



**EUROPEAN CENTRE FOR LAW AND JUSTICE
MEMORANDUM TO THE MEMBRES OF THE PARLIAMENTARY
ASSEMBLY OF THE COUNCIL OF EUROPE REGARDING THE
RECOGNITION IN EUROPE OF SAME-SEX PARTERSHIPS, PERSUANT TO
THE HEARINGS OF 7 MARCH 2008.**

Re: Draft report “LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS IN EUROPE - FREEDOM OF ASSEMBLY AND EXPRESSION FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDERED PERSONS IN MEMBER STATES”, Rapporteur Andreas GROSS.

The European Centre for Law & Justice (“ECLJ”) is an international law firm dedicated to protecting human rights and religious freedom in Europe. Attorneys for the ECLJ have served as counsel in numerous cases before the European Court of Human Rights. Additionally, the ECLJ has special Consultative Status as an NGO before the United Nations, and is accredited to the European Parliament. The proper resolution of the matter of standardizing the definition of marriage among the Member States of this Council of Europe body is of the highest institutional value to the ECLJ.

Of vital importance in discussing the issue of defining the legal meaning of marriage, it is up utmost import that all rhetoric be laid aside and that a sharp demarcation be made between the issue of hate speech or hate crimes against homosexual persons and the issue of legal recognition of same-sex partnerships. The very fact that violent behavior has occured towards homosexuals and the transgendered persons does

not have any bearing on the issue of whether same-sex marriage should be included into the legal or even semantic definition of marriage or whether universal recognition should be afforded to same-sex partners. The allowance of such reasoning to tinge these discussions sets a very dangerous precedent.

Furthermore, any attempt to extend universal recognition to same-sex partnerships, while semantically different than same-sex marriage, has the identical effect of injuring the long standing concept and social structure of marriage, protections of which in many member states pre-date the establishment of the Council of Europe.

Unfortunately, the Parliamentary Assembly of the Council of Europe (“PACE”) does not provide to the public any detailed information regarding the on-going draft documentation process. Contrary to the established practices used in most parliaments throughout Europe, the reports drafted and discussed in PACE committees are kept confidential until their final submission to the Assembly, which makes fair and informed participation by NGO’s and civil society a virtual impossibility.

This memorandum, therefore, is written on the basis of documents and information provided by Members of PACE and found on the PACE website, such as the aforementioned motion for a recommendation.

Behind the issue of recognition of homosexual relationships, are many other important issues, such as the nature of the legal status which may be granted to same-sex partnerships – civil union or marriage-, and other matters concerning “tax and social security systems, inheritance rights, immigration rights and employment rights¹”. The motion for a recommendation presented by Mr Jurgens and others on 05 July 2005

¹ Motion for a recommendation presented by Mr Jurgens and others on 5 July 2005.

recognizes that “the issue of legal recognition of same-sex relationships is a complex one, from both a social and a legal perspective”. This motion not only considers the factual “recognition” of homosexual relationships, but deals with the implementation of civil unions and marriages between homosexual persons.

The true issues behind defining marriage, which in the context of this memorandum includes legal recognition of same-sex partnerships as a form of marriage, are three-fold: on the one hand, is there a semiotic purpose behind defining marriage in the traditional sense that excludes expanding the definition to include same-sex couples; second, does the fact that same-sex marriage is not included in the definition of marriage amongst the vast majority of Council of Europe Member States mean that the definition is somehow discriminatory within the legal meaning of the term, and more specifically to this body, whether the objective definition of marriage is violative of Article 14 of the European Convention of Human Rights; and third, whether the Council of Europe is competent to legislate on the issue of redefining the nature of marriage to include couples of the same-sex and the transgendered or whether it is appropriate to produce soft law documents with the hope of liberalizing the policy on same-sex marriage and influencing customary international law.

Semiotic Issue:

Article 12 of the European Convention of Human Right states: “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.”²

In defining Article 12, we must look to the *travaux préparatoire* of the text, to the intent of those who drafted it and finally to the meaning borne upon the words when the Article was ratified by the Member States of this body. It is clear from both the *travaux préparatoire* and the interpretation of Article 12 by the European Court of Human Rights that it envisioned Convention protection only for opposite sex marriages.³ No mention is made in the legislative history of ever intending Article 12 to mean anything but marriage between people of the opposite sex. Furthermore, when the Article was ratified by the member states, the underlying agreement in acceding to the terms of Article 12 was that the definition of marriage be that between a man and a woman.

Even using the hermeneutic specified in the Vienna Convention on the Law of Treaties⁴, which places usage of the *travaux préparatoire* secondary to the plain meaning interpretation of the text, it is clear that the guiding principle in defining Article 12 was respect for national sovereignty, as emphasized in the final clause of the Article.

The family, founded on heterosexual marriage, is a concept that predates the European Convention of Human Rights and is an enshrined and protected value in the

² Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome, 4 November 1950.

³ See e.g. ECHR, Rees v. The United Kingdom, Application No. 9532/81, Judgment of 12/12/1984.

⁴ See: International Law Commission of the United Nations, Vienna Convention on the Law of Treaties, adopted 22 May 1969, Articles 31-32. While the Treaty is limited in scope and inapplicable to the instant analysis as the European Convention of Human Rights is not a treaty concluded between States but between States and an international organization, a view to this interpretive document is important as it is often seen as a codification of existing customary international law on the subject.

majority of Council of Europe Member States. Any attempt by this body to enact measures to infringe upon the judicial, legislative and moral traditions of the Council's member states is an inappropriate form of activism in a realm where this Council has no legislative competency.

A view of marriage as a subjective evolving paradigm reduces the concept to a position that it is merely just one form of household. However, the purpose of civil marriage is to ensure the stability of the social structure for the bearing and raising of children. Because of the serious social policy implications involved, it has been left to the individual Member States.⁵

Restrictions on defining marriage are not *per se* unnecessary in a democratic society and have been upheld time and again by the European Court of Human Rights.⁶ Such restrictions do not, as has been criticized, create second hand citizens. Restrictions in place regarding age, mental capacity and fraud, for example, are common means of protecting public health and morals. Furthermore, institutional requirements such as blood tests, application for marriage licenses, and consummation of the marriage are also universally regarded as justifiable means of legitimizing marriage. The argument that restrictions on choice of a partner limit the meaning and purpose of marriage are therefore, under these customary and universally accepted pre-requisites to marriage, clearly erroneous.

The Harvard Journal of Law and Policy has recently published an exhaustive defense of maintaining the objective definition of marriage as between members of the

⁵ Cf.: Hillary Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003), dissenting opinion Justice Robert J. Cordey.

⁶ The seminal precedent in this regard, particularly on the issue of marriage between partners of the same sex, is Rees v. the United Kingdom; see: *inter alia* n. 2.

opposite sex as the optimal social institution proffering a number of key arguments, chief amongst which are:

- It provides the most effective means yet developed to maximize the private welfare provided to children conceived by heterosexual coupling (with “private welfare” meaning not only basic requirements like food and shelter but also education, play, work, discipline, love, and respect);
- It provides the indispensable foundation for that child-rearing mode—that is, married mother-father child-rearing— that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child’s, and therefore society’s, well-being;
- It is society’s primary and most effective means of bridging the male-female divide;
- It is society’s only means of transforming a male into husband-father, and a female into wife-mother, statuses and identities particularly beneficial to society;
- It provides social and official endorsement of the form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.⁷

By altering the definition of marriage, the entire social concept is therefore altered and damaged irreparably. By suppressing the objective meaning of marriage, the concept becomes radically deinstitutionalized and therefore is drained of its social goods.⁸

The essence of the homosexual marriage debate is not simply the inclusion of another component into the definition of the term, and nor is it mere semantics. Marriage as a concept extends far beyond the idea of a free choice of partnership and fidelity and includes seminally the component of procreation and child rearing as the basic building block of any society.

The primary two social policy objectives achieved by maintaining the objective definition of conjugal marriage is that it is on the one hand fundamentally child-centred, going beyond the couple to the next generation, and second that it provides a stable

⁷ Monte Neil Stewart, Marriage Facts, Harvard Journal of Law and Policy, Vol. 31, No. 1 (2007), 321-322.

⁸ Id., 323.

normative institution whereby men and women are protected from the social and personal damage caused by sexual attraction outside the confines of a monogamous relationship.⁹

The promotion of same-sex partnerships and their universal legal recognition serves to damage the concept of conjugal marriage with the same social force as full legal recognition of homosexual marriage does. While a legal distinction exists between same-sex partnerships and same-sex marriage, semiotically the differentiation is *de minimus*. For the purposes of safeguarding the social entity of marriage as it has been understood for time immemorial, the Council of Europe should play no role in social engineering among the Member States and respect national sovereignty as mandated by the European Court of Human Rights on this issue.

Discrimination Issue:

With regard to the definition of discrimination proffered by the European Convention of Human Rights, it is clear from both utilization of the *travaux préparatoire* or use of a plain meaning hermeneutic, that discrimination against homosexuals or the transgendered within the meaning of Article 12 of the Convention is not applicable. With regard to the latter method, the triggering terms of homosexual, sexual orientation or transgender are not found within the exhaustive list of Article 14. Therefore, under the plain meaning understanding, it is clear that the Article meant to exclude these terms from the Convention definition of Article 14.

Furthermore, the *travaux préparatoire* itself shows that the intent of the draftsmen of Article 14 was that the contents of the Article be exhaustive. Article 4 of the Draft

⁹ Id., 325. See also: Council on Family Law, the Future of Family Law: Law and the Marriage Crisis in North America, 12–13 (2005), available at http://www.marriagedebate.com/pdf/future_of_family_law.pdf.

Recommendation stated that simple enumeration of the rights and freedoms to be safeguarded by Article 14 was not sufficient and that the majority of Member States insisted on clear and concise definitions of which groups would be protected under the Article.¹⁰

Of incredible value in determining whether Article 14 envisioned legal protection of homosexual rights when taken in conjunction with Article 12 is to look to the case-law of the European Court of Human Rights on the matter. The Court has held that with regard to defining marriage and its corresponding rights, that Member States should enjoy an important margin of appreciation.¹¹ Furthermore, the European Court of Human Rights has never extended the right to marriage to homosexuals in its interpretation of Article 12 of the Convention.

The Court has adopted that: “the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family.”¹² The Court has also added that: “Article 12 lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.”¹³ And most imperative to this analysis is that under ECHR jurisprudence, national laws

¹⁰ Article 14 of the Draft Recommendation (Collected Edition, I, p. 105; or Doc. Ass. 1949, No 77, p. 205).

¹¹ See e.g. ECHR, Case of B. and L. v. The United Kingdom, Application no. 36536/02, judgment of 13 September 2005.

¹² See e.g. ECHR, Rees v. The United Kingdom, Application No. 9532/81, Judgment of 12/12/1984; ECHR, C v. The United Kingdom, Application No. 10843/84, Report of the Commission adopted 9 May 1989, §§ 49-50.

¹³ Id.

restricting the legal definition of marriage to be that between a male and a female do not impair the substance of Article 12 and are therefore not violative of the Convention.¹⁴

While the absolute stance of the Court in granting the prohibition of legal rights to same-sex couples has been slightly nuanced in cases involving gender reassignment, the Court has not altered its stance that Article 12 protects only different sex couples.

Even when expanding the analysis of Article 14 and discrimination to include speech against homosexuals, the Court has never found for a homosexual Applicant claiming to be damaged by discriminatory speech against him based on his sexual orientation, which again fortifies the position that the Convention, as the primary human rights instrument of the Council dealing with marriage, did not intend to extend the rights of protection from discrimination beyond those afforded to the classes identified in Article 14.

Furthermore, when looking at the parallel issue of homosexual adoption, the revised draft of the European Convention on the Adoption of Children¹⁵, updating the 1967 Convention, in Article 7, fails to extend a universal right to homosexual adoption, leaving the matter to the discretion of individual Member States. The position of the draft Convention serves as an important interpretive tool as to how European and international legislation seeks to deal with the expansion of homosexual rights. It is of vital importance, as the draft Convention has done, to respect national and cultural sovereignty over such sensitive moral issues.

Subsidiarity and Respect for National Sovereignty:

¹⁴ Id.

¹⁵ See: Updating of the European Convention on the Adoption of Children, cjfa/gt adoption/cjfa-gt1 (2003) 1.

Subsidiarity and respect for national sovereignty are two of the main pillars upon which the Council of Europe was founded. The European Convention of Human Rights was drafted with a view to safeguarding fundamental human rights and providing a floor, and not a ceiling, of compliance with the enumerated rights provided in the Convention. One of the hallmarks of Convention law has been the doctrine of the margin of appreciation, which *inter alia*, states that the Council organs believe that judges and legislators within the various member states are better suited to interpreting the Convention according to their specific socio-political and cultural environment.

As has been detailed above, this is particularly true when analyzing the issue of Article 12 of the Convention and defining marriage. As established, the Court has held time and again under the Rees precedent, that the definition of marriage, including substantive and procedural requirements, must be left to the member states and that Article 12 only provides protection to couples of the opposite sex.

This position is fortified by the sheer number of Council of Europe member states who have not legalized same-sex marriage. Only in 3 of the 47 member states has same-sex marriage been legally recognized: Belgium, the Netherlands and Spain. Furthermore, in the vast majority of member states, legislation regarding same-sex marriage is either not in existence or explicitly denies the possibility. In Latvia, Poland and Lithuania, marriage is constitutionally defined as existing between only members of the opposite sex.

Additionally, attempts to garner universal recognition of same-sex unions throughout the European Union failed in July 2004 at the meeting of European Union Justice and Interior Ministers on the issue of security, justice and interior issues. The

proposal was vehemently opposed by several ministers, who expressed “radical disapproval” viewing the proposal as “absolutely unacceptable” and a misuse of the “EU for a cultural revolution aimed against the traditional family.”¹⁶

The vast divergence of views and cultural mores on the issue, coupled with the denial by the European Union’s Council of Minister of the proposal to extend universal legal recognition to same-sex couples, would lead to a strong public backlash against this body for attempting to legitimize same-sex marriage or same-sex partnerships despite existing legislation in the vast majority of Member States. Even granting the fact that a substantial number of member states give some form of legal recognition to same-sex partnerships, the very fact that recognition has been constitutionally denied in other member states should foreclose on any attempt by the Council to legislate in this area based on the founding principles of this institution.

The purpose behind the recent hearings on redefining the term marriage therefore poses a strong and direct threat to this esteemed institution’s long standing policy of respect for subsidiarity and national sovereignty.

Conclusion

In summation, the hearings held on 07 March 2008 set a dangerous precedent and mark a stark departure from the original mandate of the Council of Europe as an institution built on the foundations of respect for national sovereignty and subsidiarity. The existing structure of member states defining marriage and its procedural and substantive requirements is enshrined by the European Convention of Human Rights and the proposition that Convention protection of the right to marry between only members of

¹⁶ See e.g. Palko and Lipsic taken aback by decision to condone homosexuality, Radio Slovakia International, July 20, 2004.

the opposite sex has also been upheld by the European Court of Human Rights. Attempting to adjust European standards regarding same-sex partnerships likewise undermines the long standing concept of marriage and does irreparable damage to the social concept.

The structure of marriage as between a man and a woman, being the basic building block of society and therefore afforded the highest respect and legal protection predates the Council of Europe. Any redefinition of the legal meaning of marriage does violence to the concept and its beneficence to society and culture as a whole. In solidarity to those nations which seek to uphold this traditional definition and esteemed social structure, and with deference to the principle of subsidiarity, the European Centre for Law and Justice hereby registers its opposition to any measures pursued by either this esteemed Committee or the Parliamentary Assembly as a whole, with regard to redefining the term of marriage or interfering into the current legislation governing both marriage and legal partnerships among the 47 member states of this great Council.

Respectfully submitted.

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