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Same-Sex Couples in the  
European Union  
Citizenship, Movement and Residence

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# Abbreviations

CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EC Treaty	European Community Treaty
EEA	European Economic Area
EU	European Union
IGC	Inter Governmental Conference (on a Draft Constitution for the EU)
ILGA	International Lesbian and Gay Association
TEU	Treaty on European Union

# 1 Introduction

## 1.1 General

Once upon a time inter-racial marriages were unthinkable, children born out of wedlock were lawfully discriminated against and women were bound to home and hearth. According to human rights norms these days are now behind us. Women shall have equal opportunities to men. No distinction shall be drawn between children because of circumstances surrounding their birth. Race is not an impediment to marriage – but sex is.

It has to be acknowledged that progress has been made. In the last couple of decades the protection of rights of same-sex couples has widened considerably. No longer is the right to marry exclusive to “man and woman” throughout the world. In the European Union<sup>1</sup> two Member States, The Netherlands and Belgium, now offer legal marriage to same-sex couples.<sup>2</sup> Outside the EU, Ontario’s Court of Appeals ruled on June 10<sup>th</sup> 2003, in the case of *Halpern et. al. v. Attorney General of Canada et. al.* that it is unconstitutional to deny gays and lesbians the same right as heterosexuals to marry.<sup>3</sup> The Massachusetts Supreme Judicial Court came to a corresponding conclusion on November 18<sup>th</sup> 2003, in the case of *Goodridge & Others v. Department of Public Health and Another*.<sup>4</sup> All over Europe same-sex couples have established homes and many are raising children. These families are protected by a variety of instruments and actors, both national and international, although the level of protection varies greatly.

## 1.2 Scope and Limitations

The purpose of this thesis is to examine the actual situation of same-sex couples that are citizens of the EU, especially when they exercise their right to move and reside freely within that territory. Numerous obstacles that these couples face will be identified and consideration given to what has to be done to overcome them from a human rights perspective.

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<sup>1</sup> Henceforth referred to as the EU.

<sup>2</sup> Legal marriage is open to same-sex couples in the Netherlands as of 1<sup>st</sup> of April 2001, Act of 21 December 2000 amending Book 1 of the Civil Code, and in Belgium as of 1<sup>st</sup> of June 2003, Law of 13 February 2003 opening up marriage to persons of the same sex and modifying certain provisions of the Civil Code.

<sup>3</sup> Since then the federal government of Canada has announced that it will move to include gay and lesbian couples in the official definition of marriage (the Court reformulated the common law definition of marriage as “the voluntary union for life of two persons to the exclusion of all others”), changes to legislation are expected in 2004.

<sup>4</sup> The Court stayed entry of the judgment for 180 days to permit the Legislature to take appropriate action.

Although emphasis is placed on Europe and specifically the EU references will be made to other national, regional and universal instruments and bodies where appropriate for comparative purposes. Similarly the thesis is premised mainly on human rights law and approaches while analyzing EU law and referring to private and public international law where necessary. Lastly analysis of the subject is restricted to adults in relationships although rights of homosexual individuals feature as well and mention is made of the relationship between parent and child.

The right to marry, found a family, respect for private and family life to name a few are in many ways intrinsic to the subject studied here. However these are not studied individually or in detail but rather in the context of same-sex couples moving and residing within the EU.

### **1.3 Methodology and Terminology**

The method used is legal research primarily based at the desk, although some information was gathered through communications with the Council of Europe.<sup>5</sup> Primary and secondary sources were consulted and analysed, mainly national and regional legislation and judgments. Besides library research<sup>6</sup> on the subject the author found that it lends itself well to online research. Links to articles and documents have been included for the reader's convenience, all of them active when accessed by the author.

Note that even though the thesis refers mainly to same-sex couples the term homosexual is also used at times. The distinction is that individuals of homosexual orientation are not necessarily a part of a couple. Therefore the term homosexual is used when discussing the individual or a group of individuals of that sexual orientation and when material referred to does so.

Finally the reader needs to bear in mind that the thesis discusses to a large extent two different European systems. One is the EU and its legislation, the other the legal system established by members of the CoE to ensure the respect for human rights. Although terminology can seem similar the two are easily distinguished from one another as long as one is aware that they are both under discussion and note is taken of the context in which references are made. For those unfamiliar with the systems turn to Appendix A for short explanations and comparison of the various instruments and bodies in the two systems.

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<sup>5</sup> Henceforth referred to as the CoE.

<sup>6</sup> Mainly at the Raoul Wallenberg Institutes library and the Human Rights Library in Strasbourg.

# 2 Changing Definitions of a “Family” within Europe

## 2.1 General

The nuclear family has been under threat in Europe for the past 50 years or so. To start a family is no longer the prerogative of a heterosexual couple joined in marriage. The European average has fallen from eight marriages per 1000 inhabitants in 1960 to 5.1 in 1998 and the ratio of one divorce for every 15 marriages has risen to nearly one divorce for every three marriages.<sup>7</sup> At the same time one couple in four in Scandinavia are choosing cohabitation over marriage.<sup>8</sup> Within the EU and the European Economic Area,<sup>9</sup> Mediterranean countries aside, new family forms like divorced couples, cohabiting couples, remarried couples and single-parent families seem to have the same rights and obligations as traditional families.<sup>10</sup> Although this seems natural to many this has not always been so and the legal framework has not always accommodated these alternative families. As the Member States of the EU have exclusive competence when it comes to defining and implementing family policies and the European treaties offer no definition of the family it took a long time for concrete measures on the matter to find its way into EU documents and legislation.<sup>11</sup> It was therefore largely left to another European body, the European Court of Human Rights,<sup>12</sup> to address the changes to the family within Europe in the beginning.<sup>13</sup>

## 2.2 Role of the European Court of Human Rights

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>14</sup> provides that “everyone has the right to respect for his private and family life.” With challenges to the traditional family the boundaries of the term “family life” have been tested. In an early

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<sup>7</sup> European Commission, *Family Benefits and Family Policies in Europe*, 2002, p. 4, available at [http://europa.eu.int/comm/employment\\_social/missoc/2002/intro\\_en.pdf](http://europa.eu.int/comm/employment_social/missoc/2002/intro_en.pdf) accessed 29<sup>th</sup> July 2003.

<sup>8</sup> *ibid.*, p. 5.

<sup>9</sup> Henceforth referred to as the EEA. The area is made up of the EU, Iceland, Liechtenstein and Norway.

<sup>10</sup> See n. 7, p. 6.

<sup>11</sup> *ibid.*, p. 3

<sup>12</sup> Henceforth referred to as the ECtHR.

<sup>13</sup> The European Court of Justice (henceforth referred to as the ECJ) has contributed to later European jurisprudence and cases especially relevant to this essay are considered in chapter 4.4.2 below.

<sup>14</sup> Henceforth referred to as the ECHR.



case on the provision<sup>15</sup> concerning a child born out of wedlock and its mother the ECtHR agreed that Article 8 makes no distinction between the “legitimate” and the “illegitimate” family and that such a distinction would not be consonant with the word “everyone”. It further noted that the single woman and her child are regarded as a form of family.<sup>16</sup> In coming to these conclusions the Court stated that “this Convention must be interpreted in the light of present-day conditions” and relied upon the evolution of domestic law on the matter as well as international instruments finding that “there is a clear measure of common ground in this area amongst modern societies”.<sup>17</sup> The scope of Article 8 was widened further a few years later in the *Johnston case*<sup>18</sup> when the Court made clear that the cohabiting applicants constituted a “family” for the purposes of Article 8 and were entitled to its protection.<sup>19</sup> The Court summed up its approach nicely in the *Keegan case*<sup>20</sup> saying that “The Court recalls that the notion of the ‘family’ in this provision is not confined solely to marriage-based relationships and may encompass other de facto ‘family’ ties where the parties are living together outside of marriage”.<sup>21</sup> More generally the Court has noted “that the institution of the family is not fixed, be it historically, sociologically or even legally”.<sup>22</sup>

In spite of this last statement by the Court and the changes in attitudes we have witnessed in society towards same-sex couples it has not yet admitted that same-sex couples have the same right as “everyone” to respect for their family life and that their cohabitation constitutes *de facto* family ties.

## 2.3 Is The Charter of Fundamental Rights an Opening for a New Definition of a Family?

The EU Charter of Fundamental Rights<sup>23</sup> adopted in Nice late 2000 has some interesting elements when it comes to definition of the family. Article 7 of the Charter ensures the respect for private and family life of everyone. It is clear that the intention was for the scope to coincide with the scope of Article 8 of ECHR<sup>24</sup> as interpreted by the ECtHR.<sup>25</sup> From the discussion above in chapter 2.2 we see that same-sex couples have still not been included in the family definition from the perspective of ECtHR. In the Charter however we have a provision in Article 9 stating that “The right to marry and the right to found a family shall be guaranteed in accordance with

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<sup>15</sup> *Marckx v. Belgium* (application no. 6833/74).

<sup>16</sup> *ibid.*, para. 31.

<sup>17</sup> *ibid.*, para. 41.

<sup>18</sup> *Johnston and others v. Ireland* (application no. 9697/82).

<sup>19</sup> *ibid.*, para. 56.

<sup>20</sup> *Keegan v. Ireland* (application no. 16969/90).

<sup>21</sup> *ibid.*, para. 44.

<sup>22</sup> *Mazurek v. France* (application no. 34406/97), para. 52.

<sup>23</sup> Henceforth referred to as the Charter.

<sup>24</sup> See explanatory note to the provision. Explanatory text to the Charter was prepared at the instigation of the Praesidium to clarify its provisions, the text is available at [http://www.europarl.eu.int/charter/pdf/04473\\_en.pdf](http://www.europarl.eu.int/charter/pdf/04473_en.pdf) accessed 4<sup>th</sup> January 2004.

<sup>25</sup> The relationship between the Charter and the ECHR will be discussed in chapter 5.

the national laws<sup>26</sup> governing the exercise of these rights”. How then could the ECJ fail to accord same sex-couples protection under Article 7 if they are married and have founded a family in accordance with Article 9 e.g. in the case of Dutch or Belgian nationals even if the ECtHR hasn’t done so? The scope of Article 9 of the Charter that is wider than that of Article 12 of the ECHR<sup>27</sup> could arguably have a “spill over” effect into Article 7 of the Charter even if Article 7 is meant to have the same scope as Article 8 of the ECHR. To have founded a family recognized under the Charter and then being denied the respect accorded to family life under the same Charter is an oxymoron that cannot be accepted. Even with regard to the speculative nature of this example and the non-binding character of the Charter this is an argument that is difficult to ignore. Although agreement could not be reached in Nice on making the Charter legally binding it may become so in the future through a Constitution, see chapter 4.1, or by otherwise incorporating the Charter in EU legislation. In the meantime it is important to note that the Charter does indeed have impact as discussed in more detail in chapter 4.1.

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<sup>26</sup> National laws of course are very diverse and leaving aside the right to marry it is interesting to note that in Norway an unmarried person living alone is considered a full-fledged family. (See n. 7 p. 5)

<sup>27</sup> Article 12 of the ECHR guarantees the right of “men and women” to marry and is interpreted by the ECtHR as referring to “the traditional marriage between persons of opposite biological sex” (See *Rees v. The United Kingdom*, (application no. 9532/81) para. 49) whereas wording of Article 9 of the Charter has modernised gender neutral wording.

# 3 National Legislation on Same-Sex Couples

## 3.1 Non-Discrimination on Grounds of Sexual Orientation

Non-discrimination is the first step in gaining equality. This corresponds to the traditional evolution of human rights law from the obligation to respect human rights, to the obligation to protect them and eventually to fulfil them through positive measures. When it comes to discrimination on grounds of sexual orientation national and international human rights law has evolved frustratingly slowly. Decriminalisation of same-sex relationships happened as late as February 2002 in Romania<sup>28</sup> and only in 1999 did the ECtHR find that differential treatment on basis of sexual orientation was covered by Article 14 of the ECHR<sup>29</sup> This is now a reality that the EU members, acceding and applicant states have to comply with. However compliance does not happen overnight and in monitoring measures to combat discrimination in the acceding and applicant states it has been noted that “taking a thematic approach to implementation, sexual orientation discrimination has proven the most controversial ground. Indeed, this was deliberately omitted from new legislation in Malta, Latvia and Slovakia”.<sup>30</sup>

## 3.2 Equality for Same-Sex Couples?

Now that it has been recognised that difference in treatment on basis of sexual orientation is unacceptable governments need to face up to the fact that it is time to start moving towards equality for same sex-couples. Divisions however are glaringly obvious. In a fairly recent Gallup poll 57% of residents in the 15 EU Member States supported same-sex marriage while only 23% of people in the new states and applicant states did so. Percentages ranged from 82% of the Danish nation who are in favour of allowing same-sex couples to marry down to only 9% in Cyprus.<sup>31</sup>

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<sup>28</sup> ILGA Europe Press Release, *Repeal of laws criminalising same-sex relationships in Romania steps up pressure for repeal of discriminatory laws in Cyprus, Hungary and Bulgaria*, 2002 available at [http://www.ilga-europe.org/m7/media\\_releases/2002-02-04-RomaniaRepeal.html](http://www.ilga-europe.org/m7/media_releases/2002-02-04-RomaniaRepeal.html) accessed 5<sup>th</sup> January 2004.

<sup>29</sup> *Salgueiro da Silva v. Portugal* (application no. 33290/96), para. 28.

<sup>30</sup> European Commission, *Equality, Diversity and Enlargement: Report on measures to combat discrimination in acceding and candidate countries*, (2003), p. 37 available at [http://www.stop-discrimination.info/fileadmin/pdfs/EqualDivEnlarge\\_en.pdf](http://www.stop-discrimination.info/fileadmin/pdfs/EqualDivEnlarge_en.pdf) accessed 5<sup>th</sup> January 2004.

<sup>31</sup> EOS Gallup Europe poll as reported in EURO-LETTER, October 2003, p. 3 available at [http://www.steff.suite.dk/eurolet/eur\\_109.pdf](http://www.steff.suite.dk/eurolet/eur_109.pdf) accessed 5<sup>th</sup> January 2004.

### 3.2.1 The Member States<sup>32</sup>

Many of the fifteen Member States of the EU offer some sort of positive rights to same-sex couples. However the level of these rights varies considerably between the states. The Netherlands and Belgium offer legal marriage with all benefits attached to the institution to same-sex couples while in Austria, Greece, Ireland, Italy and Luxembourg no legal recognition is afforded same-sex couples. Denmark paved the road by allowing same-sex couples to register their partnerships since 1989 and other Nordic countries,<sup>33</sup> including Sweden and Finland, have adopted the same approach. Status and benefits accorded to registered partners is similar to marriage.<sup>34</sup> Portugal grants legal rights and tax benefits to same-sex couples to the same extent as opposite sex couples in common law marriages. France has since 1999 offered so called “Civil Solidarity Pacts” to same-sex couples to which e.g. tax benefits are attached. Similarly Germany has introduced “Life Partnerships” with some of the benefits of legal marriage. The United Kingdom has no law on registered partnership but the city of London as well as other cities in the UK have set up registries to formally recognize same-sex relationships. However these registries have a purely symbolic value and no status or benefits are attached to these registrations. In Spain some cities offer a similar symbolic registration and both the Province of Catalonia and the autonomous region of Navarra allow registration of same-sex partnerships with various rights and benefits attached.

### 3.2.2 The Acceding and the Applicant States

Currently there are ten countries in the final stages of accession to the EU and they are expected to become full-fledged members on May 1<sup>st</sup> 2004 as long as they have fulfilled all criteria to do so. Of these eight are Central and Eastern European: the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. The remaining two are Cyprus and Malta. One of the criteria for accession for these countries is of a political nature, that is the countries are required to show respect for democracy, rule of law and human rights. Unfortunately these countries have not shown a positive commitment to the rights of same-sex couples. With the notable exception of Hungary, that offers registered partnerships that confer the same rights as common law marriages, the candidate countries do not recognize same-sex partnerships. In fact, according a legal survey made by ILGA, both the

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<sup>32</sup> The information in this chapter is mainly derived from *Legal Marriage Report; Global status of Legal Marriage* by Demian, 2003 available at [www.buddybuddy.com/mar-repo.html](http://www.buddybuddy.com/mar-repo.html) accessed 24<sup>th</sup> June 2003 but other internet sources were consulted as background material.

<sup>33</sup> Laws on registered partnership have also been passed in Iceland and Norway but as they are not member of the EU, only the EEA, these will not be looked at in this essay.

<sup>34</sup> The most progressive of the Nordic countries has to be Sweden where legislation is in place allowing same-sex couples to adopt children from the year 2003 (act 1994:1117 on registered partnership as amended by act 2002:769).

Czech Republic and Latvia have tried and failed to pass bills on the subject and as late as the year 2000 a draft of the Civil Code of Lithuania was introduced specifically banning same-sex marriage.<sup>35</sup> In addition Poland has made a declaration with regard to the accession treaty concerning public morality stating that “nothing in the provisions of the Treaty on European Union [...] prevents the Polish State in regulating questions of moral significance”. It is clear however that this declaration has no legal effect and in fact the present Member States jointly counter-declared that the declaration “cannot be interpreted or applied in a way contrary to the obligations of the Member States arising from the Treaty and Act of Accession”.<sup>36</sup>

In addition there are three other countries applying for membership to the EU, namely Bulgaria, Romania and Turkey. According to the abovementioned poll these countries fall low on the scale of support of same-sex marriage with 20%, 17% and 16% national support respectively.<sup>37</sup>

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<sup>35</sup> International Lesbian and Gay Association, *World Legal Survey*, available at [www.ilga.org/Information/Legal\\_survey/Europe/world\\_legal\\_survey\\_europe.htm](http://www.ilga.org/Information/Legal_survey/Europe/world_legal_survey_europe.htm) accessed 24<sup>th</sup> June 2003.

<sup>36</sup> Declarations by the Plenipotentiaries from the Final Act to the Treaty of Accession to the European Union 2003.

<sup>37</sup> See n. 31.

# 4 Law of the European Union

## 4.1 Generally on Human Rights

No mention was made of human or fundamental rights in the original EC Treaty. It has been suggested that the cause was the overriding economic character of the Community but no matter the original reason the ECJ has since then progressively developed a body of case law that has served as a basis of fundamental rights.<sup>38</sup> In this development ECJ has to a large extent looked at common constitutional traditions of the Member States and international treaties, most notably the ECHR. Given the competences of the Court and nature of the EU cases that gave rise to concern over human rights had a limited context and were predominately of an economic character. Despite the progress made it has therefore long been obvious that developing human rights exclusively on the basis of individual Court decisions does not make for a comprehensive protection, unsurprisingly this attitude has been questioned.<sup>39</sup>

In more recent years the EU and its Member States have declared their commitment to human rights in legal instruments as well beginning with the Single European Act of 1986 and the Treaty on European Union<sup>40</sup> in 1992. That basis of human rights in the EU legal order was further strengthened by the Treaty of Amsterdam in 1997. A new Article 6 was inserted into the TEU affirming that “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. In addition the EU can determine under a new Article 7 “a serious and persistent breach by a Member State” of Article 6 and may decide to suspend certain rights under the TEU thereby exerting pressure to ensure compliance with the aforementioned principles.

As mentioned in chapter 2.3 earlier the EU Member States approved a Charter of Fundamental Rights in Nice the year 2000. The Charters proclaimed purpose was to strengthen the protection of fundamental rights by raising their visibility.<sup>41</sup> While the Charter is not a legally binding instrument its influence is considerable nonetheless as it contains the Unions approach to human rights. In addition many of the EU institutions have made use of the charter and its provisions since its approval, citizens are

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<sup>38</sup> Paul Craig & Gráinne de Búrca, *EU Law*, p. 318 (2003), and Anthony Arnall, *The European Union and its Court of Justice*, p. 204 (1999).

<sup>39</sup> For instance by Philip Alston and J.H.H. Weiler, *An “Ever Closer Union” in Need of a Human Rights Policy*, p. 668, Volume 9, Number 4 (1998), *European Journal of International Law*.

<sup>40</sup> Henceforth referred to as the TEU.

<sup>41</sup> See para. 4 of the Preamble of the Charter.

invoking it in their submissions to the EU and lawyers before the judicial bodies.<sup>42</sup>

Signs are afoot that human rights will gain even more ground within the EU and the most recent is a draft Treaty establishing a Constitution for Europe that was submitted to the European Council on 20<sup>th</sup> of June 2003.<sup>43</sup> According to the draft the Union shall acquire legal personality<sup>44</sup> and promptly seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>45</sup> The draft Constitution also integrates the Charter of Fundamental Rights into part II of the treaty according to Article I-7(1) thus giving its provisions legally binding effect at last. The Intergovernmental Conference<sup>46</sup> on the draft Constitution was opened in Rome October 4<sup>th</sup> 2003 but talks are at a standstill at the moment.<sup>47</sup> Notwithstanding when or whether a constitution will become a reality it is safe to say that human rights have come a long way since the establishment of the European Economic Community. Indeed the doors seem wide open to push forward and start implementing human rights more progressively, including rights of same-sex couples.

## 4.2 Specifically on Non-Discrimination

Since the European Economic Community was established it has been active in fighting discrimination – albeit in a selective manner. Due to the nature of the Community it focused in the beginning on preventing discrimination based on nationality. Otherwise the goal of a common market could not have been reached. Relatively early on it became clear that discrimination on basis of sex was also a hindrance to economic integration and in 1978 the ECJ found the elimination of sex discrimination to be a general principle of Community law.<sup>48</sup> A large framework has since evolved to combat that type of discrimination.

In comparison no protection was found against discrimination based on sexual orientation until the provisions of the Treaty of Amsterdam entered into force. After those revisions Article 13(1) of the EC Treaty reads:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the

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<sup>42</sup> European Union, *Annual Report on Human Rights*, (2002), p. 21-22.

<sup>43</sup> The draft is available at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> accessed 6<sup>th</sup> January 2004.

<sup>44</sup> Article I-6 of the draft Constitution.

<sup>45</sup> Article I-7(2)

<sup>46</sup> Henceforth the IGC.

<sup>47</sup> At the Brussels summit 12.-13. December 2003 the Member States failed to reach an agreement on the draft, mainly because of the new voting procedure introduced in the draft. The IGC will continue during the Irish presidency but at any rate the Constitution would have to be ratified by the 15 current and 10 future Member States before entering into force.

<sup>48</sup> Case C-149/79, *Defrenne v. Sabena* [1978] ECR 1365.

Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Thus on the 1<sup>st</sup> of May 1999 the first ever international treaty to explicitly mention and protect against discrimination on grounds of sexual orientation entered into force.<sup>49</sup> It must be noted though that the provision does not have direct affect for citizens of the Community but merely enables the Community to combat discrimination on its grounds.

Since then the Community has exercised its new-found powers and provisions on prohibition of discrimination on grounds of sexual orientation have made their way into EU documents such as the Charter of Fundamental Rights<sup>50</sup> that is non-binding and the Framework Directive on equal treatment in employment<sup>51</sup> that is binding upon the Member States and has direct effect.

However it seems that all grounds for discrimination are not created equal. While the aforementioned framework directive deals with discrimination on the grounds of religion or belief, disability, age and sexual orientation in the specific field of employment and occupation another directive has been adopted implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.<sup>52</sup> The latter directive has a considerably broader scope and beside employment it prohibits discrimination with regard to social protection, including social security and healthcare; social advantages; education and access to and supply of goods and services which are available to the public, including housing.<sup>53</sup> In addition the Council will start work on a proposal for a directive to combat discrimination on the grounds of sex in areas outside employment and occupation and a directive to consolidate and revise existing directives in the area of equal treatment between men and women.<sup>54</sup> Considering that these directives have their basis in the same provision, namely Article 13 of the EC Treaty, whose purpose it is to combat discrimination, it is particularly ironic to see the discriminatory manner in which it is applied.<sup>55</sup>

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<sup>49</sup> Human Rights Education Association, *Study Guide on Sexual Orientation and Human Rights*, available at <http://www.hrea.org/learn/guides/lgbt.html> accessed 6<sup>th</sup> June 2003.

<sup>50</sup> Article 21.

<sup>51</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>52</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

<sup>53</sup> *ibid.*, Article 3(1)(e)-(h).

<sup>54</sup> As stated by the (then) incoming Irish and Dutch presidencies 19<sup>th</sup> December 2003 in the *Operational Programme of the Council for 2004*, p.24.

<sup>55</sup> For arguments on an all-inclusive directive covering all grounds of discrimination see, Mark Bell, *After the Framework Directive: Combating discrimination outside employment*, April 2002 available at <http://www.ilga-europe.org> accessed 7<sup>th</sup> January 2004 (ILGA-Europe Policy Paper) and Philip Alston and J.H.H. Weiler, *An "Ever Closer Union" in*



## 4.3 Citizenship of the European Union and Freedom of Movement and Residence

When the European Union was established with the Maastricht Treaty in 1992 the lofty concept of European Union citizenship was introduced.<sup>56</sup> The citizenship complements national citizenship<sup>57</sup> and confers rights only within EU competencies.<sup>58</sup> One of the rights attached to the citizenship is now ensured in Article 18(1) of the EC Treaty:<sup>59</sup>

Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this treaty and by the measures adopted to give it effect.

This is a considerable expansion of the traditional and basic principle of free movement of persons for economic reasons.<sup>60</sup> However the right is not unlimited and those not gainfully employed have to have adequate resources and insurance so as not to become a burden on the host state.

In light of this new legal environment the Commission of the European Communities proposed a directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States in 2001.<sup>61</sup> The proposed directive has since then been a bone of contention and the object of much discussion within the various bodies of EU. It is intended to harmonize existing legislation on the subject by introducing a single set of rules and no less than nine directives will be replaced by it if and when it enters into force.<sup>62</sup> The directive is further premised on the right to non-discrimination, including on grounds of sexual orientation.<sup>63</sup> That right is afforded citizens of the EU and the proposal

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*Need of a Human Rights Policy*, p. 717, Volume 9, Number 4 (1998), European Journal of International Law.

<sup>56</sup> Article 8 of the Maastricht Treaty, now Article 17 of the EC Treaty.

<sup>57</sup> Citizenship of any of the Member States is a precondition for EU citizenship. As the national legislation on citizenship varies greatly people who would be citizens under the law of one Member State and therefore EU citizens remain outside the scope of EU citizenship in the next Member State.

<sup>58</sup> Indeed its lack of substance has been criticized by e.g. Philip Alston and J.H.H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy*, p. 716, Volume 9, Number 4 (1998), European Journal of International Law.

<sup>59</sup> Former Article 8a of the Maastricht Treaty.

<sup>60</sup> Based on Article 39 of the EC Treaty.

<sup>61</sup> *Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, COM (2001) 257 final.

<sup>62</sup> The relevant directives being 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

<sup>63</sup> Recital 31 of the most recent version of the directive, Council Document 13263/3/03 REV3.

although not based on Article 13 of the EC treaty is based on the citizenship concept.<sup>64</sup>

The effect on the right to movement and residence of a family member of a EU citizen, when same-sex couples are involved, are of special interest in this essay. It is stated in the explanatory memorandum to the directive as proposed by the Commission that:

While it is true that the right of movement and residence of family members of Union citizens is not explicitly referred to by the Treaty, the right does flow from the right to preserve family unity, which is intrinsically connected with the right to the protection of family life, a fundamental right forming part of the common constitutional traditions of the Member States, which are protected by Community law and incorporated in the Charter on Fundamental Rights of the European Union.<sup>65</sup>

The proposed directive will cover EU citizens who move or reside in a member state other than their own and their family members in line with Article 3. Therefore the definition of the term “family member” is the operative part in the directive for same-sex couples to exercise their rights to free movement and residence. The directive had the following definition in Article 2(2):

- (a) the spouse;
- (b) the unmarried partner, if the legislation of the host Member State treats unmarried couples as equivalent to married couples and in accordance with the conditions laid down in any such legislation;
- (c) the direct descendants and those of the spouse or unmarried partner as defined in point (b);
- (d) the direct relatives in the ascending line and those of the spouse or unmarried partner as defined in point (b)

The wording of this definition does not exclude same-sex couples as long as the host Member State recognizes those partnerships. Although the explanatory memorandum doesn't mention this type of partnership specifically a note is made of the fact that the family group is changing, “*de facto*” couples are getting more frequent and that Member States have introduced legislation on registration of cohabitants. It is furthermore noted that this development cannot be ignored by Community law.<sup>66</sup>

In accordance with the rather cumbersome co-decision procedure of Article 251 of the EC Treaty the proposed directive was transmitted from the

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<sup>64</sup> Legal basis quoted in the proposed directive are Article 12, 18(2), 40, 44 and 52 of the EC treaty.

<sup>65</sup> COM (2001) 257, n. 61 above, para. 2.4.

<sup>66</sup> *ibid.*, commentary to Article 2.

Commission to the Council and to the European Parliament that has a history of defending and promoting human rights of homosexuals dating back almost two decades.<sup>67</sup> Particularly interesting are the Parliaments reports and resolutions on fundamental and human rights in the EU in recent years. In the year 2000 it called on the Member States to guarantee same-sex couples rights equal to traditional couples and families and to recognise partnerships of persons of the same-sex.<sup>68</sup> In 2003 it takes another step forward and amidst much controversy it adopted a *Resolution on the situation as regards fundamental rights in the European Union 2002* where it calls upon the Member States to abolish discrimination in particular with regard to the right to marry and adopt children.<sup>69</sup> The resolution also pointed out specifically the necessity of recognizing non-marital relationships, be they between persons of opposite- or same-sex, and that steps are needed to enable these couples to exercise their freedom of movement within the EU.<sup>70</sup> The accompanying report furthermore makes the observation that:

In general terms, sooner or later the EU will have to take the necessary steps to allow same-sex couples to move freely without losing the rights granted them in their countries of origin.<sup>71</sup>

Unsurprisingly, considering this background, the European Parliament had problems with the proposed directive and made no less than 82 amendments (emphasised), several of them on this particular issue. Among the amendments were proposed changes to Article 2(2). The Parliament proposed that Article 2(2) point (b) read like this:

the unmarried partner, *irrespective of sex, with whom the applicant has a durable relationship*, if the legislation *or practice* of the host *and/or home* Member State treats unmarried couples *in a corresponding manner* to married couples and in accordance with the conditions laid down in any such legislation

The Parliament also added “irrespective of sex” to the term spouse in point (a) and added a new point (aa) including in the term family member:

*the registered partner, irrespective of sex, according to the relevant national legislation*

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<sup>67</sup> See n. 48 and European Parliament, *Working Paper on Prospects for an Anti-Discrimination Policy*, p. 23. Available at [www.europarl.eu.int/workingpapers/soci/pdf/105\\_en.pdf](http://www.europarl.eu.int/workingpapers/soci/pdf/105_en.pdf) accessed 27<sup>th</sup> June 2003.

<sup>68</sup> European Parliament, *Annual Report on respect for human rights in the European Union (1998-1999)*, para. 53 and 54, available at [http://www.euromedrights.net/english/Download/HARDER\\_EN.pdf](http://www.euromedrights.net/english/Download/HARDER_EN.pdf) accessed 27<sup>th</sup> June 2003

<sup>69</sup> Para. 77 of the resolution, 2002/2013(INI). The resolution was adopted by 221 votes in favour to 195 against with 23 abstentions.

<sup>70</sup> *ibid.*, para. 81.

<sup>71</sup> European Parliament, *Report on the situation as regards fundamental rights in the European Union (2002)*, quote from the explanatory statement. A5-0281/2003.

The Parliaments reasoning for these changes are much along the same lines as the Commissions abovementioned reasons for broadening the scope of the term “family member” that is that there is a need to reflect, respect and recognize the diverse family relationships that exist today in the free movement legislation of the Union.<sup>72</sup>

After receiving the Parliaments amendments of the first reading the Commission made clear that it considered impossible to recognize spouses of the same-sex, registered partner in accordance with law of the Member State of origin and non-married partners in accordance with law/practice of the host or home Member state.<sup>73</sup> The Commission made a reference to the case law of the ECJ on the definition of marriage and shied away from making clear that the concept of spouse could also mean a spouse of a same sex.<sup>74</sup> It also pointed to the fact that family law legislation does not fall within the Community’s legislative jurisdiction and therefore it wouldn’t be prudent to force a host state to recognize same-sex couples.<sup>75</sup>

How can the two institutions come to such different conclusions by using the same arguments? Obviously political will to cover same-sex couples explicitly with the directive is much stronger at the European Parliament whose parliamentarians are directly elected by the citizens they represent then at the politically appointed Commission.

After the Parliaments reading the Commission amended its proposal and transmitted it to the Council and the Parliament with Article 2(2)(b) in this form:

“*Family member*” means:

[...]

(b) the partner to whom the Union citizen is linked by registered partnership or with whom he/she has a duly attested durable relationship, if the legislation of the host Member State recognises the situation of unmarried couples, as equivalent to married couples in accordance with the conditions laid down in any such legislation;

[...]

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<sup>72</sup> European Parliament, *Report on the proposal for a European Parliament and Council directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*. Amendments 4 and 14-20. Available at <http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+REPORT+A5-2003-0009+0+DOC+XML+V0//EN&L=EN&LEVEL=2&NAV=S&LSTDOC=Y#Content5a57b8> accessed 8<sup>th</sup> January 2004.

<sup>73</sup> *Amended proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, COM (2003) 199 final, para. 3.1.

<sup>74</sup> *ibid.*, para 3.2 amendments 14, 15 and 16.

<sup>75</sup> *ibid.*, para 3.1.

In line with its role in the co-decision procedure the Council reached a political agreement on the directive proposal in September 2003. In a spirit of compromise the Council came to the conclusion that in cases where registered partners are not recognized under the host Member States national law (thus precluding an automatic right) the host Member state shall nevertheless facilitate the partners entry and residence (“durable relationship” being the standard to be measured against).<sup>76</sup> This common position was transmitted to the Parliament on January 5<sup>th</sup> 2004 in yet another version of the proposed directive<sup>77</sup> stating that “Family member” means under point (b):

the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State

Furthermore a new Article 3(2)(b) now states that entry and residence shall be facilitated by the host Member State (concept of facilitation being further clarified in recital 6).

On the surface this seems like a reasonable solution but if we take a closer look the main problem still persists; same-sex registered partners only have the status of family members if the host Member States recognizes their status as such. And while the newest proposal is an improve of the ambiguous wording of the first one, the splitting up of the concepts of registered partners and partners which have a “durable relationship” and the varying level of protection afforded each effectively, means that unmarried couples that are not registered, be they of opposite or same-sex, never have an automatic right to entry and residence even if the host Member State recognizes their situation as equivalent to married couples.<sup>78</sup>

The proposed directive has gone back and forth and is still in the making. Changes made to it have been both good and bad but as it stands today it is a long way from solving problems related to mutual recognition of same-sex couples and their rights and doesn’t remove but a small part of the obstacles to their free movement within the EU. Under those circumstances one has to be excused for thinking that “The basic premise [...] that Union citizens should be able to move between Member States on similar terms as a Member State national moving within her own country” has failed.<sup>79</sup> The fact that couples of same-sex don’t enjoy the same rights in the host

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<sup>76</sup> European Union press release on the Councils 2525<sup>th</sup> meeting, PRES/03/259.

<sup>77</sup> 13263/3/03 REV 3.

<sup>78</sup> Although a general presumption can be made that the host Member State will indeed facilitate entry and residence in these kinds of cases.

<sup>79</sup> Paul Craig & Gráinne de Búrca, *EU Law*, p. 761 (2003).

Member States as in their home state remains an effective barrier to freedom of movement and residence within the EU.

## 4.4 Practice of the European Court of Justice

### 4.4.1 General

As discussed before the ECJ has been the leading actor of the EU in the field of human rights and development of the principle of non-discrimination. It is not disputed that the Court sets standards regarding fundamental rights but “some have argued for the ECJ to develop a 'maximum universal standard' while others have warned against the risk of lowest common denominator”.<sup>80</sup> The extent of the Courts role is therefore not clearly defined and practice of the Court doesn't draw strict boundaries. To remedy that it has been argued that a more lateral approach is needed by the Court, e.g. in order to break down the boundaries between the free movement of persons and provisions on equality and non-discrimination.<sup>81</sup> Indeed the practice regarding sexual orientation issues is somewhat disappointing as may be noted by the judgments analysed in the next chapter.

### 4.4.2 Relevant Cases

#### 4.4.2.1 D v. Council<sup>82</sup>

The most recent case connected to the subject of same-sex couples is the one of *D v. Council*.<sup>83</sup> D who worked at the Council brought legal action against it for rejecting to treat as equivalent to marriage his status as registered partner for the purpose of obtaining household allowance under the Staff Regulations. Both D and his partner were Swedish nationals and were registered in a same-sex partnership in Sweden. D was unsuccessful before the Court of First Instance and appealed to the ECJ along with Sweden and supported by Denmark and the Netherlands.

The appellants argued that as civil status is a matter which comes within the exclusive competence of the Member States terms such as “spouse” and “married official” in the Staff Regulations should be interpreted by making use of national law rather than an independent definition.<sup>84</sup> The Court however considered it impossible to treat in the same way two legal

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<sup>80</sup> Paul Craig & Gráinne de Búrca, *EU Law*, p. 337 (2003).

<sup>81</sup> Jo Shaw, Gender and the Court of Justice, *The European Court of Justice*, in de Búrca and Weiler, p. 97 (Oxford 2001).

<sup>82</sup> Case C-122 and C-125/99P, *D v. Council* [2001] ECR I-4319.

<sup>83</sup> Judgment handed down in 2001.

<sup>84</sup> An independent definition takes into account the situation in the whole of EU as opposed to in one Member State.

situations distinct from each other<sup>85</sup> even while admitting that effects of registered partnership “are the same or comparable to those of marriage.”<sup>86</sup> The effect of this is that the Court using the basic methodology attached to the principle of non-discrimination<sup>87</sup> comes to a conclusion that ultimately leads to discrimination.

A further argument was made by the appellants that nationals of Member States are entitled to respect throughout the Community for the civil status that they enjoy in their own Member State. The Court does away with these arguments by stating that the relevant decision did not affect D’s situation with regard to his civil status.<sup>88</sup> Though technically correct it seems that the Court by taking form over matter skated past the real problem here, that there is not only civil status at stake but the benefits a certain status affords, the denial of which remain an effective barrier for same-sex couples and their enjoyment of human rights.

It was also contended that the decision was discriminatory based on sex. The Court easily sets aside this argument by observing that for the purposes of granting the household allowance it is irrelevant whether the official is a man or a woman, therefore it is not discriminatory.<sup>89</sup> In addition the Court denied that there had been discrimination on grounds of sexual orientation as the legal ties between D and his partner determined the granting of a household allowance and not the sex of the partner.<sup>90</sup> Again it seems that the issues are dealt with in a technical manner. The Court appears satisfied with a cursory look at the situation and overlooks a splendid opportunity to make use of the recent additions to EU law, namely Article 13 of the EC Treaty and Article 21 of the Charter of Fundamental Rights, to come to a different conclusion.

Unfortunately the argument forwarded by D that the contested decision constituted an obstacle to his freedom of movement was deemed inadmissible. In my view this argument would have had the best prospects of succeeding in light of previous case law. According to practice of the ECJ “provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of

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<sup>85</sup> n. 82, para. 37.

<sup>86</sup> *ibid.*, para. 35.

<sup>87</sup> While differential treatment is forbidden in similar instances different situations must be treated differently, see e.g. Clare Ovey and Robin C.A. White, *Jacobs and White - European Convention on Human Rights*, 3rd edition, Oxford, p. 352.

<sup>88</sup> See n. 82, para. 43. Advocate General Mischo came to this conclusion in his opinion para. 57, which the Court followed, and refused to draw comparison with the case of *Dafeki* where the Court when discussing freedom of movement for workers held that “the administrative and judicial authorities of a Member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States.” Case C-336/94, *Dafeki v.Landesversicherungsanstalt Württemberg*, [1997] ECR I-6761, para. 19.

<sup>89</sup> See n. 82., para 46.

<sup>90</sup> *ibid.*, para 47.

movement [...] constitute an obstacle to that freedom”<sup>91</sup> In addition, although obstacles can be justified, they must be applied in a non-discriminatory manner.<sup>92</sup> There seems to be plenty of room to manoeuvre if the Court had taken the chance to address the issue from this angle, instead the sad effect of the obstacle posed was that D and his partner moved back to Sweden.<sup>93</sup>

#### 4.4.2.2 Grant v. South West Trains<sup>94</sup>

*Grant v. South West Trains* was *D v. Council* predecessor. Grant was an employee of South West Trains who offered free and reduced rate travel concessions to spouses of its employees, either “legal spouse” or “common law opposite sex spouse”. Grant was refused the benefit for her same-sex (female) partner. Grant challenged this before an Industrial Tribunal and claimed that the refusal constituted discrimination based on sexual orientation and that it was included in the term discrimination based on sex. The case was referred to the ECJ for preliminary ruling.

The Court took the approach it later repeated in *D v. Council* and found that as the regulation would apply in the same way to female and male workers it could not be regarded as constituting discrimination based on sex.<sup>95</sup> The odd effect of that seems to be that as long as gay and lesbian couples are equally discriminated against in denying them the rights of heterosexual couples there is no discrimination.

The Court then goes on to consider whether the prohibition of “discrimination based on sex” in Article 119 of the Treaty extends to differential treatment based on sexual orientation and finds that it doesn’t. Its reasoning is seems a bit defensive though, instead of interpreting the relevant provision directly and in a decisive way, it interprets its own older judgment, *P v. S and Cornwall County Council*<sup>96</sup> so as to clarify that the older judgment had not applied to differences in treatment based on sexual orientation. The Court in coming to its conclusion is also dismissive of an opposite interpretation by the United Nations Human Rights Committee of a similar provision in the International Covenant on Civil and Political Rights of 19 December 1966<sup>97</sup> and states that fundamental rights “cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community.”<sup>98</sup> I must confess that I find this

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<sup>91</sup> Case C-18/95, *Terhoeve*, [1999] ECR I-345, para. 39.

<sup>92</sup> Case C-55/94, *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165, para 37.

<sup>93</sup> Elspeth Guild, *Free Movement and Same-Sex Relationships: Existing EC Law and Article 13 EC, Legal Recognition of Same-Sex Partnerships, A study of National, European and International Law*, in Wintemute, p. 686, n. 32. (Oxford 2001).

<sup>94</sup> Case C-249/96, *Grant v. South West Trains* [1998] ECR I-621.

<sup>95</sup> *ibid*, para. 28.

<sup>96</sup> Case C-13/94, *P v. S and Cornwall County Council*, [1996], ECR I-2143, para. 42.

<sup>97</sup> Communication No 488/1992, *Toonen v. Australia*, UN Doc. A/49/40 [1994].

<sup>98</sup> See n. 94, paras. 43-47.



approach by the Court disappointing considering their track record as guardians of those rights.

Disappointing as the judgment is mention must be made of the much more progressive and persuasive opinion of the Advocate General.<sup>99</sup> In his view P v. S had taken a “decisive step away from an interpretation of the principle of equal treatment based on the traditional comparison between a female and a male employee.”<sup>100</sup> In addition he held that in order to be effective the relevant provision had to be understood not only to prohibit discrimination against an employee on basis of his gender but interestingly also the gender of the employee’s dependent.<sup>101</sup> He further noted that “the delimitation of the scope of Article 119 must be kept free from conceptions of morality which may vary from Member State to Member State and change with time.”<sup>102</sup> In fact he found that the employer’s private conceptions of morality, whether or not corresponding to those in the relevant Member State, were completely irrelevant as equality before the law “is a fundamental principle in every community governed by the rule of law”<sup>103</sup> and that the Courts role was to safeguard the rule of law not “watch over questions of morality.”<sup>104</sup> Without looking at sexual orientation *per se* the Advocate held the opinion that there was gender based discrimination as employee and his/her partner had to be of opposite sex.<sup>105</sup>

#### 4.4.3 Actual Level of Protection

The aforementioned judgments leave us with frustratingly little to work with. Apparently discrimination on the basis of sexual orientation does not fall under discrimination based on sex and as long as men and women are treated the same way, even if that treatment is discriminatory, there is no discrimination. So what is left standing in all this? What we have to fall back on is the case of *Netherlands v. Reed*<sup>106</sup> where the Court held that if a host Member State allows its national workers to reside with their alien cohabitant the same right must be afforded nationals of other Member States. Presumably the same rule would apply in instances of same-sex couples but what a sad level of protection.

Finally in both *D v. Council* and *Grant v. South West Trains* the ECJ considered it prudent to wait for the legislature to act<sup>107</sup> and in some ways it has. At the national level Member states will only be obliged to “facilitate” entry and residence of same-sex partners when not married if and when the

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<sup>99</sup> Opinion of Advocate General Michael B. Elmer, [1998] All E.R. (EC) 193.

<sup>100</sup> Thus coming to a conclusion totally opposite the one the Court adopted here and later in *D v. Council*, *ibid*, para. 15.

<sup>101</sup> *ibid*, para. 16.

<sup>102</sup> *ibid.*, para. 17.

<sup>103</sup> *ibid*, para. 41-42.

<sup>104</sup> *ibid*.

<sup>105</sup> *ibid*, para. 23.

<sup>106</sup> Case 59/85, *Netherlands v. Reed* [1986] ECR 1283.

<sup>107</sup> Paras. 38 and 36 of the respective judgments.

proposed directive on free movement and residence takes effect. Protection at the EU institutional level is somewhat more promising. An amended proposal for a Council Regulation amending the Staff Regulations of officials and the Conditions of Employment of other servants of the European Communities has been transmitted to the Council by the Commission in November 2003<sup>108</sup> inserting a point (c) in paragraph 2 of Article 1 of the Staff Regulations considering right of registered partners to household allowance in cases where the couple has no access to legal marriage in a Member State.<sup>109</sup>

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<sup>108</sup> *Proposal for a Council Regulation amending the Staff Regulations of officials and the Conditions of Employment of other servants of the European Communities, COM/2003/721/FINAL.*

<sup>109</sup> In light of that specific wording it must be assumed that married same-sex couples fall under point (a) the definition of a married official. In comparison one can point out that practice at the CoE has been that marriage affords the same rights be it between opposite or same-sex partners. CoE staff regulations are under evaluation but do not now provide for registered partnerships in any way.

# 5 European Union and The European Convention for the Protection of Human Rights and Fundamental Freedoms

## 5.1 General

With the emergence of “fundamental rights” within the EU one must ask what the relationship is to the ECHR to which all the existing and forthcoming EU Member States are parties.

Since its proclamation of fundamental rights in the EU the ECJ has in its case law recognised and respected the principles of ECHR while drawing from the case law of the ECtHR. The Member States followed the ECJ lead by expressing in the preamble to the 1986 Single Act their determination to promote democracy on the basis of fundamental rights recognised in the ECHR.<sup>110</sup> This was further strengthened by the Treaty on European Union in 1992 (Maastricht Treaty) where it was stated in Article F (now Article 6 of TEU) that fundamental rights, as guaranteed by ECHR<sup>111</sup>, shall be respected by the EU as general principles of Community law.

The idea of the EU acceding to the ECHR has also been raised throughout the years, indeed as soon as 1978.<sup>112</sup> Talks on the matter finally went far enough to request an advisory opinion from the ECJ. But although there was an agreement on making the request Member States were divided in their opinions on possibility of accession under the EC Treaty.<sup>113</sup> The ECJ delivered its opinion in 1996<sup>114</sup> and ruled that the European Communities could not under the EC Treaty conclude international agreements in human rights matter. To do so a treaty amendment was needed.<sup>115</sup> The political will to make the necessary amendment took a while to gain momentum and now there is nothing left but to await results from the ongoing consultations at

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<sup>110</sup> As well as fundamental rights recognised in constitutions and laws of the Member States and the European Social Charter.

<sup>111</sup> And as they result from Member States' common constitutional traditions.

<sup>112</sup> For further details see Philip Alston and J.H.H. Weiler, *An “Ever Closer Union” in Need of a Human Rights Policy*, p. 666, Volume 9, Number 4 (1998), *European Journal of International Law*.

<sup>113</sup> With the Community institutions and majority of Member States considering that the EC Treaty served as a legal basis, see Betten and Griel, *EU Law and Human Rights*, 1998, p. 112.

<sup>114</sup> Opinion 2/94, *Accession by the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996], ECR I-1759.

<sup>115</sup> *ibid.*, paras. 34-35.

the IGC on draft Constitution. Those can still take a considerable amount of time.

## **5.2 Delimitation: Relationship between EU Law, in particular the Charter of Fundamental Rights, and the European Convention on Human Rights**

To start with one must delimit the scope of ECHR and Community law on human or fundamental rights. The concept of fundamental rights emerged with practice of the ECJ that considers these rights a part of the general principles of Community law. Its objective is to protect individuals mainly “from the erosion of sovereignty by Community bodies”.<sup>116</sup> The evolution of the concept has been different from human rights evolution as it has happened from a predominantly economic perspective. The two are moving closer together though with the EU continually gaining competencies in new areas. The scope of protection varies between the two systems of rights. Whereas parties to the ECHR guarantee everyone within their jurisdiction the rights and freedoms defined in the convention,<sup>117</sup> fundamental rights in Community law, while a condition for the lawfulness of Community acts,<sup>118</sup> only come into play when applying Community law.<sup>119</sup>

The Charter of Fundamental Rights seeks to avoid clashes between the two systems. It starts by reaffirming in the preamble the rights stemming from the ECHR and the case law of the ECtHR. The relationship between the two is further clarified in Article 52(3):

Insofar 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.

The explanatory note to the provision makes it clear that the reference to ECHR covers both the text of the Convention and its Protocols as well as case law of the ECtHR and ECJ. This means that for an example in interpreting Article 7 of the Charter the ECJ should look at case law of ECtHR on corresponding Article 8 of ECHR, case law which for now does not accept that the relationship of same-sex couples constitutes family life.<sup>120</sup> In the case of *D v. Council* this question came up but ECJ ruled that

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<sup>116</sup> European Parliament Fact Sheets, 2.1.1. *Respect for fundamental rights in the EU - general development*, available at [http://www.europarl.eu.int/factsheets/2\\_1\\_1\\_en.htm](http://www.europarl.eu.int/factsheets/2_1_1_en.htm) accessed 28<sup>th</sup> January 2004.

<sup>117</sup> See Article 1 of the convention.

<sup>118</sup> See n. 113, para. 34.

<sup>119</sup> Previously a principle formed by the ECJ, now found in Article 51 of the Charter of Fundamental Rights.

<sup>120</sup> See discussion in chapters 2.2 and 2.3 of this thesis.

on the facts of the case there hadn't been interference with family life, it did not rule that the right to family life under ECHR and EC law did not cover same-sex relationships.<sup>121</sup> As Article 52 (3) i.f. makes it clear that EU law can afford broader protection than ECHR<sup>122</sup> there is room for expansion here to include same-sex relationships in family life<sup>123</sup> especially when one bears in mind that case law quoted by the ECJ in *D v. Council* is rather old and that since then the ECtHR has adopted stronger wording in cases regarding discrimination on basis of sexual orientation<sup>124</sup> making these grounds equal to e.g. discrimination on basis of religion where it is difficult to justify a distinction.<sup>125</sup> Mention must also be made of Article 9 of the Charter whose scope is broader than that of Article 12 of the Convention. Whereas the ECtHR has interpreted Article 12 as applying only to marriage between two persons of the opposite sex<sup>126</sup> the wording of Article 9 does not preclude marriage between persons of the same-sex thus making its scope wider when national legislation so provides.<sup>127</sup>

In light of the aforementioned practice of ECtHR<sup>128</sup> and legal landscape it seems that today there is more hope in looking to ECJ to afford same-sex couples the recognition that is ultimately necessary for them to move and reside freely to the same extent as heterosexual couples.<sup>129</sup> However, there remains a question of future prospects if the EU accedes to ECHR and how the relationship between the two courts would change in applying human or fundamental rights. In that respect it must be noted that although the ECtHR is the interpretative authority of the ECHR the ECJ could, just like courts of other parties to the convention, interpret the Charter and other EU legislation in a way so as to afford better protection. Apart from the issue of fundamental rights it is worth pointing out that the EFTA Court carries out judicial control regarding the EEA Agreement, operating in parallel to the ECJ without problems arising. In face of that evidence there is no reason to

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<sup>121</sup> Paul Craig & Gráinne de Búrca, *EU Law*, p. 333 (2003).

<sup>122</sup> Note also that the "standstill" clause in Article 53 is intended only to maintain the current level of protection afforded by e.g. ECHR not to freeze the protection completely at that level.

<sup>123</sup> Even though Article 52(3) "seems likely to be intended to promote deference on the part of the ECJ to the ECtHR", see Paul Craig & Gráinne de Búrca, *EU Law*, p. 361 (2003).

<sup>124</sup> See e.g. *Salgueiro da Silva Mouta v. Portugal* (application no. 33290/96) where the Court found that sexual orientation was undoubtedly covered by Article 14 (para. 28) and found the distinction made intolerable under the ECHR (para. 34.).

<sup>125</sup> Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights*, 2003, p. 153-4.

<sup>126</sup> See for example *Rees v. United Kingdom* (application no. 9532/81).

<sup>127</sup> See also the Explanatory memorandum to the Charter.

<sup>128</sup> Note that the case law of the Court may yet progress to affording wider protection for same-sex couples through Protocol 12 to ECHR which contains an independent prohibition of discrimination. The Court could for instance rule that cohabiting same-sex couples have the same right as heterosexual couples when applying for benefits etc.

<sup>129</sup> See with regard to this opinion of Michael T McLoughlin, *Crystal or Glass? A Review of *Dudgeon v. United Kingdom* on the Fifteenth Anniversary of the Decision*, paras. 126-7, Volume 3, Number 4 (December 1996), Murdoch University Electronic Journal of Law available at <http://www.murdoch.edu.au/elaw/issues/v3n4/mclough.html> accessed 25<sup>th</sup> June 2003.

automatically assume that functions of the ECtHR *vis a vis* the ECJ will cause insurmountable problems.<sup>130</sup>

### 5.3 Protocol 12 to the European Convention on Human Rights – Implications for the European Union?

There have been significant developments in both EU and CoE as regards rights of same-sex couples. Not only has the EU taken steps to combat discrimination on grounds of sexual orientation and the ECtHR ruled that this type of discrimination is covered by Article 14 of the ECHR but a brand new protocol to the ECHR has been adopted,<sup>131</sup> namely Protocol 12 that introduces a general prohibition of discrimination.

The Protocol was opened for signature in Rome on November 4<sup>th</sup> 2000 where no less than 25 states, of which 10 are members of the EU,<sup>132</sup> signed in what now appears to have been political euphoria. Since then 8 more have signed bringing the total number of signatures up to 33 out of the 45 CoE member states. However in the more than 3 years that have lapsed only 5 states have actually ratified the protocol and not one EU Member State amongst them although one of the acceding states has indeed ratified.<sup>133</sup> The preferred excuse of the rest is that the Protocol is still under political consideration.<sup>134</sup>

Protection under Protocol 12 is of course at a much higher level than that of Article 14 of the ECHR and is a decisive step towards equality instead of focusing on prohibition of discrimination.<sup>135</sup> Article 14 can only be used in conjunction with other rights covered by the ECHR while Article 1 of Protocol 12 states that “the enjoyment of any right set forth by law shall be secured without discrimination.” As enumerated grounds, among which sexual orientation is not, are illustrative rather than exhaustive just like in Article 14 one can assume that sexual orientation will indeed be covered by

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<sup>130</sup> See further, Betten and Griel, *EU Law and Human Rights*, 1998, p. 114.

<sup>131</sup> Perhaps in response to being upstaged by the EU and its introduction of Article 13 into the EC Treaty as has been suggested by Nigel Warner in his paper *Gay and Lesbian Rights: ILGA's Activities at European Union and Council of Europe*, one of the official papers of the international conference “Sexual Orientation, Gender Identity and Fundamental Rights – Decriminalisation, Anti-Discrimination Provisions and Recognition of Homosexuals’ and Transsexuals’ Rights” held in Turin on 9<sup>th</sup>-10<sup>th</sup> March 2001, available at <http://www.cersgosig.informagay.it/documentiuk/teasures.html> accessed 5<sup>th</sup> January 2004.

<sup>132</sup> Austria, Belgium, Finland, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands and Portugal.

<sup>133</sup> Cyprus, date of ratification 30<sup>th</sup> April 2002.

<sup>134</sup> In some cases the states want to see how case law on the Protocol develops before committing themselves.

<sup>135</sup> See for instance Clare Ovey and Robin C.A. White, *Jacobs and White - European Convention on Human Rights*, 3rd edition, Oxford, p. 359

Protocol 12. If and when the Protocol<sup>136</sup> is adopted same-sex couples would not need to show e.g. how discrimination affects their right to respect for private and family life under Article 8 of the ECHR but would be able to base their claim directly on the Protocol. Obviously this is an obligation that many states are hesitant to enter into, not least because of its implications for same-sex couples in e.g. the field of family law.<sup>137</sup> In the meantime it remains that until the Protocols entry into force the signatories are under international law obliged to refrain from acts which would defeat its object and purpose.<sup>138</sup>

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<sup>136</sup> As the Protocol needs 10 ratifications before it enters into force it is hardly likely to occur in the nearby future given the attitude of the states involved.

<sup>137</sup> For instance would states that allow adoption by an un-married opposite-sex couple have to allow the same for an un-married same-sex couple?

<sup>138</sup> Vienna Convention on the Law of Treaties, Article 18.

# 6 European Consensus?

## 6.1 General

Both the ECJ and ECtHR<sup>139</sup> have in their case law made explicitly clear that a certain consensus between EU Member States/parties to the ECHR has to be identified to implement human rights progressively. When it comes to same-sex couples various human rights issues have been examined that have a very different level of a consensus. Thus a complete consensus has been reached in Europe with regard to decriminalisation of homosexual behaviour.<sup>140</sup> As regards age of sexual consent the ECtHR has observed an ever-growing European consensus that equal ages of consent should apply to heterosexual, lesbian and homosexual relations<sup>141</sup> and it has been suggested that other decisions of the Court reflect and form a part of European consensus regarding homosexual equality.<sup>142</sup>

In contrast when it comes to recognition of the relationship between same-sex couples the ECJ has noted in the *Reed* case that there has not been a general development in the Community to regard non-marital relationships as equal to marriage and made similar observations in the cases of *D v. Council* and *Grant v. South West Trains*.<sup>143</sup> Obviously this is the most controversial issue when it comes to same-sex couples in Europe and one that actors of every calibre have something to say about. Indeed the Vatican has recently published its arguments against legal recognition of homosexual unions stressing that “the Catholic law-maker has a moral duty to express his opposition clearly and publicly and vote against it.”<sup>144</sup> It is of course difficult to estimate the influence of statements such as this but strong ties remain between the Catholic Church and many European states, including EU Member States, acceding and applicant states. This

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<sup>139</sup> Although this approach is not often expressly mentioned by the ECtHR, see Robert Wintemute, *Sexual Orientation and Human Rights*, p. 137 (1995).

<sup>140</sup> Kees Waaldijk, *Chronological overview of the main legislative steps in the process of legal recognition of homosexuality in European countries*, appendix to an Article intended for publication, available at [http://www.partnerstvi.cz/rp-evropa/chronological\\_overview\\_feb2002.pdf](http://www.partnerstvi.cz/rp-evropa/chronological_overview_feb2002.pdf) accessed 11<sup>th</sup> January 2004.

<sup>141</sup> *L. and V. v. Austria* (applications no. 39392/98 and 39829/98) and *S.L. v. Austria* (application no. 45330/99).

<sup>142</sup> Richard Kamm, *European Court of Human Rights Overturns British Ban on Gays in the Military*, Human Rights Brief, Volume 7 Issue 3 (Spring 2000), available at <http://www.wcl.american.edu/hrbrief/07/3european.cfm> accessed 10<sup>th</sup> July 2003.

<sup>143</sup> Albeit quoting case law under the ECHR that is now considerably outdated.

<sup>144</sup> Congregation for the Doctrine of the Faith, *Considerations regarding Proposals to give Legal Recognition to Unions between Homosexual Persons*, para. 10, available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20\\_030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20_030731_homosexual-unions_en.html) accessed 11th January 2004.



interference naturally caused a reaction, especially from secular states, and was “strongly disapprove[d]” by the European Parliament.<sup>145</sup>

## 6.2 Public Policy and Public Morality: Leave to Depart from the Rules?

### 6.2.1 Under European Union Law

Such is the nature of rules that, even when adopted by a consensus, they seldom apply without exceptions. However the very nature of such exceptions means that they should be used sparingly and their use is delimited against general principles of law, especially principles such as the ones on non-discrimination and the protection of fundamental rights.<sup>146</sup> For instance where workers exercise their freedom of movement the EC Treaty provides that public policy can limit their freedom.<sup>147</sup> But in keeping with the abovementioned nature of derogations the ECJ has found that the concept of public policy must be interpreted strictly when derogating from the freedom of movement principle and<sup>148</sup> and that there must exist a “genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.”<sup>149</sup>

Public policy and morality are also envisaged as grounds for derogation in the proposed directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Needless to say public policy and the perception of morality vary greatly among the Member States of EU<sup>150</sup> but the proposed directive tightens the Court practice referred to above by stating that these grounds can only be invoked if there is basis for it in the personal conduct of the relevant individual. Furthermore, justifications for derogation that are isolated from the particulars of the case or rely on considerations of general prevention are not acceptable.<sup>151</sup> It seems clear that a Member State would be effectively barred from denying a person and/or his/her same-sex partner the exercise of free movement or residence on the general grounds that they were homosexual and in a same-sex relationship.

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<sup>145</sup> European Parliament, *Resolution on human rights in the world in 2002 and European Union's human rights policy*, (2002/2011(INI)), para. 136.

<sup>146</sup> Paul Craig & Gráinne de Búrca, *EU Law*, p. 826 (2003).

<sup>147</sup> Article 39(3) of the EC Treaty.

<sup>148</sup> Case C-30/77, *Régina v Pierre Bouchereau*, [1977] ECR 1999, para. 32.

<sup>149</sup> *ibid*, para. 35.

<sup>150</sup> Evident e.g. in the accession process as may be noted in Poland's attempt to make a reservation regarding morality mentioned before in chapter 3.2.

<sup>151</sup> Article 27 of the latest document, 13263/3/03. It seems strange to allow restrictions with regard to public policy on the movement of ones own citizens but this highlights the difficulties in implementing the “citizenship” concept beyond each and every Member State.

As an endnote to this subject it can be noted that the ECJ allows the Member States a certain measure of discretion and when it comes to issues that touch upon morality and family the Court is generally both sensitive and cautious. It is worth pointing out though that the ECJ has in between taken great leaps for instance by challenging the traditional gender roles of women and men<sup>152</sup> and that it may yet heed the opinion of the Advocate General in *Grant v. South West Trains* that conceptions of morality cannot justify discriminatory policy.<sup>153</sup> In this regard it is interesting to note how well the opinion of the Advocate General stands up to time in that it is mirrored in the very recent *Goodridge* judgment in another hemisphere where “our obligation is to define the liberty of all, not to mandate our own moral code” was quoted.<sup>154</sup>

## 6.2.2 Under the European Convention on Human Rights

Under Article 8 of the ECHR interference in private and family life can be justified for the necessary protection of morals<sup>155</sup> and it is interesting how the ECtHR has tackled this restriction. The Court recognizes for instance that the protection of the traditional family is a legitimate aim.<sup>156</sup> However the Court has limited the discretion of states to interfere. In the case of *Marckx v. Belgium* the Court made clear that despite the aim being legitimate the end result could not be “to prejudice the ‘illegitimate family’” and that members of these types of families enjoyed equal protection under the provision.<sup>157</sup> It has further expanded on this in the case of *Karner v. Austria* and stated that the margin of appreciation is narrow where there is difference in treatment based on sexual orientation and that to deny a person rights based on sexual orientation the differential treatment must have been necessary to achieve that aim. The burden to show that necessity was placed upon the Austrian government in this case but they were unable to do so.<sup>158</sup>

The case is also promising in the regard that the Court stated that “its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.” It went on to consider that the subject matter before it involved an important question of general interest for Member States of the

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<sup>152</sup> Mark Bell, *Shifting Conceptions of Sexual Discrimination at the Court of Justice: From P v S to Grant v SWT*, European Law Journal, Vol. 5, No. 1, (March 1999).

<sup>153</sup> See above chapter 4.4.2.1.

<sup>154</sup> Massachusetts Supreme Judicial Court, *Goodridge & Others v. Department of Public Health and Another*, para 2.

<sup>155</sup> As long as other criteria of lawfulness and proportionality is fulfilled as well.

<sup>156</sup> Be as it may arguments claiming that recognition of same-sex couples will undermine the foundations of society seem convoluted and far-fetched often suggesting that in that case everyone will admit to being homosexual and no one will be left to procreate.

<sup>157</sup> *Marckx v. Belgium* (application no. 6833/74), para. 40.

<sup>158</sup> *Karner v. Austria* (application no. 40016/98), para. 41.

Convention.<sup>159</sup> Perhaps this is an indicator that rights of same sex couples will soon be afforded greater protection under the ECHR.<sup>160</sup>

### 6.2.3 Under Private International Law<sup>161</sup>

Although private international law falls outside the scope of this thesis mention must be made of some of its implications to the subject. It is a general rule of private international law that the personal status of a person should not change when that person moves between jurisdictions.<sup>162</sup> An exception to that can be found in the concept of *ordre public*, namely public policy and public morality.<sup>163</sup> Examples that one can think of is that states may try to deny recognition of parental ties between a same-sex couple and their adopted child, marriage between same-sex couples or registered partnerships of same-sex couples.<sup>164</sup> This has not only economic impact on same-sex couples but can interfere in a wide variety of instances, right of one of the parents to influence his/her child's education may be denied, if one of the partners falls ill the other may be denied information by a hospital, there is an endless list of "what ifs" in situations where personal status is subject to change.

## 6.3 Can the European Court of Justice go Further?

As has been noted there is a varying degree of consensus on issues concerning same-sex couples in Europe. Two of the EU Member States now offer marriage to same-sex couples and many more afford them a status equivalent thereto while some have only recently made the age of sexual consent equal for same-sex and opposite-sex relations.<sup>165</sup> Divisions are apparent between Southern and Northern Europe as well as between religious and secular societies.

Despite some common European consensus to be found in recommendations and resolutions of European institutions,<sup>166</sup> most notably

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<sup>159</sup> *ibid.*, para. 26-27.

<sup>160</sup> Although it must be pointed out that the *Karner case* was disappointing in that the Court did not take the opportunity to confirm that there had been interference in the family life but the home of a same-sex couple.

<sup>161</sup> For further discussion on this subject see Aude Fiorini, *New Belgium Law on same sex marriage and the PIL implications*, *International and Comparative Law Quarterly*, vol. 52, part 4, October 2003, p. 1046-1049.

<sup>162</sup> There is also a principle of integrity of personal status in EU law as was indeed referred to in *D v. Council*.

<sup>163</sup> E.g., a state can invoke *ordre public* and refuse recognition of a polygamous marriage if its own legislation provides that marriage is between two persons only.

<sup>164</sup> In the last instance there could arise technical problems when the host state does not provide for such registration in its legislation.

<sup>165</sup> UK in 2001 and Austria in 2002, see n. 137.

<sup>166</sup> Robert Wintemute, *Sexual Orientation and Human Rights*, p. 134 (1995)

of the European Parliament, the ECJ has up until now not considered its level high enough as evidenced in the cases of *D v. Council* and *Grant v. South West Trains*. Instead of acting decisively and affording protection to same-sex couples the Court considered it for the legislature to adopt laws on the matter. Unfortunately the legislative bodies haven't answered the call and the proposed directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States lacks the necessary protection.

I would argue that the ECJ needs to abandon its cautious approach to the rights of same-sex couples and adopt the progressive approach that it used in order to recognize fundamental rights within the EU.<sup>167</sup> Of course Rome was not built in a day and the Court cannot jump into the deep end and impose positive obligations upon Member States that it doesn't have competence to do. However it can uphold the principles of non-discrimination and equality that are so deep rooted in Community law and use the momentum that has gathered in affording recognition to the rights of same-sex couples. While I recognize that the case has not been strong under the ECHR<sup>168</sup> I point to the fact that the EU is only committed not to fall below the standard of ECHR, it can certainly offer more extensive protection.

The ECJ has also sought to base general principles on constitutional traditions of Member States. The principle of non-discrimination has basis there but the grounds of sexual orientation are more doubtful. Those grounds are however without a doubt part and parcel of the ECHR of which all the Member States are parties to. The approach to human rights has to be progressive rather than minimalist while respecting the rule of subsidiarity. It is therefore quite possible for the Court to adopt the same approach it did in the case of *AM & S Europe Ltd. v. Commission*<sup>169</sup> where the Court recognized a principle whose scope and criteria for applying varied between the Member States to the extent that one Member State accused the Court of foisting a domestic rule of English Law upon the Community.<sup>170</sup>

The ultimate challenge to the Court is to move away from its own interpretation that it cannot adjudicate where the legislature bodies should act. On the contrary, with the express prohibition of discrimination on grounds of sexual orientation now found in the EC Treaty, the Charter of Fundamental Rights, secondary legislation and proposed legislation of the

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<sup>167</sup> In that event European level case law will be established that the ECtHR could then draw upon, see Michael T McLoughlin, *Crystal or Glass? A Review of Dudgeon v. United Kingdom on the Fifteenth Anniversary of the Decision*, para. 128, Volume 3, Number 4 (December 1996), Murdoch University Electronic Journal of Law available at <http://www.murdoch.edu.au/elaw/issues/v3n4/mclough.html> accessed at 25<sup>th</sup> June 2003.

<sup>168</sup> Although after several years of a stand still in its case law concerning same-sex couples and sexual orientation the ECtHR is again making use of the fact that the ECHR is a living instrument as witnessed in the recent *Karner* case and *Salgueiro da Silva Mouta* case.

<sup>169</sup> Case 155/79, *AM & S Europe Ltd. v. Commission* [1982] ECR 1575.

<sup>170</sup> Paul Craig & Gráinne de Búrca, *EU Law*, p. 328 (2003).

EU, as well as the international and European movement towards equality for same-sex couples the Court has a chance to cement its role as a guardian of fundamental rights. To keep that title it has to recognise same-sex couples as full fledged citizens of the EU with all that entails including freedom of movement and residence without discrimination. In short, the ECJ not only can but must go further.

## 7 Conclusion

History shows that equality can only be achieved by interaction between the society and its governing powers be it at the national or international level. When changes to society occur the ruling powers have to take note and be willing to take measures to reflect those changes or indeed be proactive and go further.<sup>171</sup> In doing so it signals to the society that these changes are acceptable and the changes will soon become the norm as has been the case in equality between women and men and equality no matter racial or ethnic origin. This pattern is clearly identifiable in the case of same-sex couples in Europe, both on the national and regional level, but I have argued that the ball is now in the court of EU.

In this thesis I have reviewed legislation and practice within the EU with regard to same-sex couples as well as the background to changes in the family pattern in general in Europe. The ECtHR has developed jurisprudence on issues regarding same-sex couples until now denying them protection of family life, surely this must change, if not on the basis of ECHR then because of the Charter of Fundamental Rights. EU Member States have diverse legislation on the matter in place but, since Denmark broke the ice in 1989,<sup>172</sup> the trend has been to move towards broader rights for same-sex couples. Within the EU itself various legislation has been enacted to prohibit discrimination on grounds of sexual orientation, the first to do so on the international level, although the EU has yet to combat discrimination in this regard with the same ferocity that it has in other fields.

Citizenship of the EU is a relatively new concept the holding of which should entail among other rights the free movement and residence within the territory. To that end a directive has been proposed on the subject but I have concluded that it does not solve the problems relating to uniform recognition of same-sex couples and that denial to same-sex couples of rights available to opposite-sex couples constitute a barrier to their freedom of movement and residence within the EU. With the EU striving towards integration and homogeneity it is necessary to do better and follow the lead

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<sup>171</sup> As was the case in Sweden where The Partnership and Adoption Act was adopted in Parliament by a majority of 183 over 115 in spite of only 11 of the 57 bodies the act was referred to in beforehand being in favour, reported by Ingmarie Froman, *Two Parents of the Same Sex*, available at [http://www.sweden.se/templates/Article\\_5334.asp](http://www.sweden.se/templates/Article_5334.asp) accessed 12<sup>th</sup> January 2004.

<sup>172</sup> Denmark is still at the forefront as can be seen in a personal interview with its Prime Minister, Anders Fogh Rasmussen, in *Søndagsavisen* 11<sup>th</sup> January 2004. On the subject of same-sex marriages in the Church the Prime Minister said that he had “difficulties in believing that our Lord has a more restrictive attitude towards gays and lesbians than all others” while emphasising that politicians should not get involved in the Church's inner workings. (Loosely translated by the author from Danish). Available at <http://www.sondagsavisen.dk/Site/Menu/Artikler/Indland/AndersFoghRasmussen.htm> accessed 12<sup>th</sup> January 2004.

of the European Parliament on the subject otherwise the concept of EU citizenship remains more or less symbolic.

Historically ECJ has progressively developed extensive case law on fundamental rights but against that background its practice has been disappointingly regressive when it comes to rights of same-sex couples. It has failed to elevate the European standard on the matter even though the ECHR and the by now outdated practice of ECtHR does not stand in its way to do so. In fact it is explicit that protection under the ECHR is the standard to which the EU cannot fall below, sometimes it must provide for better protection and sometimes it can act to raise the level of protection. It would do better by striving towards equality in the spirit of Protocol 12 rather than let itself be held back by traditional non-discrimination approaches by Article 14 of the ECHR.

In *D v. Council* and under the proposed directive on free movement and residence registered partners are effectively treated as single. How long can this be tolerated? Ironically this stand may actually serve to speed up the movement from affording same-sex partners rights similar to marriage by registered partnerships to simply allow them the same access to the institution of marriage. When Member States committed to rights of same-sex couples realise that same-sex registered partnerships are not recognized elsewhere in this era of globalization this is the obvious solution as already tried and tested in the Netherlands and Belgium.

I have argued that there is an ever-growing European consensus on the protection of rights of same-sex couples, enough that reactions reach the highest levels. There is also a consensus between the different legal systems of EU and under the ECHR that when it comes to discrimination on grounds of sexual orientation there can hardly be valid justifications on grounds of public policy or morality even when taking into account Member States margin of appreciation. It is after all just as unthinkable that committed partners lose their standing when moving between Member States with various economic and personal consequences just because of sexual preference as it would be for the bond between parent and child become null and void when doing the same.

Europe is in a serious danger here to be upstaged by Canada and the United States. While Europe is holding back Canada is saying that “exclusion [from the institution of marriage] perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so it offends the dignity of persons in same-sex relationships.”<sup>173</sup> Will same-sex couples lawfully married in Massachusetts<sup>174</sup> be recognized and able to

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<sup>173</sup> Ontario Court of Appeals, *Halpern et. al. v. Attorney General of Canada et. al.*, June 10<sup>th</sup> 2003, at para. 107 i.f.

<sup>174</sup> If *Goodridge & Others v. Department of Public Health and Another* is followed up in an appropriate way by the legislature after the stay of execution expires, see chapter 1.1.

move freely within the United States<sup>175</sup> while their European counterparts are effectively hindered from doing the same?

In response I would suggest that the ECJ, within its area of competence and on the basis of available practice and legislation, should adopt a more daring approach in the spirit of progressive human rights implementation to get rid of the anomaly that denial of freedom of movement and deriving rights to same-sex couples is.

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<sup>175</sup> As the United States are one nation when it comes to fundamental rights.



# Appendix A<sup>176</sup>

	<b>European Union</b>	<b>Council of Europe</b>
<i>Founded</i>	1957 by the Treaty of Rome (establishing the European Economic Community), amended and updated by the 1992 Treaty of Maastricht and the 1997 Treaty of Amsterdam	1949 by the Treaty of London
<i>Purpose</i>	Peace in Europe through economic and political integration	Respect for human rights, democracy and the rule of law
<i>Membership Criteria</i>	According to the “Copenhagen criteria” <sup>177</sup> certain economic and political conditions have to be fulfilled, including stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (fulfilled through membership to the CoE and by being party to its core human rights instruments)	Demonstrated commitment to common European values, human rights, democracy and rule of law.
<i>Members</i>	15 current members, 10 acceding states and 3 applicant states (The EU currently encompasses around 400 million people)	45 members, including all states that are or will become members of the EU. Limited space for growth as there are only 2 European countries non-members that is Belarus and Monaco (Currently encompassing around 800 million people)
Continued	<b>European Union</b>	<b>Council of Europe</b>

<sup>176</sup> Information used to create this table is very general and can be found at the European Union’s and Council of Europe’s respective websites, [www.europa.eu.int](http://www.europa.eu.int) and [www.coe.int](http://www.coe.int) accessed 6<sup>th</sup> January 2004.

<sup>177</sup> In 1993 the European Council agreed in Copenhagen that countries in Central and Eastern Europe should become members of EU if they wished and defined the criteria for accession.

<i>Main Human Rights Instruments (relevant to this thesis)</i>	<p>Charter of Fundamental Rights (2002) Not legally binding</p>	<p>* European Convention for the protection of Human Rights and fundamental freedoms (1950) and its protocols Legally binding and allows for both individual and inter-state complaints to the ECtHR</p> <p>* European Social Charter Legally binding and allows for collective complaints to the European Committee of Social Rights. Additional monitoring through a reporting procedure</p>
<i>Institutions</i>	<p>* The European Council (represents Member States) * The European Parliament (represents the EU's citizens and is directly elected by them) * The European Commission (executive body) * The Court of Justice (ensures correct implementation of community law)</p>	<p>* The Parliamentary Assembly (composed of members of the national parliaments) * The Committee of Ministers (decision making body composed of the members foreign ministers or their deputies) * European Court of Human Rights (ensures respect for human rights under the ECHR and its protocols)</p>

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