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**The Right to Marry.  
A Right or Privilege?  
-Same-sex Couples in Europe-**

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# Summary

International human rights law does not exist in a vacuum. It owes its basis in public international law and presupposes the existence of States and State law. Since the end of World War II, gigantic steps have been taken, both on national and international level, to promote the development of friendly relations between people and peoples and to facilitate recognition of equal and inalienable rights of all members of the human family, commonly known as 'fundamental human rights'. At present, 192 members of the United Nations, encompassing almost every recognized individual State, confirm this pledge to humanity, proclaimed in the Universal Declaration of Human Rights on 10 December 1948 and subsequently implemented in various international human rights treaties. As a result, men and women shall enjoy equality before the law. In spite of this, the truth remains that people and peoples of the world still suffer social and legal inequality.

This thesis manifests one part of the problem, namely the fact that international law does not recognize and protect marriage between same-sex couples as part of their human rights. It examines 'the right to marry', albeit primarily in European context, and questions the paradox between differing national legislation, whereas some States have legalized same-sex marriage while others have not. Consequently, it discusses the nature of human rights and seeks a reasoned answer as to why same-sex couples cannot invoke the right to marry by means of current human rights instruments, akin to their heterosexual family members. Finally, it offers a prediction about the legal status of same-sex marriage in Europe, i.e. what 'the law' ought to be or may in the future be.

# Preface

“All animals are equal but some animals are more equal than others.”

George Orwell (1903-1950), *Animal Farm*

Justice and equity are closely connected notions and often go hand in hand when we visualize the concept of equality where all Men, male and female, are granted equal rights, equal opportunities and equal protection before the law. Such beliefs are the keystone of the Universal Declaration of Human Rights, sometimes referred to as ‘A Magna Carta for all Humanity’. Article 1 holds that all human beings are born free and equal in dignity and rights, and Article 2 provides that everyone is entitled to the rights and freedoms set forth in the Declaration, without any distinction, of any kind. Article 7 grants protection for all against any discrimination in violation of the Declaration. According to Article 16(1), men and women of full age have the right to marry and to found a family, without any limitation due to race, nationality or religion. Marriage shall only entered into with free and full consent of the intending spouses, via 16(2), and 16(3) holds that family is the natural and fundamental group unit of society and is therefore entitled to protection by society and State.

Notwithstanding the solemn wording of the Declaration, in particular Articles 1 and 2, the question remains unanswered, whether all Men are entitled to equal rights and opportunities, or whether some are ‘*more equal*’ than others before the law, as suggested in Orwell’s novel mentioned above. My thesis deals with one aspect of this problem, namely, whether the right to marry is a human right or whether it is merely a privilege accorded to heterosexual members of society. If all Men are born free and equal, one must question why same-sex couples are by law deprived of the right to marry, and whether such legislation rests upon valid grounds. Is it possible that the right to marry is inherent in the right to freedom and equality, endowed on each person by birth, and thus irrevocable by means of Man made legislation? The answer to that question, and others relating to the right to marry, are the prime concern of my thesis. I want to share my findings in the following chapters, hoping that my account will prove Orwell’s dire quotation wrong, in spite of serious indications to the contrary.

Reykjavík, 15 October 2007.

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# Abbreviations

ACHPR	African Charter of Human and Peoples Rights
ACHR	American Charter of Human Rights
COM	Committee of Ministers
CoE	Council of Europe
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
PA	Parliamentary Assembly of the Council of Europe
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

# 1 Introduction

## 1.1 General

Lesbians and gays have been subject to discrimination and non-recognition from time immemorial.<sup>1</sup> Having suffered periodic persecution and even a systematic scheme of extermination during Nazi Germany, lesbians and gays are now an identified minority<sup>2</sup> in society, comprising around 10 percent of the world population.<sup>3</sup> They have battled for legal recognition and equal rights, individual and collective, equivalent to those granted to the heterosexual population, slowly but surely progressing towards equality before the law.<sup>4</sup> Improvements have been rapid in recent years, especially in Europe and North America, whereas in other parts of the world they still face considerable social prejudice and legal barriers in comparison with heterosexuals. The Nordic Countries, not least Sweden, the Netherlands, Belgium, and most recently Spain, have arguably been the most progressive European States in realizing lesbian and gay rights, gradually abolishing discrimination against them in national legislation. These States have little by little granted lesbians and gays family-related rights, such as registered partnership and joint custody over children, where the right to marry has been last in order of recognition.<sup>5</sup> At present, only six States in the world have made marriage available for same-sex couples, the Dutch paving the way in 2001. Belgium followed their example in 2003 and the US state of

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<sup>1</sup> In this thesis, 'lesbians' mean women who are innately drawn to pair bonding with each other, while 'gays' has the same meaning in reference to men. Hence, the concept of 'same-sex couples' is self-evident. In the past, 'homosexuals' has been used as a synonym for lesbian and gay individuals. As it over-emphasizes on sexuality, I will use this term cautiously. At the same time, my thesis takes no standpoint on whether lesbianism and male homosexuality are analogous or not in terms of social preferences and sexual orientation.

<sup>2</sup> 'Minority' has a fixed meaning, i.e. a smaller part of a group within a community or society that is different because of race, religion, language, etc. For the purpose of this thesis, minority has the further meaning of a group, whose members are subject to unequal treatment, based on sexual orientation, whereas it is evident that lesbians and gays do not enjoy legal protection of minority provisions in international human rights instruments, e.g. Article 27 of the International Covenant on Civil and Political Rights (ICCPR). Lesbians and gays have also been termed a 'social minority' or 'sexual minority'. See, e.g., J. Donnelly, 'Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime', in P. Hayden (ed.), *The Philosophy of Human Rights* (Paragon House, St. Paul MN, 2001) p. 547. Such terminology is judgemental and arguably detrimental to the lesbian and gay cause. Hence, I do not use it.

<sup>3</sup> This is a rough estimate, based on the Kinsey research carried out in 1948 and 1953. See <[www.kinseyinstitute.org/resources/bib-homoprev.html](http://www.kinseyinstitute.org/resources/bib-homoprev.html)>, visited 10 May 2006.

<sup>4</sup> Waaldijk refers to this battle as 'the law of small change', describing a certain pattern of legal recognition of homosexuality in Europe, which follows standard sequences. See K. Waaldijk, 'How the Road to Same-Sex Marriage got Paved in the Netherlands', in R. Wintemute and M. Andenæs (eds.), *Legal Recognition of Same-Sex Partnerships, A study of National, European and International Law* (Hart Publishing, Oxford, 2001) pp. 439-440.

<sup>5</sup> *Ibid.*, pp. 441-453. Accord R. Auchmuty, 'Same-sex Marriage Revived: Feminist Critique and Legal Strategy', 14(1) *Feminism & Psychology* (2004) pp. 104-105.

Massachusetts in 2004. Canada and Spain assumed the same role in 2005 and last year South Africa became sixth in line.<sup>6</sup>

On the international level, the right to marry and to found a family is established in Article 16(1) of the Universal Declaration of Human Rights (UDHR), adopted by the United Nations (UN) on 10 December 1948, and has since been implemented in various human rights treaties,<sup>7</sup> notably Article 12 of the European Convention on Human Rights (ECHR).<sup>8</sup> The right to marry has however been interpreted as being only available to women and men who marry a person of the opposite sex. Consequently, same-sex couples cannot invoke this right. The international bodies in question have nonetheless stated that discrimination on grounds of sexual orientation is impermissible. Accordingly, one might assume that their position towards lesbians and gays is contradictory. On the other hand, some will argue that there is a legitimate reason for such inequality in treatment. Independent of which conclusion is reached, recent judgments of the European Court of Human Rights (ECtHR), in cases concerning rights of transsexuals,<sup>9</sup> may indicate a shift in the Court's otherwise restrictive approach to lesbian and gay marriage.<sup>10</sup>

## 1.2 Scope and Delimitations

This thesis deals with the problematic question whether the right to marry is or should be universal, i.e. equally available to all couples who have reached the age of maturity, irrespective of gender and sexual orientation. My main objective is to examine this right from an international human rights law perspective. Thus, I hope to uncover whether there are sufficient grounds to exclude same-sex couples from marriage. Can such a right be dependent on differing national legislation or is it intrinsic in the equality and inalienable rights of all members of the human family, proclaimed in the Preamble of the UDHR as being the foundation of freedom, justice and world peace? In order to answer that question I will inevitably have to seek guidance in the writings of John Locke and other theorists on natural law, although my thesis is primarily one of legal dogmatic.

For sake of delimitation, emphasis will lay on the right to marry in European context, under the presumption that if an answer can be formulated as to whether this right is or should be regarded as a human right, available to all couples in Europe, that answer will be analogous to other parts of the world. Furthermore, my examination will focus on how

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<sup>6</sup> At present, 30 other States, including 9 U.S. states and the District of Columbia, have made varying forms of same-sex partnership available, with differing benefits and rights.

<sup>7</sup> E.g., the ICCPR, the Covenant on Economic Social and Cultural Rights (ICESCR) and the American Charter of Human Rights (ACHR). The same right is not mentioned in the African Charter of Human and Peoples Rights (ACHPR), but the right to found a family is.

<sup>8</sup> The ECHR was signed in Rome 4 November 1950 under the auspices of the Council of Europe (CoE). All European States, save one or two, are members to the ECHR, thus encompassing over 800.000.000 people.

<sup>9</sup> In this thesis, 'transsexuals' is used in reference to persons who self-identify themselves as members of the gender opposite to that assigned to them at birth and desire to establish a permanent social role as such.

<sup>10</sup> Hereinafter, reference to the 'Court' is restricted to the ECtHR.

the ECHR aims to safeguard this right and on the role of the Court towards that end.<sup>11</sup> Consequently, my thesis does not highlight other forms of partnership, such as civil unions, same-sex unions, confirmed cohabitation and registered partnership, as they are evidently distinguishable from marriage.<sup>12</sup> In addition, my thesis will not detail itself with disparities between civil and ecclesiastical marriage, whereas the right to marry is independent of religion in all European States, according to the principle of secularism and respect for the rule of law.

Questions concerning the desirability of marriage have been subject to debate. Such critique is predominant in feminist theory, arguing that the historically patriarchal system of marriage, based on ownership, property and dominance of men over women, makes it incapable of promoting a path to gender equality. Similar criticism has also come from members of the gay and lesbian community, claiming that marriage promotes neither equality nor freedom.<sup>13</sup> As important and righteous as these claims may be, they are nevertheless beyond the scope of my thesis, where the ‘right’ to marry, independent of its merits, is the centre of attention.

As stated before, Article 16 of the UDHR grants men and women the right to marry and to found a family. Article 12 of the ECHR proclaims the same right, although affixing that the exercise of this right is further governed according to national law of each Member State. While the concepts of ‘marriage’ and ‘family’ are thus interrelated and arguably even part of the same right, my thesis will focus on the former. Such separation can however never be complete. Accordingly, I will discuss family topics where essential to my thesis.

Finally, lesbians and gays are my focal subject, albeit primarily as same-sex couples. Thus, transsexuals and other minorities with sexual preferences and social identity, held to differ from those of heterosexuals, fall outside my examination. Such delimitation lacks no respect for these minorities, who have fought a similar battle for social and legal recognition.

## 1.3 Methodology and Schematic Outline

It is essential to any understanding and reasoned debate on the right to marry to examine the history of marriage in social, cultural and religious context. Chapter 2 offers an overview on these aspects, briefly discussing lesbian and gay history at the same time. It studies, albeit in a nutshell, the origin of marriage, different ideals behind its foundation, and reveals how the institution of marriage has changed in course of history.

Chapter 3 probes into the concept of equality and non-discrimination, examining and comparing such clauses in the UDHR, the ECHR and EU

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<sup>11</sup> Other human rights instruments will be discussed in parallel, not least the Charter of Fundamental Rights, hereinafter the ‘EU Charter’, adopted by the European Union (EU) in 2000, now promoted by all 27 EU Member States.

<sup>12</sup> These forms of partnership differ from marriage, not only in regard to legal rights and protection, but also social status and recognition, whereas marriage symbolizes the highest societal bond between individuals, transcending a mere set of legal rules.

<sup>13</sup> See D. Cooper, ‘Like Counting Stars?: Re-Structuring Equality and the Socio-Legal Space of Same-Sex Marriage’, in Wintemute and Andenæs (eds.), *supra* note 4, pp. 75-76.

legislation. It illustrates other measures taken by European institutions in order to promote equality and non-discrimination, and demonstrates whether lesbians and gays enjoy such protection to the same degree as heterosexuals.

Chapter 4 focuses on the right to marry and the application of this right under Article 12 of the ECHR and other human rights instruments. The main source of evaluation is the Court's case law, which I will examine and analyse along with relevant judgments of the European Court of Justice (ECJ).

Chapter 5 deals with the paradox between the Court's current interpretation on the right to marry according to Article 12 ECHR and the fact that three of its Member States have awarded same-sex couples the right to marriage and abolished any discrimination against them in that sense. It questions whether it is consistent in terms of equality and the ideal of universal human rights, that lesbians and gays can marry in State A, based on birth or otherwise residency, yet be denied the same right in State B, due to territorial boundaries. Consequently, it questions the nature of human rights, with reference to leading theories of natural law and analytical legal positivism.

Chapter 6 reveals my conclusions, providing an account on the present legal status of same-sex couples in relation to marriage, i.e. *de lege lata*, and offers a reasoned opinion on how their status may change in near future, i.e. *de lege ferenda*.

## 2 History and Marriage

In the beginning, God created the heavens and the earth. He gave life to all living creatures and created man in his own image to rule over the world. God took man to the Garden of Eden, to work it and take care for it. God said, „It is not good for the man to be alone. I will make a helper suitable for him.” Hence, God brought before him all living creatures and the man gave them names. Alas, there was no suitable helper among them. Therefore, God took a rib from the man’s chest and made a new individual. Adam was grateful and said, “This is now bone of my bones and flesh of my flesh; she shall be called ‘woman’, for she was taken out of man.” For that reason, a man will leave his father and mother and be united to his wife, and they will become one flesh.<sup>14</sup>

Thus begins the biblical version of humanity, where we encounter not only the old cliché that women are subordinate to men but also the tenets of Christianity that marriage is, so to speak, made in heaven. If one believes in this mythical account of Man’s creation, one might conclude that religion and marriage are indissoluble, where the latter cannot exist without the former. Let us examine what history reveals on this matter.

### 2.1 The Chthonic World

Human history is traceable as far back as some two million years ago, when chthonic people flocked together in tribal communities, each building upon customary rules on how one should behave in order to survive in harmony with nature. There were no formal laws, and no idea of religion playing a role in daily life. Hence, ‘marriage’<sup>15</sup> did not exist as a domain of institutional control.<sup>16</sup> Incidentally, there is no record of marriage as a union between men and women in the earliest sagas, whilst unions between men are a central feature.<sup>17</sup> Consequently, one might assume that marriage, in its earliest form, was a pattern of homosexual mating. Could this be the case?

### 2.2 Ancient Greece

Three thousand years ago, Europe was still a very chthonic place.<sup>18</sup> Ancient Greece was the cradle of Western civilization, where some city-states, such

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<sup>14</sup> See Book of Genesis, Chapters 1 and 2.

<sup>15</sup> See J. Boswell, *Same-sex Unions in Pre-Modern Europe* (Villard Books, New York, 1994) pp. 9-14, where the author discusses the controversial meaning of ‘marriage’, ‘husband’ and ‘wife’, rightly observing the difficulty in formulating precise and generally accepted definitions, whether in terms of modern speakers or ancient texts.

<sup>16</sup> See H. P. Glenn, *Legal Traditions of the World* (Oxford University Press, 2<sup>nd</sup> ed., 2004) pp. 61-65.

<sup>17</sup> See R. Norton ‘Taking a ‘Husband’: A History of Gay Marriage’, *Queer Culture*, 21 February 2004, <[www.infopt.demon.co.uk/marriage.htm](http://www.infopt.demon.co.uk/marriage.htm)>, visited 6 February 2007.

<sup>18</sup> Glenn, *supra* note 16, p. 126.

as Sparta, officially recognized “marriage” between gay men,<sup>19</sup> akin to earlier civilizations, namely those of Egypt and Mesopotamia.<sup>20</sup> Apparently, the law of Athens and other major city-states of Classical Greece did not prohibit same-sex relations, some of which were close to marriage and followed similar rituals.<sup>21</sup>

Greek philosophers, such as Plato (427-347 BC) and Aristotle (384-322 BC), speculated about heterosexual marriage, questioning its merits and arguing in its favour as the foundation of prosperity. Theophrastus (370-285 BC) and Epicurus (341-270 BC) opposed and argued against marriage, whereas the intellectuality of men and marriage could never coexist.<sup>22</sup> In his script *On Marriage*, Theophrastus set fourth several reasons why a wise man should not take a wife. His rationale is cynical and degrading towards women, maintaining that they distract men from their work and are thus a burden.<sup>23</sup> Nonetheless, his view offers a valuable insight on contemporary Greek society.

The ideal of marriage between husband and wife did not escape the attention of the Stoics in the 3<sup>rd</sup> century BC. They held that marriage was a moral duty, inherent in nature and therefore good. The Cynics opposed and argued that marriage was a human invention, which entailed family and civil commitments, and thus prevented a wise man from pursuing his profession. A true philosopher could therefore never marry.<sup>24</sup> Such proposals are now long abandoned. Consequently, they are of little importance to my thesis. The same does not apply to the Stoics, for their theories bore fruit in the doctrine of natural law and natural rights, arguing that all human beings are born free and equal. Therefore, the same law should apply to all.<sup>25</sup>

Chapter 5 will address the Stoic theory. For now, let us agree that the significance of differing views mentioned above lays, if only, in the fact that the concept of marriage, as an ideal or institution, is not only debatable but also open to change in historical context, where each culture must seek its own clarification. This became evidently clear during the Roman era.

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<sup>19</sup> Norton, *supra* note 17.

<sup>20</sup> See W. N. Eskridge, Jr., *The Case for Same-sex marriage - From Sexual Liberty to Civilized Commitment* (The Free Press, New York, 1996) pp. 17-20, where the author maintains that both cultures accepted “same-sex relationships” and treated them similarly to opposite-sex marriages, although tangible evidence cannot prove their equivalence.

<sup>21</sup> *Ibid.*, pp. 21-22. Cf. E. Cantarella, *Bisexuality in the Ancient World* (Yale University Press, New Haven and London, 1992) pp. 211-217, where the author explains that homosexual relations between men were an integral part of life experience, perfectly legitimate, although according to specific rules. Thus, adolescent boys would be loved by adults, later doing the same to adolescents themselves, before marrying women in later life. Accord Boswell, *supra* note 15, pp. 88-93, where the author further explains that such relations could last for years, with the couple living together like husband and wife, subsequent to various rituals, e.g. gifts, witnesses, a chalice and public banquet, elements which would later become important in Roman and Christian marriages.

<sup>22</sup> See A. F. D’Elia, *The Renaissance of Marriage in Fifteenth-Century Italy* (Harvard University Press, London, 2004) p. 11.

<sup>23</sup> See C. McCarthy (ed.), *Love, Sex and Marriage in the Middle Ages, A Source Book* (Routledge, London, 2004) pp. 41-42.

<sup>24</sup> D’Elia, *supra* note 22, pp. 12-13.

<sup>25</sup> See, e.g., B. Russell, *History of Western Philosophy* (Unwin University Books, London, 1961) pp. 275-276 and S. C. Neff, ‘A Short History of International Law’, in M. D. Evans (ed.), *International Law* (Oxford University Press, New York, 2003) p. 33.

## 2.3 The Roman Era

In early Rome, heterosexual marriage was a wholly private affair. This did not change until the end of the 1<sup>st</sup> century BC, when imperial dictatorship succeeded the Roman republic. Hence, during the reign of Augustus (63-14 AD), marriage became subject to legal definition and institutional control.<sup>26</sup> According to Brundage, the classical definition of marriage was as follows: “Marriage is the joining of a man and a woman and their union for life by divine and human law.”<sup>27</sup> It started with a betrothal between the heads of two families, concerning the marrying couple. The agreement regarded an arrangement for dowry from the bride’s family and a wedding gift from the groom’s family. As a rule, the couple was married shortly after the betrothal but otherwise it terminated automatically in two years. The consent of both parties as well as their parents was the only requirement for legal validity. Thus various rituals, such as the betrothal, dowry and wedding banquet, were not necessary, but yet important for proof of consent to marriage. Although unusual, divorce was optional, and men could keep a concubine.<sup>28</sup>

While the Romans were not particularly tolerant of homosexuality, their civil laws did not impose penalties upon same-sex relations between men, and homosexual activities were subject to most of the same legal restrictions as imposed on heterosexual acts, e.g. in matters concerning anal intercourse. Yet, a man who submitted passively to intercourse with another man betrayed sexual virtues, proper to all Roman citizens, and was thus subject to punishment for treachery to the social order.<sup>29</sup> During 2<sup>nd</sup> century Rome, conjugal contracts between men were nonetheless legally binding, although ridiculed at the same time, and following a public ceremony, the ‘bride’ and ‘groom’ were apparently registered in legal records as formally married.<sup>30</sup>

With the emergence of Christianity, or rather its acceptance as the official religion in Imperial Rome in the beginning of the 4<sup>th</sup> century, the classical Greek arguments found their way into the Church’s ideas on marriage and its values.<sup>31</sup> Prior to that, the Church had been silent on the subject, although positioning itself with recorded teachings of Jesus, the

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<sup>26</sup> See J. A. Brundage, *Law, Sex and Christian Society in Medieval Europe* (The University of Chicago Press, Chicago, 1987) pp. 32-33.

<sup>27</sup> *Ibid.*, p. 33. Brundage states that although such definition was judicially unworkable, it still touched upon the essential elements of marriage, i.e. the implication that mutual consent of the parties was required, and that it was intended to be on a lasting basis, yet not in the meaning of the later Christian notion of a lifelong indissoluble affair.

<sup>28</sup> *Ibid.*, pp. 34-41.

<sup>29</sup> *Ibid.*, p. 48. Cf. Cantarella, *supra* note 21, pp. 211 & 217-219, where the author maintains that Romans felt it was normal to have sexual relations with other men as well as with women, if participating assertively as the stronger party. Sexual intercourse between women was on the other hand a sign of unthinkable debauchery. Accord Eskridge, *supra* note 20, p. 22.

<sup>30</sup> Norton, *supra* note 17. Accord Eskridge, *ibid.*, pp. 22-23, where the author states that Imperial Rome considered some same-sex relations as “marriages”, the best documented being those of emperors Nero and Hadrian, although such form of marriage was not limited to the sovereign elite.

<sup>31</sup> See D’Elia, *supra* note 22, p. 13.

Pauline epistles and the ante-Nicene Patristic literature.<sup>32</sup> Thus, Christianity introduced a novel position towards sex with the notion of ‘naturalness’, which was exclusive to heterosexual intercourse.<sup>33</sup> Accordingly, debate in the 4<sup>th</sup> century consisted of which was better, marriage or celibacy.<sup>34</sup> St. Jerome (340-420) and St. Augustine (354-430) were the most influential among the clergy in developing the ideas of the Western Church,<sup>35</sup> later known as the Roman Catholic Church, whereas in the late 4<sup>th</sup> century the Roman Empire had split into Eastern and Western empires.<sup>36</sup> Although both clergymen held that celibacy was of highest importance, St. Augustine was less hostile towards marriage. While St. Jerome quoted Theophrastus at length and shared his views,<sup>37</sup> St. Augustine justified marriage, partly for the reason that Joseph and Mary had been married. Since God had created all human beings out of one, so was marriage between husband and wife the first natural bond of human society.<sup>38</sup>

Consequently, the idea of marriage between men became unthinkable. Such contracts were nonetheless legally valid, at least until 342.<sup>39</sup> Following the decline and fall of the Western Empire, Roman law revived under the reign of Justinian in the Eastern Empire, who in 529 produced a compilation of the law from its early origin, the ‘Justinian Code’, as opposed to laws of the Catholic Church, later known as ‘canon law’. Although the Justinian Code was not widely known in continental Europe until the 11<sup>th</sup> and 12<sup>th</sup> century, it enacted a total ban on same-sex intimacy, and later became the basis for legal study and teaching, influencing and shaping all medieval European legal systems.<sup>40</sup> Hence, secular law and canon law were presently in conformity on this matter.

## 2.4 The Middle Ages and Beyond

The Western Empire, covering Britain and most of the European continent, crumbled in the 5<sup>th</sup> century, thus marking the beginning of the Middle Ages, notorious for frequent warfare between small kingdoms. This was a system of society called ‘feudalism’.<sup>41</sup> The Catholic Church, with the supranational character of its canon law, was the only counter-balance to this system, and

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<sup>32</sup> J. Goody, *The Development of family and marriage in Europe* (Cambridge University Press, 1983) pp. 84-85.

<sup>33</sup> Cantarella, *supra* note 21, p. 221.

<sup>34</sup> McCarthy, *supra* note 23, p. 14.

<sup>35</sup> *Ibid.*, p. 27 and D’Elia, *supra* note 22, p. 11.

<sup>36</sup> P. Stein, *Roman Law in European History* (Cambridge University Press, 1999) p. 23.

<sup>37</sup> McCarthy, *supra* note 23, p. 41.

<sup>38</sup> *Ibid.*, p. 31.

<sup>39</sup> See, e.g., C. Pierce, ‘Gay Marriage’, in R. M. Baird and S. E. Rosenbaum (eds.), *Same-sex marriage - The Moral and Legal Debate* (Prometheus Books, New York, 1997) p. 171 and Eskridge, *supra* note 20, p. 23.

<sup>40</sup> See Brundage, *supra* note 26, p. 123 and Eskridge, *supra* note 20, p. 24. Accord Cantarella, *supra* note 21, pp. 221-222, who further provides that under the Justinian Code all homosexuals, independently of which role they assumed, were condemned to death. Thus, the concept of ‘nature’ had changed and no longer allowed any alternative choice for men “to put down both women and other men”.

<sup>41</sup> Glenn, *supra* note 16, pp. 131-132 & 136. Accord Stein, *supra* note 36, pp. 38-40.

very powerful as such.<sup>42</sup> The Church upheld a strong theological view on marriage, persistently claiming that sex was sinful, while virginity was the highest virtue. Consequently, according to official doctrine, only husband and wife were to participate in sexual activity, and only in order to produce children.<sup>43</sup> Initially, the Church did not enjoy exclusive jurisdiction over marriage,<sup>44</sup> whereas in Italy, for example, the public considered marriage a social affair rather than a religious one.<sup>45</sup> Hence, ecclesiastical ceremonies were not required,<sup>46</sup> and notaries, rather than priests, performed nuptial rites, reading a short legal formula in front of the wedding couple.<sup>47</sup> This would change in course of time and gradually the Church gained sole jurisdiction; first in 11<sup>th</sup> century England and France,<sup>48</sup> and later in Italy, align with the 1563 Council of Trent,<sup>49</sup> when the Catholic Church and its canon law finally gained full control of marital affairs.<sup>50</sup> Accordingly, marriage was to be monogamous, consensual and indissoluble, and all sexual activity outside wedlock subject to punishment.<sup>51</sup> The Church's strict view gave further rise to the ideology that men were dominant over women,<sup>52</sup> thus strengthening marriage as a patriarchal and strategic institution, where continuity of the male line, preservation of inherited property and hope of more prosperity became primary motives for marriage.<sup>53</sup>

In spite of the 16<sup>th</sup> century Protestant Reformation, marriage remained solely an institution between husband and wife. The Protestants did however not foresee sex as a sinful act but rather a source of joy in marriage, and argued that divorce was tolerable under certain circumstances, if followed by remarriage.<sup>54</sup> Thus, they rejected the Catholic notion of celibacy and of marriage as a holy sacrament in itself, emphasizing more on moral issues concerning sexual behaviour and criticizing the prevailing tolerance of concubines.<sup>55</sup> Consequently, and independent on whether one adhered to

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<sup>42</sup> *Ibid.*, Stein, p. 42 and M. N. Shaw, *International Law* (Cambridge University Press, 5<sup>th</sup> ed., 2003) p. 18.

<sup>43</sup> See McCarthy, *supra* note 23, p. 32 and P. Goubert, 'Historical Demography and the Reinterpretation of Early Modern French History: A Research Review', in T. K. Rabb and R. I. Rotberg (eds.), *The Family in History, Interdisciplinary Essays* (Harper Torchbooks, New York, 1973) p. 22.

<sup>44</sup> *Ibid.*, McCarthy, p. 15.

<sup>45</sup> T. Dean and K. J. P. Lowe, 'Introduction: issues in the history of marriage' in T. Dean and K. J. P. Lowe (eds.), *Marriage in Italy, 1300-1650* (Cambridge University Press, 1998) p. 2.

<sup>46</sup> See D. d'Avray, 'Marriage ceremonies and the church in Italy after 1215' in Dean and Lowe (eds.), *ibid.*, pp. 107-113. The author further notes that sources differ as to when ecclesiastical ceremonies became obligatory, arguably as late as the 16<sup>th</sup> century.

<sup>47</sup> D'Elia, *supra* note 22, pp. 35-36.

<sup>48</sup> See Goody, *supra* note 32, p. 150 and McCarthy, *supra* note 23, p. 15.

<sup>49</sup> The Council of Trent was established by the Catholic Church to meet the crisis of the 16<sup>th</sup> century Protestant Reformation.

<sup>50</sup> See D'Elia, *supra* note 22, p. 35 and Dean and Lowe, *supra* note 45, pp. 5-6. Accord Brundage, *supra* note 26, pp. 179-183.

<sup>51</sup> *Ibid.*, Brundage, pp. 135-137.

<sup>52</sup> Dean and Lowe, *supra* note 45, p. 4.

<sup>53</sup> *Ibid.*, pp. 7-8.

<sup>54</sup> Brundage, *supra* note 26, pp. 135-137 & 487. Accord D'elia, *supra* note 22, pp. 23-34.

<sup>55</sup> *Ibid.*, Brundage, pp. 551-552.

Catholic or Protestant beliefs, there was no official acceptance on sexual activity out of wedlock and no place within the legal domain for lesbians and gays. In 13<sup>th</sup> century France, homosexual relations carried the punishment of castration, and death on repetition, while in 16<sup>th</sup> century France and Spain women were burned alive for using dildos and taking part in sexual activities with other women.<sup>56</sup>

Let us now leap ahead to early, subculture 18<sup>th</sup> century London, where gay men got married in so-called ‘molly houses’, without legal sanction. Such marriages were not monogamous and varied in formality regarding ceremonies.<sup>57</sup> France stepped further in the first decade of the 19<sup>th</sup> century and became the first European State to decriminalize homosexuality, thus removing the anti-gay vestige of the middle ages by legalizing homosexual relations between consenting adults.<sup>58</sup> This reform in the status of lesbians and gays was no doubt a product of the 18<sup>th</sup> century Enlightenment, which stimulated a more rational approach to such matters, rather than basing them primarily on religious beliefs. The French position, confirmed in the 1810 Penal Code, formed the basis of corresponding laws in neighbouring States, such as Spain, whereas other countries could not envisage the possibility of following the French example. In England, Parliamentary debate even referred to sexual activity outside marriage as gross indecency. Hence, Parliament considered the French code unlawful and extremely dangerous to the political and social order of the 19<sup>th</sup> century.<sup>59</sup>

In the first decades of the 20<sup>th</sup> century, numerous States nevertheless abolished their so-called sodomy laws, such as Denmark in 1930 and Sweden in 1944,<sup>60</sup> while others reinstated criminalization of homosexual relations, such as Spain in 1928 and France in 1940.<sup>61</sup> Such legislation, regressive or not, proved only temporary and was eventually abolished in all European States, following actions on behalf of the Parliamentary Assembly of the Council of Europe (PA) in 1981,<sup>62</sup> and the *Dudgeon* judgment of the ECtHR in the same year.<sup>63</sup> Although European States have thus departed from the medieval tradition of incarceration, physical punishment or even

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<sup>56</sup> See R. Norton, ‘The Nature of Lesbian History’, *Lesbian History*, 1 August 2003, <[www.infopt.demon.co.uk/lesbians.htm](http://www.infopt.demon.co.uk/lesbians.htm)>, visited 6 February 2007.

<sup>57</sup> Norton, *supra* note 17. Accord Eskridge, *supra* note 20, p. 42, where the author states that such marriages were also visible in other major European cities, e.g. Paris and Amsterdam, and on occasion same-sex couples were indeed legally married.

<sup>58</sup> See, e.g., L. Feinberg, ‘Struggle for decriminalization’ *Workers World*, <[www.workers.org/ww/2005/lgbtseries0203.php](http://www.workers.org/ww/2005/lgbtseries0203.php)>, visited 29 November 2006.

<sup>59</sup> See A. Freeman, ‘Sodomy Laws’, <[www.sodomylaws.org/history/history11.htm](http://www.sodomylaws.org/history/history11.htm)>, visited 17 February 2007.

<sup>60</sup> See H. Ytterberg, ‘From Society’s Point of View, Cohabitation Between Two Persons of the Same Sex is a Perfectly Acceptable Form of Family Life: A Swedish Story of Love and Legislation’, in Wintemute and Andenæs (eds.), *supra* note 4, p. 429

<sup>61</sup> See Feinberg, *supra* note 58 and H. Graupner, ‘Sexual Consent: The Criminal Law in Europe and Overseas’ *Archives of Sexual Behavior*, Vol 29, No. 5, 2000, p. 427.

<sup>62</sup> PA Resolution 756 of 1 October 1981 and PA Recommendation 924 of 1 October 1981.

<sup>63</sup> Case of *Dudgeon v. the United Kingdom*, App. No. 7525/76, Judgment of 22 October 1981, Series A No. 45; (1982) 4 EHRR 149, see also Freeman, *supra* note 59.

death penalties for the mere fact of not being heterosexual, elsewhere lesbians and gays are less fortunate.<sup>64</sup>

## 2.5 Marriage in the Present Day

### 2.5.1 Facts and Reflections

In Europe today, marriage between heterosexual couples is monogamous. Divorce is optional and easily attained in most States, unlike before. Hence, the medieval theory on marriage, as being indissoluble, is obsolete. Apart from that, the most significant change is arguably that couples can often choose between civil and ecclesiastical marriage, whereas the Church has long since surrendered its jurisdiction in marital affairs.<sup>65</sup> Furthermore, numerous countries have drawn a clear line between canon law and secular law, with separation between Church and State. Such alteration does not necessarily imply changes in public attitude towards marriage and its supposed durability. Thus, a recent survey in the United Kingdom, on why heterosexual couples choose to marry, reveals that most perceive marriage as a statement of love, commitment and permanence of their relationship.<sup>66</sup>

Need we more proof that no heterosexual will opt to marry for a predetermined period, and few will marry on other precepts than love or affection? If so, can ‘we’, in all sincerity and without bias to lesbians and gays, maintain that ‘they’ think and feel differently, when they seek legal recognition of their relations?

In 1989, Denmark became the first country in the world to legalize registered partnership between same-sex couples. The Act provided for a marriage-like institution, according lesbians and gays almost the same rights as in marriage, although excluding the right to a wedding in a State church, the right to joint adoption and joint custody.<sup>67</sup> Other Nordic countries followed their example; Norway in 1993, Sweden in 1995 and Iceland in 1996. The Dutch assumed the same role in 1998, and broke new ground in 2001 when they legalized same-sex marriage.<sup>68</sup> As previously mentioned, Belgium and Spain have since followed their example.

Today, marriage is primarily a social and legal institution, based on equality between women and men, and conferring upon individuals the highest societal status and approval.<sup>69</sup> It entails significant legal benefits, such as citizenship or rights of residence, the right to mutual inheritance, adoption, joint parental responsibility, maintenance, tax reductions, health

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<sup>64</sup> Nigeria, Sudan, Afghanistan, Pakistan, Iran, Saudi Arabia, United Arab Emirates and Yemen still stipulate the death penalty for active homosexuality.

<sup>65</sup> In some States, such as the Netherlands, marriage is by law always a civil ceremony, but couples may subsequently seek blessing in church, although left to the discretion of each Church community.

<sup>66</sup> Auchmuty, *supra* note 5, p. 111.

<sup>67</sup> See I. L. Andersen, ‘The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes’, in Wintemute and Andenæs (eds.), *supra* note 4, p. 417.

<sup>68</sup> Waaldijk, *supra* note 4, p. 438. Accord D. Maguire, ‘The Morality of Homosexual Marriage’, in Baird and Rosenbaum (eds.), *supra* note 39, p. 62.

<sup>69</sup> Auchmuty, *supra* note 5, p. 102.

and employment benefits, and so on and so forth. Thus, the ‘spouse’ is in some respect awarded legal status it would otherwise not enjoy. For these reasons alone, marriage would seem to be an attractive option. In recent years, it has nonetheless lost part of its magnetism among heterosexual couples in Europe, and some prefer civil marriage rather than ecclesiastical. At the same time, childbirth has dropped to such a low that numerous governments are offering couples ever-increasing child allowance in order to boost their populations. In view of these factors, one might ask whether it is not to the benefit of those States in question to allow same-sex couples to marry and to found a family?

No one will deny that European States are in many ways diverse, with different cultural, religious and linguistic heritage. Yet, they have at least one commonality; they are all based upon religious beliefs rooted in Christian doctrine, whether Roman Catholic, Greek Orthodox or Protestant. Conservatives of all denominations, akin to non-religious traditionalists, have generally been opposed to equal rights and protection for lesbians and gays, not least in relation to marriage and family. Accordingly, they have held that homosexuality is a matter of choice, due to one’s upbringing and negative social influences, e.g. the media. Hence, it is curable through therapy or prayer. Liberals on the other hand, whether religious or not, believe that medical science and ‘Enlightenment’ in its broadest sense have proven that homosexuality is a genetic orientation, triggered by unknown environmental factors in early childhood and unchangeable as such in adults. Hence, it is no kind of abnormality; it is what some people are. Consequently, they reject the idea that lesbians and gays have at some period in time mutated from ‘normal’ people and assume ‘*they*’ have always been with ‘*us*’. Therefore, they shall enjoy the same rights and opportunities as heterosexuals, there among the right to marry and to found a family. Let us now briefly examine the essence of these opposing views.

## 2.5.2 The Argument against Same-sex Marriage

The Christian Church has been one of the strongest advocates for the theory that marriage is solely a relation between a man and a woman, husband and wife. The ideology of marriage as being primarily for reproductive purposes has also been a long lasting one, supported with the argument that if God had intended the human race to sustain itself through both heterosexual and homosexual marriage, He would have designed our bodies accordingly. Therefore, the Church and confirmed traditionalists alike have maintained that marriage is fundamentally a heterosexual institution, and child rearing an essential component therein.<sup>70</sup> In view of the fact that same-sex couples cannot have children together by way of natural means, so they are not suited for this institution. Furthermore, it has been widely upheld that children and their well-being could be in jeopardy, if brought up in same-sex families. Harsh as these views may be, they are not common to all who adhere to Christianity or any other religion for that matter.

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<sup>70</sup> See, e.g., A. Yanagihashi, ‘Towards Legal Protection for Same-Sex Partnerships in Japan: From the Perspective of Gay and Lesbian Identity’, in Wintemute and Andenæs (eds.), *supra* note 4, p. 351.

### 2.5.3 The Argument for Same-sex Marriage

Although marriage has been interrelated with religion for centuries, we have already established that there is no inherent connection between the two, and written sources reveal that same-sex marriage was accepted and legally recognized prior to the emergence of Christianity. Consequently, the theory on marriage being a pre-described and divine institution between husband and wife does not hold up to scrutiny. Time cannot change this fact.

The ideal of marriage for reproductive purposes is on the other hand open to change, and has done so in reality. Many heterosexual couples who get married cannot have children. Yet, they want to marry and some choose to adopt. In Europe, fertility tests are thus not a pre-condition for marriage. Secondly, some couples do not prefer children. Yet, they want to marry. Others, who would like to have children of their own, cannot by natural means and most States, if not all, provide for artificial insemination on such occasions. Irrespectively, all heterosexual couples enjoy the right to marry in all European States, as the Court demonstrated in the *Christine Goodwin* case.<sup>71</sup> Thirdly, same-sex couples have the same biological requisites for artificial insemination as heterosexuals. Therefore, it is questionable whether one can maintain in earnest that same-sex couples cannot conceive or parent a child in modern society. In fact, such technology is available at present to same-sex couples in various States, and the same goes for the right to adoption. Consequently, the reproduction argument crumples.

The tenacious myth that same-sex couples cannot raise children adequately, or are generally more inapt than heterosexuals in that respect, has been rebutted in numerous researches, showing that children growing up in same-sex families do just as well and arguably even better than children growing up with parents of opposite genders.<sup>72</sup>

Finally, and regardless of whether the Church has official control over ecclesiastical marriage in individual States, such as in Iceland,<sup>73</sup> secular law, which the Court has held to be a fundamental principle, governs all European States in accordance with the rule of law and respect for human rights and democracy.<sup>74</sup> Religion can therefore not be a refuge for those who want to exclude same-sex couples from the right to marry.

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<sup>71</sup> Case of *Christine Goodwin v. The United Kingdom*, App. No. 28957/95, Judgment of 11 July 2002; (2002) 35 EHRR 447.

<sup>72</sup> See, e.g., S. Glombok, A. Spencer and M. Rutter, 'Children in lesbian and single-parent households: Psychosexual and psychiatric appraisal', 24 *Journal of Child Psychology and Psychiatry* (1983) pp. 551-572. Accord C. J. Patterson, 'Children of lesbian and gay parents', 63 *Child Development* (1992) pp. 1025-1042 and 'Lesbian and gay parents and their children', in R. C. Savin-Williams and K. M. Cohen (eds.), *The lives of lesbians, gays and bisexuals: Children to adults* (Harcourt Brace College Publishers, Forth Worth Texas, 1996) pp. 274-304.

<sup>73</sup> In Iceland, Protestantism is the official religion and the right to ecclesiastical marriage is left to discretion of the Church.

<sup>74</sup> See Case of *Refah Partisi (the Welfare Party) and Others v. Turkey*, Apps. No. 41340/98, 41342/98, 41343/98 and 41344/98, Judgment of 13 February 2003, (2003) 37 EHRR 1, Para 93.

## 2.6 Analysis

According to the Oxford Dictionary, marriage is “the legal relationship between husband and wife”, whilst the definition on family is “a group consisting of one or two parents and their children”.<sup>75</sup> Such definitions align with the conventional understanding of these words, i.e. what ‘we’ have accorded to their meaning in the present day.

Let us however keep in mind that in the chthonic world, there was no formal expression of ‘law’, and marriage did therefore not exist as a legal relationship, subject to institutional control. Can this serve as a sufficient criterion, whereby one can assert that marriage was non-existent?

It is common belief that the sprouts of civil society in Europe are traceable back to ancient Greece. Although the Greek philosophers did not lack in speculation about the nature of marriage and its merits,<sup>76</sup> the actual laws of various city-states were not highly developed in the sense that there was little science of law.<sup>77</sup> In the 3<sup>rd</sup> century BC, the Stoics held that marriage was inherent in nature and therefore good, while the Cynics claimed it was a human invention, entailing family and civil commitments, and thus preventing the true philosopher from reaching the peak of intellectuality. Yet, this did not prevent Aristotle from marrying, not once but twice.<sup>78</sup> In view of this fact, can we be so bold as to imply that marriage was not an established institution in Greece in the 4<sup>th</sup> century BC?

In both ‘worlds’ mentioned above, it will seem that unions between gay men were accepted and in Sparta even officially recognized as marriage. Written sources reveal far less on lesbian relations, although recorded in Chinese literature as early as the 2<sup>nd</sup> century AD.<sup>79</sup> According to Norton, the explanation may lay in the fact that until recently, men have invariably chronicled history.

The Roman Empire played a major role in transforming western societies during the first centuries AD, and Roman law has influenced most European legal systems ever since. We will remember that marriage was a wholly private affair in early Rome and was not subject to legal definition and institutional control until the reign of Augustus. Before that time, Cicero (106-43 BC) married his first wife no later than 76 BC and subsequent to divorce in 46 BC, remarried the same year.<sup>80</sup> In view of these facts, can we maintain that marriage is dependant on a legal relationship, as defined in the Oxford Dictionary? Furthermore, can one actually state, that gay marriage did not enjoy legal recognition in Roman society when written sources point to the contrary?

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<sup>75</sup> *Oxford Advanced Learner's Dictionary* (Oxford University Press, 6<sup>th</sup> ed., 2000) pp. 785 & 455 respectively.

<sup>76</sup> Thus, Aristotle concluded that the appropriate age for “girls” to marry was 18 and for “men” 37. Moreover, he held that “women”, who had sexual intercourse at an early age, were apparently more likely to be dissolute. See Aristotle, *The Politics*, in T. J. Saunders, ed. (Penguin Books, London, 1981) pp. 441-442.

<sup>77</sup> Stein, *supra* note 36, p. 1.

<sup>78</sup> See Aristotle, *supra* note 76, pp. 13-14.

<sup>79</sup> Norton, *supra* note 56.

<sup>80</sup> See <[www.en.wikipedia.org/wiki/Cicero#Biography](http://www.en.wikipedia.org/wiki/Cicero#Biography)>, visited 18 February 2007.

Apparently, gay men appear to have frequently married one another throughout early history, and seemingly, this did not change prior to the Justinian Code, enacting a total ban on sexual activity between men. Even after the emergence of Christianity, the clergy disagreed on the merits and role of marriage, and St. Augustine strived to find its justification with reference to the marriage of Joseph and Mary. If they were married, which no true Christian will deny, such marriage was not ecclesiastical, for there was no Church.

Referring back to the Oxford definition on family, one might further ask whether Joseph and Mary formed a family, and if so whether its foundation was dependant on the birth of 'their' child, Jesus Christ. In this context, let us bear in mind that the Bible proclaims that Christ was the fruit of holy conception, and therefore not the son of Joseph. According to the Dictionary, one might conclude they were not a real family. In spite of this flaw, most believe they were family, although not based upon continuity of the male line.

The foregoing goes to show, that when questioning the institution of marriage and family, it is inevitable to reach obstacles, which one has to overcome. Is marriage inherent in nature and human consciousness, and the ability to express love with words and reason, thus distinguishing Man from beast? If so, marriage owes its origin in the chthonic world. If marriage hinges on codification or otherwise legal definition, its starting point is at a later stage, in Rome shortly before the birth of Christ. Neither conclusion eliminates same-sex couples from marriage. The third proposal rests upon theological doctrine that woman is made of a man's rib, and marriage is solely a relation between husband and wife, a belief embedded in canonical jurisprudence and medieval secular law that has been tenacious in European societies until recently, denouncing same-sex marriage as contradictory to God's will. This conception on marriage has also influenced our perception on other related issues, such as divorce, family structure, gender roles, and a host of other controversial topics, woven into the very fabric of our legal systems.<sup>81</sup>

Subsequent to the Catholic Church surrendering sole jurisdiction on marital affairs, both civil and ecclesiastical marriage is now available in numerous European States, and some have taken the arguably audacious step to allow same-sex couples to marry. At present however, this evolution has not found its way into the Oxford Dictionary.<sup>82</sup> Such definition set aside, there is no concise and undisputable answer to the questions raised above, for the answer depends on what you are looking for and how you want to put use to your findings. This is the Achilles heel of all theories. One must evaluate them in accordance with the historical context they are formulated within, the cultural context of which they form part and finally the context of the particular question to which they are offered as an

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<sup>81</sup> See Brundage, *supra* note 26, p. 587.

<sup>82</sup> According to the on-line edition, marriage is "the formal union of a man and a woman, by which they become husband and wife". See <[www.askoxford.com/?view=uk](http://www.askoxford.com/?view=uk)>, visited 19 February 2007.

answer.<sup>83</sup> These parameters will always confine the theorist, and influence the ‘right’ answer.

Hence, reasoned debate on ‘marriage’ and ‘family’, whether present or in the past, cannot elude the fact that these institutions do not have a single character and their substance has changed in course of time.<sup>84</sup> Therefore, the assumption that the same group of people shall indefinitely have sole right to them is illogical. Conversely, both institutions have taken diverse form and meant different things at different times.

At present, let us agree on the following:

(1) Marriage is not intrinsically subject to legal definition and does not entail the existence of an advanced legal system. Initially, it is therefore not a legal relationship.

(2) Marriage, as an institution, existed in civil society prior to the emergence of Christianity. Therefore, marriage does not owe its origin in Christianity, and is not dependant on Christian theology or canon law.

(3) The notion of marriage does not have a fixed meaning and has changed in evolution of time. Therefore, it is a dynamic concept, both in context and in form.

(4) Same-sex marriage is now legally valid in individual European States, as it was in some parts of ancient Greece and the Roman Empire.

Irrespective of the medieval hypothesis that the Church owns marriage in some obscure way or is its special guardian, the principle of equality indicates that all couples should be treated the same in respect to marriage. Some European States have already acknowledged this in their legislation, the Dutch simply stating, “There is no reason why same-sex couples should be denied the opportunity [to marry].”<sup>85</sup> Hence, according to Dutch law, it appears that the right to marry is a human right. We have yet to establish whether this will hold true on the international plain, i.e. whether all Men do, or should, enjoy the same right, or whether it is merely a privilege accorded only to heterosexual couples, and thus not fundamental in nature but left to the discretion of State politics and domestic legislation. At least, such right is more than a social or legal contract. It is the way humans express their innermost feelings; the way they relate to one another and form families, independent of sexual orientation. Human Rights Treaties are the expression of the way relationships are treated, and should thus reflect the innate sense of humanity and respect for diverse sexual orientation. In other words, such instruments can nurture either equality or father privilege, according to the alleged ‘will’ of individual States. Let us examine what international law has to say on this subject.

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<sup>83</sup> See I. McLeod, *Legal Theory* (Palgrave Macmillan, 2<sup>nd</sup> ed., Basingstoke and New York, 2003) pp. 4-7.

<sup>84</sup> The on-line edition of the Oxford Dictionary has acknowledged this fact, by defining family as “a group consisting of two parents and their children living together as a unit” or “a group of people related by blood or marriage”. See footnote 82.

<sup>85</sup> Reference to the Dutch Ministry of Justice. See <[www.english.justitie.nl/themes/family-law/index.aspx](http://www.english.justitie.nl/themes/family-law/index.aspx)>, visited 22 February 2007.

## 3 Equality, Fact or Theory?

Man has mastered the art of inequality, whether through slavery in the Greco-Roman world, the barbaric ‘Holy’ Crusades, sanctioned by the Pope, the Holocaust of Nazi Germany or other vicious acts of genocide in human history. Having fought two World Wars, governments, united under the auspices of the UN, finally realized, and none too late, that the only way to secure justice was to accept, and set into motion, the *fact* that all human beings *are* born equal.<sup>86</sup> The UDHR reflects this reality. It is a pledge to humanity never to fall back on monstrous acts of inhumane discrimination and, instead, to facilitate recognition of equal and inalienable rights of all men and women, commonly known as ‘fundamental human rights’. It is an oath to all Men that hereinafter they are to be equals, and thus subject to equal rights, equal opportunities and equal protection before the law. It transcends nationality and the mere triviality of Man made borders. State sovereignty over piece of land is thus seemingly irrelevant.

It is under these prerequisites that we can acknowledge the UDHR as ‘A Magna Carta for all Humanity’, which it is, having been confirmed by 192 UN States, encompassing almost every recognized individual State in the world. Therefore, it is relevant to our examination of the right to marry, and thus we seek there for clarification on the idea or ideal of equality.

### 3.1 The Pledge

“... Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...”

It takes neither a rocket scientist nor lawyer to comprehend the Preamble to the UDHR and its opening statement quoted above. There is no pressing need, at least not in the public eye, to interpret those words, which capture the spirit and general scheme of the Declaration, in any other way than contextual, especially in view of the preceding catastrophes endured during the Second World War. We have to believe that these words are more than words, i.e. that they have some significant meaning. For further guidance, let us read the following text of Articles 1, 2 and 7:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” (Article 1)

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<sup>86</sup> The Stoics acknowledged this fact already in the 3<sup>rd</sup> BC, stating that all Men are born free and equal, and thus, by nature, entitled to the same law. See Russell and Neff, *supra* note 25, previously cited, and B. Nicholas, *An Introduction to Roman Law* (Clarendon Press, Oxford, 1962) p. 55.

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” (Article 2)

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” (Article 7)

Articles 1 and 2, read in conjunction with the Preamble, form the basis of the Declaration and are as such general principles of human rights.<sup>87</sup> Non-discrimination clauses, such as Article 7, run like a golden thread through the body of human rights law, rooted in the same belief, i.e. that differential treatment, due to special characteristics of one human being or a group of human beings, is not in accordance with the principle of equality in rights.<sup>88</sup> It is therefore no surprise when theorists argue that equality and non-discrimination are in general terms the positive and negative statement of the same principle.<sup>89</sup>

In view of the foregoing comments, the presumption is seemingly obvious that *all* men and *all* women have the equal right to marry, and the wording of Article 16, below, has no reservation to the contrary, apart from setting normal requirements concerning age and mutual consent.

(1) “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”

(2) “Marriage shall be entered into only with the free and full consent of the intending spouses.”

(3) “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

Before we proceed, and examine how the principle of universal equality and non-discrimination is realized in European context, let us keep in mind that the solemn wording of Article 2 leaves no apparent discretion to any kind of limitation on the entitlement to those equal rights set forth in the Declaration. Moreover, the Article illustrates only a number of grounds, which are prejudiced in nature as reason for discrimination, e.g. distinction based on sex, national or social origin, birth or other status. In other words, the provision is non-exhaustive in that sense.

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<sup>87</sup> See S. Skogly, ‘Article 2’ in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights* (Kluwer Law International, The Hague, 1999) p. 75.

<sup>88</sup> *Ibid.*

<sup>89</sup> O. M. Arnardóttir, *Equality and Non-discrimination under the European Convention of Human Rights*, (Martinus Nijhoff, The Hague, 2003) p. 7.

## 3.2 The Fulfilment

The CoE was constituted in 1949 as a means to promote the development of friendly relations between the people and peoples of Europe. Its best-known achievement is the adoption of the ECHR, which came into force in 1953. The ECHR is of central importance to our query, and so is the Treaty on European Union (TEU), signed in 1992 and entering into force in November 1993.<sup>90</sup> Let us now examine their relevance, and other measures taken by the CoE and EU to combat discrimination and promote equality in Europe.

### 3.2.1 The ECHR

It is fair to say that the ECHR is to reflect the vision of equality, articulated by the founding fathers of the UDHR. Yet, the omen appears in the Preamble to the Convention, like a cloud before the storm, where the contracting States, having considered the UDHR and its aim of securing universal human rights, “take the first steps for the collective enforcement of certain of the rights stated” in the Declaration. In accordance, Articles 1, 12 and 14 read as follows:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”  
(Article 1)

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”  
(Section I, Article 12)

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” (Section I, Article 14)

There is no reference to the universality of human rights, i.e. that “all human beings are born free and equal in dignity and rights” as vowed in the UDHR. Therefore, there is no pledge, no promise, for equality among the peoples of Europe, only a word of State ‘honour’, almost as if States have the human faculty to be noble, which they do not. Accordingly, States have exercised their right to discretion when determining which human beings may marry according to Articles 12 and 14.<sup>91</sup> Although the latter does not cite the term ‘sexual orientation’, the Court has ruled that it falls within the scope of “other status”.<sup>92</sup>

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<sup>90</sup> See P. Craig and G. de Búrca, *EU Law, Text, Cases, and Materials* (Oxford University Press, 3<sup>rd</sup> ed., 2003) pp. 8 and 22.

<sup>91</sup> Article 14 is an accessory non-discrimination clause, i.e. one has to read it in conjunction with other rights provided for in the Convention, such as Article 12.

<sup>92</sup> See, e.g., *Case of Salgueiro da Silva Mouta v. Portugal*, App No. 33290/96, Judgment of 21 December 1999; (2001) 31 EHRR 1055.

In November 2000, the Member States adopted a new Protocol No. 12 to the ECHR. Article 1 of the Protocol prohibits any kind of discrimination in the enjoyment of rights set forth by law. The article is autonomous in the sense that enjoyment of rights, without discrimination, is not limited to the rights stated in the ECHR but applies to every right set forth in any legislation of Member States. The grounds for discrimination listed in Article 1 are identical to the ones listed in Article 14 of the Convention. The drafters of the Protocol did not consider it necessary, from a legal point of view, to list other special non-discrimination grounds, such as physical and mental disability, sexual orientation or age, since the list of non-discrimination grounds was not exhaustive in the provision. Moreover, the ECtHR had already in its case law, applied Article 14 in relation to discrimination grounds not explicitly mentioned in the provision.<sup>93</sup> The Protocol entered into force in April 2005 but so far, only 14 States have ratified it.<sup>94</sup> The reluctance seems to be rooted in fear that the open textured language of the Protocol may have unforeseen consequences in practice.<sup>95</sup>

Even though Article 14 and Protocol 12 refer only to securing non-discrimination and do not mention equality they do indeed entail both. Reference in this respect, is made to the general remarks at the beginning of this Chapter and the Explanatory report to Protocol 12, where it is stated that although the equality principle does not appear explicitly in the text of those provisions, it should be noted that the non-discrimination and equality principles are closely entwined. “For example, the principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists.”<sup>96</sup>

As previously noted, Article 14 can only be invoked in conjunction with a substantive right provided for in the ECHR. In short, one cannot consider a violation of Article 14 in isolation. The provision is nonetheless autonomous, i.e. its application does not presuppose violation of a specific right, although its application is dependent upon the facts of a case falling within the ambit of another ECHR provision.<sup>97</sup> In view of the fact that the

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<sup>93</sup> See Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *Explanatory Report*, Para. 20,

<[www.conventions.coe.int/Treaty/en/Reports/Html/177.htm](http://www.conventions.coe.int/Treaty/en/Reports/Html/177.htm)> visited on 14 April 2006.

<sup>94</sup> See Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *Status*,

<[www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=4/14/2006&CL=ENG](http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=4/14/2006&CL=ENG)> visited on 14 October 2007.

<sup>95</sup> Arnardóttir, *supra* note 89.

<sup>96</sup> Explanatory Report, *supra* note 93.

<sup>97</sup> See P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer Law International, The Hague, 1998, 3<sup>rd</sup> ed.) pp. 711-716 and C. Ovey and R. C. A. White, *European Convention on Human Rights* (Oxford University Press, 4<sup>th</sup> ed., 2006) pp. 415-416. *Accord the Belgian Linguistics case*, Apps. No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgment of 23 July 1968, Series A, No. 6; (1979-80) 1 EHRR 252, where the Court manifested this sphere of Article 14, prior to which there had been doubts whether the Article could be invoked if there had been no violation of the substantive right in question. The Court concluded that such an interpretation would deprive Article 14 of its effectiveness and therefore rejected it.

right to marry falls within the substantive provision of Article 12, we need not consider Protocol No. 12 any further.

### 3.2.1.1 Role of the Court

The Court has developed a certain method in its examination on whether there is a discriminatory breach of a substantive right within the meaning of Article 14. The starting point is the Aristotelian equality axiom, i.e. that equal situations shall be treated in an equal manner and unequal situations unequally,<sup>98</sup> an approach, which has been coined the comparability test.<sup>99</sup> However, differential treatment does not always constitute discrimination, e.g. in matters concerning additional educational facilities for children of less fortunate families.<sup>100</sup> Thus, in the *Belgian Linguistics* case, the Court added a justification test to Article 14, stating that the principle of equality is violated if the distinction in question has no objective and reasonable justification. It further concluded that the existence of such justification has to pursue a legitimate aim, and the means employed has to be proportionate to that legitimate end.<sup>101</sup> Finally, the Court has added a margin of appreciation factor to its method of evaluation.

The margin of appreciation doctrine<sup>102</sup> owes its origin in the principle of subsidiarity, i.e. that national authorities are, due to direct and continuous contact with the vital forces of their countries, in a better position to make the initial assessment of the situation under examination.<sup>103</sup> In the first Article 14 case, where the Court relied on the doctrine, it stated that Member States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment in law. However, the scope of this margin varies according to circumstances, the subject matter and its background.<sup>104</sup> Thus, the Court has frequently referred to a common European consensus, meaning that if there is widespread and growing consent on the particular issue at stake, it is more likely that the Court will take the stand of the majority. Moreover, examination of the Court's case law has shown that in certain categories, e.g. concerning property rights and taxation policies, Member States generally enjoy a wider margin of appreciation, whereas in others, e.g. regarding differential treatment based on sex, race, nationality, and sexual orientation, the margin of appreciation is usually narrow.<sup>105</sup>

Commentators have criticized the Court's case law concerning Article 14 for being unclear and inconsistent, in relation to both the comparability

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<sup>98</sup> Arnardóttir, *supra* note 89, p. 10.

<sup>99</sup> Van Dijk and van Hoof, *supra* note 97, p. 720.

<sup>100</sup> Ovey and White, *supra* note 97, p. 416.

<sup>101</sup> *Belgian linguistics case*, *supra* note 97.

<sup>102</sup> Case of *Handyside v. The United Kingdom*, App. No. 5493/72, Judgment of 7 December 1976, Series A, No. 24; (1979-80) 1 EHRR 737, is the leading precedent on the Court's approach to the doctrine, later developed in its case law.

<sup>103</sup> Arnardóttir, *supra* note 89, p. 58.

<sup>104</sup> Case of *Inze v. Austria*, App. No. 8695/79, Judgment of 28 October 1987; Series A, No. 126; (1998) 10 EHRR 394.

<sup>105</sup> Ovey and White, *supra* note 97, p. 429.

test, and the objective and reasonable justification test,<sup>106</sup> and some question whether the Court follows a sufficient legal and objective analysis, rather than depending on individual circumstances, even of a subjective nature.<sup>107</sup>

### 3.2.1.2 Measures on Behalf of the CoE

Among other measures aimed at combating discrimination and promoting equality, are numerous resolutions and recommendations, passed by the PA. Insofar as concerns lesbians and gays directly, new ground was broken in October 1981 with Resolution No. 756 and Recommendation No. 924.<sup>108</sup> By way of the former, the PA, in belief that all individuals should have the right to sexual self-determination, successfully called upon the World Health Organisation to remove homosexuality from its International Classification of Diseases. By the latter, the PA condemned various forms of discrimination, which lesbians and gays suffered in individual Member States and recommended *inter alia* that the Committee of Ministers (COM) would urge Member States to abolish criminalization of homosexual acts between consenting adults, and provide for the same minimum age of consent for homosexual and heterosexual acts.

In 2000, the PA stressed its concern that most Member States still discriminated against lesbians and gays in respect to asylum and migration policies. Therefore, it recommended that the COM would urge Member States to review such policies in order to ensure equal treatment of lesbian and gay partnerships and families and those of their heterosexual counterparts.<sup>109</sup> Less than a year later, the COM announced compliance with the recommendation. Finally, in Recommendation No. 1474, the PA listed various forms of discrimination against lesbians and gays, stressing its concern but also welcoming efforts of individual States in recognizing same-sex partnerships. The PA then made several recommendations to the COM among which to urge Member States to apply the same minimum age of consent for homosexual and heterosexual acts and to take positive measures to combat homophobic attitudes.<sup>110</sup>

## 3.2.2 The TEU

Another major step towards European unity was taken in 1957, with establishment of the European Economic Community (EEC), creating a common market, and leading in stages to economic and social integration, a single market, and finally political integration with creation of the European Union in 1992 and the TEU, whereby the EEC Treaty was renamed the EC Treaty.<sup>111</sup> In this evolution, it is important to understand that the market

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<sup>106</sup> Van Dijk and van Hoof, *supra* note 97, pp. 722-727 and Arnardóttir, *supra* note 89, pp. 15-16.

<sup>107</sup> *Ibid.*, Arnardóttir, pp. 16-17, where the author demonstrates such views, held by Lochak, Bossuyt and Partsch. Furthermore, he offers a different approach to the method of evaluation, based on comparative studies of the Court's case law concerning Article 14.

<sup>108</sup> See footnote 62.

<sup>109</sup> PA Recommendation 1470 of 30 June 2000.

<sup>110</sup> PA Recommendation 1474 of 26 September 2000.

<sup>111</sup> See J. McCormick, *Understanding the European Union* (Palgrave, 2<sup>nd</sup> ed., Basingstoke and New York, 2002) pp. 63-83.

came first. Initially, the EC Treaty did therefore not contain equality or discrimination clauses, akin to the ECHR. Yet, Article 12 (ex Article 6) prohibited discrimination on grounds of nationality.

The TEU confirmed the steadily growing commitment to human rights, whereby Member States acknowledged their attachment to the principles of liberty, democracy, subsidiarity and respect for human rights and fundamental freedoms, and of the rule of law, principles common to all Member States, according to Article 6(1). Moreover, in Article 6(2), the EU committed itself to respect fundamental rights, as guaranteed by the ECHR, and as such rights resulting from the constitutional traditions common to all Member States, as general principles of Community law. Although the EU is not party to the ECHR, it is thus justifiable to say that the Union is bound by the Convention through its Member States.<sup>112</sup>

In the spirit of an ever-closer union among the peoples of Europe, the EU has gradually increased its commitment to combating discrimination, from emphasizing mainly on nationality and gender equality, to amending Article 13 of the EC Treaty, by providing the Community legislature with means to take appropriate action against discrimination, based *inter alia* on sex or sexual orientation.<sup>113</sup> Accordingly, the Community enacted a general framework for equal treatment in employment and occupation, binding on all Member States, and prohibiting employment discrimination on grounds of Article 13.<sup>114</sup>

With the 2000 Treaty of Nice, further measures were taken to ensure equal pay for equal work and equality between men and women with regard to labour market opportunities and treatment at work. More importantly, EU Member States approved a Charter of Fundamental Rights.<sup>115</sup> Although the EU Charter is not legally binding, at present, EU citizens have increasingly invoked the Charter in their communications with EU institutions, and Advocates-Generals at the ECJ regularly refer to it in legal reasoning.<sup>116</sup> The Charter, stipulating that everyone is equal before the law, and containing non-discrimination clauses in the spirit of the UDHR and ECHR, now forms Part II of the draft Constitution for Europe, whereby, if ratified, the EU itself shall seek accession to the ECHR.<sup>117</sup>

Apart from Treaty legislation and binding directives, the European Parliament (EP) has repeatedly passed resolutions on issues regarding fair treatment of lesbians and gays, such as the 1984 Resolution on sexual discrimination at the workplace, and the 1994 Resolution on equal rights for homosexuals and lesbians in the EC.<sup>118</sup> The latter called upon the Commission to “draft a Recommendation seeking to end the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework and guaranteeing the full rights and benefits of marriage,

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<sup>112</sup> See European Union, *Annual Report on Human Rights*, (2004), pp. 8-9.

<sup>113</sup> See Craig and de Búrca, *supra* note 90, pp. 355-356. Reference to the 1987 Treaty of Amsterdam.

<sup>114</sup> Council Directive 2000/78/EC of 27 November 2000.

<sup>115</sup> See footnote 11.

<sup>116</sup> EU, Annual Report, *supra* note 112, p. 35.

<sup>117</sup> See Official Journal (OJ) of the European Union 2004/C 310/01.

<sup>118</sup> OJ 1984/C 104/46 and OJ 1994/C 61/40 respectively.

allowing the registration of partnerships”.<sup>119</sup> In 2000, the EP passed a resolution on respect for human rights in the EU (1998-1999).<sup>120</sup> Under the heading of ‘life styles and types of relationships’, the Commission urged Member States to amend their legislation in order to recognize registered partnerships of persons of the same sex and assigning them the same rights and obligations as existed for registered partnerships between men and women. Moreover, it recommended rapid progress in the recognition of legal marriages between same-sex couples in the EU. The Commission also deplored the fact that some Member States still had discriminatory age-of-consent provisions for homosexual relations in their criminal codes as well as other forms of discrimination, despite the fact that various competent human rights bodies and the EP had already condemned these provisions, and demanded their abolishment.<sup>121</sup> In 2005, the EP passed a resolution on the protection of minorities and anti-discrimination policies.<sup>122</sup> Taking note of continual prejudice and homophobia, permeating the public sphere, the EP condemned all acts of homophobic violence. In 2006, the EP passed a special resolution on homophobia, with a significant majority of 468 votes against 149.<sup>123</sup> Here, the EP stressed its concerns on growing homophobia in Europe, based on a series of recent events, ranging from bans on gay pride marches, use of inflammatory language by leading politicians and religious leaders, and violent demonstrations by homophobic groups, to the introduction of constitutional changes explicitly aimed to prohibit same-sex unions.<sup>124</sup> In addition to condemning such discrimination against lesbians, gays, bisexuals and transgender people, the EP urged Member States to enact legislation to end discrimination towards same-sex partners in areas of inheritance, property arrangements, tenancies, pensions, tax, social security etc.<sup>125</sup>

### 3.3 Analysis

The observant reader might ask why we are speculating in length about non-discrimination clauses, not least provisions of EC law and measures regarding lesbians and gays on behalf of the EU, when our main objective is to question the right to marry, clearly stated in Article 12 of the ECHR, or

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<sup>119</sup> K. Waaldijk ‘Towards the Recognition of Same-Sex Partners in European Union Law: Expectations Based on Trends in National Law’ in Wintemute and Andenæs (eds.), *supra* note 4, p. 639.

<sup>120</sup> EP Resolution on Respect for Human Rights in the European Union, A5-0050/2000, <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2000-0113+0+DOC+XML+V0//EN&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2000-0113+0+DOC+XML+V0//EN&language=EN)>, visited on 10 May 2006.

<sup>121</sup> *Ibid.*, Para. 56-60.

<sup>122</sup> EP Resolution on the Protection of Minorities and Anti-discrimination Policies in an Enlarged Europe, A6-0140/2005, <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2005-0228+0+DOC+XML+V0//EN&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2005-0228+0+DOC+XML+V0//EN&language=EN)>, visited on 10 May 2006.

<sup>123</sup> EP Resolution on Homophobia in Europe, B6-0025/2006, <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0018+0+DOC+XML+V0//EN&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0018+0+DOC+XML+V0//EN&language=EN)>, visited on 10 May 2006.

<sup>124</sup> *Ibid.*, Para. C.

<sup>125</sup> *Ibid.*, Para. 1, 3 & 11.

arguably so. The answer lies within the fact that human rights do not exist in a vacuum. Hence, one can only weigh and appreciate the right to marry in light of general principles of equality and the common belief that all Men are born free and equal. Presupposing that such is the case, i.e. that lesbians and gays are born with rights equivalent to heterosexuals; we must ask two imperative questions. First, at what point in life did *they* forfeit their right to equality, and secondly, by which action or inaction did they surrender the right to equal opportunities and equal protection before the law. Every man and every woman has to embark on a sole-searching journey in order to answer these questions. I shall reveal my answers later on.

For now, let us remember the initial pledge, set forth in the UDHR, that all men are born free and equal in dignity and rights, and that *we* shall act towards one another in a spirit of brotherhood, irrespective of sex, sexual orientation and religion. In the absence of religious refuge, we must ponder whether there are substantive reasons for disallowing same-sex couples to marry. In view of the TEU, preserving the equal right of all EU citizens to move freely within the Union, we must also question how this objective can be obtained, when same-sex couples are deprived of the right to marry in Member State A and recognition of marital status in the same State, when migrating as legally wedded from State B. The line was set in 1948, when the UN called upon all States to act in way of equality, tolerance and benevolence. Although the UDHR did not specifically state that lesbians and gays should enjoy the same equality as other members of the human family, there is no reason to believe otherwise. The same argument prevails, when scrutinizing the ECHR and the Court's judgments concerning equality and non-discrimination, whereby the Court has held that discrimination based on sexual orientation is impermissible according to Article 14.

We will remember that almost 60 years ago the CoE took the "first steps" for the collective enforcement of "certain of the rights" stated in the UDHR. By introducing the comparability test, the justification test and the margin of appreciation principle, the Court has paved the way for further securing equal rights of lesbians and gays, aided by important measures taken by the PA and the EP, previously mentioned. Hence, ECHR Member States can no longer discriminate against same-sex couples with reference to public morality or public health arguments, thus narrowing the scope for unfair treatment of lesbians and gays within national legislation. Recalling the Dutch statement, that there is no reason why same-sex couples should be denied the opportunity to marry, let us proceed and examine the right to marry in European context.

## 4 The Right to Marry

The right to marry attained the status of a human right in Article 16 of the UDHR, whereby men and women of full age have the equal right to marry and to found a family without any limitation due to race, nationality or religion.

According to drafting documents of the Declaration, the original proposal was however more modest in expression than the final wording, providing that “Every one has the right to contract marriage in accordance with the laws of the state”, which implies that initially the right was not considered particularly important.<sup>126</sup> This changed during the drafting process, adding reference to “race, nationality or religion” as illicit obstacles to the right to marry, a proposal instigated by Mexico in order to prohibit restrictions on mixed marriages, i.e. inter-religious, inter-racial or marriages between nationals and foreigners. Yet, many States contested, Muslim countries claiming that limitation of such right on grounds of religion was inherent in Islamic law, while Western States claimed that the additional clause was merely a restatement of the general non-discrimination provision in Article 2 of the UDHR. The Mexican proposal prevailed nonetheless, and is now seen as a reiteration of Article 2.<sup>127</sup>

Judging by Article 16 and explanatory documents, it will seem that the drafters had three main goals, first, to prevent child marriage and marriage without full consent of both parties, secondly, to secure equal rights of the sexes when marrying, during marriage and at its dissolution, and finally, to stress State responsibility in the protection of the family.<sup>128</sup>

The right to marry has since been implemented in various human rights instruments, and has gained prominence reaching far beyond Western Christian notions.<sup>129</sup> Thus, it appears in the ICCPR and the ICESCR, which most world States are parties to, including all European States.<sup>130</sup> The right also exists in many regional human rights treaties, notably in Article 12 of the ECHR, which we shall now examine, along with supportive measures adopted within the EU.

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<sup>126</sup> S. Lagoutte and Á. Th. Arnason, ‘Article 16’ in Alfredsson and Eide (eds.), *supra* note 87, p. 326, where the authors further note that according to Mrs. Roosevelt, chair of the UN Commission on Human Rights, there was no mention at all of the right to marry in the first UDHR draft proposals.

<sup>127</sup> *Ibid.*, pp. 326 & 329.

<sup>128</sup> *Ibid.*, p. 356.

<sup>129</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Engel, Strasbourg, 1993) p. 514.

<sup>130</sup> Other international instruments that contain provisions on specific aspects of the right to marry or mention the right to marry in the context of non-discrimination are as follows: The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Convention on the Elimination of All Forms of Discrimination against Women (1979), and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956).

## 4.1 The ECHR

Article 12 of the ECHR reads as follows:

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

As previously mentioned, Article 16 of the UDHR has no apparent reservation to the equal right to marry, apart from setting normal requirements concerning age and mutual consent, while it is intrinsic to Article 12 that the exercise of such right is governed by national law of each contracting State. Thus, the right is not absolute in relation to equality, and is subject to limitation according to the will, arguably whim, of national legislators. Among undisputed restrictions are legal provisions concerning marital age, although they may differ within Europe, and the proviso that both parties want to enter into marriage. Moreover, legislation varies in relation to marriage ceremonies, e.g. whether a civil wedding must take place prior to a legal religious ceremony,<sup>131</sup> and all Member States prohibit bigamy and incestuous marriage, and require that the marrying couple are of a mentally sound mind.<sup>132</sup> These requirements are generally acknowledged in Europe and do therefore not call for further discussion. Obviously, they do not exclude same-sex couples from marriage, no more than the general wording of Article 12 *per se*. Thus, we are no closer to understanding on what grounds same-sex couples are in most Member States denied the same right to marry as enjoyed by heterosexuals. In this respect, guidance may be sought in Articles 8-11, concerning the respect for private and family life, the freedom of thought, conscience and religion, the freedom of expression, and the right to peaceful assembly, whereas those rights can be restricted due to special reasons, provided for by law and necessary in a democratic society. Among justifications of such nature are limitations based on interests of national security, public safety, prevention of disorder or crime, protection of public health or morals, or for the protection of the rights and freedoms of others.

Accordingly, we can assume that each Member State has some degree of discretion when enacting and upholding its own law on the right to marry. The problem is identifying which restrictions are indeed justifiable, not only according to the will of individual States but also in relation to international human rights law and practice. In this respect, we should bear in mind that the ICCPR bans discrimination based on sex and sexual orientation, arguably including exclusion of same-sex couples from the status of civil marriage.<sup>133</sup>

Despite discretionary powers of Member States, common norms do apply, which all are to respect.<sup>134</sup> Thus, the Commission<sup>135</sup> concluded in the *Hamer* case that the wording of Article 12 does not provide unlimited State

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<sup>131</sup> Van Dijk and van Hoof, *supra* note 97, p. 601.

<sup>132</sup> Lagoutte and Arnason, *supra* note 126, p. 329

<sup>133</sup> See HRC *Joslin et al. v. New Zealand*, Communication No. 902/1999 of 17. July 2002.

<sup>134</sup> Van Dijk and van Hoof, *supra* note 97, p. 603.

<sup>135</sup> The Court, following amendments of Protocol 11, replaced the Commission.

discretion, for if it did, Article 12 would be redundant.<sup>136</sup> Hence, any limitations concerning the exercise of the right to marry and to found a family must be justifiable in relation to the ECHR. Furthermore, such limitations may not amount to a violation of any other provisions, most notably Article 14 and Article 1 of Protocol 12, previously mentioned, which prohibit national authorities from discrimination in regulating the enjoyment of the rights and freedoms set forth in the Convention.<sup>137</sup> On the other hand, there is no obligation on behalf of Member States to establish marriage as a special institution under their private law systems, contrary to the ICCPR.<sup>138</sup> Yet, if States do oblige, they must do so without any discrimination.<sup>139</sup>

It has been argued that the right to marry and to found a family should be regarded as one and the same right, whereas Article 12 stipulates "... the exercise of *this* right".<sup>140</sup> Such interpretation conforms to the Court's earlier case law. However, recent case law, illustrated below, has given rise to the conclusion that they are in fact two separate rights.<sup>141</sup>

In view of the forgoing discussion, it is apparent that Article 12 sheds no light on why same-sex couples are deprived the right to marry under the ECHR, and the aforementioned exemptions in Articles 8-11 *per se* offer insufficient guidance as to specific reasons behind such exclusion, which are objective and justifiable only in relation to lesbians and gays. Certainly, legal recognition of same-sex marriage is not contrary to national security or public safety, and such discrimination can no longer be rightly justified with reference to public disorder, criminality or the protection of public health or morals. Thus, there apparently remain obscure reasons of public policy and protection of the rights and freedoms of others, possibly based on fortification of the family as a heterosexual institution. In order to realize the basis for State discrimination against same-sex couples, and understand the reasons why the ECHR does not protect equality in this matter, despite general provisions in Articles 1 and 14 towards this end, we have to call upon the Court and scrutinize its leading judgments concerning Article 12. Before we do so, it is important to observe what the EU has accomplished in safeguarding the right to marry.

## 4.2 The TEU and Beyond

We will remember that initially the EC Treaty did not contain any specific human rights provisions, whereas its primary object was to establish a common market. Family law fell outside its scope, and it still does. Therefore, there is no reference to the right to marry, and the same applies to the TEU. As mentioned in Chapter 3.2.2, the EU has however exemplified

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<sup>136</sup> See Report of 13 December 1979, D & R 24 (1981), p.14. *Accord van Dijk and van Hoof*, *supra* note 97, pp. 603-4.

<sup>137</sup> Van Dijk and van Hoof, *supra* note 97, p. 604.

<sup>138</sup> See Nowak, *supra* note 129, p. 514 and van Dijk and van Hoof, *ibid.*, p. 602.

<sup>139</sup> *Ibid.*, van Dijk and van Hoof

<sup>140</sup> See Lagoutte and Árnason, *supra* note 126, pp. 354-355.

<sup>141</sup> See van Dijk and van Hoof, *supra* note 97, p. 613, where the authors reach the same conclusion.

its growing commitment to human rights, not least by approving the Charter of Fundamental Rights, whereby the EU acknowledged the right to marry in Article 9 of the Charter, which reads as follows:

„The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights“.<sup>142</sup>

It is notable that Article 9 does not mention ‘men and women’, akin to other human rights instruments, and by its wording one might assume that EU Member States do believe that the right to marry and the right to found a family are two separable rights. Judging by explanatory documents, the article is however rooted in Article 12 ECHR, although the drafters further stipulate in the following way:

“The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.”<sup>143</sup>

Thus, it is seemingly obvious that the drafters deliberately meant to leave room for other types of marriage than that between a woman and a man.

### 4.3 Case Law of the Court

The ECtHR has never dealt directly with the question of whether two persons of the same sex have the right to marry. Therefore, we have to seek guidance in cases, which are of similar and comparable nature. Case law concerning rights of transsexuals may shed light on our problem. Thus, in *Rees*, the Court concluded as follows:

“In the Court’s opinion, the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family.”<sup>144</sup>

Alas, the Court did not explain how Article 12 is supposedly so clear in its declaration that marriage is only between a man and a woman, merely citing that “traditional marriage” is of heterosexual nature. Moreover, the Court did not clarify the supposed and inherent connection between heterosexual marriage and “family”, as opposed to same-sex couples and their family values. Just or unjust, the Court made it implicitly clear that the

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<sup>142</sup> Charter of Fundamental Rights of the European Union, OJ 2000/C 364/01.

<sup>143</sup> See <[www.eucharter.org/home.php?page\\_id=16](http://www.eucharter.org/home.php?page_id=16)>, visited 1 June 2007.

<sup>144</sup> Case of *Rees v. United Kingdom*, App. No. 9532/81, Judgment of 17 October 1986, Series A, No. 106; (1987) 9 EHRR 56, Para. 49 of Judgment.

ECHR only protects the right to marry and to found a family when men and women marry each other.<sup>145</sup>

The Court upheld the same position in subsequent cases until 2002,<sup>146</sup> when *Christine Goodwin v. The United Kingdom* came into consideration.<sup>147</sup> The applicant, a post-operative male to female transsexual, argued for violation of her human rights, *inter alia* in respect to marriage according to Article 12 and the right to respect for private and family life under Article 8. Here, the Court deviated from its prior case law and ruled that there had been a breach of both Articles. The *Christine Goodwin* judgment is no doubt groundbreaking in terms of marital status and marital rights of others than heterosexual couples, for diverse reasons, although it does not accord such rights to lesbians and gays. Let us now summarize the Court's findings.

The first significant point is the Court's reference to the *Rees* case, and its deviation from the initial standpoint that the right to marry is the basis of the formation of family, stating that the inability of any couple to conceive or parent a child cannot remove their right to marry.<sup>148</sup>

Secondly, the Court addressed the direct wording of Article 12, before stating as follows:

“It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria [...]. There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality [...]. The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women.”<sup>149</sup>

The importance of the Court's reasoning above is twofold. First, it departs from its earlier restrictive approach towards marriage. Secondly, it offers justification for a new and more lenient approach towards the “traditional” interpretation of marriage, referring to major social changes in the conception of marriage, and citing Article 9 of the EU Charter.

Furthermore, the Court deliberated on whether the allocation of sex in national law to that registered at birth was a limitation, impairing the very essence of the right to marry, in the case in question. Subsequently, the Court ruled as artificial, the argument that transsexuals were not deprived

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<sup>145</sup> The HRC did however deal with whether the right to marry in Article 23 of the ICCPR was eligible for a same-sex couple in the case of *Joslin et al. v. New Zealand*, *supra* note 133. In its reasoning the HRC referred to the *Rees* case.

<sup>146</sup> See cases of *Cossey v. the United Kingdom*, App. No. 10843/84, Judgment of 27 September 1990, Series A, No. 184; (1991) 13 EHRR 622 and *Sheffield and Horsham v. the United Kingdom*, Apps. No. 22985/93 and 23390/94, Judgment of 30 July 1998; 27 EHRR 163.

<sup>147</sup> Case of *Christine Goodwin v. the United Kingdom*, *supra* note 71.

<sup>148</sup> *Ibid.*, Para. 98 of Judgment.

<sup>149</sup> *Ibid.*, Para. 100 of Judgment.

the right to marry, since they were able to marry a person of their former opposite sex, and stated the following:

“The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court’s view, she may therefore claim that the very essence of her right to marry has been infringed”.<sup>150</sup>

The fourth point of significance is the dynamic way in which the Court interprets human rights with an evolutionary approach, stating that while precedents do not formally bind the Court, it will not depart from them without good reason. Hence, it proclaims:

“However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved. [...] It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.”<sup>151</sup>

The fifth point of interest is that the Court seems to lineate from its former approach to a common European consensus in relation to the principle of a margin of appreciation in terms of transsexuals. Instead, it laid greater emphasis on “the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.”<sup>152</sup>

The Court’s remarks on States allowing sex-change operations and therefore recognizing certain needs of transsexuals, without acceptance of the changed legal position subsequent to such operations, are also of importance, whereas the Court held that the unsatisfactory situation of an intermediate zone, where post-operative transsexuals were not quite one gender or the other, was no longer sustainable.<sup>153</sup>

The Court also addressed the margin of appreciation principle in relation to marriage, stating that the fact that fewer States permitted transsexuals to marry in accordance with their new gender than actually recognized the change of gender itself did not make a good argument for leaving the matter entirely to Member States, as being within their margin of appreciation. According to the Court, such conclusion would be “tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry.” The margin of appreciation could thus not extend so far.<sup>154</sup>

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<sup>150</sup> *Ibid.*, Para. 101 of Judgment.

<sup>151</sup> *Ibid.*, Para. 74 of Judgment.

<sup>152</sup> *Ibid.*, Para. 84 of Judgment.

<sup>153</sup> *Ibid.*, Para. 90 of Judgment.

<sup>154</sup> *Ibid.*, Para. 103 of Judgment.

Finally yet importantly, the Court stressed its emphasis on human dignity and human freedom, by addressing the very essence of the ECHR in the same respect, although not undermining difficulties that Member States would face in their whole registration system by granting transsexuals the rights they claimed. The Court then concluded as follows:

“No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”<sup>155</sup>

Insofar as concerns same-sex couples, the initial approach was stern and unappreciative towards lesbians and gays, the Commission declaring most cases inadmissible, as “manifestly ill-founded”.<sup>156</sup> The Commission upheld the same view on the interpretation of respect for gays’ private life, where it found that laws prohibiting homosexual behaviour, which interfered with their private life, were justifiable for the protection of public health and morals.<sup>157</sup> The Commission and the Court later converted from such interpretation, and found that lesbians and gays indeed fell within the ambit of private life and such interference was thus unjustifiable.<sup>158</sup> Gradually the Court has also come to recognize certain family rights for lesbians and gays. In the case of *Salgueiro da Silva Mouta v. Portugal* the Court found that the difference of treatment the gay father had suffered to that of the heterosexual mother, by the Lisbon Court of Appeal in a custody case was on grounds of his sexual orientation, and therefore not acceptable under the Convention.<sup>159</sup>

The case of *Karner v. Austria* also gives way to a less restrictive approach towards same-sex couples.<sup>160</sup> The case was brought before the Court on grounds of Article 14, in conjunction with Article 8, whereas the applicant had been denied the status of a ‘life companion’ within the meaning of the Austrian Rent Act, and thus prevented from succeeding to his deceased companion’s tenancy. The Austrian Government maintained that the difference in treatment had an objective and reasonable justification since the aim of the provision in the Rent Act had been the protection of the traditional family. The Court accepted that protection of the family, in a

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<sup>155</sup> *Ibid.*, Para. 90-91 of Judgment.

<sup>156</sup> See R. Wintemute, ‘Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention’, in Wintemute and Andenæs (eds.), *supra* note 4, p. 714.

<sup>157</sup> Ovey and White, *supra* note 97, p. 270.

<sup>158</sup> E.g., cases of *Dudgeon v. the United Kingdom*, *supra* note 63, *Norris v. Ireland*, App. No. 10581/83, Judgment of 26 October 1988, Series A, No. 142; (1991) 13 EHRR, *Modinos v. Cyprus*, App. No. 15070/89, Judgment of 22 April 1993, Series A, No. 259; (1994) 16 EHRR 485, *Smith and Grady v. the United Kingdom*, Apps. No. 33985/96 and 33986/96, Judgment of 27 September 1999 and *Lustig-Prean and Beckett v. the United Kingdom*, Apps. No. 31417/96 and 32377/96, Judgment of 27. September 1999.

<sup>159</sup> Case of *Salgueiro da Silva Mouta v. Portugal*, *supra* note 92.

<sup>160</sup> Case of *Karner v. Austria*, App. No. 40016/98, Judgment of 24. July 2003; (2004) 38 EHRR 528

traditional sense, was in principle a weighty and legitimate reason, which might justify difference in treatment but it would have to pass the proportionality test. With the following reasoning, the Court then found that this test was insufficient, and therefore a violation had occurred:

“The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act. The Court cannot see that the Government has advanced any arguments that would allow such a conclusion.”<sup>161</sup>

In view of the foregoing analysis, it is apparent that the Court does not yet appreciate that same-sex couples have the right to marry according to Article 12 of the ECHR. Before we go any further in evaluation of the Court’s judgments and their influence, let us examine what the European Court of Justice (ECJ) has achieved in matters relating to transsexuals and homosexuals.

## 4.4 The ECJ

The ECJ embarked on its journey through the field of human rights as early as 1969 when it stated, in the *Stauder* case, that the court would protect fundamental human rights, enshrined in the general principles of EC law, even though there was no mention of such rights in the EC Treaty itself.<sup>162</sup> From that point on, the ECJ has taken appreciable account of fundamental human rights, although arguably not always with the most favourable outcome concerning those rights.

Insofar as concerns non-discrimination, the ECJ has been progressive in its interpretation in the field of gender equality. Thus, in the case of *Deutsche Telekom v. Schröder*, which regarded the equal treatment between men and women, the court promoted a strong notion of equality as a fundamental right.<sup>163</sup> In the case of *P v. S*, regarding a transsexual’s claim of discrimination, when dismissed from work following gender reassignment, the court apparently took the approach that discrimination based on such grounds was impermissible in relation to the principle of equality, already part of the fundamental principles of EC law.<sup>164</sup> In this case, the ECJ was moreover ready to interpret the term ‘sex’ in Council Directive 76/207 as wide as applying to discrimination arising from the gender reassignment of

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<sup>161</sup> *Ibid.*, Para. 41 of Judgment.

<sup>162</sup> Case C- 29/69, *Stauder v. City of Ulm* [1969] ECR 419.

<sup>163</sup> Case C-50/96, *Deutsche Telekom v. Schröder* [2000] ECR I-743.

<sup>164</sup> Case C-13/94, *P v. S and Cornwall Country Council*, [1996] ECR I-2143.

the person concerned.<sup>165</sup> Hence, the ECJ held that the directive was “simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law”. The court further proclaimed that to tolerate such discrimination would be tantamount to a failure to respect the dignity and freedom to which he or she was entitled.

As important as *P v. S* was within the human rights approach of EC law, a hasty drawback occurred in the case of *Grant v. South West Trains*,<sup>166</sup> and again in *D v. Council*, which both concerned unequal benefits for employees in same-sex relationships.<sup>167</sup> In *Grant v. South West Trains* (SWT), Ms. Grant, an employee of SWT, applied for travel concessions for her female partner, whom she had lived with for over two years. According to SWT regulations, travel concessions were available for a married member of staff or a common law opposite sex spouse of staff, if a meaningful relationship had existed for a period of two years or more. Thus, SWT denied Ms. Grant travel concessions on the ground that they were only available for partners of the opposite sex. Ms. Grant challenged this, claiming that such refusal constituted discrimination based on sex, since her employer’s decision would have been different if the benefits in issue were available to a man living with a woman, and not to a woman living with a woman. Moreover, she claimed breach on grounds of sexual orientation.

The ECJ found that the conditions imposed by SWT regulations applied in the same way to female and male workers, since travel concessions were inadmissible to a male worker, if he was living with a man, just as they were to a female worker if she were living with a woman. Thus, there was no discrimination directly based on sex. Then the ECJ considered whether persons, having stable relationships with persons of the same sex, were in the same situation as those who were married or had stable relationships outside marriage with partners of the opposite sex. In reaching its conclusion, the ECJ first noted that despite the EP having declared that it deplored all forms of discrimination based on an individual’s sexual orientation, it had not yet adopted any rules providing for such equivalence. It then referred to laws of Member States and found that there was no common consensus on how they treated same-sex partners. In addition, the court examined relevant case law of the ECtHR, and the older case law of the European Commission of Human rights, and reached the conclusion that in the present state of national law within the EC Community, stable same-sex relationships were not regarded equivalent to marriage or stable relationships outside marriage between persons of the opposite sex. Therefore, an employer was not required to treat these situations the same. The ECJ however noted that it was for the legislature alone to adopt, if appropriate, measures to affect that position.

In *D v. Council*, a judgment passed subsequent to amendments of Article 13 EC, mentioned in Chapter 3.2.2, the Council denied a male EU employee, who was in registered partnership with a same-sex partner under Swedish law, a household allowance, stating that provisions of staff regulations did not allow registered partnership to be treated equivalent to

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<sup>165</sup> Dir. 76/207/EEC Equal Treatment Directive [1976] OJ L 39/40.

<sup>166</sup> Case C-249/96, *Grant v. South West Trains* [1998] I-621.

<sup>167</sup> Case C-122/99P and C-125/99P, *D v. Council* [2001] ECR I-4319.

marriage.<sup>168</sup> The staff regulations in question granted household allowance only to married officials or officials who had been married or had dependant children or family responsibilities. Here, the ECJ held that registered partnership could not be considered equivalent to marriage. It then referred generally to registered relationships in Member States, and concluded that such relationships were considered by Member States to be distinct from marriage. The court proceeded by stating that it was up to the legislator to adopt measures to alter that situation, for example by amending provisions of the staff regulations. Akin to *Grant v. SWT*, the court then stated that Mr. D could not rightly claim the Council decision was discriminatory on the grounds of sex. The ECJ then found that according to the staff regulation it was irrelevant whether the official was a man or a woman, and therefore they were not discriminatory. It further denied that there had occurred discrimination on grounds of sexual orientation, since it was clear that it was not the sex of the partner, which determined the granting of the household allowance but the legal nature of the ties between Mr. D and his partner.

Six years have past since the rendering of *D v. Council*. Therefore, it might be prudent not to lay too much emphasis on the case's outcome, in light of more recent changes in the attitude towards same-sex marriage. It is nonetheless disappointing, or arguably so, that the ECJ did not take the plunge, improvise on its prior case law, and enhance the legal rights of lesbians and gays in the field of family affairs, instead of retreating from its initial standpoint, thus limiting the judicial development of such rights as general principles of EC law.<sup>169</sup>

Conversely, it is more appropriate to focus on the ECtHR's judgments in *Christine Goodwin* and *Karner*. Prior to the *Goodwin* case, some legal scholars predicted that the best way to pursue the right to marry was through Article 8 ECHR and link it with family life.<sup>170</sup> However, the *Goodwin* case has opened up the possibility that Article 12 is indeed applicable for a more diverse group than supposedly intended in 1949.

## 4.5 A and B Versus Utopia

In view of the foregoing, it will seem that same-sex couples cannot invoke the right to marry with reference to the ECHR. Yet, the *Christine Goodwin* case, concerning the right of transsexuals to marriage, and the *Karner* case, regarding family life of same-sex couples, may leave the door ajar. In light of the fact that five years have passed since the Court decided on the former case, and four years in respect to the latter, let us hypothesize on how the Court might today tackle a case brought before it concerning the alleged human right to same-sex marriage.

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<sup>168</sup> Article 1 of Chapter 3 of the Swedish Act on Registered Partnership provides that a registered partnership shall have the same legal effects as marriage, subject to a few exceptions.

<sup>169</sup> See Craig and de Búrca, *supra* note 90, p. 356.

<sup>170</sup> See M. Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject', 14:5 *EJIL* (2003) pp. 1023-1044 and Lagoutte and Árnason, *supra* note 126, pp. 356-357.

Hence, we introduce A and B, two lesbians living in the Member State of Utopia, who have been denied the right to marry by the country's Supreme Court. The couple claims breach of the right to marry according to Article 12, both in isolation and in conjunction with Article 14. Assessing which path the Court would take, i.e. whether it would examine the case solely under Article 12 or in conjunction with Article 14 is not of special importance, notwithstanding that the Court held in the *Christine Goodwin* case that there had been breach of Article 12 in isolation. A and B are however well read, and therefore take notice that the Court was dealing with the issue of sexual identity after sex change, where the applicant wanted to marry a person of the opposite sex, subsequent to new sexual identity. Consequently, when looking at such marriage externally, it appears to be a marriage between a woman and a man.

For now, let us imagine that the Court ruled in the case of A and B that there had been no separate breach of Article 12. The next step would then be to fit the case into the Court's methodology of examination under Article 14. Thus, the Court would examine whether there had been difference in treatment and therefore a breach of the right to marry in conjunction with Article 14. First, it would explore whether the couple was in an analogous situation to heterosexual couples who claimed the same right. Supposedly, the Court would find the circumstances of A and B equivalent to the heterosexual comparison group in all aspects, apart from them being of the same sex and of different sexual orientation, both of which are non-discriminatory grounds. Consequently, we must presume that the Court would hold the situations to be analogous. The Court would then have to examine whether the difference in treatment was objective and justifiable. The first step in such evaluation is whether the ban on same-sex marriage in Utopia pursues a legitimate aim. The State would supposedly avail itself of the argument that the traditional institution of marriage is between a man and a woman, and therefore needs protection as such. Moreover, it might argue that marriage needed protection to safeguard the traditional family, which the Court found a legitimate aim in the *Karner* case. A and B would on the other hand refer to the *Christine Goodwin* case, and most likely succeed, since the Court there abandoned its previous interpretation that Article 12 was mainly concerned to protect marriage as the basis of the family. Yet, the Court might use the same line of reasoning in protection of the family as in the *Karner* case, *mutatis mutandis* to that of marriage. Thus, the Court might accept that protection of marriage in a traditional sense is in principle a weighty and legitimate reason, which might justify a difference in treatment. If so, the problematic question remains on what reliable grounds the Court would reach such conclusion. Presupposing the Court could overstep this problem, it would proceed to examine whether the means employed were necessary to reach the aim sought. Here we come to the breaking point, leaving the Court with two options. On one hand, it could conclude, akin to the *Karner* case, that Utopia had shown no legitimate reasons for the necessity to exclude same-sex couples from marriage, in pursuing the aim of protecting traditional marriage, and therefore find the State in breach of Article 12. On the other

hand, it could rule to the contrary. Let us now examine both possibilities, hypothesizing as before on the Court's reasoning.

In the former scenario, the Court would probably refer to the *Christine Goodwin* case and emphasize on the crucial importance that the ECHR is interpreted and applied in a manner, which renders its rights practical and effective not theoretical and illusory. Moreover, failure by the Court to maintain a dynamic and evolutionary approach would indeed risk rendering it a bar to reform or improvement. In addition, the Court would point to major social changes in the institution of marriage, since the adoption of the ECHR, and cite Article 9 of the EU Charter, deliberately eliminating any reference to women and men in this context. In deliberation on 'traditional marriage', the Court might also avail itself of the historical facts we have revealed in Chapter 2. Having reached this far, the Court would address the fact that all European States have recognized the legal status of lesbians and gays, first by decriminalizing homosexual acts, followed by prohibition on discrimination against homosexuals, and by granting same-sex couples various rights equal to those of heterosexual couples. The Court could then conclude align with the *Christine Goodwin* case that it is no longer sustainable to recognize this group in society but still not grant them all the rights they need in order to live in dignity and worth in the sexual identity, granted at birth and to which they have admitted to, sometimes at great personal cost. Subsequently, the Court would rule that there is no concrete or substantial hardship or detriment to public interest, likely to flow from allowing same-sex couples to join the institution of marriage, and that in the Court's view society must tolerate a certain degree of inconvenience, in order to enable those individuals to live in dignity and worth.

The latter scenario is far from novel, whereby the Court would simply fall upon its former interpretation on the right to marry, justifying the end means of Utopia with reference to established case law, and the legal reality that there is no common consensus among Member States towards the acceptance of same-sex marriage. This is indeed the fact, whereas only 3 out of 46 States have acknowledged same-sex marriage. Thus, the Court would conclude that legalization of same-sex marriage is left to the discretion of each Member State, within the margin of appreciation principle, thereby ruling against A and B.

I leave it to the discretion of my readers which conclusion the Court will reach when confronted with the problem at hand. In all likelihood, the Court would at present rule in favour of Utopia, sad, as it may seem in view of the ideal that all human beings are equal. Hence, it seems that Orwell's assertion that 'some animals are more equal than others' is not far from being true. If so, one has to question whether the Court is preoccupied with balancing diverse views of Member States, which is a matter of politics, rather than focusing on the actual human right at stake.

## 4.6 Analysis

The UDHR declares in a solemn way that all human beings are born free and equal in dignity and rights, and further implies that the rights set forth in the Declaration are "inalienable". The term inalienable means that those

rights in question are absolute and one can therefore not forfeit such rights. In other words, they are 'fundamental'. In addition to the pledge that all Men shall enjoy equality and protection against any discrimination in violation of the Declaration, the right to marry attained the status of a human right in Article 16.

Article 1 of the ECHR declares that Member States "shall secure to everyone", within their jurisdiction, the rights and freedoms defined in Articles 12 and 14. Despite the Court's statement in *Rees*, it is not clear to all that the right to marry, guaranteed in Article 12, refers only to marriage between persons of opposite sex. True enough, such is, or rather was, the "traditional" idea of marriage in 1986, and the ideal family was that composed of a man and woman, able and willing to give birth to children. It is the picture perfect model of the heterosexual happy family in the State of Utopia. However, Article 12 *per se* does not imply exclusion of same-sex couples from the institution of marriage, and there is no definition in the ECHR on family as solely a heterosexual unity. Thus, the Court's "opinion" is that of the majority in Europe over twenty years ago, based on prevailing moral and social values rather than law and legal facts. Therefore, the Court's decision in *Rees* is understandable, although not necessarily right.

Twelve years later, in the *Sheffield and Horsham* case, the Court still held the same view. Then, in 2002, when deliberating on the *Christine Goodwin* case, the Court deviated from its former standpoint, stating *inter alia* that the right to marry is no longer contingent on the ability to conceive children and that due to major social changes and scientific developments the institution of marriage is not necessarily a relationship between persons of opposite biological sex. The question remains whether the Court would have the audacity to recognize the equal right of same-sex couples to marry, if, or rather when, the Court will have to address this matter. The Court will then have to decide whether the Member State in question can produce valid arguments for such exclusion, based on special reasons, which are objective and justifiable only in relation to lesbians and gays, i.e. reasons for segregation from heterosexuals on grounds of sexual orientation. If the Court rules in favour of that State, apparently it can only seek refuge by referring to obscure reasons of 'public policy' or 'the protection of the rights and freedoms of others'; reasons which would leave little doubt as to that lesbians and gays are inferior people in comparison with heterosexuals.

Humans are by nature frail. Hence, human law is not only imperfect but also subject to constant change, pending on different eras and diverse cultures. Our ideals of marriage cannot elude this fact. If marriage is a human right, the basis of such right is either in Man made legislation, including international law, or in the ideal that some rights are inherent in human nature, and do, or at least should, prevail over any laws of human ordinance. Let us now examine the nature of human rights, not least the right to marry, for there we may find the ultimate justification for general equality of all men and all women, independent of sex or sexual orientation.

## 5 Are Human Rights Universal?

‘All humans must die; I am a human; therefore I must die.’

This syllogism exemplifies a way of common logic. When questioning the universality of human rights, and consequently the equal and inalienable ‘right to marry’, as seemingly proclaimed in the UDHR, one might argue; all humans can marry; I am a human; therefore, I can marry. Thus, if human rights are universal, then it follows, according to the Oxford Dictionary, that the latter syllogism is “true or right at all times and in all places”.<sup>171</sup>

Presupposing this is the case, would it be acceptable that same-sex marriage is available in State A and at the same time prohibited in State B? Such *is* the case in relation to the neighbouring countries of Spain and Portugal on one hand, and the Netherlands and Germany on the other, whereas the Spanish and Dutch have legalized same-sex marriage while the Germans and Portuguese have not. Can nationality or mere borders, more often than not decided in the wake of devastating wars, suffice to determine the nature of human rights, and confine them within territorial boundaries? The founding fathers of the Declaration would most certainly disagree. Is the Court’s current interpretation on the right to marry according to Article 12 of the ECHR credible, in view of the fact that three Member States to the Convention, Spain, Belgium and the Netherlands, have already accorded lesbians and gays the constitutional right to marry in accordance with the principle of equality?

Independent of the ‘right’ answers, paradox in the interpretation of the concept of equality is evident, creating an intolerable situation from a human rights viewpoint. To put the problem into perspective, imagine four gay Spaniards, David, Manuel, Jesus and Jose, born and raised in the Spanish town of A Guardia, situated miles north of the Portuguese border. David and Manuel live together, and so do Jesus and Jose. All are in their thirties. Due to unemployment, Jesus and Jose take up permanent residence in Caminha, a small village situated miles away, just south of the border. The lifelong friends want to marry. David and Manuel can and do so. The other couple is less fortunate. How can this be? The immediate legal advice would be to move back to Spain. Yet, it does not resolve the key issue of non-discrimination, equality and respect for human dignity.

In order to seek the ‘right’ answers, let us examine whether the circumstances in the abovementioned allegory are justified with reference to dissimilar religious or legal heritage of the respective States.

### 5.1 The Christian Protocol

As previously mentioned, all European States are predominantly Christian. Portugal and Spain have a majority of adherents to the Roman Catholic Church in their populations, 97% and 92% respectively. Interestingly,

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<sup>171</sup> *Oxford Advanced Learner’s Dictionary*, *supra* note 75, p. 1420.

Belgium is also predominantly Roman Catholic (75%), while most of the 80% Christian population of South Africa is Protestant.<sup>172</sup> These statistics reveal two important facts. First, that Portugal and Spain are of the same denomination. Secondly, that the legalization of same-sex marriage is not confined to Catholic States. Hence, we can only conclude that legal amendments in the status of lesbians and gays rise above differences between Christian denominations and are not explainable with reference to liberalism within the Roman Catholic Church as such.

Consequently, the inequality our Spanish friends face in Caminha is not sufficiently justified on grounds of religion.

## 5.2 The Legal Protocol

Having ruled out the possibility that divergent Christian beliefs can explain discrimination against same-sex couples in relation to marriage, we must now seek explanation in ‘the law’ itself. Both Portugal and Spain have a civil law legal system, closely related to the Roman legal tradition. In short, the ‘right’ answer does therefore not lay in diverse legal systems. Interestingly, Canada and South Africa, having both legalized same-sex marriage, have a legal system based on common law tradition.

Consequently, Jesus and Jose cannot seek explanation in the structure of the Portuguese legal system.

## 5.3 The Nature of Human Rights

In the current situation, our gay couple has two options. They can appeal to God or nature as reason for their alleged inalienable right to marry or contest the Man made Portuguese legislation as being discriminatory, and thus arguably not ‘law’ at all. Here we arrive at the root of the problem concerning the supposed universal and fundamental right to marry, as proclaimed in the UDHR, and later implemented in the ECHR with affixed limitations, left to the discretion of its Member States. In order to realize the problem and seek a comprehensive answer, let us now join the two leading schools of legal theory, the natural law school and the school of analytical legal positivism, and examine how they constitute the true source of law.

### 5.3.1 Natural Law Theory

Belief in God has played an important role, when questioning law and its origin. Natural law theory however precedes Christendom, for it was a well-known practice prior to the emergence of Christianity, and detached from all religious beliefs in the Stoic school.<sup>173</sup> Consequently, not all natural law theories centre on God or any divine source of law for that matter. They can also find their origin in nature itself, human instinct, or any other objective

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<sup>172</sup> Reference to Wikipedia Encyclopedia, [www.wikipedia.org](http://www.wikipedia.org), visited 22 January 2007.

<sup>173</sup> The Stoics taught that everything in the universe had its own nature, and it was in the nature of humanity to be rational. Therefore, humans ought to live according to reason, because to do otherwise would be contrary to nature. *See* McLeod, *supra* note 83, p. 20.

reality. In short, they deal with human conduct and law as it ‘*ought to be*’, thus not depending only on how people do behave and how law has been written down or otherwise recognized, but also on factors such as reason, justice and morality.<sup>174</sup> Thus, natural law theory presupposes an independent universal law, separate from and higher to that made by Man, and binding on every human being.<sup>175</sup> Therefore, one might assume that rights can derive from a source *external* to human law itself.

Hence, the Stoics held that all human beings are equal. Therefore, the same law should apply to all. In theory, this means that all human law emanates from a universally valid moral rule of right and wrong conduct, and no man or State can encompass or control it.<sup>176</sup> The Romans took such theorizing to a new level by incorporating natural law into positive Roman law and legal theory, creating a new system of law, *ius gentium* (‘law of nations’), common to all people and peoples, and thus deemed to have universal application.<sup>177</sup> In effect, this meant that natural law achieved legal identity and became actual law, based, theoretically at least, on superior reason not superior force.<sup>178</sup> Following the decline of the Roman Empire, natural law theory flourished throughout the Middle Ages under the umbrella of the Church, persistently claiming that natural law, as part of God’s eternal law, was above any positive law of human ordinance.<sup>179</sup>

John Locke (1632-1704) maintained the natural law tradition, introducing a novel theory on the origin of rights. Akin to his predecessor, Thomas Hobbes (1588-1679), Locke based his theory on the ideal of a ‘social contract’ between people in society, bringing them out of the state of nature where all men were equal, by giving up their individual right to self-help, i.e. to use force to protect themselves against each other.<sup>180</sup> Locke however deviated from Hobbes’s idea of monarchical absolutism,<sup>181</sup> and argued for the division of State power, whereby government, executive and legislative, drew its authority from consent of the people and had the objective of securing freedom and *individual rights*.<sup>182</sup> According to Locke, not only had people in society made a tacit contract between themselves, relinquishing their individual and natural right to executive power in the state of nature, but also by the majority of tacit consent entrusted such power collectively to a particular government, including the power to enact civil laws.<sup>183</sup> If government broke that trust it would automatically dissolve

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<sup>174</sup> *Ibid.*, p. 19.

<sup>175</sup> See, e.g., D. A. Lloyd Thomas, *Locke on Government* (Routledge, London and New York, 1995) pp. 15-16

<sup>176</sup> See F. S. Ruddy, *International Law in the Enlightenment* (Oceana Publications, Inc., New York, 1975) p. 2 and Shaw, *supra* note 42, p. 17.

<sup>177</sup> W. C. Turner, *Introduction to the Study of Roman Private Law* (Cambridge University Press, 1953) pp. 75-76. Accord Shaw, *ibid.*, p. 16 and Stein, *supra* note 36, pp. 12-13.

<sup>178</sup> See Ruddy, *supra* note 176, p. 3 and Shaw, *ibid.*, p. 17.

<sup>179</sup> See Neff, in Evans (ed.), *supra* note 25, pp. 34-35 and J. L. Brierly, *The Law of Nations* (Oxford University Press, 6<sup>th</sup> ed., 1963) p. 18.

<sup>180</sup> See generally T. Hobbes, *Leviathan*, in J. C. A. Gaskin, ed. (Oxford University Press, 1998) and J. Locke, *Two Treatises of Government*, M. Goldie, ed. (Everyman, London, 1993). See also Lloyd Thomas, *supra* note 175, pp. 11-42.

<sup>181</sup> *Ibid.*, Hobbes, Ch. XVII-XX & XXVI. See also Brierly, *supra* note 179, pp. 12-15.

<sup>182</sup> See Locke, *supra* note 179, Second Treatise, Ch. 9-10.

<sup>183</sup> *Ibid.*, Ch. 8, Para. 95-96, Ch. 7, Para. 87-88 & Ch. 11 respectively.

itself and power would return to the people.<sup>184</sup> In short, this means that individuals are the source of authority and individual rights do not derive from State law. Thus, Locke held that civil government was only legitimate insofar as it upheld the law, and if government overstepped its limits and violated natural law it was illegitimate, which in turn justified revolution.<sup>185</sup>

The essence of the Lockean theory is that political power, whether executive, legislative or judicial, is limited by legal rules, ultimately based on natural law, conferring natural rights upon persons, and more directly on constitutional law of individual States. Hence, the 'rule' does not come from the sovereign, but from natural law and the equal right to life, liberty and property,<sup>186</sup> rights which are inalienable, according to Locke, and cannot derive from State or State law.<sup>187</sup> Whereas every Man has such rights, it follows that he has the obligation to respect the same rights of his fellow man. Systematized, positive law ought to respect this prerequisite and be consistent with it, for it is the law of nature.

Although Locke did not visualize democracy, as we know it today, his theory marked the beginning of constitutionalism with a system of 'checks and balances', where the principle of sovereignty resides in the people, as exemplified in the American Revolution in 1766 and the French Revolution in 1789.<sup>188</sup> Incidentally, the 1776 American Declaration of Independence declares as true and „self-evident“ that all Men are created equal, and endowed with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.<sup>189</sup> The French Declaration of Rights states *inter alia* that all Men are born, and remain free and equal in rights, including the right to life, liberty and security, and social distinctions may be founded only upon the general good. Moreover, liberty consists in the freedom to do everything, which injures no one else. Hence, exercise of „the natural rights of each man“ has no limits except those that assure to other members of society „the enjoyment of the same rights“. These limits can only be determined by law, and such law can only prohibit such actions as are „hurtful to society“. <sup>190</sup> Both Declarations are evidently rooted in natural law theory. Few will deny that the UDHR and the ECHR are founded upon the same idealism of liberty and general equality.

### 5.3.2 Analytical Legal Positivism

Natural law theory is a thorn in the side of those who subscribe to positivist theories in law, for they are analytical in thought and deal with what law 'is'. Thus, the status of law attaches to anything laid down or posited as law, in whatever way or ways recognized by the legal system in question.<sup>191</sup> Moral precepts, as such, have therefore no place within law, although they

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<sup>184</sup> *Ibid.*, Ch. 19.

<sup>185</sup> *Ibid.*, Ch. 19, Para. 219-222 & 225.

<sup>186</sup> *Ibid.*, Ch. 5, Para. 44.

<sup>187</sup> A. J. Simmons, *On the Edge of Anarchy* (Princeton University Press, New Jersey, 1993) pp. 101-103.

<sup>188</sup> Shaw, *supra* note 42, p. 26.

<sup>189</sup> See <[www.ushistory.org/declaration/document/index.htm](http://www.ushistory.org/declaration/document/index.htm)>, visited 3 June 2007.

<sup>190</sup> See <[www.yale.edu/lawweb/avalon/rightsof.htm](http://www.yale.edu/lawweb/avalon/rightsof.htm)>, visited 3 June 2007.

<sup>191</sup> McLeod, *supra* note 83, p. 19.

affect human behaviour, and the concept of law does not necessarily entail the notion of justice.<sup>192</sup> Hence, rights are *internal* to law, i.e. granted by law itself and the humans who make it. As a result, human rights are subject to modification, even abrogation, at the whim of the legislator in question.

The rise of analytical legal positivism as a theoretical basis for law owes much to the concept of 'sovereignty'. It surfaced as a doctrine in the 16<sup>th</sup> century, employed to bolster absolute legislative and political power of monarchs within emerging nation states, thus greatly influencing the basis for international relations between States.<sup>193</sup> Accordingly, Jean Bodin (1530-1596) stated in 1576 that nothing on Earth was greater than the power of the monarch. Therefore, he held, that the sovereign who makes the laws cannot be bound by the laws he makes.<sup>194</sup>

Jeremy Bentham (1748-1832) and John Austin (1790-1859) gave such theorizing new dimension. The former redefined the notion of *ius gentium* and coined the term 'public international law', as being the body of legal rules, norms and standards that apply between sovereign States, thus asserting legal and political State supremacy. According to Bentham, law and justice was not the same thing, as Locke had maintained, for human laws might vary from time to time and place to place, according to the positivist whim of the legislator. Therefore, he regarded the actual behaviour of States as the only basis of international law.<sup>195</sup> It was however Austin, Bentham's disciple, who struck a more decisive blow in 1832, when he defined 'law' in positive terms as the general commands of a sovereign, supported by the threat of sanction. Since international law did not fit his theory, insofar as regards a legal system of centralized and institutionalized sanction, Austin proclaimed it was not 'law' at all. Consequently, Austin characterized international law as no more than 'positive morality'.<sup>196</sup>

Brierly points out the difficulty this raised for international law, for if sovereignty means absolute power, and if States are sovereign in that sense, they cannot be, at the same time, subject to law. If such premises are right, Brierly writes, there is no escape from the conclusion that international law is nothing more than a delusion.<sup>197</sup>

Consequently, it is no surprise that later theorists, such as Hans Kelsen (1881-1973) and H. L. A. Hart (1907-1992), have questioned the authority and basis of international law, the latter rejecting any inquiry into higher moral norms of law as it ought to be.<sup>198</sup> Hence, the doctrine of analytical

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<sup>192</sup> See M. Tebbit, *Philosophy of Law* (Routledge, 2<sup>nd</sup> ed., London and New York, 2005) pp. 9-10.

<sup>193</sup> See C. Warbrick, 'States and Recognition in International Law', in M. D. Evans (ed.), *supra* note 25, p. 210, where the author maintains that the modern State system established itself no later than with the Peace Treaty of Westphalia in 1648.

<sup>194</sup> See, e.g., Brierly, *supra* note 179, pp. 8-9.

<sup>195</sup> See, e.g., P. Malanczuk (ed.), *Akehurst's Modern Introduction to International Law* (Routledge, 7<sup>th</sup> ed., London and New York, 1997) p. 16.

<sup>196</sup> *Ibid.*, p. 17. Accord W. Friedmann, *The Changing Structure of International Law* (Columbia University Press New York, 1964) p. 83.

<sup>197</sup> Brierly, *supra* note 179, p. 16.

<sup>198</sup> Kelsen largely agreed with Austin's command theory, while Hart, although reaching a similar conclusion based it on different premises. See H. Kelsen, *Principles of International Law* (Rinehart & Co. Inc., New York, 1952, second printing: The Lawbook Exchange, Ltd.,

legal positivism became dominating as the only recognition of ‘law’ until well into the 20<sup>th</sup> century.

## 5.4 Analysis

In spite of our visit to the two major schools on legal theory, are we any closer to a reasoned solution to our gay couples torment? On the one hand we have the Stoics and Locke, determined that all humans are equal. Therefore, the same law should apply to all. On the other, we have the Austinian argument, meaning essentially that the will of sovereign rulers makes the law. If the latter is right, then there is no international law as such, capable of being an independent basis for human rights. Accordingly, it ‘is’ only to the whim of the Portuguese legislator whether he recognizes a right to same-sex marriage as a human right. If the former are correct, then Jesus and Jose ‘ought’ to have the lawful right to marry in Portugal, for it is intrinsic in the inalienable right to liberty and equality, endowed on them by birth, and thus irrevocable by means of any Man made legislation.

Again, we come to the question whether human rights are universal, i.e. existing in all places and at all times. If they are, can the doctrine of sovereignty and analytical legal positivism change such fact? Did universal human rights not exist prior to their emergence? Hart seems to reject that idea, whereas he does not recognize international law as law in general or as a legal system,<sup>199</sup> while Kelsen places international law in his hierarchy of norms, and thus agrees that international law is truly law.<sup>200</sup> According to his theory, the ultimate source of validity of all law derives from a basic rule (*grundnorm*), which one can posit in any valid legal system.<sup>201</sup> Thus, if one compares a national legal system with a metaphorical pyramid, then the basic norm is at top and all law, whether constitutional law, statute law or customary law, is lower in rank according to pecking order, each set of rules deriving its legal validity from the next norm above. Consequently, there can only be one ‘right’ answer to any legal dispute if the norms come into conflict. Kelsen’s theory however runs dry when it comes to explaining the legal validity of the basic norm itself, for it can be above a Constitution, thus having no lawful justification at all. Having run out of legal norms, Kelsen justified the basic norm as a matter of logical necessity, deriving its validity from the fact that it had been accepted by a sufficient number of people in the society in question.<sup>202</sup> In addition, Kelsen failed to answer where one shall posit international law in his hierarchical pyramid, for in his theory national law and international law form part of the same pyramid.

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New Jersey, 2003) pp. 18-39 & 417-419 and H. L. A. Hart, *The Concept of Law* (Oxford University Press, 2<sup>nd</sup> ed., 1994) pp. 213-237.

<sup>199</sup> *Ibid.*, Hart, pp. 236-237.

<sup>200</sup> See generally H. Kelsen, *The Pure Theory of Law* trans. M. Knight, (Berkeley and Los Angeles: University of California Press, 1970). Accord D. J. Harris, *Cases and Materials on International Law* (London Sweet & Maxwell, 6<sup>th</sup> ed., 2004) pp. 9-10.

<sup>201</sup> See, e.g., McLeod, *supra* note 83, pp. 86-89.

<sup>202</sup> *Ibid.*, pp. 88-90. Accord Shaw, *supra* note 42, p. 49, where the author not only describes the weakness of Kelsen’s basic norm as existing upon non-legal issues but also being, in fact, a political concept.

Therefore, some might assume that legal validity of the former is rooted in primitive principles of international customary law, not least the ideal of binding force of treaties (*pacta sunt servanda*), which States ought to obey.<sup>203</sup> Thus, international law would rise above national law in the hierarchy of norms, and arguably become the basic norm itself, thereby according the ECHR supremacy over State law.

According to the ECHR individuals are secured the right to life, liberty and security. This entails *inter alia* the right to recognition as a person before the law, protection under the rule of law, and the right to a fair trial before a court of law. Although not posited in the Convention or the UDHR, which is undoubtedly its model, both instruments seem to acknowledge Locke's ideal of certain inalienable rights, which in turn points to Stoic natural law theory. This becomes evidently clear if we consider case law stemming from the Court, for is it not true that whether or not Member States have already secured certain human rights in national law by the time of ratification of the ECHR, they have an obligation to do so according to public international law. In the event of non-compliance, the Court has had no scruples in finding States in breach of their commitments.<sup>204</sup> The obvious conclusion drawn from such cases is that the Court has a *de facto* final say on human rights issues, and will eventually seek validity for its judgments in the Convention itself and other human rights instruments, rather than national Constitutions *per se*. Does this not entail that the ECHR constitutes real law, and that the Court is the 'Supreme Court' of Europe in matters relating to the Convention? If so, is it indeed to the discretion of Member States to exclude same-sex couples from marriage, for let us remember that according to the UDHR the right to marry is a fundamental human right. If it were not, such right has no place in the Declaration.

Regardless of differing opinions, two questions are persistent above all. First, do human rights depend on theory or even positive law for that matter? Secondly, can analytical legal positivism explain the basis of human rights, as natural law theory can, and has?

Imagine ten sterile individuals, representing all inhabited continents of the world, stranded for life on the desert island of Utopia. Initially they will refer to their social and legal heritage in matters of dispute. Eventually, they will however have to agree on certain fundamental rules in order to survive. Obviously, there is no State and therefore no positive State law they can appeal to. How then can they reach common ground on issues concerning the right to life, liberty and property? Certainly, no one will argue that such rights are non-existent. Then what do they entail? Imagine that two of these individuals were legally married in a far-off State, prior to the stranding. Does their marriage dissolve? If not, can others get married on the island, or is the couple in question eternally privileged in comparison with others? Among these are two Spanish lesbians, who had arranged for marriage in

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<sup>203</sup> *Ibid.*, Shaw, pp. 48-50.

<sup>204</sup> See, e.g., case of *Jón Kristinsson v. Iceland*, App. No. 12170/86, Judgment of 1 March 1990. Series No. A, 171-B. Although a settlement was reached, Iceland agreed to pay the plaintiff damages for breach of Article 6(1) of the ECHR, concerning the right to a fair trial. Consequently, this led to revision of the whole system of procedural law in Iceland.

Barcelona. Does their right to marry become obsolete for sake of their misfortune, and if so, on what legally valid grounds?

As a reply to all these questions, we need only consider the abrogation of basic civil rights of Jewish people under the racial laws of Nazi Germany, whereby they were subject to confiscation of property and extermination. Does anyone believe that by enacting and enforcing such horrific law, Jews instantly lost their right to life and property? The answer has to be “no”. This was only a dire example of perverted positive law, yet legally valid under the rule of law in Nazi Germany.<sup>205</sup> Consequently, we arrive at only one reasoned conclusion, namely that human rights are not dependant on the arbitrary whim of any State legislator. Accordingly, legal positivism does not suffice to explain the basis for such rights. Therefore, one must presume they are intrinsic to human nature, inalienable as such and ought to be equally available to all human beings. Whether these rights are rooted in natural law theory as such, is ultimately irrelevant, whereas theory does not produce rights. Human nature and the unique ability to learn right from wrong do. Attempts to pervert natural law ideals are of no importance, for they all fall foul to the elementary idea of equality.<sup>206</sup>

According to the UDHR, the right to marry is a fundamental human right, and should therefore be available to all human beings, as already constituted in three European States, Spain, Belgium and the Netherlands. Apart from these States, this right is not available at present to same-sex couples in Europe. Does this mean that the right to marry is regional, and thus based on geographical European soil, or is it indeed universal, in spite of the fact that it is yet not accessible to lesbians and gays?

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<sup>205</sup> See A. Dershowitz, *Rights from Wrongs: A Secular Theory of the Origins of Rights* (Basic Books, 2004) p. 73, where the author argues in a similar fashion.

<sup>206</sup> *Ibid.*, pp. 70-72, where the author eloquently addresses the old school argument that the function of marriage is procreative and that “the laws of nature” require a man and woman to create life, thus citing natural law as justification for prohibiting lesbians and gays to adopt children and marry each other.

## 6 Conclusions

The concept of marriage is relative, and thus subject to controversial meaning and diverse definition, pending on different cultures and different eras.

In Chapter 2, I established that marriage as an institution existed prior to Christianity and that initially it was not a legal relationship. Moreover, I illustrated that ancient civilizations recognized gay relationships and some acknowledged them as legally binding in the same or similar way as heterosexual marriage. In parallel, I proved false the tenacious myth that marriage owes its origin in Christianity or any other religion for that matter, reaching the overall conclusion that the assumption is illogical to believe that the same group of people shall indefinitely have the sole right to marry. Three Member States of the ECHR, the Netherlands, Belgium and Spain, have acknowledged this fact by abolishing discrimination against lesbians and gays in relation to marriage.

In Chapters 3 and 4, I examined provisions of the UDHR and the ECHR concerning equality, non-discrimination and the right to marry, and concluded that there is no apparent, objective reason or justification to bar same-sex couples from marriage with direct reference to those provisions. The Court's assertion to the contrary in the 1986 *Rees* case, i.e. that Article 12 ECHR refers to the "traditional marriage between persons of opposite biological sex", is unconvincing, whereas there is no such mention in the text. The Court's "opinion" towards this end, so as reference to Article 12 as having the main objective to protect marriage as the basis of the family, is thus seemingly a political observation, based on Member State legislation and common consensus at the time, and thus deemed necessary to pacify those same Member States. Since then, the Court has departed from such a restrictive approach; not only according a post-operative male to female transsexual the right to marry a man in the 2002 *Christine Goodwin* case, but also retreating from its standpoint that the right to marry and to found a family is inherently connected with the ability to conceive or parent a child. Alas, it is unresolved whether lesbians and gays enjoy such protection under the ECHR, and the Court's current viewpoint. Yet, the Court has proclaimed that discrimination on grounds of sexual orientation is impermissible. Based on this fact, and the argumentation presented in the respective Chapters, I can only conclude that national limitations aimed to exclude same-sex couples from the right to marry, enjoyed by heterosexuals, are discriminatory and contrary to the common European belief that all men and all women are born free and equal in dignity and rights. Any reference to 'public policy' or the 'protection of the rights and freedoms of others', are thus trivial as a means to eliminate same-sex couples from this institution, whereas there is no indication that such couples cannot raise children adequately, and therefore no justification to ban them from "traditional" family life, so to speak.

In Chapter 3.3, I vowed to answer two disconcerting questions, based on the presupposition that lesbians and gays are born with rights equivalent

to heterosexuals, and yet excluded from marriage. First, I asked my reader at what point in life did *they* forfeit their right to equality, and secondly, by which action or inaction did they surrender the right to equal opportunities and equal protection before the law. I have only one answer, which is plain and simple. They never did. This response may call for further clarification. Hence, I refer to my examination of the alleged universality of human rights, carried out in Chapter 5. Based on those findings, which I have only just summarized, I find no convincing evidence in support of the argument that some human beings have the right to be 'more equal' than others. Not only did the American and French Declarations concerning human rights state that all men and all women are born equal, and endowed with certain inalienable rights, so did the 1948 Universal Declaration of Human Rights, confirmed by almost every world State. The UDHR implies that the rights and freedoms set forth in the Declaration are inalienable; meaning that they are absolute and one can therefore not forfeit such rights. Amongst those rights is the right to marry. Thus, it is a universal human right. All human rights are essentially 'fundamental', for else they would merely be among countless other rights and obligation enacted according to State law, and subject to change by the whim of national legislators.

Due to major social changes in Europe in the last decades, recognized by the Court, the general attitude towards lesbians and gays has changed immensely, and a continually growing number of people and peoples believe they are to have the same rights as their heterosexual counterparts in relation to marriage and family life. Hence, there is a growing trend among European States to recognize such rights. Notwithstanding the importance of national legislation, allowing same-sex unions, registered partnership etc., and the right to joint custody and adoption, the fact remains that lesbians and gays are still subject to social and legal segregation, and will remain so while individual States retain marriage as a symbol of social and legal recognition, distinguishing *us* from *them*. Separate rights are not equal rights, as tragically shown during the civil rights struggle of Afro-American citizens' only decades ago.

As 'the law' stands today, the equal right to marry is only available to same-sex couples in three European States. I stand firm to my conviction that lesbians and gays in all other States do have the same right, although it is at present not legally recognized. Place of birth, nationality, residence or geographical boundaries are trivialities that cannot render my conviction to the contrary. The Court has yet to confirm this matter of truth, justice and equality, and in due time it will. The question "when" boils down to international politics, which sadly enough are often inconsistent with the ideal of justice.

James Madison once wrote that government itself is the greatest of all reflections on human nature, and justice is the end means of government and of civil society. Justice ever has been and ever will be pursued until it is obtained, or until liberty is lost in that pursuit.<sup>207</sup> It is up to us, the people and peoples of Europe, whether we want to participate in the making of international society and the pursuit for justice and equality, or merely be

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<sup>207</sup> See 'The Federalist' No 51, <[www.constitution.org/fed/federa00.htm](http://www.constitution.org/fed/federa00.htm)>, visited 4 June 2007.

recipients in its effects. Three European nations have taken a stand, the Dutch simply stating, “There is no reason why same-sex couples should be denied the opportunity to marry.” Let those words serve as a reminder of just how self-evident it is to respect general equality and human dignity of all women and all men. It awaits the Court to acknowledge this fact.

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