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THE ROLE OF THE EUROPEAN COURTS IN DEVELOPING SAME-SEX COUPLES' RIGHTS

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It has been a long fight for homosexual couples in their quest for the right to a civil union. Indeed, they had to wait until 2015 and *Oliari and Others v. Italy*¹.

However, they were not deprived of their rights before this case. Indeed, many cases went before the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) to claim the alignment of homosexual rights with heterosexual ones. Thanks to this case law, same-sex couples have seen their rights improve over the last few decades. The first major step in the fight for equality was taken by the ECtHR in *Norris v. Ireland*². In this case, David Norris successfully claimed that Ireland's criminalisation of certain homosexual acts between consenting adult men was in breach of Article 8 of the European Convention on Human Rights (ECHR). This led Ireland to decriminalise homosexuality in 1993. From that moment, the ECtHR continued to support the development of homosexual rights, as did the ECJ, granting homosexuals the right to succeed a tenancy after the death of a companion for instance. Important progress was also made in the *Schalk & Kopf* case³. In this case, while the ECtHR denied the applicants the right to marry, it did recognise that the relationship of cohabiting same-sex couples living in a stable de facto partnership falls within the notion of "family life". That decision took into account the evolution of society and the growing number of countries which had already granted rights to homosexual couples.

Given the growing recognition of same-sex couples' rights, we can wonder today to what extent the European Courts protect same-sex couples and influence European States. Since Europe has always been at the forefront of recognising the rights of homosexuals, are the ECtHR and the ECJ willing to put same-sex couples on an equal footing with heterosexual couples?

The emergence of a protective status for same sex-couples may be noted (I), although a move forward is still expected in favour of same-sex marriage (II).

I. The emergence of a protective status for same-sex couples

A. A set of rights for homosexual couples

While the ECJ, the ECtHR and some European Members recognise civil rights for homosexual couples (1), they do not acknowledge the right to parenthood (2). Homosexual couples' status still depends on national legislation on this latter point.

1. Recognition of civil rights for homosexual couples

a. The European Court of Human Rights

¹ ECtHR, *Oliari and others v. Italy*, Nos. 18766/11 and 36030/11, 21 July 2015

² ECtHR, *Norris v. Ireland* (6/1987/129/180), 26 October 1988

³ ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010

Member States (of the Council of Europe and/or the European Union) have jurisdiction over civil rights granted to their citizens. Nevertheless, their legislation cannot condone illegal discrimination. On this point, much legislation has been brought before the Court by homosexual couples, mainly based on Article 8 (right to a family life) combined with Article 14 of the ECHR. Quite early on, the ECtHR stated that “*a difference in treatment is discriminatory under Article 14 if it has no objective and reasonable justification*”, in other words if it does not pursue a “*legitimate aim*” or if there is no “*reasonable relationship of proportionality between the means employed and the aim to be realised*”⁴.

On this ground, the Court stated in *Mata Estevez v. Spain*⁵ that it was proportionate for Spain to exclude homosexual partners from social-security allowances for the surviving spouse, as the underlying reason for such exclusion was the protection of the bond of marriage. However, such an argument is less and less valid as homosexuality is more and more recognised as a way of life. Only two years after the *Mata Estevez* case, the Court ruled in *Karner v. Austria*⁶ that the argument held by the Government according to which legislation aimed to protect the bond of marriage was not valid in itself. On this point, the *Karner* case was a big step forward as it granted homosexual couples the right to succeed to a tenancy after the death of a companion when such a right exists for heterosexual couples. As it is a patrimonial right, the Court considers there is no justification to discriminate on the basis of sexual orientation. It should be noted that Austrian legislation allowed unmarried different-sex partners to succeed; had it been conditioned by marriage, the answer given by the Court would have been totally different. This does not mean that the Court recognises a universal right to succeed to a tenancy but that when such a right exists in national legislation, it has to be acknowledged without regard for sexual orientation.

Another important step was taken in the *P.B. and J.S. case*⁷ in which the ECtHR reaffirmed the principle that the notion of “family life” (Article 8 ECHR) applies to homosexual couples⁸. In this case, the applicant sought an extension of his health and accident insurance to cover his companion, something considered by the Supreme Court as possible under a statutory insurance scheme for cohabiting partners, on the condition that they were different-sex couples. The ECtHR considered this to be a violation of Article 8 combined with Article 14. The *P.B. and J.S.* case thus recognised

⁴ ECtHR, *Mata Estevez v. Spain*, no. 56501/00, 10 May 2001

⁵ Ibid

⁶ ECtHR, *Karner v. Austria*, no. 40016/98, 24 July 2003

⁷ ECtHR, *P.B. And J.S. V Austria*, no. 18984/02, 22 July 2010

⁸“The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many Member States (para. 29) and “*in view of this evolution the Court considers it artificial to maintain the view that, in contrast to different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.*” (para 30) Ibid.

that same-sex partners had the right to benefit from a companion's health insurance. Once again, in the absence of any European legislation on this point, this possibility depends on national legislation.

b. The European Union

The ECtHR is not the only jurisdiction fighting for homosexual couples' rights. The European Union also has its opinion on the matter even if the scope of its prerogative is narrower, given the fact that it is only competent in fields attributed by Member States. This explains why the EU has not been at the forefront of same-sex marriage, despite its modern view of society. Nonetheless, some questions related to same-sex couples fall within the scope of the Union.

This does not mean that the Court of Justice of the European Union has nothing to say on the issue. Indeed, many questions have arisen from Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. In the *Maruko* case⁹, the ECJ had to answer a question on German legislation, according to which a spouse could claim a surviving spouse's pension, when a same-sex partner, united under the *Lebenspartnerschaft* (a civil union reserved for homosexual partners) could not. The ECJ ruled that there was direct discrimination for which no justification could be accepted. By stating this, the ECJ clearly affirms that discrimination on the grounds of sexual orientation is unacceptable. The Court went further in the *Römer* case¹⁰ by affirming that a comparison between two situations should be drawn by taking rights and obligations into account with due regard to the situation and not the general perception of national law on the comparability or otherwise of marriage and registered partnerships. Thus, the ECJ affirms its will to align homosexual and heterosexual couples' rights. The ECJ continued in *K.B. v NHS Pensions Agency*¹¹ by stating that there was a violation of the ECHR and incompatibility with article 141EC which aims at protecting minority groups in the working framework.

To conclude, despite the lack of consensus on same-sex marriage, much progress has been made to align heterosexual and homosexual couples in terms of civil rights. It is far from being the same when it comes to parenthood, as neither the ECJ nor the ECHR has agreed to grant the right to parenthood.

2. No right to parenthood

When it comes to same-sex couples, the question of parenthood can be divided into two major parts: medically-assisted procreation, also known as MAP (1), and adoption (2); the issue of

⁹ ECJ, C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, 1 April 2008 (ECLI:EU:C:2008:179)

¹⁰ ECJ, C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, 10 May 2011 (ECLI:EU:C:2011:286)

¹¹ ECJ, C-117/01, *KB v NHS Pensions agency and secretary of State for Health*, 7 January 2004 (ECLI:EU:C:2004:7)

surrogacy will not be studied here, as it is more a question of ethics rather than a question of discrimination, homosexual and heterosexual couples being granted the same rights or prohibition on this aspect.

a. Medically-assisted procreation

Medically-assisted procreation enables couples unable to conceive a child to overcome this difficulty with the help of medicine. Once again, the European Union is quite powerless on this point as it is up to each country to organise access to MAP. When it comes to the ECtHR, it is more relevant for judges to rule on this matter, providing there is a suspicion of violation. Indeed, whether a country should allow MAP or not for certain categories does not fall within the scope of the said-court. It would be a good idea for the EU to define minimum standards which EU Member States agree on, but it goes without saying that this would not solve problems encountered by same-sex couples, as some countries refuse to give rights to homosexual couples as much as they can.

The ECtHR is also careful when it comes to parenthood. Firstly, it considers that there is no right to a child guaranteed by the Convention. Secondly, it is bound by Member States' legislation which meets different requirements and cannot easily be unified. That is why, in *Gas and Dubois*¹², the Court affirms that France did not violate the ECHR by refusing to allow donor insemination for homosexual couples. Indeed, French legislation maintained that donor insemination was available to heterosexual couples "*for therapeutic purposes only, with a view in particular to remedying clinically diagnosed infertility or preventing the transmission of a particularly serious disease.*" It is true that the law expressly mentioned heterosexual couples but this should be seen rather as a consequence than a cause; there was no infertility problem in the Gas and Dubois couple, but there was a biological hindrance and the law did not intend to grant the right to parenthood to every citizen.

Hope did come with a case brought before the ECtHR. In *Charron v Merle-Montet*¹³, two women wanted to have access to MAP, arguing one of them was infertile, but they were denied this right by the hospital. However, the Court considered the request could not be accepted as the applicants had not exhausted every domestic remedy before bringing their case. The judges considered they could have contested such an administrative decision on the grounds of *ultra vires*, even if that remedy had limited chances of success. Such a decision shows how careful the Court is with homosexual parenthood. Indeed, the Court has long established that the exhaustion of domestic remedies is not required when it has no chance of success¹⁴, to do so it must "*take realistic account not only of*

¹² ECtHR, *Gas and Dubois v. France*, no. 25951/07, 15 March 2012

¹³ ECtHR, *Charron and Merle-Montet v. France*, no. 22612/15, 16 January 2018

¹⁴ ECtHR, *Ferreira Alves v. Portugal*, no. 78165/12, 30 April 2015

*formal remedies [...] but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant*¹⁵. In addition, it should be pointed out that, when it comes to same-sex couples' civil rights, the Court has been more entrepreneurial. This may be seen in the *Karner* case in which the Court examined the case and ruled it, even though the conditions of Article 37 were not met. It did so for the sake of human rights, as the last paragraph of Article 37 entitles it to do.

To conclude, there is no such thing as the right to parenthood at European level; it is up to each Member State to decide whether or not it wishes to grant such a right, and whether this right is also recognised for same-sex couples. Countries like Belgium or Spain have recognised this right and this is the reason why many same-sex couples travel there to seek help, a task made far easier since the Treaty of Maastricht. Nonetheless, this practice should be called into question. MAP is a burdensome medical process and the stress of being uprooted for weeks, combined with the fear it will not work, is far from being ideal. Hence, it would be advisable to have a common policy on this matter.

b. Adoption

The other way for same-sex couples to become parents is adoption. This term covers two different realities. It can relate to the fact of one parent adopting the child of the other or the adoption of a child who is not related to the couple. In the latter case, this process is mainly international. International adoption is a hardship for couples who wish to adopt as it implies a long-term involvement in an administrative process without any guarantee of welcoming a child at the end. Even after the agreement is granted, a couple may have to wait for years. International adoption is really difficult for same-sex couples as it requires two conditions: firstly, the applicants' country has to allow same-sex couples to adopt, and secondly the child's country has to do so, which is rarely the case. When it comes to the first point, many European countries allow a single person to adopt, thus one partner has to deal with the whole process to allow the couple to become parents. On this point the ECtHR ruled that, when adoption is open to single persons, homosexuals cannot be discriminated against.¹⁶ Though this is progress in terms of same-sex couples, it is still fragile, as the child is only bound to one partner. What would happen if this partner died? And how can conditions be assessed efficiently when one part of the said-single person's life is hidden? On this point, an international framework would be more than useful. Finally, adoption by same-sex couples is also made difficult by the child's country, as the country can refuse the adoption of a child by a same-sex couple, and the adopters' country cannot counteract this due to State

¹⁵ ECtHR, *Akdivar and others v. Turkey*, no. 99/1995/605/693, 1 April 1998

¹⁶ ECtHR, *E.B. v. France*, no. 43546/02, 22 January 2008

supremacy.

Adoption can also be a means to officially recognise a way of life, when someone wants to adopt their partner's child to create a family. Once again, the ECtHR refers to national margins of appreciation. In *Gas and Dubois*¹⁷, the Court ruled that conditions to adopt a partner's child were determined, in this instance, by France. Therefore, the refusal for a woman to adopt her partner's child was legal as the French legal system only allowed adoption by depriving the legal mother of her rights to the child. It thus conflicted with the child's interests. This case emerged before the right to marriage was voted in France. Nowadays, such a position would not be acceptable as the exception given to married couples would apply to same-sex couples. The question remains for countries which do not recognise such a possibility. Can the ECtHR, with the evolution of society, still maintain that the refusal to recognise such an adoption is in the child's best interests?

To conclude, prior to any recognition of a right to marriage for same-sex couples, the ECtHR, and the EU to a lesser extent, has allowed same-sex couples' rights to evolve in a positive way, trying to give them as many rights as heterosexual couples when there is no mention of marriage. However, this trend does not exist when it comes to parenthood, the ECtHR being particularly careful on this point, when it was quite proactive in terms of union.

B. The obligation to establish legal recognition for same-sex-couples

According to the ECtHR, there is no right to marry for same sex-couples (1). However, the Court has progressively accepted the right to civil union (2)

1. No right to marriage according to the ECHR

Article 12 of the ECHR states that "*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right*". When applying article 12, the Case law of the ECtHR reveals a heteronormative approach regarding the right to marry (a), which is reinforced by a consensus-based analysis (b).

a. The heteronormative approach of the ECHR

We can already notice that the text itself addresses "men and women", which seems to mean that only heterosexual couples have the right to marry under the ECHR. Indeed, in *Rees v. The United Kingdom*¹⁸, the Court stated that "*the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex*". This also appears to be the case

¹⁷ *Gas and Dubois v. France*, cf. ibid

¹⁸ ECtHR, *Rees v. The United Kingdom*, No. 9532/81, 17 October 1986

in the wording of the Article which makes it clear that Article 12 is mainly concerned with protecting marriage as the basis of the family. In the Court's opinion, marriage is conditioned by the existence of a family, and there is no family without children. Therefore, there should be no marriage between people who cannot have children biologically. Thus, the Court considers that marriage is intimately linked to procreation, which seems contrary to our modern societies and to the protection of individual freedoms.

Since the Court found a close link between procreation and marriage, it firstly refused to grant transsexual couples the right to marry just as much as same-sex couples. Indeed, even though such couples live as heterosexual couples, they are homosexual and cannot biologically have children. This led the Court to consider that they are not capable of starting a family and should therefore not benefit from the right to marry. In *Cossey v The United Kingdom*¹⁹, the Court refused to grant the claim of a transsexual couple that was socially heterosexual but biologically homosexual. Applicant Cossey had been registered as a man at birth and had later in life transitioned to a woman. She wanted to marry an Italian man but could not, as she herself was not considered biologically to be a woman. According to the ECHR, the biological criteria was to be used for determining a person's sex for purposes of marriage, since only traditional marriage had to be considered.

However, the Court changed its position in later cases by removing the biological criteria from its reasoning. It found that the right to marry was no longer dependent on biological sex but rather on social sex - in other words: the obvious sex. This radical change in the Court's reasoning was expressed in the very noteworthy *Christine Goodwin V the United Kingdom*²⁰ case. The case concerned a transsexual, born a male and later transitioned to a female. The Court stated that, considering the major social changes in the institution of marriage, as well as the big changes brought about by developments in medicine and science in fields of transsexuality, the application of Article 12 should no longer lead to a determination of gender by purely biological criteria. Consequently, it granted Mrs Goodwin the right to marry. However, the Court's approach was still heteronormative since the only reason it granted this couple the right to marry was that it looked and lived like a heterosexual couple. It may be considered that the removal of the biological sex criteria from the Court's reasoning creates inconsistency. Indeed, while the exclusion of same-sex couples from the right to marry was once justified by their inability to procreate, this argument is no longer legitimate since the Court now grants transsexuals the right to marry, though they cannot procreate. The only thing that differentiates transsexual couples from homosexual couples is their social sex. Therefore, we are of the view that granting a right for transsexual couples to marry while refusing it for same-sex couples creates discrimination on the grounds of the sex of the applicants.

¹⁹ ECtHR, *Cossey v. The United Kingdom*, No. 10843/84, 27 September 1990

²⁰ ECtHR, *Christine Goodwin v. The United Kingdom*, No. 28957/95, 11 July 2002

b. A consensus-based analysis

The Court also bases its analysis on the lack of consensus among Member States regarding the right to marry for homosexuals.

In cases involving sensitive topics which are specific to the culture of each country, the Court respects domestic Laws and therefore gives Member States a margin of appreciation. However, the Court's position is not unchangeable and may reverse if most Member States show that there is a consensus over a specific issue. Since marriage has a lot to do with traditions, religion and ethics, the ECtHR gives Member States a wide margin of appreciation and bases its analysis on consensus of the latter regarding the right for same-sex couples to marry.

In *Schalk and Kopf v. Austria*²¹, the applicants were a same-sex couple living in Vienna, Austria, and were denied the right to marry because, according to the Austrian civil code, marriage could only be contracted between two persons of opposite sex. The Court noted that “*there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.*”

While the ECHR has always given States a wide margin of appreciation to choose whether they want to grant same-sex couples the right to marry, it narrowed the margin regarding the right to enter into a civil union.

2. The right to a civil union at least

The court first refused any kind of legal recognition for homosexual couples (a), but then accepted to recognise the right for homosexual couples to enter into a civil union (b).

a. Recognition of the right to civil union when this already exists for different-sex partners

Civil union is a form of legal recognition for homosexual and heterosexual couples that is different from marriage. It allows couples who do not want to or cannot marry to be granted a specific status so that their life together and its practical consequences can be taken into account by the Law. Those couples can therefore be granted tax and social benefits. In *Burden v. United Kingdom*, the ECtHR found that civil unions were meant only for couples and set those relationships apart from other forms of co-habitation, in the same way that marriage set relationships apart from others by giving married people a specific status. In countries where same-sex couples cannot get married,

²¹ ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010

civil union is a good alternative.

The Court first indirectly recognised the right for same sex couples to enter into a civil union by basing such recognition on the protection of the right not to be discriminated against. In *Vallianatos and others v. Greece*²², the applicants were three same-sex couples who lodged an application with the ECtHR relying on Articles 8 and 12 taken together with Article 14 of the ECHR because Greek legislation had introduced civil unions which were designed only for different-sex couples. This led the applicants to allege that the legislation infringed upon their right to respect for private and family life and amounted to unjustified discrimination between different-sex and same-sex couples, to the detriment of the latter. The Court was of the view that the applicants' relationships in the present case fell within the scope of "private life" and "family life", just as the relationships of different-sex couples in the same situation would. It therefore considered that the applicants were in a comparable situation with different-sex couples regarding their need for legal recognition and protection of their relationships. Consequently, the Court was of the view that by tacitly excluding same-sex couples from its scope, the Law in question introduced a difference in treatment based on the sexual orientation of the persons concerned. However, the Court pointed out that the applicants' complaint was not that the Greek State had failed to comply with any positive obligation which might be imposed on it by the Convention, but that it had introduced a distinction which in their view discriminated against them. Therefore, the recognition of the right for same-sex couples to enter into a civil union was incomplete.

b. Recognition of the right to enter into a civil union as such.

In *Oliari and others v. Italy*²³, the Court finally recognised the right to enter into a civil union as such. In this case, the Court had to rule on the applications of three same-sex couples complaining that there was no form of alternative marriage provided for in Italian law. They appealed to the Court for recognition of the violation of Articles 8 and 14 of the Convention. The Court held that Article 8 - originally thought of as the protection of individuals against arbitrary interference by public authorities in their private and family life - may also create positive obligations for Member States to ensure effective respect of the rights it protects (§159). The Court once again acknowledged that same-sex couples are in need of legal recognition and protection of their relationships. It noted that the applicants in the present case, who were unable to marry, had been unable to gain access to a specific legal framework (such as that for civil unions or registered partnerships) capable of providing them with the recognition of their status and guaranteeing them certain rights relevant to a couple in a stable and committed relationship. Consequently, it held that

²² ECtHR, *Vallianatos and Others v. Greece*, Nos. 29381/09 and 32684/09, 7 November 2013

²³ ECtHR, *Oliari and others v. Italy*, Nos. 18766/11 and 36030/11, 21 July 2015

the Italian State failed to provide for certain basic needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship, such as, inter alia, the mutual rights and obligations they have towards each other, including moral and material support, maintenance obligations and inheritance rights. In the Court's view, an obligation to provide for the recognition and protection of same-sex unions, and thus to allow for the law to reflect the realities of the applicants' situations, would not amount to any particular burden on the Italian State, be it legislative, administrative or other. Moreover, such legislation would serve an important social need. Consequently, the Court held that the Italian Government had exceeded the margin of appreciation granted to the High Contracting Parties and found in favour of a violation of Article 8. So far, 16 countries allow same-sex marriage, namely Austria (in 2019), Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom. 19 Member States authorise some form of civil partnership for same-sex couples on its own or alongside marriage (Andorra, Austria, Belgium, Cyprus, Croatia, the Czech Republic, Estonia, France, Greece, Hungary, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Slovenia, Spain, Switzerland and the United Kingdom).

Homosexual couples have acquired a set of rights thanks to the ECtHR as well as the ECJ, and they have, moreover, acquired a legal status which allows them to benefit from even more protection. However they still do not benefit from as many rights as heterosexual couples. Therefore, a move forward is expected in favour of same-sex marriage.

II. A move forward in favour of same-sex marriage

A. Towards the recognition of marriage contracted legally in other countries

Without forcing countries to allow same-sex marriage, further protection of same-sex couples can be achieved by recognising and registering marriage legally celebrated in other countries.

1. Current case law regarding the registration of marriage contracted abroad

a. ECtHR case law

The ECtHR stance on the registration of marriage contracted abroad was set out in *Orlandi v. Italy*²⁴. In this case, six same-sex couples who married abroad were denied registration of their marriage in Italy, solely because they were same-sex couples. The Court found that the refusal to register marriage contracted abroad as marriage did not infringe on Article 8. Indeed, the fact that

²⁴ ECtHR, *Orlandi and others v. Italy*, no. 26431/12; 26742/12; 44057/12 ; 60088/12, 14 December 2017

only 15 countries²⁵ provided for same-sex marriage and 3 countries²⁶ registered same-sex marriage contracted abroad, even though their national law did not permit it, meant that there was no consensus among the Member States of the Council of Europe and that Member States were granted a wide margin of appreciation on the topic of registration of marriage as marriage. The Court also took into account the State's legitimate interest in preventing its citizens from circumventing the national law by getting married abroad and having their marriage registered. However, the refusal to register the marriage under any form, not even as a civil union, left the couples in a legal vacuum and deprived them of protection of their relationships, thus violating Article 8. The Court did not find it necessary to examine the violation of Article 14 in conjunction with Article 8 or 12. It follows from the *Orlandi v. Italy* case that same-sex marriage contracted in another state does not have to be registered as a marriage but must at least be transcribed as a civil union to offer legal protection to the same-sex partners' relationship.

b. Pending ECJ case-law

Though civil status, including marriage, falls within the competence of EU Member States, a pending case before the ECJ could encourage European countries to recognise same-sex spouses, at least in regards to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 concerning the right of citizens of the Union and their family members to move and reside freely within Member State territory. This directive aims at easing travel through the European Union, noticeably by granting a Union citizen and their family the right of residence in another Member State for a period of up to three months or more than three months providing they fulfil certain conditions. The main difficulty encountered by same-sex couples is linked to the notion of family, which is currently defined by Member States and might exclude same-sex spouses from being recognised as spouse or family members.

In *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others*²⁷, Mr. Coman, a Romanian citizen, legally married Mr. Hamilton, a United States national, while he resided in Brussels. As the two spouses wanted to move to Romania, Mr. Hamilton applied for a residency permit as the spouse of an EU citizen, based on Directive 2004/38/EC, which allows the spouse of an EU citizen to follow his spouse to the EU Member State in which the latter chooses to reside. He was denied the residency permit on the grounds that he was not a 'spouse' according to Romanian law, which does not allow same-sex marriage (Article 277 (1) of the Civil Code) and

²⁵ Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom

²⁶ Estonia, Andorra, Malta

²⁷ ECJ, Case C-673/16, Request for a preliminary ruling from the Curtea Constituțională a României (Romania) lodged on 30 December 2016 — Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării

does not recognise same-sex marriage entered into abroad (Article 277 (2) of the Civil Code). The two spouses entered a plea of unconstitutionality of Article 277 (2) and Article 277 (4)²⁸ of the Romanian Civil Code before the Court of First Instance in Bucharest, which was transferred to the Romanian Constitutional Court. Their plea stated that, in the case of a residency permit, the refusal to recognise same-sex marriage legally contracted abroad, infringed upon the protection of the right to personal life, family life and private life and the principle of equality established in the Romanian Constitution. The Constitutional Court requested a preliminary ruling before the ECJ on the 30 November 2016 to know whether the term ‘spouse’ in Article 2(2)(a) of Directive 2004/38 “*includes the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State*”, and in such case, if the host State has to grant a residency permit²⁹.

In an opinion delivered on 11 January 2018, First Advocate General Melchior Wathelet considered that the concept of ‘spouse’ in Directive 2004/38 should be interpreted as including spouses of the same sex, and that the same-sex spouse should be granted the right to reside for more than three months in the Member State in which his EU citizen spouse is exercising his freedom of movement. Firstly, the Advocate General stated that the concept of ‘spouse’ in the Directive must be given an autonomous and uniform interpretation throughout the European Union, as Article 2 (2) a of the Directive does not make an express reference to the law of the Member States to determine its meaning. Indeed, the Court’s case-law establishes that in the absence of reference to national law, the uniform application of EU law and the principle of equality requires autonomous interpretation. Secondly, the Advocate General established that the wording of Article 2(2)(a) of Directive 2004/38 is gender-neutral when referring to marriage. This was a deliberate choice of the legislature, because the Commission did not want to include same-sex spouses in the Directive, “*unless there are subsequent developments*”³⁰. The term ‘spouse’ should therefore be interpreted in the light of developments in society. Since fourteen Member States now allow same-sex marriage and 61% of the population of the Member States are in favour of same-sex marriage, the definition of ‘spouse’ has changed since the 2001 *D and Sweden v Council* case, in which the ECJ found that “*according to the definition generally accepted by the Member States, the term marriage means a union*

²⁸ Article 277 (4) of the Romanian Civil Code : “The legal provisions relating to freedom of movement on Romanian territory by citizens of the Member States of the European Union and the European Economic Area shall be applicable”

²⁹ Request for a preliminary ruling from the Curtea Constituțională a României (Romania) lodged on 30 December 2016 – Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării, (Case C-673/16)

³⁰ Amended Proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2003) 199 final

*between persons of the opposite sex*³¹. Moreover, the Advocate General went over the fundamental rights associated with the concept of ‘spouse’, protected by Article 9 of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. He recalled the case-law of the ECtHR regarding same-sex couples and underlined the *Taddeucci and McCall v. Italy*³² case, in which the Court stated that the refusal to grant a residence permit on family grounds to an unmarried same-sex couple consisted in unjustified discrimination based on sexual orientation. Finally, the Advocate General considered that including same-sex spouses in the concept of ‘spouse’ provides “a high level of legal certainty and transparency” for same-sex couples and is in accordance with the objectives of the Directive, which mention non-discrimination.

We can only agree with the analysis of the Advocate General and recommend that the Court follow it. Although it would not force EU Member States to recognise same-sex marriage entered into abroad, it further protects the rights of homosexual couples by allowing them to move freely across Europe and might promote gradual evolution in societies that reject same-sex marriage.

2. A proposal: the obligation to register marriage contracted abroad as marriage

Imposing the registration of same-sex marriage contracted abroad in countries that do not allow same-sex marriage could be a middle-ground between fostering the individual rights of homosexual people and protecting national interests.

a. Insufficiency of current case-law

It is regrettable that the ECtHR held in *Orlandi v. Italy*³³ that the transcription of a same-sex marriage as a civil union was sufficient to meet the standards of the European Convention on Human Rights and did not impose the registration of marriage as a marriage. Such a solution had already been adopted in *Hämäläinen v. Finland*³⁴, in which the Court found that the change of gender of the transgender applicant could be conditioned on the conversion of marriage into a registered partnership, without violation of Article 8. The same criticisms can be addressed to both judgements. Firstly, by equating marriage and civil union for same-sex couples, the Court dismisses the highly symbolic and religious value of marriage for many people. The marital status of a person, and the symbolism that is associated with it, is part of social and individual identity and changing a marriage for a civil partnership might be considered as downgrading the relationship and marital status. Moreover, same-sex couples married abroad now have two different marital statuses: they

³¹ ECJ, Cases 122/99 and 125/99, *D and Sweden v Council*, 31 May 2001, EU:C:2001:304

³² ECtHR, *Taddeuci and McCall v. Italy*, no. 51362/09, 30 June 2016

³³ ECtHR, *Orlandi and others v. Italy*, no. 26431/12; 26742/12; 44057/12 ; 60088/12, 14 December 2017

³⁴ ECtHR, *Hämäläinen v. Finland*, no. 37359/09, 16 July 2014

are considered married in the country in which they contracted their marriage and they are civil partners in the country they moved to. A dual status might impact their social and individual identity. Secondly, civil partnership and marriage have different rights and obligations attached to them in certain countries. This is for instance the case in France, where only a spouse is considered as a legal heir with specified rights, while a civil partner does not have any³⁵. Hence, changing the legal status of a person, depending on the country of residence, is problematic regarding the rights attached to this status. Thirdly, this might complicate the termination of the marriage of same-sex couples: if they end their civil partnership in the country they live in, they might still be considered married abroad and vice and versa.

b. A middle-ground between individual rights and national appreciation

The recognition of marriage contracted abroad as marriage does not have the same impact on public order as the legalisation of same-sex marriage in the country. Nationals or people domiciled in the country are still not permitted to wed, but couples that legally married abroad can preserve their marital status. This facilitates the life of same-sex couples without burdening the state.

This is currently the way chosen by Estonia, which is the first ex-Soviet Union country to have legalised same-sex civil union in 2016 and to have registered same-sex marriage celebrated abroad since a Tallinn Circuit Court ruling on the 24 November 2016. Indeed, the Court estimated that a foreign law allowing same-sex marriage did not contradict public order, as it was not in “*contradiction with the general principles of the Estonian Constitution or norms of penal law or resulted in the infringement of fundamental rights*”³⁶ and that the marriage should thus be registered. In another ruling in 2017, the Tallinn Circuit Court refused to recognise an invalid same-sex marriage contracted abroad, as it considered that one of the spouses resided in Estonia at the time of the wedding, having only lived three months in the country where she got married³⁷. Such a solution protects both the interests of the individuals and of the state.

The ECtHR could recognise the obligation to register the marital status of a person on the grounds of Article 8 and the protection of one’s identity it grants.

B. The debate over whether to allow same-sex marriage

Although we are in favour of same-sex marriage and believe it could be imposed on European countries (1), we cannot ignore the arguments of those who oppose same-sex marriage (2).

³⁵ Article 756 Code civil and following.

³⁶ Tallinn Circuit Court, *Ats Joorits vs Harju Maavalitsus* (case nr 3-15-2355), 24 November 2016 <https://news.err.ee/120456/nonprofit-court-orders-entry-of-same-sex-marriage-into-estonian-register>

³⁷ <https://news.err.ee/644719/circuit-court-same-sex-marriage-cannot-be-considered-valid-in-estonia>

1. The obligation to allow same-sex marriage

It can be argued that the ECtHR should impose the obligation to allow same-sex marriage on Council of Europe Member States by changing its approach to the ECHR.

a. Reasons for imposing the legalisation of same-sex marriage

Firstly, marriage is both a symbolic and practical tool to organise one's family life. Same-sex couples, who have a 'family life' according to the ECtHR in *Schalk and Kopf v. Austria*³⁸, want to be able to see their love and commitment to their relationship recognised through marriage. Indeed, marriage is a social institution with a long history, contrary to the recent civil partnerships, which do not bear the same symbolism. Civil partnerships might be considered 'inferior' to marriage in terms of social significance, especially since they often do not entail a pledge of fidelity and are easier to dissolve than marriage (for instance, in Italy and France). Moreover, civil partnerships do not necessarily grant the same rights and obligations as marriage. In some countries, homosexual partners still have fewer rights than heterosexual spouses, when it comes to inheritance or benefits. This constitutes indirect discrimination on the grounds of sexual orientation, because homosexuals cannot access the rights that are reserved to married couples, even though they are in a stable and committed relationship.

Secondly, one can contest the consensus-based approach of the ECtHR concerning same-sex marriage. First, states do not necessarily put the protection of minorities in the foreground and might prefer the protection of political interests to giving equal marriage rights to homosexuals. Thus, by relying on changes implemented by States to promote same-sex couples' rights, the ECtHR does not provide efficient protection for minorities. Moreover, the consensus is defined in a very narrow way by the ECtHR. It refers to a majority of countries having legalised same-sex marriage, while it has sometimes considered that an emerging trend was sufficient to define the consensus. This ignores the fact that in some countries, a majority of the population is in favour of same-sex marriage, even though it is not legal (such as in the Czech Republic³⁹).

b. Methods for imposing the legalisation of same-sex marriage

To oblige Council of Europe Member States to allow same-sex marriage, the Court could base its reasoning on Article 12, Article 8 and Article 14 combined or on the recent Additional Protocol 12⁴⁰.

Although the ECtHR stated in *Schalk and Kopf v. Austria* and in *Chapin and Charpentier v. France*

³⁸ ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010

³⁹ 2017 Poll realized by Centrum pro vyzkum verejneho mineni:

https://cvvm.soc.cas.cz/media/com_form2content/documents/c2/a4354/f9/ov170608.pdf

⁴⁰ Masuma Shahid, "The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights", *Erasmus Law Review*, December 2017, No. 3

that Article 12 is applicable to same-sex partners in some circumstances, it still interprets the use of the terms “men and women” as a deliberate way of only granting the right to heterosexual marriage, based on the meaning it had when the Convention was signed and on the absence of consensus among Member States. Yet the Court can issue a new interpretation of Article 12, as the Convention is to be regarded as a “living instrument which must be interpreted in the light of present-day conditions”⁴¹. The Court can consider that Article 12 mentions men and women only to grant both sexes that right, regardless of their sex and of the sex of their partner. Such an interpretation is consistent with Article 9 of the Charter of Fundamental Rights of the European Union and the growing trend in favour of same-sex marriage across Europe, be it in legislation or in public opinion.

The Court can overturn its jurisprudence by basing itself on Article 8 as well as Article 14. It can consider that banning homosexual couples from marrying infringes their right to respect for private and family life, which includes the right to establish relationships with other human beings. By admitting that marriage offers a protection and a status that is different from civil union, the Court can establish that same-sex couples are discriminated against on the basis of their sexual orientation in their right to respect for private and family life, as they only have access to one of those institutions, and evaluate whether this discrimination is duly justified or not.

Finally, the Court can impose same-sex marriage on the ground of Additional Protocol 12. Article 1 of The Protocol states “*The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*” Hence, it is autonomous from the rights set forth in the ECHR, as opposed to Article 14. Even if the Convention does not grant the right to same-sex marriage, discrimination in the right to marry based on sexual orientation can be condemned under Additional Protocol 12. Only States which ratified this Protocol can be condemned, which provides an opportunity to make a progressive change in legislation regarding same-sex marriage. Indeed, if States which have ratified the Protocol were condemned and changed their marriage law, a majority of Member States would allow same-sex marriage and the consensus-based approach, applied to Article 8 and 12, would justify the obligation to legalise same-sex marriage.

2. Persistent obstacles to imposing same-sex marriage

Legalisation of same-sex marriage in Europe is a need for homosexual couples. However, the change can hardly come from the EU (1) or the ECtHR (2), as both institutions face limits they cannot overcome at this stage.

⁴¹ ECtHR, *Tyrer v The United Kingdom*, no. 5856/72, 25 April 1978

a. Limits to the recognition of same-sex marriage by the EU

We strongly wish same-sex marriage to be recognised in every European country as this would be, once again, a demonstration of European leadership in human rights and more particularly in LGBTI rights. However, if wished, such a marriage cannot be imposed.

Indeed, the definition of family touches the core of State prerogatives and the European Union cannot intervene in this field without having been enabled to do so by Member States themselves. It goes without saying that such an idea is unlikely to be supported by Member States which refuse same-sex marriage, such as Poland.

Furthermore, EU Member States delegate their competence when they consider that the EU level is more relevant to deal with a given issue. By doing so, EU Member States aim at efficiency and facility. For instance, the Brussels II regulation⁴² emerged because of all the ordeals EU citizens had to face when marrying someone from a different Member State. This regulation is based on the assumption that every Member State can be trusted and has a sufficient legal framework to guarantee valid marriages but also that they share the same values. For this reason, the reasoning of Brussels II cannot be transposed to same-sex marriage since many European countries do not have any regulation on same-sex marriage given they do not recognise it. There are no shared values on this matter and thus not only is the European Union prevented from legislating but it is also denied any competence to rule on same-sex marriage recognition within the EU.

The prohibition of same-sex marriage cannot even be questioned in regard to the Charter of Fundamental Rights of the European Union. Indeed, “*the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law*”⁴³. As same-sex marriage does not fall within the scope of EU competence, the European Charter does not apply and Member States remain absolutely free to decide whether or not they want to allow same-sex couples to marry.

In any event, it is anything but sure that the EU would be prone to pass a legislation forcing Member States to allow same-sex marriage as this would endanger the Union.

The European Union first imposed itself as an economic area characterised by stability, power and wealth. It is quite new that the Union takes individual rights into account for themselves and not for what they can bring to the European Market⁴⁴. The fact is that the EU is a major actor in the global economy, strong enough to counterbalance the weight of the United States or China. Being part of

⁴²Brussels II bis, 27 November 2003, CE 2201/2003

⁴³ECJ, Case C-617/10, *Aklagaren v Akerberg Fransson*, 26 February 2013

⁴⁴ It dates back to the Lisbon Treaty which entered into force in 2009

the Union is thus a real advantage for Member States which are of little importance when taken alone. For this reason, recognising the right to same-sex marriage for its citizens risks leading to a crisis at a time when European Members already have to deal with the Brexit. Having another storm to brave may be the end of the story... For the EU, having another Member State leave the community at this time is disruptive enough; it is already shaken by Brexit and does not need additional ordeals. Member States have stood strong against London; it is far from sure that this would be the same if a country from Eastern Europe decided to leave after the introduction of the right to marry a same-sex partner at European level. The biggest risk is a wave of departures that could cause the end of the European Union, and even if same-sex marriage is a great cause, it is not worth destroying what has been built for 70 years. The European Union guarantees equal rights to all its citizens, discrimination is not acceptable but fighting discrimination should not lead to reducing every citizen's rights, homosexuals included, as the end of the EU would mean a step back in terms of rights and privileges. It is not sure whether Member States would be ready to make the bet! And even if the EU were to survive another exit, the goal would be missed as the departing Member would not recognise same-sex marriage.

The only opportunity the EU has to ascertain same-sex couples' rights and preserve State sovereignty is to redefine "spouse" so that Directive 2004/38 and Brussels II bis can apply to every kind of marriage as long as it is lawfully contracted. On this aspect, the position of Estonia would be a good source of inspiration.

b. Limits to recognition of same-sex marriage by the ECtHR

Persisting limits are not exclusive to the EU. Indeed, even if a plea could be introduced before the ECtHR for discrimination, the Court has difficulties to recognise the right to marry a same-sex person. The recognition of same-sex marriage by the ECtHR is a touchy subject and any evolution in this field has to be carried out carefully, which explains why this has not happened yet. Indeed, the Court has to take into account the existence of a margin of appreciation but also, like Europe, the risk of a country denouncing the ECHR.

The Convention can be interpreted as allowing same-sex marriage but also as banning it, so unless it is for the Convention to evolve, no answer can be found in the text itself. This means that the Court could conclude with the necessity to recognise same-sex marriage, especially because it is becoming a widespread trend. However, the Court must also consider the margin of appreciation. This margin was recognised early among Member States⁴⁵ because they are "*by reason of their direct and continuous contact with the pressing needs of the moment [...], in principle, in better*

⁴⁵See for instance ECtHR, *Brannigan and McBride v United Kingdom*, no. 14553/89; 14554/89, 25 May 1993

position than the international judge to decide"⁴⁶.

The Council of Europe was created to maintain peace at a time when war was almost the norm. To maintain peace, founding Member States decided to agree on minimum standards in terms of human rights. Nowadays, when deciding whether or not the Convention has been violated, the Court has to take into account this lowest common denominator so that its decision can be accepted by its Member States.

When it comes to same-sex marriage, there is nothing like a common denominator. If it is becoming a trend in Member States, figures show it still does not concern a majority. Thus, the ECtHR is consistent with its case law when it decides there is no consensus on same-sex marriage and cannot therefore recognise such a right. There was a time when the Court was more proactive when it came to recognising new rights and it has sometimes seen a consensus where there was nothing but a few countries, but the Court has been highly criticised for this and has come back to a more traditional hearing of a consensus. The lack of consensus directly leads to recognising a wide national margin of appreciation and the Court cannot go against this, unless it is inconsistent with its own case law, a behaviour which would be in breach of Article 6 of the Convention on Human Rights, so definitely something to avoid if the Court wants to remain influential. When it comes to homosexual marriage, the COE Member States want to retain sovereignty, especially to protect their definition of family. As a matter of fact, if homosexual couples can wed, there is no reason for a homosexual couple to be denied the right to adopt when this right derives from marriage. That is why many countries with a traditional view of society are strongly opposed to gay marriage. Their legislation precludes homosexuals from adopting because adoption is only for married couples, something which would no longer be possible if the Court declares the right to marry a same-sex person. Moreover, even if some countries (such as Belgium and Portugal) did not grant the right to adopt when they granted same-sex partners the right to marriage, they did legalise adoption for same-sex parents shortly after. It is dubious whether the Court is ready to take such a big step... The only acceptable evolution has to come from Member States - the more they allow same-sex marriage, the narrower the margin of appreciation will be, at least until a consensus emerges. On this point, the positive referendum in Ireland, which is still perceived as a religious state, and the favourable vote in Germany in 2017 may help to speed up the evolution of other countries.

Another issue which prevents the ECtHR from recognising the right to same-sex marriage is that most Member States which have legalised same-sex marriage are part of the EU. Deducing a consensus in this situation would place the Court in a difficult position towards its own Member States, which could blame it for being a *de facto* European instance and for disregarding regional specificities. Indeed, the Court has already been reproached for having a Western European point of

⁴⁶Ibid

view and for being biased⁴⁷; taking a position in those circumstances would only strengthen criticism and cause instability.

As with the European Union, the Court recognising the right to marry someone of the same sex may lead to Member States denouncing the Convention, a situation that would do a lot of harm to human rights, and especially to the LGBTI community.

Indeed, as imperfect as the situation may be for the LGBTI community, they have a set of minimum rights, the first of them being to be protected against discrimination and lawsuits solely based on their sexual orientation⁴⁸. If a country decided to denounce the ECtHR, it would no longer be bound by the Convention and could not be condemned in case of a “violation”. It would be up to the State authorities to act by themselves in the case of homosexual persecution, and nothing could be done if discrimination came from the State itself; the same applies for lawsuits.

The fact is that the ECtHR is a safety net when it comes to the European Union. If a country leaves the EU, it is still part of the ECHR, unless it also denounces it, and minimum standards are guaranteed; on the contrary, there is no safety net for countries leaving the ECHR as other human rights conventions are not as efficient and are not open to individuals.

To conclude, same-sex couples have obviously acquired growing protection over the past decades. While they were first considered as criminals in many countries, same-sex couples are today recognised as a family in their own right and therefore benefit from most of the rights derived from Article 8 of the ECHR. Firstly, they were only granted scattered rights, but they have recently been granted a status to guarantee their protection, thanks to the recognition of the right to enter into a civil union. However, same-sex couples’ protection will not be completely achieved until the ECtHR decides to recognise the right for them to marry and forces Member States to change their legislation, but it still seems too early for the ECtHR to take this ultimate step forward. Yet, a positive evolution may happen more quickly than expected, firstly by the recognition of same-sex marriage legally contracted abroad and secondly thanks to Albania trying to pass a law to legalise gay marriage and Serbia, whose President appointed a gay woman as Prime Minister.

⁴⁷ « Russia may cut ties with ECHR » 1 March 2018, www.en.crimerrussia.com (last connexion 25th March 18)

⁴⁸ ECtHR, *Norris v. Ireland* (6/1987/129/180), 26 October 1988