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RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE

Master's Thesis

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Introduction

Legal recognition for the rights and protection of LGBT persons has been an actual topic for discussion for a while on international and as well as on domestic levels. After the Second World War, demand for the equal rights for LGBT persons increased as they started to voice their demands on bigger scale and require the equal rights they are entitled to and fight against the discrimination that they are facing on different aspects of their lives. Various organizations were developed to support the LGBT persons in struggles they are facing. This support was happening both on international and national levels. Even though the topic of sexual minorities has been a sensitive topic in international law discussions as well; international organizations, and legal instruments do not have the direct power to have an impact on this matter, there were and still are steps taken in order to provide equal rights and protection for everyone regardless of their sexual orientation. Prominent and impactful organizations such United Nations, Council of Europe, European Union have been a great help in fostering such change across the world. However, since they are bound to respect the sovereignty of states regarding their internal matters, this has not been an easy process. Nevertheless, these organizations still played a key role in development in progression of LGBT rights albeit a slow process. Apart from the concern for sovereignty, the socio-cultural, political, religious situation across different countries related to their geographic location also plays in important role on how the rights of LGBT persons are recognized in respective countries. For example, in countries where society has more liberal approach, it is observed that recognition for the rights and general attitude towards LGBT persons are normal, and sexual orientation is not perceived as the only trait that individuals possess. Such neutral attitude developed with time affects the legal changes happening in such countries as well, so that the legal situation meets the social reality. For example, Denmark was the first country to introduce relevant legislation for the recognition of the same-sex relationship by allowing them legalize their relationship through registered partnerships. Many countries within and outside Europe followed this trend, and offered some kind of recognition for the same-sex relationships. Moreover, the Netherlands was the first country to extend marriage rights to same-sex couples as well. We could say that Europe is the pioneer of LGBT rights. Nevertheless, despite such a strong start with the recognition of LGBT persons rights especially regarding decriminalization of homosexuality, and above-mentioned rights regarding the recognition of same-sex relationships, Europe has made a slow progress regarding furthering the scope of LGBT rights. We will discuss the reasons why this has been so in detail in the respective chapters of this thesis.

Questions that we are going to ask and provide with answers in this thesis are following:

1. What is the role of European Court of Human Rights regarding the recognition of same-sex relationships?
2. How does the concept of European Consensus affect the situation concerning recognition of same-sex relationships? What are the downsides of referring to European Consensus on matters related to recognition of same-sex relationships?
3. Do states have obligation to provide equal marriage?
4. What is family and how it is interpreted in international law?
5. How does lack of recognition for same-sex couples affect their free movement rights as an EU citizen?
6. What is the difference between approach towards recognition of same-sex marriages in U.S. and Europe?
7. What problems are LGBT families are facing concerning adoption?
8. What kind of developments to further the recognition of same-sex relationships can be foreseen?

The answers to this questions are provided by the analysis of relevant case law of UN Human Rights Committee, European Court of Human Rights (ECHR), Court of Justice of the European Union (CJEU) and various national courts; interpretation of relevant international and domestic legislation; existing literature regarding the same-sex relationships, mainly focused on registered partnerships and same-sex marriage; various articles and blogposts concerning further analysis of the cases which constitute the precedents of recognition of LGBT rights (in other words, landmark cases).

The research is conducted in mixture of various research methods such as historical, analytical, comparative and qualitative methods. Historical aspect is concerning the part where we discuss the progression of LGBT rights throughout decades, starting point could be considered the cases that were addressed to the ECHR regarding decriminalization of homosexuality. Analytical aspect of the research is related to the analysis of relevant case law. As you will observe while going through the chapter, there are in depth analysis of respective case law in order to understand the perspective of applicant, defendant and as well as the Court. Concerning the comparative aspect of the methodology, it is about comparing various legislations within and outside of Europe. Lastly, regarding the qualitative aspect of methodology, it is related to the analysis of theoretical views of certain concepts such as family, marriage, dignity and so on.

The hypothesis of this thesis is that lack of recognition of same-sex relationships constitutes discrimination on behalf of the sexual orientation, and institution of marriage has to undergo further transformations in order to extend itself to both same-sex relationships and other relationships that are not similar to heteronormative married couples.

The thesis is structured into three chapters and each chapter has its own subchapters. The first chapter is related to the issues concerning recognition of same-sex relationships solely focusing on Europe. Chapter is divided into three parts. First part of the chapter focuses on the concept of heteronormativity, its impact on same-sex relationships and being one of the main ideologies concerning the line of judgement that ECHR had showcased in its earlier case law. We proceed to analyze the several cases in order to portray the differential treatment between heterosexual and homosexual relationships. Additionally, the history of recognition of same-sex relationships are briefly described. Moreover, we are discussing socio-cultural impact of various societies on the idea of marriage, and how with time those socio-cultural norms changed into shaping the concept of marriage, making it more inclusive and expanding the border of its definition. In second part of the chapter, we are discussing one of the main decisive factors by the Court concerning the rights of LGBT persons which is the concept of European Consensus. We give description to what is European Consensus and what kind of impact does it have on recognition of same-sex relationship. We looked into how European Consensus works, in what manner the Court is resorting to this concept. Additionally, we look at the opposition views regarding the usage of European Consensus as sometimes it causes disadvantage for guarantee and protection of minority rights. While talking about the European Consensus, we briefly explain the division in Europe when it comes to recognition of the LGBT rights in order to give a bigger perspective on the matter. Lastly, in third part of the chapter, we are discussing whether the cases where Court addressed the issue whether states have obligation to provide for marriage equality or no. In this part, we are mostly focused on in depth analysis of some of the prominent cases from the Court's case law. Relevant cases are analyzed in chronological order as their judgments have been considered in each of them. Additionally, it is written in such manner because by analyzing them in chronological manner, we get to observe the shift in the Court's approach regarding the recognition of same-sex marriages. In general, in first chapter, we are answering the questions number one, two and three from the list of questions.

The second chapter of the thesis is also divided into three parts. First part of the chapter consists of one subchapter. In this part of the chapter in general, we are discussing the notion of family and how it is defined in various international legal instruments. Then we proceed to analyze the

interpretation of family life under the Article 23(2) of the International Covenant on Civil and Political Rights by discussing the relevant case law which is crucial to defining this idea.¹ Additionally, we analyze the ways in which Article 23(2) can be discussed in order to advance the protection and recognition of LGBT rights, mainly related to recognition of family rights of the same-sex couples. Moreover, we follow up the discussion in this chapter by examining the source of the Article 23(2) and why it was worded in the way that it is. In second part of the chapter, we are discussing the family law in European Union and how it affects the migration rights, namely free movement rights of the EU citizens. In this part, we analyze some of the relevant cases which have contributed to the understanding of application of fundamental rights of an EU citizens in respect to the legal situation of same-sex relationships. To be more precise, we are focused on the free movement rights of the EU citizen with their family members, and how lack of European Consensus and different legislations across the EU affect this situation. In third part of this chapter, we are focusing on the differences of the approach towards same-sex relationship between U.S. and Europe through the relevant case law of leading courts of the both regions. We resort to one of the landmark cases in history of LGBT rights in U.S. which allowed marriage equality for everyone. We proceed to analyze the difference between these two regions, as to why while U.S. is taking such an big step while Europe is still hesitant and cautious when it comes to recognition of same-sex relationships, mainly marriage equality. Lastly, in the fourth part of this chapter, we focus on the adoption and parenting rights of the LGBT persons both from perspective of single-parent and second-parent adoption. The discussion here is mainly based on the analysis of relevant case law of the ECHR regarding LGBT parenting. We focus on the concept of best interests of the child that was resorted by the Court in the earlier periods of dealing with cases regarding same-sex parenting. We proceed to discuss the perception of homosexuality by the Court and how that affects the recognition of parenting rights of the LGBT individuals. Additionally, we shed light on the dissenting opinions of various judges to get a bigger perspective on the related issue. In this part, we use the same methodology of analyzing the cases in chronological order to see the shift of opinion from the Court's side, also to see the impact of the previous case on the next case. Lastly, we proceed to discuss the difficulties that LGBT families face on daily basis and how that can affect the wellbeing of the child and family in general. To summarize, in the second chapter, we are answering the questions number four, five and six from the list of questions addressed in this thesis.

¹ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999

Lastly, the third chapter of the thesis is divided into three parts. The chapter itself focuses on the methods of recognition of same-sex relationships, how effective those methods are and what can be done in future to progress in this situation. The chapter starts with discussion of human dignity in international law and how it affected the progression of gay rights throughout the history. We proceed to talk about the definition of the concept of human dignity in various philosophical ideologies, the flexibility of the concept and how that flexibility can be an asset and at the same time an issue when it comes to resorting to dignity when approaching the cases related to same-sex relationships, mainly focused on the issue of marriage equality. We proceed to analyze the connection between concept of dignity and non-discrimination and how sometimes concept of human dignity can have limiting effects on the non-discrimination. In the second part of the chapter, we begin to discuss whether marriage equality is a necessary step towards recognition and protection of LGBT rights. We analyze the concept of marriage in general and also from the perspective of queer theorists and feminism. Then we proceed to discuss how the concept of marriage, the ideas surrounding this notion has changed with the changes of social norms and understanding of this institution. We examine the idea of reducing limitations on the marriage and observe the course of history which shows that certain changes to concept of marriage did not threaten the institution itself. Additionally, we have discussed the dynamic between the civil partnerships and marriage and how the latter is affected by the previous one in the light of events which allow civil partnerships for both different-sex and same-sex couples. We summarized this part of chapter by suggesting the further reconsideration and amendments to the concept of marriage by fast changing public opinion around it. Lastly, in the third part of the chapter, we discuss the future prospects of same-sex relationships and in general, the concept of marriage in order to prevent discrimination on different type of families other than bound by the ties of marriage. This chapter focuses on the introduction of universal sexual subject of international law and how it can help to systemize international law in a way to avoid discrimination based on sexual identity of the individuals. We discuss two suggested rights associated with this universal subject of international law, namely, their freedom to choose their sexual identity and activity, and maintaining one's family life without any interference according to this chosen identity and activities. We explain that labeling humans as on either on side of various binaries can lead to discriminative consequences, and the we must take steps into erasing those binaries instead of interpreting legislations according to them. One of the most interesting discussions of this chapter is related to the understanding relevant articles of European Convention of Human Rights and analyzing them for finding a legal basis

for the mentioned suggested rights of the universal sexual subject.² We proceed to discuss institutionalized concept of marriage, how it regarding it as such institution is affecting same-sex relationships (by preventing same-sex couples from accessing marriage in most of the jurisdictions across the world) and at the same time, couples who choose to not bound their relationships by marriage. By discussing these concepts, we consider the restructuring the concept of family in international law, mainly in the ECtHR in order to create equal treatment to all kinds of relationships. Additionally, taking slow steps to changing the perception of marriage in order to not distinguish between different kind of relationships, and creating an idea that in comparison, other kind of relationships are inferior to marriage. To summarize this chapter, we answered the question number eight from the questions list and discussed the future perspective of same sex relationships, and marriage in general.

² Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

Chapter I. Same-sex relationships and the European Court of the Human Rights

ECHR (from now on, Court) had had a significant shift of opinion on legal recognition of same-sex relationships from the moment when the first landmark LGBT-related case was lodged. Article 8 of the ECHR (hereinafter, Convention) regarding respect for private life and article 14 for non-discrimination were one of the principal grounds on which LGBT persons make their claims. After some time, as we will see in the cases discussed in this thesis, applicants started to make claims based on Article 12 (right to family). At first, mainly the respect for private life was the primary protection for the fundamental human rights of LGBT persons, primarily homosexual men. In most countries where homosexuality was considered illegal, the legislation specified the sexual acts conducted between males. However, the case of *Dudgeon v UK* had a significant impact on this matter and is considered one of the landmark cases in the history of LGBT rights.³ Mr. Dudgeon, a homosexual man, claimed that the existing legislation in Northern Ireland infringed his right to privacy by considering some homosexual acts between consenting adult males criminal offenses. The Court decided that there is no justified reason to interfere with such an intimate part of the individual's private life. During that initial period, regarding non-discrimination, we could say that the judgment of the Court was leaning towards Aristotle's idea of "like cases should be treated alike".⁴

It is argued that in the majority of the cases, the Court's methodology seems to be a four-tier system: 'Within the ambit', 'analogous situation', 'legitimate aim', and 'proportionality' tests.⁵ The first stage analyzes whether the case falls within the ambit of the rights protected by the Convention. For example, article 14 protects persons from discrimination regarding the rights stated in the Convention. Therefore it leaves a vast space for the interpretation for the Court, and it is up to the applicant to prove to the Court that their case falls within the ambit. The second stage examines whether the applicant had gone through differential treatment compared to other people in a similar situation. After going through these two stages, in the third and fourth stage, Court analyzes whether the distinction was justified with a legitimate aim. It is the state party's responsibility to prove to the Court that the distinction was justified, had a legitimate aim, or was proportionate because otherwise, a distinction without a legitimate aim results in discrimination. However, the Court does not always follow all of these steps.

³ *Dudgeon v. United Kingdom*, Appl. No. 7525/76, European Court of Human Rights, 22 October 1981

⁴ Damian A Gonzalez Salzberg, "Sexuality and Transsexuality under the European Convention on Human Rights" Hart Publishing Ltd, 2019-12-18, p. 127

⁵ *Ibid*, p. 127-128

1.1. Heteronormativity and protection of “traditional family values”

The idea and the rights of the heterosexual traditional married couple were, and somehow still are, at the top of the hierarchy of the protection by the Convention. When examining cases relating to recognizing or granting rights to same-sex couples addressed to the Court, we can see the pattern of this idea of heteronormativity. Even when deciding the cases in the aforementioned topics, the heteronormative married couple was treated as the norm, and the situation of the same-sex couples was decided upon fitting the standards of heteronormativity. This developed into creating the concept of “homonormativity”, which in easy words, can be explained as accommodating the lifestyle of same-sex couples or any other type of relationship that is not “normal heterosexual couple”, into the standards of heteronormativity. The concept of heteronormativity is much more profound than just marriage, and it is intensely embroidered into other institutions and structures in society—for example, monogamy, marriage, raising children, and stability. Heterosexual relationships are perceived as the norm of couplehood, marriage, and the decision to reproduce as the main or, in some societies, only socially acceptable way of the concept of family.⁶

Supporting this view in its case law, the Court supports heteronormativity, which ends up with the deprivation of the rights of LGBT persons. This kind of approach is problematic in certain ways; for example, groups of people who do not possess a heterosexual orientation have to prove to the Court how they are suffering from this differentiated, restricted treatment by their national legislation. After proving their suffering, they have the chance to be granted the simple rights that their heterosexual counterparts have. Besides proving the problems and suffering they face, they also have to accommodate their lifestyle to the socially accepted concept of “traditional family”, which generates from the ideas of patriarchy, socially constructed gender norms, and religion. One of the reasons for opposing the granting of the Convention rights for same-sex couples is the protection of the “traditional family”. Some countries implement laws in their national legislation to prevent “LGBT propaganda” for protecting children and traditional family values. Logically, this claim is baseless as granting family rights (marriage, adoption) to same-sex couples does not take any rights from other people, and legally, it leads to discrimination against sexual minorities. Also, protecting the kids from “LGBT Propaganda” is harmful to the children because those ideas are not based on science and, therefore, can lead to the violation of the children’s rights. Homosexuality is proven to be one of the sexual

⁶ *Ibid*, p. 139-140

orientations, and children can also be part of the LGBT community. Introducing such laws prevents LGBT children from accessing the information they need about their sexuality. One of the recent examples of adopting such legislation is the “Gay Propaganda” law in the Russian Federation.⁷

The Court supported the idea of the protection of the family in the traditional sense in various cases. For example, let us take a look at the cases of *Mata Estevez v Spain*, *Karner*, and *Kozak* cases.^{8 9 10} In *Mata Estevez* case, the surviving partner claimed their deceased partner’s pension. However, the situation was that this kind of economic benefit for the partners was only available to married couples. At that time, same-sex couples were not able to marry. The Court proceeded to analyze the situation as to whether the state had a legitimate aim with this imposed legislation and concluded that the state had a legitimate aim. As this legislation aims to protect “the family with marriage bonds”; therefore, it did not find any violation of the applicant’s rights. The situation with *Karner* and *Kozak* cases was different. The Court stated a similar opinion about “the protection of the family in the traditional sense” (*Karner*) and “union of a man and a woman as a weighty legitimate reason” (*Kozak*). Nevertheless, the Court ruled that the discrimination was based on the sexual orientation of the applicants, and the state could not justify the distinctive treatment; there was a violation of the applicant’s rights. Out of these three cases, only two of them had a positive outcome for the applicants. The argument for “protection of the traditional family” is unproven. It needs to be proved that allowing same-sex couples to marry and giving them tax benefits and the right to adopt and create their family is a danger to the traditional family. Granting these rights to same-sex couples does not affect the group of people who already have them. Because they had it all along, and they have benefited from them without any discrimination. Additionally, they do not become less valuable because other people get to enjoy those rights. The right to marry is a fundamental right, and not allowing same-sex couples to have access to this right is a violation of their human rights. They were especially considering that there is no “weighty reason” to do so. Usage of the argument of “traditional family” is not a reasonable justification because, as stated before, it does not affect the rights of the people who already had access to them.¹¹

⁷ Human Rights Watch. No Support. Russia’s “Gay Propaganda” Law Imperils LGBT Youth © 2018 by Human Rights Watch.

⁸ *Mata Estevez v Spain*, Appl. No. 56501/00, European Court of Human Rights, 10 May 2001

⁹ *Karner v. Austria*, 40016/98, European Court of Human Rights, 24 July 2003

¹⁰ *Kozak v. Poland*, Application no. 13102/02, European Court of Human Rights, 2 March 2010

¹¹ Jens M. Scherpe. “*The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights*”, *The Equal Rights Review*, vol. 10, 2013, p. 92

Heterosexual married couples are considered the traditional family. The idea of the Court supporting this ideal of the traditional family means that they have privileges, and there is discrimination against the other relationships that do not fall under this “norm”. As discussed previously in this chapter, this structure is part of the more significant concept of the heteronormative matrix, which constitutes heteronormativity. In order to have access to the same rights as heteronormative married couples (which have access to all Convention rights without any limitations), same-sex couples have been trying to fit in with these imposed norms. As mentioned before, this situation creates the concept of homonormativity, meaning same-sex couples are trying to show that they can fit into the protected lifestyle of heteronormative married couples. For example, they also can have a monogamous stable relationship, create a family, and raise children together. This tactic has helped same-sex couples to achieve legal recognition of their relationships and other rights that heterosexual couples have; however, it also creates a pre-conditioned concept of sexual minorities. This means that to fit in and have access to certain family rights, they have to show that they are similar to heteronormative couples. This is a hint that heteronormativity is the norm, and all other sexualities and forms of families have to fit in with this idea. As individual persons, they do not have the right to have access to certain rights. The idea of having a norm in this regard gives the idea that the other forms of relationships and sexualities are less worthy of human rights, which is against the concept of equality and non-discrimination.

In more recent judgments, the Court decided that granting protection to specific types of families, and this situation causing deprivation of the rights of other types of families, does not go along with the Convention’s aim of protection and granting equality for everyone. An essential change in the opinion of the Court in this matter can be seen in the case *Bayev and others v Russia*.¹² Russia’s ban on the promotion of LGBT-related issues and non-traditional families to protect traditional family values constituted a breach of freedom of expression. The Court stated that there is more than one way to lead one’s family life. The flow of applications coming from LGBT families proves once again that LGBT persons also have an interest in marriage institution and parenthood. Although this judgment is a step towards the protection of the rights of the LGBT families, we can observe the patterns of heteronormativity here, meaning the support for the LGBT families who want to fit in with the established norms of the traditional family in order to have access to the rights. The question that can be asked here is that is it reasonable to hold the norms of heteronormativity, the idealization of the traditional

¹² *Bayev and others v Russia*, Appl. No. 67667, European Court of Human Rights, 20 June 2017

family, as a justification for deciding whether certain people gain access to family rights, economic benefits deriving from marriage, having a right to settle in a different country with their partner, whether they can become a parent.

The legal recognition of same-sex relationships started with giving a similar legal status to cohabiting same-sex partners as to the same opposite-sex couples. This happened in Sweden in 1987, and at that time, the formalisation of same-sex relationships was not considered. However, in 1989, Denmark took a more significant step and introduced registered partnerships for same-sex couples. After this, many other European countries took similar steps. Recognition of same-sex relationships could be divided into three categories: formal recognition that is “lesser” than marriage, similar to marriage in its function, and availability of marriage to same-sex couples as identical to different-sex couples. Some of these types of recognition show the differential treatment based on the couples’ sexual orientation because marriage was not an option (and still is not in many countries) for same-sex couples. However, some different-sex couples claimed that they do not have access to a registered partnership. Therefore, some countries made necessary adjustments to their legislation to provide registered partnerships for different-sex couples.¹³

In many legislations, registered partnerships were regarded as the same as marriage because, more or less, it provides the same rights as marriage. Legally speaking, marriage is a form of a registered partnership; it is a legal framework provided by the state. Everything else beyond that legal framework is cultural and social, which can also be affected by state legislation. Throughout the years, the legal framework of marriage has gone through various changes. Every time such a change was introduced, there was a fear that it would change the nature of the marriage and damage it. However, despite all the fears, objections, and hesitations, the institution of marriage still survived. For example, the said fear was expressed when divorce was introduced. The same situation happened when the right to remarry after the divorce was introduced. The beliefs and faith of religious people who want to marry are not relevant to the state party; however, it is important for that religious group. Therefore, in places where same-sex marriage is legal, the state does not impose it on those religious groups to celebrate them. Instead, it is up to them if they accept and celebrate it or not. Considering that there were changes to marriage institutions, such as divorce and remarrying, shows a chance and place to accommodate other kinds of relationships than different-sex couples. It is one of the

¹³ *Ibid* 11, p. 83

fundamental aspects of modern democracy that religious groups are not forced to celebrate marriages against their ideology. However, the state does not have the right to give recognition to the relationships that are considered to be the “norm”, “natural”, or “traditional”. The main idea behind recognizing relationships is to give the legal framework of recognition to couples who constitute the marriage. The said legal framework should be provided, and it is up to social or religious groups whether they want to do with it because the lack of this legal framework leads to the nonexistence of freedom of choice. Allowing freedom and access to the right to marriage for everyone do not take that right from anyone or does not affect their idea of marriage. Therefore, the states should expand the legal framework of marriage to make it inclusive of same-sex marriage.¹⁴

1.2. Same-sex relationships and European Consensus

The Court is adapting to the social changes in society; however, it is also vital for the Court to sustain stability in matters of decision making. Therefore, it can be said that setting a path of an inclusive approach in the judgments of the Court could be helpful in order to set a precedent where no one is subjected to direct or indirect discrimination. The decisions of the Court are binding; therefore, we can say that the Court has some power over affecting the change in the national legislation of the state parties. However, it is not an easily achievable goal, as the legal instruments and doctrines in force have a strict order of the rules regulating the relationship between treaties and national legislation of the contracting parties. The doctrine of the Margin of Appreciation plays an essential role in this regard. In most cases, the Court used to grant a wide Margin of Appreciation to the states in cases related to the regulation of same-sex relationships because it is an issue that does not have a European consensus yet. The lack of consensus can be observed when comparing the rights of LGBT persons in Western and Eastern Europe. For example, while the Netherlands was the first country to legalize same-sex marriage, Poland imposed an LGBT-free zone on its territory.^{15 16}

The Court does not put an obligation on states to grant the right to marry to same-sex couples. However, there is a shift in the opinion of the Court in this matter. The Court obliges the contracting states to grant legal recognition to same-sex couples, for example, making civil

¹⁴ *Ibid* 11

¹⁵ David Masci, Elizabeth Podrebarac Sciupac and Michael Lipca, “*Same-sex Marriage Around the World*”, 28 October 2019, paragraph 54. Can be accessed via this link: <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/>

¹⁶ Ash, L. 2020. “*Inside Poland’s ‘LGBT-free zones’*”. BBC news. Can be accessed via: Inside Poland’s ‘LGBT-free zones’ <https://www.bbc.co.uk/news/stories-54191344>

partnerships or similar legal registration of relationships available in their legislation. Until the Court adopted this line of judgment, same-sex couples faced significant difficulties regarding the legal recognition of their relationships, therefore getting deprived of the rights granted to married couples. This was happening because same-sex couples were not in the same situation as married (heterosexual) couples; therefore, they were not able to benefit from the privileges of marriage, but at the same time problem was that they were not able to be similar to the married couples because their national legislation did not allow them to marry or have some kind of legal recognition of their relationship. Examples of how this situation can cause difficulties in the lives of same-sex couples can be seen in the cases of *Courten v UK*, *MW v UK*, and *Manenc v France*.^{17 18 19}In all these mentioned cases, the main issue is the problems the partners of same-sex couples face after the death of their partner, for example, exemption from the inheritance tax and survivor's pension. In *Courten* and *MW*, the decisions were similar. The Court ruled that the state's failure to introduce legislation to allow civil partnerships for same-sex couples can not be critiqued. They did not consider the situation of their relationship. Even though, at that time, those couples were not able to register their relationships legally either by civil partnership or marriage. However, in *Manenc* case, the applicant was legally connected to his partner via the French Civil Partnership; however, a survivor's pension was allowed only for married couples. Therefore the mere fact that this couple was not able to marry because it was not allowed legally was not taken into consideration. This line of decisions supports the indirect discrimination against sexual minorities. Even though it does seem that these judgments were based on the marital status of the couples, it is connected to the fact that the applicants who suffered from this indirect discrimination were not able to change their marital status due to the existing legislation in their countries. The Court grants a wide margin of appreciation to the states in these cases because these are considered measures aimed at protecting the family and marriage institutions; therefore, the Court decides not to interfere. However, by not interfering Court played a role in indirect discrimination against same-sex couples. In this way, the applicants could not have access to the benefits because they are not married, and they cannot marry because the legislation does not allow it.

Another reason for such a shift of opinion is partly related to the free movement of the European Union citizen (from now on, EU) within the EU. According to the Directive 2004/38/EC, the

¹⁷ *Courten v UK*, Appl. No. 4479/06, European Court of the Human Rights, 4 November 2008

¹⁸ *MW v UK*, Appl. No. 11313/02, European Court of the Human Rights, 23 June 2009

¹⁹ *Manenc v France*, Appl. No. 66686/09, European Court of the Human Rights, 21 September 2010

family members of the EU citizens enjoy the freedom of movement within the EU.²⁰ One of the cases that contribute to supporting this right of the EU citizens is the case of *Taduecci and McCall v Italy*.²¹ Here we can see the change in the Court's opinion regarding the privileging of married heterosexual couples and how it affects same-sex couples. In this case, the Court analyzed the situation. It was stated that the possibility of getting a residence permit on the family grounds was a right available only for married heterosexual couples. Therefore, the applicants, one from Italy (EU citizen) and the other one from New Zealand (non-EU citizen), could not get a residence permit for the non-EU citizen partner based on family grounds. The residence permit on family grounds was not available to unmarried heterosexual couples as well; however, the Court stated that, in this case, unmarried heterosexual couples and unmarried homosexual couples could not be put in similar situations. The reasoning was that unmarried heterosexual couples decide not to marry out of choice, whereas same-sex couples are legally unable to marry. Therefore, the Court found the legislation discriminatory, as it failed to treat same-sex couples differently from heterosexual couples without any reasonable justification.

We have mentioned that the Court uses the argument of the European Consensus to grant a wider Margin of Appreciation to the state parties. What is the European Consensus? It can be defined as a type of comparative legal reasoning which pleads vertically to the stances taken by the state parties to the Court, analyzed through the aspect of collectivity.²² The notion of European Consensus is sometimes perceived as something broader than just referral to the legal norms. Three factors are distinguished to show the existence of consensus: legal consensus, expert consensus, and European public consensus. By legal consensus, international treaties and national legislation are considered. By expert consensus, we can say the medical and scientific experts contribute to the matters.²³ Lastly, European public consensus means public opinion across Europe, which is sometimes demonstrated by empirical evidence as surveys.²⁴ There have been objections to using European Consensus for interpreting the Convention. For example, Eyal Benvenisti does not fully object to the use of European Consensus; however, he considers that if the issue is regarding the examination of conflicts between majority and minority rights, the use of the notion of European consensus is not appropriate. As mentioned before, consensus incorporates the legislation and public opinion, which is considered while

²⁰ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68

²¹ *Taduecci and McCall v Italy*, Appl. No. 51362/09, European Court of Human Rights, 30 June 2016

²² Jens T. Thelien, "European Consensus between Strategy and Principle", *Nomos*, 2021, p. 19

²³ *Ibid*, p. 24-25

²⁴ *Ibid*, p. 23-24

making the legislation. The legislation does not always consider minorities, as it is affected by public opinion.²⁵ Therefore, using European Consensus means that the majority's opinion overtakes, and the rights of the minorities get decided by the majority. The point of the Court was to protect minorities from the violations of their rights by the state party. Let us take into consideration the LGBT community here. The main reason why they address the Court is that fundamental human rights are denied to them based on their sexual orientation. Considering the focus of this thesis, we can use the right to marry as an example. There are many cases addressed to the Court regarding recognizing the relationship of same-sex couples - the cases have been used and will be used in future paragraphs, and chapters are examples of this. They have this issue as simple as legal recognition of relationship because relevant legislation is lacking in their home country, in which the argument of public opinion and morals is used. Therefore, there are many objections to the European consensus having normative force for interpreting the Convention. The idea is that the Court should not refer to the legislation by integrating European consensus. The respective legislation already had violated the individual's rights and is the reason why this case exists in the first place.

One of the other reasons why the European consensus is critiqued is the lack of certainty that it shows. Some argue that it would give the Court more legitimacy and power if the consensus is explained. For example, let us look at it from the perspective of same-sex marriage. As mentioned previously, one of the main reasons same-sex marriage is not legalized in Europe is that the Court grants a wide Margin of Appreciation to the states because there is a lack of European consensus regarding the matter. Therefore, it is suggested that the Court gives more clarity and guidance about the matter as to when or what number needs to be reached to be a European consensus. In other words, if the European Court continues to emphasize the requirement for consensus in future judgments on same-sex marriage, they should at the very least specify how many domestic legislatures must legalize same-sex marriage before they can establish that there is a consensus. There is a need for certainty. This is because of marriage's constitutional, legal, and symbolic indications. Couples need to know when they would be allowed to have the right to marry.²⁶

One of the main difficulties the Court is facing while maintaining a universal standard of human rights is to consider regional diversity. This can be challenging to uphold, especially in a same-

²⁵ *Ibid*, p. 63

²⁶ Hamilton, Frances, "Same-sex marriage, consensus, certainty and the European court of human rights", 2018, *European Human Rights Law Review*. ISSN 1361-1526, p. 5

sex marriage, as public opinion and legislation across Europe are very diverse. While western Europe has a liberal approach, Eastern Europe has a very conservative stance. However, this approach of the Court is criticized because it is argued that the primary duty of the Court is to protect and enforce human rights. Therefore, a lack of consensus should not be relied on for granting wide MoA. The Court also recognizes that the Convention is a living instrument and should be interpreted according to present-day conditions and not be stuck in the 1950s in the way it was drafted and adopted.²⁷

1.3. Same-sex marriage: is it a state obligation?

The Court's elaboration on the right to family and whether legalization of same-sex marriage is a state obligation or no not can be observed in the cases of *Schalk and Kopf v Austria*, *Oliari and others v Italy*.^{28 29}

In the case of *Schalk and Kopf v Austria*, applicants argued that the wording of Article 12 could not be interpreted only as man and woman as in a heterosexual couple, and according to the Convention, the state is obliged to recognize the family rights of the same-sex couples based on the Article 12. However, the Court disagreed with the argument of the applicants considering the historical background of the adoption of the Convention, and stated that back in the 1950s, when the Convention was adopted, the wording of this respective article implied the marriage of a man and a woman, in the traditional sense. The Court then confirmed that the institution of marriage should not be limited to different-sex couples. However, this stance is slightly questionable; if such a statement is made, then does it mean that the Court confirms that previously, marriage institution was limited only to heterosexual persons; therefore, fundamental human right was denied to homosexual people based on their sexual orientation? However, the Court also stated that the states are free to decide whether they allow same-sex marriage or not, and Article 12 does not impose an obligation on states to grant marriage rights to same-sex couples.³⁰ One of the crucial aspects of this case is that the Court also considered the view that the concept of family is not limited to only married couples, and relationships not bound by marriage can constitute a family. Until this case, same-sex couples could constitute a family was not recognized. However, the Court found that there was not the majority of the states to grant recognition for the rights of same-sex couples; therefore, states are enjoying the

²⁷ *Ibid*, p. 8

²⁸ *Schalk and Kopf v Austria*, Appl. No. 30141/04, European Court of Human Rights, 24 June 2010

²⁹ *Oliari and others v Italy*, Appl. Nos. 18766/11 and 36030/11, European Court of Human Rights, 21 July 2015

³⁰ *Ibid* 28, paragraph 63

margin of appreciation in this matter. Also, states are not obliged to grant the same rights that married couples have when offering an alternative to marriage. For the rights granted by alternative recognition of marriage, states also have the discretion to choose what rights are conferred with the recognition. However, three judges had a dissenting opinion stating that there had been a violation of the applicants' family right rights. The difference in treatment was recognized, and it was due to the sexual orientation of the applicants; however, the state party did not offer any arguments as to justifying the legitimate aim of their differential treatment. By this line of judgment, it can be said that the heterosexuality of the subject of the Convention was confirmed. There was no justification for bringing up why different-sex and same-sex couples were entitled to different treatment and rights. In this case, the difference between the applicants and other couples who have the right to marry is their sexual orientation. Even though the Court stated before that differential treatment based on sexual orientation has to have serious reasons for justification, we did not observe any kind of comments or justification from the state party in this case why the difference in treatment regarding the right to marry exists between different-sex and same-sex couples exist.³¹

We can see that during the times of this case, the Court did not offer protection to same-sex couples. It could be a good opportunity for the Court to develop a different judgment in this case. Even though *Schalk and Kopf* have an essential place in the Court's case law regarding same-sex relationships, the outcome of the case was not satisfactory. This line of judgment did not fit with the principles of the Court, which are equality and dignity. This judgment shows that there is a preference, and when a couple consists of two people of the same sex, then the rights they are entitled to are less, and their union is less worthy than a union of a couple consisting of different-sex couples. As one of the biggest regional courts for protecting the human rights of over 800 million citizens, a different stance could be more satisfactory. Denying the fundamental rights of people based on their sexuality is discrimination, even though we have discussed before that the Court has to take into consideration the will of the state parties to the Convention - because international law is based on the will of the contracting parties - and not risk various states stepping back. It is still essential to make sure that human rights are protected because such discrimination not only makes the life of the people who constitute the couple harder by not granting them protection, it also leaves the children who are part of this family (that the Court had failed to recognize previously) without legal recognition and protection.

³¹ *Ibid*, paragraph 97

Schalk and Kopf v Austria helped develop another perspective on the notion of family. Additionally, after this judgment, new ideas emerged as to offering alternatives to marriage for same-sex couples and developing jurisprudence in this regard. This line of the decision can be observed in the case of *Vallianatos and others v Greece*.³² The Court examined that the legislation introduced by the government of Greece included the recognition of registered partnerships only for different-sex couples, which meant that same-sex couples had access to neither of the legal options of recognition of their relationships. However, the Court was still on the same stance that the states are not obliged to introduce legislation that grants legal recognition to same-sex couples in the form of registered partnerships or marriage. Nevertheless, if the states decide to introduce legislation regarding registered partnerships, same-sex couples cannot be excluded from access to such rights.

Before discussing the *Oliari* case, we will look at the case of *Chapin and Charpentier v France*.³³ The case is about a French same-sex couple who wanted to marry but could not consider France's legal situation at that time. Therefore, the public prosecutor rejected their application stating that marriage is only allowed between different-sex couples. However, the municipality mayor carried out the marriage ceremony regardless. After this, the public prosecutor brought a case against the couple aimed at annulling their marriage and succeeded with this process, and their marriage was annulled. They appealed for this decision; however, that was also denied by the Court of Cassation. The couple took their case to the ECHR and based their claims on Article 12 in conjunction with Article 14 and argued that the fact that marriage is not available to same-sex couples is discrimination. Additionally, based on Article 8 (together with Article 14), they claimed they had been discriminated against based on their sexual orientation. They argued that if, instead, the same-sex couple were different-sex couples, they would not have problems accessing the right to marriage and recognizing their relationship. They had access only to cohabitation or a civil union as a same-sex couple. In their opinion, it did not constitute the same level of protection that marriage would offer. Therefore, they stated that the differential treatment between different-sex and same-sex couples does not possess a legitimate aim, that is why it is not proportionate. The Court started with assessing the claim based on Article 12 in conjunction with Article 14 and resorted to the same heteronormative approach observed in previous cases. Referring to *Schalk and Kopf*, Court stated that social

³² *Vallianatos and others v Greece*, Appl. Nos. 29381/09 and 32684/09, European Court of Human Rights, 7 November 2013

³³ *Chapin and Charpentier v France*, Appl. No. 40183/07, European Court of Human Rights, 9 June 2016

changes are happening since the Convention came into force; however, there is still no European Consensus on same-sex marriage; therefore, the Court can not put an obligation on state parties based on Article 12 that they have the positive obligation to make marriage accessible for same-sex couples. The Court repeated statements from previous cases that the marriage described in Article 12 concerns the marriage between people of different sex.³⁴ Additionally, it was also stated that marriage has deep cultural and social implications. It is best if state parties decide their perspective on same-sex marriage as they are more aware of the social situation in their country. It comes again to the problematic aspect of the European Consensus that we have discussed in the previous subchapter, the idea of the majority deciding on minority rights.

One of the important aspects of this case is that after the application, in 2013, France allowed marriage for same-sex couples, and Court stated that now the applicants have the chance to marry; therefore, it found no violation of Article 12 together with Article 14. Of course, it is good that France decided to make such a positive change in its legislation. However, it creates a question: if France did not take such a step, would the Court still find violations of the claimed rights? Additionally, did France take this step because they realized and admitted that it was a mistake? There are some cases in the case law of the Court that states were being held responsible for the change in legislation.³⁵ Additionally, regarding Article 8 in conjunction with Article 14, applicants stated that they had experienced discrimination based on their sexual orientation regarding exercising their right to private life. The Court stated that states enjoy a certain margin of appreciation when introducing legislation regarding the legal recognition of same-sex relationships. In case of measures introduced as an alternative to marriage, states also have to right to choose the scope of the rights these alternative measures would offer. The Court also stated that even though the marriage was not accessible for the applicants at the time of the application, they could still get into civil unions, which offer certain guarantees such as tax-related issues. The Court ignored that the essence of civil unions and marriage was different for the applicants. They have the opinion that civil unions offer less protection than marriage. The Court was of the opinion that these differences do not need to be analyzed differently. There were no problems regarding the existing recognition that France had provided because it was very similar to what was happening in other member states. France did not overstep the Margin of Appreciation that was granted to them. The fact that the Court was highlighting the part when

³⁴ 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*”, ELR, December 2017, p. 192

³⁵ *Ibid*

France legalized same-sex marriage also raises concerns as it seems like the Court is ignoring the discrimination that the applicants had faced before the respective legislation was introduced - the fact is their marriage was annulled because they were a couple consisting of two people from same-sex. Eventually, the Court did not find any violation of Article 8 in conjunction with Article 14.³⁶

A more impactful decision in this line of judgments was introduced with the case of *Oliari and others v Italy*. In 2011, three couples from Italy claimed to the Court that the Italian government does not give them access to marriage institutions or registered partnerships because they are same-sex couples. They are facing discrimination based on their sexual orientation. Their claims were based on three articles, Articles 8, 12, and 14 - right to respect for private and family life, right to marry, and prohibition of discrimination. Considering its previous case law, the Court confirmed that same-sex couples need the protection and legal recognition of their relationship. Additionally, the Court also stated that same-sex couples could be in stable and monogamous relationships as different-sex couples. Then the Court proceeded to analyze if there were alternative ways of legal recognition and protection and whether existing means were proportionate to the lack of legislation. The Court rejected various sets of arguments given by the state party. For example, one of the arguments was the existence of “local registers for civil unions”. However, in reality, such kind of registration took place in less than two percent of the local municipalities, was only symbolic, and did not grant any rights or official status to the parties involved. Moreover, “cohabitation agreements” introduced by the legislation, which was after the applicants filed their application, did cover some elements of cohabiting. However, the shortcoming of these agreements was that it was lacking the capacity to provide protection for the right and mutual obligations of the involved parties. Additionally, such kind of arrangement was available for everyone, regardless of the fact that they were in a relationship or just living together as individuals; it also had the requirement of cohabitation.³⁷ In conclusion, the state party lacked evidence in proving that the public opinion was against the legal recognition of same-sex partnerships; therefore, the state failed in its positive obligation to provide recognition and protection of same-sex partnerships. It is interesting to mention that possibility of such outcome in another country with a different public opinion would not be guaranteed.

³⁶ *Ibid*

³⁷ *Ibid* 29, paragraph 169

Additionally, the Court stated that the lack of legal recognition of same-sex relationships in Italy puts an extra burden on the already overloaded Italian judicial system. The lack of legal recognition leaves same-sex couples uncertain, and issues regarding the said recognition are addressed to the local courts. Also, the Court had found that there is no justification for why Italy has not introduced such laws that allow legal recognition of same-sex couples. The public opinion on this matter in Italy is in favor of same-sex couples. The social reality of openly living same-sex couples and the national legislation were not on the same page. Therefore, The Court had found that the state party had overstepped the Margin of Appreciation and failed to fulfill its positive obligation to provide the legal framework for the protection and legal recognition of same-sex relationships. The Court did not consider that Article 12 would impose an obligation on the contracting parties to make marriage available for same-sex couples. The Court could have taken a different, more progressive approach; however, it did not happen.³⁸

The Court has a cautious attitude when it comes to deciding on matters which do not have European Consensus and tends to grant a wide margin of appreciation to the states in these matters. The case of *Schalk and Kopf* is a good example of such a situation. However, this approach is not surprising as the Court does not want to rush with judgments perceived as controversial by the European community. At the time of *Vallianatos* and *Oliari* judgments majority of the European countries had legal recognition for same-sex partnerships in their legislation. Summing up all the conclusions from these mentioned cases, in *Schalk and Kopf*, Court took a different stance on the concept of marriage. Its judgment states that couples who are not bound by marriage fall within the concept of family. Proceeding with the judgment in *Vallianatos*, the Court stated that state parties are not obliged to provide recognition for same-sex couples in the way of marriage or registered partnerships; however, if the states are introducing legislation for registered partnerships, they are not allowed to exclude same-sex couples because it is discrimination. Finally, in *Oliari*, the Court stated that the state party fails to fulfill its positive obligation by not providing any kind of legal recognition and protection for same-sex couples.

Analyzing this line of judgments, we can say that the Court is trying to adapt to new social changes and consider the notions of Margin of Appreciation and European Consensus. However, as discussed before, the European Consensus argument has its flaws and is becoming outdated. More and more countries are now adopting legislation regarding the legal recognition

³⁸ *Ibid* 34, p. 191

of same-sex relationships or making marriage available for everyone regardless of their sexual orientation. For example, a recent referendum in Switzerland confirmed the rights of same-sex couples to marry. Therefore, it can be said that maybe it is the time for the Court to switch to a different line of judgment since the mentioned growing tendency is going to the emerging consensus, and now it could be having a European Consensus. Currently, out of 47 member states of the Council of Europe, in 17 of them, marriage is available to same-sex couples. It leaves 30 countries that allow registered partnerships or do not allow any kind of legal recognition at all. Therefore, a stronger stance must be taken in this matter because human rights are constantly evolving, new human rights are emerging, and such fundamental and relatively older human right such as marriage is still not accessed by the sexual minorities considering that they constitute a fair share of the world population. In the case of same-sex marriage, it is not a new human right, but more of recent social development as LGBT community has been more vocal about the injustice and discrimination that they have been facing since middle of the twentieth century, and consequently, from those times it led to the recent development and current state of the recognition of the rights of the sexual minorities. To sum up, it is not a recognition of new human rights, but application of the existing human rights considering the social changes, meaning perception and attitude of the society towards sexual minorities. The legal and societal perception of same-sex families from different aspects such as parenting rights, or how concepts of dignity and equality, democracy affects to shape this legal and social situation will be discussed more in detail in the following chapters.

Chapter II. Rainbow families

2.1. Notion of Family

Family is one of the oldest social structures. Throughout history, the definition, concept, social norms, and traditions surrounding the idea of the family have gone through transformations. For the first time, the idea of family was described in the Universal Declaration of Human Rights in international law.³⁹ This concept of family was described here is repeated in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR).^{40 41} Various international and regional legal instruments describe the notion of family differently. However, all these instruments do not give an exact definition of a family because each country has its own social and traditional approach to the concept; therefore, given this situation with the cultural difference, it is a more feasible approach. For example, in ICESCR, Article 10 family is described as a ‘basic unit of social life’.⁴² In general, defining family is a challenging task because it needs to be considered from the point of sociology, psychology, and law, and these elements vary in different countries. This makes it hard to come up with a definition to fit all. However, this could be considered a favorable situation as not having an exact definition makes it easier for the notion to change throughout time and adapt to the changes of the actual life events and social changes. For example, marriage was considered the beginning of the protection of family life, and natural families (families existing out of wedlock) were left out of the legal protection that family life through marriage offered. Considering the social changes affected by the fact that a fair share of people decided to create a family without getting into marriage, it was important for the legislation to adapt to these changes and provide protection for the families regardless of their marital situation. The said changes in the social attitude affected the perception of same-sex couples as part of family life as well.

³⁹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

⁴⁰ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999

⁴¹ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993

⁴² ICESCR, Article 10

2.1.1. Interpretation of Family life under the Article 23(2) of ICCPR

Let us look at the interpretation of the right to family life under Article 23(2) of the ICCPR and how the Human Rights Committee (HRC) interpreted it in the past. The expression used in the said Article is as “the right of the men and women to marry and to found a family”.⁴³ This phrasing of the Article and how it should be interpreted has been a topic of many discussions. One of the cases which portray the disputable interpretation of this provision is the case of *Joslin v New Zealand*.⁴⁴ In *Joslin* case, Ms. Joslin and her partner Ms. Rowan have been in a relationship since 1988. Since then, they have taken responsibility for the children they had from their previous marriage, and they have lived together as a family. They applied for a marriage license under the 1955 Marriage act of New Zealand by registering a notice of intended marriage with the Registry Office. However, their application was denied. Ms. Zelf and Ms. Pearl, who are in a similar situation to Ms. Joslin and her partner, were also denied by the Registry Office to accept their notice of intended marriage.

The applicants claimed that the state of New Zealand had violated their rights, namely Articles 16 and 17 of the Covenant separately and in conjunction with Article 2(1); Article 23(1) in conjunction with Article 2(1); Article 23(2) in conjunction with Article 2(1); and Article 26. They argued that the Marriage Act of 1955 fails to provide for same-sex marriage, leading to direct discrimination based on their sex and indirect discrimination based on their sexual orientation. Additionally, they stated that denial of marriage causes them to suffer “a real adverse impact” and expulsion from society. Also, the emotional damage that it generates affects their mental well-being and self-worth negatively.⁴⁵

The main argument from the applicants’ side that I would like to focus on is interpreting the phrase “man and woman” in Article 23(2) of the Covenant. The applicants argued that the interpretation of the phrase should be made on a broader sense meaning instead of understanding it as only men marrying women, the terms men and women in the said provision can be interpreted as the group of men and women.⁴⁶ In layman’s terms, 'men and women' not as in between, but instead 'men and woman' as in amongst each other regardless of the gender. The state party’s counterargument for this claim was that the provision could not be interpreted

⁴³ ICCPR, Article 23(2)

⁴⁴ Ms. Juliet Joslin et al. v. New Zealand, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002)

⁴⁵ *Ibid*, paragraph 3.1

⁴⁶ *Ibid*, paragraph 3.8

in the way that the applicants are suggesting because if we look at the other provisions in the Covenant, in describing other rights, the drafters of the Covenant have used gender-neutral terms. However, that is not the case when it comes to Article 23(2) of the Covenant, the terms men and women were used, and it is the distinguishing characteristic of this said provision.

One of the central claims of the applicants is that the Covenant puts an obligation on state parties to make marriage available for same-sex couples as well, and by not doing so, the state party breaches their rights. The Committee found that the wording of Article 23(2) recognizes marriage as a union between a man and a woman. Additionally, Committee held that by refusing to grant the right to marriage to same-sex couples, the state party had not violated the rights that the applicant claimed.⁴⁷

The judgment for the case of *Joslin* was held in 2002, and two decades had passed since that time. HRC has not made any decision regarding same-sex marriage ever since. So now we will look at several arguments why Article 23(2) should be interpreted in the evolutionary interpretation way so that it includes same-sex marriage as well.

The first argument is that, as we have discussed previously, the concept of marriage is evolving. The way marriage is perceived and regulated is very different from what was perceived in the last century or even two decades ago (for example, as discussed in the case of *Joslin*). By the time ICCPR was established, it was laid that marriage is formed by the law, even though the concept of marriage was affected by different social norms and religious ideas in various states. The founders of the Covenant were not seeking to determine the definition of marriage or describe it as only heterosexual; however, they assumed that it would be perceived as heterosexual and did not consider applying it to same-sex couples. Nevertheless, there is no evidence that the founders of the Covenant intended to establish a definition for marriage in the ICCPR.⁴⁸ Additionally, the concept of marriage should be interpreted mainly considering the cultural and social points of view, as they are constantly changing. For example, when the Covenant was drafted and established, homosexuality was regarded as a mental illness, consensual sexual acts between people of the same sex were criminalized (still are in some countries), and same-sex relationships were not legally recognized in any way.⁴⁹ ⁵⁰However,

⁴⁷ *Ibid*, paragraphs 8.2 and 8.3

⁴⁸ Oscar I. Roos and Anita Mackay, "The Evolutionary Interpretation of Treaties and the Right to Marry: Why Article 23(2) of the ICCPR Should Be Reinterpreted to Encompass Same-Sex Marriage", p. 894-895

⁴⁹ Ray Levy Uyeda, "How LGBTQ+ Activists got "Homosexuality" out of the DSM", May 26 2021, can be accessed via: <https://daily.jstor.org/how-lgbtq-activists-got-homosexuality-out-of-the-dsm/>

⁵⁰ Statistics can be accessed via: <https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/>

many things have changed since then. Several states worldwide have decriminalized consensual same-sex sexual activities; they offer legal recognition for same-sex relationships by allowing registered or other kinds of partnerships or marriage. Therefore, looking at the concept of marriage from the point of cultural and social norms affects the evolutionary interpretation of the respective provision of the Covenant in a favorable manner.

Considering the vast differences between the marriage institution in the legislations of various member states who are party to the ICCPR and the constant transformation of the concept, the assumption that the founders of the Covenant acknowledged that the interpretation of the Article 23(2) would be made progressively is affirmed by the main body of the Article 23(2) and travaux préparatoires (preparatory works).⁵¹

Here, we take a look at the case of *Joslin* again because some elements (mentioned in this chapter as well) were misunderstood by the applicant, as the founders of the Covenant had different intentions. Article 23 of the Covenant is mostly extracted from Article 16 of UDHR, which states that adult men and women have the right to marry and find a family without any restrictions based on their race, nationality, or religion. They have equal rights before, during, and after marriage.⁵² However, the founders of the ICCPR disagreed with the second paragraph of the said Article. As the reality is that the concept and ideas around the marriage in each country is based on the cultural, traditional, social, religious ideas that the particular country inhabits; therefore, suggesting such provision to put into effect the equal rights for the partners in the marriage can be perceived negatively by some societies. Such traditions took a lot of time to develop; therefore, time is also needed for them to change.⁵³ Essentially, when drafting the Covenant, the founders expected the concept of marriage to evolve and, in the future, to be interpreted in a progressive and evolving way. Body of Article 16 of the UDHR (the source of Article 23 of ICCPR), in an initial form, instead of “men and women”, the term “everyone” was used. However, it was changed by the UN Economic and Social Council Committee on Human Rights Drafting Committee (grounded on the suggestion by the Commission on the Status of Women) to highlight the equal enjoyment of rights of both men and women in marriage.⁵⁴ So the misunderstanding that was mentioned at the beginning of this paragraph is that the intention

⁵¹ *Ibid* 48, p. 898

⁵² UDHR, Article 16

⁵³ U.N. Secretary-General, Draft International Covenants on Human Rights: Annotation, ¶ 156, U.N. Doc. A/2929 (July 1, 1955); *Ibid*, p. 899

⁵⁴ Johannes Morsink, “The Universal Declaration of Human Rights: Origins, Drafting And Intent”, 121–22 (Univ. of Pa. Press, 1999); *Ibid* 10

of the way wording of Article 23(2) (which is different from the wording of Article 23(3) and 23(4) in which gender-neutral term “spouse” is used) is to highlight the gender equality between man and woman, and not to - as claimed by the applicants in *Joslin* case - define marriage as only heterosexual.

2.2. Family and migration law

In general, many reasons encouraged such an approach from the international community, especially in the European Union (EU). The recognition of same-sex relationships and belonging to the family life in the EU is also related to the free movement right of the EU citizens and their families. The regulations associated with the free movement of EU citizens and their families have changed. There was a need for the regulations to progress because the lack of recognition of same-sex relationships resulted in preventing the same-sex couples from moving freely within the EU (given that they are eligible for it depending nationality of the persons constituting the relationship). It is essential because free movement is one of the fundamental rights of the EU citizen; therefore, the lack of legislation regarding the issue was putting the concept of the said citizenship under question. Lawmaking bodies of the EU (Council of the European Union, European Parliament) do not have the direct competence to affect the family law in the EU. However, this can be done in other ways, for example, by the incentives of the member states of the EU. In that case, there is a need for an agreement among the EU member states regarding the respective issue, in this case, recognition of same-sex relationships. However, there is no complete agreement among the member states regarding recognizing same-sex relationships. There are various Council of Europe recommendations supporting the recognition of the rights of the LGBT people; however, those recommendations are not legally binding. Therefore, member states are not obliged to follow them.⁵⁵

To analyze the situation and various challenges they have faced due to the existing legislation in Europe, we will look at the multiple cases concerning different aspects of the notion of family. For example, in the cases of *Pajić* and *Coman*, we will examine the situation regarding family reunification and migration laws and analyze the involvement of same-sex couples in said rights and laws.^{56 57}

⁵⁵ 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

⁵⁶ *Pajić v. Croatia*, Application no. 68453/13, Council of Europe: European Court of Human Rights, 23 February 2016

⁵⁷ *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Case C-673/16, CJEU

Pajic case is one of the first cases where the Court has considered the treatment of same-sex couples regarding migration for family reasons. Ms. Pajic submitted her application for a residence permit in Croatia based on family reunification with her partner of two years. Ms. Pajic was in Bosnia and Herzegovina when she submitted her application; however, she had her education in Croatia and lived there for 17 years before that. The local Police Department rejected her application because she did not meet the requirements under the Aliens Act.⁵⁸ After the appeal, the Ministry of Internal Affairs also dismissed the claim because same-sex partners do not fall under the concept of “immediate family member” in the Aliens Act. Therefore, they cannot apply for residence permits on the grounds of family reunification. After this conclusion by the Ministry of Internal Affairs, Ms. Pajic argued that if not as an “immediate family member”, she should be regarded as an “other relative” relevant to the Aliens Act. However, Ministry stated that same-sex unions do not fall under the concept of the family described in the Family Act, and the applicant has not shown any particular personal or other reasons to be regarded as “other relative” within the terms of the Aliens Act.⁵⁹ Applicant appealed this decision; however, the results were not promising either, and her claims were rejected.

Ms. Pajic took her case to the Court, making claims based on Article 14 in conjunction with Article 8. It was argued that it was established through the Court's case law that same-sex couples in a stable relationship should be considered part of the family life provision.⁶⁰ Additionally, the applicant claimed there is no justification for denying a residence permit for unmarried same-sex couples while it is available for different-sex couples.⁶¹ The argument of the state party regarding this claim was that they are not exceeding the margin of appreciation granted to the state party, as they have wide margin of appreciation to interpret the issues related to family and private life, even more in the cases where same-sex couples are involved.

Court held that Croatia violated the Convention by excluding unmarried same-sex couples from Aliens Act based on their sexual orientation and failed to prove legitimate aims making this exception necessary. Going back to its decisions in *Schalk and Kopf* and *P.B. and J.S.*, Court stated that sexual orientation is considered part of private life, and same-sex couples in stable de facto relationships meet the requirements of the concept of family life.⁶² States have a wide

⁵⁸ Croatia, Aliens Act of 28 October 2011 (Text No. 2600)

⁵⁹ *Ibid* 56, paragraph 12

⁶⁰ *Ibid*, paragraph 49

⁶¹ *Ibid*, paragraph 50

⁶² *Schalk and Kopf*, paragraphs 90-95; 25 - *P.B. and J.S. v. Austria*, Appl. No. 18984/02, European Court of Human Rights, 22 July 2010, paragraphs 27-30

margin of appreciation regarding the migration issues; this fact was not denied; however, the differential treatment in the case of Ms. Pajic was based on their sexual orientation, and the government has the duty to explain the reasons of differential treatment. In this case, it was not justified. The Court addressed the issue of whether cohabitation is a requirement for consideration of a couple for the family life. According to the previous case law of the Court, which recognizes the involvement of the same-sex couples in the concept of family life, and states that same-sex couples who, due to the professional or other reasons, happen not to live together should not be differentiated from the stable same-sex couples who choose to live together, and both fall within the concept of family life under the Article 8.⁶³ After confirming that Ms. Pajic and her partner are in a similar situation to different-sex couples, but were going through differential treatment on the grounds of their sexual orientation, it was examined whether this differential treatment was justified. One of the reasons why the government rejected Ms. Pajic's application for the residence permit was that they were not together for three years with her partner at the time of her request for family reunification. After examining this argument by the state party, Court stated that by the time the Administrative Court heard the case, the couple had already fulfilled that requirement. However, this claim was not properly evaluated because it concerned her sexual orientation.⁶⁴ Considering all these findings and analyzes, the Court found that Croatia had a violation of Convention rights of the applicant, namely, violation of Article 14 in conjunction with Article 8.⁶⁵

One of the most significant aspects of *Pajic* case is that it clarified whether same-sex couples could be considered family for family reunification purposes. Additionally, the outcome of the case emphasized that regardless of the situation of the national law, the rights granted to the same-sex couples within the domestic law, if there is a right for family reunification, then it shall be regarded to both different-sex and same-sex couples.

In *Coman* case, it is the first time that Court of Justice of the European Union (CJEU) rules on the matter related to the granting of a residence permit based on marriage ties for same-sex couples. The outcome of the case was positive for the applicant as Court recognized their right to free movement with a family member. The judgment was celebrated as a major milestone toward making family law more inclusive and, in general, for the rights of LGBT persons. First,

⁶³ Ibid 56, paragraphs 64-65

⁶⁴ Ibid, paragraph 76

⁶⁵ Ibid, paragraph 86

let us see the facts and circumstances of the case, and later, we will proceed to analyze the consequences of the case.

Adrian Coman, a dual Romanian-American citizen, marries his partner Robert Hamilton in Belgium. After two years of their marriage, he decides to move to Romania. Therefore, his partner, Mr. Hamilton, applied for the residence permit because he is a member of the family of an EU citizen. Nevertheless, his request was denied because, according to the Romanian Civil Code, marriage is described as a union between a man and a woman, and same-sex marriages (even if they are conducted abroad) are not recognized in the national law. The couple decided to dispute this decision claiming on the basis that this decision results in discrimination based on sexual orientation and the respective article of the Civil Code unconstitutional.

The questions raised by the Romanian Constitutional Court were whether the term “spouse” stated in Article 2(2)(a) of the Citizen’s Directive (2004/38/EC) includes the same-sex partner; and in case of a negative response, can that same-sex partner be recognized as other family member (Article 3(2)(a)) or “a partner with whom the Union citizen has a durable relationship” (Article 3(2)(b)); and whether this inclusiveness or recognition constitutes a legal responsibility for the host Member State to assist with the entry and residence permit processes for the partner, even though same-sex marriage is not recognized in the national legislation of the host Member State.⁶⁶

Regarding the *Coman* case, Advocate General Wathelet contested that the term spouse stated in the Directive 2004/38/EC applies to different-sex and same-sex couples. AG stated that the term spouse could be open to different interpretations if the social developments make it necessary, and it is evident that there have been a lot of changes towards the idea and notion of the family. Therefore, social change requires the term to be inclusive for all couples regardless of their sexual orientation. It was also stated that the Member States are not obliged to legalize same-sex marriage in their legislation; they are free to ban it if they want to. Because it has been said before that family-related issues fall within the competence of the Member States as it is considered a sensitive issue for them based on many reasons. One of them being the national identity of the marriage. However, it was stated that EU respects the national identity issue concerned around marriage. However, granting a residence permit for a same-sex couple who

⁶⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

already have their relationship bonded by marriage is not a threat to the national identity or public policy for the marriage. This case is solely considered based on the free movement rights of the EU citizen and their family. It does not focus on the issues of discrimination based on sexual orientation. Therefore, the Court was mainly concerned about the protection of the fundamental rights of an EU citizen because this outcome of the claim for a residence permit on the national level violates Mr. Coman's right to free movement.⁶⁷

The case of *Coman* is indeed an important step for the recognition of the same-sex relationship; however, the scope of the impact of this case is not as broad as it may seem. First, the outcome of this case is only for the same-sex marriages conducted in the other Member States. As we can see from the previous statement, it applies only to married same-sex couples, which means that registered same-sex couples are not included in this; therefore, they still keep facing procedural difficulties and discrimination based on their sexual orientation. Additionally, with this case, we see that it concerns the marriages conducted in the other Member States, which means, once again, the obligation for allowing same-sex marriage in their domestic legislation was not discussed.

2.3. Approach to same-sex relationships: the US versus Europe

When comparing the situation between the US and Europe in general, we can see that the approach toward recognizing same-sex relationships, marriages, and families is different. In order to analyze the situation better, first, we are going to look at the landmark decision of the US Supreme Court in the case of *Obergefell v. Hodges*.⁶⁸ In the *Obergefell* case, a group of same-sex couples brought a suit against the government agencies in Ohio, Michigan, Kentucky, and Tennessee to dispute the legitimacy and constitutionality of same-sex marriages and denials of same-sex marriages conducted in other states where it is legalized. From the applicants' side, it was argued that the states' laws breach the Equal Protection and Due Process Clause of the Fourteenth Amendment. So, in this case, the main question was whether Fourteenth Amendment puts an obligation on states to permit same-sex marriage; and under the Fourteenth Amendment, are states required to recognize the same-sex marriage that was conducted in another state. With 5-4 majority, the case was decided in favor of the applicant. It was held by

⁶⁷ Alberto-Horst Neidhardt, "The Coman Case: Extending Free Movement Rights to Same-Sex Couples or Protecting Marital Status", 13 December 2018. Can be accessed via: <https://me.eui.eu/alberto-horst-neidhardt/blog/the-coman-case-enhancing-free-movement-rights-for-same-sex-couples-or-protecting-the-status-of-marriage/>

⁶⁸ *Obergefell v. Hodges*, 576 U.S. (2015)

the Court that under the Fourteenth Amendment right to marry is one of the highly protected liberties, and this liberty is applicable for both same-sex and different-sex couples. Justice Kennedy's approach, in this case, was the very traditional perception of the marriage portraying it as one of the most critical aspects of social order and the marriage itself as the ideal of a committed and loving relationship. This precedent held that the right to marry is fundamental liberty because it encompasses the concept of individual autonomy and the most private aspects of the relationship between two people. Moreover, as there is no difference between different-sex and same-sex couples when discussing individual autonomy and intimate aspects of private, denial of the right to marry for same-sex couples breaches the Due Process Clause of the Fourteenth Amendment. When it comes to the Equal Protection Clause of the Fourteenth Amendment, refusal of marriage for same-sex couples is a refusal of equal protection under the law for the same-sex couples as by doing so, states are denying them the rights accessed by marriage.⁶⁹

The case of *Obergefell* is vital in the history of LGBT rights in the US, and we can say it even in the world because its outcome has guaranteed marriage equality in the US. Of course, a case of such an extensive scope concerning a sensitive topic was not welcomed by everyone, and there were a lot of controversies. Some of the Judges made dissenting opinions about the case stating that it is beyond the competence of the Court to decide this matter, overstep its boundaries, and be involved in policymaking. In their dissenting opinions, every state should make its laws and decisions regarding the permission for same-sex marriages.

The main reason we are discussing the case of *Obergefell* is to compare the courts' approaches (in US and Europe) when it comes to marriage equality. As we can see from the point, the Court approached the issue from the perspective of liberty, dignity, and equality of the individuals. The idea was that lack of access to marriage by same-sex couples creates a situation in which the value of same-sex relationships is inferior to the value that different-sex couple relationships hold. The consequences that this shortcoming brings result in unequal treatment of same-sex couples before the law. However, in Europe, namely, in the ECHR case law, there is still no case that puts an obligation on the member states to make marriage accessible for same-sex couples. The Court explains this situation with a lack of European Consensus and Margin of Appreciation granted to the Member States. Clearly, the legal situation is different in Europe

⁶⁹ Summary of the facts, judges' opinions and conclusion of the case can be accessed via: <https://www.ovez.org/cases/2014/14-556>

than in the US. ECHR is one of the most powerful regional courts in the world; however, despite that, the way the Court operates is based on a fragile structure. ECHR is an international treaty, and treaties are based on the will of the states. Therefore, the Court is cautious when deciding on matters considered sensitive by the Member States. Same-sex marriage or, in general, LGBT rights are not matters that are perceived unanimously by the European Community; therefore, as stated before, the Court is farsighted when it comes to setting binding precedents with its case law because it does not want to rush a decision.⁷⁰ Making a decision ahead of its time can be perceived negatively by countries with more conservative views and trying to make referendums and ban same-sex marriage on a constitutional level.⁽²⁷⁾ As stated before, treaties are based on the will of the states, and if they disagree with the course of the events, they may withdraw from the said treaties, and in the end, it would cause harm for the citizens of those countries. Even though this is a legally and politically challenging issue, postponing causes more burden on the domestic courts and ECHR. If the access to marriage and family rights were granted to same-sex couples, there would not be a need to regulate these matters on an international level so frequently. If we look at the case law, such a legally simple act as marriage or registered partnership has to be brought up on an international level because of the reason that member states are imposing unjustified differential treatment towards the couples based on their sexual orientation.

2.4. LGBT Parenthood

Same-sex couples or LGBT persons, in general, make claims to the Court primarily for legal recognition of their rights. Another frequent issue addressed to the Court by LGBT families is concerning parenting rights. As we have observed throughout previous paragraphs, LGBT persons do not have it easy when it comes to recognition of their Convention rights; therefore, there are certain issues that they are facing both on a national level and as well as in the case law of the Court. One of the main arguments brought up regarding the cases related to LGBT parenting rights is the test of the best interests of the child. Bringing up this argument against the parenting rights of LGBT persons fuels the already existing negative perception of LGBT individuals in society by portraying them as harmful or dangerous. ECHR has never explicitly stated or referred to LGBT individuals as harmful or dangerous.⁷¹ However, there are some

⁷⁰ Marko Milanovic, "Living Instruments, Judicial Impotence, and Trajectories of Gay Rights in Europe and in the United States", 23 July 2015

⁷¹ Damian A Gonzalez Salzberg. "Sexuality and Transsexuality under the European Convention on Human Rights." Hart Publishing Ltd, 2019-12-18, p. 172-174

dissenting opinions where a negative approach towards homosexuality has been expressed; and cases where homosexual individuals were denied adoption based on their sexual orientation. When it comes to the dissenting opinions regarding homosexuality, some of the most notorious dissenting opinions we will be discussing are the dissenting opinions of Judge Dedov in the case of *Bayev and others v Russia*, and Judge Morenilla and concurring opinion of Judge Walsh in the case of *B v France*. In the case of *Bayev and others v Russia*, the Court found Russia's ban on promoting homosexuality and non-traditional sexual relations among minors, known as "Gay Propaganda Law" as a violation of the Convention.⁷² ⁷³ However, in his dissenting opinion, Judge Dedov expressed that children's private life is more important than the freedom of expression of homosexual persons.⁷⁴ Language used in his dissenting opinion was peculiar as he proceeded to associate homosexuality with pedophilia and sexual abuse. Additionally, he stated that raising awareness regarding sexual orientation amongst children does not go along well with their curious nature as their curiosity makes them easily interested in such kind of acts, and they would be ready to engage in such activities without understanding their nature.⁷⁵

Moreover, he stated that he would have a different opinion towards homosexuality and non-traditional sexualities if they were not related to pedophilia. He proceeded to bring up some statistics regarding the sexual abuse that children are suffering from. He referred to the study conducted in the US in 1994, which declared that 150 000 children are suffering from sexual abuse yearly. Perpetrators of this crime are mostly men, 70 percent of the victims are girls, and 30 percent are boys. He concluded that homosexuality makes up an important part of the mentioned sexual abuse.⁷⁶ This argument is unrelated to the matter at hand, because pedophilia and sexual abuse towards children of which majority of the victims are girls who are abused by male perpetrators has nothing to do with homosexual persons and is a very important discussion that needs to be addressed in general. Pedophilia is not related to sexual orientation; however, Russian media has specific tactics to link those two unrelated concepts to portray homosexuality as something negative.⁷⁷

However, the portrayal of homosexuality as pedophilia is not the only problematic approach taken towards LGBT persons. In the case of *B v France*, Judge Morenilla and Judge Walsh

⁷² *Bayev and others v. Russia*, Appl. No. 67667, European Court of Human Rights, 20 June 2017

⁷³ *B v France*, Appl. No. 13343/87, European Court of Human Rights, 25 March 1992

⁷⁴ Dissenting opinion of Judge Dedov, 44

⁷⁵ Dissenting opinion of Judge Dedov, 43

⁷⁶ Dissenting opinion of Judge Dedov, 41

⁷⁷ Human Rights Watch, "License to Harm. Violence and Harassment against LGBT People and Activists in Russia", 2014

were against changing the applicant's birth certificate because by doing so, they would violate the rights of the person from whom the applicant would hide her sex that was on her birth certificate before.⁽³³⁾ In other words, the idea is to state person's biological sex on the certificate so that they would not deceive people by hiding the "truth".⁷⁸

Some of the well-known judgments of the Court regarding the LGBT individual adoption are the judgments of the cases *Frette* and *EB*.⁷⁹ ⁸⁰Firstly, we are going to discuss the case of *Frette* as chronologically; it comes before *EB*, and most importantly, in *EB* Court had revisited this topic again and came to a different conclusion than in *Frette*. In other words, Court overruled its decision.⁸¹ To briefly describe the facts of the *Frette* case, Mr. Philippe *Frette*, a French national, made a request for approval for adoption. During the interview done by the Health Department, Mr. Frette mentioned that he is a homosexual. Social Services stated in the final report that despite his personal qualifications as an individual, the lifestyle choice (referring to his homosexuality) that Mr. Frette had made does not go in line with raising a child. After exhausting other national remedies, the applicant took his case to the Court, making his claims based on a violation of Article 8 in conjunction with Article 14. The Court stated that Article 8 of the Convention does not guarantee the right to adoption. The Court proceeded to analyze the legal situation of heterosexual individuals who are in a similar situation to Mr. Frette. French law allowed single persons to adopt a child, given that they are authorized to do so. Even though the state authorities did not explicitly mention the homosexuality of the applicant, they used the phrase "choice of lifestyle" which refers to the homosexuality of the applicant and clearly was a decisive element for his authorisation request. Therefore, the Court confirmed that for this reason, a claim based on Article 14 in conjunction with Article 8 is considered.

Court proceeded to analyze whether the measure taken by the state was proportionate and decided that it indeed does pursue a legitimate aim which is the protection of the rights of the child, as one of the main goals of adoption is to "provide a child with a family, not family with a child".⁸² One of the main reasons Court justified coming to this conclusion was that there was a lack of consensus in Europe regarding the matter. Even though Court did research about the situation regarding single person adoption in various European legislations and found that most

⁷⁸ Damian A Gonzalez Salzberg. "Sexuality and Transsexuality under the European Convention on Human Rights." Hart Publishing Ltd, 2019-12-18, p. 173

⁷⁹ *Frette v France*, Appl. No. 36515/97, European Court of Human Rights, 26 February 2002

⁸⁰ *EB v France*, Appl. No. 43546/02, European Court of Human Rights, 22 January 2008

⁸¹ *X and Others v. Austria*, Application no. 19010/07, Council of Europe: European Court of Human Rights, 19 February 2013

⁸² *Ibid* 79, paragraph 42

of the countries do not have any restrictions regarding LGBT persons' individual adoption, Court still proceeded with the argument of lack of European Consensus.⁸³ Additionally, Court brought up unspecified research regarding the lack of agreement in the scientific community regarding the adoption by LGBT individuals and couples.⁸⁴ Court put burden of proof on the applicant to prove why as an homosexual he is not a danger to the child and opposite to how LGBT persons are portrayed as dangerous or harmful, he is capable of raising a child in safe and loving environment. However, in the end, the case was not decided in favor of the applicant. As we can see, the sexual orientation of the applicant was a significant deciding factor in this case, and as established previously, in order to justify the differential treatment based on sexual orientation (as it is one of the most protected concepts concerning Article 14), the state party has to have a weighty legitimate aim, reasons to support their differential treatment. However, this was not considered in this case.

There was a dissenting opinion stating that the refusal for the adoption that the applicant suffered from is discrimination as it is based on his sexual orientation and on the belief that being brought up by a homosexual couple or individual is detrimental to the child. Considering these reasons and the state party not having justified reasons to prove the proportionality of their actions, Judges Bratza, Fuhrmann, and Tulkens concluded that it results in discrimination based on sexual orientation.⁸⁵

Six years after the Court made a judgment on the case of *Frette*, it overruled the decision made in the case of *EB v France*. The applicant was rejected for the authorisation that is required for the adoption based on the grounds of her sexual interest and the disinterest of the applicant's partner concerning the adoption. The difference between the cases of *Frette* and *EB* is that in the latter case, decision of the Court was in favor of the applicant. In the second case, Court held that applicant's sexual orientation being the reason why she is denied the adoption authorisation constitutes discrimination based on sexual orientation. Additionally, this time, the burden of proof was put on the state, rather than on applicant as it was in the *Frette* case. Court did not use the argument of the child's best interests in this case, and it was emphasized that when national authorities had interviews with the applicant, she showcased interpersonal skills and qualities that are a good fit for the interests of the anticipated child. Considering the educational background and line of work of the applicant, a kindergarten teacher, she is

⁸³ Ibid 79, paragraph 41

⁸⁴ *Ibid* 80

⁸⁵ Joint partly dissenting opinion of Judges Nicolas Bratza, Fuhrmann and Tulkens

educated and informed about how to communicate with children and understand and assist them with their needs. It is important to note that the state authorities allegation regarding the indifference of the applicant's partner was baseless as she participated in all of the interviews, and the psychological reports confirmed the will of both partners regarding adoption. Even though the Court ruled in favor of the applicant and the problematic approach which was taken in the *Frette* case, in this case as well, there was a dissenting opinion. Judge Loucaides stated that the sexual orientation of the applicant should be taken into consideration for the best interests of the child. He proceeded to elaborate that living in the same household with a same-sex couple can be detrimental to the child's healthy upbringing as the child would be exposed to the erotic environment of the homosexual couple, which is a negative environment for a child to grow up in.⁸⁶ Moreover, he also stated that homosexual people as individuals are entitled to their rights and freedoms regarding how they want to live their lives. However, they have to accept that considering the nature of their relationships, they are not fit for particular concepts that are inconsistent with their lifestyle.⁸⁷ The problem with this opinion is that apart from the fact that it has a homophobic tone, the judge is also presenting his opinions as if they are scientifically approved facts. Such kinds of straightforward opinions are rare to come across in the Court's case law.

Regardless of the negative approach of dissenting opinion of Judge Loucaides, Court's decision on the case of *EB v France* is significant as it established on the case law of the Court that Member State should not focus on the sexual orientation of the prospective parent as it does not affect and nor it is related to the parental abilities that individual possesses.⁸⁸

Court's opinion regarding second parent adoption is described in the cases *Gas and Debois v France* and *X and others v Austria*.⁸⁹ In the case of *Gas and Debois*, two french women who are in a relationship bound by registered partnership have a child through medically assisted procreation, and only the biological mother was acknowledged as a parent of the child. The legal situation in France regarding second parent adoption was that married couples could have joint parental custody; however, this was not applicable for unmarried couples. At the time of this case, marriage was not available for same-sex couples; therefore, they did not have the choice of getting married to be able to have joint custody of the child, whereas unmarried

⁸⁶ Dissenting opinion of Judge Loucaides, 39

⁸⁷ *Ibid*

⁸⁸ Elena Falletti, "Homosexual Single Individuals' Right to Adopt Before the European Court of Human Rights and in the French Legal Context"

⁸⁹ *Gas and Dubois v. France*, Appl. No. 25951/07, European Court of Human Rights, 15 March 2012

heterosexual couples could solve this issue by the act of marriage. Despite the situation with the unavailability of marriage for same-sex couples, Court viewed the situation of unmarried same-sex couples the same as unmarried heterosexual couples, even though it is clear that there is a disadvantage for same-sex couples.⁹⁰ This was justified by referring to *Schalk and Kopf* that under Article 12 of the Convention, states are not obligated to guarantee marriage for same-sex couples, and in the cases where the alternative for marriage is offered (such as registered partnerships), it is within the margin of appreciation of the states to regulate the rules of these alternatives.⁹¹ In conclusion, considering the situation from the perspective that unmarried heterosexual couples are also unavailable for second parent adoption, the applicants did not suffer from discrimination.⁹²

Comparing the other cases regarding the LGBT adoption that we have discussed, in this case, the best interests of the child was not used as an argument against the parenting of two homosexual partners, but in favor of it, as it was stated in the dissenting opinion of the Judge Villiger that joint custody of the child is more beneficial for the best interests of the child. He also concluded that it is discriminatory that while the children of heterosexual couples have the opportunity to enjoy the benefits of joint custody, children of the same-sex couples are not able to benefit from this as their parents are legally not allowed to get married. The Judge stated that in terms of the best interests of the child, this situation causes discriminatory treatment. However, *Gas and Debois* is the first case where the homosexuality of the parents was not used against the child's best interests.

Let us look at the case of *X and others v Austria* as it is one of the cases relevant to the second parent adoption in the Court's case law. Two unmarried women in a same-sex relationship applied for second-parent adoption; however, the problem was that in Austria, second-parent adoption did not apply to same-sex parents. To elaborate more on the details, the applicant wanted to adopt the child of her female partner (the biological mother of the child). According to national legislation, the child cannot have more than two parents, and the parents should be a man and a woman. When applied for the second parent adoption, the parent who will be the adoptive parent replaces the other person registered as the parent of the child. That replacement is done according to the sex of the parent. In conclusion, the adoptive parent replaces the other parent of same sex. In the applicant's case, the child's biological father had claimed his parental

⁹⁰ *Ibid*, paragraph 69

⁹¹ *Ibid*, paragraph 66

⁹² *Ibid*, paragraph 73

rights and paid his alimony; however, the mother has sole custody of the child. Because the child's father accepted his parental status, now the child has both of the parents registered. Therefore, if the adoption was done, the applicant would replace the child's mother because the legislation states so. It is not favorable because then the child would lose the legal connection to the neutral parent. The couple had asked the father to disclaim his parental rights. However, he did not accept it. The applicants asked the court to deprive the father of his parental rights so that the adoption as a second parent would be possible; however, the national courts decided it would be against the child's best interests, as the child has both parents at the moment. The applicants took their case to ECHR, claiming a violation of Articles 8 and 14.

If we look at the case from the perspective of the national courts, which stated that the adoption that the applicants asked for is against the best interests of the child: the child has a mother and a father, and neither of the parents is willing to or want to give up on their parental rights. Therefore, from their point of view, keeping the existing legal tie with both parents is better for the child's best interests. For that reason, the question is not about the sexual orientation of the applicants but more related to the fact that the child is not adoptable. However, from the applicant's point of view, this conclusion from the national courts, the consideration was not about the child's best interests but the treatment of different-sex and same-sex couples regarding adoption rights. Applicants argued that if the applicant were a man instead of a woman, there would be no problems regarding the adoption as it is allowed in Austrian law for unmarried heterosexual couples to go through with second-parent adoption.

In this case, Court focused on the various arguments of the state party stating that the state party had failed to refer to any studies proving or stating that same-sex couples are not able to provide for the needs of the child;⁹³ the Austrian law does not represent the idea of the society who are against for the second parent adoption of the same-sex couples;⁹⁴ the Austrian law lacks coherence when it comes to the fact that adoption is not possible for same-sex couples, but individual adoption is possible for homosexual people even when they live with their partner.⁹⁵ In this case, they still constitute a family, but the only difference is that it is an individual adoption rather than a second-parent or joint adoption; therefore, the previously used argument regarding the best interests of the child is irrelevant as at the end, it is still a child raised by two

⁹³ *X and others v Austria*, paragraph 142

⁹⁴ *Ibid*, paragraph 143

⁹⁵ *Ibid*, paragraph 144

same-sex parents. And lastly, Court rejects the argument of the state party regarding the lack of consensus in Europe concerning homosexual adoption.⁹⁶

In conclusion, the Court found that the government failed to prove that having same-sex parents is harmful to the child's upbringing mentally and legally.⁹⁷ Consequently, it should be considered that it could be in the child's best interests if the mother's partner were allowed to replace the father. The absolute ban on same-sex adoption, which is preserved in the Civil Code is discriminatory when we compare the situation of unmarried same-sex couples to unmarried different-sex couples.⁹⁸ As a result, Court criticized the Austrian government for not having a justifiable reason for not allowing a child to have two parents of the same sex.

In order to realize the Court's judgment, the state of Austria could either allow having more than two parents or having two parents of the same sex. If that would be legally allowed, the applicants could take their case to the national courts to dispossess his parental rights. This can be considered a complex matter as there are various elements to consider, and it could even lead to a contradiction with the United Nations Convention on the Rights of the Children.⁹⁹ However, if we focus on the legal aspect of it, allowing same-sex partners second adoption would make it possible to go through legal proceedings on the national level.

This judgment supported the idea that nothing should be prohibited in an absolute matter as morality is not absolute, and in every situation, it is different, adaptable, and culturally relative. In this case judgment, the Court's approach is a mixture of positivism and historicism, which views that law exceeds the reality, suggesting allowing a child to have more than two parents or same-sex parents that does not align with the social reality.¹⁰⁰ Social reality is altering with time; however, we still have not reached that time when society is entirely or at least majorly agrees with same-sex parenting. Therefore, it can be said that this line of judgment is against absolute prohibition and in favor of having the possibility to take the matters for disputing in courts.

⁹⁶ *Ibid*, paragraphs 147-150

⁹⁷ *Ibid*, paragraph 146

⁹⁸ Austrian Civil Code, Article 182, paragraph 2

⁹⁹ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577. Articles 7 and 8

¹⁰⁰ Grégor Puppincq, "x. *And others v. Austria (part I): Had the Woman Been a Man...*", 4 March 2013. Can be accessed via: <https://strasbourgobservers.com/2013/03/04/x-and-others-v-austria-part-i-had-the-woman-been-a-man/>

It was a different approach from the Court's side compared to other cases. For example, rejecting the consensus argument and disagreeing that the government's approach is the opposite reflection of the population's opinion regarding the matter can be considered as a "forceful step".¹⁰¹

There is a link between the society's opinion affecting the legal change and vice versa. In societies where there is equal (or almost equal) recognition for same-sex couples, the more situation is better for their personal and family lives.¹⁰² For the most part, child's best interests were used as the main argument; however, it was a point of view coming from only one reasoning which did not have a scientific basis and is mostly based on the religious views or protection of the traditional family values. However, the child's best interests argument can be used from different perspectives, precisely from providing equal rights for rainbow families. For example, in societies where there is little or no recognition at all, the wellbeing of LGBT families is noticeably lower than the societies where they have equal rights. The reason for that is that lack of recognition for their rights prevents them from accessing the legal protection provided by law, but apart from that, it also shapes how society views them. When there is no recognition, it creates the idea that the relationship or family ties that LGBT families have is worth less than the heterosexual couples and families do; therefore, it negatively influences the way society perceives them. Additionally, it causes distress for the family, especially the children, their safety and wellbeing when society is having a negative point of view. There is no explanation for the children why their parents and themselves are subjected to detrimental treatment. However, when the law allows equal rights for the LGBT families, in those societies, there is protection for the rights, wellbeing, and safety of the child, and they grow up in more progressive societies where it is accepted and welcomed that there are different types of families.

As we mentioned in previous chapters, considering the realities of the world, this process takes time as every society is different. Therefore, legal instruments and international and regional courts can be used as an essential role in supporting this process of equal rights for LGBT families.

¹⁰¹ *Ibid*

¹⁰² Brett Heasman, "The psychology of children with same-sex parents", 28 November 2016. Can be accessed via: <https://blogs.lse.ac.uk/psychologylse/2016/11/28/the-psychology-of-children-with-same-sex-parents/>

Chapter III. Future of same-sex relationships

In this chapter, we are going to talk about the progression of same-sex relationships through the concept of human dignity and how it may affect protection of same-sex couples from discrimination; through analyzing the concept and current social reality of marriage; and lastly, through the concept of gender neutral sexual subject of international law, and reconsidering of Article 12 of the Convention.

3.1. Dignity, indiscrimination and same-sex relationships

Dignity is a comprehensive concept which plays an important role in the legal world. There is no exact definition of the concept of dignity, it is perceived differently in various situations. For example, philosophers explain the concept of dignity in different way, in religious terms it is interpreted from other perspective, etc. However, despite the lack of an exact definition, the concept of dignity finds itself in various legal systems, both national and international. This lack of definition actually benefits the situation as when there is no absolute definition for dignity, it can be interpreted in different ways in many situations which are dissimilar to each other. Dignity is the basis for many human rights. In some legal instruments, there is no direct mention of the concept of dignity. For example in U.S. Constitution there is no mention of dignity, however, in certain amendments some elements such as liberty, individual autonomy is discussed and in one of the ways of interpreting the concept of dignity, we can see the connection between those concepts and dignity. However, in international and regional legislation, in the constitutions of various countries the concept of dignity is one of the main features, for example, UDHR, ICCPR, ICESCR, the UN Convention on the Rights of the Child, the UN Convention on the Elimination on All Forms of Discrimination against Women.¹⁰³ In some contexts, there is a direct reference to the concept of dignity. For example, in various constitutions across the Europe dignity is a constitutional principle. As an example, we can look at the Constitution of the Republic of Azerbaijan, Article 24 which states that human dignity is respected and protected under the Constitution.¹⁰⁴ ECHR visits the concept of dignity concerning the

¹⁰³ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13

¹⁰⁴ Constitution of Republic of Azerbaijan, Article 24

The concept of dignity has played an important role in the history of the LGBT rights. Especially when it comes to same-sex marriage. In the case of same-sex marriage, the concept of dignity is used both by the opponents and supports of the marriage equality. From the perspective of the opponents of same-sex marriage, they believe that the dignity of the marriage is infringed if it is accessible for everyone. This kind of thinking stems from the attitude towards homosexuality in general as it was (and still is, even though comparably less) viewed as immoral and “beneath the dignity of human beings as free and rational creatures.”¹⁰⁵ From the perspective of the supporters of same-sex marriage, the impact of dignity arises when it comes to equality. Nussbaum described this transition as going from disgust towards humanity.¹⁰⁶ With the evolution of social norms and attitude towards homosexuality, the way the rights of the LGBT persons are regulated also had gone through changes. The treaties which governs the EU describes protection of human dignity to be the primary principles of the EU law.¹⁰⁷ In Europe, the concept of dignity is applied mostly in the cases of inhuman treatment.

The concept of human dignity has been used in the progression of LGBT rights in Europe. Even though the EU does not have competence over the family law, AG of the CJEU stated that lack of legal recognition for the same-sex marriages, either in the form of registered partnership or marriage, breaches the duty to respect human dignity.¹⁰⁸ The idea that encouraged the recognition of the marriage equality in some European countries was that, the approach was taken from the perspective of dignity was concerning not further inclusion of the LGBT persons as well, but the recognition that these rights are applicable for everyone - the process of acknowledgment. Therefore, restoring the dignity and by that meaning giving back something that already existed. In this case, the rights of the LGBT persons to benefit from the equality.¹⁰⁹ This particular approach was observed in Spain when same-sex marriage was legalized there in 2005.¹¹⁰ The course of the social and cultural changes affected the decision of marriage equality in Spain, when the law was disputed before the Constitutional Court.¹¹¹ From the example of Spain, in general, the change in the legislation is happening due to the change of the social and

¹⁰⁵ Michèle Finck, “*The role of human dignity in gay rights adjudication and legislation: A comparative perspective*”, International Journal of Constitutional Law, volume 14, 2016, p. 27. Referred source: Kathryn Jean Lopez, Sex and the Empire State: Losing Marriage to Sexual Liberalism: Interview with Robert P. George, NATL REv. June 28, 2011), available at <http://www.nationalreview.com/article/270662/sex-and-empire-state-interview>

¹⁰⁶ *Ibid*, p. 28

¹⁰⁷ *Ibid*, p. 39

¹⁰⁸ Jürgen Römer v. Free und Hansestadt Hamburg, C-147/08, 15 July 2011, paragraph 976 (Op. A.-G. Jääskinen).

¹⁰⁹ *Ibid* 105, page 40

¹¹⁰ *Ibid* 107

¹¹¹ *Ibid* 109

cultural environment not only in the countries themselves, but also inspired by the other legislations. It is basically the idea of the consensus, meaning the more changes happening in different countries, more chances are that those changes, legal and social, will affect the other countries to adapt with the current social and legal context. In every time period, the legally and socially relevant issues change. If we look back in history, there were times where certain rights were preserved for certain groups, for example, voting rights were accessed by white men, and people of color, women were excluded from voting rights.¹¹² However, that dynamic gradually changed and now those marginalized groups have access to voting rights. Nevertheless, that is not entirely true as there are some countries who do not allow women to vote or take part in any political activities.

We have discussed that concept of dignity plays an important role in the progression of the LGBT rights. However, dignity is not the legal notion that encourages such changes, and the said changes are rooted in much comprehensive legal concepts, for example, equality.¹¹³ Regardless of that, it can still be said that the concept of dignity brings justification to encourage such legal changes. Pliable concept and understanding of dignity helped the process of transforming social and cultural changes into legal changes. Attitude towards homosexuality has changed, the idea that was regarded as repulsion now changed into acceptance, and naturally this socially approved change helped to progress the existing legislation by encouraging their reinterpretation. With the said interpretation (in which dignity plays a crucial role), the scope legal rights granted to LGBT persons expanded as well. For example, from the context of same-sex marriage, when same-sex couples are excluded from the marriage rights which is enshrined in the national legislations, it could be interpreted as homosexual persons are not considered as full citizens as they do not have access to certain rights based on their sexual orientation. Human dignity and equal citizenship are considered to be fundamental parts of the individual person in modern constitutional state.¹¹⁴ Both concepts imply that humans should be respected as human beings regardless of gender and sexual identity and orientation, and race. The primary understanding of the human dignity can be described as respect for the human beings just based on the simple fact that they are human beings.¹¹⁵

¹¹² *Ibid*

¹¹³ *Ibid* 105, page 45

¹¹⁴ *Ibid* 105, page 47

¹¹⁵ Omega Spielhallen- und Automatenaufstellungs-GmbH, C-36/02, 2004 E.C.R.-09609, Op. A.-G. Stix-Hackl, paragraph 75.

The concept of dignity and the influence of and reference to foreign law are useful tools for the broader interpretation of existing law which contributes to the protection of LGBT rights. For a long time sexual minorities have suffered from direct discrimination based on their sexual orientation without being given a justification for such differential treatment. However, the concept of human dignity encouraged the transformation of inevitable social changes into legal changes, which creates harmony between social and legal reality. However, this is not true for all or most jurisdiction, nevertheless, comparably there is noticeable changes for the equality for the sexual minorities. Considering the fact that neither dignity nor reference to foreign law are grounded legal concepts, they have played essential role in the discourse of the discussions and justification for the connection of social and legal changes.

The notion that dignity can be useful in terms of defining the scope of equality is not a new concept. As we said before, there is no particular definition to human dignity, it depends on various concepts as the philosophical ideology, political situation and geographical aspect as well. Considering these elements, dignity is interpreted differently. For example, in Kantian way of thinking, dignity is a concept related to ‘an unconditioned, incomparable worth’. Meaning it recognizes the everybody’s irreplaceable human worth. We can see the similarity between equality and dignity in this definition. If it is said that people are born in equal dignity, then it implies that everyone is entitled to equal treatment and protection before the law. It is suggested that the concept of dignity can present a solid basis for the equal rights. In that case, dignity would be useful not only in identifying the situations in which there is no justification for the differential treatment, but also prevent the existing situation from getting detrimental by imposing substantive obligations. It disputes the notion of ‘equal misery’ or diminishing existing rules to equal treatment. For example, in case of same-sex marriage, by not allowing the marriage rights for same-sex couples, they are showing a differential treatment based on sexual orientation, and in order to improve this situation from the perspective of the dignity that we have discussed in this chapter, prohibition of marriage for everyone would not help to make the situation better. In that case, it would not change anything for same-sex couples and affect the situation of different-sex couples negatively. Therefore, dignity would step in as a concept which sets a minimum standard of treating individuals equally.¹¹⁶ However, this idea is not certain as well because it includes discussion of what is good or what is bad, which are subjective for each state depending on their prevailing social and cultural rules and the way

¹¹⁶ Mulder, J., “*Dignity or Discrimination: what paves the road towards equal recognition of same-sex couples in the European Union?*” *Journal of Social Welfare and Family Law*, 2018, 40(1), 129-144. <https://doi.org/10.1080/09649069.2017.1414430>, part ‘Dignity and Discrimination’

concept of dignity is interpreted in respective geography. In general, as we stated before dignity is not based on any legal norm, therefore, it can be a complicated process to bring the discussion of dignity when analyzing the concepts of equality and non-discrimination. The dignity-centered approach can be limited when facing the situations regarding the same-sex relationships. If we look back at *Obergefell* case, the equal right to marry was intervened with right to equal dignity. Apart from focusing on individual's dignity, the decision was also based on the dignity of the marriage as well. In Justice Kennedy's remarks, marriage was described as the ideal of a state of any relationship, and the idea that same-sex couples understand that sanctity of the union bound by marriage, therefore, they seek to be part of it as well. This approach was criticized as such portrayal of marriage implies on the idea that relationships which are not bound by marriage are less dignified. Therefore, it can be said that dignity can bring a limited perspective when we are talking about non-discrimination issues.¹¹⁷ Another example of use of dignity regarding the legalization of same-sex marriage can be observed in Austria. In 2017, Austrian Constitutional Court held that excluding same-sex couples from marriage by granting them rights only for registered partnership is discrimination.¹¹⁸ It was mentioned in the statement that the existing distinction between marriage and civil partnerships cannot keep existing without discrimination against same-sex couples.¹¹⁹

3.2. Is marriage equality necessary step in recognition of LGBT rights?

Throughout this thesis, we have discussed the recognition of same-sex relationship throughout history and various legislations, different interpretations of the related articles. One of the ideas of this research was to indicate that exclusion of same-sex couples from marriage is discrimination on the basis of sexual orientation. Therefore, many believe that marriage equality is important for the recognition of the rights of same-sex couples, and LGBT persons in general. However, there are oppositions to the idea of marriage equality from different aspects of queer theory and feminism. According to feminism, marriage is a patriarchal construct which does not align with the idea of gender equality. In general, marriage is viewed as an heterosexual institution by many, therefore, in queer theory, the idea of applying such a heteronormative institution to LGBT persons can lead to limited understanding of queer relationships. Before we discuss this further, let us look briefly look at the definition of marriage. In its essence, marriage is legal contract to maintain the property and economic assets of the persons involved

¹¹⁷ *Ibid*, part: 'Dignity and the right to recognition'

¹¹⁸ Elżbieta Kuzelewska, "Same-Sex Marriage - A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriage in Europe", *Białostockie Studia Prawnicze* 2019 vol. 24 nr 1, p. 16

¹¹⁹ *Ibid*

in the relationship. There is no doubt that with time, this economic aspect of the marriage has shifted to background and more emotional side of it took the lead. For different religious, social and cultural norms, the idea of marriage turned into an important notion in which persons display their loyalty and love for each other, and it become more of an socially declaring one's commitment to another. Each country defines marriage according to its social norms and cultural background. For example, some countries do not allow divorce, whereas some allow child marriage, or polygamous marriages. However, in general marriage is considered as one of the oldest and most stable units of society, and this idea is often used to oppose same-sex marriage because it is thought that applying changes or new interpretations to existing concept would threaten its stability. As we discussed in one of the previous chapters, the same skepticism was shown towards divorce when it started to get included in the legislations. Nevertheless, as we can see, divorces are legal, they are happening and regardless of that, marriage institution is still intact and working out. The demand of social changes makes it necessary to alter the idea of marriage. It is clear that alterations does not affect the stability of the marriage institution and with increasing social demand, from time to time, considering the changes to make it more inclusive is necessary as does demanded change of limitations does not mean changing all the limitations.

In regards to inclusion of same-sex couples for marriage, the opponents of this idea from the queer theory perspective state that it leads to altering the dynamic or concept of same-sex relationships to fit in with the heteronormative norms, and therefore damaging the essence of same-sex relationships. This also comes from the idea that in most cultures and legislations, marriage is a protected institution and in order to have access to rights and guarantees of this particular institution, one has to fit in with the standardized concept of it. Even though in many legislations, the idea of marriage being at the top of the hierarchy concerning the amount of protection provided for the relationships, in many other countries, it still remains to be the highest form of the union between two persons (or mostly, a man and a woman). Therefore, it is argued that in order to have the optimal way of achieving the equality between all relationships, the idea of marriage has to go through many changes. With divorced introduced to legislations, and social realities changing in regards to people having more than one marriage or love relationships in their lives, there is a need to evaluate the idea of marriage. The optimal way would be to keep the marriage for cultural or religious reasons so that people who wish to be part of that process still have their access to it, and grant the rights that marriages in other form of the registered relationships fully, without any limitations. Because the idea that marriage is a stable institution in the society is outdated and promoting it as such stable and

strong tied legal and emotional bond can result in backlash and persons may reconsider whether they want to be part of such an institution or no.¹²⁰ The reality is that, at least for heterosexual couples getting into marriage is easier than getting out of one, and with the evolution of ideologies surrounding this concept, and considering the legal outcomes of it, people tend to use registered partnerships for legal recognition of their relationships. Additionally, it is also worth to mention that for the opponents of the same-sex marriages from religious or other backgrounds, the protection of the stability of the marriage is not a favorable argument, as we discussed, the emphasize on the strength of the bond can result in opposite direction.

The recognition of the same-sex relationships started in Northern Europe by introduction of registered partnerships and in still in many legislations, it is the only way of recognition of the same-sex relationships. The interesting moment here is that while same-sex couples have difficulties accessing marriage rights, different-sex couples had their difficulties accessing the registered partnerships as not everyone want to get married but still wants their relationship legally recognized for various reasons. One of the good examples of this situation is the case of *Stenfeld and Keidan*.¹²¹ In this case, a heterosexual couple argued that the lack of access of different-sex couples to civil partnerships is incompatible with the Articles 8 and 14 of the Convention. At first, their claim was dismissed on the basis that the state needs time to assess and evaluate the situation regarding the impact of same-sex relationships on the civil partnerships; and this was justified by the Appeal Court referring to the case of *Schalk and Kopf* where ECHR stated that states are authorized to certain flexibility when assessing the situation for legislative amendments.¹²² Consequently, on 2nd of October 2018, it was announced that the civil partnerships will be extended to different-sex couples as well.¹²³ The question here is, did such extension fix the problem of inequality? The answer is partly, because while making civil partnerships available for different-sex couples fixed one inequality problem, meanwhile it created another one. The newly created inequality was that while according to the Marriage Act 2013 (where marriage rights were extended to same-sex couples), same-sex couples could convert their civil partnership to marriage, different-sex couples did not have the equal

¹²⁰ Norrie, Kenneth, “*Marriage is for heterosexuals : May the rest of us be saved from it.*” *Child and Family Law Quarterly*, 12 (4), 2000. pp. 363-369.

¹²¹ *R (on the application of Steinfeld and Keidan) v Secretary of State for the International Development* (in substitution for the Home Secretary and the Education Secretary), UKSC 2017/0060

¹²² Ali Alzarak, “*The Supreme Court in 2018: R v Secretary of State for International Development*”, 29 January 2019. Can be accessed via: https://www.familylaw.co.uk/news_and_comment/the-supreme-court-in-2018-r-v-secretary-of-state-for-international-development

¹²³ Alexandra Davey, “*Civil Partnerships – A new inequality created by the correction of an old one?*”, 9 December 2019. Can be accessed via: <https://www.5sah.co.uk/knowledge-hub/articles/2019-12-09/civil-partnerships-a-new-inequality-created-by-the-correction-of-an-old-one>

opportunity. This was justified by stating that before Marriage Act made marriage available, same-sex couples had only way to make their relationship legally recognized and it was through the civil partnerships; and after the legalization of same-sex marriage, such opportunity was granted to same-sex couples so that they could convert into different kind of legal recognition without dissolving their registered partnership. Marriage was not available to them, but it is available to different-sex couples, therefore, they were not considered in similar position. The problem with this stance was that, this situation regarding the conversion from civil partnership to marriage continued after the legalization of same-sex marriages, and it was applicable only for same-sex couples; different-sex couples were excluded from this process.

Considering the situation where amendments to the legislation either fixes certain inequalities and sometimes creates another one, it could be said that the idea of having hierarchy of relationships concerning their legal recognition and the guarantees they have access to depending on the said hierarchy should be reconsidered. Marriage is not for everyone for various reasons may it be ideological or some other, and it should not mean that because some (in reality, many) people do not agree with the idea of marriage, they should not have any other way to have access to the guarantees that it provides. Clearly, it is not an easy process as we are talking about such deeply regulated institution that also has many sociological, religious and cultural impact around it; however, as we discussed often in this research, social reality changes and at this period, the needs of the society is different than it used to be decades ago.

3.3. Universal sexual subject of international law and reconsidering Article 12 of ECHR

In this chapter, we are going to focus on the idea that international legislation should elaborate more on the concept of universal sexual objects. In Grigolo's opinion, the universal sexual object should enjoy basic rights such as the following: the right to choose the sexual activity and identity and being able to form relationship and family according to these choices.

Heteronormativity has always been considered normal, and anything else besides it was not regarded as such. Acceptance of homosexuality was understood in a way as something that is the opposite of heterosexuality. Consideration of homosexuality did not imply that other sexual identities were also acknowledged by society. Heteronormativity was the basis of everything - social, legal norms, traditions, and so on, and various scholars, judges considered other sexual identities than heterosexuality as abnormal. Different sexual identities were stigmatized. The traditional idea of the family consisting of man and woman, and them procreating, dividing of

the roles in the family, man being masculine, the woman being feminine was the idea and core of the normality. Stigma was that the feminine men were considered to be gay, and women being masculine was considered to be lesbian. However, masculinity or femininity is not a factor to identify an individual's sexual identity, as a feminine man/masculine woman can freely enjoy their heterosexuality. This perception by the society fueled such stereotypical attitude towards sexual and gender identity and expression of persons.

Developing into a more accepting society in case of sexual identities, mostly homosexuality, it is worth to mention that the detraditionalization of the family structure had plenty of positive changes such as maintaining equality between the partners and this, in its turn led to having a possibility to self-determination in the matters of sexual activities and diverse aspects of a relationship. However, such kind of changes was hard to adapt to the heterosexual couples as there were obligations for them coming from gender roles. According to Weeks, traditional ways of life were losing their meaning for many people and individuals start to seek their pleasures in life. People react to it in different ways, for some it is frightening and for others it is enlightening.¹²⁴

Normalizing homosexuality affected other sexual identities, which are considered to involved in “more disturbing sexual activities”; and they were not taken into consideration.¹²⁵ So, at first, heterosexuality was the norm, and any other sexual orientation or sexual activities not related to it was considered abnormal. Homosexuality was considered as the “other” comparing to heterosexuality. Then with the social acceptance that came with decriminalization of homosexuality had an impact on the perception of homosexual sexual activities as comparably normal. However, any other sexual activities between consenting adults were viewed as immoral.

One of the good examples of why this matter should be taken into consideration is shown by the example of the case of *Laskey, Jaggard, and Brown v. the UK*.¹²⁶ One of the characteristics of their sexual activities was described as “inflicting bodily harm”, and the court specifically mentioned that the issue with this case is not about the sexual activity being conducted amongst only male parties, but the nature of the sexual activity, and added that the heterosexual or

¹²⁴ Michele Grigolo, “Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject”, EJIL (2003), Vol. 14 No. 5, 1023–1044, p. 1027

¹²⁵ *Ibid*, p. 1026

¹²⁶ *Laskey, Jaggard and Brown v. The United Kingdom*, 109/1995/615/703 - 705, Council of Europe: European Court of Human Rights, 19 February 1997

bisexual individuals would be prosecuted in the same way. However, there is a similar case regarding the heterosexual partners inflicting consensual bodily harm and the court considered this case a matter of private life, therefore there is no reason for the court intervention.

Legal instruments are based on the idea of heterosexuality, and acceptance of the rights of homosexuals was considered as something “other” than heterosexuality. At first, homosexuals were granted equal rights on the grounds of respect for private life. Subsequently, when the number of such cases has risen, the court considered that the identity besides heterosexuality exists and it is immutable in the same way. Immutability was one of the main arguments used by homosexuals when claiming equal rights in courts.

However, Grigolo also expresses that the dichotomy between heterosexuality and homosexuality is not about choosing one over another, or diminishing either of them. He suggests that instead of focusing either on heterosexuality or homosexuality, it would be creating more possibilities if the legislation focused on all subjects equally and allow them to define themselves in alternative ways (neither heterosexual, gay nor lesbian). Homosexual persons were granted their rights based on the social changes, and in order to get that social acceptance that led to recognition of their rights, they had to fit in the norm of heteronormativity. This way of reaching equal rights is coming from the idea of normalizing and fitting in with certain sexual standards in order to be considered normal.

One of the interesting suggestions is that instead of looking at this from binary perspective of heterosexuality or homosexuality, masculinity or femininity, and putting labels to human sexuality in order to define whether they should have access to certain rights or no, sexuality could be universalized as individual sexual rights. So, regardless of the sexual and gender identity and expression of the person, they would have this legal space where they can choose their sexual activity and identity; and form their family relationships according to their chosen expression of sexuality.¹²⁷ In that case, in theory, equal treatment and rights would be applicable to everyone based on their choices, rather than their sexual orientation.

Now we are going to analyze the suggested idea of right of choosing sexual activity and identity and establishing family relationships according to these choices. In order to be able to establish these rights in the Convention, we will see if there are standards in the Convention which fits

¹²⁷ *Ibid* 124, p. 1028

in with these concepts; therefore, we can find a legal basis for it. Is there guarantee in Convention regarding the equality of choices in regards to respect for individual's sexual preferences?

Relevant case law of the Court concerning decriminalization of same-sex sexual conducts between consenting men found that sexual life is an essential part of private life. In order to guarantee the equality of choices when it comes to sexual life, it is important to reconsider the concept of private life and how it relates to sexual life. This can be done by the way of examining the cases through the assessment of individual's private life by considering the perspective of the individual who is engaging in such activities. Because otherwise, with the existing framework, both cultural and legal, strict labeling can end up being despotic. In dealing with cases regarding transsexual individual, Court restored to address the definitions of sex and gender and the boundaries between biological and psychological sex. However, later, in the case of *B. v France*, Court questioned whether this necessity to define such concepts was needed.^{128 129}

It is important to maintain that this concept of private life have the same kind of recognition in public life as well. Meaning if applicant chooses to reveal his choice in public, that should not lead to differential treatment. The right to choose sexual identity and activity is part of private life; however, it does not stop there. If it did, then it would be the same as it always was, repressing the idea of homosexuality within the borders of space of legal toleration. Once people have the freedom to choose their sexual identity and activity and do not get interfered about it by public, it leads to the discussion of second element of the universal sexual subject, enjoying the right to family based on these choices made previously. Back in the times, the Court invalidated the notion of equality of choices, and as we said before, the more a non-heterosexual couple looked like a traditional family, the more chances they had in order to have their rights recognized. Considering the examination of the Court's case law, it is established that there is a strong tension between the concept of family described in the Articles 8 and 12 of the Convention. While engaging in family life is protected in Article 8, the way that family mentioned in the said article is institutionalized in Article 12.¹³⁰ Article 12 becomes the model for examining the families that do not fall within the accepted norm of heterosexuality. So if we are talking about accepting different kind of families considering and applying the sexual

¹²⁸ *Ibid*, p. 1039. Referred as: Heinze, '*Discourses of Sex: Classical, Modernist, Post-modernist*', in 67 *Nordic Journal of International Law* (1998) 37, at 69.

¹²⁹ *B v France*, Appl. No. 13343/87, European Court of Human Rights, 25 March 1992

¹³⁰ *Ibid* 124, p. 1040

neutrality, then Article 8 provides the protection for that; however, the structure of Article 12 protects this concept only for certain type of families.

This situation can be further explained by giving an example of how the idea of marriage and family enshrined in Article 12 is perceived by the society. Monogamous family is the social norm, which is considered to be the most optimal institution for moral development.¹³¹ So when moral ideas are created in such socially accepted environment and then gets transferred from public to private space, there is no problems regarding this as we said, this is the ultimate model of accepted family in society. We can see that heteronormative understanding of family is a serious nuisance when it comes to equality under the Convention. When comparing the content of Article 12 and 8, we can spot the comparison of various binaries such as heterosexuality/homosexuality, legitimate/illegitimate, public/private, etc.¹³² In order to achieve equality, the erasion of these binaries are necessary, non-heterosexual persons should be able to move from the opposite of heterosexual persons to the same side with them, to the positively accepted part of these binaries. When this happens, same-sex couples would be guaranteed certain social and economic benefits granted by marriage. As we stated before, it is observed in the case law that in order to be able to bring a claim and be successful in having a positive results, non-heterosexual families make themselves similar to the traditional family dynamic. Even though certain rights guaranteed by marriage can be accessed via registered partnerships, marriage was the only option where they could access full equality. Even after reaching the requested equality between heterosexual and homosexual relationships concerning marriage, binaries described Articles 8 and 12 will be used to distinguish married and unmarried couples, and their equal rights. In this case, concept of equality has an impact on the choice of not marrying, because certain kind of families are perceived as the universal standard, and portrayed as privileged institution.

In order to solve this difference, taking different approaches to interpret Article 12 will not be helpful as its structure does not leave space for sexual universality. Therefore, it could be suggested ““privatizing” the institution of marriage into the universal field of self-determination of family life of Article 8, on an equal footing with other relational and familial choices.”¹³³ The concept of relationships are deeper than it can be perceived by the society and law. Giving

¹³¹ *Ibid*, pages 1040-1041

¹³² *Ibid*

¹³³ *Ibid*, p. 1042. Referred as: Lützen, 'Gay and Lesbian Politics: Assimilation or Subversion: A Danish Perspective', in J Löffström, *Scandinavian Homosexualities, Essays on Gay and Lesbian Studies*, 1998, 233, at 237.

privilege for one form of relationship over others has detrimental effect on the value of those other relationships. It is understandable that these institutions have deep historical, cultural, social, legal and other backgrounds, however, as the time passes, need for more inclusion arises as social reality is changing and if the laws are not changing accordingly to provide guarantees for the existing social reality, situation gets complicated. Considering this, the change needs to be done as much as possible as it is not an easy process to make changes in such deeply rooted institutions. This analysis coming from Michele Grigolos concept of universal sexual concept was done in beginning of the XX century, and many things have progressed in the case law of the Court, international and national legislation to guarantee the inclusion and progress we have discussed. However, there are still many thing to consider as reconsidering the privilege of marriage institution and granting different forms of families (regardless of their sexual orientation) equal rights, because society changes and people start to view family life, or ideas surrounding family differently than it was perceived by the general society decades or less ago. Granting of such rights not depending on the marital status of couples, relationships, or other kind of personal or familial ties contributes to better functioning of the society. The idea of family, and emotional concepts surrounding that notion still remains there, only thing that changes is guaranteeing rights that are contributing to the less legally complicated life, as those rights that were explicitly accessible through marriage now would be just among other things people regulate regardless of their marital status. This does not mean complete erasion of marriage, it just means that it is not perceived as more dignified way of having one's relationship.

Conclusion

We are going to conclude this thesis by going through one by one the questions that we asked in the introduction in order to summarize the idea of the thesis.

So, the question number one that we asked was: What is the role of European Court of Human Rights regarding the recognition of same-sex relationships? As we analyzed in chapter one, the Court's approach towards the recognition was mostly based on the perception of heterosexual concept of the subject of international law. Through the discussed case law, we observed that there is a differential treatment between same-sex and different-sex couples, and for same-sex couples to be able to have access to the recognition of their relationship, they have to prove that they are in similar situation to different-sex couples. Therefore, from here we can deduct that the approach of the Court, mainly on initial periods of dealing with cases regarding same-sex relationships, was based on the rules of heteronormativity. However, we observed that with time and relying on the change of social attitude, the Court's approach towards the recognition of same-sex relationships have changed. We can observe the start of this line of judgement starting from *Schalk and Kopf*. Even though the Court stated that member states do not have the obligation to guarantee same-sex marriage under the Article 12 of the Convention; nevertheless, states have to offer some kind of recognition for the same-sex relationships. After this judgement, another important one was decided in the case of *Vallianatos*, where Court held that if the member states are offering the option of registered partnerships, such legislation should include everyone regardless of their sexual orientation. Finally, in *Oliari* Court held that government of Italy is failing to fulfill their positive obligation by not offering any kind of legal recognition for the same-sex relationships. To summarize, the Court plays an important role in the recognition of same-sex relationships with gradually changing their approach with each case.

Second question that was: How does the concept of European Consensus affect the situation concerning recognition of same-sex relationships? As we examined in the second part of the first chapter, Court usually resorts to the concepts of European Consensus and Doctrine of Margin of Appreciation when dealing with the cases regarding sexual minorities. The reason for that is that rights of the sexual minorities, in this case, recognition of same-sex relationships is a sensitive topic which does not have European Consensus, therefore when there is a lack of consensus, state parties have wide margin of appreciation over the situation. Considering the situation in Europe, meaning the division of the perception regarding sexual minorities, it is no

surprise that there is no European Consensus, and in that case, there is more discretion to the member states. However, here we answer the second question: What are the downsides of referring to European Consensus on matters related to recognition of same-sex relationships? The problematic aspect of the application of European Consensus argument is that, it does not help to advance the situation and help the people who address the Court to find their justice. Let us look at it this way, applicant is facing a problem in their respective member state, and they take their case to the Court and Court states that the same problem is present in many countries; therefore we cannot do anything about it. In this case, resorting to the concept of European Consensus does not help to improve the situation and problem still keeps existing. Additionally, application of argument of European Consensus, can lead to discrimination on the rights of minority by the majority. From this perspective, we can conclude that the argument of European Consensus is outdated and can bring more harm than good in certain situations.

Another question we are going to answer is whether states have obligation to provide equal marriage or no. As we discussed previously, in case of *Schalk and Kopf*, Court held that member states do not have any obligation to guarantee marriage equality. This reasoning was based on the conclusion that same-sex marriage is an issue that does not have European Consensus, therefore member states are free to regulate whether they want to expand marriage rights for same-sex couples as well. The applicant side brought up the wording of the Article 12 of the Convention that it should not be interpreted only in the way man and woman as a couple. However, the Court rejected that arguments referring to the year when the Convention was drafted and stated that drafters of the Convention intended this provision to be interpreted in a traditional way. In case of *Schalk and Kopf*, and in many other cases the Court have established various precedents regarding the recognition of same-sex relationships; however, there is no case that Court states that member states have obligation under the Convention to guarantee same-sex marriage. Even though, there is no justification why access to marriage is not available to same-sex couples, and it leads to consider that there is no other reason than it is based on the sexual orientation of the sexual minorities. However, this unjustified differential treatment is happening and there is no certain steps are taken in order to prevent this. We will discuss the reason for this problem in answer to question number six.

Next question we are going to analyze is: What is family and how it is interpreted in international law? Family is concept that does not have any exact definition, and sometimes the lack of a specific definition helps in the interpretation of the concepts in light of the current social reality. We can apply this method to definition of family as well. Throughout time, we

have observed that the concept of family had gone through changes and the notion had expanded to include families which are different from the traditional concept of it. Additionally, giving exact definition to family in international law is almost impossible because every member state to various international legal instruments have their own definition and understanding of family according to their social and cultural norms. In order to get an idea of how the concept of family is interpreted in international law, we analyzed the case of *Joslin*. In this case, one of the argument that applicant argued was the wording of Article 23(2) which has the phrasing “man and woman”; and applicant proceeded to argue the phrase can be interpreted not as between man and woman, but group of men and women individuals. However, Court rejected this argument by stating that in other provisions of the Covenant, gender-neutral terms are used. Nevertheless, in this provision the phrase “man and woman” was used on purpose to imply that it recognizes marriage between a man and a woman. If it would imply on different meaning, relevant wording would be used. After the case of *Joslin*, no remarks were made regarding the interpretation of Article 23(2), therefore in current state, respective article of ICCPR is interpreted in the way that it does not involve same-sex couples. However, one of the arguments for interpretation of the Covenant is to consider the idea that marriage is an evolving concept; and initially, wording of that Article was not mean to be that way; however, in order to highlight the emphasis on the equality of man and woman, it was suggested that the provision is worded that way.

Next question we are going to address is: How does lack of recognition for same-sex couples affect their free movement rights as an EU citizen? As we already discussed, one of the fundamental rights of an EU citizen is that they have the right to freely move within the Union and they have the right to bring their family along. However, considering the reality in Europe, not every country allows same-sex marriage, registered partnerships for same-sex couples, or in some cases, neither of these options. Therefore, when trying to enjoy from free movement rights while traveling to certain countries, LGBT persons have difficulties to prove their relationship, or the country that they are traveling to does not recognize same-sex relationships that are legally bound in the jurisdiction of another member state. When this happens, it does not align with the principles of free movement rights of EU citizen, therefore, this issue is looked at from perspective of the protection and guarantee of fundamental rights of an EU citizen. One of the landmark decisions which contributes to the solving this issue (partly) is the case of *Coman*, where CJEU decided that member states have to recognize the marriage of same-sex couples conducted in another member state’s jurisdiction. It is a positive step towards the recognition of the same-sex relationships, and it does solve some of the problems; however,

the fact still remains that the scope of the *Coman* case is very limited. Firstly, it only extends to the couples who have married in another member state - meaning there is still no obligation on member state to recognize equal marriage rights in their jurisdiction (considering that this judgment is relatively recent) and it is only applicable if the free movement rights of EU citizen is involved, meaning it is applicable only when at least one of the parties constituting relationship is a EU citizen.

Another question we are going to discuss is: What is the difference between approach towards recognition of same-sex marriages in U.S. and Europe? U.S. approached the issue of recognition of same-sex relationships from the perspective of dignity in case of *Obergefell*, stating that not allowing equal marriage rights is unconstitutional. However, in Europe, as we discussed before European Consensus plays key role. This is important because European Union does not have the direct competence over the family rights in Europe and each member state defines their own family law. In case of the ECHR is that, the Convention is another legal instrument where member states become a party based on their will. Therefore, not considering the matter of consensus, rushing a decision and deciding something that certain majority of states are against could backfire. States would consider leaving as the values of the Convention would not align with theirs. Therefore, ECHR is cautious and analyzing the social situation in member states before making a decision. For that reason, ECHR has not been able make any “forceful steps” for the recognition of marriage equality in Europe. However, as we mentioned and discussed many times in this thesis, change of the social attitude towards same-sex marriage, and more members states offering recognition in the way of registered partnerships or marriage would pave the way for stronger stance for the recognition of marriage equality in Europe in the future.

Next issue we are going to summarize is: What problems are LGBT families are facing concerning adoption? Apart from the cases addressed to to Court regarding the recognition of same-sex relationships, one of the most common issues addressed to the Court by same-sex couples is the cases related to parenting rights of the same-sex couples, or single adoption by LGBT individuals. As we have already discussed in the thesis, the perception of the homosexuality by the society has gone through changes throughout years. In the first cases related to the single-parent adoption, the sexuality of LGBT persons is considered as a harmful and detrimental element on the wellbeing of the child. This line of thinking by some of the judges in the Court which was not based on any scientific facts, but rather than based on their personal bias towards homosexuality, did not improve the situation for LGBT individuals in

the process of adoption. The dangerous sexual identity of a homosexual person had been a barrier for second-parent adoption as well. In such cases initially, the Court puts the proof of burden on the applicant to prove that they are capable of raising a child. However, with time, the opinion of Court had shifted from putting the burden of proof on applicant to having the state party to prove why the applicant is not capable of raising a child in the child's best interests. To sum up the problems faced by LGBT families regarding the adoption can be that lack of recognition of family rights can lead to negative effect on the mental wellbeing of the family; the social perception which affects the legal situation in various jurisdictions also have a negative impact of progression for the family rights of LGBT persons. Additionally, when there is lack of recognition, it can have detrimental effect on the children because, their rights are not protected and the idea of such prevention implies that their family is inferior to other families where parents have their parental rights recognized. The situation has changed because social acceptance encouraged by implementation of legislation in favor of the rights of LGBT families, and it can be said that in future, the concept of family will undergo further changes to adapt to the new type of families and ensure that everyone's rights are recognized and protected.

Lastly, the question we are going to analyze is: What kind of developments to further the recognition of same-sex relationships can be foreseen? To answer to this question, we are going to talk about the suggestions that we analyzed in the last chapter of the thesis. It is suggested that in order to guarantee equality for everyone, the new idea for the subject of international law could be introduced. The idea is that this new universal sexual subject of international law would enjoy two simple rights such as right to choose their sexual identity and activities, and their family relationships based on the former choice that they made. This would contribute to the equal treatment of individuals not based on their sexual orientation or the sexual activity that they choose to conduct, but rather than their choices. We discussed the finding a legal basis for this idea in the Convention and suggestion is that we do not interpret Article 12 from new perspective, but remove the institutionalized idea of marriage that Article 12 implies and make it a part of the Article 8 by privatizing the concept of marriage. In that case, the idea that marriage is a privileged institution would not be relevant and everyone would have access to the benefits that are granted by marriage in different way of recognition of their relationship. This idea does not suggest erasing the concept of marriage but rather get rid of the privileged status that it has. With time, the social attitude towards marriage is changing and more people do not want to get into marriage; however, they still do want the benefits that it brings for the protection of their family ties, property, parenting rights and so on. Therefore, new concept of marriage would be accessible and people would have the choice to decide whether they want

to get married or no not considering the legal aspects and difficulties that not being protected would bring; and they would make their decision solely based on their will instead of other reasons because marriage would not be an institutionalized and benefits that it used to bring would be applicable to other kinds of recognition of family rights.

Considering these analysis of various cases and existing legislation, it can be said that lack of recognition of same-sex relationships results in discrimination. However, considering the complexity of law and the time that it takes to adapt to the new social reality, we can say that there will be a clearer stance on the recognition of same-sex relationships, or in particular marriage equality in the near future.

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