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A study prepared as part of the project:

The Concept of Marriage Through the Prism of Imperative Requirements Theory

Title of the study:

Definition of Marriage and Its Impact on the Institution of Parenthood in Estonian Law (expert report)

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Definition of marriage

The Estonian Constitution refers to marriage through the concept of family. Article 27 of the Basic Law refers to the family as the basis for “the preservation and growth of the nation and as the foundation of society” and that the family “enjoys the protection of the state”. It goes on to state that wife and husband have equal rights, that parents have the right and duty to raise and provide for their children, and that the family has the duty to care for its members in need. This means that a family, as the Constitution understands it, is first and foremost a man and a woman who are married, and that a nation can only survive and develop thanks to such families in which children are born.

According to the current Family Law (Perekonnaseadus), marriage is between a man and a woman, and both persons must be of legal age. An adult with limited legal capacity may marry only if he or she sufficiently understands the legal consequences of marriage. On the other hand, direct relatives, siblings, and half-brothers and half-sisters may not marry. The court may declare a marriage to be invalid if 1. at least one person was a minor at the time of the marriage; 2. at the time of the marriage, one of the spouses had a mental disorder or did not make a conscious decision; or 3. the marriage was entered into as a result of fraud, threats or violence, and one of the spouses withheld information about health or other personal circumstances, if such circumstance is relevant to the marriage. In addition, a marriage may be dissolved if it was entered into for the purpose of obtaining an Estonian residence permit (sham marriage). The Marriage Act of 2014 also allows for the dissolution of a marriage if one of the spouses changes gender during the marriage.

In addition, Article 83 of the Family Law defines the mother as the woman who gave birth to the child, and the father as the man who conceived the child. A child is also considered to have been conceived by a man if, at the time of the child's birth, he was married to the child's mother, acknowledged paternity or had his paternity established by a court.

The first step in the marriage process is the filing of a paper or electronic marriage application. To submit a paper application, the two parties must go together to the municipality, notary or ecclesiastical institution where they wish to get married. The application form will be filled out on the spot. If the person to be married does not meet the requirements of the church, parish or religious community, the clergyman of the church, parish or religious community may refuse the marriage. However, an electronic application can only be submitted through the municipal website. When submitting the application, the spouses must choose the type of property relationship that unites them. These can be: community property, separate



property, and property division. The chosen property regime takes effect upon marriage. Joint property means that the property acquired during the marriage belongs to the spouses as joint property. It can be subject to transactions, such as being sold or given away, only by their joint decision. Property acquired before the marriage, property received during the marriage, such as a gift or inheritance, and personal property are the separate property of one spouse and decisions about them are made by that spouse alone. If the spouses are financially independent of each other, property separation occurs. A third possibility is when property acquired during the marriage is the sole property of each party. The division of property stated in the marriage application may change by the time of marriage. The parties must jointly notify in writing the local government office, notary or clergyman to whom the marriage application was submitted of their desire to change the property relationship, either in person or by sending a digitally signed request by e-mail. It is not possible to make such a change if the application is submitted electronically.

If the application is submitted to a municipal office, a notary public or a church institution, the time and place of the marriage registration will be agreed upon. No further confirmation is required. If the application is submitted electronically, the registrar will contact the parties to confirm the time and place of registration as stated in the application. If necessary, the clerk will arrange a new time and place with the couple.

After the marriage, both spouses receive a certificate. The certificate is written in Estonian and is free of charge.

Same-sex relationships

The situation of same-sex unions in Estonia has for many years been shaped by a government policy that is particularly liberal and distinctly Western in its general direction. On October 9, 2014, Estonia became the first of the Baltic states to pass a law on same-sex partnerships. The law came into force on January 1, 2016. The gender-neutral Registered Civil Partnership Act allowed couples to enter into civil partnerships regardless of gender. Estonia recognizes registered same-sex partnerships entered into abroad. Registered partners in a relationship have the same rights and obligations to each other, although the legal protection differs from that of marriage. People in a civil union have the right to make decisions regarding their partner and to receive benefits and allowances. They can also decide on the type of property relations that are available when registering a marriage: community property, property contract and property separation. Disputes over property and assets are settled in court according to the same rules as in marriage. Once a partnership is dissolved, there is no further obligation to pay maintenance, unless the parties have agreed

otherwise.

Prior to the adoption of the Registered Civil Partnership Act, LGBT issues and rights received little political and public attention in Estonia. However, the law was undoubtedly a source of antagonism and controversy in Estonian society. While the law was being debated in parliament, conservative organizations in Estonia led several campaigns against same-sex marriage. In particular, the Estonian Evangelical Church and the Russian Orthodox Church of Estonia opposed the legalization of civil unions. However, public opinion polls on homosexuality have shown that Estonians are becoming more open-minded and tolerant, and acceptance of LGBT people has increased in recent years. For example, a 2012 public opinion poll on LGBT issues conducted by the Tallinn Law School at Tallinn Technical University found that 38% of participants found homosexuality acceptable and 46% agreed that same-sex partners should be able to officially register their relationship. Later, a 2015 Eurobarometer survey found that 44% of Estonians believe that: "Gays, lesbians and bisexuals should have the same rights as heterosexuals" (in 2019, 53% of Estonian respondents already agreed with this statement). In addition, a 2017 survey conducted by the Estonian Center for Human Rights and the research company Turu-uuringute AS confirmed that 45 percent of respondents support civil unions for same-sex couples. In 2023, the survey found that 53% of respondents supported same-sex marriage.

The Estonian Parliament's delay in passing implementing legislation and amendments to other laws that would have allowed the law to actually come into force was a major obstacle to the implementation of the 2014 Law. This was most likely due to fears that the issue would trigger new confrontations. The implementing legislation was necessary, among other things, to register civil unions in the state registry and to define a partner's alimony and inheritance rights. In fact, several political parties in Estonia blocked any attempt to introduce such legislation. This situation was criticized not only by the then President of Estonia, Kersti Kaljulaid, but also by the Administrative Court of Tallinn, which ordered the Estonian government to pay compensation to those who had been found guilty for failing to adopt implementing legislation. In addition, the Constitutional Chamber of the Supreme Court stated that despite the lack of implementing legislation, the 2014 law must be interpreted by the courts in a way that ensures compliance with the Constitution.

There are three notable cases of court rulings that were the result of the government's failure to enact legislation for the implementation of the law. The first example involved a same-sex marriage between Swedish citizens living in Estonia. In 2015, citing the fact that Estonian law does not recognize same-sex



marriages, local authorities refused to register their union in the state registry. The couple appealed the decision, and the Tallinn District Court ruled in favor of the couple, stating that all marriages performed in another country must be registered in the Estonian State Register once the person becomes a resident of Estonia or acquires Estonian citizenship. The second case involved an American-Estonian couple who married in the United States in 2015 and later moved to Estonia. Estonian police and border guards issued a residence permit to a U.S. citizen who was in a relationship with an Estonian citizen, but the Tallinn District Court later overturned the previous decision, stating that a marriage between two people of the same sex is not valid in Estonia. The third case involved a Sri Lankan citizen who entered into a civil partnership with an Estonian citizen in Germany. After arriving in Estonia in 2016, they applied for a residence permit on the basis of their registered partnership, but were denied because the law did not provide for granting residence permits on such a basis. The couple filed a complaint against the police and border guards. In 2019. The Supreme Court ruled that the Aliens Act and the existing regulations are unconstitutional to the extent that they speak of prohibiting a foreigner from being granted a temporary residence permit in Estonia on the basis of a registered same-sex relationship with an Estonian citizen. It is worth noting that the Supreme Court referred to EU law in its decision.

The above cases show that the issue of same-sex unions remains controversial in Estonia and that the government's inaction in adopting implementing legislation has forced same-sex couples to turn to the courts. In addition, the issue became significantly politicized when the Social Democratic Party declared its support for same-sex marriage and included the issue in its platform, while the conservative Estonian People's Party (EKRE) strongly opposed it. In 2017, citing public concern about the negative impact of the 2014 law on registered partnerships on the normative status of marriage, EKRE drafted a new law to repeal the 2014 law. The EKRE party, which had been pushing for the repeal of the 2014 law since its adoption, claimed that Parliament had pushed it through against the will of the people. EKRE's proposal was in line with the position of religious communities. The president of the Estonian Evangelical Lutheran Church, for example, suggested at the time that the constitution be amended to include a provision stating that marriage is the union of one man and one woman and that all other issues should be regulated by law.

The issue of legal recognition of same-sex couples took on particular importance after the 2019 elections, when the Social Democratic Center Party, the national conservative Isamaa Party, and ERE formed a coalition government. The coalition agreement included a declaration of intent to hold a referendum on amending the Estonian Constitution to redefine marriage. The referendum was originally scheduled for April



2021. Voters would be asked whether they wanted to amend the constitution to add a definition that marriage could only be between a man and a woman. EKRE spearheaded the discussion and won broad public support for its referendum proposal. A poll conducted by Norstat Eesti AS in 2020 showed that 55% of Estonians opposed amending the Family Code to allow same-sex marriage. At the same time, the referendum was criticized by opposition parties on the grounds that it would weaken Estonia's pro-Western international image. It is worth recalling that the then leader of the ECE and former Minister of the Interior Mart Helme repeatedly said that homosexuals in Estonia could “flee to Sweden”. Finally, after the resignation of Prime Minister Jüri Ratas on January 13, 2021, the parliament withdrew the marriage referendum bill from further consideration and the new government removed it from the political agenda.

Marriage and the institution of parenthood

It should be noted that although Estonia is considered to be one of the least religious countries in the European Union, family law has so far represented a traditional approach to the institution of marriage. The Family Law Act, adopted in 2009 and in force since 2010, defined the family as the union of a man and a woman (paragraph 1). Under the law, only married couples had the right to adopt children. As of 2016, however, the law allowed a person in a registered partnership to adopt a child if that person had adopted the biological child of his or her partner or the child of another person whose partner was a parent before the partnership. For example, in February 2017, Tallinn Administrative Court allowed a woman to adopt her partner's children.

The law on civil unions did not guarantee the same adoption and parental rights that were previously associated with marriage. Therefore, in accordance with the agreement of the parties that make up the current governing coalition: Reform Party, Estonia 200 Party and Social Democratic Party, the process of legalizing same-sex marriage was initiated. As a result, on June 20, 2023, the Estonian Parliament adopted an amendment to the Family Law, according to which marriage is defined as “the union of two natural persons of full age, regardless of sex”². The words “man” and “woman” were replaced with “two natural persons”. In addition, implementing legislation for the 2014 Law on Civil Unions was adopted. The law is expected to enter into force in 2024. For the first time, an amendment to the Family Law Act regulates parentage in relation to the adoption rights of same-sex couples.

² ERR.EE, *Historic decision: Estonia legalizes same-sex marriage*, 20.06.2023 <https://news.err.ee/1609012469/historic-decision-estonia-legalizes-same-sex-marriage> [accessed: 26.06.2023].



The rights and obligations arising directly from the registered partnership agreement will remain the same as under current law, i.e. a partner can only adopt the child of his or her partner in a registered partnership. Partners are guaranteed a say in decisions concerning their partner and the right to receive benefits if necessary. These couples also have the option of converting their formal legal partnership into marriage under simplified rules.

Following the change in family law, Estonian Prime Minister Kaja Kallas said: “With this decision, Estonia joins other Nordic countries as well as all other democratic countries in the world where marriage equality has been granted”. In addition, the explanatory statement refers to the process of strengthening the protection of LGBT+ rights in the European Union, including the European Commission's strategy to prevent discrimination against them. The European Parliament adopted a resolution on the full enjoyment of fundamental rights by LGBT people.

Applications

The Estonian case shows that the legal recognition of same-sex couples is still a controversial issue. It also highlights that the adoption of the law in 2014 did not comprehensively resolve the issue. As the government has failed to adopt the necessary implementing legislation, several same-sex couples have resorted to the courts to enforce their rights. The Estonian Supreme Court has been forced to deal with legal uncertainty over time and, by referring to EU case law, has acted as a supportive formal institution, bringing Estonian legislation (or, more precisely, the application of Estonian rules) into line with the emerging practice of legal recognition of the rights of same-sex couples. However, this legal uncertainty and the Supreme Court's rulings also provided a political opportunity for the ERE, which mobilized voter support by proposing a referendum on the definition of marriage. Although the ERE failed in its proposal to hold a referendum on a constitutional ban on same-sex marriage in 2021, the party is unlikely to set the issue aside.

However, we must not forget that the issue of marriage equality is still complicated. Even among representatives of the Reform Party, which spearheaded the amendment of the Family Code, not everyone was in favor of marriage equality. In addition, many civil society organizations spoke out against the changes, pointing out that making decisions about marriage in haste and without public discussion increases opposition and division in society, especially since there is currently no firm support for such changes among Riigikogu members and voters. In May 2023, nearly 60 intellectuals, including renowned writers, composers and musicians, actors, artists, scientists and entrepreneurs, published an open letter on the issue.

Some in the media pushed the narrative that opposing the amendment meant that Estonian society was backward.

Changing the definition of marriage undoubtedly changes the definition of family. Norstat's late 2022 online survey shows that while support for the rights of people in same-sex relationships is high, this does not necessarily mean acceptance of changing the meaning of family. In fact, respondents said that a family is either a man and a woman or a man, a woman and children. Only 29% of respondents said a family could be two people of the same sex, and 34% said two people of the same sex with children. In other words, for the vast majority of voters, the concept of family has a traditional meaning as a union between a man and a woman from which children can be conceived.

Changing the definition of marriage also requires the amendment of a number of Estonian laws. For example, Chapter 7 of the 2009 Family Law regulates rights and obligations towards children using the terms “mother” and “father”. According to the amendment, which defines marriage in a gender-neutral way, this chapter would also have to be amended. In practice, this could lead to serious ethical dilemmas in Estonian society.

The long-term socio-cultural changes in society that a change in the definition of marriage will bring are also unknown. In fact, same-sex marriage may be the first step toward a gender-neutral society. If the concepts of “woman” and “man” are removed from family law, the concept of “mother” or “father” may also change. Pressure to legalize commercial surrogacy could also prove problematic. In addition, the amended law lays the groundwork for a single-sex family to serve the same function as a heterosexual family. There may therefore be an expectation that the state will, if necessary, provide them with some of the opportunities it provides to heterosexual couples who are treating infertility. This raises a whole range of serious ethical questions, such as who can be a surrogate mother and under what conditions, what to do if a child at some point in its life wants to know who its biological mother or father is, and so on.

Another argument against the legislative changes is that the term “marriage equality” itself is misleading. This is because there are still restrictions on the age and relationship of those who marry. According to this narrative, the new law only equalizes the rights of heterosexuals and homosexuals, so there can be no real marriage equality in this case.

The many uncertainties associated with amending the Family Law to change the definition of marriage mean that the issue of same-sex marriage requires a substantive and comprehensive discussion in Estonian society.



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