Same Sex Unions and the ECHR

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Debate is escalating in Western countries with the opening of marriage to same-sex couples. To this day, 11 European countries have altered their legislation in this sense, and within the coming months, the Supreme Court of the United Sates will decide on the constitutionality of the definition of exclusively heterosexual marriage. This judgment will have considerable impact.

In Europe, the situation has evolved rapidly in contrasting ways: in the past ten years, a double movement of the legalisation of "homosexual marriage" in the West and of the constitutionnalization of "heterosexual marriage" in the East has been observed, with the result that the continent appears 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, because its aim is to guarantee and promote the respect of human rights on the entirety of the continent, is the principal advocate in this debate.

In 2010, the main organs of the Council of Europe seemed resolutely directed towards 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) 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 legalise 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 judgement in the case *Schalk and Kopf v. Austria* ruling, 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 an 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" within the Council of Europe looking to promote the adoption by internal legislation of measures laid out in Recommendation CM (2010)5.

This series of documents and decisions has firmly engaged the Council of Europe in the promotion of LGBT rights. Nevertheless, on the question of the acknowledgement of unions between people of the same sex, the debate is not closed and continues vigorously. On one hand, the Court 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 a right to "legal recognition" for same-sex couples (II).

I. On same-sex marriage: no foreseeable right

In the last few years, 11 European States have legalised 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) and Luxembourg (2014), 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 presently the FYR of Macedonia whose parliament has 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 "*to 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* (see below), to rule that "men and women" only indicate the holders of the right to marry, but does not imply that marriage should necessarily be formed between a man and a woman (judgment No. 198/2012, of November 6 2012).

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

In 2010, reading the *Schalk and Kopf* ruling, one could think that the Court was paving the way to the establishment of a right for same-sex couples to marry. Notably, the Court accepted to apply Article 12 to the applicants although they were not "men and a women" because" *the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women*" (§55). However, in light of the context of article 12 and the intention of the authors of the Convention, the Court recognised that article 12 only guarantees "man and 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 wording of the Court in 2010 implied that "its own judgment" would have been to extend the guarantee of marriage rights offered by article twelve to all couples, irrespective of sexual complementarity. This *Schalk and Kopf* judgment was a kind of promise, setting down the grounds for the subsequent evolution of jurisprudence, according to the social changes.

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 judgment *Hämäläinen v. Finlande* (no. 37359/09) the ECHR, answering in Grand Chamber for the first time on the question of a "right to homosexual marriage", 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 statement tends to end the debate for now and for the future.

Two authoritative bodies of the Council of Europe recently adopted similar positions.
On March 24th 2014, the Committee of Ministers, responded to a written question denouncing the "*prohibition of same-sex marriage in Croatia*" (Written Question n°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 n°779 of September 25th 2014 on the draft amendment to the Constitution of the former Yugoslav Republic of Macedonia defining marriage as monogamous and heterosexual (CDL-AD(2014)026). 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 notes that the Macedonian project conforms to the recent trend shared by numerous European States., in its opinion on the similar amendment to the Hungarian fundamental law, 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*" (CDL-AD(2011)016, June 17th-18th 2011, §50).

It seems clear that the norms of the Council of Europe do not require governments to grant same-sex couples access to marriage nor prevent them to define 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 to same sex couples is open.

II. Towards a conventionnal right to "legal recognition" ?

The ability for individuals, irrespectively of their sex, to conclude a union or a civil partnership is often presented as an alternative to access to marriage. Although there is no right, as matter stands, in European law to legal recognition of same-sex couples, there is a growing tendency among 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 Netherlands (1998), France (1999), Belgium (2000), Germany (2001), Portugal (2001), Finland (2002), United Kingdom (2005), Hungary (2007), Czech Republic (2006), Switzerland (2007), Luxembourg (2010), Slovenia (2010), Ireland (2010), Austria (2010), Liechtenstein (2011), Malta (2014), Croatia (2014), Estonia (2014). Ireland is in 2015 the process of adopting such legislation. Greece is also 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 taken over by this wave.

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 favor 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.

In the *Schalk and Kopf* ruling, the Court examined whether Austria should have provided the applicants with a means of legal recognition of the relationship of the same-sex couple any earlier than it did through the adoption of the Austrian Registered Partnership Act entered into force on 1 January 2010. The Court assessed the growing emergence of a European consensus towards legal recognition of same-sex couples, but esteemed that because "*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*" (§ 105). Therefore, the Austrian legislator could not be reproached for not having introduced the Registered Partnership Act any earlier.

More recently, the Grand Chamber of the ECHR, in the case ***Vallianatos and others v Greece*** (ECHR, Nov. 7th 2013, n° 29381/09 and 32684/09) judged unjustified and therefore discriminatory the fact that the ability to contract "civil unions" is solely reserved to heterosexual couples in the Greek law. 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 judgment *Karner v Austria* (ECHR, July 24th 2003, n°40016/98). However, the Court called on European legislators, when legislating on family, 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)5 of 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 to those of heterosexual couples in a comparable situation when a* status of registered partnership exists, or when non-married couples enjoys specific rights.
Simili modo, the non-binding PACE Resolution 1728 (2010) 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). It calls on Member States notably 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 ruled (PL. ÚS 24/2014) that a referendum seeking to prohibit any future same-sex registered partnerships was deemed unconstitutional; but it judged constitutional the provisions of the referendum seeking to define marriage as a union between a man and a woman and to ban adoption of children by same-sex partners.
In the same way, the government of the FYR of Macedonia renounced to forbid constitutionally 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 n°779 of September 25th 2014 where it esteemed such amendment "*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 forthcoming ECHR's 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,* n°. 26431/12). In those cases, several same-sex couples (among them 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* judgement in which it considered that the interest of homosexual couples "*to have their relationship legally recognised*" (§90) is 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 recognised 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 civil partnership: it usually provides for more rights and duties, but both permit the legal recognition of a relationship. In *Vallianatos*, the Court found discriminatory the fact that the legal recognition of a relationship afforded by civil partnership was open solely to different sex couples. It may reach the same conclusion considering that the legal recognition of a relationship is open solely to different sex couples in Italy. 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 will come up 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*, ns. 22985/93 and 23390/94, [GC] 30 July 1998 § 66), the latter the organisation of the private life, corresponding approximately to the difference between, respectively, articles 12 and 8.

It is a well established case law of the Court 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 exemple Gas et Dubois, § 68). This "*special status"* can be different from the ones of cohabitation and civil partnership and may justify, for example, that second-parent adoption is legally possible only within 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 not less important than that of the homosexual redefinition of marriage, because it implies the acceptance by society of a brittle mode of union and which is not oriented towards the foundation of a family.