Source: Bulletin of the Transilvania University of Braşov, Series VII: Social Sciences and Law

Bulletin of the Transilvania University of Braşov, Series VII: Social Sciences and Law

Location: Romania

Author(s): Angela Maria Romito

Title: The Rights of same sex couples under European and Italian Law (I)

The Rights of same sex couples under European and Italian Law (I)

Issue: 2-Suppl/2018

Citation style: Angela Maria Romito. "The Rights of same sex couples under European and Italian Law (I)". Bulletin of the Transilvania University of Braşov, Series VII: Social Sciences and Law 2-Suppl:161-166.
https://www.ceeol.com/search/article-detail?id=745452

Bulletin of the *Transilvania* University of Braşov – Special Issue
Series VII: Social Sciences • Law • Vol. 11 (60) No. 2 - 2018

THE RIGHTS OF SAME SEX COUPLES UNDER EUROPEAN AND ITALIAN LAW (I)

Angela Maria ROMITO[1]

Abstract: *The article aims to illustrate the legal trend on the same sex couple's rights in the European area. Starting with an analysis of the increasing urge of a legal recognition of same sex relations this article will first highlight the rising interest within the European boundaries to guarantee some form of legal protection at the international level in the ECHR system and in the EU legal system as well; secondly it will briefly present the leading cases ruled by the Court of ECHR, the ones ruled by the CJEU, and finally the ones ruled by Italian courts. Hence it will focus on the Italian legal system, and the Cirinnà Bill adopted in 2016. In the conclusion, the article draws some critical concluding remarks regarding the actual outcomes.*

Key words: *non-discrimination; same sex couples; recognition of family status; international protection; Charter of Fundamental Rights of the European Union*.

1. Introduction

The legal regulation of family relationships has long been formulated around a "traditional" notion of the family as a unit comprising a heterosexual married couple who conceive children within wedlock. As a consequence, the protection mechanisms of the law focused on such "traditional family units", with other family forms such as, for example, same-sex couples, unmarried couples, couples who are unable to conceive naturally and single parents failing to have their family relationships not being adequately recognized and protected by law. Dealing with questions on same-sex marriage, legislators and courts, up to the last two decades, had followed a heteronormative approach to cases, affirming "strong heteronormative conceptualization of marriage", meaning that the focus of the concept is on heterosexual persons of opposite sexes and that same-sex couples are denied any rights that are linked to it (Johnson, 2013, p. 147).

Until the end of the 1980s there was simply no legal recognition of same-sex relationships in the European jurisdiction. However, starting from 2000, the legal

[1] University of Bari Aldo Moro - Italy, angelamaria.romito@uniba.it.

recognition of same-sex relationships has become one of the most prominent issues discussed in parliaments, in courts, and in the media around the world. It is an extremely challenging issue, which opens the way to several additional other debatable questions: what legal status should be given to same-sex couples? Should they be allowed to adopt each other's children, or jointly adopt an unrelated child? Should same-sex male couples be allowed to have a child through a surrogacy arrangement? Should same-sex female couples be allowed to have a child (as a couple) through medically assisted insemination? and, if yes, should the State fund this? How should they be treated with regard to employment, social security, pensions, housing, immigration, taxation, inheritance, and divorce?

The existing asymmetries — in terms of rights protection — between straight and gay couples, touches on issues relating to human rights, religion, morality, and tradition, as well as on constitutional principles such as equality, autonomy, and human dignity (for a comprehensive approach to the issue, see Wintemute and Andenæs, 2001).

Well aware that it is a complicated and sensitive matter which has cultural, religious, social and (even) political implications, for the purposes of the present study we focus the analysis on the recognition and rights of gay couples, leaving aside other important legal issues related to the discrimination based on sexual orientation of individuals.

From a legal point of view, it is incontestable that there is a general trend towards the recognition of same-sex couples' rights and that this trend has often been due to the courts' interpretation and application of the law.

However, the way in which judges have enforced the rights of same-sex couples, and thus, pioneered legal changes and reforms in this area of law, varies from one legal system to another. The interpretation of the courts can, indeed, have the effect of urging or even requiring lawmakers to take action, i.e., to pass new legislation or amend existing laws. In this regard, the dialogue between the judiciary and the legislature shows that the two form an 'inseparable couple' (Gallo et al., 2014, p. 4).

In the following pages we will focus on the role of judges at international level within the European area, (i.e. the European Court of Human Rights judgments, ECtHR), at the European Union legal system (Court of Justice of EU decisions) and at national (Italian) level regarding the legal status of same sex couples.

2. The Recognition and Protection of Same Sex Couples under ECHR

In order to fully understand the evolution in the interpretation of the EU norms, it is necessary to start our analysis looking at the legal system drawn by the European Convention for the Protection of Human Rights and Fundamental Freedoms (for an analysis of the role of the European Court of Human Rights in developing the legal recognition of same-sex couples, see Scherpe, 2013, p. 87 and Shahid, 2017, p. 184-198).

According to article 52 (3) of the Charter of Fundamental Rights of the European Union (CFREU) the meaning and scope of the rights which correspond to rights guaranteed by the European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms – ECHR) are to be the same as those laid

down in that Convention. According to the explanations on the Charter of Fundamental Rights — which must be 'given due regard by the courts of the Union'—, within the EU the rights guaranteed in article 7 of the Charter correspond to those guaranteed by Article 8 of the ECHR. The former therefore have the same meaning and the same scope as the latter. As a consequence, the jurisprudence of the Strasbourg Court heavily influenced the interpretation of the EU fundamental rights, and in particular the case law referred to article 8 of ECHR impacts on the interpretation of article 7 of the Charter, which applies not only to EU citizens, but to every person who resides in the EU.

The relevant norms of ECHR are article 8.1 which states the *right to respect for private and family life* (everyone has the right to respect for his private and family life, his home and his correspondence), and article 12 entitled the *right to marry* (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).

Today, 27 out of 47 States which are in the Council of Europe, provide some form of legal recognition for same-sex couples either as married couples or as legal partnerships; all States should ensure that legislation exists to provide registered same-sex couples with the same rights and benefits as married or registered different-sex couples, for example in the areas of social security, taxes, employment and pension benefits, freedom of movement, family reunification, parental rights and inheritance.

Referring to the most significant judgments of the Court based in Strasbourg (ECtHR) among all the others *five* need to be mentioned:

▪ In *Schalk and Kopf v. Austria* (2010, application n° 30141/04) the complainants, two Austrian citizens, alleged a violation of articles 12 and 8 of the Convention (the right to marry and found a family and the right to respect for private and family life) because Austrian law did not allow them to get married. The ECtHR, giving an evolutive interpretation of the norms, for the first time affirmed that a cohabiting same sex couple in a stable relationship is protected under article 8 of the Convention, and therefore they have been grouped under the family-like unions.

Also, the Court observed that, looked at in isolation, the wording of article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive articles of the Convention grant rights and freedoms to "everyone" or state that "no one". As to the literal text of article 12, the court held that, looked at in isolation, the text "might be interpreted so as not to exclude the marriage between two men or two women". However, the prohibition of discrimination on the ground of sexual orientation does not mean that Member States have to allow same-sex couples to marry, since "regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex" (paragraph 55).

▪ The ECtHR, in *Vallianatos and Others v. Greece* (2013, applications n° 29381/09 and 32684/09) further added that when a new form of non-marital relationship is disciplined by the law, it must be accessible both to heterosexual and homosexual partners, since "same-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples" (paragraph 81). It follows that

civil unions "as an officially recognized alternative to marriage have an intrinsic value for the applicants" (idem). It held that the relationship of a same-sex couple living in a stable *de facto* partnership also falls within the notion of "family life" pursuant to article 8.

▪ In 2015, the Court issued a judgment in the *Oliari and Others v Italy* case (2015, application n° 36030/11), where three same-sex couples had complained that they had no option to obtain legal recognition of their relationship in Italy, either through marriage or a registered partnership. The ECtHR found that Italy breached article 8 of the ECHR by failing to make registered partnerships available to same-sex couples. In issuing this finding, it established a positive obligation upon Member States to provide legal recognition for same-sex couples also wishing the rapid development in all Europe towards legal recognition of same-sex couples.

▪ The following year the ECtHR issued its decision in the case of *Chapin and Charpentier v. France* (2016, case n° 40183/07). It questioned the French courts' decision to annul the marriage between two men performed in Belgium in 2004, in violation of French law. By this decision, the Court unanimously recalled that the ECHR does not include the right to marriage for homosexual couples, neither under the right to respect for private and family life (article 8) nor the right to marry and to found a family (article 12).

More precisely, this new decision confirms a series of judgements and particularly recalls that the question of same-sex marriage is "subject to the national laws of the Contracting States" (paragraph 36, making reference to the *Schalk and Kopf v. Austria* judgement); that article 12 confirmed the traditional concept of marriage, which is the union between a man and a woman and "does not impose an obligation on the governments of the Contracting States to grant same-sex couples access to marriage" (paragraph 36); that article 12 "cannot be interpreted as imposing such an obligation on the governments of the Contracting States to grant same-sex couples access to marriage" (paragraph 39 and *Oliari and Others v. Italy*); the States "enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition" of same-sex relationships, and its differences concerning the rights and obligations conferred by marriage (paragraph 58).

▪ More recently in 2017 the ECHR ruled *Orlandi and Others v. Italy* case (2017, applications n° 26431/12, 26742/12, 44057/12 and 60088/12): The applicants were six same-sex couples from Italy who had all been married abroad either in North America or Europe. The applicants had tried to register their legal overseas marriages upon return to Italy, however, their applications had all been rejected according to domestic law. Despite some mayors in Italy having allowed for a valid registration of these marriages, the domestic courts held that such registrations were null and void due to Italian law only recognizing marriage between a man and a woman.

The Court begins by re-stating its approval of both *Schalk and Kopf v Austria* (2010) as well as *Chapin and Charpentier v France* (2016) that the restriction of access to marriage lies within the member states' authority under article 12 or articles 14 with 8 or with 12 ECHR. From an article 8 perspective, however, the Court affirmed *Oliari*, by stating that there is a need for same-sex couples to be legally recognized and protected by a member state. For the Court, the applicants' rights under the Convention would be fulfilled if they could register their overseas marriages as civil unions as this would

provide the applicants "the opportunity to obtain a legal status equal or similar to marriage in many respects'" (paragraph 194). As Italy had passed legislation in 2016, due to the judgment in Oliari, granting civil unions to same-sex couples, the Court limited the scope of this case to whether the applicants had been left in a "legal vacuum and devoid of any protection'" (paragraph 196) prior to 2016-17.

3. EU Legal Framework

Within the member states of the EU there is a growth towards granting same-sex couples legal recognition for their relationships, which confers certain specific protections. The first country to provide "registered partnerships" was Denmark in 1989, while The Netherlands was first to adopt same-sex marriage in 2001.

Nowadays thirteen Member States allow same-sex marriage: besides the Netherlands (since 2001) there are also Belgium (2003), Spain (2005), Sweden (2009), Portugal (2010), Denmark (2012), France (2013) the UK (England and Wales 2013; Scotland 2014), Luxembourg (2015), Ireland (2015), and Finland, Malta and Germany (2017). Following a court decision, Austria is likely to adopt new marriage legislation by 2019.

Nine Member States recognize unions similar to marriage or some form of contract or registration: Slovenia (who's Civil Partnership Act giving same-sex partners the same rights as married couples, except for access to joint adoption and in vitro fertilization, came into force in February 2017), the Czech Republic, Hungary, Austria (homosexual marriage will also be authorized in that country from 1 January 2019, at the latest), Croatia, Estonia, Cyprus, Greece, Italy.

Finally, six countries, Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia, offer no legal recognition for same-sex relationships.

4. Preliminary Conclusions

The increasing body of case law of ECtHR requiring equal treatment for the same-sex couple, as well as the growing number of European countries that legally recognize same sex couples, demonstrate the unavoidable necessity to secure a legal protection to a *de facto* situation that has been enduring for a long time. In spite of the lack of uniformity between the legislation of different European countries, it seems that the picture of Europe's map is becoming less diverse than a few years ago (Waaldijk, 2015, p. 224). However, the ECJUE obliged Member States to recognize same sex marriage not on the basis of protection against discrimination on grounds of sexual orientation but for the purposes of free movement of EU citizens within the internal market, aspects that will be analyzed in the second part of this article.

References

Gallo, D. et al. (2014). Same-Sex Couples, Legislators and Judges. An Introduction to the Book. In D. Gallo, L. Paladini, P. Pustorino (Eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions* (pp. 1-12). Springer-Verlag: Berlin.

Johnson, P. (2013). *Homosexuality and the European Court of Human Rights*. New York: Routledge.

Scherpe, J. M. (2013). The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights. *The Equal Rights Review*, *10*, 83-96. Retrieved from http://www.equalrightstrust.org/ertdocumentbank/ERR10_sp1.pdf.

Shahid M. (2017). The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights. *Erasmus Law Review, 10* (3), 184-198. Retrieved from http://www.erasmuslawreview.nl/tijdschrift/ELR/2017/3/ELR_2017_010_003_006.pdf.

Waaldijk, K. (2015). Great Diversity and Some Equality: Non-marital Legal Family Formats for Same-Sex Couples in Europe. In M. van den Brink, S. Burri, J. Goldschmidt, (eds.), *Equality and human rights: nothing but trouble? – Liber amicorum Titia Loenen (SIM Special 38)* (pp. 223-243). Utrecht: Netherlands Institute of Human Rights (SIM).

Wintemute, R. and Andenæs, M. (eds.) (2001). *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*. Oxford: Hart Publishing.

⁎⁎⁎ *European Convention on Human Rights* (1950), as amended by Protocols Nos. 11 and 14, and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16. Retrieved from https://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁎⁎⁎ *Charter of Fundamental Rights of the European Union*, published in the Official Journal of the European Union, C 326, 26.10.2012, p. 391–407.

⁎⁎⁎European Court of Human Rights (24 June 2010). *Judgment in the Case of Schalk and Kopf v. Austria* (application no. 30141/04). ECLI:CE:ECHR:2010:0624JUD003014104. Published in the Reports of Judgments and Decisions 2010.

⁎⁎⁎European Court of Human Rights (7 November 2013). *Judgment in the Case of Vallianatos and Others v. Greece* (applications nos. 29381/09 and 32684/09). ECLI:CE:ECHR:2013:1107JUD002938109. Published in the Reports of Judgments and Decisions 2013 (extracts). Retrieved from http://hudoc.echr.coe.int/eng?i=001-128294.

⁎⁎⁎European Court of Human Rights (21 July 2015). *Judgment in the case of Oliari and Others v. Italy* (applications nos. 18766/11 and 36030/11). ECLI:CE:ECHR:2015: 0721JUD001876611. Retrieved from http://hudoc.echr.coe.int/eng?i=001-156265.

⁎⁎⁎European Court of Human Rights (9 June 2016). *Judgment in the Case of* C*hapin and Charpentier v. France*. ECLI:CE:ECHR:2016:0609JUD004018307. Retrieved from http://hudoc.echr.coe.int/eng?i=001-163436.

⁎⁎⁎European Court of Human Rights (14 December 2017). *Judgment in the case of Orlandi and Others v. Italy* (applications nos. 26431/12; 26742/12; 44057/12 and 60088/12). Retrieved from http://hudoc.echr.coe.int/eng?i=001-179547.