EMEGING EUROPEAN CONCENSUS ON LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS: A COMPARATIVE STUDY OF LITHUANIA AND IRELAND

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Submitted to
Central European University
Department of Legal Studies

In partial fulfillment of the requirements for the degree of Master of Arts in Human Rights

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Budapest, Hungary
2012

Abstract

This thesis seeks to address two major issues, namely whether the current status of international human rights law could be interpreted as requiring at least certain degree of legal recognition of same-sex relationships and to what extent these international developments (if any) are capable of influencing situation on legal recognition in domestic jurisdictions.

The current status of international human rights law is explored through analyzing treaty provisions, relevant decisions by judicial entities and resolutions and recommendations by various bodies within the framework of the UN, the CoE and the EU. It is argued that at the moment the international human rights law is settled only on prohibiting *direct* discrimination between different-sex and same-sex couples in comparable situation.

The impact of international developments on domestic legal systems is assessed through analyzing the public discourse and national developments towards legal recognition of same-sex relationships in two jurisdictions, namely in Ireland and in Lithuania. It is argued that international standards (both legally binding and non-binding) do not necessarily produce identical outcomes in domestic legal systems and that the actual recognition of same-sex relationships is highly dependent upon the particularities of national circumstances.

Finally, the thesis seeks to generate specific guidelines in order to develop a comprehensive national strategy for promoting the idea of legal recognition of same-sex relationships in Lithuania. It is argued that the strategically refined (i.e. adapted to national circumstances) claims could actually result in an increased domestic willingness to embrace international norms.

It is concluded that, despite the limited impact of international human rights standards, the good practices of promoting the idea of legal recognition from one jurisdiction could be successfully utilized in another jurisdiction, only if adapted to national particularities accordingly.

Acknowledgments

I dedicate my MA thesis to Mr. R. K., who is probably the most deserving person to get married one day. Hopefully, this analysis will be a small step closer towards his dream coming true. Without his inspiration and support I would not have taken upon this research in the first place.

I would also like to express my deepest gratitude to my thesis supervisors Professor Renáta Uitz and Eszter Polgári for their advice, constructive criticism and insightful comments. They provided me with an opportunity to take the most out of my human rights studies, thus rendering it one of the most meaningful academic experiences in my career.

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List of Abbreviations

CFR – the Charter of Fundamental Rights of the European Union
CHR – the Council of Europe Commissioner for Human Rights
CJEU – the Court of Justice of the European Union
CoE – the Council of Europe
CoM – the Committee of Ministers of the Council of Europe
EC – the European Commission (of the European Union)
ECHR – the European Convention on Human Rights
ECtHR – the European Court of Human Rights
EU – the European Union
FRA – the Fundamental Rights Agency
GA – the UN General Assembly
HRC – the UN Human Rights Council
ICCPR – the International Covenant on Civil and Political Rights
ICESCR – the International Covenant on Economic, Social and Cultural Rights
LGB(T) – lesbian, gay, bisexual (and transgender) communit
OHCH – the Office of the High Commissioner for Human Rights (the UN)
PACE – the Parliamentary Assembly of the Council of Europe
TEU – the Treaty on European Union
TFEU – the Treaty on the Functioning of the European Union
ToA – the Treaty of Amsterdam
ToL – the Treaty of Lisbon
UDHR – the Universal Declaration of Human Rights
UN – the United Nations

Note

Unless otherwise noted, all translations from the Lithuanian are mine.
All websites cited in the paper were last visited on 25 November 2012.

Introduction

The status of LGB rights is believed to represent a litmus test for the general situation of human rights in a given jurisdiction.[1] This presumption is grounded mainly on two justifications. First of all, gay rights[2] do not bear anything exclusively distinct from the rights that other people have. Secondly, States do not have to devote substantial economic resources in order to ensure effective enjoyment of human rights for sexual minorities. To put it in other words, willingness to curb someone's rights out of the sheer prejudice might be very indicative of particular social morality and translate into even more hostile attitudes towards the groups with special needs.

Grigolo has argued that sexual legal subject enjoys two basic rights – the right to choose sexual activity and sexual identity and the right to establish relationships and families in accordance with this choice.[3] In relation to sexual orientation issues these two basic rights could be translated into two opposite poles of gay rights continuum, namely the decriminalization of consensual homosexual activity (i.e. the right to private life) and the legal recognition of same-sex relationships (i.e. the right to family life). While the legal logic does not necessarily imply that the latter inevitably follows from the former,[4] in practical terms it is hard to imagine any meaningful discussion on legal recognition of same-sex relationships taking place in a jurisdiction, decriminalizing consensual homosexual activity.

[1] "Like being a woman, like being a racial, religious, tribal or ethnic minority, being LGBT does not make you less human. And that's why gay rights are human rights, and human rights are gay rights." See: Hillary Rodham Clinton, "Free and Equal in Dignity and LGBT Rights: 'Be on the Right Side of History'", speech delivered on the International Human Rights Day, at the Palais des Nations, Geneva, Switzerland, 6 December 2011.

[2] For the purposes of this paper, the term *gay rights* will be used as referring to human rights of lesbian, gay and bisexual individuals, thus leaving aside the issues of transsexual and transgender rights.

[3] Michele Grigolo, "Sexuality and the ECHR: Introducing the Universal Sexual Legal Subject", *European Journal of International Law*, Vol. 14 (5), 2003, p. 1023.

[4] Purely instrumental approach to gay rights would imply taking upon separate rights and comparing them with the rights, available to other people. However, this beaten track leads to somehow contradictory findings. It either concludes that gay rights in its substance are the same as universal human rights (e.g. freedom of speech), or that no one has the rights that gays are claiming for (e.g. the right to marry somebody of the same sex). This might result in absurd conclusion that gays have all the rights available, but deliberately choose not to exercise them (e.g. not to marry somebody of the opposite sex). See: Vincent J. Samar, "Gay Rights as Particular Instantiation of Human Rights," *Albany Law Review*, Vol. 64, 2001, p. 990.

The issue of legal recognition of same-sex relationships should be inevitably situated within a broader framework of gay rights discourse. Fraser has argued that 'despised sexualities' represent a genuine example of categorical differentiation, wholly rooted in the cultural structure.[5] In essence it means that injustices, suffered by the LGB community, are a matter of recognition – the lack of it produces both heterosexism ("the construction of norms that privileges heterosexuality") and homophobia ("the cultural devaluation of homosexuality").[6] Thus, the economic disadvantage, suffered by sexual minorities, is just a side-effect of the wide-spread practice of heteronormative domination. She suggests that injustices of misrecognition are at best addressed by recognizing the group's specificity.[7] The issue of legal recognition could be located in the framework of Fraser's argumentation by indicating that reluctance in recognizing the right of family life for same-sex couples (i.e. misrecognition) results in economic disadvantages, depriving same-sex couples of certain benefits available to different-sex couples. The recognition of group's specificity, as a remedy for suffered disadvantages, could be implemented through conferring the right to get one's relationships with the person of the same sex recognized in the eyes of the law at least to some extent.

The lack of legal recognition is closely related to the concept of 'second-class citizenship' as well. According to Phelan, "[f]ull citizenship requires that one be recognized not in spite of one's unusual or minority characteristics, but with those characteristics understood as part of a valid possibility for the conduct of life."[8] This line of reasoning neatly grasps the main rationale behind the argument for legal recognition of same-sex relationships. In order to guarantee an

[5] Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age," *New Left Review*, Vol. 212, 1995, p. 78.
[6] Nancy Fraser, *Justice Interruptus. Critical Reflections on the "Postsocialist" Condition*, New York & London: Routledge, 1997, p. 18.
[7] *Supra* 5, 78.
[8] Shane Phelan, *Sexual Strangers. Gays, Lesbians, and Dilemmas of Citizenship*, Philadelphia: Temple University Press, 2001, p. 15-16.

effective enjoyment of human rights in relation to the concept of citizenship, the state authorities should not apply differential treatment to groups in comparable situations simply because certain minority traits are perceived as 'unnatural' or contravening historically rooted traditions. It is true that acknowledging the right to family life for same-sex couples requires that State authorities accept more 'public' demands by sexual minorities. However, it is precisely what it takes to recognize one's citizenship rights not in spite of unusual characteristics, but due to the valid possibility to conduct one's life in a way preferred. The failure to recognize legitimate claims for the full citizenships rights in the context of same-sex relationships results in multiple situations, when same-sex relationships are perceived as less valuable than its heterosexual equivalent.[9] Kuhar has argued that the status of 'second class citizens' might prevent same-sex couples from meaningful participation in the community all together by simply refusing the possibility for a foreign same-sex partner to acquire citizenship or at least residence permit.[10]

It has to be noted that claims for legal recognition of same-sex relationships does not necessarily imply opening up the traditional marriage to same-sex couples. According to Warner, many societies would rather agree to confer all marital rights and benefits upon the same-sex couples through alternative recognition arrangements than consider the idea of marriage equality.[11] Lehr has argued that marriage is closely related to the established gender roles and social control mechanisms, thus acquiring virtually magical significance to the heterosexual

[9] These situations range from the forced testimony against one's life partner in the criminal proceedings to the refusal to grant next-of-kin status in relation to one's intimate associate.

[10] Roman Kuhar, "Registruota tos pačios lyties asmenų partnerystė ir antrarūšiai piliečiai", in *Heternormos hegemonija. Homoseksualių žmonių socialinė atskirtis ir diskriminacijos patirtys*, ed. Arnas Zdanevičius, Kaunas: Vytauto Didžiojo universitetas, 2007, p. 191.

[11] Michael Warner, *The Trouble With Normal: Sex, Politics, and the Ethics of Queer Life*, Harvard University Press, 1999, p. 82.

majority.[12] Therefore it comes with a little surprise that the right to marry in the main international human rights treaties is formulated in a way that the exercise of this right is condition upon the different sexes of the spouses[13] or upon the requirements, set forth in the national laws.[14] Despite the fact that equality and dignity argument implicit in the marriage equality debate[15] exceeds the scope of this analysis, it will be argued that at least some legal recognition of same-sex relationships would suffice not only in guaranteeing effective enjoyment to the right of family life, but also in remedying culturally rooted injustices of misrecognition.

It is not difficult to comprehend, how at least certain degree of legal recognition would significantly contribute to the status of same-sex couples. Despite the fact that alternative recognition arrangements might still place same-sex couples in a worse situation than married spouses (e.g. no right for joint adoption), the merely formal statement by the State that it recognizes and considers same-sex relationships as socially valuable expression of human intimacy might pave the way for further acceptance and inclusion.[16] In addition to this, economic implications of alternative recognition arrangements should not be downplayed by simply emphasizing the lack of symbolic status, which remains reserved to the institution of marriage. The very moment, when the law ceases to treat same-sex partners simply as roommates and

[12] Valerie Lehr, "Relationship Rights for a Queer Society: Why gay Activism Needs to Move Away from the Right to Marriage", in *Child, Family, State*, eds. Stephen Macedo and Iris Marion Young, New York: New York University Press, 2003, p. 306-342.

[13] The Article 16(1) of the UDHR ("Men and women of full age […] have the right to marry and to found a family" and the Article 23(2) of the ICCPR („The right of men and women of marriageable age to marry and to found a family shall be recognized.")

[14] The Article 12 of the ECHR ("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") and the Article 9 of the CFR ("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.")

[15] "The exclusion of same-sex couples from the benefits and responsibilities of marriage, <…>, is not a small and tangential inconvenience <…> destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples." See: *Minister of Home Affairs and Another v Fourie and Another*, CCT 60/04, Constitutional Court of South Africa, 1 December 2005, [71].

[16] For example, it has been argued that institutionalization of same-sex relationships can lead to the decrease of homophobic attitudes. See: Judit Takács and Ivett Szalma, "Homophobia and Same-Sex Partnership Legislation in Europe", *Equality, Diversity and Inclusion: An International Journal*, Vol. 30(5), 2011, p. 356 – 378.

recognizes that certain rights and obligations might exist between them, marks the establishment of a legal basis, from which further claims for expanding on same-sex couples' rights can be articulated. Therefore it is reasonable to expect that public discussion on legal recognition of same-sex relationships should not necessarily constitute a 'black and white' scenario (i.e. no legal recognition v. full legal recognition, equivalent to that enjoyed by spouses) – intermediate solutions should be explored and concessions should be made equally on both sides.

The purpose of the subsequent analysis is to explore, whether current status of international human rights law mandates at least certain degree of legal recognition of same-sex relationships and how these requirements resonate with domestic developments in the area. In order to achieve these goals, the research question and two thesis statements were formulated accordingly.

Research Question: To what extent evolving international and regional human rights standards are capable of influencing legal recognition of same-sex relationships in European domestic legal systems?

Statement A: Despite the fact that human rights protection mechanisms devote significant attention to the issues of sexual orientation, it represents rather an aspiration than a hard-core obligation for legal recognition of same sex-relationships.

Statement B: Despite the fact that evolving international and regional standards provide a solid basis for advocacy efforts, the actual recognition of same-sex relationships is highly dependent upon the particularities of national circumstances.

In order to answer the above proposed research question and to validate thesis statements, methods of doctrinal research and discourse analysis are employed. The former pillar entails legal analysis of the main human rights treaties, jurisprudence of the main international human rights tribunals, resolutions and recommendations by various human rights bodies, domestic legislation/jurisprudence and secondary literature on legal recognition of same-sex relationships.

The second pillar focuses on gay rights discourse in two domestic jurisdictions, namely Ireland and Lithuania. These two jurisdictions were selected by applying the method of difference. Despite the fact that Lithuania and Ireland are relatively similar in their geographical (i.e. size and population), geopolitical (i.e. membership in the EU and the CoE), social (i.e. ethnically homogenous and predominantly Catholic) and cultural (i.e. rather conservative with regard to morally sensitive issues) characteristics, they stand apart in legally recognizing same-sex relationships. The discourse analysis is used in order to explore the developments in attitudes, controlling references and public sentiments in relation to sexual orientation issues since 1993, i.e. the year marking decriminalization of consensual homosexual activity in both jurisdictions under scrutiny. These findings are supplemented by the insights from personal interviews with the prominent LGBT rights activists in Ireland and Lithuania.[17]

The first chapter explores the status of international human rights law in relation to legal recognition of same-sex relationships. It is argued that international law is currently settled only on prohibiting *direct* discrimination between same-sex and unmarried different-sex couples. The second chapter discusses legal and social developments in Ireland towards opening up registered partnerships for same-sex couples in 2011. It is suggested that swiftly changing attitudes towards LGBT community represent a broader process of social transformation in Ireland. The third chapter discusses the main obstacles preventing positive developments towards legal recognition of same-sex relationships in the Lithuanian society. It is argued that, in order to promote the idea of legal recognition successfully, the advocacy effort should be strategically adapted to the Lithuanian particularities. Finally, the fourth chapter generates insights on how to refine

[17] The interviews were conducted in March, 2012. The group of Irish interviewees is represented by Fergus Ryan (Lecturer in Law at *Dublin Institute of Technology*), Brian Sheehan (Director at *Gay and Lesbian Equality Network* (GLEN)) and Moninne Griffith (Director at *Marriage Equality*). The study visit to Ireland was funded by the research grant, awarded by the Central European University. The group of Lithuanian interviewees is represented by Vladimir Simonko (Chair of the *Lithuanian Gay League* (LGL)) and Eduardas Platovas (Project Officer at *Lithuanian Gay League* (LGL)). All interview files are available upon the request from the author.

advocacy arguments in order to promote the idea of legal recognition of same-sex relationships under the Lithuanian circumstances successfully.

This analysis contributes to the research in the field by emphasizing the importance of translating international and regional human rights standards on legal recognition of same-sex relationship in order to generate successful outcomes in domestic legal systems. In this way it seeks to contribute to the already indicated lack of "adequate analysis of the role domestic culture and structures play in mediating the influence of international norms."[18] In addition to this, the present analysis represents rather evolutionary than revolutionary approach in arguing that at least certain degree of legal recognition of same-sex relationships, given the particularities of national circumstances, could suffice for guaranteeing an effective enjoyment of the right to family life for same-sex couples, thus standing in contrast with more demanding equality claims.

[18] Kelly Kollman, "European Institutions, Transnational Networks and National Same-Sex Unions Policy: When Soft Law Hits Harder", *Contemporary Polivics*, Vol. 15(1), March 2009, p.40.

Chapter 1

The State of International Human Rights Law

The human desire to live in intimate partnership with another person is guaranteed through the right to marriage, to family life, and to private life, and through the prohibition of discrimination.[19] Initially, the drafters of the main human rights treaties understood these provisions as exclusively applicable only to different-sex couples.[20] However, the changing social realities necessitated further elaboration on the issue, whether and how the law should accept alternative familial arrangements that are not based on marriage and that are not heterosexual in nature. For example, Glendon has argued that the state has been withdrawing from the regulation of family formation and dissolution and intruding into functions formally performed by the family.[21] If this is the case and heterosexual marriage is gradually losing its monopoly over legally regulating mutual rights and obligations between two individuals in intimate association, the right to family life could be in principle guaranteed through alternative legal arrangements, i.e. recognition of informal cohabitation or introduction of registered partnership schemes.[22] Legal acknowledgment that different (i.e. non-marital) familial formations can coexist alongside the institution of heterosexual marriage brings the issue of same-sex relationships into the picture. While at the moment there is no requirement in the international law to open up the institution of

[19] Kees Waaldijk, "Same-Sex Partnership, International Protection", *Max Planck Encyclopedia of International Law*, 2011, <http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e1739&recno=10>, [1].
[20] For example, see: the Article 16.1 of the UDHR ("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"), the Article 23.2 of the ICCPR ("The right of men and women of marriageable age to marry and to found a family shall be recognized ") and the Article 12 of the ECHR ("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").
[21] Mary Ann Glendon, *State, Law and Family: Family Law in Transition in the United States and Western Europe*, Amsterdam and New York: North-Holland Publishing Co., 1977, p. 272-296.
[22] Supra 19, [4].

civil marriage to same-sex couples,[23] the applicability of alternative legal arrangements for rainbow families is much more prone to legal interpretation.

The main purpose of this chapter is to outline to what extent international human rights law recognizes the right to family life for same-sex couples and requires subsequent legal recognition of their relationships as a prerequisite for effective enjoyment of this right. The subsequent analysis will focus not only on the promulgation of legally binding mandates in the United Nations, the Council of Europe and the European Union, but will also seek to identify the developments of non-binding shared principles, which could eventually lead to the introduction of common denominator as a minimum requirement for legal protection of same-sex relationships.[24] In order to achieve these aims, treaty provisions, relevant decisions by judicial entities and resolutions and recommendations by various bodies within the framework of three principal international/regional organizations will be analyzed.

1.1 United Nations

The development of binding international norms on LGB(T) rights protection at the UN level is considered to be highly dependent on a variety of cultural and religious values by the organization's Member States.[25] Despite this implicit disagreement over acknowledging LGB(T) rights as human rights, the general trend of addressing issues of sexual orientation through the

[23] Ibid., [11].

[24] The presence of common ground in protecting certain right among different societies could compel international human rights tribunals to preempt rights-limiting decisions by national authorities. However, on the limitations of 'European consensus' methodology in the ECtHR jurisprudence in relation to LGBT rights, see: Laurence R. Helfer: "Lesbian and Gay Rights as Human Rights: Strategies for United Europe", *Virginia Journal of International Law*, Vol. 32, 1991, p. 157-212.

[25] A system of differing cultural and moral imperatives is illustrated by a statement of 66 nations (mainly Western and European Union countries) at the UN General Assembly (GA) in 2008 that international human rights protection includes sexual orientation and gender identity. It was opposed by an alternative statement of 60 member states (initiated by the Organization of the Islamic Conference) that universal human rights do not include "the attempt to focus on the rights of certain persons." Neither of these positions has been officially adopted at the UN level. For a comprehensive summary, see: "UN: General Assembly Statement Affirms Rights for All", *Human Rights Watch*, 19 December 200, <http://www.hrw.org/news/2008/12/18/un-general-assembly-statement-affirms-rights-all>.

UN system is gaining its momentum.[26] On 17 June 2011 the "Human Rights, Sexual Orientation and Gender Identity" Resolution[27] was passed by the UN Human Rights Council (HRC), resulting not only in the first official report by the Office of the High Commissioner for Human Rights (OHCHR) on the issue[28], but also in the subsequent panel discussion.[29] The primary concern within the UN with regard to LGB(T) individuals are decriminalization of homosexuality, prevention of torture, protection from violence, prohibition of discrimination and respect for freedom of expression.[30] Taken into account the latitude of differences among the UN Member States in guaranteeing even the basic rights for sexual minorities, it comes with a little surprise that the right to family life for same-sex couples is currently not on the agenda.[31]

The current publication by the OHCHR unequivocally states that "[u]nder international human rights law, States are not required to allow same-sex couples to marry."[32] Nevertheless, the general prohibition of discrimination, as a core principle of the UN legal system, might still have direct consequences in situations regarding unjustified differential treatment between same-sex and unmarried different-sex couples. Therefore the applicability of the International Bill of Rights[33] should be critically attested with regard to same-sex couples.

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[26] Joke Swiebel, "Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy", *Contemporary Politics*, Vol. 15(1), March 2009, p. 27.
[27] Resolution 17/19, *Human Rights Council*, 17th Session, UN Doc. A/HRC/17/L.9/Rev.1, 15 June 2011.
[28] "Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender identity", *United Nations High Commissioner for Human Rights*, Human Right Council, 19th Session, UN Doc. A/HRC/19/41, 17 November 2011.
[29] "Human Rights Council Panel on Ending Violence and Discrimination Against Individuals Based on Their Sexual Orientation and Gender Identity", Summary of Discussion, Geneva, 7 March 2012, <http://www.ohchr.org/Documents/Issues/Discrimination/SummaryHRC19Panel.doc>.
[30] The core legal areas where national action is most urgently needed were outlined in the most recent publication by the UN Human Rights Office, see: "Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law", *Office of the High Commissioner for Human Rights*, HR/PUB/12/06, 2012, <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>.
[31] "Fighting for basic rights must top the agenda […] to persuade a majority of UN member states to recognize the [LGBT] issue as a legitimate human rights issue." See: *supra* 25, 32.
[32] *Supra* 30, 53.
[33] The International Bill of Rights is an unofficial name given to the three core human rights treaties at the UN level, namely – Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III), 10 December 1948 (hereinafter 'UDHR'), International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S.

1.1.1 The Permissible Exclusion of Same-Sex Couple from Marriage

The controlling decision at the UN level on the non-existent right to marry for same-sex couples was delivered by the Human Rights Committee (HRC) in *Joslin v. New Zealand*[34] case. The body interpreted the term 'men and women' in the Article 23(2) of the ICCPR as directly referring to "the union between a man and a woman wishing to marry each other" and thus rejected the applicants' claim that the exclusion of same-sex couples from marriage violated the article in question [8.2]. In addition to this, the HRC explicitly indicated that any claim for the right to marry should be considered exclusively under this provision and any additional considerations, such as equality before law, interference with family life and prohibition of discrimination, should not be taken into consideration [8.3]. Despite the fact that this hardline reasoning seems to put an end to any future claims for the same-sex marriage under the ICCPR, the concurring opinion by the two members of the Committee indicated that "differential treatment between married couples and same-sex couples […] may very well, *depending on the circumstances* […], amount to prohibited discrimination."[35] In addition, the explicit refusal by the HRC to consider the applicants' claims under the category of family life seems to be at odds with the General Comment No. 19[36], where the same Committee has acknowledged the existence of various family forms [2]. While the critics of the HRC have argued that the tribunal missed an opportunity to elaborate on the applicability of Article 23(1) on family protection to alternative (i.e. not based on heterosexual marriage) intimate associations, [37] it might be the case that the

171 (hereinafter 'ICCPR') and International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 (hereinafter 'ICESCR').

[34] *Joslin v. New Zealand* (902/1999), CCPR/C/75/D/902/1999 (2003).

[35] *Ibid*., 10 IHRR 40 (my emphasis).

[36] "General Comment No. 19: Protection of The Family, The Right to Marriage and Equality of The Spouses", *Human Rights Committee*, HRI/GEN/1/Rev.1, 27 June 1990.

[37] Michael O'Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles", *Human Rights Law Review*, Vol. 8(2), 2008, p. 224-225.

HRC did not address this issue deliberately by seeking not to compromise the right to family life for same-sex couples, while refusing them the right to marry.

The permissible exclusion of same-sex couples from marriage is reflected in the UN non-binding human rights standards as well. For example, the *Yogyakarta Principles*[38], launched by a group of human rights experts in order to elaborate on applicability of international human rights norms to people of diverse sexual orientations and gender identities, contains no direct expression of a right to non-heterosexual marriage for purposes of consistency with the existing law.[39] Nevertheless, these Principles still unequivocally recognize the right to family life irrespective of partners' sexual orientation [24.A] and that "no family may be subjected to discrimination on the basis of the sexual orientation." [24.B] By further elaborating that "any obligation, entitlement, privilege, obligation or benefit available to different-sex unmarried partners [should be] equally available to same-sex unmarried partners" [24.F] the Principles could be interpreted as indicating that effective enjoyment of the right to family life for same-sex couples is conditioned upon certain degree of legal recognition by the state authorities.

The objection to the differential treatment among similarly situated different-sex and same-sex couples in non-binding UN human rights standards could be seen as directly resonating with the hard law prohibition of discrimination as one of the key concerns in protecting LGB rights at the international level. For example, in its concluding observations on Ireland in 2008[40] the HRC complemented the intention to introduce civil partnership legislation, prompting the State party to

[38] "The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity", March 2007, <http://www.yogyakartaprinciples.org/principles_en.pdf>.
[39] *Supra* 37, 236.
[40] "Concluding observations of the Human Rights Committee on Ireland", *Human Rights Committee*, CCPR/C/IRL/CO/3, Geneva, 30 July 2008.

"ensure that its legislation is not discriminatory of nontraditional forms of partnership" [8][41]. If sexual orientation does not "represent an objective and reasonable criterion to prevent individuals from the enjoyment of their civil and economic rights"[42], to what extend could the international norm of non-discrimination be interpreted as requiring certain degree of State sponsored acknowledgement of the same-sex relationships?

1.1.2 'Other Status' as Substantial Basis for Prohibition of Discrimination

The International Bill of Rights establishes the general principle of equality through the enjoyment of all fundamental rights and freedoms "without distinction of any kind" (Article 2 of the UDHR) and through the "protection against discrimination on any ground" (Article 26 of the ICCPR and Article 2(2) of the ICESCR). Despite the fact that neither of these human rights treaties mentions sexual orientation explicitly[43], the non-discrimination clauses in all three documents contain an open-ended proposition of 'other status', thus opening the possibility of including other categories under the scope of legal protection as well. It has been argued that sexual identity, as such, falls under this proposition "in terms of enjoyment of all other rights enjoyed by the population at large."[44]

This interpretation refers to the prohibition of *direct* discrimination, which, in the context of legal recognition of intimate associations, could be at best illustrated by the situation, when certain benefits of marriage, registered partnership or *de facto* cohabitation are conferred upon

[41] The civil partnership legislation exclusively for same-sex couples came into force in Ireland in 2011. However, it has been documented that it does not extend all the same rights as marriage would. See: *Marriage Equality*, "Missing Pieces", October 2011, <http://www.marriagequality.ie/download/pdf/missing_pieces.pdf>.

[42] Sophie M. Clavier, "Objection Overruled: The Binding Nature of the International Norm Prohibiting Discrimination against Homosexual and Transgendered Individuals", *Fordham International Law Journal*, Vol. 35(2), January 2012, p. 407

[43] The first explicit prohibition of discrimination on grounds of sexual orientation in regional human rights instrument was articulated in the Article 21.1 of the Charter of Fundamental Rights of the European Union. See: "Charter of Fundamental Rights of the European Union", *Official Journal of the European Communities*, 2000/C 364/1, 18 December 2000.

[44] *Supra* 42, 396-397.

different-sex partners, but no upon same-sex couples that are situated in comparable situation. In addition to this, it could be argued that excluding all unmarried couples (i.e. both same-sex and different-sex) from certain benefits "amounts to *indirect* sexual orientation discrimination, because the discriminatory effect is clearly disproportionate as it affects only a small number of different-sex couples but all same-sex couples."[45] The current status of international law already mandates certain recognition for same-sex relationships in clearly defined and limited instances in order to comply with the general prohibition of non-discrimination.

In *Young v. Australia*[46] and *X v. Colombia*[47] cases the HRC established the prohibition of *direct* discrimination on grounds of sexual orientation under the Article 26 of the ICCPR. In both cases the Committee found that the denial of survivor's pension to a same-sex partner was not "based on objective and reasonable criteria"[48] and there were no factors that might justify "a distinction between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled."[49] By establishing a clear principle of non-discrimination between couples in comparable situations, i.e. different-sex and same-sex cohabiting partners, these two cases undoubtedly foster equality by paving the way for legal recognition of same-sex relationships. However, the prohibition of *direct* discrimination seems to be the only safe area in relation to same-sex couples' rights, where the HRC can operate without imposing any objectionable value judgments upon its Member States. For example, in the *X* case not only was the HRC of the view that it is not necessary to consider the applicant's claim under

[45] This type of reasoning has not been recognized by any international human rights forum so far – the mere fact that different-sex couples are entitled to marry due to the deep-rooted ideas about the family unit places them in a completely different situation than same-sex couples, who have been barred from marriage due to the cultural and historic traditions. However, some authors argued that "persuading international courts and human rights bodies to apply [this reasoning] will be […] the most effective way of increasing the international protection of same-sex partnership." See: s*upra* 19, [31].
[46] *Young v. Australia* (941/2000), CCPR/C/78/D/941/2000 (2003).
[47] *X v. Colombia* (1361/2005), CCPR/C/89/D/1361/2005 (2007).
[48] *Supra* 46, para 10.4.
[49] *Supra* 47, para 7.2.

the Article 17 of the ICCPR [7.3], but also two dissenting judges expressed an opinion that "a couple of the same sex does not constitute a family within the meaning of the Covenant and cannot claim benefits that are based on a conception of the family as comprising individuals of different sexes."[50] Therefore it is hard to foresee on what basis further claims for legal recognition at international level could proceed, especially with regard to those jurisdiction, where certain rights and benefits are exclusively attached to the institution of traditional (i.e. heterosexual) marriage and where distinctions are made between married and unmarried couples and not between homosexual and heterosexual couples.

To sum up, the UN legal standard is clear on two points: (1) the exclusion of same-sex couples from the institution of marriage is permissible; and (2) difference in treatment without reasonable justification between different-sex couples and same-sex couples in comparable situation in impermissible. While the principle of non-discrimination on grounds of sexual orientation is of a crucial importance in addressing issues such as decriminalization of homosexuality or homophobic violence, it offers protection for the same-sex couples only in rather limited number of instances. Taken differing cultural and religious traditions among the UN Member States into account, even this non-activist approach should be interpreted as success rather than failure. On the other hand, regional human rights protection mechanisms might offer a more comprehensive approach towards legal recognition of same-sex relationships primarily due to the presumably more consistent moral value systems among their Member States.[51]

[50] *Ibid*., Separate opinion by Mr. Abdelfattah Amor and Mr. Ahmed Tawfik Khalil (dissenting).

[51] For example, Swiebel argues that certain LGBT demands in the UN are blocked due the lack of political opportunity structures (e.g. the reform of the Human Rights Commission, majority of unfriendly states, the failure in establishing a linkage between sexual orientation and sexual rights, etc.), while contrasting it with the situation in the EU, where the governments (prior to the enlargement in 2004) "were on the whole much friendlier to the demands of the LGBT movement", see: *supra* 26, 29.

1.2 Council of Europe

Currently 22 out of 47 Member States of the Council of Europe (CoE) offer some legal recognition for same-sex relationships,[52] either through marriage equality, registered partnerships or cohabitation arrangements. While a generic label of 'emerging European consensus' remains a highly debated judicial construct in the ECtHR's jurisprudence,[53] even the strictly numerical interpretation of current status of same-sex couples points towards the lack of common ground for establishing a legally binding pan-European norm. To put it in other words, it is very hard to find any common denominator due to the diverse regulations in the field of family law among the Member States. [54] The factual situation notwithstanding, the Council of Europe and its institutions – i.e. the ECtHR, the Commissionaire for Human Rights, the Parliamentary Assembly (PACE) and the Committee of Ministers (CoM) – have played a crucial role in pioneering LGBT rights across Europe, and thus merit further inquiry about the possibilities of promoting legal recognition of same-sex relationships in the remaining 25 Member States.

It has been argued that the ECHR and its subsequent enforcement through the ECtHR "provid[e] the major source of international protection of LGBT rights."[55] Not only the historically more advanced text of the ECHR,[56] but also the binding nature of the Court's judgments on the Contracting Parties offer an attractive avenue for local LGBT groups and policy activists to portray certain desired developments in the field of LGBT rights as 'required by the

[52] "ILGA-Europe Rainbow Index", May 2012, <http://www.ilga-europe.org/media_library/ilga_europe/publications/reports_and_other_publications/rainbow_map_and_index_may_2012/ilga_europe_rainbow_index_side_b>.
[53] On the ECtHR's failure in defining the consensus inquiry with precision and the subsequent jurisprudential concerns, see: Laurence R. Helfer, "Consensus, Coherence and the European Convention of Human Rights", *Cornell International Law Journal*, Vol. 26, 1993, p. 133-165.
[54] The Article 12 of the ECHR stipulates that "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." (emphasis added)
[55] "The Equal Jus Legal Handbook to LGBT Rights in Europe", *Equal Jus*, Edition 20110430, <http://www.equal-jus.eu/sites/equal-jus.eu/files/Handbook%20on%20the%20protection%20of%20LGBT%20people%20-%20high%20resolution_0.pdf>.
[56] The text of the Convention was drafted in 1950 and in this regard it stands in contrast with the texts of, for example, ICCPR or ICESCR from 1966, which could be considered as relatively 'new' human rights treaties.

Strasbourg court'. However, there seem to be a few binding mandates in the ECtHR's jurisprudence on legal recognition of same-sex relationships and the ones available are still very limited in their nature.[57] The position on the issue by other bodies in the CoE represents rather a soft law norm, which can either function as a powerful catalyst of policy change or can be simply blocked by the domestic veto players.[58] Therefore the subsequent analysis seeks to draw a clear line between what is preferred and what is required by the European system of human rights protection in dealing with the rights of same-sex couples.

1.2.1 ECtHR's Jurisprudence: Limited Requirements for Legal Recognition

The Court's interpretation of the ECHR in respect of sexual orientation at its early stages has been based on construction of homosexuality as "an essentially private manifestation of the human personality" in decriminalization of consensual homosexual activity cases.[59] To put it in other words, the majority of successful complaints before the ECtHR with regard to sexual orientation had been addressed through the 'private life' prong of Article 8 of the Convention. However, the recent case law on Article 10 (i.e. the right to freedom of expression) and Article 11 (i.e. the right to freedom of assembly and association) symbolically confirmed the applicability of civil rights to non-heterosexual citizens, thus successfully challenging the heteronormativity of public space. Finally, the Court made a clear policy statement on opening up the European family law to the historic interpretation[60] by stating that:

> "[…] the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy

[57] *Supra* 17, 44.
[58] Ibid., 39.
[59] Paul Johnson, "'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights," *Human Rights Law Review*, Vol. 10(1), January 2010, p. 74.
[60] David Reddington, "Civil Partnership vs Marriage – the Approach of the European Court of Human Rights", *Irish Journal of Family Law*, Vol. 14(1), 2011, p. 18.

> "family life" for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would." [94]

While the last development bears the most direct relevance to the assumption that family life cannot be effectively enjoyed without certain degree of legal recognition, it cannot be analyzed in isolation from the rest of jurisprudence on the issues related to sexual orientation.

The first judgments on decriminalization of private, consensual homosexual sexual activity – namely, *Dudgeon v. United Kingdom*[61], *Norris v. Ireland*[62] and *Modinos v. Cyprus*[63] – were instrumental in establishing a link between homosexuality and human rights.[64] In *Dudegon* the ECtHR limited the margin of appreciation by national authorities with regard to the issue of criminalization, because it touches upon the "most intimate aspect of private life." [52] However, the Court's perception of homosexual sexual activity as 'a socially valuable expression of human intimacy'[65] was circumscribed by the statement in *Norris* that "[a]lthough members of the public who regard homosexuality as immoral may be shocked […], this cannot on its own warrant the application of penal sanctions when it is *consenting adults alone who are involved.*" [46, emphasis added][66] To put it in other words, the Court placed homosexuals within a 'private' juridical space of toleration, thus establishing a "split between a legitimate 'private'

[61] *Dudgeon v. UK* App no 7525/76 (ECtHR, 24 February 1983).
[62] *Norris v. Ireland* App no 10581/83 (ECtHR, 26 October 1988).
[63] *Modinos v. Cyprus* App no 15070/89 (ECtHR, 22 April 1993).
[64] *Supra* 59, 75.
[65] Ibid., 77.
[66] The US Supreme Court in the case, involving "two adults who, with full and mutual consent from each other, engaged in sexual *practices common to a homosexual lifestyle*," similarly held that "[t]he State cannot demean their existence or control their destiny by making their *private sexual conduct* a crime.[…]The Texas statute furthers no legitimate state interest which can justify its intrusion into the *personal and private life* of the individual." See: *Lawrence v. Texas*, 539 U.S. 558 (2003), p. 578 (emphasis added).

decriminalized homosexual subject and his/her unacceptable 'public' demands to establish relationships and families."[67]

The main problem with this distinction between 'public' and 'private' expressions of one's sexual choices[68] is that there can be no meaningful enjoyment of private life without certain recognition in public sphere.[69] In a number of instances the Court and the former Commission refused to grant any recognition for same-sex couples,[70] thus confirming the trend that "the more a relationship or a family differentiates itself from the traditional sexual and biological requirements of 'the' family based on marriage, the less likely recognition becomes."[71] Despite the fact that the Court's attitude towards homosexuality has significantly evolved since *Dudgeon*, it remains unclear, to what extent it can be employed in expanding on legal recognition issue.

In cases concerning employment the ECtHR, for example, indicated that "a predisposed bias on the part of a heterosexual majority against a homosexual minority […] cannot, of themselves, be considered […] to amount to sufficient justification"[72] for a total ban on homosexuals to serve in armed forces. In *Lustig-Prean and Beckett v. UK*[73] the ECtHR found a violation of the applicant's privacy rights mainly due to the Government's "continued investigation of the applicants' sexual orientation once they had confirmed their homosexuality." [103] Despite the fact that the Court required to provide 'convincing and weighty reasons' in justifying differential treatment of homosexuals even in the military service, i.e. the sphere where

[67] *Supra* 3, 1038.
[68] Grigolo has argued that "sexual legal subject enjoys two basic rights: the right to choose sexual activity and sexual identity and the right to establish relationships and families in accordance with this choice." See: ibid., 1023.
[69] *Supra* 59, 82.
[70] See: *X & Y v. UK* App no 9369/81 (Commission Decision, 3 May 1983), *W.J. & D.P.* v. *UK* App no 12513/86 (Commission Decision, 11 Sept. 1986), *C. & L.M.* v. *UK* App no. 14753/89 (Commission Decision, 9 Oct. 1989), *B.* v. *UK* App no. 16106/90 (Commission Decision, 10 Feb. 1990), *S.* v. *UK* App no. 11716/85 (Commission Decision, 14 May 1986) and *Röösli* v. *Germany* App no. 28318/95 (Commission Decision, 15 May 1996).
[71] *Supra* 3, 1040.
[72] *Smith and Grady v. UK* App nos. 33985/96 and 33986/96 (ECtHR, 27 September 1999), [97].
[73] *Lustig-Prean and Beckett v. UK* App nos. 31417/96 and 32377/96 (ECtHR, 27 September 1999).

Member States usually enjoy wide margin of appreciation,[74] the same did not apply with regard to family law. As recently as in 2001 the ECtHR ruled in *Mata Estevez v. Spain*[75] admissibility decision that "long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention", thus unequivocally refusing to mandate any legal recognition of same-sex relationships whatsoever.

In another group of cases on freedom of expression, assembly and association the Court has unequivocally expressed its support for public visibility of alternative (i.e. non-heterosexual) sexualities and addressed the anti-gay prejudice as detrimental influence for effective enjoyment of civil and political rights. In *Bączkowski v Poland*[76] judgment the ECtHR affirmed that the positive obligation by a State to secure the effective enjoyment of freedom of assembly is "of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimization." [64] To put it in other words, the Court stated not only that a State cannot take away certain rights from minority groups with unpopular ideas, but also that it has to provide certain assistance in effectively exercising these right with the view of avoiding further stigmatization and stereotyping. The same reasoning was reiterated in *Alekseyev v. Russia*[77] judgment by employing even stronger and straightforward language. For example, the Court held that "it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on it being accepted by the majority" [81] and "[t]here is no ambiguity about […] the right of individuals to *openly* identify themselves as […] sexual minority, and to promote their rights and freedoms." [84,

[74] *Engel and Others v. the Netherlands* App nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 8 June 1976), [57].
[75] *Mata Estevez v. Spain* App no 56501/00, (ECtHR, 10 May 2001). The Court also emphasized that "despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation."
[76] *Bączkowski v Poland* App no 1543/06 (ECtHR, 3 May 2007).
[77] *Alekseyev v. Russia* App nos 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010).

emphasis added] Furthermore, in *Vejdeland and Others v. Sweden*[78] the ECtHR upheld the ban on anti-gay hate speech by stating that "discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour." [55] In addition to this, two concurring judges in a separate opinion[79] emphasized the fact that "[h]ate speech is destructive for democratic society as a whole" [9], thus being not only hurtful to homosexual individuals in particular, but also incompatible with the teleological vision of democratic society required by the Convention in general. Finally, in the most recent judgment *Genderdoc-M v. Moldova*[80] the ECtHR once again took a firm stance on the fact that majoritarian opposition against 'promotion of homosexuality' does not constitute a 'particularly weighty and convincing reason' for differential treatment [54] and therefore amounts to discrimination on the grounds of sexual orientation. To sum up, despite the statement that "conferring substantive rights on homosexual persons is fundamentally different from recognizing their right to campaign for such rights"[81], the ECtHR's consistent position on freedoms of expression and assembly for LGBT individuals significantly contributed to the general climate of visibility. While the climate of visibility does not necessarily imply public acceptance or all the more so legal recognition,[82] it could be presumed that the Court's juridical space of toleration was constantly negotiated in a way that expanded on the enjoyment of civil and political rights by homosexual minority in a more 'public' sphere.

These positive developments regarding freedom of expression and assembly for LGBT communities were in parallel accompanied by the gradual evolution in Court's attitudes towards

[78] *Vejdeland and Others v. Sweden* App no 1813/07 (ECtHR, 9 February 2012).
[79] Ibid., Concurring Opinion Judges Judkivska and Villiger.
[80] *Genderdoc-M v. Moldova* App no 9106/06 (ECtHR, 12 June 2012).
[81] *Supra* 77, [84].
[82] The 'anti-gay prejudice' has not significantly decreased, for example, in Poland and Russia as a result of the progressive ECtHR judgments. See: *ILGA-Europe*, "Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe 2011", May 2012, <http://www.ilga-europe.org/media_library/ilga_europe/publications/reports_and_other_publications/annual_review_2011/files/annual_review_2011>, p. 128-130 (on Poland) and p. 137-141 (on Russia).

the equal rights for same-sex couples as well. *Karner v. Austria*[83] judgment represents a major breakthrough in conferring certain right to same-sex partners by narrowing a State's margin of appreciation as far as difference in treatment based on sexual orientation is concerned. The Court found that exclusion of same-sex partners from the entitlements enjoyed by unmarried different-sex couples was not 'necessary' in furthering the legitimate aim of protecting the traditional (i.e. heterosexual) family and thus constituted violation of the applicant's rights under Article 14 in conjunction with Article 8 [41]. Despite elevating the issues of sexual orientation with regard to intimate associations between two same-sex individuals to the status of 'suspect' classification, *Karner* judgment is significantly limited in two ways. First of all, the Court based its judgment on the right to respect for one's home (i.e. very material issue of the case) and did "not find it necessary to determine the notions of 'private life' or 'family life'" [33] under these particular circumstances of the case.[84] To put it differently, the ECtHR only dubiously circumvented its restrictive stance on the 'long-term homosexual relationships' in *Estevez* decision and refused to harmonize its jurisprudence with the previously established position that family life "is not confined solely to marriage-based relationships and may encompass other de facto 'family' ties where the parties are living together outside of marriage."[85] Secondly, the Court accepted the argument that "protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment" and assessed, whether the principle of proportionality has been respected in the circumstances of this particular case. [40] Despite the fact that the ECtHR reflected upon this justification because the Government raised it (i.e. not on its own motion), this type of reasoning can still be interpreted as representing deeply entrenched traditional assumptions about family life and implicitly inferring that certain (i.e. non-

[83] *Karner v. Austria* App no 40016/98 (ECtHR, 24 July 2003).
[84] It could by partially explained by the fact that none of the partners was alive by the time the case was decided.
[85] *Keegan v. Ireland* App no 16969/90 (ECtHR, 26 May 1994).

traditional) familial constellations are less valuable and worthy of protection.[86] Nevertheless, *Karner* is still a landmark judgment in relation to same-sex couple's rights due to the prohibition of *direct* discrimination on grounds of sexual orientation (i.e. difference in treatment between same-sex and unmarried different-sex couples) and thus it constitutes a strong point of reference for the future litigation on legal recognition of same-sex relationships.[87]

While the development of international law on the UN level is currently settled only on the prohibition of *direct* discrimination with regard to same-sex couples, the Strasbourg court recently took some steps further in elaborating on the issue. Despite refusing to create an obligation on State Parties to allow same-sex marriages, in *Schalk and Kopf v. Austria*[88] judgment the ECtHR made three very important statements on legal recognition of same-sex relationships.

First of all, the Court established that "a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of "family life."" [94][89] To put it differently, the ECtHR finally "broke the connection between the right to marry and the capacity to found a […] family" in relation to same-sex couples,[90] thus equating them with different-sex partners, who were not required to get married in order to establish a family life already for a substantial period of time.[91] This development not only indicates that intimate same-sex partnerships[92] are no longer confined

[86] Elizabeth Kukura, "Finding Family: Considering the Recognition of Same-Sex Families in International Human Rights Law and the European Court of Human Rights", *Human Rights Brief*, Vol. 13(2), 2006, p. 20.
[87] The reasoning applied in *Karner* was upheld in following judgment *Kozak v. Poland*, where the Court stated that "a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted […] as necessary for the protection of the family viewed in its traditional sense." See: *Kozak v. Poland* App no 13102/02 (ECtHR, 2 March 2010), [99].
[88] *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010).
[89] The same notion was further reiterated in the subsequent jurisprudence by the Court. See: *P. B. and J. S. v. Austria* App no 18984/02 (ECtHR 22 July 2010), [30].
[90] Loveday Hodson, "A Marriage by Any Other Name? *Schalk and Kopf v Austria*", *Human Rights Law Review*, Vol 11(1) February 2011, p. 172.
[91] The Court previously held that unmarried different-sex couple might constitute a "family" for the purposes of Article 8 notwithstanding their inability (e.g. constitutional prohibition on divorce) or even lack of willingness to enter into marriage, see: *Johnston and Others v. Ireland* App no 9697/82 (ECtHR, 18 December 1986), [56].
[92] For a legal analysis on what distinguishes same-sex couples from other forms of cohabitation (e.g. between two siblings), see: *Burden v. United Kingdom* App no 13378/05 (ECtHR, 29 April 2008), [62] and [65].

to the notion of 'private life' (i.e. representing a negative obligation by a State to 'leave alone' rather than a positive obligation to recognize), but also calls for a review of domestic legal provisions defining heterosexual marriage as an essential attribute of 'family life.'[93]

Secondly, the ECtHR acknowledged that "there is an emerging European consensus towards legal recognition of same-sex couples." [105] Despite the fact that in this instance the Court granted "a margin of appreciation in the timing of the introduction of legislative changes" [ibid.] and refused to accept the applicants' claims for marriage equality, it implicitly indicated that the future case law will be responsive to the situation in a majority of States with regard to legal recognition of same-sex relationships and subsequent implications under Article 8.[94] Although there is no clear definition of what precisely constitutes an already established consensus,[95] yet the Strasbourg court has previously demonstrated that its capable of changing its position on socially sensitive issues by emphasizing the 'common European approach'.[96] Therefore it could be presumed that the ECtHR may also eventually change its position on legal

[93] For example, Article 41.3 of the Irish Constitution defines marriage as "the institution […] on which the family is founded." Accordingly, the Lithuanian Parliament sought to amend Article 38 of the Lithuanian Constitution in 2012 by inserting a provision that "the family is formed on the basis of marriage between a man and a woman", but the change failed due to the lack of one [!] vote in the Parliament. For further reference, see: "The Conservatives Failed to Rewrite the Constitutional Concept of Family by One Vote", *The Lithuania Tribune*, 20 June 2012, <http://www.lithuaniatribune.com/2012/06/20/the-conservatives-failed-to-rewrite-the-constitutional-concept-of-family-by-one-vote>.

[94] In contrast the Court clearly stated that "the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State" [61] and that "Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple […] access to marriage." [63]

[95] According to Helfer, the Court relies on "three distinct factors as evidence of consensus: legal consensus, as demonstrated by […] domestic statutes, international treaties and regional legislation; expert consensus; and […] public consensus." However, the tribunal has failed to clarify "the relative weight that [these elements] should be given in determining the presence or absence of an evolving European viewpoint." See: *supra* 53, 139-140.

[96] For example, it took only six years for the Court to depart from its *Fretté v. France* App no 36515/97 (ECtHR, 26 February 2002) precedent on homosexual single-parent adoption (i.e. "[t]he total lack of consensus as to the advisability of allowing a single homosexual to adopt a child means […] it was not for the Court to […] take a categorical decision on such a delicate issue" [36]) in *E.B. v. France* App no 43546/02 (ECtHR, 22 January 2008) judgment by holding that "a distinction based on [applicant's] sexual orientation […] is not acceptable under the Convention" (note that there was no consensus inquiry in the latter judgment [46]). However, this argument is significantly limited due to the completely different dynamics of the argument in individual rights and couples' rights cases – the issue of legal recognition of same sex partnerships is supposed to be more controversial due to the deeply rooted cultural and historic notions about the family unit.

recognition of same-sex relationships, especially given its explicit reference to the emerging European consensus on the issue.[97]

Finally, in *Schalk and Kopf* the ECtHR discussed a State's margin of appreciation only in relation to "the timing of the introduction of any legislative changes" on alternative registration arrangements (i.e. not applicable to marriage) [105], rather than whether to confer certain legal recognition for same sex relationships in general.[98] To put it in the words of the Court, "legislator cannot be reproached for not having introduced the [legislation] any earlier." [106] By the time *Schalk* was decided, the Austrian Government had already opened up the registered partnerships scheme for same-sex couples,[99] thus compromising the applicant's claim that "they were discriminated against as a same-sex couple […] in that no alternative means of legal recognition were available to them." [100] Furthermore, the Court rejected the applicant's argument that "the remaining differences between marriage on the one hand and registered partnership on the other were still discriminatory" [78] by stating that "States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition." [108] Therefore, it became clear that the Strasbourg court mandates neither the exact timing of legislative change nor the substantive provisions of alternative registration arrangements for same-sex couples. However, even this cautious approach does not preclude the possibility that eventually the Court could impose an obligation on Member States to provide at least some form of legal recognition for same-sex couples. This question is likely to be answered in *Vallianatos and Others v. Greece*[100] case, where the applicants complain that the registered partnerships scheme, intended only for different-sex couples, infringes same-sex couple's rights to privacy and to non-discrimination.

[97] *Supra* 88, [105].
[98] *Supra* 90, 176.
[99] The 'Registered Partnership Act' in Austria came into force on 1 January 2010, i.e. six months prior to the ECtHR judgment in *Schalk and Kopf*, see: *Eingetragene Partnershaft-Gesetz*, Federal Law Gazette (*Bundesgesetzblatt*), Vol. 1, No. 135/2009.
[100] *Vallianatos and Others v. Greece* App no. 29381/09 (Grand Chamber hearing on 16 January 2013).

To sum up, the prohibition of *direct* discrimination with regard to the right to respect for one's home between same-sex and unmarried different-sex couples in *Karner* remains the controlling ECtHR's precedent in the area of same-sex couple's rights. Nevertheless, the Court's reasoning in *Shalk and Kopf* does not exclude anymore the possibility of creating a legally binding requirement for at least some form of legal recognition for same-sex relationships. However, it is only up to the Court to decide, when it is going to avail itself of this opportunity. While the ECtHR is waiting to be guided by the 'emerging European consensus,' other institutions of the CoE are actively taking part in promoting common denominator towards legal recognition of same-sex relationships.

1.2.2 Other Institutions: Acting Through 'Soft Law' Measures

In 2010 the Committee of Ministers, which is the CoE's decision-making body, adopted a Recommendation to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity.[101] Notwithstanding its non-binding nature,[102] the document has been praised as "the world's first comprehensive intergovernmental agreement on the rights of LGBT people."[103] Despite the fact that wording of some LGBT rights in certain areas (e.g. family law) is believed to represent a compromise rather than innovation with an attempt to secure universal compliance among the Member States,[104] the Recommendation addresses the issue of legal recognition of same-sex relationships as well. First of all, it reiterates the '*Karner* formula'

[101] Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity, 1081st Meeting of the Ministers' Deputies, 31 March 2010, <https://wcd.coe.int/ViewDoc.jsp?id=1606669&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

[102] The CoM makes recommendations on matters for which "common policy" has been agreed upon and it "may request the governments […] to inform it of the action taken by them with regard to such recommendations". See: *Statute of the Council of Europe*, London, 5 May 1949, [15.b].

[103] ILGA-Europe, "Recommendation of the Committee of Ministers on LGBT Rights", <http://ilga-europe.org/home/guide/council_of_europe/lgbt_rights/recommendation_of_the_committee_of_ministers_on_lgbt_rights>.

[104] ILGA-Europe, "Toolkit for Promoting Implementation of the Recommendation at National Level", <http://ilga-europe.org/media_library/ilga_europe/guide_to_europe/coe/recomendation_commitee_of_ministers/implementation_toolkit>, p. 2.

by stating that "[w]here national legislation confers rights and obligations on unmarried couples, member states *should ensure* that it applies in a non-discriminatory way to both same-sex and different-sex couples." [23, emphasis added] Secondly, it seeks to extend the principle of non-discrimination to the domain of registered partnership by stating that "[w]here national legislation recognizes registered same-sex partnerships, member states *should seek to ensure* that their legal status and their rights and obligations are equivalent to those of heterosexual couples *in a comparable situation*." [24, emphasis added] Finally, it states that "where national legislation does not recognize nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are *invited to consider the possibility* of providing […] same-sex couples with legal or other means to address the practical problems related to the social reality in which they live." [25, emphasis added][105] It is interesting to note that the CoM had agreed to review progress by Member States in implementing the Recommendation in March 2013. To put it differently, the non-binding nature of the document does not necessarily undermine its political significance – monitoring through the framework of regional human rights protection mechanisms provides an ample opportunity to secure compliance at least by employing name-and-shame measures.[106]

The CoM's Recommendation came out as a response to the Parliamentary Assembly's, which is the CoE's deliberative body, Resolutions 1728[107] and 1915[108]. The former resolution not

[105] It could be argued that the mildness of each recommendation correlates with the position by the ECtHR on the issue. While the States *should ensure* prohibition of *direct* discrimination between same-sex and unmarried different-sex couples according to *Karner*, they *should seek to ensure* that registered partnerships resemble rights and obligations of traditional marriage as closely as possible (the issue touched upon in *Schalk*) and they are *invited to consider the possibility* of introducing certain legal recognition for same-sex couples where no alternative registration arrangements are available (the issue which is likely to be addressed by the Court in the future).

[106] For further reference, see: Stephan Sonnenberg and James L. Cavallaro, "Name, Shame, and Then Build Consensus? Bringing Conflict Resolution Skills to Human Rights", *Washington University Journal of Law & Policy*, Vol. 39, 2012, p. 257-308.

[107] Resolution 1728 "Discrimination on the Basis of Sexual Orientation and Gender Identity", adopted by the Parliamentary Assembly on 29 April 2010 (17th Sitting).

only called on Member States to "ensure legal recognition of same-sex partnerships"[109] [16.9], but also explicitly listed what particular rights and obligation are required in order to make these legal arrangements truly effective, namely – pecuniary rights and obligations [16.9.1], 'next of kin' status [16.9.2], residence rights for foreign partners [16.9.3] and mutual recognition among the Member States [16.9.4]. It has to be taken into account that these requirements represent rather a minimum standard of rights and obligations conferred by any comprehensive legislation on registered partnerships. Nevertheless, the explicit listing of certain rights for same-sex partners indicates a rather pragmatic approach by the PACE, namely that legal recognition of same-sex relationships is not only a matter of principle, but also a matter of practical importance. Therefore the somehow vague statement about "the practical problems related to the social reality" should not be interpreted as undermining the practical importance of the Recommendation, especially taken into account that it represents a compromise among 47 Member States.

The Commissioner for Human Rights also contributes to the promotion of LGBT rights across Europe through public statements[110], interventions with government officials[111], country reports[112] and intervention to the court proceedings before the ECtHR.[113] The Commissionaire's current report on discrimination on grounds of sexual orientation in Europe recommends that

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[108] Resolution 1915 "Discrimination on the Basis of Sexual Orientation and Gender Identity", adopted by the Parliamentary Assembly on 29 April 2010 (17th Sitting).

[109] The PACE already advised in its Recommendation 1474 in 2000 that the CoM should call upon Member States to "adopt legislation which makes provision for registered partnerships" [11.iii.i], but it did not prevent the ECtHR to rule one year later in *Estevez* admissibility decision that same-sex partnerships do not fall under the notion of 'family life', see: Recommendation 1474 "Situation of Lesbians and Gays in Council of Europe Member States", adopted by the Parliamentary Assembly on 26 September 2000 (27th Sitting).

[110] For example, see: Thomas Hammarberg, "Time to Recognise that Human Rights Principles Apply Also to Sexual Orientation and Gender Identity", 14 May 2008, <http://www.coe.int/t/commissioner/viewpoints/080514_en.asp>.

[111] For example, see: "Commissioner Hammarberg Continues Dialogue with Lithuanian Authorities on Discrimination Issues and Minority Rights", Press Release 132, Strasbourg, 17 February 2010, <https://wcd.coe.int/ViewDoc.jsp?id=1584845&Site=DC >.

[112] For example, see: Office of the Commissioner for Human Rights, "Discrimination on Grounds of Sexual Orientation and Gender Identity", 2nd Edition, *Council of Europe Publishing*, September 2011, <http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf>.

[113] The Article 13 of the Protocol 14 to the ECHR foresees that "[i]n all cases before a Chamber or the Grand Chamber, the […] Commissioner for Human Rights may submit written comments and take part in hearings."

authorities in CoE Member States should "[e]nact legislation recognizing same-sex partnerships by granting such partnerships the same rights and benefits as different-sex partnerships or marriage." [114] It goes a bit further than the PACE's Resolutions by requiring equal rights in the areas of social security, employment and pension benefits, freedom of movement, family reunification, parental rights [!] and inheritance. Furthermore, a statement in the report that "the most positive attitudes *tend to be found* in the member states with some kind of legal recognition of same-sex partnerships"[115] cautiously implicates a value judgment that institutionalization of same-sex relationships can lead to the decrease of homophobic attitudes. To sum up, the Commissioner is playing a strong leadership role in advocating for LGB rights and that promotion of legal recognition of same-sex relationships is on the Commissioner's agenda.[116]

It can be concluded that legal recognition of same-sex relationships is still not required, but strongly preferred by soft law norms with the framework of CoE's human rights protection system. In comparison with the development of international standards on the UN level, the CoE institutions seem to be already balancing "on the brink of obliging States to provide same-sex relationships with some form of legal recognition."[117] While the Strasbourg court is willing to include certain sections about the status of comparative or international law in its judgments, it does not necessarily imply that these are strictly followed by the ECtHR. For example, the

[114] Ibid., p. 14-15 [5.5].
[115] Ibid., p. 116 (emphasis added).
[116] For instance: "The Commissioner is concerned about recent proposals in some Council of Europe member states to amend their domestic constitution to introduce a clause banning same sex marriage." See: "Contribution of the Commissioner for Human Rights to the work of the Committee of Experts on Discrimination on Grounds of Sexual Orientation and Gender Identity (DH-LGBT)", CommDH(2009)7, Strasbourg, 9 February 2009, <https://wcd.coe.int/ViewDoc.jsp?id=1411613&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>.
[117] *Supra* 90, 178.

ECtHR's referred to the gender neutral language in Article 9 of Charter of Fundamental Rights (CFR) of the EU[118] on the right to marry and to found a family in *Schalk and Kopf*:

> "Regard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex." [61]

However, this recourse to the EU law did not affect the final outcome of the case, where the ECtHR has left same-sex marriage issue to the national laws of the Contracting States.[119] Nevertheless, taken into account that the status of the EU law is not only relevant to more than a half (i.e. 27 out of 47) of the CoE's Member States, but also directly affects a great number of those particular countries, which at the moment offer no legal recognition of same-sex relationships, it implications on same-sex couple's rights merit further analysis.[120]

1.3 European Union

Currently 11 out of 27 Member States of the EU do not offer any legal recognition for same sex relationships.[121] Despite the fact that the majority of these countries (except Greece and Italy) acceded to the EU with the last two waves of enlargement in 2004 and 2007, it would be quite artificial to introduce a distinction between 'new' and 'old' Europe as a representation of east-west divide in relation to sexual orientation law. For example, Austria and Ireland introduced

[118] *Supra* 43.
[119] This conclusion is perfectly compatible with the scope of the Charter itself, which states that "[t]he provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*." [Article 51(1), emphasis added].
[120] It has to be noted that the EU has no competence in the domestic family law according to the Treaties and "[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties." [the Article 6(1) of the TEU]. See: Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] OJ (C 38).
[121] These countries are: Bulgaria, Cyprus, Estonia, Greece, Italy, Latvia, Lithuania, Malta, Poland, Romania and Slovakia.

legislation on civil partnerships only in 2010 and 2011 respectively, while Slovenia has allowed official registration of same-sex relationships since 2006.[122] Despite the fact the EU has no competence in the domestic family law matters, the analysis of the EU's impact through formal mandates and informal processes still can render some insights about filtering certain values through national mediating factors precisely in those jurisdictions, where no legal recognition is currently available.[123] For example, the EU could have some impact on the development of family law in the Member States due to its capacity to challenge particular moral and legal imperatives[124] with the view of protecting internal market and supremacy of the EU law[125].

1.3.1 Hard Law Prohibiting Discrimination on Grounds of Sexual Orientation

Prior to the Treaty of Amsterdam (ToA)[126], the Union had no legal competence to legislate in the domain of anti-gay discrimination policy or on any other anti-discrimination issue.[127] With the introduction of the Article 13 by the ToA (now Article 19 of the TFEU), allowing the Union to adopt legislative measures combating, *inter alia*, discrimination on the grounds of sexual orientation, the situation has changed. The adoption of the Directive 2000/78/EC[128] on equal

[122] Christopher Brocklebank, "Gay Adoption Law is Rejected in Slovenian Referendum", *PinkNews*, 26 March 2012, <http://www.pinknews.co.uk/2012/03/26/gay-adoption-law-is-rejected-in-slovenian-referendum>.
[123] *Supra* 17, 37.
[124] Dimitry Kochenov, "On Options of Citizens and Moral Choices of States: Gays and European Federalism", *Fordham International Law Journal*, Vol. 33 (1), 2009, p. 205.
[125] A good examples of this could be the steps taken within the European Commission to introduce the regulation of matrimonial property regimes (see: Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes, COM(2011) 126 Final, 16 March 2011) and property consequences of registered partnerships (see: Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships, COM(2011) 127 Final, 16 March 2011). The proposed regulations are pursued under the Article 81(3) TFEU as "measures concerning family law with cross-border implications." For further reference, see: Giorgio Buono, "Commission's Proposals On Matrimonial Property Regimes and Property Consequences of Registered Partnerships", *Conflicts of Law*, 24 March 2011, <http://conflictoflaws.net/2011/commissions-proposals-on-matrimonial-property-regimes-and-property-consequences-of-registered-partnerships>.
[126] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ (C 340).
[127] Dimitry Kochenov, "Gay Rights in the EU: A Long Way Forward for the Union of 27", *Croatian Yearbook of European Law and Policy*, Vol. 3, 2007, p. 476.
[128] Directive 2000/78/EC [2000] OJ L303/16.

treatment in employment and occupation and the Directive 2004/38/EC[129] on the free movement of citizens marked a great advancement in the field of gay right protection.[130] In addition to this, the Charter of Fundamental Rights, which became legally binding upon the Member States after the ratification of the Lisbon Treaty (ToL),[131] not only explicitly prohibits discrimination on grounds of sexual orientation (Article 21(1)), but also implicitly acknowledges the possibility of the right to marry and to found a family for same-sex couples by intentionally employing gender neutral language (Article 9).[132] Nevertheless, the scope of protection offered by the legally binding EU norms remains limited.

The Directive 2000/78/EC lays down a general framework for combating both *direct* and *indirect* discrimination on grounds religion, disability, age and sexual orientation. However, the scope of protection offered is limited to employment relations and thus stands in a contrast with the Directive 2000/43/EC ('the Race Directive')[133], which embraces issues such as social protection, social advantages, and access to goods and services.[134] It has been argued that different level of protection creates the hierarchy between different grounds of discrimination, thus challenging the general principle of equal treatment in the EU law.[135] In addition to this, the scope of the Directive 2000/78/EC is restricted by the competences of the Union – it is "without

[129] Directive 2004/38/EC [2004] OJ L158/77.
[130] Nevertheless, the Directive 2000/78/EC is "without prejudice to national laws on marital status and the benefits dependent thereon" (Recital 22) and for the purposes of the Directive 2004/38/EC "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*." (Recital 5, emphasis added).
[131] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ (C 360).
[132] "The wording of the Article has been modernized to cover cases in which national legislation recognizes 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*." (emphasis added) See: "Explanations Relating to the Charter of Fundamental Rights", OJ 2007/C 303/02. In addition to this, "[t]he provisions of th[e] Charter are addressed […] to the Member States only when they are implementing Union law." [Article 51(1)]
[133] Directive 2000/43/EC [2000] OJ L180/22.
[134] Marc Bell, "Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive", *The Equal Rights Review*, Vol. 3, 2009, p. 7-18.
[135] Erica Howard, "EU Equality Law: Three Recent Developments," *European Law Journal*, Vol.17(6), 2011, p.797.

prejudice to national laws on marital status and the benefits dependent thereon" (Recital 22). To put it differently, the wording of the secondary legislation not only indicates that regulation of family issues does not fall within the EU's sphere of competences,[136] but also implicates that principle of non-discrimination does not require that employment benefits, available to different-sex couples, should be extended to same-sex couples in comparable situation.[137]

There was an intention to respond to these shortcomings by the Commission's proposal of the new equality Directive,[138] which extends the scope of protection against discrimination on grounds of religion, disability, age and sexual orientation beyond employment and occupation. Supposedly, the new Directive would not only ban discrimination on grounds of sexual orientation in all areas of the EU competence, but would also eliminate the current hierarchy between the different grounds of discrimination.[139] In addition to this, it would oblige Member States to designate equality bodies in order to promote equal treatment on the extended number of grounds.[140] However, the adoption of the new Directive is currently blocked due to the German opposition in the European Council, where unanimity is required. The opposing arguments are essentially articulated around the costs of implementation and the fact that more embracing equality legislation already exists in the domestic legal systems.[141] Despite the fact that the new Directive could consolidate the domestic achievements in equal opportunity law and prevent any possible backlash under more hostile national circumstances, its fate currently remains unclear.

[136] Nevertheless, the EU does have competence to promote judicial co-operation in civil matters, including measures concerning family law, which have cross border implications. See: Article 81(3) TFEU.
[137] The Directive leaves up to the States to extend domestic concept of 'marital status' to embrace same-sex couples. It has been argued that Member States will eventually legislate in the field of legal recognition of same-sex relationships in order to secure 'harmonious development' of the EU law. See: Katharina Boele-Woelki "The Legal Recognition of Same-Sex Relationships Within the EU", *Tulane Law Review*, Vol. 48, May 2008, p. 1961.
[138] COM (2008) 426 *Proposal for a Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation.*
[139] For further reference, see: ILGA-Europe, "EU Anti-Discrimination Directive – Why?", <http://www.ilga-europe.org/home/how_we_work/european_institutions/anti_discrimination_law>.
[140] *Supra* 135, p. 789.
[141] "Germany's Arguments against the Directive are Flimsy", *Destination Equality*, Magazine of *ILGA-Europe*, Autumn 2008, p.10-11.

The Directive 2004/38/EC lays down "the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members." [Article 1.a] However, the 'family member' in relation to same-sex couples is defined as "the partner with whom the Union citizen has contracted a registered partnership […], if the legislation of the host Member State treats registered partnerships as equivalent to marriage."[142] [Article 2.2.b] In essence it means that the rights of same-sex couples in the EU become largely dependent on their country of origin and/or residence. To put it differently, the national discretion not to recognize same-sex marriages and unions performed in other jurisdictions[143] even where the EU law is involved can dramatically change the legal situation of same-sex couples once they cross their national borders.[144] This legal variance might have detrimental effect on the right of free movement simply by deterring registered or married same-sex couples from moving to another Member States, where no legal recognition of same-sex relationships is available.[145] Some authors have argued that "the primary rule of free movement of persons serves as a "theoretical gateway" for establishing […] mutual recognition

[142] In essence this definition of same-sex 'family members' implicates that according to national laws of a 'hosting' country registered partners should be in comparable situation with married couples in order to benefit from free movement provisions. However, the Directive does not foresee the possibility of same-sex marriage, which is currently available in 6 domestic jurisdictions, namely – Belgium, Denmark, the Netherlands, Portugal, Spain and Sweden, and stands in a contrast with CFR, where the right to marry is guaranteed in accordance with national laws. It remains unclear whether the term 'spouse' is directly applicable to *same-sex married couples* in the context of free movement. See: Allison R. O'Neill, "Recognition of Same-Sex Marriage in the European Community: The European Court of Justice's Ability to Dictate Social Policy", *Cornell International Law Journal*, Vol. 37, 2004, p. 210.

[143] Similar provisions can be found in the secondary legislation on free movement rights of third country nationals, namely in the Directive 2003/86/EC on the right to family reunification – "The Member States *may* […] authorize the entry and residence […] of the unmarried partner […], with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership" (Article 4.3, my emphasis). See: Directive 2003/86/EC [2003] OJ L251/12. There were current attempts to review the Directive due to the wide discretion by the Member States in application of a number of provisions; the process was rather characterized by the notion of "no need to fix something which is not broken." See: Green Paper on the Right to Family Reunification of Third-Country Nationals Living in the European Union (Directive 2003/86/EC), COM(2011) 735 Final, 15 November 2011.

[144] *Supra* 124, 160.

[145] *Supra* 127, 480.

of [...] family relationships within the Union."[146] The right to move and reside freely within the territory of the Member States (Article 21(1) TFEU) stems directly from the EU Citizenship, which is the main precondition in order to qualify for the full enjoyment of these rights (Article 20(2)(a) TFEU).[147] By making the exercise of free movement rights dependent upon the sexual preferences of citizens (i.e. not grating 'family member' status to same-sex partners), the Member States are introducing moral and public policy exceptions, which are neither narrowly constructed nor withstand strict levels of scrutiny.[148] It can be presumed that the Member States will inevitably have "to lose absolute control over the notion of "family" where EU law is involved" or to provide legal recognition of same-sex relationships in domestic legal systems in order to secure further economic integration and compliance with the EU norms.[149]

Despite the fact that the internal market reasoning provides ample opportunities to promote the idea of mutual recognition of same-sex relationships among the Member States, this line of argument is significantly limited in certain regards. First of all, as comprehensively put by Weiss, "arguments for respecting same-sex couples' rights to travel may appear to be nothing more than an elaborate ruse to avoid the larger question posed by simple equal protection claim."[150] The main rationale behind invoking free-movement logic might be an opportunity to couch unpopular issue of legal recognition of same-sex relationships in more acceptable terms of 'economic integration'.[151] While this strategy could serve as a tool in broadening the scope of sexual minorities' rights within the EU, it might also have negative impact on rendering European norms as directly threatening national sovereignty of the Member States and moral choices

[146] *Supra* 137, 1969.
[147] *Supra* 124, 184-185.
[148] Ibid., 160.
[149] Ibid., 160-161.
[150] Adam Weiss, "Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union", *Columbia Journal of Law and Social Problems*, Vol. 41(81), 2007 p. 121-122.
[151] *Supra* 124, 185.

inherent therein. Secondly, the requirement for legal recognition of same-sex relationships all over the Union for the purposes of free movement provisions might require intervention by the Court of Justice of the European Union (CJEU). There has been no case law interpreting the Directive 2004/38/EC yet and it would be interesting to see it challenged before the Court in a situation, where a same-sex couple, married or registered in one of the Member States, was deterred from moving to another Member State, because of the refusal to grant the status of 'family member' by one of the partners. However, up until now the CJEU case law on the protection of same-sex couples' rights in general has been rather limited and self-restrained.

1.3.2 CJEU's Jurisprudence: the Lack of Judicial Activism

In one of the first relevant cases before the CJEU the applicant complained in *Grant v. South-West Trains Ltd* [152] that her public employer refused travel concessions to her same-sex partner, despite the fact that such benefits were granted to the unmarried heterosexual couples [5]. Due to the lack of the Union's competence to legislate in the field of discrimination based on sexual orientation prior to the ToA coming into force, the applicant tried to couch her claims as sex discrimination – if the applicant had been a man herself, her female partner would have been granted with the benefit [17]. The CJEU rejected this analysis. According to the Court, the applicant should be compared to the similarly situated male, i.e. homosexual man, who seeks the benefit for his male partner.[153] It follows that there was no sex discrimination, since both a gay man and a lesbian woman would not be equally granted with same the benefit. Interestingly, the Court factually admitted the fact of sexual orientation discrimination [47] and indicated that it would give a different answer if the anti-discrimination provisions had been already enacted [48].

[152] C-249/96 *Grant v. South-West Trains Ltd.* [1998] ECR I-621.
[153] Bruce Carolan, "The Legislative Backlash to Advances in Rights for Same-Sex Couples: Judicial Impediments to Legislating Equality for Same-Sex Couples in the European Union", *Tulsa Law Review*, Vol. 40, 2005, p. 550.

Therefore it is likely that under present day conditions the CJEU would require granting employment benefits for unmarried couples irrespective of their sex (i.e. prohibition of *direct* discrimination on grounds of sexual orientation).[154] Nevertheless, *Grant* factually remains a good law and still has to be overruled.[155]

In *D. & Kingdom of Sweden v. Council*[156] the CJEU had to deal with different situation, as the applicant's complaint about rejected employment benefits to his registered same-sex partner was directed towards the institution of the EU itself [4]. The applicant argued that the refusal to grant allowance, available only to married couples, violated the general principle of non-discrimination, because the legal effects of registered partnership in Sweden are equivalent to those of marriage. [25] The CJEU disagreed. According to the Court, the applicant was discriminated not on grounds of sexual orientation, but due to the "legal nature of the ties between the official and the partner" [47]. While the restrictive approach towards same-sex couples in *Grant* could be explained by the lack of the Union's competences, the CJEU's position in *D.* is much more dubious. While dealing with the institutional employee, the Court could have expanded on same-sex partners' rights without exceeding the Union's competences.[157] Nevertheless, the legal situation has changed with the amendment of the EU Staff Regulations,[158] so as to grant "a stable partnership who do not have legal access to marriage […] the same range of benefits as married couples" (Recital 8).

The introduction of anti-discrimination provisions in the constitutional treaties of the EU and the adoption of equality directive have only marginally changed the limited CJEU's position

[154] Robert Wintemute, "Sexual Orientation and Gender Identity Discrimination: the Case Law of the European Court of Human Rights and the European Union Court of Justice", Summary Prepared for ILGA-Europe to submit to Mr. Thomas Hammarberg, Commissioner for Human Rights, Council of Europe, updated to 10 May 2011.
[155] *Supra* 124, 175.
[156] C-122/99P & C-125/99 *D. & Kingdom of Sweden v. Council* [2001] ECR I-4319.
[157] *Supra* 153, 554.
[158] Council Regulation (EC/Euratom) 723/2004 of 22 March 2004 Amending the Staff Regulations of Officials and Conditions of Employment of Other Servants of the European Communities [2004] OJ L124/1.

regarding same-sex couples. Despite the fact that in *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*[159] the Court found that the Directive 2000/78/EC "preclude[s] legislation [...] under which [...] the surviving partner does not receive a survivor's benefit […], even though [if] life partnership places persons of the same sex *in a situation comparable to that of spouses*," [73, emphasis added] it made non-discrimination in employment totally dependent on the national legal regulation of same-sex partnerships.[160] To put it differently, the EU human rights protection does not apply to same-sex couples as long as the Member States have not introduced adequate legislation. In addition to this, the Court required that legal partnerships should be substantially comparable to marriage, thus offering no legal assistance to same-sex couples in those jurisdictions, where legal framework of registered partnerships is significantly limited or simply does not exist. It has been argued that in this case the CJEU proved absolutely reluctant "to protect the EU legal order from the clashes between the national understandings of "family.""[161]

The situation was slightly improved by the CJEU's reasoning in *Jürgen Römer v. Freie und Hansestadt Hamburg*[162], where the Court explained that 'comparable' in *Maruko* does not necessarily imply 'identical' legal situation. According to the Court, it is not necessary to show that "national law […] treats registered life partnership as legally equivalent to marriage" [43] – it is enough to show that "life partners have duties towards each other, to support and care for one another and to contribute adequately to the common needs of the partnership." [47] In essence it means that the CJEU made easier for same-sex couples to pass muster for equal treatment in employment and occupation in those jurisdictions, where legal recognition is already available, but did not change its principled position on refusing to trespass on national competences over

[159] C-267/06, *Tadao Maruko v. Versorgungsanstalt der Deutschen Buhnen* [2008] ECR I-1757.
[160] *Supra* 124, 188.
[161] Ibid., 187.
[162] C-147/08 *Jürgen Römer v. Freie und Hansestadt Hamburg* [2011] ECR 00000.

family law. In addition to this, the Court stated that the Directive 2000/78/EC "does not itself lay down the principle of equal treatment" [59], but that "the right to equal treatment could be claimed […] at the earliest after the expiry of the period for transposing the Directive" [64]. The latter point might encourage differing interpretations in the light of the new equality Directive proposed, as it remains unclear, why certain Directives are bound with particular general principles, which certainly do not draw their inspiration from the secondary EU legislation.

To sum up, the CJEU's jurisprudence on legal recognition of same-sex relationships is settled on one point – once a Member State introduces institute of registered partnerships that is in comparable situation with marriage, the general principle of equal treatment in employment and occupation applies. At the given moment the Luxembourg court neither offers any recourse for same-sex couples in those jurisdictions, where no legal recognition is available, nor explicitly prohibits discrimination between same-sex and unmarried different-sex couples (*Grant* still has to be overruled). It has been submitted that the ongoing, politically controversial, and sensitive debate on mutual recognition of same-sex relationships should be advanced in political debates rather than in court proceedings with the view of ensuring Union-wide legitimacy.[163] Therefore the politically weighty position by other EU institutions might play a significant role in promoting the idea of legal recognition of same-sex relationships within the EU.

1.3.3 European Parliament's Stance on Same-Sex Couples' Rights

Taken the cautious position by the CJEU into consideration, the European Parliament (EP) is believed to be "a principal driving force in bringing LGB rights onto the European political agenda."[164] Although it issues only non-binding parliamentary resolutions, they enjoy important

[163] *Supra* 137, 1970.
[164] ILGA-Europe, "What the European Parliament has Done for LGBT Rights?", <http://www.ilga-europe.org/home/guide/eu/lgbt_rights/european_parliament>.

political weight due to the EP's democratic legitimacy as the only directly elected institution in the EU.[165] Already in 1994 the Parliament recommended ending "the barring of […] homosexual couples from marriage or from an equivalent legal framework […], allowing the registration of partnerships"[166] and since then the institution's work for LGB individuals in general and for same-sex couples in particular has steadily developed towards more comprehensive approach.

It has been argued that the adoption of non-discrimination provisions in the ToA and subsequent equality legislation were fostered by the EP's political pressure.[167] In addition to this, the introduction of 'host country principle' in the Directive on Free Movement was also sanctioned by the Parliament's view that the status of 'family member' should embrace both marital and non-marital relationships within the EU.[168] In addition to the initial Parliament's input into comprehensive *acquis* reflecting the interests of LGB individuals, the EP has took a firm stance on further ensuring effective implementation of equality and non-discrimination principles through the Union's *law*. In 2006 the Parliament adopted Resolution on Homophobia in Europe[169], which urged Member States "to enact legislation to end discrimination faced by same-sex partners in the areas of inheritance, property arrangements, tenancies, pensions, tax, social security." [11] In its Report on Progress Made in Equal Opportunities and Non-Discrimination[170] the EP reminded the Commission of its "commitment to put forward a comprehensive directive covering disability, age, religion or belief and sexual orientation" and expressed the "desirability of putting an end to the hierarchy of protection against the different

[165] *Supra* 124, 186.
[166] European Parliament, 'Resolution on Equal Rights for Homosexuals and Lesbians in the EC' (the 'Roth Report') A3-0028/94 [1994] OJ C61/40.
[167] *Supra* 26, 24.
[168] European Parliament, 'Resolution on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States' P5_TA(2003)0040, OJ C43 E, p. 42–49.
[169] European Parliament, 'Resolution on Homophobia in Europe', P6_TA-PROV(2006)0018.
[170] European Parliament, 'Resolution on Progress Made in Equal-Opportunities and Non-Discrimination in the EU (Transposition of Directives 2000/43/EC and 2000/78/EC)', P6_TA(2008)0212.

grounds of discrimination." [35] In 2009 the Parliament adopted a Report on the Situation of Fundamental Rights in the EU,[171] calling the Member States to apply "the principle of mutual recognition for homosexual couples, […] in particular when they are exercising their right to free movement under EU law." [76] Few months later the EP elaborated on the issue in the subsequent Resolution on the Application of Directive 2004/38/EC[172] by stating that "the Directive imposes an obligation to recognize freedom of movement to all Union citizens (including same-sex partners) without imposing the recognition of same-sex marriages." [2] Finally, the latest EP's annual Report on Equality Between Women and Men in the European Union[173] explicitly admitted that "families in the European Union are diverse and comprise married, unmarried and partnered parents, different-sex and same-sex parents, […] who deserve equal protection under national and European Union law." (Recital *T.*) To sum up, the European Parliament has consistently advocated for more comprehensive protection of same-sex partners' rights, thus creating an institutional image of 'pro-gay' activism in the European polity.[174]

It can be concluded that the promotion of same-sex couples' rights is shaped by the limited Union's competences in the field of family law and the general principle of non-discrimination. While the legally binding norms of equal treatment in employment and 'mutual recognition' principle in the context of free movement provisions empower same-sex couples to claim for more comprehensive protection of their rights only in those jurisdiction, where certain degree of legal recognition is already available, it offers a little support for furthering the idea of legal recognition of same-sex relationships under more restrictive national circumstances. To put it

[171] European Parliament 'Resolution on Fundamental Rights in the European Union (2009) – Effective Implementation After the Entry into Force of the Treaty of Lisbon', P7_TA(2010)0483.
[172] European Parliament, 'Resolution on Right of EU Citizens and Their Family Members to Move and Reside Freely Within the Territory of the Member States' ('Valean Report'), P6_TA(2009)0203.
[173] European Parliament, 'Resolution on Equality between Women and Men in the European Union – 2011', P7_TA(2012)0069.
[174] *Supra* 124, 186.

differently, the EU prohibits *direct* discrimination mainly on individual level, while the opportunity of extending the Union's protection in order to embrace same-sex couples depends on certain legal adjustments by the Member States themselves. Despite the fact that the EP has consistently called for more comprehensive arrangement regarding rights of same-sex partners, the main question, namely – why the emerging European norms act as a catalyst for domestic policy change only in some jurisdictions? – remains unanswered. It has been argued that reaction by different political systems to the development within international and regional spheres is dependable on prospects of getting the emerging norms through domestic filtering mechanisms.[175] Therefore the analysis of national policy developments might offer a hand in understanding how claims for legal recognition should be adapted to national particularities in order to generate successful outcomes.

* * *

The above conducted analysis indicated that at a given moment no international or regional norm requires European states as a matter of fact to legally recognize same-sex relationships. The current status of international human rights law is settled only on one point, namely – prohibition of *direct* discrimination between same-sex and different-sex couples in comparable situation. However, this requirement might be of a little practical utility in those jurisdictions, where no substantial benefits are conferred upon unmarried (i.e. both same-sex and different-sex) couples. The development of soft law norms might serve as a precursor for legal mandate, but there is no guarantee that these human rights-based norms will not be simply ignored by domestic key players. A series of resolutions by the EP and the progressive opinions by the PACE and CoM could be successfully knit together in order to advocate for legal recognition of same-sex

[175] *Supra* 17, 51.

relationships. However, the internalization of non-binding principles is highly dependent on variety of domestic factors[176] and requires a closer look into national circumstances.

The subsequent analysis proceeds by comparing developments towards legal recognition of the same-sex relationships in two jurisdictions, namely Lithuania and Ireland. Although these countries belong to all above analyzed international/regional organizations and are potential recipients of both soft-law norms and legally binding mandates, they stand apart in recognizing same-sex relationships. While Ireland has granted same-sex couples with the possibility of entering into full-fledged civil partnerships (in its substance closely resembling rights and duties of traditional marriage)[177], Lithuania seems to be at the very initial stage of the public debate.

Despite the fact that these jurisdictions might not be the most obvious choice for a comparative analysis, the socio-cultural character of the Irish and Lithuanian societies is possibly more similar than could be said at the first glance. These countries are (1) similar in their size and population[178], (2) they are ethnically quite homogeneous[179], (3) the prevalence of the Roman Catholic faith is substantially widespread[180] and, more importantly, (4) these societies could be described as taking rather conservative than liberal stance on the matters of high moral

[176] Kollman has argued, that the adoption of international soft law norms in highly politicized policy fields, such as family policy, depends on national levels of religiosity, a Catholic heritage, membership in European institutions, the legitimacy of Europe itself and the party composition of implementing governments. While it is true that all these variables significantly influence public discourse on legal recognition of same sex relationships, the blanket operationalization of 'shopping list' factors does not explain, why policy changes do not occur at the similar pace in relatively similar jurisdictions. See: Ibid.

[177] The civil partnership registration scheme in Ireland is confined to the same-sex couples and is similar, but not equivalent to the civil marriage (e.g. registered same-sex couples are not entitled to joint adoption). For the further reference, see: Catherine McLoone, "Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010: A Practioner's Guide," *Irish Journal of Family Law*, Vol. 14(3), 2011, p. 58–65.

[178] While Lithuania has 3 million inhabitants (sharply decreased from 3.7 million due to the massive economic emigration in late 90s and early 00s), Ireland has 4.5 million (seeing the net immigration every year since 1996).

[179] People of the Irish ethnic origin constitutes 87% of the population in Ireland, while the Lithuanian ethnic group constitutes 84% of the population in Lithuania.

[180] Based on the *Census 2006* by the 'Central Statistics Office Ireland' [http://www.cso.ie/en/media/csoie/census/census2006results/volume13/volume_13_religion.pdf], 87% of the population are adherents of the Roman Catholic faith; based on the *Census 2001* by 'Statistics Lithuania' [http://www.stat.gov.lt/lt/news/view/?id=292, accessed 03-15-2012], 79% of the population are adherents of the Roman Catholic faith.

sensitivity.[181] It has been already noted that the distinction between 'new' and 'old' democracies in relation to sexual orientation law is not necessarily a controlling factor in explaining the differences in national policy outcomes. Despite the fact that the Irish society holds the record of democratic governance and the adherence to the pluralist values for a substantial period of time, the struggle for gay rights in this country began only in early 90s and coincided with the developments in newly emerged democracies in the eastern part of Europe. Therefore it could be argued that rapid progress in Ireland towards the introduction of registered partnerships scheme for same-sex couples in 2010[182] could offer some useful insights in promoting the idea of legal recognition in other jurisdictions, where the issue is currently gaining its momentum.

[181] The one has to take the Irish constitutional ban on divorce (lifted in 1996 after the public referenda) and one of the most restrictive laws on abortion in Europe into account; for the further reference, see: John Canavan, "Family and Family Change in Ireland: An Overview," *Journal of Family Issues*, Vol. 33 (1), 2012, p. 10–28.

[182] The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, *Number* 24 of 2010, 19 July 2012, *Irish Statute Book*.

Chapter 2

Ireland: "Diversity Powering Success"

Ireland is a founder member of the Council of Europe (1949) and one of the first ratifying States of the ECHR (1953). It joined the United Nations organization in 1955 and acceded to the European Union in 1973. Despite its long-standing record of democratic governance, Ireland had somehow ambivalent approach towards 'bringing home' the standards of international human rights protection system. For example, the absolute ban on divorce[183] and the constitutionally guaranteed right to life of the unborn (i.e. allowing abortion only if the mother's life is in danger)[184] have resulted in strategic litigation attempts before the European human rights bodies. In addition to this, Ireland has managed to opt out from certain provisions in the constitutional treaties of the EU, which could potentially affect Irish domestic policies in certain morally sensitive areas.[185] Taken a more conservative posture by the Irish society into account, it comes with a little surprise that a legal reform and a subsequent public debate on issues regarding sexual orientation law gained its prominence only in early 90s. Nevertheless, it took less than two decades in this jurisdiction to proceed from the decriminalization of consensual homosexual sexual activity to the legal recognition of same-sex relationships under the registered partnerships scheme. Therefore it can be presumed that the current debate on marriage equality in Ireland[186] takes places in already altered socio-cultural climate, characterized by increased tolerance towards sexual minorities and their civil rights claims.

[183] "The prohibition, under the Constitution of the respondent State, of any legislation permitting the dissolution of marriage is, as seems already to have been recognised in 1967 by a Committee of that State's Parliament, […] "unnecessarily harsh and rigid." See: *supra* 85, [5].

[184] "[T]he Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law. […]Ireland is the only State which allows abortion solely where there is a risk to the life (including self-destruction) of the expectant mother." See: *A, B and C v. Ireland* App no 25579/05 (ECtHR, 16 December 2010), [235].

[185] For example, see: "Protocol on Article 40.3.3 of the Constitution of Ireland" [2004] OJ C310/377.

[186] Kathy Sheridan, "How Gay Marriage Went Mainstream", *The Irish Times*, 14 July 2012, <http://www.irishtimes.com/newspaper/weekend/2012/0714/1224320029900.html>.

2.1 Individual Rights as a Precursor for Same-Sex Couples' Rights

The intrinsic logic of gay rights movement suggests that from the achievement of individual rights, i.e. the right to engage into the homosexual sexual activity and the right to be protected from discrimination on the grounds of sexual orientation, the one has to proceed with the further claims for civil rights, i.e. the legal recognition of the same-sex relationships, acknowledgment of the same-sex family life and the empowerment through the 'gay citizenship'.[187] To put it in other words, the LGB struggle for emancipation initially begins with the 'sex rights' for individuals and eventually ends up with the 'love rights' for the same-sex couples and families.[188] Therefore the developments in the Irish society, eventually leading to the legal recognition of same-sex relationships, can be fully understood only by having recourse to the very initial stages of public debate on sexual orientation issues.

2.1.1 Decriminalization and Equal Opportunity Legislation

The private, consensual homosexual sexual activity in Ireland was decriminalized only in 1993 (interestingly, the same year as it was accomplished in Lithuania) as a consequence of a judgment by the ECtHR in *Norris* case.[189] Despite the fact that the decision by the Strasbourg court was delivered in 1988, it took 5 years until the decriminalization was pushed through by the social-democratic *Labor* political party as a part of their electoral agenda and the condition for entering into the parliamentary coalition with the republican center-right *Fianna-Fáil* in early 90s.[190] While the legislation in question could be perceived as being enforced upon Ireland by the

[187] Paul Fairfield, *Public/Private*, Lanham: Rowman & Littlefield, 2005, p. 82.
[188] Fur the further reference, see: Robert Wintemute, "From 'Sex Rights' to 'Love Rights': Partnership Rights as Human Rights," in *Sex Rights: The Oxford Amnesty Lectures 2002*, ed. Nicholas Bamforth, Oxford: Oxford University Press, 2005.
[189] *Supra* 62.
[190] Leo Flynn, "From Individual Protection to Recognition of Relationships? Same- Sex Couples and the Irish Experience of Sexual Orientation Law Reform," in *Legal Recognition of Same-sex Partnerships: a Study of*

ECtHR, it seems quite ironical that the *Prohibition of Incitement to Hatred Act 1989*[191] singled out sexual orientation as one of the prohibited grounds for inciting hateful speech. In essence it meant that for a certain period of time the one could have been punished for homophobic speech, while sexual activity between two same-sex consenting adults was a criminal offence in itself. In addition to this, by repealing criminal sanctions for same-sex sexual activity, the Irish legislature did not limit itself to the requirements, presented by the ECtHR in *Norris* decision. The decriminalization was coupled not only with introduction of equal age of consent,[192] but also with the prohibition to dismiss a worker on grounds of sexual orientation.[193] Therefore it seems that the credit for the change in domestic legislation could not be exclusively granted for *Norris* decision – the wider scope of legal protection indicates the substantial changes in attitudes towards alternative sexualities as such by the time of decriminalization.

Certain degree of legal protection for homosexuality as a 'private manifestation of human personality' had inevitable impact on public visibility and self-worth of the LGB community in Ireland. To begin with, non-heterosexuals were no longer forced to emigrate from their country due to the legal disapproval of their sexual preferences – it became possible to live a gay life in Ireland and not to be legally punished for that. Secondly, the urge for moving out of the local settlements into the bigger cities of Dublin or Cork in order to conceal one's sexual orientation was diminishing as well – according to Ryan, the one "did not have to go to Dublin to be gay"[194] any longer. Finally, due to the increased visibility of LGB community, the 'discourse of silence', i.e. pretending that the problem of homosexuality simply does not exist, ceased to be an option.

National, European and International Law, ed. Robert Wintemute and Mads Tønnesson Andenæs, Hart Publishing, 2001, p. 594–596.

[191] Prohibition of Incitement to Hatred Act, *Number* 19 of 1989, 29 November 1989, *Irish Statute Book*.

[192] Criminal Law (Sexual Offences) Act, *Number* 20 of 1993, 7 July 1993, *Irish Statute Book*.

[193] Unfair Dismissals (Amendment) Act, *Number* 22 of 1993, 14 July 1993, *Irish Statute Book*.

[194] Fergus Ryan, interviewed by the author (tape recording), 14 March 2012, Dublin. All interview files are available upon the request.

All in all, coupled with the economic boom in the last decade of the millennia[195], the social climate in Ireland was becoming increasingly more tolerant towards non-traditional sexualities.

These positive developments were further reinforced by the equality legislation in 1998,[196] which precluded discrimination on grounds of sexual orientation in employment and occupation. Interestingly, this piece of legislation preceded the EU Framework Directive 2000/78/EC and was eventually used as the means of transposing it into the domestic legal system[197]. Furthermore, the Irish government actively lobbied for the introduction of sexual orientation as one of the prohibited grounds of discrimination in the ToA, thus stimulating a positive change also in the European legal space.[198] In Ireland the 'equal status' legislation was adopted in 2000,[199] extending the scope of protection from discrimination on grounds of sexual orientation to the provision of goods, services, housing and education both in private and public domains.[200] It can be concluded that full protection of individual gay rights in Ireland was achieved virtually in a 7 year period, which might be metaphorically called as an 'over-night' reform. The rapid developments in equality legislation indicated that Ireland became one of the most progressive European legal systems in protecting the rights of its LGB citizens at a given moment. The discursive analysis of this sudden change in legal thinking might offer some useful insights about the reasons behind the increasing tolerance towards sexual minorities in the Irish society as well.

[195] The unemployment rate in Ireland decreased from 19% in 1991 to 4.3% in 2002, see: *supra* 181, 17.
[196] Employment Equality Act, *Number* 21 of 1998, 18 June 1998, *Irish Statute Book*.
[197] For the further reference, see: Bruce Carolan, "Rights of Sexual Minorities in Ireland and Europe: Rhetoric Versus Reality," *Penn State International Law Review*, Vol. 19 (3), 2001, p. 387–406.
[198] *Supra* 127, 476.
[199] Equal Status Act, *Number* 8 of 2000, 26 April 2000, *Irish Statute Book*.
[200] The Irish legislation in the field of anti-discrimination remains more far-reaching than its equivalent on the EU level, as the Commission's proposal to extend the scope of protection beyond the spheres of employment and occupation is still under the consideration. See: *supra* 134.

2.1.2 Socio-Cultural Reasons behind Accomplishment of Individual Rights

The speedy process of expanding on legal protection might be explained by the recourse to socio-cultural climate in Ireland in the 90s. First of all, the progress of individual gay rights should be perceived in a broader context of more general relaxation of strict norms of morality. For example, the outcome of the abortion and divorce referendums in 1992 and 1995 quite tellingly represents the pattern. While the Irish society can still be hardly regarded as taking a liberal stance on these issues, the establishment of the pregnant woman's right to travel for the purposes of abortion and the lift of the general ban on divorce clearly indicate some developments towards more liberal approach.[201] Secondly, the increasingly diminishing influence by the Roman Catholic Church in the Irish society was turbulently shaken by sex scandals, involving the members of clergy, and the subsequent failure by religious leaders in responding to the controversy.[202] In essence it meant that the Church as a moral authority was disempowered in the LGB rights debate, especially in its early stages focusing on individual gay rights. Finally, the general drive by the Irish society towards the principle of equality could be partially explained by the common memory of discrimination, suffered by the Irish people under the colonial British rule. To put it differently, the notion that someone should not be dismissed from a workplace due to one's intrinsic characteristics is a particular manifestation of *fairness*, [203] which is stimulated by the common public awareness of discriminatory injustices. To sum up, the legal accomplishment of individual gay rights in Ireland did not come out of the blue – it was a result

[201] However, the abortion referendum in 1992 was still defeated on allowing abortion on broader grounds, while the divorce referendum in 1995 was passed only by the mere margin of 9'000 votes, see: *supra* 181, 13-15.
[202] Ibid., 21-22.
[203] While the concept of *fairness* in legal terminology usually refers to balance and impartiality of the court proceedings as an integral part of the due process, it seems that it bears somehow different connotations in the Irish discourse. This discrepancy is elaborated *infra* in Sub-Chapter 4.1.

of the more general change in the society, leading to the acknowledgment of individual value, human diversity and multiple moral choices, inherent therein.

2.2 Towards Legal Recognition of Same-Sex Relationships

The Irish example confirmed the general pattern in the emancipatory struggle of LGB community by proceeding from individual rights to the broader civil rights claims[204]– the gay rights' discourse form the 00s onwards consistently focused on the legal recognition of the same-sex relationships, not only seeking for the inclusions of same sex-couples under the legal ambit, but also trying to prove that homosexuals are "as capable as heterosexuals when it comes to entering into loving monogamous domestic partnerships".[205] This time the debate was more nuanced – both the judicial and legislative struggles had to be won.

2.2.1 Challenge before the Courts

The Article 41.3 of the Irish Constitution provides that "[t]he State pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack." Despite the fact that the definition of family is clearly linked to the institution of marriage, neither the nature of marriage nor the contents of family are precisely defined by the Constitution itself.[206] On the other hand, the Irish courts have continuously reiterated that

[204] It has to be noted that the continuum of expanding on gay rights in Ireland intrinsically misses the intermediate link, i.e. the Irish LGB community had no substantial difficulties in getting their civil rights to freedom of assembly and association recognized by public authorities. The first Pride Marches in Ireland were held as early as in the 80s and after the decriminalization in 1993 the experience of facilitating LGB marches and demonstrations by local public authorities was largely positive. This situation stands in a sharp contrast with the jurisdictions in Eastern Europe, where the Pride Marches cause a great deal of controversy. For further reference on the situation in Ireland, see: Donncha O'Connel, "Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Ireland", 2008, <http://fra.europa.eu/sites/default/files/fra_uploads/325-FRA-hdgso-NR_IE.pdf>, p. 11-13.

[205] Brian Tobin, "Relationship Recognition for Same-Sex Couples in Ireland: The Proposed Models Critiqued," *Irish Journal of Family Law*, Vol. 11(1), 2008, p. 11.

[206] For further reference, see: Aisling O'Sullivan, "Same-sex Marriage and the Irish Constitution," *The International Journal of Human Rights*, Vol. 13 (2/3), 2009, p. 477–492.

marriage is defined as an exclusively heterosexual institution.[207] This notion was eventually filtered into the *Civil Registration Act 2004*, explicitly precluding two persons of same-sex from entering into civil marriage.[208] There can be no doubt that the latter notion substantially influenced the struggle for the recognition of same-sex couples' rights in the Irish legal system – not only the Irish law was silent on same-sex (as well as different-sex) relationships outside the marriage,[209] but also there was a legal reason for the argument that same-sex couples are not entitled to the protection of their family life at all.

In order to illustrate the prevailing ambiguity in the Irish law about the right of family life for same-sex couples, the one should take diverging judgments by the High Court and the Supreme Court in *McD v. L & and M.* case into account. Due to the dualistic nature of the Irish common law system, the ECHR was given the force of law in the Irish jurisdiction only by the adoption of the Human Rights Act in 2003.[210] Section 4 of the Act provides that the Irish Courts have to take the Strasbourg case law into consideration when dealing with the rights, falling under the scope of the Convention. Interestingly, the High Court judgment in 2008 took the leap beyond the ECtHR's jurisprudence in declaring that a lesbian couple, living together in a long-term committed relationship, should be endowed with the right to family life.[211] Despite the awareness of the fact that the ECtHR had had not granted homosexual couples with the right to

[207] To begin with the oft-cited example from *Hyde v. Hyde and Woodmansee* [1861-73] All E.R. Rep 176, where in the polygamy case from 1866 the marriage was defined as "[…] the voluntarily and permanent union of one man and one woman to the exclusion of all others" and to end up with the more recent example from *Zappone and Gilligan v. Revenue Commissioners and Others* [2006] IEHC 404, where in the Irish High Court rejected the applicants' claim that the absence of legal recognition for their Canadian same-sex marriage in Ireland was contrary to the principles of dignity and equality.

[208] Civil Registration Act 2004, *Number* 3 of 2004, 27 February 2004, *Irish Statute Book*, Section 2(2)e.

[209] Fergus Ryan, "The General Scheme of the Civil Partnership Bill 2008: Brave New Dawn or Missed Opportunity?" *Irish Journal of Family Law*, Vol. 11(3), 2008, p. 51.

[210] European Convention on Human Rights Act 2003, *Number* 20 of 2003, 30 June 2003, *Irish Statute Book*.

[211] By the time the Irish case was decided in the High Court, the controlling Strasbourg's judgment on the right to family life for same-sex couples still was a restrictive Court's position in *Estevez* admissibility decision, while the ruling in *Schalk and Kopf* came only two years later.

family life yet, the domestic judge was satisfied with the presumption that there had been 'a substantial movement towards such a finding'.[212] However, the Supreme Court overruled the decision by the High Court on appeal, bluntly stating that "[t]here is no institution in Ireland of a de facto family."[213] While some authors have argued that the latter decision was a particular manifestation of more general resistance by the Irish judges to relay on the ECHR principles while interpreting the domestic law,[214] it might be perceived as a commendable position on preventing the Contracting States from deciding on the ambit of the Convention provisions by themselves.[215] Nevertheless, the judgment by the Supreme Court should not be considered as being overtly hostile towards same-sex couples. It simply states that difficult problems of legal recognition of same-sex relationships have to be addressed by the legislature and that is not the job to be done by the courts.[216] It might have been the correct approach, taken the parallel parliamentary debate on the introduction of civil unions for same-sex couples into account. In addition to this, it could be presumed that the judgment by the Supreme Court – following the same arguments in the reasoning –would be different today. Not only the *Civil Partnership Act* entered into force on 1 January 2011, but also the ECtHR ruled in *Schalk and Kopf* that *de facto* homosexual relationships enjoy the right to family life. However, the Supreme Court still has to prove that it is capable of applying the evolving European consensus on legal recognition in accommodating same-sex couples within the framework of constitutionally established link between protection of family life and heterosexually defined marriage.

[212] *McD v. L & and M.* [2008] IEHC 96, the High Court, Hedigan J., 16 April 2008, p. 17.
[213] *McD v. L & and M.* [2010] ILRM 461, the Supreme Court, 10 December 2009, p. 488.
[214] Conor O'Mahony, "Irreconcilable Differences? Article 8 ECHR and Irish Law on Non-Traditional Families," *International Journal of Law, Policy and the Family*, Vol. 26 (1), 2012, p. 51.
[215] Brian Tobin, "Same-Sex Couples and the Law: Recent Developments in the British Isles," *International Journal of Law, Policy and the Family*, Vol. 23 (3), 2009, p. 311.
[216] *Supra* 213, 530.

In *Zappone and Gilligan v. Revenue Commissioners*[217] the applicants' sought their Canadian same-sex marriage to be recognized in Ireland for the purposes of tax benefits, available only to married (i.e. heterosexual) couples. Despite accepting the argument by the applicants that the provisions of the Irish Constitution should be interpreted in the light of the present day conditions,[218] the High Court's Justice Ms Dune found that the constitutional right to marry[219] is exclusively opposite-sex-based and could not "mean something which it has never done to date."[220] Nevertheless, the judgment acknowledges legal difficulties caused by unrecognized nature of same-sex relationships and express hope that the "legislative changes to ameliorate these difficulties will not be long in coming".[221] This legislative change came with the introduction of the *Civil Partnerships Act*, but the *Zappone* case is still pending on the appeal in the Supreme Court. However, the main rationale behind the applicants' complaint, i.e. the exclusion from certain tax benefits due to the non-recognition of same-sex relationships, lost its cause by the virtue of adopting the *Finance (No. 3) Act* in 2011,[222] which provides same-sex registered partners with the same financial benefits as enjoyed by spouses. It remains to be seen, what response will be given by the Supreme Court to this legal challenge in the light of the newly enacted legal provisions, but the appeal in question is generally believed to have reinforced rather than diminished the cause for marriage equality in Ireland.[223]

[217] *Supra* 207.
[218] Ibid., 477.
[219] It is interesting to note that the Irish Constitution does not expressly provide for the right to marry and it has been argued that the institution was defined by those, who presently have access to it. See: Ross Aylward, "The Problem with Defining Marriage," *Irish Journal of Family Law*, Vol. 9 (4), 2006, p. 23.
[220] *Supra* 207, 530.
[221] Ibid.
[222] Finance (No. 3) Act 2011, *Number* 18 of 2011, 27 July 2011, *Irish Statute Book*.
[223] In June 2012 the applicants launched a fresh legal challenge before the High Court by questioning constitutionality of the *Civil Partnership Act*, which prohibits people who have registered a civil partnership from marrying. This second case is believed to be a judicial test on a growing political and public consensus on civil marriage for same-sex couples in Ireland. See: "Zappone & Gilligan Launch Fresh Legal Challenge for Equality", *GaeLick – Irish Lesbian Blog*, 6 June 2012, <http://www.gaelick.com/2012/06/zappone-gilligan-launch-fresh-legal-challenge-for-equality-zappigan/25009>.

The above case law analysis indicates that the Irish courts were reluctant in dealing with legal recognition of same sex relationships prior to the legislative change. However, the judicial struggle in order to redefine the concepts of family and marriage already took place in the light of the parliamentary debate on the introduction of civil partnerships for same-sex couples and recognition of cohabiting couples. The adoption of the *Civil Partnerships Act* not only embraced changing parameters of social reality, but also represented a shift in the Irish legal thinking by starting to focus on the functional aspect of intimate partnerships (i.e. love, commitment, loyalty, etc.) rather than emphasizing the formal rigid requirements (i.e. gender of the spouses).[224]

2.2.2 Legislative Initiative on Legal Reform

The first attempt to initiate the parliamentary debate about the legal recognition of same-sex relationships materialized through the *Civil Partnership Bill*,[225] sponsored by the Senator David Norris (the same applicant, who won the *Norris* case of decriminalization before the ECtHR). In essence, the Bill stated that the civil partnership would not be substantially different from the institution of marriage in its rights and obligations.[226] However, parliamentary vote on the Bill was indefinitely postponed. The main reason behind this was that the generally worded legislative proposal could have caused not only the legislative nuisance in implementing the principal equality between the two 'separate, but equal' institutions of marriage and civil partnership, but could have been also subjected to and – as suggested – have not survived the constitutional challenge.[227] However, the mere fact that the issue was debated and not trivialized in the *Seanad* was already a huge initial step towards the legal recognition of same-sex

[224] *Supra* 219, 21-22.
[225] For the Bill and its associated debate, see: Civil Partnership Bill 2004, *Number* 54 of 2004, 9 December 2004, <http://www.oireachtas.ie/viewdoc.asp?DocID=3337&&CatID=59&StartDate=01%20January>.
[226] *Supra* 209, 52.
[227] The substantial equation between the newly created scheme of civil partnerships and the constitutionally protected institution of marriage could be considered as a constitutional "attack" on the family (Article 41.3). See: ibid.

relationships. Despite the fact that the *Civil Union Bill*,[228] introduced by the Labor Party in 2007, was defeated due to similar reasons as the *Norris* Bill in 2005, it was obvious that the issue is already established on the political agenda. In addition to this, the recommendations by the *Joint Oirechtas Committee on the Constitution* and the *Law Reform Commission* in 2006 called not only for the legal redress of the rights of un-married cohabitants, but also for the 'marriage-like' privileges for same-sex couples.[229] The situation seemed to reach its political peek by the time of the Irish general elections in 2007.

The outcome of the elections generally speaking was not so crucial for the adoption of the civil partnership legislation, as all the main mainstream political parties made a commitment in their electoral campaigns to bring forward the legislative change.[230] However, the governing coalition, which was formed after the elections, could be described as rather leaning towards the political left than towards the political right – while the *Fianna Fáil* is usually perceived as a centrist "catch-all" political party, their junior coalition partners, i.e. the *Green Party*, were instrumental in advocating for the adoption of robust civil partnership legislation.[231] However, it is argued that the legal reform was a result of the broader political consensus, in which all the political parties had played a role.[232] To put it in other words, granting legal recognition for same-sex couples was perceived not as a narrow political victory for interested stake-holders, but as a more general development towards justice and equality in the Irish society at large.[233]

[228] Civil Unions Bill 2006, <http://www.labour.ie/download/pdf/civil_unions_bill.pdf>.
[229] For the further reference, see: GLEN, "Briefing Notes on Legal Recognition of the Same-Sex Couples", <http://www.glen.ie/attachments/cee9abbf-f7bc-4531-b6db-f49f95cd0b72.PDF>.
[230] Ibid.
[231] 77 seats in the governing coalition were won by the *Fianna Fáil*, 6 seats by the *Green Party*, and 2 seats by the *Progressive Democrats*, totaling in the governing coalition of 85 out of 166 MPs.
[232] "Field Dispatches: Winning Civil Partnerships in Ireland", *The Atlantic Philanthropies*, 20 September 2010, <http://www.atlanticphilanthropies.org/news/field-dispatches-winning-civil-partnerships-ireland>.
[233] This impression can be obtained from the speeches, given on the *Civil Partnerships and Certain Rights and Obligations of Cohabitants Bill* in the Irish Parliament, as well. See: GLEN, *Seanad Debates on Covil Partnerships July 2010*, <http://www.glen.ie/attachments/e7954299-0194-406e-9909-cf6da6f5b3d0.PDF> and GLEN, *Dail Debates on Civil Partnership*, <http://www.glen.ie/attachments/25c5ac41-8ff1-4b4f-9477-667f52193f4d.PDF>.

The *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* (hereinafter 'the Act') consists of two separate legal schemes, namely the one introducing registered partnerships exclusively for same-sex couples and the one granting certain rights and obligations for cohabiting couples in *de facto* relationships. Despite the fact that "the Act represents the most far-reaching reform of family law in a generation",[234] the legislation in question seeks to avoid challenging the conventional definitions of marriage and family in the Irish legal consciousness. For example, when dealing with the property of registered civil partners, it introduces a new term of "shared home" instead of "family home"[235], thus implying that actual relationships between same-sex partners is somehow different from the convenient familial ties. However, this stance can be explained by the nature of the Act itself. It embodies very technical approach, amending separate pieces of the Irish legislation so as to require equal treatment for civil partners in the manner identical to spouses or to introduce certain rights and obligations for cohabiting couples.[236] It appears that the Irish legislature took upon this laborious task in order to avoid an impression that something new is being crated, which could eventually constitute an "attack" against the constitutionally protected institution of family. To put it in other words, the Act conferred much needed legal protection and recognition for alternative families without engaging into 'cultural wars' about the fundamental concepts of marriage and family in the society. It has been argued that "registration [scheme] will lead to greater social acceptance of same-sex relationships and thus, ultimately, cultural change"[237], which will eventually create more welcoming climate for embracing the full marriage equality.

[234] *Supra* 177, 58.
[235] *Supra* 182, Part 4 "Shared Home Protection".
[236] *Supra* 177, 59.
[237] Woman and Equality Unit, "*Civil Partnerships: A Framework for the Legal Recognition of Same-Sex Couples*", London: Department of Trade and Industry, 2003, para. 1.5.

The civil partnerships for same-sex couples bear both practical and symbolic benefits. First of all, it creates rights and obligations between civil partners in a wide range of areas, such as home protection, pensions, immigration, taxation, social welfare, inheritance, etc.[238] Despite the fact that the scope of the protection by the Act is broad, it is in principle silent about the rights and obligations between the partners towards the children, already living with same-sex couples.[239] This legislative reluctance of admitting same-sex couples as parents reinforces an impression that the Parliament deliberately refused to engage with morally sensitive issues in order to avoid public controversy. Interestingly, the Act amends the *Ethics in Public Office Act 1995*[240] for the purposes of civil partnerships, requiring that all holders of high political offices document the possible conflict of interest by their spouses, partners and children. To put it differently, the legislator was aware of social realities regarding rainbow families and sought to redress these realities on practical terms. However, the clear political statement on the right to family life for same-sex couples with children is still missing.

The symbolic benefits of the civil partnership registration scheme are related with further increasing public visibility of same-sex couples. The civil partnership ceremony is performed publicly before the registrar and at least two witnesses, where the partners make the oral declaration of their commitment aloud and sign the civil partnership registrar.[241] Taken the previous silence and discretion about homosexual experiences into account, the public affirmation of commitment is believed to be "a significant mark of liberation and openness".[242]

[238] Kieran Rose, "Foreword" in GLEN, *Seanad Debates on Covil Partnerships July 2010*, *supra* 232, 3.
[239] The Civil Partnership Act does not confer the right of jointly adopting children upon the civil partners, despite the fact that a homosexual person may do so as an individual, see: Adoption Act 1991, *Number* 14 of 1991, 30 May 1991, *Irish Statute Book*, s. 10.
[240] Ethics in Public Office Act, 1995, *Number* 22 of 1995, 22 July 1995, *Irish Statute Book*.
[241] GLEN, *An Information Note on Civil Partnership for Same-Sex Couples*, "What Happens at a Civil Partnership Ceremony?",<http://www.glen.ie/pdfs/An%20Information%20Note%20on%20Civil%20Partnership%20for%20Same-Sex%20Couples.pdf>.
[242] *Supra* 209, 53.

Interestingly, the civil partnership ceremony is perceived by the general public simply as a 'gay weeding', without the recourse to legal and constitutional particularities.[243] This reinforcing relationship between legal recognition and evolving solidarity in the Irish society can be better understood by singling out the main features of the Irish public discourse on LGB rights in general and on civil partnerships in particular.

2.3 Irish Public Discourse on Gay Rights

The salient feature, currently defining the Irish discourse on gay rights, is a well-documented public support for the legal recognition of same-sex relationships. In 2008 as many as 81% of the population agreed that all citizens should be treated equally by the State authorities regardless of their sexual orientation.[244] In September 2010, several months before the *Civil Partnerships Act* came into force, 60% of the population felt that the introduction of the civil partnership registration scheme does not constitute an 'attack' against constitutionally protected moral institution of the Family.[245] Currently, after experiencing the boom of civil partnerships in Ireland,[246] two thirds of Irish people support moving to civil marriage for same-sex couples.[247] Nevertheless, it has to be noted that the above outlined data on public support is primarily voiced by the LGB advocacy groups and thus should be assessed critically.

[243] Brian Sheehan, the current Director of GLEN, interviewed by the author (tape recording), 15 March 2012.
[244] Tony Grew, "Irish Gay Marriage Advocates Claim Massive Public Support", *Pink News*, 26 February 2009, <http://www.pinknews.co.uk/2009/02/26/irish-gay-marriage-advocates-claim-massive-public-support>.
[245] Carl O'Brien, "Yes to Gay Marriage and Premarital Sex: a Nation Strips Off its Conservative Values", *Irish Times*, 15 September 2010, <http://www.irishtimes.com/newspaper/ireland/2010/0915/1224278896417.html>.
[246] 862 couples entered into the Irish civil partnerships during the first eighteen months since it became available in April 2011; for the further data, see: GLEN, "Civil Partnerships in Ireland: Figures from April 2011 to September 2012", 3 October 2012, <http://www.glen.ie/attachments/Civil_Partnership_Data_to_September_2012.PDF>.
[247] GLEN, "New Poll Shows Two Thirds Support for Civil Marriage for Lesbian and Gay Couples", 21 October 2012, <http://www.glen.ie/attachments/new_poll_shows_two_thirds_support_for_civil_marriage_for_lesbian_and_gay_couples.PDF >.

2.3.1 Irish Attitudes in a Comparative Perspective

In a comparative perspective, in 2008 the Irish average in 1-to-10 scale on feeling comfortable with having a homosexual neighbor was 8.6 (exceeding the EU 27 average of 7.9) and on having a homosexual person elected to the highest political position in the country was 7.8 (exceeding the EU 27 average of 7.0).[248] In addition to this, 32% of the Irish respondents claimed that they have homosexual friends or acquaintances (slightly less that the EU's average of 34%).[249] These trends clearly indicate that homosexuality is neither a taboo, nor a social stigma in the Irish society any longer. Following the previously proposed assumption that legal recognition of civil partnerships will further increase visibility and acceptance of same-sex couples in public domain, the level of social acceptance should be maintained. Furthermore, the mounting public support for same-sex marriage will inevitably have an impact on political outcomes. A growing number of councils across Ireland have already passed motions in support of civil marriage for same-sex couples,[250] the former President of the Republic Mary McAleese has publicly stated that "gay marriage is an issue whose time has come"[251] and the constitutional convention, which will considered "the provision for same-sex marriage", was established by the Irish Parliament.[252] In the light of these findings, the main question has to be asked, namely,

[248] Eurobarometer, *Discrimination in the European Union 2008*, "Results for Ireland", <http://ec.europa.eu/public_opinion/archives/ebs/ebs_296_sheet_ie.pdf>, p. 2. It has to be noted that the Irish average on having a homosexual person elected to the highest political position in the country in 2012 increased to 8.2, while the EU average decreased to 6.6, see: Eurobarometer, *Discrimination in the European Union 2012*, "Results for Ireland", <http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_fact_ie_en.pdf>, p. 1.
[249] Ibid., Eurobarometer 2008, 4.
[250] *Marriage Equality*, "Castlebar Town Council and Louth Country Council Vote in favor of Marriage Equality", 23 October 2012, <http://www.marriagequality.ie/news/2012/10/23/castlebar-town-council-and-louth-county-council-vote-in-favour-of-marriage-equality>.
[251] Scott Roberts, "Former Irish President Announces Support for Equal Marriage", *PinkNews.com*, 9 October 2012, <http://www.pinknews.co.uk/2012/10/09/former-irish-president-announces-support-for-equal-marriage>.
[252] *Marriage Equality*, "Marriage Equality Welcomes Establishment of Constitutional Convention", 11 July 2012, <http://www.marriagequality.ie/news/2012/07/11/marriage-equality-welcomes-establishment-of-constitutional-convention>.

what are the reasons behind public and political support for homosexuality in a small, Catholic and rather conservative society?

2.3.2 Factors Contributing to Increased Acceptance of Alternative Sexualities

The discussion about gay rights is usually underpinned by the search for structural barriers and 'gate-keepers', preventing the development of LGB rights in particular contexts.[253] Therefore exploring the removal of these obstacles might be a good starting point in explaining the positive change. For example, the Catholic Church in Ireland, despite retaining its dominant position in the society, ceased to serve the function of social barometer due to the embracement of overtly moralistic stance (often embedded in the sphere of politics), which the clergy itself ceased to adhere to.[254] It can also be argued that changing family formation patterns – increasing cohabitation and birth outside the wedlock rates[255] – challenged traditional notions towards the marriage and the family in the way that eventually broadened these conceptions so as to embrace same-sex couples. However, these developments only remove structural barriers, but do not stimulate the positive change *per se*. To put it in other words, once firmly held homophobic views simply will not go away by muting the powerful key players in LGBT rights debate.

There is a great range of factors, which could be considered as indirectly contributing to the increased social acceptance of alternative sexualities in Ireland. First off all, the "Celtic Tiger" phenomenon in the 90s and the 00s not only transformed the economic face of the country, lifting Ireland among the wealthy nations of the Western Europe, but also reversed the rather closed and isolated nature of the Irish society into the one of more open and multicultural

[253] For further reference, see: Renáta Uitz, "Lessons from Sexual Orientation Discrimination in Central Europe," *American Journal of Comparative Law*, Vol. 60 (1), Winter 2012, p. 235-264.
[254] For example, see: Stephen Gray, "Church of Ireland Synod: Gay Relationships Cannot Be 'Normative'", *PinkNews.com*, 14 May 2012, <http://www.pinknews.co.uk/2012/05/14/church-of-ireland-synod-gay-relationships-cannot-be-normative>.
[255] In 2006 there were 120'000 cohabiting couples in the State (see: *supra* 177, 58), while non-marital births stood at 32% of all births in 2005 (see: *supra* 181, 12).

community. The majority group in the net immigration since 1996 was the returning Irish people, who had previously left due to the economic hardships and were coming back home.[256] It can be presumed that emigration experience by the significant part of the Irish population had an impact on broadening their horizons and eroding previously held moral attitudes. In addition to this, the increased levels of income and other means of enhanced mobility (e.g. establishment of low-cost airlines, enabling Irish people 'to get out of the island') had comparable impact to that of emigration experience. Secondly, it has to be noted that Ireland is an English speaking country. In essence it meant that the American and British media (especially television broadcasts) were readily accessible for the Irish people. The depiction of alternative sexualities and same-sex relationships in various entertainment programs (e.g. *Queer as Folk*, *The L World*, *Will & Grace*, etc.) shifted the image of homosexuals as strange alienated creatures to the very lively picture of ordinary human beings. It does not necessarily imply that TV-series are capable of changing one's perceptions towards homosexuality in general. However, the increased presence of LGB in popular culture inevitably erodes the barriers of ignorance and exclusion in the public consciousness. Thirdly, the 'coming out' of prominent public figures and celebrities in the Irish society also significantly contributed to the inclusion of gays as full-fledged members of the Irish society. For example, the Senator David Norris, the first openly gay politician to be elected to the public office in Ireland, employs the rhetoric of humanity, openness and *fairness* in speaking about morally sensitive issues, which could be easily scandalized.[257] Another example could be the premature death of the openly gay member of the boy band *Boyzone* Stephen Gately.[258] The prominent visibility of the singer's civil partner in the massively publicized story has increased

[256] *Supra* 181, 18.
[257] On the Senator's commentary about his withdrawal from the Presidential electoral campaign in 2011, see: "Senator David Norris On The Late Late Show", *youtube.com*, 9 September 2011, <http://www.youtube.com/watch?v=tkNSqEYysLA>.
[258] For the further reference, see: "Singer Stephen Gately Dies Aged 33", *Rte.ie*, 11 October 2009, <http://www.rte.ie/news/2009/1011/gatelys.html>.

public understanding about the emotional nature of same-sex relationships. It can be concluded that the decision by the prominent homosexual figures to be open about their sexuality substantially contributes to the public acceptance of homosexuality as well.

2.3.3 Homophobic Rhetoric in Ireland

Despite the fact that various changes in social and cultural reality in Ireland contributed towards the general public acceptance of homosexuality, there are several issues that merit further engagement. Homophobic bullying in schools remains one of the most prominent manifestations of anti-gay sentiment in the Irish society.[259] According to Ryan, the homophobic discourse in Ireland could not be called homophobic as such – usually it is very nuanced and respectful for homosexuals.[260] It is primarily focusing on alleged attempt to redefine the institution of marriage and openly opposes the possibility to adopt for same-sex couples (argument based on the distinct role models of a man and a woman in bringing up a child).[261] These concerns are usually expressed by the groups embracing more general anti-EU sentiments. Their rhetoric is defined by sophisticated argumentation and not directed towards discriminatory attempts as such. To put it shortly, despite the fact that the limited anti-gay sentiment is still present in the Irish discourse, there are certain things that simply cannot be said in order to humiliate or dehumanize individuals on grounds of their sexual orientation.

* * *

The shift in public attitudes towards homosexuality during the time span, marked by the decriminalization of consenting homosexual sexual activity in 1993 and the introduction of legal

[259] For the public awareness raising campaign about homophobic bullying in schools, see: *Belong To*, "Stop Homophobic Bullying in Schools", <http://www.belongto.org/pro/page.aspx?subsectionid=4663>.
[260] *Supra* 194.
[261] For example, see: COIR, "Consequences of the Civil Partnership Bill for Marriage and the Family", <http://www.coircampaign.org/images/Documents/report_civilpartnershipbill.pdf>.

recognition of same-sex relationships in 2011, should be perceived as an integral part of the broader process of social transformation in Ireland. The relative passivity, hopelessness and cultural pessimism of the economically deprived Irish society[262] were replaced by high ambitions and expectations during the years of economic boom. According to Ryan, present-day Ireland wants to be a modern European society, which does not like to be perceived as backward anymore.[263] It seems that the Irish people do not want to come back to the 'good old days' when 'people knew they place'[264] – the general satisfaction with the patterns of change both in the economy and in the social life seems to be a good cause in explaining the increased acceptance of homosexuality in the Irish public opinion.

However, a sweeping conclusion that economic and cultural transformations ultimately lead to the increased acceptance of social diversity remains to be tested in different national contexts. It has to be answered, what prevents the positive change in societies, undergoing relatively similar changes of economic and cultural modernization. Therefore the further analysis proceeds to a case study of Lithuania, where initial stages of expanding on gay rights coincided with the developments in Ireland. However, the current legal situation in Lithuania not only does not provide for any recognition of same-sex relationships, but also the Lithuanian public discourse could be characterized as being rather more homophobic than not.

[262] Tom Garvin, *Preventing the Future: Why Was Ireland so Poor for so Long?*, Gill & Macmillan, 2005, p. 4.
[263] *Supra* 194.
[264] Kieran Rose, "Diversity Powering Success", April 2006, *supra* 229.

Chapter 3

Lithuania: "We Do Not Want Europe to Tell Us What to Do"

Lithuania is a member state of the Council of Europe since 1993 and the first post-Soviet country[265] to ratify the ECHR in 1995. It joined the United Nations organization in 1991 and acceded to the European Union in 2004. The ratification of the main human rights treaties by Lithuanian political elite was first of all comprehended as a necessary tool for distancing the country from its Soviet legacy and reclaiming its place in the European legal and political space. However, the substantial implementation of external human rights standards was met with certain degree of reluctance and ambiguity by domestic key players. For example, this ambivalent approach could be illustrated by the failure of the Lithuanian authorities in implementing the ECtHR's judgment in *L v. Lithuania*[266] case, where a legislative gap in gender reassignment procedure was found to constitute a violation of the applicant's right to private life. [59] The Court ordered the respondent state either to adopt the required subsidiary legislation within three months of the judgment becoming final, or to pay the applicant EUR 40,000 in respect of pecuniary damages. Not only the Lithuanian Government chose to pay the fine instead of bringing the domestic law in line with the ECtHR's jurisprudence, but also the legal situation in the field of gender reassignment remains chaotic up to the present day.[267] Therefore it can be concluded that imposition of hard law mandates in morally sensitive areas is not necessary the most effective strategy in expanding on certain human rights under the Lithuanian circumstances.

[265] Lithuania was the first Union Republic to declare its independence from the dissolving Soviet Union in 11 March 1990. 9 out of 15 former Soviet Republics – namely, Armenia, Azerbaijan, Estonia, Georgia, Latvia, Lithuania Moldova, Russian Federation and Ukraine – belong to the Council of Europe, and only 3 out of 15 – namely, Estonia, Latvia and Lithuania – belong to the European Union.

[266] *L. v. Lithuania* App no 27527/03 (ECtHR, 11 September 2007).

[267] Recently the Ministry of Justice proposed entirely removing the provision on a person's right to change his/her gender from the Civil Code. The logic behind this was that the *L.* judgment could be 'implemented' by simply deleting the contested legal provision. See: "Trans Law Proposal Allows Documents but not Gender Reassignment Surgery", *atviri.lt*, 19 July 2012, <http://www.atviri.lt/index.php/news/trans_law_proposal_allows_documents_but_not_gender_reassignment_surgery/6025 >.

Furthermore, Lithuania could be described as rather reluctant jurisdiction in responding to any developments of non-binding principles on sexual orientation issues, which exceed the minimum standards of protection as a prerequisite for belonging to the European political and legal space.

3.1 Individual Rights and the Right to Campaign for Them

While the initial stages of proceeding on individual LGB rights in Lithuania, namely on decriminalization and equality legislation, was stimulated by the process of European integration, the subsequent developments in effective enjoyment of freedoms to speech and to peaceful assembly are marked by much bigger public controversy as allegedly infringing upon national sovereignty and moral choices inherent therein. To put it in other words, the post-accession realities in Lithuania constituted a backlash in human rights protection for sexual minorities.[268] Nevertheless, the current public debate is gradually transforming into the more nuanced discussion about the place of tolerance and openness in the Lithuanian society, which could be identified as a slow learning process on pluralism and acceptance of difference.

3.1.1 Decriminalization as an Overnight Reform

The private, consensual homosexual activity in Lithuania was decriminalized in 1993 by repealing the Article 122 of the Criminal Code,[269] as a result of more general attempt to distance the Lithuanian legal system from its Soviet legacy. It has been argued that the Lithuanian transition to democracy in early 90's, coupled with the removal of censorship in public sphere, created the new horizons for the LGB community not only to increase their public visibility, but

[268] Some authors have argued that the backlash had been generated by the massive pressure on Central and Eastern Europe to adopt liberal gay legislation as a pre-accession conditionality. For example, see: Kjetil Duvold and Inga Aalia, "Fear and Loathing in Lithuania", *Baltic Worlds*, Vol. 2, 2012, <http://balticworlds.com/in-lithuania>, p. 45.
[269] Skirmantė Česienė, "Homoseksualūs Žmonės Viešose Ir Privačiose Erdvėse: Socialistinis Ir Postsocialistinis Lietuvos Kontekstas," in *Heternormos hegemonija. Homoseksualių žmonių socialinė atskirtis ir diskriminacijos patirtys*, ed. Arnas Zdanevičius, Kaunas: Vytauto Didžiojo universitetas, 2007, p. 120.

also to engage into the more robust debate about the general principles of equality and justice.[270] To put it in other words, the legal decriminalization allowed sexual minorities to (re)appear publicly, effectively removing them from 'the invisible part of the public life' probably for the first time in the country's history.[271] However, it has to be noted that the Lithuanian way of decriminalization – despite being accomplished exactly at the same point of time – stands in a sharp contrast with the above discussed Irish experience. In the latter case the repeal of the punitive provisions came into effect not only as a result of the ECtHR judgment in the *Norris* case, but also reflected the more general consensus on the worth of individual in the Irish society, as witnessed by the equality legislation accompanying the measures of decriminalization. It would not be an overestimation to say that the reform in Lithuania happened accidentally – it was neither supplemented by public discussion, nor represented any significant shift in public attitudes. Nevertheless, the climate of legality soon resulted in the first attempts to establish the LGB discourse in public domain. In 1993 the first LGBT rights organization, namely the *Lithuanian Gay League*, was established.[272] The same period witnessed the creation of the virtual social network for the gay and lesbian community, namely *GayLine.lt*, which is currently the main on-line channel of communication for the LGBT citizens in Lithuania.[273] To sum up, despite the fact that decriminalization resulted in the first attempts to increase the visibility of

[270] Artūras Tereškinas, "Šeimos bei partnerystės formos ir šeimos politika Lietuvos žiniasklaidoje," in *Vieši Gyvenimai, Intymios Erdvės: Kūnas, Viešumas, Fantazija Šiuolaikinėje Lietuvoje*, ed. Artūras Tereškinas, Vilnius: Baltos lankos, 2002, p. 183.
[271] Ibid.
[272] For the further reference, see: Lietuvos gėjų lyga (LGL), *Official Website*, <http://www.lgl.lt/indexe.php>. Another NGO, actively campaigning for the LGB rights, namely the *Tolerant Youth Association*, was establsihed in 2005, see: Tolerantiško jaunimo asociacija (TJA), *Official Website*, <http://www.tja.lt/en. The LGL is the member of the International Lesbian and Gay Association (ILGA) since 1994, and the TJA is the member of the International Lesbian and Gay Youth Organisation (ILGYO) since 2007.
[273] For the further reference, see: *Gayline.lt* (Visuomeninis Lietuvos gėjų ir lesbiečių tinlaips), <http://www.gayline.lt>. It is interesting to note that while the initial purpose of the website was to provide an online dating service for the LGBT community, eventually it developed into the more gay rights conscious platform, collecting and systemizing relevant information and actively engaging into civic action (e.g. raising awareness of the LGBT community in voting for pro-gay candidates in national elections and tracking homophobic record of salient politicians and public figures).

gays and lesbians in the Lithuanian society, it was not accompanied by the more constructive public debate and the subsequent shift in public attitudes. To put it differently, individuals belonging to sexual minorities remained on the fringes of society, and their claims for equality were strictly conditioned upon 'private' space of public toleration.

The further developments in Lithuania towards the expansion on the LGB rights were closely related to the EU pre-accession conditionality. The pre-accession negotiations between Lithuania and the EU began in 1999 and were based on the conditionality principle, i.e. the preparedness by the candidate country was assessed on the basis of its record in the field of human rights, democracy and the rule of law.[274] It has been argued that the pre-accession conditionality actually was a 'missed opportunity' in promoting "tolerant, inclusive and nondiscriminatory treatment of gays in the countries of Eastern Europe *prior* to their accession to the Union."[275] The main rationale behind this argument is that the EU adopted rather limited approach in promoting gay rights in newly acceding countries by requiring only the decriminalization of the homosexual conduct and the equality of ages between heterosexual and homosexual acts in criminal law.[276] It is interesting to note that Lithuania satisfied both requirements with ease – the homosexual conduct was decriminalized already in 1993 and the intention to eliminate the difference in ages of consent was welcomed by the Commission in 2001.[277] Despite the limited nature of the EU pre-accession conditionality in the field of gay rights, the emphasis by the EU institutions on the principles of equality and equal opportunities generated the atmosphere of inoffensiveness among the candidate countries in order to avoid any

[274] Dimitry Kochenov, "Democracy and Human Rights-Not for Gay People?: EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities," *Texas Wesleyan Law Review*, Vol. 13, 2007, p. 463.
[275] *Supra* 127, 473.
[276] *Supra* 274, 480.
[277] The actual difference was eliminated in 2003 by the adoption of the new Criminal Code. For the further reference, see: Commission of the European Communities, "2001 Regular Report on Lithuania's Progress Towards Accession", Brussels, 13 November 2001, <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2001/lt_en.pdf>, p. 22.

substantial criticism by conditionality assessment scheme.[278] To put it in other words, it resulted in the general feeling that gay rights agenda is something not to be argued about in order to satisfy the requirements of 'gay loving' Europe. In addition to this, it stimulated the stance of defensiveness among the local LGB communities themselves, resulting in the notion that the EU norms and institutions is always a good authority to rely upon in order to convince the reluctant national policy makers. It has to be concluded that the pre-accession period in the candidate countries resulted in the increased confrontation between the local gay rights proponents, as the representatives of allegedly narrow parochial interest, and their respective governments, which tend to send the message to the population that gay rights are "not a real priority, but rather the pet issue of a foreign authority".[279]

3.1.2 Equal Opportunity Legislation

In the Lithuanian context the above mentioned discrepancy was further reinforced by the transposition of the Directive 2000/78[280] into the domestic law. Interestingly, the *Law on Equal Treatment*,[281] which entered into force in 2005, was not limited to the spheres of employment and occupation (as required by the Directive), but extended the scope of antidiscriminatory provisions to the provision of services and goods, education and to the actions by public authorities (similarly as its Irish counterpart form 2000). However, the initial law was adopted with significant shortcomings in enforcing the principle of equal treatment before the courts. The main points of criticisms were as follow: (1) the law did not foresee the possibility for an allegedly

[278] The main reason for this is so-called 'sticks and carrots' method, enabling the Commission to freeze the accession process of the non-complying candidate country by the virtue of the Regulation 622/98, see: *supra* 274, 465.
[279] *Supra* 253, 243.
[280] *Supra* 128.
[281] "Lietuvos Respublikos lygių galimybių įstatymas", No. IX-1826, Vilnius, 18 November 2003, <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=222522&p_query=&p_tr2=>. For the English version of the Law, see: The Equal Rights Trust, "Lithuania: Law on Equal Treatment", <http://www.equalrightstrust.org/view-subdocument/index.htm?id=73>.

wronged person to be represented by non-governmental organizations and associations in the judicial proceedings (prescribed by the Article 9.2 of the Directive); (2) the burden of proof in antidiscrimination cases was not shifted from the allegedly wronged person to the responded (prescribed by the Article 10.1 of the Directive); (3) in case of finding a breach of equal treatment principle, the law did not foresee the possibility for the victim to receive any kind of compensation (prescribed by the Article 17 of the Directive).[282] Despite rather technical nature of these legal shortcomings, it can be concluded that the initial version of the *Law on Equal Opportunities* did not guarantee the effective enforcement of equal treatment before domestic courts. The law in question was amended on the above mentioned points in 2008.[283] However, the Parliamentary debates on the bill proposed demonstrated substantial reluctance by the Lithuanian MPs to acknowledge the necessity of effectively enforcing the principle of non-discrimination on the grounds of sexual orientation.[284] For example, the more general anti-European sentiment was expressed by the member of the conservative Homeland Union by stating that "it might be the case that you want to ground this bill on some European directives, but Lithuania is Lithuania, we are the Catholic nation and we appreciate family values."[285]

The *Law on Equal Opportunities* nominated an equality body, namely *the Office of Equal Opportunities Ombudsperson*,[286] to investigate into the complaints about discrimination on grounds prescribed by the Directive 2000/78. In the period between 2005 and 2011 the Ombudsperson received only 41 complaints (approximately 5.8 complaints *per anum*) about

[282] Arnoldas Zdanevičius, Jolanta Reingardė, and Jolanta Samuolytė, *Lesbiečių, Gėjų, Biseksualų Ir Transeksualų (LGBT) Teisių Apsauga Ir Socialinės Atskirties Tyrimas*, Vilnius: Lygių galimybių kontrolieriaus tarnyba, 2007, p. 12–17.

[283] "Lietuvos Respublikos lygių galimybių įstatymo pakeitimo įstatymas", No. X-1602, Vilnius, 17 June 2008, <http://www.litlex.lt/scripts/sarasas2.dll?Tekstas=1&Id=115848>.

[284] For the further reference, see: The Stenograph of the 6th Parliamentary Session, No. 6(327), Vilnius, 18 September 2007, <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=304466>.

[285] The statement by Rytas Kupčinskas, ibid.

[286] Initially the Equal Opportunities Ombudsperson was responsible for promoting equality between women and men. See: Lygių galimybių kontrolieriaus tarnyba (LGKT), *Official Website*, <http://www.lygybe.lt>.

discrimination on grounds of sexual orientation.[287] However, the sparing number of complaints should not be interpreted as an indicator of non-existent pattern of discrimination on grounds of sexual orientation in the Lithuanian society. The more probable explanation is that allegedly wronged individuals simply do not dare to complain, because they are afraid that the issue will be escalated and their sexual orientation will become publicly known.[288] If this reason is singled out correctly, it can be concluded that homosexuality is still a taboo in the Lithuanian society, where the disclosure of homosexual sexual orientation might substantially harm one's public reputation.

It seems that the Lithuanian willingness to comply with the EU pre-accession conditionality in general and with the EU equality measures in particular was a consequence of the broader political determination by the new candidate countries to achieve the European integration even at the costs of embracing allegedly alien cultural values. In reality neither the adverse public opinion, nor the institutionalized hostility towards the LGB community among the elites ceased to exist. To put it in other words, the national veto-players were temporarily muted, but their prejudices were by no means abandoned.[289] It did not take long after the accession to the EU in 2004 for the anti-gay sentiment to reappear in the public discourse.

3.1.3 Post-Accession Reality: Limited Freedom of Speech and Assembly

It has to be noted that the Copenhagen criteria does not entirely coincide with the Union's *acquis*, allowing the Commission to assess situation in the candidate countries more vigorously than it would be possible in the case of fully-fledged Member States due to the limited nature of

[287] The Ombudsman received the following number of complaints on grounds of sexual orientation – 2 in 2005, 2 in 2006, 18 in 2007, 8 in 2008, 4 in 2009, 3 in 2010 and 4 in 2011. See: „Lygių galimybių kontrolieriaus tarnybos 2011 m. ataskaita", Vilnius, 2012, <http://www.lygybe.lt/assets//LGKT%20ataskaita%202011_final.doc>, p. 56.
[288] „Lygių galimybių kontrolieriaus tarnybos 2006 m. ataskaita", Vilnius, 2006, <http://lygybe.lt/assets//ataskaita 2006.doc>, p. 44.
[289] *Supra* 253, 249.

the EU's competences in the field.[290] Therefore, an already questionable aspiration of promoting more tolerant environment for LGB communities in the newly acceding countries through the pre-accession conditionality was even more circumscribed when those countries entered into the EU. In Lithuania, hostility against 'equality agenda' reemerged by raising institutional obstacles for the enjoyment of speech and assembly rights, crystalizing in a far-reaching attempt to adopt censoring measures in order to eliminate the LGB discourse from the public sphere all together.

In 2006 municipal authorities refused to grant permission for the photographic exhibition in a public gallery, depicting artistic images of alternative (i.e. same-sex, elderly, including people with disabilities) families.[291] The main rationale behind the prohibition was that free access to the exhibition by minors could have had the negative impact on their moral development, which should be based on the Christian values.[292] This is a particularly interesting example, because an attempt to prevent children from engaging into the discovery of alternative modes of social reality clearly indicated the more general characteristic of the Lithuanian society, namely an attempt to defend itself from all kinds of 'otherness' by all means possible. It has been argued that the society was not ready to embrace the increased public visibility of the LGB community (even in an artistic form), because long held convictions about homosexuality as detrimental to children, public morality and family values were challenged all too sudden.[293]

Very similar arguments were employed in refusing to grant the permission for a LGB rights organization to decorate several trolleybuses in the capital, bearing slogans " A Gay Man

[290] For the further reference, see: Dimitry Kochenov, "Why the Promotion of the Acquis Is Not the Same as the Promotion of Democracy and What Can Be Done in Order to Also Promote Democracy Instead of Just Promoting the Acquis," *Hanse Law Review* 2, no. 2 (2006): 169–194.
[291] "Bažnyčios hierarchai - prieš fotografijų apie gėjus parodą" ("The Hierarchy of the Church Protests Against the Photographic Exhibition On Gays"), *lrytas.lt*, 31 March 2006, <http://www.lrytas.lt/index.asp?id=11438058061 141728610&view=4>.
[292] Ibid.
[293] *Supra* 282, 23.

Can Work as a Police Officer" and "Homosexuals can be Open and Safe at Work"[294] Not only the municipal authorities argued that the social advertising would go against the traditional family values [*sic*!], but also the whole attempt to promote equality was ridiculed in the public opinion by creating offensive references. It seems that the mere public visibility of people belonging to sexual minorities is perceived as a threat to prevailing morality and cultural values in the Lithuanian society. The image of the LGB community is heavily sexualized in the minds of the public – the opponents of gay rights usually invoke arguments about the 'unnatural' nature of same-sex relationships, its perverseness and hideousness. This overtly hostile discourse could be explained by the general failure to 'desexualize' homosexuality in the very initial stages of gay rights movement in Lithuania. Both the decriminalization and the equality legislation were achieved not because of the shift in societal attitudes, but as a result of external influences. The society was forced to accept the demand for gay rights without the opportunity to engage into the more comprehensive debate about the worth of the individual and the benefits of equality legislation for the society as a whole. If seen in this light, the hostility against sexual minorities cannot be perceived as irreversible characteristic of the Lithuanian national character.

The first attempt to organize public gathering of the LGB community in a communal space by flying a massive rainbow flag in one of the squares in the old town of Vilnius was refused authorization by the municipal authorities in 2007.[295] The same year the so-called 'Truck of Tolerance', the Commission's initiative on promoting equality and tolerance, was denied the permission to carry out its promotional activities in Lithuania.[296] It became clear that the

[294] Evaldas Utyra, „Viešumo siekiantiems gėjams – skaudūs smūgiai" ("Gays Receive Harsh Strikes on Their Pursuit for Public Visibility"), *delfi.lt,* 15 May 2007, <http://www.delfi.lt/archive/print.php?id=13210101>.
[295] Evaldas Utyra, „Vilniaus valdžia vėl atstūmė gėjus" ("The Municipal Authorities in Vilnius Rejects Gays Once Again"), *delfi.lt,* 17 October 2007, <http://www.delfi.lt/news/daily/lithuania/article.php?id=14735511>.
[296] "Vilnius akcijos prieš diskriminaciją neįsileido pagal neegzistuojantį įstatymą" ("Vilnius Prohibits Campaign against Discrimination on the Basis of Non-Existent Law"), *lrytas.lt,* 25 May 2007, <http://www.lrytas.lt/?id=1180 0926311179598773&view=4>.

arguments employed by municipal authorities in order to prevent public action by the LGB community – namely the preservation of traditional values, morals and the rights of the others – fell short behind the principles on effective enjoyment of freedom of assembly, formulated by the ECtHR in *Baczkowski* and *Alekseyev* cases. There was an increasing agreement among human rights defenders that the idea of equality march should be pushed forward through the legal measures, i.e. by defending the right to freedom of assembly before the courts.

This strategy was implemented in 2010, when the successful application to municipal authorities in order to organize the 'Baltic Pride' march was withdrawn by the Vilnius District Administrative Court.[297] The decision by the lower court was successfully appealed before the Supreme Administrative Court, arguing that the State bears a positive obligation to guarantee the freedom of assembly even to those minorities, who hold or represent unpopular ideas.[298] The 'Baltic Pride 2010' events caused a great amount of controversy in the Lithuanian society. 350 participants in the march were assisted by more than 800 police officers, protecting the supporters from violent counterdemonstrators. In addition to this, the development of the 'Baltic Pride 2010' events received attention both from the Commissioner for Human Rights Thomas Hammarberg[299] and the European Commissioner for Fundamental Rights Viviane Reding.[300] Once again the general impression that gay rights are actively promoted by the European institutions both in Strasbourg and Brussels was reiterated in the eyes of the public, still considering any 'homosexual propaganda' as a threat to national values and moral imperatives. In

[297] The action was initiated by the Attorney General due to the difficulties in maintaining public order. See: Thomas Hammarberg, "Statement in Support for the Baltic Pride 2010", 6 May 2010, <http://www.ilga-europe.org/home/guide/country_by_country/lithuania/baltic_pride_2010/statement_from_commissioner_hammarberg>.
[298] Lithuanian Gay League, *Changing faces. First March for LGBT Equality in Lithuania*, Vilnius, 2012, p. 95-97.
[299] *Supra* 297.
[300] Viviane Reding, "Video Message to Baltic Pride 2010", *youtube.com*, 7 May 2010, <http://www.youtube.com/watch?v=_gmbkR3SnEs>.

addition to this, the pride controversy was taking place in the background of a very recent legislative initiative to eliminate to a certain extent gay rights discourse from the public domain.

The first legislative attempt to amend the *Law on the Protection of Minors against the Detrimental Effect of Public Information* was proposed as early as in 2006, entailing the provision to qualify any information "propagating homosexual relationships" as having detrimental effect to the minors.[301] Interestingly, the same bill qualified information, which discriminates on the grounds on sexual orientation, exactly in the same manner.[302] The evident ambiguity can be interpreted as follows – (1) it either seeks to eliminate both positive and negative information about homosexuality from the public sphere (2) or it seeks to facially comply with the requirements of the recent domestic equality legislation. However, the overtly discriminatory provision of the bill was dropped when the Parliament's *European Law Department* concluded that the proposal to qualify all positive information about homosexual relationships as detrimental to the minors allegedly breaches the Article 10 in conjunction with Article 14 of the ECHR and the Articles 11 and 21 of the CFR.[303] The second attempt to introduce amendments to the law in question reemerged with the formation of a new right-wing parliamentary majority in 2008. However, this time the bill prohibited information not only on (1) "campaigning for homosexual, bisexual or polygamous relationships", but also on (2) "distorting family life and mocking its values".[304] The bill was vetoed by the then President Valdas Adamkus, who heavily criticized the law due to the lack of 'definitional clarity'.[305]

[301] "LR Nepilnamečių apsaugos nuo neigiamos viešosios informacijos įstatymo 4 straipsnio papildymo ir pakeitimo projektas", No. XP-1546, 11 July 2006, <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=279921>.
[302] The full list of prohibited grounds of discrimination is as follows: ethnicity, race, sex, origin, disability, sexual orientation, religion and any other status. See: ibid.
[303] *Supra* 282, 21.
[304] "LR Nepilnamečių apsaugos nuo neigiamos viešosios informacijos poveikio įstatymo pakeitimo įstatymas", No. XIP-110(3), 3 June 2009, <http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=345108>.
[305] "V.Adamkus vetavo nepilnamečių "moralės apsaugos" įstatymą" ("V. Adamkus Blocks the Law, Which Seeks to Safeguard Morals of the Minors"), *delfi.lt*, <http://verslas.delfi.lt/Media/article.php?id=1179034&categoryID=754662>.

However, the Parliament overruled the presidential veto by 87 votes out of 141.[306] The Lithuanian authorities received a substantial amount of international criticism on allegedly homophobic provisions in the newly enacted law by *Amnesty International*,[307] *ILGA-Europe*,[308] the Council of Europe[309] and the European Parliament.[310] Interestingly, the Lithuanian Parliament even responded to the EP's criticism by adopting a resolution on its own motion, urging the Government to lodge a complaint before the ECJ in order to dismiss the EP's resolution as an "unlawful action caused by the lack of competence".[311] Due to the non-legally binding nature of the EP's resolutions, the possibility of such a complaint being reviewed by the ECJ was non-existent. However, it clearly indicated that even the 'name-and-shame' motion by the EU is perceived as the direct threat against national sovereignty in the sphere of morally sensitive issues by the Lithuanian authorities. Notwithstanding the initial reluctance in responding to the international criticism, the Lithuanian Parliament eventually removed the allegedly homophobic provisions from the law in question, replacing them with the more neutral prohibition of promoting "sexual relations".[312] To sum up, an attempt to institutionalize certain degree of censorship on homosexuality in the legal system (a) reflected political elite's willingness to

[306] Eglė Digrytė, „Seimas neišgirdo V.Adamkaus kritikos dėl nepilnamečių apsaugos įstatymo", ("Parliament Has Not Heard the Criticism by V. Adamkus on the Law on Protection of Minors"), *delfi.lt*, <http://www.delfi.lt/news/daily/lithuania/article.php?id=23095158>.
[307] Amnesty International, "Amnesty International Condemns Adoption of Homophobic Law in Lithuania", 14 July 2009, <http://www.amnesty.org.uk/news_details.asp?NewsID=18324>.
[308] ILGA-Europe, "Concerns over Lithuanian Draft Law to "Ban Propagation of Homosexuality"", 29 May 2009, <http://www.ilga-europe.org/home/news/for_media/media_releases/concerns_over_lithuanian_draft_law_to_ban_propagation_of_homosexuality>.
[309] Council of Europe, Commissioner for Human Rights, "The Commissioner Discussed Minorities' Rights and Discrimination Issues during His Visit to Lithuania", 22 October 2009, <http://www.coe.int/t/commissioner/News/2009/091022Lithuania_en.asp>.
[310] European Parliament, "Resolution on the Lithuanian Law on the Protection of Minors against the Detrimental Effects of Public Information", 17 September 2009, P7_TA(2009)0019.
[311] Seimo rezoliucijos "Dėl Lietuvos Respublikos kreipimosi į Europos Bendrijų Teisingumo teismą" projektas, No. XIP-1215, 15 October 2009, <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=355001>.
[312] "Nepilnamečių apsaugos nuo neigiamo viešosios informacijos poveikio įstatymas", No. IX-1067, 21 October 2011, <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=410367>.

exploit anti-gay sentiment in mobilizing the electorate and (b) strengthened the impression that gay rights are being enforced upon the society by international agents.

Taken these post-accession realities into account, it could be presumed that the current situation with LGBT rights under the Lithuanian circumstances is placed somewhere between the initial stages of decriminalization/equality legislation and the final stages of empowerment through fully-fledged citizenship. To put it in other words, the continuing struggle for public visibility could be interpreted as an intermediate stage between the two poles of gay rights continuum. Nevertheless, the Lithuanian case does not fit neatly with the predetermined sequence of civil rights achievements – the public debate on legal recognition of same-sex relationships emerged in the public sphere in parallel with the claims for more 'basic' rights.

3.2 Situation On Legal Recognition of Same-Sex Relationships

The most prominent feature, characterizing the Lithuanian public debate on legal recognition of same-sex relationships, is its ambiguity. The notions of 'legal recognition', 'family life', 'same-sex marriage' and 'registered partnerships' are conflated into one medley, thus rendering a constructive public debate virtually impossible. The message that 'in order to enjoy the right to family life, certain degree of legal recognition of same-sex relationships is necessary through alternative registration arrangements such as civil partnerships; same-sex marriage is not requires' simply does not come across. This situation is very convenient for the LGBT rights opponents, as it provides ample opportunities to appeal to the 'values of traditional family' every single time when the topic emerges. However, the first attempts by the Constitutional Court and the more socially responsible political parties to introduce some clarity on the issue could be regarded as successful indicators of the way, in which the further advocacy work should proceed.

3.2.1 Redefining 'the' Family

The Article 38 of the Lithuanian Constitution explicitly states that the marriage is conducted exclusively between a man and a woman. Despite the fact that the same Article establishes constitutional protection for the right to family life, it does not define the concept of family itself. In addition to this, the Article 3.229 of the Civil Code[313] foresees the possibility for different-sex couples to enter into registered partnership with "the aim of creating family relations"[*sic*]. However, no law has been adopted so far in order to establish the conditions and procedure of this alternative registration arrangement. It can be concluded that in practice the institute of registered partnerships does not exist in the Lithuanian legal system neither for different-sex nor for same-sex couples. This ambiguity is further reinforced by the fact that the Article 3.7 of the Civil Code defines marriage as "a voluntary agreement […] to create legal family relations", while the Article 3.12 explicitly prohibits marriage between two individuals of the same sex. Therefore it can be interpreted that the provisions in the Civil Cove clearly point towards conditioning the effective enjoyment of the right to family life upon the individual capacity to marry another person of a different sex, thus implicitly excluding same-sex couples from having their right to family life recognized in the eyes of the law.

In 2008 the Lithuanian Parliament adopted the *State Family Policy Concept*, defining family as 'spouses and their children (including adopted), if any'. [314] It has to be noted that back then the issue of the right to family life for same-sex couples was completely missing from the discussion – the parliamentary debates primarily focused on the issue, whether unamrried

[313] "Civil Code of the Republic of Lithuania", No. VIII-1864, 18 July 2000, <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=245495>.
[314] Resolution of the Seimas of the Republic of Lithuania, "On the Approval of the State Family Policy Concept", No. X-1569, 3 June 2008, <http://www.arsuaga.net/wp-content/uploads/lithuanian-state-family-policy-concept-june-2008.pdf >.

different-sex couples or single parents should be considered as families.[315] Despite the fact that the *Concept* is not considered as having the force of law in the Lithuanian legal system and serves merely as legislative guidelines for the parliamentary activity, the group of MPs lodged the complaint before the Constitutional Court in order to assess the constitutionality of the act. According to the complaint, the conceptual definition of family life in the *Concept* intervenes with the constitutionally protected right to family life without substantial legal basis.

The Constitutional Court delivered its judgment[316] on 28 September 2011. The main holding by the Court was that the family, i.e. the common life of a man and a woman, can come into being not solely on the basis of marriage, but also on alternative grounds, such as cohabitation. [II.15.1] In addition to this, the Court emphasized that the failure by the State authorities to protect (i.e. positive obligation) alternative familial arrangements, which are not based on marriage, is likely to result in discriminatory treatment. [II.15.2] Therefore it could be concluded the Lithuanian Constitutional Court followed the ECtHR's jurisprudence in breaking the connection between the right to marry and the capacity to found a family for different-sex couples.[317] However, nothing similar to the holding in *Schalk* that same-sex couples are also entitled to 'family life' could be inferred from the Lithuanian judgment – it simply does not address the issue of same-sex relationships. The legislative response to the Court's ruling was twofold. While the first attempts to introduce legislative measures conferring certain rights and obligations upon unmarried couples failed, the conservative parliamentary majority proposed constitutional amendments, which would have equated family with marriage and parenthood.

[315] Gediminas Sagatys, "The Concept of Family in Lithuanian Law", *Jurisprudencija*, Vol. 1(119), 2010, p. 184.
[316] „Dėl LR Seimo 2008 m. birželio 3 d. nutarimu Nr. X-1569 „Dėl Valstybinės šeimos politikos koncepcijos patvirtinimo" patvirtintos valstybinės šeimos politikos koncepcijos nuostatų atitikties Lietuvos Respublikos Konstitucijai", Judgment by the *Lithuanian Constitutional Court*, Case No. 21/2008, 28 September 2011.
[317] The Constitutional Court explicitly refers to the cases of *Marckx v. Belgium* App no. 6833/74 (ECtHR, 13 June 1979) and *Keegan v. Ireland* (see: *supra* 85) in its judgment. [III.1.2]

On 12 October 2011 the bill, regulating the procedure of entering into registered partnerships, was proposed.[318] The draft did not explicitly refer to same-sex couples (i.e. gender neutral provisions) – only the explanatory text mentions that in accordance with the ECtHR jurisprudence (referral to the '*Karner* formula') same-sex couples should not be discriminated against unmarried different-sex couples in comparable situation.[319] The bill sought to introduce narrowly circumscribed from of registered partnerships – for example, it did not confer any inheritance or maintenance rights between the partners. On 15 November 2011 the *Legal Department of the Parliament* delivered its opinion on the bill in question.[320] According to the Department's assessment, the proposed bill allegedly breaches the Article 38 of the Constitution due to the possibility for same-sex couples to be registered under the proposed scheme and thus to establish family life not between a man and a woman. Interestingly, the Ministry of Justice five days prior to the delivery of this opinion suggested certain amendments to the Civil Code, which would allow registered partnerships for different-sex couples only without adopting any additional laws.[321] However, even the latter proposal was called by some politicians as 'a vessel to introduce same-sex marriages in the future'.[322] Neither of the proposal was considered during the plenary sittings of the Parliament and their fate after the parliamentary elections in 2012 remains unclear.

[318] "LR partnerystės (bendro gyvenimo neįregistravus santuokos) įstatymo projektas", No. XIP-3687, 12 October 2012, <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=408151&p_query=&p_tr2=2>.
[319] „Aiškinamasis raštas dėl LR partnerystės (bendro gyvenimo neįregistravus santuokos) įstatymo projekto", No. XIP-3687, 12 October 2012, <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=408154 >.
[320] "Išvada dėl LR partnerystės įstatymo projekto", LR Seimo Kanceliarijos Teisės departamentas, XIP-3687, 15 November 2011, <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=411240&p_query=&p_tr2=>.
[321] "LR Civilinio kodekso 2.18, 2.19, 3.140, 3.229, 3.230, 3.231, 3.232, 3.233, 3.234, 3.235 straipsnių pakeitimo ir kodekso papildymo 3.229, 3.234, 3.234 straipsniais įstatymo projektas", No. 11-3906-01, 10 November 2011, <http://www.lrs.lt/pls/proj/dokpaieska.showdoc_l?p_id=113425&p_query=&p_tr2=&p_org=8&p_fix=y>, [Accessed 19-11-2011]: Article 4.
[322] „R.Dagys: partnerystės įstatymas taps galimybe įteisinti vienos lyties asmenų santuoką" ("R. Dagys: The Law on Registered Partnerships Will Create Opportunities for Legalizing Same-Sex Marriages"), *Delfi.lt*, 10 November 2011, <http://www.delfi.lt/news/daily/lithuania/rdagys-partnerystes-istatymas-taps-galimybe-iteisinti-vienos-lyties-asmenu-santuoka.d?id=51618629>.

On 15 December 2011 98 MPs registered the constitutional amendment, which would have equated family life with marriage by providing that 'family life is being created by an entry into marriage by a man and a woman'.[323] This proposal was not only heavily criticized by the European Law Department under the Ministry of Justice[324] on the grounds that it breaches the principle of separation of powers (i.e. disregarding the role of the Constitutional Court as the sole interpreter of the Constitution by altering the basic law through legislative procedure)[325], but also sparked a heated public debate on the definition of 'the' family in the Lithuanian society. Due to the public controversy on the issue, the amending proposal was supplemented with an additional provision that 'family life also emanates from parenthood.'[326] However, the whole process was put to an end when the first voting on approving the proposal in the Parliament failed by a nominal margin of 1 vote.[327] While an attempt to delimit constitutional protection to the family life based on traditional values (i.e. no family without marriage) was driven by right-wing political parties,[328] an overwhelming majority of votes by the MPs (i.e. 93 out of 141) represents rather conservative stance on family policy issues in general. Therefore it comes with a little surprise that the issue of legal recognition of same-sex relationships represented a dividing line among the political parties' positions on social issues during the subsequent electoral campaign.

[323] „LR Konstitucijos 38 straipsnio pakeitimo įstatymas", No. XIP-3981, 15 December 2011, <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=414644&p_query=38&p_tr2=2 >.

[324] "Europos teisės departamento išvada dėl LR Konstitucijos 38 straipsnio pakeitimo įstatymo projekto", No. XIP-3981, 27 January 2012, <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=417635>.

[325] The Article 148 of the Consitution foresees that "[a]mendments of the Constitution […] must be considered and voted at the Seimas twice. There must be a break of not less than three months between the votes. A draft law on the alteration of the Constitution shall be deemed adopted by the Seimas if, during each of the votes, *not less than 2/3 of all the Members of the Seimas vote in favour* thereof." (emphasis added) In practical numbers it means that the constitutional amendment has to be approved at least by 94 MPs.

[326] "LR Konstitucijos 38 straipsno papildymo ir pakeitimo įstatymas", No. XIP-3981(2), 5 April 2012, <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=421619 >.

[327] Liepa Želnienė, "Lithuanian Parliament One Vote Short from Approving Constitutional Amendment on Family Definition", *15min.lt*, 19 June 2012, <http://www.15min.lt/en/article/politics/lithuanian-parliament-one-vote-short-from-approving-constitutional-amendment-on-family-definition-526-227415#ixzz2CtZt3s8H>.

[328] 16 votes 'against' the proposal were delivered by the social democrats (5 votes), liberals (9 votes) and members of a mixed parliamentary group (2 votes).

3.2.2 Parliamentary Elections 2012: "I Stand for the Traditional Family"

The general parliamentary elections in Lithuania took place in October, 2012. The public pools had indicated that the back then conservative Government is going to be overthrown due to the public dissatisfaction with austerity measures, introduced as a response to the economic downturn.[329] In addition to this, representatives of civil society heavily criticized the attempts by the governing 'Homeland Union' to amend national legislation and the Constitution according to the rigid moral standards. It did not take long before the issue of legal recognition of same-sex relationship (re)emerged in the climate of more general electoral change.

On the first round of electoral TV debates on family and social issues the leaders of the 5 most relevant political parties where presented with the question about the official party's position on legal recognition of same-sex relationships.[330] Despite the fact that only the leader of the 'Liber Movement' (10 out of 141 seats in the Parliament after the elections) declared that he officially supports the introduction of alternative registration arrangements for same-sex couples, the debate comprehensively outlined controlling themes and prevailing challenges in further discussing the issue on political level. For example, the leader of the social democrats (the new PM; 38 seats in the Parliament after the elections) declared that he did not consider same-sex couples as constituting families (i.e. "I stand for the traditional family") and therefore he approved neither same-sex marriages nor registered partnerships.[331] The former PM and the leader of the 'Homeland Union' (33 seats in the Parliament after the elections) suggested not to

[329] Milda Šeputytė, "Lithuanian Opposition Leads Opinion Polls Before Oct. 14 Vote", *Bloomberg Business Week*, 24 September 2012, <http://www.businessweek.com/news/2012-09-24/lithuanian-opposition-leads-opinion-polls-before-oct-dot-14-vote>.

[330] „„Lyderių forumas": ar homoseksualūs asmenys Lietuvoje diskriminuojami? Ar įteisinsite tokių porų partnerystę ar santuokas? (III)" ("Leader's Forum": are Homosexual Individuals Discriminated Against in Lithuania? Are you Intending to Introduce Same-Sex Partnerships or Marriages?"), *tv.lrytas.lt*, 27 August 2012, <http://tv.lrytas.lt/?id=13460092641344559095>.

[331] „Algirdas Butkevičius: esu prieš gėjų santuokas ir partnerystęs" ("Algirdas Butkevičisu: I am aginst Gay Marriages and Partnerships"), *15min.lt*, 20 September 2012, <http://www.15min.lt/naujiena/aktualu/lietuva/algirdas-butkevicius-esu-pries-geju-santuokas-ir-partneryste-56-252866#ixzz2CzLZd8Zf>.

confuse family life with registered partnerships – according to him, "family is family and it has nothing to do with registered partnerships."[332] Paradoxically, he referred to the Irish Constitution, defining marriage as an institution on which family is founded (the Article 41.3). Despite the fact that this reference could be considered as being ignorant to the recent legal developments in Ireland on legal recognition of same-sex relationships, it has to be admitted that the *Civil Partnership Act 2010* does not explicitly refer to the family life of same-sex couples.[333] It can be concluded that there is a little chance of proceeding with further recognition claims without reaching a broader political agreement on the applicability of the right to family life for same-sex couples under the Lithuanian circumstances in the first place.

The debate on legal recognition of same-sex relationships in electoral context highlighted the most salient features, which are likely to shape the public and political discussions in the future. First of all, despite the fact that the issue in question is trying to penetrate into the political agenda, it is unlikely that any substantial reform is going to be implemented at least during the upcoming parliamentary tenure. Secondly, the issue is believed to be 'politically sensitive' – political parties proved to be reluctant to support the cause due to the risks of losing popular votes by the adherents of traditional values. Finally, neither politicians in particular nor the public in general are capable of distinguishing between the concepts of 'marriage', 'family' and 'legal recognition' – the message that 'in order to effectively enjoy the right to family life, at least certain degree of legal recognition is necessary' requires further advocacy work. However, lobbying for same-sex couples' rights in Lithuania takes place in pretty much hostile environment, which could be described as rather homophobic than not.

[332] „Iš didžiųjų partijų už gėjų partnerystės įteisinimą pasisako tik Liberalų sąjūdis" ("Only the Liberal Movement Supports Introduction of Gay Partnerships among the Major Paries"), *delfi.lt*, 27 August 2012, <http://www.delfi.lt/news/daily/lithuania/is-didziuju-partiju-uz-geju-partnerystes-iteisinima-pasisako-tik-liberalu-sajudis.d?id=59386573>.
[333] *Supra* 235.

3.3 Lithuanian Public Discourse on Gay Rights

One of the salient features, currently defining the Lithuanian discourse on gay rights, is a lack of public support for legal recognition of same-sex relationship. The public opinion survey in 2011 indicated that only 4% of the population support introduction of registered partnerships for same-sex couples, while around 70% of the respondents approve this alternative registration arrangement for different-sex couples.[334] Interestingly, the *Eurobarometer* survey from 2006 (i.e. prior to the first claims for public visibility by the LGBT community) indicated that 17% of Lithuanians support the statement that "Homosexual marriages should be allowed throughout Europe" (significantly below the EU average of 44%).[335] While this discrepancy could be questioned in terms of survey representativeness or differing focus of interrogation (registered partnerships v. same-sex marriage), it could be argued that the public perception of 'the' family and its institutionalization through various legal arrangements is being gradually modified in accordance with changing social realities in Lithuania. For example, the number of divorces (3.4 per 1'000 inhabitants) constituted more than a half of newly conducted marriages (6.3 per 1'000 inhabitants) in 2011.[336] The same year 30% of the babies were born out of the wedlock.[337] It can be concluded that 'the' family based on marriage is no longer perceived as the sole constellation, in which people aspire to live in. Taken these developments into account, it seems that 'anti-gay' prejudice constitutes the main obstacle for including same-sex couples into the changing notion of family life.

[334] „Vyro ir moters partnerystės įteisinimui pritaria 70 proc. gyventojų, gėjų - 4 proc." ("70% of the Population Support Introduction of Registered Partnerships between a Man and a Woman, 4% - between Gays"), *delfi.lt*, 27 December 2011, <http://www.delfi.lt/news/daily/lithuania/vyro-ir-moters-partnerystes-iteisinimui-pritaria-70-proc-gyventoju-geju-4-proc.d?id=53395855#ixzz1q9SZH3Ft>.
[335] Eurobarometer 66, September 2007, <http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_en.pdf>, p. 43.
[336] Lietuvos statistikos departamentas, „Santuokos ir ištuokos" ("Marriages and Divorces"), <http://www.stat.gov.lt/lt/pages/view/?id=2421&PHPSESSID=4a23dda7955378146aac7aa12ea3c726>.
[337] Lietuvos statistikos departamentas, „Lietuvos vaikai: vaikų skaičius šalyje mažėja" ("Children of Lithuania: the Number of Children in the Country is Decreasing"), *Press Release*, 25 May 2012, <http://www.stat.gov.lt/lt/news/view/?id=10245>.

3.3.1 Lithuanian Attitudes in a Comparative Perspective

In a comparative perspective, in 2008 the Lithuanian average in 1-to-10 scale on feeling comfortable with having a homosexual neighbor was 6.1 (below the EU 27 average of 7.9 and 2.5 points lower than the Irish result) and on having the homosexual person elected to the highest political position in the country was 4.4 (below the EU 27 average of 7.0 and 3.4 points lower than the Irish result).[338] In addition to this, only 6% of the Lithuanian respondents claimed that they have homosexual friends or acquaintances (significantly less that the EU's average of 34%).[339] It can be concluded from this comparative data that homosexuality still constitutes a social stigma in the Lithuanian society, not only decreasing the social worth of an individual due to one's sexual orientation, but also reducing visibility of LGBT community in the public domain significantly. There is no doubt that these issues of social exclusion have to be addressed preeminently in promoting the genesis of inclusive society under the Lithuanian circumstances. However, the 'anti-gay' prejudice manifests itself in a complex manner, thus resulting in the more general public and political hostility against homosexuality in Lithuania.

3.3.2 Homophobic Rhetoric in Lithuania

The homophobic discourse in Lithuania could not be described as nuanced or politically correct – it is rather straightforwardly hateful and seeks to humiliate and dehumanize individuals on grounds of their sexual orientation. Several politicians, who are using homophobic rhetoric in

[338] Eurobarometer, *Discrimination in the European Union 2008*, "Results for Lithuania", <http://ec.europa.eu/public_opinion/archives/ebs/ebs_296_sheet_lt.pdf>, p. 2. It has to be noted that the Lithuanian average on having a homosexual person elected to the highest political position in the country in 2012 decreased to 4.1, in accordance with the more general decrease in the EU to 6.6, see: Eurobarometer, *Discrimination in the European Union 2012*, "Results for Lithuania", <http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_fact_lt_en.pdf>, p. 1.

[339] Ibid., Eurobarometer 2008, 4.

order to secure the support of their constituencies,[340] overtly employ the vocabulary of disgust, perverseness and 'homosexual propaganda'. It could be by no means argued that the hateful rhetoric is employed by public authorities or more mainstream politicians as well. However, the public discourse is still massively shaped by the voices of hate – the majority of key players have chosen to embrace the strategy of silence, thus rendering any ideas about pluralism, tolerance and respect for individuality virtually absent from the political discussion.[341] The Lithuanian authorities were heavily criticized in the report on the implementation of the CoE's Recommendation CM/Rec(2010)5 for their passivity in taking any positive measures in order to combat discrimination and social exclusion, faced by LGBT community in Lithuania.[342]

In order to provide certain instances of institutionalized homophobia, an eloquent silence on sexual orientation issues in the domain of public education could be taken into account. The sexual orientation program, adopted by the Ministry of Education in 2007, suggests that homosexuality should be discussed in the classroom as "genetic defect or disorder in personal development".[343] No official data is collected on how many LGBT pupils are bullied, harassed and experience discrimination at schools.[344] In 2009 a huge controversy arose, when the *National*

[340] Petras Gražulis, who is actively campaigning for criminal sanctions for 'homosexual propaganda', has been elected to the Parliament from his constituency (i.e. not through the party list) four times in a row. Kazimieras Uoka, who belongs to the radical right movement in Lithuania, held two parliamentary tenures. Stanislovas Buškevičius, the deputy major of the second biggest city in Lithuania, who constantly refers to homosexuality as an illness, held two parliamentary tenures and has been active in politics on municipal level thereafter.

[341] For example, when the Public Prosecutor initiated proceedings against Petras Gražulis on grounds of disturbing public order during the *Blatic Pride 2010* events, the Parliament refused to shift his immunity. See: "MPs Kazimieras Uoka and Petras Gražulis Fined for Misbehaving during Vilnius Gay Pride", *en.15min.lt*, 17 April 2012, <http://www.15min.lt/en/article/in-lithuania/mps-kazimieras-uoka-and-petras-grazulis-fined-for-misbehaving-during-vilnius-gay-pride-525-211772#ixzz2D9JEPw9x>.

[342] Lithuanian Gay League, "Monitoring Implementation of the Council of Europe Recommendation CM/Rec(2010)5 to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity. Documentation Report Lithuania", 2012, p. 5-6.

[343] The Ministry of Education, „Pasirengimo šeimai ir lytiškumo ugdymo universalioji programa" ("Program for Preparation for the Family and Sexual Education"), <http://www.ebiblioteka.lt/resursai/LR_ministerijos/SMM/15rs_ugd_univers_prg.pdf>, p. 6.

[344] The methodic guidelines on combating bullying at schools, adopted by the Ministry of Education, do not mention sexual orientation or gender identity at all. See: Robertas Povilaitis and Jurgita Smiltė Jasiulionė, „Mokykla gali

Association of Parents and Families discovered that a pre-school teaching technique "Gender Loops" (funded by the EC) entails a suggestion to introduce a fairytale about two male princes to kindergarteners.[345] It can be concluded that any information about the issues of sexual orientation and gender equality are considered to be detrimental to the minors, thus strengthening the popular myth that 'gays are trying to corrupt our children.' Taken one of the biggest rates of suicides among 15-19 year olds in Lithuania (15.1per 100'000) into account,[346] it could be described as rather ignorant position by the public authorities.

Homophobic rhetoric in Lithuania embraces the more general anti-EU sentiment as well. The gay rights discourse is portrayed as imposed upon national actors by the EU institutions and Brussels-based agencies, thus threatening the national sovereignty and moral choices inherent therein. While only 14% of Lithuanian citizens perceive the country's membership in the EU as a generally bad thing,[347] the rest seems to be holding rather utilitarian attitudes towards the European integration – they support it only when it can be perceived as (economically) beneficial.[348] Therefore any attempts by the European institutions to foster the community of values and deeper integration among its Member States are met with the general notion "We do not Want Europe to Tell Us What to do".[349] The same holds for sexual orientation related issues.

To sum up, the homophobic rhetoric in Lithuania is characterized by three salient features. First of all, it is directed not only against alleged attempts to undermine the traditional Lithuanian

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įveikti patyčias. Rekomendacijos mokytojams" ("Schools can Overcome Bullying. Recommendations for the Teachers"), 2008, <http://www.sac.smm.lt/images/file/e_biblioteka/6_mokykla%20gali%20iveikti%20patycias.pdf>.

[345] Lithuanian Gay League, "Tightening the Gender Loop in Lithuania?", 2 April 2009, <http://www.lgl.lt/naujienose.php?pid=31>.

[346] OSCD, "Teenage Suicides", July 2011, <http://www.oecd.org/els/familiesandchildren/43200195.pdf>, p. 2.

[347] Standard Eurobarometer 73, "Factsheets. Lithania", August 2010, <http://ec.europa.eu/public_opinion/archives/eb/eb73/eb73_fact_lt_en.pdf >, p. 3.

[348] *Supra* 268, 45.

[349] On the most recent example, see: "After Exception on Gay Marriage, Lithuania Joins EU Divorce Regulation", *en.15min.lt*, 21 November 2012, <http://www.15min.lt/en/article/politics/after-exception-on-gay-marriage-lithuania-joins-eu-divorce-regulation-526-280972#ixzz2DACVIhgO>.

family, but also against any public visibility of alternative sexualities. Secondly, the hostile attitudes are setting the tone to the public discussion, because the voices of support for LGBT community are virtually absent from the public sphere. Finally, the 'anti-gay' prejudices embody the more general anti-EU sentiments, thus fostering the idea that gay rights are enforced upon the Lithuanian society by external agencies.

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It can be concluded that the actual situation on legal recognition of same-sex relationships in Lithuania in principle does not contradict the international human rights law – the State facially does not apply differential treatment between same-sex and unmarried different-sex couples. The sole legal instrument, guaranteeing an effective enjoyment of the right to family life, is confined to the institution of marriage, which, according to the major international human rights treaties, is governed by the national laws. While the binding requirement to confer at least certain degree of legal recognition for same-sex couples is still absent from the jurisprudence of international human rights tribunals,[350] active advocacy work within national jurisdictions remains the most effective strategy in promoting the idea of legal recognition 'at home'. Drawing on the above generated insights about good practices from Ireland, the subsequent chapter seeks to develop comprehensive guidelines, which could be used in overcoming structural obstacles for more inclusive (i.e. more responsive to the needs of LGBT community) society in Lithuania.

[350] It is very likely that this issue will be addressed by the ECtHR in *Vallianatos and Others v. Greece*). See: *supra* 100.

Chapter 4

Developing Comprehensive National Strategy

In order to address prevailing anti-gay prejudices in the Lithuanian society, some useful insights might be generated through the recourse to the Irish experience in advocating for gay rights in general and for legal recognition of the same-sex relationships in particular. While it is tempting to conclude that consolidating democracies such as Lithuania are simply 'not ready' to fully embrace gay rights agenda,[351] this sweeping conclusion risks disregarding controlling references in national discourses, preventing the empowerment of LGB(T) community and the development of mutual solidarity bonds among members of community. The Irish example indicates that it is possible to achieve legal recognition of same-sex relationships even in those jurisdictions, which not only retain conservative stance on morally sensitive issues (e.g. still valid prohibition of abortion), but also constitutionally knit the right to family life with heterosexual marriage.[352] Therefore distinct characteristics of the Lithuanian society should be treated not as insurmountable obstacles, but as particular challenges, requiring strategically adapted approach towards promoting the idea of legal recognition of same-sex relationships.

The subsequent discussion seeks to conceptualize the pertaining differences between the Irish and the Lithuanian societies with regard to public discourse on gay rights through three thematic frameworks, namely – the controlling references to 'fairness' and sickness', moral rigidity as a perceived tool for maintaining national distinctiveness and diverging rationales behind proceeding towards legal recognition of same-sex relationships. While these

[351] Dahrendorf suggested that it might take a mere six month to introduce democratic political institutions and six years to fundamentally transform a command economy into a market economy; but it will take more like 60 years to forge a pluralistic society. See: Ralf Dahrendorf, *Reflections on the Revolution in Europe: In a Letter Intended to Have Been Sent to a Gentleman in Warsaw*, New York 1990.

[352] The Article 41.3 of the Irish Constitution: "The State pledges itself to guard with special care the *institution of marriage, on which the family is founded*, and to protect it against attack." (emphasis added)

argumentation blocks by no means represent an exhaustive summary of societal attitudes and institutional obstacles in relation to empowering LGB(T) community, they provide a good example on how human rights advocacy could be 'framed' by employing the language of its own opponents in order to generate successful outcomes. In addition to this, the comparison between two distinct jurisdictions might indicate that good practices from one society could be successfully implemented in another, only if adapted to national particularities accordingly.

4.1 'Fairness' v. 'Sickness'

The Irish interviewees has repeatedly referred to the concept of 'fairness' while describing the developments towards legal recognition of same-sex relationships in Ireland. While the concept of *fairness* in legal terminology usually refers to balance and impartiality of the court proceedings as an integral part of the due process,[353] it seems that this term was used in the more generalized way by the Irish experts in describing the common public awareness of discriminatory injustices. According to them, treating somebody *unfairly* entails judging a person based entirely on stereotypes and prejudices. This particular choice of vocabulary could be interpreted as an attempt to make discrimination on grounds of sexual orientation more easily understandable to the general public by equating it to the commonly experienced past stereotype of 'being Irish'. To put it in other words, the republican principle[354] demands that every Irishman is treated with dignity and respect and this requirement prevails over any other personal characteristics. Therefore it can be concluded that the concept of 'fairness' might be identified as a controlling reference in the Irish public discourse on gay rights.

[353] For example, see: Károly Bárd, *Fairness in Criminal Proceedings : Article Six of the European Human Rights Convention in a Comparative Perspective*, Budapest : Magyar Közlöny Kiadó, 2008.

[354] "The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests." See: Alexander Hamilton, *Federalist No. 71*, 1788. In the Irish discourse the principle of republicanism emerged as an opposition to the imperial British rule.

In contrast with the Irish discourse of 'fairness', the controlling reference in the Lithuanian public discourse on gay rights remains the concept of 'sickness'. It has been already argued that developments towards legal reform on sexual orientation issues in Lithuania are characterized by a missed opportunity to desexualize the debate during the process of achieving decriminalization and equality legislation. Unlike in Ireland, where the first steps towards the emancipation of LGB community were accompanied by the more general shift in public attitudes, legal achievements in Lithuania were accomplished by the virtue of external influences. That prevented transition from 'sex rights' to 'love rights' in relation to gay rights debate – homosexuals are still being openly referred to as 'sexual perverts' and 'pedophiles' in the public sphere.[355] These domestic references closely resonate with the more general notion of 'politics of disgust',[356] essentializing LGB individuals on the basis of their sexual preferences. Therefore it becomes possible to explain, why public 'coming-out' in Lithuania virtually automatically results in an undermined status as a member of the national community – sexual minorities first and foremost are perceived not as full-fledged citizens of the State, but rather as sexualized subjects, who seek to undermine natural [*sic*] order by claiming for their parochial interests.

Taken this interpretation into account, an attempt to place the issue of gay rights in the broader narrative of nation building in Lithuania could generate some useful insights about gay rights advocacy. If the concept of 'fairness', which developed as a response to the historically suffered injustices by the Irish people, was established as a structuring reference in public debate on gay rights in Ireland, the same strategy could be employed in Lithuania by creating a link

[355] The derogatory term for referring to a homosexual individual in the Lithuanian language is 'pederastas', which is defined by the International Worlds' Dictionary (Lithuanian edition) as an 'adult man, who is sexually attracted to boys'. See: Valerija Vaitkevičiūtė, *Tarptautinių žodžių žodynas*, Vilnius: Žodynas, 2001.

[356] Through regarding certain groups in the society as disgusting, the majority seeks to maintain the image of itself as a 'pure and clean' entity. The disgust towards homosexuality is derived from the concept of 'dirty' homosexual sex between two male individuals. See: Martha C. Nussbaum, *From Disgust to Humanity. Sexual Orientation and Constitutional Law*, New York: Oxford University Press, 2010.

between 'anti-gay' prejudice and formerly experienced Soviet oppression. While currently the claims for gay rights are framed as somehow contradictory to the national sovereignty, [357] drawing parallels between individually experienced injustices of discrimination and prejudice and nationally suffered foreign occupation could successfully contribute to the more general willingness by the Lithuanian society to distance it from its Soviet past. It has to be noted that the employment of this strategy would imply at last a partial shift from the individual legal rights to the more blurred communal sentiments. Nevertheless, it could be successfully utilized in framing gay rights issue not as imposed upon Lithuanian society by external agencies, but as emanating from the more general strive for the development of modern society, based on pluralist values.

4.2 Moral Rigidity as a Toll for Maintaining National Distinctiveness

The Irish interviewees have emphasized that conservative stance on morally sensitive issues, i.e. prohibiting use of contraceptives, divorce and abortion, has initially contributed to the Irish national identity by distancing it from the British past and establishing its own cultural distinctiveness.[358] Accordingly, this moral rigidity began to fade away when Ireland succeed in establishing itself as a fully-fledged member state among the European nations. Therefore it can be argued that the inwardness of the Lithuanian society is the result of a broader national identity crisis, seeking to position itself in the changing circumstances of the European integration and international interdependence. While it is difficult to respond to these complex issues through the framework of gay rights advocacy, the successful outcomes in promoting legal recognition of

[357] For example, some Signatories of the Act of Independence have publicly blamed the LGB(T) community for undermining the sovereignty of the Lithuanian state by claiming that sexual minorities "did not support the independence 20 years ago." See: „Signataras A.Endriukaitis protestuodamas atsisako valstybinių laidotuvių" ("Signatory A. Endriukaitis Waives his Right to State Funeral in Protest"), *delfi.lt*, 31 January 2012, <http://www.delfi.lt/news/daily/lithuania/signataras-aendriukaitis-protestuodamas-atsisako-valstybiniu-laidotuviu.d?id=54904173>.

[358] *Supra* 194.

same-sex relationships could be generated by emphasizing the fact that conservative public morality does not necessarily correspond with the actual social realities.

The number of adherents of the Roman Catholic faith in Ireland and Lithuania is relatively similar (86% and 79% accordingly). However, official declaration of religious faith does not necessarily imply corresponding levels of actual religiosity. While a gradual decrease in weekly mass attendance has been recorded in Ireland since the 80s [359], it was never higher than 20% under the Lithuanian circumstances.[360] Therefore couching arguments against expanding on gay rights in the narrative of 'traditional Christian values' might be disregarding the actual prevalence of these values among the members of the Lithuanian society. However, the Church has retained a strong moral influence due to its role in the process of transition from the totalitarian rule. To put it in other words, the priest are perceived not as rigid moralists, but as legitimate participants in the public debate due to their credentials as former dissidents.[361] The anti-Soviet and the anti-gay sentiments, employed by the Church, are based on strikingly similar narratives. While the soviet ideology was regarded as being detrimental to the national sovereignty due to its repressive character, there is an openly expressed belief among the clergy that gays are trying to undermine Lithuanian national identity by degrading family values and moral foundations of the traditional society.[362] This rhetoric is mirrored by the majority of the political parties, thus pointing towards the institutionalized influence by the Church on the political process in Lithuania.

[359] *Supra* 181, 22.
[360] Aida Savicka, ed., *Lithuanian Identity and Values*, Vol. 31, IVA, Central and Eastern Europe, Washington: The Council in Research in Values and Philosophy, 2007, p. 107.
[361] For example, the Minister of Social Affairs admitted that the exceptions to the *Law on Equal Opportunities* in relation to religious communities ware introduced as a result of the pressure by the Lithuanian Bishops' Conference. See: Stenograph of the Parliament sitting of 18 September 2007, <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=304466>.
[362] For example, see: Ieva Urbnaitė, „A.Svarinskas: gėjai grasina ardyti mūsų šeimas, o išvarginta tauta tyli" ("A. Svarinskas: Gays are Threatening to Destroy our Families, but the Exhausted Nation Keeps Silent"), *delfi.lt*, 12 January 2010, <http://www.delfi.lt/news/daily/lithuania/asvarinskas-gejai-grasina-ardyti-musu-seimas-o-isvarginta-tauta-tyli.d?id=27721035#ixzz2DStVGA72>.

It could be argued that in order to retain its influence in the society after the collapse of the Soviet rule, the Church had to find a new 'enemy' with the view reestablish the opposition between 'us' (i.e. Lithuanians) and 'them' (i.e. 'the others'). While the EU membership was generally perceived as an inevitable bulwark against creeping Russian influence,[363] the Church in particular and the society in general turned against the distinguishable minority groups within the community itself. Therefore it can be concluded that the experience of 'otherness' (i.e. social exclusion) by LGBT individuals is a result not only of prevailing anti-gay sentiments in the society, but also of a more general failure by the nation to respond to the transitional challenges.

In order to respond to these issues, a comprehensive advocacy strategy should not engage in an open confrontation with the religious opponents, but rather emphasize the civil nature of LGBT rights claims. There is a clear need for a more widely disseminated message that in order to be Lithuanian, the one does not necessarily have to be a Christian.[364] Secondly, the religious concern about the importance of the traditional (i.e. heterosexual) family and marriage for the survival of the nation should be addressed by simply noting that this popular sentiment already does not correspond with social realities[365] and that extending the right to family life for same-sex couples would actually not contradict, but rather confirm an already established trend. Finally, it has to be taken into account that Lithuania has been the destination of net-emigration for the last 20 years.[366] Unlike Ireland, Lithuania did not experience a significant economic boom, which could have led to the return of previously emigrated citizens. If emigration

[363] *Supra* 268, 45.
[364] The Article 43 of the Lithuanian Constitution states that "[t]here shall not be a State religion in Lithuania."
[365] For example, taken the increasing number of babies born out of the wedlock into account. See: *supra* 337.
[366] An estimated decrease in population figures since the independence is around 620'000. See: Lietuvos Statistikos Departamentas, „Išankstiniai 2011 metų gyventojų surašymo rezultatai pagal apskritis ir savivaldybes" ("Preliminary Results of the Popular Census 2011 on Municipal Level") *Press Release*, 2 December 2011, <http://www.stat.gov.lt/uploads/docs/surasymas_lt.pdf>.

experience is named among the reasons of broadened moral horizons of the Irish citizens, there is no reason to believe that it would not have the similar effect upon the Lithuanian society.

4.3 Economic Benefits v. Substantive Equality

Sheehan has argued that in Ireland human rights language simply does not work in relation to LGBT rights in general and to legal recognition of same-sex relationships in particular.[367] To put it in other words, the controlling reference of 'fairness', which represents more general national sentiment of 'being Irish', was crucial in campaigning for gay rights in Ireland. Taking into account the prevalence of 'sickness' and the absence of any national sentiment in relation to the local LGBT community among the members of the Lithuanian society, alternative strategies for promoting the idea of legal recognition of same-sex relationships should be considered.

It has to be noted that the recent public debate on legal recognition of same-sex relationships in the framework of the electoral campaign in Lithuania highlighted two diverging justifications for the right to family life for same-sex couples. The liberals have argued that same-sex partners are entitled to certain degree of legal protection from the State because there is a clear need to protect their economic interests.[368] In essence it means that the laws should defend an already existing (i.e. *de facto*) family life between two same-sex partners and economic implications resultant thereof. The most popular arguments evolved around the inheritance rights and the division of property in case of separation. On the contrary, some more leftist members of the Social Democratic party have tried to ridicule this property rights based approach by emphasizing equal rights and opportunities.[369] According to them, the liberal arguments represent a shortsighted perspective, which does not bear any further implication on equal worth of every

[367] *Supra* 243.
[368] *Supra* 330.
[369] Jolanta Bielskienė, „Reikalausime pirmininko laikytis programos" ("We Will Demand Our Chairman to Stick to the Programme"), *gayline.lt*, 28 August 2012, <http://www.gayline.lt/article.php?sid=6834>.

citizen in democratic society based on pluralist values. To put it differently, the social democrats tried to expand on the liberal request for the legal recognition of an already existing *de facto* family life of same-sex partners by supplementing it with the more general requirement to have one's family life recognized irrespective of one's sexual orientation for the sake of substantive equality. While the latter approach represents more comprehensive link between the right to family life and certain degree of legal recognition in order to exercise that right effectively (i.e. emphasizing not only economic benefits, but also more general claims for substantive equality), its implications under the Lithuanian circumstances are significantly limited.

First of all, these progressive arguments by some members of the Social Democratic Party do not constitute an official position by the party and even directly contradict the ideas, expressed by its chairman.[370] Secondly, taken the prevailing anti-gay prejudices in the society into account, it would be strategically more appropriate to campaign 'for less than for more'. In principle, substantive equality claims would implicate that any distinctions based exclusively on grounds of sexual orientation is impermissible. This path of reasoning inevitably requires opening up the institution of marriage for same-sex couples, which is neither mandated by the current status of the international human rights law, nor supported by at least tangible fraction of the Lithuanian society. It has been already argued that even minimal degree of legal recognition of same-sex relationships would create a legal basis, from which further claims for expanding on same-sex couples' rights could proceed. Therefore it could be concluded that the limited position on legal recognition of same-sex relationships, presented by the liberals, is more compatible with the strategic approach towards gay rights advocacy in Lithuania and could resonate more reasonably with the popularly held believes about the traditional families and their legal protection.

[370] *Supra* 331.

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The above conducted analysis indicated three general recommendations in order to promote the idea of legal recognition of same-sex relationships under the Lithuanian circumstances more successfully. First of all, a link between individually experienced injustices of discrimination and nationally shared experience of foreign oppression should be established. In this way the LGBT claims could be positioned in the framework of more general attempt by the Lithuanian society to distance itself from the Soviet past and to reestablish its fully-fledged membership in the community of the European nations. Secondly, the morally rigid arguments against legal recognition of same-sex relationships should be addressed not by engaging into open confrontation, but rather by strategically emphasizing the fact of changing social realities in the community and the civil nature of LGBT claims. This strategy would benefit not only the LGBT community, but would also foster the development of civil society, based on secular and pluralist values. Finally, the idea of legal recognition of same-sex relationships should be promoted by employing the strategically limited arguments on economic disadvantages, experienced by same-sex couples. This strategy is more likely than the claims for substantive equality to produce tangible results in foreseeable future. Nevertheless, it could still marks the establishment of a legal basis, from which further claims for expanding on same-sex couples' rights will be articulated. To sum up, these three general recommendations, if implemented successfully, would result in a comprehensive national strategy on legal recognition of same-sex relationships, which is not only compatible the with international human rights standards, but is also strategically adapted to the Lithuanian particularities.

Conclusions

It is hard to disagree with the statement that "to be human is to need to love and be loved."[371] Therefore the possibility to enter into intimate association with another consenting human being is considered to constitute a vital part of the very human existence. Same-sex couples in many jurisdictions do not enjoy the right to have their relationships legally recognized, thus rendering the nature of their relationships somehow inferior to its heterosexual equivalent. This thesis sought to address two major issues, namely whether the current status of international human rights law could be interpreted as requiring at least certain degree of legal recognition of same-sex relationships and to what extent these international developments (if any) are capable of influencing situation on legal recognition in domestic jurisdictions. The scope of the analysis was specified by indicating that recognition of the right to family life does not necessarily imply opening up the institution of marriage for same-sex couples – at least certain degree of legal recognition would suffice in both legally and politically respecting one's choice to form intimate association with somebody of the same sex.

The current status of international human rights law is settled only on one point, namely – prohibition of *direct* discrimination between same-sex and different-sex couples in comparable situation. However, it does not mandate at least minimal legal recognition of same-sex relationships in order to guarantee an effective enjoyment of the right to family life for same-sex couples. The most progressive approach at the moment is represented by the ECtHR, which has explicitly concluded that "a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of "family life"."[372] Nevertheless, the recognition of an already existing family life does not automatically implicate a free-standing right to have one's relationships legally

[371] Kenneth L. Karst, "The Freedom of Intimate Association", *The Yale Law Journal*, Vol. 89 (4), 1980, p. 632.
[372] *Supra* 88, [94].

recognized. Despite the fact that the Strasbourg court has noted "there is an emerging European consensus towards legal recognition of same-sex couples,"[373] it remains unclear when and whether the Court will create a legally binding norm for legal recognition of same-sex relationships. In addition to this, human rights protection mechanisms devote significant attention to the development of soft law norms, regarding LGBT rights in general and legal recognition issue in particular. However, there is no guarantee that these norms will be internalized by domestic key players. Taken these considerations into account, the first thesis statement, namely – the developments in international human rights law represents rather an aspiration than a hard-core obligation for legal recognition of same sex-relationships, is confirmed.

The analysis of the developments towards legal recognition of same-sex relationships in two jurisdictions, namely Ireland and Lithuania, revealed that international standards (both legally binding and non-binding) do not necessarily produce identical outcomes in domestic legal systems. While decriminalization of consensual homosexual sexual activity in both jurisdictions was achieved partially as a result of external pressures (i.e. *Norris* decision in Ireland and pre-accession conditionality in Lithuania), the subsequent developments in expanding on gay rights was highly dependent on national circumstances. The controlling reference of 'fairness' became the structuring factor of the Irish public discourse all the way through from equality legislation to legal recognition of same-sex relationships. On the contrary, the controlling reference of 'sickness' in the Lithuanian public discourse generated a backlash against gay rights protection as soon as the country became a fully-fledged Member State of the EU. Taken these considerations into account, the second thesis statement, namely – the actual recognition of same-sex relationships is highly dependent upon the particularities of national circumstances, is confirmed.

[373] Ibid., [105].

Finally, the analysis sought to generate specific guidelines in order to develop a comprehensive national strategy for promoting the idea of legal recognition of same-sex relationships in Lithuania. It has been argued that (1) the transition from the controlling reference of 'sickness' to the more inclusive national framing of gay rights, (2) the appeal to changing nature of contemporary social realities and (3) the strategically limited claims for legal recognition of same-sex relationships are needed in order to foster the embracement of developing international standards in the field. To put it in other words, the achievement of preferred outcomes is conditioned upon the particularities of national discourse and the straightforward reference exclusively to international norms simply fail to take certain domestic obstacles into account. The main objectives for the future advocacy work remain an effective dissemination of the message that 'in order to guarantee an effective enjoyment of the right to family life, certain degree of legal recognition of same-sex relationships should be granted; same-sex marriage is not required' and the corresponding selection of strategically adapted human rights language, more closely resonating with the prevailing national sentiments.

In seeking to respond to the main research question, namely – to what extent evolving international and regional human rights standards are capable of influencing legal recognition of same-sex relationships in European domestic legal system, it has to be concluded that the impact remains limited. There are two major reasons for that. First of all, the international and regional standards on legal recognition are currently substantially limited in their scope. On the UN level, the broader common standard is highly unlikely due to the diverging perceptions towards homosexuality in the majority of Member States. On the CoE level, the legally-binding requirements are confined to the prohibition of *direct* discrimination between different-sex and same-sex couples in comparable situation and at the moment Member States are still not obliged to grant certain degree of legal recognition of same-sex relationships. On the EU level, the Union

does not enjoy competence over the field of family law and the CJEU took this limitation into account by conditioning the applicability of the EU's law to same-sex couples upon the recognition in national laws. Therefore it can be concluded that if a State chooses not to grant any legal recognition of same-sex relationships at all, it does not automatically violate the international and regional human rights norms. Secondly, the internalization of human rights standards is highly dependent on variety of domestic factors and requires a closer inquiry into national circumstances. Unfortunately, it seems to be true not only in regard to soft law norms, but also to legally binding judicial decisions. Taken into account the Lithuanian reluctance in implementing the *L.* judgment, it is not difficult to imagine that public authorities could resist legal recognition of same-sex relationships even if mandated by international or regional tribunal. Taken these considerations into account, the main research question is answered by concluding that international and regional human rights standards play a minor role in promoting the idea of legal recognition of same-sex relationships in European domestic jurisdictions.

The further research on the topic could proceed in the direction, questioning what exactly prevents the States from implementing legally binding mandates on legal recognition of same-sex relationships. Taken into account a number of relevant strategic litigation cases, pending before human rights tribunals,[374] it could be reasonably expected that the international human rights law will gradually expand on mandating legal recognition at least to some extent. Therefore the Member States responsiveness to these mandates will be of crucial importance in guaranteeing an effective enjoyment of the right to family life for same-sex couple and will merit further academic inquiry and research.

[374] For example, see: *Vallianatos and Others v. Greece* (ECtHR, *supra* 100), *Dietz & Suttasom v. Austria* (ECtHR, App no 36063/08, *indirect* discrimination claim), *Ratzenböck & Seydl v. Austria* (ECtHR, claim that different-sex couples are excluded from registered partnerships), *Hay v. Credit agricole mutual* (CJEU, *indirect* discrimination claim), *Roberto Taddeucci & Douglas McCall v. Italy* (ECtHR, App no. 51362/09, immigration claims), *Enrico Oliari et al v. Italy* (ECtHR, App no. 18766/11), *Fedotova-Fet and Shipitko v. Russia* (ECtHR, App no. 40792/10).

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