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The challenge of Populist Radical Right Parties to Europeanization – the cases of Estonia and Latvia, 2018-2021

Wyzwanie, jakie stawiają populistyczne partie radykalnej prawicy dla europeizacji: Przypadki Estonii i Łotwy w latach 2018-2021

Abstract: Over the last two decades, family law has undergone changes in Western Europe, widening the definition of marriage to include same-sex couples. In addition, some East European countries offer a legal recognition of civil unions of same-sex couples, while others do not offer any legal recognition at all. This diversity in family law has been recently challenged by developments at the European level. It is argued here that this constitutes an adaptational pressure on those European Union (EU) member states that do not offer any or offer only formal recognition of same-sex couples. We examine two cases when member states faced such an adaptational pressure, namely Estonia and Latvia, focusing on the interplay of two types of factors. First is that of formal institutions which, due to their constitutional role or their expertise in the EU law, may act as facilitators of legal changes. On the other hand, there are also political actors which have tried to constrain such an adaptation. We examine here especially the role of two political parties which have made a considerable effort to oppose the change in the two countries. It is argued here that the ideological orientation of these parties explains, at least partly, their opposition to the ongoing Europeanization of family law. The paper concludes with a discussion of the main findings and their implications.
Keywords: family law; same-sex unions; Radical Right; courts; European Union

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Streszczenie: W ciągu ostatnich dwóch dekad prawo rodzinne w Europie Zachodniej uległo zmianom, poszerzając definicję małżeństwa o pary osób tej samej płci. Ponadto niektóre państwa Europy Wschodniej oferują prawne uznanie związków cywilnych par osób tej samej płci, podczas gdy inne w ogóle nie oferują żadnego prawnego uznania. Ta różnorodność w prawie rodzinnym została ostatnio zakwestionowana przez zmiany na poziomie europejskim. W pracy podjęto argumentację, że stanowi to presję adaptacyjną na te państwa członkowskie Unii Europejskiej (UE), które nie oferują żadnego uznania lub oferują jedynie formalne uznanie par osób tej samej płci. Badamy dwa przypadki, w których państwa członkowskie stanęły w obliczu takiej presji adaptacyjnej, a mianowicie Estonię i Łotwę, skupiając się na wzajemnym oddziaływaniu dwóch rodzajów czynników. Pierwszym z nich są instytucje formalne, które ze względu na swoją konstytucyjną rolę lub znawstwo prawa unijnego mogą pełnić funkcję czynnika sprzyjającego dla zmian prawnych. Z drugiej strony są także gracze polityczni, którzy próbowali ograniczyć taką adaptację. Przyglądamy się w tym opracowaniu zwłaszcza roli dwóch partii politycznych, które podjęły znaczny wysiłek, by przeciwstawić się zmianom w obu krajach. W pracy stwierdza się, że ideologiczna orientacja tych partii przynajmniej częściowo wyjaśnia ich sprzeciw wobec postępującej europeizacji prawa rodzinnego. Opracowanie kończy się omówieniem głównych ustaleń i ich implikacji.
Słowa kluczowe: prawo rodzinne; związki osób tej samej płci; radykalna prawica; sądy; Unia Europejska

Introduction

Over the last two decades, family law has undergone changes in Western Europe, widening the definition of marriage to include same-sex couples. In addition, some East European countries, for instance, Croatia, the Czech Republic, Estonia, Hungary, and Slovenia, and one Western European country, Italy, offer a certain legal recognition of civil unions of same-sex couples (known as either "civil cohabitation" or "registered partnership"). Still, other countries, Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia, do not offer any legal recognition of same-sex couples. In fact, seven Eastern European countries – Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, and Slovakia – have adopted constitutional norms defining the institution of marriage as being a union of a man and a woman.

This diversity in family law has been recently challenged at the level of the European Union (EU). Although family law does not fall under the EU competences, the EU may choose to legislate in this area if there are cross-border implications. For instance, the European Commission (EC) may propose a legislation if it concludes that certain aspects of family law affect freedom of movement, one of the fundamental freedoms of the EU, ensuring proper functioning of the internal market.

In 2018, the Court of Justice of the EU (CJEU) ruled on the rights of same-sex couples residing in member states that have no legal recognition of same-sex couples. This ruling in the case C-673/16 (known as "Coman and Others v General Inspectorate for Immigration and Ministry of the Interior", or simply, the Coman case) implies that even the member states that have constitutional bans of same-sex marriage must treat same-sex couples, married in other member states, identically to the opposite-sex couples[1]. In addition, at the end of 2020, the EC presented its strategy for lesbian, gay, bisexual, trans, non-binary, intersex, and queer equality, which specifically included protection of same-sex families as one of the EC's priorities.

This article examines how the above-mentioned developments in European family law have influenced member states in Eastern Europe, specifically focusing on two Baltic countries, namely Estonia and Latvia. We argue that the recent developments in European family law, especially, the recognition of same-sex couples, constitute an adaptational pressure in those EU countries which offer no legal recognition of same-sex couples (for instance, Latvia) and which offer relatively little or only formal legal recognition of same-sex couples (for instance, Estonia). Furthermore, we argue that the countries which are faced with such a pressure are confronted with domestic pressures, too. Borrowing from the Europeanization literature, we introduce concepts of "facilitating institutions" and "veto players". The conceptual framework allows us to analyse the interactions between political actors with opposing agendas, namely, the national courts applying EU case law act as facilitators of such a change, and some parliamentary political parties acting as a constraining factor.

The topic is both socially and scientifically relevant. First, the legal challenges by the Estonian Conservative People's Party (EKRE) to the legal recognition of same-sex couples raised questions about Estonia's international reputation and about the modern and liberal image that Estonia has tried to project internationally since the country regained its independence in the early 1990s. Second, in Latvia and Estonia

1 For a legal analysis and discussion of implications of the ruling, see D.V. Kochenov, U. Belavusau, *After the celebration: Marriage equality in EU Law post-Coman in eight questions and some further thoughts*, "Maastricht Journal of European and Comparative Law" 2020, vol. 27, no. 5, pp. 549-572.

populist radical right parties (PRRPs) urged their coalition partners to adopt laws setting the countries against the emerging European pattern and the EC's political commitment to combat discrimination against same-sex couples. Although not many Latvian and Estonian political parties favour legal recognition of same-sex couples, the PRRPs were especially vocal in their opposition, and their proposals for constitutional amendments may potentially have consequences for the EU's internal cohesion and the EU foreign policy. The EU's foreign policy ambition to project a self-image of a Normative Power, exporting human rights and tolerance towards lesbian, gay, bisexual and transgender (LGBT) population, has been scrutinized before[2]. As the resistance to institutionalization of LGBT rights has increased in some Central and Eastern European countries (CEECs), it has become a source of an internal identity crisis, too[3]. Finally, this article contributes to the growing literature on the PRRPs in the Eastern Europe by empirically focusing on the relatively under-researched topic of their position on family law.

The structure of the article is as follows. In the next section, we offer a short overview of the scientific literature on how the EU impacts the domestic rules concerning legal recognition of same-sex relationships in the member states. This will be followed by an outline of the article's theoretical framework, introducing the main theoretical concepts – Europeanization, adaptational pressures, domestic response, facilitating formal institutions, and veto players. PRRPs as de facto veto players will be conceptualized in the succeeding section. This will be followed by a short description of the adaptational pressures consisting of the emerging European family law regime in which the CJEU's recent ruling plays a prominent role. In the following section, two case studies concerning how Estonia and Latvia have dealt with the adaptational pressures since 2018 will be presented. In the remaining part of the paper, we shall discuss the main findings of the two case studies and will contextualize the findings in light of the ex-

2 M. Mos, *Conflicted Normative Power Europe: The European Union and Sexual Minority Rights*, "Journal of Contemporary European Research" 2013, vol. 9, no. 1, pp. 78-93.

3 K. Slootmaeckers, *Constructing European Union Identity through LGBT Equality Promotion: Crises and Shifting Othering Processes in the European Union Enlargement*, "Political Studies Review" 2020, vol. 18, no. 3, pp. 346-361.

isting literature and point out the main risks and opportunities arising from a possible clash between the national law and the European law.

1. Literature review

The scientific literature on LGBT rights in the EU has become more visible in the political science research over time, but there are still few studies that have focused on how the EU impacts the domestic rules concerning legal recognition of same-sex relationships in the member states. On the one hand, there are studies that explore the role of transnational human rights advocacy groups in impacting the EU agenda and legislation[4], as well as how the Europeanization processes empower the advocacy groups in lobbying domestic institutions, even when faced with hostile reactions within the domestic political arena[5]. In contrast, one study argued that the EU has had little, if any, effect so far on the growth of LGBT rights groups, for instance, in Poland, where the social movement grew in strength as a reaction to the domestic political discourse against the LGBT population[6]. Still another, comparative case study argued that the EU's influence has been mostly in the form of informal social influence, exerted by LGBT rights and the EU institutions, specifically through norm diffusion and elite socialization. It was argued that such an influence has been more effective in pushing for the domestic legal regulation in Germany and Austria than the EU's "hard" legal provisions[7].

On the other hand, some research has pointed out that the push for recognition of LGBT rights has mobilized a political opposition

4 See, for instance, M. Mos, *Of Gay Rights and Christmas Ornaments: The Political History of Sexual Orientation Non-discrimination in the Treaty of Amsterdam*, "JCMS: Journal of Common Market Studies" 2014, vol. 52, no. 3, pp. 632-649; J. Swiebel, *Lesbian, gay, bisexual and transgender human rights: the search for an international strategy*, "Contemporary Politics" 2009, vol. 15, no. 1, pp. 19-35.

5 P.M. Ayoub, *Cooperative transnationalism in contemporary Europe: Europeanization and political opportunities for LGBT mobilization in the European Union*, "European Political Science Review" 2013, vol. 5, no. 2, pp. 279-310.

6 C. O'Dwyer, *Does the EU help or hinder gay-rights movements in post-communist Europe? The case of Poland*, "East European Politics" 2012, vol. 28, no. 4, pp. 332-352.

7 K. Kollman, *European institutions, transnational networks and national same-sex unions policy: when soft law hits harder*, "Contemporary Politics" 2009, vol. 15, no. 1, pp. 37-53. For a similar argument on transnational human rights groups as norm entrepreneurs, see P.M. Ayoub, *Cooperative transnationalism*…

to such a norm advocacy, for instance, in Poland and Slovenia[8]. It has been specifically argued that, in Poland, the Catholic Church succeeded in framing LGBT rights as threatening the national values[9], while its counterpart in Slovenia did not succeed in framing the issue due to its different position within the society[10]. In Slovakia, the constitutional ban on same-sex marriage was adopted as an "anticipatory" or "precautionary" measure, in case the movement advocating for same-sex marriage would grow sufficiently strong to amend the legislation[11].

2. Theoretical framework – Europeanization, supporting institutions, and veto players

Despite the scepticism of the EU's capability to influence its member states and of the Europeanization literature's explanation of the dynamics in such a domestically controversial issue[12], we believe that the Europeanization literature is the most appropriate strand of political science literature from which to begin analysis of the cases which we are to examine. First, as has been pointed out, the usefulness of the concept of "Europeanization" is found in its "ability to raise interesting questions"[13]. In this particular context, we are interested in domestic processes which cannot always be neatly isolated from the European level. Second, the Europeanization literature, especially, the strand that was developed to analyse the EU's impact on its member states (not

8 P.M. Ayoub, *With Arms Wide Shut: Threat Perception, Norm Reception, and Mobilized Resistance to LGBT Rights*, "Journal of Human Rights" 2014, vol. 13, no. 3, pp. 337-362.

9 This finding on the crucial role of the Catholic Church resonates with the findings of the research on "morality policy", exploring the changing governance of the socially controversial issue areas – life and death issues (abortion, death penalty, etc.) and sexual behaviour (same-sex marriage, prostitution, pornography, etc.). See, for instance, S. Calkin, M.E. Kaminska, *Persistence and change in morality policy: the role of the Catholic Church in the politics of abortion in Ireland and Poland*, "Feminist Review" 2020, no. 124, pp. 86-102; C. Adam, C. Knill, E.T. Budde, *How morality politics determine morality policy output – partisan effects on morality policy change*, "Journal of European Public Policy" 2020, vol. 27, no. 7, pp. 1015-1033.

10 P.M. Ayoub, op. cit.

11 M. Mos, *The anticipatory politics of homophobia: explaining constitutional bans on same-sex marriage in post-communist Europe*, "East European Politics" 2020, vol. 36, no. 3, pp. 395-416.

12 See, for instance, C. O'Dwyer, op. cit.; C. O'Dwyer, *From Conditionality to Persuasion? Europeanization and the Rights of Sexual Minorities in Post-Accession Poland*, "Journal of European Integration" 2010, vol. 32, no. 3, pp. 229-247.

13 K. Moumoutzis, *Still Fashionable Yet Useless? Addressing Problems with Research on the Europeanization of Foreign Policy*, "JCMS: Journal of Common Markets Studies" 2011, vol. 49, no. 3, p. 609.

candidate states or "new" member states) offers a clear set of variables that can be especially useful in analysing the issue areas which are domestically controversial and in which a political struggle revolving around the "European norms" can be expected. We recognize that it is by no means a viable task to summarize all the theoretical developments within the Europeanization literature here, not even within the subfield of "Europeanization East", which focuses particularly on the adaptations of the CEECs to the EU legal order and policies in the pre-accession period and in its immediate aftermath[14]. We shall therefore consider "Europeanization" as a top-down process through which the EU impacts the member states[15], specifically, as a process through which the member states adjust to the EU rules[16].

The Europeanization literature points out that the EU rules (directives, policies, or court decisions) may constitute an adaptational pressure. If there is a wide discrepancy between the EU rules and member states' national legislation, it is likely that the member states will be under greater pressure to adapt to the EU than those member states whose legislation already complies with the EU rules or whose legislation needs only minor changes for full compliance. The greater the adaptational pressure, the higher is the likelihood that the adaptational pressures will trigger a domestic response. The domestic response, understood here broadly as a domestic adaptational process, may not necessarily be linear and straightforward. After all, adoption and implementation of a new legislation takes place in a wider domestic political system, and the adjustment to the EU rules is consequently mediated by various domestic political factors.

14 For an overview, see U. Sedelmeier, *Europeanisation in new member and candidate states*, "Living Reviews in European Governance" 2011, vol. 6, no. 1, pp. 1-52; U. Sedelmeier, *Europeanization* [in:] *The Oxford Handbook of the European Union*, E. Jones, A. Menon, S. Weatherhill (eds.), Oxford University Press, 2012, pp. 825-839; F. Schimmelfennig, U. Sedelmeier, *The Europeanization of Eastern Europe: the external incentives model revisited*, "Journal of European Public Policy" 2020, vol. 27, no. 6, pp. 814-833.

15 U. Sedelmeier, *Europeanization*…; T.A. Börzel, T. Risse, *When Europe Hits Home: Europeanization and Domestic Change*, "European Integration online Papers" 2000, vol. 4, no. 15, http://eiop.or.at/eiop/texte/2000-015a.htm [12.06.2021].

16 F. Schimmelfennig, U. Sedelmeier, *Introduction: Conceptualizing the Europeanization of Central and Eastern Europe* [in:] *The Europeanization of Central and Eastern Europe*, F. Schimmelfennig, U. Sedelmeier (eds.), Cornell University Press, 2005, p. 7.

Drawing on Rational Choice Institutionalist assumptions[17], some Europeanization theorists have pointed to the important role played by various formal institutions and individual or collective actors that can either facilitate or constrain the adaptation to the EU rules. Some formal institutions have accumulated a wide expertise in the EU law or are tasked with implementing the EU rules, for instance, labour inspections (which are tasked with implementing the EU labour standards) or the courts (which are tasked with interpreting and applying the EU rules). By virtue of their mandate or due to their high expertise, these supportive formal institutions can act as facilitators of domestic change guiding and supporting the national adjustment to the adaptational pressures stemming from the EU level[18].

On the other hand, there may also be political actors perceiving the domestic adaptation to the EU rules as incurring too high costs on them. This may stem from, for instance, an ideological opposition to the proposed legislation that would ensure compliance with the EU rules, or the actors' strategic calculations that their active or passive support to such a legislation may erode their future electoral support. Moreover, the political actors may be placed within – or they may have a direct access to – influential formal political institutions (e.g., parliament, government, the presidency, etc.). The higher the perceived adaptational costs are, the higher is the likelihood that these actors may want to stop or at least significantly constrain the adoption of such legislation that ensures compliance with the EU rules. In short, drawing on the wider literature on political institutions, we find they act as either individual (for instance, a president) or collective or partisan (for instance, a coalition partner within a government) veto players trying to maintain the status quo by using their position within a coalition government or their direct access to formal institutions to "veto" decisions that would lead to the adaption to the EU rules[19].

To summarize, the domestic adaptation to the EU rules will be smooth in those cases when there are few veto players interested in

17 Especially on G. Tsebelis, *Veto Players: How Political Institutions Work*, Princeton University Press, 2002.

18 T.A. Börzel, T. Risse, *Conceptualising the Domestic Impact of Europe* [in:] *The Politics of Europeanisation*, K. Featherstone, C. Radaelli (eds.), Oxford University Press, 2003, pp. 55-78.

19 T.A. Börzel, T. *Risse Conceptualising*…; G. Tsebelis, op. cit., p. 37.

maintaining the status quo and/or when there is at least one supportive formal institution which can facilitate the adaptation process. On the other hand, the domestic adaptation to the EU rules will be protracted and constrained, or there may even not be any adjustment to the EU rules at all, if there is at least one strong veto player, or when there are no supportive formal institutions. In the next section, we shall introduce a specific type of political parties – PRRPs – that we believe can be conceptualized as veto players in the context of legislating on the legal recognition of same-sex couples.

2.1. Populist Radical Right Parties as veto players

In this subsection we outline our reasons for believing that Populist Radical Right parties (PRRPs) can be conceptualized as veto players in the situations when such parties are part of coalition government and oppose any alignment with the European rules. Following the widely accepted definition, PRRPs can be defined as parties embracing populism and radical right ideology[20]. "Populism" can be understood as a "thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite', and which argues that politics should be an expression of the *volonté générale* (general will) of the people"[21]. According to this definition, the general will of the people is more important to the PRRPs than human rights or constitutional limits (such as minority protection).

Radical right ideology, on the other hand, consists of two components – nativism, and authoritarianism – each of which deserve more attention. "Nativism" is not synonymous with nationalism; nativism refers here to an ideology postulating that "states should be inhabited exclusively by members of the native group ("the nation") and that non-native elements (persons and ideas) are fundamentally threatening to the homogeneous nation state"[22]. In short, this is a particular mix of an exclusionary ethnic nationalism and xenophobia. Authoritarianism can be described as an ideology focused on the "belief in

20 C. Mudde, *Populist Radical Right Parties in Europe*, Cambridge University Press, 2007.
21 Ibid., p. 23.
22 Ibid., p. 22.

a strictly ordered society, in which infringements of authority are to be punished severely"[23].

One of the most influential scholars of PRRPs in Central and Eastern Europe, Michael Minkenberg largely agrees with the above conceptualisation of PRRPs. Although Minkenberg avoids the term "nativism", preferring "populist and romantic ultranationalism", the content of the terminology is the same – a juxtaposition of a mythologized concept of "homogeneous nation" against the other, the supremacy of the nation against the individual, its rights and freedoms[24]. This radical right thinking is "intertwined" with an authoritarian worldview – which is "fiercely anti-egalitarian and anti-emancipatory" – as only a strong state can enforce the distinction between the nation and the other[25]. In his view, the processes that gave rise to PRRPs in Western Europe (social modernization processes coinciding with the emancipatory changes in the late 1960s and 1970s, the New Left, the Green movement, etc.) are different to those that fuelled the radical right's popularity in Central and Eastern Europe. In Central and Eastern Europe, the regime change, economic and social transformation, "high levels of social disorientation and ambivalence towards the new regime", and the cultural change were "more far-reaching, deeper, and complex" than the modernization processes in Western Europe[26]. Moreover, these processes "occurred at a high pace" and were favourable to the rise of PRRPs in Eastern Europe[27]. This is one of the reasons why East European PRRPs are often more extreme than their West European equivalents[28].

In this article we follow the previous literature and treat both the Latvian party National Alliance (NA) and the Estonian Conservative People's Party (EKRE) as PRRPs[29]. Moreover, we conceptualize PRRPs

23 Ibid., p. 23.
24 M. Minkenberg, *The Radical Right in Eastern Europe: Democracy under Siege?*, Palgrave Macmillan, 2017, p. 14.
25 Ibid., p. 14.
26 Ibid., p. 21.
27 Ibid.
28 Ibid.
29 D. Auers, A. Kasekamp, *The impact of radical right parties in the Baltic states* [in:] *Transforming the Transformation? The East European radical right in the political process*, M. Minkenberg (ed.), Routledge 2015, pp. 137-153; S. Braghiroli, V. Petsinis, *Between party-systems and identity-politics: the populist and radical right in Estonia and Latvia*, "European Politics and Society" 2019, vol. 20,

as collective or partisan veto players in the context of legislating on the legal recognition of same-sex couples. Ideologically, nativism with its emphasis on traditional family values espouses a view of the LGBT population as a threat to the purity of the nation[30], or, in another version, the moral "other" is seen as problematic to those espousing socially authoritarian attitudes[31]. Regardless of whether the opposition stems from nativism or authoritarian social attitudes, there is evidence of anti-LGBT attitudes in the rhetoric of the PRRPs both in Western and Eastern Europe[32]. There is, however, evidence that some of the West European PRRPs have become decreasingly anti-LGBT in their rhetoric, even if there are concerns that pro-gay rights statements have been included for instrumental reasons in a largely anti-immigration platform[33]. This suggests that PRRPs, most likely, may be conceptualized as veto players in the context of legal recognition of same-sex couples in Eastern EU member states only.

Due to this ideological opposition to the LGBT population, it is likely that the East European PRRPs will oppose adopting legislation that offers legal recognition of same-sex couples. This does not preclude other interpretation for such a political position (for instance, party strategic calculations); however, we argue that the ideological profile of these parties is the main predictor for the parties to assume the role of partisan veto players when such a legislation is proposed. In the next section we outline the features of the main source for adaptational pressures to the countries with formal or virtually no legal recognition of same-sex couples.

no. 4, pp. 431-449; V. Petsinis, *Identity Politics and Right-Wing Populism in Estonia: The Case of EKRE*, "Nationalism and Ethnic Politics" 2019, vol. 25, no. 2, pp. 211-230.

30 C. Mudde, op. cit., pp. 67-78.

31 M. Minkenberg, op. cit., p. 15; for a link between authoritarian attitudes and anti-gay attitudes see also V.P. Poteat, E.H. Mereish, *Ideology, Prejudice, and Attitudes Toward Sexual Minority Social Policies and Organizations*, "Political Psychology" 2012, vol. 33, no. 3, pp. 211-224.

32 B. Commerer, *Populist Radical Right Homophobia*, paper presented at the APSA 2010 Annual Meeting, available at SSRN: https://ssrn.com/abstract=1657658 [12.06.2012].

33 T. Akkerman, *Gender and the radical right in Western Europe: a comparative analysis of policy agendas*, "Patterns of Prejudice" 2015, vol. 49, no. 1-2, pp. 37-60; N. Spierings, M. Lubbers, A. Zaslove, *'Sexually modern nativist voters': do they exist and do they vote for the populist radical right?*, "Gender and Education" 2017, vol. 29, no. 2, pp. 216-237.

3. Adaptational pressures – The Court of Justice of the EU and the Coman case

The EU has so far not legislated on the legal recognition of same-sex couples explicitly. As mentioned in the introduction, the EU does not have any competence to legislate in the area of family law, which falls under the national competence, with the exception of family law with cross-border implications. As will be shown in this section, this aspect – freedom of movement within the EU – was one of the most important in the Coman case, decided by the Court of Justice of the EU (CJEU). At least partly, the adaptational pressures in the area of family law stem from the case law decided by the CJEU, whose constitutional role is to provide an interpretation of vague language of the EU treaties and law. In addition, the adaptational pressures stem from the case law of the European Court of Human Rights (ECtHR) whose role is to interpret the European Convention on Human Rights (ECHR), which all member states of the EU have ratified. Moreover, it could be argued that an indirect factor creating an additional adaptational pressure is the existing convergence of legal recognition of same-sex couples in West European member states of the EU. This factor impacts most likely how the European Commission (EC) frames legislative proposals, specifically favouring a vaguer text in order to accommodate the diversity in this sensitive area. However, the vagueness of various EU directives may open a window of opportunity for a teleological and inclusive interpretation which, step-by-step, may erode the existent different treatment of same-sex couples in those member states that do not offer any legal recognition to same-sex couples. This vagueness of EU legal texts will be examined here, offering a short description of two examples that will be relevant in our analysis of the case studies in subsequent sections.

The first example that will be discussed here is the EU Directive 2019/1158, which requires member states to implement in their national legislation various measures "designed to achieve equality between men and women with regard to labour market opportunities and treatment at work, by facilitating the reconciliation of work and family life for workers who are parents, or carers", for instance, pater-

nity leave[34]. The Directive explains the term "paternity leave" as the "leave from work for fathers or, where and insofar as recognised by national law, for equivalent second parents, on the occasion of the birth of a child for the purposes of providing care"[35]. As we shall see in the case study of Latvia below, the definition and aim of "paternity leave", as well as who can be construed as "equivalent second parents", were the subject of a legal case before the country's Constitutional Court, which relied on the case law from the ECtHR in its majority opinion. This should not be seen as unusual, because the ECtHR has over the years ruled on whether the member states' family law arrangements (or lack of thereof) regarding same-sex couples have been in breach of the norms of the ECHR. One of the most significant rulings was made in the case "Oliari and others v. Italy" (Oliari), in which the ECtHR found that Italy had failed to fulfil its "positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions"[36]. In other words, the right to respect for private and family life, provided by the ECHR, implies that the member states should recognize and protect same-sex couples, even if the ECtHR has traditionally given a wide "margin of appreciation" to the member states as to how and when such recognition and protection should be provided[37]. As it will be demonstrated below, this EU directive and this ECtHR ruling were cited in the case of Latvia.

The second instance revolved around Romania's migration authority's decision to deny prolongation of the residency permit to Mr. Robert Clabourn Hamilton, who had married Mr. Relu Adrian Coman in Belgium in 2010, on the grounds that their marriage was invalid in Romania. In 2013, Mr. Coman and his spouse sued the Romanian migration authority for breaching the family reunion clause of the EU Citizens' Free Movement Directive 2004/38/EC. In 2015, the case was referred

34 *Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU*, "Official Journal of the European Union", 12 July 2019, vol. 62, L 188/79-93.

35 Ibid.

36 *European Court of Human Rights, Case of Oliari and others v. Italy*, (Applications nos. 18766/11 and 36030/11), Judgment, Strasbourg, 21 July 2015, Final, 21/10/2015.

37 S. Ragone, V. Volpe, *An Emerging Right to a "Gay" Family Life? The Case Oliari v. Italy in a Comparative Perspective*, "German Law Journal" 2016, vol. 17, no. 3, pp. 451-485.

to Romania's Constitutional Court, which in its turn referred the case to the Court of Justice of the EU (CJEU) for preliminary ruling, especially inquiring whether the term "spouse", used in the Article 2(2)(a) of Directive 2004/38, included "same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State"[38]. In essence, the question here was whether Romania, which explicitly prohibits recognition of same-sex marriages in its legislation, should interpret the Directive's term "spouse" to include also Mr. Coman's same-sex partner, who was a citizen of the USA. The CJEU's ruling (C-673/16) clarified the EU law as affirming that the term "spouse" refers to a "person joined to another person by the bonds of marriage" and as precluding the Romanian authorities "from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex"[39]. In short, the CJEU provided an affirmative answer to the Romanian Constitutional Court's question. Moreover, it also concluded that a same-sex marriage entered in one member state must be recognized as a valid ground for applying for a prolongation of a residency permit in another member state which does not recognize the legality of a same-sex marriage. As legal scholars have observed, the CJEU demonstrated a self-restraint in this case, refraining from imposing on member states an obligation to introduce an institution of same-sex marriage[40]. Instead, a narrower interpretation was offered demanding "single-purpose recognition of the status attached to same-sex marriage for matters of free movement and residence"[41]. This particular case was especially important in deciding a similar case in Estonia which will be described below.

In sum, there are various sources for the adaptational pressures, stemming, at least partly, from the case law of the ECtHR and the CJEU

38 *Case C-673/16, Coman et al. v. Inspectoratul General pentru Imigrări*, Judgment of the Court of Justice (Grand Chamber) of 5 June 2018, EU:C:2018:385.

39 Ibid.

40 U. Belavusau, D. Kochenov, *Same-Sex Spouses: More free movement, but what about marriage? Coman*, "Common Market Law Review" 2020, vol. 57, no. 1, pp. 227-242.

41 Ibid., p. 236.

as well as the vagueness of the EU law that deals with the diversity of family law in its member states. It is suggested here that the adaptational pressures are more likely to be higher in those member states that do not provide any recognition to the same-sex couples, which will be examined in the following section, dealing with the definition of "family" in Latvia.

4. Domestic response – case of Latvia, 2020-2021

The case study here revolves around the European impact on national family law in Latvia. As mentioned above, Latvia is one of the countries that do not offer any legal recognition to same-sex couples, known as a same-sex partnership or a gender-neutral (same-sex) marriage. In fact, *Saeima*, Latvia's parliament, passed a constitutional amendment on 15 December 2005, stipulating in the first part of the Article 110 of the Constitution that the state "protects and supports marriage – a union between a man and a woman, family, the rights of parents and children"[42]. This amendment has been interpreted as one of the first instances of "antigay marriage" constitutional amendments in Europe[43], while in fact the second part of Article 35 of the Civil Code (adopted in the early 1990s) explicitly prohibits marriage between two same-sex persons explicitly.

To provide a wider political context and background to the parliament's decision, the 2005 constitutional amendment coincided with, and perhaps was at least partly caused by the first Pride parade in the city of Riga, the capital of Latvia. The parade attracted a protest rally against the LGBT event, and the Pride parade participants were subjected to physical attacks from the counter-protesters both in 2005 and in 2006[44]. In later years, the Riga City Council made a considerable effort to ban the parade, citing "security grounds" as the justification. In 2009, the organizers, Latvia's LGBT organization "Mozaīka", suc-

42 Latvijas Republikas Satversme, https://likumi.lv/ta/id/57980-latvijas-republikas-satversme [12.06.2021].

43 C. O'Dwyer, K.Z.S. Schwartz, *Minority rights after EU enlargement: A comparison of antigay politics in Poland and Latvia*, "Comparative European Politics" 2010, vol. 8, pp. 220-243.

44 Amnesty International, *Latvia: Riga Pride 2007: championing equal rights*, 14 June 2007, https://www.amnesty.org/download/Documents/64000/eur520042007en.pdf [12.06.2021].

cessfully appealed the decision in the court[45]. Although in later years, the Pride parade proceeded without any legal entanglements with the municipality, the counter-protesters were present at, for instance, the 2012 parade[46].

In academic literature, it has been argued that the Pride parade in 2005 made visible the dominant anti-LGBT discourse in Latvian politics, as politicians from several parties, including the Prime Minister, had condemned the parade and homosexuality in general, as being antithetical to Latvian-ness, even a type of internal threat to the nation of Latvia[47]. Another work, focusing on the political "battles" surrounding the Pride parades, argued that Latvia is one of the examples of a wider trend of "illiberal governance" in CEECs, which cast doubts on how deeply the CEECs had adopted the European norms promoted by the EU in the pre-accession period[48]. At least partly, the failed adoption of EU norms relating to LGBT rights has been explained with the high number of veto players in the form of many, newly established conservative parties in Latvia[49].

Having in mind this political context, especially the impact of conservative parties in Latvian politics, it probably is not surprising, that since 2015, all attempts to legislate on legal recognition of same-sex couples have been unsuccessful. The latest attempt was on 20 June 2019 when the bill "Unmarried Couple's Law" (in Latvian: *Dzīvesbiedru likums*), proposed by two government parties, "New Unity" and "Development/For!", was rejected, with 60 MPs voting against the bill, 23 MPs voting for, and one MP abstaining[50]. While only the MPs from "New Unity" and "Development/For!" and a minority of MPs from the Social Democratic Party "Harmony" voted in support of referring the

45 Amnesty International, *Baltic Pride march gets green light in Latvia*, 15 May 2009, https://www.amnesty.org/en/latest/news/2009/05/baltic-pride-march-gets-green-light-latvia-20090515/ [12.06.2021].

46 Amnesty International, *Successful Pride parade in Riga despite heavy protests*, 3 June 2012, https://www.amnesty.org/en/press-releases/2012/06/successful-pride-parade-riga-despite-heavy-protests/ [12.06.2021].

47 R. Mole, *Nationality and sexuality: homophobic discourse and the 'national threat' in contemporary Latvia*, "Nations and Nationalism" 2011, vol. 17, no. 3, pp. 540-560.

48 C. O'Dwyer, K.Z.S. Schwartz, op. cit.

49 Ibid., pp. 234-235.

50 Apollo, *Saeima noraida Dzīvesbiedru likumprojektu*, 20 June 2019, https://www.apollo.lv/6711993/saeima-noraida-dzivesbiedru-likumprojektu [12.06.2021].

bill to the committee, the National Alliance (NA), the New Conservative Party, the party "KPV LV", the Union of Greens and Farmers, and a majority of MPs from "Harmony" blocked taking any further legislative action on this matter. At the time of writing, in early 2021, there is still no law explicitly recognizing same-sex couples in Latvia.

It was therefore particularly surprising that, at the end of 2020, the Constitutional Court (henceforth, the Court) ruled in favour of a plaintiff, identified by the Court as person C, who had sought the paternity leave which was denied to her despite that person C's same-sex partner had given birth to a child. Essentially, person C contested the constitutionality of the first part of Article 155 of the Latvian Labour Code, providing that a father can seek a paternity leave, which, according to the plaintiff, denied an equivalent leave to her as a partner living in a stable same-sex relationship. Interpreting the Constitution, the case law of the European Court of Human Rights, EU Directive 2019/1158, the Court found that the contested legal norm did not conform to the Constitution, as the Constitution stipulates that the State is obliged to protect and support all families. The Court explained, however, that the definition of marriage was not the issue here, and that only the legislative branch can re-define the marriage institution. In addition, the Court invalidated the contested norm, declaring it null and void as of 1 June 2022, when Latvia is obliged to transpose the EU Directive 2019/1158 into the national legislation[51].

In essence, the Court provided an inclusive definition of family, indicating clearly that the State must protect and support, not only traditional families, but also same-sex families. In this case, acting as a supportive formal institution, the Court used the powers vested in it by Article 85 of the Constitution, which tasks the Constitutional Court with reviewing "cases concerning the conformity of laws with the Constitution"[52]. Thus, the Court can invalidate the legal norms that it finds to be unconstitutional, and the Court did it in this particular case by interpreting the Constitution and, among other others, EU and ECHR norms.

51 Latvijas Republikas Satversmes Tiesa, *Spriedums Latvijas Republikas vārdā Rīgā 2020.gada 12.novembrī lietā Nr.2019-33-01*, 16 November 2020, https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/12/2019-33-01_Spriedums-3.pdf#search=2019-33-01 [12.06.2021].

52 Ibid.

The Court was, however, divided on this judgment. Four justices (Gunārs Kusiņš, Daiga Rezevska, Jānis Neimanis, and Artūrs Kučs) supported the majority opinion, while two senior justices – Vice-President of the Court Aldis Laviņš, and the President of the Court Sanita Osipova – filed dissenting opinions. While joining the majority's opinion that the Constitution stipulates that the State is obliged to protect and support even same-sex families, Osipova argued, in contrast, that the aim of the contested norm, which implements the aim of EU Directive 2019/1158, is promoting gender equality and strengthening the role of the father in a family, and that the paternity leave and related financial benefits are hence targeted at fathers only. In conclusion, she argued, the legal proceedings had to be suspended, as the contested norm had not constituted a breach of the plaintiff's constitutional rights[53]. In a stark contrast, A. Laviņš criticized implicitly the Court's majority for legislating from the bench when it broadened the definition of family to include same-sex couples, arguing that only the legislative branch should clarify the precise meaning of the term of family in the Article 110[54].

This ruling caused an almost immediate political reaction. National Alliance (NA) signalled its intention to veto the Constitutional Court's judgment early. In December 2020, the MP from the NA Jānis Dombrava criticised, with a nod to Justice Laviņš's dissenting opinion, the Court for overstepping its constitutional boundaries and promised to bring forward legislative initiatives that would "rectify the mistakes of the Constitutional Court"[55]. One month later, the party leader Raivis Dzintars announced the intention of filing a motion to amend the Article 110 of the Constitution. He echoed his colleague's rhetoric that the Constitutional Court had "arbitrary" interpreted the notion of family

53 S. Osipova, *Satversmes tiesas tiesneses Sanitas Osipovas atsevišķās domas Rīgā 2020. gada 26. novembrī lietā Nr. 2019-33-01*, 16 November 2020, https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/12/2019-33-01_Osipova.pdf [12.06.2021].

54 A. Laviņš, *Satversmes tiesas tiesneša Alda Laviņa atsevišķās domas Rīgā 2020. gada 26. novembrī lietā Nr. 2019-33-01*, 16 November 2020, https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/12/2019-33-01_Lavins.pdf [12.06.2021].

55 LSM, *Dombrava: NA sniegs iniciatīvas, «lai labotu Satversmes tiesas kļūdas» spriedumā par viendzimuma pāru tiesībām*, 8 December 2020, https://www.lsm.lv/raksts/zinas/latvija/dombrava-na-sniegs-iniciativas-lai-labotu-satversmes-tiesas-kludas-sprieduma-par-viendzimuma-paru-tiesibam.a384813/ [12.06.2021].

and that this interpretation was contrary to the will of the parliament and the society, which required a specific clarification of the particular article in the Constitution[56]. Later, five senior MPs from the party's parliamentary group, including the party leader, filed a motion to amend the Article 110 of the Constitution, which was debated in the parliament's plenary session on 14 January 2021.

The motion proposed to amend the Article 110 as follows: "The State protects and supports marriage – a union between a man and a woman, a family that is based on marriage, consanguinity, or adoption, the rights of parents and children, including the rights to be raised in a family whose fundament is formed by a mother (woman) and a father (man)"[57]. The proposed bill's innovation consisted of specification of what type of family the state is supposed to protect and support ("that is based on marriage, consanguinity, or adoption"), and added a new right ("including the rights to be raised in a family whose fundament is formed by a mother (woman) and a father (man)"). Regarding the motives of this bill, the signatories of the motion did not hide their intention of clarifying the definition of family and reversing the Constitutional Court's judgment which recognized that same-sex partners can form a family in the concluding sentence in the annotation added to the bill: "It does not mean that there is no "family" anymore when one parent dies or leaves [the family], but that parents cannot be same-sex persons"[58].

This motion caused a stir within the ruling coalition government which consisted of, on the one hand, "New Unity" and "Development/For!", both of which favoured at least some minimal legal recognition of same-sex couples and had previously proposed a bill for that purpose in 2019, and, on the other hand, NA, New Conservative Party, and "KPV LV". All three of the latter had voted against the bill proposed by the more liberal coalition partners in 2019, and the NA's motion risked deepening this split in the coalition. Due to the parliamentary

56 LSM, *Nacionālā apvienība piedāvā Satversmē noteikt ģimenes jēdzienu*, 7 January 2021, https://www.lsm.lv/raksts/zinas/latvija/nacionala-apvieniba-piedava-satversme-noteikt-gimenes-jedzienu.a388007/ [12.06.2021].

57 J. Iesalnieks, R. Dzintars, R. Jansons, R. Kols, I. Indriksone, *Likumprojekts Grozījums Latvijas Republikas Satversmē, Nr. 111.8/5-1-13/21*, https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/o/A38F6751399F389CC225865600317857?OpenDocument#_ftn5 [12.06.2021].

58 J. Iesalnieks, R. Dzintars, R. Jansons, R. Kols, I. Indriksone, op. cit.

procedure, only two MPs debated the motion, which makes us unable to gauge the precise motives behind the MPs' vote to refer the motion for amending the Constitution to the parliamentary committees. To a large extent the vote reflected the existent division on the issue of legally recognizing the same-sex couples in the parliament: the NA, the New Conservative Party, KPV LV, the Greens and Farmers Union, joined by six independent MPs, voted for a referral to committees (47 votes), and the New Unity, and "Development/For!", joined by five independent MPs, voted against (25 votes)[59].

At this moment in time, it is unclear whether the NA will succeed in vetoing the Constitutional Court's judgment by adopting a constitutional amendment to define the concept of family as strictly heterosexual union. Twenty-eight MPs did not participate in the vote on the referral of the proposed amendment to the committees, most conspicuously all MPs from the "Harmony" parliamentary group, but also three MPs from the New Conservative Party, one MP from the New Unity, and two independent MPs. If these 28 MPs do not participate in the final vote on the amendment and if no MP defects to support the amendment, it is unlikely that the NA will succeed in mobilizing the required super-majority of two thirds of MPs to adopt the constitutional amendment.

5. Domestic response – case of Estonia, 2020

The LGBT situation in Estonia, which has for several decades claimed the credit of being notably liberal and staunchly pro-West in its general orientation, is slightly different than in Latvia. Estonia strengthened its image as a Western-oriented, liberal country defending human rights when, on 9 October 2014, as the first of the Baltic States and also the first of the former Soviet Union republics, it passed a law on same-sex partnerships[60]. The gender-neutral Registered Part-

59 Saeima, *Balsošanas rezultāti. Balsošanas motīvs: Grozījums Latvijas Republikas Satversmē (893/Lp13), nodošana komisijām. Datums: 14.01.2021 12:10:19*, http://titania.saeima.lv/LIVS13/SaeimaLIVS2_DK.nsf/0/5818B7B7C88E9D71C225865D00474DCD?OpenDocument [12.06.2021].

60 Washington Post, *Estonia approves same-sex partnerships*, https://www.washingtonpost.com/world/estonia-approves-same-sex-partnerships/2014/10/09/767e6a50-4fd4-11e4-8c24-487e92bc997b_story.html [21.05.2021].

nership Act allowed couples, irrespective of the gender of partners, to enter civil partnerships. The Act went into force on January 1, 2016. The then President of Estonia, Toomas Hendrik Ilves, commented that he saw it as a basic human rights issue[61]. In the Registered Partnership Act, Estonia recognizes same-sex registered partnerships concluded abroad. Registered partners have equal rights and duties with respect to each other, but, as it will be discussed below, their situation is different than in the case of marriage. The partners may choose the same types of their proprietary relationship that are available when a marriage is registered: jointness of property, set-off of assets increment, separateness of property. In contrast to marriage, legal separation fixed between registered partners has no legal consequences. However, disputes over housing and assets related thereto are settled in court on the same basis as in the case of marriage. If a registered partnership contract is terminated, there is no further obligation to provide maintenance, unless the parties have agreed otherwise[62]. In contrast to marriage, registered partners have limited adoption rights, too. Since 2016, Estonia permits stepchild adoption, where the partner in a registered same-sex partnership can adopt his or her partner's biological child or a child to whom another registered partner was a parent before entering into a partnership[63]. This has led to a number of court cases where individuals have been successful in getting adoptions recognised. For example, in February 2017, the Tallinn Administrative Court allowed a woman to adopt her female partner's children. The partners are not allowed, however, to jointly adopt a child who has no relationship with the couple[64].

Before the Registered Partnership Act (Act) was adopted, the LGBT issues and rights had received little political or public attention in Estonia. But doubtless, the Act antagonised the Estonian society and led to sharp disputes over the issue. At the time when the Parliament

61 ERR.EE, *Parliament Passes Cohabitation Act; President Proclaims It*, 9 October 2014, https://news.err.ee/113867/parliament-passes-cohabitation-act-president-proclaims-it [11.06.2021].

62 EESTI.EE, *Registration of cohabitation*, https://www.eesti.ee/en/family/registration-of-cohabitation/ [12.02.2021].

63 European Parliament, *The rights of LGBTI people in the European Union*, May 2019, https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637950/EPRS_BRI(2019)637950_EN.pdf [1.06.2020].

64 Riigi Teataja, Registered Partnership Act, https://www.riigiteataja.ee/en/eli/527112014001/consolide [21.05.2021].

deliberated on the Act, several campaigns against the same-sex marriages were led by the conservative organisations in Estonia. Particularly, the Estonian Evangelical Church and the Russian Orthodox Church expressed their opposition to legalizing civil partnerships. However, surveys on public attitudes toward homosexuality revealed that people in Estonia were becoming more open and tolerant, and the acceptance of LGBT people has been growing lately. For example, a public opinion survey on LGBT issues conducted by the Tallinn Law School at Tallinn University of Technology in 2012[65] found that 38% of participants considered homosexuality acceptable, while 46% agreed that same-sex partners should be able to officially register their cohabitation. Moreover, the 2015 Eurobarometer survey showed that 44% of Estonians claimed that "gay, lesbian and bisexual people should have the same rights as heterosexual people" (in 2019, 53% of the Estonian respondents agreed with this statement)[66]. Furthermore, the 2017 survey conducted by the Estonian Human Rights Centre and the market research company Turu-uuringute AS confirmed that 45% of respondents supported civil partnerships for same-sex couples[67]. Finally, in 2021 a poll revealed that more than a half of respondents were for marriages between people of the same sex, which was the highest score so far[68]. Similarly, the number of those supporting the Registered Partnership Act gradually rises – from 49% in 2019 to 64% in 2021.

A major hurdle for a successful implementation of the Act has been the hesitation of *Riigikogu*, Estonia's parliament, to adopt implementing provisions (amendments to other laws that would allow for the Act to actually become a reality). This has most likely been due to fears that the issue would induce new confrontations. The implementing provisions are necessary for, among other things, entering registered partnerships in the state register and determining the partner's

65 H. Talalaev, *The situation of LGBT persons*, Estonian Human Rights Centre, https://humanrights.ee/en/the-situation-of-lgbt-persons/ [2.04.2021].

66 European Commission, *Eurobarometer on Discrimination 2019*, 23 September 2019, https://ec.europa.eu/info/sites/default/files/ebs_493_data_fact_lgbti_eu_en-1.pdf [12.03.2021]; ERR.EE, *Survey: Estonians have become more tolerant of sexual minorities*, 1 October 2019, https://news.err.ee/987128/survey-estonians-have-become-more-tolerant-of-sexual-minorities [15.11.2020].

67 Estonian Human Rights Centre, *Attitudes towards LGBT topics in Estonia*, https://humanrights.ee/en/topics-main/equal-treatment/attitudes-towards-lgbt-topics-estonia/ [10.04.2021].

68 Ibid.

maintenance obligation and right of succession[69]. In fact, several political parties and Members of the Parliament in Estonia blocked any attempts to introduce such provisions. Not only did President Kersti Kaljulaid criticise the Parliament for failing to adopt the implementing acts[70], but also the Tallinn Administrative Court ordered the Estonian Government to pay monetary damages for its failure to adopt the implementing acts[71]. Moreover, the Constitutional Review Chamber of the Supreme Court stated that, despite the lack of implementing provisions, the Act entered into force on 1 January 2016 and confirmed that the Act needs to be interpreted by courts in a way that ensures a decision that is in line with the Constitution[72].

Three significant cases are mentioned here to highlight the complexity of the issue in Estonia. The first example concerns a same-sex marriage of Swedish citizens residing in Estonia. In 2015, the county government refused to enter their marriage into Estonia's central population register, citing the fact that Estonian laws did not recognize same-sex marriage. The couple appealed the decision, and the Tallinn Circuit Court ruled in the couple's favour, stipulating that all marriages concluded in another country must be entered into the Estonian population register when a person takes up residence in Estonia or is granted Estonian citizenship[73]. The second instance refers to the case of an American-Estonian couple who got married in the US in 2015 and later moved to Estonia. Estonia's Police and Border Guard Board (PPA) granted a residence permit to a woman of U.S. citizen-

69 Parliament of Estonia, *The second reading of the implementation provisions of the Registered Partnership Act will be held on 26 January*, 14 December 2015, https://www.riigikogu.ee/en/press-releases/legal-affairs-committee-en/the-second-reading-of-the-implementation-provisions-of-the-registered-partnership-act-will-be-held-on-26-january/ [3.02.2021].

70 ERR, *President chides MPs for shunning Partnership Act's implementing provisions*, 11 September 2017, https://news.err.ee/617964/president-chides-mps-for-shunning-partnership-act-s-implementing-provisions [10.04.2021].

71 ERR, *Estonia to pay damages for failing to adopt implementing legislation for civil partnership law*, 2 February 2017, https://news.err.ee/120607/estonia-to-pay-damages-for-failing-to-adopt-implementing-legislation-for-civil-partnership-law [10.04.2021].

72 ERR.EE, *Supreme Court: Registered Partnership Act part of Estonia's legal order*, 10 April 2018, https://news.err.ee/744978/supreme-court-registered-partnership-act-part-of-estonia-s-legal-order [12.09.2020]; ILGA EUROPE, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People 2019*, https://www.ilga-europe.org/sites/default/files/annual_review_2019.pdf [16.03.2021].

73 LGL.LT, *Same-sex Marriage Concluded Abroad Recognized by Appeals Court in Estonia*, 27 January 2017, https://www.lgl.lt/en/?p=15853 [3.05.2020].

ship married to an Estonian woman, but later, the Tallinn Circuit Court repealed the former decision, stating that a marriage between two people of the same sex is not valid in Estonia[74]. The third case involves a citizen of Sri Lanka who had entered a same-sex partnership with an Estonian citizen in Germany. In 2016, after their arrival to Estonia, they had sought a residency permit on the basis of registered partnership and been denied, as the governmental regulations do not provide for granting residency permits on such a ground. The couple brought a lawsuit against the Police and Border Guard Board. In 2019, the Supreme Court ruled the Alien Act and the existing regulations unconstitutional insofar as they preclude issuing a temporary residence permit to an alien for settling in Estonia with a registered same-sex partner who is an Estonian citizen[75]. Notably, the Supreme Court referred in its ruling not only to the EU law, but to the Coman case, too.

The cases above highlight that the LGBT issues are still a controversial topic in Estonia and that, due to the inaction of the government in adopting the implementing provisions, the same-sex couples have been forced to resort to lengthy litigation. Moreover, the issue has become deeply politicized when the Social Democratic Party clearly stated its support of same-sex marriage and included the issue in its programme, and the Conservative People's Party of Estonia (EKRE) strongly opposed it. In 2017, citing its concerns about the negative outcomes of the Registered Partnership Act on the normative status of traditional marriage, EKRE drafted a new bill that would repeal the Act. The party, which has sought to revoke the Act since its adoption, claimed that the Act was forced through the Parliament against the people's will. The EKRE proposal was in line with the position of the Estonian religious elite. The leader of Estonian Evangelical Lutheran Church (EELK) suggested that the Constitution should be amended to include a provision stating that marriage is a union between one

74 ERR.EE, *Circuit court: Same-sex marriage cannot be considered valid in Estonia*, 11 November 2017, https://news.err.ee/644719/circuit-court-same-sex-marriage-cannot-be-considered-valid-in-estonia [23.04.2021].

75 Riigikohus, *Constitutional judgment 5-18-5*, https://www.riigikohus.ee/en/constitutional-judgment-5-18-5 [21.05.2021].

man and one woman and that any other matter should then be regulated by law[76].

It should be considered that, while Estonia is considered to be one of the least religious countries in the European Union, the family law represents traditional recognition of the institution of marriage[77]. The Family Law Act adopted in 2009 and in force since 2010 defines a "family" as a union between a man and a woman (Section 1).

The issue of the legal recognition of same-sex couples assumed a particular importance after the 2019 elections, when a coalition government was formed by the Centre Party, the national-conservative party Isamaa, and EKRE. The coalition agreement included the statement of intent to conduct a referendum on amending the Estonian constitution to define marriage. The referendum was initially planned to take place in April 2021. In the referendum, voters would be asked if they wanted to change the constitution to add a definition stating that marriage can only be concluded between one man and one woman. EKRE had a leading role in initiating the political process and gained broad support with its proposal of the same-sex marriage referendum. A poll by the Norstat Eesti AS carried out in 2020 found that 55% of Estonians were against amending the Family Act to allow for marriages between people of the same sex[78]. At the same time, the referendum was criticised by the opposition parties, claiming that it would demonstrate that Estonia, at least by its mentality and value-orientations, firmly belongs to Eastern Europe, not to the West. Additionally, it would damage Estonia's reputation, especially since the then leader of EKRE and former interior minister, Mart Helme, had on several occasions repeated that homosexuals in Estonia "could run

76 A. Kilp, *Estonia: Religious Association Restrictions of Same-Sex Couple Religious Rights* [in:] *Religion in the Context of Globalization: Legal aspects of the functioning of religious organizations*, E. Elbakyan, L. Fylypovych, H. Hoffmann, A. Książek (eds.), NOMOS 2017, pp. 84-97; ERR.EE, *EELK head: Marriage should be defined in Constitution as between man, woman*, 30 November 2017, https://news.err.ee/645909/eelk-head-marriage-should-be-defined-in-constitution-as-between-man-woman [7.02.2021].

77 M. Torga, *Party autonomy of the spouses under the Rome III Regulation in Estonia – can private international law change substantive law?*, "Netherlands Private International Law on Family Law" 2014, no. 4, pp. 547-554.

78 Lääne Elu, *Uuring: enamus inimestest on perekonnaseaduse muutmise vastu*, 27 October 2020, https://online.le.ee/2020/10/27/uuring-enamus-inimestest-on-perekonnaseaduse-muutmise-vastu/ [3.09.2021].

to Sweden"[79]. Finally, after the Prime Minister of Estonia, Jüri Ratas, resigned after a corruption scandal on 13 January 2021, the Parliament withdrew the controversial marriage referendum bill, and the new government removed the referendum from the political agenda.

The case of Estonia highlights that the legal recognition of same-sex couples is still a controversial topic. In addition, it highlights that the issue was not resolved by the adoption of the Act in 2014. As the government failed to adopt the necessary implementing provisions, several same-sex couples resorted to litigating their legal rights in the courts. Estonia's Supreme Court has over time been forced to deal with the legal uncertainty, and, referring to the EU case law, it has served as a supportive formal institution, adjusting Estonia's legislation (or more precisely, application of Estonia's rules) with the emerging EU practice of legally recognizing the rights of same-sex couples. However, this legal uncertainty and the Supreme Court's judgments have also provided political opportunities to EKRE, which mobilized electoral support by proposing the marriage definition referendum. While EKRE did not succeed in pushing through the proposal to call a referendum on a constitutional ban on same-sex marriage in 2021, it is unlikely that the party will put this issue to rest.

Conclusions and implications

The main empirical findings of this article underscore the increasing political salience of LGBT rights in the two Baltic States. Both Latvia and Estonia display certain commonalities in how the national courts tasked with the constitutional review – the Supreme Court in Estonia, and the Constitutional Court in Latvia – acted as supportive formal institutions applying European case law while adjudicating two different cases in which the legal recognition of same-sex couples was at stake. Moreover, this finding also highlights that, in contrast to the previous studies on how the EU influences the legal recognition of same-sex couples in the member states, the Europeanization processes

79 S. Tambur, *Estonia's interior minister: Let our gays run to Sweden*, Estonian World, 16 October 2020, https://estonianworld.com/life/estonias-interior-minister-let-our-gays-run-to-sweden/ [11.04.2021].

do not necessarily take place through transnational advocacy, elite socialization, or norm diffusion[80] only, but through litigation and by the national courts applying and citing the EU rules and ECtHR case law, too. This underlines that Europeanization of family law is by no means driven by the EU only, but is influenced by the ECtHR case law, too.

The article highlights how the complex process of Europeanization in the area of family law is by no means linear domestic adaptation. In both countries, PRRPs (NA in Latvia, and EKRE in Estonia) reacted to the increasing legal recognition of same-sex couples by urging the adoption of constitutional amendments. While in Estonia EKRE aimed at calling a referendum to define marriage as a union between a man and a woman, NA aimed at precluding the widening of the definition of family (as the definition of marriage had been already constitutionally defined earlier). As of writing this, it is clear that EKRE failed to reach its goal, and it is too early to predict whether NA will succeed in pushing through the draft constitutional amendments. However, both cases highlight that the legal recognition of same-sex couples' rights are a politically divisive issue in the Baltic States, as political parties – especially PRRPs – may go to great lengths to constrain or even to reverse the adaptation to the emerging European norms.

In addition, this article highlights the role that PRRPs play in the politics of CEECs. While in Western Europe, PRRPs are often described as being focused on their opposition to immigration, which has led to the softening of their stance on LGBT rights, the Central and East European PRRPs are often described as being focused on their opposition to the protection of minorities. Even if the early focus of Baltic PRRPs was on ethnic (or religious) minorities, it seems that the focus has lately shifted to other domestic minorities, too, such as the LGBT population. Furthermore, it is unlikely that the two Baltic PRRPs may opt for softening their stance anytime soon. Rather, it is likely that both of the Baltic PRRPs will use their opposition to the LGBT rights in general, and the legal recognition of same-sex couples in particular, to mobilize electoral support in the future. Since the Baltic PRRPs have been part of coalition governments, their influence

80 P.M. Ayoub, op. cit.; K. Kollman, op. cit.

on the decision making is arguably higher than that of their West European counterparts, which are not part of coalition governments.

At the same time, it is worth underlining that NA in Latvia and EKRE in Estonia are not the only political parties which reject the legal recognition of same-sex couples and claim to defend traditional family values. For example, national-conservative Isamaa, similarly to EKRE, defines marriage as a union between a man and a woman and insists on granting additional legal protection to marriage. Isamaa puts anti-LGBT rights on its political agenda and continues to block implementation of same-sex partnership legislation. It means Estonia faces a relatively wide far-right political spectrum where traditional values play an important role in mobilising Estonia's conservative electorate.

This leads us finally to consider the wider implications of the two case studies, especially for EU foreign policy, which over the last years has promoted the LGBT rights as part of a wider human rights agenda. As noted above, some scholars have questioned whether the EU's foreign policy actors can credibly promote LGBT rights if it is internally split on this issue[81]. This article does not question the credibility of EU foreign policy, even if it acknowledges difficulties for the EU to conduct a coherent foreign policy promoting human rights abroad, while the LGBT rights are still a matter of political struggle within certain parts of the EU. Even if the majority of the EU members offer legal recognition to same-sex couples, the matter of granting legal recognition to same-sex couples is not settled yet in the EU.

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81 M. Mos, op. cit.; K. Slootmaeckers, op. cit.

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