

THE STATUS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS IN ESTONIA

A SHADOW REPORT

Submitted to the Human Rights Committee by:
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June 2010

INTRODUCTION

The Republic of Estonia, a parliamentary republic and member of the European Union, acceded to the International Covenant on Civil and Political Rights on 21 October 1991 without reservations. Although the government has made important steps in implementing the Covenant, it has yet to fully succeed in protecting from discrimination on grounds of sexual orientation and gender identity. The third periodic report submitted by Estonia on 10 December 2008¹ highlights legislation prohibiting discrimination on grounds of sexual orientation, but the report does not discuss the broader problems of implementation and enforcement of the legislation. Furthermore it is evident from the report that training for police and state officials on issues related to sexual violence do not include violence against LGBT individuals.²

This report is a collaborative effort by Global Rights, the Estonian Human Rights Centre, ILGA Europe and Reimo Mets (Seksuaalvähemuste Kaitse Ühing).

Since 1992, laws outlawing sexual acts between consenting adults have not existed. Although this is an important step to end discrimination and stigmatization on grounds of sexual orientation and non-normative gender identities, it does not imply full respect of civil and politics rights for lesbian, gay, bisexual, and transgender (LGBT) individuals. Only in 2002 was the age of consent for same-sex sexual relations equalized with that of opposite-sex sexual relations. While legislation prohibiting discrimination in employment exists, the attitudes of society are more conservative than the legislation.³ Discrimination based on sexual orientation and gender identity is widespread.⁴ Based on the findings of *Young v. Australia* and *X. v. Colombia*, same-sex couples should be extended benefits and rights that the state recognizes by law for unmarried opposite-sex couples.

¹ CCPR/C/EST/3

² Consideration of Reports Submitted By States Parties under Article 40 Of The Covenant. Third Periodic Report, Estonia. 10 December 2008.

³ European Commission. Discrimination in the European Union: Perceptions, Experiences and Attitudes. Special Eurobarometer 296, July 2008.

⁴ In recent years there have been several studies and reports on discrimination and the situation of sexual and gender minorities specifically in Estonia. The European Commission against Racism and Intolerance published a report on Estonia in March 2009. The Foundation of Human Rights Centre published two reports on human rights in Estonia (in 2008 and in 2009-2010), which include chapters on discrimination and LGBT issues. Experts from the Foundation were involved in the compilation of The Thematic Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation (Estonia) for the EU Fundamental Rights Agency. The study was published in 2008. The ECRI's report is available to the public on ECRI's website (http://www.coe.int/t/dghl/monitoring/ecri/default_en.asp). All other reports are available on the Foundation of Human Rights Centre webpage (www.humanrights.ee).

EXECUTIVE SUMMARY

Individuals with sexual orientations or sexual and gender identities different from traditionally accepted roles face stigmatization and discrimination in Estonia. While laws in Estonia do not outlaw sexual relations of any form between consenting adults, unequal treatment under the law denies unmarried same-sex couples the same benefits recognized for unmarried opposite-sex couples. This was recently manifested in the denial of benefits to children of same-sex couples, which the Estonian government has yet to institutionally protect under the law.

Although the government has sought to meet its obligations under the ICCPR by enacting new legislation aimed to meet standards established by the Human Rights Committee, as well as by European Union legislation, such efforts are mostly ineffective due to widespread public stigmatization. The government has made little effort to fight this discrimination that undermines its efforts at meeting ICCPR obligations, and often members of the government contribute to the stigmatization or tolerate it.⁵

The government has not assisted lesbian, gay, bisexual and transgender groups in exercising their freedom of assembly, as guaranteed under the ICCPR. At a Pride celebration in Tallinn, participants were harassed and abused. Police forces did little to protect those involved or prevent the abuse. The following year, the municipal government in Tallinn opposed the use of certain areas of the city for a Pride celebration.⁶ The government shows an unwillingness to protect the right of freedom of assembly.

The rights of transgender people are violated by the government, and inefficient regulations and laws open up such individuals to increased discrimination in the private sector. Those who do not identify with their traditional gender role must undergo sex reassignment surgery—a lengthy, difficult process itself—in order to receive a legal status change.⁷ Only after the lengthy surgery process and receiving a legally recognized change of status can individuals begin documenting their gender and/or name change, leaving a time period of uncertainty where they face discrimination in the private sector.

⁵ <http://www.qjss.eu/et/eesti/oiguskantsler-keeldus-seksuaalvahemuste-kaebust-menetlemast.html> (accessed 19 May 2010).

⁶ R. Mets, 'Pöördumine seoses Tallinna Pride 2007 korraldamisega seondult', in *Eesti Päevaleht*, 02.07.2007, available at: <http://www.epl.ee/?arvamus=392837> (14.02.2007).

⁷ Communication 07.05.1999 no. 32. *Soovahetuse arstlike toimingute ühtsed nõuded*.

SUBSTANTIVE VIOLATIONS OF ICCPR

ARTICLE 2 AND ARTICLE 26 – PRINCIPLE OF NON DISCRIMINATION

Under Article 2(1) of the ICCPR, states are required to “undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property birth or other status.” In *Toonen v. Australia*, the notion of sex as enshrined in articles 2 and 26 of the Covenant has been interpreted to cover persons of a different sexual orientation. The state has not failed to adopt legislation, but gaps exist between adoption and implementation. Over the last four years, progress has been made, but sufficient progress is still lacking and the state has therefore failed to carry out its law and fell short of its obligations under the ICCPR.

In 1992, same-sex behaviors were decriminalized. While it has been nearly 18 years, discrimination on the grounds of sexual orientation and gender identity still exists. The principle of non discrimination in the Estonian legal system is based on §12 of the Constitution of the Republic of Estonia, which prohibits discrimination on the basis of nationality, race, color, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds. The Constitution also prohibits incitement to hatred in the same section. Furthermore, §123 of the Constitution explains: “If laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu (Parliament), the provisions of the international treaty shall apply.” These principles from the Constitution can be applied when there are no more specific laws governing a certain issue to protect a minority. Not only would sexual orientation and gender identity be considered an “other” status under §12, but given the findings of the Human Rights Committee on the case listed above and the Estonian Constitution’s weight of international treaties, sexual orientation in particular would be considered a protected status. As a member of the Council of Europe, Estonia is party to the European Convention on Human Rights, whose jurisprudence has extensively covered human rights violations on grounds of sexual orientation and gender identity. However, Protocol 12 of the European Convention on Human Rights regarding the expanded application of the principle of non discrimination under the Convention has not even been signed.

Discrimination in Benefits Recognition

The only case in court concerning sexual orientation discrimination is not yet publicly available. The Estonian Human Rights Centre pieced together facts and proceedings from different official and unofficial sources.⁸ According to their findings, a same-sex family with children living in Viimsi (local authority near Tallinn) was refused social benefits payable to resident-families of the municipality because they did not

⁸ E-mail communication with Marianne Meior, May 2010. On file with Global Rights.

correspond to the traditional opposite-sex couples. The case preceding the amendment was referred to the Commissioner, but since the subject matter is not within her competence (as it did not concern employment), she was forced to reject it.

The case was then referred to the Chancellor of Justice. The Chancellor found the initial refusal to provide social benefits to be void. The Viimsi municipality accepted the opinion but went on to amend the decree so as to exclude same-sex cohabiting partnerships and rejected the couple's second application as well. The applicants turned to the court. The local municipality lost in the first instance and appealed. As of June 15, the local municipality also lost the appeal and has no further plans to appeal. While this is a success for this specific family, because of the legal system in Estonia (judgments are only directly valid for the parties of the case) which will not automatically guarantee all unmarried same-sex couples the same rights, equal benefits and rights must be specifically guaranteed for Estonia to meet their obligations under articles 2 and 26 of the ICCPR. As the Viimsi case shows, entitlement to benefits currently differs for unmarried same-sex couples from unmarried opposite-sex couples. This specific case concerned the denial of benefits for the children of same-sex couples, discriminating against children of same-sex parents by not extending benefits given to children of unmarried opposite-sex couples. In *Young v. Australia*,⁹ the Human Rights Commission found that the lack of recognition to unmarried same-sex couples of specific pension benefits granted to unmarried opposite-sex couples violated article 26 of the ICCPR, allowing a different interpretation of the notion of family under the scope of article 23. This decision has been recently confirmed in *X v. Colombia*¹⁰, on a similar issue of pension benefits.

Social Stigmatization

A sexual health officer in Estonia, Peter Mardna, made a statement inferring that homosexuality was a disease.¹¹ Though a statement was released stating this was not the official position of the health authorities, it shows that individuals within the government are unwilling to give homosexuals equal treatment because of their discriminatory beliefs. A study conducted about tolerance in the workplace found that 66% of Estonians did not want to work with AIDS/HIV patients and 54% did not want to work with homosexuals.¹² These negative attitudes of the Estonian population regarding the workplace can create hostile or unfriendly work environments for those of a different sexual orientation and even make it more difficult for them to find work.

In June 2006, the Dutch ambassador, Hans Glaubitz, requested to be reassigned because his same-sex partner, a Cuban citizen, had faced repeated acts of discrimination.¹³ In a statement made by the Dutch Foreign Ministry, it was revealed

⁹ Communication no. 941/2000.

¹⁰ Communication no. 1361/2005.

¹¹ <http://www.qiss.eu/et/eesti/oiguskantsler-keeldus-seksuaalvahemuste-kaebust-menetlemast.html> (accessed 19 May 2010).

¹² <http://www.qiss.eu/et/eesti/uuring-54-eestlastest-ei-soovi-tootada-koos-homoseksuaalidega.html> (accessed 19 May 2010).

¹³ <http://www.guardian.co.uk/world/2006/jun/08/gayrights.nickpatonwalsh> (accessed 19 May 2010).

that there had been a recurring and increasing problem and that this was the sole reason the ambassador decided to leave. Estonian authorities only offered a statement saying they “regretted the incidents very much.”

A demonstration against the rights of sexual minorities was held in 2009. The demonstration “Marriage = Man + Woman” was organized by MTÜ Agape Eesti and the Union of Estonian Evangelical Students in Tartu, accompanied by web-based campaign (<http://www.perekond.ee/>). The main message of the demonstration was to protest against attempts by the Ministry of Justice to regulate the relationship between same-sex couples. The demonstration was attended by circa 200 persons and received both positive feedback and positive coverage in Estonian media. Additionally, the campaign received 5,754 signatures, which were forwarded to the Ministry of Justice. The demonstration and its positive public reception and media coverage show that sexual minorities still face a great deal of negative social stigmatization, making it difficult for the government to effectively implement the legislation it has in place and extend more protections and rights to sexual minorities. Such events, and their popular support, are evidence that discrimination does occur and there is need for the government to act to combat it.

While it has been shown that discrimination does exist, little has been reported to the government. According to the Eurobarometer survey conducted in 2008,¹⁴ 32% of the population believes that discrimination based on sexual orientation occurs regularly, an increase of seven percent from the 2006 Eurobarometer survey. Given that discrimination still exists and discriminatory practices occur, the mechanisms enacted by the current legislation to combat discrimination (which will be analyzed in the following section) are proven not to be effective because of negative social stigma and lack of recourse. This shows that the government is not doing enough to allow reporting mechanism to function.

Domestic Legislation on Discrimination

As a consequence of its membership to the European Union, Estonia had to implement all non discrimination provisions mandated by the Union, most notably the directives 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000/78/EC establishing a general framework for equal treatment in employment and occupation (that explicitly prohibits discrimination on grounds of sexual orientation in employment and occupation) and 2002/73 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.¹⁵ To this extent, Estonia adopted the Gender Equality Act (GEA) dealing with gender discrimination and the Equal Treatment Act (ETA) dealing with discrimination based on racial or ethnic origin, color, religion or belief, age, disability and sexual orientation.

¹⁴ European Commission. Discrimination in the European Union: Perceptions, Experiences and Attitudes. Special Eurobarometer 296, July 2008.

¹⁵ Notably, EU Directives 2000/43 and 2002/73.

Furthermore, the Penal Code prohibits discrimination on the grounds of sexual orientation (the most severe violation of the principle of equal treatment constitutes a crime under §152 as a violation of equality, §153 as discrimination based on genetic characteristics of the person and §151 as public incitement to hatred or violence on the basis of ethnic origin, race, colour, sex, language, origin, religion, sexual orientation, political opinion, financial or social status).¹⁶

The GEA, as a consequence of the implementation of directive 2002/73/EC and later substituted by the so-called recast directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, prohibits discrimination on grounds of gender in all areas of life, while the ETA covers discrimination based on religion or belief, age, disability and sexual orientation only in the area of employment (as required by Directive 2000/78/EC) and discrimination based on racial or ethnic origin and color is additionally covered in the area of services and social security (as required by Directive 2000/43/EC).

In the 1994 case *P. v. S. and Cornwall County Council*,¹⁷ a transsexual woman who had been dismissed while recovering for her gender reassignment surgery, claimed she was discriminated against on the ground of sex. The European Court of Justice determined that, in order to comply with directives on human rights, discrimination on the grounds of sex was not limited to discrimination based on the fact that the individual is of one sex or the other. They court ruled that Directive 76/207/EEC included gender reassignment. As a result of this case, gender reassignment was explicitly included in the scope of directive 2006/54/EC and, consequently, it must be interpreted as included in the scope of the GEA.

Discrimination on grounds of sexual orientation and/or gender identity is also prohibited in the Employment Contracts Act (which specifically states that employment employers shall ensure the protection of employees against discrimination, follow the principle of equal treatment and promote equality in accordance with the Equal Treatment Act and Gender Equality Act).¹⁸

The two acts have effectively created a hierarchy of protection depending on the ground of discrimination: GEA prohibits discrimination in all areas of life, while the ETA divides the protected areas depending on the basis of discrimination. Therefore, the ETA covers discrimination based on religion or belief, age, disability and sexual orientation only in the area of employment (as required by Directive 2000/78/EC) and discrimination based on racial or ethnic origin and color is additionally covered in the area of services and social security (as required by Directive 2000/43/EC).

¹⁶ Estonian Penal Code.

¹⁷ Case C-13-94.

¹⁸ Employment Contracts Act. Passed on 17 December 2008, Proclaimed by Resolution No. 421 of the President of the Republic of 12 January 2009.

The Chancellor of Justice has pointed out the fragmentation of anti-discrimination legislation, which, according to him, is problematic in light of the Constitution and relevant international treaties.¹⁹ The Chancellor of Justice did not refer to any specific treaty in this context. However, previously he had noted that the anti-discrimination acts must comply with all the relevant human rights treaties, including ICCPR (he also mentioned the European Convention on Human Rights; International Covenant on Economic, Social, and Cultural Rights; Covenant on the Rights of the Child and additionally to EU Fundamental Rights Charter). Although persons can in cases not covered by the ETA rely on the Constitution, it will be more complicated for the victim and the more favorable procedural rules provided for by the ETA (e.g. shared burden of proof) will not apply. It could therefore be argued that these laws have effectively created a hierarchy of discrimination based on different grounds.

Another problem in legislation is non-pecuniary damages. No cases could be found where non-pecuniary damages were awarded based on GEA or ETA, even though both acts include provisions providing for the possibility of non-pecuniary damages being awarded to victims. The European Commission against Racism and Intolerance (ECRI) stated in its latest report on Estonia that the provision for compensation for non-pecuniary damages in the ETA (which is identical to the one in the GEA) is 'vague and subjective' and does not amount to a sanction which is 'effective, proportionate and dissuasive'.²⁰ In any event, from the general practice of the courts, it is clear that Estonian courts are reluctant to award non-pecuniary damages. Labor dispute committees have never awarded damages to the victims of discrimination. As shown by the Eurobarometer surveys, intolerance of sexual minorities still prevails, eliminating the false idea that discrimination does not occur.²¹ This shows that the mechanisms in place for damages are not effective and that Estonia is failing to meet its obligation under ICCPR.

GEA created a new institution, Gender Equality Commissioner, which was reorganized and renamed to Gender Equality and Equal Treatment Commissioner with increased competence as a result of the grounds of discrimination covered by ETA. The Commissioner accepts applications from individuals and provides her opinion and recommendations on particular issues. Her opinions are not legally binding and there is no enforcement mechanism for them.

In addition to the Commissioner, the victim of discrimination has several other options. He/she could also turn to the Chancellor of Justice that accepts applications from individuals regarding possible infringements of fundamental rights and freedoms by a public authority and may also mediate disputes between private persons in discrimination issues if both the parties agree to the proceedings. Disputes in private

¹⁹ Chancellor of Justice, *Õiguskantsleri 2008. aasta tegevuse ülevaade*, Tallinn 2009, available at: <http://www.oiguskantsler.ee/index.php?weeklyID=153&menuID=38> (5 April 2010).

²⁰ European Commission against Racism and Intolerance, *ECRI Report on Estonia (fourth monitoring cycle)*, adopted on 15 December 2009, published on 2 March 2010, doc no CRI(2010)3, para 49.

²¹ European Commission. *Discrimination in the European Union: Perceptions, Experiences and Attitudes*. Special Eurobarometer 296, July 2008.

employment relations, including non-discrimination issues, are also in the competence of labor dispute committees. The decision of a committee can be appealed to a court.

It is clear from the short period of existence of the Commissioner that her activity and impact on society is not as great as one would hope, mostly due to the limited resources available. The ETA extended the Commissioner's mandate from gender equality to general equal treatment and, correspondingly, the need to increase the Commissioner's resources was planned (prognosis of Commissioner's budget was 4.4 million kroons (ca 281,330 EUR)).²² Instead the budget was significantly diminished as a result of the general cuts in State expenditure due to the economic recession. In 2008, the Commissioner's budget was 950,000 kroons (ca 59,375 EUR) whereas in 2009 the budget was 923,254 kroons (ca 59,007 EUR). With increased mandate and new duties accompanying it, her office employs only one more person in addition to the Commissioner herself. The budget deficit has forced the Commissioner to work on partial work load (75%) since May 2009. With such limited resources, she is clearly inhibited in fulfilling the potential foreseen for her by ETA.²³ The scarcity of resources influences the subject for two reasons. First, as shown, the appropriate authorities do not have enough resources to actually do effective work and, second, giving very little resources to these authorities demonstrates clearly the perspective of the government about the issues (lack of political will), which in itself also sends a message to the public (that these are unimportant issues). This inhibits the government from accurately addressing issues related to discrimination as it underfunds its own mechanisms, further diminishing its ability to meet its obligations under the ICCPR.

The mechanisms available to discrimination victims are substantially under-used as the statistics demonstrate:

- The Gender Equality and Equal Treatment Commissioner has received one application concerning allegations of discrimination based on sexual orientation but it did not concern employment relations. She has also received one application based on transsexuality but discrimination was not identified. On other grounds she receives a fair amount of complaints every year (e.g. in 2009 the Commissioner received 161 communications, however this includes not only complaints but also requests for information).
- The Chancellor of Justice has received six petitions concerning discrimination based on sexual orientation. There are no finalized mediation proceedings at all by the Chancellor of Justice; therefore the opportunity has remained merely theoretical.
- The Labour Inspectorate (responsible for the labor dispute committees) has no case-law in regard to sexual orientation. In regard to discrimination on other grounds, the committees have had only few cases (in 2006 there were nine cases, in 2007 only seven cases, in 2008 there were eight cases and in 2009 there were 18 case).

²² Government of Republic of Estonia, explanatory memorandum to Equal Treatment Act (Draft Act 67 III).

²³ Also referred to in ECRI Report, paras 62-63, 67.

As the statistics indicate, there is a great need for awareness-raising among the public as to the options and equality bodies available to those encountering discrimination as well as to increase the public's ability to recognize discrimination.²⁴ Given the conditions, there is a need to raise awareness among prosecutors, judges and lawyers, and they have not correctly been trained. This indicates their lack of preparation for complaints from individuals on discrimination.²⁵ This is apparently due to the lack of funds available; therefore, for example, the ECRI recommended that both the Chancellor and the Commissioner should be allocated sufficient funds and other resources to this end.²⁶

Conclusion

The government has not institutionalized necessary regulations guaranteeing benefits for unmarried same-sex couples and their children as those offered to unmarried opposite-sex couples and their children. While success was seen in the Viimsi case, the civil law system of Estonia does not allow this to be considered equalizing precedent for all same-sex couples, requiring action by the government.

Social stigmatization, as evidenced by the statements of Peter Mardna, the discrimination of the Dutch ambassador and his partner, the protests against LGBT rights, and recent polls regarding the attitudes towards LGBT people, foster discrimination on grounds of sexual orientation or gender identity. The broader problem of stigmatization undermines the government's efforts to battle discrimination. As seen from its insufficient funding of the Gender Equality and Equal Treatment Commissioner, its efforts are too little. The evidence regarding social stigmatization shows that there are problems, yet the government does not provide an efficient process of reporting for discriminatory acts against sexual minorities.

ARTICLES 6 - RIGHT TO LIFE - AND ARTICLE 7 - RIGHT TO FREEDOM FROM TORTURE AND OTHER CRUEL, INHUMAN, DEGRADING PUNISHMENT OR TREATMENT -

Incitement to hatred is prohibited and punishable under the Penal Code (§151). However, no cases were initiated during the period of 2006-2009 and prior to this period there was only one case concerning incitement to hatred, which based on nationality, religious and political belief.²⁷ This case was, however, heard when §151 of the Penal Code was worded differently and did not require proof that the particular activity constituted a danger to the life, health or property of a person. The elements of the crime according to the current version of §151 are more difficult to meet. Indeed the person's life, health or property must be in danger to trigger the provision's application, which is rarely the case in these situations. The ECRI pointed out in its report on

²⁴ ECRI Report, paras 50, 53-54, 61, 63-64.

²⁵ ECRI Report, paras 50, 53-54.

²⁶ ECRI Report, paras 50, 62-67.

²⁷ Supreme Court judgment of 10 April 2006 in case no 3-1-1-117-05.

Estonia that the Penal Code should punish incitement to hatred irrespective of the effect on the person or group of persons.²⁸

In 2008, lawyer Reimo Mets filed an appeal on the behalf of MTÜ Seksuaalvähemuste Kaitse Ühing (non-profit organization Association for the Protection of Sexual Minorities) on not commencing the regulation of the Chief Superintendent of the Kesklinna Police Department of Northern Police Prefecture No. 2316,08,005604.²⁹ On the website www.delfi.ee, the comment “Burn queers!” was added to the article “Five people arrested in gay parade in Latvia” published on 01.06.2008 by an individual. The police department claimed, and the court upheld, that this was not considered hate speech since there was no direct link to actions stated above, since no person had a physical attack on his or her life, health or property.

The latest report by the ECRI on Estonia was especially concerned with the lack of cases under criminal law and expressed an opinion that it can be explained by the lack of training of members of the police, prosecutors and judges in criminal law concerning discrimination and incitement to hatred.³⁰ This is a significant issue because whether a case reaches the court or not depends solely on police officers and prosecutors. This is especially important where the case concerns law enforcement officials. The ECRI was critical in regard to the system of handling complaints against police, which are primarily dealt with internally with no external independent monitoring. There is no transparency as to what happens to the complaints and why some complaints are discarded. According to the ECRI, such training would ensure the ability of officials to recognize violations committed by individuals and avoid such conduct themselves. Admittedly, complaints could also be brought to the Chancellor of Justice.

The Ministry of Justice has actually stated that a draft proposal is under preparation to be submitted for consultation in autumn 2010 with the purpose of making the application of the hate speech provisions in the Penal Code more effective as well as supplementing the regulation of hate crimes in general.

ARTICLE 10 – RIGHTS OF PRISONERS

Although there are no statistics available as to the treatment of sexual minorities in detention facilities, the Estonian Human Rights Centre has received two complaints from prisons,³¹ one from a transsexual and one from a gay who complained about mistreatment by prison officials. Because this is outside the scope of Human Rights Centre, the complaints were not investigated by the organization. The foundation unfortunately does not have the permission to disclose details.

ARTICLE 12 – RIGHT TO LIBERTY OF MOVEMENT

²⁸ ECRI Report, para 35.

²⁹ Harju County Court. 21 August 2008, 4-08-6789.

³⁰ ECRI Report, paras 97-98, 171-176.

³¹ E-mail communication with Marianne Meiorg, May 2010. On file with Global Rights.

In 2009, the Family Law Act of Estonia was changed to state that, “any marriage contracted between persons of the same sex is invalid.”³² Estonia, as a member of the European Union, guarantees that citizens of other EU member states have rights to freedom of movement within the entire European Union, including Estonia.³³ According to the Family Law Act, therefore, rights and benefits recognized to same-sex couples legally married into another EU country would not be granted in Estonia. This effectively limits the right to freedom of movement of same-sex married couples by jeopardizing rights that they acquired in another EU country. Being the right to freedom of movement for European citizen within the European Union a founding principle and fundamental right accepted by EU member states by virtue of their accession to the European Union, the Family Law Act creates an unclear status for married same-sex couples abroad having to move to Estonia.

ARTICLE 13 – EXPULSION OF ALIENS

According to the newly founded Police and Border Guard Board (which started its work on 1 January 2010), there has been only one application, which was substantiated on the alleged discrimination based on sexual orientation in the origin state.³⁴ This application was received in 2009. The application was rejected because, based on international law, another EU Member State had jurisdiction to consider the application.³⁵

ARTICLES 16 - RECOGNITION AS PERSON BEFORE THE LAW - and ARTICLE 17 - FREEDOM FROM ARBITRARY INTERFERENCE WITH PRIVACY, FAMILY, HOME-

Regulation of 07.05.1999 no. 32 by the Ministry of Social Affairs *Soovahetuse arstlike toimingute ühtsed nõuded* [Common requirements to medical acts of sex change]³⁶ provides the basis for medical and legal acts related to gender/sex change. This provision does provide a general basis for the regulation of gender reassignment and change of name.³⁷

According to the regulation of 07.05.1999 no. 32, the precondition for deciding a person’s gender and allowing medical acts necessary for gender/sex change is a decision by the medical expert commission appointed by the Minister of Social Affairs. The applicant must submit an application to the Ministry of Social Affairs requesting a decision by the expert commission. He/she must present the following evidence:

³² §10 Family Law Act. Passed by Parliament on 18 November 2009. Declared by President Estonia 3 December 2009, decision nr 561.

³³ Art. 8a, Treaty on European Union; see also Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

³⁴ Politsei- ja Piirivalveamet, E-mail responding to request for information, 11.01.2010.

³⁵ OJ L 050, 25.02.2003, pp 1–10

³⁶ Estonia/Riigikantselei (27.05.1999) *Riigi Teataja* L, 87, 1087.

³⁷ Telephone conversation with Ms Helen Trelin, Advisor, Department of Health, Ministry of Social Affairs (07.04.2008).

- certification of transsexual identity during at least two years prior to the application;
- a psychiatrist's decision that excludes the possibility that the wish to undergo gender/sex change is caused by psychiatric disorder;
- compatibility of chromosomal and gonadic gender/sex certified by genetic research.

The decision of the medical experts commission governs the decision of the Ministry of Social Affairs, which will validate medical acts of gender reassignment surgery. At least two years must pass from the beginning of the medical treatment before the experts commission will issue a decision on the gender reassignment. This will be a basis for subsequent legal changes necessary for a person to wholly acquire new gender.

This lengthy time period for gender reassignment creates a difficult window where individuals in the process of gender reassignment cannot easily obtain identifying documents because of the incongruence of gender identity and the delay of the state in recognizing the new gender of an individual. All subsequent changes in name and personal identification are dependent on the recognition of the gender reassignment surgery.³⁸ During this time, a transgender person will have documents that show a gender and name that do not reflect a person's true gender. The time required to receive approval for the changes, even if surgery has been performed, could also be lengthy. For many, the surgery process can spread out over time, providing an intermediary phase where one already takes on the appearance of a different gender without having completed the necessary surgeries.

Furthermore, the current regulation on gender reassignment forces transgender individuals to undergo genital surgery as a requirement for change of legal sex and name; such requirement exposes individuals who do not want to or cannot undergo surgery to risk of discrimination and invasion of their private life on a daily basis and indefinitely.

In its case law, the European Court of Human Rights has established that transsexual and transgender persons are entitled to protection from arbitrary interference with privacy with reference to article 8 of the European Convention on Human Rights, whose content reflects article 17 of the ICCPR.

In *Goodwin v. UK* (2002), the European Court of Human Rights determined that the UK government failed to protect Article 8 (right to privacy) and Article 12 (right to marry) of the ICCPR by denying a post-operative transsexual's right to be recognized as her new gender which affected her right to formally obtain the status as a woman with her own separate and distinct identity for National Insurance purposes, as well as her fundamental right to marry a person of the opposite sex enshrined under both Article 12 ECHR and Article 23 ICCPR. According to the finding, "the lack of legal recognition of the change of gender of a post-operative transsexual lies at the heart of the applicant's

³⁸ Estonia/Riigikantselei (2005) *Riigi Teataja* I, 1, 1.

complaints under Article 14 of the Convention.”³⁹ The Court also used Article 8 to underline the importance and relevance to the case by showing that “gender identity is one of the most intimate areas of a person’s private life”.⁴⁰

Serious interference with private life also exist for post-operative transsexuals: institutions do not always accept the change of gender, and transsexuals are legally considered “new individuals.” Consequentially are often victims of discrimination and have to disclose repeatedly information about their personal history.

In many cases post-operative transsexual individuals are forced to submit documents about gender reassignment in order to prove continuity of their legal personhood: this constantly interferes with their right to privacy as guaranteed by article 17 of the ICCPR and article 8 of the ECHR and increase the risks for discrimination to which transsexual people are already subject.

Transgender individuals face extraordinary challenges within Estonia.⁴¹ Only one case regarding discrimination on grounds of gender identity has been reported in Estonia; the case, however, was discontinued for reasons that were deemed confidential.⁴² There has not been any opportunity to develop an approach to this ground of discrimination. This leads to discrimination against transgender individuals, and Estonia is therefore not living up to its obligations under article 26 of the ICCPR as well.

According to an unofficial report from the Commissioner on Gender Equality and Equal Treatment,⁴³ a single application was submitted to the Gender Equality Commissioner within the Ministry of Social Affairs claiming discrimination in the application process for employment because of the applicant’s gender identity. The complaint has not been processed and it is unclear whether it will be, given the Gender Equality Commissioner would be forming the official opinion that gender identity has to do with gender and not with sexual orientation. To date the Commissioner has scrupulously followed her mandate and has declined all applications and requests for information that do not directly pertain to gender issues.⁴⁴ Although the European Court of Justice has made clear that gender reassignment and gender identity more in general fall under legal regulation of equal treatment between men and women, Estonia has yet to embrace the findings. Until the application is processed, the issue on discrimination based on gender identity is unsettled and the applicant has not received any assistance from the

³⁹ *Goodwin v United Kingdom*, 588 Eur. Ct. H.R. available at <http://www.worldlii.org/eu/cases/ECHR/2002/588.html>

⁴⁰ *Van Kuck v. Germany*, 37 Eur. Ct. H.R. Rep. at 73 (2003) available at <http://www.worldlii.org/eu/cases/ECHR/2003/285.html>

⁴¹ The information presented in this section is taken from the *Thematic Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation (Estonia)*, European Union Agency for Fundamental Rights, February 2008.

⁴² Confidential according to § 358 of the Chancellor of Justice Act (25.02.1999).

⁴³ E-mail communication with Marianne Meiorg, 16 June 2010. On file with Global Rights.

⁴⁴ Estonia/*Soolise võrdõiguslikkuse volinik* [Gender Equality Commissioner] (23.01.2008) *Temaatilise õiguslik uurimus homofoobia ja diskrimineerimise kohta seksuaalse sättumuse alusel*.

government, showing an inefficient process for handling complaints for transgender individuals.

ARTICLE 21 – RIGHT TO FREEDOM OF ASSEMBLY

The right to freedom of assembly with reference to sexual minorities communities was extensively discussed in the FRA Thematic Legal Study on Homophobia in Estonia (published in 2008), which was compiled by the experts of the Estonian Human Rights Centre. The following is an excerpt from the study:

In general, freedom of assembly is guaranteed according to § 47 of the Constitution. More specific regulation is provided by the Avaliku koosoleku seadus [Public Assembly Act], which sets out possible restrictions for freedom of assembly. There are no rules which would discriminate on the grounds of sexual orientation in the Act, therefore, any discrimination that may occur is a question of the application and interpretation, rather than the text, of the law.

There has been constant public debate surrounding the yearly LGBT Pride parade that has taken place in Tallinn since 2004. During the 2006 parade counter-demonstrators attacked parade participants the police were accused of not providing sufficient protection. This also prompted Amnesty International to issue a statement calling for better protection for the freedom of assembly.⁴⁵ In 2007 parade organizers issued a public statement that parade organization ‘has turned out to be more complicated than in previous years’ and accused the public authorities of a lack of cooperation.⁴⁶ The organizers also submitted a complaint to the Chancellor of Justice’s office. The Chancellor concluded that although the requirement by the Northern Police Prefecture to parade organizers to use a private security firm to guarantee participants’ safety is in itself legal, the refusal of the organizers to fulfill the requirement cannot be a ground for refusing to allow the parade to take place.⁴⁷ It also established that the Northern Police Prefecture had not followed standards of good governance by not fully cooperating with the parade organizers, as well as not correctly responding to their initial e-mails.

In conclusion, as pointed out by the Chancellor of Justice in his analysis of the Police Prefecture’s actions, although the authorities seem to be well aware of their negative obligations not to disturb the parade, they are not so much aware of the positive obligation to provide an environment where

⁴⁵ Amnesty International, Estonia: The right to freedom of peaceful assembly must be protected, 15.08.2006, available at: <http://www.amnesty.org/en/library/info/EUR51/001/2006> (14.02.2008).

⁴⁶ R. Mets, ‘Pöördumine seoses Tallinna Pride 2007 korraldamisega seonduvalt’, in Eesti Päevaleht, 02.07.2007, available at: <http://www.epl.ee/?arvamus=392837> (14.02.2007).

⁴⁷ Õiguskantsleri kantselei, ‘Soovitus õiguspärasuse ja hea halduse tava järgimiseks’, letter to politseiprefekt Raivo Kütt, 09.2007, p. 13.

freedom of assembly and related rights can be enjoyed (italics added) (for example, by protecting protesters from counter-protesters).

As referenced in the excerpt above, in 2006, the city of Tallinn permitted the third gay and lesbian Pride parade to take place. At the event, several young “skinheads” threw rocks and sticks and assaulted participants. Organizers of the event blamed the police for their lack of protection of the event.⁴⁸

The following year, Pride organizers sought permission from the government to hold the annual Pride celebration. Officials initially denied their 2007 request, stating that their presence infringed on the constitutional rights of all others who wished to use the small streets during that time. Organizers protested their refusal to allow the event to take place in the city’s Old Town, and the city finally agreed to permit the event to take place, on the condition that the Pride event organizers hire security guards to keep the participants from infringing on the rights of others (the event organizers insisted that the security guards were present to protect participants from a recurrence of the previous year’s attacks).⁴⁹

In lobbying officials to gain permission, organizers called on the right to freedom of assembly guaranteed in the Estonian Constitution.⁵⁰ As had happened in the years before, the 2007 Pride celebration went without incident.⁵¹

ARTICLE 23 – FAMILY LIFE

There is only one court case concerning the unfair treatment of same-sex couples. The case was summarized above under the section on article 2 and article 26 (non-discrimination).

With regard to family law there has been lots of controversial discussion but very little development, at least not positive development. The new Family Law Act entered into force on 1 July 2010. It states expressly states that any marriage contracted between persons of the same sex is invalid (§10).

The discussion over the possible future Partnership Law was ongoing throughout 2009. The discussion developed due to the publication of a study from the Ministry of Justice over the legal status and situation of non-marital cohabitations.⁵² The study concentrated on non-marital cohabitations in general, analyzed the problems arising from that and different solutions to them. The study does not reach a specific conclusion

⁴⁸ http://www.ilga-europe.org/europe/guide/country_by_country/estonia/tallinn_pride_2006/third_gay_pride_march_in_tallinn_bashed_by_young_skinheads

⁴⁹ <http://www.pinknews.co.uk/news/articles/2005-5058.html/>

⁵⁰ <http://www.ukgaynews.org.uk/Archive/07/July/1401.htm>

⁵¹ <http://www.euronews.net/2007/08/11/estonia-gay-pride-march-passes-without-incident/>

⁵² Available in Estonian only:

http://www.just.ee/orb.aw/class=file/action=preview/id=44568/Partnerlussuhted_anal%FC%FCs_09.07.2009.pdf (25 May 2010).

but does bring out the benefits of registered partnerships. The Ministry is yet to announce its future plans in regard to same-sex partnerships.

ARTICLE 24 – SPECIAL PROTECTION OF CHILDREN

The only court case regarding sexual minorities and children, summarized above under the section on article 2 and article 26 (non-discrimination), concerned a family with children. Social benefits that the local municipality refused to give benefits payable per child to the family. This case shows that the children of same-sex partners are not guaranteed the same benefits that children of unmarried opposite-sex couples would be guaranteed. Although the appeal upheld the ruling allowing these children specific rights, other instances of similar situations could place children of same-sex couples in jeopardy. By not institutionalizing protections for such children, Estonia is failing to meet its obligations under article 24 of the ICCPR.

RECOMMENDATIONS

The Estonian Government should:

1. Implement efforts to reduce stigmatization based on sexual orientation and gender identity.
2. Improve reporting mechanisms for discrimination against individuals based on their sexual orientation and gender identity.
3. Train judges and prosecutors have not been specifically trained on the ETA.
4. Enact laws guaranteeing that all benefits and protections guaranteed to unmarried opposite-sex couples and their dependents are guaranteed to same-sex couples and their dependents.
5. Fund the Chancellor of Justice and the Commissioner on Gender Equality and Equal Treatment to complete the previous recommendation, as well as improve internal mechanisms for handling reported discrimination.
6. Accept Ministry of Justice draft proposal making the application of the hate speech provisions in the Penal Code more effective as well as supplementing the regulation of hate crimes in general.
7. Enact policies that allow for transgender individuals to change their legal documentation to represent their identity (name and recorded gender) without humiliating or lengthy procedures.
8. Enact policies to allow those unable or unwilling to undergo operations to change sex to obtain documentation that represents their gender identity.

PROPOSED QUESTIONS FOR THE GOVERNMENT DELEGATION

1. How does the government plan to better protect the freedom of assembly and protect gatherings to avoid events like those of the Pride Parade in 2006?
2. How does the government seek to change the intense social stigmatization that prevents anti-discrimination mechanisms from being effective?
3. If the Viimsi ruling is upheld, how does the government plan to institutionalize the guarantee of equal benefits and rights to unmarried same-sex couples and their dependents as those guaranteed to unmarried opposite sex couples and their dependents?
4. How will the government better seek to protect against discrimination against gender identity, which is part protected on anti-discrimination directives regarding sex?