

# **The evolution of LGBTI+ marriage rights in Germany, Ireland and Albania.**

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M.A in Human Rights Long Thesis

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November 2019

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## **Acknowledgements**

This thesis would not have been possible without the help of some people who deserve special thanks.

First, I thank Professor Eszter Polgári, my supervisor, from the Legal Studies Department, who with great professionalism gave me worthy advice throughout the year and with patience supported me during the elaboration of this thesis.

Secondly, I would like to thank my family for the tremendous emotional support and sacrifices shown throughout my academic year and for standing by me in every step I decide to take.

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# 1 Introduction

Sigmund Freud, the father of Psychoanalysis once wrote: “Homosexuality [...] is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness: we consider it to be a variation of the sexual function”<sup>1</sup>. He also objected homosexual intolerance when arguing: “It is one of the obvious social injustices that the standard of civilization should demand from everyone the same sexual life-conduct which can be followed without any difficulty by some people, thanks to their organization, but which imposes the heaviest psychological sacrifices on others.”<sup>2</sup>

I quoted these two statements from Freud as an introduction to the heated debate regarding the rights of the people who are part of LGBTI+ community (LGBTI stands for Lesbian, Gay, Bisexual, Transgender and Intersex and + for any other identity terms that are not heterosexual, non-intersex, such as queer or asexual to mention just a few)<sup>3</sup>. This community faces several challenges on a daily basis and their rights are still not fully recognized. They deal with stigmatization, discrimination, social exclusion and a considerable degree of prejudice in society. Since the rights of people belonging to the LGBTI+ are still contested and controversial in many parts of the globe, in this thesis I will enquire on one of the main rights of human beings, the right to marriage. This thesis will provide an analysis of this right in the light of LGBTI+ community, known as “same-sex marriage”.

The issue of same-sex marriage gained attention in the 20<sup>th</sup> century when homosexuals’ rights started to acquire more visibility. Same-sex marriage is the practice of marrying the same sex, namely men to men or women to women. The right to marry and have a family is foreseen in almost every country’s Constitution, but there are controversial theories regarding to whether this right should or

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<sup>1</sup> Letter to an American mother, *The American Psychiatric Journal*, 107(10), pp. 786–787.

<sup>2</sup> ‘Civilized’ sexual morality and modern nervous illness in J. Strachey, *The standard edition of the complete psychological works of Sigmund Freud* Vol. 9, pp.177–204.

<sup>3</sup><[https://waaids.com › images › 20180618\\_IEWA\\_Glossary](https://waaids.com › images › 20180618_IEWA_Glossary)>

not be allowed. There are different approaches to this issue and ongoing debates in the world about this topic. Thirty-two countries have recognized the right to people belonging to the LGBTI+ community to marry each other (Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Ecuador, England, Finland, France, Germany, Greenland, Iceland, India, Ireland, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Portugal, Scotland, South Africa, Spain, Sweden, Taiwan, the United Kingdom, the United States, and Uruguay). Some countries have not expressed any concern about this question, while in others the right to same-sex marriage is banned or even considered as a crime (Iran, Saudi Arabia, Sudan, Yemen, Somalia, and Nigeria).

The grounds for not accepting same-sex marriage can be traced in religious and cultural values. Most religious traditions have since back in history denied same-sex marriage finding same-sex intimate acts as immoral and believing that marriage is supposed to be the unit of a man and a woman only. There are also some views that consider that the main aim of marriage is reproduction and the continuity of family and therefore they cannot accept married same-sex couples to access to this institution, since it does not meet this end. *A contrario*, a different perspective maintains that banning same-sex marriage is immoral because it interferes with private life and entails discrimination, therefore they advocate for the legalization of same-sex marriage. They understand that prohibiting a certain group in the society the enjoyment of their full rights leads to non-equal treatment and incompatibility with human rights.

The main goal of this thesis is to address the challenges and controversies regarding the recognition of same-sex marriage in countries that have legalized it. This work also seeks to provide practical guidelines to answer the following question: How can the LGBTI+ communities in other countries where the resistance to same-sex marriage is significant and high, can achieve the recognition of this right by the law? I will answer to this question by examining three different jurisdictions.

I have first chosen to analyze the history of Ireland regarding same-sex marriage, because it is a unique and significant example towards the recognition of same-sex marriage. Ireland approved same-sex marriage in 2015 after a public referendum. Since then, Article 41 paragraph 4 of the Irish Constitution states that “Marriage may be contracted in accordance with law by two persons without distinction as to their sex.”<sup>4</sup> This thesis will also analyze the example of Germany, which has gone through a long journey until the legalization of same-sex marriage as an institution protected by the Same-Sex Bill of 2017. The third jurisdiction is Albania, which is still in the early phase of recognizing the LGBTI+ community’s rights. In 2010 the government passed an anti-discrimination law which bans discrimination on grounds of sexual orientation. However, same-sex marriage is still not recognized.

To achieve the aforementioned research goals, I will first provide a historical background of each of the countries and their process towards the legalization same-sex marriage. Secondly, I will offer an insight of the social movements in the two countries that have legalized same-sex marriage, since they did it in different ways, overcoming diverse challenges and difficulties. Last, and as the core of this work, I will focus on the way in which the anti-discrimination law of Albania is being implemented and the effects of it to date. In this sense, I will provide specific recommendations that can be followed by policy-makers and the civil society in that country.

The most suitable methodology to achieve the goal of this paper would be a qualitative, comparisons between the regulations regarding same-sex marriage in Ireland, Germany and Albania will be established.

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<sup>4</sup> Constitution of Ireland, Fundamental Rights, Art.41 (4).

## 2 Chapter I

### 2.1 The concept of sexual orientation

The term "sexual orientation" is used to describe a person's romantic, emotional, or sexual attraction to another person. Someone who is attracted to someone of the same sex has a homosexual orientation and can be called gay or lesbian. Individuals who are attracted to persons of the opposite sex have a heterosexual orientation. Individuals who are attracted to both men and women are called bisexuals. Sexual orientation is a process that is constantly changing, evolving and fluctuating over time.

The concept of sexual orientation cannot be reduced only to sexual behavior. It involves both feeling and identity. Some individuals may identify themselves as gay, lesbian, or bisexual even without engaging in any sexual activity or sexual intercourse.<sup>5</sup> Some people believe that sexual orientation is innate and determined; but sexual orientation develops throughout one's life. Individuals may at some point in their lives become aware of being heterosexual, gay, lesbian, or bisexual. For some individuals, sexual orientation is formed in an early age. There is also evidence to suggest that biological factors, including genetic or congenital hormones, play a significant role in a person's sexuality. It is important to recognize that there are many reasons for the sexual orientation of individuals and these reasons may differ from person to person. Some scholars maintain that human beings cannot choose to be gay or heterosexual. For some others the environment can stimulate the individual to the extent that it form an emotional and sexual attraction different from society's expectations of heterosexuality. Sexual orientation tends to appear in early adolescence, with no prior sexual experience. Psychologists, for example, do not conceive sexual orientation as a conscious choice that can be changed voluntarily.

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<sup>5</sup>Spitzer, R. L. "Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation"2003, vol. 32, issue 5.

LGBTI+ people are part of society and have existed at all times, what has changed is the acceptance of sexual orientation people even though they know very well that they will be prejudiced and discriminated against. LGBTI+ people are found in every place in society, they are biologically boys or girls, who at an early age of adolescence notice that they are different from what society expects.

## 2.2 The concept of marriage and its evolution

There is not a single definition of marriage, because it is perceived in different ways depending on the culture. Nonetheless, the most common one is that which states that marriage is a relationship between a man and a woman with its main purpose being childbirth. Corvino provides with an encompassing definition of marriage that is widely approved: “Marriage is intrinsically a sexual union of husband and wife, because these are the only unions that can make new life [...]”<sup>6</sup>

There are also different and contested views in determining which the purposes of marriage are. While childbirth is the most common, there are also married couples who choose not to have children or who cannot have children and hence adopt a child, unmarried couples who raise children, and couples who live together without being legally married. It is hard to trace back the history of marriage completely but it is commonly agreed that the concept of marriage has undergone a historical change, it has evolved over time. What marriage meant in ancient times is not the same to what it is considered to be in modern times. It has undergone a lot of transformations due to social developments time after time, such as the status of women or the same-sex unions’ issue. Religion is where the concept of traditional marriage is rooted. The most widespread religions in the world, Christianity, Islam, Buddhism, Hinduism, and Judaism have originally opposed same-sex marriage.

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<sup>6</sup> Corvino, John, and Gallagher, Maggie, “Debating Same-Sex Marriage”, 2012, Oxford University Press.



It is argued that homosexual relations are immoral, contrary to natural law and that sacred texts recognize the marriage of a man and woman only.

Although marriage was a religious institution, it later became regulated by the state. Therefore, in a small number of countries it is still valid to marry in the church (for example, in Greece, Poland, Italy, Slovakia)<sup>7</sup>, but it is mostly civil ceremonies that are recognized as a legal union and from that moment on the partners can enjoy the rights and benefits that compound the institution, such as inheritance rights, social benefits, etc. Similarly, many societies have had a casual attitude toward what deserves recognition as a marriage. Marriage and family life have undergone a transformation, as women's liberation occurred.

Now, marriage is no longer a mean of gaining social or public status or property. For thousands of years, marriage served for people's status in the economic and political hierarchy of society. Love was not the main issue to consider when marrying someone. In the 18th century there was a turning shift towards marriage. Couples started to invest more on the emotional side and intimacy and privacy became important features for couples. It was then, when some first steps to decriminalize homosexuality took place from proponents of love as the main bridge between couples. In support of the above-mentioned, Cherlin suggests that there was a change in how marriage used to be seen as and how it is conceived today. For instance, he argues that "[marriage] used to be the foundation of adult personal life; now [...] it is something to be achieved through one's efforts rather than something to which one routinely accedes"<sup>8</sup>. Previously, marriage was considered as a way of strengthening the relationship between two families and a way to gain wealth and power. Nowadays, in almost all societies women are not any longer seen as a marriage transaction but as equal partners in marriage. Giddens, for instance, argued that gaining legal quality and independence women have

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<sup>7</sup>Luxmoore, Jonathan, 15 April 2015, "European countries distinguish between religious, civil marriages" available at <[nrcronline.org/news/world/european-countries-distinguish-between-religious-civil-marriages](http://nrcronline.org/news/world/european-countries-distinguish-between-religious-civil-marriages)>

<sup>8</sup> Cherlin, Andrew J. "The Deinstitutionalization of American Marriage." *Journal of Marriage and Family* 66, November 2004, p.855

reframed the notion of family life.<sup>9</sup> Cherlin further argues in his piece that marriages have become “an important symbol of the partners’ personal achievements and a stage in their self-development”<sup>10</sup>. This means that now marriage is part of the individual’s self-achievements, and not a result of tradition or customs.

To sum up, research shows that the concept of marriage is now different from the past, new forms of marriage or alternatives to it have been developed, such as same-sex marriage.

### 2.3 The debate over same-sex marriage

Marriage between persons of the same sex or, more broadly, marriage equality refers to marriage between two persons of the same sex or gender. Although sexual relations between persons of the same gender have always existed, claims on marriage equality did not get recognized until 2001, when it was legalized in the Netherlands. Some legal rules instead, prohibited an individual to marry someone of another race (as it used to be in the United States with marriages between white people and African descendants) or of a different status and, or of the same sex. Furthermore, same-sex relationships are punished under criminal law in some countries (more common in Eastern countries such as, Iran, Sudan, Saudi Arabia and Yemen). The issue of same-sex marriage is undoubtedly a product of major changes in the socio-political values that humanity has undergone over time, which will be explained below.

Setting the individual at the heart of the society, giving great importance to his/her needs and desires has in some way determined the definition of marriage as a whole, where the individual is the one to choose the person he/she marries. Recognition of same-sex marriage is increasingly considered as a matter of political, social, civil and religious rights in many countries and there is an ongoing

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<sup>9</sup> Giddens, Anthony, “The transformation of intimacy: Sexuality, love and intimacy in modern societies.” Cambridge, Polity, 1992.

<sup>10</sup> Cherlin, Andrew J. "The Deinstitutionalization of American Marriage." *Journal of Marriage and Family* 66, November 2004, p.856.

debate about whether couples of the same sex shall be allowed to marry, have a different status (known as civil unions) or not having such rights at all. Same-sex marriage is a relatively new social phenomenon that leads to the formation of a new kind of marriage. It did not exist until the 21st century when some countries<sup>11</sup> began to allow couples of the same sex to marry legally. This happened as a consequence of the global movement to consider marriage as a fundamental human right which should include couples of the same gender as well.

One of the first cases to claim marriage as a fundamental right can be traced back in 1967 when the United States' Supreme Court dealt with the issue of interracial marriages.<sup>12</sup> This case was later used as precedent from the US Supreme Court in cases regarding prohibition of same-sex marriage. Such events are of great significance since homosexuality was for centuries considered as mental illness, immoral or subject for criminal law and marriage was not even conceived. As a result of the transformation of marriage, same-sex marriage is finding support in a number of countries all over the world.

Legal recognition of same-sex marriage is a matter that leads to great social, political and legal divisions. Based on the nature of the debate, most of the discussions related to same-sex marriage focus on religious and moral reasons in allowing or not for same-sex couples to be recognized. This debate is very important due to the effects marriage produces, such as rights and benefits for the spouses. Studies have long been focusing on people's attitude towards same-sex unions, providing different reasons why people support or oppose the legal recognition of this kind of union. LGBTI+ rights activists rely on the legal arguments of civil and human rights. Many people

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<sup>11</sup> Some of the earliest countries to legalize same-sex marriage were The Netherlands, Belgium, Canada, Spain, South Africa, etc. according to the World Atlas "The First Countries to Legalize Gay Marriage" available at <<https://www.worldatlas.com/articles/first-countries-to-recognize-same-sex-marriages-nationally.html>>

<sup>12</sup>*Loving v. Virginia*, 388 U.S., 1967

who have participated in same-sex marriage demonstrations and activities have done so to protest unequal legal status of same-sex couples rather than the real desire to marry themselves.<sup>13</sup>

One of the main arguments to oppose same-sex marriage is the argument that homosexual relations do not correspond to the normal definition of marriage. These opponents believe that moral values should be embodied in legal norms; so it all depends on how marriage is defined. Even though, marriage is widely regulated by the government and legislative bodies, married partners are the ones who define their marriage and set most of the rules between each other. Jonathan Rauch in his piece about same-sex marriage underlines that “today marriage is almost entirely a voluntary arrangement whose contents are up to the people making the deal”<sup>14</sup>.

According to the traditional concept of marriage, since only a couple composed by a man and woman can procreate, the opportunity to marry had to be offered only to hetero-sexual couples. In contrast, the proponents of same-sex relations argue that “sexual partnerships are one of a number of factors that bond adults together into stable household units”<sup>15</sup>. Hence, they claim that prohibition of same-sex relationships is in itself immoral because it results in discrimination, which violates the principle of equal treatment. So the main argument opposing same-sex marriage is that homosexuality is immoral, leaving apart the idea that homosexuality is a natural condition. Homosexuality has existed for long and it has always been a feature of human kind. Hence, if this is a natural condition for a group of individuals, it can be natural and moral for them to get married as well.

According to the argument that same sex marriage may destroy the meaning of marriage as a heterosexual union defined to procreate, there are counterarguments which prove the contrary. For example, there are sterile heterosexual couples who cannot procreate and they are still allowed to

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<sup>13</sup>Gretchen, S. “From This Day Forward: Commitment, Marriage, and Family in Lesbian and Gay Relationships”, *St. Martin’s Griffin*, 1999, New York.

<sup>14</sup> Rauch, J. “For Better or Worse?”, *The New Republic Magazine*, May 1996.

<sup>15</sup>“Same-sex marriage”, *Encyclopedia Britannica*, 27 September 2018, available at <<https://www.britannica.com/topic/same-sex-marriage>> [last accessed 24 January, 2019].

freely marry. This leads to the conclusion that procreation also cannot be a sufficient argument for opposing same-sex marriage.

Other studies on same-sex marriage can be divided into two categories: those based on the public opinion and those focused on political mobilization. The varied range of support is linked to demographic, contextual and cultural factors, such as sex, age, religion, education, according to public opinion research.<sup>16</sup> These studies show that among others religious beliefs are particularly strong factors in opposing same-sex unions. In addition, public opinion surveys on gay and lesbian individuals can provide some insight into same-sex marriage attitudes, such as, for instance beliefs about the nature of homosexuality, negative stereotypes, and beliefs in traditional moral values.<sup>17</sup>

## 2.4 Religion and homosexuality

This section will consider some religious views on homosexuality. As religion is one of the main forces that opposes the legalization of same-sex marriage in several countries. Religious activities include practices such as attending churches or mosques, reading the Bible or Koran, beliefs about God, among other practices. Some studies have found that religious participation, high levels of access to religion and the degree of importance of religion in an individual are associated with low support for same-sex marriage.<sup>18</sup>

However even within the context of religion, there can be distinguished different divisions, such as, for instance, conservative, moderate and liberal. Each of these forms have different approaches on homosexuality. Some studies on homosexuality have found that members of

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<sup>16</sup> Kite, M.E., Whitley, B.E, “Sex differences in attitudes toward homosexual persons, behaviors, and civil rights: A meta-analysis”, *Personality and Social Psychology Bulletin*, 1996, pp. 336–353.

<sup>17</sup> Lannutti, P.J., Lachlan, K.A. “Assessing attitudes toward same-sex marriage: Scale development and validation.” *Journal of Homosexuality*, 2008, pp. 113–133.

<sup>18</sup> Schuck, K.D, Liddle, B.J., “Religious conflicts experienced by lesbian, gay, and bisexual individuals.” *Journal of Gay and Lesbian Psychotherapy*, 2001, pp. 63–82.

conservative protestant groups hold more negative attitudes toward gay and lesbian persons<sup>19</sup>. According to other studies, Baptists and fundamentalist evangelical Protestants showed more negative attitudes toward homosexuality and same-sex marriage than Catholics and Jews<sup>20</sup>. On the other hand, Jews, liberal Protestants, and people with no religious affiliation have more liberal attitudes toward gay and lesbian persons.<sup>21</sup>

The members of a community that have negative attitudes toward same-sex marriage can affect the perception of other members of the group as well. However, this is not always the case since it is more possible to have individual attitudes on same-sex marriage. It is actually more common that the strength of religious affiliations is closely related to attitudes on homosexuality. Contrary to persons who do not have religious access, any religious affiliation increases the likelihood of holding negative attitudes towards homosexuality.<sup>22</sup> In other words, although there may be religious organizations which preach tolerance toward homosexual people, the lack of religious affiliations nonetheless shows more positive attitudes toward same-sex couples contrary to people being affiliated in any kind of religion.

Conservative religions portray homosexuality as immoral and a crime against nature. According to conservative religious lessons, homosexual acts between people from the same sex are considered a sin.<sup>23</sup> In addition, they claim that homosexuality is a choice. If homosexuality is a sin and choice, it is not genetically or biologically determined, but a behavior that can be changed. In this way, conservatives equate the sinful homosexual behavior with same as same-sex marriage. When it

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<sup>19</sup> Stefurak, T. Taylor, C. Mehta, S., "Gender-Specific Models of Homosexual Prejudice: Religiosity, Authoritarianism, and Gender Roles". *Psychology of Religion and Spirituality*, 2010, pp. 247–261.

<sup>20</sup> Woodford, M.R. Walls, N.E. Levy, D.L. "Religion and endorsement of same-sex marriage: The role of syncretism between denominational teachings about homosexuality and personal religious beliefs." *Interdisciplinary Journal of Research on Religion*, 2012, pp. 1-29.

<sup>21</sup> Finlay, B. Walther, C.S. "The relation of religious affiliation, service attendance, and other factors that contribute to homophobic attitudes among college students." *Review of Religious Research*, 2003, pp. 370-393.

<sup>22</sup> Gonzalez-Rivera, Milagritos. Herek, Gregory M. "Attitudes toward homosexuality among U.S. Residents of Mexican descent." *Journal of Sex Research*, 2006, pp. 122–135.

<sup>23</sup> Spahiu, D., "Same-sex marriage (The Attitudes)", 2018, Tirana.

comes to young people, they tend to be more supportive of same-sex marriage than the rest of the society. However, religious factors have been considered important influencers in predicting also young people's attitudes on same-sex relationships.<sup>24</sup>

## 2.5 The arguments in favor of same-sex marriage.

Although the concept of marriage is under transformation and does not have the same status it had decades before, it is still a very important institution. Beyond its symbolic and religious meaning, marriage encompasses legal and civil consequences as well. A married couple, once they are married can benefit from several rights such as, favorable tax treatment, inheritance and immigration rights, the right to visit and decide in hospitals for the other partner, among others. Apart from the civil rights and benefits aspect, marriage is an expression of individuality and identity as well. It reflects a couple's commitment to live together and support each other. For the benefits that associate the institution of marriage, lesbian and gay couples are fighting an ongoing battle to gain the right to marry, seen by them as a privilege for heterosexual couples only. For them it is a form of recognition and validation from the society. In her book on sexual orientation and the constitution Martha Nussbaum claimed that "[t]o get this privileged treatment under law people do not have to show that they are good people."<sup>25</sup> Convicted people, sexual and drug abusers, for instance, are all free to marry, she further argues, while homosexual couples are not. The only criteria, it seems, to have been put by the state is that of being of the opposite sex. Although in theory marriage should be enjoyed by everyone, the state does not approve this right to gays and lesbians. Since all human beings have human dignity, the right to choose a partner and be legally recognized should be a fundamental and universal right. Marriage for same-sex partners is a set of entitlements and

<sup>24</sup> Olson, L.R. Cadge, W. Harrison, J.T. "Religion and public opinion about same-sex marriage." *Social Science Quarterly*, 2006, pp. 340-360.

<sup>25</sup> Nussbaum, Martha, "Disgust to Humanity: Sexual Orientation and the Constitution", *Oxford University Press*, 2010.

responsibilities, social acceptance and legitimacy, the same as for other couples. They claim their right to marry for the very same reasons as opposite-sex couples. Therefore, the main argument in favor of same-sex marriage is very simple:

“If two people want to make a commitment of the marital sort, they should be permitted to do so, and excluding one class of citizens from the benefits and dignity of that commitment demeans them and insults their dignity.”<sup>26</sup>

Additionally, the right to marry is reflected in almost all the international human rights declarations, covenants and treaties and particularly it is always included in the fundamental rights section. The main instrument in defense of human rights is the Universal Declaration of Human Rights (UDHR) and, as such, it reads as follows:

“(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.

[...](3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>27</sup>

Furthermore, the International Covenant on Civil and Political Rights recognizes the right to marry men and women of marriageable age, and emphasizes the family’s importance in society in its Article 23:

“1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

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<sup>26</sup> Nussbaum, Martha, “Disgust to Humanity: Sexual Orientation and the Constitution”, *Oxford University Press*, 2010.

<sup>27</sup> UN General Assembly, Universal declaration of human rights (217 [III] A), 1948 United Nations Article 16 (1) and (2).



2. The right of men and women of marriageable age to marry and to found a family shall be recognized.”<sup>28</sup>

Articles similar to these are found in other regional human rights documents, such as European Convention on Human Rights and the European Charter of Fundamental Rights, which will be further examined in the upcoming sections.

Moreover, almost every Constitution in the world, such as for example the Constitution of Portugal (Articles 36 and 67), Spain (Article 32), Poland (Article 18), Germany (Article 6), just to mention a few includes the right to marry as a fundamental right of the individual. In addition to the right to marry, there is usually an anti-discrimination clause as well. Taking into consideration these two, marriage being a fundamental right for men and women, should be equally enjoyed by everyone; it is not fair if it is denied to one or another group of people. In contrast to this, state officials and other opposing groups of same-sex marriage support their arguments in the “men and women” phrase of the right to marry clause. However, as it was discussed in the section “The evolution of marriage” in this chapter, marriage has and will still undergo many transformations, as it will adapt to the needs of the society. Thus, the recognition of same-sex couples will most probably simply follow the same fate as the interracial marriage.

The prohibition of the right to marry of same-sex couples can have emotional effects, since they are denied lots of important legal, economic and social benefits and protections. Although some states have in some way recognized same-sex couples and introduced the right to civil unions for them, it is still a challenging and controversial issue, since it can have many differences compared to the institution of marriage. Many countries do not grant the same entitlements to civil unions as they grant to marriage. Also, civil unions are not always recognized from one country to another. After all, why should states distinguish between homosexual and heterosexual couples, while based on the

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<sup>28</sup> UN General Assembly, International Covenant on Civil and Political Rights, 1966, United Nations, Treaty Series, (999), Article 23 (1) and (2).

principle of equality and non-discrimination, there should be no differences among individuals in the enjoyment of fundamental rights.

## 3 Chapter II

### 3.1 The LGBT+ movement and the state

The first country that legally recognized civil unions for couples of the same sex was Denmark in 1989. After Denmark, a several countries followed this model. In April 2001, the Netherlands was the first country to allow couples of the same sex to get legally married. Following that, the number of countries recognizing this type of marriage has been increasing every year. Thus, the countries that have legalized same-sex marriage so far are: Netherlands (2001), Belgium (2003), Canada (2005), Spain (2005), South Africa (2006), Norway (2009), Sweden (2009), Mexico (2009), Portugal (2010), Iceland (2010), Argentina (2010), Denmark (2012), England/Wales (2013), New Zealand (2013), Brazil (2013), Uruguay (2013), France (2013), Scotland (2014), Luxembourg (2014), Finland (2015), Greenland (2015), Ireland (2015), USA (2015), Colombia (2016), Germany (2017), Malta (2017) and Australia (2017), some of the recent ones being: Northern Ireland (2019), Ecuador (2019), Taiwan (2019), Austria (2019).<sup>29</sup>

Bearing in mind the example of some of the above mentioned states that have legalized same-sex marriage, this section further reflects on whether LGBT+ movement has any impact in public policy making, for instance by achieving some sort of recognition. Social movements are defined as “collective challenges, based on common purposes and social solidarities rather than expressions of violence or extremism.”<sup>30</sup> Other scholars argue that “social movements are a sustained series of interactions between the state and challenging groups.”<sup>31</sup> Social movements are thus described as groups which interact with the state and its institutions to get access to state resources and to promote policies and social change.

<sup>29</sup> Pew Research Center, “Same Sex marriage Around the World”, 29 October 2019, available at <<https://www.pewforum.org/fact-sheet/gay-marriage-around-the-world/>> [last accessed 1 November 2019]

<sup>30</sup> Sidney T., “Power in movement: Social Movements and Contentious politics”, *Cambridge University Press*, 1998.

<sup>31</sup> Jenkins, J.C., Klandermans, B., “The Politics of Social Protest: Comparative perspective on States and Social movements,” edited by Jenkins and Klandermans, *University College London Press*, 1995, pp. 3-13.

The LGBT+ movement has evolved overtime. Historically, gay and lesbian groups have not always aimed at targeting the state, rather the critiques of other social institutions such as family, religious institutions, etc. This has changed because now the state is continuously targeted by this movement, which often regard it as “a key tool to change gender and sexual relationships through rights and policies”<sup>32</sup>. These movements increasingly cooperate with the state and they sometimes even participate in advisory bodies, drafting or implementing policies or through policy networks and personal ties.<sup>33</sup>

Tremblay, Paternotte and Johnson<sup>34</sup> further argue that among different state models, conservative, religious and nationalist ones use gender backsliding politics that target gays and lesbians when denouncing non-heterogeneous forms of sexuality in their own countries as forms of western deviance. While in less religion dependent states it is easier to change a practice, and it may explain why the Netherlands was the first country to grant the right to marriage for same-sex couples. Mainly because in that country marriage does not have a sacred connotation as it does in most of the religions.

In the Netherlands since 1960s, relations were primarily based on love and equality, regardless of the sex of the partners.<sup>35</sup> Political opportunities for gay marriage came up with the coalition of Labor with Liberals in the 1990s (the first government without Christian Democrats composition). The transformation of marriage from a family arrangement to a love-based enterprise also contributed significantly to the public acceptance of same-sex marriage.

International human rights regimes have played an important role at influencing domestic policies as well. Activists use the favorable international environments to put pressure on reluctant

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<sup>32</sup>Adam, B. D. “The Lesbian and Gay Movement and the State” edited by Manon Tremblay, David Paternotte and Carol Johnson, *Sexualities*, 2013, 16(3/4) pp. 487–489.

<sup>33</sup>*Ibid.*

<sup>34</sup>*Ibid.*

<sup>35</sup> Hekma, G., “The drive for Sexual Equality”, *Sexualities*, 2008, 11(1), pp.51-55.

states and to gain acceptance at a domestic level.<sup>36</sup> As Kelly Kollman and Matthew Waites argue about the European Court of Human Rights (ECtHR): “Not only have activists been able to utilize ECtHR to catalyze specific legal changes, but they have also been able to use the logic of the Court’s rulings to argue for the further expansion of LGBT rights.”<sup>37</sup>

LGBTI+ activists have not only used the international mechanisms to push states, but they have also contributed to inspire activists in other countries and finding support from abroad, building in this way international. According to International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), these connections also encourage national groups to look across national borders for good practices.<sup>38</sup>

It is possible to say that there is a bilateral and feedbacking relationship between the LGBT+ movement and the state. On the one hand, the movement influences the states and policy making. On the other hand, the state has a significant impact on the movement. The state has traditionally tried to support heterosexuality. However, the movement has not only managed to change state policies, but it has sometimes improved the state relations with the movement by bringing about more collaboration. Tremblay, Patternote and Johnson state that: “As a result, lesbian and gay activists are moving from their position of challengers or political outsiders towards becoming political insiders and even, in some cases, policy makers or being involved in overseeing policy implementation.”<sup>39</sup>

Therefore, the perfect situation for the concretization of same-sex marriage friendly country is dependent on some key factors. For instance, social movements that are larger in size with many members and who possess a better financial status, will more likely be better effective in campaigning

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<sup>36</sup>Keck, M , Sikkink, K. , “Activists without borders, Advocacy Networks in International Politics” *Ithaca, Cornell university Press*, 1998.

<sup>37</sup> Kollman, Kelly. 2014. “Deploying Europe: The Creation of Discursive Imperatives for Same-Sex Unions” in Phillip M. Ayoub and David Paternotte Eds. *LGBT Activism and the Making of Europe: A Rainbow Europe?*, London

<sup>38</sup> Adam, B. D. “The Lesbian and Gay Movement and the State” edited by Manon Tremblay, David Paternotte and Carol Johnson, *Sexualities*, 2013, pp. 487–489.

<sup>39</sup> Adam, B. D. “The Lesbian and Gay Movement and the State” edited by Manon Tremblay, David Paternotte and Carol Johnson, *Sexualities*, 2013, pp. 487–489.

in favor of same-sex marriage. Most often, the strength of the social movement dictates the probability of a state to progress LGBTI+ rights. The orientation of the party in office in a specific state can also have an impact on the prospects of introducing same-sex marriage. For instance, a left wing or more liberal party will be more willing to support the advancement of LGBTI+ rights, while right wing and more conservative parties will be reluctant to introduce such policies.<sup>40</sup>

In line with what was widely argued in the religious and homosexuality section, Fernandez and Lutter argue that the more secularized a society is or where the religious opposition is less visible, the easier it is to introduce same-sex marriage.<sup>41</sup> Inglehart, in addition, takes the same stand. He argues that due to the long-lasting religious opposition to same-sex marriage a more traditional and less-secularized country is less likely to be welcoming of same-sex marriage policies.<sup>42</sup>

### 3.2 The role of the media

This section will examine the impact of media in the debate over homosexual couples. Studies on attitudes toward same-sex marriage suggest that positive media coverage is an important means of decreasing prejudices and improving attitudes toward homosexual couples.<sup>43</sup> Media coverage can largely affect a public issue, because it transmits information to the society and it is very important the way the media chooses to represent this information. With regard to sensitive issues, such as same-sex marriage, the media plays a significant role; therefore, LGBTI+ movements tend to strategically address the issue of same-sex marriage and the arguments in favor in the mass media.<sup>44</sup>

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<sup>40</sup> Fernández, Juan J., and Mark Lutter., "Supranational cultural norms, domestic value orientations and the diffusion of same-sex union rights in Europe, 1988–2009.", 2013, *International Sociology*, pp. 102-120.

<sup>41</sup> Fernández, Juan J., and Mark Lutter., "Supranational cultural norms, domestic value orientations and the diffusion of same-sex union rights in Europe, 1988–2009.", 2013, *International Sociology*, pp. 102-120.

<sup>42</sup> Inglehart, R., "Modernization and Postmodernization: Cultural, Economic, and Political Change in 43 Societies", 1997, *Princeton University Press*, p. 72.

<sup>43</sup> Schiappa, Edward, Peter B. Gregg, and Dean E. Hewes. 2006. "Can One TV Show Make a Difference? Will & Grace and the Parasocial Contact Hypothesis." *Journal of Homosexuality* 51(4): 15–37.

<sup>44</sup> Moscovitz, Leigh., 2013, "The Battle over Marriage: Gay Rights Activism through the Media", University of Illinois Press.

Taking into consideration the fact that traditional values and morality is one of the main overriding arguments against same-sex marriage, modern theorists argue that it is necessary to change traditional values into modern ones in order to promote progress. Lerner, for instance, regarded mass media as an incentive for social change. Media, he argued, expose people with traditional beliefs and values to the modern world and promotes ideas of equality and tolerance. “[T]he importance of media in our theory is that it enlarges a person’s view of the world and his capacity to imagine himself in new and strange situations in ways that will alter action”<sup>45</sup>, Lerner claimed.

It is true that inclusion of the social movements issues in the media leads to social change, however many scholars agree that the media is biased.<sup>46</sup> There is a risk that media can be selective and can include in a substantial part in its agenda the opposition campaigns. When this happens, it may result in counter mobilization and the claim of LGBTI+ supporters might be undermined in some way.

Other scholars, argue that mass media is closely linked to the advancement of liberal viewpoints.<sup>47</sup> This argument is mainly based on the theory that people become more accepting of certain community members while they interact or get in touch with them. Related to this same theory, some scholars suggest that media can help eliminate or reduce prejudices towards LGBTI+ people.<sup>48</sup> However, media very often is owned or controlled by the national authorities, and this happens usually in less developed countries. So, it may depend a lot on the state what media will represent.<sup>49</sup>

Overall, there are findings which suggest that media can play a substantial role in influencing the change of the perception of the society about sexual minorities. In order for the media to contribute

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<sup>45</sup> Lerner, Daniel. 1958. *The Passing of Traditional Society: Modernizing the Middle East*. New York: Free Press.

<sup>46</sup> Gwendolyn, M. Lechman, “Media, Marriage and the Construction of LGBT Legal Agenda” Legal Studies Research Paper Series Paper No. 1437, 5 February 2018.

<sup>47</sup> Norris, Pippa, and Ronald Inglehart, “Cosmopolitan Communications: Cultural Diversity in a Globalized World”, 2009, Cambridge University Press.

<sup>48</sup> Schiappa, Edward, Peter B. Gregg, and Dean E. Hewes. 2006. “Can One TV Show Make a Difference? Will & Grace and the Parasocial Contact Hypothesis.” *Journal of Homosexuality* 51(4), pp. 15–37.

<sup>49</sup> Diez, Jordi, and Michelle L. Dion. 2018. New Media and Support for Same-Sex Marriage. *Latin American Research Review* 53(3), pp. 466–484.

in the advancement of LGBTI+ rights, it has to be unbiased and fair with respect to its agenda. In a society where homosexual relationships are still a highly controversial issue, media can have a worthy impact by portraying this issue as positive.

### **3.3 The evolution of LGBTI+ marriage rights in Germany**

#### **3.3.1 The Constitution of Germany**

This section will review the evolution of the legal framework of Germany regarding same-sex couples. The German primary source of law is its constitution called the German Basic Law. It stipulates the fundamental and general principles on which the Federal Republic of Germany runs. Its article 6 regulates the institution of marriage, claiming that “marriage and the family shall enjoy the special protection of the state”.<sup>50</sup> Article 2 of the German Basic Law, on the other hand, includes “the right to free development of [everyone’s] personality [...]”<sup>51</sup>. In addition, the German Basic Law contains the equal protection clause, stating that:

“(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

(3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavored because of disability.”<sup>52</sup>

There is actually nothing in the German Basic Law defining marriage; neither the Civil Code nor the previous Law on Marriage contain a precise definition of marriage. However, the Court’s case

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<sup>50</sup> German Basic Law 1949 (Grundgesetz), art. 6(1).

<sup>51</sup> German Basic Law 1949 (Grundgesetz), art. 2(1).

<sup>52</sup> German Basic Law 1949 (Grundgesetz), art. 3.



law has for a long time interpreted that the concept of marriage in article 6 belongs to heterosexual couples and supporting, therefore, the traditional view of marriage.<sup>53</sup>

### 3.3.2 The Registered Life Partnerships Act

For many years, as it will be analyzed further, the relationship of same-sex couples was regulated by the Registered Life Partnerships Act. Just recently, precisely on 1 October 2017, the new law granting same-sex marriage was passed. Same-sex couples do now enjoy the same rights as hetero-sex couples. The partners can now conclude a contract and owe each other maintenance, their divorce is regulated under the same rules as married hetero-sex couples, they are bound by the inheritance law. Previously registered partnerships can be converted to marriage and the latter will be considered valid from the day of the conclusion of the registered partnership.

In 1968 homosexual behaviors were first decriminalized in the German Democratic Republic, followed by the West Germany one year later. The first LGBTI+ parade dates back to 1972 in Munster. Later on, same-sex couples were granted the possibility of registered partnerships with the amendment of the German Act on Registered Life Partnerships (Lebenspartnerschaftsgesetz; LPartG) on 16 February 2001.<sup>54</sup> It took 16 more years for same-sex couples to gain the right to marriage and consequently gain full marital rights.

Before 2017, the same year that same-sex marriage was legalized, the German Civil Code stated that a marriage could exist between a man and a woman<sup>55</sup>, without explicitly mentioning the requirement of the opposite sex. Nevertheless, no same-sex marriage was allowed in Germany, only registered partnerships. Representatives of gay and lesbian groups tried to claim marriage under the existing laws but the Federal Constitutional Court held that this was not the case, however the

<sup>53</sup> This argument is supported in cases such as BvR 640/93, 4 October 1993, 3058 and Constitutional Tribunal, case no 121/2010, 8 April 2010.

<sup>54</sup> Act on Registered Life Partnerships, (Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften), 2001, Art. 3 (25)

<sup>55</sup> German Civil Code (Bürgerliches Gesetzbuch; BGB), sec. 1303.

legislator could enact a law in this respect.<sup>56</sup> So for a long time, the German Act on Registered Life Partnerships was in power. Most of its provisions were very similar to marriage. The law was modified in 2005 to progress the child adoption rights; it enabled for one of the partners to adopt the other partner's biological child. With the reforms made to the German Act on Registered Life Partnerships, this law was very much identical to the marriage provisions. However, this did not stop LGBTI+ activists from fighting for the right to same-sex marriage.

Germany has been named one of the leading countries with regard to LGBTI+ rights.<sup>57</sup> Following the unification of both parts of Germany, a number of reforms have taken place towards the development of LGBTI+ rights. Some of the reasons for this wave of changes, as Davidson-Schmich suggests, are the influence of internal and external actors, namely LGBTI+ activists and the European Union policies.<sup>58</sup>

As early as the 1980s, the German Democratic Republic in order to gain more control over the then developing LGBTI+ movement, started speaking publicly in conferences about homosexuality and calling for non-discrimination of this group. Later, articles on homosexuality, a movie on homosexuality were shown on the state-controlled media. Youth clubs began gathering to support young gays and lesbians.

In 1978, activists from various countries, such as United States, Ireland, United Kingdom, etc. had founded what was to become the largest international organization of LGBTI+ community, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)<sup>59</sup>. Since its beginning, ILGA challenged human rights violations of the LGBTI+ community at the European Court of

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<sup>56</sup> BVerfG, 4.10.1993.

<sup>57</sup> Ayoub, Phillip M. 2013, "Cooperative Transnationalism in Contemporary Europe: Europeanization and Political Opportunities for LGBT Mobilization in the European Union", *European Political Science Review* Vol. 5, Issue 2, p 279 – 310.

<sup>58</sup> Davidson-Schmich, Louise K., "LGBT Politics in Germany: Unification as a Catalyst for Change", *German Politics*, 2017, 26:4, pp. 534-555.

<sup>59</sup> Ayoub, Phillip M. and David Paternotte. 2014. *LGBT Activism and the Making of Europe: A Rainbow Europe?*, London

Human Rights. Van der Vleuten argues that governments may sometimes introduce policies, with which the leaders disagree, but this happens when the government is “squeezed between pincers”<sup>60</sup> of international pressure and domestic social movements. Thus, Germany after World War II had to prove its commitment to the protection of human rights.<sup>61</sup>

Ayoub also argues that the cooperation between domestic LGBTI+ activists and the international or European organizations results in greater development in the domestic level.<sup>62</sup> For instance, the International Lesbian, Gay, Bisexual, Trans and Intersex Association took advantage of the pressure by the European Union at that time and, in 1996, founded a separate branch, ILGA-Europe, which would focus on the promotion of LGBTI+ rights at the European Union Level.<sup>63</sup>

On the other hand, European Union institutions have through the treaty amendments, or the so-called “deepening” of the community, contributed to a large extent to the advancement of LGBTI+ rights. The rights of LGBTI+ became present in the European Union firstly through the coming into force of the Treaty of Amsterdam in 1997, which added in the anti-discrimination clause as one of the grounds that of sexual orientation, stating that the EU should “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”<sup>64</sup> Additionally, the Employment Equality Directive (Directive 2000/78)<sup>65</sup>, which is applicable mainly within the field of employment and occupation, prohibits discrimination on

<sup>60</sup> Van der Vleuten, Anna. 2005. “Pincers and Prestige: Explaining the Implementation of EU Gender Equality Legislation” *Comparative European Politics*. Vol. 3: 464 – 488

<sup>61</sup> Kollman, Kelly. 2014. “Deploying Europe: The Creation of Discursive Imperatives for Same-Sex Unions” in Phillip M. Ayoub and David Paternotte Eds. *LGBT Activism and the Making of Europe: A Rainbow Europe?*, London

<sup>62</sup> Ayoub, Phillip. 2016. *When States Come Out: Europe's Sexual Minorities and the Politics of Visibility*. Cambridge University Press.

<sup>63</sup> Van der Vleuten, Anna. 2014. “Transnational LGBT Activism and the European Courts: Constructing the Idea of Europe” in Phillip M. Ayoub and David Paternotte, eds. *LGBT Activism and the Making of Europe: A Rainbow Europe?* London: 119 – 144

<sup>64</sup> Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997, available at: <https://www.refworld.org/docid/51c009ec4.html> [accessed 6 October 2019]

<sup>65</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16

grounds of sexual orientation among other grounds. Finally, the EU Charter of Fundamental Rights became a legal binding act following the Lisbon treaty in 2009. As soon as the Lisbon treaty became effective, its Article 6(1)<sup>66</sup> granted the Charter of Fundamental Rights the same legal status as the treaties. The anti-discrimination clause is present also in the EU Charter in Article 21 reading: “Any discrimination based on any ground such as [.....] sexual orientation shall be prohibited.”<sup>67</sup> The EU Charter holds in Article 9 that “the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”<sup>68</sup>. These provisions were drafted with the aim of improving the rights of the LGBTI+ persons in the member states of the EU. Furthermore, the EU has also supported ILGA-Europe in their work on the rights of sexual minorities.

Another significant development upon German reunification was the creation of a united German LGBTI+ political organization, known as Lesben und Schwulenverband in Deutschland (LSVD). This organization has played a key role in pushing the German government to meet the international requirements with respect to the rights of LGBTI+ persons. One of the first aims of this organization was to remove Paragraph 175, banning homosexual intercourse, which was successfully achieved in 1994. Afterwards, the LSVD focused on further issues, such as marriage rights for same-sex unions, combating discrimination and violence, etc. The LSVD activists, over the years, have been addressing at the national and international level, bringing a number of cases before the European Court of Human Rights and the Court of Justice of the European Union. Regarding same-sex marriage, the LSVD filed several cases against the domestic authorities, one of which was consequently sent to the Federal Constitutional Court, which held that the fact that same-sex couples did not have access to marriage was not a violation; however the lack of the possibility for same-sex

<sup>66</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art. 6(1).

<sup>67</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art. 21.

<sup>68</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art. 9.

couples to institutionalize their union was in breach of article 3 of the German Basic Law, the equal treatment provision.<sup>69</sup>

The Greens, thus, presented a bill to the Bundestag (12/7885) asking for the right to marry for same-sex couples. The LSVD began a campaign to raise public awareness on challenges faced by same-sex couples. This was then successfully concluded with the adoption of the Bill on Registered Life Partnerships (14/3751). Such an event was a triumph, but on the other hand the full equality between same-sex and hetero-sex unions was not achieved. The fight for full equality went on, and in 2005 the government revised the Registered Life Partnerships Law, extending some rights to same-sex unions, such as social security benefits and the other partner's child adoption.

Although, Germany has been considered as one the leading countries with regard to LGBTI+ rights, actually it took long for it to adopt the same-sex marriage bill. Finally, on June 2017, the German Bundestag voted in favor of the same-sex marriage bill, holding 393 pro votes and 226 against votes (including Angela Merkel). The reason behind the late adoption of same-sex marriage law in the Federal Republic of Germany was the political resistance from the Christian Democratic Union (CDU) party.

### **3.4 The evolution of LGBTI+ marriage rights in Ireland**

Ireland was the first country to grant same-sex couples the right to marry through a referendum.<sup>70</sup> The Irish Constitution holds in its article 40 that “All citizens shall, as human persons, be held equal before the law”.<sup>71</sup> In 2015, the marriage Equality Referendum was held in order to decide whether the right to same-sex marriage deserved to be included in the Constitution of the Republic of Ireland. Following a positive result of the referendum Article 41 (4) of the Constitution was amended, which expresses that “marriage may be contracted in accordance with law by two

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<sup>69</sup> BVerfG, 1993, 3058.

<sup>70</sup> Tobin, Bryan; “Marriage Equality in Ireland: The Politico-Legal Context” 2016, International Journal of Law, Policy and the Family.

<sup>71</sup> Irish Constitution (Bunreacht na hEirann) 1937, art. 40

persons without distinction as to their sex”.<sup>72</sup> However, coming to this result was not an easy path, so this section will focus on the road of Ireland to the constitutional right of same-sex marriage.

In 1993 private consensual sexual activity between homosexual males was decriminalized by the legislative and there were introduced further legislative protections for gay and lesbian persons in the fields of employment, insurance, goods and services.

In the Constitution of Ireland Article 41 (3) (1) claims that “The State pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack.”<sup>73</sup> But, the notion of marriage and family are not defined by the Irish Constitution. The law in Ireland had previously denied same-sex marriage until the Civil Registration Act of 2004 was introduced. This act was responsible for the registration of marriages and in section 2 (2) (e) it held “For the purposes of this Act there is an impediment to a marriage if [...] both parties are of the same sex”<sup>74</sup>. In 2003, in a case that was brought before it the Supreme Court held that the concept of marriage “remains a solemn contract of partnership entered into between man and woman with a special status recognized by the Constitution”.<sup>75</sup>

In 2006 however, section 2(2)(e) came into question in a case before the High Court (*Zappone v. Revenue Commissioners*)<sup>76</sup> brought by a lesbian couple who have been married in Canada and wanted to have their same-sex marriage recognized in Ireland. In the High Court, Dunne J suggested that the main question of the case to be answered was: Whether the right to marry inherent in the Constitution includes the right to same-sex marriage as well? She admitted that “the definition of marriage to date has always been understood as being opposite-sex marriage”<sup>77</sup>, but she claimed that it was for the legislator (the Oireachtas in Ireland) to decide on the scope of the right to marry under

<sup>72</sup> Irish Constitution (Bunreacht na hEirann) 1937, art. 41 (4).

<sup>73</sup> Irish Constitution (Bunreacht na hEirann) 1937, art. 41 (3)(1).

<sup>74</sup> Civil Registration Act, 2004, s. (2)(e).

<sup>75</sup> *DT v CT* [2003] 1 ILRM 321.

<sup>76</sup> *Zappone v Revenue Commissioners*, 2008, 2 IR 417, 14 December 2006.

<sup>77</sup> *Zappone v Revenue Commissioners*, 2008, 2 IR 417, 504.

the Civil Registration Act 2004 to the legislator (Oireachtas in Ireland).<sup>78</sup> This moment is very interesting, because it can be argued that the Government could have taken advantage of this judgment to recognize same-sex marriages instead of developing a referendum much later, as did the UK Parliament in 2013 when it adopted the Marriage Act. One option suggests that they were maybe reluctant about this issue because of an unconstitutionality claim from the Supreme Court.<sup>79</sup> The President in Ireland has the right to bring any Bill before the Supreme Court to decide on its constitutionality. What might have caused the fear of the legislative to pass a same-sex marriage bill, is maybe Article 26 of the Irish Constitution, which provides that before passing a law, the President may refer a Bill to the Supreme Court as to whether that Bill is in conflict with the Constitution. Hence, if, for instance, an Article 26 was brought up regarding the same-sex marriage Bill, the Supreme Court might have held that it is unconstitutional because the institution of marriage in Ireland has traditionally been between two persons of the same sex.

At the same year, 2006, the then Minister for Justice, Equality and Law Reform, Michael McDowell, established a Working Group on Domestic Partnership to consider the issue of same-sex couples and their legal status. This Working Group was consisted of members from the government departments and the Gay and Lesbian Equality Network (GLEN). It then published its recommendations, in which it recommended civil partnership as the best option for same-sex relationships, since the introduction of same-sex marriage would probably be subject to a strong debate and a constitutional challenge. As a result, the Civil Partnership Bill was published in June 2009. The Civil Partnerships Bill of 2009 was largely criticised because it represented indirect discrimination. Hence, one year later, in July 2010, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 was passed by the President of Ireland, which granted same-sex

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<sup>78</sup> Tobin, Bryan; 2016, "Marriage Equality in Ireland: The Politico-Legal Context", *International Journal of Law, Policy and the Family*, vol. 30, no. 2, p.115.

<sup>79</sup> Tobin, Bryan; 2016, "Marriage Equality in Ireland: The Politico-Legal Context", *International Journal of Law, Policy and the Family*, vol. 30, no. 2, p.120.

couples a legal status for their relationship and many rights and responsibilities very similar to marriage. However, the debate still continued, because some aspects were still different with regard to same-sex couples. For instance, same-sex couples did not have the same rights especially regarding witness testimony before the court, tax amendments, children, etc. Also, the fact that they were enabled to enter into a civil partnership rather than marriage did not grant true equality.

In 2011, the Labor coalition Government came into power and established a Constitutional Convention. This Convention would consider some reforms to the Constitution among which the issue of same-sex marriage. In the end, the Government decided to hold a referendum in 2015. It was a very risky decision since the outcome could have been a “No”, but it can be understood that the Government was trying to satisfy people in giving them the power to decide in important issues. Although, it was successful it could have resulted fatal by not favoring same-sex marriages, but rejecting gays/lesbians’ rights deeper. Therefore, Tobin argues that the Government is not to be glorified for this occurring since they had the means to produce such a result and they hesitated to do so by risking in a dangerous result.<sup>80</sup>

### **3.5 The European Court of Human Rights**

This section will briefly examine how the European Court of Human Rights (ECtHR) has been dealing with cases concerning same-sex couples. In fact, we cannot rely much on the ECtHR because the case law is very limited in number with regard to this issue. However, as we will further see, positive and progressive steps have been taken so far by the Court with regard to same-sex couples’ recognition, although this has not yet been implemented in the text of the Convention. Under the European Convention on Human Rights, LGBTI+ rights can be protected through invoking either Article 8, Article 12, Article 14 or Protocol no. 12. Article 8 concerns the right to respect for private

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<sup>80</sup> Tobin, Bryan, “Marriage Equality in Ireland: The Politico-Legal Context”, *International Journal of Law, Policy and the Family*, 2016, vol. 30, no. 2.



life<sup>81</sup>, Article 12 the right to marry<sup>82</sup>, Article 14<sup>83</sup> guarantees equal enjoyment of the rights set out in the Convention and Protocol no. 12<sup>84</sup> prohibits discrimination in general.

LGBTI+ rights have historically been protected based on Article 14 of the European Convention on Human Rights (ECHR), which guarantees equal enjoyment of rights and freedoms set forth in the Convention.<sup>85</sup> This Article, in fact, is not an independent right but is an accessory one which applies in relation to the enjoyment of the rights and freedoms protected by the Convention. What is noteworthy for the purpose of this paper is that Article 14 does not explicitly mention sexual orientation as one of the grounds but, the ECtHR has made it clear that sexual orientation falls under the protection of Article 14, because this is not an exhaustive right. Protocol no. 12, unlike Article 14, is an independent right combating discrimination generally, but it has not so far been invoked in the Court's case-law.

Generally, discrimination can occur when people in comparable situations are treated differently, so the requirement of comparability needs to be established for there to be a discrimination prohibited under Article 14. The Court, actually, established in one of the cases brought before it, *Vallianatos v. Greece*<sup>86</sup>, that same-sex couples are in comparable situations as hetero-sex couples as far as their need for legal recognition concerns.

The safest provision under the Convention to claim LGBTI+ rights so far has been Article 8, because it has a very broad definition and the Court has continuously widened its scope through its case law. What is more helpful is the fact that oftentimes the Court relies on the “living instrument” doctrine to combat discrimination on basis of sexual orientation, bringing up new arguments in favor

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<sup>81</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, 4 November 1950, Art. 8- Right to respect for private and family life.

<sup>82</sup>*Ibid.* Art. 12- Right to marry

<sup>83</sup>*Ibid.* Art. 14- Prohibition of Discrimination

<sup>84</sup>*Ibid.* Protocol no. 12- General prohibition of discrimination

<sup>85</sup>*Supra.* 3

<sup>86</sup> Application no. [32684/09](#), ECHR 2013, *Vallianatos v. Greece*.

of same-sex couples. On the other hand, the Court, as far as same-sex couples' recognition concerns, has afforded a wide margin of appreciation to States since there is a lack of European consensus, a standard the Court relies on heavily. Article 8 imposes on Member States the obligation to not interfere with the private life of individuals. It is not an absolute right so the States can derogate from their obligations. The Court has always assessed the limitation test, whenever claims under Article 8 have arisen.

However, according to the justification of States for not affording LGBTI+ people the same equal rights as to other individuals, the ECtHR in many cases has argued intensively that differences relying on sexual orientation should be justified by weighty and serious reasons. In *Dudgeon v. The United Kingdom*,<sup>87</sup> the Court ascertained that homosexual activities are part of the concept of private life, expressly "most intimate aspect" of private life and it reiterated that the State is allowed to interfere only when there are weighty reasons that justify the interference, applying the limitation test as usually.

One of the most significant cases in favor of homosexual relationships is *Schalk and Kopf v Austria*<sup>88</sup> where the Court for the first time acknowledged that same-sex relationships fall under the notion of family life, arguing as follows:

"[...] 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 a different-sex couple in the same situation would."<sup>89</sup>

<sup>87</sup> Application no. 7525/76, ECHR 1981, *Dudgeon v. United Kingdom*.

<sup>88</sup> Application no. 30141/04, ECHR 2010, *Schalk and Kopf v Austria*.

<sup>89</sup> *Ibid.* para 94.

Meanwhile, Article 12 of the ECHR states that “men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”<sup>90</sup>. This provision is relevant for same-sex couples concerning their right to marry, unlike Article 8 which cannot go beyond the sphere of private and family life, but the debate on the right to marry is still ongoing and has not yet been clarified. Interestingly, the European Union Charter of Fundamental Rights, highly inspired by the ECHR, has a modified wording of the right to marry clause. Since, the EU Charter of Fundamental Rights was drafted later than the ECHR, the drafter’s intent was to avoid the problems that have arisen from this provision, which is interpreted as granting status to marry to people of different sex only, and therefore it deleted the “men and women” phrase. Since this latter phrase can be interpreted as it allows the right to marry to couples of the opposite-sex only, it is quite problematic regarding same-sex couples’ right to marry in the Council of Europe. On the other hand, the Court which is the ultimate interpreter of the Convention has also been reluctant to hold that this phrase should be interpreted as meaning that same-sex couples can enjoy the right to marry, but has left it on the Member States’ latitude to decide.

A relatively recent case concerning same-sex couples’ recognition is the one named *Oliari and Others v. Italy*<sup>91</sup>. The applicants of the case argued that their right to non-discrimination (Art. 14), right to marry (Art.12) and the right to respect for private and family life (Art.8) were violated, because the Italian law did not foresee any possibility for them to legalize their relationship either through marriage or any other form such as civil union. The Court held that:

“...the Court considers that in the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have

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<sup>90</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950.

<sup>91</sup> Application no. 36030/11, ECHR 2015, *Oliari and Others v. Italy*

their relationship legally recognized and which would guarantee them the relevant protection....”<sup>92</sup>

In the end the Court found that “the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.”<sup>93</sup>

Through this case the Court acknowledges a positive obligation on Member States to provide a legislative framework granting the recognition of same-sex couples relying on Article 8 of ECtHR. However, the Court did not raise the right to marry argument even in this recent case, which further reinforces the reluctance of the Court to make such a progress. In fact, the Court did not even assess the claim under Article 12 (right to marry) as admissible in this case.

Apart from the ECtHR, the Council of Europe through its soft law has also contributed in the fight against discrimination and marginalization of LGBTI+ people. For instance, in 2010 a Recommendation of Committee of Ministers<sup>94</sup> on measures to combat discrimination on grounds of sexual orientation or gender identity was adopted, which imposes specific measures on Member States with the aim of advancing the situation of LGBTI+ persons. With respect to same-sex couples it states that:

“Where national legislation recognizes registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.”<sup>95</sup>

Although, this is a progressive step undertaken by the Committee of Ministers to promote LGBTI+ rights, it still grants discretion on Member States to decide whether or not to grant same-sex couples

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<sup>92</sup>*Ibid.* para. 174

<sup>93</sup>*Ibid.* para. 185

<sup>94</sup>Recommendation of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, CM/Rec(2010)5, 31 March 2010

<sup>95</sup>*Ibid.* para. 24

recognition. This leads to a diversity of approaches and legislations throughout Council of Europe's Member States, which can also be contrary to the principle of universal human rights. Hence, there is still room for improvement and there is still a lot to be done to achieve absolute equality and non-discrimination for LGBTI+ people.

In conclusion I would like to emphasize that although the European Court of Human Rights in particular has been willing to stand a progressive approach in this issue, it has not been fully consistent and determined to grant homosexual or lesbian couples right to marry or to firmly establish a positive obligation on all Member States to implement comprehensive legislation in favor of same-sex couples.

## 4 Chapter III

### Albania

#### 4.1 The Constitution of the Republic of Albania

The constitution of the republic of Albania is the basic act that specifically regulates human rights and fundamental freedoms. The Constitution also affirms the basic principles upon which the Albanian state is created, functions and is organized. Its preamble affirms the obligation of the Albanian state to recognize and respect fundamental rights and freedoms, as well as the protection of human dignity and personality.

Article 3 of the Constitution provides: "... human dignity, human rights and freedoms, social justice, [...] pluralism, [...] and the coexistence and understanding of Albanians with minorities are the basis of this state, which has a duty to respect and protect them"<sup>96</sup>. Thus, the principle of respect for and protection of human dignity is strongly affirmed by the Constitution and is closely linked to fundamental rights and freedoms. Respect for human dignity serves as a basis for interpretation without which human freedoms cannot be applied.

There is currently no definition in Albanian jurisprudence regarding the principle of respect for and protection of human dignity. However, the Albanian Constitution, unlike other formulations of some of the constitutions of democratic countries, has given human dignity the clear place of the basic constitutional principle. It serves as a fundamental basis for interpreting all parts of the Constitution and its respect and protection is at the heart of the entire legal system.<sup>97</sup>

The principle of equality in the Constitution of the Republic of Albania is formulated in the classic version of this principle, the equality of all before the law.<sup>98</sup> This principle is fused with the principle of protection against discrimination. The legislator has listed exhaustively the causes that

<sup>96</sup> The Constitution of the Republic of Albania, 1998, art. 3.

<sup>97</sup> Omari, Sonila; 2010 "Family Law", Morava publications, Tirana.

<sup>98</sup> The Constitution of the Republic of Albania, 1998, art. 18.

make the basis of discrimination. It should be noted that although the Constitution of the Republic of Albania was reformed in 2016, it still does not explicitly provide for sexual orientation and gender identity as a cause of discrimination. In a broader sense, gender identity can be understood as 'sex'. The Constitution in its Article 53 recognizes the right of everyone to get married and have a family<sup>99</sup>. It states in paragraph 3 of the same article that the “The entering into and dissolution of marriage are regulated by law.”<sup>100</sup>

One of the newest forms of discrimination in Albanian society is discrimination based on sexual orientation. I consider the anti-discrimination clause in the Albanian Constitution to be quite a short and limited provision regarding the grounds of anti-discrimination and what is more interesting is that sexual orientation is not included, at all. It is also not an open clause so that other grounds can be added in accordance with the up-to-date conditions. The Constitution of the Republic of Albania gives hardly any hope to claim discrimination on the basis of sexual orientation before the Court. Law enforcers should therefore broadly interpret cases of discrimination on grounds of sex, including discrimination on grounds of sexual orientation.

## 4.2 Law “On Protection from Discrimination”

Adoption of law No. 10 221, dated 04.02.2010 “On Protection from Discrimination”<sup>101</sup> for the LGBTI+ community constitutes a positive step in protecting their rights. This law was a necessity at the time to be adopted. The new forms of discrimination and the direct shortcomings of their provisions in the basic acts forced the Albanian legislator to adopt a specific law on protection against discrimination.

<sup>99</sup> The Constitution of the Republic of Albania, 1998, art. 53.

<sup>100</sup> The Constitution of the Republic of Albania, 1998, art. 53 (3).

<sup>101</sup> Law No. 10 221, dated 04.02.2010 “On the protection from discrimination”.

The object of the law "On Protection from Discrimination" is the application and the observance of the principle of equality in relation to gender identity, sexual orientation, genetic predisposition, disability, belonging to a particular group or any other cause in the field of education, employment, and the establishment and functioning of effective state structures for the most effective application of this principle. The law has been shown to be very open by listing a variety of causes on which discrimination arises, but leaving this list open. Thus, any new form of discrimination enjoys protection under this law.

The law also aims to regulate the problems that may arise as a result of its violation, mentioning the problems faced by the LGBTI+ community. This means that these persons enjoy equality before the law and effective protection from any form of discrimination. Although the law was adopted in the spirit of a series of controversies of a social, moral or cultural nature, its effectiveness has not yet been fully realized in practice. It is worth noting that in Albania until 2001, homosexuality was considered a criminal offense under Article 116 of the Criminal Code. Homosexuality was decriminalized in 2001 (Amendments to the Criminal Code, under Law No. 8733, dated 24.01.2002).

In 2013, the Parliament of Albania amended the Criminal Code following the adoption of the Law on Protection from Discrimination. The first amendment was made to Article 50 of the Criminal Code, which added sexual orientation motives as aggravating circumstances in a crime.<sup>102</sup> Article 50 of the Criminal Code, paragraph (j) now reads: “when the offense is committed by motives relating to [...], sexual orientation [...]”<sup>103</sup>. Therefore, if the motive of a crime is one of those mentioned in paragraph (j) including sexual orientation this will be an aggravating circumstance and will lead to a more severe punishment.

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<sup>102</sup> Amendments to the Criminal Code, under Law No. 8733, 2002.

<sup>103</sup> The Criminal Code of Albania, no.7895, 1995, art. 50 (j).



The second change included the concept of homophobic crimes through technology in the Criminal Code of Albania. Article 119 in its paragraph (a) provides a new crime in its list of criminal offenses which reads as follows:

“Offering in public or intentional public distribution, through information and communication technology systems, of racist, homophobic or xenophobic content constitutes criminal contravention and is punishable by a fine or up to two years of imprisonment”.<sup>104</sup>

So, a person who offers in public or intentionally distributes homophobic materials is held criminally responsible.

These two changes are a major step in the process of protecting and guaranteeing security for the LGBTI+ community in Albania. However, despite the progress made by Albania in the advancement of the rights of LGBTI+ persons, some other articles of the Criminal Code of the Republic of Albania continue to contain certain provisions that influence the dignity and integrity of LGBTI+ people and discriminate citizens on a sexual orientation basis, such as articles 100, 101, 102, 102(a), 103, 104, 105, 106 and 107. These provisions are quite prejudicial and discriminatory towards LGBTI+ persons because they distinguish between sexual and homosexual violence. Sexual violence is sexual violence and it should not matter whether it is heterosexual or homosexual.

### 4.3 The Family Code

The Albanian constitution delegates the regulation of the institution of marriage to the specific law: “Marriage and divorce are regulated by law”<sup>105</sup>. The law that regulates in detail the institution of marriage in Albania is the Family Code<sup>106</sup>. The Family Code actually does not recognize the right to marriage or cohabitation for same-sex couples. When reading the Family Code the institution of

<sup>104</sup> The Criminal Code of Albania, no.7895, 1995, art. 199 (a).

<sup>105</sup> The Constitution of the Republic of Albania, 1998, art. 53 (3).

<sup>106</sup> The Family Code of the Republic of Albania, no. 9062, 2003.

marriage is understood as a voluntary union between a man and a woman, which means a heterosexual union and not a homosexual one. This formulation excludes members of this community to marry and enjoy family life same as heterosexual couples. Further, the Family Code does not even recognize cohabitation as an alternative to marriage for homosexual couples.

Currently, according to the Albanian Constitution, every person has the right to decide freely whether or not to enter into marriage, as well as to choose freely a spouse for themselves. This constitutional right is limited though by the Family Code, which as mentioned above only allows two people of different gender to marry. In fact, the Family Code does not provide a clear definition of future spouses. However, in terms of the Family Code, “man”, “woman” means that the legislator has fully acknowledged the existence of different sexes.<sup>107</sup> Under these conditions, the right to choose a partner is dependent on the partner’s opposite sex, otherwise the marriage is invalid because it does not fulfill one of the essential conditions to enter the into marriage.

The Family Code foresees also other alternative forms of establishing a family such as cohabitation.<sup>108</sup> Even in the case of cohabitation the Family Code defines it as a union of fact between a man and a woman, thus exempting the possibility for two people of the same sex to cohabit and such a cohabitation to be recognized consequently. However, it can be concluded that maybe this is the only alternative for same-sex couples; they can cohabit without any other legal entitlements, since cohabitation is not punished itself. Meanwhile, when it comes to marriage between same-sex persons, the situation is quite different; such a marriage is considered null and void. Article 7 of the Family Code reads: “Marriage shall be entered into between a man and a woman who have reached the age of 18”.<sup>109</sup>

<sup>107</sup> Mandro, A., Meçaj, V., Zaka, T., Fullani, A., 2006, “Family law”, KRISTALINA KH, Tirana, p. 118.

<sup>108</sup> The Family Code of the Republic of Albania, no. 9062, 2003, art. 163: “Cohabitation is a factual union between a man and a woman living as a couple, having a stability and continuity character.”

<sup>109</sup> The Family Code of the Republic of Albania, no. 9062, 2003, art. 7

From what we just discussed, one of the most controversial issues today has to do with the gender restriction of spouses under Albanian legislation, which means that homosexual marriages are prohibited by the current legal framework. Moreover, the legal framework does not even recognize marriages between same-sex persons concluded in other states, which grant the right to marriage to persons of the same sex. This is because of the fact that a foreign law cannot be recognized when it is clearly contrary to public order or the fundamental principles of the Constitution.<sup>110</sup> This invalidity of gay marriage in Albania is due to the fact that it runs counter to the public order principle, which in the terms of marriage dictates the condition of different sexes between two spouses.

More specifically, the conditions for a marriage to be valid are set out in the Family Code of the Republic of Albania included in the Articles 7-14 (regulating for example, the age for marriage, the consent of the spouses and impediments to concluding a marriage).<sup>111</sup> They list the conditions whose presence is necessary for the validity of marriage and other conditions the lack of which is cannot produce marriage.

As a consequence of this, the Albanian Ombudsman and the Commissioner for Protection from Discrimination have sent recommendations for amendments to the Family Code in order to enable same-sex couples to legally cohabit. Some of these proposed amendments affect exactly Articles 163 and 164 of the Family Code. The amended Article 163 is supposed to read as follows: “Cohabitation is a union of fact between two people living in a couple characterized by a common life that represents a character of stability and sustainability”.<sup>112</sup> This provision makes the institution of cohabitation possible for same-sex couples, because it will no longer include the wording “between a man and a woman” as it actually is.

Following, Article 164 is supposed to be modified as follows:

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<sup>110</sup> Law No. 10 428, 2011, “On private international law”, art. 7.

<sup>111</sup> The Family Code of the Republic of Albania, no. 9062, 2003, art. 7-14.

<sup>112</sup> The Albanian *Ombudsman and Commissioner for Protection from Discrimination’s Recommendation nr 201501, 690/2.*

“The conditions and procedures of registration, the consequences of registration, the ways of completing coexistence and the personal and property relations between the co-habitants are regulated by a special law”.<sup>113</sup>

This will open the door for a specific law to regulate the institution of cohabitation to adapt it to the needs of same-sex couples, in accordance with the constitutional provision granting everyone the right to marry.

#### 4.4 Comparative observations

In this last chapter I would like to broadly analyze the main events in Germany and Ireland, based on the facts elaborated in the previous chapter and provide some insightful conclusions. Both of the countries chose a different path for the same outcome, so it would be worth assessing their road to same-sex marriage and try to take away some lessons. As many scholars, mentioned in the section dealing with Ireland, have pointed out, it was a surprising occurrence to hold a referendum in such a sensitive issue. Taking into consideration previous experiences in Ireland, especially the previous referendum’s outcome, especially that on the removal of the ban on divorce (in 1986 and 1995), one could argue that there was not enough hope for same-sex marriage referendum to succeed. On the other hand, one could also argue that referendums are one of the means of pure transparency to the people’s political will; however this is not a well-founded position. For instance, although the topic is not content wise relevant, the Brexit ongoing issue reflects how referendums may turn out to be really controversial. If we are to assess the advantages and disadvantages of a referendum one of the main lessons we get from Ireland’s past experiences and Brexit, is that it depends a lot on people’s knowledge about a specific issue. In the case of Ireland the fact that same-sex marriage rights were left on the Irish people’s decision, is even more significant, bearing in mind that Ireland has been a highly religious society; almost 84 percent of the population were Catholic believers at the time of

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<sup>113</sup> The Albanian *Ombudsman and Commissioner for Protection from Discrimination’s Recommendation* nr 201501, 690/2.

the referendum.<sup>114</sup> Parallel to this, the NO campaign (the campaign in opposition to the same-sex marriage policy) was trying to misinform the people.<sup>115</sup> All the above mentioned, caused some uncertainty with regard to the referendum outcome. Another issue, with respect to Irish referendum, that caught the attention of different scholars is that “placing the rights of a minority group in the hands of the majority seems almost ludicrous, as a sizeable number of the electorate could have simply voted against the issue without being properly informed [...]”<sup>116</sup>.

On the other hand, Germany’s story is a bit more different. As it was pointed out in the previous chapter, the LGBTI+ movement in Germany had a remarkable influence towards LGBTI+’s rights. This movement followed a multifold strategy, taking advantage of the domestic and international situation. It is clear that in each country its history has a great impact on its future developments, national identities, values, etc., and, since Ireland and Germany share different stories, this had an impact to how the fundamental and human rights were framed. In Germany the World War II aftermath, reinforced its people’s will and tendency to fight for human rights, on one hand and it led the international structures to put some sort of pressure on Germany advancing and promoting human rights. In Germany, same-sex marriage advocates linked their campaign to the suppression of homosexuals during the Holocaust. Nevertheless, it is noteworthy that same-sex marriage in Germany did not become legal until very recently, in the year 2017. Although the work of LGBTI+ movement led mainly by the Lesben und Schwulenverband in Deutschland (LSVD) was very intense it took long for the government to adapt the same-sex marriage legislation. It can be argued in this regard, that the most difficult challenge was the fact that marriage and family in Germany were specially protected by the Constitution, and for this reason the opponents of same-sex marriage would object any law on allowing the latter basing their arguments on the traditional marriage paradigm.

<sup>114</sup> Census 2011, This is Ireland: Part 1, CSO, 2012.

<sup>115</sup> S. Bardon, ‘Surrogacy and adoption rights will not be affected: Minister accuses No side of trying to confuse voters with irrelevant issues’, Irish Times, 13 May 2015.

<sup>116</sup> Tobin, Bryan, “Marriage Equality in Ireland: The Politico-Legal Context”, International Journal of Law, Policy and the Family, 2016, vol. 30, no. 2.

On some certain aspects Ireland and Germany had similarities. For instance, the respective Constitutional Courts played an important role in addressing the same-sex marriage issue and opening the door for its recognition. The German courts took advantage of the European Union's anti-discrimination policy and the Court of Justice of the EU rulings. In Ireland, there is not sufficient evidence that suggests the influence of the EU, although the European Court of Human Rights helped with its early case law in the advancement of some LGBTI+ rights, one of the well-known cases being *Norris v. Ireland*<sup>117</sup>.

Another distinguishing feature in Germany was that in fact one of the main problems that delayed the introduction of same-sex marriage was the government itself.<sup>118</sup> More specifically, the political reluctance of Angela Merkel's conservative Christian Democratic Party. While most of the other big parties in Germany supported same-sex marriage, the CDU ruling party was influenced by the Catholic Church. Quite surprisingly, in Ireland even the traditionally conservative parties (Fine Gael and Fianna Fail) highly showed great support for the YES campaign.<sup>119</sup> Actually one of the politicians who initiated the Constitutional Convention was the Irish Prime Minister member of the Fine Gael.<sup>120</sup> The referendum in Ireland implied that the once dominant role the Catholic Church had in Ireland's society, had vanished and is now undermined by liberal and progressive activists, such as the LGBTI+ activists in the case of same-sex marriage.

In Albania, it is to be noted that the attitude towards gays and lesbians has changed over time, becoming more and more acceptable. The LGBTI+ activism in Albania began around the 2000s. In December 2008, Albania signed the Declaration of Homosexual Rights of the United Nations Assembly. Since 2013, every year on 17 of May (the International Day Against Homophobia),

<sup>117</sup>*Norris v. Ireland*, Application no. 10581/83, Council of Europe: European Court of Human Rights, 26 October 1988.

<sup>118</sup> Kollman, Kelly. *The Same-Sex Unions Revolution in Western Democracies : International Norms and Domestic Policy Change*. Manchester University Press, 2016.

<sup>119</sup>“VOTE YES | Marriage Equality Referendum 22 May 2015 | Fine Gael”&“Fine Gael launches campaign for Yes vote in Marriage Equality Referendum”, available at “[www.finegaele.ie](http://www.finegaele.ie)”

<sup>120</sup>“Referendum”, RTÉ News, 19 February 2015.

Albanian LGBTI+ supporters fill the streets, launching public campaigns. In Albania, other than Germany and Ireland, religion is not an important part of the society. This was mainly the result of the Communist regime, where people were not allowed to practice religion and religion was banned by law. Therefore, in Albania religion opposition does not play any strong impact on the rights of LGBTI+ community. However, the society is regarded to be conservative and the role of men in society is very important. Therefore, gays especially are highly opposed and not accepted by the males. On the other hand, most of the people believe that being gay or lesbian is something abnormal and does not comply with the traditional meaning of marriage and biological function of the human being.

Taking into consideration the developments in both Germany and Ireland, it is arguable that Albanian society is in its early steps of the protection and promotion of LGBTI+ rights. As it was mentioned above, not only until the late 2000s, the state adopted some legislation in the field of discrimination and that the civil rights activists started lobbying for LGBTI+ community rights. Thus, it is noteworthy that the attitude towards lesbians and gays has improved, which gives lots of hope for the future.

But, as it was discussed in the section about the Social Movement and the State and as the experiences in both Germany and Ireland provide, the prospects of a same-sex marriage legislation are not only dependent on the overall attitudes of the society or the public opinion but also the political situation of a specific country. So if the citizens or the civil rights organizations have an impact on the government's policy making process there is more probability for the introduction of advanced policies, such as same-sex marriage rights. In the Albanian context, due to the recent years' developments, such as a large number of protests opposing the new government's policies which did not turn out to be influential<sup>121</sup>, one can argue that the citizens' will is not always represented in the policy making procedure. In contrast, the international pressure has turned out to be a very

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<sup>121</sup>"Students' protests, the government delivers some of the demands", *Independent Balkan News Agency*, 26 December 2018.

advantageous factor. Hence, Albania's status as a candidate member to the European Union will increase the chances of the Albanian government introducing progressive policies in its legislative framework, including hopefully the recognition of same-sex couples' relationship.

When it comes to the more efficient way of introducing same-sex marriage in the Albanian context, but not only, this paper takes the position that referendum can be very risky. As several scholars have argued, although the Irish Referendum produced a very positive outcome for LGBTI+ proponents, it could have been avoided, had the Irish Government taken advantage of the Supreme Court's holdings. Moreover, it was claimed that the referendum's result was surprisingly positive, although many expected that because of the Irish religious importance and previous referendum's fate, if people voted contrary to the same-sex marriage bill, the door for its legalization would have been firmly shut. In addition, when it comes to such controversial issues, it is very likely that citizens are misinformed on the referendum's issue. Many times, before a referendum activists both in favor and contrary to the main issue will fight to influence as much as they can in the citizens' vote. Therefore, the visibility of proponents and opponents plays an important role in this regard, as the Irish YES and NO campaign did.

Referring to the debate on whether holding a referendum on same-sex marriage is efficient, it is useful to not only rely on Ireland's example, but have a look to other European countries who held a referendum on this issue. Referendums were held in Croatia, Slovenia, Slovakia, and more recently in Romania, apart from Ireland which we analyzed extensively in this thesis. The table below shows the outcome of these referendums.

Table on European Countries Referendum

State	Date of Referendum	Question at stake	Results



Croatia	1 December 2013	“Are you in favour of the constitution of the Republic of Croatia being amended with a provision stating that marriage is matrimony between a woman and a man?”	For - 65,87%
Slovakia	7 February 2015	“Do you agree that only a bond between one man and one woman can be called marriage?”	For - 94.50%
Ireland	22 May 2015	“The same-sex marriage”	For - 62,07%
Slovenia	20 December 2015	“The same-sex marriage”	Turnout 36,38 % -not accepted (63,51% against)
Romania	6-7 October 2018	“Constitutional amendment to specify that marriage can only be between a man and a woman”	Turnout 21.1% -not accepted

*This table is my own creation based on the research paper “Same-Sex Marriage – A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriage in Europe”<sup>122</sup>*

From all of the countries illustrated in the table, only the referendum in Ireland had a positive outcome, all the others either resulted in a NO vote or were not accepted because the percentage of the eligible voters who showed was very low. The result of the illustrating table below shows that popular votes are not always in favor of such a controversial issue, and they can undermine the sexual minority rights. Although, in theory a referendum is very democratic, the results below show that they can lead to non-democratic results. These results can be a useful indicator for Albania, which implies that a referendum is not the best means to achieve non-discrimination of sexual minorities. As a result, based on the analysis made in this thesis, it is recommended that the LGBTI+

<sup>122</sup>Kuzelewska, E., “Same-Sex Marriage – A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriage in Europe” vol. 24, 2019.

organizations in Albania currently active with the issue of same-sex marriage, the Albanian *Ombudsman and the Commissioner* for Protection from Discrimination continue to address the problems faced by homosexual couples to the state authorities to put pressure on them and bring about change.

Same-sex marriage legalization does not occur over night. It is a process that takes time and can be achieved step by step. Most states, in which same-sex marriage is now available, first of all go through the decriminalization of homosexual activity, afterwards they introduce non-discrimination policies, following with civil partnerships laws, and at the end, same-sex marriage laws. Each of the aforementioned steps entails on its own difficulties and challenges to be borne by LGBTI+ activists. Hence, there is still hope for improvement as long as LGBTI+ advocates fight hard and use all their means to achieve the goals they have on their agenda.

## 5 Conclusion and Recommendations

To conclude, in its first part this thesis engaged in the development of the institution of marriage, the debate on same-sex marriage. It pointed out the main arguments in favor of the same-sex marriage policies, mainly the grounds of human dignity, equality and non-discrimination. Recent developments support the idea that the institution of marriage has undergone lots of changes and is shifting apart from its traditional view, nonetheless its importance is not fully undermined. Marriage continues to be a state-protected and regulated union, which implies a range of rights and benefits for the parties being part of it. Therefore, the fight for same-sex marriage will continue until full equality is achieved. On the other hand, some of the main opposing arguments were also mentioned, focusing mainly at the strongest opponent, religion. This study provided enough arguments why same-sex marriage should be adopted and why the counter arguments are not valid.

The second Chapter dealt with the issue of the social movement, the mass media and the state, all being important actors in the fight for the advancement of LGBTI+ rights. It reflected how the social movement can influence the state authorities in implementing positive and progressed policies. As many scholars have suggested, the domestic campaigns are an important key factor in putting pressure on the government authorities to develop same-sex marriage policies.

In addition, international organizations play also a very significant role in directing states policymaking. For example, the European Court of Human Rights, has over years shaped the homosexual relationship debate in its member states through its case law. The Council of Europe has imposed obligations and issued recommendations for member states to improve the legislative framework with respect to the rights of the lesbian, gays, transsexuals, and so on. In the case of Germany and Ireland, as well as other European member states, the European Union “deepening” and harmonization policy has pushed states to afford some sort of recognition to same-sex unions. The judiciary on its part, is another key institution, which can open the doors for the institution of marriage being available to homosexual unions as well, as it did in Germany and Ireland.

Moreover, mass media draws at a large extent the attention of the people all over the world. Although, media can be controlled by the state and may sometimes be biased, adding the issue of same-sex marriage in the agenda can have a positive influence. Many studies suggested that making a controversial issue visible to the people can result in social change, because people become more and more acceptable of the phenomenon of same-sex marriage when they are faced with it on a regular basis.

The next sections of this thesis engaged on the legal framework relevant to same-sex unions or LGBTI+ people in general, in the Republic of Albania, where same-sex marriage is not available. In Albania, the “Law on the Protection from Discrimination” is the only specific piece of legislation in protecting LGBTI+ rights. Further, the legal framework of the Federal Republic of Germany and that of the Republic of Ireland was reviewed. This section though mainly focused on a detailed analysis of the evolution of LGBTI+ rights, the challenges and what influenced the result of same-sex marriage.

The last part of the thesis engaged in a comparative analysis of the different factors that played an important role on the adoption of same-sex marriage policies in Germany and Ireland. These two states, each followed a slightly different path to legalize same-sex marriage. Ireland became the first country to pass the same-sex marriage bill by a public referendum. This event caused lots of debates among scholars, which helped this paper identify some key features of a public referendum on controversial issues, such as same-sex marriage. Germany, instead, although distinguished for its powerful LGBTI+ movement, did not recognize same-sex marriage until 2017. Fortunately, both states are now granting marriage rights to same-sex unions.

However, when trying to answer the question: which is the most suitable way to legalize same-sex marriages and which are the takeaways from the experience of Germany and Ireland, I tried to bear in mind the realities in today’s world and particularly the current situation in Albania. Even though the progress the Republic of Albania has made in the field of LGBTI+ rights is to be

appreciated, the society is still not ready for a public referendum. Evidence shows that the public opinion weighs more towards the opposition of homosexual relationships. On the other hand, the government is more likely to pass a law on same-sex marriage in the future due to the pressure from international structures. Therefore the model suggested in this thesis, which would be best suitable for Albania is that the legislative body adopts the law on same-sex marriage. It should be noted that this thesis is not a comparative analysis *stricto sensu*, it represents thou a basic analysis of the legal and social framework in the three chosen jurisdictions. Also, the conclusions and recommendations are the author's own views; hence it can be subject to further research and elaborations.

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