

ADOÇÃO E CASAIS DO MESMO SEXO: NOVOS DIREITOS NO ESPAÇO CONSTITUCIONAL EUROPEU APÓS A DECISÃO X E OUTROS V. AUSTRIA

ADOPTION AND SAME-SEX COUPLES: NEW RIGHTS IN EUROPEAN CONSTITUTIONAL SPACE AFTER THE RULING X AND OTHERS V. AUSTRIA

NELIANA RODEAN¹

RESUMO: O “quintal de direitos” da Europa está crescendo e os estados-membro enfrenam um novo período de reconhecimento de direitos humanos. A garantia de novos direitos ocorre tanto por legislação nacional quanto pela jurisprudência de cortes internacionais ou supranacionais. A Corte Europeia de Direitos Humanos (ECtHR) tornou-se o “quarto juiz” chamado a intervir quando a legislação doméstica não respeita novos direitos relacionados ao reconhecimento de casais do mesmo sexo ou a adoção de uma criança por parte desses casais. Nesse sentido, a ECtHR recentemente decidiu que a impossibilidade de adoção por um segundo pai ou mãe em uma relação de entre pessoas do mesmo sexo é discriminatória quando tal adoção é permitida a pares heterossexuais não casadas, a despeito da exclusão do progenitor biológico. Dessa forma, a decisão da ECtHR estabeleceu o princípio de que a adoção de crianças por casais homossexuais deve ser permitida, assim como é para pares heterossexuais não casadas.

PALAVRAS-CHAVE: Casais do Mesmo Sexo; Casamento; Adoção; Direito Comunitário; Discriminação; Vida Privada; Igualdade.

ABSTRACT: The European “backyard of rights” is enlarging and Member States face a new period of acknowledgment of human rights. The guarantee of the new rights occurs both through national legislation and through the jurisprudence of international or supranational courts. The European Court of Human Rights (ECtHR) became the “fourth judge” called to intervene when the domestic legislation is not guardian of new rights regarding the recognition of the same-sex couples but also the adoption of a child by these couples. In this sense, recently the ECtHR ruled that the impossibility of second-parent adoption in a same-sex relationship is discriminatory when such adoption is possible for unmarried heterosexual couples,

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¹ Doctor Europaeus. Pesquisadora associada em Direito Público na Universidade de Verona, Itália, onde recebeu seu título de Doutora em Direito Constitucional Italiano e Europeu. Ex-Pesquisadora visitante na Columbia Law School (Nova York, Estados Unidos, 2013-2014) e CooperInt Fellow 2012 na Universidade ‘Carlos III’ de Madrid (Espanha). neliana.rodéan@univ.it

although the exclusion of the biological parent. Thus, the decision of the ECtHR established the principle that the adoption of children by same-sex partners should be possible, as it is for heterosexual unmarried couples.

KEYS: Same-sex Couples; Marriage; Adoption; EU Law; Discrimination; Private Life; Equality.

SUMÁRIO: 1. Novos Direitos: a evolução da jurisprudência da ECtHR entre interpretações novas e antiga; 2. Sobre a Adoção de uma Criança por um Casal Homossexual; 3. Efetividade da Decisão e Perspectivas Futuras para as Ordens Jurídicas Nacionais; Referências.

SUMMARY: 1. New Rights: the evolution of the case-law of the ECtHR between old and new interpretations; 2. On the Adoption of a Child by a Homosexual Couple; 3. Effectiveness of the Ruling and Future Perspectives for the National Legal Orders; References.

1. NEW RIGHTS: THE EVOLUTION OF THE CASE-LAW OF THE ECtHR BETWEEN OLD AND NEW INTERPRETATIONS

In Europe, the protection of the human rights has been increased in the same time and in a complementary way with the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights.

The most recent period of history and experience of the European constitutional space definitely seems characterized by a progressive extension of the protections afforded to fundamental rights. In this “age of rights”, it became customary the recall of external sources (supranational and international) bearing the guarantee of fundamental rights. Thus, faced with problems of interpretation by both constitutional courts that supreme courts, the European Court of Human Rights becomes the judge of the fourth degree called to rule on abstract situations raised by the people with respect to their discrimination.

The principle of non-discrimination² is widely recognized as a manifestation of the more general principle of equality, according to which similar situations must be treated in the same way while different situations in a dissimilar way. Otherwise, and in the absence of reasonable justification, the treatment should be considered discriminatory. These principles are fundamental elements of international law relating to human rights and “deeply rooted in the case-law of the ECtHR”.³

Article 14 of the ECHR has a substantial nature, which implies that should be applied in conjunction with other provisions of the Convention⁴.

² Art. 7 of Universal Declaration of Human Rights of 1948, Art. 26 of International Covenant on Civil and Political Rights, Art. 14 of the European Convention of Human Rights.

³ *Engel and others v. The Netherlands*, judgment 8 June 1976, [1976] ECHR Series A No. 22, in *Racc.* 22-34, § 72.

⁴ *Kosteski v. The Former Yugoslav Republic of Macedonia*, No. 55170/00 (2006) of 13 April 2006, § 44: “Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It may be applied in an autonomous manner as a breach of Article 14 does not presuppose a breach of those other provisions although, since it has no independent existence,

In the sense of the aim of this paper, it is Article 8 on the private and family life, especially discriminations on the ground of sexual orientation of various plaintiffs.

Discrimination based on sexual orientation, whether direct or indirect, is certainly an example of differentiation of treatment that does not found yet unambiguous and absolute conviction, as is the case for those based on gender or ethnic origin. The greatest difficulty, probably, is the lack of an orientation common to the member states. Moreover, often the ECtHR has considered this factor for recourse to the doctrine of "margin of appreciation"⁵ in examining cases in which judgments were reported discriminatory treatment on the basis of the sexual orientation of the applicant. It is obviously that an European consent is emerging.

The Court observed during the process *Salgueiro da Silva Mouta v. Portugal*⁶, that a homosexual father cannot be denied custody of his children based on his (homo)sexual preferences, as this infringe the father's right to take part in the life family and Article 14 ECHR (non-discrimination) should be interpreted as including sexual orientation.

With regard to the application of Article 14 in conjunction with Article 8 for discriminatory treatment to the detriment of homosexual people, two cases are important to analyze: *Fretté* and *EB*, both presented against France. These cases highlight, almost 6 years on, a change of interpretation of the ECtHR. The comparison between the two cases is very interesting, because the Court was asked to consider two apparently similar situations coming to different conclusions.

In *Fretté v. France*⁷ had been refused adoption by a single because of the sexual orientation, while the French system recognized the adoption by single heterosexuals⁸. In that ruling, the European Court did not consider any

it can only come into play where the alleged discrimination falls within the scope of the rights and freedoms safeguarded by the other substantive provisions". See also *Van der Mussele v. Belgium*, No. 8919/80, judgment 23 November 1983, [1983] ECHR Series A No. 70, § 43; *Tysiac v. Poland*, No. 5410/03, judgment 20 March 2007; *E.B. v. France*, No. 43546/2002, judgment 22 January 2008; *Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment 28 May 1985, [1985] 7 EHRR 471, § 71; *Inze v. Austria*, No. 8695/79, judgment 28 October 1987, Series A, No. 126, § 36; *Karlheinz Schmidt v. Germany*, judgment 18 July 1994, ECHR Series A, No. 291-B, § 22; *Petrovic v. Austria*, judgment 27 March 1998, § 22; *Haas v. The Netherlands*, No. 36983/97, judgment 13 January 2004, § 41. See Robert Wintemute, "Within the Ambit": How is the Gap in Article 14 European Convention on Human Rights?, *European Human Rights Law Review*, 366, 382 (2004).

⁵ Jeroen Schokkenbroek, *The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation*, 19 *Human Rights Law Journal*, 20, 23 (1998); Nicholas Lavender, *The Problem of Margin of Appreciation*, *European Human Rights Law Review*, 380, 390 (1997); Yutaka Arai-Takahashi, *The defensibility of the margin of appreciation doctrine in the ECHR: value-pluralism in the European integration*, 13(3) *Revue Européenne de Droit Public*, 1162, 1193 (2001); George Letsas, *Two concepts of the margin of appreciation*, 26(4) *Oxford Journal of Legal Studies*, 705, 732 (2006).

⁶ *Salgueiro da Silva Mouta v. Portugal*, No. 33290/96, judgment 21 December 1999, ECHR 1999-IX.

⁷ *Fretté v. France*, No. 36515/97, judgment 26 May 2002, CEDH 2002 I.

⁸ On adoption by a single see Elena Falletti, *La Corte Europea dei Diritti dell'Uomo e l'adozione da parte del single omosessuale*, 3 *Famiglia e Diritto*, 224, 229 (2008).

existing violation of the conventional principles of the Article 14 ECHR, evoking the wide margin of discretion enjoyed by the States on a ethically relevant matter, dividing the scientific reflections on adoption by homosexual persons and the consequences on the child. A partly concurring opinion held that since the Convention does not guarantee a right to adopt and does not also guarantee a right to establish a family, the State has not violated the applicant's rights under Article 8 of the Convention and therefore the difference in treatment complained of is not discriminatory within the meaning of Article 14 of the Convention.

But with *E.b. v. France*⁹, the Grand Chamber of the ECtHR had changed its conviction regarding a person who had a stable homosexual relationship and that he intended to adopt a child. In that case the Court enhanced the value that the rejection of the application by the domestic authorities had founded, in fact, that the applicant was a homosexual. It was, therefore, considered that the basis of the decision rejecting the application on grounds of sexual orientation of the adoptive woman justified the violation of Articles 8 and 14 ECHR. If, in fact, French law admitted the adoption by singles, the banning adoption by homosexual person based on sexual orientation is in contrast with the above mentioned provisions (§ 103). The Court's assessment focuses mainly on the distinctive characters of the story of Mrs. B. compared to that of Mr. Fretté. In fact, if in the second case there were objective reasons that justify a different treatment in relation to the applicant, the adoption request of Mrs. B. has to be compliant with the law in force at that time in France. If, for any unmarried person over the age of 28 years are allowed to apply for adoption, is not clear why the application of Mrs. B. had been refused. For the judges of Strasbourg, for that matter, it cannot state the rejection on the lack of a father figure because it would be in contradiction with the law itself, "thus risking to render meaningless the right of unmarried people to seek authorization". (§ 33).

At first glance, the Grand Chamber decided to change its orientation with respect to the case Fretté. However, the Court's reasoning is more subtle. From the judgment E.B. it does not follow, in fact, a peaceful consensus for the adoption by a homosexual; it is rather the correct application of the principle of non-discrimination laid down in Article 14.

In recent years increased the judgments in which the ECtHR has interpreted broadly the guarantees contained in the Convention on the rights of family life. Increasingly, the European Court is asked to rule on the compatibility with the ECHR of situations created by the national legislation of European states which prevent qualify as "marriage" cohabitation of same-sex couples.

In *Schalk and Kopf v. Austria*¹⁰, the Strasbourg Court rejects the idea that the textual reference to "men and women" contained in Article 12 ECHR can be overcome with the evolutionary interpretation of the rule. While in thirteenth

⁹ *E.B. v. France*, No. 435466/02, judgment 22 January 2008.

¹⁰ *Schalk and Kopf v. Austria*, No. 30141/04, ECHR 2010.

countries of the Council of Europe¹¹ the institution of marriage is being extended to homosexual couples who live together, in others the cohabitation of same-sex couples is expressly regulated by the attribution to them of rights similar to those of heterosexual couples¹². Moreover, Article 9 of the Charter of Fundamental Rights of the European Union, which came into force on 1 December 2009, does not mention the sexual difference between spouses as a condition for marriage. The Court, however, does not close the door to such a development, and admits that the question of Article 12 to the applicants' situation is not manifestly unfounded. The matter for national legislation have the effect of the introduction of same-sex marriage and that the ECHR cannot be derived, at present, any complaint in respect of the state decides not to proceed in this direction. Developing the idea already emerged in *Karner v. Austria*¹³, the Strasbourg Court also recognizes that the notion of "family life" (and not only that of "private life") may well extend to the ménage of a gay couple, "the Court considers it artificial to the view that, unlike heterosexual couple, a same-sex couple could not enjoy a right to a family life under Article 8 ECHR. As a result, the relationship between the applicants, two same-sex partners, jointed permanently in the same way as an unmarried couple, fall within the definition of 'family life', as a heterosexual unmarried couple (§ 94).

In *Gas and Dubois v. France*¹⁴, in a same-sex couple joined by a French *Pacte civil de solidarité* (PACS), one of the partners had called for the adoption of his son of her partner, born with the techniques of artificial insemination. The domestic authorities had refused the adoption considering it contrary to the best interests of the child and the ECtHR had ruled the violation of conventional parameters as mentioned above, noting that French law did not require that the partners have identical rights to those of married couples and allowed the adoption to married couples but not to couple jointed by a civil agreement.

In any case the situation in France is changing. On 13 April 2013, French Parliament adopted the controversial law on homosexual marriage and the adoption by the same-sex couples.

The backyard of the human rights is enlarging and after an age of *de facto* heterosexual couples is passing to a recognition of homosexual rights over the world; furthermore the adoption became possible also for the same-sex couples¹⁵.

¹¹ Nederland, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Mexico, France (April 2013) and Uruguay (April 2013).

¹² Andorra, Austria, Repubblica Ceca, Danimarca, Finlandia, Francia, Germania, Islanda, Lussemburgo, Slovenia, Svizzera, Regno Unito e Ungheria.

¹³ *Karner v. Austria*, No. 40016/98, ECHR 2003-IX.

¹⁴ *Gas and Dubois v. France*, No. 25951/07, judgment 15 March 2012. See Alexander Schuster, *Il matrimonio e la famiglia omosessuale in due recenti sentenze. Prime note in forma di soliloquio*, (10 April 2012), available at www.forumcostituzionale.it; Elisabetta Crivelli, *Gas e Dubois c. Francia: la Corte di Strasburgo frena sull'adozione da parte di coppie omosessuali. Nota a Corte Edu, Gas e Dubois c. Francia*, 15 marzo 2012, *ric. n. 25951/07*, 3 Quaderni Costituzionali, 672, 674 (2012).

¹⁵ Countries that allow same-sex adoption include England and Wales, the Netherlands, Iceland, Belgium, Spain, Sweden, South Africa, and Andorra. Germany, Israel, Denmark and Norway allow

2. ON THE ADOPTION OF A CHILD BY A HOMOSEXUAL COUPLE

2.1 Introduction to *X and Others v. Austria*

On 19 February 2013, the European Court of Human Rights (ECtHR) announced the Grand Chamber's judgment in *X and Others v. Austria*, app. no. 19010/07, in which the court considered whether a restriction on a lesbian woman's ability to adopt her partner's child violated the European Convention on Human Rights (ECHR). In finding a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life), the ECtHR's ruling affirmed the prohibition of discrimination on the grounds of sexual orientation, while confirming its understanding that the Convention does not *per se* require States to legally recognize same-sex marriage or extend family-related rights to lesbian and gay individuals¹⁶. The Grand Chamber's finding of discrimination was based on the fact that, while Austria legal order allowed unwed heterosexual couples the right to adopt, it effectively prohibited adoption by unmarried same-sex couples. In Austria currently same-sex marriage is not recognized and its adoption law would require the biological parent to sever legal ties with the child before adoption by his or her same-sex partner would be authorized.

In the event that gave rise to the decision of the Grand Chamber the Austrian lesbian couple had signed an agreement for the adoption of the son of one of these by the other one. This agreement, more specifically, was concluded between the adopter and the child, represented by the his mother.

The Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*)¹⁷ does not contain provisions specific to adoption by same-sex couples and the Austrian courts interpreted it to exclude adoption of one partner's biological child by the other partner in a same-sex couple.

partners in civil unions to adopt the natural or sometimes adopted child of the other partner. France has a law that both same-sex parents have parental rights over the biological child of one partner, reducing the significance of biological parenthood in a sperm donation situation. In America, California, New Jersey, New York, Ohio, Massachusetts, Washington state, Washington, D.C., Wisconsin, Vermont and New Mexico allow gay couples to adopt. Likewise, in Canada, adoption laws vary from state to state, but most states have gay adoption rights in some form. The ACT, Tasmania and Western Australia allow same-sex couple adoption in Australia. Legislation in New Zealand may soon be introduced to allow gay couples to adopt.

¹⁶ At the time of the Grand Chamber's decision, the laws concerning adoption by a second same-sex parent remained varied throughout Europe: ten Council of Europe Member States allow adoption in such instances - Germany, Belgium, Denmark, Finland, Iceland, Norway, Netherlands, UK and Sweden (§ 55); thirty-five States do not have access to the joint adoption and adoption by the second parent - Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, the former Yugoslav Republic of Macedonia, the Russian Federation, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Poland, Portugal, Czech Republic, Romania, San Marino, Serbia, Slovakia, Slovenia, Switzerland, Turkey and Ukraine; Austria and France had both prohibited a second parent adoption.

¹⁷ Available at <http://www.ibiblio.org/ais/abgb1.htm>.

Considering that the internal rules prevented this form of adoption, the applicants appealed to the Constitutional Court for declare unconstitutional the Article 182 (2) of the Civil Code¹⁸, insofar as it does not include the adoption by the same sex couples.

In June 2005, the Constitutional Court declared the appeal inadmissible¹⁹, stating that only as a result of the action of the parties to the court to ascertain the scope of civil law would be possible to assume the subsequent intervention to verify the correctness of the constitutional rules. (§ 13)

Then in October 2005, the agreement on the future adoption was submitted for approval to the District Court in Austria, before which the father of the child, holder of right, opposed.

The District Court rejected the approval, noting that the domestic legal order admitted only the adoption by singles and by married couples. It was therefore impossible for the interpretation of the internal discipline to allow the adoption going to affect the rights of the father. The Court of first instance, through the examination of any *vulnus* produced by the domestic legislation on the rights enshrined in the Artt.8 and 14 of ECHR on discrimination for reasons related to sexual orientation, highlighted the considerable margin of appreciation by the European Court of Human Rights to the States in matters that have strong ethical components not settled evenly in the contracting countries. The GC concluded that in the domestic law did not allow to same-sex couples to create a legally binding relationship with respect to the child and that to achieve this, it would be necessary a regulatory action. The Court cannot interpret domestic legislation so different from the meaning revealed by its text.

The decision was upheld on appeal in February 2006 and subsequently, in September 2006, by the Supreme Court which reaffirmed that the internal rules did not allow the adoption of a child by a partner of the mother of the minor and this did not contravene the Austrian constitutional principles or the holdings of the European Court of Human Rights. (§ 20)

Both the District Court and Supreme Court endorsed the view that children are better off when raised by a female parent and a male parent²⁰, as opposed to two same-sex parents. The Supreme Court's reasoning implied that it found

¹⁸ Austrian Civil Code, Article 182(2), which governs the effects of adoption, provides that if the child is adopted by an adoptive mother (or father), the child's legal relationship with his biological mother (or father) and her relatives "shall cease. As the Court also noted, "Article 182 § 2 of the Civil Code imposes a general prohibition (that is, not just in the case of same-sex partners) on adoption by a man as long as the ties of kinship with the child's biological father still exist, and by a woman where such ties still exist with the biological mother."

¹⁹ Federal Constitution, Article 140.

²⁰ ABGB, Articles 137(b), 138(1): «[t]he mother shall be the woman who has given birth to the child" and the father is the man who (1). is married to the child's mother at the time of the child's birth or, being the mother's husband, died no earlier than three hundred days prior to the child's birth, or (2). who has recognized paternity, or (3). whose paternity has been established by a court.»

the Civil Code's prohibition on adoption by a second parent of a same-sex couple pursued the legitimate aim of protecting the child's best interests.

All three applicants (the homosexual couple and the child, represented by the biological mother) turned to the Strasbourg Court.

2.2 Austrian law goes to Strasbourg

The European judges have dedicated a great part of the motivations to the identification of internal regulatory framework of reference, noting that in the Austrian legal order same-sex couples cannot unite in marriage (§ 33) and the Registered Partnership Act²¹ permits the registration of cohabitation, from which they derive certain legal effects for the partners, remaining, however, marked differences with respect to the couple united in marriage (§ 38).

Into Austrian law parental right over a child born outside marriage is recognized only to the mother, cohabiting biological parents being able to conclude an agreement for the joint exercise of parental right, subject to approval by the court called upon to assess if such an agreement is pursued the legitimate aim of protecting the child's best interests. The natural parent who does not live with the child has the right to attend the child and be a part of certain relevant decisions concerning the child (§ 45 and 48). Moreover, the Court refers to article 3 § 1 of the Convention Rights of the Child adopted in 1989 in New York²², which enshrines the principle of the best interests of the child and to the European Convention on the Adoption of Children, open to ratification procedure on November 27, 2008²³.

In the evaluation of the Austrian legal order it is compulsory to consider the international conventions regarding the rights of the child. According to the European Convention on the Adoption of Children, State authorities must verify whether the adoption is arranged in the best interests of the child (art. 4), providing that the adoption is allowed to persons of different sex within a couple united in marriage or to a single (art. 7). The same Convention states that the Contracting States are free to extend the scope of the Convention to same-sex couples who are married to or permanently related by an agreement. It is the explanatory report to the same Convention to take note of the different circumstances in each Member State about unions of persons of the same sex and adoptions in these circumstances.

The Recommendation of the Committee of Ministers of 2010²⁴ makes explicit reference to the fact that the countries in which association between

²¹ Eingetragene Partnerschaft-Gesetz (EPG) adopted 10 December 2009 and entered into force on January 1st, 2010, Bundesgesetzblatt, 30 December 2009; BGBl. I 135/2009. Registered partners are not allowed to adopt a child jointly, nor is second-parent adoption permitted. Section 8(4) of the RPA provides that «registered partners shall not be allowed to adopt a child jointly, nor shall one registered partner be allowed to adopt the other partner's child.»

²² Available at http://www.unesco.org/education/pdf/CHILD_E.PDF.

²³ Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/202.htm>.

²⁴ Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the

persons of the same sex is recognized, they cannot be discriminated on grounds of sexual orientation, despite having to take into account the 'interests of the child' (§ 54).

Considering the application of the above principles stated to Articles 14 and 8 ECHR to the present case, the Court is went to analyzing whether the situation of the applicants could be similar to that of a married couple, in which one of the spouses will adopt the biological child of the partner.

The negative answer of the Court is based on the reasons given in the judgment *Gas and Dubois*, i.e. the margin of appreciation of states to recognize marriage between persons of the same sex. The margin of appreciation which States enjoy in regulating the union of such couples, differently from marriage, leads the Court to exclude the existence of discrimination with respect to married couples in Austria. If, in that country, the adoption is ruled for married couples and the adoption by those who are not parent of the minor – child of the other spouse – is an exception, it cannot exist a violation for the first and the third applicant, not being able to compare their situation to that of a married couple.

However, the Court examined the possible discriminatory profile between the two applicants and married heterosexual couples for which, in Austria, is permitted the second-parent adoption.

First, the Court held that the situations between married heterosexual couples and same-sex couples could be the object of comparison for the purposes of Article 14 ECHR, then noting that the applicants could benefit from the system of recognition of unmarried couples, in fact, introduced in Austria, in which a specific section was introduced to ban, only to the same-sex couples, the adoption of the child of the other partner (and notwithstanding the fact that the father of the child had died, or even had given his consent to the adoption) (§ 116).

The European Court noted that the national court had criticized the situation of the mother of the child that represented the minor in a possible conflict of interest, but it shows that this fact was exceeded because of the statutory prohibition. In addition, the national court had not addressed the issue of the relationship between father and son, merely to find that they met, but does not check the grounds, also provided in national law, such as to overcome the absence of consent to the adoption.

The Court seems to move by the intention of eliminating it at the root of the discriminatory effects that may result from a difference in protection between heterosexual and homosexual couples. In this direction includes the reference to the *Karner* case - July 24, 2003, app. 40016/98 - in which Austria had always been held responsible for the violation of Articles 8 and 14 ECHR

Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies. Available at <https://wcd.coe.int/ViewDoc.jsp?id=1606669>.

admitting discrimination between heterosexual and homosexual couples on the issue of succession in the lease²⁵.

Secondly, the Court found that the primary reason that led the Austrian judges to not permit the adoption was not represented by specific assessment of the situation involving the child and the natural father, but only the legal prohibition to obtain the expected adoption into national law, which prevented to determine and consider the existence of the conditions for considered irrelevant the consent of the natural father, and above all, to ponder what effect would produce the adoption compared to the best interests of the child.

The European Court noted that domestic courts, in a real situation characterized by clear factual implications, had ruled out the adoption, almost under the “cloak” of national law²⁶, which, according to the Court, is not admissible.²⁷

Thus, it is acclaimed the discrimination against the applicants, since the prohibition of adoption was inextricably linked to sexual orientation of the two women. This allows the Court to make a clear distinction between the events examined in *Gas and Dubois* case in which the main problem was not the discrimination between homosexual and heterosexual couples, since under French law the adoption was permitted only to married couples. However, the Court considers that it is not relevant “the existence or not of specific requirements for the adoption, on which the only one competent was the national court” (§ 132). This is the part of the ruling in which the judges are trying to precisely define the “boundaries” of the decision.

It is therefore clear that the Court does not intend to address in a general and abstract question of the right of same-sex couples adoption, but only the existence, in this case, a violation pointed discrimination to the detriment of the applicants.

The Court considers, therefore proportionate to the prohibition of adoption prescribed by the Austrian legislature in the absence of evidence justifying an injury to the child, nor is satisfied with the position taken by the Austrian legislature that, in accepting the recognition of civil unions, however, had expressly prohibited the adoption between persons of the same sex.

In this sense, the need to protect the family in the traditional sense is no reason justifying the different treatment (§ 138 and 139). And it is here that

²⁵ Riccardo Conte, *Profili costituzionali del riconoscimento giuridico delle coppie omosessuali alla luce di una pronuncia della Corte europea dei diritti dell'uomo*, Corr.giur., 574 (2012).

²⁶ Roberto Conti, *Note e Commenti (24/02/2013) - Pensieri sparsi, a prima lettura, su una sentenza della Corte dei diritti umani in tema di adozione di coppie dello stesso sesso e sull'efficacia delle sentenze di Strasburgo-GC, 19 febbraio 2013, X e altri c. Austria, 24 February 2013*, available at www.europeanrights.eu

²⁷ § 127: «It follows that the Court is not reviewing the law *in abstracto*: the blanket prohibition at issue, by its very nature, removes the factual circumstances of the case from the scope of both the domestic courts' and this Court's examination». The Court takes into consideration the direct discriminatory effect, not only with regard to the position of the adopter, but stretching into account the interests of the two applicants directly involving the family life of the entire group.

the Court relies on the necessity that the ECHR is the subject of ongoing operations and renewed interpretation in the light of changes in society, so long as to believe that the exclusion of same-sex couples adoption could not be pursue a legitimate aim, neither appeared proportionate to achieve that aim, precisely because of the narrow margins to which is subject the “margin of appreciation”²⁸. (§ 138, 139, 140 and 148)

Ultimately, according to the Court, all the issues raised in the case were such as to suggest that the position concerning the adoption is up to the national court regardless of the prohibition contained in an abstract way by law. And it was in that ruling that it was for the judge to assess the child's best interests, which “[...] is a key notion in the relevant international instruments.”

Nor did the Court hold that there is no consensus about adoption among the Contracting Parties regarding the same-sex couples, matter that other times demonstrated an certain attention by the European judges²⁹. According to the Court, there can be no doubt that, in the absence of common *consensus* between the member states in relation to matters morally or ethically sensitive,

²⁸ *Kosteski v. The former Yugoslav Republic of Macedonia*, supra note 3; *Karlheinz Schmidt v. Germany*, judgment 18 July 1994, Series A, no. 291-B, § 24: «the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment».

²⁹ *Fretté v. France*, supra note 6, § 41: «It is indisputable that there is no common ground on the question. Although most of the Contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt, it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues on which opinions within a democratic society may reasonably differ widely. The Court considers it quite natural that the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters. By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. Since the delicate issues raised in the case therefore touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State [...] This margin of appreciation should not, however, be interpreted as granting the State arbitrary power, and the authorities' decision remains subject to review by the Court for conformity with the requirements of Article 14 of the Convention». See also papers of Guido Raimondi, *La controversa nozione di consensus e le recenti tendenze della giurisprudenza della Corte di Strasburgo in riferimento agli articoli 8 e 11 della Convenzione europea dei diritti dell'uomo* and Pierpaolo Gori, *La rilevanza del diritto comparato nelle decisioni della CEDU*, Workshop of Consiglio Superiore della Magistratura, Formazione Decentrata del Distretto di Milano, 11 January 2013 on “La Corte europea dei diritti dell'uomo, il meccanismo di decisione della Cedu ed i criteri dell'interpretazione conforme alla Convenzione”, Milano, 11 January 2013, available at http://www.ca.milano.giustizia.it/allegato_corsi.aspx?File_id_allegato=839; Anna Maria Lecis Cocco-Ortu, *Consenso europeo, chi è costui? L'individuazione del consensus standard da parte della Corte Edu tra interpretazione evolutiva e margine d'apprezzamento*, (28 novembre 2011) available at www.diritticomparati.it; Roberto Conti, *Convergenze (inconsapevoli o ... naturali) e contaminazioni tra giudici nazionali e Corte EDU: a proposito del matrimonio di coppie omosessuali*, *Corr.giur.*, 579 (2011). See Cristina Vitucci, *La tutela internazionale dell'orientamento sessuale*. Napoli: Jovene, 2012 (book review), available at www.diritticomparati.it.

the margin of appreciation owed to the States is large, but this margin is progressively reduced, when exist a discrimination on grounds of sexual orientation. However, neither the International Convention on Adoption, ratified by a limited number of countries, could be able to demonstrate the existence of a consensus as to justify the difference in treatment between heterosexual and homosexual couples in event of adoption.

Finally, the Court's opinion the lack of consistency on the Austrian system which, on the one hand, admitted the adoption for singles, although homosexual and recognized that a child could live in a homosexual couple, but then claim the prohibition that a child could have two mothers or two fathers. So, it followed the sentence of fair fulfillment by Austria considered in relation to non-pecuniary damage suffered by the plaintiffs.

3. EFFECTIVENESS OF THE RULING AND FUTURE PERSPECTIVES FOR THE NATIONAL LEGAL ORDERS

The reasoning exposed in this ruling may be thus summarized: if the woman had been a man, the adoption would have been possible, so it must be possible in the name of non-discrimination according to sexual orientation while the woman is not a man.

Several non-governmental organizations had intervened in this case; to remember the intervention of the Advocate General in Northern Ireland, focusing on the absence of consent among countries and the interests of the child³⁰.

The ECHR held clearly to combat discrimination based on sexual orientation in this matter. And once stressed that the same-sex relationship shall enjoy the protection afforded by Article 8 ECHR to family life. So, at § 100, the Court makes clear three different assumptions that can be described when discussing adoption of same-sex couples: (1) adoption by a single person; (2) adoption of the child by the other partner; (3) adoption of a child by a homosexual couple. Regarding the first two hypothesis, the Court recalls the cases *Frettè v. France* - app. n. 36515/97 of 26 May 2002; *E.B v. France* - app. n. 435466/02 of 22 January 2008 and *Gas and Dubois v. France* - app. n. 25951/07 of 15 March 2012.

The Court, in its reasoning, shows an arbitration impetus regarding the adoption, even repeatedly stressing the limits of its decision. It must be said clearly, that every time when Court held that “sex couples have the right to adoption”, would not be understood in the laterally meaning because would be not only erroneous but persuasive. The soft solution adopted by the Court seems to have been the adhesive which has coagulated on the consent of the judges who supported the majority opinion. The Strasbourg Court emphasized

³⁰ See also Amnesty International which further referred to the Convention on the Rights of the Child, noting that Article 3 made the best interests of the child the “primary consideration” in all actions concerning children.

the role of the primordial interests of the child and ultimately focusing its reasoning on it.

If there are the assumptions of the couple and the child jointed in a stable family relationship, it is not possible to prohibit the further formalization of this relationship only for reasons of sexual orientation and do not behave equally to heterosexual couples. But this claim has nothing with the opportunity and duty that a national legislation allows *tout court* homosexual couples to adopt a child, even where the child is the child of one of the partners. The Court, in other words, seems to mark its own limits among others rulings of the ECHR.

The possibility of adoption for homosexual couples is measured by comparison with the protection which the laws recognize to heterosexual couples. The *tertium comparationis* has to be considered in order to check the discrimination that the Court intended to marginalize and regardless the *consensus* that will consolidate in the contracting countries.

However, regarding the effectiveness of this ruling on Italy, it is clear that the decision to standardize the relationships of unmarried couples, if it were to materialize, it will move towards discriminatory regimes between homo and/or hetero-sexual couples, with risk of incurring those vulnerable issues identified by the European Court in the matter examined here. According to judge Gallo of the Italian Constitutional Court, it need to legislate on civil rights. Since 2010 that the Constitutional Court urges the legislator in this sense³¹. Gallo also stressed as the Court, on these issues, has been easier to interact with the institutions and the European judges, declaration made on the day in which France were approved marriage and gay adoptions.

The absence of specific legislation, *de jure conditio*, seems to leave no space for interpretations, proposing questions of constitutionality, based on the decision of the European Court of Human Rights or conventional human rights.

The message that seems to materialize from the ruling is that the rights recognized by the Member States to the married couple should not due *tout court* to non-married couples, subject to the rules that each State should adopt. However, it remains to individual countries regulate the situations which can have a social relevance on the basis of the margin of appreciation.

The issue affects the Italian system, presenting the difficulties that beset the interpreter each time is to measure, in practice, the effects of a judgment of the Strasbourg Court in relation to each other that finds specific regulation into national law.

³¹ See judgment no 138/2010 of Italian Constitutional Court. In that judgment the Court ruled unconstitutional rules that limit the application of the institution of marriage to unions between men and women; however, two people of the same sex have the fundamental right to obtain legal recognition, with the associated rights and obligations, of their stable union. See Roberto Romboli, *La sentenza 138/2010 della Corte Costituzionale sul matrimonio tra omosessuali e le sue interpretazioni*, 3 Rivista Italiana dei Costituzionalisti (2011), available at www.associazionedeicostituzionalisti.it.

The European Court has not ordered any action or general measure to avoid the effects of the breach in this case. But this fact is explained by the fact that at the time of the decision on the third applicant, who had been asked to adopt, was approaching the age of majority. So explains the choice of the ECtHR to avoid any reference to the particular measures stated by Article 46 ECHR. Obviously, this does not reduce the scope of the Court's decision and the effects that this may result in similar cases that could be examined in Austrian law.

In Austria, the ECHR has a constitutional rank according to the express provision contained in the Constitution; thus, the conventional rights which also acquire, by virtue of their incorporation with constitutional law, the rank of constitutional rights. In case of conflict between the ECHR and the Austrian national legislation, if it cannot be resolved at the level of interpretation, intervene a control of constitutionality by the Constitutional Court, which should take into account the case law of the European Court and in this situation it seems that the Austrian Court may not depart from the principle of the *res judicata* interpreted by the European Court³².

It is doubtful whether this decision complies with international law, in particular because, as many international texts state, it is in the child's best interest to keep its father and its mother and the father has the right and the duty to continue to look after his child. To allow artificial filiations is a serious threat to the rights of the child, as well as a clear violation of the Convention on the rights of the child which states that the child has "*as far as possible, the right to know and be cared for by his or her parents*" (Article 7) and the right "*to preserve his or her identity, including nationality, name and family relations*" (Article 8).

It is also doubtful that it complies with international law since it extends the State's obligations much further than they sovereignly consented to when ratifying the European Convention on Human Rights. Moreover, one can presume that the new obligation established through this case goes against the will of a large proportion of the 47 states parties to the Convention where it is supposed to apply, particularly against the will of Portugal, Romania, Russia and Ukraine which explicitly prohibit the possibility of "co-parental" adoption by

³² On *primauté* of ECHR over domestic legislation see Giuseppe Martinico and Oreste Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*. Groningen: Europa Law Publishing, 2010, 57. Roberto Conti, *CEDU e interpretazione del giudice: gerarchia o dialogo tra la Corte di Strasburgo?*, 6 *Rivista di diritto pubblico italiano, comunitario e comparato* (2010), available at www.federalismi.it; Elisabetta Lamarque, *Gli effetti delle sentenze della Corte di Strasburgo secondo la Corte costituzionale italiana*, 7 *Corr.giur.*, 962 (2010); Ugo Villani, *Tutela dei diritti fondamentali nel 'dialogo' tra corti europee e giudici nazionali* (115) in Luigi Moccia (eds), *Diritti fondamentali e Cittadinanza dell'Unione Europea*. Milano: FrancoAngeli, 2010. On sub-constitutional rank of ECHR into Italian legal order see Giampaolo Parodi, *Le sentenze della Corte EDU come fonte di diritto*. *La giurisprudenza costituzionale successiva alle sentenze n. 348 e n. 349 del 2007*, (28 November 2012), available at www.diritticomparati.it.

a same-sex partner. These states can, like the ten judges did, retort that this case “does nothing but “merely reflects the position of those sectors of the [Court] which are [favorable] to the idea of opening up second-parent adoption to same-sex couples” (§ 143); this shows how dangerous it is for a Court to disregard the legitimate law, and the rule of law.

So, what can be the impact of this case when no less than seven judges (judges Casadevall, Ziemele, Kovler, Jociene, Sikuta, De Gaetano and Sicilianos) expressed a dissenting opinion? And out of the 10 judges in the majority, how many of them preferred to follow the LGBT political correctness rather than seriously considering the case? In a case on this ideological point which is so far removed from the original content of the Convention, the Court should have chosen the wisdom of law instead of the audacity of ideology. Despite its internal division, the tiny majority of judges chose instead to take “a forceful step” to impose its choice with the risk of weakening the Court and human rights.

There is no doubt that opponents of the Court will see this decision as a new reason to celebrate. The Court is internally divided and its prestige and authority are weakened among the public opinion of the 47 member states. The Court has adopted an enthusiastic but also a worrying logic. Depending on one's degree of attachment to human reality, they will see in this ruling audacity or irrationality.

X and others v. Austria is a ruling with far-reaching consequences. It is difficult to measure the extent of the potential consequences of this case. To execute the Court's decision, Austria could legislate to allow children to have more than two parents at the same time. Austria could also adopt a special law declaring that a child can have two mothers or two fathers. In that case, the two plaintiff women could sue the father and attempt to deprive him of his parental rights and then, the father would have to prove to the judge that he is a better “parent” for his son than his ex-wife's new partner, even if he no longer lives with his child.

This case will not change anything in the daily life of the two plaintiff women. But this decision profoundly disrupts family law in all of Europe, something which was its only objective.

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