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ECHR: TOWARDS A CONVENTIONAL RIGHT TO “LEGAL RECOGNITION” OF SAME-SEX UNIONS?

The European Convention on Human Rights does not require European nations to redefine marriage to include same-sex relationships. However, the European Court of Human Rights may rule in the future that member states must recognize same-sex civil unions.

Debate is escalating in Western countries with the opening of marriage to same-sex couples. To this day, 12 European countries have altered their legislation in this sense, and within the coming months, the Supreme Court of the United States will decide on the constitutionality of the definition of exclusively heterosexual marriage. This judgment will have a considerable impact.

In Europe, the situation has evolved rapidly in contrasting ways: in the past ten years, a double movement of the legalization of “homosexual marriage” in the West and of the constitutionalization of “heterosexual marriage” in the East has been observed, with the result that the continent appears to be more and more divided.

Access to homosexual marriage is largely presented as a question of equality and non-discrimination, in other words in terms of human rights. The Council of Europe is the principal advocate in this debate, because its aim is to guarantee and promote the respect of human rights on the entirety of the continent.

In 2010, the main organs of the Council of Europe seemed resolutely committed to the extension of the principle of non-discrimination

according to sexual orientation to all domains of existence. On March 31st 2010, the Committee of Ministers of the Council of Europe adopted Recommendation CM (2010)⁵ advising Member States to adopt measures against discrimination founded on sexual orientation or gender identity. On April 29th 2010, the Parliamentary Assembly of the Council of Europe in turn adopted Resolution 1728 (2010)² on “Discrimination on the basis of sexual orientation and gender identity” promoting the same measures as the Recommendation. None of these documents invited the States to legalize same-sex marriage, but they were more explicitly supportive of civil partnership.

On June 24th 2010, the European Court of Human Rights (ECHR) published its judgment in the ruling on *Schalk and Kopf v. Austria*,³ declaring for the first time that the stable relationship of two same-sex partners falls under the notion of “family life” (and no longer just private life) “just as the relationship of a different-sex couple” (§ 94). It guarantees them equality of treatment by means of the principle of non-discrimination in regard to the protection of family life. Finally, in September 2011, six Member States supported the creation of an “LGBT project”⁴ within the Council of Europe to promote the adoption of measures laid out in Recommendation CM (2010)⁵ by internal legislation.

This series of documents and decisions has firmly engaged the Council of Europe in the promotion of LGBT rights. Nevertheless, the debate on the question of the acknowledgement of unions between people of the same sex is not closed and continues vigorously. On one hand, the

¹ Committee of Ministers, Recommendation CM/Rec(2010)5 to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010. Available at: http://www.coe.int/t/dg4/lgbt/documents/reccm2010_5_EN.asp

² PACE, Resolution 1728(2010), *Discrimination on the basis of sexual orientation and gender identity*, adopted on 29 April 2010. Available at: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1728.htm>

³ ECHR, *Schalk and Kopf v. Austria*, n°30141/04, 1st Section, 24 June 2010. Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605>

⁴ Council of Europe, *Combating discrimination on the grounds of sexual orientation or gender identity*, Project description available at: http://www.coe.int/t/dg4/lgbt/project/description_EN.asp

Court has declared clearly that the European Convention on Human Rights does not guarantee any right to marriage for same-sex couples (I) but, on the other hand, it seems to be building up a right to “legal recognition” for same-sex couples (II).

I. ON SAME-SEX MARRIAGE: NO FORESEEABLE RIGHT

In the last few years, 12 European States have legalized homosexual marriage (the Netherlands since 2001, Belgium (2003), Spain (2005), Sweden (2009), Norway (2009), Portugal (2010), Iceland (2010), Denmark (2012), France, England and Wales (2013), Luxembourg (2014) and Ireland (2015)) whereas 13 others have constitutionalized the definition of marriage as strictly heterosexual and monogamous. This is the case in the following countries: Belarus (art. 32), Bulgaria (art. 46), Croatia (art. 62), and Hungary (art. L.1), Latvia (art. 110), Lithuania (art. 38), Moldova (art. 48.2), Montenegro (art. 71), Poland (art. 18), Serbia (art. 62), Slovakia (art. 41) and Ukraine (art. 51). The most recent cases are Hungary in 2012, Croatia in 2013, Slovakia in 2014 and lately the FYR of Macedonia, whose parliament adopted a constitutional amendment on January 20th 2015 by 72 votes to 4.

The most recent constitutional amendments (Latvia, Hungary, Croatia, Slovakia, FYR of Macedonia) are aimed at preventing the introduction of same-sex marriage either by way of legislation or jurisprudence. This is why they define marriage as “a unique union between a man and a woman” (Slovakia) instead of simply guaranteeing “men and women” the right to marry and found a family, according to the wording of European (ECHR, Art.12) and international law (UDHR, art.16 and ICCPR, art. 23). This latter formulation allowed the Spanish Constitutional Court, following the ECHR indication in *Schalk and Kopf*⁵ (see below), to rule that the phrase “men and women” only indicates the holders of the right to marry, but does not imply that marriage should

⁵ ECHR, *Schalk and Kopf v. Austria*, n°30141/04, 1st Section, 24 June 2010. Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605>

necessarily only be contracted between a man and a woman (judgment No. 198/2012⁶, of November 6, 2012).

The increasing divergence between European countries on the question of marriage has led the Court to depart from the evolutive interpretation of the Convention in recognizing the absence of any right to same-sex marriage under the Convention. The Council of Europe's other institutions have likewise followed this evolution.

On reading the *Schalk and Kopf* ruling of 2010,⁷ one might think that the Court was paving the way to the establishment of a right for same-sex couples to marry. Notably, the Court admitted an interpretation of Article 12 as applicable to couples who were not "a man and a woman" because "the wording of Article 12 might be interpreted so as not to exclude marriage between two men or two women" (§ 55). However, in the light of the context of Article 12 and the intention of the authors of the Convention, the Court recognized that Article 12 only guarantees "a man and a woman" the right to marry and found a family. Therefore, "as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State" (§ 61). The Court added in this regard "that it must not rush to substitute its own judgment in place of that of the national authorities" (§ 62). The Court concluded "that States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples" (§ 108).

The Court's wording in the 2010 ruling implied that "its own judgment" would have been to extend the guarantee of marriage rights offered by Article 12 to all couples, irrespective of sexual complementarity. The *Schalk and Kopf* judgment was a kind of promise, setting down the grounds for the subsequent evolution of jurisprudence, according to the social changes.

⁶ Constitutional Court Judgment, n°198/2012, 6 November 2012. Unofficial translation available at: <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC1982012en.aspx>

⁷ ECHR, *Schalk and Kopf v. Austria*, n°30141/04, 1st Section, 24 June 2010. Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605>

But the social changes moved far from a European consensus favourable to same-sex marriage, leading to a new ruling, this time of the Grand Chamber.

On July 16th 2014, in the *Hämäläinen v. Finland* judgment,⁸ its first answer in the Grand Chamber on the question of a “right to homosexual marriage,” the ECHR gave a response in which its formulation appears definitive, indicating that neither Article 8 nor Article 12 of the Convention can be understood “as imposing an obligation on Contracting States to grant same-sex couples access to marriage” (§ 71 and 96). The Court clarified “the fundamental right of a man and woman to marry and to found a family,” assuring that Article 12 “enshrines the traditional concept of marriage as being between a man and a woman.” Duly noting the absence of consensus on this matter in Europe, the Grand Chamber concluded that “while it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples” (§ 96).

Such clear statements tend to bring the debate to a close for now and for the future.

Two authoritative Council of Europe bodies recently adopted similar positions.

On March 24th 2014, the Committee of Ministers responded⁹ to a written question denouncing the “prohibition of same-sex marriage in Croatia” (Written Question No.647, Doc. 13369), recalling “that Article 12 of the Convention does not impose an obligation on the respondent government to grant a same-sex couple access to marriage.”

This is also the position of the Venice Commission, in its opinion No.779 of September 25th 2014¹⁰ on the draft amendment to the

⁸ ECHR, *Hämäläinen v. Finlande*, n°37359/09, Grand Chamber, 16 July 2014. Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145768>

⁹ Committee of Ministers, *Prohibition of same sex marriage in Croatia*, Reply to Written question No. 647 (Doc. 13369), adopted on 12 March 2014. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20576&lang=en>

¹⁰ Venice Commission, Opinion No.779/2014, (CDL-AD(2014)026), 13 October 2014. Available at: <http://www.venice.coe.int/webforms/documents/default>.

Constitution of the former Yugoslav Republic of Macedonia, which defines marriage as monogamous and heterosexual. In its opinion, the Venice Commission recalls the jurisprudence of the ECHR, noting the absence of a right to marry for same-sex couples, and observes that the Macedonian draft conforms to the recent trend shared by numerous European States; in its opinion on the similar amendment to the Hungarian Constitution, the Commission had already concluded that “[i]n the absence of established European standards in this area and in the light of the above-mentioned case-law, the Commission concludes that the definition of marriage belongs to the Hungarian state and its constituent legislator.”¹¹

It seems clear that the norms of the Council of Europe do not require governments to grant same-sex couples access to marriage; nor do they prevent them from defining marriage in their Constitution as only between one man and one woman. However, the question whether there could be a positive obligation on Member States to provide for another form of legal recognition for same-sex couples is open.

II. TOWARDS A CONVENTIONAL RIGHT TO “LEGAL RECOGNITION”?

The possibility for individuals, irrespectively of their sex, to contract a union or a civil partnership is often presented as an alternative to access to marriage. Although there is no right, as the matter stands, in European law to legal recognition of same-sex couples, there is a growing tendency for European States to offer such a legal framework and for the Council of Europe’s institutions to recommend it.

A growing number of States agree to such a provision: since 1989, 23 out of 47 member States of the Council of Europe have adopted a legal framework for civil union open to same-sex couples: Denmark (1989), Norway (1993), Sweden (1995), Iceland (1996), Spain (1998), the

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¹¹ Venice Commission, Opinion on the new Constitution of Hungary, CDL-AD(2011)016-e, Venice, 17-18 June 2011, § 50. Available at : <http://www.venice.coe.int/webforms/documents/CDL-AD%282011%29016-E.aspx>

Netherlands (1998), France (1999), Belgium (2000), Germany (2001), Portugal (2001), Finland (2002), the United Kingdom (2005), Hungary (2007), the Czech Republic (2006), Switzerland (2007), Luxembourg (2010), Slovenia (2010), Ireland (2010), Austria (2010), Liechtenstein (2011), Malta (2014), Croatia (2014), and Estonia (2014). Greece is in the process of extending the “civil union” status adopted in 2008 to same-sex union, executing the ECHR ruling in *Vallianatos and others v. Greece*. Not only secular countries, but also Catholic and Orthodox “bastions” are following this trend.

It should be noted that the wave underpinning “civil unions” is not only supported by the movement in favour of the social recognition of homosexuality, but more broadly by the questioning of the institutional and social dimension of marriage in favour of a more private mode of engagement. In France, 95% of civil partnerships are concluded by heterosexual couples, and two civil unions are celebrated for three marriages.¹²

In the *Schalk and Kopf*¹³ ruling, the Court examined whether Austria should have provided the applicants with a means of legal recognition of the same-sex couple’s relationship any earlier than it did through the adoption of the Austrian Registered Partnership Act, which came into force on 1st January 2010. The Court assessed the growing emergence of a European consensus on the legal recognition of same-sex couples, but observed that “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 enjoy a margin of appreciation in the timing of the introduction of legislative changes” (§ 105). Therefore, the Austrian legislator could not be reproached for not having introduced the Registered Partnership Act any earlier.

¹² Vanessa Bellamy et Catherine Beaumel, division Enquêtes et études démographiques, Insee, *Bilan démographique 2013, Trois mariages pour deux pacs*. Available at: http://www.insee.fr/fr/themes/document.asp?ref_id=ip1482

¹³ ECHR, *Schalk and Kopf v. Austria*, n°30141/04, 1st Section, 24 June 2010. Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605>

More recently, in the *Vallianatos and others v Greece* case¹⁴ the Grand Chamber of the ECHR ruled that it was unjustified and therefore discriminatory that in the Greek law the ability to contract “civil unions” was reserved solely for heterosexual couples. The Grand Chamber did not take the opportunity of this case to declare a conventional right to legal recognition of same-sex partnerships and remained on the grounds of the conventional right to not be discriminated against in the enjoyment of an internal right, in line with the *Karner v Austria* judgment.¹⁵ However, the Court called on European legislators on family matters to choose measures that “take into account developments in society and changes in the perception of social and civil-status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one’s family or private life” (*Vallianatos*, § 84).

At this stage, the Court invites member States, but does not oblige them to adopt such legislation. The same is true of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe (PACE).

The non-binding annex of Recommendation CM (2010)5¹⁶ issued by the Committee of Ministers invites States “to consider the possibility of providing, without discrimination of any kind, including against different-sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live” (§ 25). It also invites States to afford the same rights to same-sex couples as those enjoyed by heterosexual couples in a comparable situation when a registered partnership status exists, or when non-married couples enjoys specific rights.

¹⁴ ECHR, *Vallianatos and others v Greece*, n° 29381/09 and 32684/09, Grand Chamber, 7 November 2013. Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-128294>

¹⁵ ECHR, *Karner v. Austria*, n°40016/98, First Section, 24 July 2003. Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61263>

¹⁶ Committee of Ministers, Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010. Available at: http://www.coe.int/t/dg4/lgbt/documents/reccm2010_5_EN.asp?

Likewise, the non-binding PACE Resolution 1728 (2010)¹⁷ underlines that “the denial of rights to de facto ‘LGBT families’ in many member states must also be addressed, including through the legal recognition and protection of these families” (§ 10). In particular it calls on Member States to “ensure legal recognition of same-sex partnerships when national legislation envisages such recognition” (§ 16.9) for heterosexual couples.

Following the same path, on October 28th 2014, the Slovak constitutional court ruled¹⁸ that a referendum seeking to prohibit any future same-sex registered partnerships was deemed unconstitutional; but it ruled that the provisions of the referendum seeking to define marriage as a union between a man and a woman and to ban the adoption of children by same-sex partners were constitutional.

In the same way, the government of the FYR of Macedonia turned down an application to constitutionally prohibit the legal recognition of same-sex partnerships and limited its amendment in the field of family law to the heterosexual and monogamous definition of marriage. This decision followed the Venice Commission’s Opinion No.779 of September 25th 2014¹⁹ where it observed that such an amendment would be “problematic, if the authorities decide to introduce ‘intermediate’ forms of recognition of personal unions,” in regard to the ECHR ruling in *Vallianatos*.

In the coming months there will be a majority of Member States providing for legal recognition of same-sex couples. This may have a decisive impact on the ECHR’s forthcoming rulings in three new cases currently pending (*Oliari and A. v. Italy* and *Felicetti and others v. Italy*, Nos. 36030/11 18766/11; *Francesca Orlandi and others v. Italy*, No. 26431/12). In these cases, several same-sex couples (among them

¹⁷ PACE, Resolution 1728(2010), *Discrimination on the basis of sexual orientation and gender identity*, adopted on 29 April 2010. Available at: <http://assembly.coe.int/nw/xml/Xref/Xref-XML2HTML-en.asp?fileid=17853&lang=en>

¹⁸ Slovak constitutional court, PL. ÚS 24/2014, 28 October 2014.

¹⁹ Venice Commission, Opinion n°779/2014, (CDL-AD(2014)026), 13 October 2014. Available at: <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282014%29026-e>

six were married abroad) challenge the impossibility of obtaining legal recognition of their relationship through marriage or any other legal means. They invoke Articles 8, 12 and 14.

The Court will certainly not support a right to marriage, but may build on the Vallianatos judgment in which it considered that the interest of homosexual couples “to have their relationship legally recognized” (§ 90) was an element of their private and family life guaranteed by Article 8 of the Convention. Therefore, the refusal to provide for such recognition could be judged as interfering with Article 8. Even if Article 8 may not be interpreted as containing, *per se*, a positive obligation to provide for such recognition, this refusal may be found discriminatory in regard to the possibility afforded to different-sex couples to have their relationship recognized through marriage. The Court could rely on its findings in Vallianatos, where it judged that “same-sex couples are just as capable as different-sex couples of entering into stable committed relationships,” and that they have “the same needs in terms of mutual support and assistance as different-sex couples” (Vallianatos, § 81).

Marriage is “more” than a civil partnership: it usually provides for more rights and duties, but both permit the legal recognition of a relationship. In Vallianatos, the Court found it discriminatory that the legal recognition of a relationship afforded by civil partnership was open solely to different-sex couples. It may reach the same conclusion when it considers that in Italy the legal recognition of a relationship is open solely to different-sex couples. Italy would not have to allow same-sex marriage but to afford a legal framework for same-sex partners, whatever it is called. Such an assessment would oblige all European countries who do not provide for homosexual marriage to establish a status of civil union, open to same-sex couples.

Then there will be the question of the justification for the difference between rights and obligations attached to marriage and civil unions. In *Schalk and Kopf*, Court was “not convinced” by the argument that the rights attached to marriage and civil partnership should be equivalent. “It considers on the contrary that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of

recognition” (§ 108). But this difference of rights would have to manifest the difference of purpose between marriage and civil partnership: the first being the foundation of a family (*Sheffield and Horsham v. UK*),²⁰ the latter the organization of a couple’s private life, corresponding approximately to the difference between Articles 12 and 8 respectively.

The Court’s well-established case law is that “marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences” (see for example *Gas and Dubois*,²¹ § 68). This “special status” can be different from the status of cohabitation and civil partnership and may justify, for example, that second-parent adoption is legally admissible only to a married couple (*Gas and Dubois*).

More generally, the development of civil partnership indicates not only a broader social acceptance of homosexuality, but more fundamentally it reflects a more general change in attitudes which, to the detriment of the institutional and stable nature of marriage, tends to prefer a contractual and easily revocable mode of union. It is the expression of a society in which it is not so much the family that is the natural and fundamental group unit of society (UDHR, Art. 16 § 3), but the individual. The impact of civil partnerships on society, even limited to heterosexual couples, seems therefore no less important than that of the homosexual redefinition of marriage, because it implies society’s acceptance of a fragile mode of union which is not oriented on the foundation of a family.

²⁰ ECHR, *Sheffield and Horsham v. UK*, ns. 22985/93 and 23390/94, Grand Chamber, 30 July 1998, § 66. Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58212>

²¹ ECHR, *Gas and Dubois v. France*, n°25951/07, Fifth Section, 15 March 2012. Available at: <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-109572>

EUROPEJSKI TRYBUNAŁ PRAW CZŁOWIEKA NA DRODZE KU PRAWNEMU UZNANIU ZWIĄZKÓW JEDNOPŁCIOWYCH?

Streszczenie

Artykuł ukazuje ewolucję orzecznictwa ETPCz w zakresie wykładni artykułu 8 Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności. Autor koncentruje się na zmianie, jaka następowała w sposobie kwalifikowania praktyk homoseksualnych, których penalizacja była początkowo akceptowana przez Trybunał, by później przyznać im ochronę jako aspektowi życia prywatnego, aż do uznania ich za element pozwalający kwalifikować relacje dwóch osób tej samej płci za życie rodzinne. W tym kontekście, w świetle ostatnich wypowiedzi orzeczniczych, Autor stawia tezę, że Europejski Trybunał Praw Człowieka zmierza do wykreowania na gruncie Europejskiej Konwencji Praw Człowieka prawa do instytucjonalizacji związku jednopłciowego, jako wynikającego z art. 8 Konwencji.

Słowa kluczowe: Europejski Trybunał Praw Człowieka, związki jednopłciowe, życie rodzinne.

Keywords: European Court of Human Rights, same-sex couples, family life.