



THE ROLE OF THE EU AND HUMAN RIGHTS LAW IN THE FAMILY LAWS OF THE MEMBER STATES

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SUMMARY

For a long time two approaches have been contrasted to each other: differences of cultures of states which do not allow to harmonize the family laws and a liberal approach by which the common European culture and values allows to unify the family laws of European states. In recent years the supranational identity has become more significant pushing aside the concept that culture is an obstacle for harmonization of family laws. European Court of Human Rights has given a pattern that certain human rights can be restricted when it is needed to protect certain more important value of the state. However, court has stated that this justification process must consist of correct proportionality test. Unfortunately, in practice the justification right has been used very often but proportionality test has not been made. Also, in this justification process the changes of the society should be considered – supranational identity and more liberal approaches to the family life impact this process. One can argue that it is more complicated to find a justified reason not to allow same-sex marriages or cohabitation when follow correctly the proportionality test in the justification process. Estonian Partnership Registration Act is a good example to show what such inappropriate proportionality test in a justification process can cause. Author analyses the proportionality test in the adoption process and implementation practice of Estonian Partnership Registration Act to discuss and describe the mess what can be caused when proportionality test has not been used in an appropriate way if used at all.

KEY WORDS

Registered partnership, justification process, family law, EU values.

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INTRODUCTION

For a long time two approaches have been contrasted to each other: differences of cultures of states which do not allow to harmonize the family laws and a liberal approach by which the common European culture and values allows to unify the family laws of European states. In recent years the supranational identity has become more significant pushing aside the concept that culture is an obstacle for harmonization of family laws. Still, contracting state has a right not to follow certain human rights, e.g. marriage (which is analyzed in this article) but this right is legal only when it bases on a justification process. Unfortunately, in practice the justification right has been used very often referring to the need to protect the culture or some value but proportionality test has not been made. *Estonian Partnership Registration Act* is a good example to show what such inappropriate proportionality test in a justification process can cause.

FAMILY LAW AND CULTURE. VALUE DECISION AND JUSTIFICATION PROCESS

When talking about family law in EU it is usually referred to the fact that family laws of Member States are so different because of the differences of cultures in these states and this is as if a static reason why family laws can never been harmonized. On the other hand we refer to the process of globalization and multiculturalism, and notice how step by step the changes in the relations of individuals change the previous understandings of certain family relations reaching in the end to the changes of national law. Meanwhile, there are several conflicts between those who understand that law should reflect the changes in the society and those who deny these changes and fight against the development of the law. Such conflicts seem to be natural. From the academic literature can be found several references to the inevitability of the conflicts and changes in the society. For example, Luhmann² has said that "without conflicts law would not develop, would not be reproduced, and would then be forgotten".³ Aarnio has stated that law carries values and in case they are changing, also the law should be changed.⁴ Based on Snow the culture and hence its values can be found in a public policy from which they are transferred to the law.⁵ Mautner⁶ has stated that law is a product of a nation's culture.

In recent years the European values and culture has got more attention. Terms "value" and "culture" are often used as synonyms. Also, it seems that more and more the culture withdraws

² Niklas Luhmann, *Law as a Social System*, eds. Klaus Ziegert et al (Oxford: Oxford University Press, 2004), 477.

³ *Ibid*, 477.

⁴ Aulis Aarnio *Õiguse tõlgendamise teooria (Theory of Interpreting the Law)*, ed Raul Narits (Tallinn: Õigusteabe AS Juura, 1996), 23.

⁵ Chris Snow, "Defining the Family: The Family in Transition." *Journal of Law and Family Studies* 1(2) (1999): 288-297, 288.

⁶ Menachem Mautner, "Three Approaches to Law and Culture." *Cornell Law Review* 96(4) (2011): 839-868, 841.

form the individual and so called supranational identity⁷ becomes more significant. We hear more often about common legal culture of Europe.⁸ With no doubt human rights play here an important role in providing values. When analyzing the decisions of European Court of Human Rights (ECtHR) one can notice that a court has emphasized repeatedly that *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) is as a "living instrument"⁹ – so it considers the changes in a society. However, as ECtHR leaves the "value decisions" to the national level of law though requiring the proportionality test to reason the restriction of the rights and freedoms of the individual, it is up to the contracting state to decide which value needs more protection than the other¹⁰. Unfortunately, practice shows that in family matters contracting states are referring eagerly to the protection of culture or values but these values forget to evaluate their decision through the proportionality test. Antokolskaia¹¹ has stated that after her 5-year research she can conclude that those who refer to the culture in justification process have not investigated it in depth.

Author of article has researched the law-drafting process of *Estonian Partnership Registration Act*. In Estonia, concerned the *Partnership Registration Act* is often referred to the need to protect some kind of values to impede the enforcement of the act but since 2009 when the Intent of *Partnership Registration Act* was created until today no clear explanation for how this regulation would harm some other values has never been given. Sometimes there has been referred to the need to protect "traditional marriage" but even the definition of traditional

⁷ See about supranational identity Alessio Lo Giudice "The European Self – A Reflective Approach to European Identity." *Tilburg Foreign Law Review* 12(2) (2004-2005): 145-168, 147.

⁸ See e.g. Reza Banakar "The Sociology of Law: From Industrialisation to Globalisation." *University of Westminster School of Law Research Paper* 11-03 (2011): 1-32, 1; Barbara Stark "International Law from the bottom up: Fragmentation and Transformation." *University of Pennsylvania Journal of International Law* 34(4) (2012-2013): 687-742, 690; Mayte Peters "The Democratic Function of the Public Sphere in Europe." *German Law Journal* 14(5) (2013): 673-694, 676.

⁹ E.g. see *Tyrer v UK* 1978, *Dudgeon v UK* 1982, *Johnston v Ireland* 1986, *Schalk and Kopf v Austria* 2010, *Vallianatos and others v Greece* 2013, *Rees v UK* 1986, *B v France* 1992, *Cossey v UK* 1990, *X, Y and Z v UK* 2006, *Goodwin v UK* 2002, *Grant v UK* 2006, *Van Kück v Germany* 2013 etc.

¹⁰ ECtHR In *Schalk and Kopf v Austria* 2010 (par 96), the ECtHR has stated that: "... a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment.", in *X and others v. Austria* 2013 (par 139), the ECtHR has stated, that: "Given that the convention is a living instrument, to be interpreted in present-day conditions, the State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life", also that: "The Government did not adduce any specific argument, any scientific studies or other item of evidence to show that..." (par 142) and that "The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it" (par 139), "it remains to be ascertained whether, in the circumstances of the case, the principle of proportionality was adhered to or not" (par 138). Similarly, in *Vallianatos and others v. Greece* 2013, the court stated that "It remained to be ascertained whether the principle of proportionality had been respected in the present case".

¹¹ Masha Antokolskaia "The Law and Natural Culture. Arguing Against the Cultural Constraint Argument." *Utrecht Law Review* 4(2) (2008): 25-34, 26.

marriage is missing in such statements. Also, there has been referred to the fact that Estonian society is not ready for the same-sex marriages but nobody has clarified "Why?". The similar weaknesses can be found in attempts regulating surrogacy, euthanasia, digital registration of birth, death, marriage and divorce etc. There misses profound reasoning how one or another new regulation would harm certain values state wants to protect. Art 5 of *Estonian Instruction of Good Law-Drafting and Standard Techniques*¹² states that in a law-drafting procedure the restrictions of rights and freedoms of an individual that a draft of law might contain, must be appropriate and proportional to the aim that the law pursues and for the protection of the domestic public interests. Despite the requirements such analyze has not been made, or, it is superficial, and sometimes even contradictory in the content. Often such analyze has been made by one person with no reference to the expert studies, or even these studies are incomplete.¹³ Author of this article even argues that proportionality analyze cannot be the result of one person but a group of experts. Concerned family matters, there has often been argued that as EU does not regulate family law matters and hence there is no need to analyze EU or International law concerned. Such statement is wrong because EU primary law is related to every family matter at least in some extent. Proportionality test should consist also the supranational law – considering in deciding the human rights, free movement and other principles.

In case *X and other v Austria* 2010 the ECHR has stated that: "As an explanatory report of the draft law missed the profound justification, but merely reflected the position of those sectors of society which are opposed to the idea of (opening to second-parent adoption to same-sex couples), the court cast considerable doubt on the proportionality of the prohibition of certain right."¹⁴ In Estonian practice the author of the article has never heard of using the proportionality test when changing the family law regulations.

ARE FAMILY LAWS OF EU MEMBER STATES MOVING TOWARDS THE CENTER OF EU LAW?

Quite a lot has been written about the influence of the EU primary and secondary law concerning family matters. Baarsma gives a thorough overview how the *Treaty of Amsterdam*¹⁵, *Treaty of Maastricht*¹⁶ have paved the way to the unification of family laws of Member States.

¹² State Gazette I, 29.12.2011, 228.

¹³ See the analyse made by Kristi Joamets, *Gender as an Element of Marriage Capacity in the Context of National and Supranational Law in the European Union*. Tallinn University Of Technology Doctoral Theses Series I: Social Sciences, no 21 (Tallinn: TUT Press, 2014), 39-41.

¹⁴ Par 143, 146.

¹⁵ Art 220 of the *EEC-Treaty*. Brussels I Convention, Lugano Convention and the Rome Convention have been developed on the basis of Article 220 *EEC-Treaty*. Nynke Anna Baarsma 2011. The Europeanisation of International Family Law: The EU Legislature's Competence. *The Europeanisation of International Family Law*. T. M. C. Asser Press by Springer-Verlag. Heidelberg., 79-134, 82. Today these conventions seem to be unimportant but at that time they were the legal acts promoting the harmonisation of civil law (though not touching family law directly).

¹⁶ Title VI. Containing the provisions on the cooperation in the field of Justice and Home Affairs: as judicial cooperation in civil matters was placed under the "third pillar" the judicial cooperation in civil matters became an element of European cooperation. Nynke Anna Baarsma 2011. The Europeanisation of

She explains: EU citizenship, introduced by the *Treaty of Maastricht* widened the protection of individuals as every citizen of EU had now the right to move and reside freely within the territory of the Member State. Since then the free movement was no more related only to the working in another state; *Treaty of Amsterdam* transferred judicial cooperation in civil matters to the first pillar providing "political integration"; article 65 *EC-Treaty* covered now cooperation in jurisdiction, applicable law and recognition and enforcement of foreign judgements providing Brussels-II-Regulation.¹⁷ When Treaty of Nice made clear that international family law in EU belongs to the scope of Articles 61 and 65 *EC-Treaty*¹⁸ then the *Treaty of Lisbon* replaced art 65 of *EC-Treaty* by the art 81 "expanding the legal basis of union action in the field of judicial cooperation in civil matters".¹⁹ One can conclude that after the Treaty of Amsterdam entered into force in 1999 a rapid Europeanisation of private international law began²⁰ and today any spokesperson should be rather careful when referring to the invisible cultural difference which makes it impossible to unify step-by-step the family law regulations of Member States. Also, why to fight against the unification at all? Practicians face every day the problems when solving cross-border family cases and often realize that there is no need to regulate one or another relation differently. Even more, in some cases they do not follow the outdated norm and solve cases individually with no harm to anybody.

As Baarsma has stated: "Unified choice of law rules on issues of International family law will, moreover, serve a number of specific objectives: they will ensure more legal certainty, prevent forum shopping, provide for more decisional harmony, grant better protection to the legitimate expectations of the parties and contribute to the achievement of justice."²¹

Thinking of the legal literature and political statements one can see that it is often referred to the specific differences of regulations in Member States but a question: "What if in a Member States X would be a regulation of Member State Y?" has seen as a "forgery". However, did anything awful happened after 2011 when divorce was allowed in Malta?, or why not allow divorce via internet?, or if not so much then at least without a court procedure and a long waiting period provided by the law?, what if a child can marry being 14-year old instead of being 15?, or what if same-sex couples are married? What is this cultural difference that predicts something terrible to happen when all Member States allow aforementioned rights? Probably nothing. People would not even notice this except those politicians who try to gain some fame through the protest.

International Family Law: The EU Legislature's Competence. The Europeanisation of International Family Law. T. M. C. Asser Press by Springer-Verlag. Heidelberg., 79-134, 82.

¹⁷ *Ibid*, 83-85.

¹⁸ *Ibid*, 90.

¹⁹ *Ibid*, 93.

²⁰ *Ibid*, 133.

²¹ *Ibid*, 134.

CAN CONSTITUTIONAL NORMS JUSTIFY DIFFERENCES IN REGULATIONS?

Peculiar is a reference to the constitutions: it is often stated that when constitution says clearly that marriage is allowed between a man and a woman then this constitutional principle denies to allow same-sex marriages. As constitutional norm is stronger than a provision in an ordinary law, like family law act or civil law act then it carries more stronger legal power. Now this provision in the Constitution has used as a "constitutional principle".

In a legal theory two concepts are often used in interpreting the constitutional (or any other legal) norm: first, should the implementer interpret the content of the provision according to the aim of the norm at the time it was written or second, should it be interpreted based on current social relations. The first principle can cause the need to change the law now and then to specify the current needs in the text. The second causes the possibility to manipulate by the norm. Reminding in which era in the history the constitutions of Europe were enforced, one has a right to doubt that at that time creating the constitution lawyers were thinking about the same-sex marriages and therefore a question whether or not to legalize such relationship was not the reason why they used in a text terms "man" and "woman". Actually, from the legal literature there can be pointed out the reasoning to use a reference to the women and man: to "highlight the equality between a man and a woman".²² This shows that reference to the constitutional norms when denying certain rights of the individual, is not correct.

The same pattern can be seen even in ECtHR practice: in *Schalk and Kopf v Austria* ECtHR has stated that "in the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex".²³ In *Johnston v Ireland* ECtHR has stated that "It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions. However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset".²⁴ Knowing that the *European Charter of Fundamental Rights and Freedoms* (Charter) does not have the reference to the man and woman there are several discussions whether this does mean that the Charter allows same-sex marriages contrary to the ECHR. Author of this article argues that the terms in a text do not matter at all because both legal acts oblige Member States to follow the current needs of society.

There could be emphasized that ECtHR has said that ECHR should be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.²⁵ This principle should also impact the process of justification when protecting the culture of contracting state.

²² Jone-Itxaro Elisondo Urrestarazu, Oana-Mariuca Petrescu, "New tendencies regarding same-sex marriage in the member states of the European Union: a brief inside and outside perspective." *LexETScientia Int'l J.* 20 (2013): 20.

²³ Jens M. Scherpe, "The Impact of the ECHR and the ECtHR on European family law": 67; in: Jens M. Scherpe. *European Family Law*. Vol 1. The Lypiatts: Edvard Elgar Publishing, 2016). DOI 10.4337/9781785363016.

²⁴ *Ibid*, 71.

²⁵ See Kristi Joamets, *Gender as an Element of Marriage Capacity in the Context of National and Supranational Law in the European Union*. Tallinn University Of Technology Doctoral Theses Series I: Social Sciences, no 21 (Tallinn: TUT Press, 2014), 30.

EU has itself also adopted several legal acts impacting more or less the family laws of Member States. And, one cannot forget the general principles provided by the primary law of EU. More generally, EU intervenes to the civil relations, for example when protecting the general rights and freedoms and free movement, promoting integration, non-discrimination, legal certainty, tolerance, predictability etc.

Human rights play a constitutional role for the EU establishing prevailing principles for supranational as well as for the national law either through EU primary law or directly from being a contracting state of ECHR.

In a legal literature usually ECHR has been treated separately from the EU law. In principle this is correct but as ECHR provides certain pan-European values then discussing European family law one should not leave this legal act aside. Even more, it is important to notice the mutual influence of ECtHR decisions and the development of EU family laws – either political or social. Without a doubt, the most important articles related to the family issues are art 8, art 12 and art 14. Article 8 provides that "Everyone has the right to respect for his private and family life, his home and his correspondence". And, that "there shall be no interference by a public authority with the exercise of these rights except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals or for the protection of the rights and freedoms of others.". Article 12 provides that "men and a women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right". Article 14 provides that "The enjoyment of rights and freedoms asset forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political and other opinion, national or social origin, association with a national minority, property, birth or other status." Convention uses the term "family life" but does not define what is family.

A lot has been discussed about the right to marry leading to the questions whether this right includes also a right to divorce. In *Johnston v Ireland* court stated that the right to divorce cannot derive from the art 12. However, does this waiting period between the ended marriage and an intended new one not restrict the right to marriage? Also, as by the convention "family life" is protected in case a person is not divorced but lives separately and has found a new partner then two values collide. Scherpe discusses the rights of the transsexuals and transgender persons, also same-sex persons concerned marriage.²⁶ He shows that ECtHR has not been very forceful and leaves the door open for new principles. Additionally, it is clearly visible that court directs the responsibility to the state but with explicit guidelines to make a proportionality test as if knowing that by this a state realizes by itself that earlier a wrong decision was made. In *Shalk and Kopf v Austria* ECtHR provided that art 12 of the convention limits the right to marry between a man and a woman but turned attention to the excerpt "In that connection the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgement in place of that of the national authorities, who are best placed to assess and respond to the needs of

²⁶ See also his references to *Corbett v Corbett* 1971, *Goodwin v UK* etc in Jens M. Scherpe, "The Impact of the ECHR and the ECtHR on European family law": 67; in: Jens M. Scherpe. *European Family Law*. Vol 1. The Lypiatts: Edvard Elgar Publishing, 2016).DOI 10.4337/9781785363016.

society...²⁷ Paying attention to the words "national authorities, who are best placed to assess and respond to the needs of society" one can argue that contracting states do not have just an unbounded right to what they want but have to follow the needs of society. And as mentioned above these needs must be confirmed by the proportional analyze of the values protected in the society.

In *Schalk and Kopf v Austria*²⁸ is also stated that same-sex couple cannot enjoy "family life" for the purposes of Art 8 and therefore "a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of "family life".²⁹

In family matters often, The European Charter has been left aside for the reason that Charter applies to the EU Member States only when they are implementing EU law. However, in this situation one cannot forget that based on the preamble of the Charter an individual is in the heart of the Union by establishing the European citizenship and by creating the area of freedom, security and justice. In a legal literature and also in practice it is sometimes unclear when and how much a Member State should follow the Charter and when and how much the ECHR. For example, Art 9 of the Charter provides that the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights. Art 12 of ECHR provides that a men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right. As already referred above in this article the Charter does not have a reference to a man and women. Does it mean that in applying EU secondary law the same-sex persons have the same rights as the heteros? Interpretation becomes even more interesting and more complicated when to mention that in *Schalk and Kopf v Austria* ECtHR refers itself to the Charter³⁰ explaining that Charter has "deliberately dropped the reference to "men and women"" but still leaves the decision whether accept such marriage or not to the Member State. At the same time the Commentaries of the Charter refer to the ECHR as a "living instrument"³¹. Such mutual reference to both documents is a bit weird as usually they are treated separately in a legal literature but definitely shows their tense connection to each other leaving without a doubt the statement that they both form European values.³²

The more the author of this article has analysed the legal regulations of family matters the more it seems to her that this is not a task of lawyers to define the values. Other sciences, like sociology should give the answers to the syage of development of the society. And, such answer should not base only on one research or survey.

²⁷ See Jens M. Scherpe, "The Impact of the ECHR and the ECtHR on European family law": 64; in: Jens M. Scherpe. *European Family Law*. Vol 1. The Lypiatts: Edvard Elgar Publishing, 2016):. DOI 10.4337/9781785363016.

²⁸ Par 94, 95.

²⁹ *Ibid*, 66.

³⁰ Par 60.

³¹ EU Network of Independent Experts on Fundamental Rights. "Commentary of the Charter of Fundamental Rights of the European Union," (June 2006) // http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf.

³² See more specifically Kristi Joamets, Gender as an Element of Marriage Capacity in the Context of National and Supranational Law in the European Union. Tallinn University Of Technology Doctoral Theses Series I: Social Sciences, no 21 (Tallinn: TUT Press, 2014),

ESTONIAN EXAMPLE

In Estonia the *Registered Partnership Act* was passed in 2014 but because of the election of new government the implementation act of this Law was not started to draft by the Minister of Justice. *Registered Partnership Act* was supposed to enter into force on 1 January 2016 together with implementing legislation. Currently there is a situation where the norms of substantial law as if exists but procedural norms and its enforcement act are missing. So, in principle the persons have the rights but they could not implement them. There were several discussions whether the norms of *Registered Partnership Act* should be implemented or not and in the end every administration made its own decision whether and how to apply the norms of *Registered Partnership Act*. Naturally this leads to the court cases and courts decided that persons have the substantial rights. This has put public administration in a situation where they have to find the way how to make an administrative deed to guarantee the substantial rights of the persons. For example, until today notaries have made ca 60 partnership contracts but they are not entered into the Population Register because there are no provisions to allow the changes in the register. Parliament still does not act. Even more, in September 2017 Estonian Parliament discussed the question whether annul the substantial law act – and of course with no justification argument based on proportional analyze. If the *Registered Partnership Act* will not be annulled and its implementation act will be adopted there remain still several questions concerned the rights of an individual and obligations of the state. To make a situation more acceptable, some parties have started to discuss about the need to make changes in a *Registered Partnership Act* because there are many unclear provisions. That is true, for example, article 7 of the act provides that cohabitation registered abroad is valid in Estonia according to the *Estonian Private International Law Act*³³. Unfortunately, this Act has no provision about cohabitation at all. The only provision applicable to the recognition of cohabitation proceeded abroad is art 7: "Foreign law shall not apply if the result of such application would be in obvious conflict with the essential principles of Estonian law (public order). In such an event Estonian law applies." These norms are in collision and no one can say today which interpretation would be correct. Leaving it open whether the fact that Estonia has provided in the substantial law the cohabitation of same-sex persons author of the article states that such provision proves that registered cohabitation or marriage of same-sex persons made abroad is not against Estonian public order. The European Court has decided in several cases that national legislation which places the nationals of the Member State concerned at the disadvantage simply because they have exercised their right and freedom to move and reside in another Member State are restricting the rights and freedoms of the citizen of the Union.³⁴ As there misses the proportional analyze in justifying the denial to recognize same-sex marriage, author of this article sees no legal ground not to recognize the same-sex marriages contracted abroad. Then analyzing the surveys made in the process of drafting the Registered Partnership Act one can see that they were with no specific focus on the rights of same-sex persons, contradictory and the statements did not base on the collected data. Even more, some of the surveys used in this process were not even directly about same-sex cohabitations or traditional marriages but about the need to protect the children born in a cohabitation of man and a woman.

³³ State Gazette I, 26.06.2017, 31.

³⁴ See e.g case C-406/04 De Cuyper 18 July 2006, C-499/06 Nerkowska 22 may 2008, Grunkin and Paul v Niebiüll 14 oct 2008, C-148/02 Carcia Avello v Etat Belge 20 oct 2003.

CONCLUSION

Though ECtHR has stated that in certain cases states can make exceptions from the human rights when it is justified by the need to protect their culture then in practice the justification process has been used very often but its essential element – proportionality test has not been done at all or has been done carelessly. Based on the ECtHR decision, the interpretations of the Charter, statements in the legal literature and practice author of this article showed that as society changes the previous understandings about the impossibility to unify the family laws of European states is not relevant any more. When using the justification tool correctly there will be little proof to argue that denying the (human) rights of an individual is justified. Author analyzed *Estonian Partnership Registration Act* and its adoption and implementation practice discussing and describing the mess what can be caused when proportionality test has not been used in an appropriate way if used at all.

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SANTRAUKA

EUROPOS SAJUNGOS IR ŽMOGAUS TEISIŲ TEISĖS VAIDMUO VALSTYBIŲ NARIŲ ŠEIMOS TEISĖS AKTUOSE

Ilgą laiką egzistavo du priešaringi požiūriai: valstybių kultūrų skirtumų požiūris, neleidžiantis suderinti šeimos teisės įstatymų, ir liberalusis požiūris, pagal kurį bendra Europos kultūra ir vertybės leidžia suvienodinti Europos valstybių šeimos teisės aktus. Pastaraisiais metais supranacionalinis tapatumas tapo reikšmingesnis, nepaisant to, kad kultūra yra kliūtis šeimos teisės įstatymams suderinti. Europos Žmogaus Teisių Teismas nustatė, kad tam tikros žmogaus teisės gali būti apribotos, kai to reikia tam tikrai, svarbesnei valstybės vertybei apsaugoti. Tačiau teismas konstatavo, kad šis pateisinimas turi būti pagrįstas tinkamu proporcingumo testu. Deja, praktikoje pateisinimo teisė buvo naudojama labai dažnai, bet proporcingumo testas taip ir nebuvo sukurtas. Be to, pateisinimo procese turėtų būti atsižvelgiama į visuomenės pokyčius – šio proceso įtaką supranacionaliniam tapatumui ir liberalesnį požiūrį į šeimos gyvenimą. Galima teigti, kad daug sunkiau rasti pateisinamą priežastį neleisti tos pačios lyties asmenų santuokų ar bendro gyvenimo, kai pateisinimo procese tinkamai laikomasi proporcingumo testo. Estijos partnerystės registravimo įstatymas yra puikus pavyzdys, parodantis, kokių pasekmių pateisinimo procese gali sukelti netinkamas proporcingumo testas. Autorė analizuoja proporcingumo testą Estijos partnerystės registravimo įstatymo priėmimo procese ir jo įgyvendinimo praktikoje ir siekia aptarti bei apibūdinti painiavą, galinčią kilti dėl netinkamo proporcingumo testo panaudojimo, jei jis iš viso būtų panaudotas.

REIKŠMINIAI ŽODŽIAI

Registruota partnerystė, pateisinimo procesas, šeimos teisė, ES vertybės.