Chapter 17
Same-Sex Couples Before the ECtHR: The Right to Marriage

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Abstract This chapter analyses the jurisprudence of the European Court of Human Rights on the recognition of the right to marriage for same-sex couples. It focuses on the Court's 2010 judgment in the well-known case *Schalk and Kopf*, referring also to other cases on the subject. The discussion highlights important aspects of the evolutive approach of the Court and the limits of the decision of 2010, particularly with regard to the absence of a European consensus on same-sex marriages among the States Parties to the ECHR. The conclusion provides some observations on recent and future developments, both in the case law of the Court and in the legislation of the Member States.

17.1 Introduction

The European Court of Human Rights (ECtHR) has decided several cases concerning the rights of same-sex couples or individuals in a homosexual relationship. The issues examined in this and the following chapter were referred to the Court following individual complaints against States whose laws, acts or decisions were considered by the applicants as contrary to the ECHR.

The specific provisions invoked in the cases discussed here are Articles 8, 12 and 14 ECHR. The first, on the protection of private and family life, reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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The second, on the right to marriage, 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.

And the third, on the prohibition of discrimination,[1] provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The above provisions have been invoked either alone or in combination—e.g., Art. 8 in conjunction with Art. 14.

This chapter will focus on the issues related to the application to same-sex couples of Art. 12 on the right to marry, while the application of the other two provisions of the ECHR to same-sex couples or individuals in a homosexual relationship will be discussed in Chap. 18.

17.2 *Schalk and Kopf*: The Proceedings Before the National Courts

As is well known, the ECtHR's case law on the extension of the right to marry to same-sex couples consists primarily of one case, *Schalk and Kopf v. Austria*,[2] which was decided by the Court on 24 June 2010.

In this judgment, the First Section of the Court found that the Austrian Government had breached neither Art. 12 nor Art. 14 taken in conjunction with Art. 8 ECHR. The choice of the First Section not to relinquish its jurisdiction in favour of the Grand Chamber has been strongly criticized.[3] At any rate, the five-judge panel of the Grand Chamber rejected the applicant's request to review the judgment of the First Section.[4]

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[1] Originally, Art. 14 was not a free standing provision and it could be invoked only in connection with a substantive ECHR provision. After the entry into force of Protocol 12, the prohibition of discrimination stands as an autonomous right and it can be invoked also separately from other substantive rights protected by the Convention. However, since only 18 out of the 47 States Parties to the ECHR have ratified Protocol 12, *de facto* Art. 14 cannot yet be considered a free-standing provision.

[2] *Schalk and Kopf v. Austria*, n. 30141/04, judgment of 24th June 2010. On this judgment, see Buyse (2010), Johnson (2010), Milanovic (2010), Peroni (2010), Ragni (2010), Repetto (2010), Timmer (2010a), Timmer (2010b), Wiemann (2010), Winkler (2010), Graupner (2011), Magi (2011), Paladini (2011), Waaldijk (2011), Cozzi (2012), Vitucci (2012) and Scherpe (2013).

[3] Thienel (2010). In this regard, and in connection with very recent developments in the case law, see the last paragraph of this chapter.

[4] Registrar of the ECtHR, press release of 29 November 2011.

The facts of the case are quite well known. The applicants created a same-sex couple living in Vienna. In 2002, they requested the Office for matters of Personal Status to proceed with the formalities to enable them to contract marriage. The Office refused their request based on the Austrian legislation (Art. 44 of the Austrian Civil Code) and national case law on the subject, which restricted the right to marry to opposite-sex couples only. Following the decision of the Vienna Regional Governor in 2003, which confirmed the refusal, the applicants lodged a constitutional complaint.

In its judgment of 12 December 2003, the Constitutional Court dismissed the complaint as ill-founded. With regard to the ECHR, it observed that the concept of marriage enshrined in Art. 12 should not be extended to homosexual relationships, and that "the fact that same-sex relationships fall within the concept of private life and as such enjoy the protection of Art. 8 ECHR" did not "give rise to an obligation to change the law of marriage."[5]

17.3 The ECtHR's Judgment in *Schalk and Kopf*: The Reference to Transsexual Cases

Before examining the arguments that led the ECtHR to conclude that there had been no violation of Arts. 8, 12 and 14 ECHR, we should emphasize that the Court, at the outset of the judgment in *Schalk and Kopf*, acknowledged a connection between cases concerning the right to marry of same-sex couples and its own case law on the rights of transsexuals, observing that "certain principles might be derived from [the] Court's case-law relating to transsexuals".[6] Among the principles applied in the case of transsexuals, the Court referred to the distinction between the right to marry and the right to found a family, which, based on the wording of Art. 12, are closely linked to each other.

The connection between marriage and family, which was certainly justified at the time when the provision was drafted, had already been established by the Court in *Christine Goodwin v. The United Kingdom*.[7] In that judgment, the Court found that there had been a violation of Arts. 8 and 12 with regard to the rights claimed by a female transsexual. The decision was based on an evolutive interpretation of Art. 12 and expressly overruled the Court's conclusions in previous cases concerning transsexuals. In particular, the ECtHR observed that Art. 12 secured the fundamental right to marry and to found a family, but added that

[5] *Schalk and Kopf v. Austria*, paras 7–14.

[6] *Ibidem*, para. 50.

[7] *Christine Goodwin v. the United-Kingdom*, n. 28957/95, judgment of 11th July 2002 (Grand Chamber).

> the second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of the provision.[8]

17.4 The Reasoning of the European Court in *Schalk and Kopf*

Some of the arguments used by the Court in *Schalk and Kopf* as regards the interpretation of the right to marry and the right to private and family life, in conjunction with the principle of non-discrimination, were inspired by the need to apply an evolutive approach to the interpretation of the ECHR, whereas other arguments seemed more cautious and in line with its previous case law.

Concerning the application of Art. 12, the Court overruled its previous interpretation—according to which the provision referred "to the traditional marriage between persons of opposite biological sex"[9] and stated that "it cannot be said that Article 12 is inapplicable to the applicants' case".[10]

Even though the negative form of the statement may be vulnerable to criticism (a positive form establishing the applicability of the provision would have been more appropriate), the meaning does not change: Art. 12 applies to the situation of a same-sex couple claiming to have a right to marry. However, as noted in the literature,[11] the Court did not specify the circumstances in which Art. 12 may be applied to same-sex couples.

The Court's reasoning seems to reflect the position adopted by an authoritative member of the former European Commission of Human Rights, Mr. Schermers, in his partially dissenting opinion in the Commission's report of 7 March 1989 on the case of *W. v. The United Kingdom*, which concerned a transsexual. Considering that the right to live in a family is of paramount importance for the individual, Schermers observed that

> the fundamental right underlying Article 12 should also be granted to homosexual and lesbian couples. They should not be denied the right to found a family without good reasons.[12]

As regards the application of Art. 8 ECHR, the Court, referring to a large number of cases concerning discrimination based on sexual orientation, stated very clearly that it was "undisputed" in this case that "the relationship of a same-sex couple

[8] *Ibidem*, para. 98.

[9] *Rees v. the United Kingdom*, n. 9532/81, judgment of 17th October 1986, para. 49.

[10] *Ibidem*, para. 61.

[11] Hodson (2011), p. 173.

[12] *W. v. United Kingdom*, n. 11095/84, report of 7th March 1989.

like the applicants' falls within the notion of 'private life' within the meaning of Article 8".[13]

In addition to confirming its approach that the sexual relationship of a same-sex couple has to be qualified as "private life" within the meaning of Art. 8, the Court also noted that a rapid evolution of social attitudes towards same-sex couples had already taken place in many member States of the ECHR.

For this reason, the Court had no hesitation in observing that it was "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."[14]

In terms of the application of Art. 8 to same-sex couples, the recent approach of the Court fits into the broader context of a wide interpretation of the notion of "family life" contained in the provision. For quite a long time now, the Court has recognized *de facto* stable family relationships between persons of the opposite sex,[15] specifically protecting the *de facto* relationships of these persons with their children. From this point of view, the *Schalk and Kopf* judgment can be regarded as a further and relevant development of the substantial equivalence between *de jure* and *de facto* relationships.

Finally, the Court answered the question regarding the combined application of Arts. 14 and 8 ECHR. Establishing that the legal situation of opposite and same-sex couples is comparable also in this respect, the Court stated that the applicants were "in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship."[16]

In light of the foregoing, some of the criticisms made against the conclusions of the Court seem rather excessive. In particular, the judgment has been defined as "particularly underdeveloped"[17] and "hasty and unsatisfactory for its lack of reasoning".[18] On the contrary, we believe that there are many positive aspects to the evolutive interpretation of the ECHR in *Schalk and Kopf*, and that these aspects are likely to be taken up and developed in future cases.

All the same, we need to comment on the fact that, according to the Court, Art. 12 ECHR cannot be interpreted in the sense of establishing the right to marry of a same-sex couple.

The main reason that led the Court to conclude that the Convention did not protect the right claimed by the applicants was the absence of a "European consensus regarding same-sex marriage". According to the Court, at the time of the judgment only 6 of the 47 States Parties to the Convention allowed same-sex marriages.[19] This is not the appropriate place to focus on the nature and meaning of

[13] *Schalk and Kopf v. Austria*, para. 90.

[14] *Ibidem*, para. 94.

[15] *Keegan v. Ireland*, n. 16969/90, judgment of 26th May 1994, para. 44.

[16] *Schalk and Kopf v. Austria*, para. 99.

[17] Johnson (2013a), p. 149.

[18] Hodson (2011), p. 175.

[19] *Schalk and Kopf v. Austria*, para. 58.

the expression "European consensus", which is often used by the Court to take account of the developments of legal and social issues relevant to the interpretation of the ECHR. In particular, the question arises whether European consensus necessarily corresponds to a general principle of European Union law, or whether, as we believe, it may be a lower and less established legal standard, which gives the Court a wider margin of appreciation in terms of an evolutive interpretation of the ECHR. In any case, what it is necessary is to clearly identify the trends followed by the majority of the States Parties to the ECHR, in order to avoid abuses about evolutive interpretation of the ECHR based on an European consensus which simply does not exist or is only in phase of initial formation. In *Schalk and Kopf,* the absence of a European consensus led the Court to rule out the possibility of an evolutive interpretation of Art. 12 in the sense suggested by the applicants.

The Court also excluded that Art. 9 of the Charter of Fundamental Rights of the European Union (proclaimed on 7 December 2000 and 12 December 2007, and entered into force on 1 December 2009) (further referred to as CFR) could lead to an interpretation favourable to the applicants. Art. 9 which has dropped the reference to men and women, provides that: "The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." Moreover, the Commentary of the CFR states that Art. 9 "neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex."[20]

Since Austrian legislation did not recognize the right to marry for same-sex couples, the Court ruled out a conflict with Art. 9 CFR, which could have been relevant to an evolutive interpretation of Art. 12 ECHR.

To sum up, it is my opinion that, at the time of the judgment, it was not so easy to take a different decision on the merits. In the absence of an adequate legal criterion based on a European consensus, a different decision would have meant applying just a "creative" interpretation of Art. 12, rather than an evolutive interpretation of the provision. As correctly noted by others, the main question at stake in *Schalk and Kopf* concerned the limits of the 'living instrument approach',[21] i.e., the extension of the evolutive method in interpreting the Convention. Even though the Court has progressively extended the limits on the use of the evolutive method, it would have been very difficult to decide in favour of the applicants when there was just an emerging European consensus on the right to marry for same-sex couples.

This observation seems to be confirmed by the criticisms raised in the Concurring Opinion of Judge Malinverni joined by Judge Kovler. According to the two judges, the rules on the interpretation of international treaties laid down in the Vienna Convention on the Law of Treaties of 23 May 1969 precluded "Article

[20] Explanations Relating to the Charter of Fundamental Rights, OJ 2007 C 303, p. 17.

[21] Thienel (2010).

12 from being construed as conferring the right to marry on persons of the same-sex."[22]

Moreover, the judges even seemed to hold that the Court could not retrospectively change its approach by using an evolutive interpretation of Art. 12:

> the Court cannot, by means of an evolutive interpretation "derive from [it] a right that was not included therein at the outset".[23]

This second part of the concurring opinion is not in line with the importance of evolutive interpretation in the jurisprudence of the Court, which does not hesitate to accept interpretations that are very far from the ordinary meaning of the provisions of the ECHR, if a clear European consensus on the right to marry of a same-sex couple will emerge.

17.5 Effects of the Decision in *Schalk and Kopf* and Future Developments

It seems reasonable to assume that the *Schalk and Kopf* case led the Austrian legislature to pass the Registered Partnership Act on 1 January 2010, which establishes, to some extent, rules very similar to those governing marriages in Austria.[24] Although it is difficult to assess to what extent a simple application to the European Court can induce the respondent State to change its legislation prior to the judgment of the Court—especially in area in which there is no precedent similar to that of the application and when the provision at stake (Art. 12) does not recognize the right to marry for same-sex couples—there is no doubt that in some cases it has happened. This clearly shows that the ECHR and the jurisprudence of the Strasbourg Court have an influence on national legal systems.

To conclude, we will make some final observations on whether future developments in the interpretation of Art. 12 will lead to the recognition of the right to marry for same-sex couples.

In my opinion, the time is not ripe yet for to the rapid formation of a European consensus in that direction. Moreover, it must be noted that the European Court has recently confirmed that "Article 12 does not impose an obligation on the Contracting States to grant same-sex couples access to marriages", and that the individual right to marriage cannot be derived from Art. 14 in conjunction with Art. 8.[25] As already emphasised in the literature, the fact that the ECtHR has

[22] Concurring Opinion of Judge Malinverni joined by Judge Kovler, attached to the judgement (*supra*, note 2).

[23] *Ibidem*.

[24] See, in this volume, the chapter by Repetto in this volume.

[25] *X. and Others v. Austria*, n. 19010/07, judgment of 19th February 2013 (Grand Chamber), para. 106. On this judgment, see the chapter by Crisafulli in this volume.

confirmed its interpretation of Art. 12 in *Schalk and Kopf* "is a clear sign that the Court intends no evolution in its case law on same-sex marriage in the near future."[26]

However, the changes in national legislations, case law and social perceptions after 2010, which are amply discussed in this volume, suggest that the margin of appreciation of the States Parties to the ECHR has been further reduced in recent years. As a consequence, we believe that, in order to pass the test of conformity with the Convention, the States Parties to the ECHR are obliged to more strictly justify national measures distinguishing between different and same-sex couples for the purposes of the right to marry or to register civil unions.

In other words, in the absence of a European consensus on this subject, it is still difficult to maintain that the right to marry under Art. 12 already includes same-sex couples. However, it is certainly easier now than a few years ago to assess situations of discrimination for which there is insufficient justification. Certainly, the progressive assessment of violations of ECHR provisions that are due to discrimination between opposite- and same-sex couples is likely to facilitate the formation of a European consensus in the future, and its eventual recognition by the ECtHR. The current problem is, therefore, to understand the extent to which the discretion of the States Parties to the European Convention to approve national measures distinguishing between same- and different-sex couples for the purposes of certain human rights has been reduced.

From this point of view, a number of cases currently pending before the Court can help determine the actual extent of that reduction and, at the same time, whether the Court intends to usher in a new approach in its case law, as it did in the past with regard to the rights of transsexuals.

Two cases are especially noteworthy: *Vallianatos and Mylonas v. Greece* and *C. S. and Others v. Greece*.[27] They both concern the Greek legislation on civil unions (Law no. 3719/2008, entered into force in November 2008), which allows only different-sex adults to register their civil unions by means of a notarial instrument. The applicants rely on Art. 8 and 14 ECHR, complaining that the Greek law breaches their right to respect for their private life and the principle of non-discrimination.

These applications were lodged with the European Court on 6 may 2009, but on 11 September 2012 the Chamber relinquished jurisdiction in favour of the Grand Chamber. Thus, unlike what happened in the *Schalk and Kopf* case, it is the Grand Chamber that will decide this very delicate issue.

[26] Johnson (2013b).

[27] Applications n. 29381/09 and n. 32684/09. On the development of the cases, see Registrar of the Court, press release ECHR 015 (2013), 16 January 2013. For a national perspective on these cases, see the chapter by Drosos and Constantinides in this volume.

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Post Scriptum

On 7th November 2013, the ECtHR decided applications no. 29381/09 and no. 32684/08 referred to in para. 17.5 of this chapter. In the judgement, the Court reiterates its considerations in *Schalk and Kopf* on the application of Article 8 to

same-sex couples, stating that the relationship of same-sex couples falls within both the notion of "private life" and the notion of "family life", but also interestingly adding that a lack of cohabitation between the two partners does not deprive the relationship of the stability necessary to form a real couple (para. 73). On the merits, the core of the observations of the Court lies in the application of the principle of proportionality, in order to analyze the respect of the margin of appreciation recognized to the State in the treatment of same-sex couples. Even though the Court correctly takes note that there is no uniformity on the subject among the legal systems of the ECHR States parties, it also confirms that "a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships". On the specific discrimination between same-sex and opposite-sex couples in the matter of accessing to civil unions, as in the case of the Greek legislation at stake, it is noteworthy to underline that the Court, in considering all the pertinent national legislations, observes that "Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples" (para. 91). For these reasons, the Court found a violation of Article 14 taken in conjunction with Article 8. The decision, as stressed in this chapter, confirms the trend to reduce the State's margin of appreciation in order to enact legislations which discriminate same-sex from opposite-sex couples in the enjoyment of identical rights. It is also interesting to note that the "Court continues to use the weapon" of the European trend as the most important parameter to analyze the conformity of national measures to the ECHR, assessing not only the existence of a general trend towards forms of legal recognition of same-sex relationships, but even a sub-level of this trend (formed by just 19 of the 47 States member of the Council of Europe) which becomes essential to find a violation in the present case. Thus, it seems that the only way to enhance the protection of the same-sex couples in the framework of the ECHR is the very flexible application of the method of the European consensus, which implies the appreciation of not particularly wide trends. Maybe this is the only possibility to "open the doors" of the ECHR to same-sex couples, but the problem to limit the use of this evolutive method of interpretation of the ECHR still remains, waiting for a future modification of the Convention that would expressly consider gay people's rights and interests.