The right to a "family life" free from discrimination on the basis of sexual orientation

European perspectives on adoption by same-sex couples

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0. FOREWORD

Whether to permit same-sex couples to adopt a child is one of the most contested issues throughout Europe. It becomes even more disputed and complicated in cross-border cases, since private international law approaches in respect of same-sex relationships differ to a large extent. The theme is striclty linked to the more general issue of the legal recognition of same-sex partnerships, which has also taken place throughout Europe; but, with specific regard to adoption - both full joint adoption and step-child adoption – there is still much more to do[1]. Even on the national scale, mono-disciplinary approaches to the theme do not allow legal solutions interact with psychological, anthropological, religious and ethic evaluations; on the EU scale, the issue is complicated by the profound diversity of national perspectives (deriving from different cultural and historical backgrounds which are bound up also with laicist or confessional pressures) as well as by the absence of a specific EU legislation, as hereinafter we will more specifically say. The limits of EU legislative procedures in family law matters cannot be forgotten: the rule of unanimity within a special legislative procedure under Article 81 par. 3 of the Treaty on the Functioning of the European Union[2] shows how family law matters represent a ground in which member States are less willing to renounce to their full sovereignity.

[1] Full joint adoption by same-sex couples is legal in fourteen European countries, namely Andorra, Belgium, Denmark, Finland (effective in 2017), France, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Spain, Sweden and the United Kingdom. An additional four (Austria, Estonia (effective 2016), Germany and Slovenia) permit step-child adoption in which the registered partner can adopt the biological and, in some cases, the adopted child of his or her partner. In Croatia, a life partner may become a partner-guardian over their partner's child, a situation which is to a great extent comparable to step-child adoption. Several countries are currently considering permitting full joint or step-child adoption by same-sex couples. As regards the most recent events in full joint adoption, in January 2015 the Austrian Constitutional court found the existing laws on adoption to be unconstitutional and ordered the laws to be changed by 31 December 2015; in Germany, the opposition party The Left submitted a bill to the Federal Diet on 23 October 2013. It had its first reading on 19 December 2013. In Slovenia, in December 2014, the opposition party United Left introduced a marriage equality bill into Parliament, which would also give same-sex couples full adoption rights. On 3 March, the Assembly passed the bill in the third reading, in a 51-28 vote. On 10 March the National Council decided not to veto the bill with 14 votes for the veto and 23 against. Now the bill awaits promulgation by the president. As regards step-child adoption, in September 2014 a group of deputies in the Czech Republic introduced a bill to allow step-child adoption by a partner of the same-sex. In October, the government decided not to take a stance on the bill. In Switzerland, in 2011 and 2012, the Swiss Parliament debated whether to extend stepchild adoption or full joint adoption, ultimately opting for stepchild adoption. In November 2014, the government approved allowing stepchild adoption as part of a broader adoption reform. After approval by parliament, it will likely be put to a referendum.

[2] Under this provision, "*measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament. The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament*". Furthermore, the proposal will be notified to the National Parliaments which may comunicate their opposition within six months; only if no opposition is notified, the Council can adopt the decision.

Thus, in such a "sensitive" field, since empty spots in legislation are often enormous both in the national and EU systems, case-law and a principle-based legislation, although playing a really very important role, have to face the difficulty in finding and appraising "*constitutional traditions*" which are really "*common to Member States*"[3].

1. THE EU LEGISLATIVE SHYNESS

No EU act directly regulates the issue of adoption. But an overview on the notion of "family" in EU secondary legislation can be useful. The Council Regulation (EC) No 2201/2003 of 27 November 2003 (Brussels II) concerning the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, "*shall not apply to: (a) the establishment or contesting of a parent-child relationship; (b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption*" (Art. 1). Article 2 clarifies that "*for the purposes of this Regulation, (...) the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access*". The Regulation neither contains a definition of marriage nor specifically refers to registered partnerships and, regarding the latter, it is acknowledged that the Regulation does not apply. The assessment of the validity of an adoption or of its general eligibility is therefore entirely at the discretion of the national legislators.

In Article 1 of the December 2005 Proposal for an EU Regulation[4], i.e. in the provision on the choice of law by the parties, reference was made to the case of a maintenance obligation between two persons who are or were married or are in a relation that has *similar effects* under the law applicable to it. The 2005 proposal was soon replaced by a new version[5], which, under Article 1 (*Scope of application*) states that "*this Regulation shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity*".

Furthermore, recital no. 21 in the Regulation states that "*rules on conflict of laws determine only the law applicable to maintenance obligations and do not determine the law applicable to the establishment of the family relationships on which the maintenance obligations are based. The establishment of family*

[3] See Article 6, par. 3, of the Consolidated versions of the Treaty on European Union. With reference to this, reconsidering all the debate about the project and then the failure of a Treaty establishing a Constitution for Europe, especially with regards to the proposal to include a statement on historical Christian roots of Europe into the text of the treaty, could be useful.

[4] Commission Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, COM (2005) 649 final (Dec. 15, 2005).

[5] I.e. Council, Regulation No 4/2009 of 18 December 2008, which is available on http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0004&from=EN.

relationships continues to be covered by the national law of the Member States, including their rules of private international law". Recital n. 25 underlines that "*recognition in a Member State of a decision relating to maintenance obligations has as its only object to allow the recovery of the maintenance claim determined in the decision. It does not imply the recognition by that Member State of the family relationship, parentage, marriage or affinity underlying the maintenance obligations which gave rise to the decision*", as reiterated under Article 22.

More recently, an European anti-discrimination directive[6] – the main objective of which "*is to combat discrimination based on religion or belief, disability, age or sexual orientation and to put into effect the principle of equal treatment*" - was proposed by the European Commission already in July 2008 and strongly supported by the European Parliament. But it has been stalled in the Council, after the last discussion on 11 December 2014.

It must be underlined that the text does not seem so ambitious: the proposed directive states that "*national traditions and approaches in areas such as healthcare, social protection and education tend to be more diverse than in employment-related areas. These areas are characterised by legitimate societal choices in areas which fall within national competence. The diversity of European societies is one of Europe's strengths, and is to be respected in line with the principle of subsidiarity. Issues such as the organisation and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions are best decided at national level. The Directive does not therefore require any Member State to amend its present laws and practices in relation to these issues*". The consequence is that "*it will remain for Member States alone to take decisions on questions such as whether to allow selective admission to schools, or (…) to recognise same-sex marriages…*".

The last contribution to the debate from the EU bodies came from the "*Annual Report on Human Rights and Democracy in the World 2013 and the European Union's policy on the matter* (2014/2216(INI))"[7] which was issued on February, 20th 2015. Apart from the blame for criminalisation of homosexuality still existing throughout Europe, at n. 162 of the Report the European Parliament "*takes note of the legalisation of same-sex marriage or same-sex civil unions in an increasing number of countries – 17 to date – around the world; encourages the EU institutions and the Member States to further contribute to reflection on the recognition of same-sex marriage or same-sex civil union as a political, social and human and civil rights issue*". The debate is on whether: (a) defining the recognition

[6] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}, which is available on http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52008PC0426.

[7] Which is available on http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2015-0023&language=EN.

of same-sex partnership as a human right or (b) issuing nothing more than a mere statement of principles in the recent history of legal recognition of homosexual unions.

On 16 March 2011, the European Commission proposed a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2011) 126 final)[8] and a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM(2011) 127 final)[9].

EU legislators decided to regulate the issue by two different acts "*because of the distinctive features of marriage and registered partnerships, and of the different legal consequences resulting from these forms of union*". This shows very clearly the cautious approach to the topic chosen by the European institutions.

In the second of the two proposed Council Regulations, under Article 2, lett. b), a "*registered partnership*" is "*the regime governing the shared life of two people which is provided for in law and is registered by an official authority*". Through the Resolution on the proposed Regulation[10], the European Parliament approved a number of amendments, among which the following new clause: "*recognition in a Member State of a decision relating to the property consequences of a registered partnership has as its only object to allow the enforcement of the property consequences determined in that decision. It does not imply recognition by that Member State of the partnership underlying the property consequences which gave rise to that decision. Member States where the institution of a registered partnership does not exist are not obliged by this Regulation to create such an institution*". Furthermore, in addition to the statement, already existing in the original text, according to which "*the Regulation covers matters arising from the property consequences of registered partnerships. 'Registered partnership' is defined here solely for the purposes of this Regulation. The actual substance of the concept is defined in the national laws of the Member States*", another EP amendement added "*For the purposes of this Regulation, a registered partnership is a form of union other than marriage*", in order to underline the refusal of a levelling the two situations, the differences between which are therefore enhanced.

[8] Available at http://eur-lex.europa.eu/legal-contcontent/EN/TXT/PDF/?uri=CELEX:52011PC0126&from=en.
[9] Available at http://ec.europa.eu/justice/policies/civil/docs/com_2011_127_en.pdf.
[10] European Parliament legislative resolution of 10 September 2013 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM(2011)0127 – C7-0094/2011 – 2011/0060(CNS)), which is available in http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-337. See also the Draft report on the proposal (2011/0060(CNS)) of 25.7.2012 (COM(2011)0127 – C7-0094/2011 – 2011/0060(CNS)) by the Committee on Legal Affairs, which is available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-494.575+01+DOC+PDF+V0//EN&language=EN.

The first step leading to the proposal of Regulation on matrimonial property regimes was taken in July 2006 in the form of a Green Paper[11], which launched a wide-ranging consultation exercise on this legal question. The Green Paper specifically questioned whether registered partnerships should be included in the scope of the instrument: the recently published summary of replies provided by the European Commission indicates that, in accordance with the view expressed by a majority of the forty replies which were received, the traditional questions of private international law (jurisdiction, applicable law, and recognition and enforcement) with reference to both married couples and registered partnerships should be further examined, but it was generally agreed that nonmarital cohabitation, however, should have been excluded from the scope of the act.

2. THE INTERNATIONAL INSTRUMENTS

The landscape of current and future European instruments that are and will be applied to cross-border same-sex relationships has recently been supplemented by the first multilateral convention in this field. Under the auspices of the International Commission on Civil Status (ICCS), a Convention on the Recognition of Registered Partnerships was adopted on September 5, 2007 but ratified only by Spain and Portugal. It contains a definition of a registered partnership as "*a committment to live together, other than marriage, entered into by two persons of the same sex or different sex, giving rise to registration by public authority*". The application of the *lex loci celebrationis* is favored; thus, if the Convention becomes effective, each contracting State will recognize the effects of the civil status of partners who entered into a registered partnership in another contracting country. It should be mentioned that any State may reserve the right to exclude registered partnerships concluded between persons of different sexes from the scope of the Convention. Currently, thirteen out of the sixteen member states of the ICCS that could ratify this Convention are European Union member states.

As a member of the Hague Conference on Private International Law since April 2007, the European Union is a party[12] to the two relevant instruments that were adopted on November 23, 2007, under the auspices of that organization: *The Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* which shall apply "*to maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years*"[13] (Article 2); and the *Protocol on the Law*

[11] *Commission Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes Including the Question of Jurisdiction and Mutual Recognition, at 1, COM (2006) 400 final*.
[12] The question of the possible overlapping between the EU and single State membership in the Hague Conference should be further investigated; this also applies to the issue of EU and single States' participation in one of the Hague Conventions.
[13] Full text of the Convention is available at http://www.hcch.net/index_en.php?act=conventions.text&cid=131.

Applicable to Maintenance Obligations[14], which "*shall determine the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity*" (Article 1). The scope of the Protocol is thus wider: in fact, it comprises maintenance obligations which are based on formalized same-sex relationships creating a family relationship, a concept that has to be understood referring to national legislations. Anyway, neither the preliminary Draft Report to the Convention nor the Draft Report to the Protocol explicitly mention same-sex marriages. It is significant that both the Convention (Article 22) and the Protocol (Article 13) clarify that the application of the law determined under the Protocol may be refused "*only to the extent that its effects would be manifestly contrary to the public policy of the forum*".

As regards the Council of Europe, the *European Convention on the Adoption of Children,* drafted under its auspices, must be mentioned. Under Art. 3 (*Validity of an adoption*), only national authorities can grant validity to an adoption (that is through the decision of a court or of an administrative authority). The law "*shall permit a child to be adopted: by two persons of different sex (who are married to each other, or where such an institution exists, have entered into a registered partnership together); by one person*"; however, in another article the Convention underlines that "*States are free to extend the scope of this Convention to same sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different sex couples and same sex couples who are living together in a stable relationship*" (Art.7).

The '*right to respect for family life*' and the '*right to marry and found a family'* are human rights that are guaranteed under Article 8 and Article 12, respectively, of the European Convention of Human Rights. Furthermore, Article 14 provides that enjoyment of these rights shall be secured without discrimination. These rights are protected, at first hand, at the national level in each contracting State but, in case of alleged breach, the European Court of Human Rights has final jurisdiction and its judgment is binding on States.

3. THE DRIVING FORCE OF ANTI-DISCRIMINATORY PRINCIPLE: THE CASE-LAW PERSPECTIVE

In the most recent judgments, the ECtHR strongly supports the conclusion that any discrimination between unmarried different-sex couples and same-sex couples is unacceptable under the Convention. However, the special status of marriage still justifies the continuing exclusion of same-sex families from rights and benefits only available to marital families.

[14] Full text of the Protocol is available at http://www.hcch.net/index_en.php?act=conventions.text&cid=133.

One important aspect of the legal recognition of same-sex family life is the legal recognition of parent-child relationships. According to FRA's EU LGBT survey[15], 10% of households headed by same-sex couples had children living in them; in the individual EU member States the figures ranged between 7 and 15%. Also a study conducted by the Council of Europe noted that many LGBT persons in Council of Europe member States raise children, whether alone or with their partner; some of them may have brought children from previous heterosexual relationships to the partnership, and some of them may have adopted children, or accessed services for medically assisted reproduction[16].

The Committee of Ministers has recommended that the *child's best interest* should be the primary consideration in decisions regarding the child, such as decisions concerning parental responsibility for guardianship or adoption of a child[17].

An expert report focusing on the rights and legal status of children brought up in various forms of families found that the well-being of children in families depends also on the legal framework existing in each Country: "C*hildren do not live in a vacuum, but within a family, and an important part of their protection is that the family unit, no matter what form it takes, enjoys adequate and equal legal recognition and protection. In other words, it is as discriminating to the child to limit legal parenthood, or to deny significant carers legal rights and responsibilities, as it is to accord the child a different status and legal rights according to the circumstances of their birth or upbringing".*

Also an ILGA-Europe[18] report on the rights of children raised in LGBT families noted: "*[...] it cannot be in the best interest of [...] children to leave their important relationships of care outside of the legal framework of rights and responsibilities that are specifically designed to protect their interests simply on the basis of their parent's sexual orientation or gender identity".*

The biological parent-child relationship has always been protected under the Convention. Furthermore, the Court found already in 1999 that the sexual orientation of a biological parent must not be a factor when deciding on the parental custody over a child *(Salgueiro da Silva Mouta v. Portugal*). However, the child's status in same-sex families and especially the relationship between the second-parent and the child is often left without any legal protection, even when the relationship between the parents is protected. Differences between partnership laws and marriage laws are most likely to be found in the matters relating to children. Even when a country allows same-sex marriage, the same-sex spouses'

[15] The European Union Agency for Fundamental Rights (FRA). LGBT is an initialism that stands for lesbian, gay, bisexual, and transgender.
[16] Council of Europe 2011, 97.
[17] Recommendation CM/Rec (2010),5, par. 26-27.
[18] ILGA-Europe is the European regional antenna of the International Lesbian, Gay, Bisexual, Trans and Intersex Association. ILGA is an advocacy group promoting the interests of lesbian, gay, bisexual, transgender and intersex persons.

access to parenthood (through *inter alia* adoption, surrogacy or AID[19]) might be inferior to that of different-sex spouses.

Usually three different types of adoption are recognised: 1) individual or single adoption, when one person becomes adoptive parent alone; 2) second-parent or step-parent adoption, when one partner adopts the other partner's biological or adopted child without terminating the first parents legal rights and thereby giving both of them legally recognised parental status; 3) joint adoption, when a couple adopts a child jointly. A single adoption and a joint adoption are usually aimed at creating a relationship with a child who is unrelated to the adopter(s), whereas second-parent adoption "*serves to confer rights vis-à-vis the child on the partner of one of the child's parents*"[20]. Consequently, allowing second-parent adoption is believed to be the best way to protect children already being raised in same-sex families.

The ECtHR's rulings concerning adoption by gay individuals or same-sex couples demonstrate an evolution of its case-law on this issue, and provide hints at to where its case-law may eventually lead, along with States' policies change and increase of recognition of the *de facto* families referred to by the Court.

The first application that concerned (second-parent) adoption was *Kerkhoven and Others v. the Netherlands* (1989) which the Commission dismissed as manifestly ill-founded. The Commission noted among other things that the positive obligation under the Convention "*does not go so far as to require that a woman [...] living together with the mother of a child and the child itself, should be entitled to get parental rights over the child*" and that "*as regards parental authority over a child, a homosexual couple cannot be equated to a man and woman living together*".

In *Fretté v. France* (2002) French authorities rejected a man's adoption application due to the fact that he was homosexual. The Court held that decisions taken by the domestic authorities pursued a legitimate aim: to protect the health and rights of children. The ECtHR noted that the scientific community was divided on the possible consequences of the fact that one or more homosexual parents received a child, especially given the limited number of scientific studies on the subject that were available at the time. The Court held that the national authorities had been legitimately and reasonably entitled to consider that the right to be able to adopt was limited by the interests of children eligible for adoption. Here, the Court found no violation of Article 14 in conjunction with Article 8.

However, in *E.B. v. France* (2008), the Court ruled that the French authorities' refusal of a lesbian woman's application to obtain authorization to adopt a child on the grounds of her sexual orientation was unlawful. The Court observed that the applicant's homosexuality had been a determining factor in

[19] AID: artificial insemination by a third-party donor.
[20] X and Others v. Austria, 2013 (par. 145).

refusing her request, whereas French law allowed single persons to adopt a child, thus allowing the possibility of adoption by a single homosexual individual. The ECtHR found France in violation of Article 14 in conjunction with Article 8.

The issue was not raised again until *Gas and Dubois v. France* in 2012. The applicants were two women who had cohabited since 1989 and had, in 2002, entered into a civil partnership agreement (*Pacte civil de solidarité*, PACS).

In 2000 Ms. Dubois had given birth to a child, conceived in Belgium through AID, and the child had lived all her life in the applicants' shared home and been co-parented by both applicants. Ms. Gas had applied for a simple adoption in order to legally establish her parental responsibility over, and relationship with, the child. However, her application was rejected on the grounds that second parent adoption was only available to married couples and, in the applicants' case, it would have the effect that the legal relationship between the child and her biological mother would be severed, contrary to their intentions.

The applicants submitted that the reasons given for the refusal definitely ruled out adoption by same-sex couples, because they were unable to marry under the French law. They complained that the refusal to grant them second-parent adoption violated their rights under articles 8 and 14. The applicants further submitted that because of their sexual orientation their child was deprived of her right to a second legal parent. Whereas a child, conceived by AID, born to a cohabiting different-sex couple, would have the man automatically registered as the legal father.

The Court ruled that, for the purposes of second-parent adoption, the applicants were not in a comparable situation to married different-sex couple, only for whom the second-parent adoption was possible, because of the differences between PACS and marriage. When compared to a different-sex couple in a PACS, there was no discrimination, because they would likewise have their application for second-parent adoption rejected. By finding that the applicants were not in an analogous situation compared to a married different-sex couple, the Court found an objective and reasonable justification for excluding unmarried same-sex couples from second parent adoption, and found as well that such distinction was necessary in a democratic society to protect families based on marriage.

The fact that the applicants were legally unable to marry, unlike a different-sex couple in the same situation, was not important in the Court's view. Indeed, it had already ruled, in *Schalk and Kopf,* that article 12 did not impose an obligation on the contracting States to grant same-sex couples access to marriage and that providing any other means of recognition was within the state's margin of

appreciation[21]. The existence of family life between the applicants, which was not disputed, should have led to a positive obligation imposed on the state to legally recognise the existing family ties[22].

The latest judgment concerning adoption by same-sex couples is *X and Others v. Austria* (2013). The applicants complained that the Austrian Courts' refusal to grant the co-parent the right to adopt the biological son of the other partner without severing the mother's legal ties with the child, amounted to discrimination under article 14 taken in conjunction with article 8. In finding a violation of the Convention, the ECtHR's ruling affirmed the prohibition of discrimination on the grounds of sexual orientation, while confirming its understanding that the Convention does not *per se* require States to legally recognize same-sex marriage or extend family-related rights to lesbian and gay individuals (where not provided to similarly situated heterosexual individuals or couples). The Grand Chamber's finding of discrimination was based on the fact that, while Austria allowed unwed heterosexual couples the right to adopt, it prohibited adoption by unmarried same-sex couples. Austria does not currently recognize same-sex marriage, and its adoption law would require the biological parent to sever legal ties with the child before adoption.

This case differed from *Gas and Dubois* because the Austrian Civil Code allowed second-parent adoption for both married and unmarried couples. These provisions, however, were not applicable to same-sex couples because the second-parent adoption severed the parent-child relationship between the child and the parent who is of the same sex as the adoptive parent, therefore a second-parent adoption by the female partner of the child's mother would sever the relationship between the child and the mother.

The existence of '*family life*' between the applicants was not disputed.

As to the alleged discrimination on ground of sexual orientation, the Court took the same approach as in cases *E.B. v. France*, *Kozak v. Poland* and *P.B and J.S. v. Austria*, considering that differences based

[21] As commentators have noted, the Court refused to consider this form of (indirect) discrimination; rather it concentrated on direct discrimination, which does not exist because a PACS is not in analogous to a marriage.

[22] For instance, in the *Marckx* and *Johnston and Others* cases the respondent State was required to legally recognise the bond between the child and her biological parent(s) in order to allow the persons concerned to lead a normal family life. The same should apply even in the absence of biological ties especially as in *Gas and Dubois* where the child only had one legal parent. Furthermore, Judges Spielman and Berro-Lefèvre observed in their concurring opinion that the fact that "*the applicants' daughter can have a legal tie only with her mother [...] does not appear to me to stand in the way of a normal family life*", especially where the delegation of parental responsibility was an option in the event of a crisis. The best interest of the child is, in fact, totally absent from the Court's reasoning in the case, as Judge Villiger points out in his dissenting opinion:"*justifying discrimination in respect of the children by pointing out that marriage enjoys a particular status for those adults, who engage in it, is in my view insufficient in this balancing exercise [...] In the best interest of the child born into a same-gender-relationship, I believe the child should be offered the best possible treatment afforded to other children born into a heterosexual relationship - which is joint parental custody".* The concurring opinion of Spielmann and Berro-Lefèvre explicitly shows that the sitting judges recognised that sexual orientation was the sole ground for a difference in treatment in *Gas and Dubois*, but nevertheless failed to follow the Court's own principle, established in *Kozak v Poland,* that "*if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention*".

on sexual orientation require particularly convincing and weighty reasons, and that differences based solely on considerations of sexual orientation are unacceptable under the Convention. The Court found the applicants to be in a relevantly similar situation compared to an unmarried different-sex couple to whom second-parent adoption was available, because it had "*not been argued that a special legal status exists which would distinguish an unmarried heterosexual couple from a same-sex couple*".

Secondly, the Court observed that there had been difference of treatment between the applicants and an unmarried different-sex couple and that this difference was "*inseparably linked to the fact that [they] formed a same-sex couple, and was thus based on their sexual orientation*". The Court paid particular attention to the fact that the Austrian courts had only relied on the legal impossibility of second-parent adoption in a same-sex couple as a ground for dismissal; and had not examined the circumstances of the case in detail, for instance, considering whether the adoption was in the child's best interest or whether any conditions existed for overriding the biological father's refusal to consent to the adoption. The Court noted that this would not have been the case, if the applicants were an unmarried different-sex couple: "*then the domestic courts would not have been able to refuse the adoption request as a matter of principle*".

The Court, however, emphasised the fact that it was not ruling on whether the applicants' adoption request should be granted, but whether "*the applicants were discriminated against on account of the fact that the courts had no opportunity to examine in any meaningful manner whether the requested adoption was in the [child's] interest given that it was in any case legally impossible*". This meant that the applicants' second-parent adoption request should have been examined in substance, as would have been a similar request from a different-sex couple in similar situation.

The government's arguments relied on the implied but unproven assumption that only a family with opposite-sex parents could adequately provide for a child's needs. The Court noted, however, that Austrian legislation appeared to lack coherence: "*adoption by one person, including one homosexual, was possible, and if this person had a registered partner the latter had to consent*". Nevertheless, second-parent adoption was explicitly prohibited in the Registered Partnership Act. The Court observed that *"[t]he legislature therefore accepts that a child may grow up in a family based on a same-sex couple, thus accepting that this is not detrimental to the child. Nevertheless, Austrian law insists that a child should not have two mothers or two fathers*."

Finally, the Court noted the importance of obtaining legal recognition and protection of family life for existing *de facto* families. The Court stated that "*de facto families based on same-sex couple exist but are refused the possibility of obtaining legal recognition and protection*".

It should be made clear that this judgment still leaves most same-sex families in Europe without such protection, the judgment only being applicable to situations where contracting States authorise second-parent adoption for unmarried different-sex couples (which is four countries in addition to Austria).

The Court's reasoning implied that it found the Civil Code's prohibition on second-parent adoption by a same-sex couple pursued the legitimate aim of protecting the child's best interests, in that: "*adoption should constitute an appropriate means of entrusting to suitable and responsible individuals the care and upbringing of children who have no parents, those who come from broken homes or those whose parents, for whatever reason, are unable to provide their children with a proper upbringing or may not even want their children. However, this aim can be achieved only when the adoption allows the situation in a biological family to be recreated as far as possible".*

In the context of the present case, the Court noted that there is no obligation under Article 8 of the Convention to extend the right to second-parent adoption to unmarried couples. Nonetheless, Austrian law allows second-parent adoption in unmarried different-sex couples. The Court therefore had to examine whether refusing that right to (unmarried) same-sex couples served a legitimate aim and was proportionate to that aim.

Importantly, the Court found that the Austrian adoption law's purpose of "*recreating the circumstances of a biological family*" was a legitimate aim. However, as to proportionality, the Court found the Austrian legislation lacked coherence because single, homosexual individuals could legally adopt, children could lawfully be raised by same-sex couples, and the government had acknowledged that such families could meet a child's needs. In contrast, the Court stressed the importance of granting legal recognition to *de facto* families, and stated: "[*these considerations] cast considerable doubt on the proportionality of the absolute prohibition on second-parent adoption in same-sex couples arising out of Article 182 § 2 of the Civil Code. Unless any other particularly convincing and weighty reasons militate in favour of such an absolute prohibition, the considerations adduced so far would seem rather to weigh in favour of allowing the courts to carry out an examination of each individual case. This would also appear to be more in keeping with the best interests of the child, which is a key notion in the relevant international instruments".*

In concluding its analysis, the Court noted its awareness that "*striking a balance between the protection of the family in the traditional sense and the Convention rights of sexual minorities is in the nature of things a difficult and delicate exercise*," but found the government had failed to meet its burden of providing "*particularly weighty and convincing reasons*" to justify the discriminatory treatment.

The Grand Chamber therefore concluded there had been "*a violation of Article 14 of the Convention taken in conjunction with Article 8 when the applicants' situation is compared with that of an unmarried different-sex couple in which one partner wishes to adopt the other partner's child*".

4. THE ITALIAN EXPERIENCE

Italy's position on this topic is paradigmatic of how difficult and delicate it is to find a balance between the protection of the family in the traditional sense and the Convention rights of sexual minorities. In fact, in Italy, adoption is regulated by the law n. 184/1983, which provides for strict requirements for adoption, according to the *ratio legis*, set out in the interest of the child. Only opposite-sex couples who have been married for at least three years may adopt[23]. This "stability requirement" may also be met if the opposite-sex couple has lived together for a period of three years before marriage: in such cases, however, the Juvenile Court must make a finding of the continuity and stability of such a relationship, taking all the circumstances into account. Single persons may not adopt, except in some enumerated cases[24], including one that allows a single person to adopt children (also adopted ones) of his or her spouse[25].

As a consequence, gay or lesbian couples have no possibility to adopt, not even as a single persons.

Despite the developments in society since 1983, Italian legislators have always opposed recognition of same-sex marriages and lesbian and gay parenting, in order to preserve the family in the traditional sense. However, since several years, the Italian society is divided between those who support gay and lesbian adoption and those who are unfavourable to it.

In order to illustrate the debate we can highlight that it is a "cross-cutting issue": not all progressive or broadminded people stand up for adoption by gays and lesbians[26].

In this background, case law is playing a very important role, showing an open attitude towards the recognition of same-sex couples' rights and not ignoring same-sex couples' expectations. Therefore, in 2013 the Supreme Court of Cassation upheld the decision of a lower Court which granted the sole temporary custody of a child to a lesbian mother. The father of the child complained about the

[23] Art. 6 of law n. 184/1983, modified by law n. 149/2001. Instead, married couples who have been separated at any time during the three years before adoption may not adopt.
[24] Art. 44 of law n. 184/1983: this kind of adoptions is regarded as an "adoption in a special case".
[25] The prohibition on adoption by single persons has been the topic of considerable debate in Italy, even more so because the European Convention on the Adoption of children authorizes its member States to provide for adoption by single persons, through it does not require them to allow it.
[26] For exemple, Dolce & Gabbana, two Italian gay fashion designers, have recently declared to the press to be contrary to lesbian and gay adoption.

homosexual relationship of the mother, which would be dangerous for the child. The Supreme Court rejected the father's appeal because it was not argued properly, ruling that the harmfulness of foster care in a homosexual family has to be tested in practice and cannot be based on prejudice[27]. In agreement with this decision, in another case, the Court of Bologna chose a gay couple to foster a 3-year-old child[28].

Later, the Court of Turin authorized the registration, in the town registers relevant for civil status, of the birth certificate of a child born in Spain to two women (one of them Italian), after assisted heterologous fertilization (a mother donated ovum for conception, another bore pregnancy and childbirth): the Court considered this registration not contrary to public policy and the homosexuality of parents not an obstacle to the creation of a family [29].

Lastly, the Juvenile Court of Rome has allowed a woman to adopt the biological daughter of her partner, born through a fertility treatment and raised by the lesbian couple[30]: it is the first case of stepchild adoption involving a same-sex couple in Italy, therefore a historic step for Italy. The Court has recognized the adoption pursuant to art. 44 of Italy's adoption law (L. 184/1983) in favour of the partner of the biological parent, although homosexual, considering that this article does not discriminate between heterosexual and homosexual parents and that a discriminatory interpretation of this rule is contrary to the *ratio legis* (best intererest of the child) and Artt. 14 and 8 ECHR.

Recently, also the Italian Cabinet appears to be moving towards same-sex couple adoption, but only for biological children of the partner. The opening, called "stepchild adoption", is contained in the text of a document on civil unions approved by a parliamentary Justice Commitee on March 26, 2015. Even if not yet finally approved, this bill shows an important move of the Italian Government towards same-sex couple adoption.

5. "*TAKING THE RIGHT TO FAMILY LIFE SERIOUSLY*": SOME CONCLUSIONS IN VIEW OF INNOVATIVE APPROACHES BY COURTS IN EUROPE

The aim that we are modestly trying to pursue through this paper is to provide some critical appreciations on a difficult topic, such as the law's treatment of homosexuality, and possible to provide some innovative proposals for the activity of the judiciary in Europe in the even more delicate sub-topic of adoption by homosexuals: this remains a frontier that needs taming. Based on our analysis, it seems clear that there is more concealment than recognition of rights.

[27] Judgement 11.01.2013, n. 601.
[28] On November 15, 2013.
[29] Appeal Court of Torino, decision 29.10.2014.
[30] Judgement 30.06.2014

However, as we have tried to demonstrate, judges in Europe, and also in our country, Italy, appear to have taken a stand – often making reference to the ECHR – in favour of a vision in which formal equality cannot be a shield for prejudices and discrimination.

The major barrier appears to be the strength of the resistance to giving a family status to homosexual unions.

Some scientific research has shown that gay and lesbian parents are as fit and capable as heterosexual parents and their children are as psychologically healthy and well-adjusted as those reared by heterosexual parents[31].

Many American and European studies have shown that there is no evidence that the development of children with lesbian or gay parents is compromised in any significant respect relative to that among children of heterosexual parents in otherwise comparable circumstances. Among these studies, we wish to emphasize a research conducted by the University of Cambridge[32], which has revealed that: "*contrary to what's sometimes suggested by the opponents of equal treatment for gay people, there is no substantive evidence that their children experience any developmental disadvantage into adulthood…. their lived experience is often similar to that of so many black or Asian or Jewish children. It's the prejudices of others that cause them far more distress than their own personal or family characteristics*"[33].

[31] Marriage of Same-Sex Couples – 2006 Position Statement, Canadian Psychological Association; Elizabeth Short, Damien W. Riggs, Amaryll Perlesz, Rhonda Brown, Graeme Kane: Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families – A Literature Review prepared for The Australian Psychological Society" (PDF). Retrieved 2010-11-05. Besides, major associations of mental health professionals in the U.S., Canada, and Australia have not identified credible empirical research that suggests otherwise.

[32] Stonewall, a Scottish organization, commissioned this study to the Centre for Family Research at the University of Cambridge, in order to conduct interviews and focus groups with children of lesbian, gay and bisexual parents. Between October 2009 and February 2010, researchers interviewed 82 children and young people between the ages of 4 and 27. Researchers recruited participants across England, Scotland and Wales. Participants were spread geographically across the country.

[33] The results of this research are the following: children with gay parents like having gay parents and would not want things to change but wish other people were more accepting; sometimes children do not tell people they have gay parents, because they are worried about what may happen if other children know they have gay parents. This is stressful and they wish they could tell other people about their families; many of the young people said they want to feel supported by teachers, but not singled out. They want teachers to show that they understand that having gay parents is not a problem, but other people's reactions can be a problem; children with gay parents want their schools to talk about different families and stop homophobic bullying. This would make them feel more able to be themselves in school; children want to see gay people and their families talked about and celebrated in primary school. This would mean that all children learn about gay people in a positive way, not just from negative comments and it would mean that children with gay parents could stop being the people who have to educate everyone else; children with gay parents do not like the way the word 'gay' is used as an insult in primary and secondary school; children said that homophobia is not treated in the same way that racism is in their school and that teachers do not respond to anti-gay language in the same way they respond to racist language. This means that other children do not understand the impact of their prejudice: on the contrary, schools should tackle all forms of discrimination.

Another research[34] by a team of psychologists has revealed an interesting fact: children adopted by gay parents had more risk factors at the time of their placement than children adopted by heterosexual parents but, despite this, two years after adoption their cognitive advances were comparable to those of other children adopted by heterosexual parents. For this reason, a child-clinical psychologist (Jill Waterman), having been asked whether children need a mother and a father, answered: "*children need people who love them, regardless of the sex of their parents*"[35].

Therefore, research to date about gay parenting[36] seems to show that the children of lesbian and gay parents grow up as successfully as the children of heterosexual parents and are, in the end, not disadvantaged because of their parents' sexual orientation[37].

Accordingly, we can draw the following considerations: there is no evidence to suggest that lesbians and gay men are unfit to be parents; there is no evidence to suggest that the children of lesbian and gay parents are less intelligent, suffer from more problems, are less popular, or have lower self-esteem than children of heterosexual parents; home environments with lesbian and gay parents are as likely to successfully support a child's development as those with heterosexual parents; the children of lesbian and gay parents grow up as happy, healthy and well-adjusted as the children of heterosexual parents; good parenting is not influenced by sexual orientation, rather it is influenced most profoundly by a parent's ability to create a loving and nurturing home, an ability that does not depend on whether a parent is gay, lesbian or heterosexual.

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[34] http://www.stateofmind.it/2012/10/genitori-omosessuali-adozioni/; Justin A. Lavner, Jill Waterman & Letitia Anne Peplau (2012). Can Gay and Lesbian Parents Promote Healthy Development in High-Risk Children Adopted From Foster Care? *American Journal of Orthopsychiatry*, 82(4): 465 DOI: 10.1111/j.1939-0025.2012.01176.

[35] Other studies, comparing LG and heterosexual parents in regard to mental health, parenting stress and parenting competence, have found only few differences based on family structure. Conditions linked to poorer weel-being for LG parents include: living in less supportive legal contexts, perceiving less support from family, having higher levels of internalized homophobia and encountering more child behaviour problems.
In the same way, scientific research has found only few differences between children raised by lesbian and heterosexual parents in terms of self-esteem, quality of life, psychological adjustment or social functioning. Several studies have provided no evidence that children with same-sex parents demonstrate problems with respect to their academic and educational outcomes; than they have demonstrated that children with same and different parents do not differ in social competence or relationships with peers.

[36] See American Psychological Association. *Lesbian and Gay Parenting: A Resource for Psychologists*, District of Columbia, 1995; Child Welfare League of America, *Issues in Gay and Lesbian Adoption: Proceedings of the Fourth Annual Peirce-Warwick Adoption Symposium*, District of Columbia, 1995.

[37] So we must critically analyze the main objections to lesbian and gay parenting. Someone claims that gays and lesbians do not know how to be good parents because they have no stable relationships. This argument is unfounded, because the majority of lesbians and gay men are in stable committed relationships. Of course some of these relationships have problems, as do some heterosexual relationships. The American Psychological Association, in a recent report reviewing the research, observed that "*not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents*" and concluded that "*home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth*". That is why the Child Welfare League of America, the nation's oldest children's advocacy organization and the North American Council on Adoptable Children, say that gays and lesbians seeking to adopt should be evaluated just like other adoptive applicants.

Of course, since our perspective is a judicial one, the above considerations are just background innovative cultural critical appreciations, at the psychological and sociological level, which can influece but are not determining; what is relevant, of course, is the law, at a domestic and European level; yet, since the purpose of our Themis exercise is to make innovative proposals on a difficult topic, such as the law's treatment of homosexuality, we believe that the above considerations are important: among other things, they can guide European judges in evaluating concepts, such as the "best interest of the child", which are to be "filled out" – as they usually are – exactly with what we just said is not the law, but is just psychological and sociological contents.

Thus, both within statute-law and case-law perspectives, there is room to wonder about the possible follow up that European judges – a profession to which we will belong in the future – may give on the topic of same-sex couple adoption.

From the first point of view, a functionalist approach to the issue could be the key. More specifically, freedom of movement could be a key issue toward new approaches. The right to move freely within the territory of the Union is granted by article 18 of the Treaty Establishing the European Community (EC Treaty). It has become one of the leading principles in the discussion on the unification and harmonization of family law in Europe. In recital n. 5, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States states that "*the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage*"; Article 2, among the definitions, states that for the purposes of the Directive: "(…) *"Family member" means: (a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State*". Article 3 underlines that the direcive "*shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them*".

Having in mind these provisions, it appears clearly that the primary rule of the free movement of persons may serve as a "theoretical gateway" to lead judges in Europe to recognize a private international law principle of mutual recognition that may also facilitate the recognition of at least some of the rights

linked to EU citizens' personal status and family relationships within the Union; specifically, this recognition could lead to a dialogue among European courts and to some degree of harmonization at least of the implementation of laws of the member states, even with regards to non-marital partnership regimes, in order to ensure compliance with the principle of freedom of movement.

Another proposal to make room for a Eu right to "family life" for everybody may be based on the search for principle-based solutions, as a response to the lack of specific legislation in the EU sources of law. Such principles – which could be enforced by national judges - could be not so hazardous or implausible, since principles ("*prohibition of discrimination*", for instance) do not play, in EU law, the role of abstract statements[38] but, in their connections and mutual interactions, they define the frame in which statute-law and case-law, in member States as well as in the European *arena*, should develop.

As an example, we can bring up the provision of Article 14 of the European Convention on Human Rights, according to which "*the enjoyment of the rights and freedoms set forth in this Convention* – the "right to marry" under Article 12 included - *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*"; Article 9 of Charter of Fundamental Rights reiterates the "*right to marry and to find a family*", but it specifies that such a right "*shall be guaranteed in accordance with the national laws governing the exercise of these rights*".

Such a frame cannot be fully understood without taking the public policy clause into consideration[39].

As an example, according to Article 28, par. 1 and Article 31 of Regulation (EC) No 2201/2003, judgments on parental responsibility must be declared enforceable, unless one of the reasons specified in Articles 22 et seq. of the same Regulation applies (as regards to matrimonial matters, Article 22 of the Regulation contains the following exception of public policy: "*A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised: (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought*; …").

It is known that in European instruments public policy clauses are a ground for the non-recognition of a foreign judgment and for the non-application of foreign laws: they are exceptional clauses which only apply in extreme cases and require a "manifest" contradiction to fundamental values

[38] The debate between Hart and Dworkin on rules vs. principles is still a milestone in the European landscape. Two simple, not exhaustive, references could be the following: R. Dworkin, *Taking Rights Seriously*, Cambridge, MA: Harvard University Press, 1977 and H. L. A. Hart, *The Concept of Law*, eds. Penelope Bulloch and Joseph Raz, Oxford: Clarendon Press, 1994.

[39] See by B. Hess and T. Pfeiffer, *Interpretation of public policy exception as referred to in EU instruments of Private International and Procedural Law*, study, 2011, requested by the European Parliament's Committee on Legal Affairs, available on the internet at the Internet at http://www.europarl.europa.eu/studies.

of member States legal systems: in family matters – and specifically with regards to same-sex couple right to marry and adopt – public policy is the last bulwark in defense of national values for countries based on cultural and religious values having a different approach to these problems.

But also the understanding of what "public policy" is constitutes a challenge for European judiciaries: it is up to them to evaluate what content should be given to public policy, in view of innovations in society and scientific understanding of social phenomena.

Having in mind all we have tried to say so far, a first conclusive proposal for fellow judges is Europe could be the following: until the shy legislative attempts to regulate the issue come to results at the national (and eventually European) level, *principles* seem to be the only handhold for supporting judicial innovative interpretations, expecially where the absence of specific legislative instruments require the courts to carry out an inevitably creative and propulsive activity.

Secondly, considering how much the ECtHR's position has evolved over the past twenty years, it is arguable that in the coming decades the Court will find that the Convention requires the States to legally recognize same-sex families (although not necessarily, at an early stage, homosexuals' adoption). This, too, may serve as a guidance for European judges, since they have to keep fine-tuned with the evolution of ECtHR case-law.

We may even try – taking some risks – to anticipate what the Strasbourg Court could do in order to enhance the protection of same-sex families under the Convention.

The Court could be especially discouraging against differences in parental rights.

Since the child's best interest should be of utmost importance in all matters involving children, the Court could – in the future - apply stricter scrutiny than in cases concerning only adults.

It is a fact that children are raised in same-sex families across Europe. Affording the States too wide a margin of appreciation as regards the legal recognition of these children's "*important relationships of care*" is certainly not in their best interest.

Instead of affirming a need of legal recognition of same-sex couples under the Convention, the Court could require that, even if the States are not willing to enact civil partnership regulations, the status of children and their right to two legal parents should be equalised. As we tried to show, there is growing scientific and sociological evidence to rebut any lack of European consensus as to the uncertainty of the possible consequences in growing up in a same-sex family.

Another step further: the Court could consider stating an '*obligation of consistency*'. Accordingly, the Court could, in the name of consistency, impose higher standards upon those contracting States that

have voluntarily created a legal framework for same-sex families. We have tried to show some precedents in this direction.

This approach could also be relevant for national judges: it would counter the formation and the persistence of a ‘separate but equal’ regime.

We strongly believe, however, that the EctHR alone, should it be isolated from national judiciaries, can make no progress on this, as well as other, issues; it will be the continuing interaction and cooperation of judiciaries over Europe - and not the Court alone - that will guarantee the best results for same-sex families on a pan-European level as well as in the individual countries. And this Themis exercise is a modest step in this pathway.