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# Gender as an Element of Marriage Capacity in the Context of National and Supranational Law in the European Union

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Declaration:
*Hereby I declare that this doctoral thesis, my original investigation and achievement, submitted for the doctoral degree at Tallinn University of Technology, has not been submitted for any other degree or examination.*

/Kristi Joamets/

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## LIST OF PUBLICATIONS

The dissertation is based on the following original publications:

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**III Joamets Kristi**. 2013. "Gender as an Impediment of Marriage, Free Movement of Citizens, and EU Charter of Fundamental Rights". Protecting Human Rights in the EU. Controversies and Challenges of the Charter of Fundamental Rights. Ed. Tanel Kerikmäe. Springer, 91-106. (3.1)

**Author's contribution**
In Paper II author of the thesis was responsible for investigating the position and development of marriage law in EU, as well as the analysing of the Green Paper promoting the free movement of family event documents.

## Abbreviations

Charter – European Charter of Fundamental Rights
EC – European Community
ECHR – European Convention of Human Rights
ECtHR – European Court of Human Rights
ECJ – European Court of Justice
EL – Euroopa Liit
EU – European Union
TEU – Treaty of European Union
TFEU – Treaty on Functioning of European Union

# INTRODUCTION

The relationship between the state and its subjects in regard to legal family matters is a legal phenomenon which has changed tremendously in recent years. Attitudes and understandings started to transform in Europe since the 1960s. The free movement and the consequent rise of cross-border family relations have caused legal conflicts between traditions and cultures[1] and regulatory legal norms of different European Union (EU) member states, in tandem with the development and spread of human rights, that has focused on the general rights and freedoms of individuals. In this context, marriage is a sphere where those problems are clearly reflected and where the changing society manifests.

The free movement of persons is one of the four freedoms, supporting the foundation of the European Community, as well as a principle derived from the Treaty on European Union (TEU), Treaty of Functioning of European Union (TFEU), the Lisbon Treaty and included into the EU Charter of Fundamental Rights (Charter). When a member state limits this freedom, on the basis of legally established or judicially admitted grounds, this must be evaluated in the light of the EU law. According to the subsidiary principle, family law belongs to the domestic level of regulatory competences. However, the EU continously aims to expand to those domains in response to the rise of cross-border family relations in the region. Migration for work has been notoriously replaced by the migration of families (Benton, Petrovic, 2013, 1). As a result, the promotion of free movement linked to the family relations has been considered in the policies and development of the EU, as well as in the interpretation of supranational laws. (**II**)

Cross-border family relations have influenced the European family laws considerably. On one hand, they are characterized by their (justified) “diversity“, whereas on the other hand they seek further harmonisation[2] in this field, instead of continuing to deal with overly complicated cases derived from this “diversity“. Legal policies contrast in this respect; more conservative member states still support a less flexible posture on the convergence of family laws (see p 26-27) on the grounds of “cultural“ protection (see also p 17). Gender as an element of marriage capacity is a topical issue casing many disputes related to the harmonisation of the family laws of EU member states. Restricting the right to marry or the right to a certain family life becomes a question of human rights (**III**), a question of free movement and is also an obstacle for the harmonisation of the EU family law systems (**II**).

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[1] About culture see p 17.

[2] Recently the term “harmonised“ has been replaced in the EU policy documents (see part 2.2) and also in the legal literature by the term “converge“ as a “softer“ attitude in impacting the family laws of member states. However, as shown in a thesis in terms of the gender as marriage capacity there should be supported the harmonisation and not the convergence to ensure the free movement.

In a liberal democratic state the freedoms of individuals receive special attention. States can restrict them only under certain circumstances. In any dispute between the state's interest and the rights of the individual, the individual's rights must prevail (see Lauchland and McCabe 2001). Also, compliance with the rule of law doctrine preserves people's rights and guarantees freedoms by limiting the power of the state and constraining its actions. The rule of law is an important element considered by the constitutional laws of the EU member states, and as one of the foundational principles of EU (see Pech 2010) with normative nature; not only an ideal function, it can be tested on law-making processes. The rule of law demands have to be fulfilled at both levels, as a result, the legal processes are more complex considering that in supranational legislation values and principles of laws have an explicit normative value. The traditional legal hierarchy of laws is transformed accordingly attending to considerations such as the fundamental laws being primary laws of the EU legal system. National legislatures thus have a much wider and deeper responsibility than ever before.

At the supranational level, the family law competences have been increased as the sphere of national law appears to have reduced significantly. Marriage laws of the domestic level (national law) reach out imposing a better understanding of the mutual impact of the two systems and how they should integrate. On the free movement principle many directives can be related to the rights of persons in family relations and the free movement principle, even if not directly to regulate the family relations. Also the EU policy continues to develop towards facilitating the free movement and particularly in connection to family law. (see **II**)

The main claim of this thesis is that in today's changing society resorting to cultural differences to claim exceptions to harmonisation is disputable and begs the question whether in law-making processes the rule of law has been respected as this process demands the evaluation of the values of the member state. Tolerance for diversity and multiculturalism have already pushed away the traditional[3] concept of marriage – in fact, it is not marriage that needs being protected, but family life; one that consists of many forms of cohabitation. Moreover, marriage is no longer the most important element of family life nowadays, also in Estonia. However, in the Estonian legal practice the marriage between a man and a woman is the only possible form of marriage, justified by the need to protect the culture. In the context of Estonian and European legal developments it raises questions whether this is a legally grounded justification.

[3] In some literature the traditional marriage has been understood also as non-Christian marriage or Islamic marriage or marriage based on some other religion (see Thornton 2012, 30-49). In the thesis the term „traditional marriage“ is used as a Christian marriage in which having children are an obligatory element.

**The aim of the thesis is to analyse legal regulations of gender as an element of marriage capacity in Estonia and verify its conformity with supranational law.**

The hypothesis of the thesis states that the legal justification to avoid harmonisation of the member state regulations on gender in marriage based on cultural differences does not conform to the rule of law principle as interpreted in the context of the right of free movement, the right to marry and harmonisation of family laws of the EU member states.

The thesis is a legal research that does not study the philosophical or sociological nature of marriage; only the validity of the legal norms has been analysed. It is based on a positivist view of law although it considers that naturalism is the essential production of rules to create the most appropriate norms for a society. This functionalist study favours monistic perspectives considering the national and supranational law as one integrated legal system.

To reach the aim of the thesis valid norms in national and supranational level of law are analysed. On these grounds the research is mainly based on the systematic legal-dogmatic research method. This qualitative research also involves a historical, teleological and literal legal interpretation of the evolution of the norms. Comparative analysis of legal regulations of EU member states allows to conclude whether there are and how considerable appear to be the differences between legal systems, and also helps to assess the value-based discrepancies in legal regulations.

Marriage capacity could be studied using different approaches. This reasearch bases on the hierarchy of laws and wants to show the importance to consider in law-making processes all the elements provided by the law according to the mandate of the due process[4]. The interaction of national and supranational laws, including how the supranational law should be applied in drafting or interpreting the national law, is explained in detail.

The main sources of the study are doctrine: monographies, academic journals/articles, papers from international conferences, documents of law-drafting as well as EU legal policy, legal acts, studies, and jurisprudence: case law and judicial opinions.

The main body of argumentation of this work is developed in three original articles (**I; II; III**) and an introduction. The article *“Marriage capacity, social values and law-making process“* presents an explanation and

[4] Due process means that the draft of the law must be compliant with the constitution, general principles and norms of international law, treaties and EU law; 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; an explanation letter of draft of law must be elaborated with the social, and demographic impact analyses, etc, defined by the legal acts regulating the law-making.

understanding of the most specific object of this study – marriage capacity – it's legal development in Estonia since the 13th century, and a legal comparative analysis of the main differences in marriage capacity regulations within the EU. It claims that marriage capacity, a legal phenomenon receiving growing state's attention, has developed across Europe in a relatively similar way, so in the absence of significant differences a legal justification on the grounds of cultural diversity loses validity. This first article also proposes a discussion about the values of society in regard to marriage capacity and a discussion of the process of law-making related to marriage in Estonia. This includes reflections related to the rule of law and its relevance in this context (see also p 22, 36).

The second article *"The New Developments in EU Family Law – Its Applicability to Estonian Law"* describes the legal development of family law in a wider scale, the viability of its harmonisation and the applicability of new means suggested by EU by the Green Paper to converge the family law systems of member states. The EU legal policy expressed in a Green Paper plays an important role in promoting the cooperation at the level of public administration. Undoubtedly such instruments would make member states more tolerant to the regulations of other member states as well as to cultures of other member states and would facilitate the convergence of these bodies of law. This article concentrates on the analysis of marriage capacity at a supranational level, more specifically at the secondary law level of EU (see **II**) and shows the legal development of marriage capacity regulation.

The third article *"Gender as an Impediment of Marriage Capacity, Free Movement of Citizen and EU Charter of Fundamental Rights"* places the issue in the context of human rights and their prevalence over national laws. It revises whether the EU Charter and ECHR (see p 28) states that marriage should be allowed only between people of different gender or not – are member states forced to recognise same-sex marriages contracted abroad, and how the matter of recognition impacts the right of free movement of citizens and the right to marry. In this article it is explained that restrictions based on the need to protect the culture of member states are legitimate, but that they should be grounded by the proportionality test. (see **III**)

As marriage capacity is an essential element of the marriage contract, then the analysis of the development of marriage describes also the development of marriage capacity. The work sets out to find out if there is one united (legal) definition of marriage or not and whether the values in respect to marriage are up to date. No definition to the term marriage is proposed, but this work relies on the terms given in the literature.

Currently, the most discussed element of marriage capacity in Europe is *gender*, and this is also the most salient element in this work. However, a similar research design can be applied to the other aspects of marriage capacity, e.g. age, kinship, etc., and to other institutions from different branches of law in case a member state wants to impose restrictions to supranational law with the justification of protecting the culture.

The term *supranational law* is used as a law which goes beyond the national law and prevails, more specifically as EU law. Private international law regulates the cross-border cases and therefore is sometimes understood as developing with the EU law (see e.g. Baarsma 2011, 2-3). However, as private international law means the application of private international law acts of member states in case the EU law is not applicable then it has not been treated in this thesis. Some rules and examples in their implementations have been presented to explain the problems related to the differences of family laws of member states, but with no deeper analysis. Research of the thesis is concentrated only on the EU law. This is a research on "international law" in as much as it covers the rules for cross-border family relations on the one hand and the body of International and (European) instruments and decisions of supranational courts which regulate family relations, on the other (see Boele-Woelki 2008, 4). But it also classifies as comparative family law consisting of the comparison of national substantive law rules. The similarities and differences of member state's laws have been determined, the causes of the similarities and differences have been explained and solutions to the conflict of rules have been evaluated (about the methods of comparative law see Boele-Woelki 2008, 7; Örücü 2006).

At both, the national and supranational levels, this research reaches to the question of protection of culture as an obstacle to harmonise the elements of marriage capacity: is *culture* (see p 17) a valid legal obstacle to harmonise, or are there additional arguments? Culture has been used in different meanings in the literature, legal acts and the court practice; too often the meaning has been only improvised. Here, culture is used and understood as the complex of values of society, which in terms of law must be considered in a law-making process and should be reflected by the legal systems. Law drafting validity is crucial in states where positivism prevails. During this process the rules are embedded with values; later, it is assumed that the laws have the attributes that culture and society have formed. By law-making, states cannot stop changes in society, but can accept and go along with those complex developments (Friedmann 1959, 6) to protect the rights and freedoms of the individual.

This thesis does not assess the sociological changes, but only describes them, to evaluate this accordance to the valid laws, to confirm the content of the system of norms and to understand what has led to the creation of such valid norms.

The *rule of law* is the doctrine of choice to support this work because of its widely recognised importance in providing the guidelines for the "proper" creation of rules (see Chiassoni 2013, 249) (see p 22). It influences the law-making process in states where the value of diversity is recognised and respected (see Friedmann 1959, ix; Burton 2012-2013, 540; see Powell 2009, 54). This thesis supports the views of Kerikmäe in that "the rule of law must remain a determinator of any state activity in any conditions i.e. in the context of the EU" (Kerikmäe 2009, 18). Estonian law-making process is analysed to assess

whether and how the obligations the rule of law provides are followed ensuring the legality of legal norms, including reasonings on what are those values that the state considers as culture and protects in a way that justifies the rights and freedoms of an individual to be restricted (see p 36).

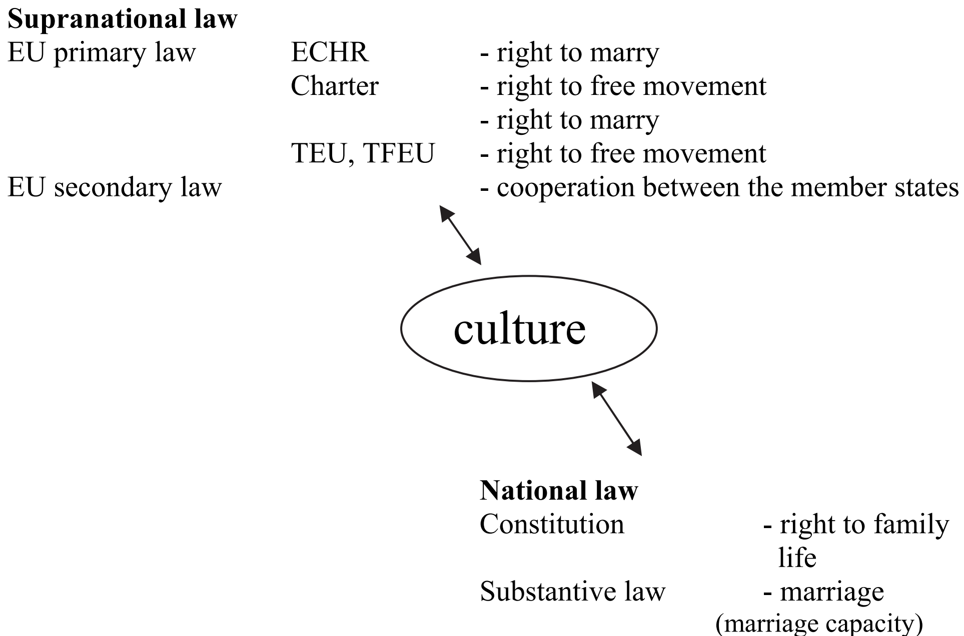


*Figure 1. Relations between national and supranational law in regulating the marriage capacity and culture as a tool for justification.*

Figure 1 shows the research objects of the thesis at the national and supranational law levels. Between the national and supranational law is culture, which acts as a filter allowing the member state not to follow certain supranational legal norms.

The legal meaning of marriage capacity and the content of marriage capacity regulation is analysed **first**, to identify the values that the norms regulating marriage capacity consist of. To continue with the similarities and differences of the marriage capacity regulations of EU member states, and mapping the values that they are reflecting. To understand the legal evolution of norms a legal-historical analysis is made on content. This section would also answer the question whether marriage capacity responds to the changes in society, or not. In the national law, the conformity between substantive law and the Constitution has been evaluated. More specifically, the conformity of Estonian legal provision: “Marriage is contracted between a man and a women“ with the right of the family life in the Estonian Constitution is evaluated. (**I**)

Second, at the supranational law level primary and secondary laws are analysed to find out, what legal rules and principles derive from these, relating to the capacity to marry. In this context the research focuses only on the *right to free movement* and on the *right to marry*, prohibition of *discrimination* is not discussed to focus and limit the research object. A right to free movement is provided by the TEU, TFEU and is an aim of the union, a right to marry is provided by the Charter as well as by the ECHR. Both rights are closely related to the *cross-border family relations* and can be restricted if it is useful to protect the culture of the member state. Both rights are also directly related to the question of (possible) *harmonisation of family laws* of EU member states. The harmonisation of civil laws of EU member states as such has been a topical question in the EU for decades already, however by the developments of EU law also the attitudes towards harmonisation has been weakened. The thesis deals with the question of harmonisation only in respect to show how the differences of family laws and hence the reference to the culture are gradually and actually losing their importance as harmonisation has been carried out by the means which impact the bottom-up harmonisation. (see **II**, **III**; see part 2.2)

**Third**, in the evaluation process of the values and how the proportionality principle has been applied, the Estonian law-making procedure[5] documents have been analysed to determine if the applicable rules and principles are followed. Law-making procedure itself has been understood in the thesis as a legal procedure in which certain rules provided by the legal acts, including supranational law, should be followed. When law-making procedure misses the following of the rules and principles provided by the supranational law, the rule of law principle has not been fulfilled and national law is not in conformity with the supranational law. (see Ch 3)

Estonia is at the threshold of deciding if to regulate cohabitation or not (also cohabitations of couples of the same sex). However, such a policy needs a preliminary clarification of several questions deriving from the collision of traditions and culture, the needs of different groups in society as well as the legal development of society and EU legal policy.[6] The rule of law demands a profound assessment of these aspects and rational decisions based on those assessments. Estonia started the process years ago, but some important procedural mistakes in the law-making have taken place, possibly contributing to a violation of the rule of law principles.

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[5] Law-drafting procedure can be understood in a wider meaning (covering the policy previous to a series of certain decisions expressed in a draft-of-law) than used in a thesis. The thesis treats law-drafting procedure from the compilation of the conception of the draft of law to analysis of certain legal regulations. In Estonian practice this conception has been made for the Cohabitation Law Act, for the Family Law Act the conception has not been made.

[6] EU legal policy has been analysed through the documentation provided in this respect, including green papers, recommendations, drafts of resolutions etc.

In this research Estonia has been taken as an example state. However, the same analysis can be done by any other EU member state. In Estonia a new Family Law Act was adopted in 2010. Also the Draft of Cohabitation Law Act regulating cohabitation and same-sex unions has been worked out and is in a discussion since 2014.

Family law as such is analysed rather modestly in Estonia. Most attention has been paid to the property relations, thus, other legal categories and relations like marriage, divorce, parentage and custody, are studied much less. Cross-border family relations have brought an additional attention to family questions, including marriage, but research continues being limited, in every field.

This thesis contributes to academic discussions in at least 5 ways: First, it provides a legal historical overview of the development of marriage and marriage capacity in Estonia and on a smaller scale also in Europe. It also explains the legal development of marriage law in a contemporary continuously changing society. Second, it explains the dynamics between the legal systems of member states and EU, the meaning of harmonisation and problems derived from the subsidiary principle as well as the interaction between the different levels of law (national and supranational law). Third, it shows the gaps in the regulatory system of the Estonian legislative process. Fourth, it reveals how the values as undetermined legal norms impact state action in law-making processes. And fifth, it demonstrates the role that the rule of law plays in a law-making process as certain guidelines for better legislative development process. The analysis will give a complex of rules and principles which the state should consider in evaluation of the valid norms of the contemporary society as well as in the law-making process.

# 1. THEORETICAL FRAMEWORK

## 1.1. Values in the Positivist Law

When analysing a legal norm one should consider its context and where it will be applied. The differences can be considerable depending upon whether it is a common law or a civil law. This leads to the theoretical question: are positivist or natural principles prevailing?

Natural law theorists explain that the only source of rules is not the law but rather that rules exist in different and other orders. However, there is also a common understanding that the development of society has diffused the borders between the natural and positivist law by the spread of values as the principles the person applying a law must consider in a decision making process. Values[7] are closely related to the law, but in the positivist practice they do not replace a written legal norm, they already exist in it. Finnis states that one can't rationally get an *Ought* from a social *Is*, from what Hart following Austin called positive morality, or morality as a social phenomenon (see Finnis 2013, 232). In this respect law is a complicated web, in which the law and morals are interwoven and where legal norm must find the moral response in a legal society to become a "real" legal norm (Aarnio 1996, 83; see also Endicott 2013, 34), or as Dworkin has described "a unified view of the realm of the value, according to which the several values in the various dimensions of human life make up a unitary whole". (Dworkin 2011 in Chiassoni 2013, 265)

This research is based on the positivist understanding of law – that is, law is valid when written in a legal act[8] (Gontarek 1995, 5-6; Hart 1997; Raz 2003; Rowen 2008, 98; Krueger 2009, 342; Barzun 2013, 28; Seidman 2013, 1260), but it does not leave aside the question of values. Further more, research emphasizes how important are values; and that they are not limited or static – they reflect the change in society and shape the law as well. In this respect positivism posits the existence of law in the social reality. (see Rowen 2008, 98).

Hunter describes law as a language of the state and says: "/…/ and thus, by its very nature as a language it too defines a particular reality – not least, the normative reality of what the state will allow and not allow, what it requires and does not require, and the consequences of failing to abide within those strictures" (Hunter 2013, 1071).

In a science of law the concepts of values are used as the basis of interpretation or reasoning (Aarnio 1996, 55). Law carries values and in case

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[7] In this thesis terms "value" and "morality" are used interchangable, only when cited to the exact words of authors using the term "morality" this term has been used.

[8] As an "ought" in Kelsen's theory (Banakar 2008, 52, 53) in which "is" or Ehrlich's "living law" is only the foundation of so called normative law (see Banakar 2008, 53) or as the Pound's "law in book" (see Banakar 2001).

they are changing, the law must be changed as well. When analysing the law, changes in a society must always be considered (Aarnio 1996, 23). One of the charactersitics of positivism is that even if a norm seems outdated, it remains applicable until it's derogation.

Rigid laws obstruct the development of society. The faster the changes in a society, the greater flexibility (see also Aarnio 1996, 24) is expected from the legal order.

Luhmann states that "without conflicts law would not develop, would not be reproduced, and would then be forgotten" (Luhmann 2004, 477), if the values change in society the laws have to respond to them. Jabareen explains that law has a transformative form in the context of civil and human rights, not a passive one (Jabareen 2006, 565). It is common that the old values contradict with the new ones. This leads to the theoretical and practical question - which norm is appropriate? When norm is socially outdated, it can be still formally valid (see Aarnio 1996, 78-79; Sherwin 2014). In such a situation the outdated legal norm should be replaced by a relevant one – one reflecting or validating contemporary values. In a law-making process and also in interpreting a legal norm values must be considered to create or ascertain the content of the legal rule. In contrast, in natural law injustice precludes laws from being valid while in the view of positivism, the unjust law must be changed.

Furthermore, Örücü explains that legal development is a rational and natural response to the existing social, economic, political, geographic and religious circumstances (Örücü 2010). Örücü wrotes: "However, there are many examples to prove that law has been made and used as a creative tool for bringing about certain desired effects and sometimes even needs in society rather than rationally and naturally reflecting peoples' needs and desires. Law can act as a harmonising agent with economic, social and cultural implications. Law can "lead" and change society rather than adjust a legal system to social change; it can "follow" social change and reflect multi-cultures; or, it can "tinker" and seek to keep the existing system operating while making adjustments to improve efficiency. Thus, law can be a reactor to social change or its initiator. These approaches to law have significant consequences for the dilemma surrounding the relationship of legal change to social change: law versus culture." (Örücü 2010, 77)

The relationship between the laws and culture is a complicated issue (see e.g. Sarat 2000; Krygier 2009, 27; Mezey 2001). Culture includes the values, but not exclusively; it has received many definitions and approaches, also values can be discussed or understood in many different ways. However, in legal research analysing the legal norm these values should have been already reached into certain consensual frames (Habermas also empahasizes in his communicative action the common understanding and the coordination of actions by reasoned argument, consensus, and cooperation rather than strategic action strictly in pursuit of their own goals (Habermas 1984 in Bolton 2005)).

Culture and hence its values are reflected in a public policy from which they are transfered to the legislation (Snow 1999, 288). As explained above the values of society are changing all the time. When public policy needs to be reflected in laws, the examination of society's values should be made in the law-making process. Law should "create an appropriate balance between preservation and stability on the one hand and flexibility, openness to change, and further development on the other" (Mautner 2011, 848).

## 1.2. Hierarchy of Laws in EU Context

In a civil law system legal acts are based on certain hierarchical[9] principles (Koskenniemi 1997, 567; see Fisher 2013, 287), which means that some legal norms are systematically subordinated to others and the implementer of law must follow those rules which have authority. Kelsen has stated that legal norm has systematic validity when it belongs into such norm hierarchy, in which in the top is constitution (see Aarnio 1996, 56, 72; see Koskenniemi 1997, 567; see Sherwin 2014). However, this principle is easily applicable in a national law system. In EU legal space national laws and EU primary and secondary law comprise a hierarchical norm system and they also provide certain rules about the validity of the norms. In that respect a legal norm of a member state's national substantive law can be evaluated by the EU secondary law as well as by the EU primary law (see figure 1 in p 11). Certain hierarchy is also present in the EU law. As the national constitution and the EU primary law consist of principles and not of the "sentences with clear literal interpretation", the determination of the content of rule prevailing over the substantive law of the member state can be complicated. As explained above, the value systems influence the content of legal norm as well - if not by the possible new interpretations then by the need to change the legal regulation.

The nature of supranational law makes the legal space somehow unclear. As EU law has at its primary law level the value-based principles it could be asked if this legal system is wholy positivist.

Gontarek has stated (describing the mutual impact of national and international law, but the idea is also applicable in the EU law) that "positivism does not address the intangible sources that are inevitable in a system of law that aspires to govern equal sovereigns: naturalism lacks the visibility and uniformity necessary to define what the law really is, especially across highly diverse cultures and national legal systems. A hybrid theory has been proposed, combining rules with flexible interpretation and application. This compromise is motivated by the inability of either positivism or naturalism to treat the entire domain of international law." (Gontarek, 1995, 6)

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[9] Hierarchy means difference in a normative light (see Koskenniemi 1997, 567).

However, as shown in the thesis, those value-based principles also reach in the end in the positivist system to the suggestions to change the law. In respect to natural law the thesis does not state what law should be, but only describes the social and legal relations in society which a member state should consider in the law-making process.

In the context of EU the national law and supranational law has certain subordination, such hierarchy of laws exist in a national law system and in a supranational law as well. National law must be in conformity with the supranational law.

Hierarchy of law gives a rule in analysing the validity or conformity of national legal norm that this norm must be in conformity 1) to national constitution; 2) to EU primary and secondary law; 3) to human rights as the part of EU and national legal space.

## 1.3. The Concept of Culture as a Tool of Legitimation of Restriction of the Rights and Freedoms of an Individual

Legal literature discussing laws on marriage, often uses the concept of "culture" when justifying the differences on legal regulations and impossibility to converge family laws of member states; sometimes also the terms "tradition" and "public order" or "public interest" are used. The ECtHR has applied the expressions "weighty and legitimate reason", "restriction of the right in such an extent that the very essence of the right is impaired" (*Goodwin v. The United Kingdom* 2002, par 99), "the needs of society" (*Schalk and Kopf v. Austria* 2010, par 62) etc. However, the prevailing term is "culture". As culture has been used by the member states as a tool of legitimation in cases where this action seems to be a violation of the rights and freedoms of an individual, it is useful to determine what does culture mean in this context.

The concept of culture can have several interpretations, approaches and definitions. Even though the interest towards culture is as old as human history, the first scientific definition of culture was made in the 19th century by Brittish anthropologist E. B. Tyler: "A complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society" (author's translation) (Danesi & Perron 2005, 15). Kroeber and Kluckholm have offered more than 150 qualitatively differing definitions for culture (Danesi & Perron 2005, 31). However, they have agreed in two principles: first, the culture is a life-style, which is based on certain common system of understanding, and second, there is a continuous transfering of such system to the following generation (Danesi & Perron 2005, 31).

Since 50s-60s when cultural studies movement arose, culture started to play a more visible role for the law as well. In this sense "culture not only determines the categories through which individuals perceive the reality they

live in but also attaches normative tags to these categories, reflecting the interests and worldviews of dominant social groups“ (Mautner, 2011, 840).

Mautner highlights the following approaches in connecting the concepts of law and culture: “law as a product of a nation’s culture“ (German jurisprudence) and, “as embedded in the daily practices of its people“ (historical school); law as a participating the constitution of culture and thereby in the constitution of peoples minds, practices, and social relations (constitutive approach); law is that which courts create and apply as a distinct cultural system (Mautner, 2011, 841). However, this list is not exhaustive; Mautner brings more of them: law and anthropology, applies anthropological research methods to the study of law; the “legal culture“ approach, dealing with people’s views on the legal system and beliefs about the feasibility of taking legal action to promote their interests; the “legal conciousness“ approach, which deals with the legal knowledge that people invoke in the course of their daily social interactions, “law and multiculturalism“ discussing the functions that law plays, and the normative solutions it should adopt, in culturally diversified countries; connection between law and culture from the perspective of particular legal branches of doctrines; law as an autopoietic system viewing law as an autonomous system whose contents and communications affect social reality in a unique manner, mutually influencing each other and creating law’s contents from within (Mautner 2011, 843-844).

This multitude of links between the law and culture describes the complexity of this phenomenon. Culture can mean collective identity, nation, race, corporate policy, civilization, arts and letters, lifestyle, ideology, mentalities, traditions etc (see Mezey 2001, 35; Nelken 2010, 7). Mezey also describes the relationship between laws and culture by “the commonplace sense that law partakes of culture – by reflecting it as well as by reacting against it – and that culture refracts law (Mezey 2001, 37). She states that most visions of law include culture, if they include it at all“ (Mezey 2001, 35) refering to the practice where culture is deployed as political device (see Mezey 2001, 39). It has been considered one of the most important elements of our society besides culture (Butculescu 2012, 242) or both, a producer of culture and an object of culture (Mezey 2001, 46), or as Nelken explains: “culture-in-law and law-as-culture“ (Nelken 2010, 3-4).

The spread of use of the concept of the legal culture is connected to the notion of legal tradition. Webber describes legal culture as “it represents a point of contact between sociological description and normative assessment, ideally providing a foundation both for full account of social causation and, ultimatedly, for consideration of the normative adequacy of a particular society’s legal order“ (Webber, 2004, 36; see also Nelken 2010). Legal culture can be understood also as „a particular element of general culture: a sort of translation of general culture into the language of legal concepts, techniques and ideas“ (Antokolskaia 2008, 30).

Related to family law an evident and widely discussed question is the balance between the impact of other legal cultures and the protection of traditions in legal culture. Legal culture is something which is and is allowed to be different in different countries. In comparative law the question of collision of legal cultures is often raised. However, it is arguable that these legal cultures are actually so different that restrictions on individual rights and freedoms are justified; or whether the (legal) culture is merely a tool to achieve political goals? On one hand, the ECHR does not associate culture and individual rights directly but on the other, Donders (2003) seems to suggest that cultural rights have a protective function of the cultural identity. What would be the scope of this identity remains to be solved; is it national (see Georgopoulos 2010, 972, 975) or supranational identity (collective identity) (see Lo Giudice 2004, 147)?

Culture is not monolithic, fixed or static (see Mushkat 2002, 1032; Vadi 2012, 94) – it changes when the values of society are changing. The dynamic nature of law can be described by Jian's words: "/…/ the laws and legal systems between various countries influence, borrow, receive, integrate, and even interflow each other/…/" (Jian 2013, 33). In a law-making process it means that the reference to culture involves the values in the contemporary society. In the European context culture includes human rights (see Mushkat 2002). Müllerson has stated that sometimes ethnic and religious considerations work as a cover-mechanism to facilitate the achievement of political aims and consolidation of leadership (see Müllerson 1997 in Mushkat 2002, 1038).

In this respect, despite the fact that cultures of different societies emerge, they have a certain "holy" position being prior to the rights and freedoms provided by the supranational law. The ECHR (art 8) regulating the right to respect for private and family life provides that everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority except when in accordance with the law in the interests of national security, public safety or the economic wellbeing of the country (for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others).[10]

As explained above, restrictions of rights and freedoms of an individual are acceptable in certain circumstances, which in general have been refered to as culture or legal culture, but in practice mean certain criteria to protect other, more important values. However, these restrictions must be proportional.

[10] According to the Estonian Constitution this restriction is necessary and shall not distort the nature of the rights and freedoms being affected (par 11); Liu states that "restrictions must directly relate to the specific aims, be proportionate and not to be applied in a discriminatory manner" (Liu 2013, 48). Estonian Instruction of Good Law-Drafting and Standard Techniques (Eesti Vabariigi… 2009) provide that 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 interest (par 5).

Proportionality is a requirement of justification (Cohen-Eliya and Porat 2011, 466), implying rationality and reasonableness, which "transfers the debate over values into a debate over facts, one much easier to resolve" (Cohen-Eliya and Porat 2011, 471), and should be applied not only by the interpreter of the law but also by the legislator in a legislative process.

There is no unified standard about what is meant by proportionality. In Estonia it has been explained to consist of suitability, necessity and moderate as "applied means are proportional for the desired aim" (Põhiseaduse Kommenteeritud….2012, Ch. 2, Introduction 9.1.2) Suitability implies that an action promotes the achievement of the prescribed aim. When the aim cannot be reached by some other, less burdensome mean, which is at least effective as the first one then it is acceptable. It is important to consider that a restriction cannot distort the essence of restricted rights and freedoms. (Põhiseaduse Kommenteeritud…2012, Ch. 2, Introduction 9.1.2) Burton states that "a law lacks normativity when its justification is only preliminary or tentative" (Burton 2012-2013, 540).

Using the proportionality principle in practice demands serious consideration and discussions. It is an important part of the law-making process. In EU the member states have the right to restrict the rights and freedoms, including the human rights related to marriage capacity if justified by the needs of culture of this certain member state. (see **III**) Proportionality deals with the substance of law, and the values or interests the law protects (Kalmo 2013, 81). The ECJ has emphasized that the public order is defined by the legal tradition of the member state, that it is dynamic and for that reason determination of its content belongs to the national authorities (Laaring 2012, 258; Liu 2013, 51).

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".

Although (member) states have the right to decide (ECtHR controls only the legal base and if the necessity for restrictions exist (see Laaring 2012, 255)) what is the content of culture and values of society they protect and how to regulate them, it must be done based on objective standards and in a rational manner. It means that also in law-making process the legislator must run the test of proportionality. Rationality means in this context that it is justified by reasoning. For example in case *X and others v. Austria* 2010 the ECtHR stated that "As an explanatory report on 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 up second-parent adoption to same-sex couples), the court cast considerable doubt on the proportionality of the prohibition of certain right" (par 143 and 146)". This confirms the importance of issuing rules that enable assessment of their considerations related to culture when relevant.

Culture is related to the identity of a person, but this does not exclude the principle of harmonisation. Culture itself has vague borders and different cultures can create culture groups according to certain common values, e.g. values of democratic states or values of Western states or values of human rights or common EU values etc. To add to the complexity of this topic, nowadays the notion of cultural primacy exists with an emphasis on multiculturalism. The evaluation of cultural components could never be objective. Therefore, when using the word "culture", its diverse connotations can affect substantially the meaning of the rights and duties that countries seek to legislate about. The historical development of culture in Europe, and even in a wider context, can be described through the conflict of traditionalism and modernism, this is also a topical problem in defining marriage today, e.g. traditional marriage versus gender-neutral marriage.

When using culture as a legal tool in justifying the limitation of rights and freedoms of an individual, it is important to consider that 1) law reflects the culture, 2) law-makers must know clearly the institution they refer before the formulation of legal norms, 3) law should be as dynamic as culture. Clarity helps the proportionality principle in the justification process.

The question posed by this thesis is whether culture is the actual reason that justifies the impossibility to harmonise the marriage laws of member states related to gender and if so, how those values in culture are explained, defined and determined in the justification process, e.g. in a law-making process. Antokolskaia states in 2008 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 (Antokolskaia 2008, 26).

## 1.4. The Concept of Rule of Law in the Law-Making Process

Transformations in society require opportune legal response through the reform of outdated laws. Law-makers have their activities delimited by certain fixed rules and constraints to consider changing social relations and values. These guidelines are created to protect the person by limiting the power of the state and its agents, regarding an individual (Bedner 2010, 50). The concept of the rule of law provides a normative model that law-making functions and activities can be judged against or to evaluate the legitimacy of the state (see Tamanaha 2003, 5).

On the rule of law many approaches and meanings have been discussed (Mootz III, 1993; Nagengast 1998; Sachs 1998; Kinley 2002-2003; Tamanaha 2003; Stewart 2004, 136; Kleinfeld Belton 2005; Moroni 2007, 148; Krygier 2009, 26; Pech 2010; Bergling, Wennerström and Sannerholm 2010, 180; Favell 2011), but the limitation of state powers and its rationalization is at the core of all definitions. Legitimacy as the requirement of the laws of a legal system is to be justified adequately for a system to yield genuine, if prima facie, obligations for its subjects to comply with them (Burton 2012-2013, 539).

EU is a community based on the rule of law. The TEU refers to the rule of law already in its preamble[11], article 2[12] provides that the Union is founded on the values of respect for the rule of law. The Charter states that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity and is based on the principles of democracy and the rule of law.

Pech explains that „the ECJ's initial understanding of the notion of "community based on the rule of law" can be described as legalistic and procedural as it is closely related to the traditional and interrelated principles of legality, judicial protection and judicial review, principles which are inherent to all modern and democratic legal systems" (Pech 2010, 372). Hence the rule of law plays an important role in EU legal space impacting and obligating also member states to follow it. In applying culture as a tool to support the rights and freedoms of an individual, the rule of law demands that for imposing such restrictions a due process has to be followed. In this respect the rule of law has been understood in its formal dimension as a guarantee of the existence of certain and unambiguous rules that are to be followed to ensure legality. When protecting the culture the principle of proportionality must be used, in case of law-making processes the impact assessment of new regulations should be taken into account and used to found reasoning for the regulatory development. A

[11] Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law and confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.

[12] The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

process is complete only when the study previous to the issuing of a new regulation is made systematically, taking into account the different normative layers and relevant dimensions to the issue in question. In marriage capacity this means that not only national substantive laws are important, but also the constitution as well as supranational laws, and international instruments.

By limiting the power of the state regarding an individual, the rule of law is the institutionalisation of private freedoms and the establishment of a rational instrument of predictability and legal security of every democratic government. In a law-drafting process derived from the rule of law there is an obligation to follow the legal acts providing certain analysis and evaluation of the regulation to ensure the legality of the legal act or norm.

# 2. MARRIAGE CAPACITY AND EU LAW

Marriage capacity has been an issue of human relations since the earliest times, being first regulated by custom, then by legal acts and soon also influenced by the church. The developments of family law from the end of the Middle Ages until today can be seen as the gradual abandonment of concepts of canon family law being essentially the same in all European countries, and took place under the influence of the same liberal ideas. (Antokolskaia 2000) (**I**; see also Friedmann 1959, 10)

The newest developments related to marriage began five decades ago (see Bradley, 1996; Spencer 2010, 174), when the institution of marriage was considered to have entered a period of crisis (see Wettenberg 2013, 1). Marriage capacity started to lose its meaning then, first giving up to cohabitation (see Lifshitz 2012, 262) (including same-sex cohabitation) and later on because of the prevalence of individualism in family relations. This social change became a legislative concern with the legalisation of same-sex marriages or partnerships in many EU member states, at the same time, raising the question whether the other member states should also legalise such marriages and/or unions. (**III**) It was noticeable how some of the remaining traditional understandings of family could collide with the new views, causing confusion and problems in practice in implementing the laws.

Marriage capacity has been characterised as an essential element of the validity of the marriage contract (Lüderitz 2005, 49), but also denotes a status (Baty 1917, 1) implying that a person has no obstacles to marry. The extent of this capacity is defined by gender, age, general legal capacity, kinship, and pre-existence of a valid marriage(s). Being closely related to marriage, "a society's most vital and primary institution" (Dobson 2004, 2), marriage capacity is more of a social phenomenon which has changed enormously in the last few decades (**I**). Undoubtedly marriage does not have only a private dimension, because it can be the only available means for acquiring certain public benefits or interests (Bonini-Baraldi 2003, 304). Marriage capacity directly affects state interests and the way it expresses the values of a society in a given "era" at a certain place. Moreover, as Schwenzer has stated: "the deinstitutionalisation of family relationships and growing awareness of gender issues in family law go hand in hand with the family moving more and more to the public sphere" (Schwenzer 2003, 157).

In every society, particularly in a changing society, there is a need for a meaningful clarification of basic social values, social institutions, modes of living and social relations (Blumer 1954, 3; Nelken 2004; Berns-McGown 2005, 342; Nelken 2007; Banakar 2008, 49), which are the basis for the legal norm. Social values are carried by culture, and culture consists of values (see Walker 2001). Normal progress is that these beliefs and attitudes change (see Harrison & Huntington 2002, x, xix; Bourdieu 2003, 20). Marriage and marriage law have evolved to reflect the changing social values. Garrison and Scott explain: "These

changes are reflected in the gender-equality reforms, in the availability of no-fault divorce, and (indirectly) in legal changes ending discrimination against nonmarital families. In this evolution, law and social norms have interacted in a dynamic process.“ (Garrison & Scott, 2012, 315)

Responding positively to the challenge extend marriage to same-sex couples shows the type of adaption of the evolution through which the institution of marriage has retained its robustness as a family form. (Garrison & Scott, 2012, 315)

Changes in family law have raised again a question “What is marriage?“. In general the view is divided into two positions – *conjugal*, by which the elements of marriage are different sex, children and conjugal acts (Carter names it “nuclear family“, 1995, 186-187), refered also as traditionalist (Carter 1995 in O’Brien 2012, 414; see Garrison & Scott 2012, 304) and emphasizing the reproduction of society over the time (see O’Brien 2012, 416) while *revisionists* explain marriage as the union of two people (whether of the same sex or of opposite sex), who commit romantically, loving and caring for each other and to share the burdens and benefits of domestic life (see Girgis, George, Anderson, 2010; O’Brien 2012, 414, 418).

The traditionalists and the revisionists alike propose to enshrine in the law a deeply controversial facet of their incompatible “comprehensive doctrines“, to use John Rawls’s term, about the valuable forms of sexuality, their place in human flourishing and the nature of moral equality (O’Brien 2012). Rawls ideal of “public reason“ which requires that arguments over the legal definition of marriage, like other arguments over matters of basic justice, be “publicly reasonable[13]“ is tremendously influential also in constitutional law. Marriage arguments must be acceptable from citizen’s different viewpoints within the various comprehensive doctrines that overlap to form the public political culture of liberal democracies. The arguments must not depend essentially upon controversial facets of any comprehensive doctrine as such. (Rawls 1997; see also Larmore 2006; O’Brien 2012, 415-416)

O’Brian opposes Rawls’s philosophy and supports the traditional understanding of marriage. His main argument is having children as the only way of reproduction of society and stating that also Rawls refers to the reproduction of society (O’Brien 2012, 423), but he does not explain that Rawls uses the word “family“ being a part of the basic structure of society (see O’Brien 2012, 423), which has a much wider meaning than just marriage (see Fadel 2013, 168). Even more, reproduction can be interpreted much wider than only having one’s own biological children. O’Brien also refers to Macedo who states that if “incentives to form relatively stable commitments are good for straight

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[13] Rawls explains the public reason as a view about the kind of reasons on which citizens are to rest their political cases in making their political justifications to one another when they support laws and policies that invoke the coercive powers of government concerning fundamental political questions (Rawls 1997 in O’Brien 2012, 415).

people, then they may be good for gays and lesbians as well". Therefore, Macedo claims that promotion of same-sex marriage should be a part of the general state interest in ensuring marital and familial stability. (Macedo 1998 in O'Brian 2012, 428) What should be emphasized from Rawls's theory is the reconciliation of different values, for him the pluralism is not seen as a disaster but rather as the natural outcome of the activities of human reason (Graham 2006, 131).

In a contemporary society revisionist's view seems more proper as fertility and gender could be the factors leading to discrimination. Even more, it is wrong to state that only traditional marriage would create the civilization or progress (see Bradley 2003, 129). Family law can be said to be a "living law", a manifest in transnational moral, social or economic practices, norms and values that tansgress the territorial and legal boundaries of the nation-state (Hellum, Ali, Griffiths 2011, 4). (**I**) Goldberg states that marriage has never been the stable, unchangeable phenomenon described by those who purport to defend it from change (Goldberg 2006 in Goldberg, 2012, 223). Marriage should be designed as a dynamic institution that can be renewed and that balances the contemporary public values and interests against the needs (Lifshitz 2012, 279).

Family as an "institution" (a holistic concept, in which the entire family is a basic social unit) has been replaced by the family as a group (Durkheim's "association" in which "every family member is an individual and can exit the group" as Mätzke and Ostner state (Hobson 1990 in Mätzke, Ostner 2010, 389)). Being a tool of society, family continues to play an important role in policy development (see Foucault 2004 in Halley and Rittich 2010, 758) of a state.

Individualism in family relations has been emphasized by many authors (Snow 1999; Thornton 2005; see Daly, Scheiwe 2010; Marella 2011; Eekelaar 2012). Lifshitz assumes that the public-channeling approach perceives marriage as a public institution and stresses the state's role in steering couples into traditional, legal marriage, and then by contrast, in the private-neutral approach the state must maintain a neutral approach towards various lifestyles and refrain from prefering one over another (Lifshitz 2012, 260). Lifshitz (2012) suggests "the pluralistic model, which rejects the pure, private vision of marriage and insists on the active role of the state in the design of marriage as well as alternative affiliative institutions". However, this model seeks to design affiliative institutions in the light of the liberal values of pluralism and autonomy. (see Lifshitz 2012, 261)

As explained above, some states (*progressive*) have made changes into their family laws responding to changes perceived in society, while *regressive* states refer to the differences of culture when justifying their protest against legalising or recognising same-sex marriages or partnerships (see Von Schendel and Aronstein 2010).

As also explained, the "wall" between those views is the culture. The question that needs to be answered is whether the cultures of member state are so different in this respect (see part 1.3) or is it possible to talk about a similar

culture in this respect? For example Connolly states that "people from different cultures are so different in their conceptual schemes or worldviews that there is no hope of them ever understanding and effectively cooperating with each other – and its operation in the practice of law" (Connolly 2012, 281). According to Pintens law should be protected just as the monuments and landscapes; the unification and even harmonisation of family law will lead to a loss of important aspects of one's culture (Pintens 2003, 7). Supporting in general the protection of culture there are many reasons to doubt its primacy related to the general rights and freedoms of an individual. Analysing the concept of "cultural defence" the conflict between human rights and culture is evident (Van Broeck 2001; de Pasquale 2002; see Phillips 2003; Howes 2005; see also Boele-Woelki 2008, 16).

Antokolskaia explains the justification of culture as the "cultural constraint argument", by which the differences between national laws are "embedded in a unique and cherished national cultural heritage and that this cultural and historical diversity is unbridgeable" (Antokolskaia 2010, 399). Progressive states (see Antokolskaia 2007) believe that a new social group comes about, formed by citizens who are open to and in favour of European integration (see also Bradley 2003, 70; Haandrikman 2012, 2), regressive states support the impossibility of converging the legal cultures of states. One should notice that before the convergence of family law in EU became topical, the similar discussions were related to civil laws of member states (see e.g. Drobning 2001; López-Rodrígues 2004). However, it seems that family law has been handled by EU institutions even more strongly than civil law earlier.

Some authors refer to the common legal culture in Europe, which allows to speak of a European cultural identity in this respect (see Collins 1995, 365; Hahn 2002, 276; Dethloff 2003, 61; Meeusen 2007, 278; Gerhards, Kämpfer, Schäfer 2008, 4; Gerhards 2010, 6; Banakar 2011, 1; Stark 2012-2013, 690; Peters 2013, 676). Banini-Baraldi characterises pointedly the current situation in EU as "cooperation versus competition" and "altruism versus individualism" (Bonini-Baraldi 2003, 301). Antokolskaia explains the situation very clearly related to a multicultural society – the ideology of neutrality respects personal autonomy and pluralism and thus leaves room for people who adhere to different moral values to arrange their family life in their own way; this does not mean that a state in the "shadow of the law" tolerates *de facto* relations, but rather clear regulations (Antokolskaia 2007, 66), so that predictability and equality are ensured. She also states that unique national cultures do not really exist, but "rather a pan-European conservative and pan-European progressive culture exists, and a whole range of varieties in between" (see Antokolskaia 2008, 29; 2010, 408). Örücü explains the situation as follows: "It is only after secularisation that diversity occured; yet secularisation is also a shared value. European cultural identity is expressed in the ECHR. Social realities in Europe are also similar. It seems that all legal systems are moving in the same direction, but at a different speed.". (Örücü 2003, 560; 2010, 84) It all shows that in spite

of the traditional understanding of marriage and marriage capacity in some member states, the trend is towards the weakening of those traditions and the spread of a new worldview, which could reach to the convergence of marriage capacity regulations (about the convergence of civil law see de Cruz 2007, 503). Contemporary values can be described as those ideas and concepts which are the basis of international law (e.g. respect for human dignity, equality, the rule of law and respect for human rights in European law) (Martiny 2007, 69).

Law should partly lead and partly respond to the changes of society (see Friedmann 1959, 3). In case of marriage capacity, especially related to gender, a state should use both activities – it has to respond to the existing new family relations on the one hand and accept the developments in family law of other member states on the other hand. Certainly this does not mean blind following, but rational analysis.

The principle of primacy of the EU law has two fundamental limits: the basic principles of the Constitutional provisions of member states and the fundamental rights of the human beings. National law must not contradict supranational law – this expands the legal space of the EU member state, especially in cross-border cases (Baarsma 2011, 2-3). On the other hand also supranational law system is composed of layers. Human rights belong to the EU primary legislation which is not only functional but mainly constitutional for the whole system. At the supranational level justifications based on cultural differences in regard to marriage capacity need to consult the principles elaborated by the court on human rights linked to the right of marriage and determine to what extent if at all those principles are compulsory for a member state so the differences of their regulations and policy can be acceptable. On the other hand it is useful to analyse the relation between the domestic laws on marriage and EU secondary law to check if there is any principle prevailing in the national law and so whether it should be considered in the law-making processes.

## 2.1. The Right to Marry and EU Primary Law

EU primary law consists of fundamental rights. Human rights establish prevailing principles for both – for the supranational as well as for the national law. According to Article 6 of the TEU, the three sources of fundamental rights law are: the Charter, the general principles of EU law, as developed by the ECJ, and the ECHR (Bringing the Charter to life…. 2012, 5). Related to human rights and protection of culture there is a conflict between the cultural relativism (culture is the sole source of a moral right where there is a presumption that rights are culturally determined) and universalism (culture as irrelevant to the validity of a moral right – this right is held to be universally valid) (Donelly 1984 in Sibian 2013, 78). However, despite the strong tension between universalism and cultural relativism, "in today's highly diverse international

community the human rights are viewed as *prima facie* universal but culture does pose inherent limits on how human rights can be enforced and interpreted in this context" (Donelly 1984 in Sibian 2013, 78). However, in this respect it is essential to avoid the situations in which the "traditional practices and values mask self-interest or abuse of powers under the veil of cultural relativism" (Donelly 1984 in Sibian 2013, 79).

However, human rights universalism has a necessary, if limited, embrace of cultural differences in the origin, interpretation, and implementation of human rights standards (Kinley 2002-2003, 254). The Charter states in its preamble, that the Union "places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating the area of freedom, security and justice". However, it applies to member states only when they are implementing EU law. Consequently, the member states are only bound by the Charter when they act as "agents" for the Union, e.g. when they execute an EU decision, apply an EU Regulation at national level or implement an EU Directive. When states act on their own initiative, they are not bound to the Charter, but they are subject to their national law. (**III**) Also, the Charter must be respected at each stage of law-making, including implementing the EU law by the member state or putting it into the national law (Report from the Commission 2010…).

Pan-European values (Antokolskaia 2007) are a part of EU values and have been developed by the ECtHR and ECJ. One part of those values are human rights. All public powers must respect and protect human rights (Criddle and Fox-Decent 2012, 54), they are a state's responsibility.

It is sometimes unclear how much a member state is obliged to follow the Charter (see **III**) and while applying the Charter it is often ambiguous as to which concrete aspects of the fundamental rights are covered under EU law. Article 9 of the Charter on the right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights. The reference to man and woman in ECHR article 12 has been replaced by "person" formulating the right to marry in a gender neutral manner, creating disputes on the meaning of this provision today.[14] Some interpret the wording as an acceptance of marriage between same-sex persons (see Reding 2012), others (see Cornides and Brussels 2010, 2-3) that the Charter should be consistent with the ECHR and thus guarantee the access to marriage only to two persons of different sex. Meanwhile the ECtHR itself has interpreted the article 12 of the ECHR in the light of Article 9 of the Charter (*Schalk and Kopf v. Austria* 2010 (par 60).

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[14] ECHR art 12 "Right to marry": Men and 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.
Charter art 9 "Right to marry and right to found a family": 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.

Commentaries to the Charter explain that as a living instrument the ECHR should be interpreted in the light of present-day conditions; it may be inferred that the family as an instrument is in a state of transition in structure, functions and values (EU Network…2006, 98). This is a very important statement showing that the decision made by a state today can be outdated already tomorrow and the conformity of the two instruments must be pursued. However, it is still too risky to state that the change in the wording of ECHR replacing "man and a woman" with a more generic "person" means that it is up to the member state to decide if the marriage between the same-sex persons is allowed or not, because also article 12 of the ECHR contains the phrase "according to the national laws governing the exercise of this right" leaving references to sex and age out. It is also important to note that even though the aim of the Charter is to further explain the ECHR, the Charter itself can be interpreted not by the ECtHR, but falls into the competence of the ECJ. (see Cornides and Brussels 2010, 2-3)

The practice of ECtHR and ECJ confuses the interpreter and policy maker as on the one hand the rights of the transsexuals are protected (see McGlynn 2003, 231), the same-sex couples are taken as family members, but the marriage between same-sex persons has not received explicit validation[15]. As a "mercy" the "registered partnership" has been suggested, though often the content of those two legal relations are the same, as often explained by the legislator – to give to the partners the same rights as the spouses have in a marriage relationship. the question of "What is protected in reality?" can be raised. Similar laws should be applicable to similar situations, in the end marriage and registered partnership are almost identical situations except for their denomination. When registered partnership was founded to grant to unmarried couples the same rights as a married couple has, what becomes of the values or institutions that were protected by the state – is the name "marriage" and not the content, or more exactly what is this value which allows the restriction of rights and freedoms of an individual? (see **III**).

The ECtHR has pointed out that it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (see **III**). Such statement supports the recognition of marriages of people of the same sex contracted in another member state. Also, already in 1994 a resolution of the European Parliament on equal rights for homosexuals and lesbians in the European Community (Resolution of…1994, par 40) determined that member states are to

[15] There are plenty of cases related to the question of violation of Articles 8 and 12 of ECHR, e.g. *Rees v. UK* 1986, *Cossey v. UK* 1990, *B. v. France* 1992, *X, Y and Z v. UK* 1997, *Sheffield and Horsham v. UK* 1998, *Christine Goodwin v. UK* 2002, *Grant v. UK* 2006, *L. v. Lithuania* 2007, Schlumpf v. Switzerland 2009, *Van Kück v. Germany* 2013, *Vallianatos and others v. Greece* 2013 etc., but these cases are not directly about contracting the marriage. However, these cases are related to gender as an impediment in marriage and the need for proportional justification.

take action to safeguard equal treatment of all EC citizens regardless of their sexual orientation, and to eliminate all forms of discrimination based on it. The resolution considers it abusive that some legal systems neither allow homosexual couples to marry nor provide with alternative legal means to access the same status (see Pintens 2003, 12). However, other Community institutions did not react to this statement for a long time (Antokolskaia 2010, 412). Homosexuality is not only a debate about the nature of human intimacy and sexuality, but about the meaning of family, about the range, extent, and meaning of human freedom (Hunter 2013, 1077).

The ECJ has stated (see **III**) that national legislation which places the nationals of the member state concerned at a disadvantage simply because they have exercised their freedom to move and to reside in another member state are effectively restricting the freedoms of every citizen of the Union[16]. The court also said that "Although, as Community law stands at present, the rules governing a person's surname are matters coming within the competence of the member states, the latter must none the less, when exercising that competence, comply with Community law unless what is involved is an internal situation which has no link with Community law"[17] (**III**). This reflects yet one more contradiction if two same-sex persons have contracted marriage in one member state but when moving to live in another member state their marriage is not recognised: In what sense the name is any less related and protected by culture than marriage? (**III**).

Revising the ECtHR jurisprudence, it is observed that the main disputes in this context have been related to gender as an obstacle of marriage, other impediments are not under discussion. This suggests that this capacity is also arising from the cultural identity of each member state.

The ECtHR has emphasized in its decisions repeatedly that ECHR (as a living instrument) as well as marriage and society are evolving. Therefore, the legal precedent hardly helps to solve the cases of same-sex marriage or marriage impediment today – could it be that society has changed too rapidly and the statements of the court became outdated? The examples of Sweden and Denmark show consistently how quickly society changes with no special reference to culture or traditions, they have found a suitable opportunity to follow practical and effective measures regulating legal relations between people – especially in the context of legalising "partnership". On one hand the member state protects marriage – but does not have any clarity on what "marriage" currently is. On the other side, it establishes a legal relation with analogous content. In fact, this could have a catastrophic effect on the concept of "marriage" itself, but does not justify the use of improper and illegal tools to protect it.

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[16] E.g. Case C-406/04 De Cuyper (18 July 2006), par 39, 40; Case C-499/06 Nerkowska (22 May 2008), par 32, 40.

[17] See Case C-353/06 Grunkin and Paul v. Niebüll (14 Oct 2008), Case C-148/02 Carcia Avello v État Belge (20 Oct 2003).

Even if questions about restricting free movement of citizens in case of same-sex marriage could arise during implementation of EU law, no case law has been decided on the matter as of today. Nevertheless, analogy can be applied in the interpretation between these hypotheses and the treatment given to name law cases in that similarly to non-recognition of a name, the non-recognition of the family status can cause inconveniences for a citizen. How can a person use his/her right of free movement when in some member states his/her civil status might not be recognised?

The ECtHR leaves the "value decision" to the national level of law, authorizing the use of exceptions based on cultural considerations; and the door is open for different interpretations in the future. However, as a main claim in the thesis, this exception needs a profound analysis – proportionality test in explaining why is the restriction of the freedoms and rights the only possible solution in protecting certain values. As shown in the thesis related to the protection of traditional marriage there are many contradictions in such justification, or proportionality test is missed alltogether, and the reasoning is only based on an undefined "culture" which creates no identically understandable rule of such legitimation.

## 2.2. Marriage capacity and EU secondary law

Family law has been often a topic of interest for EU institutions, but no specific secondary law regulating marriage capacity has been issued, except for a directive on general principles that subjects family law under the subsidiary principle. Meanwhile, the European immigration law includes the "unmarried partner" as subject (e.g. Directive 2004/38/EC and 2003/86/EC; see also footnote 4 of Tomasi, Ricci, Bariatti 2007, 342). Marriage regulations of member state's differ but not to a considerable extent. The most important difference is linked to gender capacity; however, the trend towards convergence is visible in this.

The free movement right has given to the family law a new meaning and this right and freedom has influenced the working out of the secondary law related to family law, including marriage. The main question here is the conflicting regulations of member states and the possibility to converge laws to ensure the rights of EU citizens in cross-border cases.  Free movement is also a right in the Charter - according to Article 45 every citizen of the Union has the right to move and reside freely within the territory of the member states. Fundamental rights are at the top of the legal hierarchy. In cases of cross-border marriages some very important principles collide – the right to marry, the right to free movement, the right to non-discrimination, the right of a state to protect its culture, etc.

The fact is that national legal systems cannot regulate cross-border cases any more on their own (Župan, Puljko 2010, 25), the EU itself has weakened the

borders and created a multicultural society which needs a new approach. Any reference to cultural differences could seem outdated. In the thesis the relationship between the law and culture and family in it has been discussed (see p 24-28). One could see that in most European legal systems, the family law has adopted many reforms of neighbouring countries to the degree that much of national individuality and culture has been lost (see Pintens 2003, 8).

The EU and national laws are based on the same understandings on fundamental rights, and their relation could be described as a ”communicative relationship” or as the relationship between international law and domestic law (Cottier and Wüger 1999 in Peters 2009, 195), that if the EU law does not regulate these relations, the principles and rules of interpretation of the private international law should be used. However, in the international private law the similar pattern or principle can be found - non-recognition of the law of another state is allowed if it is against the public order of the first state. This is the same rule provided by the ECHR and ECJ and leads to the protection of culture. Actually, also in this case it should be specified what are those values the culture or public order consists of and why they need special protection compared to the freedoms and rights of an individual.

The harmonisation of family laws has been on the agenda of the EU already for many decades now. A new impulse was given by the Treaty of Amsterdam (Treaty of Amst …1997) and Treaty of Lisbon (Treaty of Lis… 2007) turning the attention from the economy towards the individuals as citizens of the EU and hence their affairs – family relations. As the free movement notion also has changed its nature from the economic understanding into the family relations, the EU needed a new vision on how family laws should be reformulated. At the same time, family relations themselves have been changing as shown in the thesis, especially in their cross-border dimension. Also, a growing individualism (Luhmann 2004, 478) has encouraged people to be more assertive and claim the rights as well, which has made the problem more visible and topical including in EU institutions. (**II**)

The Green Paper “Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records”, might very well be the most important document affecting cross-border family legal developments. It is thought to work out the measures within the framework of the Stockholm Programme to guarantee the full exercise of the right of freedom by free movement of documents by eliminating legalisation formalities between member states and recognising the effects of certain civil status records, so that the legal status granted in one member state can be recognised and have the same legal consequences in another member state (Commission Green …) (**II**). In 2013 a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the EU and amending Regulation (EU) No 1024/2012 (Proposal for…) was worked out. These developments show clearly the intention of the EU to regulate also family

relations – the society has made its needs manifest and the public policy responds to those realities. Although these developments honor the domestic culture, a strong movement of EU towards family law regulation at EU level is marked. Until now there are still contradictory approaches on this and those disputes and confrontations on the question of unifying the family laws are mainly based on the different legal cultures of member states. Related to marriage the progressive states support convergence and regressive states are against it (see p 26). Some theorists considering also the human rights in this question refer to the possibility of common (legal) culture of EU, while others emphasize the different historical and traditional values member states must retain.

Dethloff argues that "a fully harmonised European family law would ensure the free movement for citizens and create a common legal culture in Europe which would develop into a European cultural identity" (Dethloff 2003 in Spencer 2010, 173). The question is whether EU and member states are ready for such a policy.

Antokolskaia states that Europe is not ready for top-down harmonisation yet, but diversity as such is also not an obstacle for the harmonisation of private international law - she supports non-binding principles and bottom-up harmonisation of the family law in Europe (Antokolskaia 2007, 67). This means exactly that states should analyse what are those values they intend to protect by not recognising same-sex marriages. The present research concurs with Antokolskaia in that that "it is national politics rather than national culture, that determines the pertinence of family laws" (Antokolskaia 2010, 408) and in that sense it is reasonable to use the justification of the "political constraints argument"[18] (Antokolskaia 2010, 409) instead of the "justification of cultural diversity" (see also p 22).

ECJ refers to the constitutional values of the member states instead of deciding for itself what those constitutional values entail (see von Schendel and Aronstein 2010, 5). So, again, similarly to ECHR, the authority to decide has been assigned to the state, with the option to use the exception of culture but the European legal system still modifies the outlines of the national exception.

Curry-Sumner believes that Europe will ultimately be host to two main family relationship systems (regardless of their sexual orientation): "the pluralistic system in which couples are offered multiple choices with regard to the formalisation of their relationship, and the monistic system in which couples are allowed access to marriage as the only form of official relationship recognition". He states that "it is only a matter of time before the third option, the dualistic system (in which same-sex couples are provided with registered

[18] Antokolskaia does not define the term "political constraint argument", author of the thesis understands it as an opposite to the "grounded cultural argument". More specifically as a decision, which has not followed the rules provided for such a decision, including the proportionality principle. If refering to culture the actual aim is to gain some political profit and not protecting certain values of society.

partnership and different-sex couples with marriage) will die out completely, either as a result of internal pressure or external pressure from Strasbourg or Luxembourg". (Curry-Sumner 2011, 60)

In the supranational level, marriage law has been left under the power of national law on the grounds of the protection of culture, but it still remains an issue of EU policy that continues affecting its developments by other means, for example through the promotion of principles and rights such as the free movement of citizens. Member state having the authority to restrict the rights and freedoms of an individual, whether this right and freedom are constitutional or are derived from the supranational law, must use a proportionality test in this restriction process, otherwise the justification is illegal. Proportionality test means considering the supranational law – analysing in the case also the human rights and free movement, etc. Although it seems clear and logical to leave the authority in this question to the member state, there remain still some contradictions, which could have received explanation from the ECHR, ECJ and EU institutions. For example, first, the relationship between the legalised cohabitation between the same-sex persons and marriage (between the persons of different sex). When the content of those two legal institutions or relation is the same (see e.g. the statement of ECJ in C-147/08 *Römer* 2011, par 43) how does such an approach protect the traditional marriage? And, second, based on ECJ decisions on free movement and the name of person, then how the name as an element of personal identity differs in this respect from the civil status of a person which is also an element of personal identity (see e.g. ECJ C-267/12 *Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* 2013, par 26) so that a name is protected by free movement but civil status is not?

# 3. GENDER IN THE MARRIAGE CAPACITY REGULATION OF THE LAW OF MEMBER STATES (IN AN ESTONIAN EXAMPLE)

National marriage law must be in accordance to supranational law, but the only obligations deriving directly from the EU primary law – the right to free movement in the context of marriage recognition, and the right to marry from the ECHR and the Charter permits to limit the right to marry in case of protecting the culture of the member state. In this justification process the proportionality test must be used. Culture, consisting of the values can be found from the legal norm, in a law-making process these values must be explained in the documents obligatory to provide in this process. Estonia belongs to the group of regressive (see p 26) member states declaring that marriage between the same-sex persons is against its culture.

As in Estonia the new Family Law Act was passed in 2010, and in 2014 the Draft of Cohabitation Law Act has been initiated, there are suitable sources to check if there exist the justifications and what exactly are the values protected and the legal norms based on.

Estonia is a civil law state reflecting the positivist view of law (see p 14). Estonian Supreme Court has stated that an administrative organ must apply a valid law and cannot refuse the application even though the norm is inaccordance with the Estonian Constitution (e.g. 3-4-1-49-13, par 22; 3-4-1-50-13, par 18). Legal acts regulating law-drafting procedure provide clear obligations to follow the changes in society and new values.

The rule of law plays an important role both in a law-making process as well as in implementing the laws. In an implementation process the state organs are constrained by the existing regulations and are restricted from interpreting the legal norm as they wish, so a vital role remains with the legislator who must attend to human relations in the changing society and must pass contemporary laws. If unaware of the current values prevailing in the country, it is a matter of responsibility to research and study them. Other factors of legislative development relevance are the increased establishment of rights, hierarchy of laws, constitutional laws and human rights, and the potential development of society and laws at the supranational level, all of these while focusing on the interests of an individual.

Encouraged by the Recommendations of the Council of Ministries of OECD (1995) and in EU context by the Report of Mandelkern Group (2001) many regulatory instruments in Estonia have been reformed and improved to raise the quality of the law-making processes. Some of the initiatives are the General Directions of Legal Policy of Estonia until 2018 (Õiguspoliitika… 2011), the Development of Better Legislative Procedure Programm (2011), and the Conception of Analysis of Impacts of Legal Acts (2009). The main legal acts regulating the law-drafting process are the Government's Instruction on Good Law-Drafting and Standard Techniques (Vabariigi Valitsuse…2009) and the

Parliament's Instruction of Stardard Technique for the Drafts of Laws Proceeded in a Parliament (Riigikogu juhatuse…2011).

According to the principles and provisions contained in these documents, the priority of the legislator should be to improve law drafting, legality, legal certainty, necessity, suitability, proportionality, openness and responsibility (Vabariigi Valitsuse… 2009) during the legislative activity. The Directions of Legal Policy of Estonia emphasize that the public authority must consider the following principle in the law-drafting procedure: in a democratic state of rule of law a major instrument for implementing the political decisions is *law* (Õiguspoliitika…2011). Therefore the success of implementing the political decisions largely depends on the quality of used legal solution; quality of legal acts will be improved by the assessment of development of legal environment and to promote the legal system in terms of social welfare and the assessment and analysis of the impact on the legal system caused by globalization (Õiguspoliitika…2011). These principles confirm that the legal acts regulating the policy emphasize the changes in society as well as the respect of rule of law.

The Directions of Legal Policy provide the steps policy-makers must follow during the law-drafting process, further regulated by the Instructions on Good Law-Drafting and Standard Techniques (Vabariigi Valitsuse…2009) and the Parliament's Instruction of Stardard Technique for the Drafts of Laws Proceeded in a Parliament (Riigikogu juhatuse…2011). According to the rule of law, these norms are binding. According to paragraph 5 of both these instructions 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. An explanation letter of the draft of the law must be elaborated with the social and demographic impact analysis. Impact assessment cannot be only conjectural and declarative.

The Explanation letter of the legal act gives a possibility to understand the objective and meaning of the legal norm and gives confidence to the implementer to make decisions relevant and compliant. Assessing the social impact is complicated, time-, knowledge and resource consuming, but in its absence no law can be made or amended – every decision made by a certain reason influences social process to some extent. Especially important for this research is the provision that the draft of the law must be compliant with the constitution, general principles and norms of international law, treaties and EU law (Vabariigi Valitsuse..., par 3; Riigikogus menetletavate…2011, par 3). (**I**) In terms of EU law, both of the instructions provide the obligation to analyse the relation and impact of the law related to the EU secondary law (Vabariigi Valitsuse..., par 45; Riigikogu juhatuse …2011 par 45). Binding the obligation only to certain EU legal acts refering to the directives and regulations limits the obligation to ensure the compliance to the EU law. As an explanation letter of the Instructions on Good Law-Drafting and Standard Techniques only rewrites or repeats the provision regulating the obligation of draft-of-law to be compliant with the EU law (par 39), then there is a legal cap in interpreting the instruction

in this respect. For example, an explanation letter of Family Law Act states that family matters do not belong to the competence of EU legislative organs (explanation letter refers to Articles 3 and 5 of the Treaty of EC) and thus it is concluded that the EU legal acts are missing for that reason.[19] Based on the analysis made in the thesis this approach seems inadequate – firstly, since the signing of the Treaty of EC a lot has changed in terms of family law, expressed also in the EU policy; and secondly, to ensure the compliance with EU law, it is necessary that the analysis of the EU primary law must also be included in the law-drafting process as well, because it is impossible only by the secondary law.

The Estonian family law has been affected mostly by two major forces recently. One, the soviet legal and social regime, and later the regaining of the independence that brought up issues of international law and conflict of rules due to the increased exchange and the new exposure to cross-border cases in every sphere of life. These have greatly influenced the general attitudes and understandings of family relations in particular. In 1995 a new Family Law Act was passed, but no meaningful changes were introduced to the marriage contract from the Marriage and Family Code of 1969. Joining the EU caused the predictable rise of cross-border family relations and new questions in practice – the conflicts-of-law. Year after year the number of cross-border marriages has increased and with them, the problems related to such movement as had been noticed in other EU member states already for decades. However, this "lag behind" gives Estonia an opportunity to learn from the experiences of older members of the Union. (**I**) Meanwhile, according to the Census of Population and Housing 2011 the relative importance of households of the cohabitance has increased (10,1% up to 13,6%) and the relative importance of households of married couples has decreased (36,8% up to 30%). (Rahva- ja eluruumide…2011)

This describes the new values spread in Estonian marriage law, including the question of same-sex marriages.

Estonia is a member of the EU from 1995 and ratified ECHR in 1996. Respect of rights and freedoms in the constitutional as well as in the human right's context are strongly valued in practice, meaning that many changes of legal acts are based on a better legal protection of those rights and freedoms. As already shown, the legal acts regulating the law-drafting process should include an analysis of the comformity with the constitutional and supranational law, including human rights. In principle there exist the means to ensure the rule of law, hence in the law-drafting process the new understanding of human rights and the principles derived from EU law are considered, that is the changes of

[19] Similar explanation is in a Draft of Cohabitation Act: "EU law does not regulate the area directly as the member states have an exclusive competence to regulate marriage law essentially". However, this document consists of an additional explanation: "EU can by the special procedure adopt the means related to cross-border effect, to regulate the questions of private international law" (Kooseluseaduse eelnõu… 2014, 28).

society are followed and the legal acts are continuously evaluated in this respect.[20]

With regard to same-sex marriages, the mainstream attitude has long been that this is a problem somewhere far removed from the Estonian reality. Only in recent years the questions related to marriage capacity have become of interest, mainly due to the problems derived from the marriage impediment certificate and cases regarding recognition of same-sex marriages. The Draft of the Cohabitation Law Act has given a new flow to the question of gender in a marriage but the evidence shows that Estonia is not very open to the changes and unfortunatedly also to the discussions related to those changes. Some attempts in media have been tried to initiate the debate, only too quickly to fade away before it is worthy of attention at the public policy level. Actually, in the Estonian Human Rights Report 2012 it is mentioned that there is a need to better protect the rights of homosexuals in the country (Eesti Inimõiguste… 2012, 9-10). Only in 2014 the theme of same-sex cohabitation has become topical again. One can find a lot of statements and guesses in the media about the suitability to permit and regulate the cohabitation of same-sex persons, but most of these are personal statements and only some of them are based on scientific reasoning. However, the question of marriage between the same-sex persons is out of the question.

Substantive family law should be a result of an adequate family policy and must be adapted to particular demographic, sociological, cultural as well as legal values of certain areas (see Župan, Puljko 2010, 26). Burton assumes that "relying on several convergences in values provides a stronger justification than relying on only one" (Burton 2012-2013, 555). Schöpflin states that for small communities it is more complicated to condense the same intensity to cultural power as for large ones, therefore they are necessarily more exposed to external cultural currents; they have to rely on external models and the synthesis between their own domestic value systems and the ones from outside are indispensable. (Schöpflin 2010, 214)

In the following legal analysis documents provided in the law-drafting process have been presented to answer the question as to what are those values that the drafted legal norms reflect in Estonian practice.

The drafting process of the Family Law Act (entered into force in 2010) started in 2006. In 2009 a Study of Cohabitation (Olm 2009) and soon after the Intent of the Draft of Cohabitation Law Act (Kooseluseaduse eelnõu konts…2009) was made.

When the draft of Family Law Act reached the Parliament an Evaluation of Social Impact for the Marriage Law Act (Perekonnaseaduse eelnõu sotsiaalsete…2008) was ordered from a research group led by the Institute of Sociology and Social Policy of Tartu University. According to its introduction,

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[20] Most law acts need the ex-post evaluation, consisting of impact analysis made some years after the enforcement of the law (Vabariigi Valitsuse… 2009, par 42). This means that the state is obliged to analyse again the situation of the society in terms of change. Related to marriage capacity such evaluation has not been made in Estonia.

its objective was that the new Family Law Act would correspond more to the human behavior and social developments in Estonia. The introduction of this research reads: “Every change in law causes changes also in attitudes, systems of values and human behavior, leading to new social developments. It is not obvious how will new laws affect Estonian society and correspond to the objectives of international and state development. The law is related to the whole citizenship, which gives to the legislator a high responsibility, and is accompanied by the need to analyse properly all possible consequences derived from it. The objective of this analysis is to study the most important direct and indirect social impacts at the level of individuals, family and society. The study emphasizes the differences between norms and systems of values, growing individualisation in society in general, principle of social ethics: equal rights and possibilities to everyone related to the trend turn more attention to the individual, not to the group. This individualism can jeopardise the institute of marriage as the support of current societies. In the text the developments of values of this law are also studied in the light of – negative freedom (the richer the person the more freedom he/she has) or positive freedom (cohesion, relations, responsibility).” (Perekonnaseaduse eelnõu sotsiaalsete... 2008, 2-6) (**I**)

By reading the introduction of the Evaluation there is no doubt that based on such an analysis Estonian legal policy is adequately respecting the rule of law and the proportionality principle on the “justification of culture“. Unfortunately, this study addressed only the marriage property regimes and relations between parents and children to some extent. The only reference related to marriage capacity was that “individualisation of property challenges the marriage institution” (Perekonnaseaduse eelnõu sotsiaalsete... 2008, 2-6). Other aspects, as refered to in the introduction, were missing.

An explanation letter of the Estonian new Family Law Act states that “The draft does not make any changes in the prequisites for marriage compared to the former act. As usual there is a principle that marriage is contracted between a man and a woman for an unlimited time. Prerequisite for marriage is still majority of spouses (18-years of age, deriving from the Code of Civil Code Act). The only remarkable difference from the previous regulation is that a 15-year old minor can marry with the consent of the court.” (Perekonnaseaduse eelnõu seletuskiri 2008) (**I**)

When on the one hand the state expresses that “no changes will be needed in marriage in today’s society” and on the other hand this social impact research suggests to analyse marriage in a changing society, then one does not see coherency in the law-making procedure.

In 2009 a Study about Cohabitation was made (Olm 2009). It states that “family life” is rather a non-married cohabitation of different sex couples (Olm 2009, 31), and marriage, which is protected by the Constitution (par 27) is in Estonia a *traditional marriage* between a man and a woman; paragraph 26 of Estonian Constitution which provides that everyone has the right to the inviolability of private and family life, is to protect the cohabitation of

heterosexual partners (Olm 2009, 31). Any reasoning on such conclusion is missing. One can note that article 27 of the Constitution does not use the term “marriage“, but “family“ and “spouses“, which means that the study about the cohabitation is not complete or trustworthy. Estonian Constitution does not provide separate rule about the right to marry as ECHR and Charter provide. However, the Constitution has been interpreted to state that marriage is only one part of family life (Põhiseaduse kommenteeritud….par 14).

At the same time, the Study says that “As in Estonia the constitutional protection of marriage has not been properly studied, thus marriage has been based on a definition from the study by the constitutional law of Germany.”[21] It admits that in Estonian public policy the protection of culture related to marriage has been based on a foreign culture. Furthermore, the reference to the German constitutional interpretations in the study is from 1999 and the interpreters themselves later comment in this study that it is difficult to find reasons not to allow marriage between the same-sex partners. In the law-making process a comparative method is important to introduce and support other methods and use results obtained with these methodologies, but their application of justification for a diversity which is based on certain national values which need to be protected, is clearly questionable.

The study about Cohabitation also states that “deriving from the principle of equal treatment in Estonia the relations of same-sex persons will be regulated by the registration system”, that “the different treatment of partners and spouses should be grounded very profoundly,“ and that “in restricting the rights of homosexuals the justification must be objective, proportional and fair, and according to the needs of society“ (Olm 2009). However, the general attitude to the possibility to regulate the family life of same-sex couples was negative (see Olm 2009, 20) grounding on the selected statements of ECJ (Olm 2009, 41) and ECHR (Olm 2009, 33).

The study further concludes that in the Estonian law there are sufficient regulations that protect non-married partners (including same-sex partners), but in practice they are not used, which indicates that there is no apparent need for more regulations of cohabitation. However, in 2011 a poll with four possible models of cohabitation was conducted at the Parliament and ¾ answered or were of the opinion that this question needs to be regulated. Counting with this political support the Ministry of Justice had the initiative and started to work out an Intent of the Cohabitation Law Act. Because of the political non-interest the plan was left aside for a while. Despite some modest attempts to refer to the question in media, it soon faded away.

[21] Estonian Supreme Court has stated in its decision (3-2-1-145-04) that in private law to find out the meaning and aim of the Estonian legal act the legal norms and practices of other civil law states can be used as a comparative source, but in the research of cohabitation the Estonian Constitution was interpreted and the legal norm interpreted in a manner closely related with culture.

In 2011 the Estonian Chancellor of Justice gave his statement on limiting the rights and freedoms of same-sex persons to marry. He stated that cohabitation of same-sex persons belong under the protection of constitutional family law and therefore such relation should be regulated by law. However, he also stated that from the constitution or international law there does not derive an obligation for a state to allow by its substantial law a marriage between the same-sex persons. (Õiguskantsleri 2011…, par 5)

The Chancellor refers to ECHR, which has used in this context the words "states have certain free leeway to decide" whether to recognise or not the marriage between same-sex persons (Õiguskantsleri… 2011, 16). However, this is not sufficient justification in this respect. ECtHR has stated in many cases that the state must give sufficient reasons using the proportionality principle in restricting this right (see part 2.1).

In April 2014 forty members of Parliament initiated a Draft of Cohabitation Law Act. It intends to regulate cohabitation by registration, including same-sex cohabitation, providing to partners almost the same rights and obligations as to the spouses in marriage – except the obligation to financially support each other during and after marriage, some inheritance rights and joint adoption. When in 2009 the attitude towards the regulation of same-sex cohabitation or marriage was in general negative then year after year the change in a positive direction could be found. Cohabitation became a gender-neutral institution and provided to the cohabitation couples almost the same rights and freedoms as in marriage.

However, the reasoning why such model(s) was/were chosen, is missing. Again a refence to the Study of Cohabitation was made, but as shown above, this study also did not contain any explanations as to why one or another model protects (or fails to protect) the Estonian culture. In contrast to the Study of Cohabitation, the Intent of Cohabitation Law Act states that "State has an obligation to regulate the registration of same-sex persons to ensure that they can live their family life without restrictions" (Kooseluseaduse eelnõu konts…2009, par 15). However, again no explanation for this statement could be found in this document, no discussions why cohabitation is more suitable than marriage, are present, nor is there any explanation as to how it is in accordance with Estonian culture (how does this not harm the institute of marriage) to legalise next to marriage the institution of registered cohabitation and *de facto* cohabitation.

An Explanation Letter of the Cohabitation Law Act states: "Although same-sex persons could be granted protection through marriage, Estonian society is not yet ready to allow marriage between same-sex persons according to public opinion[22] (Kooseluseaduse eelnõu seletusk… 2014, 4). Although in a

[22] Public opinion in this respect means that the Ministry of Justice sent the Intent of Cohabitation Law Act for a feedback to the major Estonian organisations and associations, also other groups could give their statements on this Intent. Generalisation was made based upon the the received answers.

law-making process the public opinion acts as an important role, it does not mean that the legislator should decide the attitude of the whole society on these opinions. Even further, the Study of Cohabitation Law Act states that "…restricting the rights and obligations of homosexuals by law is not grounded when it is based on the prejudice of the majority in society" (Olm 2009, 39). This confirms that state should be very careful with the collected opinions. Analysing the statements there one can conclude, that yes, many of them could be considered as prejudices and not based on any knowledgeable research. Also, opinions do not eliminate the obligation of justification on clear grounds when limiting the rights and freedoms of an individual. Replacing the justification by the opinion does not show mature law-drafting practice of a member state.

Analysis of marriage in the context of EU law is insufficient and consists only of the statements the actual drafted regulation was not based on, the others being contradictory to the new regulation were just left out. It would have been correct to explain why they have not been considered. Change in attitudes towards same-sex persons in five years mean a change of values. The question arises as to on what social analysis this understanding has been based upon? Although the predictable result can facilitate the family life of same-sex persons, the state action cannot be considered as following the rule of law. The proportionality principle is not followed in a justification process. And still there is no clarity on what values the Estonian legal regulations are based upon related to gender in marriage. This leads to the conclusion that the decisions are made on political or other basis, but are not based on the protection of culture. Constitutional rights and freedoms (a right for family life) and supranational fundamental rights (a right to marry in a Charter and ECHR) and the right to free movement are restricted, on the basis of no reasoned grounds, that the justification on cultural reasons is missing, and that no test has been made for proportionality. There is no legitimate justification on cultural differences related to gender in this light. Lastly, if considering that a justification through the proportionality principle has to be made when passing a law of formulating policy, then the due process is affected and the rule of law is weakened.

# CONCLUSIONS

This thesis explored the legal relation of marriage capacity and its legal function in a changing society, concentrating on the validity of the relevant regulation in Estonia and its conformity with supranational laws. A plausible answer to the question on whether the prevailing justification based on culture not to harmonise the regulations on marriage capacity in the EU is legitimate or not, has been searched through the prism of the hierarchy of laws and rule of law doctrine. At the core of a democratic state the rule of law imposes rules for the creation of "proper" laws, including rules for law-making processes. This analysis also took into account the interaction between the normative layers that coexist in the EU legal system and the resulting legal hierarchy to respect when combining national and supranational legal systems.

The first section is dedicated to the concept of marriage capacity in its legal-historical development in a changing society, especially in Estonia and its relation to culture. The second section covers the legal regulation of marriage capacity and the question of free movement in the supranational level, first in the terms of human rights aspects related to marriage capacity, exploring what principles derive from them and how they could be linked to the justification of non-regulation and non-recognition of same-sex marriages, and the free movement as a fundamental right belonging to the primary law of EU. Then the secondary law of EU is analysed, specifically the developments of EU law on family relations. The third section explores compliance of Estonian substantial law with supranational law, specifically how in Estonian law-making procedure the principles deriving from supranational law have been applied, is analysed.

The revision of the concept of marriage capacity and its legal-historical development, focusing on Estonia, showed that marriage capacity is a legal phenomenon of public law reflecting the intention of the state to direct and influence the development of society. However, traditional marriage comprising of biological children of married couples cannot be undestood as the only means of reproduction in today's society. There exist many different forms of family life which also could be considered as reproduction-units in this context. Legal-historical analysis showed that marriage capacity has been influenced by the changes of society in Europe as well as in Estonia. In Estonia the Soviet regime slowed down the development a little as the state borders were closed, but in recent decades new flow of remarkable changes can be perceived in this institution, characterising the collision between the traditional and the gender-neutral marriage. Estonia, being so far more or less a bystander to those changes, is facing the same questions now in practice. The increase of cross-border family relations have highlighted the question of free movement not only from the economic standpoint of view but also on the rights of individuals and especially regarding their family relations.

A comparative analysis of the legal regulations of EU member states does not show significant differences among marriage capacity regulations.

These regulations have been developed or changed similarly but at different speeds. However, in terms of all the elements of marriage capacity there can be raised the question of their applicability in today's changed society, specifically in the context of cohabitation as in the aim of the restrictions the marriage capacity reflects cannot be gained. On the contrary, restriction to marry causes additional problems related to the non-recognition of certain legal rights. The main difference resides on the issue of "gender" causing diputes at the national and supranational levels.

Analysing **the human rights considerations applicable to marriage capacity,** it was concluded that the ECHR as well as the Charter should be interpreted so that states can restrict the rights to marry and family life if useful for the protection of their culture, but this restriction must be reasoned with references to the proportionality test. When proportionality principle has not been followed then the restriction is considered illegitimate. This is an essential guideline for a member state to consider in law-making. Continuous changes in values are emphasized also by the ECtHR - ECHR has been described as a "living instrument" and can be interpreted differently at any point, and it is open to the changes in society.

The part analysing the secondary law of EU demonstrated that family law in the EU is in an important stage of development. The concept of free movement originally focused on job-related fields but has been expanding to the family-oriented question with the EU citizenship notion also being linked more closely to the person as a legal entity, placing family laws clearly much closer into the scope of the EU regulatory competence and strongly influencing convergence with the entering into force of the Lisbon Treaty. Questions of family law are again of high interest for EU institutions. Cross-border family events are on the rise and no member state will be untouched by this. With the publication of the Green Paper "Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records", a strong influence has begun to alter the trend towards the harmonisation of family laws. The means proposed in the Green Paper are based on cooperation of member states and on the principle that EU has the power to intervene in the laws of member states if it is useful for granting the general aims deriving from the treaties. As free movement is a general principle of the EU, it is possible to demand from the member states' actions for the guarantee of this principle. In this respect the free movement can be seen as a powerful tool in the harmonisation process.

The analysis in the thesis showed that at the national level (based on the constitutional right to create and have a family) as well as at the supranational level (related to free movement and the right to marry) the possibility to restrict constitutional and fundamental rights and freedoms is justifiable when the need to protect the culture exists. In this respect culture acts as a legal tool to legitimise the restrictions on rights and freedoms of an individual. However, the restrictions need to be proportional. In case the proportionality test is not passed,

the limitations are illegal. From the doctrinal sources analysed during this study, including the law-making documentation of Estonia as an example state, no explanations were apparent about what interests, safety, order, health or morals of the most regressive member states would be compromised in case of recognising or regulating same-sex marriages. Continuous references have been made in terms of "protection of culture" or "protection of tradition" but their content has not been opened, or in Estonian case they are also contradictional (see Ch 3). Analysing the court practice of ECJ (see Ch 2) there could be noted that the restriction of free movement based on the cultural differences is not grounded, because the civil status should be protected similarly as the person's name is protected (see p 31, 35).

In the Estonian case, the contemporary meaning of "marriage" is undefined but to correct this weakness, state should make the studies to give the institution a contemporary content. In Estonian law-making procedures, rational decision-making based on proportionality is missing. Hence, the justification for the need to protect Estonian culture by non-recognising same-sex marriages is also fragile and does not conform to the rule of law as the legislature did not follow the due process. The current marriage capacity conditions (especially gender as an impediment for marriage) are in violation of human rights instruments as well as of the Estonian Constitution, including restricting the free movement of persons.

The Estonian example illustrates Antokolskaia's statement that the justification on "cultural constraint arguments" supporting differences of family laws of EU member states is incorrect because in reality this is a matter of "political constraint arguments" (see p 34). This means that the decisions in a legislative process have not been based on profound analysis but on personal attitudes, concurrently not performing the rules[23] provided by the legal acts regulating the law-making process. It shows that no profound grounds are used in stating that culture needs protection, hence there are no obstacles to harmonise family laws in EU given that there exists a diversity of family laws based on cultural differences.

This work claims that regressive states (see p 26) in the EU should make a critical appraisal of their culture to evaluate their position on the protection of culture and its legitimacy, and must attend to the proportionality principle. Harmonisation of family laws could take place, along with society development in a bottom up direction, with human relationships in constant transformation. Changing societies allow no single paradigm, but would foster evolution in all spheres of life; regressive states need to be open to understanding that they are

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[23] Repetitively emphasizing the following: the rule of law as a major instrument; the obligation to ensure that the restrictions of rights and freedoms of an individual in a draft of law are appropriate and proportional to the aim that the law pursues and for the protection of the domestic public interests; the compliance of the legal act to the constitution, general principles and norms of international law, treaties and EU law.

protecting values that no longer exist. In the light of the reality of free movement of EU citizens, the aforementioned evolution is inevitable. In practice individuals encounter serious obstacles to conduct their lives as a citizen of developed democratic liberal states, following the rule of law. As established, no current justification is based on facts or match postulates of a democratic state.

Further analysis and research is needed on marriage capacity and marriage in a changing society. Prior to issuing normative statements, the government and legislatures should inform and document their options and map society's interests. Then, a discussion on the cultural differences and protection can continue, applying to the debate the same approach for analysis and principles: changing society, respect for human rights, proportional use of public order protection measures, etc.

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# SUMMARY IN ESTONIAN

## Sugu kui abieluvõime element liikmesriigi ja EL õiguses

Suhe riigi ja üksikisiku vahel seoses perekonnasuhetega on viimastel aastatel märgatavalt muutunud. Õiguslik arusaam ja suhtumine perekonda hakkas Euroopas oluliselt muutuma 1960ndatel aastatel. Vaba liikumise õigus ja sellega kaasnev ülepiiriliste perekonnasuhete kasv tõi endaga kaasa konfliktid EL liikmesriikide õiguste vahel, põhjuseks erinev (õigus)kultuur. Samal ajal hakati inimõiguste arenguga seoses erilist tähelepanu pöörama just üksikisikule ja tema õigustele ja vabadustele mõjutades perekonnasuhete õiguslikku arengut. Abielu ja abieluvõime peegeldab kõiki nende ühiskonna muudatustega kaasnevaid probleeme.

Isikute vaba liikumine on üks EL põhiõigustest, samuti on see Euroopa Liidu Lepingu, EL Toimimise Lepingu ja Lissaboni lepingu üks aluspõhimõtteid ning sisaldub ka Euroopa Liidu Põhiõiguste Hartas. See tähendab, et kui liikmesriik piirab isiku vaba liikumise õigust, tuleb seda piirangut hinnata Euroopa Liidu õiguse raames. Tulenevalt subsidiaarsuse põhimõttest kuulub perekonnaõiguse reguleerimine küll liikmesriikide pädevusse, kuid ülepiiriliste perekonnasuhete kasvu tõttu on EL hakanud sellesse valdkonda üha jõulisemalt sekkuma. Kuna nn „tööalane migratsioon“ on asendunud „perekondliku migratsiooniga“, kajastatakse vaba liikumist seoses perekonnasuhetega nii EL poliitikas kui ka EL õiguse tõlgendustes. (**II**)

Ülepiirilised perekonnasuhted on perekonnaõiguse arengut oluliselt mõjutanud. Kui ühelt poolt kirjeldatakse EL perekonnaõigust kui kultuurilistest erinevustest tingitud „kirjut“ süsteemi, siis teisalt toetavad liikmesriigid ise perekonnaõiguse harmoniseerimist, et vältida õiguste erinevusest tulenevaid õiguslikke kollisioone. EL liikmesriigid võib liigitada kaheks rühmaks – progressiivsed, kes võtavad kiirelt omaks ühiskonnas toimuvad muutused ning regressiivsed (nimetatakse ka konservatiivsed), kes on kinni senises ning tõrjuvad võimalikke muutusi, viidates kultuuri kaitsele (vt lk 26). Abielu ja selle kaudu ka perekonnaelu õiguse piiramine on küsimus inimõigustest (**III**) ja vabast liikumisest (**II**), samuti on see takistus EL liikmesriikide perekonnaõiguste harmoniseerimisel (**II**).

Liberaalses demokraatlikus riigis omavad üksikisiku õigused ja vabadused erilist tähelepanu. Riik võib neid õigusi ja vabadusi piirata üksnes teatud juhtudel, indiviidi huvid on siin riigi huvist tähtsamad. Demokraatlikus riigis piirab ja suunab riigi võimu üksikisiku suhtes õigusriigi põhimõte, olles samal ajal EL liikmesriikide konstitutsiooniliste õiguste oluline element ning üks Euroopa Liidu aluspõhimõtteid (vt Pech 2010). Õigusriigi põhimõte ei ole ainult ideaal, normatiivse tähenduse tõttu saab sellega kontrollida õigusloome õiguspärasust. Õigusriigi põhimõte tähendab, et liikmesriik järgib õigusloome kohta kehtestatud reegleid, arvestades liikmesriigi õiguse suhtes ülimusliku

õiguse põhimõttega: nii EL-i õiguse kui ka inimõigustega, kooskõlas õigusaktide hierarhiaga.

Tänapäeva muutuvas ühiskonnas on vaieldav põhjendada EL liikmesriikide perekonnaõiguse harmoniseerimise võimatust kultuurierinevustega. Kerkib küsimus, kas õigusloome protsessis on ikka niisuguse põhjenduseni jõutud õigusriigi põhimõtteist lähtudes. Erinevuste sallivus, üleilmastumine ja multikultuurilisus on juba kõrvale lükanud abielu traditsioonilise tähenduse – tegelikult ei kaitstagi enam mitte abielu, vaid perekonnaelu, hõlmates lisaks ka teisi kooselu vorme. Perekonnaõigus on üha enam muutumas riigisisesest õigusest keskseks EL õiguseks. Liikmesriigi perekonnaõigus mõjutab EL õigust ja vastupidi. Vaba liikumist reguleerivad suunised mõjutavad kaudselt ka perekonnaõigust. EL poliitika areneb vaba liikumise lihtsustamise suunas eriti just seoses perekonnaõigusega (vt **II**).

Väitekirja eesmärk on kontrollida Eesti õiguses sugu kui abieluvõime elementi reguleerivate normide õiguspärasust ja vastavust EL õigusele.

Hüpoteesina väidetakse, et EL liikmesriikide abieluvõime normide erinevuse põhjendamine kultuurierinevustele ei vasta õigusriigi põhimõttele EL lõimingu tähenduses. Analüüs põhineb õigusaktide hierarhial.

Eesmärgi saavutamiseks analüüsitakse Eesti perekonnaseaduses sätestatud norme, mis reguleerivad sugu abielu sõlmimisel, kahel tasandil – normi vastavust Eesti põhiseadusele ja EL õigusele. EL õiguses tehakse eraldi normianalüüs EL esmase ja teisese õiguse kohta. Esmasest õigusest käsitletakse vaba liikumise õigust ning õigust abielluda, teisesest õigusest harmoniseerimise küsimust ning EL õiguse poliitikaid selle kohta seoses abieluga. Samuti analüüsitakse Eesti õigusloomet – selle protsessi käigus koostatud dokumentide sisu, mis peavad andma vastava analüüsi õigus(aktid)e hierarhiast tuleneva kooskõla kohta ning põhjendusi isiku põhiõiguste ja vabaduste piiramise osas.

Väitekiri on õiguslik uurimus, mis ei analüüsi ega määratle abielu filosoofilist ega sotsioloogilist tähendust, vaid annab hinnangu õigusnormi kehtivusele. Uurimus tugineb õiguspositivismile ning monismile EL-i õiguse ülimuslikkuse ning ühtse õigussüsteemi moodustamise mõttes liikmesriigi õiguse suhtes. Väitekirja teoreetiline raamistik toetub õiguskirjanduse, õigusaktide ja kohtupraktika õiguslikule analüüsile. Tegemist on kvalitatiivse uurimusega, milles kasutatakse süstemaatilist õigus-dogmaatilist uurimismeetodit, hõlmates nii ajaloolist, teleoloogilist kui ka grammatilist õiguse tõlgendamise meetodit. EL liikmesriikide abielu ja abieluvõime regulatsioonide võrdlev analüüs võimaldab hinnata, kui suur on erinevus nende riikide väärtustel põhinevas õiguses. Töö eesmärgi saavutamiseks analüüsitakse kõigepealt abielu ja abieluvõime õiguslikku olemust ja abieluvõimet reguleerivaid norme Eesti õiguses, et kindlaks teha need väärtused, mida normid sisaldavad. Normide arengu mõistmiseks on kasutatud õiguslik-ajaloolist meetodit. Selle tulemusena hinnatakse, kas abieluvõime muutub ühiskonna muutumisega või mitte ning millised on need väärtused (kultuur), millele õigusloomes tuginetakse vastava regulatsiooni õigustamiseks.

Õiguskirjanduses ja kohtupraktikas levinud seisukoht, et EL liikmesriikide perekonnaõigusi ei ole võimalik harmoniseerida, kuna perekonnaõigus on liiga tihedalt seotud riigi kultuuriga, vajab põhjalikumat analüüsi selle kohta, kuidas kultuur on seotud ja mõjutab õigust. Väitekirjas analüüsitakse, kas peamiseks takistuseks liikmesriikide abieluõiguse harmoniseerimisel on ikka kultuur/kultuurilised erinevused, milline on üldse kultuuri seos õigusega ja kuidas seda rakendatakse õigusnormi loomisel. Sellele küsimusele vastamisel analüüsitakse Eesti õigusloomet perekonnaseaduse ja kooseluseaduse kontseptsiooni väljatöötamise näitel, hinnates praegu kehtivaid väärtusi, mis kajastuvad õigusnormides ja õigusnormide tõlgendustes ning õigusloome dokumentatsioonis toodud põhjendusi vastavate väärtuste kaitse ja võimalike muutuste kohta, mis normi loomisel aluseks on võetud.

EL õiguse tasandil määratakse kindlaks, millised õiguslikud reeglid ja põhimõtted EL õigusest mõjutavad otseselt ja kaudselt abieluvõimet. Keskendutakse vaid isikute vabale liikumisele ja õigusele abielluda, diskrimineerimise küsimus on jäetud kõrvale uurimuse piiride kitsendamise eesmärgil. Nii EL Põhiõiguste Hartas ja Euroopa Inimõiguste Konventsioonis on sätestatud õigus abielluda. See õigus on tihedalt seotud ülepiiriliste perekonnasuhetega ning vaba liikumise õigusega ning osa EL liikmesriikide perekonnaõiguse harmoniseerimise küsimusest. Uurimuses analüüsitakse perekonnaõiguse kohta harmoniseerimise protsessis ning võimalikke EL arenguid selles osas seoses abieluga.

Õigusriigi põhimõte toetab analüüsi kui laialt tunnustatud reeglit „õige“ õiguse loomiseks, mõjutades õigusloome protsessi. Õigusriigi põhimõtte kaudu kontrollitakse Eesti näitel, kas viitamine kultuurilistele erinevustele põhjendusena EL liikmesriikide abieluvõime regulatsioonide harmoniseerimise võimatusele on õiguspärane või mitte s.t. kas ja kuidas õigusloomes on järgitud kehtivaid reegleid, et loodav norm vastaks EL õigusele.

ELis on aktuaalseim küsimus seoses abieluvõimega olnud viimastel aastatel sugu. Selles osas toimub EL õigusruumis pidev muutumine – üha enam riike loobuvad oma regressiivsest suhtumisest ning lähevad üle progressiivsete riikide mõtteviisile tunnustada sooneutraalset kooselu. Soo aktuaalsuse tõttu on väitekirjas käsitletud peamiselt just seda elementi. Samas on võimalik analoogselt töös loodud mudeliga hinnata ka teisi abieluvõime elemente, samuti on mudelit võimalik kasutada teiste õigusharude instituutide ja ka õigusloome analüüsimisel.

Väitekiri panustab akadeemilisse diskussiooni vähemalt viiel viisil. Esiteks annab ta ajaloolis-õigusliku ülevaate abielu ja abieluvõime arengust Eestis ja vähemal määral ka EL-is. Samuti selgitab abieluõiguse arenguid tänapäeva muutuvas ühiskonnas. Teiseks näitab ta lünkasid Eesti avalikus halduses õigusloome protsessis ning pakub välja lahenduse, kuidas neid lünkasid täita. Kolmandaks selgitab väitekiri EL ja tema liikmesriikide õiguste omavahelist seost, õiguste harmoniseerimise tähendust ja kirjeldab probleeme, mis tekivad nii subsidiaarsuse põhimõttest kui ka eritasandite õiguse

(liikmesriigi ja EL õiguse) omavahelistest suhetest ühe kitsa õigussuhte näitel. Üldiste põhimõtete tähendus võib saada teistsuguse väärtuse nende sügavamasse sisusse süüvides ning sisulises rakendamises. Uurimus näitab, et seisukohtade andmisel tuginetakse pealispinnalistele, poolikutele järeldustele, need ei põhine sügaval, lõplikul analüüsil nii nagu õigusaktid ette näevad. Neljandaks näitab väitekiri, kuidas väärtused mõjutavad õigust ja selle tekkimist õigusloomes. Viiendaks näitab ta õigusriigi põhimõtte rolli õigusloome protsessis. Väitekiri esitab põhimõtted ja reeglid, mida riik peaks järgima kehtiva õiguse õiguspärasuse hindamisel, sealhulgas ka õigusloomes.

Väitekiri koosneb kolmest teaduspublikatsioonist (**I**, **II** ja **III**) ja sissejuhatusest. Publikatsioonid annavad ülevaate abieluvõime õiguslikust olemusest, selle õiguslikust arengust Eestis alates 13. sajandist, EL liikmesriikide abieluvõime õiguslikest regulatsioonidest, abieluvõime ja väärtuste omavahelisest seosest ning väärtuste kohast ühiskonnas ja õiguses, liikmesriigi tasandil õigusriigi põhimõtte kohaldamisest õigusloomes (**I**), EL poliitikast perekonnaõiguse võimaliku harmoniseerimise eesmärgil, käsitledes nii liikmesriikide haldusorganite vahelist koostööd kui ka konkreetseid meetmeid vaba liikumise edendamiseks just seoses perekonna-, eelkõige abielusuhetega (**II**) ja inimõigustest tulenevaid põhimõtteid abielu ja abieluvõime osas hõlmates nii Euroopa Põhiõiguste Harta kui ka Euroopa Inimõiguste Konventsiooni käsitlusi ja tõlgendusi (**III**).

Ajaloolis-õiguslik analüüs näitab, et abieluvõime on muutunud ühiskonna muutustega seoses nii Eestis kui ka Euroopas. Eestis aeglustas seda arengut teatud määral nõukogude võim, kuna piirid olid suletud, kuid viimastel kümnenditel on toimunud kiired muutused, tuues kaasa õigusliku konflikti traditsioonilise ja kaasaegse abielu- ja perekonnamudeli vahel. EL liikmesriikide abieluvõime regulatsioonide võrdlev analüüs näitab, et tegelikkuses on abieluvõime normid suhteliselt sarnased, erinevused on vaid mõnes üksikus elemendis. Oluliseks erinevuseks saab pidada siiski „sugu“, põhjustades vaidlusi nii liikmesriigi kui EL tasandil. Eesti lahendab täna probleemi traditsioonilise ja sooneutraalse peremudeli õiguslikust reguleerimisest.

Abieluvõime kannab endas ühiskonna väärtusi, kuid samas peaks ta ka muutuma ühiskonna muutumisel. Normid, mis kannavad vananenud põhimõtteid, tekitavad praktikas tõsiseid probleeme, takistades isikutel teostada nende õigusi ja vabadusi. Õigusloome protsessis peab riik arvestama muutunud ühiskonnaga. Samas põhjendused, miks üks või teine muutus ühiskonnas on õiguses kajastatud või vastupidi, ignoreeritud, on õiguskirjanduses toodud väga üldistavalt, kasutades vaid viidet „kultuurilised erinevused“, kuid mida täpsemalt selle all mõeldakse, on jäetud selgitamata.

Inimõiguste analüüs näitab, et nii Euroopa Põhiõiguste Hartat kui ka Euroopa Inimõiguste Konventsiooni peaks tõlgendama selliselt, et riik võib oma siseriikliku õigusega piirata isiku üldist õigust abielluda, kui see on vajalik riigi kultuuri kaitseks. Samas aga peab niisugune piirang olema proportsionaalne. Kui proportsionaalsus puudub, on piirang ebaseaduslik.

EL tasandil näitab abieluvõime analüüs, et perekonnaõigus on täna olulises arenguetapis. Kuna tööga seotud vaba liikumine on asendunud perekonnast tuleneva vaba liikumisega, on perekonnaõigus liikunud üha rohkem EL õiguse ja poliitika keskpunkti. Oluliseks näiteks on siin Roheline Raamat „Vähem bürokraatiat kodanike jaoks: avalike dokumentide vaba liikumise edendamine ja perekonnaseisuaktide õigusjõu tunnustamine“, mis mõjutab tugevalt ka liikmesriikide praktikat ning arusaamu perekonnaõiguse erinevustest õiguste lähendamise suunas.

Õiguskirjanduses puudub sisuline viitamine kultuurile. Seetõttu võib kahelda, kas tegelikkuses regressiivsete liikmesriikide abieluvõime regulatsioonid ikka vastavad nende hetkel olemasolevale kultuurile. Eesti näite puhul leidis tõestust, et viitamine kultuuri kaitsele ei ole põhjendatud. Õigusloome protsessis koostatud ja kasutatud allikate põhjal saab järeldada, et puudub põhjendus, miks Eesti kultuuri on vaja kaitsta sooneutraalse abielu eest ehk milliseid teisi väärtusi ja kuidas niisugune abielu ohustab. Liikmesriigi tasandil isiku põhiõiguste piiramisel peab seda piirangut proportsionaalselt põhjendama. Eesti puhul kuulub ka samasooliste kooselu perekonnaelu kaitse alla, kuid miks selliseks perekonnaeluks ei saa olla abielu, jääb erinevate õigusloome käigus koostatud dokumentide põhjal vastuoluliseks ja seetõttu ka põhjendamatuks. Proportsionaalsuse printsiip jääb seetõttu täitmata.

Eeltoodust saab järeldada, et tuginemine Eesti kultuuri kaitsele samasooliste abielu mittetunnustamisel ning selle mittereguleerimisel puudub ning riigi tegevus ei vasta õigusriigi põhimõttele, kuna õigusloome protsessis ei ole täidetud selleks ettenähtud kohustusi piisava sisulise kvaliteediga. Seetõttu on Eesti kehtiv õigus abieluvõime kohta selles osas, et ei ole tunnustatud ega lubatud abielu samasooliste vahel, vastuolus EL õigusega ning Eesti Vabariigi põhiseadusega. Proportsionaalse põhjenduse puudumine traditsioonilise abielu kaitseks tähendab ka takistuste puudumist sooga seotud abieluvõime harmoniseerimiseks.

Kokkuvõttes näitab väitekiri, et abieluvõime kui õiguslik nähtus kannab endas ühiskonna väärtusi, selles kajastub kultuur, kuid nii nagu muutuvad ühiskonnas olemasolevad väärtused, muutub ka kultuur ning seeläbi peaks muutuma ka abieluvõime õiguslik regulatsioon. EL liikmesriigid peavad õigusloomes arvestama muutusi ühiskonnas, sealhulgas erinevate õigussüsteemide lähenemise või harmoniseerimise vajadust ning kasutama õigust erisustele õiguses vaid juhul, kui see on tõepoolest põhjendatud. Selle tagab õigusriigi põhimõtte järgimine selles menetluses. Liikmesriigid peaksid aru saama, et muutuvas ühiskonnas ei ole ühtainust paradigmat, vaid see toetab arenguid kõikides eluvaldkondades ning et need väärtused, mida riigid arvavad kaitsvat, võivad täna enam mitteeksisteerida. Vaba liikumise ja inimõiguste kontekstis on niisugune seisukohtade muutumine möödapääsmatu, kuna liikmesriikide erinevate õiguste tõttu puutuvad üksikisikud praktikas kokku tõsiste takistustega EL kodanikuna oma õiguste teostamisel arenenud liberaalsetes demokraatlikes riikides vastavalt õigusriigi põhimõttele.

Väitekirjas järeldatakse, et kuna Eesti riik ei oma nii põhiseadusest kui EL õigusest tuleneva õiguse abielluda piiramiseks piisavalt selgeid ja põhjalikke argumente, siis tuleb praegune õiguslik regulatsioon lugeda EL õigusega vastuolus olevaks. Kuna väitekirja eesmärk ei ole määratleda abielu mõistet ja ei analüüsita abielu sotsioloogilist või filosoofilist tähendust, siis ei väideta väitekirjas abielu olemuse pinnalt, et Eesti peaks või ei peaks lubama sooneutraalset abielu, vaid: 1) kuni puuduvad põhjendused isiku põhiõiguste piiramiseks, puudub riigil õiguslik alus neid keelata; 2) riik peab kaasaegsete põhjalike sotsioloogiliste jm uuringute pinnalt määratlema ära abielu tähenduse tänapäeva Eesti ühiskonnas ning kui selle tulemusena selguvad väärtused, mis läbi kultuuri vajavad erilist kaitset, on olemas kooselu reguleerimise menetluses proportsionaalne põhjendus sooneutraalse abielu mittelubamiseks ning isiku põhiõiguste piiramine kooskõlas EL õigusega.

Sugu on ainult üks abieluvõime element, kuid perekonnaõiguse arengud muutuvas ühiskonnas näitavad ka teiste elementide problemaatikat – näit. vallalisus seoses polügaamiaga, vanus, ning laiemalt perekonnaõiguse raames asendusemadus, isaduse kindlaksmääramine jm, mille õiguslik regulatsioon tugineb samuti kultuurile. Õiguse tõlgendamine ja õiguse loomine ei saa toimuda õigusnormi pealiskaudse või puuduva sisulise analüüsita. Viitamine kultuurile ei tohi olla deklaratiivne. Normi sisu on need ühiskonna väärtused, mis õigusloome käigus normi kinnitatakse. Ka positivistliku õigusega riigis peab väärtuste muutudes muutuma ka õigusnorm. Väärtused tuleb kindlaks määrata teaduspõhiste vahenditega. Muutuvas ühiskonnas peavad need uuringud olema kaasaegsed. Õigusloome käigus õigusnormi vastavuse hindamisel EL õigusega ei saa jääda n.ö „õiguse pealispinnale", vaid analüüsima kooskõla sügavamalt nii nagu seda näevad ette õigusloomet reguleerivad normid ja põhimõtted.

## ACKNOWLEDGEMENTS

This thesis is a subtotal of the knowledge I have collected and experienced as a lawyer in public administration for a long period of my career. Being a participant in a law-drafting I have seen the problems treated in a thesis and I have made the mistakes criticised in a thesis myself as well. In public administration a state-representative must follow the rules and every decision must be based on legal norm. This responsibility needs often more knowledge than time left for the decision allows. Estonia has too few scientists and experts on family law in public administration, especially related to cross-border family matters. I started to analyse the topic of interaction of supranational and national law related to family law already years ago; quick developments in this area in Europe and almost visible changes in values faschinated me professionally. I could not understand how is legally possible that some states change their values and the others do not. I started to look for the answers. Leaving the position in public administration gave me more freedom to have statements – I wasn'nt bounded to the political attitudes any more, so I could be more critical. However, I do hope that this research helps public administration as it gives a model, an explanation, and an example. I myself continue researching family law.

I would like to express my deepest gratitude to my supervisors, Professor Tanel Kerikmäe and Associate Professor Lehte Roots. Professor Tanel Kerikmäe always found time to discuss with me the questions I had and encouraged and supported me through the writing of the thesis.

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## Curriculum vitae

1. Personal data


Name Kristi Joamets
Date and place of birth 30 July 1971 Tallinn, Estonia
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2. Education

| Educational institution | Graduation year | Education (field of study/degree) |
|---|---|---|
| Tallinn University of Technology, Faculty of Social Sciences | 2000 -… | PhD program in Public Administration |
| Tallinn University of Technology, Faculty of Social Sciences | 1998 - 1999 | MA in Public Administration |
| University of Tartu, Faculty of Law | 1991 - 1996 | BA in law (degree equivalent to Bologna Master's degree) |
| Tallinn Technical School of Light Industry | 1989-1991 | Secondary specialised education on Administration Organisation and Archival Science |
| Tallinn Secondary School No 37 | 1978-1989 | Secondary education |

3. Language competence/skills (fluent; average, basic skills)

| Language | Level |
|---|---|
| Estonian | Fluent (native language) |
| English | Average |
| Russian | Average |
| German | Basic skills |
| Finnish | Basic skills |

4. Special courses

| Period | Educational or other organisation |
|---|---|
| 2014 | TUT "Pedagogical Psychology and Sociology" |
| 2014 | Tallinn University "Student tutoring in carrying out the development and research activities" |
| 2014 | Tallinn University "Estonian academic language. Academic writing." |
| 2014 | Tallinn University "Academic English I: oral expression" |

| | |
|---|---|
| 2014 | Tallinn University “Academic English II: academic writing.“ |
| 2013 | 13th Congress of the Registrars of Europe „Civil Status Registration – “The Path to Citizen Orientation and Harmonisation“ Bled, Slovenia<br><br>Preismann Koolitus “Topical questions in the practice of private International law“ |
| 2013 | Tartu University „E-course – from idea to realization“ |
| 2012 | 12th Congress of the Registrars of Europe “Viennese Blend“, Vienna, Austria |
| 2011 | 11th Congress of the Registrars of Europe „Truth or Falsity in Register Office Practice. The Problem of Sham Marriages in Europe“, Zielona Gora, Poola |
| 2011 | Eesti Juristide Liit “Non-contentious proceedings –is it a justice?“;<br><br>Preismann Koolitus “Labour contract in an obligation law“; “Role of public power protecting the minor with limited legal ability in the relations of family matters“;<br><br>Tallinn University “Learning and teaching at the university“; “Speak and shine! Public performance and media-training“; “Creating the syllabus and program“; “Social influence and conflict management in a learning and teaching situation“; “Methods of teamwork“; “Efficacy of a lecturer“ |
| 2009 | 9th Congress of the Registrars of Europe „European data transit - the future begins today“, Poprad, Slovakkia |

5. Professional employment

| **Period** | **Organisation** | **Position** |
|---|---|---|
| 1994-1995 | Estonian Ministry of Agriculture | Law Department, specialist |
| 1995-2004 | Estonian Ministry of Finance | Law Department, specialist/head of unit of legal acts/adviser |
| 2006-2013 | Estonian Ministry of Interior | Population Department, adviser |
| 2003-2012 | Tallinn University of Technology | Faculty of Economics, Chair of Economic Law, lecturer |
| 2012-… | Tallinn University of Technology | Faculty of Social Sciences, Tallinn Law School, Chair of Economic Law, lecturer |

6. Research activity, including honours and thesis supervised

Joamets, Kristi. 2012. “Marriage Capacity, Social Values and Law-Making Process“. International and Comparative Law Review 12. Palackỳ University, 97-115.
Joamets Kristi and Tanel Kerikmäe. 2013. “The New Developments In EU Family Law – Its Applicability To Estonian Law“. Korea University Law Review, 13. The Korea University Legal Research Institute, 25-42.
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Joamets Kristi. 2011. ”Näilik abielu: probleemid meil ja mujal”. Regionaalministri valitsemisala infoleht REGI, 14-15.
Joamets Kristi. 2010. ”Perekonnaseisuametnik. Paindlikkuse suurendamine perekonnasündmuste registreerimisel”. Avaliku teenistuse aastaraamat, 52-56.
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Joamets Kristi and Maria Claudia Solarte Vasquez. 2008. Legal environment of business: textbook. TUT Press.
Joamets Kristi and Maria Claudia Solarte Vasquez. 2006. “Estonian Developments of the Legal Instruments Regulating Pathological Gambling.“. TUTWPE no 139, 43-57.

*Thesis supervised:*

2012 Eva Tolbatova “The Children Rights in the Process of Cross Border Adoptions“, BA.
2013 Anna Tšilingarjan “Abielus ja vabaabielus olevate inimeste varasuhted“, MA.
2014 Liis Listra “Registreerimata kooselu mudeli sobivus ja vajalikkus Eesti õiguses“ BA.
2014 Kersti Oksvort-Kikas “Otsustusõiguse tähendus ühise hooldusõiguse teostamisel“ BA.
2014 Annika Salmiste “Pärija vastutus pärandaja võlgnevuse korral“ BA.
2014 Liina Luukas “Alaealisega töösuhte sõlmimiseks esitatavad nõuded ja nendest tulenev õiguslik problemaatika“ BA.
2014 Virge Millert “Töökohustuste täitmise kontrollimine austades töötaja ja tööandja põhiõigusi“ BA.
2014 Kerttu Kuul “DNA kohustuslikkus isaduse kindlaksmääramisel“ BA.
2014 Triin Kimer “Polügaamia õiguslikust tähendusest erinevates kultuuriruumides“ BA.
2014 Sofia Helena Ylonen “The Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoptions - its applicability in respect of the protection of the child” BA.
2014 Merily Mets “Põlvnemisest tulenev ülalpidamiskohustus ning selle menetlus kohtus“ MA.

## Elulookirjeldus

1. Isikuandmed

| | |
|---|---|
| Ees- ja perekonnanimi | Kristi Joamets |
| Sünniaeg ja -koht | 30.07.1971 Tallinn, Eesti |
| Kodakondsus | Eesti |
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2. Hariduskäik

| Õppeasutus (nimetus lõpetamise ajal) | Lõpetamise aeg | Haridus (eriala/kraad) |
|---|---|---|
| Tallinna Tehnikaülikool, Sotsiaalteaduskond | 2000 -… | Doktoriõppe programm avalikus halduses |
| Tallinna Tehnikaülikool, Sotsiaalteaduskond | 1998 - 1999 | MA avaliku halduse erialal |
| Tartu Ülikool, õigus-teaduskond | 1991 - 1996 | BA õigusteaduse erialal (vastab Bologna magistri tasemele) |
| Tallinna Kergetööstus-tehnikum | 1989-1991 | Keskeriharidus asjaajamise ja arhiivinduse erialal |
| Tallinna 37. Keskkool | 1978-1989 | Keskharidus |

3. Keelteoskus (alg-, kesk- või kõrgtase)

| Keel | Tase |
|---|---|
| Eesti | Kõrgtase (emakeel) |
| Inglise | Kesktase |
| Vene | Kesktase |
| Saksa | Algtase |
| Soome | Algtase |

4. Teenistuskäik

| Töötamise aeg | Tööandja nimetus | Ametikoht |
|---|---|---|
| 1994-1995 | Põllumajandusministeerium | Juriidiline osakond, spetsialist |
| 1995-2004 | Rahandusministeerium | juriidiline osakond, spetsialist/ õigusaktide talituse juhataja/ nõunik |
| 2006-2013 | Siseministeerium | Rahvastiku toimingute osakond, nõunik |
| 2003-2012 | Tallinna Tehnikaülikool | Majandusteaduskond, Majandusõiguse õppetool, lektor |
| 2012-… | Tallinna Tehnikaülikool | Sotsiaalteaduskond, Õiguse Instituut, Majandusõiguse õppetool, lektor |

4. Täiendusõpe

| Õppimise aeg | Täiendusõppe korraldaja nimetus |
|---|---|
| 2014 | TTÜ „Pedagoogiline psühholoogia ja sotsioloogia“ |
| 2014 | TLÜ „Üliõpilaste juhendamine arendus- ja tegevusruuringute läbiviimisel“ |
| 2014 | TLÜ „Eesti teaduskeel. Akadeemiline kirjutamine“ |
| 2014 | TLÜ „Akadeemiline inglise keel I: suuline eneseväljendus“ |
| 2014 | TLÜ „Akadeemiline inglise keel II: akadeemiline kirjutamine“ |
| 2013 | 13. Euroopa Perekonnaseisuametnike Kongress „Civil Status Registration - „The Path to Citizen Orientation and Harmonisation“ Bled, Sloveenia<br><br>Preismann Koolitus „Aktuaalset rahvusvahelise eraõiguse praktikas“ |
| 2013 | Tartu Ülikool „E-kursus – ideest teostuseni“ |
| 2012 | 12. Euroopa Perekonnaseisuametnike Kongress, „Viennese Blend“, Viin, Austria |
| 2012 | Tallinna Ülikool „Tõhustatud loeng“; „Üliõpilaste juhendamine ja tagasiside andmine“; Ettevõtlusmõtlemine õppejõu töös“;<br><br>ATAK „Haldusmenetlus“;<br><br>Tallinna Tehnikaülikool „Õppemeetodite sihipärane rakendamine“;<br><br>Tartu Ülikool „E-kursus – ideest teostuseni“ |
| 2011 | 11. Euroopa Perekonnaseisuametnike Kongress „Truth or Falsity in Register Office Practice. The Problem of Sham Marriages in Europe“, Zielona Gora, Poola |
| 2011 | Eesti Juristide Liit „Hagita menetlus- kas see on õigusemõistmine“;<br><br>Preismann Koolitus „Tööleping võlaõiguse süsteemis“; „Avaliku võimu roll piiratud teovõimega alaealise isiku kaitsel perekonnaõiguslikes suhetes“;<br><br>Tallinna Ülikool „Õppimine ja õpetamine ülikoolis“; „Räägi ja sära! Avalik esinemine ja meediatreening“; „Õppekava ja aineprogrammi koostamine“; „Sotsiaalne mõjutamine ja konflikti juhtimine õppesituatsioonis“; „Rühmatöö meetodid“; „Õppejõu mõjusus“ |
| 2009 | 9. Euroopa Perekonnaseisuametnike Kongress „European data transit - the future begins today“, Poprad, Slovakkia |

5. Teadustegevus, sh tunnustused ja juhendatud lõputööd

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