

Round Table on Rainbow Families: from mutual recognition of rights in the EU to national strategies on marriage equality and/or civil union laws

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REPORT

Summary

This round table discussion, organised by ILGA-Europe, brought together policy-makers, NGOs and legal experts to exchange good practices related to recognition of rights of LGBT families and to identify means of action. Representatives of ILGA-Europe member organisations from Latvia, Croatia, Estonia, Portugal and Sweden were present, as well as experts on European law and human rights law. We started off with an extensive state of play on the freedom of movement for same-sex couples and their children in the EU and an overview of litigation strategies for recognition of same-sex relationships. Then, we looked into the situation in different countries, with a particular interest in the host country of the 2015 Europride, Latvia. There was a general agreement on the fact that developments on the European level regarding mutual recognition helped to advance the recognition of same-sex relationships within the Member States, also for their own residents. Finally, a phrase often heard was that society was much more ready for the recognition of same-sex relationships than policy-makers seemed to think. Political leaders needed to show courage and step up to make sure the law respected the rights of people living in same-sex relationships.

Introduction

Katrin Hugendubel started by explaining how some policy and legislative proposals had been made by EU institutions in the past ten years, regarding freedom of movement in the EU for same-sex couples and their children. However, same sex couples and LGBTI families still face great challenges to enforce the respect of their fundamental rights, especially the right to family life. ILGA-Europe advocates for the mutual recognition of rights of LGBTI families throughout the EU, in cooperation with the Network of European LGBT Families Associations (NELFA). ILGA-Europe contributed these infringements of fundamental rights to the 2012 consultation on mutual recognition, providing the European Parliament and the European Commission with real-life experiences of LGBT families. Katrin set out two key questions for the discussion: (1) how to advocate for the recognition of same-sex relationships at the national and European level and (2) what we can learn from experiences on the national level, like e.g. in Latvia, Estonia, Croatia, and other countries.



The situation of mutual recognition of same-sex families in the EU

Alexander Schuster (University of Trento, Italy) presented the results of the Rights on the Move Project, which studied how the 28 EU Member States deal with family diversity and how they treat LGBTI families. The results will soon be published on the Project's website: www.rightsonthemove.eu.

Regarding the interpretation of the term "spouse" in the Freedom of movement Directive, he found that for the purpose of the Directive, no Member State had actually denied access to spouses of same-sex couples and there were no administrative obstructions in place. There was one case negatively decided by the Supreme Court of Cyprus, but back in 2010. One case occurred in Poland, taken care of by the Helsinki Foundation. It does not seem to have been challenged in court and it might have been an occasional mistake, i.e. not attributable to the position of the Polish legal order. In this case, the parties also sent a letter to the Commission, but the latter did not undertake any action. Regarding the recognition of same-sex parents, it was a whole different story however, the situation being very problematic.

In principle, the EU has no competence on family law and marriage, but it has the obligation to ensure the full enjoyment of rights of its citizens when enjoying freedom of movement within the EU. Serious inconveniences caused by the fact that the Member State where you reside does not recognise your partnership or parental relations, can hinder your freedom of movement and thus fall fully under EU law. Looking at the effects of non-recognition, regarding employment, social benefits, tax law, commercial law, freedom of enterprise, etc., there was enough evidence that non-recognition does constitute a serious inconvenience and that EU competences are thus at stake and the EU needs to act.

Ensuring mutual recognition of relationships is therefore an EU obligation and is part of the solution for LGBTI families. But other measures can be taken to remove barriers, depending on the legal system of each Member State, sometimes even without formally granting full recognition. In case law of the CJEU on legal gender recognition, such examples can be found: in the case *K.B. v NHS Pensions Agency and Secretary of State for Health*, the Court agreed that the trans applicant's impossibility to then obtain legal gender recognition and to marry under the new gender was a violation of a human right. Despite marriage laws falling outside of the EU competences, ensuing employment discrimination was unacceptable, and employment legislation is an EU competence. For the purpose of employment, the applicant had to be treated as a spouse, and *de facto* all the same effects and benefits of a spouse were accorded.

Several examples were then brought up of couples, both EU citizens and non-EU citizens, who travelled to a different EU Member State to have their relationship recognised. In Sweden for instance, an Irish couple wanted to marry, but the Swedish Courts refused. Marko Jurčić explained that Croatia was one of the few countries in the region recognising same-sex relationships, regardless of nationality, and that many non-EU citizens thus engage in such civil partnerships in Croatia, even if they do not have any effect in their home countries. The question of the "abuse of rights" argument was raised. However, if a person has a settled family life when traveling and providing services abroad, it would be difficult to argue that this is an abuse of

rights. The same goes for families established in one member state who then move back to the Member State of origin of one of the partners. Dr. Schuster gave the example of Italians living in Belgium who moved back to Italy after several years. The freedom of movement definitely applies there, as these persons had an established family life in Belgium as a same-sex couple. A genuine married family life rather than a marriage abroad over a week-end may play an important role in defending a truly family life based on marriage. Dr. Schuster replied that the freedom of movement is not only an economic issue, but also has an important impact on one's private life (cf. family names of children).¹

The LGBT parents' and their children's perspective

Luis Filipe Loureiro de Amorim from NELFA then brought in the parents' and children's perspective, inviting everyone to the Annual Family Meeting in Portugal in October 2015. Unfortunately, children's voices are all too often absent, as is the children's rights-based approach. This is not an abstract debate, however. It is about real people and their children. Parents and children don't feel heard enough within the LGBTI Movement, and they feel isolated when other activists say that the issue of parenting is touchy, or not a priority. Children from LGBTI parents can either be from previous heterosexual relationships or directly from same-sex relationships.

NELFA has repeatedly urged the European Commission to create a legal framework in which adoption decisions in one Member State would be automatically recognised in another Member State. For instance, a same-sex Portuguese-Swedish couple living in Belgium adopted a child in Belgium from a third country. When they wanted the child to have the Portuguese nationality, the Portuguese Consulate in Brussels refused to treat the case, as it did not recognise same-sex couples' adoptions. At the Swedish consulate however, few questions were asked and the adopted child received a passport the next week.

Other problematic situations can take place where services are provided to families or in healthcare facilities. For example, same-sex parents going to the hospital with their child often experience unacceptable reactions from hospital staff. The main concern for the parents is first how their child will experience this and only secondly how it impacts the parents.

¹ One month after this Round table event, the ECtHR issued an important judgement in the case of *Oliari and Others v. Italy* (application no. 18766/11 and 36030/11), involving a complaint by three gay couples that under Italian legislation they do not have the possibility to get married or enter into any other type of civil union. The Court held, unanimously, that there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, as the legal protection currently available to same-sex couples in Italy did not only fail to provide for the core needs relevant to a couple in a stable committed relationship, but it was also not sufficiently reliable. A civil union or registered partnership would be the most appropriate way for same-sex couples like the applicants to have their relationship legally recognised. The Court pointed out, in particular, that there was a trend among Council of Europe member States towards legal recognition of same-sex couples – 24 out of the 47 member States having legislated in favour of such recognition – and that the Italian Constitutional Court had repeatedly called for such protection and recognition. Furthermore, according to recent surveys, a majority of the Italian population supported legal recognition of homosexual couples. See <http://hudoc.echr.coe.int/eng?i=001-156265>.

The problems that rainbow families face can put children in an unsafe situation because of the lack of recognition by the authorities and despite of their parents' parenting capacities. This is also psychologically hard for families. Therefore, this issue must be brought to the EU Council. One approach could be to bring together representatives from a number of Member States to sensitise them on the protection of their nationals when they travel or move to other Member States. Advocacy-wise, connections must be made with the children's rights movement, as they are often not aware of the problems children of same-sex couples face.

Another avenue towards mutual recognition and recognition of same-sex relationships: the courts!

Professor Robert Wintemute of King's College London set out the framework in which cases can be brought to court. The following table shows which law applies, and juxtaposes national law, EU law and European human rights law (European Convention of Human Rights, hereinafter ECHR):

Internal situation (non-moving EU citizen), >90% of all couples?	National law and ECHR, <u>but not EU law</u>
Cross-border situation (moving EU citizen)	National law + EU law (Directive 2004/38) + ECHR
Former cross-border situation (returning EU citizen)	National law + EU law (Directive 2004/38) + ECHR <i>Surinder Singh, Roman Angonese</i>
Third-country national situation	National law + EU law (Directive 2003/86) + ECHR

The large majority of situations do not involve EU law, which can be frustrating at times. And to step to the European Court of Human Rights (ECtHR), national remedies must first be exhausted. But Professor Wintemute did encourage victims to go to court. It is worth the try and you cannot really make things worse. Whether you win or not is not the only important issue either you win and change national law or you lose and have the chance to change European law (via the CJEU or the ECtHR). However, the main problem with litigation is that most people do not want to litigate. It is a complicated process that takes a lot of time, and many prefer a quick solution to their problem.

A first tip was to make children a party before the Court, which makes it more likely for the children's rights perspective to come forth. E.g. in *Gas and Dubois v France*, the child in question was not a party to the case, whereas in *X & Others v. Austria*, the child was a party.

Concerning the **Court of Justice of the European Union** (CJEU), Professor Wintemute reminded that there was no direct access for individuals and that national courts could not be forced to make a reference to the CJEU. In some cases, it can be very difficult, as you need to prove a reasonable doubt about the correct interpretation of EU law. Only if there is a "reasonable doubt", there will be a reference, which can be quite hard to obtain.

If you do get to the CJEU as a same-sex couple, there is a very powerful combination of case law that you can use in your favour:

- *Maruko* (2008): the refusal to grant a survivor's pension to the life partner constituted a direct discrimination on grounds of sexual orientation
- *Römer* (2011): a supplementary retirement pension refused to a partner in a civil partnership, constituted a discrimination on grounds of sexual orientation
- *Hay* (2013): the refusal to grant marriage benefits to an employee entering into a civil partnership with his same-sex partner constitutes direct discrimination based on sexual orientation.

These cases in combination with Article 21 of the Charter of Fundamental Rights of the EU and with ECtHR case law are a powerful body of anti-discrimination law. However, it should be noted that the situation on the ground is evolving, and that more and more Member States now recognise same-sex marriages and civil partnerships, which eases the access to rights. Indeed, 19 of 28 Member States now have marriage or registered partnership for same-sex couples. In 2000, this was only the case in 5 out of 15 Member States.

Also for the **European Court of Human Rights**, the list of positive cases is impressive:

- *Karner v. Austria* (2003): regarding tenancy succession rights, only unmarried different-sex and not same-sex partners could succeed to a tenancy after the death of the official tenant, which was condemned as discriminatory.
- *Schalk & Kopf v. Austria* (2010): marriage was not granted as a right, but the ECtHR said that same-sex couples have family life under Article 8 and this created positive pressure to pass a registered partnership law.
- *X & Others v. Austria* (2013): a biological parent being in a stable same-sex relationship has the right to retain the status of a parent if his/her partner adopts his/her child
- *Vallianatos & Others v. Greece* (2013): the exclusion of same-sex couples from "civil unions" under Greek law was found to be discriminatory. It was noted that the draft bill on same-sex partnerships recently proposed in Lithuania is actually quite similar to the one in Greece that was condemned in *Vallianatos*.

Pending cases on recognition of same-sex relationships are: *Taddeucci & McCall v. Italy* (Sept 2009, communicated in Jan 2012; concerning an application for a residence permit), *Oliari v. Italy* and *Orlandi v. Italy* group of cases (March 2011, communicated in December 2013).² The chance for consensus on a same-sex partner (at least of a European citizen) receiving a residence permit is slightly higher, as probably at least 30 out of 47 State Parties to the Convention already implement this practice. Only 24 out of 47 State parties have registered partnership laws, which is probably not enough for a European consensus translating into ECtHR judgements valling for partnership legislation. However, in Greece, Cyprus and Italy discussions on partnership legislation has started and drafts were proposed, which could positively influence the path towards consensus hereon. Finally, regarding access to marriage, Professor Wintemute was sure that the ECtHR would not depart from *Schalk & Kopf* in *Oliari* and *Orlandi*, the maximum to expect would be an obligation to pass a registered partnership law as an alternative to marriage.

² See footnote above. <http://hudoc.echr.coe.int/eng?i=001-156265>.

Regarding parenting and filiation, several French cases were mentioned. A case on access to donor insemination for lesbian couples was trying to rely on *X & Others v. Austria* and in *Menesson v. France* (2014), it was stated that a European genetic father of a child born through surrogacy, within or outside Europe, had to be legally recognised by the State. Finally, Professor Wintemute regretted that an obligation to permit second parent adoption (by the male partner of the genetic father) was not to be expected soon where second parent adoption is restricted to married different-sex couples. There is greater consensus on registered partnership than on adoption.

Discussion, bringing in different country experiences.

Ulrika Westerlund of the Swedish NGO RFSL brought up the question of surrogacy, which had caused heated debates in **Sweden**. The fiscal administration, in charge of the population registry, had refused to grant custody to two fathers of a child born through surrogacy in the U.S. The case was pending before the Swedish Supreme Court, which means that none of the fathers had custody for the already 10 months old child. This points to an ideological problem related to surrogacy, because non-biological adoption by two fathers is approved without any problems by the same authority.

Then Juris Pūce from the Latvian liberal party Latvijas Attīstībai, spoke about the possible recognition of same-sex relationships in **Latvia**. He stated that LGBTI people now had an opportunity, thanks to the activists' perseverance of the last years. Politicians were starting to campaign on the issue, and it was becoming more and more discussed. However, legislation on same-sex relationships was not within close reach yet, and would take a few more years of building political pressure. Pūce stated that this was not due to the general public's position, but rather to politicians' hesitation and fear of the reaction of some opinion makers or media. During the campaign for the recent presidential elections, civil union for same-sex couples was touched upon in a televised debate, and no participant explicitly rejected it. Pūce hoped that such legislation would be adopted in 5-6 years and that Latvian society would get accustomed to seeing same-sex relationships as equal. On the issue of parenting rights, he acknowledged that there was no push for this in Latvia.

Finally, Pūce stated that developments on the European level regarding mutual recognition would certainly help to advance the issue in Latvia too, as Latvian citizens do marry or register their partnerships in other EU Member States. When they then return to Latvia, he esteemed there would be willingness by the judiciary to accord at least some rights to this situation created in another Member State.

Switching to **Croatia**, Marko Jurčić of the NGO Zagreb Pride reported on how the same-sex "life-partnership" Act came into being. Since the first parliamentary debate in 2005, activists had engaged in a long campaign aimed at policy makers, discussions, parliamentary debates, and media visibility. A lot depended on framing the issue right, in order to build popular support. The Croatian Act shows great similarities with the legislation on marriage. In terms of rights, privileges and obligations, life-partnership is placed at the same level as marriage. Same-sex partners have the same social rights and citizenship rights as married couples, but not the same rights when it comes to adoption. According to the Act, same sex couples cannot adopt, neither joint adoptions nor second parent adoptions are

possible. This had been justified by the so called “incremental approach”, meant to allow the legislator some feedback regarding real-life effects of the new institution before taking a decision on the adoption. However, the Act does introduce some sort of alternative to adoption through to the so-called “partner-guardianship”, another unique feature of the Croatian law. The only difference between the adoption and partner-guardianship concerns the kinship effects of the institutions. Finally, the Act has a significant “EU dimension”, explicitly providing that all same-sex marriages and other registered partnerships legally established in EU Member States enjoy the same status as Croatian married couples in all matters falling within the scope of EU law. Furthermore, in order to facilitate EU free movement rights, the Act explicitly provides that all EU citizens can register their same-sex partnership in Croatia.

Finally, touching upon marriage equality, he stated clearly that the constitutional ban on same-sex marriage from 2013 would not stop the movement and that they would first fight for parenting rights and for modifications in family code, both through legislation or through litigation. Professor Wintemute remarked that constitutional bans were futile and gave the example of Utah’s 2004 amendment, which was struck down in 2014 (with the decision confirmed by the US Supreme Court in 2015).

Reimo Mets, a participant with litigation and advocacy experience in **Estonia**, insisted on the use of personal stories. In the run-up to the adoption of the Estonian partnership law, personal stories had really affected the Members of Parliament. While opponents of the partnership law were “spamming” MPs with negative messages based on the Russian “traditional values” discourse, the proponents used selective strong personal stories using the very little means available as efficiently as possible. He stressed that enough financial means were very important, in order to afford professional media and campaigning support. Katrin Hugendubel stated that ILGA-Europe was aware of this, and that a specific project was being developed to Enable ILGA-Europe to support selected members in national campaigning.

Finally, looking back to Latvia, Kristine Dupale stated that the Latvian NGOs would build up the advocacy for a partnership law till the next elections, and that in the meanwhile they would also use strategic litigation to try to enforce recognition of same-sex relationships. She noted, as other participants did before her, that society was changing much more rapidly than politicians thought and that the latter needed to step up and meet the increasing call for equality.

Further information

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List of participants

Name	Organisation	Title	Country of residence
Katrin Hugendubel	ILGA-Europe	Advocacy Director	Belgium
Alexander Schuster	University of Trento	Coordinator of the Rights on the move project	Italy
Luis Filipe Loureiro de Amorim	NELFA	Treasurer	Belgium
Robert Wintemute	King's College London	Professor of Human Rights Law	UK
Reimo Mets	SEKY	Lawyer	Estonia
Marko Jurčić	Zagreb Pride	Program and PR Coordinator	Croatia
Kristine Dupale	LGBT and their friends alliance MOZAIKA	Associate Professor of non-discrimination law	Latvia
Juris Pūce	Latvijas Attīstībai, (member party of ALDE)	Chairperson	Latvia
Ulrika Westerlund	RFSL	Chairperson	Sweden
Michael Cerulus	ILGA-Europe	Senior Policy Officer	Belgium