

05.05.2022

# LGBTQIA+ rights and prevention of discrimination

Lauris Liepa  
Attorney at Law, COBALT Leading Partner

COBALT



 This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

1

## Concepts and manifestations of discrimination

COBALT

2

## Evolution of concepts and understanding

- LGBT (*lesbian – gay – bisexual – transgender*)
- LGBTQ (*queer*)
- LGBTQI (*intersex*)
- LGBTQIA+ (*asexual – ally – ?*)



3

## Manifestations of discrimination

### UK supreme court backs bakery that refused to make gay marriage cake

Judges find in favour of appeal, ruling there was no discrimination on grounds of sexual orientation



■ Belfast bakery wins gay cake discrimination ruling - video

A Belfast bakery run by evangelical Christians was not obliged to make a cake emblazoned with the message "support gay marriage", the supreme court has ruled, overturning a £500 damages award imposed on it.



### Married lesbian couple launch discrimination action against NHS

Exclusive: Social media stars 'Wegan' say branch of NHS's fertility sector in England discriminates against LGBT+ families



■ Megan (left) and Whitney Bacon-Evans launched a legal action against the NHS's Frimley clinical commissioning group.

A married lesbian couple are launching a landmark legal test case against a branch of the NHS fertility sector in [England](#), claiming it discriminates against LGBT+ families.

4

# Legislation



## EU legislation

- EU Charter of Fundamental Rights, Article 21: *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.*
- Treaty on the Functioning of the European Union, Article 19 *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.*
- EU Council Directive 2000/78/EC, Article 1: *The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, **disability**, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.*



## EU initiatives and general competence

- Proposal for the EU Council Directive in 2008 “regarding implementation of the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation”
- The family law is within the scope of competence of national countries and EU law is applicable in cross-border matters.

## Latvian legislation

- Article 91 of Satversme [Constitution]: *All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind.*
- Section 7 of the Labour Law: *The rights provided for in Paragraph One of this Section shall be ensured without any direct or indirect discrimination - irrespective of a person's race, skin colour, gender, age, disability, religious, political or other conviction, ethnic or social origin, property or marital status, sexual orientation or other circumstances.*
- Law on the Prohibition of Discrimination of Natural Persons - Performers of Economic Activity, Section 2 *Differential treatment in relation to the performer of economic activity due to person's gender, age, religious, political or other conviction, sexual orientation, disability, race, or ethnic origin in relation to his or her access to economic activity is prohibited.*

## Case law



9

## ECJ case law – P v S and Cornwall County Council (1996)

- The person notified of the intention to undergo gender reassignment → the person was dismissed
- *“The person’s dismissal because the gender reassignment surgery was performed or is scheduled to be performed is discrimination “on the grounds of gender”.”*
- *“If the person is dismissed because he/ she plans or has performed the gender reassignment, the person experiences unfavourable treatment in comparison to the persons to whose gender he/ she belonged prior to the gender reassignment.”*



10

## ECJ case law – X, Y, Z v Minister voor Immigratie en Asiel (2013)

- Three persons lodged applications for residence permits for a fixed period (asylum) in the Netherlands. They claimed in their applications that they should be granted refugee status on the ground that they have reason to fear persecution in their respective countries of origin on account of their homosexuality.
- *“The criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.”*
- *“It is not allowed to expect that, in order to avoid persecution, an asylum seeker must conceal his homosexuality in his country of origin.”*



## ECJ case law – Coman and others (2018)

- Partners (the same gender couple) lodged an application for residence permits for a fixed period with the state authority based on exercise of the right of free movement in EU.
- Member States are obliged to recognise lawfully concluded marriages in another Member State, irrespective of whether the citizens of own country have such rights provided by the national law. Also the countries where the same gender marriage is prohibited, recognise such marriage in cases when it is within the scope of the EU law. According to the scope of the EU law, such couples and their concluded marriages are included in the cases when persons exercise one of the freedoms provided by the EU law - the right of free movement.
- The above judgment only applies to persons who have concluded marriage by interpreting it as an autonomous EU concept. The above statements will not apply to persons who have legally registered their relationship in another way - for example, in Estonia by using the regulation of partner relationship.



## ECJ case law – V.M.A. (2021)

- The case refers to the refusal of Bulgaria, Sofia municipality to issue the Bulgarian birth certificate to a child born to two mothers of the same gender (one is the Bulgarian national and the other is the UK national) in Spain, following a mother's refusal to submit evidence regarding the identity of the child's biological mother, considering that one mother and one father has to be specified in the Bulgarian birth certificate, moreover, only one name can be entered in each cell. The child was born in Spain where the birth certificate was issued by entering both the national of Bulgaria and the UK national as the child's mothers.
- In compliance with the European Union legislation, Bulgarian authorities have to issue the child's personal ID and passport where the child's citizenship and surname is specified in compliance with the Spanish birth certificate.



## Constitutional Court case law 2019-33-01 (2020)

- *“The family is a social institute based on close personal relations which can be found in the social reality and which can arise both from the fact of concluded marriage or the family relationship, as well as emerge in other ways which can be actually established, for example, in the result of actual co-habitation. The social reality reveals that the society consists not only of persons who, based on their nature, develop close personal and family relationship with the opposite gender representatives, but also of persons who, based on their nature, develop such relationship with their own gender representatives. The state should respect both groups of its residents and the families which have formed based on close relationship to the same extent.”*



## Constitutional Court case law 2019-33-01 (2020)

- “The first sentence of Article 110 of Satversme in conjunction with the principle of human dignity and the person’s rights to privacy define the obligation of the state to protect and support also families of the same gender partners”, and although “existence of close personal relationship between persons results from their concluded marriage or family relationship, still within the social reality close personal relationship develops also in other ways, for example, in the result of actual co-habitation. The first sentence of Article 110 of Satversme stipulates the positive obligation of the state to protect and to support every family, including an actual family.”



## Constitutional Court case law 2020-34-03 (2021)

- “The obligation to protect every family imposed upon the legislator by the first sentence of Article 110 of Satversme means that the legislator does not have the discretion to choose whether legal protection, as well as economic and social protection and support should be provided to the families of the same gender couples.”





## SC judgment SKA-[B1]/2021 (2021)

- The Senate established that the regional court had incorrectly concluded that the legal protection of the family of the same gender couple is a legal political decision.
- The Constitutional Court has already recognised that Article 110 of Satversme of the Republic of Latvia imposes the obligation upon the legislator to provide legal protection of such families, which also includes the obligation to provide the possibility to legally register the relationship and to be recognised as a family by the state.
- The obligation to provide legal protection to the families of the same gender couple also arised from the principle of human dignity requiring recognition of the equal-value of all people.



## ECHR judgment *Vallianatos et al v Greece* (2013)

- The case refers to civil unions in Greece introduced as an official form of partners' relationship by the law. The applicants lodged an application with the European Court of Human Rights by stating that the relevant law only provided for conclusion of partnership between different gender couples by automatically excluding the same gender couples from the scope of its application.
- The European Court of Human Rights emphasised that the goal of the state to protect traditional families was too abstract and various particular measures could be applied for its implementation.
- The state should prove that it was necessary to prohibit the same gender couples to conclude civil unions for the purpose of attaining the set legitimate goals. The state of Greece was not able to prove such a legitimate goal, resulting in establishment a breach of Article 14 of the ECHR in conjunction with Article 8 of the ECHR.



## **ECHR judgment *Oliari et al v Italy* (2015)**

- The case was opened following receipt of applications of two applicants, referred to the general need of legal recognition of the same gender relationship and protection of the claimants as the same gender couples.
- The European Court of Human Rights emphasised that within the review of the case the progress of recognition of the same gender couples plays an important role and it is developing very fast not only in Europe, but also globally. Accordingly, this type of consensus among the Member States of the Council of Europe indicates that the countries should be granted narrower freedom of action for adopting relevant decisions.
- Moreover, the European Court of Human Rights referred to the necessity put forward by the Constitutional Court of Italy and the cassation court to recognise and to protect this relationship, and an intentional attempt of the legislator and the executive power to prevent execution of a final and enforceable judgment cannot be substantiated on the grounds of legitimate public or community interest.




## **ECHR judgment *Fedotova et al v Russian Federation* (2021)**

- The European Court of Human Rights stated that the signatories of the ECHR do not have the clearly defined obligation to recognise the same gender union, however, it is important to find fair balance between the interests of the same gender couples and the interests of the whole community.
- Although, in essence, the same gender couples are not prohibited to co-habit as a family, such persons have no means to have this relationship recognised by the law, resulting in the persons being prevented to have access to housing or financing programs, to visit partners in hospital, to enjoy particular guarantees within criminal proceedings, for example, not to testify against their partner, as well as the rights to inhering the property of the deceased partner - therefore the ECHR declared a breach of Article 8 of ECHR.



## Future perspective

## Draft law on civil union

<b>1. Nr. 1380/Lp13</b> Civilās savienības likums 					
<b>Kopsavilkums:</b> Likums definē civilo savienību, kā arī paredz tās noslēgšanas un izbeigšanas kārtību. Tā mērķis ir nodrošināt personu, kuras noslēdz civilo savienību, personisko un mantisko tiesību aizsardzību.					
	Iesniegts	Prezidijs	Nodošana komis.	1. lasījums	2. lasījums
Datums	08.03.2022	14.03.2022	31.03.2022	31.03.2022	
Rezultāts			Nod. kom.	Pieņemts	
Dok. nr.			<u>5588</u> , <u>5588A</u> , <u>5714A</u>	<u>5588</u>	
Termiņš					Priekšlikumi līdz 21.04.2022
<input checked="" type="checkbox"/> Saeimas sēdes dokumenti:					
<input checked="" type="checkbox"/> <b>Atbildīgā komisija:</b> Juridiskā komisija					
	Sēdes datums	Komisijas lēmums			
Uz 2.lasījumu					
Referents: Butāns Jānis    Iesniedzēji: Juridiskā komisija					

## Unresolved issues

- Implementation of the law on civil union
- Recognition of marriages concluded abroad
- Rights of the same gender couples - parents



23

# Thank you !



**Estonia**  
Kawe Plaza, Pärnu mnt 15  
10141 Tallinn  
Tel +372 665 1888  
tallinn@cobalt.legal

**Latvia**  
Marjas iela 13 k-2  
LV-1050 Riga  
Tel +371 6720 1800  
riga@cobalt.legal

**Lithuania**  
Lviso 25  
LT-09320 Vilnius  
Tel +370 5250 0800  
vilnius@cobalt.legal

[www.cobalt.legal](http://www.cobalt.legal)

24