The evolution of the concept of marriage

Analysis of the opposing arguments towards same-sex marriage and partnership

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Abstract

Upon the latest strides made in towards equality of rights of same-sex couples, this thesis examines the standing and development of same-sex marriage and partnership in two European countries, Hungary and France, along with the related case-law of the European Court of Human Rights. Mainly concentrating upon the arguments of the opposition towards the legalization of same-sex relationships, it will describe and analyze their background, reasons and consequences, to show how they can be outdated, unnecessary and too conservative.

Introduction

The official recognition of same-sex unions is a relatively new phenomenon in law. The Netherlands have been the first country to grant registered partnerships to gay and lesbian couples in 1989. Since then several countries followed suit, however there is one step further which only a handful of countries dared to take: marriage. Even though in Europe, the European Court of Human Right has subtly declared that recognized civil unions should be a must in every European country[1], it so far has not said the same about marriage. Since same-sex marriage has enjoyed major breakthroughs just in 2015[2], with just as much joy for progress as sorrow for opposition, I have embarked on the task to try to examine this institution, with all its problems.

The main focus of this thesis is to disprove the opposition arguments towards same-sex marriage, to point out why they are unnecessary and harmful. What I am trying to achieve here is to go through a part of the European situation, present all the problems I can categorize that concern the recognition of same-sex marriage, and show that even though they do not lack basis, in actuality same-sex marriage does not present a threat to society and these opposing arguments mostly stand on stereotypes and are starting to be too old-fashioned to stand.

To achieve what I set out to do, I have chosen three different jurisdictions. Firstly I will analyze the practice of two countries from different ends of the European spectrum: Hungary and France. These two countries have similar cultural traditions when it comes to marriage, but the experience of achieving this goal was very different. France has legalized same-sex

[1] Oliari and others v. Italy, 18766/11 36030/11, ECtHR, 2015.
[2] Such as same-sex marriage, for the first time, being accepted via referendum in Ireland and the ruling of the US Supreme Court, granting the right to marry to same-sex couples.

marriage in 2013, amongst heated debates and demonstrations (for both sides). Nevertheless the issue relentlessly persists and, with the 2016 presidential elections approaching, there is some cause to worry for the future of marriage equality. Whereas on the other hand, Hungary has not yet come to full recognition, the country only has registered partnerships (established only for same-sex couples) since 2009. However, I found the arguments to be similar to the French debate, with the exception that marriage has only been discussed in theory, and its existence cannot be expected in the near future. Nevertheless my intention is to use the Hungarian example as the reason of why simple partnerships are not enough in order to achieve full equality. In addition, I will also analyze the jurisprudence of the European Court of Human Rights, which by now has several cases that concern same-sex partnerships and marriage. The examination of the jurisprudence helps to map out what is supposed to be standard for all European countries to follow in theory. It is also useful in order to point out a few holes or controversies in the behavior of the court towards marriage equality.

My thesis will present a four-step analysis in trying to find the answers to my hypothesis. Firstly, I will start with a general examination of the institution of marriage, with a special focus on its present problems and challenges (one of them being same-sex marriage). In the second chapter I take on to describe the legal framework that is currently in place in my three jurisdictions that concern marriage, and if possible, same-sex marriage. I will concentrate on the problems of the process of legalization. Thirdly, I will move on the content opposition towards marriage equality, by categorizing and analyzing the different reasons which political figures, religious organizations and occasionally, civil society uses to counter the notion of same-sex marriage. I will try to extricate the roots, meaning and validity of these arguments, with the help of the established European standards. In the last chapter, my examination turns to further issues and debates, mainly concerning the process of legalizing same-sex marriage,

with questions such as if marriage is the business of the state of all, and if it is, which state institution is competent to make a decision about such a complicated issue.

Therefore the most important question in this thesis is whether the opposing arguments to marriage equality have basis and content that is still relevant today, or is same-sex marriage the logical and symbolic next step towards the full equality of lesbian and gay people.

Chapter 1

The place of marriage in society

Marriage is present in some form in all societies. Therefore it is not provided with a crystal clear definition, since it is interpreted in various ways in different cultures and it exists mostly as a cultural, ritual institution which, with a very simple and vague definition, provides two people with an official acceptance of their commitment.[3] Since this thesis concerns European countries, marriage would be defined in a wider and somewhat modern way as 'A legally and socially sanctioned union, usually between a man and a woman, that is regulated by laws, rules, customs, beliefs, and attitudes that prescribe the rights and duties of the partners and accords status to their offspring.'[4]

This would be a definition that could still stand today. Marriage, as an institution in the European cultural sphere, has gone through significant transformation. Most aspects of marriage have been questioned so far, with the broadening of women's rights, the notion of gender equality and the emergence of same-sex marriage as one of the most important concept of lesbian and gay equality. Because marriage has such deep cultural and religious roots, as a symbol of the sacred union, the insistence upon it is still relevant when assessing the changing attitude this ancient institution. Marriage can still be regarded as a key to a successful society and, most importantly, the foundation of the family. That is why the traditional concept of marriage is present and still defended in today's discourse.[5]

[3] Marriage and society: studies in the social history of marriage, Outhwaite R B (ed.), Europa Publications, London, 1981. p. 1.

[4] Encyclopedia Britannica http://eds.a.ebscohost.com/eds/detail/detail?sid=81e80d23-7bba-4bbd-9231-428f94bbe0f9%40sessionmgr4002&vid=34&hid=4108&bdata=JnNpdGU9ZWRzLWxpdmU%3d#db=ers&AN=894070795

[5] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007. p. 58.

From church weddings to civil marriage

In Europe, in the West and in the East, marriage was looked at, until the mid-20th century as a monogamous relationship, which is a lifelong union between a man and a woman, sanctioned by the state, the community, hopefully blessed by God, with the primary aim to raise children.[6] Traditional marriage today derives from Cristian, religious values. Christianity appreciates loyalty and chastity in marriage, its most important aspect being child rearing. Therefore marriage based on natural law, how a man and a woman unite in an institution that provides framework to bring up the future generation.[7]

Before Christianity became the Europe's leading religion and declared its own stance on marriage, it was considered as an economic and political union, established for either financial or status gain. Later, with the emergence of Christianity marriage had three important aspects. Firstly, it was considered as the foundation of the family. Secondly, it is mainly established for procreation and its most important function is to ensure children. Thirdly, the fact that it is a sacrament, to which there is no possibility of dissolution.[8] Mutual consent was considered an aspect of the process, however the notion of love, which is the basis of most marriages today was not a factor at all.[9] Women married because their only career opportunity could be being a good wife and mother, and stayed in the relationship because divorce or annulment was virtually impossible to obtain.[10]

The state regulations of marriage also play a significant role in this process. Even though for hundreds of years marriage was defined as a religious ritual, in 18th century, when the concept of secularization and separation of church and state appeared, marriage also took on another

[6] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007. p. 1.
[7] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007. p. 5.
[8] Bertrand R, Marriage and morals, Allen and Unwin, London, 1929.
[9] Marriage and society: Studies in the social history of marriage, Outhwaite R B (ed.), Europa Publications, London, 1981. p. 20.
[10] Marriage and society: studies in the social history of marriage, Outhwaite R B (ed.), Europa Publications, London, 1981. p. 6.

meaning. The state started to regulate how the institution works by regulating the ceremony, and issuing marriage certificates as official documents. It took control over the management of marriage and provided privileges for married couples. Marriage still kept its moral significance, but transformed into a legal institution which provides rights and privileges for those who choose to participate in it.[11]

Marriage as a union of two people who are in love emerged as a widespread phenomenon in the late 19th century. Slowly it was joined by the concept of romance, which mostly took over political considerations (for example to secure social position of the family) as the main reason to marry. However love did not overrule comfort.[12] Since women could not access education or work in order to properly provide for themselves, marriage was still the only way to gain a comfortable lifestyle. It required complete subordination to the husband, but in return the woman could live in financial security. Although the notion of complete subordination later diminished, dependence on men still remained.[13]

Church weddings started to become less and less relevant. By the 20th century, the status and state acceptance of religious ceremonies are quite varied. Some countries still accept wedding in all churches to be valid, while others only regard a marriage performed within the state religion to be equal to a civil ceremony (such as England, Spain, Portugal). Whereas several states now only formerly accept the civil ceremony as the official married union of the couple (such as Hungary and France).[14] In these countries the official ceremony happens in front of a registrar, and usually is a contract based union, with a prenuptial contract being drawn up on

[11] Brake E, Minimizing marriage: Marriage, morality and the law, Oxford University Press, New York, 2012. p. 2.
[12] Brake E, Minimizing marriage: Marriage, morality and the law, Oxford University Press, New York, 2012. p. 17.
[13] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007. p. 24.
[14] Doe N, Law and religion in Europe: a comparative introduction, Oxford University Press, Oxford, 2011.

several occasions. The two halves of the couple now have equal status and enter the marriage with the same prospects.[15]

[15] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007. p. 24.

The role of marriage in human rights documents

After World War II, international documents emerged to manifest the respect for fundamental rights. Among these rights, marriage can be found as well. The Universal Declaration of Human Rights proclaims in Article 16:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.[16]

The International Covenant on Civil and Political Rights operates with the same framework. Article 23 stresses the importance of family as a fundamental unit of society, the obligation of states to ensure the equality of the spouses in the relationship and recognizes the right of men and women of marriageable age to get married and to found a family.[17]

Apart from the basic international conventions, marriage is also mentioned in the specific document that concerns the rights of women, the Convention on the Elimination of All Forms of Discrimination against Women. Article 16 obliges the contracting state to "…take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations…."[18]

On the European level, marriage is part of the core human rights documents. The European Convention on Human Rights gives the right to marry by saying that "*Men and women of marriageable age have the right to marry and to found a family, according to the national*

[16] Universal Declaration of Human Rights, 1948. Article 16. (1) and (3).
[17] International Covenant on Civil and Political Rights, 1966. Article 23 (1), (2) and (4).
[18] Convention on the Elimination of All Forms of Discrimination against Women, 1979. Article 16.

laws governing the exercise of this right."[19] Furthermore Article 9 of the European Charter of Fundamental Rights references the right to marry and to found a family. This document also takes the national laws of European Union country into account, however it does not contain the condition that the marrying couple should consist of a man and a woman.[20]Although in case of the ECHR, the text of Article 12 'men and women of marriageable age' can actually be interpreted as having the right to get married but necessarily to a partner of the opposite sex.

All these international human rights instruments greatly emphasize marriage and founding a family as a fundamental right. Their text mostly mirrors the time in which they were drafted. The UDHR, being adopted in 1948, reflects a more basic and traditional view, the ICCPR and CEDAW, which were prepared in the 1960s and the 1970s respectively, place a responsibility on the state to ensure equal treatment of men and women, signaling the success of the women rights movements. Whereas the Charter of Fundamental Rights, which was enacted in 2000, shows the change in the perception of same-sex relationships by not referencing the requirement of different-gender partners in the marriage.

[19] European Convention on Human Rights, 1950. Article 12.
[20] Charter of Fundamental Rights of the European Union, 2000. Article 9.

Revolution of the 60s: Women's rights and lesbian and gay rights

During the 1960s, in the Western cultural sphere, a different perception emerged when thinking about sexual life. The conservatism of the 1950s slowly disappeared a new issues started to rise, such as the question of contraception, abortion, the relevance of marital monogamy and the status of same-sex relationships.[21] Earlier oppressed minority movements have risen up to prominence and demanded the states to loosen their regulation concerning the above-mentioned issues. These movements included a new wave of feminist activists and the newly established lesbian and gay rights advocacy groups.[22]

As an impact of new feminism, changes occurred from the 1960s in the position of women within the relationship. After claiming equal political rights in the early 20th century, the focus of feminist activism turned towards equal treatment of men and women in all spheres of life, including marriage. Feminists perceived marriage as hierarchical institution in which the overeducated and underemployed wives cannot find any way out.[23] The aimed to alter the role of women in married relationships, to break down the stereotypes concerning the female body and sexuality as well as raise awareness and take action against the growing concern of marital violence. Therefore the dominance of men in the marriage was thoroughly questioned and refused.[24] The fight for rights has provided women new opportunities for education and an independent lifestyle. Marriage is no longer the only possibility to live comfortable life, but instead it is a choice. Its primary motivation is romance and a chance to be happy with an

[21] Herzog D, Sexuality in Europe : a twentieth-century history, Cambridge University Press, Cambridge, 2011. p. 148.
[22] Herzog D, Sexuality in Europe : a twentieth-century history, Cambridge University Press, Cambridge, 2011. p. 154.
[23] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007. p. 24.
[24] Walters M, Feminism: A very short introduction, Oxford University Press, Oxford, 2005.

equal partner in a legitimate relationship, and sometimes it is not even considered as the fulfillment of the life of a couple.[25]

The sexual revolution of the 60s also encompassed liberation of gay and lesbian relationships. A series of protests aimed at trying to get the states to decriminalize homosexuality. In several countries sex between two men was criminalized, but in some states, such as Austria, lesbianism amounted to a crime as well.[26] This led into an urge to come out and demonstrate for equal treatment for gays and lesbians, both as individuals and as couples. In the next decades, the fight for lesbian and gay rights operated with three mottos: liberty (to shatter the stereotypes about homosexuality, and express 'gay pride'), equality (to eliminate discrimination based on sexual orientation) and security (to raise awareness and combat homophobic violence).[27] Lesbian feminists had an interesting place, sort of go-between gay activists and straight feminist advocates. It involved a choice whether to show primary support to the lesbian and gay rights movement or side with the feminists to campaign for equal treatment of men and women.[28] However slowly, legislative changes started to occur, first by the decriminalization of all homosexual acts (although practice between different countries was far from uniform) and then, from the 1990s, firstly the adoption of registered partnerships or civil unions became available for same-sex couples, and finally since 2001 more and more countries legislate on same-sex marriage.[29] But even among the lesbian and gay rights movements there are groups that do not deem same-sex marriage as an important step in the equality of heterosexual and homosexual couples.

Both these advocacy movements helped to question the importance of marriage, and found that there are alternative ways to get recognition from the state. Therefore less and less

[25] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007. p. 55.
[26] Herzog D, Sexuality in Europe : a twentieth-century history, Cambridge University Press, Cambridge, 2011. p. 196.
[27] Caballero F, Droit du sexe, LGDJ, Paris, 2010.
[28] Herzog D, Sexuality in Europe : a twentieth-century history, Cambridge University Press, Cambridge, 2011. p. 170.
[29] Doe N, Law and religion in Europe: a comparative introduction, Oxford University Press, Oxford, 2011. p. 223.

marriages are happening today. Registered partnerships and civil unions nowadays guarantee similar entitlements for couples as marriage. It is easier to step out of the relationship and have the official proceedings annulled. Due to the recent, significant tendency towards a change in social behavior concerning the perception of marriage, it can be proclaimed that the institution of marriage is in trouble.

Problems and the breakdown of the traditional view

The recent developments regarding the field of marriage raise significant questions about the relevance of the institution. It seems from recent statistics that divorce becomes more and more frequent, acceptance grows towards registered partnerships that the idea of the abolition of the marriage as an institution could surfaced quite intensely. The traditional definition of marriage is losing its importance.

One of these recent developments is the possibility of divorce. While in the 19th and early 20th century, divorce required a significant amount of money along with a quite complicated court case, and several times the invention of fake reasons, but these days getting a divorce is much easier.[30] According to Hungarian statistics, the number of divorced started to steeply increase in the 1960s and steadily growing all through the 21st century. In 2012, more 21000 divorces were registered, whereas the number of new marriages is not much higher: it is only barely 36000.[31] Most divorcees remarry and found new families. It seems that marriage has lost its traditional standing as a sacred union which cannot be broken.[32] On the other hand, from a philosophical point of view, divorce may be considered by some as a breaking of a promise, but can a promise actually be made to love someone for decades? In this respect divorce might be a solution for unhappiness and proof to the fact that love cannot be controlled and can change and disappear over time.[33]

Another phenomenon that emerged in the late 20th century which might be more attractive to couples than marriage is registered partnership. With a marriage ceremony a couple is entitled to several different rights, however non-married couples can also enjoy these rights if they choose registered partnership. For example Hungary declared in law that registered partnership is just as valid and has mostly the same entitlements as marriage (with the

[30] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007. p. 27.
[31] Statistical yearbook of Hungary, Central Statistics Office, 2012. p. 3.
[32] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007. p. 2.
[33] Brake E, Minimizing marriage: Marriage, morality and the law, Oxford University Press, New York, 2012.

exception of joint adoption and taking the partner's name).[34] Few of these rights include social benefits, making decisions about life or death, in case of an illness or accident. Furthermore, upon the death of one partner, the surviving member of the couple is entitled to certain benefits, such as pensions or tax exemptions.[35]

Further problems are generated from the fact that marriage is not universally supported among the groups that are supposed to benefit from it. Consequently the abolition of marriage exists as a valid view, mostly among different groups of feminists and lesbian and gay rights activists. Even as early as the 1960, Swedish lesbian activists expressed their opinion that marriage actually "*….forces lesbians to accept the outmoded institution of family….*"[36] Feminist critiques claimed the elevation of marriage as the primarily accepted social institution to be fundamentally unfair by treating women, children, sexual minorities and unmarried people in a very discriminative way, both in societal recognition and economic respects.[37] Concerns over the lack of state response to spousal abuse and domestic violence by citing the respect for private, married life ruins the reputation of marriage even further. Based on these points, marriage might be seen as a mere societal expectation which was forced on couples centuries ago and is now irrelevant.[38]

Moreover, some lesbian and gay activists voiced their opposition to declare same-sex marriage as the ultimate right to be gained. Their reasoning includes that marriage is a profoundly heterosexual institution which can interfere and threaten aspects of the gay and lesbian culture which can be regarded as being started from free love. [39] A further problem is the expansion of an institution that is already in crisis to homosexuals, an institution that in

[34] 2009. XXIX. Act About registered partnerships and the modifications of certain acts needed to certify the partnership.
[35] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007.
[36] Herzog D, Sexuality in Europe: a twentieth-century history, Cambridge University Press, Cambridge, 2011. p. 170.
[37] Brake E, Minimizing marriage: Marriage, morality and the law, Oxford University Press, New York, 2012. p. 120.
[38] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007. p. 132
[39] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007.

turn establishes a hierarchy between couples, excluding the ones not wishing to tie the knot. In fact, marriage is seen to be a broken down, far too traditional ceremony which only diverts the attention of the lesbian and gay community from bigger problems, such as the discrimination of homosexuals in several spheres of life, such as employment or healthcare.[40]

[40] Badgett M V L, When gay people get married: What happens when societies legalize same-sex marriage?, New York University Press, New York, 2009.

In defense of marriage and the significance of same-sex marriage

Even though the reputation of marriage is definitely at a low point these days, arguments can be brought up why it should be reinstated as the official forum for a relationship. As a symbolic defense it can be said that this institution is still the celebration and representation of a couple's commitment.[41] Furthermore, from a communitarian point of view, the Western cultural sphere has been accused to place too much emphasis on individual success. Marriage on the other hand is undoubtedly a project where two people help each other and create their own shared life. In addition, creating a family through marriage is claimed to be the calmest, most appropriate way to start to raise children.[42]

Thirdly, marriage may be defended from a utilitarian viewpoint, as it brings certain entitlements for the participants, as well as their children.[43] Even though there is a possibility for registered partnership to take the place of marriage, some countries such as France (institution of PACs) do not recognize it as an equal to marriage.[44]

Certainly arguments can be made both for and against the institution of marriage. However it cannot be denied that it is an ancient ritual that still can hold a special place in society. It may not be a commitment for life for everyone, but it may be the final step in determining the seriousness and stability of a relationship.

Nowadays marriage is a similar to a contract between equal partners. It has transformed from being a traditional ritual that hands over the woman from her father to her new husband with the blessing of God to a legal institution which provides recognition for the couples and

[41] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007. p. 58.
[42] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007. p. 69.
[43] West R, Marriage, sexuality and gender, Paradigm Publishers, Boulder, 2007. p. 70.
[44] 99-944 Act of 15 November 1999 About the pacte de civil solidarité.

assurances from the state that their relationship will be respected.[45] Since its cultural meaning still remains, for groups secluded from traditional marriage it is a way to gain social acceptance.[46]

The lesbian and gay community is such a group in society. The reason why same-sex marriage is such important agenda in the lesbian and gay rights movement is because marriage today simply means the public recognition and validation of a loving relationship. It means that the state values the couple to give them an official declaration and special rights and benefits and therefore hold every couple equal to each other. In addition, there is an aspect of choice involved in marriage, meaning to choose whether to marry or not to marry and this is currently not available for all partnerships. Creating alternative institutions does not seem to solve this, as they are just the legalization of the exclusion of a certain minority from an institution. This, in fact, goes against the idea of non-discrimination and equality, which is one of the basic human rights.[47]

The road for the gay community to reach wide social acceptance leads through the institution of same-sex marriage. The reputation of marriage might not be very high, but its relevance still remains as the most important step to legitimize a relationship, even without the traditional, religious overtones.[48]

[45] Lee A M, Lee E B, Marriage and the family, Barnes and Noble, New York, 196. p. 105.
[46] Brake E, Minimizing marriage: Marriage, morality and the law, Oxford University Press, New York, 2012. p. 149.
[47] Badgett M V L, When gay people get married: What happens when societies legalize same-sex marriage?, New York University Press, New York, 2009.
[48] Brake E, Minimizing marriage: Marriage, morality and the law, Oxford University Press, New York, 2012. p. 186.

Chapter 2

The evolution of national legislation about marriage and the case law of the European Convention on Human Rights

This chapter concerns the legislation of my chosen jurisdictions concerning marriage and registered partnership. In the case of Hungary I am taking 1989-1990, the fall of the socialist regime as the starting point of analysis of the change of legislation concerning marriage This change set Hungary on the course to try to become a modern, democratic state and it was during the early 1990s when the sexual revolution of the West reached behind the fallen Iron Curtain.[49] This change included the rise and wider recognition of the movement for lesbian and gay rights. Furthermore the political change started the country off to a road to become a modern, democratic state which makes it possible to look at the legislative processes comparatively with Western democracies, such as France.

Along with presenting the constitutions, civil codes and different judicial bodies and pieces of legislations from Hungary and France, this chapter will also discuss various articles from the European Convention of Human Rights, mainly Articles 8 and 12, with a little touch on article 14 and Protocol 12. This discussion will entail the position and interpretation of the European Court of Human Rights, based on relevant case law, on the subject of same-sex partnership and the possibility of marriage.

[49] Herzog D, Sexuality in Europe: A twentieth-century history, Cambridge University Press, Cambridge, 2011. p. 184.

Hungary

Two constitutions

The Hungarian transition to democracy included the most unique aspect, namely that no new constitution was ever accepted to symbolize the change. The new order was the result of an interim compromise which ended up staying in force for several years.[50] Although there have been efforts and pressure and by reigning political parties (The Hungarian Socialist Party and the Free Democrats) firstly in the years directly after the fall of communism and secondly in the mid-2000s to draft a new constitution, these efforts always proved to be in vain. Even though the political alliance of the socialists and the free democrats did have a two-third majority that is needed for such legislation, negotiation fell though due to lack of compromise over what this document should contain.[51] Therefore the constitution Hungary had until 1 January 2012 still had some parts of the one enacted in 1949. However the collapse of the previous system had been signified by amendments made within the framework of a law (1990/XL.) that changed the most important aspects about the establishment of the country. These amendments transformed the constitution significantly, with their most important aspect being the proclamation that "*The Republic of Hungary is an independent, democratic state*."[52] The constitution nevertheless retained some of its earlier framework and definitions. The reformed constitution refers quite briefly to family and marriage, and the provision about the Hungarian nation's philosophy of these institutions was left intact. Its fifteenth paragraph contains the following: "*The Republic of Hungary protects the institution of marriage and*

[50] Dupre C, Importing the law in post-communist transitions : the Hungarian Constitutional Court and the right to human dignity, Hart Publishing, Oxford, 2003. p.32.
[51] The basic law of Hungary: A first commentary, (eds.) Csink L, Schanda B & Varga A, Clarus Press, Dublin, 2012. p. 4.
[52] 1990/XL Act. Amendments to the constitution of the Republic of Hungary, Paragraph 1.

family."[53] This proclamation stood until the enactment of the basic law and was often cited as a source by the Constitutional Court when reviewing matters concerning family law.

However, with the change of government in 2010, the winning parties FIDESZ and KDNP managed to gain two-third majority in the parliament and immediately started a constitutional reform. On 29 June 2011 an ad-hoc committee was establishes and tasked with identifying the key aspect and then drafting the new constitution. Although the opposition was originally invited to become part of the drafting process, they dropped out almost immediately, citing the injustice of the process and the lack of consultation and debate as their reason.[54] Therefore the committee presented the draft constitution (officially the basic law of Hungary) before the parliament in March 2011. The debate of the basic law took place from 22 March. It was then voted and accepted on 18 April. The new basic law of Hungary is in force since 1 January 2012.[55]

The intent of creating the basic law, according to the governing parties, was to represent a new Hungary. It is not denied, even contained in the preamble, that this document was born with political aims, to eliminate the alleged crisis the Hungarian nation was going through at that time.[56] However, the creation and reception of the basic law, both domestically and in international circles, was not particularly enthusiastic. During the work of the ad-hoc committee and the parliamentary debate, the opposition constantly brought up the fact that they were excluded from the decision making process, as their amendment propositions were continuously disregarded. When a representative suggested sending the basic law to the people, and asking for a referendum, his proposition was refused to even be considered.[57] The

[53] 1949/XX Act. Constitution of the Democratic Republic of Hungary, Paragraph 51.
[54] The basic law of Hungary: A first commentary, (eds.) Csink L, Schanda B & Varga A, Clarus Press, Dublin, 2012. p.9.
[55] The basic law of Hungary: A first commentary, (eds.) Csink L, Schanda B & Varga A, Clarus Press, Dublin, 2012. p. 8.
[56] The basic law of Hungary: A first commentary, (eds.) Csink L, Schanda B & Varga A, Clarus Press, Dublin, 2012. p. 21.
[57] Tibor Bana, Jobbik
The records of debates and voting statistics can be accessed here

draft then passed with an overwhelming majority, but the supporting representatives all came from the governing parties, not a single opposition representative approved the law.[58]

The European Union also expressed concern over the basic law. The Venice Commission examined it in detailed and found worrying tendencies, such as the speed with which the law was prepared and accepted that did not allow the proper involvement of civil society and completely excluded the media. Furthermore, based on the voting statistics the basic law can be perceived as representing only a part of the Hungarian people.[59] The Commission criticized the overuse of future cardinal laws as well. Since these laws also required two-third majority in parliament, they can be regarded as limiting the possibility to rethink and rewrite certain passages over which societal consensus may change over time.[60]

The provisions of the basic law about marriage and family were among the ones that raised the most concern in Europe. While the basic law contains the wish of Hungary to work within the framework of the European Union and respect the fundamental rights and freedoms of the European Convention on Human Rights, the articles concerning family and marriage definitely take a quite backward approach to that of the European Court of Human Rights.[61] Family first surfaces in the preamble as "*We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are*

2010-2014:
http://www.parlament.hu/orszaggyulesi-naplo-elozo-ciklusbeli-adatai?p_auth=uIuoo3IX&p_p_id=pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&_pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_ujnapok_ckl%3Fp_ckl%3D39
2006-2010:
http://www.parlament.hu/orszaggyulesi-naplo-elozo-ciklusbeli-adatai?p_auth=uIuoo3IX&p_p_id=pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&_pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql%2Fogy_naplo.naplo_ujnapok_ckl%3Fp_ckl%3D38
From now on, I will only indicate the name and party affiliation of the person who can be linked to the opinion.

[58] Voting statistics of the basic law of Hungary

[59] The basic law of Hungary: A first commentary, (eds.) Csink L, Schanda B & Varga A, Clarus Press, Dublin, 2012. p. 9.

[60] Opinion on the new constitution of Hungary, adopted 18 June 2011 by the Venice Commission, Paragraph 23.

[61] Dombos T & Polgári E, Amicus brief on the act of the protection of families, p. 2.

fidelity, faith and love."[62] The most controversial passage of the basic law proved to be Article L, which proclaims that "*Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage and/or the relationship between parents and children.*"[63] Even though the European Court found no official consensus on same-sex marriage among the member states and never claimed same-sex marriage to be under the scope of either Article 8 or 12, it nevertheless acknowledged that gay and lesbian relationships are to be regarded as family.[64] Furthermore the court also stressed the trend among European countries that leads to more and more of them legally allowing same-sex marriage.[65] In this aspect the deliberate disregard of lesbian and gay couples shows a worrying tendency about the perception of same-sex relationships by Hungarian political elite. Article L contains another concerning aspect, namely the minimization of registered partnerships, which by law are just as valid as marriages both for opposite and same-sex couples.[66] However, the Venice Commission's position over Article L is leaving it up to the national legislation. The Commission claims that the lack of consensus in Europe and the fact that the law does not directly discriminate registered partnerships (which is designed for same-sex couples) gives enough support for the Hungarian parliament to be trusted.[67] In addition, the Commission noted the missing characteristic of sexual orientation from the discrimination clause of the basic law.[68] They found this to be against the latest European developments (in 2010, the EU in fact listed sexual orientation as a ground for discrimination which requires protection[69]). But the presence of 'other circumstances' in the text of the

[62] basic law of Hungary, 2012, Preamble
[63] basic law of Hungary, 2012, Article L Paragraph 1.
[64] Schalk and Kopf v. Austria, 30141/04, ECtHR, 2010, Paragraph 94.
[65] Currently,same-sex marriage is legal in 12 states, five of whom passed a law about marriage equality in the last three years
[66] Dombos T & Polgari E, Amicus brief on the act of the protection of families, p. 2.
[67] Opinion on the new constitution of Hungary, adopted 18 June 2011 by the Venice Commission, Paragraph 50.
[68] basic law of Hungary, 2012, Article XV.
[69] Charter of Fundamental Rights of the European Union, 2000, Article 21.

provision actually gives hope that the Constitutional Court can interpret sexual orientation as part of the protected characteristics.[70]

[70] Opinion on the new constitution of Hungary, adopted 18 June 2011 by the Venice Commission, Paragraph 79.

The Civil Code, the Constitutional Court and existing legislation

Since the exact definition of marriage and family was not mentioned constitutionally before the enactment of the basic law, family matters were regulated by lesser laws. Before 2013, when a completely new Civil Code came into force, the rules of marriage existed according to the 1952/IV. Act, which declared that "*Marriage can only be performed between men and women of age*."[71] Furthermore the Civil Code, which has been in force since 1959 claimed partnerships to be "…*a man and a woman, living together in a household, in emotional and economic commitment, without marriage*…"[72] But after 1990, this definition went through significant changes. In 1995, the two provisions were challenged by lesbian and gay rights activists who claimed that them to be discriminatory towards same-sex couples. In its landmark 14/1995 decision the Hungarian Constitutional Court stated that "*An enduring union of two persons may realize such values that can call for legal acknowledgment on the basis of equal human dignity of those affected, irrespective of the sex of the cohabiting partners*."[73] It did, however, refuse the right of marriage from gay and lesbian couples. The Court it cited several reasons in support. Firstly, neither the Hungarian nor the European society accepts a consensus about same-sex marriage. Secondly, international documents never mention the rights to be married for same-sex couples as valid and thirdly, the Hungarian constitution specifically stresses the protection of family as one of its core values, and at this point, gay and lesbian couples were not considered to constitute a family.[74] The declaration about partnerships being expanded to same-sex couples was actually taken seriously by the court

[71] 1952/IV Act about marriage, family and guardianship, Paragraph 10 (1)
[72] 1959/IV Act The Civil Code of the Democratic Republic of Hungary, 685/A
[73] 14/1995 decision of the Hungarian Constitutional Court, 07. 03. 1995. My translation. http://public.mkab.hu/dev/dontesek.nsf/0/DA693CDE8BF08185C1257ADA005257FB?OpenDocument (Last accessed 26 March 2015)
[74] 14/1995 decision of the Hungarian Constitutional Court, 07. 03. 1995. http://public.mkab.hu/dev/dontesek.nsf/0/DA693CDE8BF08185C1257ADA005257FB?OpenDocument (Last accessed 26 March 2015)

and consequently, the Civil Code was amended the next year, defining domestic partners as "*two persons living in an emotional and economic union, in a common household, without marriage*."[75]

During the 2000s there have been attempts to bring same-sex couples under the scope of registered partnership, the first try being in 2007. The parliament narrowly voted the legislation to be valid, but it was immediately challenged before the Constitutional Court, which then claimed it unconstitutional. In its 154/2008 decision, the court ruled against the law by claiming that partners being members of the opposite sex is a crucial element of marriage, and this is protected explicitly in the constitution.[76] They did, however, make a disclaimer that "…..*creating legislation about registered partnerships for same-sex couples is not unconstitutional.*"[77] With this decision, they left open a window for future legislation which the government used to their advantage. Their second proposition about extending registered partnerships to gay and lesbian couples in 2009 was again voted into valid legislation, and its constitutional challenge failed before the court.[78] Therefore currently the institution of registered partnership is available for same-sex couples in Hungary.

However, the change of government in 2010 affected legislation about marriage greatly. In 2011, the parliament accepted Act no. CCXI., titled 'About the protection of families', which elaborated their position (which was already hinted at in the basic law) about what they consider to be a lawful family. It claimed the family is *"…the solid and enduring relationship of the mother and the father, which is fulfilled in the responsibility for their children."*[79] But parts of this legislation have been found to be unconstitutional.[80] Even more recently, in 2013, a new Civil Code was enacted by parliament. This code sets the process of marriage as

[75] 1996/ XLII Act Amendment to the Civil Code of the Republic of Hungary, Paragraph 2.
[76] 154/2008 decision of the Hungarian Constitutional Court, 17.12. 2008.
[77] 154/2008 decision of the Hungarian Constitutional Court, 17.12. 2008.
[78] 32/2010 decision of the Hungarian Constitutional Court, 25.03.2010.
[79] 2011/CCXI Act About the protection of families, Preamble.
[80] 43/2012 decision of the Hungarian Constitutional Court, 20.12. 2012.

".....the man and woman present themselves together before the registrar and proclaim their wish to be married.....and....without the fulfillment of these conditions, the marriage is to be regarded null and void."[81]

Legislation about marriage changed constantly in Hungary, especially in the last few years. Even though registered partnerships are still open for same-sex couples to take, but the views expressed in most recent legislation implies a negative tendency towards the recognition of gay and lesbian relationships.

[81] 2013/V Act about the Civil Code, Paragraph 4:5 (1) and (3)

France

The constitution

The French Constitution of 1958 does not actually contain any declaration of rights and freedoms provided to citizens. Instead, in its preamble, the document recalls the Universal Declaration of Man and Citizen and the Preamble of the Constitution of 1946 as the framework to legislate about fundamental rights and freedoms.[82] In these two documents there is no specific mention about marriage or family. The 1946 Constitution proclaims that "*....the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights.....and..... the Nation shall provide the individual and the family with the conditions necessary to their development*"[83] In addition, according to decision 2010-92 of the Conseil Constitutionnel, the right to marry derives from Articles 2 and 4 of the Universal Declaration of Man and Citizen.[84] Therefore that the foundation of all political association is the conservation of the conservation of the natural rights of man, among them liberty[85] and liberty means the possibility to do anything until it does not infringe the rights of others.[86] The only vague mention can be found in Article 34 which contains that "*Statutes shall determine the rules concerning: civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties; freedom, pluralism.....*"[87], which basically means that it is up to the legislator to create appropriate acts to regulate fundamental rights.

[82] Constitution of 4 October 1958, Preamble.
[83] Constitution of 1946, Fourth Republic, Preamble.
[84] Decision 2010-92 of 28 January 2011 of the Conseil Constitutionnel, Paragraph 6.
[85] Universal; Declaration of Man and Citizen, 1789, Article 2.
[86] Universal; Declaration of Man and Citizen, 1789, Article 4.
[87] Constitution of 4 October 1958, Article 34.

The Code Civil

Since there is no mention about marriage or family in the constitution, their definition could be found in different legislative documents. One of them, probably the most important is the Code Civil of France. This document has enormous respect in the political and legal life of France, because it has been in force for more than two centuries, with occasional changes obviously. The constitution and state institutions may have changed dramatically through modern French history, but the Code Civil always remained.

There are two passages in the Code Civil that define how marriage should work, and both of them create no small amount of controversy, especially in the light of recent developments in the field of family life regulations. According to article 75 "*He (the registrar) shall receive from each party, one after the other, the declaration that they wish to take each other as husband and wife; he shall pronounce, in the name of the law that they are united by marriage, and he shall draw up a record of it at once."*[88] Furthermore Article 144 declares that male under the age of eighteen and a female under the age of fifteen cannot marry.[89] When lesbian and gay rights activists challenged these provisions in 2011 as being of a discriminatory nature to gay and lesbian couples, they did not succeed in overturning the passages, but the 2013 France law allowing same-sex marriage made the language of these articles gender neutral.

[88] Code Civil, Article 75.
[89] Code Civil, Article 144.

The Conseil Constitutionnel

Originally the French constitution did not establish a court to review the constitutionality of regular and institutional acts. The body which instead practices some of the functions of a constitutional court, is called the Conseil Constitutionnel.[90] However, it is not a court, it works in a different, more politicized way. An interesting aspect of its inner workings include closed hearings, which does not conform to European norms.[91] A large majority of its past and present members are politicians, and the nature of their decisions in some aspects mirror political strategy (until 2007, 43 of the members of the Conseil were various ministers).[92] Decision 2010-92 is a perfect example for this, by ruling that same-sex couples do not have the right to marry in France, which proved to be a very controversial one, mainly due to the justifying reasons. The chief justification given by the Conseil is the ability of the legislators to judge the consequences of their decisions.[93] According to the Conseil, the sources of French constitutional law do not cover the marriage of couples of the same-sex.[94]

In addition the French Conseil Constitutionnel does not particularly use European or international documents and treaties as sources for its decisions. While the Hungarian Constitutional Court specifically looks at European and other international instruments (such as the European Convention on Human Rights, the European Court of Human Rights' case law and European Union law) when passing its judgments (comparative law is used, for

[90] Constitution of 4 October 1958, Article 61.
[91] Albi A, *France, the impact of European fundamental rights on the French Constitutional Court*, in (eds) Popelier P, Van de Heyning C & Van Nuffel P, Human rights protection in the European legal order : the interaction between the European and the national courts, Intersentia, Cambridge, p. 230.
[92] The French Fifth Republic at fifty : beyond stereotypes, (eds.) Brouard S, Appleton A & Mazur A, Palgrave Macmillan, New York, 2009.
[93] Decision 2010-92 of 28 January 2011 of the Conseil Constitutionnel, Paragraph 5 and 7.
[94] Decision 2010-92 of 28 January 2011 of the Conseil Constitutionnel, Paragraph 8.

example in the 14/1995 decision), while the Conseil Constitutionnel does not seem to be looking to Europe during the decision making process.[95]

[95] Albi A, *France, the impact of European fundamental rights on the French Constitutional Court*, in (eds) Popelier P, Van de Heyning C & Van Nuffel P, Human rights protection in the European legal order : the interaction between the European and the national courts, Intersentia, Cambridge, p. 234.

PACs and 2013 same-sex marriage law

Even though the Code Civil or the constitution does not give a great support for legislation about same-sex relationships, there have been significant developments in this area since the late 1990s. The official recognition of the rights of gay and lesbian relationships occurred first in 1998, when the proposition of the pacte civil de solidarité (PACs) came about. Although the first attempt of making it though the parliament failed, it eventually found a way to become law in November 1999.[96] Since this form of registered partnership openly benefitted same-sex couples much more (since until then they did not have the possibility of official recognition), the adoption of the 99-944 Act sparked a wildly intense public debate, with right-wing representatives, such as Christine Boutin spearheading the charge against the enactment of this law, who at one point declared that "…*the two victims of PACs are families and single persons*".[97] Nevertheless the 99-944 Act entered into force on 16 November 1999, with a pacte civil de solidarité being defined as "*contract between two persons of age, either of the opposite or the same-sex, to organize their life together.*"[98] Although the PACs are very similar to civil marriage, they actually do not count as such. The constitutionality of the PACs were challenged before the Conseil Constitutionnel, however the Council declared it to be constitutional, yet again using the reason that the legislator sees most clearly the developments in the domestic trend concerning a life of a committed couple, therefore if the

[96] 99-944 Act of 15 November 1999 About the pacte civil de solidarité
[97] Debate in the National Assembly, 8 December 1998
The records of debates and voting statistics can be accessed here
For the 2014 debate:
http://www.assemblee-nationale.fr/14/dossiers/mariage_personnes_meme_sexe.asp
For the 2011 same-sex marriage law proposition:
http://www.assemblee-nationale.fr/13/dossiers/mariage_couples_meme_sexe.asp
For the debate about the PACs:
http://www.assemblee-nationale.fr/11/cra/1998-1999/98120821.asp
[98] 99-944 Act of 15 November 1999 About the pacte civil de solidarité, Article 515-1.

law is accepted, it will stand.[99] In the next two decades the concept of PACs proved to be a success. While the number of marriages gradually declined over the years, the number of PACs formed per year has been rapidly increasing. Furthermore approximately 90-95% of PACs are conducted between couples of different sex.[100]

The issue of same-sex marriage surfaced a few years later. In 2006, the National Assembly ordered a report about the family and the rights of children, in which they examined the possibility of same-sex marriage, however they refused to make it legal. In this case, the report contained references to the European Convention on Human Rights, namely that neither Article 8 nor 14 covers the right and the protection of same-sex marriage. Therefore the report concluded that "*It results from the lack of ambiguity in the (European) Court's decisions that marriage in France cannot mean anything else than a union of a man and a woman.*"[101]

Meanwhile the agenda of same-sex marriage was taken up by the political left as one of their issues. In early 2008, Socialist representatives, among them the current President Francois Hollande, proposed a bill to legalize same-sex marriage in France. Bill no. 586, however, did make it through the National Assembly and failed to find enough support to be voted on. The then-governing party Union for Popular Movement voted largely against the motion which was defeated 222 votes to 293 on 14 June 2011.[102]

In 2012, during his presidential campaign, Francois Hollande openly declared support for a future same-sex marriage bill. The Socialist Party won the election, which enabled to start legislation immediately.[103] Draft of the bill was finished late 2012, and its debate took place during January to April of 2013. The final vote was scheduled on 24 April 2013 and bill

[99] Decision 99-419 of 09 November 1999 of the Conseil Constitutionnel Paragraph 26.
[100] INSEE statistics
http://www.insee.fr/fr/themes/tableau.asp?ref_id=NATTEF02327 (Last accessed 26 March 2015)
[101] Report 2832 Part II 1/b, 25 January 2006.
http://www.assemblee-nationale.fr/12/rap-info/i2832.asp
[102] Voting statistics
http://www.assemblee-nationale.fr/13/scrutins/jo0773.asp
[103] Baruch M, *Gay marriage and the limits to French liberalism* (2013) Dissent 4, p. 25.

triumphed with 331 votes for and 225 against. The two biggest political forces almost uniformly voted for their own agenda. The law was signed by President Hollande on 18 May and came into effect the next day.[104] The constitutionality of the act was immediately brought before the Conseil Constitutionnel, but this time, the Conseil claimed the act to be in line with the constitution.[105]

The public reaction to the 2013-404 Act was not uniformly enthusiastic. Participants numbered over tens of thousands in protest against this law. Members of the political right, representatives of the Catholic Church and several media personalities expressed their condemnation.[106] Nevertheless the law is still in force, and same-sex marriage is now actually legal in France, making it the ninth country in Europe to recognize such unions.[107]

[104] Voting statistics
http://www.assemblee-nationale.fr/14/scrutins/jo0511.asp
[105] Decision 2013-669 of 17 May 2013 of the Conseil Constitutionnel.
[106] Baruch M, *Gay marriage and the limits to French liberalism* (2013) Dissent 4, 26-27.
[107] Herzog D, Sexuality in Europe: A twentieth-century history, Cambridge University Press, Cambridge, 2011.

The European Convention on Human Rights

The Convention has three articles and one protocol that can be used to bring claims for same-sex couples, therefore to provide a standard for states to follow in their practice: Article 8 concerning private life, Article 12 concerning marriage, Article 14 and Protocol 12 concerning the prohibition of discrimination. I will elaborate on how the rights of lesbian and gay couples can be realized under these articles and how far has the Court taken same-sex partnership recognition.

In advance, based on its case law, the European Court of Human Rights seems quite open to progress, new ideas and the acceptance of new social phenomena. Although same-sex marriage is not recognized under the Convention yet, there are other positive developments such as bringing same-sex couples under the notion of family life or the judging discrimination based on sexual orientation with strict scrutiny.

Article 8

Article 8 has been, for decades, the chief instrument under which the issues concerning homosexuality could be brought, mostly because the scope of it can be interpreted very widely and flexibly. This, however, carries the danger of inconsistency and confusion when it comes to how the court uses its power to give a verdict.[108] The article gives protection from interference in the sphere of private life, family life, home and correspondence.[109] Of these four, the court usually considers lesbian and gay issues under private life as the part of personal integrity, and also with a parallel accusation of discrimination under Article 14. Since the landmark decision *Dudgeon v. The United Kingdom*, sexuality and sexual conduct are considered to be "*essentially private manifestation(s) of the human personality*."[110] For a long time the court refused to accept homosexual relationships under the scope of family life. Several times, the court rather deflected towards the discrimination aspect, than discussing the case under Article 8.[111] However, in the judgment of *Schalk and Kopf v. Austria*, the court declared for the first time that same-sex relationships do belong under the notion of family life by claiming that "*…the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. 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*

[108] Aleca C & Duminica R, *Jurisprudential issues concerning the interpretation of Article 8 of the European Convention on Human Rights*. Current Issues of Business & Law. 2012, Vol. 7 Issue 1, p. 112.
[109] European Convention on Human Rights, 1950, Article 8.
[110] Dudgeon v. The United Kingdom, 7525/76, ECtHR, 1981, paragraph 60.
[111] "The Court does not find it necessary to determine the notions of "private life" or "family life" because, in any event, the applicant's complaint relates to the manner in which the alleged difference in treatment adversely affected the enjoyment of his right to respect for his home guaranteed under Article 8 of the Convention." Karner v. Austria, 40016/98, ECtHR, 2003, paragraph 33.

a different-sex couple in the same situation would"[112] and since then, this interpretation has been used in multiple cases.[113]

It is also worth to take a look at the obligations Article 8 places on the member states. The negative obligation, the freedom from interference is obvious from the text of the provision, but Article 8 entails a positive aspect as well. "*Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life…*"[114]

Therefore the current standard of the court on same-sex relationships under Article 8 is their acceptance under the notion of 'family life.' Bringing marriage claims under this provision is not accepted, because marriage has its own separate article under the Convention.

[112] Schalk and Kopf v. Austria, 30141/04, ECtHR, 2010, paragraph 94.
[113] For example X and others v. Austria, 19010/07, ECtHR, 2013, paragraph 95. and Vallianatos and others v. Greece, 29381/09 and 32684/09, ECtHR, 2013, paragraph 73.
[114] X and Y v. The Netherlands, 8978/80, ECtHR, 1985, paragraph 23.

Article 12

The text of the Convention about marriage does not reflect very well on same-sex couples. A strictly textual interpretation might even exclude them from marriage. However, the court is not so short-sighted when it comes to accepting progressive ideas and has since, to some extent, reinterpreted the concept of marriage. At first, the problems and issues of marriages occurring after the sex change of one partner caused the court to open up the definition of marriage under Article 12. Since the decision in *Christine Goodwin v. The United Kingdom,* marriage is declared to be not dependent on biological criteria and the ability to procreate.[115] As mentioned above, the court is even willing to say that the reference to 'man and woman' in the text does not necessarily mean only opposite sex couples.

However, so far Article 12 has not been used by the court to justify same-sex marriage. As professed in *Schalk and Kopf* "*…the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment…*"[116] It can be explained with two reasons: firstly, the lack of consensus about the acceptance of same-sex marriage, within the member states. Consensus is, in itself, a double-edged sword for the court when making decision about new phenomena, because it can both be used to justify judicial restraint or judicial activism. It seems that the court is for now leaving it up to the national authorities to decide upon the matter. Secondly, the court always considers the available alternative institutions. If there exists an appropriate institution for same-sex couples in the member state (such as civil union or registered partnership) to have their relationship recognized, then their claim to marriage is not convincing to the court. "*The Court starts from its findings above,*

[115] Christine Goodwin v. The United Kingdom, 28957/95, ECtHR, 2002, paragraph 98-100.
[116] Schalk and Kopf v. Austria, 30141/04, ECtHR, 2010, Paragraph 62.

that States are still free, under Article 12 of the Convention…to restrict access to marriage to different-sex couples. Nevertheless, the applicants appear to argue that if a State chooses to provide same-sex couples with an alternative means of recognition, it is obliged to confer a status on them which – though carrying a different name – corresponds to marriage in each and every respect. The Court is not convinced by that argument. It considers on the contrary that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition."[117]

[117] Schalk and Kopf v. Austria, 30141/04, ECtHR, 2010, Paragraph 108.

Article 14 and Protocol 12

The two provision concerning discrimination differ profoundly in the Convention. Article 14 is older, can be found in the original text of the document, however, it is recognized by the court as an accessory right, which cannot function individually.[118] Furthermore, its text does not mention sexual orientation specifically as a protected characteristic. The court has since stated that it actually belongs under the scope of the article, under the notion of 'other status.'[119] Apart from being established to be under the scope of Article 14, sexual orientation is now also being regarded among the suspect characteristics, therefore it requires strict scrutiny by the court and particularly serious and weighty reasons as justification for interference by the state.[120] Based on this progress, Article 14 is regularly used in conjunction with either Article 8 or Article 12, to claim violation.

Protocol 12 is different from Article 14 in the fact that it is not an accessory provision. The general prohibition of discrimination can stand by itself. But this protocol has reached the number of needed ratifications in order to come into force in 2005, and its case law is only slowly developing. Unfortunately there is not any case concerning same-sex relationships ever decided under Protocol 12, but I mentioned it nevertheless, just as a future possibility. [121]

[118] European Convention on Human Rights: A commentary, (ed.) Grabenwarter C, Hart, Oxford, 2014, p.346.
[119] European Convention on Human Rights: A commentary, (ed.) Grabenwarter C, Hart, Oxford, 2014, p. 360.
[120] Salgueiro Da Silva Mouta v. Portugal, 33290/96, ECtHR, 2000, paragraph 28. and Smith and Grady v. The United Kingdom, 33985/96 and 33986/96, ECtHR, 1999, paragraph 90.
[121] European Convention on Human Rights: A commentary, (ed.) Grabenwarter C, Hart, Oxford, 2014, p. 444.

Chapter 3

Opposing arguments to the recognition of same-sex relationships

In this chapter, I move on to discussing the actual argument against the recognition in same-sex relationships. In the case of my two jurisdictions, the scope of the discussion is different. In Hungary, registered partnership has been introduced in 2009. However, due to recent events since the change of government, in addition to several factors, such as the increase in strength of conservative-minded parties, and the quite low social acceptance of same-sex relationships, marriage does not seem to be a possibility in the near future. Even though social acceptance has grown a little over the last few years, as nowadays support for same-sex marriage in Hungarian society levels around 30%.[122] I will try to identify the reasons why this has been happening.

In France, the situation is much different, since same-sex marriage has been legalized in 2013. Nevertheless, the conflict over lesbian and gay has not died yet. A considerable controversy surrounded the law itself, and ever since promises and attempts come ever more influential to curb the scope of the same-sex marriage law. I will discuss that even though opposition is present in both countries, due to cultural differences and differences in social attitudes, anti-lesbian and gay feeling manifest in a quite diverse manner.

Along with discovering situation, I would also like to expand on the European regional standard concerning the recognition of same-sex relationship, by using the jurisprudence of the European Court of Human Right as a control mechanism to which national standards can be measured against. Therefore this chapter will contain an analysis on the methods and

[122] Discrimination in Europe in 2015. Hungarian results of the Eurobarometer. ebs_437_fact_hu_hu

doctrines of the Court, as well as establishing the minimal level of respect which the Court requires from member states in the field of lesbian and gay rights, with further describing how Hungary and France abide to these mechanisms.

Visibility of the lesbian and gay community at the national level

Before starting on the opposing argument, it is worth to look briefly at the visibility of the lesbian and gay community in both France and Hungary, since social visibility is actually very much connected to the manifestations of the opposing arguments. Low visibility is problematic because it festers strongly. Sometimes unsaid social aversion to homosexuality, along with abuse and injustice against members of the lesbian and gay community might even be institutionally justified, but at least easily tolerated, not challenged. An active and visible community is more able to fight for equal rights, expand acceptance and normalize views concerning homosexuality. However, as with all forthcoming social movements, it is possible that larger visibility may generate more widespread and violent opposition.

It can be observed in recent years that the expansion of lesbian and gay rights, its most important aspect being civil unions and same-sex marriage, have created a very persistent opposing side, movements which even after the legalization of same-sex marriage find different ways to protect their own agenda.[123] In addition, fueling anti-gay feelings among the general population is still very present, and recently certain leading politicians in countries where same-sex marriage is legal have started mentioning the possibility of retraction.[124] Furthermore, especially in Europe there has been a surge of power of right-wing conservative and even far right-wing radical political forces, whose agenda usually advocated against the improvement of lesbian and gay rights and most especially, same-sex marriage.[125]

[123] Example here is the appearance of so-called religious liberty laws in the USA, such as the Religious Freedom Restoration Act in Indiana, which allows businesses to refuse to serve same-sex couples based on their confronted religious beliefs. Furthermore there has been a case before the European Court of Human Rights, Eweida and others v. The United Kingdom, where a public servant claimed discrimination of having to officiate same-sex unions despite his strong religious beliefs.

[124] One such politician is the French ex-president, Nicholas Sarkozy. http://www.theguardian.com/world/2014/nov/16/nicolas-sarkozy-calls-repeal-france-same-sex-marriage-law

[125] Such emerging far right-wing parties are present in both France (The National Front), Hungary (Jobbik party). Jobbik representatives have called same-sex marriage "unnatural" and "deviant" in speeches before parliament.

The awareness of lesbian and gay issues in Hungary is quite disappointing, however it did improve a little bit in the last years. The level of social acceptance of homosexuals has risen to almost 50% by 2015.[126] According to the Eurobarometer survey of 2012, the country was ranked 20th among the then 24 member states in public tolerance of lesbian and gay rights.[127] Public recognition and same-sex marriage enjoy and equal amount of opposition. In 2003, 63% of Hungarian adults disapproved of same-sex marriage. According to a 2007 survey, 18% of Hungarians would allow same-sex marriage, and the institution has an approval rate of 1.4 out of 10.[128] In 2015, 39% of the population agreed that same-sex couples should be allowed to be married.[129] However, there has hardly been any public discussion on the recognition of same-sex relationships so far (it has only come up in connection with the 2009/XXIX Act that introduced registered partnership). Furthermore, constant opposition and problem are present every year regarding the Budapest Pride. The march has notably been very difficult to organize with approval from the state, and has been attacked by counterdemonstrators multiple times (the most violent attack occurred in 2007). The event has even been banned by the police however these bans were overturned by courts.[130] The conduct and level of protection which the police provides has been questioned and called inadequate by lesbian and gay-rights NGOs.[131] More problems arise concerning the legal protection and non-discrimination of homosexuals. The Equal Treatment Authority (Egyenlő Bánásmód Hatóság) has been established in 2003, however during the 12 years of its activity, very few cases that concerned discrimination based on sexual orientation have ended in a

[126] Confronting homophobia in Europe : social and legal perspectives, Trappolin L, Gasparini A &Wintemute R (eds), Hart, Oxford, 2012. p. 80. Eurobarometer
[127] Takács J, How to put equality into practice? : Anti-discrimination and equal treatment policymaking and LGBT people, New Mandate, Budapest, 2007. p. 14.
[128] Gerhards J, Non-discrimination towards homosexuality (2010) International Sociology, Vol. 25. Issue 1. p. 10-12.
[129] Discrimination in Europe in 2015. Hungarian results of the Eurobarometer. ebs_437_fact_hu_hu
[130] The verdict that the police discriminated based on sexual orientation has been declared by the Budapest-Capital Regional Court on 18 September 2014.
[131] Opinion on the police conduct at the 2015 Budapest Pride. http://budapestpride.hu/hirek/rendori-biztositas-a-20-budapest-pride-fesztival-alatt

positive decision.[132] Furthermore according to the 2015 Eurobarometer survey, homosexuals still have the second lowest acceptance rate in everyday situations, just above 40%.[133]

The interesting aspect of the Hungarian case lies between the discrepancy of public support and the level of legislation that is currently in place. It can be observed that other countries with as low acceptance rate as Hungary (such as Poland, Lithuania and Greece) are not even close to introducing civil unions or registered partnerships.[134] In contrast, in Hungary, the 2009 legislation went through with a significant amount of public indifference, even if it was debated, to some extent, in political circles.

The French case shares little to none similarity to the Hungarian experience. Even though France has been characterized as the "least tolerant country" in Western-Europe and same-sex couples only constitute less than 1% of the population[135], the act allowing same-sex marriage has been met with widespread public approval. Contrary to Hungary, France had a 48% rate of approval concerning opening up marriage to same-sex couples, and 5.2 out of 10 citizens found acceptable (or at least tolerable) and justifiable.[136] However the representation of the lesbian and gay community in front of the Defender of Rights (Defenseur des Droits), the authority responsible for examining discrimination claims, has been just as low as in Hungary. In the five years since this authority exists, it has discussed very few cases concerning discrimination based on sexual orientation.[137] This can show that discrimination based on sexual orientation has difficulties in emerging as a problem.

[132] Cases of the Equal Treatment Authority
http://www.egyenlobanasmod.hu/article/index/jogesetek
[133] Discrimination in Europe in 2015. Hungarian results of the Eurobarometer.
ebs_437_fact_hu_hu
[134] Gerhards J, Non-discrimination towards homosexuality (2010) International Sociology, Vol. 25. Issue 1. p. 12.
[135] Legal recognition of same-sex relationships in Europe : national, cross-border and European perspectives, (eds.) Boele-Woelki K & Fuchs A, Intersentia, Cambridge, 2012. p. 437.
[136] Gerhards J, Non-discrimination towards homosexuality (2010) International Sociology, Vol. 25. Issue 1. p. 10-12.
[137] Cases of the Defenseur des droits.
http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/decision?theme_id=65&sub_id=467

Despite the seeming seal of approval on same-sex marriage by the majority of the population, this reaction was far from being unanimous and united during the debate over law in late 2012/early 2013. The opposers among French citizens have been very active, organizing several protests[138], even after the law has already been accepted by parliament and signed by President Hollande. The discussion over lesbian and gay rights has not disappeared since, and the issue is continuously kept in the attention of the public.

Therefore when confronting the Hungarian and French experience over the visibility of the lesbian and gay community, different approaches come to light. In Hungary, the institution of registered partnership has been pushed through, and the lack of public approval has been overshadowed by a general lack of awareness. However, the situation of the lesbian and gay community remains largely invisible, with the exception of the ever-controversy generating Pride Parade. Whereas French citizens were very much aware and active during the same-sex marriage debate, and even though statistics might show majority in favor, the opposition was loud enough to persist even until today. Therefore the issue of same-sex marriage is still on the agenda and quite influential public figures, politicians support its possible retraction.

[138] The organization La Manif pour tous has staged over a dozen demonstrations in Paris and other cities around the country. The biggest ones took place on 13 January and 2013 March 2013.

Manifestations of the opposing arguments

Opposition to the expansion of lesbian and gay rights can be found from the lowest to the highest circle of society. Therefore, different fora are used by persons and organizations with anti-lesbian and gay feeling to express their view and try to challenge new legislation. To a different extent, three methods are used most frequently.

Firstly, on the political level, legislation concerning possible introduction of lesbian and gay rights (either registered partnership or same-sex marriage) could be preceded by very intense debate in parliament.

The political structure has both similarities and considerable differences in Hungary in France. In both countries, the center-liberal left-wing party introduced the pro-lesbian and gay legislation, when they were on power and opposition came from the conservative (in the case of Hungary, religious conservative) and far-right wing radical political forces.[139] However, the process of the debate shows significant difference. In France, the length of the debate both for the PACs and same-sex marriage was on the agenda of parliament for six months at least, with established committees to inquire about public reactions, religious feelings, and possible social consequences.[140] The actual debate included 20 and 15 days of actual debate respectively, several of which was attributed solely and specifically to the issue of lesbian and gay rights.[141]

In Hungary, however, the process of acceptance of the 2009 Act happened much faster. The law rushed through parliament within two months, was only on the agenda for three days,

[139] French parliament officially cannot contain religiously affiliated parties.
[140] The report of the Committee of Social Affairs. 11 January 2013.
http://www.assemblee-nationale.fr/14/pdf/amendements_commissions/soc/0344-01.pdf
[141] The process of the passing of the law can be found, in detail, with debates, committee decisions, opinion polls.
http://www.assemblee-nationale.fr/14/dossiers/mariage_personnes_meme_sexe.asp

always in the midst of other issues, therefore a special debate day never happened.[142] Consequently, the opposition used the lack of social consultation as one counterargument to refuse the proposed legislation. Notably, the lack of consultation is not a problem that is specific to lesbian and gay issues, Hungarian governments (especially since 2010) have constantly been receiving criticism from the Venice Commission for their deficiencies in the field of democratic consultation.[143] The same party that criticized the lack of consultation in 2009 has continued to ignore public opinion once they came to power in 2010. Nevertheless, the quick implementation of the proposition did not really allow for any serious social movement to take place.

In connection, generating public opposition could also be a weapon to stop lesbian and gay rights legislation. As I have mentioned already, the manifestation of public opposition shows very different tendencies in Hungary and France. Even though registered partnership and same-sex marriage are issues which could generate quite widespread public opposition[144], yet in Hungary, no such event took place when the parliament was considering the 2009 Act. This might be connected to the very low level of visibility of the lesbian and gay community, and the lack of presence of lesbian and gay issues in public life. Therefore the law went through so quietly and silently that most people might not even have known about it, only after it was implemented. One possible reason for this may have been the unpreparedness of the Hungarian public to accept such a bill, therefore the silence could have been the drafters' intention.

In France, the situation is the polar opposite. The anti-PACS and anti-same-sex marriage movement was actively fueled by parliamentary representatives and also religious organizations. The main motivator of anti-PACs hate was Christine Boutin, a French

[142] On the day of the debate, registered partnership was discussed along with 3 other propositions.
[143] Opinion on the new constitution of Hungary, adopted 18 June 2011 by the Venice Commission.
[144] One such example is the US, where the issue remains constantly visible since the decision of the Supreme Court, experiencing backlash.

conservative politician, who once protested against the institution by carrying around a Bible in the Parliament and declaring that "*PACs is a chimera, a monster who pretends to address (the problems of) persons but who plays with the principal foundations of society*."[145] Mainly her advocacy resulted in the organization of anti-PACs demonstrations in certain cities of France. The protest attracted many participants, the demonstration in Paris on 31 January 1999 consisted of roughly 100 000 people.[146]

Still mistakes were reassessed in 2013, when the much more visible campaign the "Demonstration for everyone" (La Manif pour Tous, a spoof of the name of the pro-gay marriage movement, Mariage pour Tous – Marriage for everyone) have come together to protest against same-sex marriage. Even though the campaign has not resulted in the successful retraction of the proposition, it nevertheless found considerable attention among the society. A younger, seemingly less homophobic image[147] of the movement helped attracting between 300 000 (according to the police) and a million (according to the organizers) people during their biggest demonstration on 13 January 2013.[148] La Manif pour Tous has been active since September 2012 and it now operates as a non-governmental organization, still maintaining its advocacy. Furthermore, this campaign has distanced itself from any religion or political party (although it was supported by such institutions).

In connection to public demonstrations the role of civil society in opposition needs to be discussed. The French demonstrations were supported by several non-governmental organizations, who actually established a coalition to lead the opposition to same-sex-marriage. Different NGOs with mostly conservative (such as the anti-abortionist Alliance VITA, Civitas and UNAF) or religious agendas (mainly Catholic, but Muslim as well)

[145] Christine Boutin. My translation.
[146] Au-delà du Pacs : l'expertise familiale à l'épreuve de l'homosexualité , (eds.) Borrillo D & Fassin E, Presses Universitaires de France, Paris, 2001.
[147] During 1999 protests, signs used by opposers showed, for example: "Homosexuals of today are the pedophiles of tomorrow." Whereas La Manif pour Tous has tried to distance itself from homophobic accusations.
http://www.lamanifpourtous.fr/en/who-are-we/our-ethics
[148] http://www.lamanifpourtous.fr/en/give-nothing-up/the-protester-s-handbook

encouraged citizens to express their disbelief and sorrow towards same-sex marriage. Such NGOs are present not only nationally, but on the regional level as well. The European Court of Human Rights usually receives several third party interventions for every lesbian and gay-themed case it reviews. Organizations such as the European Center for Law and Justice regularly submit briefs to cases, most recently for *Vallianatos and others v. Greece* and *Oliari and others v. Italy*.[149] Therefore civil society activism has been just as strong in the anti-lesbian and gay agenda, as in the supportive movement.

If all else fails, pro-lesbian and gay legislation might be attacked even after it has been passed through parliament. In both Hungary and France, legislation has been challenged before a judicial or quasi-judicial authority. An interesting tendency shows in the reviews of these authorities as they have at first declared such laws unconstitutional, only to change their opinion very shortly. In the Hungarian case, members of parliament and non-governmental organizations first submitted a request for review to the Constitutional Court in 2008, when the Court refused the Registered Partnership Act. It has to be mentioned however that the Constitutional Court had no problem with the concept of partnership itself, and rather refused the law due to its exclusivity to same-sex couples.[150] However in 2010, the second attempt to invalidate the act was unsuccessful and it still stands.[151] In the French case, the constitutional review found PACs to be constitutional.[152] In 2013, the same-sex marriage law passed through the council, being hailed to be constitutional as well.[153]

[149] Written observations in the case of Vallianatos and others v. Greece.
http://eclj.org/pdf/Vallianatos-v-Greece-ECHR-ECLJ-WO-ENGLISH.pdf
Third party observations submitted to the European Court of Human Rights in the cases of Oliari & others v. Italy
http://eclj.org/pdf/Oliari-Orlandi-v-Italy-ECHR-ECLJ-WO-English.pdf
[150] 154/2008 decision of the Hungarian Constitutional Court, 17.12. 2008.
http://public.mkab.hu/dev/dontesek.nsf/0/6C09F3A24DAC9AE8C1257ADA005258D5?OpenDocument
[151] 32/2010 decision of the Hungarian Constitutional Court, 25.03.2010.
http://public.mkab.hu/dev/dontesek.nsf/0/F78D82B977A20D74C1257ADA00527EEF?OpenDocument
[152] Decision 99-419 of 09 November 1999 of the Conseil Constitutionnel
[153] Decision 2013-669 of 17 May 2013 of the Conseil Constitutionnel

As it can be observed, anti-partnership and anti-marriage attempts and campaigns have not been successful in either Hungary or France, for different reasons. Even though the Hungarian atmosphere is much more hostile to lesbian and gay rights, due to public indifference, the speed of the procedure, and a temporary relief in hostility, a registered partnership was allowed to pass through. However, its temporariness is strengthened by the fact that there have been no advancement in the field of recognition of lesbian and gay relationships ever since, what is more, the existence of registered partnership is starting to be threatened.[154] Conversely, the opposition same-sex partnership and marriage has been much stronger and more vocal in France, but the more widespread political and public support managed to ensure its coming to existence. Nevertheless, despite such positive tendencies, the anti-lesbian and gay movement persists, and starting to find renewed support.

[154] It is not mentioned in the new Civil Code.

The perspectives of opposition

After analyzing the form of anti-lesbian and gay conduct, I now move on to the actual conduct or arguments that persons and groups use to advocate against the recognition of same-sex relationship. The identified arguments categorized into 3 groups. According to my grouping, these include the opposition based on medical grounds and public health concerns (meaning that homosexuality stems from medical issues, and same-sex relationships are related to different public health problems/crises), opposition based on moral grounds (this mostly consists of the religious perspective, and the view of homosexuality and same-sex relationships as a sin) and lastly, the opposition based on social grounds (these are arguments that regard homosexuality as a social deviance, and same-sex relationships as being against the profound character of a certain society).

Opposition on medical and health grounds

Firstly, confronting same-sex relationships due to medical grounds or public health concerns has lost credibility and significance in the 21st century. In Europe, homosexuality is not regarded as a medical condition, or at least equating it to a disease that could be cured now generates considerable controversy. In addition, although the stigma of HIV/AIDS has not yet disappeared from public knowledge, the hypothesis that the disease only spreads from/between the lesbian and gay community has been disproved. Nevertheless such presuppositions occasionally still present themselves during the debate concerning same-sex relationships. A representative of FIDESZ has produced data from a study detailing the health risks of same-sex relationships, and actually referenced in parliament during the debate of the Act recognizing registered partnership in 2009, along with claiming that homosexuality can actually be cured.[155] The far right-wing party Jobbik has also claimed that homosexuality is *"sexual deviance and….homosexual parents cannot ensure the conditions for healthy physical, intellectual and moral development for children."*[156] In France, medical issues did not come up during the marriage equality debate, but they were present before, in the 1990s when the notion of PACS was first proposed. It was argued that this proposition *"introduces perversion to society"*[157] and therefore is not worthy of public recognition.

Even though medical arguments are sometimes still cited, in these jurisdictions, they are only cited by the most devout opposers of marriage equality. On the European level, although scientists are very careful in researching what exactly causes homosexuality, opposition based on medical grounds is not viable anymore. Homosexuality is not considered a medical

[155] Ékes Ilona, FIDESZ
[156] Kulcsár Gergely, Jobbik. My translation
[157] Christine Boutin. My translation.

disorder anymore and European Court of Human Rights does not consider these reasons to be enough to the differentiation and discrimination of homosexuals.[158]

[158] Smith and Grady v. The United Kingdom, 33985/96 and 33986/96, ECtHR, 1999.
The court refused the argument that lesbians and gays serving in the military carries health concerns.

Opposition on religious grounds

A timeless argument comes from certain churches against same-sex marriage by claiming the institution to be fundamentally incompatible with their respective core values and texts. Naturally there is a significant difference in the conduct and opinions of different churches and the extent of their influence over the process of enacting same-sex marriage into law as well (such as over the lawmakers or the general population).

However, reaction of religious institutions might be considered slightly contradictory, because in most countries where marriage equality has been implemented, the permission for same-sex couples to marry extends only to civil marriage which is a state-controlled institution, and marriage equality laws do not cover religious marriages.[159] Churches still have the power of conscience to refuse to marry same-sex couples in their congregations.

The French marriage equality debate is a perfect example of pointing out the contradictions between the behavior of certain religious institutions and the opportunities which they actually have the right to meddle in the issue of civil marriage. Naturally, freedom of speech allows organizations to express their opinion about same-sex marriage, but in this case, some churches go a little bit further than that.

When the marriage equality debate started in France, only the regulation of civil marriage was affected and the churches were and still are not required to perform same-sex marriages.[160] Yet, when the widespread anti-marriage movement, La Manif pour Tous, was formed in order to express the malcontent of French citizens against this legislation, churches in France

[159] Code Civil, Chapter II, Article 165.
Similarly, for further examples, in the United Kingdom and Spain, churches also do not have to perform same-sex marriages.
[160] Code Civil, Chapter II, Article 165.

strongly supported its goals. The Catholic Church publicly endorsed their aims[161] and the Islam Association of France urged its followers to participate in demonstrations.[162] Therefore, during the six months when the marriage debate has been going on in parliament, most churches of France have put aside their differences to unitedly stand behind the opposition of the 2013-404 Act.

France has several bigger and smaller churches, among whom four have issued declarations regarding their views on same-sex marriage, the Catholic Church of France, the Protestant Federation of France, the Union of Muslim Organizations of France and the Buddhist Union of France. Those churches that stood opposing the marriage equality bill had very similar foundations of arguments (these include the traditional nature of marriage, the protection of the family and the interest of children), however their actual language and detailed reasoning differ considerably.

The Catholic Church was the most active attacker of the proposition ever since its inception. The bulk of their reasoning comes from valuing marriage as an institution that can give life, and therefore has an important social value, which naturally would crumble with the legalization of same-sex marriage. Delving deeper, the church argues that historically marriage has always been a union of man and woman, and same-sex marriage supporters use this institution as a selfish, individualistic way of self-expression. Furthermore, marriage is a perfect space to recognize commitment, and its primary function should remain to bring up future generations.[163] While stating its intent, the church assures that homophobia is not something it condones, since gays and lesbians have been suffering discrimination for a very long time, therefore the church supports the PACs as an alternative for recognition for same-

[161] Communication released by the Catholic Church, 13 January, 2013. http://www.paris.catholique.fr/Suite-a-la-Manif-pour-tous-du-13.html
[162] Call for demonstration, Issued by the French Union of Muslim Organizations, 4 January 2013.
[163] Following the dialogue. Press release issued by the French Catholuc Church, 3 June, 2013. http://www.eglise.catholique.fr/conference-des-eveques-de-france/textes-et-declarations/365765-poursuivons-le-dialogue/

sex couples, however marriage, based on its uniquely important history, is not the place for the lesbian and gay community to seek recognition.[164]

The Catholic Church addresses the difference between civil and religious marriage most interestingly. They admit that the divide between the civil and religious institution has gotten so deep that "*Civil and religious marriage does not cover the same type of engagement anymore."*[165] Nevertheless it is further claimed that *"The sexual difference between man and woman, which is a fundamental element in thinking of marriage as alliance by the image of God, had been emptied from the definition of civil marriage."*[166] Therefore besides the declaration that civil marriage has undermined Christian values, the church really does not give any proper explanation why it is the task of the church to meddle with issues in a state institution.

Surprisingly, the Union of Muslim Organizations has expressed a very similar view about same-sex marriage as the Catholic Church. The basis of the argument has been built upon the notion of the importance of marriage in procreation. According to the Union, marriage from Muslim aspect means the unification of two families which and reciprocated family relations became the basis of humanity. [167] While also condemning the manifestations of homophobia, the union declares *"Our sense of conscience obliges us to oppose this project of law because our ethics do not permit us to put in danger the most fundamental foundation of our*

[164] / Following the dialogue. Press release issued by the French Catholuc Church, 3 June, 2013. http://www.eglise.catholique.fr/conference-des-eveques-de-france/textes-et-declarations/365765-poursuivons-le-dialogue/

[165] Following the dialogue. Press release issued by the French Catholuc Church, 3 June, 2013. My translation. http://www.eglise.catholique.fr/conference-des-eveques-de-france/textes-et-declarations/365765-poursuivons-le-dialogue/

[166] Following the dialogue. Press release issued by the French Catholic Church, 3 June, 2013. My translation. http://www.eglise.catholique.fr/conference-des-eveques-de-france/textes-et-declarations/365765-poursuivons-le-dialogue/

[167] On marriage between persons of the same-sex and homosexual parenting: The point of view of the UOIF. Press release issued by the French Union of Muslim Organizations, 13 November 2012. http://www.saphirnews.com/Sur-le-mariage-entre-personnes-de-meme-sexe-et-l-homoparentalite-le-point-de-vue-de-l-UOIF_a15689.html

society."[168] Furthermore, statistics are introduced to show that the recognition of same-sex marriage only concerns a very small minority in the French population who consist *"The proportion of the population so marginal that cannot even be regarded as a minority in the name of human values."*[169] However, contrary to the attempt of the Catholic declaration, the difference between civil and religious marriage is not addressed at all.

Contrary to the reaction of the above mentioned two churches, the Federation of Protestants chose a different route of expressing opinion concerning same-sex marriage. First of all, since marriage does not belong among the sanctities of the protestant churches, the revulsion towards same-sex marriage is not as strong. In their declaration, the Protestant Federation chooses to renounce *"to place control of constitutive acts of couples and families in the hands of the church."*[170] They further add that *"the protestant congregations do not question the legitimacy of the state to regulate marriage."*[171] Therefore the statements of the Protestant Federation are no more than opinions and even though they hold same-sex marriage only brings confusion in the symbolic role of marriage as a social institution, nevertheless they do not claim marriage equality to be a moral issue, merely a discourse over the symbolism behind marriage.[172] The issue of the difference between civil and religious marriage is not expanded upon explicitly, marriage is looked upon primarily as a state institution which the church has really no legitimate reason to interfere in.

[168] On marriage between persons of the same-sex and homosexual parenting: The point of view of the UOIF. Press release issued by the French Union of Muslim Organizations, 13 November 2012. My translation. http://www.saphirnews.com/Sur-le-mariage-entre-personnes-de-meme-sexe-et-l-homoparentalite-le-point-de-vue-de-l-UOIF_a15689.html

[169] On marriage between persons of the same-sex and homosexual parenting: The point of view of the UOIF. Press release issued by the French Union of Muslim Organizations, 13 November 2012. My translation. http://www.saphirnews.com/Sur-le-mariage-entre-personnes-de-meme-sexe-et-l-homoparentalite-le-point-de-vue-de-l-UOIF_a15689.html

[170] Declaration of the Council of the Protestant Federation of France on the 'mariag epour tous.' Press release issued by the Protestant Federation of France, 31 October 2012. My translation. http://www.protestants.org/?id=33257

[171] Declaration of the Council of the Protestant Federation of France on the 'mariag epour tous.' Press release issued by the Protestant Federation of France, 31 October 2012. My translation. http://www.protestants.org/?id=33257

[172] Declaration of the Council of the Protestant Federation of France on the 'mariag epour tous.' Press release issued by the Protestant Federation of France, 31 October 2012. http://www.protestants.org/?id=33257

The French Buddhist Union was also asked to provide a statement regarding their opinion about same-sex marriage. The Union stressed the lack of unified voice within the Buddhist community to abstain from grand declarations, with further adding than *"For the Buddhists, marriage is not a religious, but a civil act. It does not have sacred meaning, it is regarded only as a contract between two persons."*[173] Therefore the Buddhist Union did not wish to contribute to the marriage equality debate.

The activism of certain churches brought about interesting question concerning their possible role in debates that concern state institutions. This issue is especially problematic in France, where the separation of churches and state are enforced stricter than anywhere else in Europe. Strict secularization originates from the French Revolution, and therefore holds a very special place in the life of the nation. It is enforced by the Constitution that *"The Republic does not recognize, nor renumerate or nor subsidize any religion."*[174] Although freedom of religion is guaranteed, it is prohibited to display religious symbols, or advertise any religion in neutral public places.[175] Even though the majority of French citizens are Catholic, along with a more and more visible Muslim minority, no church given preference and in theory, has to stay out of state affairs.[176] For more than a hundred years French political life is dominated by the notion of laïcité, the complete absence of the religious perspective.[177] That is why during the marriage equality debate, the author of the same-sex marriage bill, Erwin Binet, has accused

[173] Consultation of religions on 'mariage pour tous.' Press release issued by the French Buddhist Union, 29 November 2012. My translation.
http://www.bouddhisme-france.org/autres-activites/participation-ubf-a-des-evenements/article/consultation-des-religions-sur-le-mariage-pour-tous.html
[174] Law of 9 December 1905 of the separation of church and state, Article 2. My translation.
[175] 2004-228 Act of 15 mars 2004 About the principle of laïcité, the wearing of symbols or clothing denoting religious affiliation in public schools, colleges and universities.
[176] Even though making statistics about religion is forbidden by law (as of 6 January 1978) in France, this estimation is made based on the number and nationality of migrants
see INSEE statistics: http://www.insee.fr/fr/themes/tableau.asp?reg_id=0&ref_id=NATTEF02131
[177] Daly E, The ambiguous reach of constitutional secularism in republican France: Revisiting the idea of laïcité and political liberalism as alternatives (2012) Oxford Journal of Legal Studies, Vol. 32. Issue 2. p. 585.

the Catholic Church of "*straying from its role"* therefore becoming part of a secular state affair, despite being forbidden by law to do so.[178]

The theory of laïcité has given rise to substantial controversy. It has been claimed as a cover to forcefully neutralize politics, and disrespectfully disregard the freedom of churches to manifest their beliefs.[179] Nevertheless, the separation of church and state is one of the foundations of a democratic state, and its enforcement can give rise to reforms, such as same-sex marriage which might not be able to subsidize due to opposing religious feelings. The European Court of Human Rights backed up this notion by stating that *"In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."*[180]

* * *

The Hungarian experience differs quite significantly from the French debate and the root of this difference can be found after the examining of the position of churches and their influence over Hungarian society and politics. Only a small number of Hungarians actually practice religion. Yet several citizens expect churches to react to new challenges in society, among which same-sex marriage is a leading issue, protect the moral order of the country and represent the value of marriage and family.[181]

[178] Catholics oppose French gay marriage bill. UPI Top News, 5 November 2012.
[179] Nirenberg S, Resurgence of secularism: *Hostility towards religion in the United States and France* (2012) Washington University Jurisprudence Review, Vol. 5. Issue 1.
[180] S. A. S v. France, 43835/11, ECtHR, 2014, paragraph 126.
[181] Vallások és egyházak az egyesült Európában : Magyarország, (ed.) Korpics M, Typotex, Budapest, 2010.

The largest religious congregation in the country, the Catholic, follows a similar principle as in France, declaring that marriage has been sanctified by God as *"a union of man and woman what, by its nature should serve for the good of the partners, procreation and education of children."*[182] The protestant churches take a similar view by declaring that "*Even though the institution of marriage seems to crumble nowadays….we believe that the foundation of the family is marriage…and the diverse development of children can only be ensured in a harmonious family environment."*[183] Even though in Hungary the separation of church and state doctrine does not have as important an emphasis as in France, it is still vital. In a decision after the Registered Partnership Act was found constitutional, the Constitutional Court declared that state officials cannot refuse service to same-sex couples due to personal religious views.[184] This sentiment is shared by the European Court of Human Rights.[185]

Religious arguments have also creeped into the debate on the political level. Even though marriage is not a reality yet, but it is the logical next step towards partnership and such views from prominent churches might drown the marriage debate, before it ever begins. Currently one of Hungary' governing parties is KDNP whose program explicitly states the ultimate refusal of same-sex marriage and has very close ties to the Catholic Church.[186]

It is true that religious views play a very important role in the opposition of the same-sex marriage debate. However, marriage equality only extends to civil marriage, which is an institution controlled by the state, so as to guard and respect religious liberty. When looking at a state like France that have especially strong ties toward the separation of church and state,

[182] Principles of the Hungarian Catholic Church
http://www.katolikus.hu/kek/kek01601.html#N23
[183] Principles of the Hungarian Calvinist Church
http://www.reformatus.hu/mutat/6221/
[184] 32/2010 decision of the Hungarian Constitutional Court, 25.03.2010.
[185] Eweida and others v. The United Kingdom, 48420/10, 59842/10, 51671/10 and 36516/10, ECtHR, 2013. Refusing to perform same-sex unions due to religious beliefs is not a valid discriminatory complaint.
[186] In the program of KDNP, they refuse to accept the concept of family to cover same-sex couples.
http://kdnp.hu/celjaink/alapelvek#csalad

particularly serious reasons would be needed from churches to justify meddling into affairs of the state.[187]

When examining the arguments of different churches, it can be found that their justifications for interference are severely lacking. These organizations cannot bring an actual reason as to why it should be their right to step over boundary of a secularized institution. Naturally, it is within their competence to express their opinion. However, there is a difference between expressing an opinion and actively seeking to stop the reform of a state institution. In case of a delicate issue like marriage equality, ancient traditional religious views cannot be the only opinions to be taken into consideration. The statements of religious institutions should be respected, nevertheless that does not give them the right to forcefully intrude upon a debate which is, within the boundaries of democracy, is not in their competence. This argument is even more important now, when after more and more same-sex marriage laws pass, couples could be barred from other services, in the name of protecting religious liberty.[188] Even though this process has not reached Europe yet, but the danger is ever-present. In front of the European Court of Human Rights, organizations that claim to act on religious values, such as the European Center for Law and Justice are filing amicus curiae briefs on every single lesbian and gay rights case, claiming that traditional family is a natural reality and same-sex partnerships threaten society.[189] These organizations have their own counterparts on the national level, as demonstrated during the consultation process of the French same-sex marriage law, when all the religious organizations flatly refused to support the law.[190]

Moreover there is one quite aggravating issue that came to light during the marriage debate, at least in France. Because the 'threat' of marriage equality managed to unify and bring common

[187] Daly E, *The ambiguous reach of constitutional secularism in republican France: Revisiting the idea of laïcité and political liberalism as alternatives* (2012) Oxford Journal of Legal Studies, Vol. 32. Issue 2. p. 584.
[188] For example, in the US religious liberty laws have appeared already.
[189] European Center for Law and Justice written observations.
http://eclj.org/pdf/Vallianatos-v-Greece-ECHR-ECLJ-WO-ENGLISH.pdf
[190] Such organizations include UNAF (Union Nationale des Assiciation Familiale) and and AFC (Les Association Familiale Catholique).

understanding to churches that were not on proper speaking terms before. How this will affect the future is uncertain, but nevertheless not a good sign as certain candidates who have started to slowly emerge for the 2016 presidential elections, actually spoke for the retraction of the 2013-404 Act, in the name of traditional values.

Opposition on social and moral grounds

Social aversion towards same-sex couples can be founded in the argument that homosexuality is to be regarded as a deviance from the social norm that need not be encouraged or recognized. In this case, I have isolated three basic points of arguments, although they are all interconnected. Firstly, same-sex marriage being the reason of the demise of the traditional family (because same-sex couples cannot naturally procreate), secondly that same-sex marriage is against national values, and thirdly that being a progeny of a same-sex couple is harmful for the emotional development of children. However, it can be found that the forthcoming arguments, which I will detail in the next few pages, are quite closely linked to a certain moral basis. Therefore the protection of children and the protection of the traditional family can have religious overtones, but I chose to list them here under social reasons as they are used widespread in the opposition. In addition there are two more arguments that will be discussed: the relationship of marriage to national values and the demographic consequences of legalized same-sex partnership and marriage.

* * *

The importance of the traditional marriage and family is an argument that is not unique to only Hungary and France. It may be the most popular and oldest ground for offense to marriage equality. In a previous chapter, I have already reflected on how the marriage argument is flawed and baseless, and since the argument for defending the traditional family, in its only acceptable form (namely marriage between a man and a woman, as a basis of family life with their children) has similar foundations, therefore it has similar flaws. In actuality, the European Court of Human Rights has stated, in *Karner v. Austria*, that even

though protection of the family is an acceptable reason, however, due to its age and the changing times, it is not justified to use anymore.[191]

In addition, in both my chosen jurisdictions, an interesting twist has been put on the marriage debate, namely that allowing same-sex couples to marry is actually contrary to the nature of the respective nations. However, it is expressed in slightly different terms, because while in Hungary the emphasis is on the children and the gradual decrease in the number of them per couple, in France the importance of the parents (them being man and woman) is stressed.

Hungarian politicians first discussed same-sex couples in the late 1990s, when debating the possibility of registered partnerships being available for them as well.[192] One of the most important contrary arguments was placed on the lack of procreation within same-sex partnerships. It was claimed that relationships of same-sex partners cannot be considered family.[193] In later years, as the argument became more nuanced, it represented legalized same-sex relationships as something that cannot give rise to future generations and is therefore hurting the country from a democratic point of view, as well as destroying the traditional institution of marriage and family, which, in a supposedly Hungarian interpretation, should mainly aim at produce and bring up healthy future citizens.[194] Children as being the future of the nation and their threatened existence and/or well-being is present in every opposing argument, along with a worry over the demographic decrease of the number of Hungarians, and the solution being the encouragement and nurturing of the traditional family unit. [195]

However, this definition of the family, which is riddled with the so-called national values and look to the future, is quite harmful for a substantial part of the Hungarian population, not

[191] Karner v. Austria, 40016/98, 2003. paragraph 40.
[192] Tóth L, *A meleg büszkeség napja*, In: Hajós B & Szabó M (eds.) Pajzsuk a törvény. Rászoruló csoportok az ombudsmani jogvédelemben, Alapvető Jogok biztosának HIvatala, 2013. http://www.ajbh.hu/documents/10180/125038/pajzsuk_a_torveny.pdf/1cc8924d-b610-4813-92f4-30c289223207
[193] Turi-Kovács Béla, FIDESZ
[194] Fundamentum 2008/3. *Fórum a szexuális kisebbségek jogairól*.
[195] Harrach Péter, KDNP

necessarily limited to same-sex couples.[196] As it was stressed by supporters of the registered partnership bill, such limited definition of family actually disregards childless and unmarried heterosexual couples as well. [197] Opinion of the LMP clearly expressed that the party *"refuses to support creating a hierarchy between different types of families."*[198] In addition, defense of traditional values cannot be the reason for categorizing certain Hungarians as second-class citizens and devoid them of their human rights by insisting on such an old-fashioned standpoint.[199] The country's demographic problems clearly will not be solved by denying legalization of same-sex relationships, and marriage will not use its value because it is extended, or a similar institution is installed alongside. In the Hungarian case, there is not yet real debate about adoption, so the argument of same-sex couples and their relationship to children has not yet been discussed seriously, at least not on the political level.

Even though the same opposition is present in France, in the name of traditional family, national values and the protection of children, it played in a slightly different way. When discussing how the "Frenchness of marriage" will be lost with marriage equality, two aspects are to be considered. Firstly, as in the Hungarian case, marriage was, and sometimes still is, regarded traditionally as a union of a man and a woman. The supposed danger to children at this point is not yet emphasized so much, but rather the symbolic role of a mother and the father in the child's life.[200] But in addition, it should be discussed that in France, the same-sex marriage law was required to amend the Code Civil. As I have mentioned before, the Code Civil bears immense importance in French law and politics, due to its age and stability, as well as its historical value. Therefore amending anything in this document is subject to great scrutiny and any suggestion of alteration is done with caution and care. During the first debate

[196] Kamarás É, *Families based on homosexual partnerships and a different approach to the same-sex marriage debate* (2003) Jura, Volume 9, Issue 1.
[197] Tóth L, *A meleg büszkeség napja*, In: Hajós B & Szabó M (eds.) Pajzsuk a törvény. Rászoruló csoportok az ombudsmani jogvédelemben, Alapvető Jogok biztosának HIvatala, 2013. http://www.ajbh.hu/documents/10180/125038/pajzsuk_a_torveny.pdf/1cc8924d-b610-4813-92f4-30c289223207
[198] Szabó Tímea, LMP
[199] Vágó Gábor, minority opinion from the Committee for Family Issues
[200] 2013 debate about same-sex marriage

of the possibility of marriage equality, in 2011, a considerable weight was given to the fact that definitions of the Code Civil would have to change for the legislation to work, and in consequence, it might hurt something particularly French, thus damaging the culture and foundations of the country.[201]

The debate about Frenchness and national values does not mean the disappearance of more traditional arguments. The role of children and their healthy upbringing was actually discussed at length, with stress on the fact that it is impossible to measure the psychological consequence when the child is growing up with a same-sex couple, since same-sex adoption is still in its early days. Nevertheless, the needs of children have come up during the debate. However this thesis only slightly touches the issues of same-sex adoption, usually as illustration for examples, it is enough to say that the well-being of future children is an argument opposing same-sex marriage is a one that still holds up, and is taken into considerable consideration.[202]

Beside these considerations, another argument has also surfaced during the marriage equality debate. Since the laws in France and Hungary to legalize same-sex marriage and registered partnerships all turned from idea to actual proposition in the late 2000s, when an economic recession ravaged Europe, supporters of these bills were accused of trying to deflect from the real problems of the country by creating artificial trouble within society.[203] Francois Hollande himself was accused of using same-sex marriage as a political move.[204] During the Hungarian debates in 2009, just as the recession hit hardest, the government faced a similar accusation from the opposition party FIDESZ.[205]

[201] 2011 debate about same-sex marriage, Michel Diefenbacher
[202] One of the most important standing case for same-sex adoption from the European Court of Human Rights is E. B. v. France, 43546/02, 2008. It does not grant the right to adopt for same-sex couples, it merely refuses discrimination on the basis of sexual orientation during single-parent adoption.
[203] Dr. Salamon László, KDNP
[204] 2013 debate about same-sex marriage
[205] Dr. Salamon László, KDNP

Chapter 4

Further issues

After analyzing the obstacles before same-sex marriage on a the basis of content, the concrete arguments against it, this chapter is now going to take a look at the problems surrounding the process with which same-sex marriage can be realized. In this process, I have categorized three different issues that are being brought up during the debate, as sort of technical difficulties towards the concept of marriage equality.

First of all, the role of international sources and inspiration needs to be discussed. Both sides of the marriage debate claims European standard to be for or against same-sex marriage, and it is useful to try to determine exactly what the European standard is. Using the jurisprudence of the European Court of Human Rights, I elaborate on that, with a particular emphasis on the doctrine of the European consensus, an argument that is frequently cited in cases. Secondly, the chapter will discuss the role of the initiator of marriage and partnership laws. There is a rift concerning whether the authority who makes the decision of legalizing same-sex marriage should be the legislator, or the judiciary. Questions are raised whether a court with a specific case can press the legislator to take certain steps (on a theoretical level, because it legally definitely can), therefore mapping the possible limits of judicial activism. On the other hand, can a court leave the issue completely to the legislator, to restrain itself from trying to initiate a debate? Along with looking at these questions, I will also discuss one practice of the European Court of Human Rights, the margin of appreciation, to analyze how far the court usually allows a country to go on its own in this issue.

Lastly, one more aspect of the marriage debate is worth analyzing, namely whether there should be a debate at all. There are voices calling for the end of the debate, due to regarding

marriage as a completely private issue, with which the state does not have anything to do. In this case, I will try to find a possible answer to the question of whether is state regulation furthers the marriage debate, and is legalization necessary at all.

International sources in the national marriage and partnership debate

As I have mentioned before, both sides of the marriage debate cites different international sources to strengthen their own position. These international sources can be foreign studies, European Union guidelines or court cases. The cases mostly come from the European Court of Human Rights.

In Hungary, ever since the possibility of registered same-sex partnerships was raised as a point of discussion, the issue of catching up to the Western- Europe is regularly cited on the pro side of the debate. First in 2007, countries such as The Netherlands, Belgium, Spain, and the United Kingdom were raised as examples in order to support the need for legalized same-sex partnerships.[206] Two years later, the fact that Hungary *"needs to catch up to the rest of the world"* was used as a positive argument, along with citing different countries, France among them, who have already taken progressive steps as an example to follow. The argument unfolded as homosexuality being a characteristic that nobody can change in himself/herself, therefore legal recognition of lesbian and gay rights, partnerships among them is needed. European Union principles also came up in the debate, that already have recognized same-sex partnerships.[207] In France, the arguments for both sides were quite similar. The pro side cited other countries where same-sex marriage has already been legalized to show that society was not ruined by the process, and encouraged to be in step with progress.[208] Whereas the con side pointed out that the EU simply suggested changing the guidelines regarding same-sex marriage and the then latest case before the ECtHR, *Schalk and Kopf v. Austria* ended up with the court refusing to extend the scope of Article 12 to same-sex couples, therefore so far not

[206] Gusztos Péter, SZDSZ
[207] Dr. Avarkeszi Dezső, president of the Committe for Justice
[208] 2011 debate about same-sex marriage, Michel Diefenbacher
http://www.assemblee-nationale.fr/13/cri/2010-2011/20110205.asp

proclaiming that same-sex couples have the right to marry.[209] Touching on *Schalk and Kopf* leads in to the discussion about the European consensus, as the lack of consensus was one of the main arguments for the court's reasoning.

[209] 2011 debate about same-sex marriage, Michel Diefenbacher
http://www.assemblee-nationale.fr/13/cri/2010-2011/20110205.asp

The role of the European consensus: change v. the status quo

Firstly, it is worth looking at the use of the consensus doctrine when the court is restraining itself from pushing member states towards progress. From this point of view, the consensus can be perceived as the symbol of the status quo which exists between the member states, but also among the member states and the Court.[210] Justification of a decision with the help of an established consensus may signal the consent of the member states, and since consent can be regarded as the primary foundation of international law, this supports the doctrine as a symbolic sign of cooperation. In these instances, the consensus appears hand in hand with the doctrine of the margin of appreciation.[211]

However, this interpretation has several quite significant problems. Firstly, the Court has not yet given a precise definition of what the consensus means exactly. Judging from the progress of the case law, it means more than a lowest common denominator. However, the difficulty in assessing what the consensus really is can come from the variety of names which might refer to it. In *Fretté v. France*, the Court refused to find a violation of Article 14, by referring to the lack of "common ground" between member states about adoption by homosexuals.[212] It can be noted that using the phrase "common ground" seems to be sign of judicial restraint, as it happened in *Schalk and Kopf v. Austria*, where the Court supported its decision of not recognizing same-sex marriage under Article 12 with the lack of common understanding between the member states.[213] In addition, going back to the exact meaning of the consensus, the Court has never clarified whether said consensus has to be scientific, based on experts'

[210] Dzehtsiarou K, *European consensus and the evolutive interpretation of the European Convention on Human Rights* (2011) German Law Journal, Vol. 12. Issue 10. p. 1733.
[211] Regan D, *European consensus: A worthy endeavor for the European Court of Human Rights* (2011) Trinity College Law Review, Vol. 14 Issue 51. p. 66.
[212] Fretté v. France, 36515/97, ECtHR, 2002. paragraph 41.
[213] Schalk and Kopf v. Austria, 30141/04, ECtHR, 2010.

reports, or on judicial, legal or public opinion. The Court has used all of these, sometimes together or separately, especially in cases concerning transsexuality.[214]

Despite the appealing symbolism of keeping a consent-based status quo, the lack of the universal application of the doctrine is identified as its serious deficiency. Criticism suggests that using the consensus does not give opportunity to establish universal standards Therefore it endangers the basic meaning of human rights, since the rights are supposed to be individual and should not depend on the conduct of states. Furthermore, predictability is recognized to be the foundation of the rule of law, and the inconsistent application of the consensus argument does not really conform to that idea.[215]

* * *

The other side of the elusive coin that is the European consensus is its use as a method to support the "living instrument" doctrine, the dynamic interpretation of the Convention. This theory provides the Court the means to recognize certain rights which had not really been around at the drafting of the Convention. The court is willing to recognize that the text of the Convention is not set in stone, therefore it can be open for reinterpretation in the case of new social phenomena. In these instances, the consensus is usually used to narrow down the margin of appreciation.[216]

The dynamic interpretation has been used to refute the protection of the traditional family as a legitimate aim. Family is considered to be an ever-evolving concept and meanwhile the court admits that balancing the concept of the traditional family and lesbian and gay rights is not

[214] Regan D, *European consensus: A worthy endeavor for the European Court of Human Rights* (2011) Trinity College Law Review, Vol. 14 Issue 51. p. 55.
[215] Brauch J, *The Dangerous search for the elusive consensus: What the Supreme Court should learn from the European Court of Human Rights (*2009) Howard Law Journal, Vol. 52. Issue 2. p. 288.
[216] Dzehtsiarou K, *European consensus and the evolutive interpretation of the European Convention on Human Rights* (2011) German Law Journal, Vol. 12. Issue 10. p. 1732.

easy, exclusion of homosexuals from certain benefits in the name of family protection is unacceptable.[217] The doctrine was also used to demonstrate progress in other spheres of homosexual life, such as the pointing out the difference between the age of consent in the case of heterosexuals and homosexuals[218] and reflecting positively on single parent adoption by lesbians and gay men.[219] However, yet again, the dynamic nature of the Convention is not considered as a supporting argument of same-sex marriage. The conservative use of the doctrine is demonstrated in *Schalk and Kopf*.[220]

Apart from these three possibilities of encouraging progress, there are other issues the court has to deal with while considering the validity of same-sex relationships. The protection of the rights of others is an often cited aim of the state, as the concept of 'others' may include potential children or religious communities. In *X and others v. Austria*, the court found that the there is no sufficient evidence to show that growing up as a child of a same-sex couple has negative effects on personal development.[221] As for religious communities, it is established that they can choose whether to perform or not to perform same-sex marriages. It is also interesting to mention that regarding same-sex marriage, no state has ever had to provide arguments as to why it is opposed in the national legislation.[222]

The consensus operates with many names to justify that nudge by the Court to follow progress. In *Dudgeon v. The United Kingdom*, one of the first cases where the consensus was invoked, it was called "great majority" within the member states.[223] It also can bear the name "common European approach", and "European and international consensus."[224]

[217] Kozak v. Poland, 13102/02, ECtHR, 2010, paragraph 99.
[218] L. and V. v. Austria, 39392/98 and 39829/98, ECtHR, 2003.
[219] E.B. v. France, 43546/02, ECtHR, 2008.
[220] Schalk and Kopf v. Austria, 30141/04, ECtHR, 2010, paragraph 57.
[221] X and others v. Austria, 19010/07, ECtHR, 2013, paragraph 102.
[222] Bribosia E, Rorive I & Van den Eynde L, *Same-sex marriage: Building an argument before the European Court of Human Rights in light of the US experience*, (2014), Berkeley Journal of International Law, Vol. 32 Issue 1, p. 20.
[223] Dudgeon v. The United Kingdom, 7525/76, ECtHR, 1981, paragraph 49.
[224] Brauch J, *The Dangerous search for the elusive consensus: What the Supreme Court should learn from the European Court of Human Rights (*2009) Howard Law Journal, Vol. 52. Issue 2. p. 282.

However, the number of countries needed to establish a consensus could be very problematic.[225] In *Tyrer v. The United Kingdom*, only two states did not follow the European practice of prohibiting corporal punishment, and Court held them to be in violation of Article 3.[226] Conversely, in *A., B. and C. v. Ireland*, only three states had restricted abortion very narrowly, however, no violation was found. The Court constantly plays with number of countries needed to determine the existence of the consensus.[227] In *Schalk and Kopf v. Austria*, the six member states allowing same-sex marriage did not constitute an emerging consensus.[228] The lack of consensus can certainly restrict or even the stop the opportunity to use dynamic interpretation, but in addition, the inconsistency with the numbers can further hamper effective and progressive decision making.[229]

Moreover, the consensus doctrine also receives criticism from the viewpoint of state sovereignty. Meaning that states that lag behind the European standard can ask for the Court to not step out of its role, and to not try to make the state change its practice only to conform to the consensus. This argument is especially strong when the Court declared something very progressive, which might even go against the will of the majority. For example, in *X and others v. Austria*, it was found that only ten states allow second parent adoption for unmarried couples, but despite the lack of actual consensus on the issue, the Court found a violation.[230]

However, in most landmark cases of the recognition of same-sex relationships, the consensus is not really invoked. It is not mentioned in *Karner v. Austria*, or *Kozak v. Poland*, and in *Schalk and Kopf*, it is used to support finding no violation. However in *Oliari v. Italy* the Court notes an emerging consensus among member states in the recognition of same-sex

[225] Regan D, *European consensus: A worthy endeavor for the European Court of Human Rights* (2011) Trinity College Law Review, Vol. 14 Issue 51. p. 54.
[226] Tyrer v The United Kingdom, 5856/72, ECtHR, 1978, paragraph 31.
[227] A, B and C v. Ireland, 25579, ECtHR, 2010, paragraph 194.
[228] Schalk and Kopf v. Austria, 30141/04, ECtHR, 2010. paragraph 58.
[229] Dzehtsiarou K, *European consensus and the evolutive interpretation of the European Convention on Human Rights* (2011) German Law Journal, Vol. 12. Issue 10. p. 1736.
[230] X and others v. Austria, 19010/07, ECtHR, 2013.

relationship, to at least provide the institution of registered partnership to them.[231] Therefore, the problem is the same at both sides of the coin. Whether it is called upon to practice judicial restraint or activism, the lack of boundaries, set standards, and general unpredictability of the consensus doctrine creates much doubt towards the legitimacy of its existence.[232]

On the issue of homosexuality and same-sex relationships, the consensus may even be more uncertain than in any other case. Since its vocation is so inconsistent, it sometimes can be seen as a bother or obstacle, rather than a help in effective decision making. Therefore recently the Court started to open up the European consensus even more, in order to initiate change when crippled by the lack of it, with the notion of the international trend. This is actually quite a new development that is relied on mainly in cases concerning transgender rights, however it has been used by Court in a few instances to support the arguments for same-sex partnership recognition.[233]

The international trend was first used in *Christine Goodwin v. The UK*. The Court found that establishing a European consensus on legal recognition following gender reassignment was not possible, in addition, previous case law (*Rees v. The United Kingdom, Cossey v. The United Kingdom, Sheffield and Horsham v. The United Kingdom*) suggested an absence of common ground between states. Instead, the Court to international materials and determined that even though the European situation has not changed, on the international scene, there has been significant progress.[234]

A similar situation emerged in the case of *Vallianatos and others v. Greece*. Following the path of *Schalk and Kopf*, the Court could not establish common understanding concerning the forms of legal recognition of same-sex relationships. However, when looking outside Europe, the Court found that an increasing trend towards not excluding same-sex couples from new

[231] Oliari and others v. Italy, 18766/11 36030/11, 2015, paragraph 163.
[232] Brauch J, *The Dangerous search for the elusive consensus: What the Supreme Court should learn from the European Court of Human Rights (*2009) Howard Law Journal, Vol. 52. Issue 2. p. 278.
[233] Such as in Vallianatos and others v. Greece, 29381/09 and 32684/09, ECtHR, 2013
[234] Christine Goodwin v. The United Kingdom, 28957/95, ECtHR, 2002. paragraph 85.

legislation about civil unions. With the help of the "continuing international trend" the court was able to broaden the scope of the consensus, and to establish a violation of Article 14 in the conduct of Greece.[235] The Court furthermore looked to the notion of such trend in *Oliari v. Italy*, although in that case, it was not stressed as much as in *Vallianatos*.[236]

Naturally, bringing in the international trend to the scope of consensus can help to solve its deficiencies. Since the scope is broader, truly the Court can afford to search for common understanding in all jurisdictions of the world, can choose different countries on a case by case basis, and this makes the notion of international trend even more unreliable than the consensus. Based on the previous case law, it seems that the Court uses this method to support the dynamic interpretation, but its extreme selectivity and complete lack of standards and definition create a substantial obstacle to its legitimacy.[237]

Beside the international trend, which might be regarded as a means to bypass the consensus, there is one case, *X and others v. Austria*, where the Court interprets the consensus very uniquely, without resorting to the trend. As I have mentioned above, The Court found only ten states that allow second-parent adoption to unmarried couples, and their practices are wildly different. Staying within the limits of the traditional consensus analysis (especially after *Schalk and Kopf*), this would suggest the lack of consensus, therefore a broad margin of appreciation for the state. However, instead the Court manages to set aside the consensus as a decisive factor by declaring that *"only those ten Council of Europe member States which allow second-parent adoption in unmarried couples may be regarded as a basis for comparison. Within that group, six States treat heterosexual couples and same-sex couples in the same manner, while four adopt the same position as Austria … The Court considers that the narrowness of this sample is such that no conclusions can be drawn as to the existence of*

[235] Vallianatos and others v. Greece, 29381/09 and 32684/09, ECtHR, 2012.
[236] Oliari and others v. Italy, 18766/11 36030/11, ECtHR, 2015.
[237] Regan D, *European consensus: A worthy endeavor for the European Court of Human Rights* (2011) Trinity College Law Review, Vol. 14 Issue 51. p. 62.

a possible consensus among Council of Europe member States."[238] With this most ingenious argumentation, the Court manages to rid itself from the problem of looking at the European consensus, and can find other means to find a violation, without being restricted by the limits of the consensus. However, this is a very unique occurrence and cannot really be regarded as a basis of a future practice.

[238] X and others v. Austria, 19010/07, ECtHR, 2013. paragraph 149.

Who is to decide? Judicial v. legislative interpretations and the margin of appreciation

The question of different interpretations also came up in my two jurisdictions. Meaning that the fact of whose word is decisive in granting the right to same-sex partnership or marriage is a subject to considerable debate. Conflict can arise between the legislator and the judiciary (usually the Constitutional Court) as to who needs to take the other's opinion on the matter and needs to step back to allow certain laws or verdicts to stand.

When Hungary's Constitutional Court has ruled on the constitutionality of legalizing de facto partnerships, it declared an opinion on the role of the court in the same-sex partnership debate. This opinion included that the legislator must recognize de facto partnership of lesbian and gay couples, but is not obligated to do anything else.[239]

Conversely in France, it has been an ongoing issue if the legislator or the judiciary is competent to make decisions about legalizing same-sex marriage. Furthermore, since France does not have a constitutional court, only the Conseil Constitutionnel, before whom the request for review of law appears, the debate becomes even more interesting. So far it seems that in France, the legislator is regarded as the decisive voice in this debate. It has been called to be responsible for progress, and needs to follow international trends as well as the force to move democracy forward.[240] Moreover, the Conseil Constitutionnel seems to agree to this so extensively that in both of its decisions concerning the law legalizing same-sex marriage, the principal reasons for its ruling heavily featured the fact that the Council really is not competent to decide on this law. The decision declared that only the legislator, who represents the people of France and therefore is a mirror of their will, can weigh the arguments and legalize same-sex marriage if it wishes. [241] However, the interesting aspect of such reasoning

[239] 14/1995 decision of the Hungarian Constitutional Court
[240] 2011 (Olivier Dussopt) and 2013 (Marcel Rogemont) debate about same-sex marriage.
[241] Decision 2010-92 of 28 January 2011 of the Conseil Constitutionnel

is that basically almost exactly the same wording was used in both 2011 and 2013, but the whereas the earlier ruling refused to let same-sex marriage stand, the later one actually reversed this![242] This eventuality is interesting because in several countries it is the courts that overrule the reluctance of the legislator when same-sex marriage is concerned, and such attitude what the Conseil Constitutionnel has is quite interesting or maybe even strange.[243]

The legislator v. judiciary debate can reflect in the doctrine of the margin of appreciation on the level of the European Court of Human Rights. The Court often uses this doctrine of interpretation to establish limits to state conduct, the margin is the actually the limit within with the Court does not interfere with the business of the state. This doctrine if used very frequently in cases whose issues are not word-by-word covered in the Convention (same-sex relationships obviously being one of them), and its scope depends on multiple factors. These factors include the right in question, the status of the European consensus and the positive obligations of the state.[244] The relationship between the consensus and the margin of appreciation doctrines is special because the consensus can swing the margin either way.

During the first cases concerning same-sex couples that used the margin of appreciation, it usually ensured a positive ruling. Ever since *Handyside v. UK*, the protection of morals ensures a wide margin of appreciation for the state. However, in *Dudgeon v. The United Kingdom*, the court opposed this with the notion of sexuality being one of the 'most intimate aspect(s)' of private life, therefore eliminating the wide margin.[245] Applicants in cases concerning lesbian and gay rights have used this argument before the court consistently. Even though in *Salguero da Silva Mouta v. Portugal*, the margin was considered to be wide, it was

[242] Decision 2013-669 of 17 May 2013 of the Conseil Constitutionnel
[243] For example in the US and South Africa, the right for same-sex couples to marry was pronounced by the Supreme Court and the Constitutional Court, respectively.
[244] Kratochvil J, *The Inflation of the Margin of Appreciation by the European Court of Human Rights* (2011) Netherlands Quarterly of Human Rights, Vol. 29 Issue 3 p. 326.
[245] Dudgeon v. The United Kingdom, 7525/76, ECtHR, 1981, paragraph 52.

not a decisive factor in the otherwise positive decision.[246] In *Kozak v. Poland,* the Court also narrowed down the margin due to the intimacy of the right involved.[247] A similar path was followed in *Vallianatos and others v. Greece*.[248] In *Oliari v. Italy,* the margin was considerably narrowed down by the emerging consensus on recognizing same-sex relationships as well as the intimate nature of the right involved, in the Court's words *"…the instant case concerns… the core protection of the applicants as same-sex couples. The Court considers the latter to be facets of an individual's existence and identity to which the relevant margin should apply."*[249] In contrast, on the account of same-sex marriage, this doctrine was interpreted very differently. In *Schalk and Kopf,* the court refused to acknowledge same-sex marriage by allowing discretion to national courts, claiming that they are in better position in judging the status of the lesbian and gay community and the necessity of legislation for them.[250]

Even though initially the margin of appreciation was used to encourage progress in cases concerning same-sex couples, by now the trend has reversed. In later cases that won before the court, such as *Vallianatos or Oliari and others,* the decisive argument was not the margin of appreciation, and the only case where it factored greatly in the result is *Schalk and Kopf,* which ended with a negative ruling, at least on the issue of marriage equality. However the case is an example for the few times when same-sex couples tried to appeal to the Court under Article 12. Although they were not successful under Article 12, lesbian and gay rights have managed to make strides under Article 8.[251]

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[246] Salgueiro da Silva Mouta v. Portugal, 33290/96, ECtHR, 1999 paragraph 25.
[247] Kozak v. Poland, 13102/02, ECtHR, 2010, paragraph 92.
[248] Vallianatos and others v. Greece, 29381/09 and 32684/09, ECtHR, 2013, paragraph 77.
[249] Oliari and others v. Italy, 18766/11 36030/11, ECtHR, 2015, paragraph 177.
[250] Schalk and Kopf v. Austria, 30141/04, ECtHR, 2010, paragraph 62.
[251] Every single successful case about same-sex partnership was won under the scope of Article 8, such as Vallianatos and Oliari and others.

Naturally, it is very complicated for the court to touch an institution like marriage. Nevertheless, the court has shown the intention of opening up Article 12 slightly, in order to accommodate non-traditional couples. Marriage is declared to be not dependent on biological criteria and the ability to procreate.[252] The interpretation of the phrasing of the article has been shown to have changed, with the court stating "…*the wording did not necessarily imply that a man could only marry a woman and vice versa. The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women*."[253] Even though it is a half-step towards recognition, the drafter's intention still won over the dynamic interpretation.

[252] Christine Goodwin v. The United Kingdom, 28957/95, ECtHR, 2002, paragraph 98-100.
[253] Schalk and Kopf v. Austria, 30141/04, ECtHR, 2010, paragraph 55.

The concerns of privacy and publicity

The last question has arisen over the years is whether a public debate is even needed in the case of the recognition of same-sex relationships. Namely, forming a romantic relationship is a very private part of someone's life and therefore the state might not even be obligated to legislate on any issue that concerns the choice of partner. On the national level, it was touched on slightly in both Hungary and France, but only slightly. In Hungary, the argument consisted of same-sex relationships being the responsibility of the state, and their legalization is an issue that politics just has to face, because lesbian and gay people are among the citizens of the country as well, and their rights needs to be championed by the lawmakers.[254] In France, it was raised as an opposing argument, to show that since homosexuality is a private matter, same-sex relationships should also remain private. [255]

Privacy and publicity has surfaced in certain cases of the European Court of Human Rights as well. When examining the Court's interpretation of same-sex relationships, there is a noticeable trend of viewing sexuality as a private part of the personality that is completely shut off from the public. This view can create a controversy and a difficulty in having same-sex marriage recognized. This 'private manifestation' was established in *Dudgeon,* and has been used ever since to rule in favor of lesbian and gay rights. It became almost a requirement of homosexuality to being kept under wraps and states have been found to be unjustifiably violating privacy by revealing this information.[256] The margin of appreciation of the state is declared to be very narrow by the Court, when private acts are involved in the cases (such as choosing the partner, living a certain lifestyle with him/her). However when to positive

[254] Gusztos Péter, SZDSZ
[255] 2011 debate about same-sex marriage, Jean-Pierre Brard
[256] For example Smith and Grady v. The United Kingdom, 33985/96 and 33986/96, ECtHR, 1999, paragraph 91. and ADT v. The United Kingdom 35765/97, ECtHR, 2000, paragraph 37.

obligations of the state in granting recognition or rights that concern family life, the margin is considerably wider.[257] Therefore it seems the court is only willing to deal with same-sex relationships as long as they are kept in private. However choices that concern someone's private life can sometimes reach the public sphere.[258] Like marriage, which is essentially a public act, therefore recognizing same-sex marriage cannot stay within the notion of privacy. Keeping such practice in place suggest only a tolerance of homosexuality, with appropriately ensured rights of sexual conduct and integrity, instead of acknowledging the love aspect of same-sex relationships, which requires the alteration and reinterpretation of an institution.[259]

[257] Grigolo M, *Sexualities and the ECHR: Introducing the universal sexual legal subject* (2003) European Journal of International Law, Volume 14, Issue 5. p. 1039
[258] Grigolo M, *Sexualities and the ECHR: Introducing the universal sexual legal subject* (2003) European Journal of International Law, Volume 14, Issue 5. p. 1040.
[259] Johnson P, *An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights*, (2010) Human Rights Law Review, Vol. 10, Issue 1, p. 78.

Summary and conclusion

In the last four chapters, my goal was to point out the problems in the marriage equality debate, with special focus on the opposing arguments. I have tried to find whether these arguments could still stand. The answer which I can provide is no, not really. The cultural importance of marriage, even though it has its challenges, is too huge for the lesbian and gay community to be left out of, because marriage still holds as the state approved union of love and commitment. It is a symbol, and as such its extension would symbolize the acceptance of same-sex couples into this cultural tradition. Naturally, same-sex marriage is not a solution for every problem the lesbian and gay community has, and its guarantee has never been unanimous (as with every other civil rights issue, there is always a portion of society that resists), however it is a vital step for inclusion.

In my analysis, I found that the opposing arguments are quite weak. Opposition based on medical grounds has won out from state practice. Opposition based on religious grounds has foundation and reason, but several churches stand against the extension of civil marriage, an institution on which they have no control. Furthermore, they were never asked to include same-sex couples in religious marriages, due to their conscience. Therefore they are meddling in issues, which they have practically nothing to do with. Opposition based on social grounds also have their reasonable basis but they can hold less and less since more and more countries legalize same-sex marriage, some even adoption, it is starting to be clear that it does not ruin society and there is no scientific proof that it might be harmful for children. The European Court of Human Rights has already abandoned granting the protection of the traditional family, it is the lack of consensus that holds same-sex couples from the scope of Article 12. However, on a positive note, developments under Article should not be ignored, because the

latest decisions of the Court make it almost mandatory for a state to establish some form of partnership recognition for same-sex couples by declaring that *"the absence of a legal framework allowing for recognition and protection of (the applicants') relationship violates their rights under Article 8 of the Convention."*[260]

On the question of why same-sex marriage is needed, when registered partnership is starting to become an expected norm, the answer could be difference. Because there is a difference between inclusion within a vastly important, culturally rooted and respected institution and a new solution that was crafted with the intention to keep same-sex couples out of marriage. Registered partnership, especially if it is only valid for gay and lesbian couples, is actually could be parallel to segregation. A separate solution to stop the extension of the institution of marriage. Even though most benefits that come with marriage come with registered partnerships as well, if something is missing, it is the important aspect of marriage: taking the partner's name and having children together.[261] Therefore same-sex marriage is the only way to get closer to substantial equality for the lesbian and gay community. Recently, Justice Kennedy put it best in his opinion of *Obergefell v. Hodges*:

> "In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law."[262]

[260] Oliari and others v. Italy, 18766/11 36030/11, ECtHR, 2015, paragraph 199.
[261] 2009/XXIX. Act. About registered partnerships and the modifications of certain acts needed to certify the partnership. Paragraph 3 (2) and (3).
[262] Obergefell v. Hodges, 576 US 2015. Part V. This landmark case declared that the US Constitution covers the right to get married for same-sex couples.

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