

# **‘ENDSOGIDISC: Combating Discrimination and Violence on the Basis of Sexual Orientation and Gender Identity’**

## **Lithuania – National Report**



OFFICE OF THE EQUAL  
OPPORTUNITIES OMBUDSPERSON



Italian Coalition  
for Civil Liberties and Rights



This national report has been developed in the course of implementing the project ‘ENDSOGIEDISC: Combating Discrimination and Violence on the Basis of Sexual Orientation and Gender Identity through Improved Legal Frameworks and Implementation of European Standards’, partially funded by the Rights, Equality and Citizenship (REC) Programme of the European Union (Agreement No. JUST-REC-RDIS-DISC-AG-2018-848821). Opinions expressed in this publication reflect the position of its authors only. The European Commission is not responsible for any use of any information contained in this publication.

#### **AUTHORS OF THE NATIONAL REPORT:**

Evelina Dobrovolska (national legal expert)

Stephanie Cramer Marsal (independent consultant)

Tomas Vytautas Raskevičius (Office of the Equal Opportunities Ombudsperson)

During the process of preparing this publication it was intended to avoid any inaccuracies. However, corrections of and additions to methodology and contents of this national review could be proposed in the future. You are welcome to share your comments and suggestions using e-mail address [lygybe@lygybe.lt](mailto:lygybe@lygybe.lt).

Even though this publication contains legal information regarding implementation of equal opportunities in the Republic of Lithuania, it is recommended to consult legal experts before taking any legal action in any specific situations.



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# ACRONYMS

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CAT	UN Committee Against Torture
CEDAW	UN Committee on the Convention on the Elimination of All Forms of Discrimination against Women
CJEU	Court of Justice of the European Union
CM	Committee of Ministers of the Council of Europe
CM/Rec (2010)5	Committee of Ministers Recommendation (2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity
CoE	Council of Europe
CRC	UN Committee on the Convention on the Rights of the Child
CSO	Civil Society Organisation
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRI	European Commission against Racism and Intolerance
ECSR	European Committee of Social Rights
EU	European Union
LGBT	Lesbian, Gay, Bisexual and Transgender
PACE	Parliamentary Assembly of the Council of Europe
GPR	General Policy Recommendation
FRA	European Union Agency for Fundamental Rights
HRC	United Nations Human Rights Committee
ICCPR	United Nations International Covenant on Civil and Political Rights
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organisation for Security and Co-operation in Europe
SOGI	Sexual Orientation and Gender Identity

# EXECUTIVE SUMMARY

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*Although the human rights situation of LGBT persons in Lithuania remains challenging, substantial advancements have been made recently through strategic national and international litigation. They now need to be taken further through the passing of key legislation for LGBT persons to practically and effectively enjoy human rights protection.*

## **The report**

As part of the CoE/EU project 'ENDSOGIDISC: Combating Discrimination and Violence on the Basis of Sexual Orientation and Gender Identity through Improved Legal Frameworks and Implementation of European Standards, this report maps out the most pressing legal challenges in three priority areas for safeguarding basic human rights of LGBT persons in Lithuania: legal gender recognition, legal recognition of same-sex relationships (families) and effective response to anti-LGBT hate crimes and hate speech. It does so by drawing from a wide range of sources, including international and national documentation reports. It also draws from the results of two national consultations on legal gender recognition and hate crimes/ hate speech held in Vilnius in December 2019 and one online consultation in July 2020.

## **Goals**

It is expected that this report will assist in defining a roadmap for the national multi-stakeholder working group to be established under the coordination of the Office of the Equal Opportunities Ombudsperson as part of the aforementioned project.

## **Key findings and recommendations**

### **Legal gender recognition:**

Lithuanian legislation provides for the right to change one's gender but fails to lay out the conditions and procedure for gender reassignment, a legislative gap which amounts to a violation of Article 8 of the ECHR (ECtHR, L. v. Lithuania, 2007). In practice, since 2017, gender identity can be legally recognised through court order on the basis of psychiatrist's diagnosis and no longer requires sterilisation. This process comes with some serious concerns on the approach itself (pathologisation) and consequences, including in terms of privacy. This calls for a quick, transparent and accessible administrative procedure to be adopted in line with European standards, resuming the legislative work initiated on draft Law on Recognition of Gender Identity in 2017.

### **Legal recognition of same-sex relationships (families):**

Lithuanian legislation does not provide for any legal recognition of same-sex relationships. Some legislative proposals regarding registered partnerships have been made in the past, including one about introducing 'cohabitation agreement' which would have removed same-sex partners of family status. In 2019, the Constitutional Court ruled that same-sex partners fall under the scope of the constitutional concept of 'family life' and concluded that the exclusion of same-sex spouses for migration purposes is unconstitutional. Although the judgment concerned the field of migration, its reasoning importantly feeds into the much-needed debate to introduce legal recognition of same-sex relationships (families) in a way that ensures alignment of rights and obligation between same-sex partners and spouses in Lithuania.

### **Anti-LGBT hate crimes and hate speech:**

Hate crime and hate speech on the grounds of sexual orientation are explicitly criminalised in Lithuanian law but the grounds of gender identity and gender expression are not covered as yet. Officially recorded instances of such crimes is low when other sources point out to higher numbers. Underreporting, failure of law enforcement and judiciary to investigate and prosecute and related lack of capacity or unwillingness to initiate criminal proceedings are all explanatory factors. With the recent ECtHR ruling *Beizaras and Levickas v. Lithuania* (2020) noting the applicants' sexual orientation had played a role in refusing a pre-trial investigation, a renewed opportunity arise for national authorities to take measures to change this state of affairs. This includes increasing the capacity of the judiciary and law enforcement to investigate such crimes through training, drawing from co-operation with CSO and equality body. Reviewing and updating existing guidelines on victims' rights to take LGBT persons' needs into account would also be a positive way forward.

# INTRODUCTION

## OVERALL BACKGROUND

10 years after the adoption of CM/Rec (2010)5, a heavily contrasted picture of the human rights situation of LGBT persons among CoE member States has emerged: during this decade, the long-time invisibility of human rights issues faced by transgender and intersex persons are now more discussed, the legal landscape is slowly but remarkably changing, notably with more countries including sex characteristics as a protected ground of non-discrimination or hate crime legislation. Undoubtedly, these changes send positive signals that concerns related to the human rights of LGBT persons can be progressively tackled despite the slowness of reforms, challenges in implementation or at times, a growing adverse climate towards the community.

## OBJECTIVES OF THE REPORT

In order to stimulate and support change, the project ‘ENDSOGIEDISC: Combating Discrimination and Violence on the Basis of Sexual Orientation and Gender Identity through Improved Legal Frameworks and Implementation of European Standards’ was developed to provide targeted assistance in selected countries (Italy, Lithuania and Romania) where progress is needed but also achievable. For this to happen, the project participants selected three critical areas: 1) legal gender recognition, 2) same-sex partnerships and 3) hate crime and hate speech. The present report is meant to inform national stakeholders engaged in updating their respective legislative frameworks with an analysis of the state of play of legislation, practical implementation and challenges in these three areas. As part of this project, a national multi-stakeholder working group will be established in the three countries. In Lithuania, the working group is placed under the co-ordination of the Office of the Equal Opportunities Ombudsperson, with the task to propose human rights compliant draft policy and legislative measures regarding these three set of issues by 2021.

## METHODOLOGY

Establishing a process enabling national co-operation among government, LGBT community based organisations and civil society was a priority in the design of the present project. The report was thus prepared by national experts, in collaboration with a governmental focal point. It draws from a wide range of information, making use of both international<sup>1</sup> and national sources, in particular the documentation report on the implementation of the Recommendation CM/Rec(2010)5 in Lithuania<sup>2</sup>. These have been complemented by international-level legal instrument and related relevant jurisprudence. Further consultations were held, where possible in order to collect information, views and examples of good practice. The Office of the Equal Opportunities Ombudsperson convened a consultation on legal gender recognition on 11 December 2019. An interinstitutional meeting on combating hate crimes and hate speech was held on 13 December 2019. An online consultation with the members of the local LGBT community took place on 9 July 2020. Besides national stakeholders, the consultation meeting on legal gender recognition involved also international experts from Council of Europe, ILGA-Europe and three other member States (i.e. Portugal, Norway and Malta), who shared good practice examples from their respective jurisdictions.

## STRUCTURE

The report provides an overview of the legal and practical situation in Lithuania about three aforementioned clusters of rights. In doing so, it reviews gaps but also highlight some positive developments to capitalise on the future work of

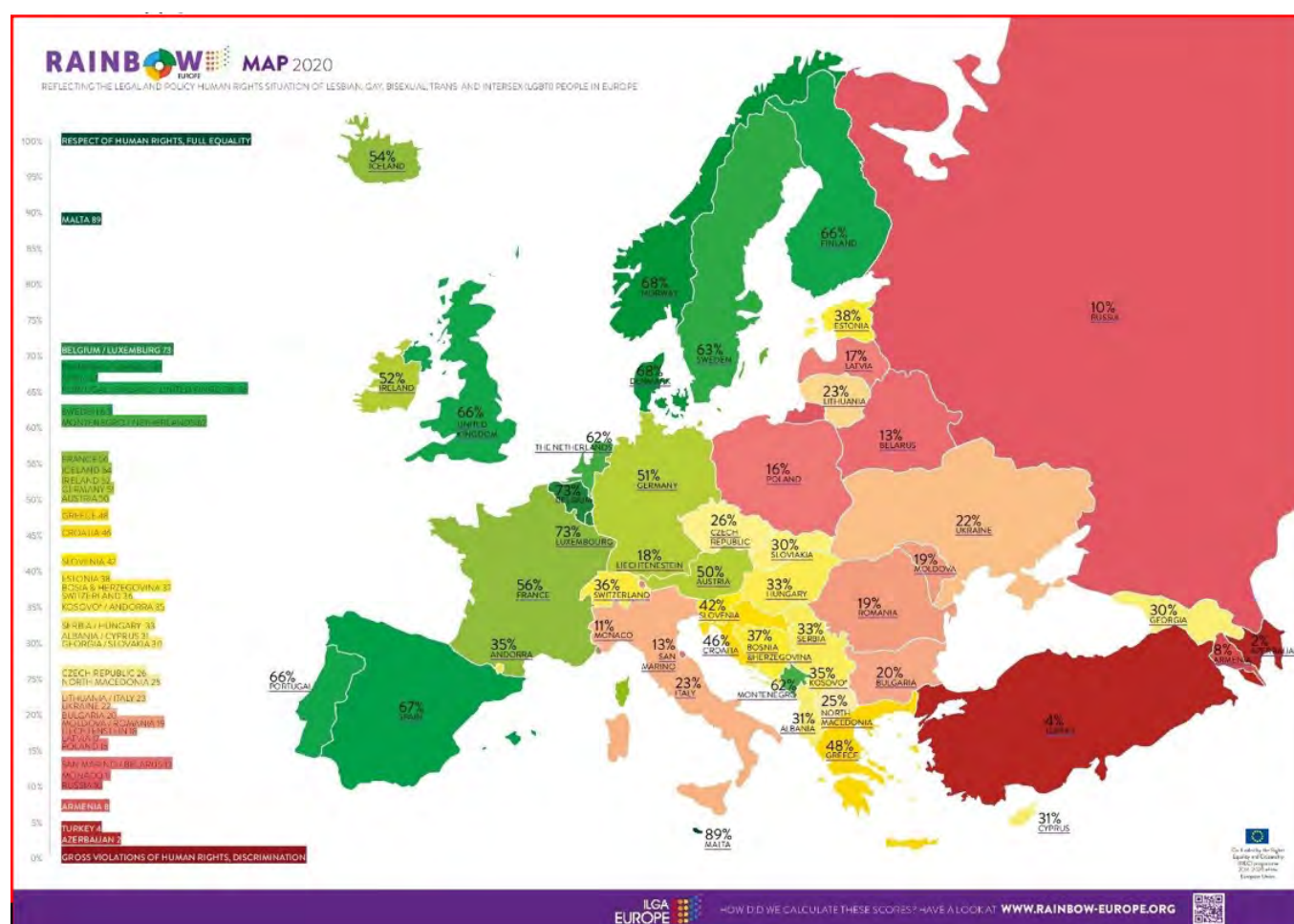
1 This includes inter alia: ILGA-Europe’s Rainbow Map (2020), the Transgender Europe’s Trans Rights Europe & Central Asia Map & Index (2020), the Special Eurobarometer 493 on discrimination (2019), results of the FRA’s LGBT survey (2020), FRA’s reports on comparative legal analysis (2015) and attitudes by professionals in education, healthcare and law enforcement (2016).

2 Tomas V. Raskevičius, ‘We Are People, Not Propaganda: Monitoring Implementation of the Council of Europe Recommendation CM/Rec(2010)5 to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity’, Documentation Report, LGL: 2018, [https://www.ilga-europe.org/sites/default/files/Attachments/lithuania\\_1.pdf](https://www.ilga-europe.org/sites/default/files/Attachments/lithuania_1.pdf).

the national multi-stakeholder working group (some of them are highlighted in a specific section). In order to channel discussions on reforms compatible with the most advanced European standards, a main overview of these standards and related case-law is provided at the beginning of each chapter. Examples of reforms or trends in other countries (so-called good practices examples) are also hereby included with a view to stimulate discussion. Recommendations are included at the end of each thematic chapter and are meant to recap on the main issues needed to be acted upon by the national multi-stakeholder working group.

## COUNTRY PROFILE

According to the annual ‘Rainbow Europe Map’ by the international organization ILGA-Europe<sup>3</sup>, Lithuania ranked 33rd among 49 European countries in terms of legal protections for LGBT(I) persons in 2020.



The general prohibition of discrimination on the grounds of sexual orientation in the Lithuanian legal system is established by the *Law on Equal Treatment*<sup>4</sup>, which transposes the Employment Equality Framework Directive 2000/78/EC. The scope of the national equality legislation is much wider than mandated by the EU Directive, i.e. discrimination on the grounds of sexual orientation is prohibited not only in the sphere of employment and occupation, but also in the spheres of provision of goods and services, education and in the course of all actions by public authorities. The prohibition of discrimination

<sup>3</sup> ILGA-Europe, ‘Rainbow Map Europe. Country Ranking’, May 2020, <https://rainbow-europe.org/country-ranking>.

<sup>4</sup> Law on Equal Treatment of the Republic of Lithuania, No. IX-1826, 18 November 2003, last amendments on 1 July 2019, <https://www.e-tar.lt/portal/lt/legalAct/TAR.0CC6CB2A9E42/asr>.

on the grounds of sexual orientation is also established in the *Labor Code*<sup>5</sup> (Articles 2.1, 26, 59.2 and 75.1.2), the *Law on the Protection of Minors against the Detrimental Effect of Public Information*<sup>6</sup> (Article 4.2.12) and the *Law on Provision of Information to the Public*<sup>7</sup> (Article 19.1.3). The *Criminal Code*<sup>8</sup> contains a combination of general and specific penalty-enhancement provisions for hate crimes, as well as a substantive offence. Article 129.2.13 (i.e. murder), Article 135.2.13 (i.e. severe health impairment) and Article 138.2.13 (i.e. non-severe health impairment) establishes penalty enhancement in case these offences are committed out of bias motivation on grounds of sexual orientation. Article 60.12.1 qualifies acts committed in order to express hatred on the ground of sexual orientation as an aggravating circumstance (i.e. prohibition of hate crimes), while Article 170 prohibits incitement to hatred based on sexual orientation (i.e. prohibition of hate speech).

While sexual orientation is a protected ground under the Lithuanian legislation, the same does not apply to the ground of gender identity and (or) gender expression. To put it in other words, **discrimination and hate motivated incidents against transgender or gender non-conforming people would not technically qualify as punishable offences in Lithuania.**

Even though Lithuanian legislation, in theory, provides for quite extensive legal guarantees against discrimination on the grounds of sexual orientation, its implementation in practice is, at best, described as ineffective. Instances of discrimination on the grounds of sexual orientation remain highly underreported. For example, the Office of the Equal Opportunities Ombudsperson, i.e. the public body responsible for the implementation of the Law on Equal Treatment, received three complaints regarding alleged instances of discrimination on the ground of sexual orientation in 2017, five in 2018 and three in 2019<sup>9</sup>. Considering the widespread phenomenon of discrimination on the grounds of sexual orientation indicated by international surveys and opinion polls, it can be concluded that local LGBT persons are reluctant to employ available reporting and (or) complaint mechanisms.

Various international surveys and opinion polls indicate that Lithuania remains one of the most socially hostile societies against LGBT people in Europe. According to the second wave of the LGBT Survey by the EU Agency for Fundamental Rights (FRA), 55 % of the Lithuanian respondents felt discriminated in various spheres of life in the last twelve months due to being LGBT(I)<sup>10</sup> (the worst result in the EU). These negative patterns correlate with attitudes by members of the general public. According to the Special Eurobarometer 493 survey, 37 % of the Lithuanian respondents would feel uncomfortable working with an LGB person, while this number increases to 42 % regarding a transgender colleague<sup>11</sup>. Furthermore, 70 % of the Lithuanian respondents would feel totally uncomfortable if their children were in a love relationship with a person of the same sex and 71 % would feel totally uncomfortable if their children dated a transgender person<sup>12</sup>. It can be concluded that **social acceptance of LGBT persons in Lithuania remains very low.**

5 Labor Code of the Republic of Lithuania, No. XII-2603, 14 September 2016, last amendments on 29 March 2020,

<https://e-tar.lt/portal/lt/legalAct/f6d686707e7011e6b969d7ae07280e89/PuJjRmfzLF>.

6 Law on the Protection of Minors against the Detrimental Effect of Public Information, No. IX-1067, 10 September 2002, last amendments on 5 November 2011, [https://www.e-tar.lt/portal/lt/legalAct/TAR.817CC58C1A54/TAIS\\_410367](https://www.e-tar.lt/portal/lt/legalAct/TAR.817CC58C1A54/TAIS_410367).

7 Law on the Provision of Information to the Public of the Republic of Lithuania, No. I-1418, 2 July 1996, last amendments on 17 January 2020, <https://www.e-tar.lt/portal/lt/legalAct/TAR.065AB8483E1E/asr>.

8 Criminal Code of the Republic of Lithuania, No. VIII-1968, 26 September 2000, last amendments on 1 January 2020, <https://www.e-tar.lt/portal/lt/legalAct/TAR.2B866DFF7D43/asr>.

9 Annual Report of the Office of the Equal Opportunities Ombudsperson, Vilnius, 2019, [https://lygybe.lt/data/public/uploads/2020/03/lr\\_lygiu\\_galimybiu\\_kontrolieriaus\\_2019\\_m.\\_veiklos\\_ataskaita.pdf](https://lygybe.lt/data/public/uploads/2020/03/lr_lygiu_galimybiu_kontrolieriaus_2019_m._veiklos_ataskaita.pdf), p. 50.

10 EU Agency for Fundamental Rights, European Union lesbian, gay, bisexual and transgender survey. Data Explorer, Vienna, 2020, <https://fra.europa.eu/en/data-and-maps/2020/lgbti-survey-data-explorer>.

11 European Commission, ‘Discrimination in the EU in 2019. Report’, Special Eurobarometer 493, 2019, <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/88301>, p. 55, 68.

12 Ibid., p. 58, 70.

# LEGAL GENDER RECOGNITION

European and international case-law have set out important benchmarks regarding legal gender recognition. Such case-law comes against a background of international human rights bodies' efforts to ensure that international human rights law, although not explicitly referring to transgender and intersex persons, embraces evolving social realities and provide basic protection. In addition, important other CoE soft law documents, in particular CM (2010)5 have provided guidance to States on the issue.

## STATE POSITIVE OBLIGATION TO LEGALLY RECOGNISE PREFERRED GENDER

Legal gender recognition has been much in focus of the ECtHR's jurisprudence concerning transgender and intersex human cases rights over time. While 'gender identity' was already established to fall within the non-exhaustive list of protected characteristics set out in the right to non-discrimination (Article 14 ECHR), the ECtHR has further considered that 'elements such as gender identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8'<sup>13</sup>.

The ECtHR jurisprudence has evolved considering the changed social context regarding transgender and intersex legal recognition of their chosen identity in CoE member States. Referring to 'clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of postoperative transsexuals', the ECtHR found in its landmark judgment, *Goodwin v. the United Kingdom* (2002)<sup>14</sup> that the applicant has a right to preferred gender recognition and established the corresponding obligation for the state to establish that right.

While the ECtHR jurisprudence asserted a general positive obligation for States to legally recognise preferred gender, it also differed to States' margin of appreciation as to the means to achieving such recognition. The below provides an overview of how the ECtHR but also other human rights bodies, have reviewed States' exercise of their margin of appreciation regarding requirements prior to obtaining legal gender recognition.

## LIMITS TO STATES' MARGIN OF APPRECIATION

### Divorce:

In *Hämäläinen v. Finland* (2015)<sup>15</sup>, married applicants were required to convert their relationship to a registered partnership prior to obtaining legal gender recognition. The ECtHR recognised that the divorce requirement leads to 'daily situations in which' a trans person 'faces inconveniences' but did not find this requirement disproportionate in view of the existence of a genuine option providing legal protection for same-sex couples that was almost identical to that of marriage. On the other hand, at UN level, the HRC found that divorce requirements do violate the rights to privacy and equality under Articles 17 and 26 ICCPR in its case *G v. Australia* (2017). It endorsed the argument that 'even though failure to provide access to marriage for same-sex couples may not constitute a violation of the ICCPR, consistency between Birth registrations and Marriage Act is not a legitimate aim', by finding the national policies inconsistent and discriminatory. Interestingly, the ECtHR aforementioned case concerned a country, Finland, which did offer an alternative to marriage. It therefore remains to be seen how the ECtHR would rule in a case where such an alternative would not exist.

13 See: Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence, page 31, para 128. (Among these: *B. v. France*, § 63; *Burghartz v. Switzerland*, § 24; *Dudgeon v. the United Kingdom*, § 41; *Laskey, Jaggard and Brown v. the United Kingdom*, § 36; *P.G. and J.H. v. the United Kingdom*); [https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf).

14 *Goodwin v. the United Kingdom*, (Application No. 28957/95, ECtHR), 11 July 2002, <http://hudoc.echr.coe.int/fre?i=001-60596>. Goodwin, who had undergone gender confirmation surgery, was denied an amended birth certificate showing her preferred female gender. As a result, she was unable to access core legal and social benefits in the United Kingdom, including retirement guarantees and marriage

15 *Hämäläinen v. Finland*, (Application No. 37359/09, ECtHR), 16 July 2014, <http://hudoc.echr.coe.int/fre?i=001-145768>.

ICCPR in its case *G v. Australia*<sup>16</sup> (2017). It endorsed the argument that ‘even though failure to provide access to marriage for same-sex couples may not constitute a violation of the ICCPR, consistency between Birth registrations and Marriage Act is not a legitimate aim’, by finding the national policies inconsistent and discriminatory. Interestingly, the ECtHR aforementioned case concerned a country, Finland, which did offer an alternative to marriage. It therefore remains to be seen how the ECtHR would rule in a case where such an alternative would not exist.

### **Sterilisation and medical interventions:**

In *Y. Y. v. Turkey*<sup>17</sup> (2015), the ECtHR ruled that sterilisation cannot be made a prerequisite for access to gender reassignment surgery. Even if the ECtHR made the argument more in the context of legal recognition than gender reassignment, it is in the *A.P., Garçon and Nicot v. France* (2017)<sup>18</sup> that the ECtHR made the argument explicit: mandatory infertility, in order to obtain gender recognition, violates the right to physical and moral integrity under Article 8. The ECtHR did however have a more deferential stance towards diagnosis prerequisites, even if it did note that ‘the psycho-pathologisation of transgender persons reinforces the stigmatisation of which they are victims’ (para. 138).

In *L. v. Lithuania* (2007)<sup>19</sup> discussed below (see page 14), domestic law required that individuals undergo certain surgical procedures before they could officially amend their legal gender but the lack of regulation for such procedures left complainant unable to satisfy the requirement (violation of Article 8). Further, the ECtHR held that medical requirement should not be disproportionate such as placing the burden of the proof for the medical necessity of gender reassignment on the applicant (*Van Kück v. Germany* (2003)<sup>20</sup>) as this amounts to a violation of fair hearing and right to privacy. Sterilisation requirements also came under the scrutiny of the ECSR<sup>21</sup>, including under its collective complaints procedure. In *Transgender Europe and ILGA-Europe v. the Czech Republic* (2018)<sup>22</sup>, the ECSR considered that such requirement is not being consistent with ‘State obligation to refrain from interfering with the enjoyment of the right to health’ (Article 11 of the ESC).

### **Age:**

Explicit or implicit age restrictions may obstruct this best-interest-principle for young as well as elderly. In *Schlumpf v. Switzerland* (2009)<sup>23</sup>, the ECtHR held that the personal circumstances of the persons should be taken into account rather than a mechanical application of the law. The case in question concerned the refusal by the applicant’s health insurers to pay the costs of her sex-change operation on the ground that she had not complied with a two-year waiting time before gender reassignment surgery. Given the age of the applicant (67), the decision to undergo gender assignment surgery was likely to be affected by the long waiting time.

16 *G v. Australia*, Human Rights Committee, Communication No. 2172/2012, 28 March 2017, [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/CCPR\\_C\\_119\\_D\\_2172\\_2012\\_25976\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/AUS/CCPR_C_119_D_2172_2012_25976_E.pdf).

17 *Y. Y. v. Turkey* (Application No. 14793/08, ECtHR), 10 March 2015, <http://hudoc.echr.coe.int/rus?i=001-153134>.

18 *A.P., Garçon and Nicot v. France* (Application Nos. 79885/12, 52471/13 and 52596/13, ECtHR), 6 April 2017, <http://hudoc.echr.coe.int/eng?i=001-172913>.

19 *L v. Lithuania* (Application No. 27527/03, ECtHR), 11 September 2007, <http://hudoc.echr.coe.int/eng?i=001-82243>.

20 *Van Kück v. Germany* (Application No. 35968/97), 12 June 2003, <http://hudoc.echr.coe.int/eng?i=001-61142>.

21 Note also that as part of its monitoring activities, ECSR asked if States parties legal recognition of gender requires required sterilisation or any other invasive medical treatment that could impair the health or physical integrity of transgender persons. See ECSR Conclusions 2013, General Introduction.

22 *Transgender Europe and ILGA-Europe v. the Czech Republic* (Complaint No. 117/2015, ECSR), adopted on 15 May 2018, <http://hudoc.esc.coe.int/eng?i=cc-117-2015-dmerits-en>,

23 *Schlumpf v. Switzerland* (Application no. 29002/06, ECtHR), 9 January 2009, <http://hudoc.echr.coe.int/eng?i=001-90498>.

## Other Council of Europe instruments:

While this overview of international standards is centered around existing ECtHR jurisprudence, **soft law instruments** have also played an important role in clarifying the scope existing human rights standards in the context of gender identity or expression. The Commissioner for Human Rights had had a pioneer role in addressing trans equality in its Issues papers<sup>24</sup>, ECRI is also addressing the issue in its country monitoring reports. In its judgments, the ECtHR usually refers to PACE resolutions, including Resolution 2048 (2015)<sup>25</sup>, as well as **CM (2010)5** (para. 20 to 22) which inter alia recommends to member States to review prior requirements for legal recognition of gender reassignment.

**At the UN level**, UN human rights bodies have also paid specific attention to issue of discrimination of transgender and intersex persons. The HRC regularly addresses such issues in its concluding observations to state parties. CAT called on states ‘to guarantee respect for the physical integrity of intersex individuals’ and ensure that ‘no one is subjected during childhood to non-urgent medical or surgical procedures intended to establish one’s sex’<sup>26</sup>. The CRC emphasized freedom of expression of adolescent and respect for their physical and psychological integrity, gender identity and emerging autonomy<sup>27</sup>. CEDAW advocated the explicit prohibition of ‘unnecessary surgical or other medical treatment on intersex children until they reach an age when they are able to give their free, prior and informed consent’<sup>28</sup>.

**EU primary and secondary legislation** is rather limited to cover the issues of transgender persons and even more so on issues of intersex persons. Interestingly there is some caselaw from the CJEU attempting to offer some protection to transgender persons. The reasoning has mainly relied on sex grounds to provide the complainant with an equality-based remedy under the then Equal Treatment Directive of 1976 (76/207/EEC). In the landmark case, *P v. S and Cornwall County Council* (1996)<sup>29</sup>, the CJEU found that the dismissal of complainant who was undergoing gender reassignment from male to female constituted unfavourable treatment. Other CJEU decisions confirmed that jurisprudence<sup>30</sup>. Consolidating the existing directives on gender equality, **Directive 2006/54/EC** on the implementation of the principle of equal opportunities and equal treatment between men and women (recast) later became the first EU Directive which also refers to persons intending to undergo or having undergone gender reassignment.

24 See the first Issue paper by the Commissioner for Human Rights of the Council of Europe, Human Rights and Gender Identity (CoE, 2009), followed by Human Rights and Intersex People: Issue paper (CoE, 2015), p. 9.

25 PACE Resolution 2048 (2015) on ‘Discrimination against transgender people in Europe, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736>. The said Resolution was followed by Resolution 2191 (2017) on ‘Promoting the human rights of and eliminating discrimination against intersex people’, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24232&lang=en>

26 CAT, ‘Concluding observations on the seventh periodic report of France’ (10 June 2016), UN Doc No. CAT/C/FRA/CO/7, [35(a)], <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsuGd5%2BKvluDuD5l6A8lGLwe7yYFE5XN4yWN%2FVIB-V2%2Fx5xo5wdbP%2FfJ9lnN%2BHL72zfmMftvkB4lyBGPhyXl1IYNK3kkf4ZRLRPHOyl7%2BoEeNG>

27 CRC, ‘Concluding observations on the combined third to fifth periodic reports of Cameroon’ (6 July 2017), UN Doc. No. CRC/C/CMR/CO/3-5, [15(b)], <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsuGd5%2BKvluDuD5l6A8lGLwe7yYFE5XN4yWN%2FVIB-V2%2Fx5xo5wdbP%2FfJ9lnN%2BHL72zfmMftvkB4lyBGPhyXl1IYNK3kkf4ZRLRPHOyl7%2BoEeNG>

28 CEDAW, ‘Concluding observations on the seventh periodic report of Chile’ (14 March 2018), UN Doc No. CEDAW/C/CHL/CO/7, [23]. [http://inter-sex.shadowreport.org/public/CEDAW\\_C\\_CHL\\_CO\\_7\\_28426\\_E.pdf](http://inter-sex.shadowreport.org/public/CEDAW_C_CHL_CO_7_28426_E.pdf).

29 *P v. S and Cornwall County Council* (C-13/94, CJEU) decided on 30 April 1996, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=99622&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5842289>.

30 *K. B. v. National Health Service Pensions Agency, Secretary of State for Health* (C-117/01, CJEU) decided on 7 January 2004, Sarah Margaret Richards v. Secretary of State for Work and Pensions (C-423/04, CJEU) decided on 27 April 2006.

In conclusion, European standards on legal gender recognition show an incremental shift towards the principle of self-declared gender (see also good practices below). One can expect that acceptance of some form of medical condition for legal gender recognition as is currently the case in the ECtHR will surely further evolve in light of a growing trends and calls for depathologisation. In this respect, the common stance of international human rights bodies insisting that all medical conditions for legal gender recognition are a human rights violation is further reasserting the need to move away from outdated pathologisation approaches<sup>31</sup>.

## GOOD PRACTICE EXAMPLES

### SELF-DETERMINATION PROCEDURE

One could observe a progressive shift in CoE member States from medicalised procedures to a new set of laws centered on the respect of human rights allowing transgender persons to have their gender identity legally recognised through **self-determination** rather than medical diagnosis or court order. Denmark was the first EU Member State to proceed with such legislation in 2014 and was followed by a growing number of States: Malta (2015), Ireland (2015), Norway (2016), Belgium (2017), Portugal (2018) Luxembourg (2018) and Iceland (2019).

Variations exist however between these laws as to the **age limitations, with Maltese legislation being the most progressive** (persons exercising parental authority over the minor or the tutor of the minor may file an application in the registry of the Civil Court... requesting the Court to change the recorded gender and first name of the minor...)<sup>32</sup>.

Other good practices include steps taken to **remove existing requirement such as divorce**: Ireland, Finland, Sweden, France or Germany have removed such a requirement. In Germany, the Federal Constitutional Court struck down divorce prerequisites as inconsistent with Basic Law guarantees. In France, domestic courts have rejected involuntary divorce even before the same-sex partnership law was adopted.

### QUICK AND TRANSPARENT PROCEDURES

Such procedures are now enshrined in the law of 8 Council of Europe member States: Belgium, Denmark, Greece, Ireland, Luxembourg, Iceland, Malta, Norway and Portugal. In Denmark, the process requires applicants to request a change of legal gender and to confirm the application six months later but does not require any medical intervention or opinion or diagnosis by an external expert. In Malta, changing the official gender merely requires declaring before a notary that one's gender identity does not correspond to the sex assigned in the birth registry. In Ireland, following adoption of the Gender Recognition Act 2015, the gender-recognition process is also based entirely on the self-determination of the person concerned. In Norway, the Gender Recognition Act grants individuals the right to have their gender marker changed in public registers and passports through a simple procedure to the National Registry Office, with decision being subject to appeal. A reasonable duration of procedure being the case in point, Portuguese law for example stipulates that for a change of name and gender, relevant authorities have to give a decision within eight days of receiving the application.

31 See: Inter-Agencies Declaration on the occasion of the International Day against Homophobia, Transphobia and Biphobia Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness', 17 May 2016, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E>.

32 For other examples, see Denmark: minor applicants are explicitly excluded from gender recognition pathways. In Ireland, Portugal, Belgium, while parents can consent to legal affirmation of young people's preferred gender, minors must be aged at least 16 years.

# SITUATION IN LITHUANIA

## EXISTING NATIONAL LEGAL FRAMEWORK AND JURISPRUDENCE

### HIGHLIGHT EVENTS



2003

Right to change one's gender established in the Civil Code



2007

Judgment by the European Court of Human Rights in the case *L. v. Lithuania*



2014

Enhanced supervision by the Council of Europe due to the lack of legal regulation on gender reassignment



2017

Legal gender recognition ordered by the national courts without requirement for surgery



2017

Draft Law on Recognition of Gender Identity



2019

Discrimination on the grounds of gender identity prohibited by the Constitutional Court

Lithuania has no administrative procedure for legal gender recognition and gender affirming healthcare. Despite the fact that the Article 2.27 of the Civil Code establishes that '[a]n unmarried natural person of full age enjoys the right to the change of designation of sex in cases when it is feasible from the medical point of view'<sup>33</sup>, the enabling legislation has never been adopted. In 2007 the ECtHR delivered a judgment in the case *L. v. Lithuania*, indicating that an existing legal gap constitutes a violation of the right to private life<sup>34</sup>. Based on observations by civil society organisations<sup>35</sup>, the Committee of Ministers of the Council of Europe applied the enhanced supervision procedure in September 2014 with the view of implementing the judgment<sup>36</sup>. Despite the fact that almost 20 years have passed since the introduction of the right to gender reassignment in the Civil Code, 13 years since the adoption of the ECtHR judgment, and six years since the application of the enhanced supervision procedure, the Lithuanian authorities still have not adopted any legal measures with the view of facilitating gender reassignment procedures.

As transgender persons are not able to receive necessary medical services within the framework of the Lithuanian public healthcare system (i.e. healthcare providers simply refuse to provide services and (or) it is not covered by the national health care insurance scheme), they are forced to seek these services from private providers or abroad. Until 2017 transgender persons, after undergoing gender affirming treatment abroad, had to apply before the national courts for new identity documents. The new identity documents were issued **only after a transgender person had undergone gender affirming surgery resulting in sterilization**. In the period between 2008 and 2017 the Lithuanian courts had developed a consistent jurisprudence in mandating that new identity documents were issued after

33 Civil Code of the Republic of Lithuania, No. VIII-1864, 18 July 2000, last amendments on 1 January 2020,

<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.107687/asr>.

34 Supra 19.

35 For the extensive communication among the civil society organizations, the Lithuanian Government and the Committee of Ministers with the view of monitoring the process of implementing the *L. v. Lithuania* judgement, please see: <https://www.coe.int/en/web/execution/submissions-lithuania>.

36 1208DH meeting of the Ministers' Deputies, CM/Del/OJ/DH(2014)/1208/10, 26 September 2014,

[https://search.coe.int/cm/pages/result\\_details.aspx?objectid=-09000016805c4e58](https://search.coe.int/cm/pages/result_details.aspx?objectid=-09000016805c4e58).

the accomplished gender affirming surgery abroad. However, the Lithuanian courts do not award transgender applicants with compensation for pecuniary damages, covering the costs incurred for obtaining gender affirming treatment<sup>37</sup>. It can be concluded that not only were transgender individuals forced outside the country to undergo treatment they seek, but they also had to go through a litigation procedure in order to obtain corresponding identity documents upon their return. This critical situation has dramatically improved since April 2017, as the national courts started granting legal gender recognition without the requirement for mandatory gender affirming surgery implying sterilisation.

The judicial decisions of 7 April 2017<sup>38</sup> and 2 May 2017<sup>39</sup> by the Vilnius City District Court have changed the course of domestic jurisprudence of granting legal gender recognition. These cases concerned two transgender individuals, who had not undergone irreversible gender affirming surgeries (implying sterilisation) because this medical procedure remains currently unavailable in Lithuania. Both applicants have obtained psychiatric diagnosis of 'gender dysphoria' (ICD-10 code F64.0), started hormone replacement therapy, performed mastectomy (i.e. breast reduction surgery) and purposefully constructed their social identity as male individuals in the public sphere. Both applicants requested the civil registry to change their personal identification documents but were refused due to the absence of the relevant national legislation.

The applicants turned to the court, which by respective judgments granted both with the right to change their gender markers and personal identification numbers in their identity documents. After these positive developments, between 2017 and 2019 personal identity documents were changed for 28 transgender individuals without the requirement for gender affirming surgery (implying sterilisation). Based on the courts' jurisprudence, the material conditions for obtaining legal gender recognition in Lithuania at the moment are the requirement for psychiatric diagnosis of 'gender dysphoria' (ICD-10 code F64.0) and self-identification as belonging to the opposite gender. Nevertheless, it must be emphasised that now legal gender recognition could be sanctioned only by the court's decision. **No administrative procedure is still available.** Furthermore, the requirement for psychiatric diagnosis goes against the self-determination model and bears pathologising implications. Currently no legal gender recognition is available for non-binary trans people.



In 2017 corresponding working groups were established in the Ministry of Health and the Ministry of Justice with the aim of developing the necessary legal acts to enable administrative legal gender recognition procedure<sup>40</sup>. The working group in the Ministry of Health was tasked with preparing a health care protocol, enabling provision of primary health care services for transgender individuals, namely – psychological counselling, psychiatric assessment and hormone replacement therapy. Upon receiving these services within the framework of the Lithuanian public healthcare system, transgender

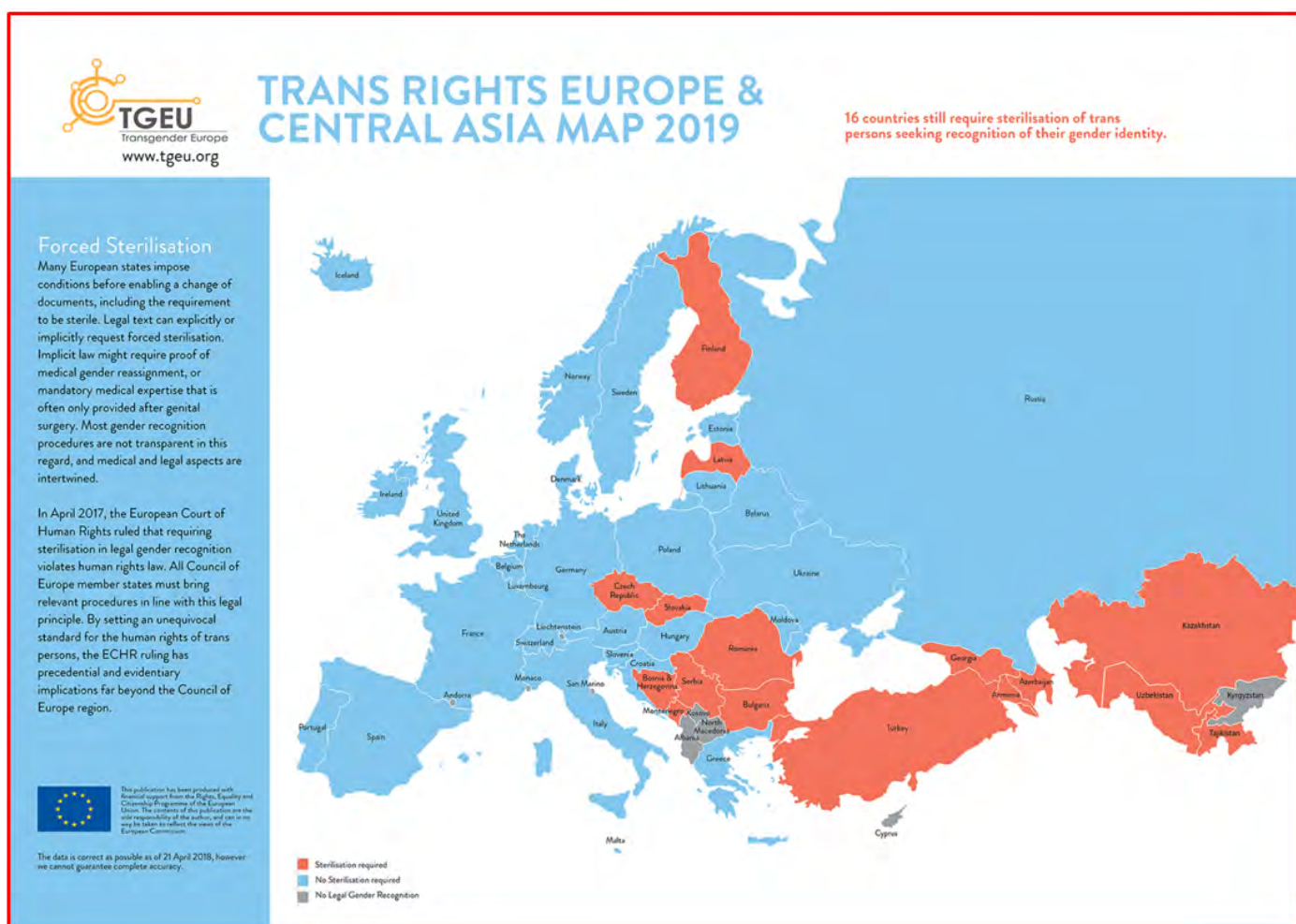
37 It must be noted that on two occasions the national courts (i.e. the Supreme Court of Lithuania in the case No. 3K-3-257/2012 on 30 May 2012 and the Vilnius City District Court in the case No. e2-344-541/2018 on 3 July 2018) awarded a transgender applicant with pecuniary damages with the view of reimbursing the costs related to the gender affirming treatment. However, these judgments are classified; therefore, they are not accessible to the general public and cannot be used as a precedent in further litigation attempts.

38 Vilnius City District Court, Case No. e2YT-5329-934/2017, 7 April 2017.

39 Vilnius City District Court, Case No. e2YT-5326-987/2017, 2 May 2017.

40 Human Rights Committee, 'Fourth periodic report submitted by Lithuania under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2018', No. CCPR/C/LTU/4, 29 November 2017, [http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRI-CAqhKb7yhspsglUbPkaTnjMnKleQtzm7WnwNWr0H0Wi0yLs2218y%2bHeKEysGIAVNyzuBnPHZwak4CqOnk7s%2f1mrR7HqExefnO0NTpjvKnFEuvD-8MILkW, para. \[70\].](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRI-CAqhKb7yhspsglUbPkaTnjMnKleQtzm7WnwNWr0H0Wi0yLs2218y%2bHeKEysGIAVNyzuBnPHZwak4CqOnk7s%2f1mrR7HqExefnO0NTpjvKnFEuvD-8MILkW, para. [70].)

individuals would be able to apply before the national courts with the aim of obtaining legal gender recognition. The working group in the Ministry of Justice was tasked with preparing the comprehensive Law on Recognition of Gender Identity<sup>41</sup>, which would create an administrative procedure for obtaining legal gender recognition in Lithuania. Even though these legal acts were successfully prepared by the indicated deadlines, they remain to be adopted. To put it in other words, there is no administrative procedure for legal gender recognition and healthcare services for transgender individuals remain unavailable within the framework of the public healthcare system.



Despite the progressive jurisprudence by the national courts on granting legal gender recognition based on psychiatric diagnosis and self-identification, it must be noted that the Article 2.27 of the Civil Code still imposes **the requirements of divorce and minimum legal age for the judicial procedure**. To put it in different words, a transgender person, who wants to change their personal identification documents, must be at least 18 years old of age and not married. There are documented cases, when a transgender person had to purposefully terminate their different-sex marriage in order to obtain legal gender recognition. This abusive requirement could be potentially mediated by introducing legal recognition<sup>42</sup> of same-sex relationships in the Lithuanian legal system (see also page 21 and following).

41 Lietuvos Respublikos asmens lytinės tapatybės pripažinimo įstatymo projektas, No. 17-12650, 3 November 2017, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/bc2a5010c09111e7af36e75c0ac79247?positionInSearchResults=0&searchModelUUID=82956dc3-2605-4c22-b705-0094ec4db8ec>.

42 'Translyčiai asmenys Lietuvoje yra priversti išsiskirti' (Eng. 'Transgender Persons in Lithuania are Forced to Divorce'), Office of the Equal Opportunities Ombudsperson, 9 December 2019, <https://www.youtube.com/watch?v=5MHPJ7ab5jw&t=3s>.

Another specific legal challenge is related to the fact that some transgender applicants, undergoing legal gender recognition, have children. As Lithuanian birth certificates are gendered and provide entries only for mother and father (i.e. no possibility of registering two same-sex parents), a transgender person, after undergoing legal gender recognition, is still acknowledged by their previous legal name in the birth certificates of their children (i.e. birth certificates are not updated). In practice, it means that the right to privacy of the transgender applicants remains continuously violated every time they need to claim their paternity or maternity rights, as the fact of legal gender recognition must be disclosed to the third parties. The situation when a transgender applicant gives a birth after undergoing legal recognition, remains to be established. However, there are serious concerns regarding personal data, **which should be entered in a child's birth certificate in that situation.**

**The absence of administrative procedure for legal gender recognition and trans-specific healthcare has very direct negative consequences** on the daily lives of transgender persons. First of all, the negative phenomenon of unsupervised hormone treatment is widespread among the members of the local community. Transgender persons are smuggling hormonal medication from foreign countries and using it without any medical supervision, thus causing catastrophic health hazards (e.g. high risk of venous thrombosis while using estrogen). Secondly, transgender persons, who are undergoing gender affirming treatment abroad, do not have the possibility of changing their identity documents through quick, accessible and transparent administrative procedure, because legal gender recognition still must be sanctioned by the Lithuanian courts. Thirdly, transgender persons who already live according to their true gender, but do not have necessary resources to obtain legal gender recognition through the judicial procedure, are exposed to discrimination, harassment and violence on a daily basis. Every time they are requested to display their identity documents, they are immediately ‘outed’ as a transgender person. **Finally, the Lithuanian legal system does not recognise the legal categories of ‘gender identity’ and (or) ‘gender expression’, thus rendering discrimination against transgender and gender non-conforming people technically not punishable by law.** It can be concluded that transgender persons, due to the absence of any legal protections, remain the most vulnerable group within the local LGBT community.

LEGAL SITUATION					
LEGAL GENDER RECOGNITION	DEPATHOLOGIZATION	PROTECTION FROM DISCRIMINATION	FAMILY LIFE	HATE CRIMES	HEALTHCARE
Only before the court	None (pathologization)	In 2019 established by the Constitutional Court (no legislation)	No protection	Ineffective response	Not available

After obtaining legal gender recognition (i.e. changing name, surname, gender marker and personal identification number) through the judicial procedure, transgender persons do not face any barriers in legally marrying a person of the opposite legal gender. As the Law on Recognition of Gender Identity has not been adopted yet, the procedures of ensuring corresponding changes after legal gender recognition in the key documents originated by state and non-state actors remain largely undefined and thus executed on an ad hoc basis. Transgender persons are usually requested to provide the executing authority with the corresponding court judgment on legal gender recognition. This practice is highly problematic, because it does not provide for the adequate protection of a person's private life. To put it other words, **transgender persons are forced to disclose their transgender identity to multiple actors (i.e. third parties) even after having successfully obtained legal gender recognition.** Despite the lack of privacy protection, on most instances transgender persons are able to obtain the updated documents from state and non-state actors. Up to the present date some transgender individuals faced some challenges only in updating their certificates of higher education.

## IDENTIFIED OBSTACLES

In November 2017, a group of 31 MPs in the Lithuanian Parliament registered a legislative proposal, which aims at banning legal gender recognition and all medical procedures pertaining to gender reassignment treatment<sup>43</sup>. This proposal stands in a sharp contrast with the jurisprudence of the national courts, granting legal gender recognition based on self-identification and corresponding psychiatric diagnosis. It has been interpreted that this radical proposal had been tabled as a response to the progressive draft *Law on Recognition of Gender Identity*<sup>44</sup>, registered by the Ministry of Justice. After the submission, the regressive proposal has not been deliberated upon in the Parliament.

At the moment, the national anti-discrimination legislation does not cover the protected ground of gender identity. Despite the fact the ground of gender identity is not covered by the *Law on Equal Treatment*<sup>45</sup> either, the Office of the Equal Opportunities Ombudsperson would process a potential complaint by a transgender applicant on the alleged instance of discrimination as falling under the protected ground of gender. However, it would be highly beneficial to include the protected ground of gender identity within the framework of the national non-discrimination legislation in order to create legal certainty.

Taking into consideration the fact that almost 20 years have passed since the introduction of the right to gender reassignment in the Civil Code, 13 years since the adoption of the ECtHR judgment in the case *L. v. Lithuania*, and six years since the application of the enhanced supervision procedure by the Committee of Ministers, it can be concluded that there is no political will in Lithuania to legislate on legal gender recognition. This can be explained by two contributing factors. First of all, the local transgender community is relatively small in number (i.e. no more than 200-300 individuals). As a result, politicians are not interested in tackling this socially sensitive topic, because it is believed that it would not generate any political dividends in the light of homophobic and (or) transphobic attitudes in the Lithuanian society. Secondly, the Roman Catholic Church, which is the dominating denomination in Lithuania, voices fierce opposition regarding topics on gender (in contrast to biological sex) and, correspondingly, gender identity. This opposition is at best illustrated by the Church's position against ratifying the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (i.e. the so-called 'Istanbul Convention')<sup>46</sup>.

## SITUATION OF TRANSGENDER PERSONS IN LITHUANIA: NATIONAL REVIEW

<sup>43</sup> Civilinio kodekso 2.27 straipsnio pakeitimo įstatymo projektas, No. XIII-P-1327, 10 November 2017, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/66fe0380c61711e782d4fd2c44cc67af?jfwid=-19syzywy9ez>.

<sup>44</sup> Supra 41.

<sup>45</sup> Supra 4.

<sup>46</sup> CEDAW, 'Concluding Observations on the Sixth Periodic Report of Lithuania', No. CEDAW/C/LTU/CO/6, 12 November 2019, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fCO%2fCO%2f6&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fCO%2fCO%2f6&Lang=en), paras. [22]-[23].

## POSITIVE STEPS

While implementing the measure within the Action Plan for Non-Discrimination 2017–2019 No. 3.1 ‘Research and analysis of the situation of the local LGBT community in the society and in the sphere of private life’<sup>47</sup>, the Office of the Equal Opportunities Ombudsperson conducted the national review on the situation of transgender persons in Lithuania<sup>48</sup>. The review analysed the situation of transgender persons from legal and sociological perspectives. Corresponding recommendations were presented to legislators and policy makers. The national review covered the following topics: (a) standards and recommendations of international organizations in the field of transgender human rights; (b) analysis of the results of the representative opinion survey about transgender persons; (c) overview and analysis of practical challenges, which are faced by transgender persons in multiple daily situations (change of personal documents, provision of healthcare services, protection of personal data, employment, etc.); (d) best practices from other countries. The national review was an outcome of one of the preventive and educational activities by the Office of the Equal Opportunities Ombudsperson, which seeks to reduce discrimination against specific social groups in Lithuania.

## SUMMARY

Although the Civil Code includes the right for a person to change one’s gender, the specific law outlining the conditions and procedure for gender reassignment has not been adopted yet. In 2007, the European Court of Human Rights (ECtHR) in the case *L. v. Lithuania* concluded that non-existent legal regulation amounts to a violation of the right to respect for private life. The Lithuanian authorities are still to adopt the required legislation. For a long time, identity documents for transgender persons were changed only after a gender reassignment surgery, which in turn implied forced sterilisation. This situation changed in 2017, when national courts ordered legal gender recognition based solely on a psychiatrist’s diagnosis. This precedent resulted in a consistent national jurisprudence. Following this progressive jurisprudence, nearly 30 transgender persons have already changed their identity documents in Lithuania.

However, identity documents for transgender persons are changed only through the court proceedings. There is no quick, transparent and accessible administrative procedure in Lithuania. Additionally, the requirement for a psychiatric diagnosis contradicts the individual right to self-determination and leads to pathologising nature of legal gender recognition.

In 2017 a group of members of the Lithuanian Parliament registered a bill that would ban any legal and medical gender reassignment procedures all together. By its’ very nature, this proposal is in stark contrasts to the progressive jurisprudence of the national courts, as well as international human rights standards. Moreover, this radical proposal is believed to be a direct response to the progressive draft Law on Recognition of Gender Identity by the Ministry of Justice.

Those who have exercised the right to legal gender recognition are experiencing specific challenges. For instance, in changing documents and (or) certificates issued by the state authorities that contain personal data. Such changes are not legally regulated and are being implemented on an ad hoc basis. Transgender persons almost always have to submit a court decision on the recognition of their gender identity in order to change documents and (or) certificates. That means that they are forced to disclose their transgender identity to third parties, which is in violation of the right to respect for private life.

Transgender persons cannot access necessary healthcare services in public healthcare institutions. As healthcare professionals refuse to provide such services and (or) they are not covered by public healthcare insurance schemes, transgender persons are forced to seek such services abroad or to pay for them by themselves.

47 Lietuvos Respublikos socialinės apsaugos ir darbo ministro 2017 m. gegužės 15 d. įsakymas Nr. A1-250 „Dėl nediskriminavimo skatinimo 2017–2019 metų veiksmų plano patvirtinimo“ (Eng. ‘Order by the Minister of Social Security and Labor of the Republic of Lithuania No. A1-250 of 15 May 2017 ‘On the Approval of the Action Plan 2017-2019 for the Promotion of Non-Discrimination’), No. A1-250, 17 May 2017, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/0e515fe03b3c11e79f4996496b137f39/asr>.

48 Office of the Equal Opportunities Ombudsperson, ‘National Review of the Situation of Transgender Persons in Lithuania’, Vilnius, 2019, <https://lygybe.lt/data/public/uploads/2019/07/nat.review.transgender.pdf>.

## RECOMMENDATIONS

- Based on the existing 2017 draft law, adopt a Law on Recognition of Gender Identity, which removes requirement of psychiatric diagnosis of 'gender dysphoria', any divorce requirement, provides for a quick, accessible and transparent administrative procedure and ensures the protection of personal data in the provision of all related documents;
- To introduce horizontal prohibition of discrimination on the grounds of gender identity in the Lithuanian legal system through amending the Law on Equal Treatment and other corresponding legal acts;
- To ensure provision of trans-specific healthcare services within the framework of the public healthcare system.

# LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS

The legal landscape regarding the recognition of same-sex relationships has substantially evolved through changes in national legislation and recent European jurisprudence, especially at ECtHR level and to a limited extent at the CJEU level.

**ECtHR.** While the ECHR currently does not create an obligation on states to allow same-sex couples to marry, the ECtHR has nevertheless clearly established that same-sex couple relationships fall within the notion of ‘private life’ as protected in Article 8 of the ECHR. The ECtHR recognised for the first time that same-sex partners enjoy ‘family life’ in the sense of Article 8 in the case of *Schalk and Kopf v. Austria* (2010)<sup>49</sup>, an approach that was confirmed in subsequent cases like *Vallianatos and others v. Greece* (2013)<sup>50</sup> where the exclusion of same-sex couples from ‘civil unions’ under Greek law was found to be discriminatory. These ECtHR rulings essentially oblige contracting states to provide at least some form of legal recognition for same-sex couples and their family life. Importantly, they also mean that every differential treatment of same-sex and opposite-sex couples is now subject to the Court’s scrutiny to a much greater extent.

Indeed, the ECtHR has gradually narrowed states’ margin of appreciation in this area to slowly move toward placing an obligation on state parties to provide legal recognition to same-sex couples as a way to protect their right to family life. In this respect, the landmark judgment *Oliari v. Italy* (2015)<sup>51</sup> represents a step in this direction: the ECtHR found that Italy had violated Article 8 by failing to make registered partnerships available to same-sex couples. In making this finding, the ECtHR cited the rapid development in Europe towards legal recognition of same-sex couples (see also good practice examples below page 22), the Italian Constitutional Court repeated call for such a recognition as well as the recent surveys showing that a majority of the Italian population supported legal recognition of same-sex couples.

In its ruling on this issue, the ECtHR referred to CoE soft law instruments such as texts adopted by PACE recommendations adopted since 1981 regarding discrimination on grounds of sexual orientation or gender identity<sup>52</sup> and CM (2010)5 recommending that member States provide same-sex couples legal or other means to address the needs arising from their social reality and this, without discrimination between different-sex and same sex-couples (para 25).

**EU** competence does not extend to the recognition of marital or family status as such, it is a national competence. Same-sex partners may fall in the definitions of ‘family member’ under EU directives but only in those member States that provide for their legal recognition in their national legislation. While there are variations among EU member States, important questions have arisen from Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. CJEU caselaw importantly highlights that when a member State has created some form of union, comparable to marriage, for same-sex partners, it may not create an arbitrary difference in treatment between marriage, not open to such partners, and this form of union<sup>53</sup>.

49 *Schalk and Kopf v. Austria* (Application No. 30141/04, ECtHR), 22 November 2010, <http://hudoc.echr.coe.int/eng?i=001-99605>.

50 *Vallianatos and others v. Greece* (Applications nos. 29381/09 and 32684/09, ECtHR), 7 November 2013, <http://hudoc.echr.coe.int/eng?i=001-128294>.

51 *Oliari and others v. Italy* (Applications nos. 18766/11 and 36030/11, ECtHR), 21 July 2015, *Oliari v. Italy*.

52 See: Recommendation 924 (1981) of the Parliamentary Assembly on Discrimination against homosexuals; Recommendation 1915 (2010) of the Parliamentary Assembly on Discrimination on the basis of sexual orientation and gender identity; Recommendation 1474 (2000) of the Parliamentary Assembly on situation of lesbians and gays in Council of Europe member States; Recommendation 1470 (2000) of the Parliamentary Assembly on Situation of gays and lesbians and their partners in respect of asylum and immigration in the member States of the Council of Europe.

53 CJEU *Maruko* case (C-267/06) <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-267/06> and *Römer* case (C-147/08) <http://curia.europa.eu/juris/document/document.jsf?docid=80921&doclang=EN>.

In *Coman* (2018)<sup>54</sup>, the CJEU clarified that the gender-neutral framing of ‘spouse’ in Article 2(2)(a) of the Citizens’ Rights Directive 2004/38 implies that married same-sex couples enjoy free movement rights equally to heterosexual married couples throughout the whole territory of the Union, no matter how each particular Member State frames ‘family’ in its own legislation. With *Coman*, the CJEU allowed for the recognition same-sex marriage for immigration purposes all around the EU. Although the narrow angle of free movement is used in this case, it may be instrumental to further influence the recognition of same-sex partnership in EU Member States that have not yet done so (see also the situation in Lithuania, positive developments, page 25).

## GOOD PRACTICE EXAMPLES

### THE ROAD TO EQUALITY: FROM REGISTERED PARTNERSHIP TO MARRIAGE

Starting with the introduction of registered partnership in 1989 in Denmark and the opening up of marriage in 2001 in the Netherlands, the trend towards registered partnership and same-sex marriage has been growing fast in Europe: at the time of writing, 28 CoE Member States<sup>55</sup> are providing some form of legal recognition for same-sex couples. Different forms of recognition exist, with formal legal recognition of same-sex relationships offering an inferior protection than marriage; those in which it is more or less ‘functionally equivalent’ to marriage or those where marriage is available to same-sex as well as opposite-sex couples.

Equality of rights and obligations has been the drive for opening marriage to same-sex couples especially if there is no legally relevant reason for having two separate legal regimes which are functionally equivalent. This option is the path chosen in 16 member States of the CoE<sup>56</sup>.

The case of Ireland is an interesting example, although context specific since marriage equality was achieved through popular vote: in 2010, Ireland passed a civil partnership bill that provided protection to LGBT couples and achieved marriage equality for same-sex couples with an overwhelming passage of Ireland’s May 2015 referendum. Such a positive outcome was achieved, overcoming difficulties in a traditionally conservative country. Some interesting lessons have been highlighted in terms of laying the groundwork, partnering with a wide range of organisations and understanding the opposition arguments<sup>57</sup>.

## SITUATION IN LITHUANIA

### EXISTING NATIONAL LEGAL FRAMEWORK AND JURISPRUDENCE

Lithuania remains one of few jurisdictions in the European Union (alongside Bulgaria, Latvia, Poland, Romania and Slovakia) without any legal recognition of same-sex families and their relationships. Article 38 of the Constitution explicitly states that ‘[m]arriage shall be concluded upon the free mutual consent of man and woman’, while the Article 3.339 of the Civil Code foresees a separate law that should lay down the procedure for registering a partnership between a man and a

54 Case C-673/16, *Coman et al. v. Inspectoratul General pentru Imigrări*, 5 June 2018, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-673/16>.

55 Supra 3.

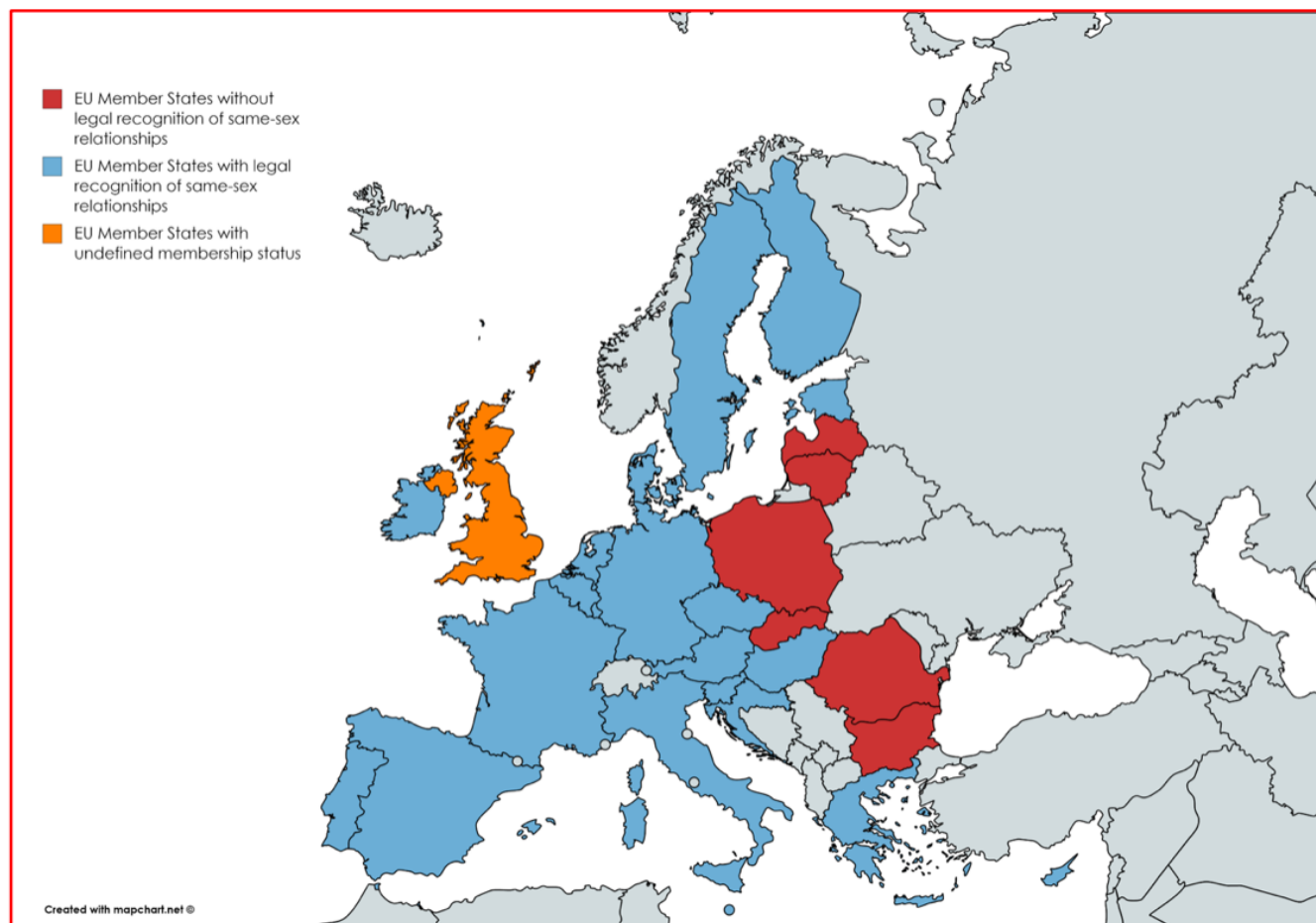
56 Ibid.: Austria, Belgium, Denmark, Germany, Finland, France, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, and the United Kingdom.

57 The Path to Marriage Equality in Ireland: A Case Study, Susan Parker, December 2017

[https://www.atlanticphilanthropies.org/wp-content/uploads/2018/01/Marriage\\_Equality\\_Case\\_Study.pdf](https://www.atlanticphilanthropies.org/wp-content/uploads/2018/01/Marriage_Equality_Case_Study.pdf).

woman<sup>58</sup>. Even though the Civil Code was adopted in 2000, the 2017 draft law on registered partnerships (for different-sex and same-sex couples) has never been adopted.

In 2011, the Lithuanian Constitutional Court provided a progressive interpretation of the constitutional concept of ‘family life’ by indicating that ‘[it] does not mean that [...] the Constitution does not protect and defend families **other than those founded on the basis of marriage**, inter alia, the relationship of a man and a woman living together without concluding a marriage, which is based on the permanent bonds of emotional affection, reciprocal understanding, responsibility, respect, shared upbringing of the children and similar ones, as well as on the voluntary determination to take on certain rights and responsibilities [...]’<sup>59</sup>. While the Constitutional Court did not mention same-sex families in this particular judgment explicitly, the legal reading thereof indicates that same-sex families potentially fall under the ambit of the constitutional concept of ‘family life’.



In 2016 the Lithuanian Parliament voted in favour of the constitutional amendment, which sought to limit the constitutional concept of ‘family life’ as emanating exclusively from a marriage between a man and a woman and from a relationship of ‘motherhood and fatherhood’<sup>60</sup>. Since then, the draft bill has not been submitted for the first hearing at the Parliament. It is noteworthy that for the constitutional amendment to be adopted, the Parliament has to vote in favour of the amendment twice, securing the majority of 94 votes (out of 141 votes) in favour on both occasions. There must be at least three month break between the two votes. It can be concluded that these constitutional requirements have worked in favour of preventing this particular constitutional amendment from being adopted, which would effectively exclude same-sex couples from the constitutional protection of ‘family life’. In practice, the exclusion from the constitutional protection

58 Constitution of the Republic of Lithuania, 25 October 1992, <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>.

59 Constitutional Court of the Republic of Lithuania, Case No. 21/2008, 28 September 2012, <https://www.lrkt.lt/en/court-acts/search/170/ta1112/content>.

60 Draft Bill on Amending the Article 38 of the Constitution of the Republic of Lithuania, No. XIIP-2017(2), 17 June 2016, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/0be20cb0348411e6a222b0cd86c2adfc>.

of ‘family life’ would implicate the loss of various economic and social benefits, such as the right to receive information on patient’s health, not to testify against each other in the course of criminal proceedings, to inherit without additional taxation, etc. The exclusion from the status of ‘family life’ would also bear significant moral implications, resulting in social stigmatisation as not leading the ‘proper lifestyle’. The latest motion for the constitutional amendment was analogous to the one introduced in 2012 as a response to the above-mentioned progressive judgement by the Lithuanian Constitutional Court. In 2012 the first hearing of adoption failed by one vote (i.e. it collected 93 votes in favour instead of the required majority of 94 votes)<sup>61</sup>.

In 2017 the Lithuanian Parliament voted down a proposal to amend the Civil Code aiming to recognise the legal status of both unmarried different-sex and same-sex couples<sup>62</sup>. 29 MPs voted in favour of the progressive proposal, 59 voted against and 20 abstained. In parallel, an alternative proposal to regulate partnerships by so-called ‘agreements of cohabitation’ was introduced<sup>63</sup>. The ‘agreement of cohabitation’ would allow two or more cohabitants to realise certain property rights without an intention to create family relations. If adopted, this amendment would once again prevent same-sex couples from effective protection of their family life, because they would be considered as ‘business partners’ rather than ‘family members’. Furthermore, this amendment would not solve any challenges faced by same-sex families outside the realm of financial matters (e.g. prohibition to testify against family members in the course of criminal proceedings). This proposal was approved by the Parliament for consideration in May 2017. However, it has not been considered by the Parliament ever since. Furthermore, the Lithuanian Parliament has been proactively eliminating other references to ‘family life’ for same-sex couples in other legal acts as well. For example, in July 2017 the Lithuanian Parliament amended the *Law on Equal Opportunities*, so that it would not cover same-sex registered partners from other EU countries<sup>64</sup>. To put it in other words, after these amendments the same-sex registered partners of EU citizens will not be considered as family members and will not be able to file a complaint before the Office of the Equal Opportunities Ombudsperson regarding discrimination based on their nationality. In the period between 2018 and 2019 no other significant legislative motions, regarding legal recognition of same-sex relationships, were introduced.

Concerning decisions regarding parental authority or guardianship of a child, the provisions of the Civil Code do not establish any different treatment due to a person’s sexual orientation and (or) gender identity. Article 3.156 establishes the principle of equal authority between the parents and secures equal rights and duties of both the mother and the father of a child. Article 3.161(3) of the Civil Code provides that a child has a right to live together with the parents, be brought up and cared for by the parents’ family, communicate with the parents, regardless of whether the parents live together or separately, and communicate with their relatives, if this does not contradict the best interest of the child.

According to the Article 3.210 of the Civil Code, only married couples have the right to adopt a child. As marriage equality has not been introduced in Lithuania, in practice it means that same-sex families do not have the right to adopt. Nevertheless, it must be noted that the Civil Code foresees the right for single-parent adoption only ‘under exceptional circumstances’. There are no documented instances, if this right has ever been exercised by an LGBT person. In 2016 the Lithuanian Parliament adopted the Law on Assisted Reproduction<sup>65</sup>. According to Article 5(3) of this law, assisted reproduction treatment is available only to couples that are married or have concluded a registered partnership. The law does not foresee the possibility for the assisted reproductive treatment for single mothers. As same-sex couples have no possibility for legally registering their relationships in Lithuania, assisted reproduction services remain unavailable for them.

61 ‘Lithuanian Parliament One Vote Short from Approving Constitutional Amendment on Family Definition’, 15min.lt, 19 June 2012, <https://www.15min.lt/en/article/politics/lithuanian-parliament-one-vote-short-from-approving-constitutional-amendment-on-family-definition-526-227415>.

62 ‘29 Lithuanian MPs Vote in Favor of Same-Sex Partnership as the Proposal Gets Rejected’, lgl.lt, 15 June 2017, <http://www.lgl.lt/en/?p=17529>.

63 Civilinio kodekso 6.589, 6.969, 6.971, 6.973, 6.978 straipsnių pakeitimo įstatymo projektas, No. XIII P-750, 23 May 2017, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/2eed4fd03fbc11e7b8e5a254f4e1c3a7>.

64 ‘LGL Urges President to Veto Amendments to Law on Equal Opportunities’, lgl.lt, 13 July 2017, <http://www.lgl.lt/en/?p=17782>.

65 Law on Assisted Reproduction of the Republic of Lithuania, No. XII-2608, last amendments on 1 July 2019, <https://www.e-tar.lt/portal/lt/legalAct/074c2b707e7311e6b969d7ae07280e89/asr>.

## IDENTIFIED OBSTACLES

The topic of legal recognition of same-sex relationships has become a symbolic ‘token’ in the course of public debate on LGBT human right situation in Lithuania. The present public opinion is settled on the premise that same-sex partners should be legally acknowledged; however, they should not be entitled to the status of ‘family members’. This questionable assumption is at best illustrated by the above described legislative proposal to regulate same-sex relationships through ‘agreements of cohabitation’. The legal question, whether same-sex partners (families) fall under the ambit of the constitutional concept of ‘family life’, was deliberated by the Constitutional Court in 2019<sup>66</sup> (see detailed description of the judgment below). It is expected that this constitutional jurisprudence will provide additional legal clarity in advocating for legal recognition of same-sex relationships in Lithuania.

There are a few political parties that openly support LGBT human rights in Lithuania (including legal recognition of same-sex relationships). Only the newly established ‘Liberty Party’ actively supports marriage equality (11 out of 141 seats in the Parliament after the general elections in 2020). Other political parties defined by the liberal ideology reservedly support legal recognition of same-sex relationships through the registered partnership scheme.

## POSITIVE DEVELOPMENTS

Prior to the 2018 CJEU Coman case (see page 22), the Lithuanian Constitutional Court was asked to examine in December 2016 whether the decision by the national migration authorities to refuse residence permit on grounds of family reunification for a Belarusian citizen, who has entered in the same-sex marriage with a Lithuanian citizen abroad, is in line with the country’s Constitution. *The Law on the Legal Status of Aliens*<sup>67</sup> does not explicitly prohibit reunification of same-sex couples. To put it in other words, the law does not specify that the marriage must be between persons of the opposite-sex. However, the migration authorities had rejected the application for the residence permit, pointing out that same-sex marriage was not permitted under the Lithuanian law. Therefore, the inclusion of the same-sex marriage into the public registrar with the view of issuing the residence permit on the grounds of family reunification would violate the public order.

In January 2019, the Constitutional Court decided that exclusion of same-sex partners, who have obtained legal recognition of their same-sex relationships abroad, within the ambit of the *Law on the Legal Status of Aliens* is unconstitutional<sup>68</sup>. In delivering its judgment, the Constitutional Court extensively relied on the EU acquis and its relationship with the Lithuanian national law. The Court stated that ‘*the norms of European Union law are a constituent part of the legal system of the Republic of Lithuania*’ [28.2], meaning that the Charter of Fundamental Rights of the European Union also constitutes an important legal source in transposing and interpreting the EU *acquis in its relationship with the Lithuanian national law. It was concluded that ‘when ensuring the free movement of persons, the private and family life of EU citizens must be respected and regard must be paid to the prohibition on any discrimination, inter alia, based on sex or sexual orientation [...]’* [23]. It has to be noted that, based on the judgment by the Constitutional Court, the national migration authorities have developed a consistent policy practice in issuing residence permits on the grounds of family reunification of same-sex families. However, this practice is applied in very narrowly defined situations, when same-sex marriage is concluded between a Lithuanian citizen and a third country national (predominantly coming from Russia, Belarus or Ukraine).

Despite the fact that the Constitutional Court in this particular judgment deliberated on very narrow legal issue (i.e. issuing residence permits to same-sex spouses from the third countries on the grounds of family reunification), it did not miss an opportunity to provide additional clarifications on the constitutional jurisprudence in terms of securing the human rights of LGBT persons. First of all, the Constitutional Court explicitly stated that the Article 29 of the Constitution (i.e. principle of non-discrimination) prohibits discrimination not only on the grounds of sexual orientation, but also on the grounds

66 Constitutional Court of the Republic of Lithuania, Judgment No. KT3-N1/2019, Case No. 16/2016, 11 January 2019, <https://www.lrkt.lt/en/court-acts/search/170/ta1915/content>.

67 Law on the Legal Status of Aliens, No. IX-2206, 29 April 2004, last amendments on 1 February 2020, <https://www.e-tar.lt/portal/lt/legalAct/TAR.42837E5A79DD/asr>.

68 Supra 66.

of gender identity [31.2]. As the Article 29 of the Constitution is defined by a closed list of the protected grounds, this clarification by the Constitutional Court directly establishes horizontal principle of non-discrimination on the grounds of sexual orientation and gender identity in the Lithuanian legal system. Secondly, the Constitutional Court reiterated that *‘[...] attitudes or stereotypes prevailing in a certain period of time among the majority of the members of society may not [...] serve as constitutionally justifiable grounds for discriminating against persons solely on the basis of their gender identity and/or sexual orientation, inter alia, for limiting the right [...] to the protection of relationships with other family members.’* [31.3] To put it in other words, the Constitutional Court stated that legal recognition of same-sex relationships cannot be made conditional upon majoritarian preferences in the society and indirectly pointed out that there are no constitutional obstacles in legally recognizing same-sex relationships. Finally, the Constitutional Court clarified that *‘the constitutional concept of the family [...] is neutral in terms of gender. [...] the Constitution protects and defends all families that meet the constitutional concept of the family, which is based on the contents of permanent or long-lasting relationships between family members, i.e. reciprocal understanding and responsibility, emotional affection, help and similar bonds, as well as on the voluntary determination to take on certain rights and duties.’* [32.5] In this way the Constitutional Court has concluded the public debate, whether same-sex partners (families) fall under the ambit of the constitutional concept of ‘family life’. It can be concluded that this particular judgment by the Constitutional Court has significantly strengthened the advocacy position for legal recognition of same-sex relationships in Lithuania.

It is also noteworthy that in this particular judgment the Constitutional Court did not deal with the situation, defined by the concept of free movement under the EU acquis, directly. The same-sex spouses have concluded their marriage in the EU Member State over a weekend trip, i.e. not in the course of exercising free movement rights by a Lithuanian citizen. Therefore, the decision by the Constitutional Court to rely on the EU acquis and its relationships with the national law in this particular case could be potentially identified as judicial activism with the view of expanding on protection for the human rights of LGBT persons. It can be concluded that the Lithuanian national courts have become active proponents of the human rights of LGBT persons in the absence of any positive legislative and (or) policy measures.

## SUMMARY

Lithuania remains one of few jurisdictions in the European Union without any legal recognition of same-sex relationships. In 2017, the Lithuanian Parliament not only dismissed a bill on introducing gender-neutral registered partnerships, but also proposed to regulate same-sex relationships through so-called ‘cohabitation agreements’ which would strip same-sex partners of family status all together. The failure by national migration authorities in recognising same-sex marriages concluded abroad for the purposes of immigration resulted in a case before the Constitutional Court. In 2019 the Constitutional Court decided that exclusion of same-sex spouses for migration purposes is unconstitutional. Despite the fact that the Constitutional Court deliberated on a very narrow legal issue, it did not miss an opportunity to provide more detailed explanations regarding the human rights of LGBT persons. According to the Constitutional Court, the Constitution directly prohibits discrimination on grounds of sexual orientation and (or) gender identity, the human rights of LGBT persons cannot be made conditional upon majoritarian preferences and same-sex partners (families) fall under the ambit of the constitutional concept of ‘family life’. It is expected that the judgment by the Constitutional Court will significantly strengthen advocacy positions for legal recognition of same-sex relationships in Lithuania.

## RECOMMENDATIONS

- To ensure full alignment of the rights and obligations of same-sex couples to those of different sex-couples by introducing recognition of same-sex relationships in Lithuanian legislation;
- To engage all relevant stakeholders on the issue of marriage equality, notably by organising public debates and building public understanding and support for introducing marriage equality through amending the Article 38 of the Constitution.

# HATE CRIME AND HATE SPEECH

Investigating homophobic hate crime and hate speech entails additional duties for the State.

Combatting hate crime has been at the heart of the work of human rights bodies and more generally, international intergovernmental organisations. Three central themes may be derived from that work (positive duty, aggravating circumstance, reporting and data collection):

## **Hate crime: positive duty of the State to unmask the bias motivation of a crime**

At the level of the CoE, the ECtHR already established that under Article 2 ECHR (right to life), State authorities have a procedural obligation to carry out an effective criminal investigation establishing the cause and identifying those responsible with a view to their punishment<sup>69</sup>. In *Nachova v. Bulgaria* (2005), the Court went further and derived from Article 14 ECHR a separate duty to investigate and unmask bias motivation of a crime (racial motivation in that particular case)<sup>70</sup>. That reasoning is not limited to Article 2 of the ECHR but extend to Article 3 (prohibition of torture and inhuman and degrading treatment) and Article 8 (right to respect for private and family life). This positive duty to carry out an effective investigation of possible bias motivation is also applied in cases involving private persons rather than State authorities (see: *Šečić v. Croatia* (2007)) and has been applied in cases involving SOGI motivated hate crime.

In several key judgments, the ECtHR found a violation of Article 3 in conjunction with Article 14 because of the failure of law enforcement to 'unmask' the homophobic motive in hate crimes. In *Identoba v. Georgia* (2015), thirteen individual applicants contended that the authorities had failed to protect them from the violent attacks in the context of a peaceful demonstration in Tbilisi in May 2012 to mark the International Day against Homophobia. The authorities were also reported as having failed to investigate effectively the incident, including its discriminatory motive. In concluding to the violation of the said articles, the ECtHR referred to the negative attitudes against members of the community were widespread in some parts of Georgian society as detailed in various reports, in particular from the CoE Commissioner for Human Rights. It also referred to the warnings expressed to the police by the organisers of the march about the possibility of conflicts. Additionally, the ECtHR noted that Georgian authorities failed to investigate the homophobic motive of the attack despite its national legislation providing that discrimination on the grounds of sexual orientation and gender identity should be treated as an aggravating circumstance<sup>71</sup>.

*M.C. and A.C v. Romania* (2017) was a very similar case concerning homophobic violence following an annual gay pride march. The ECtHR found that the authorities had protracted the investigation and, more importantly, had not taken reasonable steps to examine the role played by possible homophobic motives behind the attack<sup>72</sup>.

A number of similar cases involving authorities' failure to adequately investigate attacks motivated by hatred against LGBT persons are pending in front of the ECtHR<sup>73</sup>.

## **Hate crime legislation: aggravating circumstances and dissuasive sanctions**

The need to take into account the SOGI bias motive as an aggravating circumstance when determining the sanction has been highlighted in several CoE documents. This includes in particular CM (2010)5 CM (para 2). Besides, ECRI in its monitoring work has been reviewing CoE member States criminal legislation and its implementation<sup>74</sup>, including on

69 *Menson and Others v. UK* (Application no. 47916/99, ECtHR), decision on the admissibility, 6 May 2003, <http://hudoc.echr.coe.int/eng?i=001-23192>.

70 *Nachova and others v. Bulgaria* (Applications nos. 43577/98 and 43579/98, ECtHR), 6 July 2009, <http://hudoc.echr.coe.int/eng?i=001-69630>.

71 *Identoba and others v. Georgia* (Application no. 73235/12, ECtHR), 12 August 2015, <http://hudoc.echr.coe.int/eng?i=001-154400>.

72 *M.C. and A.C. v. Romania* (Application no. 12060/12, ECtHR) 12 April 2016, <http://hudoc.echr.coe.int/eng?i=001-161982>.

73 See: Factsheet of the ECtHR on Sexual orientation, [https://www.echr.coe.int/Documents/FS\\_Sexual\\_orientation\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf).

74 See as far as Lithuania is concerned: European Commission against Racism and Intolerance (ECRI), 'Conclusions on the Implementation of the Recommendations in Respect to Lithuania Subject to Interim Follow-Up', 6 June 2019, <https://rm.coe.int/interim-follow-up-conclusions-on-lithuania-5th-monitoring-cycle-/168094ce17>.

homophobic crime, taking into account the principles established in its GPR No. 7 on National Legislation to Combat Racism and Discrimination (2017)<sup>75</sup>. Among these is the need for criminal law to provide for effective, proportionate and dissuasive sanctions for racist, homo- and transphobic offences and ensure that racist, homo- and transphobic motivation constitutes an aggravating circumstance for any ordinary offence.

### **Hate crime reporting and data**

All international documents refer to the need to collect robust data on hate crimes<sup>76</sup>. In the OSCE context, participating States have made a specific commitment to collect such data and take appropriate measures to encourage victims to report hate crimes<sup>77</sup>. As a result, the OSCE ODIHR maintains information from OSCE participating States, civil society and inter-governmental organisations about hate crime<sup>78</sup>.

At the same time, under-reporting of hate crimes has been identified by many international organisations as a persistent obstacle to effectively tackling hate crime. Only a small number of victims report hate-motivated incidents to the police. In addition, law enforcement officers may not recognise certain incidents as stemming from prejudice or lacking the tool to flag them as hate crimes.

CM (2010)5 (para. 5) addresses the issue and recommended to ensure that *‘law enforcement structures, including the judiciary, have the necessary knowledge and skills to identify such crimes and incidents and provide adequate assistance and support to victims and witnesses’*<sup>79</sup>. At EU level, the 2012 Victims’ Rights Directive recognises victims of hate crime, as being particularly vulnerable victims who require individual assessments to identify their specific protection and support needs (Article 22) as well as encourages States to raise awareness on the rights of victims as set out in this Directive, notably by co-operating with civil society and other stakeholders on awareness raising campaigns, research and education programmes (Article 26)<sup>80</sup>.

### **Hate speech: legitimacy to restrict freedom of expression and State duties to investigate**

With regard to hate speech, the ECtHR has developed an extensive jurisprudence recognising the legitimacy of restrictions to Article 10 (right to freedom of expression) in order to protect LGBT persons from hate speech. For example, in a case involving applicants’ conviction for distributing homophobic leaflets in schools in Sweden, it found no violation of Article 10, as the interference with the applicants’ exercise of their right to freedom of expression had reasonably been regarded by the Swedish authorities as ‘necessary in a democratic society’ for the protection of the reputation and rights of others<sup>81</sup>.

The ECtHR also addressed on-line hate speech: it established ‘duties and responsibilities’ associated with freedom of expression for internet news portals providing a platform for user-generated comments disseminating hateful comments. The landmark case in this area is *Delfi AS v. Estonia* (2015) where the Court found that national court holding the company’s liability for offensive comments posted by its readers below one of its online news had been a justified and proportionate

75 See ECRI GRP No. 7: <https://rm.coe.int/ecri-general-policy-recommendation-no-7-revised-on-national-legislation/16808b5aae>.

76 See inter alia: CM (2010)5 para 5 (‘relevant data should be gathered and analysed on the prevalence and nature of discrimination and intolerance on grounds of sexual orientation or gender identity’), ECRI GPR 11 (2007), para 68 (‘necessary to develop a reliable system for the recording and monitoring of racist incidents’), Victims Rights Directive, paragraph 64 (‘Systematic and adequate statistical data collection as an essential component of effective policymaking’).

77 OSCE Ministerial Council Decision No. 9/09 on Combating Hate Crimes, <https://www.osce.org/cio/40695?download=true>

78 See: <https://hatecrime.osce.org/>.

79 Building on CoE standards on hate crime investigation, see the Council of Europe’s manual “Policing Hate Crime against LGBTI persons: Training for a Professional Police Response is designed for police trainers, investigators, managers, hate crime officers and frontline police officers”, <https://rm.coe.int/prems-030717-gbr-2575-hate-crimes-against-lgbti-web-a4/1680723b1d>.

80 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=EN>.

81 *Vejdeland and Others v. Sweden* (Application no. 1813/07, ECtHR), 9 February 2012, <http://hudoc.echr.coe.int/eng?i=001-109046>.

restriction on the portal's freedom of expression. In making its findings, the ECtHR noted that these comments were tantamount to inciting to hatred and it also noted the insufficiency of the measures taken by the applicant company to remove without delay after publication these comments<sup>82</sup>.

In its first judgment regarding on-line homophobic hate speech (*Beizaras and Levickas v. Lithuania* (2020))<sup>83</sup>, the ECtHR held that the State authorities' failure to investigate online hate speech against a gay couple violated the couple's rights to private and family life and constituted a discrimination on sexual orientation grounds under the ECHR. This case, which concerns Lithuania, is detailed further in the below section.

## GOOD PRACTICE EXAMPLES

### LEGISLATION

A growing number of CoE member States (8 more states since 2013)<sup>84</sup> have taken legal steps to ensure that their criminal legislation explicitly include the grounds of gender identity. Among them, Spain did so in 2013 by introducing an amendment to its criminal code (Article 22.4 of the Criminal Code, Organic Law 10/1995)<sup>85</sup>.

### IMPLEMENTATION: EXAMPLE OF CO-OPERATION BETWEEN POLICE AND LGBT COMMUNITIES

The Amsterdam Police have several anti-discrimination groups, including the Pink in Blue police network. Pink in Blue works with the National Police Gay Network, COC Amsterdam (the Amsterdam branch of a national LGBT organisation), the ProGay foundation and the Amsterdam Discrimination Reporting Office, among others. Pink in Blue works from within the Amsterdam police force on behalf of the LGBT community and is entirely funded by the police. The network's members carry out all their network duties alongside their regular duties. Pink in Blue consists of well-trained police staff.

## SITUATION IN LITHUANIA

### EXISTING NATIONAL LEGAL FRAMEWORK AND OFFICIAL STATISTICS

The Criminal Code contains a combination of general and specific penalty-enhancement provisions for hate crimes, as well as a substantive offence. Article 129.2.13 (i.e. murder), Article 135.2.13 (i.e. severe health impairment) and Article 138.2.13 (i.e. non-severe health impairment) of the Criminal Code establishes penalty enhancement in case these particular offences are committed out of bias motivation on grounds of sexual orientation. Article 60.12.1 qualifies acts committed in order to express hatred on the grounds of sexual orientation as an aggravating circumstance within the framework of criminal proceedings. While sexual orientation is a protected ground under the Lithuanian criminal legislation, the same does not apply to the grounds of gender identity and (or) gender expression. The disaggregated official statistical data on the reported hate motivated incidents on the grounds of sexual orientation is available only from 2017<sup>86</sup>:

82 Delfi AS v. Estonia (Application no. 64569/09, ECtHR), 16 June 2015, <http://hudoc.echr.coe.int/eng?i=001-155105>.

83 Beizaras and Levickas v. Lithuania (Application. no. 41288/15, ECtHR), 14 January 2020, <http://hudoc.echr.coe.int/fre?i=001-200344>.

84 Second review of the implementation of the CM (2010)5, 2019 [https://rm.coe.int/combating-discrimination-on-grounds-of-sexual-orientation-and-gender-i/16809fb2b8?fbclid=IwAR05wrYc4-IL2dltx7akBVPfbSV70s\\_9f6557-lbzLSvilO96hpZOqKG41g](https://rm.coe.int/combating-discrimination-on-grounds-of-sexual-orientation-and-gender-i/16809fb2b8?fbclid=IwAR05wrYc4-IL2dltx7akBVPfbSV70s_9f6557-lbzLSvilO96hpZOqKG41g).

85 See: 'Article 22.4: Committing the offence for racist or anti-Semitic reasons, or another kind of discrimination related to ideology, religion or belief of the victim, ethnicity, race or nation to which he belongs, his gender, sexual orientation or identity, illness suffered or disability', [https://www.legislationline.org/download/id/6443/file/Spain\\_CC\\_am2013\\_en.pdf](https://www.legislationline.org/download/id/6443/file/Spain_CC_am2013_en.pdf).

86 Data available by the Information Technology and Communications Department under the Ministry of Interior: [www.ird.lt](http://www.ird.lt).

	2017	2018	2019	2020 (January-September)
<b>Article 129.2.13</b>	0	0	0	0
<b>Article 135.2.13</b>	0	0	0	0
<b>Article 138.2.13</b>	0	0	0	1
<b>Other criminal offences, potentially committed out of bias motivation</b>	0	1	2	1

It is noteworthy that it is not possible to determine on how many instances the Article 60.1.12 of the Criminal Code had been used in order to enhance penalty for hate crimes on the grounds of sexual orientation, because this data is not collected for the purposes of the official statistics. Also, there are no publicly documented instances, when the aggravating circumstance under Article 60.1.12 of the Criminal Code has been applied in practice on the grounds of sexual orientation. In essence, this data indicates that anti-LGBT hate crimes in Lithuania are alarmingly underreported and (or) under-recorded.

The *Criminal Code* contains a general prohibition of hate speech. Article 170 prohibits incitement to hatred and violence on the exhaustive list of grounds, including sexual orientation. Taking into account that hate speech is explicitly criminalised, the incitement to hatred and violence is considered as a specific form of hate crime in Lithuania. However, the law does not include the grounds of gender identity and (or) gender expression. The disaggregated official statistical data on the reported instances of hate speech on the grounds of sexual orientation from 2012 is provided therein<sup>87</sup>:

	2012	2013	2014	2015	2016	2017	2018	2019	2020 (January-September)
<b>Article 170</b>	47	55	57	32	8	2	21	28	33

Based on the official statistics, it can be concluded that numbers of the registered instances of hate speech on the grounds of sexual orientation were gradually decreasing in the period between 2015 and 2018 and currently remain unprecedentedly low.

The *EU Directive on Victims' Rights*<sup>88</sup> was transposed to the national legislation in the period between 2015 and 2016 through the introduction of amendments to the *Code of Criminal Procedure*<sup>89</sup> and the adoption of enabling secondary legislation. In the context of anti-LGBT hate motivated incidents, the most notable improvements were related to the adoption of the *Report on Informing the Aggrieved Person on His/Her Rights*<sup>90</sup> (i.e. obligation to inform a victim about their rights in the course of criminal proceedings) and the *Recommendations on Assessing Special Protection Needs by the*

<sup>87</sup> Ibid.

<sup>88</sup> Supra 80.

<sup>89</sup> Code of Criminal Procedure of the Republic of Lithuania, No. IX-785, 14 March 2002, last amendments on 1 January 2020, <https://www.e-tar.lt/portal/lt/legalAct/TAR.EC588C321777/asr>.

<sup>90</sup> General Prosecutor of the Republic of Lithuania, 'Nukentėjusiojo teisių išaiškinimo protokolai', <https://e-seimas.lrs.lt/rs/lasupplement/TAP/24ee7b60056a11e687e0fbad81d55a7c/618ea770056a11e687e0fbad81d55a7c>.

*Aggrieved Person*<sup>91</sup> (i.e. guidelines on assessing vulnerability of a victim). While these guidelines and recommendations provide for a substantial basis for ensuring the victims’ rights in the course of criminal proceedings, they do not take the specific needs of LGBT victims into account. For example, recommendations do not explicitly mention sexual orientation or gender identity, even though the acknowledgement of these characteristics are instrumental in protecting LGBT victims of hate motivated incidents from secondary victimisation. While it remains to be seen how law enforcement agencies and victim support service providers will apply these new guidelines in practice, it seems that the current framework does not guarantee that all rights of victims of anti-LGBT hate motivated incidents will be respected. Furthermore, there are no victim support services in Lithuania specifically tailored for the needs of LGBT people. These services are usually performed by non-governmental organisations with limited financial and organisational resources. LGBT individuals are reluctant to seek appropriate support services due to a range of reasons which contribute to underreporting (e.g. fear of disclosing one’s sexual orientation).

## IDENTIFIED OBSTACLES

Independent surveys and research indicate high prevalence of hate motivated incidents on the grounds of sexual orientation and (or) gender identity in Lithuania. According to the second wave of the LGBT Survey by the EU Agency for Fundamental Rights (FRA), 15 % of the members of the local LGBT community experienced physical or sexual attacks due to being LGBTI in the past 5 years<sup>92</sup>. According to quantitative research by the Centre for Research and Prejudice of the University of Warsaw, 27.9 % of the Lithuanian LGBT respondents have experienced hate crimes or harassment on grounds of their actual or perceived sexual orientation in the course of the past five years<sup>93</sup>. However, as many as 80 % did not report it to the national authorities. The most often quoted reasons for not reporting hate related incidents to the competent authorities are: ‘did not think they would do anything’, ‘*did not think they could do anything*’ and ‘*fear of a homophobic and (or) transphobic reaction from the police*’. It can be concluded that there is an apparent discrepancy between the official hate crime and hate speech statistics and the actual prevalence of hate motivated incidents in the country. This tendency could be potentially explained by three contributing factors, namely: (a) **systematic failure by the criminal justice system to investigate and prosecute already reported hate motivated incidents**, (b) **lack of capacity and (or) unwillingness by the law enforcement structures to recognize and qualify new incidents as hate crimes**; (c) **underreporting by the affected communities (due to the lack of trust in law enforcement structures)**.

The **systematic failure** by the criminal justice system to investigate and prosecute already reported hate motivated incidents is demonstrated by the lack of coordination in existing practices of investigation and prosecution, as well as the lack of consistency in the national jurisprudence. A significant part of investigations are terminated without establishing that an act had the character of a criminal offence and without identifying a person who committed an act. According to the Human Rights Monitoring Institute, the most frequent arguments cited by law enforcement authorities in explaining their failure to initiate criminal proceedings include the following: (a) no data is retrieved that it was purposefully, intentionally intended to incite violence or hatred; (b) an act by a person does not contain a direct call to incite other persons to discriminate, but rather expresses a negative opinion; (c) the mere unethical dimension of the public act is not enough to be criminalised (i.e. ‘ultima ratio’ argument)<sup>94</sup>. By analysing recent case-law, it is possible to identify certain criteria that the national courts consider when qualifying an act as a hate crime. However, such criteria as (i) the context, (ii) the reality of incitement and (iii) the expert’s conclusion cause certain problems. As legal practice in this category is not uniform, these criteria are attributed different weight at times. There are cases when courts of law do not assess aforementioned criteria at all or they evaluate them contrary to the previously developed practice. The systematic failure by law enforcement structures and national courts in investigating and prosecuting hate motivated incidents in Lithuania is at best demonstrated by the case *Beizaras and Levickas v. Lithuania*<sup>95</sup> before the ECtHR (please see the detailed description below).

91 General Prosecutor of the Republic of Lithuania, ‘Dėl Rekomendacijų dėl nukentėjusiųjų specialių apsaugos poreikių vertinimo patvirtinimo’, No. I-63, <https://www.e-tar.lt/portal/lt/legalAct/86bc22f0dfa611e58a92afc65dd68e97>.

92 Supra 10.

93 The Center for Research and Prejudice of the University of Warsaw, Hate No More. Quantitative Study Report, Warsaw, 2015, p. 50.

94 Human Rights Monitoring Institute, ‘Atsakas į neapykantos nusikaltimus: situacijos Lietuvoje apžvalga’, Vinius, 2017, <https://hrmi.lt/wp-content/uploads/2017/12/Atsakas-%C4%AF-neapykantos-nusikaltimus-2017-1.pdf>, p. 16-22.

95 Supra 83.

Also, law enforcement officers simply **lack capacity and (or) are unwilling** to recognise and qualify certain incidents as motivated by hate. For example, police representatives often state that investigation of cases that possibly involve hatred is not initiated when investigators assume in advance that the outcome of the investigation will be ‘unsuccessful’. In other words, when law enforcement officers assume that perpetrators will not be convicted in court, they choose not to act, as investigation of such cases sometimes is considered as ‘waste of resources’. Also, it can be suspected that negative attitudes prevalent in the Lithuanian society against certain social groups are also identifiable within the police force. For example, according to the Eurobarometer 493, 40 % of Lithuanians think that gay, lesbian and bisexual people should not necessarily have the same rights as heterosexual people<sup>96</sup>. While there is no available research on social attitudes within the Lithuanian police force specifically, sensitivity training courses (e.g. on domestic violence, human trafficking, LGBT issues, etc.) are not included in the official curriculum and are usually initiated upon the initiative by civil society groups. It can be concluded that law enforcement officers in Lithuania do not receive any systematic training on hate crimes and hate speech as part of their professional development programme.

The **underreporting by the affected communities** also negatively impacts the national response to the phenomenon of hate crimes and hate speech. Due to the lack of capacity and (or) unwillingness, police officers are not able to qualify hate crimes and hate speech properly. This often leads to situations when victims of hate motivated incidents fail to receive proper help from police officers, which contravenes the *EU Directive on Victims’ Rights*. Based on the feedback from various non-governmental organisations, who conduct capacity building trainings for law enforcement officers and investigators, it can be concluded that law enforcement officers in Lithuania are not only unfamiliar with the *EU Directive on Victims’ Rights*, but they also lack even the elementary knowledge about LGBT community and their specific needs. Due to these tendencies, the risk of secondary or repeated victimisation of hate crime victims increases, while the probability of victims contacting law enforcement, if they encounter crimes of similar nature in the future, declines. For example, according to the survey of local LGBT community members, even 25 % of surveyed respondents would not report a homophobic or transphobic incident to law enforcement structures in the future<sup>97</sup>. It is also noteworthy that Lithuania is one of a few jurisdictions in the EU with no system of victim support services for victims of hate crimes and (or) hate speech, thus preventing victims of this type of crimes from accessing necessary legal, emotional and psychological assistance. These systematic challenges in the field of hate crime and hate speech prevention are repeatedly acknowledged by the international human rights protection mechanisms as well. For example, within the framework of the second cycle of the Universal Periodic Review by the Human Rights Council of the United Nations, the Lithuanian Government received 12 recommendations on hate crimes during the 26th UPR Session in November 2016<sup>98</sup>. Some of these recommendations on hate crimes were made by the EU member States (i.e. Slovenia, Sweden, the Netherlands and United Kingdom), thus clearly indicating that Lithuania is lagging behind the overall level of effective response to the negative phenomenon of hate crimes and hate speech within the Union. Similar recommendations were made by ECRI<sup>99</sup>, the UN HRC within the framework of the fourth review under the ICCPR<sup>100</sup> and other international bodies and treaties.

## BEIZARAS AND LEVICKAS V. LITHUANIA

In order to illustrate the systematic failure by the national authorities in investigating hate speech on the grounds of sexual orientation, one specific example is examined in more detail. In December 2014 two gay men posted a public picture on a personal Facebook profile. The picture depicted a kiss between the men in question. The picture received more than 2,400 ‘likes’ and more than 800 comments. The majority of online comments were inciting hatred and violence against LGBT persons in general, while a number of comments were directly threatening the two gay men in question. Some examples of the posted comments include ‘Faggots should be burnt’ (Lith. ‘Sudegint pidarastus’), ‘You both should be thrown into

96 Supra 11, p. 123.

97 ‘Epidemic of Hate in Lithuania: To Report, or Not to Report?’, Igl.lt, 23 October 2017, <https://www.igl.lt/en/?p=18594>.

98 UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review. Lithuania’, 34th Session, No. A/HRC/34/9, 27 December 2016, <https://daccess-ods.un.org/TMP/3726024.92570877.html>

99 Supra 74, p. 6.

100 United Nations Human Rights Committee, ‘Concluding Observations on the Fourth Periodic Report of Lithuania’, No. CCPR/C/LTU/CO/429, August 2018,

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CCPR%2fC%2fLTU%2fCO%2f4&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CCPR%2fC%2fLTU%2fCO%2f4&Lang=en), paras. [11]-[12].

gas chambers’ (Lith. ‘*I duju kameras abu*’), ‘You are fucking gays, you should be exterminated’ (Lith. ‘*Gėjai jūs supisti, jus naikinti nx.*’) and ‘Kill them!’ (Lith. ‘*zudyti!*’). The local LGBT organisation lodged a complaint on behalf of the two gay men in question to the prosecutor’s office regarding 31 comments on their social media profile. The complaint was lodged under the Article 170 of the Criminal Code (i.e. prohibition of hate speech). It was indicated that comments in question ridicule gay people and incite discrimination, hatred and violence against them. The Prosecutor’s Office issued a decision not to start a pre-trial investigation regarding the complaint in question. The organisation appealed against this decision before a pre-trial investigation judge. In January 2015, the first instance court dismissed the appeal. The court stated that ‘the individual by posting a picture of two kissing men in a public sphere should have and must have foreseen that **eccentric behaviour really does not contribute to social cohesion among individuals with different views in the society** and *promotion of tolerance*<sup>101</sup>. The decision by the first instance court was upheld by the second instance court. In February 2015, the final instance court indicated that ‘[t]he owner of the social network profile by exercising the freedom to express his convictions and to promote tolerance had to take into account that freedom is inseparable from obligation to respect the views and traditions of other individuals. [...] Therefore this action can be interpreted as an **attempt to intentionally tease or shock individuals with different views or encourage posting of negative comments**’<sup>102</sup>.



The Strasbourg court concluded that the applicants’ sexual orientation had indeed played a role in a way they had been treated by the national authorities. For example, by focusing on the applicants’ ‘eccentric behaviour’ [120], the national courts had clearly expressed disapproval of the applicants’ sexual orientation by citing the incompatibility of ‘traditional family values’ with social acceptance of same-sex relationships. To put it differently, the national authorities failed to protect the applicants, because they were biased against them on the grounds of their sexual orientation. The ECtHR found that hateful comments had been inspired by bigoted attitudes towards LGBT persons in general and that ‘*the very same discriminatory state of mind was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to investigate in an effective manner whether those comments regarding the applicants’ sexual orientation constituted incitement to hatred and violence, which confirmed that by downgrading the danger of such comments the authorities at least tolerated such comments*’ [129]. The Court found that the applicants had suffered discrimination on the grounds of their sexual orientation and that there had been a violation of the Article 14, taken in conjunction with the Article 8.

With regard to the Article 13, the Strasbourg court found that national jurisprudence and its application by the national authorities do not provide for an effective domestic legal remedy for homophobic hate speech [152]. In particular, the ECtHR referred to the notion of ‘eccentric behaviour’ and noted with concern that the Supreme Court’s jurisprudence emphasised ‘eccentric behaviour’ of persons belonging to LGBT community and their duty ‘to respect the views and traditions of others’ when exercising their own rights’ [152]. Moreover, reports by international bodies confirmed that there was growing intolerance towards LGBT persons in Lithuania [56] and that the **national authorities lacked a comprehensive strategic approach to tackle racist and homophobic hate speech** [62].

Consequently, the ECtHR found that there had also been a violation of the Article 13. The implementation of the Beizaras and Levickas v. Lithuania judgment will be a two-fold process. First of all, national authorities will have to renew pre-trial investigations regarding the initial applicants’ hate speech complaints, to identify possible perpetrators and to apply criminal sanctions (i.e. individual measures). Secondly, the national authorities will have to take necessary steps to change the course of the flawed national jurisprudence (i.e. general measures). Taken into account that the national jurisprudence in questions has been identified at the highest judicial level (i.e. the Supreme Court), it will require that all instances of the national courts synchronize their jurisprudence with the legal standards of this landmark judgment by the ECtHR. As a result, the implementation process might take a significant period of time.

101 District Court of Klaipėda City, Case No. 25.8.30-963/2015, 23 January 2015, p. 2.

102 Klaipėda Regional Court, Case No. 1S-72-417/2015, 18 February 2015, p. 2-3.

## POSITIVE DEVELOPMENTS

Since 2017 the Information Technology and Communications Department under the Ministry of Interior ([www.ird.lt](http://www.ird.lt)) provides the official disaggregated statistical data on hate crimes and hate speech, committed on the specific grounds, including sexual orientation.

After the ECtHR's judgment in the case *Delfi AS v. Estonia*<sup>103</sup>, the Lithuanian online media outlets (e.g. [www.delfi.lt](http://www.delfi.lt), [www.15min.lt](http://www.15min.lt), etc.) have introduced effective monitoring and removal systems for online comments inciting hatred and violence. These measures have most certainly helped in decreasing the prevalence of anti-LGBT hate speech online. However, sometimes the speedy removal of particular online comments prevents them from being submitted to the competent national authorities for criminal investigation. Also, the Lithuanian stakeholders have been successfully cooperating with the IT companies (i.e. *Facebook, Twitter, Google/Youtube and Microsoft*) with the view of monitoring the European Commission's Code of Conduct on countering illegal hate speech online<sup>104</sup>. The removal rate for the notified content from Lithuania has been higher than 90 %<sup>105</sup>.

In 2019 the Ministry of Interior conducted a qualitative review among socially vulnerable groups, which are disproportionately affected by the negative phenomenon of hate crimes and hate speech<sup>106</sup>. The qualitative review revealed that hate motivated incidents in Lithuania are massively underreported, because victims do not believe that perpetrators will be identified and sanctioned. Following the qualitative review, the Ministry of Interior issued recommendations on applying criminal sanctions regarding hate crimes and hate speech<sup>107</sup>. As these recommendations are not legally binding, it remains to be seen whether law enforcement officers and prosecutors apply them in practice.

In 2020 the Ministry of Interior established a working group, which will seek to generate effective response to the negative phenomenon of hate speech and hate crimes in Lithuania<sup>108</sup>. The working group consists of representatives from law enforcement structures, prosecution, courts' administration, civil society organisations and ombudsmen-type institutions. The working group is expected not only to monitor the current situation, but also to initiate legislative, policy and awareness raising measures, which are necessary in effectively responding to hate crimes and hate speech. While the ambitious scope of the working group's activities is commendable, it remains to be seen whether participating institutions will be awarded with the necessary resources to implement the assigned tasks.

In the period between 2020 and 2022 the Office of the Equal Opportunities Ombudsperson and the Office of the Ombudsperson for Journalist Ethics will be implement the project '*#NoPlace4Hate: Improving Institutional Response to Hate Speech in Lithuania*', which is partially funded by the Rights, Equality and Citizenship Programme of the European Commission<sup>109</sup>. In addition to establishing clear guidelines on investigating complaints on hate speech within the criminal justice system and raising public awareness on this negative phenomenon, the project consortium will also seek to establish an online victim support and information hub that will include network of independent service providers and comprehensive referral system. It will be sought to address the requirements of the *EU Directive on Victims' Rights* at the

103 The case concerned the positive obligation by an online media outlet to remove the content (i.e. online comments by Internet users), which could potentially qualify as hate speech. For more information, see: *supra* 82.

104 'Code of Conduct on Countering Illegal Hate Speech Online', [http://ec.europa.eu/newsroom/document.cfm?doc\\_id=42985](http://ec.europa.eu/newsroom/document.cfm?doc_id=42985).

105 European Commission, Factsheet - 4th Monitoring Round of the Code of Conduct, 30 January 2019, [https://ec.europa.eu/info/sites/info/files/code\\_of\\_conduct\\_factsheet\\_7\\_web.pdf](https://ec.europa.eu/info/sites/info/files/code_of_conduct_factsheet_7_web.pdf), p. 4.

106 Vidaus reikalų ministerija, 'Neapykantos nusikaltimų pažeidžiamų bendruomenių kokybinio tyrimo ataskaita', Vilnius, 2019, <https://vrm.lrv.lt/uploads/vrm/documents/files/Pa%C5%BEeid%C5%BEiam%C5%B3%20bendruomeni%C5%B3%20kokybinio%20tyrimo%20ataskaita.pdf>.

107 Vidaus reikalų ministerija, 'Rekomendacijos dėl baudžiamosios atsakomybės už neapykantos nusikaltimus ir neapykantą kurstančias kalbas taikymo', Vilnius, 2019, [https://vrm.lrv.lt/uploads/vrm/documents/files/Rekomendacijos%20d%C4%97l%20baud%C5%BEiamosios%20atsakomyb%C4%97s%20taikymo\(1\).pdf](https://vrm.lrv.lt/uploads/vrm/documents/files/Rekomendacijos%20d%C4%97l%20baud%C5%BEiamosios%20atsakomyb%C4%97s%20taikymo(1).pdf).

108 LR vidaus reikalų ministro 2020 m. vasario 24 d. įsakymas Nr. 1V-162 'Dėl darbo grupės sudarymo', <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/dee05d62574411eaac56f6e40072e018?positionInSearchResults=2&searchModelUUID=b9a7c78a-1dfa-44ec-a77d-e637b603d5d2>.

109 Project Agreement No. 875127 — LGKT\_HS — REC-AG-2019 / REC-RRAC-RACI-AG-2019.

national level by providing tailored assistance to victims of hate speech and (or) hate crimes while taking their special protection needs into account.

## SUMMARY

Despite the fact that hate crimes and hate speech on the grounds of sexual orientation are explicitly criminalised through the national criminal law, the Lithuanian authorities systematically fail in effectively responding to this negative phenomenon. While the official statistics provide only a few recorded instances of hate crimes and hate speech on the grounds of sexual orientation, international surveys and opinion polls indicate that hate motivated incidents are widespread in the Lithuanian society. To put it in other words, hate motivated incidents against local LGBT persons are massively under-recorded. This tendency could be potentially explained by three contributing factors, namely: (a) **systematic failure to investigate and prosecute**, (b) **lack of capacity and (or) unwillingness to initiate criminal proceedings**, (c) **underreporting**.

In 2020, the European Court of Human Right (ECtHR) in the case *Beizaras and Levickas v. Lithuania* concluded that an effective legal remedy for combating homophobic hate speech in Lithuania does not exist. The Strasbourg court arrived to this conclusion due to the biased position by the national authorities in the course of not investigating complaints about anti-LGBT hate speech, as well as due to the flawed national jurisprudence, insisting on the local LGBT community ‘to respect the views and traditions of others’ when exercising their own rights’. In order to implement this judgment effectively, not only the national law enforcement authorities and prosecutor’s will have to change the course of their practices, but also the national courts will have to reconsider their jurisprudence in the light of the ECtHR’s standards.

## RECOMMENDATIONS

**Legislation:** add the protected grounds of ‘gender identity’ and ‘gender expression’ in the relevant provisions of the Criminal Code, criminalising hate crimes and hate speech;

**Implementation:**

- Step-up the capacity of law enforcement and the judiciary to investigate hate crime and hate speech by providing systematic training and by increasing the co-operation with CSO and ombudsmen-type institutions in this respect;
- Review existing guidelines on victims’ rights and related practice with a view to take the specific needs of LGBT victims into account in line with the EU Directive on Victims’ Rights.
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