDI — Institute of International Law.

LGBT — lesbian, gay, bisexual, transgender.

Maintenance Regulation — Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

Matrimonial Property Regulation — Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

Public Documents Regulation — Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No. 1024/2012.

REC — Recueil des Cours.

Regulation on Property Consequences of Registered Partnerships — Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnership.

Rome I — Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

Rome III — Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

Succession Regulation — Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

TEU — Consolidated version of the Treaty on European Union.

TFEU — Consolidated version of the Treaty on the Functioning of the European Union.

UN — United Nations.

SPECIAL TERMINOLOGY*

Civil status — here, legal identity of a natural person, based on conclusion of marriage or registration of partnership.

Complementariness — or complementarity of a man and a woman refers to the principle suggested in traditional ideology on gender roles.

Core rights — rights under the ECHR, which relate to recognition of the existence and identity of the family relationship of same-sex couples. I argue that core rights in substantive law and core rights in private international law are not identical. The core right in cross-border settings is cross-border recognition.

Cross-border recognition — recognition of formal and substantive validity of the civil status, i.e. marriage and registered partnership, which had been lawfully acquired abroad, or its separate effects in family law and closely related areas of law. In this book, the focus is on substantive validity.

Europeanization — here, the development of European Union law and the European human rights law under the European Convention of Human Rights, inasmuch it is relevant to private international law.

European *ordre public* — here, the overriding effect of the primary European Union law and the European Convention on Human Rights.

Family civil status — here, marriage or registered partnership.

Favor divortii — the principle favouring validity of divorce in cross-border situations.

Favor matrimonii — the principle that marriages remain valid when spouses move across State borders.

Foreign (international) element — a legal situation is related to more than one State. Substantive law of the forum State cannot immediately claim applicability.

Formalization — here, entering into marriage or registering partnership.

* Terms are explained by the method of popular summary and applied in the context of the analysis. For more precise and contextual definitions, see the relevant parts of the book.

Formal validity of marriage — here, the procedural questions or forms of concluding the marriage, for example, marrying in church or civil registry. This book focuses on substantive validity, which refers to substantive prerequisites of marriage concluded abroad, for example, sex or age of spouses.

Formalized relationships — marriages or partnerships lawfully entered abroad.

Forum State — the State where a legal position is taken.

Forum necessitatis — jurisdiction by necessity, for instance, in a situation where no other jurisdiction is available for spouses to dissolve their marriage.

Gender complementarity — a view that men and women have distinct functions defined by their nature which complete each other.

Habitual residence — the place where a person habitually lives that entails some degree of integration in a certain State.

Incidental question — when a question of status validity needs to be solved in the dispute over a specific effect of that status, that question of status validity is called “incidental question”.

Lawfully concluded status — marriages or registered partnership formalized by the competent State authorities through legally valid procedure.

Limping family relationships — relationships lawfully concluded in one State but treated as having no legal effects, or very limited effects, characteristic of that relationship, in another State.

Lex fori — the law of the forum State.

Lex loci celebrationis — the law of the place (State) where marriage or registered partnership was concluded.

Lex validitatis — the law that works for a marriage’s or registered partnership’s validity.

Marriage tourism — here, travelling to a country where a specific type of marriage is allowed in order to conclude marriage.

Mutual recognition — a principle in European Union law that presupposes free movement of goods, services, and arguably, civil statuses across EU borders.

Ordre Public — a traditional safeguard of private international law that allows refusal of applying otherwise applicable foreign law, or recognition of decision, or an acquired civil status on the basis of manifest contradiction with fundamental principles of the State’s legal order, as applicable to situations with a foreign element.

Overriding effect of human rights — limits imposed by European human rights law on the use of national rules on private international law including *ordre public* safeguard.

Populism — ideological instrument promoting unconstrained collective egoism.

Private international law — law that becomes relevant where legal relations have a “foreign” (or international) element. Private international law (PIL) regulates the issues of international jurisdiction, applicable law and recognition of foreign judgments or foreign civil status decisions.

Qualification — assessing the legal situation at hand and characterizing it for the purposes of private international law (determination of jurisdiction, applicable law and recognition). Here, the focus falls on the choice-of-law.

Recognition (also cross-border recognition) — here, recognition of substantive validity of marriages and registered partnerships validly concluded abroad, or their separate legal effects in family law and closely connected areas of law.

Split conflicts solution — a legislative solution to provide different rules for finding the applicable law to marriages with a foreign element that are about to be concluded and those marriages already concluded abroad. For instance, law of common nationality may apply while entering into marriage, and *lex loci celebrationis* may apply to the already concluded status.

Substantive law — law that regulates the rights and duties of the parties in substance. In contrast, private international law enables finding the applicable substantive law on marriage validity or divorce and so on.

Substantive (material) marriage validity — validity of marriages concluded abroad in substance. Impossibility to enter into marriage for same-sex couples is a substantive, rather than a formal requirement or prerequisite.

Substitution — here, when the family-law institute which does not exist in a forum State is substituted with the closest domestic family-law institute, for instance, a marriage concluded abroad could be substituted with a registered partnership.

LIST OF LEGISLATION AND OTHER INSTRUMENTS

TREATIES

- Agreement between the Republic of Lithuania and the Republic of Poland on Legal Assistance and Legal Relations in Civil, Family, Labour and Criminal Cases, signed in Warsaw, 26 January 1993.
- Agreement Between the Republic of Lithuania and the Republic of Belarus on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases, signed in Vilnius, 20 October 1992.
- Agreement between the Holy See and the Republic of Lithuania Concerning Juridical Aspects of the Relations between the Catholic Church and the State, signed in Vilnius, 5 May 2000.
- Consolidated Version of the Treaty on European Union. *Official Journal C* 326, 26 October 2012: 13–390.
- Convention Centre La Republique Française et le Royaume du Maroc Relative au Statut des Personnes et de la Famille et la Cooperation Judiciaire. Décret n° 83-435 DU 27 Mai 1983 (publié au J.O du 1er juin 1983, p. 1643).
- Convention of 1902 Relating to the Settlement of Guardianship of Minors, entry into force 30 July 1904.
- Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship.
- Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, Entry into force 1992, ratified by France, the Netherlands, Luxembourg.
- Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, entered into force 2013.
- Convention on the Law Applicable to Contractual Obligations 1980 (consolidated version). *Official Journal C* 27, 26 January 1998, pp. 34–53.
- Convention on the Recognition of Registered Partnerships by International Commission on Civil Status signed 5 September 2007.
- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
- Franco-German Agreement of 4 February 2010 on an Optional Matrimonial Property Regime of a Community of Accrued Gains.
- Hague Convention of 12 June 1902 Relating to the Settlement of the Conflict of the Laws Concerning Marriage.
- Hague Convention of 15 July 1905 Relating to the Conflicts of Law with Regard to the Effects of Marriage on the Rights and Duties of the Spouses in their Personal Relationships and With Regard to their Estate.
- Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents entered into force 1965.

- Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, entered into force 5 January 1964.
- Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages entered into force 1991.
- Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, entered into force 1 August 2013.
- ICCS Convention No. 11 on the Recognition of Decisions Relating to the Matrimonial Bond, signed in Luxembourg 8 September 1967.
- ICCS Convention No. 14 on the Recording of Surnames and Forenames in Civil Status Registers, signed in Berne 13 September 1973.
- ICCS Convention No. 16 on the Issue of Multilingual Extracts from Civil Status Records, signed in Vienna 8 September 1976.
- ICCS Convention No. 19 on the Law Applicable to Surnames and Forenames, signed in Munich 5 September 1980.
- ICCS Convention No. 21 on the Issue of Certificate of Differing Surnames, signed in Hague 8 September 1982.
- ICCS Convention No. 31 On Recognition of Surnames, signed in Antalya 16 September 2005.
- ICCS Convention No. 32 on the Recognition of Registered Partnerships, signed in Munich 5 September 2007, and Explanatory report.
- ICCS Convention No. 34 on the Issue of Multilingual and Coded Extracts from Civil-Status Records and Multilingual and Coded Civil-Status Certificates signed in Strasbourg 14 March 2014.
- Nordic Convention of 6 February 1931 Containing Certain Provisions of Private International Law Regarding Marriage, Adoption and Guardianship, with Final Protocol, 126 LNTS 121.
- Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS 214, 2 October 2013.
- UN Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations *Treaty Series*, vol. 1249: 13.
- UN Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, *Treaty Series*, vol. 360: 117.
- Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, *Treaty Series*, vol. 1155: 331.

EU LAW

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