



Recommendation Paper On Legal Recognition of Same-Sex Relationship and Parenthood for the European Union, Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia

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Love Does Not Exclude Association
Warsaw, 2021



Table of Content

Foreword 5

Introduction 9

1. European Union 11

2. Bulgaria 17

3. Latvia 21

4. Lithuania 25

5. Poland 29

6. Romania 35

7. Slovakia 41

About Love Does Not Exclude Association 45

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Unless stated otherwise, photos and quotations used in this publication give voice to Polish rainbow families. Learn their stories at www.jestesmyrodzina.pl.

ISBN print 978-83-958816-3-3 | pdf 978-83-958816-5-7

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Raising awareness for Inclusive Societies to Embrace rainbow families in Europe (R.I.S.E) is a joint initiative of LGBT+ NGOs from Bulgaria, Lithuania, Latvia, Romania, Slovakia, and Poland, ie., the last remaining EU countries which offer no legal recognition of any kind to same-sex couples and their children. Lack of legal status creates obstacles and problems in everyday life, especially in official and institutional matters. It means families live in constant uncertainty and have no protections in the most difficult situations in life.



Foreword

Prof. Adam Bodnar



A few years ago in an interview for Polish “Replika” magazine Dawid Wawryka asked me, why I had been advocating the rights of LGBT+ people. Of course, there are many reasons. Their main origin is my deep belief in respecting human rights, especially of those excluded and discriminated against. But when answering this question, I thought about my personal life – at that time I was recently divorced. Therefore I had been able to get married, break up and afterward I was free to consider another relationship. Those options are not available in Poland (and many other countries in East-Central Europe) for people who are non-heteronormative. Those options are not available for many of my friends and acquaintances. And yet their love is no different – they want to build a family with the other person, live together, pay taxes, make decisions about their life, support each other in need, protect themselves in case of sickness or even death. But they are deprived of such opportunities. They also cannot raise children together, not to mention the possibility of adoption. At that time I felt we had been dealing with profound social injustice. Because love should unite us, not make us treat some people worse than others in a democratic society. And in this case the only feature that distinguishes them is the gender of a person they love and they want to live with.

I have no doubts this will change in Poland. In August 2020 Georgette Mosbacher, U.S. Ambassador to Poland, addressed the homophobic re-



marks and actions of the Polish government members by saying: “In this matter you are on the wrong side of history”. And history is unfolding before our very eyes – more and more countries are introducing marriage equality, like Switzerland in September 2021. Meanwhile in Poland the lack of possibility to regularize the status of same-sex couples, who live together and create families, leads to personal tragedies. Worse still, lots of these people decide to leave, to search for some other place where one can shape their life freely. Not always it is an obvious choice. It may bring happiness, but one needs to leave their friends, their professional networks and also their families. With each year their aging parents are getting even more helpless and lonely. Therefore emigration is not a free choice. It is a serious decision that those harassed and discriminated against are forced to make because of this air of oppression, suffocating like incense smoke.

But there is another side to it. Career challenges often pressure us to look for new job opportunities. Work in commerce, diplomacy, academia or in artistic fields may require us to move abroad. As citizens of the European Union we expect equal treatment in its borders. However some EU countries treat people bound by marriage (or civil partnerships) like they were strangers to one another. Therefore now we can pass the border between Poland and Germany in Kołbaskowo-Pomellen, driving at 80 kph and not being stopped by anyone. At the same minute we cross the border, our legal status changes. For this exact reason the efforts of the European Commission, supported by the case-law of the Court of Justice of the European Union, should be commended, as they may lead to full recognition of same-sex relationships and marriages for citizens moving within the EU, in particular those who relocate to another member state.

However the efforts of the European Union face a series of obstacles, especially in the East-Central Europe. One reason is the lower level of acceptance for LGBT+ people, stemming from different cultural, moral and religious traditions. But the second reason seems much more serious – the matter of protecting LGBT+ people’s rights has become a political weapon to create deep social divides. It is exploited by fringe organizations and the Catholic Church also takes part in such ruthless



political strife. Whole strategies are being created under heavy influence of Russian disinformation practices and evangelical methods of conservative American circles. In Poland we experienced that mainly during the presidential election campaign in 2020, when homophobic remarks were made by President of the Republic of Poland Andrzej Duda. Instrumentalization of LGBT+ people’s rights for political purposes makes the public debate much more complicated. In some aspects one can no longer see the push for marriage equality, but a regression in protecting basic personal and political rights and liberties.

In these difficult times it is necessary to look for allies and new strategies. Cross-border cooperation and making use of arguments and methods from other countries may be enriching for the public debate. It is also important to keep track of the paths that individual states take on their way to marriage equality – how the demands of LGBT+ organizations turn into judicial decisions, programs of political parties, draft laws and constitutional amendments. Comparisons do matter, because the situation of individual countries may be different. But the national experiences might also help to identify some effective measures of political pressure and action. They can be used as ammunition in an effort to make a change nationally. European Union can also be helpful, in particular on a political level. And indeed it had some success fighting homophobia recently. The financial argument (cutting the budgetary funds) made some local governments in Poland withdraw from outrageous resolutions against “LGBT ideology”.

However even if the EU will strive for marriage equality, its bodies and institutions must not forget they have their own “homework” to do. Article 19 of the Treaty on the Functioning of the European Union creates a legal space to adopt comprehensive regulations or directives defining the status of national equality bodies. This has not been achieved so far. Moreover, the adoption of the so-called horizontal directive has been blocked for many years now. And the directive would increase

I am convinced that in a few years I will be able to celebrate the weddings of my friends, who will enter fully legal civil partnerships or marriages for the people of the same sex on the territory of Poland.

prof. Adam Bodnar



the protection of LGBT+ people in various social life situations (like the access to healthcare or publicly available goods and services). In brief – the call for marriage equality should not obscure the unaccomplished objectives of the EU law development.

I am convinced that in a few years I will be able to celebrate the weddings of my friends, who will enter fully legal civil partnerships or marriages for the people of the same sex on the territory of Poland. The good side of history will bring them justice and recognition of their rights. And this paper is one of the many important steps in this direction.

Adam Bodnar Professor and Dean of the Law Faculty at the SWPS University of Social Science and Humanities in Warsaw, Polish Ombudsman – Commissioner for Human Rights, 7th term (2015–2021); winner of the European Tolerantia Award by Lambda Warszawa Association (2011) and the special prize Equality Crown (2020) awarded by Campaign Against Homophobia.



Introduction

Milena Adamczewska-Stachura



LGBTIQ people start their families – regardless of where they live and how big are the legal and social challenges they have to face. It is an obvious truth but there are many, politicians in particular, who close their eyes and ears to it, desperately trying to deny the reality.

In the 21st-century European Union, which in its Treaties names the protection of human rights and equal treatment as fundamental values, hundreds of thousands of families are being treated worse than others, solely on the basis of the sexual orientation or gender identity of the people who create those families. In six EU states – Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia, the law does not see them at all. It does not allow their relationships to be formalized – neither as marriage, nor in any other form. It does not permit them to become parents together. It does not recognize emotional, familial and actual relations that exist anyway and often are confirmed by non-discriminatory laws of other EU countries. By keeping such state of affairs, aforementioned countries effectively discourage many LGBTIQ people from staying, arriving or coming back there, but they cannot make rainbow families disappear. On the contrary – ongoing social change make even more people speak openly, not only about their gender and sexuality, but also about families they form. Voices of dissent and demands for vital changes are getting louder and ever more frequent.



This paper collects such voices from those six countries, where the right to protect family lives of LGBTIQ people is being systemically violated. In the following chapters civil society organizations, representing the LGBTIQ communities and advocating for them, managed to point out the crucial legal problems, that rainbow families have to deal with in their countries; to highlight recent or planned changes, indicate key court rulings and current strategic litigations and also outline the social contexts. What is particularly important, each chapter was concluded with recommendations for changes at the national level, that according to authors' judgment, would greatly improve the situation of rainbow families in their countries.

While each national chapter is a standalone part of this paper, when read together they reveal numerous systemic similarities. However one common feature of all countries covered here – their membership in the European Union – was factored out in a way. First chapter, concerning the European law, gives clear arguments from the beginning, that the situation of rainbow families is also a matter for the EU. While ensuring the protection of the right to family life for LGBTIQ people in national law remains undoubtedly within the competence (and obligations) of member states, the Union can (and should) provide rainbow families with protection in cross-border situations. Recommendations for specific actions in this area sum up the first chapter and introduce the latter part of this paper, concerning aforementioned national systems.

We believe in change and we work for it every day. However in order for this change to happen, it is necessary to build awareness of existing inequalities, to speak out about the law that is harming lots of families instead of protecting them. We hope this recommendation paper will be a helpful tool for those who want to speak and also a signal and a guideline for those who may finally start to listen.

Milena Adamczewska-Stachura, LL.M Lawyer specializing in anti-discrimination law, in particular in LGBT+ people's rights protection; from 2019–2020 member of the Team for Equal Treatment in the Office of the Ombudsman, currently the coordinator of legal group of Love Does Not Exclude Association.



1. European Union





1. European Union

The Charter of Fundamental Rights of the EU grants everyone protection of their family and private life, as well as protection from discrimination based on sexual orientation or gender identity. Yet, due to limits of EU competence in the area of family law and gaps in EU legislation, Member States are not required, under EU law, to guarantee LGBTIQ persons and their families equal access to the rights to marry, enter into registered partnerships, and to have children or to adopt them, jointly or as second parents. Consequently, the situation of “rainbow families” (families consisting of a same-sex couple and any children they might be raising together) depends on national legislation and vary between Member States, with six of them (Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia) not guaranteeing any family rights to LGBTIQ persons.

While the internal situation in above-mentioned Member States will be the subject of further analysis in this report, with the country specific recommendations following, it cannot be said that the situation of rainbow families falls completely out of the scope of the EU competence. LGBTIQ persons, just as all EU citizens, move between EU Member States and have an unquestionable right to do so, as well as to choose freely their place of residence, on the basis of article 21 of the TFEU. Moreover, for the families formed by EU citizens and Third Country Nationals, the secondary legislation (Directive 2004/38) guarantees family reunification rights.

However, when exercising their freedom of movement and family reunification rights, rainbow families face numerous obstacles, caused mostly by the differences in national legislations and the refusal of some Member States to recognize their family ties, either between partners (married or unmarried) or between LGBTIQ persons and their children. What it means in practice, is that same-sex couples (married, registered as partners or unregistered), either with or without children, can be recognized as a family equal to a family formed by partners of different sex



in one Member State, but after crossing a border with another Member State, might be legally considered as strangers. Both to one-another and to their children, who suddenly, instead of having two legal parents, have either one or even none (in the cases of unrecognized surrogacy).

The particular situation of each rainbow family, which wishes to exercise their freedom of movement and either move or return to one of the six Member States which do not protect family rights of LGBTIQ persons, depends on several factors, mainly: legal ties between them, their EU citizenship or its absence, national legislation of the State they are moving or returning to, and the scope of recognition they are seeking. On the basis of Directive 2004/38 and CJEU jurisprudence, there is no doubt that each Member State is legally obliged to recognize at least same-sex marriage of an EU citizen and a TCN, for the purpose of granting a residence permit to the latter. However, in practice, even that might be a problem, with Romania being an example of a Member State which did not comply with the CJEU’s judgment in the Coman & Hamilton case (2018).

Nevertheless, problems with exercising family reunification rights are just a tip of an iceberg of issues that rainbow families are facing in the EU in cross-border situations (thus, when exercising freedom of movement). This transnational dimension of the situations discussed results also with the applicability of protection of the Charter. According to art. 51, the Charter is binding on Member States when they are implementing Union law (meaning, as interpreted by the CJEU, when they act within the scope of EU law). Consequently, when rainbow families exercise their freedom of movement and family reunification rights, Member States are legally required to

Being yourself is not your ideology. It's your identity. And no one can ever take it away. So I want to be crystal clear – LGBTQI-free zones are humanity free zones. And they have no place in our Union. And to make sure that we support the whole community, the Commission will soon put forward a strategy to strengthen LGBTQI rights. As part of this, I will also push for mutual recognition of family relations in the EU. If you are parent in one country, you are parent in every country.

**Ursula von der Leyen,
President of the European
Commission**



respect their fundamental rights laid down in the Charter, including the right to non-discrimination and to protection of private and family life.

Therefore, whereas national family law falls within the scope of competence of Member States, the EU has competence over freedom of movement of EU citizens, which is enough to resolve at least some obstacles that rainbow families face, when moving or returning to Member States which do not recognize family rights of LGBTIQ persons.

“If you are a parent in one country, you are a parent in every country” - announced the President of the European Commission Ursula von der Leyen in her State of the Union Speech in 2020. In the LGBTIQ Equality Strategy for 2020-2025 the Commission has made this promise more precise, stating that it will push for mutual recognition of family relations in the EU and propose a horizontal legislative initiative to support it, and improve the protection for rainbow families in cross-border situations.

The actions of the EU in that regard should respond to the following recommendations.

Recommendations:

Legislative and judicial

- The European Commission should propose a horizontal legislative initiative requiring all Member States to recognize, for the purposes of national law, the parentage of a child, as established in a birth certificate issued in another Member State, regardless of sex or gender identity of parents or their marital status.
- As an interim measure, the European Commission should guard that all Member States recognise the parentage of a child for the purposes of the exercise of the rights conferred by EU law on European Union citizens, especially the free movement of citizens, and follow the obligation to issue an

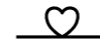


identity document or a travel document referring to persons mentioned in a birth certificate as the parents, as pointed in the Advocate General's Opinion in Case C-490/20.

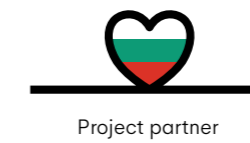
- The European Commission should propose a horizontal legislative initiative requiring all Member States to recognize, for the purposes of national law, marriage or registered partnership formed in another Member State, regardless of sex or gender identity of spouses or partners.
- The Council of the EU should adopt the directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation, as proposed by the Commission in 2008 and blocked in the Council since then.
- The European Commission should take enforcement action against Romania for not complying with the CJEU Coman & Hamilton judgment and examine whether all Member States comply with it.

Non-legislative

- The European Commission should revise the guidelines on free movement to reflect the diversity of rainbow families, including families of transgender persons.
- The European Commission should propose a communication, clarifying the scope of the Directive 2004/38, so that the terms “partner”, “parent”, “child”, “direct descendant”, or “direct relative in the ascending line” used in it, refer also to same-sex persons, transgender persons, and their children.
- The EU should support strategic litigation by civil society organizations aimed at extending the protection of rainbow families' rights as guaranteed by the CJEU and ECHR judgments.



2. Bulgaria



Project partner

bilitis



2. Bulgaria

The rights of rainbow families are not protected by any legal instrument in Bulgaria. Marriage is constitutionally established as being only possible between persons of different sexes. There is no other legal form of recognition of a family in addition to marriage. The legislation provides recognition of family rights only for married couples, which are by definition a couple of different-sex partners, and for no other form of cohabitation. As a result of this legal void, the rainbow families do not have the rights to joint adoption, access to reproductive health as a family, inheritance, and many other social, economic and civic rights.

There are different definitions of family scattered in different laws, and with different meanings, but none of them includes the rainbow families, because of the primary limitation of the meaning of the term “spouses”, established by the constitution, which considers spouses as different-sex people. The Family Code, as the main normative act dealing with the regulation of family relations, does not define the term “family”. A definition of family is to be found in the Family Allowances Act, which considers cohabiting partners and their recognized common children as a type of family in addition to the married spouses. However, given that Bulgarian law does not provide for the possibility of same-sex persons having any recognized common children, this definition also applies only to different-sex couples. Most places where definitions of a family are to be found refer to family as a couple. The mentioned Family Allowances Act also recognizes a type of family, which comprises of a parent and his/her underage children (born, legally recognized, or adopted). This definition is inclusive of single LGBTI parents with their biological children, although not explicitly mentioned. Single LGBTI parents and their biological children are entitled to the same social benefits as other single parents. The foster family definition in the Child Protection Act is two spouses or an individual with whom a foster child

Her wife had a car accident and they didn't allow her in the ambulance. They said "she's no one to her".

Bulgaria



is accommodated. According to this definition, a rainbow family cannot become a foster family, but one of the partners could apply to become a foster parent. Adoption rights are the greatest challenge, both second parent adoption, and single-parent adoption. Our research shows that when an LGBTI person applies for adoption, they may not be granted adoption, because of the strong homo/transphobic attitudes of the adoption authorities.

Following the Coman case in Romania, Bulgaria succeeded in guaranteeing the right of free movement to LGBTI families. On 24 July, 2019, the Supreme Court of Bulgaria upheld the Sofia City Administrative Court's positive judgment from 2018, that granted the right of residency for the same-sex spouse of an EU citizen - in line with the Coman v. Romania judgment. The decision does not legalize same-sex marriage, but recognises the right of free movement for spouses of EU citizens in same-sex marriages and is the first court decision that takes into account the existence of a marriage between citizens of the same sex.

Currently, the second parent of a baby born in a same-sex partnership, legally recognized abroad, cannot be included in a birth certificate, if the latter is issued by the Bulgarian state. There is an ongoing case of “LGBT Daystvie” organization, which aims to change this practice. The rights of the second parent in a marriage or registered partnership concluded abroad, not being recognized. There was a positive court case in 2019 where the Sofia Regional Court ruled that a woman in a same-sex marriage, concluded abroad, could take her partner's family name. However, the latter did not imply automatic recognition of all social and economic rights that are granted to different-sex spouses.

At the same time, as a result of strong anti-LGBTI and anti-gender campaigns, in the last couple of years we witness a decrease in the social acceptance of LGBTI people and rainbow families. This can be clearly seen when comparing the Eurobarometer results regarding LGBTI from 2015 and 2019. According to the 2019 Eurobarometer, the Bulgarian society shows some of the lowest levels of acceptance towards LGBTI people in the EU. For example, only 39% (51% in 2015) of the people totally agree that gay, lesbian and bisexual people should have the



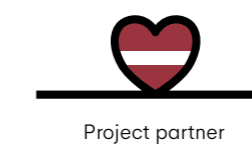
same rights as heterosexual people, only 20% (27% in 2015) agree that there is nothing wrong in a sexual relationship between persons of the same sex and only 16% (17% in 2015) agree that same sex marriages should be allowed throughout Europe (the lowest score in the EU).

Recommendations:

1. To adopt a law or amend the current Family Code of the Republic of Bulgaria in order to include civil partnership available to both different-sex and same-sex couples.
2. Recognition of marriages between persons of the same sex concluded in other EU Member States or third countries, for the purposes of exercising the right to free movement in the Republic of Bulgaria.
3. Recognition of birth certificates of children born within same-sex families in other EU Member States or third countries, for the purposes of exercising the right to free movement in the Republic of Bulgaria and in line with the Convention on the Rights of the Child.



3. Latvia





3. Latvia

Article 110 of the Constitution of the Republic of Latvia (Satversme) states, “The State shall protect and support marriage – a union between a man and a woman, the family, the rights of parents and rights of the child. ...” and The Civil Law Article 35 states “Marriage between persons of the same sex is prohibited.” Therefore Latvia is still among six EU member states where there is absolutely no protection of same-sex couples. On November 12, 2020, The Constitutional Court (Satversmes State) issued Judgment No. 2019-33-01 on the right of a same-sex couple to a parental leave acknowledged that the provision of the Labor Law Article 150 (1), in so far as it does not provide protection and support for the mother’s partner due to the birth of the child, does not comply with the first sentence of Article 110 of the Constitution. According to the Court judgment, it shall be deemed null and void as from June 1 2022. On April 8, 2021, the Constitutional Court judgment No. 2020-34-03 declared that the rule which requires a same-sex family partner to pay a higher state fee for the inheritance of the estate of their deceased partner than spouses pay, shall be abolished; currently, the state fee is 60 times higher than for married couples. The rule expires on June 1 2022, as stated in the Constitutional Court judgment.

The state stands in between you and is not allowing you to build a strong family.
Latvia

Currently, Latvian legislation does not have a clear definition of family. The Civil Law Article 214 defines family in the narrow sense “... a family consists of the spouses and their children while they are still part of a common household.” On January 7, 2021, the right-wing political group National Alliance (Nacionālā Apvienība) submitted to the Latvian Parliament (Saeima) a draft law regarding an amendment to the Constitution, which intends to define the concept of family as a union of a male and a female person. The proposed draft law encourages the wording of Article 110 of the Constitution as follows: “The State protects and supports marriage - a union between a man and a woman, a



family based on marriage, blood relation or adoption, the rights of parents and a child, including the right to grow up in a family based on a mother (woman) and father (man). The State particularly helps disabled children, children left without parental care or suffering from violence.” On January 14, 2021, The Parliament with 47 votes for this proposal, 25 against, 21 did not vote, and 7 transferred the proposal to all Saima Comittes setting Legal Affairs Commission as a responsible Committee.

According to Article 110 of the Latvian Constitution and Article 35 of the Civil Law, the marriages and registered partnerships concluded abroad are not recognized. The same goes on recognition of the families with children born in same-sex families abroad.

According to the leading market research agency SKDS survey in February 2021, 55% of respondents answered that they have neutral attitudes towards homosexual people, almost 20% responded that they are in support and 22% and condemning homosexual people. Data show an increase in positive public attitudes towards LGBT persons. The survey shows that 55,6% of respondents agree that the Co-habitation bill (Dzīvesbiedru likums) should be adopted, and 44% agree that such rights should also be granted to same-sex couples. The same survey also included data on public attitudes towards children living in same-sex families and 75% of respondents agreed that children who live in a same-sex couple have to have the same rights as other children.



Recommendations:

1. Extend the definition of family under the Civil Law also to same-sex couples and couples living in non-registered partnerships
2. Adopt regulation to protect all families, such as Partnership or Co-habitation.
3. Implement the Constitutional Court judgments No. 2019-33-01 and No. 2020-34-03.
4. Implement regulations to protect also same-sex families who have registered partnerships or married abroad.



4. Lithuania





4. Lithuania

The Law on Equal Treatment includes a definition of family members as only spouses and direct descendants, thus excluding (registered) partners from legal protection in case of discrimination on the grounds of citizenship. The registered partners of citizens from countries where these partnerships are legally registered are not recognized as family members in Lithuania and are not able to lodge individual complaints regarding the alleged discrimination on the grounds of citizenship. On 22 January 2020 the Government of the Republic of Lithuania proposed to abolish this clause and to define family members according to the definition provided in the Law on Legal Status of Aliens, i.e. including (registered) partners in definition of family members.

On 11 January 2019 the Constitutional Court of the Republic of Lithuania issued a judgment on legal recognition of same-sex unions concluded abroad. Despite the fact that the Constitutional Court ruled on a narrow issue, whether a same-sex spouse is entitled to a residence permit on the grounds of family reunification, the Court made some important remarks reiterating that the constitutional concept of family life includes couples in stable de facto relationships (para. [32.5] of the judgment). Therefore it is recommended to extend the definition of family members under the Law on Equal Treatment in order to provide effective protection from discrimination on the grounds of citizenship to (registered) partners of the EEA citizens.

The Law on Family Strengthening (in force since 1 March 2018), the Law on the Fundamentals of Protection of the Rights of the Child (in force since 1 July 2018) and the Civil Code¹¹ (in force since 1 July 2018) have introduced the concept of complementarity of maternity and paternity defined as the child's essential need to

We could talk about the availability to adopt to same-sex couples, full family recognition or at least some family insurance guarantees, but actually at this point, just about anything would make a difference.

Lithuania



have two parents or adoptive parents of different sexes. The principle of “complementarity of maternity and paternity” should be applied in implementing the protection of the rights of the child and providing assistance to the family. The principle potentially bears discriminatory implications on the grounds of sexual orientation, because same-sex parenting could be considered as incompatible with the best interests of the child. Such principle potentially conflicts with the right to private and family life, equality and non-discrimination (Article 17 and Article 26 of ICCPR).

Article 3.229 of the Lithuanian Civil Code (2000) is currently constructed in way that is idiscriminatory towards same-sex couples i.e. according to it, the partnership could only result from the relationship of opposite-sex persons.

Out of 19 Council of Europe Member States which authorize some form of registered partnership other than marriage, only Lithuania appears to be reserving it specifically to the opposite-sex couples.



Recommendations:

1. Extend the definition of “family member” under the Law on Equal Treatment in order to provide effective protection from discrimination on the grounds of citizenship to (registered) partners of the EEA citizens.
2. Amend Article 3.229 of the Lithuanian Civil Code (2000) to make the institution of civil partnership gender neutral.
3. Abolish the potentially discriminatory principle of complementarity of paternity and maternity.
4. Strengthen intersectional efforts to mainstream the principle of equality of families rights.



5. Poland





5. Poland

In 2021 Poland was placed at the very bottom amongst the EU Member States in the ILGA-Europe Rainbow Index¹. Under the category of “Family”, which refers to marriage equality, registered partnership, joint adoption, and second-parent adoption, the score for Poland has been “0” for years. There is no legal recognition of same-sex relationships, nor does the law guarantee any rights to LGBTI families. Only married couples have the right to joint adoption. Access to assisted reproductive technologies used for infertility treatment is granted to married couples and couples in informal relationships – but not same-sex couples. A divorce is required from married person in order to go through the process of legal gender recognition (however, required in practice but not by the statutory law) and a transgender person after LGR can marry only a person of the opposite legal gender. Reproductive rights of transgender people are not recognized, as in the absence of provisions regulating their parenthood, the situation of a child born to a transgender man or conceived by a transgender woman largely depends on individual registrars or courts.

However, Polish Constitution or Family and Guardianship Code do not define the terms “family” or “parenthood”. Definition of “family” is provided only in the Act on Social Assistance of 2004, which states that family consists of “related or unrelated persons remaining in the actual relationship, living together and running a common household”². A similar approach was applied by the Supreme Court when interpreting the notions of a “cohabiting person” and “next of kin”. In both cases, the Supreme Court found that the terms can refer to same-sex persons³. In practice though, the judgments have positive consequences only in very limited situations – e.g. for the purpose of succession to the tenancy after a deceased partner (but not inheritance) and for the rights in

1 Rainbow Europe Index 2021, access: <https://www.rainbow-europe.org/#8653/0/0>

2 Article 6.14 of the Act on Social Assistance of 2004.

3 Judgement of 28 November 2012, III CZP 65/12 and judgement of 25 February 2016, I KZP 20/15.



the course of criminal proceedings (e.g. to refuse to testify).

Article 18 of the Polish Constitution states that “marriage, being a union of a man and a woman, as well as the family, motherhood, and parenthood, shall be placed under the protection and care of the Republic of Poland”. One side of the legal debate argues that it remains an obstacle to marriage equality. On the other hand, the opinions of prominent legal experts confirm that Article 18 in no way establishes a definition of marriage, but only indicates that heterosexual marriages are under the protection and care of the State. Thus, this provision does not exclude the existence of same-sex marriages, but only grants a certain status to different-sex marriages⁴.

Nevertheless, courts base their judgments on article 18 in the cases of same-sex couples who attempt to marry and in the cases of couples who married or registered their partnership abroad and apply to register them in Poland. Therefore, currently, it is not possible for same-sex couples to register a foreign marriage/partnership certificate in Poland. However, strategic litigation in that regard is ongoing and includes cases communicated in 2020 by the ECHR⁵.

The legal situation of same-sex parents and their children born abroad is also legally uncertain and is constantly changing, depending on jurisprudence and practice of the registry office. In most cases, the parenthood of a social parent (a parent who is not biologically related to a child) is not recognized, as the courts claim that parents can only be two people of the opposite sex (however, the term is not defined as such in law). In some cases, children of same-sex couples have problems even with obtaining Polish ID and passport, as the registry offices refuse to register their foreign birth certificates which show same-sex

**When I’m walking down
the street with my partner,
I am constantly anxious
that someone’s going to
hurt us.
Poland**

4 See, among others, prof. E. Łętowska in the film „Article 18”, directed by B. Staszewski, details available at <https://mnw.org.pl/biblioteczka/film-artykul-18/>

5 For more information see <https://mnw.org.pl/tematy/polskie-pary-w-strasburgu/>



persons as parents⁶. Strategic litigation in such cases is ongoing as well and includes a case communicated in 2020 by the ECHR⁷ and a case referred to the CJEU⁸.

Same-sex couples and LGBTI families adopt various strategies to deal with this lack of legal recognition. Partners can grant one another various authorizations – e.g. to represent each other in certain official situations - but their scope is very limited. In practice, as the conducted studies have shown, the situation often depends on social and financial privilege, as the level of social acceptance is higher in big cities, private schools, or private healthcare. In general, social attitudes towards LGBTI persons in Poland are ambiguous. On the one hand, research polls show that support for marriage equality is rising and reached 42 % in 2019 (with 57 % of support for same-sex registered partnerships)⁹. On the other hand, 24 % of respondents in the Public Opinion Research Center survey stated in 2019 that homosexual persons must not be tolerated, and 54 % held the opposite opinion¹⁰.

6 For more information on the situation of children of same-sex parents, born abroad, see: Report of the Office of the Commissioner for Human Rights, *The legal situation of LGBT persons in Poland*, December 2019.

7 A.P. and R.P. v. Poland, no. 1298/19, communicated on 8 December 2020.

8 See ruling of Administrative Court in Cracow of 9 December 2020, available at <https://bip.brpo.gov.pl/pl/content/rpo-pytanie-prejudycjalne-ws-dzieci-ktorych-rodzice-sa-jednej-plci>. In a similar Bulgarian case (C–490/20) the Advocate General of the CJEU issued an opinion, stating that Bulgaria must guarantee a child an identity document, mentioning both parents.

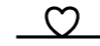
9 See results of the study analysed at: <https://mnw.org.pl/tematy/badania/>.

10 „Attitudes of Poles towards same-sex relationships” (PL), July 2019, survey results no 90/2019.



Recommendations:

1. To introduce marriage equality, i.e., open the institution of marriage to same-sex persons, by amending the Family and Guardianship Code and other necessary legislation.
2. Alternatively, as an interim measure, to introduce the institution of registered partnerships, open to couples regardless of partners' gender and guaranteeing the equivalent of rights.
3. To make it possible to indicate same-sex persons as parents in the child's birth certificate; to determine the contents of the birth certificate of a child born to a transgender man or conceived by a transgender woman; to open joint adoption and second-parent adoption to married or unmarried couples regardless of their gender
4. To provide reproductive health services to married or unmarried couples regardless of partners' gender, as well as to single persons.
5. Regardless of the legislative process of introduction of marriage equality and adoption rights, to immediately adjust common practice of registry office, so it registers foreign marriage/partnerships certificates of same-sex couples and foreign birth certificates of children of same-sex parents. Consequently, to fully recognize the rights of LGBTI families in cross-border situations.



6. Romania





6. Romania

Romania does not provide any form of recognition and legal protection for rainbow families.¹¹ In the last 12 years, the Parliament has been unsuccessfully debating eight bills regarding civil partnership. In 2009, the Parliament adopted a New Civil Code that is explicitly forbidding officiating marriage in Romania, as well as recognizing marriage concluded abroad between two persons of the same sex. Adoption is strictly forbidden for rainbow families in any format. All rights that the State is providing for persons of different sex when they get married are denied to persons of same sex who form de facto families of many years and are forbidden to get married (the right to be recognized at the hospital as family member, the right to be recognized as family member for making the arrangements in case of death, the right to legal inheritance, the right to co-insurance, the right to take over the rent contract, the right to civil compensation in case of violent death, the right to survivorship pension, the right to family care leave, the maintenance obligation, the benefits for family business etc.).

The law and practice do not define family or family member, but the concept of “family life”. In 2016, the Constitutional Court of Romania stated that the notion of family life is complex, entailing de facto families and families that resulted of marriage.¹² In 2018, the Court established that the relationship formed of two persons of the same sex has the same right to constitutional protection of the right to family life as a couple formed of persons of different sex.¹³

The New Civil Code strictly forbids the recognition marriages and registered partnerships of persons of the same sex concluded abroad for all purposes.¹⁴ In 2018, the Constitutional Court decided that this le-

11 21 cases are pending before the European Court of Human Rights complaining against discrimination and lack of recognition and protection. See ECtHR, *Buhuceanu and Ciobotaru v. Romania*, No.20081/19, and 20 other applications.

12 Constitutional Court of Romania, Decision No.580 of 20.07.2016, para.40.

13 Constitutional Court of Romania, Decision No.534 of 18.07.2018, para.41.

14 New Civil Code of 2009, Art.277.



gal ban should not apply to cases of spouses who exercise freedom of movement under EU law.¹⁵ This decision came as a result of the CJEU judgment in *Coman and Others*.¹⁶ Despite these judgments that are mandatory for all authorities, the immigration authorities continue to refuse to recognize the status of spouse for same sex persons.¹⁷

Parent-child relationships of children of same-sex partners born abroad are not recognized in Romania because the New Civil Code strictly bans the recognition of marriages and registered partnerships of persons of the same sex. Moreover, the preformatted headings for parents in the birth certificate are “mother” and “father”.

ACCEPT Association conducted a statistically relevant survey on the public perception regarding the legal protection and recognition of same-sex couples. The study had as the target population the Romanian resident adult population eligible to vote, meaning all residents of Romania with Romanian citizenship, older than 18 years of age. The survey excluded the Romanian diaspora, a population already exposed to LGBTI individuals who have the right to marry or establish other civil unions. The sample size was 1064 questionnaires, applied by Computer Assisted Telephone Interviewing, that selects random participants. The margin of error applicable was ±3%, and the data was collected from January 6 to January 15, 2021.

When asked what phrase describes best their opinion on gay and lesbian couples, 26% of respondents said same sex couples should be allowed to marry, just like any other couple, while 17% opted for legal protection under a civil union, totaling 43% of Romanians in favor of

15 Constitutional Court of Romania, Decision No.534 of 18.07.2018.

16 CJEU, C-673/16 *Coman and Others*, 5 June 2018.

17 *Coman Case* is now pending before the European Court of Human Rights complaining against these continuous violations. See ECtHR, Application no. 2663/21, *Relu-Adrian COMAN and Others v. Romania*, communicated on 09.02.2021.

We all think what would happen if one partner died and should be taken from the morgue to start preparing the funeral. How would he or she be treated?

Romania



legal recognition of same-sex couples. Furthermore, we asked the respondents if civil marriage was one day made legal for same-sex couples in Romania, what impact would that have on their life. Unsurprisingly, a whopping 71% said this would not have any impact on their lives, while only 17% said this would impact them very negatively. This percentage comes to validate once again the result of the 2018 Referendum regarding the definition of the family in the Romanian Constitution, when almost 80% of the population choose not to vote. Thus, the attempt to ban same-sex marriage in the Romanian constitution and redefine family very narrowly failed because the minimum participation threshold in Romanian referenda is 30%.

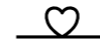
Furthermore, children are often viewed as a contentious topic in relation to the acceptance by a traditional public of same sex relationships and their legal recognition and regulation. However, the data contradicts these concerns, and shows the palpable empathy and importance Romanians give to children and families rearing kids. When asked about same-sex couples in Romania who want to raise children together, participants were asked to select the option that represents their view. 34% said same-sex couples are equally capable of raising children and should be respected according to the laws of our country, while 18% noting that some same-sex couples are already raising children and may need some legal protections in Romania. Thus, 52% of Romanians recognize the existing or potential status of LGBTI individuals as parents in our country.

The ACCEPT quantitative study shows even greater rates of acceptance among young adults. 56% of those aged between 18 and 34 agree that same-sex couples should benefit from legal protection under the law: 42% agree with marriage, while only 12% support a lesser form of recognition. Moreover, in all age groups we see equal marriage, with its complex bundle of meanings, being the legal form favored over other types of civil unions by the Romanian public. Even in the 65+ age group, where 30% of Romanians agree with a legal form of regulation of same sex relationships, we see 17% opting for marriage while only 13% for other types of civil unions.

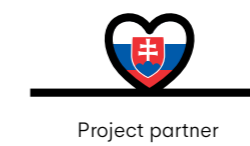


Recommendations:

1. Adopt legislation that is ensuring recognition and protection of same-sex families on an equal basis as heterosexual families.
2. Immigration authorities should immediately change their practice and enforce the CJEU judgment C-673/16 Coman and Others and the Constitutional Court Decision No.534 of 18.07.2018.



7. Slovakia



 **iniciatíva
inakosť**



7. Slovakia

The most important Slovak legislation with respect to family is Law about Family (Act no. 36/2005 Coll.) There is no direct definition of family, however, this law states that family based on marriage is the basis of the society. Article 1 of the same law as well as the Article 41 of the Constitution define marriage as a unique connection between a man and a woman. This formulation of national legislation has represented a huge obstacle for further changes and advocacy activities. In addition, the same-sex couples marriages and registered partnerships from abroad are not recognized by the Slovakia. There are different problems connected to this issue. If the husband or wife of Slovak citizens is from f.e. New Zeland, there is problem to receive permit to stay, while in case of heterosexual married couple the husband/wife from the New Zeland has automatically right for 5 years permit to stay and after that has possibility to ask for permit to stay without restriction. The obstacle is the definition of marriage mentioned within national legislation as well as non-existence of registered partnership.

In Slovakia, there is basically no legal recognition of the rainbow families. There is no possibility to get married or to register partnership. There is the possibility to adopt a child by a single person or by a married couple. While same sex couples are exclude from possibility to get married there is no possibility to adopt a child by same sex couples. There is a possibility to undergo IVF, however only the biological parent will be in the child's birth certificate. In addition, with respect to our focus group and in-depth interviews, there might be feeling of stigma by society in case a person, living in same sex relationship, wants to undergo IVF accompanied by her partner. In case of inheritance, it is possible to write a will, but on the one hand it is an act that is required of same-sex couples compared to married couples in addition, can be an economically demanding task and at the same time the will can be questioned in practice uncertainties and risks of litigation¹⁸.

18 Plaváková, L. (2020). Analýza právnej úpravy situácie párov rovnakého pohlavia. Iniciatíva Inakosť.



The same problem is in the case of recognition of birth certificates for children born abroad. The non-existent legislation with respect to these issues has left parents to live in insecurity and push them to prepare more documents in case of necessity and use services of notary. In addition, in 2021 there was an attempt to include into legislation that only a man and a woman can be parents.¹⁹ In general with respect to our research based on in-depth interviews as well as focus groups – people living in rainbow families divide their lives into two parts. The first one represents their ordinary lives with their family members and this one was perceived as non-problematic. They find ways to have children, they are able to find services which are LGBT friendly and in general the attitude of the small part of the society around them is accepting. On the other side there is the rest of the society, within which they need to act, they need to often visit state social services, different public offices and members of rainbow families live in constant stress. The violation of rights of same sex couples has been criticised by the Slovak Ombudsperson. She presented her report in the national parliament and received criticism that this report represents “LGBT ideology”. This report, on the other side, was supported by the Slovak president Zuzana Čaputova²⁰.

The fact that the state does not “see” same-sex couples and rainbow families has been even more visible during the COVID-19 pandemic. Several of the pandemic measures expose same-sex couples and rainbow families to situations that complicate their lives and create other barriers. When restricting the entry of foreigners into its territory,

I perceive institutions as an enemy. It is not something I want or consciously do, but I go to them as if I were going to to an enemy camp, I have to be armoured with everything I can – mentally and formally – so that I can win the fight.

Slovakia

19 K NR SR. (2004–2021). Návrh poslancov Národnej rady Slovenskej republiky Mariana KOTLEBU, Rastislava SCHLOSÁRA, Martina BELUSKÉHO a Magdalény SULANOVEJ na vydanie ústavného zákona, ktorým sa mení a dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov. [ONLINE] available at: <https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=8120>

20 Kleinová, P. (2020). Ombudsmanka sa zastala LGBTI, Kotlebovci sa zabávali. Prirovnali ju k „sorosovskej mimovládke“. [ONLINE] available at: <https://www.startitup.sk/ombudsmanka-sa-zastala-lgbti-kotlebovci-sa-zabavali-prirovnali-ju-k-sorosovskej-mimovladke/>



Slovakia has defined the circle of persons to whom the restriction does not apply and who are therefore allowed to enter the territory of Slovakia. These exceptions include spouses and minor children, while any other family ties have been omitted by Slovakia. In the case of a same-sex couple, only the legal parent is entitled to ask for nursing care during COVID-19 restrictions. There is no possibility to use this measure for both, biological as well as social parent, as is the case with heterosexual couples²¹.

Recommendations:

1. To legally recognise same-sex couples at least in form of registered partnership.
2. Ensuring that registered partnership legislation that recognise and protect same-sex couples is passed and implemented effectively and that second parent adoption is available for all.
3. Adopt legislation that ensure recognition and protection of children of same-sex families on an equal basis as children of heterosexual families.

21 Plaváková, L. (2020). Analýza právnej úpravy situácie párov rovnakého pohlavia. Iniciatíva Inakosť.



Love Does Not Exclude Association

Since 2009 we have been working for the protection of the rights of LGBT+ community in Poland, in particular for the introduction of marriage equality, regardless of sexual orientation and gender identity. We change the law, we build the community and we build the understanding. We conduct advocacy work, social campaigns, educational projects, training for business, and – as Law Does Not Exclude – legal aid.

mnw.org.pl/en





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rodziną!**

 **miłość
nie wyklucza**
STOWARZYSZENIE

R.I.S.E




Projekt RISE jest współfinansowany
przez Unię Europejską ze środków
programu Prawa, Równość
i Obywatelstwo

Raising awareness for Inclusive Societies to Embrace rainbow families in Europe (R.I.S.E) is a joint initiative of LGBT+ NGOs from Bulgaria, Lithuania, Latvia, Romania, Slovakia, and Poland, ie., the last remaining EU countries which offer no legal recognition of any kind to same-sex couples and their children. Lack of legal status creates obstacles and problems in everyday life, especially in official and institutional matters. It means families live in constant uncertainty and have no protections in the most difficult situations in life.