March 16, 2012

The Problem of Same-Sex Marriage, from a European Perspective

Javier Nanclares

Available at: https://works.bepress.com/javier_nanclares/1/
The Problem of Same-sex Marriage, from a European Perspective

Javier Nanclares

This article will analyze various legislative positions together with the significance of the decisions taken by different national courts and some international ones on the appeals on the dismissal sentences on the subject of access to same-sex marriage. In particular, it will analyze the position of the European Court of Human Rights, the supra-national body whose decisions affect the legislation of those Member States who have signed the Treaty, and whose jurisprudence may compel them to make legal reforms. It will examine the constitutionality of limiting matrimony to that celebrated between persons of different sexes, in view of the technical demands deriving from the non-discrimination principle, respect for the essential content of marriage and its institutional guarantee by the constitutions of some countries.

Keywords

Same-sex marriage; non-discrimination principle; European Court of Human Rights; Family life.

I. Legal Situation and Diverging Tendencies

II. The Posture of the European Court of Human Rights on Same-sex Marriage

A. Absence of discrimination in case of non-admittance
   1. Similarity between the different types of relationships
   2. Justification of different treatment

B. The right to contract marriage in the ECHR framework
   1. Present and evolution
   2. Is there a limit to the reform of the right to contract marriage?

I. Legal Situation and Diverging Tendencies.

In recent years, one of the most contentious issues in family law has been the legalization of same-sex marriage. Supporters and opponents of legal recognition of what is often called “gay marriage” have put forward their arguments and have lobbied their respective parliaments so that progressive or restrictive legislation should be put in
place. What for centuries had been a peaceful and undisputed matter has recently become the battleground where two opposing views on society and law struggle.

International treaties of the mid-twentieth century provided for the right to marry, and closely linked, the right to form a family. A tendentially indissoluble marriage, open to procreation, was seen to be the root of the legally protected family model and this, in turn, as the fundamental core of society. In these texts heterosexuality was a legal presupposition for marriage, so that, while not stating explicitly that it was the right of man and woman to marry “one another”, it could not honestly be concluded that the cited texts deliberately left an opening for marriage between people of the same sex.

The evolution of society and the formulas for affective or sexualized cohabitation, the greater visibility of gay relationships and the pressure exerted by certain groups have led to a progressive modification of the laws in many countries, thereby granting same-sex couples a set of rights which are vary similar in their legal status to those of heterosexual married couples.

The globalization of the phenomenon, especially present in the Western world, has raised considerable controversy in many countries and has triggered two contrasting movements or trends. Thus, some countries have chosen to modify their Civil Codes to delete the reference to heterosexuality in marriage, simply stating that it may be between two people, with no mention of their sexual predisposition, and even establishing that marriage can be contracted by persons of the same or opposite sex. The decision taken by the Netherlands (Act of 21 December 2000, amending Article 30 of Book 1 of the Civil Code) produced a certain “domino effect” in Europe that led to the approval of same-sex marriage in Belgium (Act of 13 February 2003), Spain (Act of 1

---


2 Wet Van 21 December 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen a hetzelfde geslacht (Wet openstelling huwelijk) [Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening up of Marriage)], Staatsblad van het Koninkrijk der Nederlanden [Stb.] 2001, No. 9 (Januari 11, 2001) 1 (Neth.).

3 Following the terminology used by the Professor Rafael Navarro-Valls, Debate planetario sobre el matrimonio, in HUMANITAS: REVISTA DE ANTROPOLOGÍA Y CULTURA CRISTIANA, http://www.humanitas.cl/web/index.php?option=com_content&view=category&id=180&Itemid=67

July 2005),\(^5\) Norway (Act of 27 June 2008),\(^6\) Sweden (Act of 1 April 2009)\(^7\) and lately Portugal (Act of 31 May 2010)\(^8\) and Iceland (Act of 22 June 2010).\(^9\)

The legal trend which if favorable to same-sex marriage is not confined to Europe. This type of marriage has been recognized in Canada (Civil Marriage Act of 20 July 2005),\(^10\) South Africa (Civil Union Act of 30 November 2006),\(^11\) Mexico Federal District (Decree of 29 December 2009),\(^12\) Argentina (Act of 21 July 2010),\(^13\) as well as several States of the United States of America (Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, District of Columbia, New York).

As can be seen, the countries that recognize same-sex marriage still form a very small group within the international community as a whole. However, this trend favoring same-sex marriage increases the need for other countries to make a stand on an issue which no longer refers to the future but is current reality, as the problem arises of

---

\(^5\) Ley 13/2005, de 1 de Julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio (R.C.L. 2005, 1407) (Spain).


\(^8\) Lei 9/2010, de 31 de Maio de 2010, permite o casamento civil entre pessoas do mesmo sexo (Diário da República [D. Rep.], 105: 1853, 31 maio 2010) (Por.).

\(^9\) Lög um breytingar á hjúskaparlögum og fleiri lögum og um brottfall laga um stadfesta samvist (Ein hjúskaparlög) [Law on amendments to the Marriage and other laws and repealed the Act on registered partnership (one marriage)] (Stjórnartíðindi [Law Gazette] 2010: 65), available at http://www.stjornartidindi.is/Advert.aspx?ID=9c234d50-ea1f-4911-aa67-f659240a5e48 (Ice.).

\(^10\) An Act respecting certain aspects of legal capacity for marriage for civil purposes, 2005 S.C., c. 33 (Can.).

\(^11\) Civil Union Act 17 of 2006 (Government Gazette [GG] 29441, Nov. 30, 2006) (S. Afr.). By Judgment of Dec. 1, 2005 (Minister of Home Affairs and Another v. Fourie and Another; Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others, Cases CCT 60/04; CCT10-05, http://www.constitutionalcourt.org.za/Archimages/5257.PDF, at 72-73) the Constitutional Court of South Africa established that both Common Law and the Marriage Act, by failing to “[P]rovide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law under section 9 (1), and not to be discriminated against unfairly in terms of section 9(3) of the Constitution. Furthermore … such failure represents an unjustifiable violation of their right to dignity in terms of section 10 of the Constitution”. In that judgment the Court ruled that same-sex couples have a right to marry and gave Parliament one year to pass the necessary legislation.

\(^12\) Decreto por el que se reforman diversas disposiciones del Código civil para el Distrito Federal y del Código de Procedimientos civiles para el Distrito Federal [Decree to reform several provisions of Civil Code for the Federal District and the Civil Procedure Code for the Federal District], Gaceta Oficial del Distrito Federal [G.O.D.F.], 29 de Diciembre de 2009 (Mex.).

recognition or not of same-sex marriages in countries\textsuperscript{14} whose laws do not allow such marriages,\textsuperscript{15} although they are legally valid in other countries.

Conversely, there is a notable emergence of a reactionary movement that seeks to expressly limit marriage to relationships between persons of different sex. As it no longer appears possible to assume what is understood by marriage and by family some countries have decided to constitutionally establish the fact of heterosexuality in marriage.

This phenomenon, contrary to the previously mentioned one, described as “an armor-plating effect” is seen in the new Hungarian Constitution adopted on April 25, 2011,\textsuperscript{16} which states that “Hungary protects the institution of marriage between man and woman, a matrimonial relationship voluntarily established, as well as the family as the basis for the survival of the nation”\textsuperscript{17} (article L(1) of the Chapter I), thus following the

\textsuperscript{14} Thus, a Circular from the Italian Ministry of the Interior on Oct. 18, 2007, established the impossibility of registering the marriage contracted abroad between persons of the same sex, as Italian law does not provide for this type of marriage, which is contrary to the public interest (Circolare del Ministero dell’Interno [Circ. Min. Int.] Matrimoni contratti all'estero tra persone dello stesso sesso. Estratti plurilingue di atti dello stato civile No. 55/2007, Oct. 18, 2007, http://www.servizidemografici.interno.it/sitoCNSD/documentazioneRicerca.do?metodo=dettaglioDocumento&servizio=documentazione&EID_DOCUMENTO=986&codiceFunzione=NO&codiceSettore=SC)

\textsuperscript{15} In Europe, it is a problem raised by the European Commission in Green Paper Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records (Dec. 14, 2010, COM (2010) 747 final, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:ES:PDF) (last visited Feb. 28, 2012) where, despite the advantages that would support a system of automatic recognition (especially to guarantee the right to free movement of persons which is fundamental to the European Union), it is stated that said solution (paragraph 4.3 letter b) “[S]hould, however, be accompanied by a series of compensatory measures to prevent potential fraud and abuse and take due account of the public order rules of the Member States” and “[M]oreover, automatic recognition might, where appropriate, be better suited to certain civil status situations such as the attribution or change of surnames. This might prove to be more complicated in other civil status situations such as marriage”. On the other hand, the imposition of such measures regarding family law with cross-border implications, it would follow the procedure of article 81.3 of the Treaty on the Functioning of the European Union, which requires its establishment by the Council, acting unanimously after consulting the European Parliament.

\textsuperscript{16} Magyarország Alaptörvénye [Basic Law] Apr. 25, 2011 (Magyar Közlöny [MK.] [Hungarian Gazette] No. 43, p. 10656, http://www.kormany.hu/download/0/d9/30000/Alapt%C3%A9rv%C3%A9ny.pdf (Hun.).

\textsuperscript{17} L) cikk (1): Magyarország védi a házasság intézményét mint férfi és nő között, önkéntes elhatározás alapján létrejött életközösséget, valamint a családot mint a nemzet fennmaradásának alapját (Id. at 10658).

\textsuperscript{18} This Constitution has prompted the European Parliament Resolution of July 5, 2011 (http://www.europarl.europa.eu/portal/en, search P7_TA-PROV(2011)0315), which asks the Hungarian authorities to ensure equal protection of the rights of all citizens regardless of the sexual group to which they belong (first petition, letter c), and prohibit discrimination based on sexual orientation (first petition, letter f). Thus, the European Parliament expressed its misgivings about the protection by Hungary of homosexual relationships, and despite the fact that the “European Commission for Democracy through Law” (known as “Venice Commission”), established that a violation of the doctrine of the European Court of Human Rights could not be attributed to the Hungarian Constitution on the subject of the regulation of marriage (Council of Europe, Opinion No. 621/2011: Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), CDL-AD(2011)016, http://www.venice.coe.int/docs/2011/CDL-AD%282011%29016-E.pdf, sect. 47-50).
path marked by Article 38 of the Constitution of Lithuania\textsuperscript{19} adopted in 1992 and by Article 18 of the Constitution of Poland,\textsuperscript{20} in 1997.

This same line was taken by the Mexican State of Baja California as a reaction to the decision of the Supreme Court of Mexico to declare the constitutionality of the reform occurred in Mexico Federal District, which changes the subjective dimension of marriage. Thus, in Article 7 of the Political Constitution,\textsuperscript{21} amended in 2011, it states that “[T]he State recognizes and protects the institution of marriage as a right of society oriented to guarantee and safeguard the perpetuation of the species and mutual support between spouses, and this can only be fulfilled in the union of one man and one woman”.

Finally, we must stress that this movement to defend the heterosexuality of marriage, unquestionably still a minority, has been well received in America, where the recognition of same-sex marriage in several States diverge from the Defense of Marriage Act\textsuperscript{22} of September 21, 1996, and the shielding of some States by the constitutionalization of the heterosexuality of marriage (Section 7.5 added to Article I of the California Constitution by Proposition 8, approved by referendum on November 4, 2008).\textsuperscript{23}

Progressiveness or exclusion are the solutions adopted by a few countries. The remaining countries witness the debate on the right to marriage from the vantage point of their civil norms on the institution, established in sometimes hundred-year-old codifications, and from a constitutional regulation based on international texts of the middle of last century, often channeling the claims of those groups into an alternative to marriage such as civil union, registered or not.

This was the solution initially chosen in Europe, in what has been called the ‘Scandinavian model’, which reserves for same-sex couples access to registered partnership, whose judicial conditions have many similarities with marriage (in terms of capacity, formalities of formation and abrogation, patrimonial aspects of the union, and, to a lesser extent, personal issues). This model was initiated by Denmark in 1989

\textsuperscript{21} Constitución Política del Estado Libre y Soberano de Baja California [Const. B.C.], as amended, Art. 7, Periódico Oficial del Estado de Baja California [P.O.B.C.], 16 de Agosto de 1953, available at http://www.ordenjuridico.gob.mx/Documentos/Estatal/Baja%20California/wo19505.pdf (Mex.).
\textsuperscript{22} Defense of Marriage Act, § 3, Pub. L. 104-199, 110 Stat. 2419.
\textsuperscript{23} Cal Const, Art. I § 7.5 (2012).
(Registered Partnership Act of 7 June 1989)\textsuperscript{24} and was followed by other Nordic countries, such as Norway in 1993 (Act of 30 April 1993 Relating to Registered Partnership)\textsuperscript{25}, Sweden in 1994 (Registered Partnership Act of 23 June 1994)\textsuperscript{26}, Iceland (Recognized Partnership Law of 1 July 1996)\textsuperscript{27} and Finland in 2001 (Act on Registered Partnerships of 28 September 2001),\textsuperscript{28} together with Germany by the Gesetz über die Eingetragene Lebenspartnerschaft of 16 February 2001\textsuperscript{29}. On the same issue, the United Kingdom passed the Civil Partnership Act, 18 November 2004,\textsuperscript{30} very similar to the legal status of marriage. There is also specific legislation for same-sex unions in Switzerland, a country that adopted on June 18, 2004 the Loi fédérale sur le partenariat enregistré entre personnes du même sexe.\textsuperscript{31}

France, however, has opted for a different solution,\textsuperscript{32} as its passing of the Pacte Civil de Solidarité\textsuperscript{33} is not limited to the legally registered community of life between same-sex persons but also includes heterosexual unions. On the other hand, the legal status is not intended to fully equate with marriage but recognizes some patrimonial rights that are attributed to marriage.

These are just some examples\textsuperscript{34} of the position taken by many countries in tackling the legal protection of the formulas for stable and lasting relationships between people of the same sex without a need to re-define the legal form of marriage. They are

\begin{itemize}
\item \textsuperscript{24} LOV OM REGISTRERET PARTNERSKAB [REGISTERED PARTNERSHIP ACT] (Lovtidende [Official Gazette] 1989:372) (Den.).
\item \textsuperscript{25} LOV OM REGISTRERT PARTNERSKAP [ACT RELATING TO REGISTERED PARTNERSHIP] (Norsk Lovtidend [Norway Law Gazette] 1993:40) (Nor.).
\item \textsuperscript{26} LAG OM REGISTRERAT PARTNERSKAP [REGISTERED PARTNERSHIP ACT] (Svensk författningssamling [SFS] 1994:1117) (Swed.).
\item \textsuperscript{28} LAKI REKISTERÖIDYSTÄ PARISUHTEESTA [ACT ON REGISTERED PARTNERSHIPS] (Suomen Säädoskokoealma [SS] [Official Gazette] 2001:950, available at http://www.edilex.fi/virallistieto/saadoskokoealma/20010132.pdf) (Fin.).
\item \textsuperscript{29} Gesetz über die Eingetragene Lebenspartnerschaft [Registered Partnership Act] Feb. 16, 2001, BGBl. I at 266, last amended by Gesetz July 6, 2009, BGBl. I at 1696.
\item \textsuperscript{30} Civil Partnership Act, 2004, c. 33 (Eng.).
\item \textsuperscript{31} Loi fédérale du 18 juin 2004 sur le partenariat enregistré entre personnes du même sexe (Loi sur le partenariat, LPart) [Federal Law of 18 June 2004 on Registered Partnerships between Same Sex (Partnership Act, LPart)], June 18, 2004, Recueil systématique du droit federal [RS] 211.231, available at http://www.admin.ch/ch/f/rs/c211_231.html (Switz.).
\item \textsuperscript{32} Despite attempts to reform the legal regime of marriage. In this sense, on June 14, 2011 the French Assemblee Nationale rejected by 293 against 222 for the proposition of law raised by the Socialist deputy M. Patrick Bloche with which he pursued the opening of marriage to same-sex couples through the corresponding legal reform, available at http://www.assemblee-nationale.fr/13/cri/2010-2011/20110210.asp#P503_96940..
\item \textsuperscript{34} The list of Member States of the Council of Europe which have accepted some form of legislation to allow same-sex couples register their relationship can be seen in paragraph 28 of the Judgment of European Court of Human Rights of June 24, 2010 (Schalk and Kopf v. Austria, App. No. 30141/04, http://www.echr.coe.int/hudoc).
\end{itemize}
solutions, as outlined in the Commentary of the Charter of Fundamental Rights of the European Union, that show “[T]hat the name ‘registered partnership’ has intentionally been chosen not to confuse it with marriage and it has been established as an alternative method of recognizing personal relationships. This new institution is, consequently, as a rule only accessible to couples who cannot marry, and the same-sex partnership does not have the same status and the same benefits as marriage”. Ultimately, the option for registered civil unions responds to the desire to combine the legal protection of certain socially important relationships with respect for the historically coined concept of marriage and the acceptance of a diversity of status between the two institutions. This is a terminological difference and a difference at the legal level which inevitably leads to incomplete satisfaction of the expectations of gay groups, who see the solution as an intermediate step in the race for the legitimacy of homosexual relationships. Basically, this is precisely what underlies the claims in favor of same-sex marriage because, as given in Judge Vaughn Walker's decision, domestic partnership laws “[D]o not provide the same social meaning as marriage”, and “[T]he record reflects that marriage is a culturally superior status compared to a domestic partnership”.

II. THE POSTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON SAME-SEX MARRIAGE

In the European area, the controversy surrounding the acceptance or not of same-sex marriage was directly addressed by the European Court of Human Rights in its Judgment of June 24, 2010 (Schalk and Kopf v. Austria, application nº. 30141/04).

The situation at the origin of the sentence began with the opposition of a male couple to Article 44 of the Austrian Civil Code, which states: “Under the marriage contract two persons of opposite sex declare their lawful intention to live together in indissoluble matrimony, to beget and raise children and to support each other”. In order


36 This is the position of the New Jersey Supreme Court in its ruling of Oct. 25, 2006 (Lewis v. Harris 2006 N.J. LEXIS 1521) when it considers that although it is unconstitutional to deny that same-sex couples are entitled to the same equal protection as heterosexual couples; however, is not constitutionally required formal recognition of such couples as marriage. Thus, the Court states that “[W]e are mindful that in the cultural clash over same-sex marriage, the word marriage itself - independent of the rights and benefits of marriage - has an evocative and important meaning to both parties. Under our equal protection jurisprudence, however, plaintiffs' claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples”.

to offer same-sex couples a formal mechanism for recognition and for giving effect to their relationship, Austria approved the *Registered Partnership Act*[^38] which came into force on 1 January 2010, focused only registered partnerships of same-sex couples and which sought to provide partners “[W]ith the same status as spouses in various other fields of law, such as inheritance law, labor, social and social insurance law, fiscal law, the law on administrative procedure, the law on data protection and public service, passport and registration issues, as well as the law on foreigners”.[^39]

Nevertheless, some differences remained with regard to marriage, mainly concerning access to parenthood, as they saw that they were excluded both from joint adoption and from the of children from the other partner, and denied access to artificial insemination.

As a result, the claimants made an appeal to the Austrian Constitutional Court in which they petitioned “[T]hat the legal impossibility for them to get married constituted a violation of their right to respect for private and family life and of the principle of non-discrimination”.[^40] They argued the evolution of the notion of marriage and, in particular, the fact that “[T]he procreation and education of children no longer formed an integral part of marriage. In present-day perception, marriage was rather a permanent union encompassing all aspects of life”.[^41] Consequently, preventing the access of same-sex marriage lacked, in their opinion, a reasonable justification and constituted a violation of the Austrian Constitution and the European Convention on Human Rights (hereinafter ECHR). After the rejection of the appeal by the Austrian Constitutional Court, the issue came to the European Court of Human Rights, which only accepted their arguments in part, while yet rejecting the principal claim.

Thus, the Court denies the existence of discrimination by Austrian law when dealing with the legal treatment of cohabitation between people of the same sex.[^42] And on the other hand, it denies that the current interpretation of the right to marry obliges the signatories of the European Convention to amend their domestic legislation in order to support same-sex marriage.[^43]

On appeal by the applicants, the five-judge panel of the Grand Chamber of the European Court of Human Rights, meeting on 22 November 2010, rejected the referral

[^38]: Eingetragene Partnerschaft-Gesetz [EPG] [Registered Partnership Act] Bundesgesetzblatt Teil I [BGB1 I] No. 135/2009 (Austria).
[^39]: Schalk and Kopf § 22.
[^40]: Id. § 11.
[^41]: Id. § 11.
[^42]: Id. § 96-110.
[^43]: Id. § 54-64.
request relating to the case *Schalk and Kopf*, thus taking as definitive (Article 44 ECHR) the decision taken at the time by the First Section, sitting as a Chamber.

We shall now analyze the arguments given by the Court in *Schalk and Kopf*, placing them in relation to decisions taken by some Constitutional Courts in Europe.

A. **Absence of discrimination in case of non-admittance.**

It is common among those who aspire to the legalization of same-sex marriage to justify their claim on the existence of discrimination, which in this case would be not be based on gender but on the sexual orientation of those who wish to marry. The violation of the principle of equality and prohibition of discrimination would be the basis of national laws reforms, which, from this perspective, would not be desirable but truly necessary. To some extent, the very coherence of the ordinance would demand this reform, which in some countries would surmount a certain intra-constitutional contradiction between the principle of equality and the configuration of marriage as a human right that restricts its scope to persons of different genders.

Appeal on this alleged discrimination is the argument at the basis of the vast majority of petitions presented in litigation against state laws that prevent or do not provide for same-sex marriage and is one of the foundations at the basis of the appeal of the Austrian homosexual couple whose complaint led to that decision. Discrimination which, for those who reason thus, should be surmounted so as to permit the free development of personality and the exercise of their rights in equal conditions by those whose free sexual and emotional choice is with persons of the same sex.

Does such discrimination really exist? To answer this question we must clarify what is meant by discrimination, as an undeniable prerequisite to declare its presence or absence. For discrimination to exist there must be a difference in treatment between persons in similar or comparable situations. This does not mean that all difference in treatment is discriminatory because this will only occur when it introduces a

---

44 Press Release, Grand Chamber of the European Court of Human Rights, Court’s judgment concerning Austrian authorities’ refusal to allow marriage of homosexual couple becomes final, Referrals to Grand Chamber No. 906 (Nov. 29, 2010), [http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-pr-en](http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-pr-en).

45 Specifically rejected by the Spanish Supreme Court in its Judgment of Apr. 29, 2009, regarding the refusal of a Surviving Civil Partner's pension to the members of gay couples who lived together *more uxorio* as it had been impossible for them to marry before Law 13/2005 was passed. The rejection is based on the non-retroactive nature of the laws and that what occurs because of this law is the establishment of a new conformation of marriage (STS, Apr. 29, 2009, R.J., No. 4165). Previously, the Spanish Constitutional Court had set out its position in this regard in its Ruling of July 11, 1994 (ATC [Auto Tribunal Constitucional] [Ruling Constitutional Court] No. 222/1994, [http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=AUTO-1994-0222](http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=AUTO-1994-0222)).

46 In fact, in *Schalk and Kopf* the Court admits the existence of a broad margin of appreciation when the signatory states of the European Convention on Human Rights evaluated to what extent the differences
difference in situations that may be considered equal or equivalent, with no objective and reasonable justification, as will happen when such difference in the legal treatment does not pursue a legitimate aim or if there is no reasonable relationship of proportionality\(^{47}\) between the measure, the result produced and the intended purpose.\(^{48}\)

1. **Similarity between the different types of relationships**

Whatever the case, the essential thesis to proceed with a prosecution from the perspective of the principle of equality is that subjective situations compared are indeed comparable. Thus, the situations we must evaluate and compare are those in which the people involved maintain stable and lasting emotional relationships with people of the same sex and, on the other hand, the situation of those who have the same kind of relationships with the opposite sex.

This task of comparison and definition may be approached from a legal-positive perspective, according to which affective and stable coexistence between people of

\(^{47}\) In the Spanish literature, MARÍA MARTÍN, MATRIMONIO HOMOSEXUAL Y CONSTITUCIÓN 130-32 (Tirant lo Blanch ed., 2008), states that only if the difference in treatment and the restriction of the right to marry of a certain group of people obeys a stronger constitutional argument than the right at stake could the constitutionality of said difference be upheld. In her view, the imposition of the heterosexual principle is not proportional to the rights that are limited, which would be the personal right to marriage, manifestation of the right to freedom of the individual, the free development of personality, dignity and personal and family privacy. As stated by Judge Hernán Vodanovic in his dissenting vote against Judgment of Nov. 3, 2011 of the Constitutional Court of Chile, there is no doubt that, for its protagonists, marriage between same sex expresses the full realization of the values of freedom, equality and dignity. If it is understood that there is opposition between the exercise of such rights and the protection of the family, a reasonable weighting of the conflict can only give prominence to the dignity and human rights of people over the interests of a social institution, however transcendental and respectable it may be (Tribunal Constitucional [T.C.] [Constitutional Court], 3 november 2011, No. 1881-10-INA, http://www.tribunalconstitucional.cl/wp/ver.php?id=2213).

different genders who want to create a legal relationship has been regulated for centuries through the figure of marriage, an institution that enjoys the constitutional and legal protection which is lacking for same-sex couples, whose relationship is not institutionalized, nor a priori has specific constitutional protection.

This argument, supported by the Spanish Constitutional Court on some occasions, is not strong, as what is specifically being proposed is the possible unconstitutionality of the difference in treatment in the law of the two situations, one institutionalized and the other historically ignored, despite their possible similarities. To say that the difference between both subjective situations is constitutional because at this level they are given a different treatment is tautology and throws little light on the question now raised, which is none other than whether both situations should have been accorded the same treatment (that is, access to the institution of marriage).

The inconsistency of the former approach leads to a second perspective from which to compare the two situations, based on highlighting the real differences between the two relationships; differences which, obviously, are based on the gender of the members of each couple and the consequences resulting from sexual diversity. While relations between persons of different sexes are structurally open to procreation, to the creation of a family in the classical sense and the perpetuation of the species and society, the situation of same-sex domestic partners lacks the structure for this possibility of procreation, which results in an affective and sexual relationship deserving of respect, but is inevitably barren.

From this point of view, there is a substantial difference between the subjective situations that make for the terms of comparison which are at the root of the judgment to be made on the basis of the principles of equality. Heterosexual and homosexual cohabitation are different realities, which could lead us to assert the failure of the basic assumption of the existence of discrimination.

50 Or, as the German Federal Constitutional Court stated, in the combination of genders, which is the point on which the legislator attributes the formation of a personal union which gives these people access to a joint life. It is not about rights and obligations associated with the gender of a person, but the combination of genders (Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 17, 2002, 55-2 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2543, 2002)
However, the differences between the two situations end in the subjective structure and its consequences.\textsuperscript{52} In all other aspects, namely, cohabitation and affective-sexual component, in the intention of creating a relevant legal union, the stability or instability of the relationship, mutual help and support between the partners, the similarity of homosexual unions with respect to traditional marriage is remarkable, and hence is not unreasonable to consider that both situations are if not identical, they are at least similar\textsuperscript{53} and, therefore, it is necessary to pursue the judgment in the light of the principle of equality.

In this sense, it is curious to note that “[W]hile the parties have not explicitly addressed the issue whether the applicants were in a relevantly similar situation to different-sex couples, the Court would start from the premise that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship”.\textsuperscript{54} Thus, the Court dispenses the appellants from having to prove the similarity of the two situations and offers fast-track agreement to study the basic subject, namely whether the differences in legal treatment are justified.

75.1 final paragraph and 144 of the French Civil Code [C.Civ]. Court of Cassation which curiously had expressly stated the heterosexuality of marriage under French law, determining the nullity of marriage between two persons of the same sex (Cass. 1e civ., Mar. 13, 2007, arrêt No. 511, http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_n_9963.html). The French Constitutional Court states that “[T]he principle of equality does not prevent the legislator from settling different situations in different ways, or from derogating from equality for the general interest, provided that in both cases the difference in treatment that results is either in direct relationship with the subject of the law established thereby” (Id. at 9). This implies that we are facing different situations, although the French Constitutional Court does not specify the reasons for the difference on which it bases the different legal differences. See also the Judgment of May 23, 2006 of the Constitutional Court of Costa Rica, which states that the legal requirement to gender diversity for marriage does not violate the principle of equality in the law (Sala Constitucional [Sala Const.] [Constitutional Court], No. 7262, http://200.91.68.20/sciibusqueda/jurisprudencia/jur_repartidor.asp?param1=ABC&param2=2%20&%20param3=FECHA&param4=DESC, last visited Feb. 29, 2012).

\textsuperscript{52} Contra CARLOS MARTÍNEZ DE AGUIRRE & PEDRO DE PABLO, CONSTITUCIÓN, DERECHO AL MATRIMONIO Y UNIONES ENTRE PERSONAS DEL MISMO SEXO 48-50 (Rialp ed., 2007) (giving various studies and reports that reflect the increased volatility and lower level of loyalty that would characterize the pattern of homosexual cohabitation).

\textsuperscript{53} It is the position taken by the Court of Arbitration of Belgium, which examines the constitutionality of the law of Feb. 13, 2003 and which states that, taking marriage as an institution whose primary purpose is the creation of durable community of life between two people and whose effects are regulated by law, the difference between people who wish to form such a community of life with persons of the opposite sex and, on the other hand, persons who wish to do the same with persons of the same sex is not such as to exclude the latter group from the possibility of marriage (Cour d’arbitrage [C.A.] [from Mai 7, 2007, Cour constitutionnelle] [Constitutional Court] Ruling No. 159, Oct. 20, 2004, http://www.const-court.be/public/f/2004/2004-159f.pdf). In a similar sense, the German Constitutional Court Judgment of July 21, 2010 (in terms of inheritance tax) argues that special protection of marriage under article 6.1 of the German Constitution does not require other forms of cohabitation be treated as inferior (BVerfG July 21, 2010, 63 NJW 2783 (§ 91), 2010). In other words, it is understood that the protection of marriage is a separate issue from the treatment accorded to registered partners (Id. § 92).

\textsuperscript{54} Schalk and Kopf § 99.
2. Justification of different treatment

Supported by the European Court of Human Rights, the similarity between the two legal situations, should the difference in normative treatment between the two types of relationships arise, is objective and reasonable. In particular, if it can be argued that the circumscription of marriage to only one of those situations (that of different-sex cohabiting partners) does not imply any discrimination whatsoever, as such differing normative treatment responds to a legitimate objective and as there is proportionality between the measure, the result produced and the intended purpose.

The denial of such a statement is the argument developed by the appellants in Schalk and Kopf, in which they invoke two-fold discrimination (Paragraphs 65 and 100): first, by not giving them access to marriage under Austrian law, and secondly, by not providing alternative means of legal recognition of their union until the year that the court should dictate its sentence, the year when the Registered Partnership Act came into force.

Given the potential problems arising from the interpretation of Article 12 of the ECHR when regulating the right to marry, the appellants seek to gain access to the institution through Article 14 ECHR in conjunction with Article 8 ECHR, so that the protection of the right to private and family life contained in the latter would allow people of the same sex, for the sake of respect for the equality established in Article 14, access to marriage or, failing that, to a regime of equal protection, even when articulated through a different, newly-coined institution.

The European Court of Human Rights states that it does not share this approach (Paragraph 101) but, however, does not adequately explain the reasons for its dissent. In particular there is no analysis the difference in treatment introduced by Austrian law even in light of the judgment of proportionality referred to in Section 96 of the Judgment itself (“Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised”).

Viewed from forgotten perspective of the legitimate aim, it seems clear that if the Austrian legislature restricted marriage to that between one man and one woman and gave protection only to heterosexual and stable relationships, this was due to the wish to protect those relationships structurally oriented to the perpetuation of the species and
the education of children\textsuperscript{55}, thus linking it with the vision of marriage as the basis of the family and of the family as the basic building-block in society.

The sexual diversity that has historically characterized marriage responds to the sexual complementariness of the human being and is justified because marriage is viewed as structurally open to procreation\textsuperscript{56} and care and education of the offspring based on different and complementary roles. This is what allows us to understand that marriage is for two people (which blocks the marriage of three or more)\textsuperscript{57} and is celebrated between man and woman.

On the contrary, same-sex couples lack this potential opening to procreation and therefore do not contribute to the perpetuation of the species,\textsuperscript{58} a socially relevant legal good that in itself\textsuperscript{59} justifies the regulation of the right to marriage and its protection at both a civil and constitutional level.

\textsuperscript{55}As noted in Ruling 359/2009 of July 9, 2009 of the Portuguese Constitutional Court “[T]he link that it is possible to meaningfully make between marriage and procreation operates at the level of the fact that the former is considered to be a social institution via which the State resorts to the potential of the law to disseminate certain values in society -in the present case, those values according to which on the one hand marriage is a specific means of involving one generation in the creation of the next, and on the other the only means of that kind which ensures that a child enjoys the right to know and be educated by his/her biological parents”, for which reason “[I]t seems clear that redefining marriage as a union of two persons, whatever their gender, makes this framework of references impossible” (Acordão Tribunal Constitucional, First Chamber, 9 july 2009, Case No. 779/07, paragraph 12, english version available at \url{www.tribunalconstitucional.pt/tc/acordaos/20090359.html}).

\textsuperscript{56}Not contradicted, despite what it seems, when authorizing the marriage of someone who is impotent because, as states Luis I. Arechederra, El matrimonio es heterosexual, ACTUALIDAD JURÍDICA ARANZADI, Feb. 24, 2005, at 8, although the marriage as “[T]he institutionalization of the transmission of life does not seem to conform well with the validity of the marriage of an impotent man” and “Even today the Civil Code seems to ignore procreation as the basis for marriage”, in reality this is not so, as “[I]mpotence is the failure of heterosexuality, but not its denial.”

\textsuperscript{57}Thus, in Canada, the Civil Marriage Act of July 20, 2005 restated the definition of civil marriage, now understood as “[T]he lawful union of two persons to the exclusion of all others” (Civil Marriage Act, 33 S.C. Sect. 2 (2005) LexisNexis), namely, excluding the note of heterosexuality but also polygamy.

\textsuperscript{58}This is the argument on which the German Federal Constitutional Court based its Judgment on July 17, 2002, which examines the constitutionality of the Lebenspartnerschaftsgesetz, on appealing because of a possible violation of Article 6 § 1 of the Basic Law of Germany (GRUNDEGEBETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDEGEBETZ] [GG], May 23, 1949, BGBl. 1), which guarantees the right to form a family and a marriage, and because of violation of the principle of equality (55-2 NJW 2543). The Italian Constitutional Court, by resolving two questions on constitutionality posed in 2009, has emphasized, in Section 9, the “constitutional relevance attributed to the legitimate family and the (potential) reproductive purpose of marriage, which are what differentiate it form a homosexual union” (Corte Cost., 14 april 2010, n. 138, Giur. it. 2011, I, 537).

\textsuperscript{59}In contrast, the Massachusetts Supreme Judicial Decision Court, on Nov. 18, 2003 (Goodridge v. Dept. of Public Health, 2003 Mass. LEXIS 814) considers that the guarantees of equality and liberty protected by the Constitution of the State make limitation of marriage to heterosexuals unconstitutional, because there is no rational basis to support it (in the opinion of the Court, the openness to procreation would not be such ) and, therefore, to deprive two persons of the same sex who wish to marry the protection, benefits and obligations conferred by civil marriage. As already stated by the Hawai'i Supreme Court in its decision of May 5, 1993 (Baehr v. Lewin, 1993 Haw. LEXIS 26) accordingly, “sex is a ‘suspect category’ for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution and that Hawaii Revised Statutes § 572-1 (1985) - the section of the Hawaii Marriage Law enumerating the requisites of a valid marriage contract - is subject to the ‘strict scrutiny’ test. It therefore follows, and we so hold, that HRS § 572-1 is presumed to be unconstitutional unless Lewin, as an agent of the State of
The legitimate aim pursued by the difference in treatment lies, therefore, in the interest the institution of marriage has for society, thus constituted in its subjective dimension. However, this argument is not developed by the European Court of Human Rights, which, in Section 97 merely states as a counterargument to its doctrine according to which “[L]ike differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification”, that “[O]n the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy”.

Similarly, nor does the Judgment of the European Court directly address the question of whether it respects the so-called judgment of proportionality, due to which it must be considered that there is no disproportion between the measures taken, the intended purpose and the result produced. To respect this principle is necessary that the legal measure adopted (in this case, the rejection of same-sex marriage and no alternative regulation of such cohabitation) does not involve the unnecessary or excessively costly sacrifice of other values or interests with rights to constitutional protection.

Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights.

An interest which explains that the Hungarian Constitution regulates marriage within its “Alapvetés” (Basic Stipulations) and not in “Szabadság és Felelősség” (Freedom and Responsibility) (see supra note 16); that Lithuania places it not in the Second Title “Žmogus ir Valstybė” (The Human Being and The State), which includes the rights of the individual, but in the Third Title “Visuomenė ir Valstybė” (Society and The State) (see supra note 19); or that the Polish Constitution places it in Chapter I “Rzeczpospolita” (The Republic) and not in Chapter II “Wolności, Prawa i Obowiązki Człowieka i Obywatela” ( Freedoms, Rights and Obligations of Persons and Citizens) (see supra note 20). An interest that also leads to Article 7 of the Constitution of the State of Baja California, Mexico, to recognize and protect the institution of marriage as “[T]he right of society” and not as an individual right of the people (Const. B.C., as amended, 66 P.O.B.C. No.23, 16 de Agosto de 1953). With utmost restraint and technical rigor, says the Portuguese Constitutional Court in its Ruling 359/2009 of July 9, 2009, that if marriage is understood as a social institution based on the appropriate role in the reproduction of society, it may make sense reserve marriage to persons of different sex. Now, if a conception of marriage is adopted as a purely private relationship between two adults, without any projection on the reproduction of society, the exclusion of marriage between persons of the same sex would necessarily be discriminatory (A.T.C. 9 July 2009, Case No. 779/07, paragraph 14).

The fact that marriage should be reworded and its individualistic perspective exalted is explained by the lack of teleological vigor in marriage as underlined in his day by LUIS I. ARECHEDEERRA, EL CONSENTIMIENTO MATRIMONIAL 19 (Servicio Publicaciones Universidad de Navarra ed.,1989). This diagnosis is what leads Carlos Martínez de Aguirre, Nuevas Perspectivas sobre el Derecho de Familia: perplejidades, claves y paradojas, in MATRIMONIO Y ADOPCIÓN POR PERSONAS DEL MISMO SEXO 479, 489-90 (Consejo General del Poder Judicial ed., 2006), to propose the recuperation of this teleological vigor as a solution: to attempt to understand the reasons why and what for of legal regulation, beyond mere historical or cultural inertia. “Think what is the reason for which, for centuries, Society and the Law invest time and effort to regulate this type of relationship, besides providing them with a very specific configuration and a dense legal structure.”

As noted by Christina M. Cerna, Schalk & Kopf v. Austria (Eur. Ct. H.R.) -- Introductory Note, 5 INTERNATIONAL LEGAL MATERIALS 1302-24 (2010), this is the argument that Judge Walker used to reject Proposition 8: the State should prove that the restriction of the right to marry responds to a superior state interest, but the Court found no such interest, and concluded, therefore, that there was a violation of the
The recognition by States of the *ius connubii* not only responds to the social reproductive and educational interest of the offspring as described above, but also the desire to ensure the right of people to form a life community in which to freely develop their personality and form a new family. Its configuration as a fundamental right of the people advocates this individualist conception of the right to marry.

However, the modern view of the family is not limited to what is traditional, based on a heterosexual marriage. The European Court of Human Rights itself, in an about-turn on its earlier doctrine, admits in its Judgment of June 24, 2010 that coexistence between people of the same sex is at the present time a manifestation not only the right to privacy but also the right to family life, both upheld in Article 8 ECHR.

Thus, in its paragraph 94 it states that it is artificial “[T]o maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8”. It bases its assertion on the evolution of social attitudes regarding same-sex couples and their inclusion within the concept of family, as can be observed in many Member States as well as some provisions of European Community Law (Article 4.3 European Council Directive of 22 September 2003 on the right to family reunification and Article 2 Directive of the European Parliament and Council of 29 April 2004 concerns the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States), which now leads it

---

63 Or it does not respond at all, as noted in Ruling 121/2010, of Apr. 8, 2010, of the Portuguese Constitutional Court, which argued that reproductive potentiality did not form part of the preexisting concept of heterosexual marriage (Acordão Trib. Const., Plenum, 9 july 2009, Case No. 192/2010, paragraph 21, english version available at www.tribunalconstitucional.pt/tc/acordaos/20100121.html).

64 Included in the Decision of May 10, 2001, where it was understood that lasting homosexual relationships between two men did not fall within the right to respect for family life, as it was a matter in which there was no widely-shared denominator and in which the States enjoyed a broad margin of appreciation (Mata Estévez v. Spain (dec.), 2001-VI Eur. Ct. H.R. 311) (on denial of a survivor's pension to surviving member of the gay couple).

65 For the French Constitutional Court, “[C]onsidering, on the one hand, that the right to lead a normal family life stems from the tenth subparagraph of the Preamble to the Constitution of 1946: “The Nation shall provide the individual and the family with the conditions necessary to their development”; that the final subparagraph of Article 75 and Article 144 of the Civil Code do not impede the liberty of same-sex couples to cohabit in the conditions set out in Article 515-8 of the Code, or to benefit from the legal framework of a PACS civil solidarity pact governed by Articles 515-1 et seq.; that the right to lead a normal family life does not imply the right to marry for couples of the same sex; that, consequently, the provisions criticized do not infringe the right to lead a normal family life (*Mme Corinne*, CC decision No. 2010-92 QPC, Jan. 28, 2011, paragraph 8).


to reject the existence of the broad margin of appreciation of the States which it previously accepted on the matter.

Having admitted the family nature of stable and lasting coexistence between people of the same sex, it seems inevitable to recognize the duty of States to grant legal protection to these relationships to make such a manifestation of the right to family life effective. If no such protection existed, it would mean the unnecessary and onerous sacrifice of a right included in the ECHR, in an attempt to preserve the social interest that has traditionally underlain the institution of marriage. That is to say, state regulation would not surpass the judgment of proportionality which, however, would be respected when it grants protection through marriage or, as equally valid alternative, through the figure of registered partnerships.

The Judgment reached in Schalk and Kopf considers, however, that with the diversity established by Austrian law (i.e. denying marriage to gay couples and not providing up to January 1, 2010 the union as registered partnerships) the principle of equality of Article 14 in conjunction with Article 8 of the Convention is not violated.

The reason for this decision, approved by 4 votes to 3 which was the object of joint dissenting opinion of the three discrepant judges, is none other than the purely temporal: it is in the June 24, 2010 Judgment in which the Court denied the margin of appreciation of the States when considering homosexual coexistence as family life.

---

68 This is the view of the Colombian Constitutional Court in its Judgment of July 26, 2011, in which, although it supports the constitutionality of the circumscription of marriage to couples made up of persons of opposite sex, states that couples consisting of people of the same sex are also family models that are due constitutional protection, so it urges the legislator to create, within a period of two years, the figure through which legal recognition would be institutionalized for unions of persons of the same gender which intend to be lasting (Corte Constitucional [C.C.], July 26, 2011, Sentencia C-577/11, http://www.corteconstitucional.gov.co/inicio/SENTENCIAS%20DE%20CONSTITUCIONALIDAD%20DE%20INTERESTS11.php). This is the meaning of the provisions of Sect. 91-95 and implicitly in Sect. 102 and 103 of Schalk and Kopf (June 24, 2010, App. No. 30141/04). More subtly, the Judgment of May 23, 2006, of the Constitutional Court of Costa Rica rejected the non-constitutionality of the requirement of heterosexuality in marriage and said that the problem is the absence of regulations on the personal and patrimonial effects of the partners in same-sex unions, and that this regulation must be so established as it is "an urgent necessity for legal security and for justice (Sala Constit., No. 7262, 23 May 2006)."

69 If heterosexuality were suppressed, marriage would be reduced to a relationship with community of life established freely, unconditionally and formally between two people and would create a binding legal effect to both (Trib. Const., Plenum, 8 April 2010, n. 121, paragraph 22) (Port.). Or, as stated in article 146 of the Civil Code for the Federal District of Mexico, "[M]atrimonio es la unión libre de dos personas para realizar la comunidad de vida, en donde ambos se procuran respeto, igualdad y ayuda mutua ("[M]arriage is the free union of two people for community life, where both give respect, equality and mutual assistance") (C.C.F. [Federal Civil Code], as amended, art. 146, Gaceta Oficial del Distrito Federal [G.O.], 18 de Agosto de 2011, available at http://www.aldf.gob.mx/codigos-107-4.html)."

70 Although in reality, the argument was already implicit in Kozak (Mar. 2, 2010, App. No. 13102/02) which states in its Section 98 that the Convention is a living instrument, to be interpreted in the light of present-day conditions and "[T]he State, in its choice of means designed to protect the family and secure, as required by Article 8, respect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life".
Until then, the lack of a sufficient consensus in the European Court allowed Austria to refuse protection for such a model of coexistence without that legal decision violating the judgment of proportionality, which therefore was respected (sections 105 and 106).

Although the Judgment does not expressly say so, an *a contrario* reading of sections 102 to 110 shows that at present such a regulatory vacuum would be a violation of Article 14 in conjunction with Article 8 and the right to family life. Consequently, it appears that affective relationships of coexistence and mutual assistance between same-sex partners cannot be ignored by the state legislator, as this would preclude the exercise of the right to family life, hindering the free development of one’s personality\(^{71}\) and affecting the true dignity of the person, the cornerstone for the whole system of fundamental rights and the modern interpretation of family law.\(^{72}\)

This being the case, the institution of marriage would channel the satisfaction of social interest in the perpetuation of society and education of new members, while simultaneously managing to support the free development of personality of those who choose to contract this union. On the other hand, the figure of registered partnerships or other similar ones for same-sex couples would be permitted in order to satisfy the free development of personality of those who form such a union, would normalize and legalize their union and grant it the protection which it is due as a family model in the current meaning of the term. The two institutions would, then, be compatible and their coexistence would offer a solution respecting the combination of Articles 8 and 14 of the ECHR.

The European Court of Human Rights recognizes that it corresponds to the national legislature to determine the degree of protection of the two situations, because the fact that a State decides to offer protection to same-sex couples with alternative means of recognition does not imply that it is obligated to grant them a status that, despite the differences in name, corresponds to that of marriage in every aspect,\(^{73}\) and stipulates a certain margin of appreciation on the matter,\(^{74}\) without implying any

\(^{71}\) Corte Cost., 14 april 2010, n. 138, Giur. it. 2011, I, 537, section 8 (It.), considers that the inviolable rights of man must be guaranteed and recognized not only as an individual but also in social formations where his personality is developed. But despite admitting that social formations may include homosexual unions, which thus can obtain legal recognition and rights and duties attendant, it does not imply that the desire for such recognition would be met only by likening homosexual unions with marriage.

\(^{72}\) Trib. Const., Plenum, 8 april 2010, n. 121, para. 19 (Port.).

\(^{73}\) A different question is whether it is legitimate to accept same-sex marriage but not fully apply legal rules identical to heterosexual marriage, as occurs in Portugal (Article 3 Lei No. 9/2010, de 31 de Maio de 2010, Diário da República [D. Rep.], 105: 1853, 31 maio 2010) where adoption is not permitted for married same-sex persons. For Luis M. Díez-Picazo, *En torno al matrimonio entre personas del mismo sexo*, 2 INDRET (Apr. 24, 2007), [http://www.indret.com/pdf/420_es.pdf](http://www.indret.com/pdf/420_es.pdf), declaring as unconstitutional the requirement to difference of gender implies that marriage between same sex couples must be granted the same legal status as traditional marriage; “otherwise a declaration of unconstitutionality based on the discrimination argument would not make sense”.

\(^{74}\) Schalk and Kopf § 108.
discrimination whatsoever.\textsuperscript{75} At most, the violation of the principle of equality before the law might be considered, when there are specific unjustified differences in treatment of both.\textsuperscript{76}

B. The right to contract marriage in the ECHR framework

1. Present and evolution

On an alleged violation of the right to marry referred to in Article 12 ECHR raised by the complainants, whose wording does not necessarily imply “[T]hat a man could only marry a woman and vice versa”,\textsuperscript{77} the European Court points outs that, while an isolated interpretation of the rule could permit a defense of said pretension, both the literal and systematic interpretation of the whole Convention allow us to understand that the reference to men and women is deliberate, in as far as the right is attributed in a correlative way. This argument would be confirmed by the interpretation of the article in its historical context, which clearly referred to unions between persons of different sex.

Nevertheless, as they were aware of this, the appellants based their claim “[O]n the Court’s case-law according to which the Convention is a living instrument which is to be interpreted in present-day conditions”, which would lead to take Article 12 as a provision that would grant same-sex couples access to marriage and force the member States to provide for such access in their national laws.\textsuperscript{78}

The Court admits the significant social changes in the institution of marriage in recent years but, despite everything, understands that there is no European consensus regarding same-sex marriage, as very few countries accept it. It is true that Article 9 of

\textsuperscript{75} In contrast, the Judgment of May 15, 2008 of the California Supreme Court (In re Marriage Cases, 43 Cal.4th 757 Lexis Nexis) considers that, despite the legal admission of the contract of domestic partnership and despite the concession to the contracting parties of essentially the same rights as marriage provides for heterosexual couples, the non-designation of such a relationship as marriage violates the California Constitution. A similar position was taken by the Ontario Court of Appeal (Halpern v. Canada (Attorney General), [2003] O.J. 2268 Lexis/Nexis (ONCA June 10, 2003) para. 102-108).

\textsuperscript{76} BVerfG July 7, 2009, \url{http://www.bverfg.de/entscheidungen/rs20090707_1bvr116407.html} (Ger.) (relating to the regulation of pensions for widows of public sector employees) and BVerfG July 21, 2010, 63 NJW 2783 (2010) (relating to inheritance tax). It is the argument upheld in the Judgment of the Court of Justice of the European Union of May 10, 2011 (Case C-147/08, Römer v. Freie und Hansestadt Hamburg, \url{http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0147:EN:HTML} (2011)). See also S.T.C. Nov. 15, 1990 (R.T.C., No. 184, p. 434) (Spain) and S.T.C. Dec. 11, 1992 (R.T.C., No. 222, p. 1016) (Spain) (when comparing the differences in treatment between two realities defined as not equivalent for all purposes; specifically, marriage and cohabitation, in this case not only homosexual).

\textsuperscript{77} Schalk and Kopf § 55.

\textsuperscript{78} Id. § 57
the Charter of Fundamental Rights of the European Union\textsuperscript{79} adopts a different text\textsuperscript{80} from Article 12, the wording with which deliberately grants a more open character to the right to marriage and thus leaves an opening for the acceptance of same-sex marriage. But it is also true that the Charter itself is inclusive, but in no case is it obligatory, because in the end it leaves the regulation of the matter in the hands of the legislative bodies of the Member States.\textsuperscript{81} Therefore it is understood that, unlike what occurred in regard to the marriage of transsexuals, where the convergence of standards regarding marriage of transsexuals in their assigned gender led the Court to modify its previous case law and to require signatory states to allow such marriages,\textsuperscript{82} on the subject of same-sex marriage neither this convergence of positions nor this consensus among the several States is found. The conclusion is that Article 12 ECHR cannot be applied as an imposition for same-sex


\textsuperscript{80} Article 9: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights” (2007 O.J. (C 303/01) 4). In the Explanation to said Article 9, having recognized that it is based on article 12 ECHR, it immediately adds that, “[T]he wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides” (2007 O.J. (C 303/02) 21). Arguments repeated in Article 52 paragraph 3 of the Charter, which states that “[I]nsofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection” (2007 O.J. (C 303/01) 13), and later, in the Explanation of said Article 52, stating that this article 9 “[C]overs the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation” (2007 O.J. (C 303/02) 34).

\textsuperscript{81} This is the approach found in Reference re Same-Sex Marriage, of Dec. 9, 2004 (Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79) (Can.), in which the Federal Supreme Court of Canada rejected the doctrine contained in the case Hyde v. Hyde, 1866, which stated that “[M]arriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others” (cited at § 21), arguing that Hyde case referred to a society with shared social values in which it was thought that marriage and religion are inseparable, thus the doctrine is not applicable in as much as Canada today is a pluralistic society and marriage, from the perspective of the State, a civil institution (Id. § 22). Said report avoided ruling on the constitutionality of the requirement to gender diversity in marriage, although it did consider that an eventual legal reform supporting marriage between same sex partners would not be contrary to the Charter of Rights (Id. § 73.2).

marriage. The admission or prohibition shall remain with national legislative bodies, whose criteria can not be replaced by the Court.\textsuperscript{83}

The Court's position is interesting not only because of the arguments put forward to resolve the complaint raised but also because of the openings it leaves. This is because the sociological and evolutive argument is a double-edged sword: it both proclaims the inappropriateness of any imposition of homosexual marriage at present, and admits that in the future this imposition may be a fact. The ductility of the concept of marriage and of the interpretation of Article 12 ECHR leaves the future of what is called gay marriage at the mercy of a sociological argument and a legislative context. To be more precise, it is up to the Court to decide when social,\textsuperscript{84} institutional\textsuperscript{85} and legislative acceptance of such marriages reaches a level of inflection at which margin of appreciation of States disappears and what was only possible becomes proper.\textsuperscript{86}

For the moment, the only thing the Court has recognized is that “[R]egard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex”.\textsuperscript{87} Only the future can tell whether there will be an appropriate jurisprudential change similar to that made on the subject of transsexualism.

What we now have is the concurring opinion issued by Judge Malinverni, joined by Judge Kovler, in which both expressed their dissatisfaction with some of the arguments used to justify the absence of a violation of article 12 ECHR. This opposition denies that said article leaves room for marriage between two men or two women, since the application of the general rule on the interpretation of international treaties requires that every Treaty be interpreted “[I]n good faith in accordance with the ordinary

\textsuperscript{83} Schalk and Kopf § 62.

\textsuperscript{84} As reflected in the so-called Eurobarometer. In this sense, we must highlight Standard Eurobarometer 66, Public Opinion in the European Union, published in December 2006, which indicated that 44 percent of citizens in the whole of the European Union accepted gay marriage, whereas 49 percent opposed it (at p. 43-46 and 461-62, http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_en.htm).


\textsuperscript{86} Unless, as the European Court itself has noted on occasion, it be admitted that, “the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field - matrimony - which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit” (F. v. Switzerland, Dec. 18, 1987, App. No. 11329/85, http://www.echr.coe.int/hudoc, paragraph 33).

\textsuperscript{87} Schalk and Kopf § 62.
meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, 88 which, in the opinion of the Judges mentioned, necessarily circumscribes the exercise of the right to marriage to that between persons of opposite sexes.

While admitting that the Convention is a living instrument which must be interpreted in a ‘contemporary’ manner, in the light of present-day conditions and there have been major social changes in the institution of marriage since the adoption of the Convention, however these Judges understand that the Court cannot, by means of an evolutive interpretation, “[D]erive from [it] a right that was not included therein at the outset”. 89

2. Is there a limit to the reform of the right to contract marriage?

Accepting the evolutive argument means the existence of an essential content on the right to marry, as an untouchable area that permits the identification of the figure, distinguishing it from similar institutions and explains its legal status. This is an essential content which, on the contrary, is specifically referred to in some previous judgments of the European Court of Human Rights, in which it asserted that “[T]he limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired”. 90 In as much as these limitations that cannot affect the essence of law are identified with conditions that are embodied in norms both of form (principally, on the public nature and solemnity of marriage) and of content (on the subject of capacity, consent and certain impediments), 91 the essence of the right seems to be identified with entailed freedom, which is an imprecise approach to the problem at hand.

This is precisely the main criticism formulated in some countries by opponents of legal reform in favor of same-sex marriage. In Spain, Portugal and Italy the unconstitutionality of the reform of marriage has been brought to the respective Constitutional Courts, as it violates the essential content of the right to marriage (which

89 This position is supported by the Constitutional Court of Chile, in its Judgment of Nov. 3, 2011, upon being required by the Santiago Appeals Court to give a pronouncement on the applicability or inapplicability due to unconstitutionality of article 102 of the Chilean Civil Code (T.C., 3 November 2011, No. 1881-10-INA).
includes the heterosexual requirement)\textsuperscript{92} and also, in the first two of the above-mentioned countries of the institutional guarantee of marriage contained in the respective constitutional precepts.

However, the Portuguese Constitutional Court did not perceive such violations and its Spanish counterpart (which six years later still has not decided) provides arguments to follow the same procedure. The reason in both cases is the recognition that neither the concepts nor the judicial rules that use them must be set in stone, indeed, on the contrary, they must be enlivened by legislative action in order to adapt to the new demands of the society in which are applied.\textsuperscript{93}

This need for adaptation would be present even when dealing with what is considered essential content.\textsuperscript{94} Having defined this as “[T]hat part of content that is unavoidably necessary to permit its holder to satisfy the interests for whose attainment the right is granted” and “[T]hat part of the content of a right without which this would lose its distinctiveness or, in other words, what makes it recognizable as a right of a particular type” (Judgment of April 8, 1981), the Spanish Constitutional Court clarifies that “[A]ll this refers to the particular moment for each case and to the conditions inherent to democratic societies, when dealing with constitutional rights”.

By contrast, the Italian Constitutional Court stated in its Judgment of April 14, 2010, that while “[I]t is true that the concepts of family and marriage can no longer be considered fixed as they were in the era in which the Constitution came into force, because they are endowed with that ductility proper to constitutional principles and thus are interpreted taking into account not only the transformations of ordinance but also the evolution of society and customs”, in spite of which “[T]his interpretation cannot however go so far as to affect the core of the norm, changing it in such a way as to include phenomena and controversies which, in no way whatsoever were considered when it was emitted”.\textsuperscript{95} This is what would occur with same-sex marriage, a subject that was not contemplated when the Italian Constitution was approved.\textsuperscript{96} Therefore it can be

\textsuperscript{92} 55-2 NJW 2543 § 79(Ger.) (stating that “marriage can only be contracted with a person of the opposite sex, because gender difference is inherent as an essential feature in marriage”).

\textsuperscript{93} In Reference re Same-Sex Marriage, the Supreme Court of Canada notes that “[T]he ‘frozen concepts’ reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life” (Reference re Same-Sex Marriage, at § 22).

\textsuperscript{94} As stated by Luis I. Arechederra, supra note 56, at 7, the essential content of a right can be seen from a dual perspective: as a supra-cultural structure, fixed and unalterable in time; or as the object of a cultural transformation over time, taking as essential content those basic features without which the right is no longer socially recognized. For the author, it is this second conception that is anchored in Art. 53.1 of the Spanish Constitution (C.E., B.O.E. n. 311, Dec. 29, 1978), which does not prevent him from stating that, in his opinion, the loss of heterosexuality would affect essential content.

\textsuperscript{95} Corte Cost., 14 april 2010, n.138, Giur. it. 2011, I, 537 (section 9).

\textsuperscript{96} In much the same way, the German Constitutional Court Judgment of July 17, 2002 (55-2 NJW 2543), when it states that the definition of a lasting union of man and woman is part of the substance of marriage.
said that “[T]his meaning of the constitutional precept cannot be prevailed over hermeneutically, because this would not be a simple re-wording of the system nor a mere interpretative praxis, but rather would imply a creative interpretation”.  

So it seems that the Italian Constitutional Court is heading for an amendment of the Constitution, without which the gay marriage would be constitutionally impossible, regardless of social evolution. In view of this, the European Court, with its perspective on the problem, would be forcing Italy to interpret the rules with a sociological evolutive approach that, not at present, but possibly in the future, could make said constitutional change unnecessary.

The need to adapt to social change is also present in the interpretation of the so-called ‘theory on institutional guarantee’, a theory of German origin which seeks to justify that civil regulation cannot distort the concept of marriage that was taken into account by the constituent power of each State when granting constitutional protection to the corresponding right. However, “[T]he institutional guarantee does not ensure a specific content ... fixed forever, rather the preservation of an institution in terms recognizable for the image offered by social awareness in every time and place” (Spanish Constitutional Court Judgment of July 28, 1981). This, applied to the field of marriage, means that it does not prevent a change in its judicial regime nor in that of concept, as long as the institution continues to be recognizable by the social awareness of every time and place.

Nevertheless I consider that it is a constitutionally open concept, into which the legislator must translate the dominant beliefs on the matter at any given moment; however it does not mean a blank check for the legislator. The ductility highlighted in

as it is protected, regardless of social evolution and the transformations that may occur, and was set out thus by Fundamental Law. This does not mean that the special protection it receives must always mean superior protection to other forms of life in common.

97 *Id.* at para. 9.

98 According to CARLOS MARTÍNEZ DE AGUIRRE & PEDRO DE PABLO, supra note 52, at 124-27, the flexibility which characterizes the institutional guarantee of marriage is limited, however, by the essential content of the fundamental right to marriage, so that the limits imposed by this essential content in regulating the fundamental right also establish limits when it comes to shaping the institution guaranteed; all of which means that, for the author, there is an intangible core that may not be affected by a social evolution in the perception of the institution and the fundamental right.

99 *Contra* Díez-Picazo, supra note 73, at 11, who states that if we take Article 32 of the Spanish Constitution (C.E., B.O.E. n. 311, Dec. 29, 1978) as an institutional guarantee, we must conclude that the constituent body set down a certain image of the institution of marriage, and removed it from the free convenience of the legislator.

100 With the consequent danger, highlighted by José M. Serrano, *La desaparición legal del matrimonio como figura reconocible en el Derecho español*, in MATRIMONIO Y ADOPCIÓN POR PERSONAS DEL MISMO SEXO 365, 380 (Consejo General del Poder Judicial ed., 2006) that the generalization of the malleability of concepts and meanings of the institutions implies that nothing is protected by the Constitution, and that it becomes a useless *flatus vocis*. 
preceding lines does not give power to make arbitrary modifications of the concept of marriage and the fundamental right it involves.

It is true that establishing the legal reform of marriage based on the effective equality of citizens in the free development of their personality and the preservation of freedom on forms of co-habitation would lead to a rejection of any possible limits to *ius connubi* and leave the door open, for example, to endogamy and polygamy/polyandry. Taken to the extreme, such reasoning would lead to free or *à la carte* matrimony.

Using the recognisability argument, however, those other barriers or subjective limits to matrimony are not *a priori* insurmountable, but the hypothetical removal by the legislature demands that these must be characteristics that have already been accepted by society,\(^\text{101}\) sufficiently accepted as to advocate for legal amendment without making the institution of marriage unrecognizable to the social conscience.\(^\text{102}\) It is no longer a question of internal coherence,\(^\text{103}\) but mainly of acceptance and the legal and social assimilation of a certain way of understanding marriage.

This recognisability, social acceptance and consensus on what is understood by marriage and the content of the correlative fundamental right is what is found in the interpretation of the European Court of Human Rights. Such broad interpretation (which otherwise places us on quicksand, and is very subjective and difficult to separate from one’s own convictions, in which the prudence of the judges will be particularly important) results in an apparent fuzziness of concepts: marriage *may be* anything over time, however, at a particular time, it *may be* only what society identifies as marriage, and *must have* a certain form only when the degree of acceptance is such as to accept (indeed, only for the time being) that quality as inherent to marriage. That is, social evolution and growing legal acceptance expand the possibilities of marriage, by blurring the essential content; and social consensus, through ostensible recognisability, is what re-establishes the essential content of the right to marry.

---

101 As stated by Javier Seoane, *Matrimonio, Familia y Constitución, in MATRIMONIO Y ADOPCIÓN POR PERSONAS DEL MISMO SEXO* 21, 101 (Consejo General del Poder Judicial ed., 2006) the intention of constituent body was to protect marriage as it was understood at all times, and that it corresponds to society, through democratic legislative process, to decide at any given moment what is understood by marriage, thus justifying the intervention of constitutional jurisdiction only in extreme cases.

102 As stated in the Judgment of the Spanish Constitutional Court of Mar. 27, 2003, giving its own reiterated doctrine, “[T]he only clearly discernible prohibition is the clear and distinct break with the commonly accepted image of the institution, which, regarding legal formation, is determined to a certain extent by the norms which, at any given time, regulate it and due to the application of the same” (S.T.C. Mar. 27, 2003, R.T.C., No. 62, p. 1016).

103 According to which the mentioned impediments to marriage would be abolishable because do monogamy and exogamy make sense in a judicial business in which both the affection-sexual component of relationships and the reproductive one would not belong nowadays to the essence of the resulting relationship?
Finally, Sentence 24 June 2010 infers that there is no previous and immutable content (or that, if there is heterosexuality is not part of it), but it is essential that it conforms to that social shaping that makes it recognizable. A recognisability which is already found in marriage between people of different sexes, but that nevertheless does not have enough acceptance in national legislations (“there is no European consensus regarding same-sex marriage”) to abolish the margin of appreciation in each country and to be imposed on those national legislations which are reticent, on pain of having to bear the imposition of equitable satisfactions with which compensate people whose rights had been violated (articles 41 and 46 of the Convention).

Consequently, in neither the Convention of Rome (1950) nor the Charter of Strasbourg (2007) can it be inferred that there is a fundamental right to marriage between two people regardless of gender. Rather, it seems that the fundamental right is in the right of men and women to marry each other and that what is made possible by the European Union is that Member States can freely extend this configuration of marriage. This extension is not prohibited by the Convention, according to the Judgment of the European Court of Human Rights of June 24, 2010, as it pertains to the margin of appreciation of the States. This margin may perhaps disappear in the future if the legislative panorama of countries on this matter is altered, but, until that time comes, a legal reform of the subjective realm of marriage based on the principle of nondiscrimination cannot be imposed.

104 Thus we find the interaction between systems of protection of fundamental rights, both nationally and internationally, and the tendency to set up one single legal body for guarantee, Claudio Nash, *Relación entre el sistema constitucional e internacional en materia de derechos humanos*, http://www.cdh.uchile.cl/articulos/Nash/Charla_relacion_derecho_internacional-derecho_constitucional.pdf (last visited Feb. 29, 2012), who precisely uses the subject of same-sex marriage and the Judgment of the European Court of Human Rights, *Schalk and Kopf v. Austria* to support this interaction.

105 Thus, this answers the question posed by Cerna, *supra* note 62 at 1303, who, with reference to the decision of Judge Vaughn Walker on the same subject (Judge Walker's Aug. 4, 2010, federal district court decision *Perry v. Schwarzenegger*), states: should there not be an “[E]xplicit requirement that domestic laws should facilitate such [same-sex] marriage” if the right to same-sex marriage were a human right? The answer to that question goes on to assert that no such right exists, at least for now.