

## The LGBTI Rights in European Union – Do Survivals get Pension?

*By Lehte Roots\**

*The rights and discrimination of LGBTI people is constantly changing in the time and space. The approach to this specific group of people depends from the values and morality that is prevailing in the leading political parties of the state. All humans are equal and the first article of Universal Declaration of Human Rights states that „all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. This basic universal value seems to be forgotten in case of giving rights to LGBTI people. European case law has also fixed the superiority of the EU in this matter and some cases of the CJEU will be discussed to give an example of the power of interpretation of law. It shows how limiting one right (survival's pension) will change also the power balance in same-sex partnership. This article will explore and analyse the legal, political approaches to LGBTI rights in European Union using the examples of Estonia and Poland.*

**Keywords:** *Partnership; Same sex union; Charter of Fundamental Rights; Discrimination; LGBT; Human rights; Family rights; Survival's pension*

### Introduction

The EU Member States' political agenda on recognition of same-sex marriages has risen during the last twenty years and currently, fourteen European Union Member States allow same-sex marriages, where the Netherlands and Denmark were one of the first countries that allowed same-sex marriages in 2001 and Finland in 2002. Since then, the majority of the MS of the EU recognised same-sex unions in the form of marriage or other forms of partnerships.

The principal institutions of the state have protected traditional marriages between a woman and a man. European Union has also secured these unions by enacting appropriate laws. Under Article 21 of the Treaty on the Functioning of the European Union (TFEU) the citizens of the EU have a right to move freely to another Member State. Also, they are granted to similar rights in the field of work, social security, and social benefits. However, the situation is different from those couples that live in same-sex relationships, as the recognition of same-sex partnerships, marriages and cohabitation is not equal to a system where the country by its national law can decide what policy it enacts or determines towards family unions,<sup>1</sup> the state can freely choose on behalf of the same-sex unions or against it. Even though the European Union has passed anti-discriminatory laws and regulations that prohibit discriminative rules and actions based on sexual

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<sup>1</sup>Roots & Joamets (2018).

orientation, it has not entirely removed the inequalities that same-sex couples face. Diversity of family laws cause legal conflicts in case of cross border relationships.<sup>2</sup>

The Employment Equality Framework Directive (Council Directive 2000/78/EC) that has been implemented by all the Member States has ensured the basic protection for individuals that are living in same-sex partnerships and marriages. It is Article 2 that explains the concept of discrimination Article 2 a states that “direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred in the directive”. According to Article 2b indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons.

However, similar protection does not cover other areas that are important for the EU citizens that reside in another Member State due to their civil status. Furthermore, same-sex couples have encountered discrimination based on their sexual orientation in the field of social security, more precisely, on the survivor’s pensions, where the surviving spouse may claim survivor’s pensions after their spouse has died. Even though the benefits, and the right to receive those benefits, differentiate from one country to another, the discrimination has been in place in those situations where same-sex unions have been considered to be equal with heterosexual unions. Therefore, such treatment based on the sexual orientation of the individuals can potentially hinder the free movement within the European Union.

The chapter investigates the problems that same sex couples face with equal treatment. The following article will examine and compare the legislation of Estonia and Poland by covering three main groups of same-sex unions, which are marriage, registered partnership and cohabitation.

Specific issue regarding the grants of survivor's pensions to same-sex couples is used as an illustration of the realistic discriminatory problem that needs a solution. The contemporary legislation of the European Union will be taken into account by analysing the responses of the European Courts.

### **The Role of European Union in attitude formation of the pro-LGBT**

In 2004, the European Union (EU) had its biggest enlargement that added eight Eastern-European countries (including Estonia, Poland), and two Mediterranean countries to the union. This was a strategically important enlargement as seven countries out of ten were formerly either member-or satellite states of the USSR. The enlargement was important to prevent Eastern bloc countries from further Russian influence. The European Union has a vastly different stance on the acceptance of sexual minorities than the Soviet Union. The EU operates on the principles that all people in its member states should be treated

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<sup>2</sup>Joamets & Roots (2015).

fairly and equally, including the treatment of sexual minorities. EU promotes equal rights among their member states, but Kollman points out that the EU lacks an enforcement method in the member states, even though they can use soft measures to slightly guide national policy outcomes.<sup>3</sup>

Apparently, the EU has more power among the applicant states than it does among member states. According to Pelz the EU is highly successful in enacting policy changes during the accession period through conditionality.<sup>4</sup> For example, Pelz found that in Montenegro and Serbia (both applicant countries) the pro-LGBT anti-discrimination legislation was passed quickly and smoothly even though the public view is predominantly against sexual minorities.<sup>5</sup> This creates the image that political elites simply pass laws in order to gain fast access to the EU. The Estonian Parliament prohibited discrimination of sexual minorities in the workplace in 2004. However, LaSala, who carried out interviews with homosexual participants for his empirical research, found that this was also only done under the pressure of fulfilling the European Union accession criteria<sup>6</sup>. However, once a country is part of the EU such as Estonia and Hungary, the success rate of the EU conditionality drops dramatically. Therefore, the theory of Europeanisation becomes increasingly important as it gives insight into the “enforcement of supranational rules in domestic contexts”<sup>7</sup> which in this case is the method the EU can use to promote LGBT rights in member states.

The soft measures which the EU uses in member states to promote LGBT rights are aimed to bring about more tolerance and acceptance. For example, ILGA-Europe (2014) found that the EU finances and uses various social campaigns to raise awareness, and cooperates with local pressure groups that stand for LGBT rights. Pelz also introduced the concept of social learning which can influence domestic policy makers by “repeated interactions with EU institutions”<sup>8</sup> to persuade the policy makers into the specific goal.<sup>9</sup> However, Kollman pointed out that the Europeanisation theory is flawed as the acceptance of supranational policies through social learning still depends on the local politicians’ willingness to accept foreign lobbying efforts.<sup>10</sup>

The first country to accept the Registered Partnership Act in Europe was Denmark in 1989. By 2015, 18 European countries have implemented the legislation, however only two countries have been ex-Soviet satellite states (Czech Republic in 2005 and Hungary in 2009) and one has been ex-Soviet member state (Estonia in 2016) Poland has not adopted relevant legislation. In fact there is still lot of resistance to accept the rights of LGBT in Poland.<sup>11</sup>

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<sup>3</sup>Kollmann (2009).

<sup>4</sup>Pelz (2014).

<sup>5</sup>Pelz (2014).

<sup>6</sup>LaSala (2011).

<sup>7</sup>Pelz (2014) at 4.

<sup>8</sup>Pelz (2014) at 4.

<sup>9</sup>Pelz (2014).

<sup>10</sup>Kollmann (2009).

<sup>11</sup>Reid (2021).

Marriage and adoption rights have been granted in many other EU countries. Representatives of sexual minorities agree that state-level acceptance and protection have made significant improvements to their lives.

## **Rules in European Union**

### *Fundamental Freedoms of Same-sex Couples in the Treaty*

The Treaty of Lisbon was ratified by the Member States on 13 December 2007 and entered into force on 1 December 2009.<sup>12</sup> It amends the previous legislation of the EU and promotes efficiency, progress and democratic legitimacy.<sup>13</sup> Its core values lay on the respect to human rights on the broad spectrum.<sup>14</sup> The respect for equality, freedom and human dignity applies to all people including those who belong to minorities. These core values should also reflect the values of the Member States of the EU. According to Article 49 TEU, the Member State should respect and accept the values in order to become a member of the EU. Furthermore, other essential provisions reflect the values of the European Union. According to Article 3(3), there is a general obligation for the EU to combat social exclusion and promote social justice.

Article 10 of the TFEU determines that the EU should adopt policies and activities to combat discrimination based on sexual orientation. Regarding the competence of the EU, Article 19(1) of the TFEU lays down that “Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”<sup>15</sup> As regards to equal treatment, Article 9 of the TEU determines that “In all its activities, the Union shall observe the principle of equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies”.

All these provisions promote and support social justice and provides the possibility for further development. In the case of unequal treatment and discrimination in the Member States, the EU is obliged to amend rules in order to combat those injustices.<sup>16</sup>

Furthermore, the concept of free movement of persons within EU contains the prohibition of discrimination based on nationality, and every citizen of the EU are entitled to exercise their fundamental rights and freedoms.<sup>17</sup> They are also entitled to social benefits, social security and other important cultural rights in another

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<sup>12</sup>Roots (2009); Bonde (2009).

<sup>13</sup>Piris & Merkel (2017) at 48.

<sup>14</sup>Piris & Merkel (2017) at 48.

<sup>15</sup>TEFU art 19

<sup>16</sup>Ashiagbor, Countouris & Lianos (2012) at 137-138.

<sup>17</sup>Weatherill (2016) at 376.

Member State.<sup>18</sup> Numerous treaties and directives, where the latest, the Treaty of Lisbon, includes Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), The EU Charter of Fundamental Rights and European Convention of Human Rights have guaranteed the above-mentioned rights. In addition to nationality, discrimination based on sex, race, ethnic origin, sexual orientation, religion or belief is also prohibited and is accompanied by various EU directives. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) Art. 3 provides that “discrimination between human beings on grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the UDHR and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations”.<sup>19</sup>

### *Fundamental Freedoms of Same-sex Couples under the Charter of Fundamental Rights*

Although the Charter of Fundamental Rights came into force in 2000, it, however, became fully legally binding only on 1 December 2009, when the Charter was incorporated into the Treaty of Lisbon and gave it the same status as European Union Treaties. With this change the European Union has positioned principles of human rights as one of the EU's most fundamental values<sup>20</sup> Furthermore, the above mentioned facts are affirmed by Article 6(1) of the TEU, where "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."<sup>21</sup>

Respectively, Article 6(3) of the Charter lays down that “fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”<sup>22</sup> Therefore, the EU law places fundamental rights as general principles of the EU law, and the Member States should give them full effect by the national courts, and ensure that the national legal provisions are compatible with the principles. One of the most essential principles of the Charter of Rights is non-discrimination. Article 21 of the Charter of Rights states that: “any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”<sup>23</sup> Therefore, there is a clear reference for forbidding discrimination

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<sup>18</sup>Meenan (2007).

<sup>19</sup>Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), Art. 3.

<sup>20</sup>Peers, Hervey, Kenner & Ward (2014).

<sup>21</sup>TEU at Art. 6(1).

<sup>22</sup>Charter of Fundamental Rights, Art. 6(3)

<sup>23</sup>The Charter of Fundamental Rights, at Art. 21.

based on sexual orientation, and this has been confirmed by the ECJ in the case between *Accept Association and the Consiliul Național pentru Combaterea Discriminării*.<sup>24</sup> In this case Mr Becali, a manager of the football club, excluded the possibility of hiring a homosexual footballer. The CNDC gave Mr Becali a warning on the grounds of giving harassing statements that had the purpose of violating the dignity of the player. The ECJ concluded that Mr Becali acted in possible violation of the Directive 2000/78/EC<sup>22</sup> by directly discriminating the player.

As regards to the rights relating to marriage and founding a family, the Charter of Rights does not prohibit nor impose the rights in granting marriage rights to same-sex couples. It leaves the decision of family foundation and marriage rights to the Member States and their national legislation. However, under the decision rendered by the European Court of Human Rights, has been recognised that same-sex couples that have concluded their marriage in their own Member State should receive some form of legal recognition, at least in the form of civil union. This has also been confirmed by the European Court of Human Rights.<sup>25</sup> In the case, three same-sex couples complained about the non-existing alternative to marry under the Italian law. The Court acknowledged the need for the legal recognition of same-sex relationships as the applicants could not enjoy and gain access to the rights that heterosexual couples enjoy. The Court stated, that the Italian State should ensure certain basic fundamental rights to the couples that are in a committed relationship, such as, mutual rights and obligations, including moral and material support, maintenance obligations and inheritance rights. By providing recognition and protection of the same-sex unions, the applicants would not impose a burden on Italian State.

As it is clear that the Treaty of Lisbon and the Charter of Rights are intertwined by virtue of Article 6 of the TEU, the EU law confers the legitimacy and obligatory application of the Charter of Fundamental Rights. The principle of non-discrimination laid down in Article 21 of the Charter, discusses the anti-discriminatory treatment based on sexual orientation, whereas article 19 TFEU specifies that in case of discrimination based on sexual orientation, the EU should take appropriate action to combat the discrimination. The family members also include the same-sex spouses.

The Court of Justice of the European Union (CJEU) in the judgement *Relu Adrian Coman and others v Inspectoratul General pentru Imigrari and Others*<sup>26</sup> has clarified it in its case law. In this case, same-sex partner Mr Hamilton and Mr Coman, who were legally married, wanted to move to Romania. Mr Hamilton applied for a residency permit based on Directive 2004/38/EC. However, he was denied a residency permit because he was not considered as a "spouse" according to the national law (Romanian law), which did not permit same-sex marriage or same-sex marriage that was entered in another state. In order to apply the EU law in a correct manner the Romanian Constitutional Court requested a preliminary ruling before ECJ. The court had to determine whether:

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<sup>24</sup>(C-81/12).

<sup>25</sup>*Oliari and others v Italy*.

<sup>26</sup>(C-673/16)

1. “Spouse” in Article 2(2)(a) of Directive 2004/38/EC “includes the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State”<sup>27</sup>.
2. If the spouse includes same-sex spouse, can the host State grant a residency permit.

The ECJ and Advocate General concluded in their opinions that the wording of Article 2(2)(a) is presented by a gender-neutral way when referring to marriage, and this leaves a room for further interpretation and intention not to limit further societal changes within the Member States. Furthermore, the Advocate General referred to Article 9 of the Charter of Rights and the European Convention on Human Rights and recalled the case law of the ECtHR on *Taddeucci and McCall v Italy*, where the Court ruled that the refusal to grant a residence permit on family grounds to an unmarried same-sex couple, consisted an unjustified discrimination based on sexual orientation. They also stated that Directive includes non-discrimination clause, including same-sex couples as "a spouse".

Moreover, according to the ECJ and “established case law, the restriction on the right to freedom of movement for persons may be justified if it is based on objective public-interest considerations, and if it is proportionate to a legitimate objective pursued by the judgement law. However, in order to rely on the justification of public policy there should be a genuine and sufficiently serious threat to a fundamental interest of the society since derogation from a fundamental freedom must be interpreted strictly. Finally, “an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the State concerned”. Therefore, the concept “spouse” in Directive 2004/38/the EC should include spouse of the same sex. So the Court of Justice of European Union is clear about the treatment of same sex couples they should be treated equally with other couples. The court also stated that the same-sex spouse should be granted the residence permit for more than three months in the Member State so in this case the EU law prevails over the national law. This case had an impact on changing the legal landscape by promoting and recognising the same-sex relationships within the EU.

Furthermore, European Court of Human Rights has also taken its stand on the protection of the family. In the practice of the ECtHR, the concept of family life includes unregistered cohabitation of a man and a woman as well as non-traditional families, such as cohabitation of homosexuals and transsexuals and their children born through the donation of sperm and artificial insemination or surrogacy of one of the partners. The Court has stated that the term “family life” in Article 8 of the ECHR does not only cover families based on marriage, but may also cover other *de facto* relationships. Several factors may be relevant in deciding whether a relationship constitutes family life, including whether the couple lives together, how long the relationship is between them, and whether they have expressed

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<sup>27</sup>Directive 2004/38/EC

commitment to each other when having children or ”in any other way. “<sup>28</sup> At the same time, the ECtHR has limited family life to the concept of a “core family”. Thus, the ECtHR has not recognised the relationship between an adult child and his or her parent as family life unless a relationship of dependence between them has been further established.<sup>29</sup> According to the case law of the Court of Justice, cohabitation is not always an obligatory feature of the family, eg in the case of a relationship between a child and a parent<sup>30</sup> or when persons are permanently committed to a relationship.<sup>31</sup> The Court also recognises family relationships within the meaning of Article 8 as links between close relatives.<sup>32</sup>

Whereas the ECtHR previously considered same-sex cohabitation rather to be protected as private life, since 2010 cohabitation has also been protected as family life in the practice of the ECtHR. The ECtHR saw no reason to consider cohabitation of heterosexuals to be family life, but cohabitation of same-sex couples to be purely private, as same-sex couples can similarly live together in a stable, committed relationship<sup>33</sup>. In these cases, the ECtHR assessed Article 8 in conjunction with Article 14, which prohibits unequal treatment.<sup>34</sup>

### **Rights of same Sex Couples in Estonia and Poland**

Family is an essential part of society and it is a reflection of societal norms and social morals. Currently societies are dominated by the heterosexual norms and has had impediments in recognising different family units.<sup>35</sup> The norms within societies are changing in time and become more liberal and also it has affected the same sex couples they have enjoyed the recognition their family rights but there are still inconsistencies to which level the countries offer the protection to their family.<sup>36</sup> As discussed before various human rights mechanisms promote same-sex relationships through marriage or other arrangements and the increasing numbers of states have followed the same paths by amending their legislation. This is the competence of the states that they can regulate the family law. The competence of the European Union in this matter is minor as it can act on behalf of its competence given by the Treaties.

To illustrate the problems that LGBT community faces it is important to look at the societies themselves and the historical background. The satellite states in Eastern Europe were officially sovereign, but in actuality the USSR had the political, economic and military control over these satellite states.

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<sup>28</sup>*X, Y and Z v The United Kingdom.*

<sup>29</sup>*Slivenko v Latvia* at § 97; *Senchishak v Finland* at 54-55.

<sup>30</sup>*Boughanem v France.*

<sup>31</sup>*Vallianatos and oth v Greece*, at 49, 73; *Oliari and oth. v Italy* at 169.

<sup>32</sup>*Marckx v Belgium.*

<sup>33</sup>*Shalk and Kopf v Austria; Vallianatos and oth v Greece.*

<sup>34</sup>*Pajić v Croatia; Taddeucci and McCall v Italy; Orlandi and Oth v Italy.*

<sup>35</sup>Hodson (2004).

<sup>36</sup>Lee (2010) at 17-18.



Poland and Estonia are part of the East European countries built upon democratic values and promoting equality and freedom to its citizens. Religion in Poland is officially separated from the state but the society is highly influence by the Catholic Church.<sup>37</sup> The concept of family unit is very traditional and it is confirmed by the Constitution of the Republic of Poland which was enforced on 17<sup>th</sup> of October in 1997.<sup>38</sup> According to art 18 of the Constitution, marriage is a union between man and a woman therefor also Polish marital law sees the concept of marriage as a heterosexual union.<sup>39</sup> According to Takács, Dombos, Mészáros & Tóth religion is the most important factor in reference to tolerance towards sexual minorities.<sup>40</sup>

Estonian constitution art 27 states that the family is a foundation of the society and is under protection of the state. It sates also that “spouses have equal rights” but does not specify if the spouses have to be from opposite sex. More specific rules are written down in the Family Act.

As members of the European Union Poland and Estonia have to follow the Charter of Fundamental Rights of the European Union. Poland has acceded to Protocol no. 30 on the application of the Charter of Rights to Poland which gives a chance to opt out and can limit the application of the Charter. As EU law is supranational law the Charter should prevail over national legislation but according to the art 8 of the Constitution of Poland, the Constitution should be supreme law and the provisions should apply directly.<sup>41</sup>

Moreover, there has been argued whether the Protocol should be interpreted in the way that it should not contradict the moral values of the country. This applies then also to the provisions of family law and LGBT rights.<sup>42</sup> As Noack and Cibano write the Polish regions are not welcoming the EU rules.<sup>43</sup>

The concept of family unions in Estonia has changed from having only traditional marriages to decriminalising homosexuality and allowing registered partnerships.

There is still quite a big percentage of people (43%) who do not support the same sex attraction acceptable in Estonia.<sup>44</sup>

According to the 2021 survey for the first time, more than half of the respondents consider same-sex attraction completely or somewhat acceptable (53%).<sup>45</sup> This survey was conducted among the residents of Estonia and it is remarkable that acceptance has raised 12% compared to 2019. Estonian speaking population is more tolerant as 61% of those questioned accepted these relationships but only 38% of those who speak other languages agreed with this statement. It is an interesting phenomenon to study why the society is divided in this question on the basis of language knowledge.

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<sup>37</sup>Slootmaeckers, Touguet & Vermeersch (2016) at 108.

<sup>38</sup>The Constitution of the Republic of Poland.

<sup>39</sup>Johnson (2015) at 64.

<sup>40</sup>Takács, Dombos, Mészáros & Tóth (2012).

<sup>41</sup>The Constitution of the Republic of Poland, Art.8

<sup>42</sup>Kastelik-Smaza (2018) at 104

<sup>43</sup>Noack (2019); Ciobanu (2020).

<sup>44</sup>Estonian Human Rights Centre (2022).

<sup>45</sup>Ibid.

42% of respondents consider same-sex attraction completely or somewhat unacceptable. Differences in attitudes are mostly related to age, native language and level of education. Respondents mostly regard same-sex attraction as unacceptable because they think that it is abnormal or unpleasant. Remarkably, according to the survey conducted by Turu-uuringute AS in 2012 “Society's attitude towards homosexuality as a whole is considered less tolerant than it really is”<sup>46</sup>. This raises hope that there is increasing possibility to improve the legal norms too that would facilitate the rights of same sex couples.

Regarding the rights of LGBT 72% of Estonian speaking agreed that same-sex partners should have the opportunity to officially register their partnership and 53% of Estonian speaking persons agreed that same-sex partners (gays and lesbians) should have the right to marry each other. There is more tolerance in Estonian society for registered partnership but less tolerance for the marriage.<sup>47</sup> It shows that the traditional conception of marriage is still strongly supporting the marriage between man and a woman. Article 26 of the Estonian constitution states that “Everyone has the right to the inviolability of private and family life. State agencies, municipalities and their officials shall not interfere with the family or private life of any person, except in the cases and pursuant to a procedure provided by a law to protect health, morals, public order, or the rights and freedoms of others, to prevent a criminal offence or to apprehend a criminal offender.” Marriage is regulated in Estonian Family Law Act and it was passed 18.11.2009<sup>48</sup>. According to this act art 1 a marriage in Estonia is contracted between a man and a woman and the basic principle is that the adults can get married.

In Poland the law governing the family came into force 1964.<sup>49</sup> According to art 1 of Family and Guardianship Code the marriage is concluded between a man and a woman. Polish law does not recognise the same-sex marriages and partnerships. Still the couples can cohabit although the official marriage and partnerships are not allowed. According to Article 115(11) of the Family and Guardianship Code, "A next of kin is a spouse, an ascendant, descendant, a brother or sister, relative by marriage in the same line or degree, a person being an adopted relation, as well as his spouse, and also a person actually living in cohabitation."<sup>50</sup> According to this provision persons can enjoy informal romantic relationships and live in the same household. Furthermore, discrimination is forbidden by the art 32 of the Polish Constitution.<sup>51</sup> In this comparison Estonia and Poland in the normative viewpoint are similar. But the government policy is different and depends a lot from the governing political party views.

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<sup>46</sup>Turu uuringute AS, 2012.

<sup>47</sup>Ibid.

<sup>48</sup>RT I 2009, 60, 395

<sup>49</sup>The Family and Guardianship Code 1964, Poland.

<sup>50</sup>The Penal Code Act of 6 June 1997

<sup>51</sup>Konstytucja Rzeczypospolitej Polskiej of 2 April 1997

### Survivor's Pension as an Example of Unequal Treatment

One field, where the unequal treatment of persons in legal marriages and cohabitation of same sex couples leads to discrimination, is the survivor's pension which by the law cannot register their marriage and become legally spouses is the field of survivors' pension. Survivor's pension is the benefit that the survived spouse may be entitled after the other spouse has died. In Poland these pensions are regulated by the Act on Retirement Pension.<sup>52</sup> The pensions are granted to a survived spouse due to the deceased spouse's contributions paid into the pension scheme for a sufficient amount of time.<sup>53</sup> In order to receive the survivor's benefits certain conditions should be met. The survived spouse should be 50 years old at the time of death of the deceased spouse.<sup>54</sup>

In Estonia Right to receive survivor's pension arrives upon the death of a provider, family members who were maintained by him or her have the right to receive a survivor's pension. The right of the provider's children, parents and the widow or widower to receive a survivor's pension does not depend on whether they were maintained by the provider or not.<sup>55</sup>

In both cases, the pensions are available to persons that have been married. However, since Poland and Estonia do not recognise same-sex unions, and the cohabitating partners have limited rights, the same-sex partners do not enjoy similar rights as the couples in heterosexual relationships.

CJEU has expressed its opinion in some cases like in *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*<sup>56</sup> case. In this case the applicant was Mr. Maruko who was homosexual and in registered partnership with the other man. His partner was a member of the German Theatrical Pension Fund (hereinafter, "the Pension Fund") and had contributed voluntarily to that institution during the periods when he was not obliged to be a member. After death of Mr. Maruko's partner, Mr Maruko applied for the widower's pension. The Pension fund rejected the application on the grounds that only spouses were entitled to such benefits. The decision was challenged in the Bavarian Administrative Court, Munich Germany. The main claim was that there is discrimination on the grounds of sexual orientation and that such treatment infringed the principle of equal treatment, since German legislature has positioned life partnership and marriage on the equal footing. The partners were equally committed to the lifetime union and they also accepted responsibilities towards each other. The Administrative Court referred 3 questions to the ECJ.

First the Court asked whether the Directive 2000/78 could be applied and can the survivor's pensions be regarded as "pay" within the meaning of Article 3(1)(c) of the Directive. The Court identified by referring to the case law of the Court, that benefits payable to survivors come within the scope of the concept of "pay".

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<sup>52</sup>Act on retirement pension schemes for workers and their families (Text No. 267). Dziennik Ustaw, 1982, Texte 267, ISN:POL-1982-L-10639

<sup>53</sup>Ibid

<sup>54</sup>The Survivors' Pensions Act (No. 38 of 1969)

<sup>55</sup>Pensioniseadus §20 lg1.

<sup>56</sup>C-267/06.

Second the Court wanted to know, whether the provisions of Article 1 and Article 2(2)(a) of the Directive 2000/78 excludes provisions such as in the Pension Fund, under which a spouse that lived in life partnership, cannot receive survivor's benefits, equivalent to those offered to a surviving spouse. Answering this, the court concluded that there is discrimination and the case falls within the scope of Directive 2000/78. And thirdly they wanted to clarify if the combined provisions of Article 1 and 2(2)(a) of Directive 2000/78 excludes provisions such as presented in the Pensions Fund, is the discrimination on the grounds of sexual orientation permitted in the light of Recital 22 in the preamble to the Directive. According to the ECJ the widower's pensions should be classified as pay within the meaning of article 3(1)(c) of the Directive. To the next question, the Court ruled that, because the Directive's aim is to combat certain forms of discrimination in the field of employment, and when the situation of surviving life partner is comparable with that of a spouse, the denial of a survivor's benefit to life partners can be considered as direct discrimination within the meaning of articles 1 and 2(2)(a) of the Directive. Regarding the third question and Recital 22 of the preamble to the directive, which states that "Directive is without prejudice to national laws on marital status and the benefits dependent thereon", the Court ruled the following: "The Court acknowledged that the civil status and its benefits fall within the competence of the Member States, but the decisions must still comply with the principle of non-discrimination. Therefore, the Recital 22 could not be taken into account."<sup>57</sup>

Another relevant case that needs to be taken into consideration is *Jürgen Römer v Freie und Hansestadt Hamburg*<sup>58</sup>, where Mr.Römer was previous employee enjoying his retirement. Since 1969, he has been living with his partner Mr Alwin Ulrich. In 1999, they registered their partnership in the City of Hamburg using the available registration scheme and in 2001, they entered into partnership. Mr Römer requested for higher amount of his supplementary retirement due to his change of his status. However, his request for higher amount was denied and the case was brought later on before the ECJ for interpretation of Directive 2000/78. In this case the Court decided that same-sex couples should have equal access to pensions in the same way as heterosexuals under the Directive. The Court ruled that "if a member state has a registered partnership putting same-sex couples into a legal position comparable to married couples, exclusion from marriage benefits constitutes direct discrimination".<sup>59</sup>

## Conclusion

The research shows that the family law in general is still mainly regulated by the EU member states and there is little coordination between the states regarding rights of the same sex couples. There is still a strong need to create common rules

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<sup>57</sup>Ibid

<sup>58</sup>C-147/08.

<sup>59</sup>Ibid

based on the values of European Union to protect the same sex couples. Court of Justice of European Union has taken a clear stand for the protection of the same sex couples and their right to live together in another EU member state. This nevertheless does not change the fact that there are still many EU states that do not accept same sex partnerships or these partnerships are not equal to marriage. It leads to an unequal treatment in cases of inheritance or in custody of child care and also the survivor's pension.

Last decade countries of European Union have steadily recognised some forms of same-sex unions. But there are still some European states that do not recognise the marriage nor the registered partnerships. However, the number has increased starting from 2005. Now in most countries the same sex marriage or registered partnership is allowed. It is an important development as the number of same-sex relationships is also increasing.

The Lisbon Treaty and the Charter of Fundamental Rights and the European Convention of Human Rights are the main instruments that set the requirements for the protection of humans, promotion of equality and stabilising the principle of non-discrimination on all areas of life for all citizens of European Union.

Despite this there are still problematic issues due to the inconsistent application of the EU legislation and lack of coordination. These inconsistencies can especially be witnessed in the field of employment, where persons do not receive the equal payment from the pension funds, even in cases where the state has recognised some forms of same-sex unions. Furthermore, the protection cannot be extended to those couples that live in a state where same-sex unions are not recognised. This leads to the violation of equal treatment. *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*<sup>60</sup> and *Römer v FHH*<sup>61</sup> cases have clarified some situations in the case of the direct discrimination on the grounds of the sexual orientation. However, this analysis has also shown that within the EU the inequality still exists. The fact that same-sex couples are not entitled equally to the survivor's pensions is more about the discrimination rather than the preservation of family life.

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<sup>60</sup>C-267/06.

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