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**SECURING THE HARMONIZATION OF THE EU LAW
REGARDING THE GRANTS OF SURVIVOR'S PENSIONS TO
SAME - SEX COUPLES:
A COMPARISON BETWEEN FINLAND AND POLAND**

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ABSTRACT

The research examines the present Finnish and Polish legislation in the field of Free Movement of Persons under the European Union Law. More precisely, it examines the current status on receiving survivor's pensions equally of same-sex partners that are in same-sex relationships and residing outside of their country; however, within the European Union. The research aims to investigate how the EU law can be harmonized in eliminating unequal treatment between Member States of European Union regarding the grants of survivor's pensions to same-sex couples.

The purpose of the research is to draw a comprehensive overview by comparing two countries on how the individuals are treated and do they receive survivor's pensions equally and does their civil status effect on receiving such benefits. The hypothesis is that the Finnish and Polish law is not harmonized in the field of survivor's pensions of same-sex couples in the EU in the framework of Free Movement of Persons.

The research method is legal research, which involves a case study, document and literature analysis. The information will be collected from articles, books, and legal acts. The research will be qualitative in order to gain understanding of the current situation of same-sex couples within the European Union.

Regarding of proposal of changing unequal treatment of same-sex couples, it can be concluded the Finnish and Polish law can be harmonized by applying "Proposal Council Directive" and strengthen it with the Directive 2000/78/EC.

Keywords: Harmonization of the EU Law, Poland and Finland, Same-Sex Marriages, Survivor's Benefits

INTRODUCTION

The status of non-traditional unions has varied across time as they have reflected the social, moral values of the country and its legal system. Religion has also had a significant impact, especially if it plays a big part in the culture of the country. All of the central institutions of the state have always protected traditional marriages between a woman and a man. European Union has also secured these unions by enacting appropriate laws. Under Article 21 of the Treaty of Lisbon¹, the protection of family life to all European Union citizens and their families is ensured. Thus, the citizens of the EU have a right to move freely to another Member State with their families and receive similar treatment if they were nationals of that country. Also, they are granted to similar rights in the field of work, social security, and social benefits. However, the situation is not the same as those couples that live in same-sex relationships, as the recognition of same-sex partnerships, marriages and cohabitation is not equal to a system where the country by its national law can decide what policy it enacts or determines towards family unions, the state can freely choose on behalf of the same-sex unions or against it. Even though the European Union has passed anti-discriminatory laws and regulations that prohibit discriminative rules and actions based on sexual orientation, it has not entirely removed the inequalities that same-sex couples face.

The Employment Equality Framework Directive (Council Directive 2000/78/EC)² that has been implemented by all the Member States has ensured the basic protection for individuals that are living in same-sex partnerships and marriages. However, similar protection does not cover other areas that are important for the EU citizens that reside in another Member State due to their civil status. Furthermore, same-sex couples have encountered discrimination based on their sexual

¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community signed at Lisbon, 13 December 2007. Article 21.

² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OJ L 303, 2.12.2000, p. 16–22.

orientation in the field of social security, more precisely, on the survivor's pensions, where the surviving spouse may claim survivor's pensions after their spouse has died. Even though the benefits, and the right to receive those benefits, differentiate from one country to another, the discrimination has been in place in those situations where same-sex unions have been considered to be equal with heterosexual unions. Therefore, such treatment based on the sexual orientation of the individuals can potentially hinder the free movement within the European Union.

The thesis aims to investigate how the European Union law could be harmonized in eliminating unequal treatment between Member States of European Union regarding the grants of survivor's pensions to same-sex couples.

Thus, the hypothesis is that Finnish and Polish law is not harmonized in the field of survivor's pensions of same-sex couples in the European Union in the framework of the Free Movement of Persons. The research question is how Finnish and Polish law can be harmonized regarding survivor's pensions of same-sex couples in the European Union in the framework of the Free Movement of Persons. The research mainly focuses on the survivor's pensions received through work and leaves out migrant individuals that are not engaged in economic activity.

In the research will be conducted a comparative study between two countries, Finland and Poland. The reason for the chosen countries is, that the states represent opposing views on same-sex marriages across the Member States, as there still are some countries that have not accepted same-sex unions. The countries have different laws regarding the status of same-sex couples: Finland has accepted same-sex partnerships and marriages, whereas Poland has not. Thus, not all citizens of the EU are treated equally and can enjoy the rights and freedoms that the principle of Free movement of person offers. By comparing these two countries and reflecting the decisions of the ECJ, in research it will be explored, examined and analyzed whether it is possible to harmonize the EU law in the field of survivor's pensions and provide more significant protection that same-sex couples currently do not enjoy in all states due to their national legislation.

The research method is qualitative, and the analysis will be conducted through case study, document and literature review of the status of same-sex couples living in same-sex partnerships and marriages in Poland and Finland. Besides, the contemporary legislation of the European Union will be taken into account and be reflected in the national law of the two countries.

The structure of the thesis consists of four chapters, wherein in the first chapter will be examined

the fundamental rights and freedoms of the same-sex couples conferred by the Charter of Fundamental Rights of the European Union and by the Lisbon Treaty. Furthermore, the scope and applicability of the European Union law and the social and legal rights of same-sex couples will be explored. Here will be presented the fundamental rights of the citizens of the European Union in the framework of social security.

In the second chapter the legal status of same-sex couples living in Poland and Finland will be examined and compared. The chapter will include the rights under the Constitution of Poland and Finland. Moreover, the current situation, differences and rights of same-sex couples will be analyzed. Furthermore, the problematic issues of application of the rights regarding the marriage and status will be presented.

In the third chapter, the situation regarding survivor's pensions in Poland and Finland will be introduced. The relevant treaty provisions and secondary legislation will be covered. Also, the case law on survivor's pensions and persons living in same-sex partnerships and marriages will be included.

In the fourth chapter will be presented the unequal treatment based on sexual orientation and whether there are measures that could be taken in order to harmonize European Union Law and eliminate inequalities in the field of survivor's benefits.

1. FREE MOVEMENT OF PERSONS IN EU

Free movement of persons is one of the fundamental freedoms within the single market of the European Union along with the free movement of goods, capital and services. The right to move freely and reside in another Member State is secured by Article 3(2) of the Treaty on European Union (TEU)³ and Article 21 of the Treaty on the Functioning of the European Union (TFEU).⁴ In addition, Article 45(1) of the Charter of Fundamental Rights of the European Union (hereinafter, Charter of Rights) imposes that "every citizen of the Union has right to move and reside freely within the territory of the Member States."⁵ These rights are secured to all the citizens of the Member States.

The concept of free movement of persons contains the prohibition of discrimination based on nationality, and every citizen of the EU are entitled to exercise their fundamental rights and freedoms. They are also entitled to social benefits, social security and other important cultural rights in another Member State. Numerous treaties and directives, where the latest, the Treaty of Lisbon, includes Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), have guaranteed the above-mentioned rights. In addition to nationality, discrimination based on sex, race, ethnic origin, sexual orientation, religion or belief is also prohibited and is accompanied by various directives.

The following chapters will introduce the fundamental freedoms of citizens of the European Union that live in same-sex relationships. Furthermore, the scope and applicability of the free movement of persons, and lastly, the survivor's pensions of the citizens of the EU will be covered. It is also appropriate to mention that in the thesis will only cover the survivor's pensions

³ Consolidated versions of the Treaty on European Union. Official Journal C115/15. 09.05.2008. Art 3(2).

⁴ Consolidated version of the Treaty on the Functioning of the European Union. Official Journal C115/15. 09.05.2008. Art 21.

⁵ Charter of Fundamental Rights of the European Union. Official Journal C364/1. 18.12.2000. Art 45(1).

of those individuals that are engaged in economic activity; in other words, have concluded pensions scheme through employment. Therefore, the research is limited to only survivor's pensions received through employment.

1.1. Fundamental freedoms of same-sex couples under the Treaty of Lisbon

The Treaty of Lisbon was ratified by the Member States on 13 December 2007 and entered into force on 1 December 2009.⁶ It amends the previous legislation of the EU and promotes efficiency, progress and democratic legitimacy.⁷ Its core values lay on the respect to human rights on the broad spectrum. The respect for equality, freedom and human dignity applies to all people including those who belong to minorities. These core values should also reflect the values of the Member States of the EU. According to Article 49 TEU, the Member State should respect and accept the values in order to become a member of the EU.⁸ Furthermore, other essential provisions reflect the values of the European Union. According to Article 3(3), there is a general obligation for the EU to combat social exclusion and promote social justice.⁹ Article 10 of the TFEU determines that the EU should adopt policies and activities to combat discrimination based on sexual orientation.¹⁰ Regarding the competence of the EU, Article 19(1) of the TFEU lays down that “Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”¹¹ As regards to equal treatment, Article 9 of the TEU determines that “In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies”.¹²

⁶ Ed. Bonde, J-P. (2008). *The Lisbon Treaty- The readable version*. 3rd ed. Denmark: Foundation for EU Democracy. p.3

⁷ Piris, Jean-Claude., Merkel, Angela. (2017). *The Lisbon Treaty: A Legal and Political Analysis*. Cambridge University Press. p.48

⁸ Consolidated version of the Treaty on European Union. Official Journal C115/15. 09.05.2008. Art 49.

⁹ Ibid. Art 3(3).

¹⁰ Consolidated version of the Treaty on the Functioning of the European Union. Official Journal C115/15. 09.05.2008. Art 10.

¹¹ Ibid. Art 19(1).

¹² Consolidated version of the Treaty on European Union. Official Journal C115/15. 09.05.2008. Art 9.

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

1.2. Fundamental freedoms of same-sex couples under the Charter of Fundamental Rights

Although the Charter of Rights came into force in 2000, it, however, became fully legally binding only on 1 December 2009, when the Charter of Rights was incorporated into the Treaty of Lisbon and gave it the same status as European Union Treaties. Due to incorporation, the European Union has placed human rights principles as one of the EU's most fundamental values and promoted their protection efficiently. Furthermore, the above mentioned facts are affirmed by Article 6(1) of the TEU, where "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." Also, Article 6(3) lays down that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." Therefore, the EU law places fundamental rights as general principles of the EU law, and the Member States should give them full effect by the national courts, and ensure that the national legal provisions are compatible with the principles.¹³

One of the most essential principles of the Charter of Rights is non-discrimination. Article 21 of the Charter of Rights states that: "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation

¹³ Peers, S., Hervey, T., Kenner, J., Ward, A. Eds. (2014). *The EU Charter of Fundamental Rights: A Commentary*. Hart Publishing. p.1661.

shall be prohibited.”¹⁴ Therefore, there is an apparent reference to banning discrimination based on sexual orientation, and this has been confirmed by the ECJ. In the case between *Accept Association and the Consiliul Național pentru Combaterea Discriminării (CNDC)*¹⁵, where CNDC being the Romanian National Council against Discrimination. The CNDC partially rejected a complaint filed by Accept, a Romanian association devoted to the protection of LGBT rights, who complained against a statement made Mr Becali, a manager of the football club that excluded the possibility of hiring a homosexual footballer. The CNDC gave Mr Becali a warning on the grounds of giving harassing statements that had the purpose of violating the dignity of the player. However, by the appeal made on behalf of Accept, the case was referred to the ECJ by the Bucharest Court of Appeal. The ECJ concluded that Mr Becali acted in possible violation of the Directive 2000/78/EC¹⁶ by directly discriminating the player.¹⁷

As regards to the rights relating to marriage and founding a family, the Charter of Rights does not prohibit nor impose the rights in granting marriage rights to same-sex couples. It leaves the decision of family foundation and marriage rights to the Member States and their national legislation. However, under the decision rendered by the ECtHR is has been recognized that same-sex couples that have concluded their marriage in their own Member State should receive some form of legal recognition, at least in the form of civil union. This has also been confirmed in the *Orlandi and others v. Italy*¹⁸ case. In the case, three same-sex couples complained about the non-existing alternative to marriage under the Italian law. The Court acknowledged the need for the legal recognition of same-sex relationships as the applicants could not enjoy and gain access to the rights that couples enjoy. The Court stated, that the Italian State should ensure certain basic fundamental needs to the couples that are in a committed relationship, such as, mutual rights and obligations, including moral and material support, maintenance obligations and inheritance rights. By providing the recognition and protection of the same-sex union, the applicants would not impact a burden on the Italian State.

¹⁴ Charter of Fundamental Rights of the European Union. 2010 O.J. C 83/02

¹⁵ *Accept Association and the Consiliul Național pentru Combaterea Discriminării (CNDC)* (C81/12)

¹⁶ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

¹⁷ Cellini, M. (2015). The Rights to non-discrimination on the ground of sexual orientation: an analysis of the EU law and the jurisprudence of European Court of Justice. IRPPS Working Paper 82/2015.

¹⁸ *Oliari and others v. Italy*, ECtHR Nos. 18766/11 and 36030/11 (2015).

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

1.3. The scope and applicability of Free Movement of Persons

Free movement of persons includes residence within the territory of the Member States, employment rights, EU citizenship and the rights of a mobile citizen's families to move freely and reside within the territory of the Member States.¹⁹ All the citizens of the EU are automatically granted an EU citizenship.

Directive 2004/38/EC²⁰ determines the conditions for persons to move and reside in another Member State freely. Those conditions are related to time and whether the person residing in another EU Member State is looking for a job. The person can stay in a country for three months by only providing his identity document or passport.²¹ However, if the person is planning on staying there longer than three months, he is either obliged to find work or prove that he has sufficient resources and insurances to demonstrate that he will not become a burden on the social services to the host Member State.²² The person is also entitled to receive permanent residence if he had lived in host Member State for five years.²³

The Directive has a significant impact on the rights of the citizens of the EU, as it has encouraged the citizens to move and reside freely in another Member State without being

¹⁹ Kaczorowska, A. (2011). *European Union Law*. Second edition. Routledge. p.633

²⁰ Directive of the European Parliament 2004/38/EC. (2004). OJ L 158, 30.4.2004.

²¹ Relu Adrian Coman, Robert Clabourn Hamilton, *Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării*, C-673/16 (2018).

²² Condinanzi, Massimo., Lang, Alessandra., Nascimbene, Bruno. (2008). *Citizenship of the Union and Free Movement of Persons*. Martinus Nijhoff publishers. p.30

²³ Ibid. p12

receiving refusal or termination.²⁴ The family members also include spouses that are same-sex and the Court of Justice of the European Union (CJEU) in the judgement *Relu Adrian Coman and others v Inspectoratul General pentru Imigrari and Others (C-673/16)* has clarified this in the case law. In the case, same-sex partner Mr Hamilton and Mr Coman, who were legally married wanted to move to Roma. Mr Hamilton applied for a residency permit based on Directive 2004/38/EC. However, he was denied a residency permit because he was not considered as a "spouse" according to the national law (Romanian law), which did not permit same-sex marriage or same-sex marriage that was entered into abroad. The Romanian Constitutional Court requested a preliminary ruling before ECJ.

The court had to determine whether:

1. "Spouse" in Article 2(2)(a) of Directive 2004/38/EC "includes the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State".²⁵

2. If the spouse includes same-sex spouse, can the host State grant a residency permit.

The ECJ and Advocate General concluded their opinion in the following way. Regarding the first question, the wording of Article 2(2)(a) is presented by a gender-neutral way when referring to marriage, and this leaves a room for further interpretation and intention not to limit further societal changes within the Member States. Secondly, the Advocate General referred to Article 9 of the Charter of Rights and the European Convention on Human Rights. He recalled the case law of the ECtHR on *Taddeucci and McCall v. Italy*²⁶, where the Court ruled that the refusal to grant a residence permit on family grounds to an unmarried same-sex couple of consisted an unjustified discrimination based on sexual orientation. Thirdly, as the Directive includes non-discrimination clause, including same-sex couples as " a spouse" , it provides high level of legal

²⁴ Weatherill, S. (2016). *Law and Values in the European Union*. New York: Oxford University Press. p.366

²⁵ Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării, C-673/16 (2018).

²⁶ Taddeuci and McCall v. Italy, no. 51362/09 ECtHR (2016)

certainty and The opinionncy.²⁷ Moreover, according to the ECJ and “established case law, the restriction on the right to freedom of movement for persons may be justified if it is based on objective public-interest considerations, and if it is proportionate to a legitimate objective pursued by the judgement law.²⁸ However, in order to rely on the justification of public policy there should be a genuine and sufficiently serious threat to a fundamental interest of the society since derogation from a fundamental freedom must be interpreted strictly.²⁹ Finally, “an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the State concerned.³⁰” Therefore, the concept “spouse” in Directive 2004/38/the EC should include spouse of the same sex.

As regards to the second question, the same-sex spouse should be granted the residence permit for more than three months in the Member State.

Such analysis given by the Advocate General, and the ruling rendered by the ECJ - which also supported the opinion, has had an impact on changing the legal landscape by promoting and recognizing the same-sex relationships within the EU.

1.4. Survivor’s pensions and legal rights of persons in European single market

The European Union grants wide-range of legal rights to its citizens and also to their families. As mentioned above, the Lisbon Treaty ensures the right to move freely within Union, find work in another Member State and reside there with one’s family. In addition, the European Union Law ensures that the individuals living in another Member State receive similar treatment as nationals of the Member State and are entitled to social security and other benefits.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

The protection that the EU law provides in the field of employment, which includes the employee and their families, is laid down in Article 45 TFEU.³¹ According to Article 45(2) TFEU.³² the discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment is prohibited.³³

In terms of social security, the EU law provides protection for non-nationals crossing the borders and moving to another Member State. It also ensures that individuals cannot take advantage of social security systems and gain unnecessary benefits. The EU law also regulates the pensions in cases when one and one's family enter host Member State and engages in economic activity. The person can decide to which pensions scheme they are willing to engage in.

The pension system in the EU is divided into different branches, where they can be classified on the type of the pensions or mode of governance. When a non-national moves to another country, there are some options for the person to consider.

Regulation 1408/71³⁴, which has been replaced by the Regulation 883/2004,³⁵ on the coordination of social security systems, ensures that the migrant workers should be treated in the same manner as the national workers of the host Member State. From the ruling of case law in *Gilbert Even and Office national des pensions pour travailleurs salariés (ONPTS)*³⁶, the migrant workers are entitled to social advantages. The Regulation “modernises the rules on the coordination of Member States’ social security systems, specifying the measures and procedures

³¹ Craig, P., de Burca, G. (2015). *EU Law: Text, Cases, and Materials*. 6th ed. New York: Oxford University Press. p.745-749

³² Ibid.

³³ Ibid.

³⁴ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

³⁵ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

³⁶ Gilbert Even et Office national des pensions pour travailleurs salariés (ONPTS). Case 207/78 (1979).

for implementing them and simplifying them for all the players involved.”³⁷

In the Regulation, pensions are defined as payments that can be payable out of public funds, revalorisaadditional and supplementary allowance and lump-sum benefits which may be paid instead of pensions, and payments made by way of reimbursement of contributions.³⁸ According to the Regulation it “applies to the survivors of persons who have been subject to the legislation of one or more Member State, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.”³⁹

As regards to supplementary pensions, the EU law protects members of supplementary pensions schemes who move from one Member State to another by virtue of Council. The document in question is Council Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community⁴⁰ provides protection for voluntary and compulsory supplementary pensions. However, it excludes pension schemes that are covered by the Regulation 883/2004.⁴¹

1.4.1. Survivor’s pensions and legal rights of same-sex couples in European single market

As a citizen of the EU one can enjoy the rights and freedoms secured by the treaties, regulations and directives. Migrants usually move between different right regimes, albeit, due to foreign national law systems, they can enjoy different rights. However, in some cases, the migrant might experience negative aspects by moving between different right regimes, where the rights that he used to enjoy in his home state are not available in the host state. It has been recognized by the

³⁷ Ibid.

³⁸ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. Article 1.

³⁹ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. Article 2.

⁴⁰ Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community

⁴¹ Dalila Ghailani, Igor Guardiancich, David Natali, Maurizio Ferrera, Matteo Jessoula. (2011). European Social Observatory deliverable. Scope of the coordination system in the pensions field- Final Report. Tender VT/2010/104.

case law of the EU that if a migrant moves into another member state, he should be granted the same rights as nationals. However, some minority groups still experience discrimination based on their civil status and cannot execute their rights under the free movement of persons.

Even though the EU has taken actions combating against discrimination based on sexual orientation, the situation regarding social benefits is not the same, since not all of the same-sex couples are equally entitled to the social benefits as opposed to the heterosexual couples. This is the contemporary situation is due to different legal systems of Member States. The Member States are not obliged to recognize same-sex relationships and therefore, can implement rules that might hinder the rights and freedoms of the migrant.

Since one of the core principles of the EU is respect of the Human Rights and abolishment of discrimination based on all grounds, the EU has implemented the Employment Equality Framework Directive (Council Directive 2000/78/EC)⁴² in order to mitigate discrimination based on sexual orientation. Even though there are other legal instruments that fight against discrimination, inter alia, on the grounds of gender, race and ethnic origin, the Directive is only legal document that covers equality and non-discrimination based on sexual orientation.

The Directive 2000/78/EC came into force in 2000 and imposed anti-discriminatory rules based on sexual orientation, religion, belief and age in the workplace. The rights of individuals and their protection were expanded in a way that same-sex couples could enjoy similar rights as individuals who are in a heterosexual relationship.

After implementing the Directive, the CJEU has ruled on two important cases, *Jürgen Römer v. Freie und Hansestadt Hamburg*⁴³ and *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*⁴⁴. In both of the cases the applicants had faced discrimination based on their sexual orientation in regards of payment of occupational pensions. In addition, in both cases the

⁴² Directive 2000/78/EC. 27 November 2000 establishing a general framework for equal treatment in and occupation

⁴³ Jürgen Römer v Freie und Hansestadt Hamburg. C-147/08 (2011).

⁴⁴ Tadao Maruko v Versorgungsanstalt der deutschen Bühnen. C-267/06 (2008).

applicants entered into a registered same-sex life partnership and were either denied of survivor's pensions or received a smaller payment from the pension fund. Thus, the Court ruled that such treatment is considered to be direct discrimination under Directive 2000/78/EC and granted the applicants equal pay.

2. RIGHTS OF SAME-SEX COUPLES IN POLAND AND IN FINLAND

Family as a concept has always been an essential part of society, having a link and reflection to the society's norms and social morals.⁴⁵ Society is dominated by the heterosexual norms and has had obstacles in recognizing different family units.⁴⁶ However, as the norms within societies have changed into a more liberal way and, thus, the same-sex couples have enjoyed the recognition of their family units and the rights that comes with it, there are still discrepancies to what kind of level of protection the countries offer to their minority groups.⁴⁷ Various human rights mechanisms have promoted the availability of same-sex relationships through marriage or, other arrangements, and the increasing numbers of states have followed the line by amending

⁴⁵ Lee, M.Y. (2010). *Equality, Dignity and Same-sex Marriages: A Rights Disagreement in Democratic Societies*. Martinus Nijhoff Publishers.

⁴⁶ Loveday Hodson, Family Values: The Recognition of Same-Sex Relationships in International Law, 22 Neth. Q. Hum. Rts. 33 (2004). p.35.

⁴⁷ Godard, J. (2007). Pacts Seven Years on: is it Moving Towards Marriage? - *International Journal of Law, Policy and the Family*. Oxford University Press. Vol. 21(3), 310-321

appropriate legislation.⁴⁸ However, the states have the primary competence in regulating the legislation in family matters. The EU's competence on that part is insignificant, as it only can act only to its competence granted by the treaties.

The following chapter will examine and compare the legislation of Poland and Finland by covering three main groups of same-sex unions, which are marriage, registered partnership and cohabitation.

2.1. Rights under the Constitution of Poland and Finland

Poland is part of Eastern European countries, which is built upon democratic values by promoting equality and freedom to its citizens. Even though the state is neutral towards religion and separates religion from the state, its norms and values are still influenced by the Catholic Church. Therefore, the concept of family unit has traditional aspects, and this is also confirmed by the New Constitution of the Republic of Poland, which came into force on 17 October 1997.⁴⁹ According to the Constitution, marriage is union between a man and a woman.⁵⁰

As being part of the European Union, Poland has signed the Charter of Fundamental Rights of the European Union. However, Poland has acceded to Protocol No. 30 on the application of the Charter of Rights to Poland, also known as an opt-out clause and can limit its application. The Charter of Rights has priority over national law, but not over the Constitution of Poland and thus it is applied additionally to the cases. According to Article 8 of the Constitution, the Constitution should be the supreme law and the provisions should apply directly.⁵¹ Furthermore, it has also been argued whether the Protocol has another meaning, such as not adopting laws that might be against the moral values of the country. This might consider the provisions relating to family law

⁴⁸ Eriksen, Erik., Fossum, John., Menendez, Augustin. (2004). *Developing a Constitution for Europe*. Routledge.

⁴⁹ The Constitution of the Republic of Poland. Accessible: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>

⁵⁰ Ibid. Art.18

⁵¹ Ibid. Art.8

and LGBT rights.⁵²

Finland is a part of the Nordic Countries, along with Denmark, Iceland, Norway and Sweden. They share a common history, and cultural and social values that reflect their legal system, accompanied by a strong trust in the democratic processes. These countries are known for being the first countries that has recognized same-sex unions.⁵³ The concept of family unions in Finland has changed from having only traditional marriages to decriminalizing homosexuality and allowing registered partnerships and, as a final step, by granting legality of same-sex marriages. The Constitution of Finland, which entered into force on 1 March 2000, encompasses the fundamental rules, values and principles of the Finnish democracy and promotes equality. According to Chapter 2 and Section 6 of the Constitution, “No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.”⁵⁴

The Constitution of Finland does not define marriage. Instead matrimonial issues are regulated by the Marriage Act (234/1929).⁵⁵ According to the Marriage Act, the marriage is a union between a man and a women, but in 2017 it became gender-neutral and allowed same-sex couples to marry. From there on, same-sex couples have enjoyed right to a joint surname and adoption.

2.2. Right to marry, to register a partnership or to cohabitate in a comparative perspective

Poland became a Member State of the EU in 2004, whereas Finland has been a Member State since 1995. Their national legal situation regarding family law differs significantly, since

⁵² Agnieszka Kastelik-smaza. The application of the Charter of Fundamental Rights of the EU in Poland. *Acta Universitatis Carolinae-Iuridica* 4. 2018. p.104

⁵³ Gallo, Daniele., Paladini, Luca., Pustorino, Pietro. Eds. (2014). *Same-Sex Couples before National, Supranational and International Jurisdictions*. Springer-Verlag Berlin Heidelberg. p.162

⁵⁴ Constitution of Finland, Chapter 2, Section 6.

⁵⁵ Marriage Act (234/1929; amendments up to 1226/2001 included).

Accessible: <https://www.finlex.fi/en/laki/kaannokset/1929/en19290234>

Finland has accepted registered partnerships since 2002 (Act on Registered Partnerships 950/2001)⁵⁶, and since 2017 same-sex marriages have been legalized.

In Finland, the Act on Registered Partnerships was in accordance with the old Marriage Act (234/1929)⁵⁷, however, it excluded adoption rights from same-sex couples and the right to joint surname. In 2014 the Finnish Parliament approved same-sex marriages and adopted new provisions to the Marriage Act. From 2017 onwards the law took effect. According to Article 1 of Marriage Act, a marriage is between two people.⁵⁸ According to Article 14 of the Marriage Act couples can choose to receive either a civil ceremony or a church ceremony.⁵⁹ Finland also recognizes same-sex unions established abroad.

In Poland, the family law is governed by the Family and Guardianship Code⁶⁰ that came into force in 1964. It defines marriage in traditional way. Under Article 1 of the Family and Guardianship Code marriage is concluded between a man and a woman.⁶¹ Regarding the rights of same-sex couples, Polish law does not recognize same-sex marriages and partnerships. Therefore, they do not enjoy similar freedoms that Finnish Marriage Act provides.

Even though concluding a marriage and entering into partnership is not allowed to same-sex couples, they still can cohabit. According to Article 115(11) of the Family and Guardianship Code, "A next of kin is a spouse, an ascendant, descendant, a brother or sister, relative by marriage in the same line or degree, a person being an adopted relation, as well as his spouse, and also a person actually living in cohabitation."⁶² Even though it is not directly mentioned in the cohabitation rights, but according to the article, persons can have an informal romantic relationship and live in the same house hold.

⁵⁶ Act on Registered Partnerships (950/2001). Accessible <https://www.finlex.fi/fi/laki/kaannokset/2001/en20010950>

⁵⁷ Marriage Act (234/1929)

⁵⁸ Ibid. Art.1

⁵⁹ Ibid. Art.14

⁶⁰ The Family and Guardianship Code 1964. Accessible: <https://www.infor.pl/akt-prawny/718589,ustawa-kodeks-rodziny-i-opiekunczy.html>

⁶¹ Ibid. Art.1

⁶² The Penal Code Act of 6 June 1997.

Accessible: https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=43864

Even the Polish Constitution does not recognize same-sex marriages and partnerships it still prohibits discrimination in the public, social and economic spheres because all people are equal before the law. This non-discrimination rule is laid down in Article 32 of the Polish Constitution.⁶³

2.3. Status of same-sex relationships in the EU

Over the past decade European countries have gradually recognized some form of same-sex unions.⁶⁴ According to a comparative analysis of data from the Laws and Familie database⁶⁵, it was concluded that the countries, which recognized same-sex relationships, the numbers of same-sex relationships have grown remarkably from 1985 till 2016. In 1985, any country did not recognize the marriage or registered partnership. However, the numbers have started to increase from the 2005, and in 2016, whole Council of Europe had concluded 26 marriages or registered partnerships.

Now, there are sixteen European countries that have legally recognized same-sex marriages, twelve countries that have legally recognized some form of civil union and, lastly, two countries that have recognized cohabitation. Therefore, two more countries have recognized same-sex unions in two years. When comparing to the situation in 2016, it is presented that the majority of the Member States of the EU have acknowledged the rights and obligations that same-sex partners should enjoy, at least to some extent. In addition, it can be seen that the trend in recognizing same-sex marriages is increasing. The reason behind this may be the changed attitudes in society, promotion of the rights of the same-sex couples through different organizations and finally, through the moral pressure to address the discrimination against LGBT individuals.

⁶³ The Constitution of the Republic of Poland. Art.32.

⁶⁴ Boele-Woelki, Katharina., Fuchs, Angelika. Eds. (2012). *Legal Recognition of Same-Sex Relationships in Europe*. 2nd ed. Intersentia. p.247

⁶⁵ Waaldijk, K. Ed. (2017). More and more together: Legal family formats for same-sex and different-sex couples in European countries. Comparative analysis of data in the LawsAndFamilies Database. p.26

3.SURVIVOR’S PENSIONS IN POLAND AND FINLAND

The right to social security is ensured to all the citizens by national social security systems. In general, the pension system can be the state pensions, mandatory pensions or supplementary funded pensions. The survivor’s pensions are covered by all the pensions systems and the amount paid depends on the amount that the deceased was receiving from the social security system.

3.1. Survivor’s pensions of same-sex couples in a comparative perspective

Survivor's pensions are the survivor's benefits that the survived spouse may be entitled to after the other spouse has died. In Poland, the survivor’s pensions are regulated by Act on retirement pension, schemes for workers and their families⁶⁶ that were adopted in 1982. Under Polish law, the survivor’s pensions are granted to a survived spouse due to the deceased spouse’s contributions paid into a pension scheme for a sufficient amount of time.⁶⁷ There are certain conditions that should be met in order to receive survivor’s benefits. The survived spouse should be 50 years old at the time of the death of the deceased spouse, in the case of the survived spouse is bringing up to at least one child, a grandchild who is below six years.⁶⁸

In Finland, the survivor’s pensions are regulated by the Survivors' Pensions Act.⁶⁹ In the Finnish pension system the statutory survivor's pensions are paid to the surviving spouse aged less 65 years. The Social Insurance Institution of Finland pays the spouse's pension to Also a spouse. In addition, there are earning related pension schemes, and they can be paid to the surviving spouse, a former spouse and the surviving party in a registered partnership.

⁶⁶Act on retirement pension schemes for workers and their families 1982-12-14. Accessible: https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=10639

⁶⁷ Ghailani, D., Guardiancich, I. (2010). Scope of the coordination system in the pensions field. European Social Observatory deliverable. Tender VT/2010/104

⁶⁸ Ibid.

⁶⁹The Survivors' Pensions Act (No. 38 of 1969).⁶⁹
https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=18046

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

3.2. Case law on survivor's pensions and persons living in same-sex partnerships

There have been few significant cases in the field of social security that have affected positively the rights of same-sex couples.

In *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*⁷⁰ case, Mr. Maruko was a homosexual man who entered into a registered same-sex life partnership. His partner was a member of the The German Theatrical Pension Fund (hereinafter, “the Pension Fund”) and he had contributed voluntarily to that institution during the periods when he was not obliged to be a member. After Mr. Maruko's partner's death, he applied for widower's pension. However, the Pension fund rejected his application on the grounds that only spouses were entitled to such benefit. Mr. Maruko challenged the decision in the domestic court (Bavarian Administrative Court, Munich) and argued that it constituted discrimination on the grounds of his sexual orientation. Moreover, such treatment infringed the principle of equal treatment, since the German legislature has placed life partnership and marriage on an equal footing. The partners were mutually committed to a lifetime union and they accepted mutual ties with regard to each other.

The Court referred the following questions to the ECJ for a preliminary ruling:

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

⁷⁰ Tadao Maruko v Versorgungsanstalt der deutschen Bühnen C-267/06 (2000).

2. Furthermore, the Court seeks to know, whether the provisions of Article 1 and Article 2(2)(a) of the Directive 2000/78 excludes provisions such as in the Pension Fund, under which a spouse that lived in life partnership, cannot receive survivor's benefits, equivalent to those offered to a surviving spouse. The court concluded that there is the caseation and the case fall within the scope of Directive 2000/78.

3. If the combined provisions of Article 1 and 2(2)(a) of Directive 2000/78 excludes provisions such as presented in the Pensions Fund, is on the grounds of sexual orientation permitted in the light of Recital 22 in the preamble.

The ECJ ruled in the following way. According to the Court, the widower's pensions should be classified as pay within the meaning of article 3(1)(c) of the Directive. To the next question, the Court stated that, because the Directive's aim is to combat certain forms of discrimination in the field of employment, and when the situation of surviving life partner is comparable with that of a spouse, the denial of a survivor's benefit to life partners can be considered as direct discrimination within the meaning of articles 1 and 2(2)(a) of the Directive. Regarding the third question and Recital 22 of the preamble to the directive, which states that “Directive is without prejudice to national laws on marital status and the benefits dependent thereon”, the Court ruled the following. The Court acknowledged that the civil status and its benefits fall within the competence of the Member States, but the decisions must still comply with the principle of non-discrimination. Therefore, the Recital 22 could not be taken into account.

The second relevant from pensions scheme point of view is the *Jürgen Römer v Freie und Hansestadt Hamburg*.⁷¹ case. Mr. Römer was a retired employee. Since 1969, he has been living with his partner Mr Alwin Ulrich. In 1999, they registered their partnership under the City of Hamburg's registration scheme and in 2001, they entered into Mrfe partnership .Mr Raömer requested for higher amount of his supplementary retirement due to his change of his status. However, the request for higher amount he was denied and the case was brought later on before the ECJ for interpretation of Directive 2000/78.

⁷¹ Römer v. FHH Mr147/08

The Court ruled that under the Directive same-sex couples should have equal access to pensions as heterosexuals do. The court stated, “if a member state has a registered partnership putting same-sex couples into a legal position comparable to married couples, exclusion from marriage benefits constitutes direct discrimination”.

4.DISCRIMINATION

4.1. Unequal treatment based on the sexual orientation in European Union and the existing directive proposal

The Lisbon Treaty and the Charter of Rights are the basic instruments that set out requirements for the protection of human rights, promotion of equality and stabilizing the principle of non-discrimination on all areas of life of the citizens of the EU. Despite this, there are still problematic issues due to the inconsistent application of the EU legislation. These inconsistencies can especially be witnessed in the field of employment, where persons do not receive the equal payment from the pension funds, even though the state has recognized some forms of same-sex unions. Moreover, if the protection cannot be extended to those couples that live in a state where same-sex unions are not recognized, they would not receive the equal treatment that is the EU's basic principle.

Tadao Maruko v Versorgungsanstalt der deutschen Bühnen and *Römer v. FHH* cases have brought some clarity on how the situations in case of direct discrimination on the grounds of sexual orientation are handled. However, the cases have also shown that within the EU there still exists inequality between the Member States. The fact that same-sex couples are not entitled equally to the survivor's pensions concerns equality and discrimination rather than the preservation of family life.

The European Commission has already added proposal for an equal treatment, namely, the "Proposal for a Council Directive on implementing the principle of equal treatment between

persons irrespective of religion or belief, disability, age or sex".⁷² The Directive aims to equalize protection against discrimination on all grounds across the EU.

4.2. The proposal of changing unequal treatment of same-sex couples

Referring back to the research question “how Finnish and Polish law can be harmonized regarding survivor's pensions of same-sex couples in the European Union in the framework of the Free Movement of Persons” it is appropriate to establish the appropriate answer. The Finnish and Polish law can be harmonized in order to provide the minimum requirements in the field of social security. As the matter is not concerned with the recognition of the same-sex marriages and unions, but rather establishing the minimum level of protection to all EU citizens that move across the EU, the EU law could reconsider of application of the “Proposal Council Directive” and strengthen it with the Directive 2000/78/EC. The aforementioned examples through the case law have shown the current situation of same-sex couples and the treatment they receive in the host state. Although the ECJ has ruled on behalf of the same-couples and established a solid ground regarding non-discrimination in case of sexual orientation, such protection does not expand to all situations.

Furthermore, by having compared Finnish and Polish law, it can be concluded that Poland and Finland represent the opposing views in regards to the marriage and therefore granting social security rights to same-sex couples. As in Finland the marriage and registered partnership is available for heterosexual and homosexual partners, they both can enjoy similar rights and receive survivor's benefits after the death of their spouse. The situation in Poland is not same, as the law does not recognize same-sex unions. However, as the matter regarding survivor's benefits is not concerned with the family rights but with the rights to receive an equal treatment in the field of free movement of persons, the Directive 2000/78/EC and the “Proposal Council Directive” should be still effectively applicable.

⁷² Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180}

CONCLUSION

Citizens of the European Union enjoy rights and freedoms that the Treaty of Lisbon has established. By the Charter of Rights, the respect for human rights, equality and non-discrimination are the core values that every Member State has to consider while implementing national legislation. The EU law is harmonized in many aspects, but there are still gaps that enable the interpretation of the law in a way that is discriminatory towards the citizens. Although the family law of the state governs same-sex relationships, however, the discrimination and unequal treatment in the field of social security is a matter of the fundamental rights of each citizen. The differences in the family law between the countries vary because of different social attitudes, culture, and norms that are reflected to the legislation. Changing those essential aspects of the country is not easy and might be too extreme. However, every person has the freedom to foster his rights and have standard living conditions.

When comparing Polish and Finnish legislation in matrimonial matters, it appears that the country's Constitution plays its role in how the future in allowing same-sex partnerships to develop. Poland is influenced by the Catholic Church and remains traditional regarding the family law, and in the New Constitution of the Republic of Poland, the marriage is concerned to be a union between a man and a woman. Finnish family law is the opposite, as it has developed to more gender-neutral the direction where it has recognized same-sex marriages in 2017. Since then, same-sex partners can enjoy all the rights that heterosexual spouses can.

As Poland and Finland represent the opposite sides regarding the family law, the regulation of survivor's pensions is also the same, as the pensions are paid to the survived spouse. Therefore, same-sex couples cannot enjoy those rights that are granted to heterosexual couples in Poland. Even though the couples would move from different right regimes, their enjoyment of social security rights will stay limited. However, it would also be beneficial for Poland to consider implementing the Proposal Directive, as it would guarantee equal treatment for same-sex couples.

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