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# Regulation of Gender Equality as a Fundamental Right in Estonia

## Introduction

One of the most important parts of the Constitution of the Republic of Estonia as well as of the other countries is the catalogue of fundamental rights and freedoms, which contains both freedoms protected from intervention by the state and several rights that can be implemented only through the positive activities of the state. The fundamental rights of individuals provided in the Constitution have traditionally been the rights of a citizen in respect of the state.<sup>\*1</sup> “If a person violates another person’s rights and this also constitutes a violation of human rights, then according to the currently prevailing opinions, it is not an issue of human rights law but it is an issue of criminal law, family law, procedural law or other specific branch of law depending on the content of the violation”.<sup>\*2</sup>

At the same time, the fundamental rights and freedoms of individuals cannot be regarded as solely the rights of the state in respect of an individual. According to § 19 of the Estonian Constitution<sup>\*3</sup>, everyone shall honour and consider the rights and freedoms of others, and shall observe the law, in exercising his or her rights and freedoms and in fulfilling his or her duties. We must acknowledge the opinion that the question about being the addressee of the fundamental rights of private persons cannot be disregarded only because a particular tradition exists. Fundamental rights are not exclusively about an absolute relationship between the state and the citizen but also about relations between citizens. Such a case involves the extension of the impact of the fundamental rights and their impact on private persons. Fundamental rights are, by nature, not simply a part of positive law but also principles that are valid in law as such.<sup>\*4</sup> As a result, the private person is not subjected to the correlative duties arising from fundamental rights but as a member of society, he or she is

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<sup>1</sup> K. Merusk, R. Narits. *Eesti konstitutsiooniõigusest* (On Estonian Constitutional Law). Tallinn: Õigusteabe AS Juura, 1998, p. 177 (in Estonian).

<sup>2</sup> R. Maruste. *Inimõigused ja ausa õigusemõistmise põhimõtted*. Euroopa Inimõiguste Konventsioon. Euroopa Sotsiaalharta (Human Rights and Principles of Fair Judgment. European Convention of Human Rights. European Social Charter). Tallinn: Õigusteabe AS Juura, 1993, p. 11 (in Estonian).

<sup>3</sup> Riigi Teataja (The State Gazette) 1992, 26, 349 (in Estonian).

<sup>4</sup> K. Merusk, R. Narits (Note 1), p. 177.

obliged to honour the rights and freedoms of other persons. Thus, the private person is not the direct addressee of fundamental right and freedoms; but still his or her rights and freedoms are influenced only by the third-party application (*i.e.* by another private person) of fundamental rights that is mediated by the state.<sup>5</sup>

Section 12 of the Constitution of Estonia provides for the principle of equal treatment as a fundamental right. According to § 12 (1) of the Constitution, no one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds. Estonia as many other countries faces an important problem of ensuring equal treatment for women and men or the abolition of discrimination on grounds of sex. Just like the other human rights, the right not to be discriminated against on the grounds of sex involves a horizontal (legal relations between a natural person and a legal person in private law or between a natural person and a natural person) dimension.<sup>6</sup>

Unlike other developed countries, Estonian society is still making its first steps in introducing the principle of gender equality. The opinion of the head of the Equality Bureau<sup>7</sup>, operating under the Republic of Estonia Ministry of Social Affairs, Ülle-Marike Papp, is that in Estonian legal culture, gender equality must be recognised as a fundamental human right, the main principle of democracy and a main prerequisite for social development is justified. Men and women must be assured equal rights and equal opportunities, accompanied by equal duties and liability. The constitutional prohibitions against discrimination and equal rights *de jure* are essential but not sufficient measures for ensuring equality for men and women. The necessary and sufficient prerequisites will be met only when women, in addition to rights, also have equal opportunities with men to participate in societal activities.<sup>8</sup> In order to achieve this goal, among other things, the draft Gender Equality Act (GEA)<sup>9</sup> has been prepared, which has been submitted to the legislative proceeding of the *Riigikogu* (Parliament) and which was intended to be adopted in 2002. In addition to GEA, prepared in the Ministry of Social Affairs, the Ministry of Justice submitted for approval the draft Equality and Equal Treatment Act<sup>10</sup> in April 2002, which has a wider approach to those issues of equality, prohibiting discrimination on grounds of sex, race, nationality, age, disability, sexual orientation and religious or political opinion. As both drafts provide for similar rules regarding gender equality and it is not clear which one of them will be adopted, only GEA, that was prepared first, was taken as the basis for writing this article. The article will examine the international obligations imposed on Estonia that have influenced the preparation of the act and analyse the impact of the act on the actual implementation of the principle of gender equality.

## 1. Obligations arising from international legislation

### 1.1. International regulation

On the international level, numerous acts have been adopted that have to contribute to the implementation of the fundamental rights of people. The principles set out in these documents are most often reflected in the constitutions of the states, in many cases also in secondary legislation. According to § 3 (1) of the Constitution of Estonia, generally recognised principles and rules of international law are an inseparable part of the Estonian legal system. The second paragraph of § 123 of the Constitution provides that if laws or other legislation of Estonia are in conflict with international treaties ratified by the *Riigikogu*, the provisions of the international treaty shall apply.

Several acts issued by international organisations, prohibiting discrimination on grounds of sex are binding on Estonia. As the first act in this field, the *Riigikogu* ratified the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (1979)<sup>11</sup> (entered into force in Estonia in

<sup>5</sup> See M. Ernits. Holders and Addressees of Basic Rights in the Constitution of the Republic of Estonia. – *Juridica International*, Vol. 4, 1999, pp. 24; 27–29.

<sup>6</sup> The explanatory memorandum accompanying the draft Gender Equality Act. Available at: <http://www.riigikogu.ee/ems/index.html> (1.04.2002) (in Estonian).

<sup>7</sup> The main purpose of the Equality Bureau is to arrange for the introduction of the principle of equality into social and political development.

<sup>8</sup> Ü.-M. Papp. National Gender Equality Policy. Towards a Balanced Society. Women and Men in Estonia. Tallinn: Ministry of Social Affairs. United Nations Development Programme, 2000, pp. 73–74.

<sup>9</sup> Soolise võrdõiguslikkuse seadus. Eelnõu, 4.12.2001 (The Gender Equality Act. Draft. 4 December 2001). Available at: <http://www.riigikogu.ee/ems/index.html> (1.04.2002) (in Estonian).

<sup>10</sup> Võrdõiguslikkuse ja võrdse kohtlemise seadus. Eelnõu, 24.04.2002 (The Equality and Equal Treatment Act. Draft, 24 April 2002). Available at: <http://www.just.ee/index.php3?cath=4963> (5.06.2002) (in Estonian).

<sup>11</sup> Riigi Teataja (The State Gazette) II 1995, 5, 31.

1991). The obligation to implement the principle of gender equality arises, among other acts, also from the UN International Covenant on Economic, Social and Cultural Rights (1966)<sup>\*12</sup> (entered into force in Estonia in 1992) and the European Social Charter, adopted by the Council of Europe (1961)<sup>\*13</sup> (entered into force in Estonia in 2000), as well as convention No. 100 of the International Labour Organisation concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951)<sup>\*14</sup> (entered into force in Estonia in 1996).<sup>\*15</sup>

The UN Convention on the Elimination of All Forms of Discrimination Against Women prohibits any discrimination on grounds of sex. Guided by the convention, Estonia has assumed an obligation to take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men (article 3). Articles 4–16 of the convention elaborate on the content of the prohibition against discrimination — women must be ensured equal rights with men and equal treatment in participation in politics and decision-making, in acquiring education, employment, in family duties, *etc.*

The UN International Covenant on Economic, Social and Cultural Rights, ILO convention No. 100 and European Social Charter provide the implementation of the principle of equal treatment in labour relations. According to article 7 of the UN International Covenant on Economic, Social and Cultural Rights, the states recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work (clause (a) (i)).

According to article 2 (1) of the ILO convention No. 100, each member shall ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

In article 20 of the European Social Charter, the following principle has been established: in order to implement the right to equal opportunities and equal treatment effectively in employment and vocational issues irrespective of sex, the parties undertake to recognise the right and take measures to ensure or promote its implementation in the following fields:

- a) finding of work, protection against lay-off and vocational reintegration;
- b) vocational guidance, vocational training, retraining and rehabilitation;
- c) labour relations and labour conditions, including remuneration;
- d) career, including promotion.

Thus, according to the previously mentioned international acts, Estonia must ensure equal opportunities and equal treatment for men and women in any field, but above all, in the area of labour relations.

In addition to the international provisions binding on Estonia, account must also be taken of the European Union (EU) acts prohibiting discrimination on grounds of sex, since the Europe Agreement<sup>\*16</sup> obliges to approximate and harmonise Estonia's legislation to EU law (articles 68–69 of the Europe Agreement). Consequently, the legislation concerning gender equality applicable in Estonia must be in accordance with the EU provisions, which is also a prerequisite for the accession to the EU. Estonia as a candidate country is obliged to show its readiness to adapt to the EU *acquis* already before the accession in order to be on the same legislative level with the other candidate countries.<sup>\*17</sup>

The White Paper on preparation of the associated countries of Central and Eastern Europe for integration into the EU internal market also considers the equal treatment of men and women in the field of social policy a priority<sup>\*18</sup>, pointing out primarily directives 76/207/EEC (on the implementation of the principle of

<sup>12</sup> Riigi Teataja (The State Gazette) II 1993, 10, 13.

<sup>13</sup> Riigi Teataja (The State Gazette) II 2000, 15, 93.

<sup>14</sup> Riigi Teataja (The State Gazette) II 1996, 9/10, 31.

<sup>15</sup> In addition to the listed acts, the principle of equal treatment has also been provided in the UN Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), (entered into force in Estonia in 1992; Riigi Teataja (The State Gazette) II 1993, 10, 11) and in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), adopted by the Council of Europe (entered into force in Estonia in 1996; Riigi Teataja (The State Gazette) II 1996, 11/12, 34).

<sup>16</sup> The Association Agreement between the European Communities and its member states and the Republic of Estonia (Europe Agreement). – Riigi Teataja (the State Gazette) II 1995, 22–27, 120.

<sup>17</sup> See T. Kerikmäe. Euroopa Liit ja õigus (European Union and Law). – Rahvusvahelise Õiguse Assotsiatsiooni Eesti Osakonna Toimetised I. Tallinn: Õiguskirjastus, 2000, p. 37 (in Estonian).

<sup>18</sup> Valge raamat. Assotsieerunud Kesk- ja Ida-Euroopa riikide ettevalmistamine integreerumiseks Euroopa Liidu siseturgu (White Paper. Preparation of the Associated Central and Eastern European Countries for Integration into European Union Internal Market). Tallinn: Eesti Õigustõlke Keskus, 1996, pp. 82–85 (in Estonian).

equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions)\*<sup>19</sup> and 75/117/EEC (on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women)\*<sup>20</sup> as the most important legally binding acts. Directive 97/80/EC on the burden of proof in cases of discrimination based on sex\*<sup>21</sup> also plays a very significant role in contributing to the implementation of the principle of equal treatment.\*<sup>22</sup> Here it is important to note that increasingly more attention is paid to the equal treatment of men and women workers in the EU — the competence of the EU in this area was considerably increased by the Treaty of Amsterdam (1997). This act was used to supplement article 2 of the Treaty establishing the European Community (EC), according to which the promotion of equality between men and women is one of the tasks of the Community.\*<sup>23</sup> Also, the importance of the implementation of the principle of gender equality in labour relations was increased, by rendering adherence thereto obligatory both in remuneration and in matters of employment and occupation and recognising so-called positive discrimination (article 141 of the Treaty establishing EC).\*<sup>24</sup>

## 1.2. Situation in Estonia

It has to be admitted that although several international acts prohibiting discrimination on the grounds of sex are binding on Estonia, and in relation to the accession to the EU, Estonia must also introduce into its legislation the requirements established in the relevant EU acts, the implementation of the principle of equal treatment is not ensured in practice. In Estonia, as in many other countries:

- the remuneration of women is lower than that of men and the difference in wages shows a growing trend;
- the labour market has been segregated both horizontally and vertically, which, on the one hand, is related to different valuation of the work of men and women, and on the other hand, impedes the purposeful use of the potential of both sexes;
- mainly women bear the burden of household work;
- the share of women on the level of decision-making is small;
- unreasonable stereotypes and division of roles both in working and family life have taken root in society;
- the gap between the average lifespan of men and women is too wide.\*<sup>25</sup>

Although in addition to the Constitution the application of the principle of gender equality has been set out in the Employment Contracts Act (ECA § 10)\*<sup>26</sup>, the Wages Act (WA §§ 5 and 5<sup>1</sup>)\*<sup>27</sup> and the Advertising Act (§ 5)\*<sup>28</sup>, the regulation of the issues related to the prohibition against discrimination is relatively insufficient, the relevant provisions are limited and declarative and do not guarantee sufficient protection for people.\*<sup>29</sup>

<sup>19</sup> OJ L 39, 14.02.1976, p. 40.

<sup>20</sup> OJ L 45, 19.02.1975, p. 19.

<sup>21</sup> OJ L 14, 20.01.1998, p. 6.

<sup>22</sup> In addition to the above-mentioned legislation, the area is also governed by directives 79/7/EEC on progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ L 6, 10.01.1979, p. 24), 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ L 225, 12.08.1986, p. 40), 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (OJ L 359, 19.12.1986, p. 56), 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) (OJ L 348, 19.10.1992, p. 11) and 96/34/EC on the framework agreement on parental leave concluded by Union of Industrial and Employer's Confederations of Europe, European Centre for Public Enterprise and the European Trade Union Confederation (OJ L 145, 19.06.1996, p. 4).

<sup>23</sup> Amsterdami leping. Konsolideeritud lepingud (Amsterdam Treaty. Consolidated Treaties). Tallinn: Eesti Õigustõlke Keskus, 1998, pp. 160 (in Estonian).

<sup>24</sup> *Ibid.*, p. 217.

<sup>25</sup> Ü.-M. Papp (Note 8), p. 74. See also about the same issue A. Narusk. Men and Women: Opportunities, Rights and Obligations. Human Rights in Estonia. Tallinn: United Nations Development Programme, 1998, pp. 41–51; R. Võõrman. Men and Women on the Labour Market: Wage Ratios. National Gender Equality Policy. Towards a Balanced Society. Women and Men in Estonia. Tallinn: Ministry of Social Affairs, United Nations Development Programme, 2000, pp. 46–53.

<sup>26</sup> Riigi Teataja (The State Gazette) 1992, 15/16, 241; 2001, 53, 311 (in Estonian).

<sup>27</sup> Riigi Teataja (The State Gazette) I 1994, 11, 154; 2001, 50, 287 (in Estonian).

<sup>28</sup> Riigi Teataja (The State Gazette) I 1997, 52, 835; 2001, 50, 284 (in Estonian).

<sup>29</sup> See also M. Muda. Prohibition of Discrimination in Labour Relations. – *Juridica International*, Vol. 4, 1999, pp. 189–199.

It is also difficult to ensure compliance with the laws providing the principle of equal treatment. Although according to § 15 (1) of the Constitution, everyone whose rights and freedoms are violated has the right of recourse to the courts, this may remain a merely theoretical option upon the application of the principles of equal treatment. It is very difficult to prove that discrimination occurred in these issues. This gives rise to a question of how informed the Estonian courts are when deciding on these problems. No relevant decisions are available. No mechanism providing the criteria on the basis of which equal treatment and equal opportunities should be evaluated has been prepared either.

The application of the principles of gender equality is problematic in Estonia, above all, due to the fact that very many people are not aware of the problems accompanying equal treatment and creation of equal opportunities. The problems related to discrimination may arise only after several years, when particular stability has been achieved in the economy and on the labour market and people start to consider the ensuring of an increasingly better quality of life. The adoption of the GEA will certainly contribute to achieving this goal.

## 2. Gender Equality Act

### 2.1. General principles

In 2000–2001, the draft GEA was prepared in the Republic of Estonia Ministry of Social Affairs, based on both the above-mentioned international acts and the relevant laws of the other countries.<sup>30</sup>

The purpose of the GEA is to promote the equality of men and women as one of the fundamental human rights<sup>31</sup>, by prohibiting discrimination on grounds of sex and by obliging the state and local government agencies, educational and science institutions and employers to act in economic, social, educational and cultural areas and the other areas of community life to promote gender equality<sup>32</sup> (§ 1). Thus, the GEA provides for two measures in the implementation of the principle of gender equality as a fundamental right:

- 1) prohibition against discrimination on grounds of sex;
- 2) promotion of gender equality.

The particular feature of the Estonian GEA is that while in the majority of the countries the regulation of the relevant specific law only concerns labour relations<sup>33</sup>, the methods referred to in § 1 of the GEA shall be applied in all areas of community life in Estonia. As an exception, the principles provided in the GEA need not be followed in religious associations in professing and practicing faith, including when working as a minister of religion. Application of the act will not involve intervention in family relations and private life either (§ 2 (2)). The establishment of such exceptions is justified and necessary, in order to honour historically developed religious traditions and the inviolability of the family and private life of an individual.

<sup>30</sup> In order to prepare the draft, the equality acts of Germany, Austria, Australia, Switzerland, Ireland, Norway, Sweden, Finland and Lithuania were analysed. The draft has been influenced the most by the latter two acts, as they were the newest and most modern laws. See explanatory note accompanying the draft Gender Equality Act (Note 6).

<sup>31</sup> Section 1 of the GEA refers to the equality for women and men as one of the **primary** human rights. The right not to be discriminated against on grounds of sex is undoubtedly one of the main rights of an individual, but its position in the catalogue of fundamental rights and freedoms is approximate. The equality for men and women may be considered as a main human right in the developed welfare states, the social policy of which is aimed at the improvement of the existing benefits. The situation is different in the developing countries, for example, where attempts are made, above all, to ensure the satisfaction of the people's primary needs and the promotion of gender equality does not belong to the state's priorities.

<sup>32</sup> According to § 3 (1) 1), gender equality or the equality for women and men is the equal rights, duties, opportunities and liability of women and men in working life, in the acquisition of education and in participating in the other areas of community life.

<sup>33</sup> See R. Ben-Israel. *Equality and Prohibition of Discrimination in Employment. Comparative Labour Law and Industrial Relations in Industrialized Market Economies.* – R. Blanpain and C. Engels (eds.). VII<sup>th</sup> and revised ed. The Hague-London-Boston: Kluwer Law International, 2001, p. 389.

## 2.2. Prohibition against discrimination on grounds of sex

### 2.2.1. General rule

Subsection 4 (1) of the GEA prohibits direct<sup>\*34</sup> and indirect<sup>\*35</sup> discrimination on grounds of sex. According to this rule, any discrimination on grounds of sex in any area of life is not allowed. The establishment of such a general rule is necessary as the act cannot provide a comprehensive list of all possible situations of discrimination and consequently, the general rule against discrimination may be implemented in very different areas and in numerous situations. The act may also be implemented in those cases when discrimination on grounds of sex is not aimed against a specific individual.<sup>\*36</sup> The provision of the general prohibition against discrimination on grounds of sex is also necessary for the performance of the obligations set out in international acts.<sup>\*37</sup>

However, the GEA as similar laws of other countries sets out particular exceptions the implementation of which is not considered a discriminating activity. These include:

- 1) special protection of women in relation to pregnancy and maternity;
- 2) imposition of compulsory military service only on men;
- 3) acceptance of only women or only men as members of a non-profit association, if this derives from the articles of the association;
- 4) employment of or permission to training of a person of a particular gender, if this derives from the type of the activity or other circumstances;
- 5) implementation of special measures promoting gender equality, which give preference to the gender that is under-represented or in a worse position or decrease the existing inequality (so-called positive action) (GEA § 4 (2)).

The exceptions listed above are, to a large extent, based on the international regulation. Prohibition, differentiation and preference related to the nature of occupation, guaranteeing the security of the state or application of special measure of protection are generally not considered to be contrary to the principle of equal treatment.<sup>\*38</sup> According to EU directive 76/207/EEC, differentiation resulting from the nature of occupation, protection of women as regards pregnancy and maternity and implementation of positive action are not considered to be discriminatory (article 2). A similar option to make differences is also provided by the UN Convention on the Elimination of All Forms of Discrimination Against Women (article 4). Thus, according to the GEA, it is not discrimination on grounds of sex, if a performer is chosen in a theatre from among the representatives of only one sex, if night work is prohibited only to pregnant women or if preference is given to applicants of the under-represented sex upon employment.

Although the Defence Forces Service Act<sup>\*39</sup> imposes the duty to serve in the Defence Forces only on male Estonian citizens (§ 3 (1)), it does not preclude the voluntary entry into service of female persons. The possibility to make an exception to the members of a non-profit association should also be considered as justified, if this derives from the articles of the association (*e.g.* student organisations, women's associations, *etc.*). According to § 7 (1) 4) of the Non-profit Associations Act<sup>\*40</sup>, the articles of an association shall set out the conditions and procedure for membership in the non-profit association and for leaving and exclusion from the non-profit association.

<sup>34</sup> According to § 3 (1) 3) of the GEA, direct discrimination on grounds of sex is a more unfavourable treatment of an individual due to his or her sex, particularly in relation to pregnancy and maternity, parenthood, performance of family duties or other circumstances related to gender, and sexual harassment.

<sup>35</sup> According to § 3 (1) 4) of the GEA, indirect discrimination on grounds of sex is a neutral condition, circumstance or activity that appears or is by nature neutral, which places a considerably majority of persons of one gender into a more unfavourable situation when compared to the other gender.

<sup>36</sup> The explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

<sup>37</sup> This concerns, above all, the UN Convention on the Elimination of All Forms of Discrimination Against Women, which prohibits any discrimination on grounds of sex; as well as the EU rules that make the principle of gender equality increasingly widespread.

<sup>38</sup> See R. Ben-Israel (Note 33), pp. 385–387.

<sup>39</sup> Riigi Teataja (The State Gazette) I 2000, 28, 167; 2001, 100, 648 (in Estonian).

<sup>40</sup> Riigi Teataja (The State Gazette) I 1996, 42, 811; 2001, 93, 565 (in Estonian).

### 2.2.2. Prohibition against discrimination on grounds of sex in labour relations<sup>\*41</sup>

The GEA regulates, in the greatest detail, the prohibition against discrimination in labour relations. This is also justified as in this field instances of discrimination are more numerous<sup>\*42</sup> than in any other areas and it is very difficult to prove discrimination.

According to § 5 (1) of the GEA, the following cases shall be considered as discriminating in working life: if the employer employs, promotes, selects for a position, training or performance of a task or sends to training a person of one sex, leaving aside a more highly qualified person of the opposite sex, except when there are substantial reasons for his or her doing so or this derives from those circumstances not related to gender. This provision does not limit the employer's right to select for the job the most competent and suitable person. The purpose of this is to prevent selection of a person according to his or her gender.<sup>\*43</sup> Establishment of different working conditions, including remuneration<sup>\*44</sup>, division of duties and changes in and termination of the employment relationship on grounds of sex as well as sexual harassment<sup>\*45</sup> shall also be considered discriminating (§ 5 (2)).

The prohibition against discrimination on grounds of sex has been provided both in the applicable ECA (§ 10) and the new draft ECA<sup>\*46</sup> (§ 8). While the applicable act may be criticised for its excessively declarative nature and absence of sanctions against a violation of the principle of equal treatment, the relevant regulation has been considerably supplemented in the draft ECA. This concerns, above all, an employer's burden of proof and liability for disregarding the prohibition against discrimination. The regulation of the WA concerning equal treatment was also supplemented in 2001 — § 5<sup>1</sup> that prohibits the establishment of different wage conditions for the same or equal work to employees of different sex<sup>\*47</sup> (subsection (1)) and specifies the obligations and liability of an employer (subsections (2)–(4)) was inserted in the act.<sup>\*48</sup>

Both upon the adoption and entry into force of the ECA and upon the implementation of the WA, in addition to the rules provided in them, account must be taken of the provisions of the GEA. Section 7 of the GEA obliges the employer to provide an employee with written explanations about the skills and knowledge of the employed person (a person applying for the post has the same right), and about the bases for calculating the wages. The representative of the trade union and the employee's representative are also entitled to receive information about the remuneration of an employee or a group of employees. The employer's obligation to provide information is necessary, above all, for identifying discrimination; nevertheless, the preventive nature of the obligation is not of any lesser importance.

As it was mentioned above, according to § 5 (1) of the GEA, an instance in which the employer has substantial reasons for his or her activity or this derives from those circumstances not related to gender shall not be considered as discrimination. It has to be admitted that the legislator cannot provide more specific instructions for making exceptions to the prohibition against discrimination. At the same time, the above-mentioned rule is a very general one, rendering it very difficult for an employee to prove discrimination. In any cases of discrimination, the situation of the employee is further deteriorated by the fact that he or she usually lacks access to the necessary information. Therefore, the GEA establishes, based on EU directive 97/80/EC, a principle that when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority<sup>\*49</sup>, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove

<sup>41</sup> In the GEA, labour relations refer to both working under an employment contract and in public service (§ 3 (2)).

<sup>42</sup> See also R. Ben-Israel (Note 33), pp. 382–383.

<sup>43</sup> The explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

<sup>44</sup> The objective of the GEA is to eradicate discrimination arising from different wage systems, classification of positions or professional evaluation criteria (*Ibid.*).

<sup>45</sup> According to § 3 (1) 5) of the GEA, sexual harassment is a sexual activity that is undesirable or degrading for an individual who is in a subordinate or dependent relationship, which creates a disturbing, frightening, hostile or degrading atmosphere and which the individual averts or sustains because it serves, in its direct or indirect manifestation, as a prerequisite for employment, preservation of an employment relationship, permission to training, payment of remuneration or other advantages or benefits.

<sup>46</sup> Töölepingu seadus. Eelnõu, 06.06.2001 (The Employment Contracts Act. Draft, 6 June 2001). Available at: <http://www.riigikogu.ee/ems/index.html> (1.04.2002) (in Estonian).

<sup>47</sup> According to § 3 (1) of the WA, In this Act, wage conditions include wage rates, additional remuneration and additional payments payable to employees, methods of calculation and procedures for payment of wages.

<sup>48</sup> According to the WA, at the request of an employee, the employer is required to prove that the employer has adhered to the principle of gender equality and any preferences given were based on objective circumstances not connected to sex. Employees have the right to request explanations concerning the bases for calculation of wages, and also equal payment for the same or equal work and the compensation of damages caused by violation of the principle of equal remuneration. Upon hiring, employers are required to inform employees of the regulation of equal remuneration by law.

<sup>49</sup> Pursuant to § 4 (1) of the Individual Labour Dispute Resolution Act (Riigi Teataja (The State Gazette) I 1996, 3, 57; 2000, 25, 144), individual labour disputes are resolved by labour dispute committees and the courts. Under § 21 of the GEA, an instance of discrimination may also be identified by the Gender Equality Committee (see more precisely chapter 2.4).

that there has been no breach of the principle of equal treatment.<sup>\*50</sup> Consequently, it will suffice, if the employee describes in his or her application why he or she finds that he or she has been discriminated against in employment and the employer as the main possessor of information must prove that different treatment did not result from the employee's gender. Thus, the burden of proof transfers to the employer after the suspicion of discrimination has been created. The imposition of the burden of proof on the employer significantly contributes to the identification of discrimination and reduces the number of cases when recourse to a competent body for assistance is not sought solely because it appears to be impossible to prove the instance of discrimination.

In addition to the above-mentioned circumstances, the establishment of a limitation period the duration of which exceeds the usual one also fosters recourse to a body settling disputes. When the limitation period for filing claims concerning the recognition of rights or protection of violated rights arising from employment relations is four months according to § 6 (1) of the Individual Labour Dispute Resolution Act<sup>\*51</sup>, § 39 (1) of the GEA provides for a limitation period of two years from the instance of discrimination.<sup>\*52</sup> The establishment of a limitation period exceeding that provided by the general rule is justified as employees often delay the initiation of legal proceedings to avoid disagreement with the employer. It cannot be precluded that the employee will take recourse to a competent body only after the expiry of the employment relationship. A sufficiently long limitation period also allows to obtain an opinion of the Gender Equality Committee about the same point of dispute before the initiation of the legal proceedings.<sup>\*53</sup>

Imposition of sanctions against the violation of the prohibition against discrimination also significantly contributes to the application of the principle of gender equality to employment relations. According to § 38 of the GEA, the employer who has ignored the prohibition against discrimination shall be obliged to compensate the discriminated person for the proprietary and moral damage at least five-fold in minimum monthly wage.<sup>\*54</sup> The compensation is determined on the basis of the principles of efficiency and proportionality, taking into account the extent, duration and type of discrimination. The minimum compensation for damage provided in the GEA may be considered to be relatively optimum. At the same time, further to the provisions of the GEA, the employee may rely on the provisions of the labour laws in an instance of discrimination.<sup>\*55</sup> This is due to the fact that, under the GEA, an individual may demand compensation for discrimination as a fact (for the violation of the individual's right not to be discriminated against), under the other laws for receiving less wages than the person should have received or for any other violation by the employer of a prohibition set out in some other law. In such a case, the court may, in addition to the compensation arising from the Gender Equality Act, order the payment of a compensation provided for in a specific law.<sup>\*56</sup>

### 2.2.3. Prohibition against discriminating advertisements and training and employment offers

In addition to the prohibition against discrimination in working life, the GEA also separately provides for a prohibition against the publication of discriminating advertisements and training and employment offers, since these areas are also the most problematic with regard to the application of the principle of gender equality. According to § 8 (1) of the GEA, it is prohibited to publish advertisements that depict or reinforce stereotypical gender roles manifesting inequality between women and men as well as advertisements that disparage one gender or are degrading to one gender. Employment and training offers aimed at people of one gender only, if this does not derive from the nature of work or the need to apply positive actions<sup>\*57</sup> shall also be prohibited (subsection (3)).

In Estonian practice, both publication of discriminating employment offers and advertisements depicting discriminating gender roles are relatively common. The public has not reacted to it in any manner and no relevant decisions are available either. The prohibition against discrimination set out in the GEA will obvi-

<sup>50</sup> A similar rule has been also established in § 5<sup>1</sup> (2) of WA and § 8 (3) of the draft ECA.

<sup>51</sup> Riigi Teataja (The State Gazette) I 1996, 3, 57; 2000, 25, 144 (in Estonian).

<sup>52</sup> In addition to employment relations, this limitation period also applies to instances of discrimination occurring in other areas.

<sup>53</sup> See more precisely chapter 2.4.

<sup>54</sup> In 2002, the minimum monthly wage in Estonia is 1,850 kroons, that is, 118 euros (Vabariigi Valitsuse määrus "Palga alammäärade kehtestamine" (Government of the Republic regulation "Establishment of minimum wage"). – Riigi Teataja (The State Gazette) I 2001, 98, 619 (in Estonian)). Thus, if a violation of the prohibition against discrimination is identified, the body settling the dispute shall order the payment of at least 9,250 kroons, that is, 590 euros to the employee.

<sup>55</sup> Unfortunately, the regulations of the WA and the draft ECA are rather general in this respect — pursuant to § 51 (3) of WA, an employee has the right to demand the compensation of damages caused by violation of the principle of equal remuneration. According to § 8 of the draft ECA, upon a violation of the prohibition against discrimination, an individual whose rights were violated may demand of the employer a reasonable compensation for the proprietary and non-proprietary damage caused by the violation.

<sup>56</sup> See the explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

<sup>57</sup> See more precisely chapter 2.2.1.



ously discipline publishers of announcements and advertisers more and numerous court actions are not likely to emerge in this area. Prohibition against advertising that is discriminating on grounds of sex also allows for cooperation between the GEA supervision bodies and institutions provided by the Advertising Act (police) and thus also for more efficient action in those cases in which individuals do not initiate legal proceedings.<sup>\*58</sup>

### 2.3. Promotion of equality for women and men

Another important step in achieving gender equality is the promotion of equality for women and men. This obligation has been provided in several international acts.<sup>\*59</sup> If the prohibition against discrimination on grounds of sex is contained in several already existing acts, then the issues related to the promotion of equality have been regulated in the GEA for the first time; the GEA imposes this obligation on three groups of persons:

- 1) the state and local government;
- 2) educational, science and training institutions;
- 3) employers.

Such regulation must ensure application of equal treatment in all areas of community life. The task of the agencies of the state and local government units is to change the conditions and circumstances that impede the achievement of equality for women and men. When planning, implementing and evaluating national, regional and institutional strategies, policies and plans of action, they must be guided by the different needs and social status of women and men and take into account how the measures implemented and to be implemented will affect the situation of women and men in society (§ 9). It is important that officials gather gender-based data on their respective areas. This would help see the processes in society and analyse how the drafted plan of action, programme or legislation will affect women and men as the two largest social groups in society.<sup>\*60</sup> Equal opportunities to participate in decision-making should also be guaranteed to women and men both on the state and local level.

According to § 10 of the GEA, educational, science and training institutions shall ensure equal treatment for women and men upon the acquisition of education and upon professional and vocational development (§ 10). This obligation covers a very wide range of activities starting from the compilation of curricula (training materials) to the selection of a profession.

According to § 11 (1) of the GEA, in order to promote gender equality, an employer shall be obliged to fill vacant positions with persons of both genders and different positions as equally as possible with women and men and to ensure them equal treatment upon promotion; to provide suitable working conditions for both women and men and to encourage the efficiency of unifying working and family life; and also to see that the employee is protected from sexual harassment, *etc.* The general purpose of the entire section is to reduce the horizontal and vertical segregation in the labour market.<sup>\*61</sup> The obligation of the employer to collect gender-based statistical labour data provided in the GEA (§ 11 (2)) (*e.g.* the gender composition of employees according to posts, average wages of employees, gender structure of promoted employees, *etc.*) is also very important. These data are primarily necessary for monitoring the adherence to the requirements arising from the GEA, but the employer can also use them when shaping the personnel policy.

### 2.4. Gender Equality Committee

The EU directives on gender equality<sup>\*62</sup> provide for extra-judicial competent bodies concerning the issues of discrimination on grounds of sex. Special bodies to implement the principle of gender equality have been established in most of the states.<sup>\*63</sup> These are institutions that have the right to consult both employers and employees in matters of equal treatment, to commence proceedings at their own initiative, conciliate parties, *etc.* Such institutions have to be independent of the political changes in society.<sup>\*64</sup>

<sup>58</sup> See the explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

<sup>59</sup> See, *e.g.*, article 2 of the EC Treaty and articles 3 and 5 of the UN Convention on the Elimination of All Forms of Discrimination Against Women.

<sup>60</sup> The explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

<sup>61</sup> *Ibid.*

<sup>62</sup> See, *e.g.*, article 2 of directive 75/117/EEC; article 6 of directive 76/207/EEC.

<sup>63</sup> *E.g.* in Sweden, Finland, Norway, Germany, *etc.* See International Encyclopaedia for Labour Law and Industrial Relations. – R. Blanpain, C. Engels (eds.). The Hague: Kluwer Law International, 1977.

<sup>64</sup> The explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

The GEA also sets out a special body — the Gender Equality Committee (the Committee) — to supervise over the compliance with law. The activities of the Committee are directed by a head elected for a term of five years, who shall have high morals, preliminary knowledge of human rights and academic education in law (§§ 15 and 16).

According to § 13 of the GEA, the main functions of the Committee are:

- supervision over the compliance with GEA<sup>\*65</sup>;
- receipt of applications from individuals and provision of expert opinions about whether discrimination occurred;
- monitoring of the efficiency of the legislation for gender equality and making of amendment proposals;
- counselling of interested persons;
- international cooperation, *etc.*

One of the important functions of the GEA is the detailed regulation of the processing of discrimination cases in the Committee. The Committee may commence the relevant proceedings at its own initiative or on the basis of an application submitted to it (§ 21). When conducting this procedure, the Committee has the right to demand of the persons concerned information and unrestricted access to documents, materials and positions; to take written explanations and oral testimonies (§ 22 *ff.*). If a written application concerning discrimination was submitted to the Committee<sup>\*66</sup>, it shall be processed within two months of its receipt (§ 29 (1)). Processing shall be carried out in writing and in the course of that, the Committee shall identify the existence of the alleged instance of discrimination on the basis of evidence (§ 30). Subsection 32 (3) of the GEA sets out that after the termination of the procedure the Committee shall:

- 1) provide an opinion about the possible discrimination on grounds of sex<sup>\*67</sup>;
- 2) make a proposal to settle the case by conciliation of the parties without the court;
- 3) make a proposal to discontinue the discriminating activities or to perform particular acts.<sup>\*68</sup>

Consequently, the GEA creates a fast and simple procedure for processing complaints about discrimination. Yet the Committee is not a body settling disputes, its task is to provide an opinion about the matter, while this does not deprive an individual of the right to have recourse to court in the same matter.

## 2.5. Gender Equality Council

In addition to the body supervising over the compliance of the principle of gender equality, many states<sup>\*69</sup> have also established a body directing national equality policy. The establishment of the relevant special body — the Gender Equality Council (the Council) — has also been provided for by the GEA. The Council shall be an advisory body by the Ministry of Social Affairs, which shall coordinate national gender equality policy (§ 36). The Gender Equality Council shall consist of 15 members and its composition shall be approved by the Government of the Republic for three years. As the issues related to gender equality concern all areas of community life, according to the GEA, the Council comprises the representatives of the *Riigikogu*, the Government, employees, employers and the representatives of other spheres of life. The chairman of the Council shall be the Minister of Social Affairs (§ 37). The existence of the permanent Council ensures consistent cooperation of those persons having the necessary knowledge and skills in achieving the goals of the act and a more efficient counselling of the Government upon the implementation of the equality development plans, taking primarily into account the need to integrate into EU.<sup>\*70</sup>

<sup>65</sup> In order to perform this function, the Committee has the right to obtain necessary information, inspect the situation at workplaces, make a proposal to discontinue the discriminating activities, *etc.* (§ 17 (1)).

<sup>66</sup> According to § 26 (1) of the GEA, everyone has a right, in the case of a suspected instance of discrimination, to file with the Committee an application that shall specify the name and contact information of the applicant, the data on the agency or persons, whose activities the applicant considers as discriminating in respect of himself or herself, and a description of the activities serving as the content of the application and the reasons for submitting the application (§ 27). The application shall be filed within two years of the occurrence of the alleged instance of discrimination (§ 28 2)).

<sup>67</sup> The system is favourable for individuals since the Committee's opinion about the occurrence of the instance of discrimination provides the applicant with a moral assurance when referring to the court when it is difficult to assess the likelihood of winning. See the explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

<sup>68</sup> *E.g.* to amend the bases for remuneration that are in conflict with the principle of gender equality, the provisions of an employment contract or collective agreement, *etc.*

<sup>69</sup> Above all, in the Nordic Countries. See Gender Equality — the Nordic Model. Copenhagen: Nordic Council of Ministers, 1995, pp. 12–21.

<sup>70</sup> The explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

## Conclusions

The Constitution of the Republic of Estonia sets out as one of the fundamental rights the right not to be discriminated against on grounds of sex. As any other fundamental right, this right must also be exercisable both in the relationship between the state and an individual and in the relationships between individuals. Although several acts of international legislation are binding on Estonia, imposing an obligation to comply with the principle of gender equality, the performance of this obligation is not ensured in practice. This is partly caused by inadequate legislation, but to a greater extent the failure to perform the obligation derives from the habits and stereotypes evolved in society and from lacking awareness and a relatively low quality of life.

In order to comply with the requirements of international legislation and to contribute to the implementation of the fundamental right set out in the Constitution and to introduce the mentalities and rules of conduct of the contemporary society, the draft GEA has been prepared in Estonia, which is likely to be adopted as a law in 2002. According to the draft act, the principle of equality of women and men must be implemented in two ways — firstly, by prohibiting discrimination on grounds of sex, and secondly, by promoting gender equality.

GEA prohibits discrimination on grounds of sex in three areas, by providing, first of all, a general prohibition against discrimination on grounds of sex, and by then providing precise rules for preventing discrimination in working life and in publishing advertisements and announcements. The regulation of the prohibition against discrimination is most detailed in employment relations since discrimination is most specific and widespread in this area. The employer's obligation to provide information and evidence as well as the establishment of a limitation period the duration of which exceeds that of a usual limitation period and the minimum rate of compensation payable to the person who was discriminated against set out in GEA significantly contribute to the identification of discrimination in working life.

The obligation to promote gender equality has been imposed on the national and local governments and science, educational and training institutions as well as on employers who shall take all appropriate measures for the implementation of the principle of equality of women and men. It has to be admitted that the promotion of gender equality is a very important measure for increasing people's awareness of issues relating to equal treatment and equal opportunities.

According to GEA, the national gender equality policy shall be coordinated by a specific body — the Gender Equality Council. In order to ensure the compliance with the principle of equal treatment, a special body — the Gender Equality Committee — will be established on the basis of GEA, while the Committee will, among other things, also process applications of individuals concerning possible instances of discrimination. Although the Committee can only provide opinions about such issues and make conciliation proposals, the establishment of such an independent institution will allow for the settlement of problems outside the court, by way of a simplified procedure.

Although the response expressed by the public concerning the drafting of GEA has also been negative (e.g. such a specific act is unnecessary; GEA imposes too great obligations on employers, *etc.*), the preparation of the act deserves recognition. Although initially, the primary function of GEA may be to draw people's attention to the issues related to gender equality, it may, if necessary, also provide them with sufficiently efficient protection in the case of discrimination on grounds of sex as a violation of their fundamental right.