Marriage of an Adolescent in the Context of Migration

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Summary: The laws of EU member states in relation to age an adolescent can marry differ from state to state but not considerably. This difference is justified by the protection of different cultures of member states. Article discusses how different those cultures in Europe actually are giving the grounds for the conflicts in recognising the marriages or maturity evaluation of adolescents in another member state. It shows that the legal instrument in fighting against the forced and child marriages: "to forbid the adolescent's marriages at all" does not protect the rights of the child in all cases; even more, this can even lead to the violation of the children's rights, especially in the context of comparing the marriage to cohabitation and the rights derived from both.

Keywords: marriage capacity, migration, cultural pluralism, adolescent, marriage, family law, human rights, EU law, fundamental rights.

1. Introduction

It is widely known that diversity of family laws of EU member states can cause legal conflicts when there is a cross-border element in a family relation. Protecting culture is one of the justifications to maintain family formulation regulations in the state legislation as they are. This type of approach nevertheless can lead to the violation of fundamental rights. However, taking a deeper look into the conflicting regulations and comparing them to the fundamental rights these regulations must be in conformity with each other. One can notice that the justification of different treatment, based on the protection of culture is questionable.

Marriage capacity is about validity of marriage, which differs from the traditional legal capacity, as it provides additional requirements for being able to marry. Marriage capacity carries the values of society that vary depending from the historical, cultural and social values of state[1], but it is not often so

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[1] In this article a term *marriage capacity* has been used as a legal concept covering the following elements – general legal capacity, gender, age, kinship, validity of previous marriages etc. In

evident that those differences exist in reality. Social relations are not static, they are changing and this is justified by the dynamic nature of marriage law. In this respect also restictions to marry on the basis of age has a new meaning compared to the past.

In a legal literature after the gender the age is another widely discussed element both in EU and even more globally. The main debate is about the protection of the child. While Western tradition allows adolescent marriages starting from certain age and after the evaluation of child maturity, then other traditions have no age limits or these limits are (too) low in respect of maturity. Frankly saying no maturity control exists. In these cultures the married child becomes an adult despite of the age he/she has. In this respect the Western and other cultures collide, furthermore also the collision of human rights and religion or tradition in a certain single state can be observed.[2] However, also the laws of EU member states collide as they declare different age limits for adolescent marriages.

This article explores the differences deriving from the age as an element of marriage capacity related to the marriages of adolescents in the context of migration within Europe by using Estonian example.

Article is based on a legal research that analyses the valid legal norms and principles. Child marriages and collision of cultures is very comprehensive topic. The legal analyse with sociological aspects is discussed comparatively. Questions related to the age and marriage in EU member states are compared.

First, age as an element of marriage capacity is introduced through the patterns of laws of member states of EU. Secondly, the age is discussed through

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a literature different terms have been used refering to the aforementioned elements and they are often also devided into different groups. See Joamets K. 2012. Marriage Capacity, Social Values and Law-Making Process. *International and Comparative Law Review* 12. Palackỳ University, 97–115, p 98–99.

[2] See e.g. Thomas C. 2009. Forced and Early Marriage: A Focus on Central and Eastern Europe and Former Soviet Union Countries with Selected Laws from Other Countries. Expert Paper. United Nations; Gangoly G., Chantler K. 2009. Protecting Victims of Forced Marriage: Is Age a Protective Factor?. Fem Leg Stud, Vol. 17. DOI 10.1007/s10691–009–9132–7, 267–288; Chantler K. 2012. Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse. Trauma, Violence, & Abuse, 13(3), 176–183. Sagepub.com; Myers J. 2013. Research Report. Untying the Knot. Exploring Early Marriage in Fragile States. World Vision, UK. Available at: *www.**worldvision**.org/...nsf/.../**Untying-the-Knot**_report.pd*... (16.12.2013); Malhotra A., Warner A., McGonagle A., Lee-Rife S. Solutions to End Child Marriage. What the evidence shows. ICRW. 2011. www.icrw.org/childmarriage; Khanna T., Verma R., Weiss E. Child Marriage in South Asia: Realities, Responses and the Way Forward. „Solidarity for the Children of SAARC". 2013. Available at: *www.icrw.org/.../**child-marriage-south-asia-realities-respons***...; Chandra-Mouli V., Camacho A. V. and Michaud P.-A. 2013. WHO Guidelines on Preventing Early Pregnancy and Poor Reproductive Outcomes Among Adolescents in Developing Countries. Journal of Adolescent Health 52. Elsever Inc., 517–522, etc.

the general legal capacity theory and application of family regulation in an Estonian example. Then the conflict of laws has been examined by the example of Estonian and Lithuanian law showing the problems that the different regulations can cause and raises a question where the non-recognition is grounded? After that the age, related to marriage, is discussed in the migration process.

The article raises a question whether the cultures of EU member states are so different that the younger age of a child cannot be recognised to respect the marriage and if there is a possibility to overcome the conflict of law in this respect?

2. Age as an impediment for marriage in Europe

In most European countries the main principle follows that a person who wants to marry must be at least 18 years old. This age is presumably related to the legal capacity expressing person's ability to excercise the rights and obligations deriving from the certain deed – in most European states this age is 18 (full active legal capacity) when a person understands the responsibility and is able to protect her/himself in case of dispute. However, in most member states also the restricted legal capacity is common, which means that from certain age an adolecent can make valid deeds with or without the consent of her/his guardian. According to the report of European Union Agency for Fundamental Rights there is no internationally accepted definition of legal capacity, it can be defined as "the law's recognition of the decisions person takes: it makes a person a subject of law, and a bearer of legal rights and obligations; without such recognition, an individual's decisions have no legal effect or validity; they cannot make binding decisions".[3]"

Gangoly and Chantler explain that „the notion that one is more mature as one gets older is often accepted as "common sense" and therefore "not subject to further scrutiny"; "this common sense has its roots in developmental psychology, where the links between age and maturity are evident"[4]. In this respect age shows the maturity of a child.

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[3] Legal capacity of persons with intellectual disabilities and persons with mental health proɵ blems. Luxembourg: Publications Office of the European Union, 2013. Published by European Union Agency for Fundamental Rights, 2013. Available at: www.google.ee/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CEMQFjAD&url=http%3A%2F%2Ffra.europa.eu%2Fsites%2Fdefault%2Ffiles%2Flegal-capacity-intellectual-disabilities-mental-health-problems.pdf&ei=T26nUqWuKsOI4gSo2ID4Cg&usg=AFQjCNHP31TyrKW3gb0aeRjUOo2dRmehDA&sig2=wvrJom1E53imqI0Efm3WMw&bvm=bv.57799294,d.bGE (09. Dec 2013), p. 9.

[4] Gangoly G., Chantler K. 2009. Protecting Victims of Forced Marriage: Is Age a Protective Factor?. Fem Leg Stud, Vol. 17. DOI 10.1007/s10691–009–9132–7, 267–288, p 276.

Marriage capacity as a special legal capacity has also an exception related to the general rule of the marriageable age[5] – in EU member states it varies from 15[6] to 16[7] years[8]. However, most of the states recognise the age 16, which allows an adolescent to marry with the consent of her/his parents or guardian or court or certain administrative organ dealing with adolescent's rights. The general understanding has been for decades that a parent or a guardian of the minor knows if the child is developed mentally, emotionally and she is sexually mature[9] that he/she can act as a grown up in a marriage relation; and as a parent or guardian in general on behalf of the interests of the child. In some states court or other state institution can be involved in the process of allowing an adolescent to marry, such institution must control the mental ability of the child instead or next to the parent/quardian, being an additional institution for determining the child's interests in this context. In some states an adolescent can turn for the permission to the court in case his/her parent does not give a permission for marriage. In some states only court gives such permission[10].

Nevertheless, in every EU member state the interest of the child are controlled. Probably the court or other institution which determines the adolescent ability to take the obligations related to marriage, is more neutral than a parent, on the other hand a parent knows his/her child best. Procedure in a court or state organ is more time-consuming and raises a question how competent judges or public officials are to evaluate the maturity of a child.

Comparison of the laws of EU member states shows that in some states[11] there is a restriction that only one of the future spouse can be adolesent, another must be of full-age. This is an interesting principle and raises a question what is the aim of such rule? What does it protect?

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5 Eruklan states refering to Dixon-Mueller (2008) that a review of psysiological and cognitive readiness at different stages of adolescence concluded that early adolescence (younger than age 15) – is generally "too early" from any point of view, for transitions such as sexual initiation and marriage. (Eruklan A. 2013. Adolescence Lost: The Realities of Child Marriage. Journal of Adolescent Health Vol. 52, 513–514, p 513. Reference to the Dixon-Mueller R. 2008. How young is "too young?" Comparative perspectives on adolescent sexual, marital and reproductive transitions. Stud Fam Plan, Vol. 39, 247–262).

6 For example Estonia, Slovenia, Lithuania, Sweden, Denmark.

7 For example Austria, Bulgaria, Croatia, Czech Republic, Germany, Greeck, Hungary, Italy, Latvia etc.

8 Council of Europe Family Policy Database. Family law and children's rights. Marriage and cohabitation. Available at: www.coe.int/familypolicy/database (10.12.2013)

9 Maertens A. 2013. Social Norms and Aspirations: Age of Marriage and Education in Rural India. World Development Vol. 47, 1–15. Elsevier Ltd. p 13. Reference to the Billig M., S. 1992. The marriage squeeze and the rise of groomprice in India's Kerala state. Journal of Comparative Family Studies, 23(2), 197–216.

10 E.g. in Estonia.

11 E.g. Austria, Germany, Latvia.

As a general principle by the law the spouses are treated as equal[12]. In case one of the spouses is adolescent, in order to maintain the equality of spouses, the maturity of adolscent has to correspond to the level of a person with full active legal capacity.

3. Adolescent marriages in Estonia

As already mentioned, Estonia is an exception state, where adolescent can marry already in age 15[13], but only by the consent of the court[14]. In Estonian legislation a parent or guardian as a consent-giver was replaced by the court "to protect better a child" as court would be more neutral in deciding the consent giving in 2010[15].

In this process the court must clearly express in its decision that a child is able to perform the acts required for the contraction of marriage and for the exercise of the rights and performance of the obligations related to marriage[16]. However, in Estonian case it is not clear what are those obligations related to marriage, e.g. that does this give active legal capacity to the spouse to register the birth of his/her child and does it allow to divorce or buy and sell the property for the needs of the family[17]?

As having children is not a compulsory element of marriage, it would be arguable if court can deal with this question in its decision at all. On the other hand, when this right has not been mentioned in a decision then it can be discussed if a permission to marry includes an active legal capacity related to the legal representation of the children born in this marriage. Estonian court has expressed the ability of an adolescent exactly by the words of the regulation,

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[12] See footnote 17.

[13] Estonian Family Law Act par 1 (4). Also in Lithuania the age is 15.

[14] According to Estonian General Part of the Civil Code a 15-year old adolescent can acquire from a court a full active legal capacity (par 9). This right is not related to marriage, instead is meant for starting a business.

[15] An Explanational Letter of Estonian Family Law Act (in Estonian). However, there is no statistic that consent given by the parents have been caused any problems.

[16] Estonian Family Law Act par 1 (4).

[17] According to Estonian Family Law Act spouses have equal rights and obligations with respect to each other and family; they organise together their marital cohabitation and satisfaction of the needs of their family considering the well-being of each other and their children and they shall each accept responsibilities relating to marriage with regard to the other; spouses participate in the organisation of shared household and earning of income to the best of their ability; a spouse shall select his or her area of activity and operate in his or her area of activity by making the best use of his or her ability to obtain the assets for maintenance of his or her family. (par 15).

e.g. *"X. X is able to perform the acts required for the contraction of marriage and for the exercise of the rights and performance of the obligations related to marriage"*?[18] Such wording puts a state organ or other institution using the active legal capacity of an adolescent in a complicated situation when interpreting the decision: does this or another deed or transaction belong to the context of marriage? For example, when court extends the restricted active legal capacity of an adolescent of at least 15 years of age whether this is in the interests of the adolescent and the level of development of the adolescent so permits, court must decide the transactions which the adolescent is permitted independently to enter into[19]. Based on this principle in case of deciding the permission of marriage of an adolescent court should point out certain deeds and transaction adolescent can make[20], but Family Law Act does not provide such obligation or even an authority for a court to decide the aforementioned matters.

Prevailing understanding is that in most cases the reason for marriage of adolescents is pregnancy. When court has extended the legal capacity of an adolescent he/she gets probably also the right to represent his/her soon born child, e.g. in registering the birth of the child. If adolescent's active legal capacity is not extended, the guardian of the child is a full-age parent or if both of the parents of the child are adolescents with no extended active legal capacity, then the local government; local government performs guardian duties until the appointment of the guardian for a born child[21] and hence the birth of the child is also registered by the local goverment as a guardian of the child who has also the custody over the child. This makes the legal relations in a family complicated as adolescent parent has on the one hand a custody over the child, but still cannot represent his/her child in any deeds[22].

There can also be questioned if such a court decision gives an adolescent a right to choose a marriage property regime in the process of marriage[23]. In the process of deciding whether an adolescent is ready to take the responsibilites related to marriage, then she or he must be able also to decide which property regime suits him or her best. However, considering of 15-year old

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[18] See Estonian Family Law Act par 1 (4).

[19] General Part of Civil Code Act par 9.

[20] General Part of Civil Code Act par 9.

[21] Estonian Family Law Act par 176.

[22] See Estonian Family Law act par 139 (A parent with restricted active legal capacity does not have the right to represent a child and shall exercise the right of custody over person with respect to a child together with the legal representative of the child. If the guardian or special guardian is the legal representative of the child, the opinion of the parent shall be preferred in the case of divergent opinions between the parent and the representative.)

[23] See Estonian Family Law Act par 24: in a procedure of marriage future spouses must choose a matrimonial property regime.

child who maybe has never even been working in his or her life and the only relation to the question "On what I should spend my money?" is related to the pocket-money, it seems considerably difficult for a judge to decide the level of knowledge in economy of this adolescent. For example, in Bulgaria a married adolescent can conclude real estate transactions only with the permission of the respective district court where he or she lives[24]. Estonian family law does not have exceptions in marriage property regime for adolescents in this respect. If a child's active legal capacity has been expanded then she/he has a full legal capacity on the deeds court determined. In such case the obligations taken for the marriage are valid for both spouses, not depending on the age of the spouse.

One characteristic of the development of family law in Western world is the decrease of marriages and increase of cohabitations. The same pattern is in Estonia. In many European states cohabitation has been regulated by registration procedure or by providing more or less similar rights to the factual cohabitants. Estonia has not directly regulated cohabitation yet[25], however there are legal norms in several legal acts giving cohabitants the same rights as to the married spouses[26]. By the Cohabitation Law Act the registration is not allowed to the adolescent. Unlogical is the reason restricting the adolescents to register their cohabitation – "adolescents marry only because of the pregnancy of one spouse, but our society does not condemn factual cohabitation"[27].

There is no reference to the certain research confirming such statement; comparing the statement to the regulation in Estonian Family Law Act providing the right to marry, there can be noticed a contradiction between regulations: 15-year old adolescent can marry by the consent of the court, but cannot register the partnership, because of the reason refered above.

Those adolescents whose legal capacity has not been expanded for marriage[28], live in a factual relationship (i.e. not registered). Because of the non-expansion of their legal capacity in every (legal) deed they cannot make the transactions or deeds to protect and support their "family", they need to involve their parents or

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[24] Council of Europe Family Policy Database. Family law and children's rights. Marriage and cohabitation. Available at: www.coe.int/familypolicy/database (10.12.2013)

[25] In October 2014 Estonian Parliament adopted the Cohabitation Law Act, but it will be enforced only in 2016.

[26] See Draft of Cohabitation Act. Available at: http://www.riigikogu.ee/?page=en_vaade&op=ems&enr=650SE&koosseis=12. Last accessed 10.08.2014.

[27] See the explanatory letter of the Estonian Draft of the Cohabitation Law Act. Available at: http://www.riigikogu.ee/?page=en_vaade&op=ems&enr=650SE&koosseis=12. Last accessed 10.08.2014. (in Estonian).

[28] According to the courts' view they are not mature enough to take obligations and responsibilities related to marriage.

guardians to have their consent[29]. Situation is somehow different when one of the spouses is of full age and another adolescent. A person of full age has legal ability to take the obligations for the family and in some cases these obligations can lead to the financial commitment of the both spouses[30]. According to the study about the decision-making in a family it was ascertained that decisions of buying something expensive for the family are made mostly together (74%)[31]. Study covers also adolescents who live together with a partner creating a family. This example shows that in reality the adolescents are also involved with the decision-making processes related to property, though in a legal regulation this has not been clearly determined. In such situation the rights of an adolescent spouse living in a factual cohabitation can be restricted. In factual cohabitation live also adolescents who have got a "negative decision" from the court in widening the legal capacity to get married. As according to the study mentioned above also such adolescents decide the property questions with another grown-up partner of a factual cohabitation, there can be claimed that the adolescent can be manipulated and induced as a non-mature person for such decisions.

Though the number of the adolescents who marry or want to register their partnership is small, their legal relations need more thorough analyse to ensure their rights to family life. As the restriction in age has been provided for a protection of a child then there should be considered the other negative aspects the decision of a court can cause violating the other rights or interests of the child.

4. Permission to marry regulations in private international law

The applicable rules how conflicts between the diversity of the law should be resolved are found in private international laws of member states. In order to

[29] According to the Estonian General Part of the Civil Code a multilateral transaction entered into by a person with restricted active legal capacity without the prior consent of his or her legal representative is void unless the legal representative subsequently ratifies the transaction. If a person acquires full active legal capacity after entry into the transaction, he or she may ratify the transaction himself or herself. (Par 11).

[30] According to the Estonian Family Law Act a solidary obligation of the spouses arises from a transaction made by one spouse for the organisation of shared household or in the interests of children or in order to satisfy other common needs of the family if the amount of the transaction does not exceed the reasonable rate according to the living conditions of the spouses. (par 18)

[31] See Vainu V., Järviste L., Biin H. Soolise võrdõiguslikkuse monitooring. Uuringuraport. (Monitoring of Gender Equality) 2009. Sotsiaalministeeriumi toimetised 2010. Published by Ministry of Social Affairs 2010, p 130–131. Study includes also cohabitants and married couples from age 15.

find out the applicable legislation one has to look at the substantive laws of different member states.

Prevailed understanding in European legal space related to family law is that this branch of law is so deeply related to the culture of each member state that it is not possible to harmonise the family laws of member states[32], while the others see instead one common European cultural identity[33] and hence the culture is not an obstacle for harmonisation of family laws of EU. In this respect there could be raised a question that how to solve in cross-border cases the diversity of ages of adolescents who want to marry abroad or have already married abroad.

For example, according to Lithuanian law a female younger than 15-years can marry in case of pregnancy by the permission of court. When such girl gets a permission from the Lithuanian court and receives by this a certificate of no impediments for marriage and wants to marry in Estonia then according to Estonian Private International Law Act (par 56) the prerequisites of and hindrances to the contraction of a marriage and the consequences arising there from shall be governed by the law of the state of residence of the prospective spouses. In this case it can be Lithuanian. However, in the process of marriage it is also assessed if those conditions are in accordance to Estonian law. As according to Estonian law an adolescent can marry only since the age of 15, there is a collision between the laws of two member states. Furthermore if the Lithuanian girl is residing in Estonia the 14-year old girl cannot get her marriage recognised and therefore deprived from fundamental rights to enjoy family life and get benefits that the marriage status can bring her in Lithuania.

Similar situation is in case of adolescents of age 15 and 16. The maturity of an adolescent is controlled by the state of residence or citizenship. Problem rises in another state which applies its own legislation while determing the full active legal capacity.

In case of marriage in Estonia the administrative body does not agree to contract the marriage between the aforementioned 14-year old Lithuanian girl

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[32] See for example Connolly A. J. 2012. Naturalising Cultural Difference and Law: Author's Introduction. *Australian Journal of Legal Philosophy* 37, Monash University, 280–292 and Pintens W. 2003. Europeanisation of Family Law. Perspectives for the Unification and Harmonisation of Family Law in Europe. Boele-Woelki K. (ed.). Intersentia. Antwerp-Oxford-New York.

[33] See for example Dethloff N. 2003. Arguments for the Unification and Harmonisation of Family Law in Europe. Perspectives for the Unification and Harmonisation of Family Law in Europe (ed. Boele-Woelki K.). Intersentia. Antwerp- Oxford-New York and Meeusen J. 2007. System Shopping in European Private International Law in Family Matters. International Family Law for the European Union. Meeusen J., M. Pertegás, G. Straetmans, F. Swennen (eds.). Intersentia. Antwerpen-Oxford. Antokolskaia M. 2010. Harmonisation of Substantive Family Law in Europe: Myths and Reality. *Child and Family Law Quaterly* 22, Jordan Publishing, 397–421.

who has a certificate of no marriage impediments, because the preconditions to marry are not followed, the girl does not have marriage capacity according to the Estonian law. When this Lithuanian girl marries in Lithuania and plans to live in Estonia with her husband as a married couple then Estonia will not recognise this marriage because her age is less than 15 and is hence in conflict with Estonian prerequisites of marriage, that is, in collision with Estonian substantive law.

As already mentioned, the differences in age as an element of marriage capacity derives as claimed by the different cultures of member states. Undoubtedly culture is reflected in law, but in this example case it raises a question if Estonian and Lithuanian "culture" are in respect of maturity of children so different? That is, how much is 15-year child more mature than 14-year child related to marriage? How different can be the principles Lithuania uses in the process of maturity evaluation compared to the principles in Estonia?

Protection of culture in this context means that state protects certain values by this non-recognition. In Estonian case there is no clarity what values and how does the recognition of marriage capacity certificate issued by the Lithuania violate?

And more, whose responsibility it is to protect the rights of these adolescents? Can they represent themselves by themself or should their parents be involved? This is a question of the legal capacity of the child which can be different in both states and not recognised, again. Such non-recognition can be disputed. Person who can submit the claim, can differ from state to state as well.

As explained above, the registration of the birth of the child in case one parent or both is/are adolescents, is complicated in Estonia. When into this process is included the cross-border element then such procedure becomes even more difficult as the parent of the adolescent should be involved. In case discribed above the marriage contracted in Lithuania is not recognised, this means that the birth of the child must be registered as a birth of non-married parents. As a mother is adolescent she cannot provide an application for registration in Estonia. Even when a father of the child is full-of-age he cannot represent a child in this process because he is not a legal father yet: the acknowledgement of a child must be done first. After that he is a legal representative of the child and can present an application to register the birth of the child. However, adolescent mother is also involved, but partly together with the local government. In case a father of the child is also adolescent, he cannot represent a child in this process and local government as a legal representative of a child presents the application of registering the birth of the child. According to Estonian law a representative of a child is the local government where a child lives[34]. Before

[34] Family Law Act par 176.

registering the birth a child does not have a registered residence. In this case a mother's residence is applied. However, in case a mother does not have a residence in Estonia yet, it is disputable, which local government should represent the child in a process of registering the birth.

If both of those parents of the child, who are actually married in another member state, are adolescent, their parents must be involved, they must give their consents to the statements of intent – e.g. to the acknowledgement of fatherhood, to the name of the child etc. Consent derives from the responsibility of a parent to protect the interests of their child. Analysing more deeply such protection one can notice clear overregulation and waist of time instead of protecting anything in reality.

As Estonia does not recognise the marriage of those adolescents, then they will not get the rights of the spouses; however, they still can be considered as a family and their rights can be evaluated as through the factual cohabitation.

5. Marriages of adolescents in the case of migration

Another question which can be raised is that how are protected the interests of the adolescents when evaluate the situation throught the prism of free movement right? Is the right of free movement within EU restricted by the refusal to recognise their marriages contracted abroad? Again, the restriction to free movement within EU is legitimate when protecting certain value. But this value must be clear and in the process of restriction a proportionality principle must be followed. In Estonian case the values related to marriage are not clearly expressed in legal acts nor their interpretations, including the documents provided in a law-making procedure.

In the case the adolescent wants to move from one EU state to another the situation becomes even more complicated. Prevailed understanding in European legal space related to family law is that this branch of law is so deeply related to the culture of each member state that it is not possible to harmonise the family laws of member states, while the others see instead one common European cultural identity and hence the culture is not an obstacle for harmonisation of family laws of EU[35]. In this respect there could be raised a question that how to solve in cross-border cases the diversity of ages of adolescents who want to marry abroad or have already married abroad.

The free movement of EU citizens is regulated by the Treaty articles and by the directive 2004/38/EC. Article 20 §2 of the TFEU states that citizens of

[35] See p. 125.

the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have right to move and reside freely within the territory of the Member States. Article 21 of TFEU gives the Union citizens a right to move and reside freely within the territory of any of the Member States subject to the limitations and conditions contained in the Treaties and secondary legislation. The right to move derived from the EU legislation though does not resolve the collision of norms of family law and the right to marry of adolsents.

If marriage or relationship is not recognised in another member state there might raise problems of the application of art 7 of the 2004/38/EC directive. Article 7 of the citizenship directive states the right of residence for more than three months. According to § 1 "all Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and – have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c)."

The enjoyment of free movement rights in EU are not unlimited which means that the fact of being married and having additional rights from the fact that one is married can increase these possibilities, because the family members of the EU citizen can relay on the income of the spouse in order to justify their right to stay in another member state.

Art 2.§ 2 c) of the directive states: that family members are the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b).

Refusing to recognise the adolecent marriage in another member state might lead to discrimination and deprivation from some family benefits or other social benefits that are available only for families or registered couples. Also additional problems are realated to sickness insurance coverage as in Estonia the spouses can be covered with sickness insurance if one of the spouses

is working and paying social tax.[36] Furthermore ECHR art 8 gives the right to enjoy family life to all human beings regardless of the age and art 12 of ECHR gives the right to marry and found a family according to the national laws. The only limitation provided is the marriageable age which seems to be controversial in the European Union legal space.

6. Conclusion

Contemporary society can be characterised as a globalised, multicultural, pluralistic and tolerant society. Cross-border family relations have mixed the cultures and changed the understanding about family as well as about marriages. Single European culture and the jurisdiction based on traditions are discussed more and more also that the culture of national state is weakening its positions. EU member states are becoming more tolerant and try to find solutions, to solve the cross-border problems related to marriage and ensure the free movement of EU citizens and respect of human rights. Marriage where one spouse is adolescent needs an additional attention because of its specific problematics.

With no doubt the rights of the children should be protected on the one hand, but on the other hand the right of being recognised as couples is also a right of the child. Right for marriage/family life is a human right and protected by the ECHR (Art 12) as well as by the European Union Charter of Fundamental Rights (Art 9). Based on the practice of ECtHR[37] member states can restrict the right to marry in case there is a need to protect the certain value of the member state, but as already mentioned this restriction must be evaluated and explained clearly by this that what are those interests and values such marriage will endanger and whether this restriction is the only suitable mean to protect those interests and values.

Through the analyse in respect of age in relation of context of marriage, it seems that it is not correct to refuse to confirm the contract or to recognise the marriage when one of the (future) spouses is younger than it is provided by the state legislation, which has to fulfill the procedure of the confirming the contract of marriage or recognise the marriage contracted in other member state. Probably the strongest argument in this attitude is the fact that another state

[36] Art 5; Par 3[1] Estonian Health Insurance Act, RT I 2002, 62, 377.

[37] See e.g. Rees v. UK 1986, Cossey v. UK 1990, B.v. V France 1992, X, Y and Z v. UK 1997, Christine Goodwin v. UK 2002, Van Kück v. Germany 2013, Vallianatos and others v. Greece 2013 etc.

already has evaluated the maturity of the child. In Lithuanian case it seems the only possible solution.

The analysis of the marriage capacity in Estonia and Lithuania which are both EU member states has leaded us to the conclusion that there is urgent need for European legislation of family law. In this article only the specific issue as marriage capacity was discussed and analysed but there are more cases where the differences in the state legislation can lead to the human rights violations or impede the enjoyment of the free movement rights. Futhermore the research should be done how the non-recognition of marriages or partnerships in different EU states may impede the free movement rights and fundamental rights in general.