THE RIGHT TO MARRY

A comparative study outlining varied international legislation on the inviolable right to marriage

KAREN VELLA

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE DEGREE OF DOCTORATE OF LAWS

FACULTY OF LAWS
UNIVERSITY OF MALTA
JUNE 2001

ABSTRACT

In this thesis the concept of marriage is explored alongside that of the family and human rights. Marriage legal protection made a path in history. Marriage comes with several restrictions among which we find those of sex and age. A juridical definition of sex is difficult to find. The carnal aspect of marriage is regulated in all States since the State is interested in controlling marriage. Traditional marriage is bombarded by new lobbies of homosexual and transsexual marriage. Slowly traditional marriage is being shaken. For example, till date we find legal same-sex marriage in the Netherlands and registered and domestic partnerships in several States.

Restrictions regarding age are compulsory all over the world despite of their diversity. Capacity to marry includes not only age requirements, but also legal capacity which certain adults do not have due to causes such as mental incapacity. The State has the interest of regulating marriage as an institution through legislation. Among its rules the State delves into consent and intention to marry too. Hence, the State conditions marriage prior, during and after the celebration of marriage.

In this thesis the diversity of marriage impediments is discussed. The focus is mainly on absolute, relative and temporary impediments. The issue of marriage of a PWA is discussed in depth as legislation regulating this is sparsely found. Marriage is a social institution which should be meritoriously regulated in the interest of society in general.

Marriage is an institution regulated by strict rules regarding bigamy and polygamy. Due to the diversity of culture and mingling of multi-cultural persons problems arise. This could lead to the State or a cultural practice to be put in a strait. Finally, the issue of divorce is discussed. The emphasis is on the fact that divorce is not a right recognised in the European Convention of Human Rights.

Moreover, the right to marry of foreigners and certain European immigration policies are studied. Marriage is a means to attain certain privileges for foreigners such as freedom of movement. Thus the State checks whether the motive of marriage is a real one or a disguised one. Stringent rules in several States make marriage for such purposes difficult. Also prisoners are sometimes considered as foreigners to society and denied the right to marriage. Illegal restrictions are unjustly imposed due to race, nationality and religion. Other restrictions are imposed on persons by conditions of celibacy and widowhood.

Finally, cohabitation is discussed as an alternative to marriage. Issues arising from it such as illegitimacy and private agreements are discussed as well.

Fil-Kostituzzjoni taghna d-dritt li wiehed jizzewweg mhux dritt fundamentali ... fl-Att XIV ta' l-1987 li ghamel il-Konvenzjoni Ewropeja tad-Drittijiet Umani parti mill-ligijiet taghna hemm espressament li persuna ghandha d-dritt li tizzewweg u tifforma familja ghaliex dak id-dritt huwa espress f'Att XIV ta' l-1987 mhux miktub fil-Kostituzzjoni taghna ....Fl-1987, ghall-ewwel darba, d-dritt taz-zwieg gie mgholli ghall-livell ta' dritt fondamentali'.

Hon. Dr. Karmenu Mifsud Bonnici, Parliamentary Debates, Sitting 119 of the 17th. March, 1993, p.1300.

CHAPTER 1
MARRIAGE, HISTORY AND HUMAN RIGHTS

CHAPTER 2
THE RIGHT TO CONTRACT MARRIAGE

CHAPTER 3

MORE LEGAL RESTRICTIONS REGARDING THE PERSON OF THE CANDIDATE TO MARRIAGE

CHAPTER 4

THE SOCIAL DIMENSION OF MARRIAGE AND THE STATE

CHAPTER 5

THE CONTROL OF NATIONAL LAWS GUARANTEEING THE INSTITUTIONAL ASPECT OF MARRIAGE

CHAPTER 6

THE RIGHT TO MARRY OF FOREIGNERS, PRISONERS AND OTHER PERMITTED AND PROHIBITED RESTRICTIONS

CHAPTER 7

AN ALTERNATIVE TO MARRIAGE

ACKNOWLEDGEMENTS

With sincere and deep gratitude to the Hon. Dr. Tonio Borg who as my tutor has given me his guidance and support. I feel profoundly indebted to Prof. Ian Refalo, Mr. Paul Bilocca and Rev. Fr. Mario Grech for their immeasurable patience. A special thanks goes also to all those people from around the globe for their valuable advise, material and other assistance. Lastly, but not the less I would like to thank my family Alfred, Maria Concetta and Philip for their continuous moral support and understanding. The assistance and cooperation of all proved to be indispensable.

ABBREVIATIONS

- **ECHR** - European Convention on Human Rights and Personal Freedom
- **UDHR** - Universal Declaration of Human Rights
- **PWA** - persons with AIDS
- **PACS** - Pacte Civil de Solidarité

CHAPTER 1

MARRIAGE, HISTORY AND HUMAN RIGHTS

INTRODUCTION

The Evolution of the Notion of Family and its Implications in Europe

Family may be defined as an association of persons of same blood and living together under one roof, relatives of any degree who live together or an association of persons having the same origins or the same interests. These are the particular bonds which unite the individuals which constitute a family. There are various bonds which are an elaboration of intellectual and moral basis - the foundation of social life, whatever be society's evolution. Hence, family is not just an economic-social structure. It is a combination of natural love, feelings, personal and social duties as well as economic ones.

The family is normally conceived as a group of persons related among each other by a union born from marriage. Such bond can be created by blood bond, filiation or artificially by adoption and medically assisted procreation. The 19th. Century family norm was basically this model - legitimate family and patriarchal authoritarian type. Nowadays family pluralism is formed in Europe. The law does not impose that much but is more open and is formed by the help of judges and family relatives. Family law became more liberal and democratic. The European notion of family law found its echo in the ECHR which is one of the foremost instruments of protection and promotion of human rights.

The family is a biological and cultural fact. The biological bonds which unite a child with his parents are undeniable, unalterable and unfalsifiable according to genetics. These bonds are independent from all institutional forms. Family is the cultural body, an element of civilisation. In Europe we find a multiplicity of population, cultures, political philosophers, different religious creeds, different ways of thought and life styles - the family is the image of this diversity. In my opinion one finds divergent and new family models from nation to nation and region to region, while one can see the curves of marriage, births and divorce are soaring and slumping.

The family's function is changing and various factors are due to this change. Is the deduction that the family is in crisis true? Marriage decreases while cohabitation and births outside marriage increase, more single parents and homosexuals are rearing their children. The change of mentality and the evolution of morals changed but did not destroy the family. The father was dethroned from his paternal

authority, but the family will not be destroyed. The family builds and favourises the construction of personal identities. Today's families fight against isolation created by individualism.

Family law is a group of juridical laws managing personal and patrimonial relations of this family cell - creating privileged bonds for the married and also to the cohabiting and children be they legitimate or not. The family is a private and a public entity. The constitution of a couple and having children are personal decisions regulated by law to stabilise private and public interests. In the absence of a legal definition law adapts itself. Since ancient times religion, morals, political economy and more recently sociology, medicine and biology left their imprint in the different branches of law - international law, constitutional law, administrative law, fiscal law and social security law. The pluralism in family law is manifested also by the diverse source other than the traditional legal frame.

The family is an intermediary between the individual and the State delineated by privileged bonds. The Irish, Italian, Greek and Luxembourg constitutions fully recognise the fundamental nature of the marriage institution and thus protect it. The German, Portuguese, Spanish and French constitutions simply assure protection of family social and economic rights. Certain European States hold a paradox - the political foundations of Belgium, UK, Denmark and Netherlands rest on the notion of family created by marriage but their constitutions do not contain any reference to marriage or the family in general.

Interestingly the movement of internationalisation of human rights penetrated in the family institution. Marriage and family life were raised to the rank of human rights. Each person is guaranteed the right to marry and enjoy family life in such setting free from the State's intrusion and religious and political barriers. These inalienable rights are sacred and protected against all violations. Since the 20th. Century the individual could concretise the notion of right and liberty without the State. The point of departure is undoubtedly the Universal Declaration of Human Rights of 10th. December 1948.

Neither the UDHR nor the other international or regional conventions defending and promoting human rights have concretised the notion of family. National jurisdictions applying supranational norms discover or recover the notion of family. The jurisprudence of Strasbourg help us to understand the contours of family in the sense of the ECHR. Did the ECHR influence or orientate family law and in what degree or did the ECHR simply justified the reforms which were already taking place?

I . The ECHR: an Original Tool of Human Rights Protection

Human rights became a preoccupation of the international community in the mid-XX Century though they are of ancient origin. The idea of human rights conceptualised by favouring Humanism and Reform were systemised in the US Independence Declaration of 1776 and the Declaration of the Rights of Man and Citizen of 1789. It was not until the end of World War II that on international and regional basis the individual emerged in the international order. The Council of Europe's democracies wanted that the atrocities of Hitler and Mussolini based on the Nuremberg laws will never be reproduced and affect marriage.

Marriage and the founding of a family are not protected by the wording of Article 12 of the ECHR as an institution[1]. It is the right of every individual to marry the person of his choice. The respect of this liberty supposes the juridical and social possibility of living your own choices. The Strasbourg model does not move far from the traditional family model thus refusing claims such as those of homosexual and transsexual marriages. The individual seeks the affirmation of his rights among them that of living a normal family life, legal protection against arbitrary interference of the national authorities or third parties, granting of specific family rights among which we find right to have children. The right to have a family is not only a legal right, but a right of implicit well-being guaranteed by the State. This idealistic vision of family in reality does not mean that one's well-being is others' well-being too. Today the child's well-being is at the heart of the family, after centuries of sacrifice at the *pater*'s altar of power. Due to his fragility because of adults' egoism and irresponsibility the child needs protection.

The authors of the ECHR did not intend to establish and validate a particular family model. Thus each State is free to define its proper notion of family. Though the Commission and the European Court see that the national authorities do not go off the substance of the right to marry and the right to respect of family life. The Court cannot ignore the majoritarian interpretation and the common European denominator. To justify its proper interpretation it often refers to the prevalent situation in the majority of member States. All individuals who fall in this family and social reality are entitled to rights and liberties. The man and woman being spouses, cohabitants or lovers are placed equally to the principles enshrined in the ECHR.

The formation and the serenity of the family depend on its members' will. The evolution of morals and of mentalities reinforced the role of will of adults which can be proven formidable. The will to create

[1] **'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'**: Article 12 of the European Convention of Human Rights.

one's own proper family model, will to procreate or not to procreate, will to break up family relations, suffer less assaults from the exterior as much as the interior. But despite this the State parties to the ECHR and the Strasbourg organs do not let the future of the 'constituted' family in the hands of those composing it. The Member States' and European judges maintain a certain conception of the family via the family law from where the interests of the family and child justify it. The child has become a central element in the definition of family. Its importance in family law is getting bigger - side by side to the subject of marriage in the frame of recognition of the natural family. We find diverse forms of families as well such as the single parent, the extended family and the heart and affection family.

The primary bond of family and Article 12 of the ECHR is certainly the marriage bond. By Article 12 the authors of the Convention intended to promote the legitimate family, i.e. the family founded on marriage bonds. In this section's terms marriage has become a fundamental liberty. The emphasis is put on the couple who must be a man and a woman, of marriageable age. Marriage is above all a private affair, which engages two free persons in terms of choice. Article 12 is directed towards the future - procreation and education. This is the guarantee of renewal of generations and of perennity of society. The legitimate family founded on marriage bonds is still the strong value of this juridical institution; a social unit and object of Statal and European protection. This conception of family resists to family changes which are evidentiated by the States' and Strasbourg Courts. Because marriage is the guarantee of a reciprocal bond of two wills directed to the founding of a family cell, the authors of Article 12 have foreseen that access to marriage must be regulated by the national laws of each member State. As contract and institution marriage supposes that its candidates fulfill certain conditions. This remand to national legislations is symbolic: Europe is a pluralistic society whose traditions vary from one State to another. Hence, Strasbourg sees that matrimonial liberty is respected in principle as marriage is the basis of the legitimate family which is juridically protected and socially recognised ideal.

This family portrait, anchored in national legislations and defended by the Strasbourg Courts reminds us also that the liberty to marry has as corollary, the liberty of not marrying. This is another facet of individual liberty which is implicitly protected by Article 12 of the ECHR. Cohabitation was already known to the authors of the ECHR, but many States knowingly quartered it to a zone of non-laws in the name of the protection of the marriage institution. Paradoxically, the development of the free union since the middle of the XX Century is undoubtedly one of the consequences of individualism. But this liberty does not present only advantages, this choice of family life equally presents inconveniences, principally due to the absence of juridical protection. On the other hand many persons as singles or in couple decide to claim the right to have descendants. But if adults do not assume the responsibility of

their choice, the children find themselves in a situation of total dependence with regard to their parents. Strasbourg released new criteria of existence of a family. The legitimate family[2] and the natural family, the two forms and their children are put on the same footing. Family structures other than the legitimate family are recognised - the right of every person to respect of his or her family life, corroborated by the principle of non-discrimination between children born out of marriage and legitimate children. The legitimate family is not superior to another, because the interest of a child or several children is at play.

The principle of non-discrimination, universally accepted between children born out of wedlock and legitimate children, found not only the recognition of other family structures other than legitimate, but guarantees the blooming and development of the quality of family bonds, independently from status. Certain couples cannot pretend to benefit from the same rights which legally married ones benefit from. The child is not hindered and the child is considered as a natural factor of equality between the parents, equally among the families. A study of Strasbourg's jurisprudence and their effects in the juridical orders of the member States parties to the ECHR permit the fullness of these family mutations, thus the degree of recognition of other forms of the family.

A. The Consecration of Marriage as the Only Legal Way of Founding the Family

Marriage is a union which essentially can be apprehended in different manners. In fact, the conjugal bond interests not only the State's positive law, but also religious and moral norms. But in all cases, marriage is a privileged frame of development of society whose values it shall reproduce, an essential form of registration of the constituent elements of this society. This importance is highlighted in Article 12 of the ECHR where marriage is the only criterion of formation of the family which is officially and expressly protected. In this sense, it enshrines the first of family rights since it describes the point of departure of family life. Nevertheless, marriage has evolved and this evolution has not escaped neither to the authors of the ECHR, nor to the Strasbourg Courts. From a sacred institution recognised as such for a long time, now we speak henceforth of the right to marry in terms of public liberty of expression of matrimonial will. Marriage is envisaged as the engagement of two individuals who decide about their common future. This right is thus apprehended as a right of the person, individual right to contract marriage and right to consent to marriage with the person of one's choice.

[2] A form of legitimate and socially recognised conjugal situation known as *ho'o-ao* meaning 'to stay until daylight' exists in Hawaii as a flexible arrangement of marriage.

Up to 1975 marriage in Malta was regulated on both the domestic and the international plane[3] by Canon law. The COCP held that Canon law is **'the Maltese law of marriage except when otherwise stated therein'**. Even the validity of a non-Catholic marriage of a Maltese person (free to marry) with a foreigner was disputed by Sir Adrian Dingli and Sir Augustus Bartolo. Malta followed English[4] private international law rules since the beginning of the century[5]. The Marriage Act of 1975 still modeled on Canon law was enacted since the need was felt to provide for civil marriage and the recognition of foreign marriages and divorce decrees. As far as 1900 Pietro Paolo Borg held thus: ***'Gli acattolici vogliono ciascuno seguire nel contrarre le nozze, le leggi e i riti della loro religione. Di che quanti inconvenienti potrebbero derivare nessuno non vede...le dispute teologiche cui il sistema puo dar luogo innanzi ai tribunali civili...'***[6]. The Church-State separation of powers affected marriage too. We find no definition of marriage in our Civil Code as it was in the case of the 1917 Canon Code. Under Canon 1055(1) of the 1983 Canon Code marriage is indirectly defined[7].

B. Towards a Definition of the Concept of Marriage

Marriage is a social institution recognised worldwide for the establishment of a family, the basic cell of society. Most religions and cultures have different perceptions of marriage. The Pentateuch describes the historical and religious source of marriage stating: **'And the Lord Said, it is not good that the man should be alone; I will make him an help meet for him'**[8]. In Christian theology marriage is a sacrament created by God. **'For this cause a man shall leave his father and mother, and shall cleave to his wife; and the two shall become one flesh. This mystery is great'**[9]. Marriage is a mystery, one of seven, for the Orthodox Church. A Hindu marriage is a sort of a contract and sacrament. At Jewish law it is a religious institution. Bhuddist marriage is a contract, not a sacrament. An Islamic marriage is a **'tie which is pure and honourable'** resembling a civil contract.

A marriage is indissoluble[10] according to the Roman-Catholic tradition. In Iran[11] a temporary marriage (*mut'a*) may be contracted by the Shiites. This seems to legalise prostitution, thus the Islamic Sunni prohibit it. In Europe marriage was secularised since the French Revolution. Even before the Romans

---

[3] *'...f'materja hekk skizitament ta' ordni pubblika bhal ma hi l-istat matrimonjali, id-dritt kanoniku...jikkostitwixxi id-dritt internazzjonali tal-ligi Maltija ghas-soluzzjoni ta' kwistjonijiet li jikkontjenu element strangier'*: Formosa vs. Dr. A. Valenzia et noe (1959).

[4] In England and Wales the Civil Marriage Act of 1836 had already introduced purely secular marriage.

[5] Valentini vs. Valentini (1923).

[6] Borg P.P., *La Questione Matrimoniale in Malta: Studio Filosofico, Canonico e Politico con appendici*, Stabilimento Tip. Librario A.E.S. Festa, Napoli, 1900.

[7] *Matrimoniale foedus quo vir et mulier inter totius vitae consortium constituent, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum, a Christo Domino ad Sacramenti dignitatem inter baptizatos evectum est.*

[8] Genesis, 2/18.

[9] Epistle of Paul to the Ephesians, Ch.5, 31, 32.

[10] Coram Heiner, Sacra Romana Rota, 23rd. February, 1912 (AAS 4 [1912]), SRRD IV 95-111.

had a different concept of marriage from the Christian concept. Modestinus defines the *ius connubium* as the consortium of a man and a woman: '***Nuptiae sunt coniunctio maris et feminae, consortium omnis vitae, iuris divini et humani communicatio***'[12]. Marriage had a physical, moral and religious-legal dimension. Since then we still retain marriage as monogamous at the heart of European marriage legislation. The essential character of monogamous marriage was defined by Lord Penzance in ***Hyde vs. Hyde et***[13] as: '**...the voluntary union for life of one man and one woman to the exclusion of all others**'[14] and recently as '**the voluntary and permanent union of one man and one woman to the exclusion of all others for life**'[15].

In several African States[16] marriage is still a union between two clans and not just of the spouses. Are these customary marriages a different variety of marriage or a different institution? Human marriage is made of the same fundamental ideas all over the world. In most African States as at Roman law marriage and concubinage have different parameters. Polygamy subsists in several African States. Usually Christians established there considered these marriages invalid. Unlike in Europe the social system is different since it is characterised by male dominance.

In Rome we find, not the right to marry, but the duty of marry. Roman marriage is not an institution founded on the individual's feelings and love. The agreement of the two future spouses is always presumed according to the Digest's wording: '**If a son marries a woman under his father's duress, marriage is validly contracted, although one cannot marry against his liking: one presumes that he preferred to accept**'[17].With regard to the girl, the Digest holds that - '**The girl who does not resist openly to her father's will is considered to have consented and the resistance is not tolerated unless the boy chosen by her father is of an infamous or dissolute or immoral conduct**'[18]. The duty to marry is constantly evoked: Plutarch[19] teaches that marriage is a brake to young people's sexuality; marriage was probably considered as an extension of order: settlement and domestication of all men. Even today e.g. in the Indian civilisation marriage is perceived as an obligation. Marriage is the most important ceremony of life's cycle for a Hindu all over India.

---

[11] Article 1075 of the Marriage Code of Iran. Trial marriages are also found around the continents in Argentina, Angola and in the Philippines.

[12] Digesta XXIII. II, I: Wedlock is the union of a male and female and the partnership of the whole of life, the sharing of human and divine law. In the Institutes of Justinian (1.9.1) defines marriage as: '***Nuptiae autem sive matrimonium est viri et mulieris coniunctio individuam consuetudinem vitae continens.*** Justinian does not indicate the source of this definition. Basically it says that wedlock or marriage is a union of man and women involving an individualised habit of life. The Roman monogamous marriage is proven in a bronze military diploma of 103AD found in Cheshire, England issued by Emperor Trajan officially certifies to Beburus, a Spanish soldier (*decurion*) '**granting him with citizenship and the right to marry... but not more than one wife...**'.

[13] **Hyde vs. Hyde and Woodmansee**, (1886) L.R. 1 P. & D. 130, 133.

[14] Australia changed the law following Khan *vs.* Khan (1962) 3 F.L.R. 496 (Vic.) which followed **Hyde vs. Hyde and Woodmansee** giving unjust results to partners of potentially polygamous marriages.

[15] **B vs. R.**, Mr. Justice Costello, President of the High Court, (1995) 1 ILRM 491 (HC); (1995) 1 Fam LJ 27 (HC).

[16] One usually finds several types of marriages such as in Sierra Leone: customary marriage, common law marriage and Islamic marriage.

[17] Digest 23-2-22.

[18] Digest 23-1-12.

II. Marriage Today

A recent report in The Times[20] revealed that in 1996 32% of men had never married and by 2021 the figure may rise to 41% and for women they are 24% for women and 33% respectively. Some of these may cohabit. Is it a time towards cohabitation? In the time where new reforms of marriage law and where the pressure for the regulation of homosexual marriage is increasing, it is not worthless referring to the ideologies which have not ceased to inspire the big reforms of modern marriage law, that is to say in exposing the logic of ideas which have put the doctrinal sources of change in Western law on the matter along three quarters of a century in the light. In Ireland the Court refused to get theologians to define the right to marry in the light of natural law. Murphy J. stated:

> **'It may well be that 'marriage' as referred in our Constitution derives from the Christian concept of marriage. However, whatever its origin, the obligations of the State and the rights of parties in relation to marriage are now contained in the Constitution and our laws...and it falls to me as a judge of the High Court to interpret those provisions and it is not permissible for me to abdicate that function to any expert, however, distinguished'**[21].

G.K. Chesterton once observed that the modern world is full of Christian ideas which have become madness. This is particularly evident in the contemporary marriage regulatory change. Since the first legislation regarding matrimonial equality of between the wars (Sweden 1920, Denmark 1925, Finland 1929, Norway 1931) to the European Parliament recommendations concerning homosexual marriage[22] to the 1984 Swiss *Partnerschaft* law allowing partnerships between spouses and the recent Scandinavian laws regarding registered domestic partnerships in Denmark (including Greenland) [1989], Norway [1993], Sweden [1994], Iceland [1996], the Netherlands and Belgium [1998]. Such legislation is found only *in partibus infidelium* in Spain[23], Catalunya and Aragon regions enacted in 1998 and 1999 respectively. Finland and Hungary[24] too went into legalising cohabitation. In June 1997, the governing Socialist Party in Portugal introduced a bill on registered partnerships, which would permit official recognition of same-sex couples and would extend to them most of the privileges

---

[19] De *Liberis Educandis*, 13.

[20] The Times (England), Frien 'More are Choosing Not to Marry', 9th. January, 1999.

[21] **The State (Ryan and Others) vs. Lennon**, (1935) I.R., 170 at 204-205. The Constitutional Court ruled in 1995 that, while civil marriage was reserved for partners of the opposite sex, existing state recognition of "common-law" marriages--which allowed unmarried opposite-sex couples to claim most of the economic benefits of marriage--had to be extended to same-sex couples. Parliament then revised the law on cohabitation. Under it, same-sex couples can claim all marital rights except access to adoption.

[22] Resolution No.A3-0028/94 approved on the 8th. February, 1994. It was severely criticised in local newspapers especially on the 21st. February, 1994 in reports in The Times p.3 and in In-Nazzjon p.6. Another European Parliament non-binding Resolution passed on the 16th. March, 2000 was opposed by the Prime Minister and the Archbishop as reported in The Sunday Times p.1, Kullhadd p.1, it-Torca p.1, il-Mument p.4 and in il-Gens p.24.

[23] In 1987 Teixdor and Lozano requested marriage in Vic, Catalunya which was denied. Defending lawyer of FAGC (Catalunya Homo Liberation Front) held this denial unconstitutional. The Court stated thus: **'There is no need to say that the legislator intended marriage to be between a man and a woman'**. In 1994 Major José Cuerda of Vitoria (Basque Region) inaugurated a registry for heterosexual and homosexual couples (*parejas de hecho*) even if of no juridical consquence. Now we find them in Valencia, Barcellona, Cordoba, Granada, Ibiza and Toledo while refused in Madrid and Seville.

[24] Hungarian Civil Code, Sections 578(1) &(2) and 685/A in particular.

of heterosexual marriage, excluding adoption. Lobbying by Portugal's lesbian and gay organization, Associação ILGA-Portugal, helped convince them to include same-sex couples. On June 13, 1997, the most respected weekly newspaper in Portugal, 'Expresso' described the Catholic Church as already **'preparing for war'**. This Bill was attacked by Socialist MPs too and was never made law.

The contemporary evolution of marriage law shows the fundamental values of marriage in Christian marriage in Western civilisation. The canonical requirement of liberty of consent of the parties has changed in an individualistic principle of sexual liberty in the emancipation of marriage with regard to the biological order of creation and the sacramental ordination of marriage as a means of grace to the realisation of one's self. Individual liberty in the family domain led to the setting aside of the end of procreation. The Swiss Federal Council[25] on the reform of Swiss marriage law of 1979 held that the it is not the legislator's competence to define the internal order of the spouses, i.e. the relationship between them - to the regulation of homosexual unions under the name of *partnerskab* by which two persons of the same sex can register their partnership, as the Danish legislator held in 1989, followed by the Norwegian legislator in 1993, exactly: the registration of partnership has the same juridical effects of marriage, save the conditions of Section 4'(amended in 1999) permitting adoption.[26]. In Norway the Norwegian Gay and Lesbian Association expressed this: **'Security for adults contributes to security for children'**. The Ministry held that 'adoption should be considered independently of a Partnership Act... The proposal to exclude the issue of adoption is upheld'[27]. One must keep in mind that many gays have children from previous marriage/s.

Marriage can be seen as a contract obligatorily concluded under the patrimony of the lay State. The State controls the dissolution of marriage too - this is the reason why the marriage crisis inevitably leads to the actual divorce crisis in Europe. The contractuality, laity of marriage, individualism, liberty and equality are distinctive traits of the loss of the hierarchy of values in the XXth. Century. Actually their intellectual basis can be tracked in the major forming traditions of thought and of modern Western society.

- The Scholastic tradition
- The Jus Naturalis tradition
- The Canonical tradition

It is in the heart of these three that the fundamental changes of Western marriage law and the relationship of Church-State has occurred.

---

[25] Message regarding the revision of the Swiss Civil Code of 11th. July 1979, Feuille Federale (FF), 1979, II/2, pp. 1179ss.

[26] Danish law of 7th. June 1989 (*Lov on registreret partnerskab*, S.1: *To personner af samme kon kan lade deres partnerskab registrere* and S.3, 1. *Registrering af partnerskab har med de* I S. 4 *anforte undtagelser samme retsvirkninger som indgaelse af aegteskab.* By the Norwegian law regarding homosexual partnerships of 30th. April 1993 (*Lov om registrert partnerskap*), The Norwegian Act on registered Partnerships for Homosexual Couples, Oslo, 1993. (Norwegian Ministry of the Family).

A. Intellectual Bases of Modern Marriage Law

If the essential revolution to the juridical civilisation of today's ideas is attributed to the French Revolution, we will be forgetting their direct inspirers, the philosophers of the Century of Enlightenment, from whom paternity starts. From this we see the obligatory civil marriage which postulates the civil power in lay marriage and the essential nature of marriage as a contract.

The competence of the legislative and jurisdictional order of civil power in the matter of marriage is found since the Scholastic period[28] of the German Emperor Louis IV of Bavaria (1286-1347), while the Pope and the Emperor had the power to establish impediments and give dispenses. The reasons advanced in favour of the competence of civil power for example by D'Occam (1285-1347) appear to be of two natures: historical and philosophical i.e. the legitimacy of power of the Holy Roman Emperors and the fact that marriage pertained to the order of nature too, and the intervention of the legislator in domains not regulated by Divine Law for public good, thus leading to Ecclesiastical legislation. De Padoue[29] (1275-1343) affirms the competence of the temporal sovereign in human laws at the exclusion of the Church whose function is purely spiritual and hence, implies that the ecclesiastical power was separated from the *potestas coactiva*.

Both D'Occam and De Padoue saw the dissociation of the Church's spiritual power on marriage and the founding of civil power in marriage. The proper competence of civil power in the domain of marriage and the spiritual power of the Church were reaffirmed also in the XIV Century and also later in Spanish Scholasticism by Francisco de Vitoria (1483-1546) without contesting the legislative competence of the civil power in marriage, which is founded on the nature and on the placing of marriage as a *bonum rei publicae*, reaffirming the subordination of civil power to the ecclesiastical powers of the Church. Melchior Cano (1509-1560), a defender of the sacramentality of marriage finds the form of marriage in the State's civil power, its sacramentality not in contract, but in the words pronounced by the priest. Then in the XVII-XVIII centuries the jus naturalis school and that of modern canonists drew all the consequences.

B. The Thesis of the Jus Naturalis School

The theses affirming the competence of the civil power on the contract of marriage and the limitation of the competence of the ecclesiastical power regarding the sacrament which were formulated in the

[27] [27] The Norwegian Act on Registered Partnerships, Ministry of Children and Family Affairs, Oslo, Norway, 1993, p.53.

[28] G.D'Occam, *Consultatio de causa matrimoniali* (1342), M.Goldast Edition, Monarchia S.Romani Imperii, Book 1, 1668, pp.21-24.

Medieval Scholastic period in the context of conflict between Pope and Emperor, were radicalised in the modern thought of the Jus Naturalis school. The objective of this school was to make marriage a universal institution valid for all mankind '***inter homines non qua Christiani, sed qua homines sunt***[30]' and to make law an autonomous systematic science inspired by the methods of physical sciences and mathematics.

Firstly, Grotius[31] and Rousseau[32] were for the founding of the exclusive competence of the civil power in both temporal and spiritual matters submitting marriage and the Church to this power and Pufendorf[33] and Vattel[34] who affirmed the pure spiritual nature of the Church as an indivisible union of individuals with Christ without any power or form of government. The pioneers of the Jus Naturalis school considered marriage as **'the most natural community'**[35] and as **'the fundamental institution of life in society'**[36], while the rationalists such as Thomasius[37] perceived marriage as a pure contract and as a civil contract by Rousseau[38] and as law of nations by Voltaire[39].

C. The Doctrines of the Modern Canonists

From now on we can see the limitation of power of the Church to the dissociation of the contract from the sacrament. Launoy and Oberhauser dissociate the nature of sacrament in marriage which is only relevant to the ecclesiastical power and of the contract, its natural basis, which arises from the competence of the civil power. In their conception marriage dualism subjected the institution of marriage to the power of the State for its formation and its civil effects and to the power of the Church for all which is religious. They had been moving towards the secularisation of marriage and towards obligatory civil marriage. This was the fruit of juridical rationalisation which led to the French Revolution too.

Modern marriage law is deprived of a supranatural dimension and is based on the human image; single dimension. In fact marriage finds the human being as the sole actor in modern marriage. One shall not be surprised how its distinctive traits reduce it to a simple contract. It is meaningful to mention the French Durand and Maillaine, inspired by the concepts of liberty and equality who in 1789 were

---

[29] De Padue M., *Tractatus de Jurisdictione imperiali in causis matrimonialibus*, s.d., M.Goldast Edition, Book 2, pp.1383-1391.
[30] Pudendorf, S., *Specimen controversiarum circa jus naturale*, Upsala, 1678, Chapter IV, Part 12.
[31] Grotius H., *De Imperio Summarum Potestatum circa sacra* (1614).
[32] Rousseau, J.J., *Du Contrat Social* (1762).
[33] Pufendorf, *De Habitu Religionis Christianae ad vitam civilem* (1687).
[34] De Vattel E., Of the Law of Nations or Principles of Natural law applied to the management of Nations and Sovereigns (1758).
[35] Grotius H., *De Jure Belli ac Pacis*, Paris, (1625).
[36] Pufendorf, *De Jure Naturae et Gentium*, Lund, (1672).
[37] Thomasius, *Institutiones Jurisprudentiae Divinae*, Frankfurt, (1688).
[38] Ibid. Book IV, Chapter VIII.

involved in the constitutional project having in mind the dispositions of marriage of the Civil Code. As time went by marriage became modeled on the general theory of contracts. The mode of formation and the juridical effects of marriage fell under this theory. The dissolution of marriage had to regulated, a new concept not existing in the Roman-Canonical tradition.

De Felice[40] affirmed that the well-being of the partners was an end of marriage: **'The true end of marriage is a friendly relationship between husband and wife, who love reciprocally...thus procreation of children is a natural outcome'**. This thinking led to a revolution in marriage law, including the principles of divorce law, hence voluntary dissolution in contemporary legislation around the world. Therefore, well being was inextricably linked to the principles of liberty and equality.

III. Matrimonial Liberty

The bond between individual liberty and respect of the spouses' will arises from Article 16[41] of the UDHR which inspired Article 12 of the ECHR. The latter does not include a section regarding spouses' consent, though this is found in member States' law in line with international institutions. Matrimonial liberty was ridiculed under the Nazi regime in the name of preservation of the Aryan race. Fascist and Nazi law determined marriage as a racial community of **'two healthy persons of the same race and of different sex'**[42]. In the eyes of the authors of the ECHR the right to marry constituted a natural right validly anchored in universal conscience. The institutions of protection of human rights are the echo of the question of well-being of each individual. The right to marry being promoted to the level of human rights aims at assuring the free opening up of every individual in his private and family life. Marriage is a juridical act, a contract imposed by society of which consent forms both a personal and intimate facet and interests national authorities which guarantee matrimonial liberty. In marriage consent the focus is posed on the role of the individuals' will who want to marry rather than the protection and control of this matrimonial liberty. Consenting to marry implies an act of will and the affirmation of an intention. The expression of matrimonial liberty is a reciprocal choice which is left to the free discretion of the persons who satisfy the legal conditions to contract marriage.

European States look into the consent to marry of certain categories of persons, but should not impose prohibitions creating discriminatory conditions towards marriage contrary to Article 12 combined to Article 14 of the ECHR. Public order comes into play at this point as well since no individual can neither be forced to marry nor not to marry. This is an exercise of a choice of the individual. The

---

[39] Voltaire, *Dictionnaire Philosophique*, Paris, (1824).
[40] De Felice F.B., *Encyclopedie*, Yverdon, (1770-1780).
[41] Article 16(1) of the UDHR: **'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage ...'.**
[42] Dikov L., *Semeino Pravo*, Sofia, 1937, p.30.

Strasbourg organs have never explicitly answered to the question as to whether Article 12 of the ECHR includes the right of not marrying. This question was posed to them in the ***Marckx case*** and both the Commission and the Court did not deem it necessary to pronounce themselves on this point. It seems that the State is entitled to treat married families more favourably than unmarried families when founding a family. Complainant argued that the Belgian Civil Code, imposed on her a duty to marry in order to confer a legitimate status on her daughter. The Commission held that Article 12 does not enter in this matter of Marckx and the European Court followed the same reasoning holding no legal obstacle opposes the exercise of the liberty to marry or to remain celibate. The conjunction of the rights to marry and to found a family suggests that unmarried persons do not have the same right to found a family. If Article 12 read *'everyone has the right to marry and to found a family'* it would have been easier to conclude that unmarried couples have the right to found a family too.

The right to marry implies a liberty of choice and requires the **'free and full consent of the spouses'**. Any law which imposes authoritatively a celibate's marriage to the father of the child violates Article 12: marriage is a right, not an obligation by law. Persons who deliberately and at liberty choose not to marry should not pretend that laws favouring married couples are an obstacle to the liberty to choose to remain celibate. ***EPJM Kleine Staarman vs. Netherlands***, decision of the Commission of the 16th. May 1985 holds that the loss of an invalidity pension in case of remarriage laid down at law is not an obstacle to the exercise of the right to marry. Law is not always effective and its means to fight against the hostility towards celibacy[43] are limited. These social and religious resistances hinder the liberty of these individuals and social exclusion may follow. The Catholic Church has proclaimed itself thus: *'Ogni persona ha diritto alla libera scelta del proprio stato di vita, e perció a sposarsi e formare una famiglia oppure a restare celibe o nubile'. 'Ogni uomo e ogni donna, che ha ragiunto l'eta del matrimonio e ne ha la necessaria capacita ha il diritto di sposarsi e di formare una famiglia, senza alcuna discriminazione'*[44]. The Strasbourg jurisdiction does not oblige a State to render this liberty to choice effective. It is unprobable that social pressures will be considered as an arbitrary interference. In ***Brüggemann and Schenten Case*** the Commission held that Article 12 is not in question when complainant held that the position of the Criminal law regarding abortion limits her possibilities of marriage.

---

[42] Dikov L., *Semeino Pravo*, Sofia, 1937, p.30.

[43] Catholic priests and religious persons voluntarily choose not to marry. Luther held marriage as a right of nature and declared the right of the clergy to marry. The Catholic Church does not allow priests (Canon 1087) to marry though religious persons who renounce to the vows taken by them can marry by Church religious ceremony. Married priests's issues can be found in http://www.rentapriest.com and in 'Married Priests: a research report', McIntyre J., Canon Law Society of America Proceedings 56 (1994) 130-152 and Married Priests and Canon Law, Smolinski D.S., Canada, 9th. July, 1999.

[44] La Carta dei diritti della famiglia, rm.1,1a, in Il Regno,1 (1984)14; Pope Leo XIII Ency. Arcanum 10/2/1880; Pius XII, Casti Connubii, 13/12/1930; Pope John XXIII, Pacem in Terris, 1/14/1963.

A. The Protection of Matrimonial Liberty by some European States

The Zaherit jurisprudents and some of the Hanabalit and Malekit consider marriage illegal and invalid if a party to it had been betrothed to another. Most Muslim schools accept the validity of this illegal marriage. At French law a promise of marriage is not civilly obligatory. The inexecution of a promise to marry does not lead to damages and interests itself, because this will limit the liberty of marriage[45]. In Germany[46] a promise to marry is a contract which creates a family relationship, but the marriage is not obligatory according to Article 1297 of the BGB and no penal clause can make it obligatory either. The same is held under Greek law under Articles 1346-1349 of the Civil Code. The position in Malta is that: **'No court in Malta shall have jurisdiction, power, or authority, to compel, adjudge, decree or order any person specifically to perform or complete any promise of marriage made to another, or any contract or agreement entered into with another for the solemnisation of marriage'**[47].

The UK Law Reform (Miscellaneous Provisions) Act of 1970 has abolished the action for damages and interests based on the rupture of betrothal (Section 1), since it was considered as an indirect means of pressing towards the celebration of marriage[48]. It cannot be criminally sanctioned either. In Sweden Article 9 of a law of 1734 held that a man who refuses to marry his pregnant girlfriend ended up with that woman as his legitimate wife and having the same rights arising from marriage on his property[49]. Hence, betrothal was a contract having juridical effects *sui generis*. This was abrogated by a law of reform of marriage law of the 4th. July 1973. At Henry VIII's time betrothal was forbidden to men and women who had not completed 14 and 16 years respectively, save for grave reasons[50].

Marriage is still society's affair though in many States of Roman-Christian tradition marriage has become a civil contract separate from the religious sacrament. But this subjective right is not absolute. The Roman Catholic Church elaborated the theory of marriage - a social and religious institution which concentrates on the problem of prohibitions relating to family connections or kinship. The law takes into consideration social and moral aspects which hinder the liberty to marry. Many national legislators have laid numerous legal restrictions to the liberty to marry.

---

[45] Cass. Civs. 30th. May 1838, '***porterait une atteinte indirecte à la liberté du mariage***'.
[46] *EheG samt Nebengesetzen*, 1st. April, 1999, Juris Verlag, ISBN 3-906264-07-6.
[47] Section 2, Promises of Marriage Law, Chapter 5 (Proclamation VI of 1834).
[48] **Mossop vs Mossop**, (1988) 2 All ER 202, CA.
[49] Tiberg H., Sterzel F., Cronhult P., Swedish Law - a survey, Juristförlaget, 1994, Chap.3.7.
[50] ***Distructius inhibemus ne masculus qui sextum decimum, mulier vero que quartum decimum sue etatis annum non compleverit matrimonium seu sponsalia contrahat, et quod contra factum fuerit nullum esse decernimus nisi urgentissima aliqua necessitas interveniat, ut pote pro bona pacis sponsalia tantum inter minores tollerantur'***.

CHAPTER 2

THE RIGHT TO CONTRACT MARRIAGE

Article 12 of the ECHR recognises the exercise of the fundamental right to marry and to found a family to every man and every women as an individual liberty. The State parties to the ECHR sanction this right but subjected it to certain conditions. Marriage appears in the first place as an objective juridical situation. The national rules can thus be the object of a European control, in the name of respect of these same liberties. Yet, the mission of the European organs must be guided by the constant concern to reconcile antagonistic interests: the satisfaction of the individual's interests and the needs of respect of others and of public order.

The drafters of the Convention have not set up except two conditions of physiological class in order for each person to exercise such right - marriageable age and difference of sex of the two future spouses. With regard to other conditions of form, it is the national legislation's job to enact such. Contrary to the rights enshrined in the Convention contained in Articles 8, 9, 10, 11, the right to marry does not form part of specific limitations of public order, because of difficulties encountered in the preparatory works to insert the right to marry in the Convention. This right thus obeys the national law of the contracting States, but the latter must not restrict it, reduce it in any way or in a degree as to overtake it in its own substance.

It was in the exercise of this control of that the Strasbourg organs had to evaluate the two conditions of physiological class in cases arising before them. Thus the Courts guaranteed Article 12 an autonomous existence and control national laws which assure the institutional aspect of marriage.

I. Conditions affirming the Carnal Aspect of Marriage

Marriageable age and the difference of sex of the future spouses are the basic conditions found in legislations of the Member States of the Council of Europe. These are the two *sine qua non* conditions of marriage making the carnal aspect of marriage: a family is traditionally composed of a man and a woman mature enough to assume, if this is their will the responsibility of a family. But this family model imposed and defended by most national politics, opposes the will of those who want to construct their proper model notwithstanding the matrimonial rules, mainly inspired by social morality. In front of these aspirations notably those of homosexuals the Strasbourg organs try to maintain a position of principle in line with the traditional image of the family. Thus the State conceptions are strong enough

to be their safeguard. But with the evolution of morals combined with the progress of medicine, this position may be more or less long term put aside in favour of transsexuals in the name of respect due to individual's liberties which the Convention safeguards.

A. Maintaining a Traditional Concept of Couple: The Difference of Sex of the Future Spouses

In the examination by the Strasbourg proceedings of requests presented to the Commission and the cases in front of the European Court a position of principle concerning the elementary rules of marriage was established. The conditions of marriageable age notwithstanding the poorness of the matters in dispute will be treated below and the condition of difference of sex of the future spouses, a question which has furnished a European jurisprudence rich in teachings marking a prudent evolution of this matter.

For a long time this condition appeared to be natural and evident and that it provokes no controversy and that it does not appeal to juridical prescription. Now the evolution of morals and the claims of certain homosexual organisations have knocked over the obvious fact according to which only the sexual relations between a man and a woman forms a couple, the basic cell of the family as it is witnessed by Article 12. This is because European jurisprudence has improved its juridical approach to sex towards the end of protecting the traditional concept of marriage, what must have permitted the support of the principle in front of the matrimonial claims or demands of homosexual couples, now that homosexuals see that their juridical situation is getting better.

The Christian understanding of marriage cannot be expressed solely in terms of relationship between persons. It is not that we can do without speaking of relationships and persons, but that this is only one of the two poles around which a Christian theology of marriage must move. To abstract this pole from the other is to deprive Christian thought - for the Bible's interest in marriage as a relationship **'... a man leaves his father and his mother and is united to his wife ...'** is interpreted by the Church as sexual differentiation of creational order **'...male and female he created them'**. Even Jesus[51] emphasised this. One can see this as a limitation to personal freedom.

[51] Mark 10-6.

B. The Juridical Approach to the Notion of Sex: Of the Absence of Juridical Definitions

Now that sex is the means of identification between men and women, an element of the status of persons permitting their individualisation together with the name, surnames, filiation etc., it is one of the conditions expressed by national legislation and by the ECHR which is not defined. It has not been until recently that the European Court was led to pronounce itself on the question of definition of sex to precise this condition with regard to the right to marry.

At the time when the European Convention was drafted the rule of difference of sex of the future spouses was imposing itself, the authors of the Convention assembled the facts of national legislations as it is evidentiated by the absence of debates on this subject in the preparatory works. In fact some among them economised the mentioning in the dispositions of the basis of marriage. Thus in French jurisprudence the question of difference of sex has not been mentioned except with regard to the imperfection of certain characteristic organs of sex, for example, natural or accidental impotency. The question to know whether two persons of the same sex, be they two men or two women can marry has not achieved a certain standing in Germany. The Federal Constitutional Court has rejected marital capacity for homosexuals, but intimated other form of protection[52]. The Christian Democratic Party called for a motion in the Bundesrat for registered partnerships[53]. The Social Democrats indicated prospects of change, while the Greens favoured marriage and adoption too[54]. States are not obliged to give juridical existence to the homosexual bond or couple. Therefore, this is one of the first obstacles in recognising the right of marriage to homosexuals.

This question dashed with sexual morality, criss-crossed always by religion as well as at law in so far as social norm[55]. Now this rule is always presented as a natural condition of marriage. But, it is imprudent to hold to this obvious fact as has been brought to be achieved in the judgement pronounced by the European Court in 1986 in which it took the opportunity to define sex. Only some European States require it as an essential condition of marriage[56] . This is found in certain modern codes in which absence the union is inexistent[57].

---

[52] BVerfG, Neue Juristische Wochenschrift, (4th. October,1993), Kammer des Ersten Senats, NJW 46 3058.
[53] The Guardian, 22nd. June, 1998.
[54] The Economist, 9th. January, 1999.
[55] In August 1992, 2000 homosexual persons tried to marry but the local marriage licence bureaus refused and a Constitutional case of 1966 was cited defining marriage as a **'relationship between a man and a woman'**. When test cases were brought to the Constitutional Court it suggested that the German Parliament adopts legislation recognising non-married couples.
[56] Section 2 of the Polish Code and Section 401 of the Quebec Civil Code.
Section 1628 of the Portuguese Civil Code, Section 3 of the Bulgarian Family Code, Section 5 of the German Family Code.
[57] Section 1628 of the Portuguese Civil Code, Section 3 of the Bulgarian Family Code, Section 5 of the German Family Code.

C. To a Biological Definition of Sex

Only two persons of different biological sex can get married[58], this is the principle held by European jurisprudence which is not without consequences as to homosexual couples and transsexuals. There is some support for the recognition of homosexual unions recognised on the basis of substance rather than by the character of the partners, such as a 'registered partnership' giving legal effects of marriage without being marriage[59]. Many people were concerned about this in Malta as newspaper articles reveal[60]. In a Parliamentary Question the Hon. Minister Tonio Borg was asked by the Hon. Adrian Vassallo whether same-sex marriages contracted abroad will be recognised in Malta. The Minister answered: *'Zwieg bejn persuni ta' l-istess sess hu rikonoxxut f'xi ftit pajjizi. Ma hemm l-ebda intenzjoni li dan it-tip ta' zwieg jigi rikonnoxut f'Malta u dan peress li huwa inkompatibbli mal-ligi taz-Zwigijiet ta' Malta li tippermetti biss zwieg bejn persuni tas-sess oppost'*.[61]

It was in the case before the British legislator, that in 1986 the European Court has given a definition of sex. M. Mark Rees, a transsexual registered as a child of the female sex at birth in 1942 pleaded what British law did not confer on plaintiff as another corresponding juridical stature dealing with her real condition. He evoked Articles 8 and 12 of the ECHR. In this case the European Commission considered unanimously that there was no violation of Article 12. Five of these members (MMFaucault, Tenekides, Gozuyuk, Soyer and Batliner) have taken into consideration in their arguments, the social ends of the right to marry guaranteed by Article 12 which manifestly refers to the physical faculty of procreating.

The European Court, has posed the principle according to which the right to marry is guaranteed as a traditional marriage between two persons of different biological sex, thus the end is to found a family. Is family just this? It added nevertheless that the limitations of this right must not restrict or reduce it in a manner or degree which attacks it in its own substance. The Court concluded that the legal impediments exercised in the UK with regard to marriage of persons of same biological sex does not amount to a violation of the right to marry. This same argument was successfully taken up again some years later in the ***Cossey case***.

---

[58] UK transsexual ancillary relief case: In **J vs ST(formerly J)**, (1997): confirmed that the fundamental essence of marriage is the union between people of the opposite sex.

[59] **W vs United Kingdom**, (1989) 63 DR 34, 48.

[60] The Times report of 8/5/2000, article and letter on The Times of Malta p.14, 15 of 7/5/2000, article in il-Gens p.9 of 12/5/2000, series in The Times of Malta p.9 of 16/5/2000, series in Kulhadd p.8 of 11/6/2000 and in it-Torca p.13 of 26/11/2000.

[61] Answer given in Sitting No. 487 of the 6th. February, 2001. Reported in in-Nazzjon p.10 of 20/2/2001.

What is thus meant by **'biological sex'**? The European Court has confirmed the definition of biological sex advanced by the UK government. This definition finds its origin in a High Court judgement of ***Corbett vs. Corbett*** which holds that for the end of the celebration of a valid marriage, sex has to be determined by means of chromosomic, gonodal and genital criteria; these criteria, scientific elements of identification between men and women must concur among each other. The British legislator took cognisance of this biological definition of sex retained in Corbett to give legal value to the common law rule striking as null *ab initio* marriages between individuals of the same sex[62].

D. The Bearing of this Principle

The European Commission explicitly recognised the applicability of the reasoning developed in the Rees judgement to the homosexual applicants in ***C.M & L.M. vs. UK***. The contracting States can validly prohibit homosexual marriage without fear of being condemned by the European Court on the basis of violation of Article 12 perceived in the same way by Article 14. It is now a fact that homosexuals frequently invoke Article 14 claiming distinction between 'unions' contrary to this Article. Now it is the competence of the Strasbourg jurisprudence that this Article is not to be applied only if some persons are in analogous situations of fact and at law and if the difference of treatment lacks objective and reasonable justification. The German Federal Constitutional Court[63] held that there is no cause for complaint in legal-constitutional terms (*verfassungrechtlich*) if the official registrar turns down the request made by homosexual partners to grant the banns and undertake their marriage. The notion of marriage in view of Article 6 1 GG[64] has from the outset been determined by the maxim of equal rights (*Grundsatz der Gleichberechtigung*) as between the partners; therefore, inferences about a potential change in the legal-constitutional notion of marriage (*verfassungsrechtiches Eheverstandnis*) cannot be drawn from the piecemeal non-constitutional (*einfachrechtlich*) realisation of equal rights between the sexes.

Homosexual couples if they are stable and their relationship is aimed to a long duration, not very different in fact from heterosexual couples regarding the definition of biological sex and to the social end of marriage. Their relations are protected by law in the Convention under private life and not under that of family life. The question as to whether a right of marriage for homosexual partners can be derived from the general right of privacy or the maxim of equality has, on principle, no legal-

---

[62] S.11 of the law of 1973 regarding matrimonial matters: Matrimonial Causes Act.

[63] BVerfG (*3.Kammer des Ersten Senats*), decision of the 4th. October, 1993) - 1 **B vs R** 640/93.

[64] **'Marriage and the family enjoy the special protection of governmental institutions'**.This derives from Article 119(1) of the Consititution of Weimar of the 11th. August, 1919 when for the first time in Europe a constitutional rule was aimed at the protection of marriage.

constitutional (*verfassungsrechtlich*) significance[65]. This is based on Article 12's express terms and on the traditional view of marriage promoted an defended by the majority of Member States, that the Strasbourg organs have not sanctioned the right to marry to persons of the same sex. Meanwhile not all authors hold thus. Mr. Sherman commenting on ***W vs. UK***[66] held that such a right must be given to homosexuals and that Article 12 does not protect exclusively traditional marriage, but also marriage defined as an association between two individuals without considering sex. MM. P. Van Dijk and GJH Vanhoff[67] hold that Article 12 must be interpreted in an evolutive way to take into consideration today's circumstances, i.e. the evolution of morals.

E. The Concept of Traditional Marriage in front of the Evolution of Morals

Until today European jurisprudence excludes homosexuals from the benefit of Article 12's dispositions but the European Court has not definitively discarded the possibility of an evolutive interpretation of this Article, in the way Van Dijk and Van Hoof have advocated. In the past, the Commission and the Court have already applied a general method of interpretation, a stake of respect of human rights protected by the Convention in widely interpreting Article 8, recognising thus to homosexuals the right to respect of their private life. An eventual sudden change of jurisprudence of the European Courts appears thus depending on the evolution of society, in the field of morals. From when legislation accords homosexuals the right to unite a certain change of mentality will be shown. But it does not seem that it is enough for a sudden change in jurisprudence to be made; the obstacles to the recognition to the right to marriage of homosexuals are still numerous.

II. The ECHR and the Right of Homosexuals to Respect of their Private Life

Doctrine is unanimous in recognising that the aim and end of the Convention occupy a place of primary importance in the jurisdictional system of Strasbourg. In fact, the analysis of the jurisprudence of Strasbourg shows that the European judge is realising the adaptation of the conventional text to the social evolution, i.e. to the objective or dynamic law, in order to respect the founding principles of the Council of Europe. This is the reason why the European Commission and Court have been caused to proceeded to the actualisation of the bearing of Article 8 of the ECHR which has permitted them to recognising the right to respect of private life to homosexuals.

---

[65] An acceptance of the constitutional complaint (*Verfassungsbeschwerde*) is also not appropriate to enforce the complainants' constitutional rights (*Grundrechte*) - Bverf, NJW 46 (1993).

[66] **W vs United Kingdom**, (1989) 63 DR 34, 48.

[67] Van Dijk P., & Van Hoof, Theory and Practice of the European Court of Human Rights, Deventer, London, 1990.

Private life is a different notion to define because its content varies in function according to time, circle or society in which the individual lives. Classically European jurisprudence sees the right to private life as the right to secret of private life, understood as the right to live screened from strangers. This right supposes, for example, that the right to domicile be assured in order that the intimacy of the places where private life is exercised will be protected. The Commission has inserted sexual life in the right of respect to private life, in that the violations of human rights based on sexual orientations were not explicitly mentioned in the text of the Convention.

The Court has confirmed this approach, in matters where it had known situations of distress of sexual minorities affirming the right to sexual liberty. Thus in 1985, the European Court condemned the Netherlands on the basis of violation of respect of private life of a young mentally handicapped girl victim of sexual violence[68]. At that time in virtue of criminal and civil law it was impossible for a father to take action against the perpetrator of sexual violence on his girl, minor over 16 and mentally handicapped. The Court as the Commission has recognised unanimously that civil law's protection was insufficient with regard to these misdeeds which put into discussion fundamental points and essential aspects of private life. The Court precises now that private life covers the physical and moral integrity of the person and includes sexual life. This liberty finds its basis in tolerance and pluralism cardinal values of democracy. In fact, according to the Preamble of the Convention, the respect of human rights and the upholding of fundamental liberties essentially lie on a real democratic regime. The Court has expressly recognised that pluralism, tolerance and a spirit of opening characterise a democratic society respecting human rights.

In virtue of these principles everyone has the right to have a sexual life of his choice in conformity with his identity, even if this sexual behaviour is described by a majoritarian opinion as for example, homosexuality. Homosexuality is a word of Greek derivation (homos : similar) and created near 1860 by the Hungarian Dr. Karoly Maria Benkert, covers all the forms of carnal love between persons pertaining to the same biological sex, substituting in this way old denominations which characterise this phenomenon according to the ages and cultures. Along the centuries, homosexuals were accused of infringing the laws of the family and of indulging in abnormal sexual practices, satanic, perverse and disapproved by Jewish and Christian morality. One had to wait for the 1970's and the emergence of movements favouring sexual liberty in order to make homosexuals not seen as a sickness anymore, a defect, but as a sexual practice on itself as Freud has defined it in the beginning of the 20th. Century. The idea defended by the founding father of psychoanalysis is that homosexuality is a variation of the

[68] **X & Y et rx The Netherlands**, judgement of the ECHR of the 26th. March 1985.

sexual function provoked by a stop in sexual development according to the theory of the Ædipe and the inconscience.

The research of the American sociologist Kinsey held during the 1940-1950 years, show that homosexuality is simply an alternative form of sexuality, an orientation which is decided in fact very early in life[69]. Be that as it may be homosexuality makes today a rejection by a part of society for whom this type of behaviour considered as marginal infringes the anatomic, genetic and physical determination of the individuals in that they are interpreted in society. Homosexual relations are neither protected nor organised by law. Homosexuals undoubtedly constitute a sexual minority which henceforth, with certain reservations can claim the right to the protection of private life, a right which has been refused to them for a long time.

A. The Recognition of the Right to Respect of Private Life of Homosexuals

The right to respect of private life of homosexuals is a right which comprises two particularities: it has been recently recognised and guaranteed by the European Courts, but at the same time it has been rigorously defined and limited the Commission opposed the receiving of requests introduced by some homosexuals concerning their intimate relationships liable to punishment in virtue of national legislation. The applicants alleged that repression of homosexuality constitutes a violation of the Convention not only in its principle in so far as it injures respect of private life (Article 8), but also in its extent, in so far as it is limited to men and carries harm to the principle of discrimination as regards sex (Articles 8 and 14 combined). The Commission affirmed that the requests declared were unfounded, that the Convention permits Member States to establish homosexuality as an offence.

Thus the public authorities can interfere in the right to a private life in a democratic society to ensure the protection of health and morals unconformity with dispositions of Article 8(2) even if the measures taken differentiate between the sexes. The evolution of jurisprudence follows the mentalities and morals of society. The Commission recognised that sexuality constitutes an important aspect of private life, upon the decriminalisation of homosexuality between two consenting adults in the Federal Republic of Germany[70], UK followed in 1969 and the Commission accepted to modify its position in an unpublished decision of the 7th. July 1977. Now it applies the principle according to which it must examine the request of considering the evolution of morals and the rules concerning incriminating facts.

[69] International Gay and Lesbian Human Rights Commission, San Francisco, USA. *Vide* Internet - http://www.iglhrc.org
[70] Law of 25th. June 1965.

This change took place later as the Commission declared as receivable a request introduced by a British regarding the law *in vigore* in Northern Ireland prohibiting male homosexuality.

B. Is there a Right to Same-Sex Marriage - Is marriage for Adam and Eve or Steve?

It is interesting to know that among the Nuer[71] there is practice of woman-woman marriage. The purpose is to turn a barren woman into a 'man'[72]. This woman will marry, is paid a bridewealth and be counted as a man in her natal patrilineal kin. Then this barren woman chooses a man to sleep with her bride and the offspring will have the barren woman as legal father, while the bride will be under the authority of this 'woman counted as a man'. This is no lesbian marriage, but a creation of a social role of husband/father to make up for barrenness.

In 1994 the book Same-Sex Unions in Pre-Modern Europe, John Boswell[73] recounts his finding of medieval liturgy for blessing of same-sex couples in church ceremonies. Is this possible when we know how the Church criticised even sex between married persons? These prayers from the VIII Century to the XII Century in both Western and Eastern Orthodox Churches were interpreted by Boswell as marriages, though the social context for the ceremonies is nearly inexistent. It could be that they were commitments of political or economic nature rather than intimacy and love.

The effort to gain same-sex marriages has proven volatile. As far as 1953 the issue of the withheld U.S. One Magazine's cover bore the title, 'Homosexual Marriage'. Since 1970 we find an article headed: 'Homosexual Marriages Defended by UN Aide'[74]. During the 1970's and 1980's gay couples in four US States (Kentucky, Minnesota, Pennsylvania and Washington) sought judicial acknowledgment of same-sex marriage. Same-sex couples applied for licenses at clerk's offices in Hawaii, Alaska, New York, the District of Columbia and Vermont and when denied filed cases in State courts[75]. The Hawaii case stirred most attention. In 1993 Hawaii's Supreme Court ruled that the State's law requiring

---

[71] Stone I., Kinship and Gender-An Introduction, Westview Press, Harper Collins Publishers, (1997), ISBN 0-8133-2858-6.

[72] Reported in Nigeria, Anglo-Egyptian Sudan and S.Africa by Sullivan A., Same-Sex Marriage: Pro and Con a reader, Vintage Books, New York, 1st. Edition, 1997, ISBN 0-679-77637-0. This is found in the Bible when Sarah gave Hagar to Abraham to conceive from him.

[73] Boswell John, Same-Sex Unions in PreModern Europe, Vintage Books, New York, (1994), ISBN 0-679-75164-5.

[74] New York Times of the 11th. August, 1970

[75] Court decisions and attorney general opinions denying licensability or recognition of same-sex marriage (note: this list excludes cases involving transsexuals):**Adams vs Howerton**, 486 F.Supp. 1119 (C.D.Cal. 1980), aff'd, 673 F.2d 1036 (9th Cir. 1982);**Anonymous vs Anonymous**, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (Sup.Ct. 1971);**Baker vs Nelson**, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed for want of substantial federal question, 409 U.S. 810 (1972);**Dean vs District of Columbia**, 653 A.2d 307 (D.C.Ct.App. 1995) **DeSanto vs Barnsley**, 328 Pa.Super. 181, 476 A.2d 952 (1984);Estate of Cooper, 149 Misc.2d 282, 564 N.Y.S.2d 684 (Surr.Ct.1990);**Gajovski vs Gajovski**, 81 Ohio App.3d 11, 610 N.E.2d 431 (1991), **Jones vs Hallahan**, 501 S.W.2d 588 (Ky. Ct. App. 1973);**Singer vs Hara**, 11 Wash.App.247, 522 P.2d 1187 (1974);**Slayton vs State**, 633 S.W.2d 934 (Tex.Ct.App. 1982);**Weaver vs G.D. Searle & Co.**, 558 F.Supp. 720 (N.D.Ala. 1983);190 Ala. Op.Atty.Gen. 30, 1983 WL 41865;Ark. Op. Atty. Gen. No. 95-062, 1995 WL 256755;Me. Op. Atty. Gen. No. 84-28, 1984 WL 248975 *and* Neb. Op. Atty. Gen. No.113, 1977 WL 25368.

different sex partners for legal marriage is presumptively unconstitutional and breaches the State's Equal Rights Amendment barring sex discrimination. The case was remanded to the lower Courts. The struggle was lost. In 1998 a public referendum in Hawaii held gay marriages unwanted. The 1993 Washington March organisers drafted a platform of demands including, the 'legalisation of same-sex marriage'[76] and legalisation of multiple partner unions'[77].

Constitutional arguments for and against same-sex marriage often go along with policy arguments. Same-sex litigation used two arguments: fundamental rights claim and equal protection claims. Does the equal protection doctrine mandate legalization of same-sex marriage? In the **Baehr vs. Lewin**[78] decision, the Supreme Court of Hawaii almost granted same-sex couples the status of a suspect class[79]; discrimination on the basis of sex. Moreover, relying on ***Loving vs. Virginia***, the Baehr Court noted that the marriage statute applies to women and men alike does not prevent finding that a constitutional violation exists based on invidious discrimination. This case pressed political branches to consider enacting legislation that will accommodate domestic partnership relations.

Under Article IV's full faith and credit clause[80] stating acknowledgment[81] of marriages celebrated in other States and vice-versa. Hence, a nationwide problem arose. Congress passed the Defense of Marriage Act (DOMA) signed by the President barring the recognition of same-sex marriages for federal purposes and permitting out-of State same-sex marriages[82]. The Defense of Marriage Act was introduced in the U.S. House of Representatives by Representative Bob Barr and in the Senate by Senator Don Nickles, and was co-sponsored by then Majority Leader Bob Dole among others. It was overwhelmingly passed in the House of Representatives on July 12 by a vote of 342 to 67.

---

[76] Texas Platform. Demand No.45.

[77] Texas Platform. Demand No.46.

[78] **Baehr vs. Lewin**, 852 P.2d 44(Haw.1993)

[79] Only race, nationality, religion and alienage were granted the *status* of suspect class by the Supreme Court.

[80] **'No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe, respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state, territory, possession or tribe, or a right or claim arising from such relationship'**. Pub. L. 104-199 sec. 2, 100 Stat. 2419 (Sep. 21, 1996) codified at 28 U.S.C. §1738C (1997).

[81] State statutes defining marriage as between a man and a woman, and/or explicitly declaring same-sex marriages void or denying recognition to out-of-state same-sex marriages: Alaska Stat. §§ 25.05.11(a), 25.05.013 (1996 Alaska Laws ch.21);Ariz. Revs.. Stat. §§ 25-101, 25-112 (1996 Ariz. Laws ch. 348);Cal. Fam. Code § 300 (Cal. Stats. 1993 ch.219 § 88);Colo. Revs.. Stat. Ann. §14-2-104 (West 1989);Del. Code tit.13, § 101(a),(d) (1996 Del.Laws ch.375);Fla.Stat.Ann. § 741.04 (last proviso, added by 1945 Fla. Laws ch. 22643);Ga. Code §§ 19-3-3.1, 19-3-30(b)(1) (1996 Ga. Laws p.1025);Haw.Revs.Stat. Ann. §§ 572-1, 572-1.6, 572-3 (1994 Haw. Laws ch.217 § 3);Idaho Code § 32-201 (1995 Idaho Laws ch.104 § 3); Idaho Code § 32-209 (1996 Idaho Laws ch.331 § 1);Ill. Stat. ch.750, Act 5, §§ 201, 212, 213.1 (1996 Ill. Pub. Act. 89-459);Ind. Code § 31-7-1-2 (Pub.L. 180-1986);Kan.Stat.Ann. §§ 23-101, 23-115 (1996 Kan.Laws ch.142);La. Civil Code arts 86, 89, 96 (1987 La. Acts No.886);Md. Code, Fam. L. § 2-201 (1984 Md. Laws ch.296 § 2);Mich. Comp. Laws §§ 551.2 - .4 (1996 Mich.Pub.Act 324);Mich. Comp. Laws §§ 551.271, 551.272 (1996 Mich. Pub. Act 334);Minn. Stat. Ann. § 517.01 (1977 Minn. Laws ch. 441);Mo. Senate Bill 768, § 6 (enacted July 3,1996);Mont.Code Ann. § 40-1-103 (1975 Mont.Laws ch.536, §4);N.H.Revs.Stat. Ann. §§ 457:1,457:2 (as amended thru 1987 N.H. Laws act 218);N.C.Stat. § 51-1.2 (1996 N.C. Laws ch.588);P.R. Laws Ann., tit.31 § 221 (P.R.Civil Code, 1930, §68);S.C. Code §§ 20-1-15, 20-1-10 (1996 S.C. Laws Act 327);S.D. Codified Laws Ann. S 25-1-1 (1996 S.D. Laws ch. 161);Tenn.Code Ann. § 36-3-103(c)(1) (1996 Tenn. Laws Pub. Ch. 1031);Tex.Fam. Code § 1.01 (1973 Tex. Gen. Laws ch.577);Utah Code § 30-1-2 (5) (1993 Utah Laws, 2d spec.sess. ch.14 §1) *and* Va. Code. Ann. § 20-45.2 (1975 Va. Acts ch.644).

[82] Discussion draft, May 2, 1996, H.R., 3396, 104th. Cong., 2d sess.

All States passed legislation explicitly prohibiting in-State same-sex marriages and recognition of any out-of State same-sex marriages. Some held that it was not a federal competence to decide on other States' same-sex marriage recognition[83]. Up to 1996 most State statutes did not explicitly prohibit homosexuals from marrying. With or without an explicit ban State courts have interpreted laws as prohibiting same-sex marriage with the exception of the Hawaii Supreme Court. By mid-1999, 29 States adopted such laws and bills and referenda pending in 8 others, including California and New York led to this too in the end[84].

All States define marriage as **'the legal union of one man and one woman as husband and wife'**[85]. Thus marriage should be between people of different sex. In 1888, the US Supreme Court described marriage **'as creating the most important relation in life, as having more to do with the morals and civilisation of a people than any other institution'**[86]. In the Minnesota case, the Supreme Court noted thus:

> **'The institution of marriage as a union of man and woman, uniquely involving the procreating and rearing of children within a family, is as old as the book of Genesis...This historic institution is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend'**[87].

States could be able to prove that they have a legitimate interest in preserving the traditional model of male-female marriage and that there is a rational relation between such legitimate interest and the statutory classification that gives preference to male-female couples for the purpose of marriage. Justice Steadman of the D.C. Court of Appeals put it:

> **'Much the same considerations that elevate opposite-sex marriage to the status of a fundamental right constitute the requisite substantial relationship to an important governmental interest of a statute designed to recognise and promote that fundamental right. Surely, if only opposite-sex marriage is a fundamental right, the State may give separate recognition solely to that institution through a marriage act'**[88].

Certain legislators gave marriage a functional definition that appeals to reproduction. The legally acknowledged institution of marriage in fact does not track this functional definition. All States allow

---

[83] Strasser M., Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution, University of Pittsburgh Law Review 58, 1997: 279.

[84] *Vide* Internet - http://www.buddybuddy.com

[85] All US states' laws declare same-sex marriages void and unrecognisable or against public policy. *Vide* Internet - http://marriagelaw.cua.edu/states_with_marriage_recognition.htm

[86] **Maynard vs Hill**, 125 US 190, 205 (1888).

[87] **Baker vs Nelson**, Minnesota Supreme Court, (1971) 291 Min. 310, 191 N.W. 2d 185.

[88] Civil Rights Project, GLAD, Washington. *Vide* Internet - http://www.glad.org

people who are over 60 to marry even though by natural necessity such marriages will be sterile[89]. If the functional definition is to bear and raise children, then the State should have no objection to the legal recognition of homosexual marriage, transsexual marriage and prisoners' marriage. At root, the prohibition of same-sex marriage depends on a functional definition of the marriage relationship which excludes all the characteristics, other than procreation, which go to make up an enduring relationship of any couple of whatever sex.

If legal and functional definitions of marriage all fail, how should marriage be defined? Could it be defined by the people in a referendum as it was proposed in some US States? I do not want to define marriage poetically but to me it is the intimacy of everyday life: love's sanctity and necessity's demand. Not all intimate relations are marriages. Great loves of Anthony and Cleopatra, Tristan and Isolde, Catherine and Heathcliff are far from washing the dishes and such. 'Domestic partners' who live together, cook, clean and share finances share the common necessities of life, but marriage requires the blending of both necessity and intimacy. The legal rights benefits of marriage fit this matrix of love and necessity. Marriage changes strangers at law into next of kin with all rights that it entails. Marriage is a social and legal institution characterised by a mutual long-term commitment involving fidelity, loyalty and physical intimacy.

Monogamy is literally the requirement of entering a formal contractual relationship, the number of partners involved must be two and only two, no person may participate in more than one marriage at the same time and that no married person may engage in any sexual relations with any person other than the marriage partner. Monogamy promotes profound affection between the partners and a child-rearing friendly unit. Arguments against polygamy have two crucial features: a defense of monogamy as central to the values of Western civilisation, and a critique of polygamy as reinforcing the unjust subjection of a particular gender. Institutional needs for fidelity are found in monogamous marriage. Public policy, law and morals in most States of the world permit only monogamous marriage. Though homosexuals want to dignify their intimate relationships through legal marriage, there are gays who are skeptical of marriage as institution and those who have no interest in monogamous institutions. Most gay people are celibate and non-gay people who are celibate too are not condemned in Western society[90]. Could it be when same-sex marriage is permitted gays who choose not to marry are stigmatised?

[89] Sterility neither forbids nor invalidates a marriage under Canon 1084(3) of the Canon Code 1983. At French law and Italian law neither impotency nor sterility are impediments to marriage.

[90] In most Islamic countries the celibate is considered as an incomplete person.

Baehr vs. Lewin is a path-breaking departure from the usual interpretation of applicable constitutional principles in the area of same-sex marriage. Almost all American courts have held, both under State and Federal constitutional law, that failure to recognise same-sex marriage is not unconstitutional[91] and have correlatively failed to accord spousal rights under the law of wills[92] or the immigration laws or the law of veteran benefits[93]. Baehr suggests it may be timely to rethink this question fundamentally. Plaintiffs sought judicial declaration of unconstitutionality of denial of same-sex marriage on account of the heterosexual requirement. In my opinion it is not right that the judiciary decides such a question, the legislature should instead.

Studies by William Eskridge[94] and Mark Strasser[95] have argued cogently that the denial of same-sex marriage is presumptively unconstitutional not only on the suspect ground urged in Baehr, but on the independent ground of abridging the basic human right to intimate life, of which the right to marriage is an important institutional expression. For example, to bear children is not a constitutionally reasonable requirement for heterosexual marriage and therefore, not bearing children could not be a compelling reason for excluding homosexuals from the institution[96].

According to a Catholic moral conservative John Finnis[97], the right to marriage is to be exclusively based on the procreational model of sexuality. He argues that:

> **'the principal difference is simple and fundamental: the artificially delimited category named 'gay marriage' or 'same-sex marriage' corresponds to no intrinsic reason or set of reasons at all .... The world of same-sex partnerships offers no genuine instantiations, equivalents, or counterparts to marriage, and so very few whole-hearted-imitations. Marriage is a category of relationships, activities, satisfactions, and responsibilities which can be intelligently and reasonably chosen by a man together with a woman, and adopted as their demanding mutual commitment and common good, because its components respond and correspond coherently to that complex of interlocking, complementary good reasons.'**

In ***Loving vs. Commonwealth of Virginia*** [98], the Supreme Court invalidated under the Equal Protection and Due Process Clauses a Virginia statute banning interracial marriages. The Court's

---

[91] **Dean vs. District of Columbia** 653 A.2d 307 (D.C. 1995) District of Columbia marriage law prohibits clerk from issuing marriage licence to same-sex couple and does not unlawfully discriminate against couples under DC Human Rights Act or US Constitution: **Singer vs. Hara**, 522 P.2d 1187 (Wash.Ct.App.1974) statutory prohibition of same-sex marriage not violative of Washington Equal Rights Amendment: **Baker vs. Nelson**, 191 N.W.2d 185 (Minn.1971) same-sex couples are not permitted to marry and denial is not violative of constitutional protections.

[92] In **Re Matter of Cooper**, 592 N.Y.S. 2d 797 (App.Divs.1993) surviving partner of same-sex relationship not entitled to spousal right of election against decedent's will.

[93] **McConnell vs. Nooner**, 547 F.2d 54 (8th. Cir.1976) spousal veteran benefits denied to same-sex partner of veteran who had gone through same-sex ceremony.

[94] Eskridge, W.N.,Jr., The Case for Same-Sex Marriage: From Sexual Liberty to Civilised Commitment, New York, Free Press, 1996.

[95] Strasser, M., Legally Wed: Same-Sex Marriage and the Constitution, Ithaca, Cornell University Press, 1997.

[96] **Turner vs. Safley**, 482 U.S. 78 (1987) State bar to marriage of prison inmates, on ground that they could not procreate was held unconstitutional.

[97] Finnis, J., Law, Morality and Sexual Orientation, Notre Dame Journal of Law, Ethics and Public Policy 9, 1995:11.

opinion was that every person has a fundamental right to be free of government interference in selecting a marital partner. The fundamental right of marriage of persons between persons of the opposite sex is considered in this respect. This case cannot be applied to same-sex partners. Race was the suspect classification on which discrimination[99] was made. At that time, 1967 it was unlikely that the Court wanted to create a fundamental right to choose a marital partner of the same-sex too. The focus in this case is the racial aspect. From the perspective of legitimate marriage same-race marriages and interracial marriages are functionally equal.

The Courts unanimously refused to find Loving a controlling precedent that the right of same-sex couples to marry is fundamental. Even the Hawaii Supreme Court, which in 1993 ruled that the State had to show a compelling interest to justify refusing to issue marriage licenses to same-sex couples, did not use Loving as a precedent for finding a federal or State constitutional fundamental right to marry. Instead it used an equal protection analysis based on the Hawaii Constitution, finding that just as in Loving the State violated equal protection by using a race classification in its marriage law, in this case the State violated its own State's constitutional equal protection requirement by using a sex classification in its marriage law; the Hawaii Constitution, unlike the US Constitution explicitly forbids sex discrimination.

A constitutional amendment states that: **'The legislature shall have the power to reserve marriage to opposite-sex couples'**[100]. The Hawaii legislature attempted to prevent judicial recognition of same-sex marriages[101] and passed the Hawaii Reciprocal Beneficiaries Act[102]. This Act gives non-married couples who register as 'reciprocal beneficiaries'[103] many rights and benefits married couples receive under Hawaii law. These rights and benefits include family health care benefits for State workers, hospital visitation rights, property and inheritance rights, right to sue for the wrongful death of a reciprocal partner and the right to protection from the domestic violence of the domestic partner. The Act also preserves the **'unique social institution'** of heterosexual marriage. Courts have always described marriage as the 'legal union of one man and one woman'[104]. According to Fineman[105] only

---

[98] 388 U.S. 1 (1967).

[99] State statutes providing that anti-discrimination laws are not to be construed to authorize recognition of right to same-sex marriage: Conn. Gen. Stat. Ann. § 46a-81r(4) (1991 Conn. Pub.Act 91-58, §36) *and* Minn. Stat. Ann. § 363.021 (4) (1993 Minn. Laws ch.22 § 7).

[100] 1998 HB 117 (Constitutional amendment).

[101] *Vide* **Baehr vs. Lewin**, 852 P.2d 44 (Haw.1993) ruling that the State should show a compelling reason for the statutory ban on same-sex marriages at the trial level, enforced sub nom. **Baehr vs. Mike**, CIV No.91-1394, 1996 WL 694235 (Haw.Cir.Ct. 3rd. December 1996) ruling that the State failed to show a compelling reason to justify the statutory ban on same-sex marriages (950 P.2d 1234 (Haw.1997).

[102] Haw. Revs.Stat. 572C (Supplement 1997).

[103] Reciprocal beneficiaries include all non-married couples who register with the Hawaii Dept. of Health as reciprocal beneficiaries, are both over 18 and unmarried and not in any reciprocal beneficiary relationship and cannot otherwise be legally married.

[104] **Singer vs. Hara**, 522 P. 2d 1187, 1191 (Wash.Ct.App.1974); **Baker vs. Nelson**, 191 N.W. 2d 185, 186 (Minn.1971); **M.T. vs. J.T.**, 355 A.2d 204, 207 (N.J.Super.Ct.App.Divs.1976).

[105] Howard Fineman. Dulling a Sharp Wedge: Inside Clinton's Relentless Right-Turn Strategy, Newsweek, June 3, 1996, p.30.

33% of the U.S. citizens supported same-sex marriages. Even the Washington Times[106] reported that 67% of Americans polled oppose same-sex marriage.

Sullivan was one of the first to support classical liberalism that **'wishes to ensure the neutrality of the State'** and **'refuses to see the State as a way to inculcate virtue of to promote one way of living over another'**[107]. Sullivan's arguments are based on the value of loving relationships. In fact he holds that gay children benefit from marriage since **'... they would be able to feel by the intimation of a myriad [of] examples that in this respect their emotional orientation was not merely about pleasure .... but about the ability to love and be loved as complete, imperfect human beings'.**[108]

Unlike Sullivan, Professor Eskridge states explicitly that **'the only persuasive arguments for or against same-sex marriage must be ones grounded in a normative vision of what functions are important to marriage as an institution'**[109]. In my opinion the denial of legal marriage leads to promiscuity among gays especially clandestine encounters because of the overt hostility against them. Marriage would reduce promiscuity, since gays would choose to stabilise their relationships. Moreover, he holds that continued prohibition of same-sex marriage is 'antiprocreation' and 'antichildren' because: **'...the State makes it a bit harder for gay people to form lasting unions....to raise children and probably discourages some gay people from having children'**[110].

Tom Stoddard, a homosexual activist acknowledges that:

> **'Enlarging the concept to embrace same-sex couples would necessarily transform it into something new .... Extending the right to marry to gay people - i.e. abolishing the traditional gender requirements of marriage - can be one of the means, perhaps the principal one, through which the institution divests itself of the sexist trappings of the past'**[111].

If the gender differentiation is to be removed what are we going to call the partners, then 'husband' and 'wife' as in heterosexual marriage? In my opinion to put domestic partner relationships on a par with marriage will degenerate the importance of marriage. The definition of marriage will be completely destroyed. If the word 'marriage' becomes more inclusive the exclusivity of marriage will be lost. Let us say a US State extends it to include domestic partner relationships, then other States can challenge that State's marriage licences since 'marriage' means something different from that of the other States.

---

[106] Washington Times, June 14, 1996 at A4.
[107] Sullivan A., Virtually Normal: An Argument About Homosexuality, 1995, p.139.
[108] Ibid. at p.184.
[109] Eskridge W.N., Jr, The Case for Same-Sex Marriage: From Sexual Liberty to Civilised Commitment, New York, Free Press, 1996.
[110] Ibid. p.112
[111] Stoddard Thomas, Why Gay People Should Seek the Right to Marry, in W.B. Rubenstein, ed., Lesbians, Gay, Men and the Law, New York, Free Press, 1993, p.398-400.

In my opinion arguments are not for the right to marry, but for a radical change in the nature and content of the institution of marriage. Change will transform marriage into a different institution from the recognised one where the union of a man and a woman establishes a family.

Why is a marriage licence required? Society seems to be more concerned about driving licences rather than marriage licences. People cohabit despite of public condemnation or taboo. On the other hand why should persons regulate their relationship by a State licence when they could be better off without it especially where divorce is not permissible? This does not mean that legal marriage should be abolished, but could be avoided.

In 1990 the Dutch Supreme Court ruled that prohibition of same-sex marriage is not in violation of international law[112]. However, as a consequence of a campaign conducted by the gay newspaper *de Gay Krant* for the introduction of same-sex marriage, the government has proposed a bill enabling registration of homosexual couples. As far as 1997 the Ministry of Justice described marriage and partnership as **'equivalent ... the consequences are virtually identical'** and the State Secretary himself has emphasised that the partnership institution **'under the law, is given a separate and equal place to that of marriage'**[113]. On 25 June 1999 (i.e. on the eve of "Roze Zaterdag", the Dutch name for the Gay and Lesbian Pride Day) the Dutch Cabinet finally approved the introduction of bills to open up marriage and adoption to same-sex partners. **'A consensus between the Church and the State as old as the hills is going to be broken because of the symbolic equality of something which has always seen as something unequal'**, said Schutte (GPV). Mr. Van Der Staaij of SGP[114] could not do anything else then, awfully, conclude that; **'Marriage is not abolished ... but the unique and exclusive engagement between man and woman is removed of our code of law. They changed the essence of the marriage. On a homosexual relation, they are going to paste the label 'marriage' and this is not right'**.

The debate was stretched over three days (5, 6 and 7 September). The political parties PVDA, VVD, D'66, GroenLinks & SP called it a historical milestone. The Netherlands is the first country in the world where two men or two women can marry as from the 1st. April 2001. In a Press Release[115] of the Dutch Ministry of Justice the State gave information about the right to marry of same-sex persons. It states thus: **'The basic tenet of equal treatment was decisive in this'**. In fact conditions that apply to male-female marriage apply, such as age requirements and rules of prohibitions, rules of prevention of sham marriages and divorce rules too. If at least one partner is a Dutch national or resides in the

[112] Statement of the International Gay and Lesbian Association to the UN Economic Committee for Europe to all governments of Europe and North America present at the European and Atlantic Governmental. Prep. Conference, Vienna, Austria, 17-21 October,1994.
[113] Dutch Ministry of Justice, Press Release of 1997, 3.
[114] Staatkundig Gereformeerde Partij-Political Calvinistic Party.
[115] Press Release of the Dutch Ministry of Justice, 26th. March 2001- Internet - http://www.minjust.nl

Netherlands can contract a same-sex marriage. A registered partnership[116] can be converted into a marriage and vice-versa. A Dutch same-sex marriage is recognised in the Netherlands and the Netherlands Antilles and Aruba though impossible to conclude such marriage in the latter two. It is interesting that if a heir to the throne wants to get married, they need to have the permission of the Parliament, as stated in the Constitution. State Secretary Cohen repeated that this counts for a marriage with a person of the other sex. A Prince who is gay and wants to marry with somebody of his own sex is not allowed to inherit the throne and is automatically out of this matter.

The Marriage Bill did not seek to do away with registered partnership[117] (possible since January 1998, for both same-sex and different-sex couples). For at least five years marriage and registered partnership will exist alongside each other. The only exception will be that if a child is born to a woman in a lesbian marriage, her female spouse will not be presumed to be the 'father' of the child. However, through adoption she will be able to become the second legal parent of the child. The rules of adoption will also be almost identical for same-sex and different-sex couples. The only exception will be that same-sex couples will not be allowed to adopt a foreign child. Same-sex adoption[118] is already possible in Denmark, in several States in the USA and in several provinces of Canada.

One must think about the recognition of such marriages. All foreign jurisdictions do attach numerous consequences to being married, and for some purposes would normally apply Dutch law. So there are three types of problems: firstly, foreign jurisdictions could refuse to consider a Dutch same-sex marriage as marriage, secondly, they could refuse to attach one or more consequences to it, thirdly, they could refuse to apply Dutch law on the ground that this particular aspect of Dutch law violates their own public order. Moreover, preoccupation will be shown in the future because of the diversity of partnership and marriage legislation.

- Should the law permit legal sanctioning of the homosexual bond? This question does not leave jurists, theologians and philosophers, sociologists and politicians indifferent and unchallenged. The European Court in the ***Cossey case*** has held that it was not permissible to interpret Article 12 in a way for marriage of persons not having different sex, since the evolution in the Member States does not prove to legal abandon the traditional concept of marriage. After a certain number of years some Nordic legislation permitted homosexuals to unite, to register their union and the ceremonies under the form of

[116] Between January and June 1998 2.655 registrations took place of which 841 were between couples of the opposite sex.

[117] On the 21st. December 2000 Queen Beatrix of the Netherlands signed Bills 26672 (marriage) and 26673 (adoption) into law. Both Laws of 21 December 2000 were officially published on 11 January 2001 (Staatsblad 2001, Nr. 9 and 10).

[118] Adoption can be used to pass as marriage, to meet the same purposes eventhough double control regarding age of a celibate adoptant being over 30 and must be 15 years older than the adopted (S.353 of the Code Civil) - ***'La moitié des decisions de rejet devant le Tribunal de Paris concernaient en 1982 des demandes d'adoption entre homosexuels'***, Sutton G., Une Annee d'Adoption d'Enfants Etrangers au Tribunal de Grande Instance de Paris, in L'Adoption d'Enfants Etrangers under the direction of Foyer J. and Labrusse-Riou C., Economica., 1986, p.9.

blessings multiplied in Europe. But the concept of marriage is anchored in the deepest values of society or morals and the law seems not to surrender in front of the evolution of morals in matters of homosexuality.

C. The Practice of Homosexual 'Unions' and Registered and Domestic Partnerships

If the European contracting States want to prohibit the marriage of homosexuals under the actual state of European jurisprudence it can be validly done and nothing prohibits them from so doing by Article 53 of the ECHR, permitting thus in the evolution of morals of their society. In fact, this Article prohibits Strasbourg from interpreting the dispositions of the Convention as limiting or harming human rights and fundamental liberties, which can be recognised in accordance to the laws of the contracting States or to any Convention to which such State may be a party. Most Nordic countries have legislated in favour of homosexuals, blessing the juridical existence of couples composed of two persons of the same sex.

Denmark[119] has been one of the first States to bless partnership unions by the law no.372 of the 7th. June 1989 (*Lov on Registreret Partnerskab*[120]) in force from the 1st. October 1989[121]. To escape the massive demand for registration, registration can take place only if both or one of the two partners is or are domiciled in Denmark and has or have Danish citizenship. The registration of these unions takes place at the town hall with a celebration identical to that of all civil marriages. These unions involve the same juridical effects as in traditional marriage: the partners have a mutual responsibility to contribute to the burdens of marriage, patrimonial dispositions, succession and fiscal incentives are the same as those of heterosexual couples. Partnerships may be dissolved according to the same rules and procedures applicable to marriage save the right to claim a mediation of the clergy. But the similarities with the legal statute of marriage used to stop there, because homosexuals in many States do not have right to adopt nor to joint custody; they cannot thus found a family in the full sense of the word. The end of this law is above all to put homosexual partnerships away from financial difficulties in case of the death of one or separation as for married couples.

In Norway the Norwegian Tabloid, Dagbladet uses 'married' and 'partnerships' to demarcate announcements. As far as 1973 Prof. Jakob Jervell propounded: **'The Registered Partnership Act**

[119] Information and assistance obtained from the Embassy of Denmark in Paris, Consular Service and Ministry of Justice, Department of Private Law (CivilRetsDirektoratet) in Copenhagen - Internet - http://www.civildir.dk

[120] In English - Law on Registered Partnerships.

would strengthen marriage incredibly. The act is a weak mirror image of marriage and points to the enormous strength of marriage'. Hence partnerships should not be the same as marriages. Bishop Halvor Bergan held that the Bill: **'would axe marriage as a fundament of our society as we have had it through the ages'**[122]. The Ministry of Children and Family Affairs held thus: **'Homosexual couples have the same opportunities as cohabiting heterosexual partners to enter into private legal contracts ... (to which) married couples are automatically entitled under the law....(but) there are legal limits to how far private contracts can go'**[123]. Moreover, **'a formal, registered partnership will be a signal from a gay or lesbian couples to their friends and society that they wish to inter into a committed relationship'**[124]. In 1992 the Finnish Government's Family Commission reached a conclusion that marriage should be reserved for relationships between a man and a woman.

By law of the 30th. April 1993[125] Norway permitted that homosexual couples unite and thus register their partnership. The rights attached to traditional marriage are extended to gays and lesbians, save the right to adopt as in Denmark. Both laws are almost alike. The raison d'être of these laws is the mutual bond on which these personal unions opt. These legalised unions must permit homosexuals to open in their relationships, to satisfy their fundamental needs and affective needs of security and stability as the Norwegian Ministry for the Family and Childhood defined in the project of the law. The registration of homosexual partnerships must also be comprised as a means of integration destined to fight against the prejudices of which homosexuals and *a fortiori* the couples who decide to live together.

Sweden too has legislated the possibility for homosexual couples to declare their relationship juridically defined as concubinage[126]. According to this law the declaration follows the same rite of celebration of a civil marriage, the parties must be both present accompanied by two witnesses. Each consents to the other's declaration upon the officer's question. The officer declares them as concubines. This procedure shall be respected upon pain of nullity of the declaration. A declared concubinage has the same juridical effects as a marriage, with the exemptions concerning the faculty of adoption in common or on one's own, tutorship, joint custody of a minor and finally the possibility of benefits from the law regarding insemination and in vitro fertilisation. This law became *in vigore* on the 1st. January 1995.

---

[121] 1014 same-sex partnerships were registered in three years from 1989; 324 in 1989, 428 in 1990 and 262 in 1991. Information obtained from the Embassy of Denmark in Paris, Consular Service.

[122] Aftenposten, October 6, 1992.

[123] The Norwegian Act on Registered Partnerships, Ministry of Children and Family Affairs, Oslo, Norway, 1993, p.9.

[124] Ibid, p.11.

[125] Act 40 passed by quite a narrow majority in the Norwegian Parliament: 18 votes in the Lagting and 58 votes in the Odelsting.

[126] **'Society's task ought to be that of enabling people to live in accordance with their own preferences and personalities, not preventing them from doing so, so long as this does not cause harm to others'**: Swedish Partnership Commission on Homosexuals and Society, (SOU1984:63), p.21.

The situation seems more ambiguous in the Netherlands: in the 1990's the Supreme Court recognised that the matrimonial legislation contained unjustified discriminations against homosexual couples as compared to heterosexual couples, with regard to the right to marry. It has left it to the legislator to intervene. In April 1993 the Dutch government upon a proposition of the Minister of Justice M. Ernst Hirsch Ballin, has recognised the necessity for cohabiting couples, but being in the legal impossibility of getting married to be officially registered in so far as cohabitees. Registration carries the same juridical consequences as marriage to the partners. This without creating a juridical bond between partners and children of one or both. This project of law presents the particularity of permitted long term cohabitees too to legalise their cohabitation. Maybe they had legal prohibitions on their marriage. On the 8th. August 1993 the Council of Ministers approved the project of law of the Minister of Justice modifying Book 1 of the Dutch Civil Code. On the 4th. September 1995 this project was deposited to Parliament and on May 1996 a Commission of experts had to reply Parliament's questions and to advise the Government on the content of a law and inconveniences of marriage between persons of the same sex[127].

In France there are priests who celebrate blessings of love and friendship (*d'amour et amitié*)[128]. It consists of an exchange of promises, a sort of a moral and commitment contract between the partners. Couples who do not want to marry and some who cannot marry (homosexuals[129]) now can enter into a PACs in France[130]. PACS was intended to be an alternative to marriage, but it is almost a replica of marriage provisions. Firstly, PACS are subject to registration, secondly, the same prohibitions[131] are laid down and thirdly, previous marriage or PACS prohibit another one[132]. Certain parliamentary members considered this *Pacte de Solidarité* a threat to civil and Republican marriage (***'atteinte au mariage civil et républicain'***)[133]. This is based on Article 1 of the Constitution establishing France as a ***'République indivisible, laïque, démocratique et sociale'***[134]. When the bill was passed to the Conseil Constitutionnel it declared that no violation of equality, no threat to republican marriage were found in the bill[135].

---

[127] Report of 1997.

[128] On the 24th. August 1974 the first benediction was celebrated in Lens (Pas-de-Calais) by Pastor Joseph Doucé - Petites Affiches, PA No.95, 10th. August, 1994. Concubinage was ignored as held in the phrase attributed to Bonaparte ***'Puisque les concubins se désintéressent de la loi, qu'à se désintéresser d'eux'.***

[129] *'Le PACS n'est ni un mariage, ni même un pas vers la reconnaissance du mariage homosexuel'*, Elisabeth Guigou, Le Journal du Dimanche, 13th. September, 1998.

[130] Law No.99-944 of the 15th. November, 1999 - Article 515(1), Title XII, of the Code Civil - ***'Un pacte civil de solidarité est un contrat conclu par deux personnes physiques majeures, de sexe différent ou de même sexe, pour organiser leur vie commune'.*** *Vide* Journal Officiel 16th. November, p.16959; Dalloz 1999, and on Internet - http://www.premier ministre.gouvs.fr.

[131] Compare new Article 515(2) paras. 1 and 2 with Articles 161-163 of the French Code Civil.

[132] Compare new Article 515(2) para.3 with Article 147 of the French Code Civil.

[133] The speeches made during the debates in the National Assembly can be consulted on the Minister of Justice website at http://www.justice.gouvs.fr.

[134] Loi Relative au PACS, Recueil Dalloz 2000, Chroniques p.203.

[135] Conseil Constitutionnel, decision 99-419 DC of the 9th. November, 1999. *Vide* Recueil Dalloz 1999, Chroniques p.483.

The gender neutrality of this law implies that difference of sex is not required to enter a PACS, then some time ahead it will not be a requirement for marriage itself. Can partnerships and marriages between homosexuals constitute the proof of legal abandon of the traditional concept of marriage in Europe, a condition posed by the European Court to permit an interpretation of Article 12 in favour of homosexual couples? One doubts this because these practices are difficult to understand and above all to admit socially and morally. The PACS Bill envisaged a system whereby heterosexual and same-sex cohabitants would be able to enter into a written agreement regulating their relationship (Art.1).

The incentive to enter into such a *pacte* is economical[136] including social security rights, (Art.4), the right to succeed to a tenancy upon the death of a cohabitant (Art.9), tax concessions on *inter vivos* gifts or legacies after 2 years (Art.3) and joint taxation as of the third anniversary of the *pacte* (Art.2). Articles 2, 4 and 9 were also to apply to two siblings living together (Art.10). The Senate adopted a modified version of the National Assembly's proposals and defined *concubinage* as **'the fact of living together as a couple without being married'**. However, no rights flow from this status alone.

PACS was criticised because heterosexual couples do not bother to register their relationship and thus the effect of creating a four-tiered system is created - between married couples, *pacte* couples, heterosexual cohabitants and homosexual cohabitants. France accepted the fact that the law should take account of the widespread existence of unmarried cohabitation. Contrastingly, the UK Government went into 'strengthening marriage' in the Home Office Consultation paper Supporting Families (1998) and the Government continued to ignore the need of a coherent legal framework for cohabitation. What can convince Governments that more than one type of family form now merits a formal legal status? Traditional family law has to provide an answer for new social phenomena.

In New Zealand a Study Paper issued by the Law Commission noted that the State should consider **'recognition beyond live and let live...what is being sought is not just toleration in the sense of a shutting of one's eyes, but affirmative action signifying acceptance'**[137]. In 1998 three lesbian couples sought the issue of marriage licences under the 1955 Marriage Act which were refused to them. Their case was decided by the Court of Appeal, ***Quilter vs. Attorney General***[138] the Court made it clear that by marriage the legislators of 1955 contemplated only a heterosexual union and there being no

---

[136] This *pacte* would be registered at the local court (Tribunal d'Instance). The content of the agreement would be left to the parties owed one another **'mutual and material assistance'**. According to Article 1 in default of declaration to the contrary all assets purchased after entering the *pacte* would be jointly owned by cohabitants (*l'indivision*).

[137] Recognising Same-Sex Relationships, Study Paper 4, Law Commission (*Te Aka Matua O Te Ture*), Wellington, 1999, ISSN 1174-9776, para.4, p.2.

[138] New Zealand Court of Appeal, 1 NZLR 523 (1998). *Vide* Article in Sunday Star Times 25 February 1996.

subsequent legislation able to be construed as an amendment to the 1955 statute in that respect, the claim of plaintiffs inevitably failed.

The Law Commission considered six categories for statutory recognition of same-sex relationships:

1. **Doing nothing.**
2. **Recognition to cohabitants without any marriage-like requirement.**
3. **Recognise same-sex couples for certain limited purposes.**
4. **Recognise same-sex couples for most or all purposes.**
5. **Recognise same-sex couples for most or all purposes subject to a requirement of registration.**
6. **Alter the definition of marriage to include same-sex couples.**

Currently only four New Zealand statutes which recognise same-sex marriage-like relationships in the Electricity Act 1992 in definition of near relative, in the Domestic Violence Act 1995 in the definition of 'partner' in Section 2, in the Harassment Act 1997 in the definition of 'partner' in Section 2 and in the Accident Insurance Act 1998 in its definition of spouse in Section 25.

The Law Commission's recommendations include a reference to a paper from the Ministry of Justice published in November 1999 about adoption and gay parenting. The indications are favourable. They suggest a law modeled on the Dutch law and not open to heterosexual partners, since the latter have diverse options already. They recommended that registered partnerships should not be regarded as inferior to marriage at law. Moreover, as in the Scandinavian models the effects of registration should be identical to those of marriage.

The paradox in the Registered Partnership Act is that while the formal differences between heterosexuals and homosexuals may have become smaller, the differences ascribed to heterosexuals vis-à-vis homosexuals were implicitly 'confirmed' as unbridgeable, innate and fundamental. Both the supporters and the opponents of these bills saw lesbians and gays as two different species and different to heterosexual standard or norm.

D. The Concept of Marriage: a Seemingly Unshaken Concept

The practice of homosexual unions leads us to ask ourselves on the juridical nature of such unions: is it a traditional marriage with limited effects or a registered moral contract, *sui generis* institution? The preparatory works of the Danish law show the difficulties and the oppositions which are raised by the possibility for a couple composed of two persons of the same sex to be juridically recognised. In fact, before envisaging any legal work the Danish Government created a Commission of study in 1988 to

study the condition of homosexuals. Only a minority of the members of this Commission accepted the proposition concerning the possibility of a partnership in favour of homosexual couples. This proposition saw light grace to the majority of the disputes of Parliament.

The Norwegian Minister of the Family and Childhood had deliberately excluded the possibility of marriage between homosexuals in his project of law on the registration of homosexual partnerships. Thus the text approved by the Senate and Parliament does not give homosexual unions the same status as that of marriage. Marriage stays in the eyes of the Norwegian legislator the fundamental social unity and the natural cell where children grow. The terms 'marriage' and 'conjugal life' are strictly reserved to heterosexual couples. In frustration of common rules to married couples and homosexual couples the majority of these rules are based on the need to legalise mutual rights and obligations between two adults, on one hand, and between them and society on the other.

Public opinion is very divided as to giving the right to marriage to homosexuals. In France according to a survey by IFOP for *Le Monde*[139] 48% of the French (sample of approximately 1000 persons) hold that homosexual couples should have the right to marry. But in general rights of homosexual couples have been accepted by a majority long before it was a question of neither marriage nor adoption. The slanderers of the right to marriage of homosexuals are numerous and do not lack arguments. For some it will be wrong to affirm that homosexuals have the right to marry, there exists only registered unions as marriages from which effects of limited rights emerge; the value of these unions will be more symbolic. It will never be conceivable that a union between individuals of the same sex can be treated in relation to marriage because the institution of marriage is very branded to recognise such an opposed model.

Others opposed to the idea of a right to marry for homosexuals do not hesitate to condemn it in principle, considering that only a man-woman relation based on which society can develop has universal value. The principal Norwegian religious organisations opposing to the registration of homosexual partnerships held that giving such rights to homosexuals weakens the institution of marriage and favours the dissolution of the family; only the cohabitation between a man and a woman can be seen as a norm of society. But the slanderers of the right to marry are equally in the homosexual community. Several associations fighting for the homosexual cause refuse to see gay marriage as a means of integration **'this will turn against us'**, held the President of the Lesbian and Gay Pride. **'It is absurd to put yourself in a ghetto'**. They refuse that their status will be more marginalised rather than

[139] The cities of St Nazaire and Strasbourg were first to acknowledge homosexual concubinage - *Le Monde* of the 16th.&26th. September,1995. It is interesting that in France town halls issued *certificats de vie commune* to heterosexual cohabitants and around 300 are willing to do the same to homosexual couples.

their difference be remarked. This is what explains this ghetto idea; they prefer the solution of a contract of social union.

The question of a marriage between homosexuals is a question which causes embarrassment because of the values of society. In fact marriage is an institution confined to cultural and historical traditions of each society and to the deep conceptions of this on the family cell[140] where the moral imperative is present. In Greece, neither the Constitution nor the dispositions of family law give the definition of the notion of marriage. This takes from the dominant moral conceptions of the Greek society. Marriage cannot take place except between a man and a woman, the difference of sex being considered as determining a quality of marriage. A homosexual marriage thus cannot be possible because it is contrary to good morals and to the traditional customs of this country. The civil law translates in general the influence and idea that society is made by the sexual union it does not evolve if society does not evolve enough[141]. In addition a wide margin of appreciation is left in this field to the States parties to the Convention. In virtue of this theory, the national authorities stay free to choose the measures which they deem appropriate. Hence national authorities have no obligation of marriage or family nature vis-à-vis homosexuals.

In the Strasbourg jurisprudence this 'moral' must represents a notion which is found between the lines of decisions emanating from the ECHR. Only the European judge can go into the nature of morality as evolved in particular European States and thus of right guaranteed by the convention. Prudence and boldness, between the formal approach of the texts and the taking in consideration of their substance. Concerning the right for marriage enacted by Article 12 and the determination of its beneficiaries, the authorities of Strasbourg are guided by prudence and a respect of the margin of appreciation of the member State: the protection of the morals may imply the safeguard of ethics or moral values of a society, a worry which translates at present by the protection of the traditional conception of marriage and by the refusal to give the homosexual couples the benefit of the protection of the right for marriage.

If the situation does not appear to be called into question in what concerns homosexuals, this does not appear to be the case for transsexuals, because much more than a question of sexual orientation, transsexualism stands in the heart of the troubles of gender identity[142], of the sense of personality of sexuality and obliges the jurist, the doctor, the legislator to take position on essential points. In fact, sex appears, henceforth a complex and mobile notion which cannot be reduce to the only chromosomal

[140] **F. vs Switzerland**, decision of the ECHR of the 18th. December 1987.
[141] Kennedy I., *Transsexualism and Single-Sex Marriage* (1973) 2 Anglo American Law Review 112.
[142] Assistance and research and information on transsexuality and the identity of gender obtained on internet http://www.transgenderlegal.com

criterion presumed immutable to the risk of excluding transsexuals of the benefit of the disposition of Article 12.

III. The Particular Case of Transsexuals

Since antiquity Herodote quotes that the Scythes in Northern Europe had a sickness, that of men living as women. From the point of view of statistics the phenomena of transsexualism remains very limited but, at the same time the mediating and juridical discussions on this subject are very passionate. The problematic of transsexualism exists on the European level, as is witnessed by the organisation by the Council of Europe in 1993, by a colloquium on the theme 'Transsexualism, Medicine and Law'[143]. This colloquium has permitted various specialists to evoke the question brought up regarding transsexualism. The European Commission and Court of Human Rights have contributed widely to these discussions which are linked around the fundamental questions, closely linked one to the other: the respect of the private life of transsexuals and the respect of the right for marriage.

For the moment, in Europe it seems that one can conclude that the general tendency is to authorise the transsexual to ask for the modification of the mention of sex inscribed on the birth certificate in order to put an end to distortion source of suffering, between his legal and physical being. Only two-thirds of the European States change the birth certificate to reflect the gender identity of the person. Only the UK, Ireland, Andorra and Albania positively prohibit this change. The latter two States do not permit gender confirmation at all[144]. There is little evidence that amendments cause social disruptions. In the Council of Europe member States, permitting such change including Sweden, Norway, Finland, Belgium, Luxembourg, Spain, Austria, France, Italy, Switzerland, Netherlands, Denmark, Germany and Turkey) no adverse social, administrative or legal consequences were documented. The integration of these people in society has not caused notable controversy.

However, the recognition of transsexualism carries consequences on the right of the family which are difficult to 'manage' for a great number of the member States. It is without doubt the reason for which the European Court refuses transsexuals the advantages of the disposition of Article 12. Thus, recognising the transsexual his new sex, does not mean for all that he can contract marriage with a person of the opposite sex to his sex. The question of marriage is still a critical point of the condition of transsexuals. This recognition of transsexualism is made outside the family protective, on the basis of the protection of the private life, thus one can only speak of a partial recognition.

[143] Act of the *XXIII Colloquium of European law*, Amsterdam, 14-16 April 1993, Council of Europe, 1995.
[144] Internet - http:www.liberty-human-rights.org.uk/mpolic3n.html

The evolution of morals and the converging evolution of the juridical nouns to ameliorate the condition of transsexuals, as well as the judgement of the European Court, ***B vs. France*** [145], ask for a reversal of jurisprudence on the part of the European Court in order that this fundamental liberty which is marriage is finally recognised for them. In ***Attorney-General vs. Family Court of Otahuhu*** [146] the Attorney-General applied for a declaration under the Judicature Act 1908 as to whether two genetically same-sex persons can marry. Ellis J. found it convenient to adopt the ***Hyde vs. Hyde et.*** classic definition.

A very recent decision in the United States regarding transsexualism was decided by the Texas Court of Appeals in ***Littleton vs. Prange*** [147].The Court held a marriage between a man and a male-to-female transsexual invalid. In ***Re Gardiner*** the first sentence in the "Conclusion" by the Kansas Appeals Court read:

> **'This court rejects the reasoning of the majority in the Littleton case as a rigid and simplistic approach to issues that are far more complex than addressed in that opinion ... We conclude that a trial court must consider and decide whether an individual was male or female at the time the individual's marriage license was issued and the individual was married, not simply what the individual's chromosomes were or were not at the moment of birth.'** [148].

The Littleton decision is not dead, but it is doubtful that the mean spirited effects of it will spread much further. And as the Texas Legislature is near an end, and specially chose not to bring the House Bill and the Senate Bill that both would have overruled Littleton in Texas, therefore, Littleton remains law in the 32 counties of the Texas 4th Court of Appeals in San Antonio. What this means is that a transsexual couple where one is female-to-male who wants to get married to a male-to-female can still do so in San Antonio. [149]

One can find an occasional case for example, ***Gardner vs. Gardner*** which involved a contested divorce in respect of a valid marriage. Hodson J. had little hesitation to grant divorce to husband because of the wife's conduct classified as **'sexual perversion borne out by (a) letter ... on the subject of her proposed change of sex'** according to Hodson J.. This was in 1947 where a moral tone was adopted in Gardner which is not found in Corbett. So far the British Government's defence that the status of transsexuals in English law falls short of the liberal approach advocated by several European States. Britain has an important legal ruling established by the 1970 judgement in ***Corbett vs. Corbett*** [150], that

---

[145] **B vs. France**, (1992) 16 EHRR 1, ECHR.

[146] New Zealand Supreme Court case (1995) NZFLR 57.

[147] Texas Crt of Appeals in **Littleton vs Prange**, 9 S.W.3d 223 (Tex.Civ.App.1999), *cert. denied* 148 L. Ed. 2d 119, 121 S.Ct. 174 (2000), A petition for writ of certiorari of the *Littleton* holding was denied by the United States Supreme Court on October 2, 2000.

[148] *Vide* Kansas Courts website - http://www.kscourts.org/kscases/ctapp/2001/20010511/85030.htm. In The Court Of Appeals Of The State Of Kansas In The Matter Of The Estate Of Marshall G. Gardiner, No. 85,030, 11th. May 2001.

[149] San Antonio Express, 12th. June 2001, News Article, 3rd. Same-sex couple get a licence to marry in San Antonio, Texas.

[150] (1970) 2 All ER 33.

such marriages are void; but that does not mean that the question cannot arise in Britain even at present, and in the event of new legislation to permit them (such as is already in force in Sweden and West Germany), it would become an urgent matter for the churches too to clarify their attitude.

In the Corbett ruling Mr. Justice Ormrod maintained that an unambiguous biological sex must be determinative of a person's sexual status for the purposes of marriage. Sex is usually determined in relation to four or possibly five criteria: the presence or absence of a 'Y' chromosome, the possession of either male or female gonads, the possession of either male or female genitalia, psychological factors, and perhaps the secondary sexual characteristics which develop at puberty. Biological sex is usually understood in terms of the first three of these. When they are found they determine a person's sexual status for the purposes of marriage according to the Judge. Thus, they cannot be set aside in favour of social or psychological criteria or in favour of an artificially remodeled sexual morphology.

The ruling did not address the question of how sex was to be determined when these biological criteria were at cross-purposes, i.e. in cases of hermaphroditism, and did not exclude the possibility that psychological, social or even surgical criteria might be relevant in such instances. Nor, as has sometimes been mistakenly suggested, did it assign a determinative weight to the chromosomal test over other biological criteria. It simply declared that for the purposes of marriage a normal and unambiguous biological sex could not be overruled.

The judge ruled that **'the respondent's operation cannot affect her true sex'. 'Change of sex'** is appropriate only where a mistake of sex is made at birth. Nor is it relevant that a postoperative male-to-female transsexual can engage in a simulation of sexual intercourse, for such a coitus cannot be called **'ordinary and complete intercourse'** or **'the natural sort of coitus'**. Sexual self-consciousness as a psychological phenomenon, marriage as a social phenomenon, neither of them can claim independence of the sexual identity conferred biologically when that identity is not of itself doubtful; nor can that identity be modified by surgical artifice. That is the essence of the Corbett judgement.

The psychological case tends to become the standard argument among those who support the transsexual's assumed gender role. It has influenced at least one significant court judgement in America, that of the New Jersey Superior Court in ***M.T. vs. J.T.*** (1976).[151] The case is built upon two arguments. In contrast to Corbett's first thesis, it argues against a preferred status for the biological factors all must be coherent before one can speak of someone's sex as unambiguous. Thus the New Jersey Court, arguing that **'sex in its biological sense should not be the exclusive standard'**, took as its

[151] 355A.2d 204. New Jersey Supreme Court 1976: absent fraud, man not allowed to void marriage to post-operative transsexual female.

measuring line the practical test of **'sexual capacity'**, which **'requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in intercourse as either male or female'**. The preoperative transsexual who did not have this sexual capacity by virtue of psychological abhorrence did not have an unambiguous sex. The category of 'intersex' is thus widened beyond the range of hermaphroditic conditions to include psycho-sexual disorders.

In contrast to Corbett's theses, it argues against a preferred status for the natural body in determining the sex of the patient's genitalia. Successful surgical remodeling should weigh heavily in the description of a person's sex. In effect, the American Judge thought, was to make **'gender and genitalia no longer discordant'**. The Court gave **'legal effect to a fait accompli'**. Thus the postoperative transsexual had if not an unambiguous sex at least one with a functional coherence. Surgery is thus a form of corrective 'reassignment' resolving an initially ambiguous sexual endowment.

The mistake of the Corbett judgement was not necessarily in what the Judge thought about April Ashley's sex, but the fact that these thoughts became public policy. Society has no business wanting to know what a person's real sex is. It is enough for it to accept at face value the role she plays, and any deeper knowledge should be left to her and to her spouse. But is there a separation of private and public realms? Should a public fiction be recommended? In the New Jersey decision Handler J. held that there shall be: **'no legal barrier, no cognisable social taboo, or reason founded in public policy, to prevent that person's identification, at least for the purposes of marriage, to the sex generally indicated'**.

In Canada, in Alberta a record should state **'that the anatomical sex of the person has changed'**[152]. In Ontario, the designation of sex is to be **'changed so that the designation will be consistent with the results of the transsexual surgery'**[153]. In Alberta the public document is to contain a misleading, if defensible, statement, while in Ontario it is to contain an outright fiction. In Britain it remains the case that transsexual people cannot alter or rectify their birth certificates and consequently cannot marry. The right to marry has arisen in the recommendations of 1999 regarding Sex Discrimination (Gender Reassignment) Regulations[154].

---

[152] R.S.A. c.384 s.21.
[153] R.S.O. 1980 c.524 s.32.
[154] Liberty, June 1999, Recommendation 3 entitled 'Marriage and Children'. *Vide* Internet - http://www.liberty.human-rights.org.uk - Liberty submission to interdepartmental working group on trans people.

A. The Slow and Partial Recognition of Transsexualism

The taking into account of the transsexual syndrome, if it does not seem to have set down problems to doctors in that which concerns recommended treatment, it has been the same for jurists in that which concerns results and consequences of this treatment, that is the story of the juridical recognition. During a long time, and a due to lack of legislation in this matter, certain national jurisdictions have refused to make right to the quest of transsexuals having as subject the legal recognition of new sex, making the general interest of society override over the particular interest of transsexuals. In Europe transsexuals, therefore, have seized the instance of Strasbourg in order to see recognised the existence of a violation of the respect due to their private life by the States refusing the modification of their original sex on the act of civil status and some of them have asserted that in this manner they could not contract marriage in conformity with Article 12.

In America **'In the matter of Dickinson'**[155] an early case of a post-operative transsexual acclaimed by the Court in Pennsylvania since this provides emotional security and peace of mind and places legal status on an equal footing with her medical status and she could marry a man as soon as this is recognised. Judge Eugene Gelfard concluded that a change shall be recorded in favour of Roberta Dickinson. In Malta we find two cases of this sort, first in ***Lawrence sive Roxanne Cassar vs. Onor. PM et***[156] the Court upheld her pleas of change of name and sex. In ***Raymond Gilford known as Rachel vs. Director of Public Registry***, the Constitutional Court ordered the same changes, but an annotation had to be added on the certificates to be issued. In Malta we do not have laws regarding transsexualism and thus no particular protection of such persons. Ergo, such persons cannot live a satisfactory private life in our Islands due to this deficiency. Till date no request for marriage by a transsexual has yet been made in Malta. The Hon. Minister Tonio Borg in answering Parliamentary Questions 5083 and 5538 of 1999 held that the Public Registry has to consult the Attorney General in case such a request is made[157].

We also find a rare case of hermaphrodism in Malta of 1774 where Rosa Mifsud who was recorded as a female developed certain male characteristics such as the voice and was ordered by the Grand Court to wear as man. They held that from a medical examination **'the male sex is the dominant one, though the examinee is incapable of procreation'**[158]. In 1989 the European Parliament called on Member States **'to enact provisions on transsexuals'**. Even the Parliamentary Assembly of the Council of

[155] Court of Common Pleas of Philadelphia County, No.4862 (1977).
[156] Decision of Mr. Justice F. Depasquale, 10th. March 1995 (Appl. No.376/91).
[157] Answers of Parliamentary Sitting No.71 of the 3rd. March. 1999 and Parliamentary Sitting No.75 of the 15th. March. 1999.

Europe in 1989 held that **'the legislation of many member States is seriously deficient in this area and does not permit transsexuals, particularly those who have undergone an operation, to have civil status amendment made ...'**.

B. The Interest at Stake - The Particular Interest of the Transsexual

The definition of transsexualism is a medical definition which poses the problem of the definition of sex, because it supposes that the psychological sex of individuals is taken in consideration, a determining element for the transsexual who aspires for a private and normal family life. But this recognition of the psychological sex, risks of putting in question the image of the traditional sexual polarity and by the same, some of our institutions founded on this differentiation of sexes, this ambiguity attached to the state of the transsexual preoccupies the majority of jurists. The psychological definition is to be taken into account when determining the sex of an individual for the purpose of marriage. This was held by Mr. Justice Charles in ***W vs. W*** (Physical Inter-Sex)[159]. This is different from a transsexual's case because Mrs. W was a physical inter-sex whose biological characteristics were ambiguous and not congruent at birth. Having accepted the diagnosis of partial androgen insensitivity too his Lordship was satisfied that Mrs. W was a female for the purposes of her marriage. The factors for determining sex for the purpose of marriage, as set in ***Corbett vs. Corbett*** (1971) were biological and, if the gonodal, chromosomal and genital tests were congruent, that was determinative of the person's sex.

The term 'transsexual' was introduced in 1954 by the American psychiatrist A. Benjamin to point out a purely psychic trouble of sexual identity characterised by the unwaivering conviction of a subject pertaining to the opposite sex. Medically, this conviction necessitates, in the interest of the sick person, an adapted treatment, the aim which is to stop the suffering which animates the subject affected by this syndrome. Juridically, the transsexual demands the right for sexual identity and consequently, the juridical change of his sex, the ultimate phase of a therapy which will give him the possibility of integrating himself in society, in order to live a normal and private family life, as everyone is in the right to expect (idea of a right-claim). The interest of the transsexual is therefore double, it is a question in part, of obtaining medically this change of sex and on the other part of obtaining juridically the recognition of this change of sex.

---

[158] Reported by Dr. Joseph Micallef Stafrace, legal expert in the case **Lawrence *sive* Roxanne Cassar vs. Onor. PM et.**, 10th. March 1995 (Appl. No.376/91).

[159] **W vs W**, English High Court, Family Division, 10th. October, 2000. Solicitors: Buss Murton, Tenterden: Ms. Bonneton De Sarlat. Cranleigh. *Vide* also The Times (UK), Tuesday, 31st. October 2000.

The attitude of refusal may be understood as posing a treat to family and marriage. Moreover, the latter are the cardinal institutions built on the difference of sex. The recognition of transsexualism was perceived as a menace for the maintaining of social harmony and public order. How can marriage be protected when a person changes sex after marriage? Persons conscious of their condition who marry in full knowledge of the condition attempt to normalise pulsations and as a means of social insertion. So now what happens of the marriage of two persons of different genetical sex, but of a sex which is morphologically and legally identical? It appears in the order of things to annul such a union if one bases on the institutional conception of marriage which naturally supposes the union of a man and of a woman. In the contrary case the problem of assimilation of this union to homosexual marriage will be posed. Some fear to see proliferate the spectre of homosexual marriage. One can very well, in fact, imagine that for affective or economic reasons the two spouses decide to remain together, dissolution of their union may have effective, patrimonial of social tragic consequences.

Absolute nullity as a cause of sex identity cannot be retained because it is impossible to admit that this cause existed at the time of marriage, the chromosomic sex corroborating perfectly to the mentioned sex to the act of civil status. Relative nullity, will be founded on an error of the spouse, on a syndrome of which it will show the preciseness with report to the marriage, by proving that the pathology was not known at the moment of marriage. The marriage will be supposed to have never existed, that which may lift off difficulties in the case where the couple has children. But since marriage is more than a simple contract the notion of putative marriage permits to alienate this rule. In fact, in the case of putative marriage one supposes that where the spouses were in good faith, thus annulment would not produce the effect but for the future and the prior effects will subsist. The same rule has been extended to children by the French law of 3rd. January 1972 without consideration of good or bad faith of the parents. However, the action by relative nullity will not be received if not in the hypothesis where the spouse will have ceased on cohabitation in the 6 months of the knowledge of the mistake[160].

The invalidation of the marriage, which will have as effect to sanction the laws of an essential element to the validity of the contract by the occurrence of a posterior to its formation and independent of the will of the parties, is a solution that can be advanced. In fact, one of the condition of the basis of marriage, the difference of sex has disappeared from the moment where the transsexual has obtained the juridical change of sex. One can equally invoke, as backing of this thesis, the incapability for the transsexual to assume his conjugal obligations. Now, there again, one must not forget that marriage is not a contract in the traditional sense of the term, in this sense that the power of organisation *ab initio* of

[160] French Code Civil - Article 131.

contractual type does not exist. Moreover, marriage, in time as an act of adhesion to a statute, is submitted to a particular juridical system, notably with regards to its rupture.

With regards to divorce, several forms are possible abroad: it may be a question, for example, of a divorce of mutual consent, of the fact of a separation of a number of years or much more for a dissimulation by mistake by the transsexual to his spouse his state at the moment of marriage. These different hypotheses suppose that the two spouses want to separate and start a procedure to this aim. Divorce is by definition a personal action and nothing can constrain a person not to divorce. Finally, the automatic dissolution of the union at the date at which the change of sex intervenes appears as the most adequate solution to avoid the maintenance of marriage of two persons of the same 'legal' sex. During 5 years, Italy has adopted this system then made the change of sex one of the motifs of divorce, but dissolution is very contested by the unity of the doctrine because it leaves the possibility to the spouses to remain together if no one of them asks for divorce.

C. Marriage after the Change of Sex

The question whether a postoperative transsexual can be a partner in marriage resolves itself into two related questions: Will such a marriage be a union of a man and a woman? Does it matter that it should be? It is important to the Christian understanding of marriage that it is contracted only between members of the opposite sex, between **'this man and this woman'**. The Church has been criticised for not solemnising same sex marriages. The Church constantly considers marriage as a relationship of two persons and based on it inherited teachings of natural structures of human existence. If a priest celebrating a marriage is told that one of the parties to a marriage is postoperative transsexual must he regard this as a guilty secret for which the Church cannot take responsibility or he think it is an innocent one? The Church should take no such responsibility. The Christian understanding of vocation is either being married or single and no other alternative to marriage. A policy of institutionalising para-marital relationships would involve the Church in the promotion of some kind of 'public doctrine' which is at variance with its own theological convictions but which is judged necessary for pastoral flexibility.

In the post-operative hypothesis there will be very well union between two persons of different sex on the legal and morphological plane, but identical to the genetical level. The question is therefore, to know if one can prevent such a union, and if yes on which basis. According to the social institutional theory[161] of marriage where marriage and procreation are intimately linked in the aim of assuring the renewal of

[161] Hyde vs Hyde et. (1866): **'Marriage has been well said to be something more than a contract, either civil or religious. It is an institution'.**

generations marriage cannot be an individual institution. Only society is in the right to tell which are the marriages which can be contracted. The political aspect of marriage is in case, the legitimate union obeys to a normalisation imposed by society which assumes it is social role and its durability. According to the this hostile conception of the defined family by Emile Durkeim, the formation to the couple must obey to the rules of the institution, the individual exists by report to the social group. The marriage combines a personal story and a story of others symbolised by the regard of society. Marriage being defined as the union of a man and of a woman, the determining of sex appears therefore as a condition of the basis to the validity of marriage. Thus the Spanish Supreme Court although granting operated transsexuals the possibility of changing name and to modify the mention of their sex denies them the ability to contract marriage on the motive that these latter will be inexistent by application of Articles 44 and 73 of the Spanish Civil Code. The new sex of the transsexual is a social sex which does not produce but the effects strictly necessary for the accomplishment of that which was solicitated.

The transsexual cannot contract marriage with a person of the opposite sex, because there is impossibility of procreating and consequently of founding a family, since the couple is by nature sterile. It is the Christian concept of marriage which is put in front to justify such a prohibition. This conception is not the work of jurists, but of Christian authors. It can be defined as a moral which takes its source in the sermons, letters of direction etc.. These authors justify marriage wanted by God and confirmed by Christ at the wedding of Cana by procreation is presented as the first aim of marriage by Saint Augustine around 400 A.D. who associates it to the theory of the three goods of marriage: ***proles fides sacramentum***. The law does not recognise but partially transsexualism. It does not protect but an appearance.

The marriage of a transsexual must be annulled by reason of an error of an essential quality of the person: a man might have married a false (true woman) and vice-versa. The only production of the act of birth corrected is not enough, therefore to render the marriage valid: acceding to the ceremony is one thing, allowing the right for marriage is another. The act of birth will not be but a way of proof, the corrected sex does not enjoy but of a presumption of truth until proof of the contrary. The transsexual cannot get married because he finds himself in the double possibility of dismantling of one part that he belongs to a determined sex, and of another part, that this sex is different from that of his future spouse. Because although, an operated transsexual can obtain a change of civil status, the real change of sex is not possible, the chromosomic sex remains unchanged. But on one legitimately and humanly deprive somebody of a right as fundamental as the right of marriage?

All these questions call for the intervention of the legislator, if one is favourable or not to the juridical recognition of transsexualism. Some national legislators intervened in this domain, trying to concile the interests of everyone. But numerous are the transsexuals that could not take advantage of the cause in front of their national jurisdictions. Some of them did not lose hope, and took their request in front of the jurisdictions of Strasbourg so that they acknowledge to them these two fundamental rights which are the right to respect of their private life and the right to contract marriage with a person of opposite sex to their new sex.

D. The Appreciation by the Authorities of Strasbourg of these Interests

In substance the authorities of Strasbourg see the following questions: a juridical system which does not permit to an operated transsexual to rectify the mention of sex shown on his act of birth to put on himself in conformity with his new identity, does he violate Article 8 of the ECHR - an operated transsexual has he the right to contract marriage under his new sexual identity with the terms of Article 12? These two questions have opposed on numerous occasions the conceptions of the commission and those of the Court. To know if society and law should acknowledge the new sexual identity of an operated transsexual, the authorities of Strasbourg had to place themselves on the grounds of positive obligations. The Court was much more reticent to acknowledge the new sexual identity thus acquired than the Commission. But concerning the right for marriage of transsexuals it must be stated that uncertainties remain.

The importance of this case is far from being negligible. In fact, the German government engaged itself equally to vote a law on the problem of transsexuals. This law was effectively voted by the Bundestag on the 10th. September 1980 and entered into force on the 1st. January 1981. The Commission went again to give a favourable opinion to the recognition of the respect for private life for transsexuals in an case opposing 38 transsexuals to the Italian government[162]. Following the example of the German government it rapidly adopted a specific legislation to the transsexual problem (law of the 14th. April 1982).

The Commission confirmed the principle of the recognition of sexual identity some years later on the occasion of the Rees case[163] the fact of which are widely identical to those of the Van Oosterwijck [164] case, to this near that the British government who was into the case the Commission equally concluded unanimously to the violation of Article 8, where the defending government sustained that the register of

[162] Application No. 9420/81, **38 transsexuals vs Italy**, 5th. October 1982. unpublished.
[163] Application No. 9532/81, **Mark Rees vs UK**, opinion of the Commission annexed to the European Court case.

births destined to furnish the authentic proof of events and to establish the family ties of succession of legitimate filiation and of the division of goods cannot, in any case, be modified by a voluntary act. To reinforce the position estimates that the medical recognition in Britain the necessity to help the claimant to release his identity must also be considered as a supplementary argument in favour of the sexual recognition of the claimant.

E. The Reservations of the European Court

In the judgement Van Oosterwijck the Court certifies in *limine litis*, that the rule of exhaustion of ways of internal recourse not being filled, it could not know the depth of the affair[165]. However, one would have been tempted to believe that, in a next case, the court would have followed the commission granting by them even the benefit of the dispositions of Article 8 to transsexuals. In fact, the court acknowledges that the possibility for the transsexual to change his name can certainly satisfy third parties, but it cannot resolve all the problems posed by transsexualism.

In the judgements Cossey[166], Sheffield and Hornsham[167], not discerning any community of ways of the member States of the Council of Europe since the Rees judgement, the Court in the absence of 'imperious reasons' suffering a touching up of its jurisprudence confirms its interpretation according to which there is not, for the moment, violation of Article 8 the stated enjoying in this domain of a great margin of assessment, but that it can otherwise if medical science and social conception evolve. The principal claim of transsexuals is to this subject the possibility for them to contract marriage with a person of the opposite sex to their new sex. On this point, the judgements of Strasbourg are equally very divided.

F. Uncertainties of the Right to Marriage: The Failure of this Attempt

From a distinct definition of marriage to the right to found a family by the Commission to the Van Oosterwijck case and the Cossey case, the Court knew how to impose up to now a traditional conception of marriage thus refusing the benefits of the dispositions of the Article 12 to transsexuals. An attempt for acknowledgment to the right to marriage by the Commission this attempt illustrated itself in two cases, the Van Oosterwijck case and the Cossey case. In the first case the claimant estimated that the Belgian legislation deprived him of the right of marriage as it is granted by Article 12,

---

[164] **Van Oosterwijck vs. Belgium**, ECHR, 6th. November 1980.
[165] Solution open to criticism according to the four dissenting magistrates in this case.
[166] **Cossey vs. UK**, ECHR judgement of the 27th. September 1990: 13 EHRR 622, ECHR.
[167] **Sheffield and Hornsham vs. UK**, judgement of the ECHR of the 30th. July 1998.

since the only union permitted by law with a man is impossible for a psychological and social reasons, the claimant cannot legally get married with a woman since, according to the civil status, this marriage will be that of two persons of the same sex.

The Commission took awareness of this problem, observing that Belgian law does not permit to the claimant to marry a woman and that besides it cannot be a reasonable question for him of a marriage with a man. Thus the Belgian legislation deprives by an absolute marriage the transsexual of the right to get married, which is not in his eyes conceivable. In order to justify the violation of Article 12 by the Belgian State, the Commission always very in line with the evolution of morals disassociated marriage and procreation, a thing which it had already done in recognising the right to marriage of the detained[168]. Article 12 does not authorise a State to **'completely deprive a person or a category of persons of the right to marry'**[169]. The State's freedom to determine the legal framework of marriage will be restricted where the standards applied are arbitrary.

The Commission acknowledges, in fact, that the impossibility of having conjugal relationships is not an obstacle to marriage and estimates that **'the essence of the right to get married consists ... to form a juridical association in solidarity between a man and a woman'**. This definition of marriage reduces the latter to the acquisition to the juridical state, a definition which can appear a bit brutal. The same, the Commission does not see in the sterility of a couple of which one of the spouses is transsexual a determining objection: **'If the marriage and the family are effectively associated in the Convention as in the national rights, nothing permits however to deduce from it that the ability of procreating will be a fundamental condition, nor that procreation is an essential aim'.**[170] Article 12 guarantees a distinct right and independent of the right to the respect of family life enacted in Article 8. The Commission in recognising the complexity of the problem, acknowledged by 7 votes against 3 that the Belgian State has violated Article 12.

In the Cossey case, it is the circumstances of the species that led the Commission to retain the grievance of the violation of Article 12. In fact, the claimant acknowledged a male friend and wished to marry him when the British legislation declares null all marriages of persons of identical biological sex (Article 11 of the law of 1975). The Commission declared that the right to marriage of the claimant was licit and that as a consequence the British State had violated Article 12 to the motive that the biological sex cannot be tied to the ability of procreation. But such a reasoning did not convince a strong minority of the Commission. The latter explains without doubt the reasons for which in the cases Sheffield and

[168] Hamer vs UK, judgement of the 13th. December 1979.
[169] Van Oosterwijck vs Belgium, (1980) 3EHRR 557, Com. Rep. para.56.
[170] Van Oosterwijck case.

Hornsham, the Commission formulated the opinion that there had not been violation of Article 12 and no distinct question posed itself with regards of Article 13 and 14 of the ECHR. The majority of the judgements of the European Court remains up to now attached to a traditional concept of marriage not distinguishing the right to marriage from the right to found a family. The question of marriage is of the fact a very debated question on which the Court has not without doubt formulated a definite position.

This strict conception of marriage which makes of it a juridical association between a man and a woman did not find support in the heart itself of the Commission. In fact, in the Rees case, the Commission judged in unanimity that there had not been violation of Article 12, when in the Van Oosterwijck case, it had acknowledged such a violation. But this unanimity rests on two arguments so different that the Commission could not give a unique motivation, and of this fact, reproduced them. For five members, the grievance presented to the title of Article 12 is identical to that brought up with regards to Article 8. If the claimant cannot remarry with a woman, is because legislation does not permit the acknowledgment of its masculine status. Article 12 is therefore not violated by a distinct manner. It must therefore be legally acknowledged as man or woman to contract marriage. On the contrary, for other 5 members, the right to be acknowledged as man does not bring the right to get married in the sense of Article 12.

It manifestly takes into account the social finality of the right to marriage which sends back to the physical faculty of engendering, this is witnessed by the explicit reference to the marriageable age. Moreover, Article 12 does not guarantee the right to get married if not according to **'national legislations'** which can pose particular conditions for marriage. It ensures that a contracting State must be admitted to exclude this type of marriage from when the couple finds itself in the absolute inability to procreate. According to this last thesis, the member States incontestably dispose of a large margin of appreciation. This evolution towards a traditional conception of marriage should materialise in the Rees judgement.

Other than the adopted restrictive position being a question of the status of transsexuals with regards to Article 8, the Court goes to mark clearly what is its interpretation of Article 12, guaranteeing in this manner a great margin of appreciation to the member States. **'In the eyes of the Court, by guaranteeing the right to get married, Article 12 aims a traditional marriage between two persons of different biological sex. Its wording confirms it: it comes out from it that the aim followed essentially consists to protect marriage as a foundation of the family'**[171]. This right obeys to national laws of the contracting States for that which concerns its exercise. Limitations must not restrain it or lessen it by a manner or at

[171] Rees judgement decided on the 17th. October 1986 by the European Court of Human Rights: 9EHRR 56, ECHR.

a degree which will reach it in its main substance but one cannot attribute such an effect to the prevention brought to the United Kingdom to the marriage of persons not belonging to different biological sexes. This solution has as foundation the fact that, transsexuals cannot pretend to a real change of sex.

For two times, in 1989, the Commission strictly applied this Rees[172] jurisprudence, affirming that Article 12 does not aim that the right to marry someone of the opposite sex. This means that two persons of identical biological sex, but this equally means of two partners who are not biologically of the same sex, but of which one has obtained to the civil status the same sex that his partner by an act of will recognised in internal law[173]. The transsexuals are therefore, in the absolute impossibility of contracting marriage.

The protection of marriage as much as foundation of the family has been actualised in the Cossey judgement. The problems posed in this case were, in all points, similar to those that the Court had had to resolve in the Rees case. It was a matter of knowing if the circumstances of the second differed from the first and if the Court had to draw aside from its position of principle and admit the benefits of the dispositions of Article 12 to transsexuals. It affirms in the preliminary that a change in the jurisprudence is possible, but it shows itself enough restricted as to the conditions that it poses for such a change, making allusion notably to the imperious reasons, to the developments of the data. But again, it affirms the Rees jurisprudence considering that the **'registered evolution up to now ... cannot pass as the proof of a general abandon of the traditional concept of the marriage'**. From the point of view of the Court, the recourse to the biological criteria to determine the sex of a person in the aims of the marriage is again justified, considering that this matter comes from the power of which the contracting States enjoy[174].

If the maintenance of such a jurisprudence witnesses respect of the margin of appreciation of the British State, one can all the less ask which attitude would be adopted by the judgements of Strasbourg in the hypotheses where a French transsexual being able to pretend to the violation of Article 8, on the foundation of the Botella judgement, involved the violation of Article 12. Although, in this case the Court would not have pronounced itself on this question in reason of the non-exhaustion of the ways of recourse, the Commission having declared this grievance inadmissible, this judgement constituted already, for the transsexuals, a step in advance in the amelioration of their juridical condition in

[172] **'The right to marry guaranteed by Article 12 refers to the traditional marriage between persons of the opposite biological sex'**: para.49 of the Rees judgement.
[173] **Anita Erikson et Asta Goldschmidt vs. Sweden**, decision of the 9th. November 1989.
[174] **Sheffield and Hornsham case.**

France[175], and perhaps even in Europe[176]. The possibility of modifying the extracts of the act of birth in that which concerns the sex does not resolve itself at the same time the problem of marriage which will be from the legal point of view, that of a man and a woman in the sense of Article 12 renouncing this thesis comes back to create a sub category of human beings, of man and women who cannot enjoy of all their rights.

G. Towards a Total and Full Recognition of Transsexualism

i. The Interpretation of the Botella judgement of 1992

Numerous are the authors who agree that from the moment where a transsexual obtained the juridical modification of its civil status a surrounded modification of certain guarantees[177] it is not much logical to refuse him the possibility of contracting marriage. He should be able, in fact to benefit of all the rights and being subjected to all the rights and obligations ensuring from his new status to the day of modifying of the act of birth. In the Botella judgement the European court has not recognised transsexualism if not under the angle of the protection of private life keeping itself from envisaging the eventual consequences. In the future it will be incumbent upon it to carry all the consequences of this judgement notably having regard to the question of marriage, to risk in the contrary case, to fail in its mission of defense of the rights of man.

Making proof of an extreme prudence, the Court entrenched itself behind non-saying, the technical argumentations sometimes of an elliptic character being limited to demonstrate the existing differences existing between the British and French systems. Yet, it ensures clearly that the Court, even without saying it has made primarily the interest of the transsexual over that of the public order. This argument of public order more questionable than the number of transsexuals wishing to obtain the juridical modification of their sex and claiming the possibility of getting married is retained. Moreover, the Court abandons the reasoning according in which the operation of sexual conversion does not carry the acquisition of all biological characteristics of the opposite sex.

---

[175] During a long time the Court of French Cassation opposed itself to the majority of jurisdictions by depth which admitted the rectification of the mention of sex on the act of birth, on the grounds that **'transsexualim even when it is medically recognised, cannot be analysed in a true change of sex, the transsexual although having lost certain characteristics of his artificial sex has not acquired those of the opposite sex'**: Cass. Civs.. 1st. four judgements 21st. May 1990, Report Massip, JCP ed. 1990. The Court of Cassation, following the condemnation of the French government in the Botella case, operated a change of jurisprudence much expected, Ass. Plen. 11th. December 1992, JCP ed. 1993. The modification of the civil status of the transsexual is authorised, the principle of the respect due to private life justifying of the civil status of the latter, from now on the sex of which it took the appearance. Decision confirmed as a result, Cassation Civil 1st., 18th. October 1994 judgement no. 1322.

[176] However, the Belgian jurisdiction acknowledges to true transsexuals the possibility to change the mention of their sex and as a consequence to contract marriage with a person of the opposite sex: remarks collected (of informal manner) by Mrs. M.T. Meulders-Klein from the Colloquium on the juridical situation of the couple held in Reims on the 20-21 June, 1997.

In fact, the question of marriage is indissociable of the position taken in the Botella judgement, even if the argumentation of the Court is not on this point of the most clear. It seems to abandon the only reference to genetic sex, criteria advanced up to now to refuse to extend the benefit of the dispositions of Article 12 to transsexuals. The margin of appreciation of member States is widely dulled. Thus, it is permitted to suggest that the recognition of the right to marriage of transsexuals does not pass, as the Court affirmed by the abandonment of the traditional concept of marriage between a man and a woman, rather by an abandonment of this reference very restrictive to the biological sex where the chromosomic criteria predominates. In fact, the States which recognise to transsexuals having obtained the modification of civil status the possibility of getting married have not so far admitted the marriage of homosexuals.

Is it therefore legitimate to identify the sex of an individual to one of his components and to interpret Article 12 showing persons of opposite biological sex? Even in the transsexual syndrome an obstacle to marriage comes back to admit that beside an apparent civil status, there exists a real civil status which only counts for marriage.

ii. The Dangers of a Discrimination founded on Procreation

Retaining the biological criteria of the sex has an effect of reducing the social finality of marriage of Article 12 to ability of procreating. To this effect, the Court in the judgements Rees and Cossey has closely tied the right to get married to that of founding a family. Thus, considering that marriage with a transsexual is impossible from the only fact that the couple is sterile because the operation of sexual conversion has supposed his capacity of procreating with report to the original sex without creating an equivalent ability to report to the other sex comes back to introduce in the matrimonial rights, under colour of sexual condition, a condition of physical aptitude.

There will be therefore an unacceptable discrimination if only those who are capable of procreating had the right to a family life, which emerges inevitably on the 'creation of material slaves'. It is in fact completely conceivable that a French transsexual to which the French Court of Cassation refused this fundamental liberty which is the right for marriage seizes the Court of a request to the title of the violation of Article 14, combined with Article 12. Such an action may lead to a condemnation of France. During a long time, almost all the authors have assigned to marriage the following four aims: procreation, creation of the enforcement of alliances of group to group, the preservation even the

[177] In the case where the reality of the syndrome will be discussed, it is therefore possible to have recourse to a juridical expertise: it has as its aim to make appear that the person has acquired all the psychological and morphological characteristics of the sex which they claim. The research must equally determine the existence of a feminine or a masculine cerebral sex according to the considered case.

increase of the patrimony, and finally love. One has to acknowledge that these finalities have evolved. Procreation has certainly held a dominating place in the history of marriage[178], but in the Western model, procreation is not imposed any more, it comes from the choice of having or not children, procreation did not appear more than as the dominating factor of marriage.

Juridically the ability of procreating is not a criterion for the validity and the existence of marriage. From 1903, the French Court of Cassation[179] admitted that the default, the weakness or imperfection of certain organs characteristic of sex were without influence possible on the validity of marriage and as a consequence a spouse deprived of her internal genital organs could be considered as a woman as from when she presented the external appearances of the feminine sex. This jurisprudence is rich in teaching: one must keep to the indications which appear on the act of civil status marriage thus being valid if the two future spouses are shown as of different sex. The Italian Constitutional Court[180] in a decision of 1985, declared that a new marriage of the transsexual will not be inexistent because his procreative capability is not an essential criterion for the validity and existence of marriage. Thus the fact that a transsexual sex is shown on certificates does not hinder him or her from entering in relationships with other persons of the same or opposite sex.

The same it can be conceivable to think and sustain that these marriages which in reality concern very few people, are a real menace for the institution of marriage as a foundation of society, while other forms of marriage for which the procreating dimension is completely absent are admitted in certain States such as marriage by old people, marriage *in extremis*, or more, posthumous marriage. Transsexuals want that through marriage they concretise sentiments which lead to a normal existence, finalities which are also noble as the marriages for which only the patrimonial interest are at stake. Finally, retaining the principle of an apparent civil status to lead a private life and of a real civil status to enjoy the right of marrying brings about another prejudicial consequence for the transsexual who when operated asks for only one thing: live normally in a total harmony with his sexual identity.

iii. The Dangers of the Creation of a Third Sex

The detractors of the right to marriage of transsexuals put in advance the argument according to which Article 12 foresees that the right to marriage exercises itself in conformity with **'the national laws of the contracting States'**. The reservations to recognise the right to marriage of transsexuals are widely

[178] St. Augustine goes as far as to write that the natural and legitimate reason of marriage is procreation, unlike the Roman formulation. Summa Contras Gentiles, 4-78. However, the birth of children does not condition the marriage, the latter subsists even if there is not fertility.
[179] Cass. Civs. 6th. April 1903, **Dame G... vs G...**, D.P., 1904.
[180] Judgement of the 24th. May 1985.

strained by the fact of seeing the transsexual acquiring the status of masculine spouse or feminine spouse and claim as a consequence that of parent and adoption. The divergencies remain in that which concerns the questions of marriage Germany[181], Austria, Italy, Greece and the Scandinavian countries[182] admit the right to marriage of transsexuals, whereas Great Britain as well as Spain prohibit it. For lack of legislation to this effect, the general direction of the registers of the Spanish civil State has taken a resolution on the 20th. December 1991 which requires Officers of Civil Status to refuse marriage to transsexuals, without taking account of the correction carried on the act of birth.

In France, the question of marriage of transsexuals rests open since the judgements of the plenary assembly of 1992, the Chancellery not having given analogous instructions to the Officers of Civil Status. Therefore, in practice nothing appeared to oppose to the marriage of transsexuals being observed that the union is celebrated on the only production of an extract of the act of birth which only reflects the actual situation. The possibility for German transsexuals to contract marriage was admitted before the law of 1980[183] as a consequence of the modification of the mention of sex in the act of birth of a transsexual. Only a judgement of the 11th. October 1978 of the Constitutional Court of Karlsruhe held that this consequence does not transgress moral law that all individuals must respect in the exercise of the right to the free development of his personality in conformity with Article 2, first line of the constitutional law. In Greece, the licence of civil or religious marriage is given to transsexuals as soon as the following conditions are filled: an operation of sex change - the obtaining of a judgement which confirms that change of sex - the change of the act of birth - the issue of a new identity and showing the name chosen - the striking off of the register of man and woman according to the considered case[184].

It is, in fact, very important for the transsexual to be able to get married in his new sexual identity (whether this right is used or not). To judge the assessment carried by the assessments of Strasbourg being a question assuring the carnal aspect of marriage, the latter, is symbolised by the union of the sexes for which the aim is procreation. In face of the evolution of morals and of mentalities and to the progress of medicine, the majority of the member States do not have in mind, for the moment, to put into question this 'natural' evidence and the authorities of Strasbourg affix a certain prudence: No institution is at the same time more universal and more stable in its finality, no institution is more submitted to the changes that are produced in society. However, marriage cannot be reduced to the only function of propagation of the species. St. Augustine elaborated to this title, the doctrine of the

[181] Law on transsexuals TSG of 10th. September 1980.
[182] Sweden pioneered legislation on transsexualism in 1972.
[183] German law of the 10th. September 1980.
[184] Remarks picked from Miss Avgerion advocate at the Bar of Athens.

three goods of marriage: ***generandi ordinatio fides pudicitae , connubii sacramentum*** or according to the shortened formula: ***proles, fides, sacramentum*** (procreation, fidelity, sacrament). For his part St. Thomas D'Aquinas assigned to marriage procreation and mutual help between spouses. I do not apprehend that in this day and age the notion that procreation is the sole or major purpose of marriage commands significant support. While procreation, or the capacity to procreate, may be an aspect of many marriages, the definition of marriage by reference to that function ignores those facets or qualities which make up the essence of the marriage relationship, such as cohabitation, commitment, intimacy, and financial interdependence.

It is equally a rite of passage which stretches the course of human life and it has been known to individual liberty. But, it doesn't remain less that it is before everything a social institution. The transformation of the sexual encounter between a man and a woman is a durable union acknowledged socially supposes that the candidates to this adventure respect the rules designed to assure to marriage its institutional aspect, because marriage is not only an individual promise. It is also the structure of welcoming and of the education of children and to this title, it interests all the society.

CHAPTER 3

MORE LEGAL RESTRICTIONS REGARDING THE PERSON OF THE CANDIDATE TO MARRIAGE

I. Minors

Certain persons' right to marry is limited by their young age or their mental state or their incapacity. According to the UDHR the right to marry in Article 16(1) states: **'Men and women of full age ... have the right to marry and to found a family'**[185]. Minimum age required for marriage was the subject of the Recommendation on Consent to Marriage and Minimum Age for Marriage and Registration of Marriages adopted by the UN General Assembly on the 7th. November 1962. Principle II establishes that it cannot be less than 15 years, save where a competent authority can grant a dispensation for serious reasons. Following this several states recommended legal change. For example, Tanzania in Government Paper No.1 of 1969, paragraph 7 held that **'young daughters could not be removed from school, because they cannot be married until they reach the prescribed minimum age'**[186]. Child marriage was prohibited[187]. Article 6(3) stipulates that children cannot be betrothed prior to puberty[188]. Article 2 states the States should specify a minimum age for marriage. Higher minimum age prevent forced and arranged marriages. On the 16th. December 1966 the International Covenant on Civil and Political Rights held: **'The right of men and women of marriageable age to marry and to found a family shall be recognised'**. This speaks of 'marriageable age' instead of 'full age' as the UDHR and race, nationality and religious limitations are not mentioned. States are free to establish this age. So Pakistan[189] remarked that this is vague. In Article 12 of the European Convention on Human Rights[190] and Article 17(2) of the American Convention on Human Rights[191] speak of **'marriageable age'**.

---

[185] United Nations Declaration of Human Rights, General Assembly Res.217A, 10th. December 1948.

[186] The Law Reform of Tanzania. Report of the Commission on the Law of the Marriage Act, 1971, No.5, of 1971, Dar es Salaam, April 1994.The age under the Law of Marriage Act of 1971 was 18 for men and 15 for women.

[187] Young Hindu girls of high castes must marry before puberty. They only cohabit with their spouse when they can procreate. During the period 1891-1901, the average age at first marriage in India was 13 years for females and 21 years for males. In 1920 the Child Marriage Restraint Act fixed age at 14 and 18 years. Then in 1976 by an amendment the ages were changed to 18 and 21 years this time.

[188] In China the custom of child girl friends (*Tongyangxi*) is still practiced where a girl takes care of a young boy, her future husband. In the South of China where it is practiced law applies too which sets minimum age at 20 and 22 years of age on the 10th. September 1980.

[189] UN Doc. A/C.3/SR.1090-1091, p.153.

[190] The term **'full age'** is found in the Draft version, which was changed to **'marriageable age'** at the Conference of the senior officials in June 1950. The right to marry is provided for **'according to the national laws governing the exercise of this right'**.

[191] OAS, Off.Rec.OEA/Ser.L./V/II.23doc.rev2: Article 17(2): **'The right of men and women of marriageable age to marry and to raise a family shall be recognised, if they meet the conditions required by domestic laws, in so far as such conditions do not affect the principle of non-discrimination established in this Convention'**. Of the 22nd. November 1969 (signed) and in force on the 18th. July 1978.

A. Marriageable Age and the Right to Marry: A rule destined to affirm the Liberty of Marriage: A compulsorily respected rule

Marriageable age may be defined as a secular frontier behind which the attitude towards sex, thus procreation is concealed. It affirms the liberty of marriage of the future spouses. This is because this natural condition presents a certain interest with regard to the founding of the family, that it does not seem to be postponed.

All the European legislations impose a minimum age according to different restrictive clauses due to geographical, social and political differences. Southerners have an early puberty compared to Northern people; the development varies according to the social centres, marriage age of women produces consequences on demography. This is undoubtedly one of the reasons which led the authors of the European Convention and before them those of the UDHR of the 10th. February, 1948, not to fix an age limit themselves. They just posed the principle. But one is permitted to affirm that a minimum age is commonly found in all Member States of the Council of Europe.

Marriageable age presumes puberty, this is to say physical aptitude. Marriage is a carnal union as well as a spiritual union, minimum age is indispensable to the expression of free consent of each spouse. A personal act as marriage implies thus a certain minimum psychic and physiological maturity. The modern conception of marriageable age goes beyond those of Roman law and Canon law[192] which see marriage as a means of reproduction of the human species, the age of maturity being thus that of puberty. In the meantime one must not forget that marriage is an institution. It is the expression of morals and morality which characterise each period and all society. Thus, the contemporary social morality is opposed to the marriage of young children even if the latter live in a permissive society. The possibility of marriage before legal age is only exceptionally given in certain States these days. Public opinion considers that the ideal age to get married is between 20 and 22 years for girls and 23 and 25 for boys .

The condition of marriageable age defined as a presumption of impuberty is an obstacle if it is not respected in the formation of the marriage bond; it constitutes thus a measure of protection which sees above all to affirm the liberty to marriage. The perspective is aimed at avoiding hasty affairs whose aim is to affirm procreative functions of the couple. The jurists thus guided the institution of marriage along the ages, towards the ends which seemed to be just and good, having reconciliated the individuals

[192] Marriageable age was over 16 for boys and over14 for girls at Canon law up to the 31st. August, 1976.

interests with those of the institution of marriage. This explains without any doubt, the attachment of matrimonial legislation to this rule.

In a decision of the 7th. July 1986 in the ***Janis Khan vs. UK***[193], the European Commission of Human Rights affirmed that the obligation to respect legal marriageable age does not constitute a refusal to the right to marry even if the religion of the interested person authorises marriage at lower age. In this case the plaintiff a Muslim, a British citizen was charged of defilement of a minor in virtue of Section 20 of the 1956 law. In fact he contracted marriage with a young Muslim, aged 14½ years against her father's will. The marriage was celebrated according to the Islamic rite which authorises the marriage of a young Muslim without her parents' consent from the age of 12 onwards. The Commission considered the Khan request unfounded. Two principles result from this decision. The first is that marriage cannot be uniquely considered as a form of expression of thought, of conscience or of religion. In effect marriage is regulated by specific dispositions of Article 12 which thus filter the other rights which can be invoked under the Convention. The second principle is that marriageable age seen by Section 12 cannot be except that fixed by the national legislators: **'the legal marriageable age'**[194].

Can the liberty to marry be put back due to the distinction between the sexes which is observed by certain States to fix the marriageable age of the future spouses or still by strictness, thus making proof between them as to the threshold of age? In the first case can a breach of equality between the sexes be recognised by the European Court on the basis of violation of Articles 12 and 14 of the ECHR? Article 14 proclaims the prohibition of every discrimination based on sex. Now this right has no autonomous existence it must be put near another Article of the Convention in the present case Article 12. Thus Article 14 protects only against the distress between persons in the exercise of the guaranteed rights of the Convention.

The Court holds two cumulative criteria of the definition of discrimination. From one side, Article 14 is not applicable unless the persons are victims of a discrimination are in an analogous situation at law and at fact. But concerning marriageable age, it is generally established. The French legislator has conformed with this opinion, that a woman is more precocious than the man, she reaches maturity earlier. This is thus the physiology which justifies the gap between the man and the woman. On the other hand, a distinction between persons placed in analogous situations is not a discrimination unless it is in a measure where it lacks justification, i.e. to say if they make a defect, be it a legitimate and be it a reasonable relation of proportionality between the end and the means in question. In ***Phelps vs.***

[193] Khan vs UK (1986).
[194] Ibid.

Bing[195], the Supreme Court of Illinois held that it is unconstitutional and discriminatory to have different minimum marriageable ages for men and women. In another case ***Friedrich vs. Katz***[196], Judge Mangan held that there is a rational basis for the State to provide safeguards affecting the marriage of male minors.

Now it is undeniable that the protection of marriage and the family is an end pursued by all States. In addition the rule of marriageable age does not have absolute implications. In fact, this legal presumption of impuberty which prohibits marriage is not unquestionable. The circumstances of life can decide differently in this case, it is possible to obtain an exemption due to grave reasons, notably that of assuming the responsibility of a family. Thus in the hypothesis of a resort against these legislations actually in vigor, there is the possibility that they will be judged as acceptable under the condition that marriageable age protects a reasonable link with the concept of marriageable age of Article 12 guaranteeing the liberty to marry.

In English law the parties must be at least 16 and if less than 18 consent must be obtained under the Children Act 1989. This age restriction has been justified on the basis of early marriage and childbirth is **'socially and morally wrong'**[197]. Marriage in which one or both parties are under 16 will be recognised provided that neither party is domiciled in the UK and the marriage is recognised by the law of the parties' country of domicile[198]. In ***Pugh vs. Pugh*** (1951) a Hungarian girl W married and English domiciliary in Austria; a valid married in Austria and Hungary despite of her age. Four years later W sought nullity of marriage. Pearce J. allowed the petition: English law regulates the marriages of all those domiciled in England and under provision of an Act of 1929 (re-enacted as Section 2 of the 1949 Act) he could not lawfully enter into marriage with a girl under 16. In New Zealand a case arose where a 45 year-year-old widower (legally capable) married an English 19 year-old-woman (legally capable), his son's divorcee; a valid marriage in the eyes of New Zealand law. He could validly marry her only with a dispensation required under the Marriage (Prohibited Degrees of Relationship) Act (1986 UK) because she was under 21. Hence, the marriage is void[199].

In Algeria the minimum age for valid consent is 21 for men and 18 for women[200]. The law (unlike the law of the 29th. June 1963) does not impose sanctions in case of non-age marriage, whether against the

---

[195] **Phelps vs Bing**, Supreme Court of Illinois, (1974) 58 Ill.2d 32, 316 N.E.2d 775.
[196] **Friedrich vs Katz**, Supreme Court, Special Term. New York County, Part I, (1973)360 NYS2d 415, 318NE2d606.
[197] **Pugh vs Pugh** (1951): 2 All ER 680, Pearce J.
[198] **Alhaji Mohamed vs Knott** (1969).
[199] Law of domicile governing this marriage celebrated on the 1st. January,1993.
[200] Article 7(1), Algerian Family Code of 1984.

validity of the marriage itself[201] or against the parties to it or the Registrar[202], sanctions which were sometimes judicially enforced[203]. In Malta the issue of non-age marriages arose when the Marriage Bill was being discussed in Parliament[204]. It was left for the Judiciary to determine this on a case by case basis. In the UK it is held that a marriage is binding if one spouse is of age, though the other is still a minor when married[205]. Under our Marriage Act 1975 marriageable age is 16 years[206]. Prof. De Marco suggested that **'marriage can be initiated at a lower age for serious reasons'**[207]. This proposal did not pass. In my opinion a mature person has greater possibility of understanding the consequences of marriage and can defend himself against coercion, thus in my opinion the minimum marriage age should be higher than 16 and dispensation granted where required. Moreover, I opine that the prohibition of marriage by proxy is an effective measure to secure the free consent of both spouses. During the Parliamentary Debates of 1995 amending the Marriage Act 1975, the Hon. Michael Bonnici stated thus: ***'Dawk iz-zghazagh li ser jersqu kmieni ghall-piz taz-zwieg iridu jkunu verament ippreparati ... min se jizzewweg ta' sittax-il sena forsi ma jkollux maturita' bizzejjed u ghalhekk irid jintalab il-kunsens tal-genituri'***[208].

Many States give the right to marriage to the man and woman who are of marriageable age, but minors require the consent of their parents or legal representatives. In no case does this substitute the spouses' consent, but this is required on pain of nullity. In many States this nullity is a relative one and marriage should be confirmed, for example, in France, Germany, Belgium and other States. The condition of psychological maturity reinforces physical maturity (marriageable age) of the future spouses with the object of assuring matrimonial liberty. Finally, national legislators not to be arbitrary fixed this psychological maturity to full civil capacity. The parents should protect the will of the child against unscrupulous persons. On the other hand the parents may want to protect the family against undesirable intrusions, not to protect the person of the child. Thus the parents impeach a marriage by refusing it altogether. At Algerian law a father can prevent the marriage of his daughter if he considers her interest so requires and she has never been married[209].

---

[201] Article 3(1) and (2) of the law of 1963.

[202] Article 2 of the law of 1963.

[203] Cour de Mostaganem, 31st. May 1967, in Revue Algerienne No.4, 1968, p.1205.

[204] ***'Iera li min jizzewweg ta' inqas minn sittax-il sena z-zwieg tieghu hu null, imma mhux ser jibqa null eternament'***, Hon. Anton Buttigieg, Parliamentary Debates, House of Representatives, Third Parliament, First Session, Independence Constitution 1964, Vol.73, p.1577.

[205] Emery, G.F., The Law of Husband and Wife, Engagements to marry, divorce and separation, Effingham Wilson, London, 1929, p.1.

[206] Section 3 of the Marriage Act XXXVII of 1975, Chapter 255. By the 1995 amendments consent of parents or legal representative is required by Section 3(2) and (3) for a child under authority. Dispensation can be given by the Second Hall, Civil Court. ***'Bhala koncessjoni...l-organi kompetenti mir-restrizzjoni tas-Subartikolu 3(2).'***, Hon. Guido De Marco, Parliamentary Debates, Sitting 122 of the 24th. March, 1993, p.89.

[207] Extract from Sitting 441 dated 28th. July, 1975. Parliamentary Debates, House of Representatives, Third Parliament, First Session, Independence Constitution 1964, Vol.73, p.53. The Maltese Episcopal Conference in view of this Act decided that who has not yet attained 16 years of age may marry only with a special permission of the local Ordinary, under stringent conditions and upon express parental consent and for serious reasons.

[208] Hon. Michael Bonnici, Parliamentary Debates, Sitting 115 of the 9th. March, 1993, p.989.

[209] Article 12(2), Algerian Family Code of 1984.

At French law this authorisation is required if the future spouses are under 18 years of age. This authorisation is special, discretionary and absolute. The parents authorise the minor to marry a determined person identified in the authorisation. The law gives this absolute power to the ascendant. By Articles 148 and 150 any parent's consent is enough. Above all the Courts have no right to subsistute the parents in giving consent. Carbonnier remarks that young girls can follow their seducers without their parents' consent (Articles 340-2, 6342-6 Code Civil). Why do they need the consent to get married if so? In Kentucky[210] a minor under 18 shall acquire a parent's or legal guardian's consent to marry. Permission may be granted at the judge's discretion in case of pregnancy where a direct application to the District Court is made.

Certain legislation take account of the maturity of the minor or circumstances such as pregnancy and minors can request the Court[211] to reconsider the parents' refusal. In Germany[212] a minor can do this if he or she is 16 years of age or over and the other spouse is a major (18 years) and had got the authorisation of the legal representative. If the latter does not consent the minor has the right to go to the Courts if consent was refused without a reason. In Belgian jurisprudence the pregnancy of a fifteen year old is not a grave motive to legitimise systematic exemption of the prohibition to marry[213]. The legal age for marriage in the Ukrainian family legislation depends on the sex of the party concerned. The minimum age for marriage is 18 for men and 17[214] for women[215]. Exceptionally, for a good reason such as pregnancy of a young woman the marriage age may be lowered by a competent authority[216]. It seems that if a good reason is found couples can marry at any age.

National legislation and jurisprudence tend to reconcile the condition of marriageable age to the rule of civil capacity to contract marriage and the duties of the parents towards their minors. It is difficult to cut a line where a man and a woman are of age to consent to marriage one can oppose the argument favouring matrimonial liberty of minors to marry by using the dimension of whether this person understands what is a family. In many States including European States marriage is a juridical act affecting the person of the minor as well as his patrimony. Marriage means the end of parental authority too. It is not without danger to permit a minor to suppress parental authority conferred on parents by law.

---

[210] KRS 402.020.

[211] Application may be made to a New Zealand Family Court Judge for the consent to marry: **Re Wong vs Hatton** (1958) NZLR 955.

[212] *Ehe und Familienrecht*, Bundesministerium der Justiz, Januar 1999, ISSN 0177-1663. Internet - http://www.bmj.bund.de

[213] Trib.Jeun.Gand.25ch., 12th. October 1992: *Recueil Annuel de la jurisprudence Belge*, 1994, p. 1037, no. 8.

[214] Ukraine considered change to 16 years for women in the new Family Code.

[215] Article 16 of the Marriage and Family Code of Ukraine, renamed on the 23rd. June 1992.

[216] The Decree of the Præsidium of the Supreme Soviet of Ukraine, 'On Amendments to Article 16 of the Code on Marriage and Family of the Ukrainian SSR', Vidomosti Verhovnoi, Ukrainy, No.4 St.25. (1992).

II. Incapable Majors

If States admit that the founding of a family by marriage supposes psychological maturity presumed by age of civil majority they agree also on the necessary internal will to contract marriage. More than a question of maturity this is about a condition of consciousness and sanity which can be affected by the health of the candidate to marriage whatever his age. The 'yes' pronounced in front of the authority celebrating marriage should not be just a word coming from real and internal will, but also from the outcome of a mature state of the spirit.

In Russia by a decision of the 'Praesidium of Supreme Soviet Authority' of the 16th. April 1945 and Act 10 III of Fundamental Principles of Marriage and the Family of the 17th. June 1968 held that spouses should sign a declaration stating that they comment on their state of mental health to each other and that they know that a mental illness or weakness of spirit is a prohibition to marriage. Draconian legislations existed such as of measures of prevention in Hitlerian Germany and Denmark[217], Sweden[218] and Finland[219] where persons with mental disorders were sterilised or castrated. In America we find a the State of Arkansas permitting marriage of mentally retarded persons after the age of 45 years only. In the UK the sterilisation of a minor or a mentally retarded adult requires prior sanction of a High Court judge[220]. The patient's interest are foremost as held in ***Re S (Adult Patient: Sterilisation)*** decided on the 18th. May, 2000[221].

Certain juridical systems in Europe accord persons suffering from mental problems (who are 'weak' in spirit) juridical protection of their matrimonial liberty. Even incapable majors have in principle the right to consent to marriage, but on the condition of requiring the consent of their legal representatives under pain of nullity. In the US we find that a statue in Dakota prohibits marriage of a woman under 45 or a man of any age, unless he marries a woman over 45 if he or she is **'a habitual criminal, a mentally deficient person, afflicted with hereditary insanity or with any contagious disease'**[222].

At French law marriage has to be authorised by the representative of the major under tutorship and or curatorship[223]. In Austria persons who have a limited capacity should obtain the authorisation of their

---

[217] Abrogated by a Law of the 13th. June 1973.

[218] Law on Sterilisation of 1934, expanded in 1941 and abrogated in 1975. Consent of the person affected was not required.

[219] Finnish Marriage Act, Marriage Decree, Translations of Finnish Legislation, Ministry of Justice, Helsinki,1992. *Vide* 'Finland: the New Marriage Act enters into force', M.Savolainen, Journal of Family Law, 1988-1989, 27, p.127-144, University of Louisville.

[220] Practice note official solicitor to the Supreme Court: Sterilisation, June 1996. *Vide* **Re B (A Minor)** (Wardship: Sterilisation) [1988].

[221] Internet - http://www.lawreports.co.uk

[222] This is an 'old line' statute No. Dak. Cent. Code 14-03-07.

[223] Article 506 and 514 of the French Civil Code. Relative nullity ensues only upon demand by the major himself or the curator. *Vide* Recueil Dalloz 2000, *Sommaires commentés*, p.103. In default of these authorisation could be sought from the Judge des Tutelles.

legal representative and that of the person who takes care of them and educates them[224]. In Norway the interdicted should obtain the authorisation of his tutor[225]. In the Netherlands who is under curatorship because of prodigality or alcoholism can marry with the consent of his curator and tutor. This consent can be replaced by the authorisation of the Court (*Kantonrechter*) whose authorisation is always necessary for the marriage of the interdicted due to mental disorder. This authorisation is needed to ensure that the incapable is conscious of the commitment he is taking with regard to the other person. This legal restriction is aimed at protecting the incapable as well as his future spouse. One should not forget that consent should be personal, clear and free. Moreover, no marriage is possible for a mentally handicapped person who is incapable of determining his or her free will or of understanding the meaning of the statement[226].

A common condition is the internal will to contract marriage and the possibility of perceiving its aims[227]. The fact that a tutor or curator consents to the marriage of an incapable major or an interdicted person does not lead to the presumption of validity of consent of the latter. The right to marry is a fundamental right which lunatics have too. The French law[228] admits the validity of a lunatic's marriage contracted in a lucid interval. By Article 174 members of the family can oppose to the marriage. In Gabon[229] marriage in a lucid interval is admitted as it is in French law. At Italian law[230] and UK law the position is stricter than this. The expression of consent by the lunatic poses two problems - the finding of a mental disorder risking to lead to nullity of the marriage and that of proof. In a judgement of the French Court of Cassation of the 23rd. May 1980 the theory of lucid intervals and presumption of sanity was abandoned. An old man married a year before his death and was put under tutorship three months after his marriage. His brother held that such marriage was null due to mental disorders. The Parisian Court of Appeal based itself on external evidence to find that he was suffering from dementia leading to nullity. The Courts held that it was up to the 'wife' to prove the contrary. The proof of absence of consent was encumbered on who contests the validity of marriage and consequently marriage is valid if at the moment of celebration the future spouse is not insane.

This is not so in many States where mental disorders are an impediment to the liberty to marry[231]. In Germany the theory of lucid interval is held by Article 2 of the German law regarding marriage such person can marry only if this state is temporary. Many States preferred to focus on the marriage act

[224] EheG Articles 3(1) and 3(2).
[225] Article 3 of the law regarding marriage of the 31st. May 1918.
[226] Article 1:32 of the Dutch Civil Code.
[227] Article 97 Swiss Civil Code, Article 180 French Civil Code and Article 89 of the Turkish Civil Code.
[228] As in Canon law at French law insanity is a vice of consent rather than an incapacity to marry.
[229] Article 204.
[230] Articles 85 and 119 of the Italian Civil Code.
[231] Shaman, 'Persons Who are Mentally Retarded: Their Right to Marry and Have Children', 12 Fam.L.Q.61 (1978).

itself rather denying the person right to marry. In the Netherlands marriage cannot be contracted if a party suffering from a mental disorder cannot ascertain his will or to understand the sense of his declaration[232]. In Greece the incapable cannot contract marriage[233]. In Italy the person who suffers from a natural incapacity to understand and intend even if temporary cannot give his consent to marriage[234]. At UK law persons who are insane cannot contract marriage not even during lucid intervals.

In Belgium the Court of Cassation held that a person from whom the management of his affairs were taken could not validly consent to a marriage[235]. A severely mentally retarded is considered as a minor under fifteen years[236]. Thus he cannot contract marriage whatever his age since he cannot satisfy the marriageable age fixed at law[237]. Finally, Article 138 of the Belgian Judiciary Code gives the public ministry the right to opposed to a marriage of two persons where one seems to be affected by a congenital mental deficiency rendering him incapable to understand the implications of marriage. Jurisprudence has judged that no contravention of Articles 8 and 12 of the ECHR occur once Belgian law prohibits such marriage. The judge still can go into the capacity of the future spouses with a mental handicap[238]. Here the institution itself is protected not matrimonial liberty. The belief of transmission of mental disorders to descendants can be equally advanced as justifying the prohibition of such marriages.

In Spain legal problems and administrative decisions of the Register of Civil Status highlighted the nature of the right to marry as a fundamental human right recognised under Article 32 of the Constitution[239]. According to Article 44 of the Civil Code **'the man and the woman have the right to contract marriage as provided in this Code'**. At Spanish law soundness of mind is no precondition of marriage, though the doctrine is to nullify marriages of the mentally troubled. An interesting case arose in 1994[240] where the Judge favoured the marriage of a woman of a mental age of 14 years. Medical opinion was that marriage would be beneficial. The Public Ministry opposed this marriage and the Directorate General rejected this opposition, because the *jus nubendi* is recognised in the Constitution as a fundamental human right and the freedom to marry enjoys the benefit of the doubt.

---

[232] Article 1:32 B.W.
[233] Article 1351 of the Greek Civil Code.
[234] Article 85 of the Italian Civil Code.
[235] Decision of the Belgian Court of Cassation of the 21st. February 1895, by law of the 19th. June 1973.
[236] Article 48-7 of the Belgian Civil Code from a law of the 29th. June 1973.
[237] Article 144 of the Belgian Civil Code.
[238] Civs. Namur decision of the 19th. September 1990. In Malta a marriage of an infirm of mind is void (Section 4 of the Marriage Act).
[239] Article 32(1): **'The man and woman have the right to contract marriage in full legal capacity'**.
[240] Resolution of the 12th. March 1994.

In another case a mother opposed the marriage of her adult daughter, judicially declared incapable. The Judge held that such persons can perform certain civil acts and in this case the required conditions for the validity of a civil marriage were fulfilled. Consequently, the resolution confirmed the Judge's decision to permit the celebration of the patient's marriage[241]. A contrary decision was reached by Resolution of the 24th. March 1994. Here medical opinion, the Judge and the Public Ministry did not reach any decision of incapacity though they refused marriage on the basis of Article 56(2) of the Civil Code on the ground that the person lacked capacity to give consent to a marriage.

In Delaware[242] a marriage of a person of any degree of unsoundness of mind is prohibited and a patient in a mental hospital may apply for a marriage licence or a certificate of the superintendent of the hospital stating that such person is fit to marry. Even in Kentucky[243] a marriage is prohibited with a person who has been adjudged mentally disabled by a court of competent jurisdiction. Finally, in Maine[244] marriage is prohibited with persons under disability - a person impaired by reason of mental illness or mental retardation to the extent that that person lacks sufficient understanding or capacity to make, communicate or implement responsible decisions concerning that person's property or person is not capable of contracting marriage.

III. The State assures both a Personal and an Institutional Dimension of Marriage

A. Consent

Marriage is a juridical act *intuitu personae* and consent can be protected against vices of consent. The will of each spouse to marry should be personal, conscious, free and a serious one. This will should be free of vice. Marriage celebrated without consent is void *ab initio*. Marriage is a juridical act of a particular nature. The theory of vice creates a double problem - of proof and extent of vice. The spouse who starts an action for nullity of marriage should prove a physical or moral pressure leading to fraud,

---

[241] Resolution of the 18th. March 1994.

[242] 13 Delaware Code Annotated '101 (1996).

[243] Section 2(1) KRS 402.020 (1998).

[244] 19 A Maine Revs. Stat. Ann. 701 (1997). At Maltese law **'infirmity of mind'** makes a person **'incapable of contracting marriage'** therefore, the capacity to contract standard is used - Section 4 of the Marriage Act 1975. *Vide* **Azzopardi vs Azzopardi** -30/6/1980, **Catania vs Catania** (1982) and **Difesa vs Difesa** (1981). Canon law uses the ***'praesumptio stat pro sanitate'*** where a doubt as to infirmity of mind arises. A person under the effect of drugs or alcohol can also fall under the **'lack of sufficient use of reason'**. It should affect the will and consciousness of a contracting party to lead to a case of nullity. Both Canon law (Canon 1095 ***'usus rationis'***) and Maltese law state 'sufficient' thus a person who is not completely infirm of mind can validly consent to marry. **'Sufficient knowledge and sufficient deliberation of the will is required for the validity of consent'**. *Vide* Coram R.P.D. Funghini, Rotal Jurisprudence, 19th. December, 1994, p.97 (a case concerning nullity due to incapacity to accept and fulfill matrimonial obligations due to homosexual tendencies of defendant).

error or violence[245]. At French law vices of consent cannot be only determined by the judges of the Court of Cassation, but on a case by case basis[246].

Causes of nullity include - the ignorance of husband's impotency[247], partner's insanity[248], religious sentiments[249] and grave dishonesty[250]. Apart from social qualities there are sexual and mental health too. The causes of error about personal qualities are divided into three - physical qualities (age, virginity and impotency), moral qualities (maliciousness, homosexuality and quarrelsome person) and finally mental qualities (mental illnesses). Fraud and violence lead to judicial dissolution upon the spouse's demand not of a third party as in Austrian law. Italian law is one of the most detailed in Europe. Error should be essential only and only in the following cases - physical or psychic illness, sexual anomaly which impedes normal conjugal development, when a spouse is condemned for a voluntary criminal offence of not less than five years imprisonment or one related to prostitution of not less than two years, where husband finds out that his spouse is pregnant from another man. Fraud is not included but provoked error substitutes this. Maltese law[251], Swiss law[252] and Turkish law[253] are largely inspired by Italian law. Swiss law holds fraud which put a spouse's health in danger too[254].

The integrity of consent and the marriage institution should be complementarily protected in the name of matrimonial liberty. In the absence of Strasbourg jurisprudence regarding nullity of marriage by vice of consent it is without doubt that it will give a wide evaluation to national legislators. All European juridical systems accord a minimum protection to the integrity of consent, assuming the protection of matrimonial liberty by recognising vices of consent. The European Court can condemn a State and oblige him to protect and assure matrimonial liberty in case of non-protection of the integrity of consent.

At Islam Mohammed imposed a requirement that the girl shall express her consent by spoken word. Later traditions hold that the virgin could not dare manifest her desire and a sign of acquiescence was enough. Hence the simple absence of refusal is enough. Only widows and repudiated women were expressly consulted upon the proposal of remarriage. In Algeria the woman cannot consent to her own marriage in front of a group of men she does not know, raising the question of genuine consent and

[245] Section 19(1) of the Marriage Act 1975.
[246] Nullity of a marriage between adults cannot be based on moral, religious, family or personal order, but on a prohibition of marriage as held by the Cour d'Appel of Versailles, 14e.Ch. on the 15th. June, 1990 in **M. Jean-Louis X... vs Florence X... et.**, Recueil Dalloz 1991, Jurisprudence, p. 268.
[247] TGI Grenoble-13th. March and 20th. November 1958. The Marriage Registrar can oppose marriage of an impotent- Section 7(7), Marriage Act 1975.
[248] TGI Vesoul-28th. November 1989. This cause is found at Maltese law too.
[249] TGI Mans-7th. December 1986.
[250] TGI Paris-23rd. March 1982.
[251] Section 4 of the Marriage Act, 1975.
[252] Article 124(2) of the Swiss Civil Code.
[253] Article 116 of the Turkish Civil Code.
[254] Article 125 of the Swiss Civil Code.

whether she may be forced into marriage. According to Article 10(1)[255] the exchange of consent to marriage takes place in a 'contractual meeting' in which both the man and woman must clearly and unequivocally express their consent to the marriage. The Draft Charter on Human and People's Rights in the Arab World[256] mentions the right of the intending spouses to enter into marriage of their own 'free will' and with 'full consent' in Article 14 as one of the social rights.

B. Intention to Marry

It is up to the legislator to fix rules regarding the validity of a marriage. Western law, influenced by a Roman-Canonical tradition the concurrence of a man and a woman's intention to marry is an essential element in the formation of marriage. Consent to marry shall be inspired by an intention to marry. It has been difficult to insert moral and social aspects of marriage in a juridical definition of marriage. The intention to marry has a residual place in this context. Marriage is both a social act and an individual's act. People who marry know that they are submitting themselves to juridical rules fixed by the legislator. Hegel defines marriage as **'two persons who renounce their independent personalities to become a single personality. Marriage is the first manifestation of the family, the way of being in a collective existence'**. The determination of conjugal intention is difficult because of a lack of legal definition of marriage and its essential ends in modern civil laws. Though the permanency of consent can contribute to this finding.

In the ***Hamer case***[257] the Commission held the right to marry in accordance to Article 12 even when the partners cannot cohabit, since the right to marry is a right to form a generating association of a juridical nature between a man and a woman independently of the conjugal obligations. Commission held marriage, procreation and cohabitation as separate and not essential in marriage reality. Still it held that procreation is a fundamental condition of marriage and an essential aim too. In Rees and Cossey the European Court held **'in guaranteeing the right to marry Article 12 sees traditional marriage between two persons of different biological sex (...) the end consists essentially of protecting marriage as a foundation of the family'**. This last conjugal conception is shared by most European States. For the French Court of Cassation the existence of a conjugal union is the essence of marriage. Loysel held thus: ***'Boire, manger, dormir ensemble, c'est mariage ce me semble'***[258].

[255] The Algerian Family Code, 1984.
[256] Convened by the International Institute of Higher Studies in Criminal Sciences in Syracuse, December 1986.
[257] Hamer vs. UK (Report of the Commission of the 13th. December 1979.
[258] Roland H. & Boyer L., *Locutions Latines et Adages du Droit Français Contemporain*, L'Hermes, 1978, no.25, p.100.

C. Forced Marriages: persons in marriage prisons

The UDHR in Article 16(2) states: **'Marriage shall be entered into only with the free and full consent of the intending spouses'**. Moreover, CEDAW Article 16(1)(b) states: **'State parties shall ensure on a basis of equality of men and women ... the same right freely to choose a spouse and to enter into marriage only with their full and free consent'**. No major world faith condones forced marriage. The freely given consent of both parties is a prerequisite of Christian, Jewish, Muslim, Hindu and Sikh marriages. Certain people use religion to justify forced marriage. This cannot be justified on religious or cultural grounds. For example, traditionally in China the boy and girl had no say in the choice of a spouse and only the heads of the families signed the marriage contract. In Bangwa refusal to marry a selected person occurs and appeal to the power of the chief invariably leads to upholding the parents' authority, then elopement may be resorted to, but if caught torture is executed on the offender[259].

In English law the Marriage Act 1949 and the Matrimonial Causes Act 1973 govern marriage in England and Wales. People under 16 may not marry and parental consent is required for those under 18. Marriages concluded abroad satisfying the proper formalities and legal capacity there are generally recognised. The Matrimonial Causes Act 1973 states that a marriage shall be voidable if **'either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise'**. In ***Hinari vs. Hinari*** duress is simply: **'the mind of the victim has in fact been overborne ...'**[260]. The Court's wardship powers were used in ***Re KR (a minor)*** to protect a young girl from a forced marriage overseas, where she was being held against her will, and to facilitate her safe return to the UK[261].

One must distinguish between arranged[262] and forced marriages. In the former there is choice so one can refuse to marry, while in the latter there is no choice. In 2000 a UK Working Group on Forced Marriage[263] held that most of the cases in the UK come from the Indian Sub-Continent. Such marriages may end with life-long domestic violence and/or suicide. Awareness must be promoted by the State because victims usually cannot institute actions or escape the situation. In arranged marriages the spouses have a say. Among the Huron of Ontario a boy's parents suggest a prospective spouse for their son. This reminds me of Fiddler on the Roof when Tevye asks Golde, **"Do you love me?"** Golde's response was a stunned, **"Do I what?"** Tevye persists in his question and Golde finally relents; with some insight and resignation she responds that after living together for 25 years, after raising

---

[259] Brain R., Bangwa Kinship and Marriage, Cambridge, University Press, 1972, ISBN 0-521-083117.
[260] **Hinari vs. Hinari**, (1984) FLR 232 CA.
[261] Re KR, 1999 (2) FLR 542.
[262] Arranged marriages are unions of lineages not individuals only; such as in Yoruba Marriages (Lagos) New Guinea and Zaire.
[263] 'A Choice by Right', Report of the Working Committee on Forced Marriage, 2000.

children and creating a life together, she **'supposes'** she loves her husband. And Tevye declares that he **'supposes'** he loves her too.

D. Fraud and Mixed marriages

A law in France encouraged *mariages blancs* which law removed the possibility of control over foreign marriages[264]. On the 2nd. August 1989 a circular of the Ministry of Interior warned civil administrators of marriages of convenience. These marriages hinder the marriage institution itself. These partners do not violate marriage dispositions, but they abuse the legal possibilities which are offered to them. The acquirement of a residence permit and nationality are ends sought by the foreigner of a fictitious marriage. Unfortunately, foreigners who enter into real marriages are victims of deportation too. In ***Stoner vs. PM*** a foreigner married to a Maltese woman was denied freedom of movement and was sexually discriminated since normally women were not deported[265].

Belgian law invalidates marriages against public order. Certain spouses are victims of such marriages arising from fraud. The penalty after marrying is nullity. At Austrian law under Article 23(1) of the Federal law on marriage a marriage is null if a husband marries to acquire a family's name or Austrian nationality without an intention of forming a community of spouses. Even in Canon law simulation is a cause of nullity of marriage. Many countries hold the same under abuse of law in Switzerland,[266] defect of consent in France and also absence of a cause. French law does not admit of the canonical position regarding nullity of marriage due to fictitious consent. Once a marriage is annulled can nationality in favour of a foreign spouse be removed from his favour? A spouse in good faith is protected by a putative marriage, while the partner in bad faith shall pay interests and damages to his/her partner. It is against the right to found a family and discriminatory to take away somebody's nationality.

In Europe Germany, Switzerland, Turkey and Greece do not make null such marriages on the basis of simulation. Just to mention the Greek position - a marriage can be annulled only in the following cases: marriage of a person under marriageable age (18 for a male and 14 for a female) and consent is not theirs[267], marriage contracted by a minor without a parent's consent or of tutor of curator or Court authorisation[268], marriage of an incapable person[269], marriage during the subsistence of a previous

[264] Law no.81-973 of the 29th. October 1981.
[265] The Times, 23/2/1996 law report on p.15. **Stoner vs PM.** First Hall 9/10/1995 and Constitutional Court 22/2/1996.
[266] The Swiss Civil Code by Ivy Williams, Volume I, reprint by Remak Verlag Zürich, 1976.
[267] Section 1350 of the Greek Civil Code.
[268] Section 1352 of the Greek Civil Code.
[269] Section 1352 of the Greek Civil Code.

union[270], marriage between relatives by consanguinity in the direct line ad infinitum and in the collateral line up to the fourth degree inclusively[271] and marriage of persons related by affinity upon certain conditions[272] and marriage of adopting and adopted or descendants of adopting persons[273]. This subsists even when adoption is dissolved. This latter idea is missing from out Civil Code. I opine that it should be introduced at Maltese law.

In Greece there is no particular text concerning the conditions of giving of residence permit for the foreign spouse, but in practice is authorised from three months to one year renewable. Article 4 of the Code of Nationality does not give nationality upon marriage, but facilitates naturalisation. In Turkey only foreign women who marry Turkish male nationals acquire nationality[274]. In Germany a residence permit is obtained after four years of cohabiting or after three years in serious cases of necessity[275]. Naturalisation is not automatic, four conditions must be satisfied by the stranger - (1) five years of residence of which two are of cohabitation or three of cohabitation and residence, (2) not ever convicted, (3) enough means to live and lodging. (4) should renounce to his original nationality and (4) he should integrate with society without difficulty[276].

In Switzerland a foreign spouse of a local spouse can get authorisation to reside if the marriage subsists, but not necessarily a community of life[277]. On the other hand a foreign spouse of a foreign spouse can get a residence permit if the conjugal community subsists. After five years of uninterrupted regular residence he will get right to establish himself[278]. In order to get Swiss nationality the conditions are various. If a foreigner is married to a Swiss and lives there he should live for five years and three years of which of conjugal community life and if they live elsewhere he should prove bonds with Switzerland and six years of conjugal community life.

These States have disconnected family law rights from advantages arising from nationality. Other States tend to maintain the principle of nationality of the family of the members which compose it to keep its unity. These States use other means to dissuade fraudulent persons independently of nullity of marriage. The majority of European States take immediate administrative action upon marriage fraud without waiting for a judicial judgement of annulment. Belgium, Italy, Greece, Turkey do not do this. In

[270] Section 1354 of the Greek Civil Code.
[271] Section 1356 of the Greek Civil Code.
[272] Section 1357 of the Greek Civil Code.
[273] Section 1360 of the Greek Civil Code.
[274] Article 42 of Law no.1587-1974 regarding population.
[275] Section 23 of a law regarding foreigners of the 29th. July 1990.
[276] Section 29 of the law of 22nd. July 1913 about nationality.
[277] Article 7(1) of Federal law of the 26th. March 1931 regarding the residence and establishment of foreigners.
[278] Article 7(2) of the same law.

France the Conseil d'Etat in 1992 held that a mayor can refuse residence permit in case of a fictitious marriage. Case law about this is found well before 1992[279].

Fraud can be sanctioned prior to marriage where it can be detected. A marriage registrar has the possibility of refusing to celebrate marriage. Greece, Turkey, Italy and Portugal he cannot refuse since he has no right to check about it once his duty is to celebrate marriages. At Swiss law he is obliged to verify the matrimonial capacity of the spouses[280]. In Germany and Malta[281] a foreigner should present a certificate of the authorities of his State attesting that he has no impediment to marry in his State[282]. The Officers of Civil Status are not obliged to check about the regularity of residence except in Italy and the Netherlands, since it is not a condition of validity of marriage. Marriage is not null if there is an irregularity and a stranger contracted marriage. In the Netherlands the Officer of Civil Status can check the sincerity of matrimonial intention and can get information from the immigration police about the future spouse. In case of a possibility of damage to public order he can refuse to celebrate such marriage. In Austria and in Spain if the Officer of Civil Status has doubts with regard to matrimonial capacity of a future spouse or regarding the regularity of documents marriage can be refused and both in Austria and in Spain the person who is refused marriage can appeal from the decision.

In Germany the partners' will can be verified but he cannot refuse to celebrate marriage, unless the abuse of law is manifest, i.e. residence permit is sole motive and not spousal union. This was affirmed on the 2nd. April 1982 in the Supreme Court of Bavaria. In Switzerland the Officer has the power and duty to refuse such marriage celebration and can oppose it if a cause of absolute nullity exists[283]. In Belgium in case of a marriage candidate subjected to an order to leave the territory the Officer of Civil Status must contact the Administrative Officers of foreign affairs to check the reasons for the measure ordered and to pose them side by side the interest of marriage. Moreover, following a circular of the 1st. July 1994 the Officer can refuse if the defect of matrimonial intent is manifest or in case of doubt he can postpone the marriage.

E. Opposition to Marriage

In Belgian law the opposition to marriage is found in Articles 172-9 of the Civil Code. The Procurator of the King can according to Article 138 of the Judiciary Code inform the Officer of Civil Status about

[279] TA Orleans - 5th. February 1991 and TA Besanzon - 3rd. October 1991. Article 21(2) of the Code Civil, the dispositions of law of the 7th. May, 1984 and those of the 22nd. July, 1993 were steps towards investigation of marriages of convenience.
[280] Articles 150 plus of the Swiss Civil Code and Ordinance of Civil Status.
[281] Not required at law but introduced by the Marriage Registrar.
[282] Article 10(1) of a law of the 20th. February 1976 regarding marriage.
[283] Article 109 of the Swiss Civil Code.

the opposition if public order is at stake and marriage would be absolutely null[284]. At French law if the Officer of Civil Status[285] foresees serious indications of a marriage susceptible to nullity under Article 146, then he can inform the Procurator of the Republic. He has fifteen days (maximum of one month's time) to give a go on or stop him. The Public Ministry can oppose marriage only in defense of public order and can invoke defect of consent and not vices which can change it[286]. The search for matrimonial intent if it appears necessary to prevent simulated marriages is not easy. The protection of social order and of the marriage institution should not be assured at the detriment of the persons' intimacy and matrimonial liberty, though there is a suspicion of fraud, because both interests which seem to be antagonistic are also complementary.

The verification of matrimonial intention can be divided into two State bodies - (1) administrative authorities and (2) judiciary authorities. In France, the Officer of Civil Status cannot refuse to celebrate a marriage upon his own initiative. Obviously he can refuse to marry somebody who is already married or under age. If the Officer of Civil Status has doubts regarding the sincerity of the union or suspects a marriage of convenience he is obliged to inform the Public Ministry, the Procurator of the Republic according to Article 175-2 of the law of the 20th. December 1993[287]. On the other hand he can be prosecuted if he acts in excess of his powers, since thus he exposes fundamental liberty to unjust obstruction. In certain States the powers of the Officer of Civil Status are wide as in Germany, Belgium, the Netherlands, Spain and Austria. He can go into eventual prohibition of marriage and can refuse the celebration of marriage such as in the case where there is a big difference of age between the future spouses, a notorious linguistic incomprehension, the presence of a third party and irregularity in the spouses' residence permit. Can one conclude that these laws do not respect the liberty to marry?

In Malta all is required under the Marriage Act of 1975 are a birth certificate and a declaration required under Article 18 of the same Act and a certificate that the foreign spouse-to-be is free to marry in his State of origin. The latter is a matter of practice not at law. It seems that these States want to deter fraud from marriage, though Malta's laws seems to be short of protection of the marriage institution as we find in other States' laws as we have seen above. It is easy for foreigners to buy Maltese wives with some hundreds of Maltese Liri[288]. An Egyptian man of 26 years was refused citizenship after marrying a 61 year old Maltese woman and applying for citizenship at the immigration office. In fact the need

[284] Civs. Liège decision of the 16th. April 1992.

[285] Article 175-2 of the French Civil Code: *Vide* Cour d'Appel, First Instance, 13th. November, 1998, held that in case that the Procurator takes no decision within the established time marriage can be celebrated without any obstacle.

[286] Judgement of the Tribunal de Grand Instance de La Rochelle of the 2nd. May, 1991, **Antonio S... et. vs Public Ministry.**

[287] The Tribunal de Grande Instance of Toulouse has judged not illegal the action of the Officer of Civil Status of refusing marriage until a decision of the Procurator of the Republic in virtue of a Ministerial circular of the 17th. July, 1992: Cass. 15th. October, 1993.

was felt to reduce the number of people obtaining citizenship through marriage of convenience. It was on the 1st. August, 1989 that the law gave the opportunity to foreign spouses married to Maltese persons to apply for Maltese citizenship while refusing their own. The law regarding freedom of movement has been changed on the 10th. February, 2000 and now foreigners can obtain Maltese nationality after 5 years of cohabiting from marriage[289]. Certain people can wait even more just for this purpose. I opine that amendments to the Criminal Code should be introduced too instead of just in the Civil Code, special laws and the Constitution[290].

In the case ***Khanan vs. UK***[291], a decision of the Commission held that the Immigration authorities never contested the validity of marriage of spouses and held that the principal end of marriage was to emigrate to the UK according to the 'primary purpose rule', which rule was repealed in June 1997 as any spouse had to prove that marriage was not a means to obtain immigration. In certain cases the Commission held that only the judiciary authorities can enter in the substance of marriage and the possible irregularities. In Belgium the Public Ministry could intervene in private life matters to protect public order, thus acting to protect the marriage institution against simulated marriages[292]. The Court of Appeal has interpreted Article 12 as conferring a right to marry **'only when circumstances permit'**, so rejected the claim of an illegal immigrant detained with a view to deportation that the authorities should provide facilities for him to marry at a local registry office[293].

The judge can deduce from pre-marital attitudes of the spouses what they intended. The proof of default of matrimonial intention is difficult, but the public ministry should make such proof. In order to find the truth certain investigations can subject the spouses to intrusion in their family life. Neither the judge nor the relatives can enter in the intimacy of the spouses' private life. Above all marriage is a personal choice, a private affair. So how far can national authorities intrude in private affairs? National authorities take into consideration many other factors which attack matrimonial liberty and prohibit marriage in case of the non-fulfillment of legal conditions of marriage - difference of sex, absence of bigamy etc.. All interference should be necessary and must have an adequate end. Hence, the proportionality principle must be used. If a celebration of marriage is prohibited due to a doubt about

---

[288] Public Registry statistics of 1996 and 1997 show that 111 Maltese girls married North African men. *Vide* The Times p.48 of 13/4/1997. Over 900 married foreigners between 1995 and 1999 according to a Rep. in The Times p.52 of 1/4/1999. This year up to the 28th. February,2001, 40 Maltese married a foreigner, PQ No.24318, answered by the Hon. T. Borg, on the 12th. March,2001.

[289] *Vide* Parliamentary Question 30563, 24th. January, 1996 and The Times, 27th. December, 1997 'Curbing Marriage of Convenience', p.1. At French law a foreigner can obtain French nationality after 6 months of marriage according to Article 37(1) of the Code Civil modified by law no.73-42 of the 9th. January, 1973 (Article 21) regarding the acquisition of French nationality by marriage. The law of the 22nd. July, 1993 restricts this right, but modified to respect the liberty to marry by a law of the 16th. March, 1998. Hence the Ministere Public can contest the registration in case of fraud. *Vide* Demain la Famille, Notaires de France, 95th. Congress, Marseille, 9-12 May 1999.

[290] The Times p.13 and l-Orizzont p.5 of the 8/3/2001, from the Parliament reports.

[291] Appl. No. 14112/88, decided on the 14th. June 1988.

[292] Bruxelles - 17th. June 1994, *Recueil Annuel de Jurisprudence Belge*, 1996, p.887, no.2.

[293] **R. vs Home Secretary *ex parte* Bhajan Singh** (1976) QB 198.

the reality of matrimonial intent of the spouses, there can be a direct attack on matrimonial liberty implying a violation of the right to marry.

The European Court is very protective with regard to matrimonial liberty. In ***F vs. Switzerland***, the Court considered that the temporary prohibition of remarrying brings harm to matrimonial liberty. In this case applicant who had divorced three times was ordered by the Court of Lausanne a temporary prohibition of three years not to marry according to Article 150 of the Swiss Civil Code. The Court held that the stability of marriage is a legitimate end of public interest, but the efficacy of the means used did not convince it and Court held the measure in breach of Article 12 of the ECHR as it hinders the right to marry itself as it was disproportioned to the end pursued. It is unjust to restrict anybody's right to remarry once the right to divorce is available at national law. This is not the same as in the case of Johnston (in detail in Chapter 5) where no right to divorce was found at national law, thus the State could restrict the right to remarry of its citizens.

The Swiss Federal Court reminded the inferior Courts that certain practices had to be curbed such as the presentation of documents showing the marriage candidates' civil status[294]. It was enough to show a minimum of matrimonial capacity so that publication of marriage can go on. The practice was that a foreigner was usually refused publication of marriage, since the Inferior Courts held that he envisaged marriage as a means to a Swiss residence permit[295]. The exercise of the right to marry is primarily a private affair of the couple. The conception of marriage as a traditional institution is changing into the recognition of unions of fact called concubinage and single parent families. The family is based on marriage and is threatened as held by Pope John Paul II in 1994, the International Year of the Family.

IV. The Celebration of Marriage

A. The Obligation of Respecting a Ceremonial

The celebration of marriage is known in history and in the geography of different systems. In spite of the diversity of rules the matrimonial rite occupies an important place tied to the rules. It translates the social and solemn character of the engagement of two persons, it expresses the desire of a social recognition of the union and finally it renders possible control of the State of this union.

---

[294] *Vide* Internet http://www.admin.ch. Assistance and information obtained from the Office Féderal de l'Etat Civil, Office Féderal de la Justice, Bern, Switzerland.

[295] Guillot O., Suisse - *De la Liberte Personelle et des Devoirs de Famille, Regard sur le droit de la famille dans le monde*, Ed. CNRS, 1992, p.206.

The rules governing the celebration of marriage are multiple going from the consensual system to most solemn rituals. Certain States recognise only the validity of marriages celebrated following very strict norms, whereas others grant civil effects to those contracted according to certain rites and consecrated religious customs recognised by their laws. All the juridical systems establish a minimum of rules relative to the creation of the conjugal tie. Marriage is deprived of existence in default of a celebration. In France marriage became a lay institution the spouses may wish to contract a religious marriage, but on condition of making a civil marriage precede it which only has legal value[296]. In several European States religious marriage is without juridical effect and denounced as illegal if celebrated before civil marriage. One must not forget that spouses are free to celebrate a religious marriage.

The principle of an obligatory civil marriage is followed in Belgium, in the Netherlands as well as in Germany. Civil marriage is the only form of marriage possible in certain States, since the law on civil status adopted in 1875 during the Kulturkampf. The Swiss Civil Code since 1874 permitted the laity of the civil State and religious marriage. In other countries, Catholic (Italy, Spain, Portugal) or Protestant (Anglo-Saxon and Nordic countries) the future spouses have the free choice of the civil or religious marriage forms and the second has the same juridical value as the first. In Greece civil marriage was instituted by law 1250/1982[297]. So future spouses had a choice as long as a religious marriage is not contrary to public order.

The State's discretion to appreciate the validity of marriages is far greater than that of the individual. In Germany the point of cohabitation promoted by the State where it does not condone certain religious marriages. In the case ***X vs. Federal Republic of Germany***[298] the Court held that the obligation of contracting marriage according to the forms prescribed by law in the place of a particular religious ritual is not a refusal of the right to get married. Thus claimant was not deprived of the right to get married when he got married according to a different marriage ritual. I opine that making civil marriage obligatory is not in conflict to the fundamental right of religious freedom because the rules of marriage assure above all a juridical existence and a social recognition to the couple. In the Parliamentary Debates of the Marriage Bill 1975 Prof. De Marco held that *'ghax ma jigix konsenjat ic-certifikat taz-zwieg, iz-zwieg ghad ... ma jkollux effett'*.[299] A case may arise where a Parish Priest forgets to register the marriage. In the 1993 Parliamentary Debates the Hon. Ugo Mifsud Bonnici held that:

---

[296] Article 165 of the French Civil Code.
[297] Law 1250/1982 came in force on the 19th. July 1982.
[298] Decision of the 18th. December 1975. Claimant held that he was validly married when he read aloud a passage of the II Chapter of the Book 2 of Moses prior to the first sexual relations with his wife.
[299] Parliamentary Debates, House of Representatives, Third Parliament, First Session, Independence Constitution 1964, Vol.73, p.1610.

'... malli z-zwieg jigi celebrat dan ikun zwieg. Jekk kemm il-darba dan ma jigix registrat dan jibqa zwieg. Il-validita' ma tigix konsiderata jekk kemm il-darba wiehed jirregistrah jew le'.[300]

B. The Conditions of Celebration of Marriage

In order that the ceremony of marriage is celebrated the national authorities require that the future spouses produce according to the forms foreseen by law a certain number of documents attesting their identity, their date of birth, their family background and their residence. Both German and French law impose this obligation. Moreover, a foreigner to contract marriage in Germany should present an attestation from his country of origin that he/she is free to marry[301]. These formalities tend to inform the officer of the civil status on the situation of each of the future spouses, so that he can verify if the conditions of basis of the marriage are filled. If one of the formalities is defective the competent authorities can legitimately refuse to celebrate the marriage. The European Commission estimated that the production of the act of birth did not attack the right to get married of the foreign claimant, so the refusal of the French authorities to substitute a detail of the act of birth which is necessary to produce and claimant could not do so not amounting to breach of European Convention.[302]

The national authorities may equally foresee that both the future spouses must present together, personally in front of the competent officer to declare that they want to marry each other. This condition of personal appearance supposes that one asks himself on the prohibition of marriage by procuration and that of posthumous marriage. In these hypotheses do national legislations carry attack to the right to contract marriage if one of the future spouses is temporarily or definitely prevented? For the moment only the question of posthumous marriage has been posed to the French Court.

Because marriage is a most personal act of all in the sense that it engages the destiny of two persons marriage supposes in French law a consent expressed by two persons present, contrary to old law which permitted marriage by procuration. In fact law No.93-1027 of the 24th. August 1993 about control of immigration and to the conditions of entry and residence of foreigners in France inserted an Article 146-1 in the Civil Code which makes the default of the presence of the French partner at the celebration a cause of absolute nullity of marriage. Paradoxically, French law admits the possibility of posthumous marriage. Posthumous marriage is an institution which supposes that the will of a living person can write to the matrimonial intention of a dead person. This form of marriage is rare and the

[300] Parliamentary Debates, House of Representatives, Hon. Ugo Mifsud Bonnici, Sitting No.108 of the 22nd. February, 1993, p.511. Moreover, registration is essential for proof and civil effects vis-à-vis third parties according to Section 12(3) of the Marriage Act 1975.
[301] Article 10 of the law on marriage of the 20th. February 1946.

possibility of getting married with a deceased person defined as such cannot be qualified with liberty, but as an exception to the principle according to which two persons get married to form a couple and found a family.

The European Commission held that Article 12 does not guarantee among its rights and liberties that of marrying a deceased person. This was held in ***M. vs. Federal Republic of Germany***[303] . Germany has abandoned this institution in 1946. It insists that men and women of marriageable age, i.e. living persons have the right to get married and found a family. For the Commission the moral interests which can justify posthumous marriage cannot benefit from the protection of Article 12 of the ECHR. It was advised against during the drafting and voted against at the International Convention of Civil Status held in Vienna in 1976. Hence there is no European recognition of posthumous marriage.

---

[302] Appl. No.224041/93, **Theodore Semine Vodboski and Anne-Marie Demonet vs. France**, decision of the 12th. October 1994.
[303] Appl.No. 10995/84, decision of the 13th. December 1984.

CHAPTER 4

THE SOCIAL DIMENSION OF MARRIAGE AND THE STATE

Marriage assures the perpetuation of groups and man has not left this up to the individual's initiative. National legislators cater for this as Article 12 of the ECHR is a witness of this. Rules made by the State limit the free choice of a partner by imposing prohibitions and impediments (*impedimentum dirimens*) and (*impedimentum impediens*)[304]. Marriage between close relatives was almost always considered a prohibited union. These unions are of a prohibited degree and incestuous by definition. The majority of European legislation admit this on a varied level. Historically the Church extended this up to sixth or seventh canonical degree from the Council of Lateran of 1215. This prohibition included not only legitimate and adopted relatives, but also godfathers and godmothers (spiritual relatives). This was both socially and morally justifiable at those times. One should distinguish between absolute prohibitions and other prohibitions which evolved in many States. While discussing the Marriage Bill Onor. Anton Buttigieg held thus: '*... ahna ghamilna biss l-impedimenti dirimenti, l-impedimenti li jirrendu z-zwieg null*'[305].

I. Absolute and Relative Marriage Impediments

Almost all European States prohibit marriage on the basis of incest which has been a taboo of humanity[306]. The risk of genetically transmitted diseases and disturbance of families are likely to happen if incest is nor discouraged. This is absolute because it has no exception in certain cases of direct line and collateral line relatives. Thus a marriage between a father and daughter, sister and brother are absolutely null. Switzerland and UK extend this to uncles and niece and aunt and nephew. The prohibited degrees are found in the UK Marriage (Marriage Prohibited Degrees of Relationship) Act 1986 and other legislation. Moreover, a man may not marry his stepdaughter, stepmother, step-grandmother or step-granddaughter, nor a woman can, unless both parties are over 21 at the time of the marriage and the younger was not at any time before the age of 18 **'a child of the family'** in relation to the older.

According to Article 4 of German law about marriage, a marriage between relatives in the direct line, between brothers and sisters from same parents or one parent is common is null. In Sweden marriage

[304] Both were found at Canon law but not in the 1983 Code which speaks of *impedimentum dirimens* only.
[305] Parliamentary Debates, House of Representatives. Third Parliament, First Session, Independence Constitution 1964, Vol.73, p.1571.

between half sister and half brother can be authorised by Royal permission according to a law of the 4th. July 1973. In France the law Courts extended the prohibition to half brothers and half sisters[307]. These legal restrictions exist in Austria, Denmark, Luxembourg, Malta, Greece and other States. Greece permits the marriage of father and godchild and marriage between a relative by consanguinity of the spouse and another from the spouse's side. Marriages are prohibited up to the fourth degree inclusively of the collateral line[308].

In Algeria marriage with mother, daughter, sister, paternal or maternal aunt and the daughter of a brother or sister is prohibited[309]. Cousins may marry[310]. Among the Bedouin Arabs there is pressure to consolidate ties within the kin group of the husband and wife and to consolidate a family's wealth. The Tuareg consider cross-cousin marriage as ideal and other kinds of marriage as undesirable. Certain societies are exogamic prohibiting marriage of relatives while others are endogamic allowing this and prohibiting marriage to foreigners. In Arizona marriage between cousins is allowed only if both are 65 of age or older or if one or both first cousins are under 65 years of age, upon approval of any superior court judge in the State if proof has been presented to the judge that one of the cousins is unable to reproduce[311]. In Illinois[312] too, a marriage between cousins of 50 years of older is allowed or in case either party at the time of the application for a marriage licence presents a medical certificate stating that the party to the marriage is permanently and irreversibly sterile.

Marriage impediments concern natural families and do not distinguish between legitimate family and family of fact. Relatives by adoption cannot marry[313] and choice of partner cannot be exercised except out of the family circle *strictu sensu*. At Maltese law a lacuna exists with regards to marriage between adopter's widow and adopted. Not even marriage between an adopted (who is adopted by another person) and first adopter's descendants is covered by Maltese law. We find the example of Œdipe in Greek mythology who unknowingly married her father Laïos. Moreover, in the Old Testament a religious man was not allowed to marry a divorced woman[314]. This is still valid for the Jewish community for a Cohen. This is circumvented by a legal private marriage without a Rabbi. Israeli law is circumvented by contracting marriage abroad in case of persons who cannot or do not want to marry by an Orthodox marriage.

---

[306] Judaism imposed this prohibition stringently: Leviticus. Chap.18 punishment is death or Divine (Kareth).
[307] Rouen. decision of the 23rd. February 1982.
[308] Article 1356 of the Greek Civil Code.
[309] Article 25 of the Algerian Family Code, 1984 taken from verse23 of Surah 'The Women' of the Quran.
[310] Surah 'Al-Ahzab', verse 50 of the Quran.
[311] Arizona Revs. Stat. Ann. '25-101 (1996).
[312] 750 Illinois Comp. Stat. Ann. '5/212 (1996).
[313] Marriage between brother and adopted sister was permitted in **Israel vs. Allen** (1978) by the Supreme Court of Colorado, since it does not obstruct public order. Such a marriage is void under Section 5(d) of the Maltese Marriage Act 1975.
[314] Leviticus, 21/1-15, 22/12-13, Ezechiel, 44/22.

Marriage was prohibited even in Germany between a couple of whom one caused the divorce by reason of adultery[315]. Several divorces between the same man and woman lead to the prohibition of marriage between them for ever in Islam. No clear written proof for this is found, but it is practiced. It is clearly prohibited for a woman to marry more than one husband, unlike men who can marry up to four at the same time. In Kurdistan the rich Agha, Beg and Khan can marry more than four wives [316]. Marriage between an abductor (male) and abducted cannot exist unless she **'chooses marriage through her own accord'** [317].

In earliest times marriage was permitted among close relatives such as sisters as we find in Egypt and Persia. Roman law prohibits marriage with close relatives and with collateral relatives up to the 6th. degree which was changed to the 4th. degree. Emperor Claudius changed the law to marry his brother's wife. At Roman law marriage between an ex-wife/husband and a relative by blood in the vertical line of the ex-partner was prohibited. Unlike this the Pentateuch obliged a man to marry his brother's widow. This is still practiced in Jewish communities. A widow without issue can only marry another person if her ex-husband's brother sets her free by '*halitza*'. Moreover, such a widow who marries a Cohen may end up unprotected, since the Rabbinical Court will allow divorce without compensation.[318]

The risks of consanguinity explain the prohibition of marriages between close relatives which extends in certain countries to marriage between aunt and nephew and uncle and niece, but only moral considerations justify the prohibitions of marriage between persons related by affinity[319]. This can be defined as the bond resulting from a previous marriage with a certain member of the family of the partner. This can create domestic disorders. Marriage with a deceased wife's sister was widely discussed in the late 19th. Century. The objections urged were prohibition by Scripture, condemnation by Early Church, the Canons of the English Church and social inexpediency[320]. At Maltese law marriage within the prohibited degrees is between ascendant and descendant in the direct line, brother and sister of full or half blood, persons related by affinity in the direct line or between the adopter and the adopted or descendant, or husband or wife of the adopted person[321].

---

[315] Section 6 of the German Marriage Law of the 20th. February, 1946. By amendment of the 11th. August, 1961 the court has been empowered to ignore the prohibition in special circumstances.

[316] Karadaghy, M.SS., Marriage and Customs in Mohammedan Law and Current Customs in Kurdistan, University of London, Bachelor of Arts, 1961-1962.

[317] Canon 1089 of the 1983 Canon Code.

[318] C.A. 571/69, **Kahana vs Kahana**, 24(2) Piskei Din 549.

[319] At Maltese law there is only restriction on affinity in the direct line, not in the collateral line - Section 5(c).

[320] Shore T., A summary of the chief arguments for and against marriage with a deceased wife's sister, London, Marriage Law Reform Association, 1883.

[321] Section 5 (a-d) of the Marriage Act 1975.

Canonical law justified this prohibition by *copula carnalis.*[322] Moral barriers fell in Germany where a marriage between uncle and niece and aunt and nephew are not prohibited (since 1875) and in the Netherlands (since 1970). On the other hand Switzerland[323], France[324] and the UK[325] hold this family prohibition. In Switzerland it is absolute while in France an exemption is possible. Marriages between direct relatives in the ascent and descent line and marriage between full-blood and/or half-blood brothers and sisters are prohibited under Article 17 of the Marriage and Family Code of Ukraine. There is a proposition to forbid marriages of first cousins and aunt-nephew or uncle-niece which are permitted in Ukraine.

A marriage between persons related in the direct line, under German law can be refused exemption, but if celebrated it is valid from the origin once exemption is granted after marriage. This does not apply in France[326]. Belgium holds the prohibition of marriage between brothers-in-law and sisters-in-law. The Greek law is severe too, according to Article 1356 of the Civil Code marriage is prohibited between relatives in the direct line ad infinitum and in the collateral line up to the third degree inclusively. No possibility of exemption is found. Many States tolerate certain marriages, while the principle of free choice of partner is largely conditioned by law. According to the Quran[327] one may not marry one's wife's ascendants, her descendants, nor can one marry widows or divorcees of one's own ascendants, nor descendants of one's spouse without limit. Moreover, the Quran forbids the marriage of persons who have been breast fed by the same wet nurse[328]. Quran has abolished the relationship by adoption found in Surah 4 verse 23. This was adopted by Orthodox jurisprudence from Roman law and according to Dauvillier and De Clerc Ancient Coptic jurisprudence rejected it[329].

II. Temporary Marriage Impediments

Contrary to permanent impediments which arise independently of any voluntary act, temporary impediments cease to exist when their cause disappears, whether or not as a result of such a person's voluntary act. According to the Quran a woman in legal seclusion (*idda*) following divorce [330] must observe three menstrual periods and the widow [331] 4 months and 10 days during which she may not

[322] Canon 1090 (1-4). Prohibition due to adoption - Canon 1094.
[323] Article 100 of the Swiss Civil Code.
[324] Article 163 of the French Civil Code.
[325] Marriage Act modified by the Marriage Prohibited Degrees of Relationship Act of 1986.
[326] TI Seine - decision of the 26th. July 1894.
[327] Quran, Surah 'The Women', Verses 22-23. Prohibitions due to relation by consanguinity are found in Islamic states: e.g. Morocco 1958 Article 26 and in Jordan 1976 under Article 24.
[328] Quran. Verse 23 from Surah 'The Women' (*Al Quarabatol Rada'a*) and in Article 27 of the Algerian Family Code of 1984. We find this prohibition under Article 35 of the Syrian Code, under Article 17 of the Tunisian Code and under Article 28 of the Moroccan law of 1958.
[329] Jean Dauvillier & Carlo De Clerc, *Le Mariage en Droit Canonique Oriental*, p.156.
[330] Surah, 'The Hfeifer' verse 226.
[331] Surah. 'The Hfeifer' verse 232.

remarry. According to Islamic jurisprudence a marriage celebrated during this period will void and those persons cannot marry each other. *Idda* lasts until the end of pregnancy under Article 60 of the Algerian Family Code of 1984. It is also interesting that at Islamic law the husband cannot remarry his wife after the third repudiation, unless she has been married to another and that union properly dissolved. [332] It is a discriminatory rule imposed only on women. [333]

In Italy, Austria, Tunisia, Afghanistan and Algeria the waiting period is four months, in Saudi Arabia it is 6 months. In Louisiana it is 10 months, in the Netherlands it is 306 days, [334] in Kuwait it is one year and in Thailand 310 days. The waiting period may be reduced for certain reasons. Rabbinites (widowers) could not marry before three religious feasts without permission from the religious authorities. This rule is for men only. For widows it lasts 92 days. At Roman law there was no *idda* after divorce. In the case of a widow *idda* lasted 10 months and changed to 12 months for both men and women. In the last Roman period a divorced sinner woman was punished not to marry for 5 years, while a man could never remarry.

In Honduras remarriage is possible if a declaration of the man's impotency is made upon dissolution of the previous marriage. A widow may marry if she shows that she is not pregnant. Panama[335] in its periodic report to CEDAW held this is no discrimination, while Japan[336] was ready to consider this question of the right for women to remarry. The Philippines[337] held that the 300 day period was decreased to 30 days, since pregnancy tests can determine this early and the waiting period protects the inheritance of a child whose father died. In 1983 in India the Hindu Widows' Remarriage Act was enacted to protect women who wanted to remarry[338]. In Afghanistan a woman who wishes to remarry forfeits the limited custody rights. In El Salvador offenders who kill their spouse may not contract marriage[339]. In Brazil a surviving spouse cannot marry until the children of the deceased spouse have received their part of an inheritance.

---

[332] Quran, Surah, 'The Hfeifer' verse 228 and Article 29(3) of the Algerian Family Code of 1984.
[333] Article 180 of the Civil Code of El Salvador; 6 months in Japan-Article 733 of the Japanese Family Code.
[334] Unless she has reached 52 years, given birth after husband's death, produced a medical certificate stating that she is not pregnant or was officially separated from the husband during these last 306 days - Articles 1:33 and 1:34(1)(2) of the Dutch Civil Code.
[335] CEDAW/C/5/Add.9, p.24.
[336] GAOR, Supp.No.38 (A/43/38),p.48.
[337] CEDAW/C/5Add.6.
[338] When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired, or when six months after the date of any decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction, or when any such appeal has been dismissed, or when in the result of any such appeal any marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death: Provided that no appeal to the Supreme Court has been presented against any such order or decree.
[339] CCPR/C/14/Add.7, p.26 and Bolivia, Costa Rica, The Family Code 7th. November 1973; Brazil and Argentina. This is found at Italian law too and under Canon 1090(1) of the Canon Code (affecting only those baptised by the Catholic Church).

The prohibition of remarriage is a relic of the Canonical idea according to which a remarriage even after death transgresses the principle of monogamy the keystone of European civilisation.[340] This situation was qualified of successive polygamy and the Church refused to bless a second marriage[341]. A loss of temporal powers of the Church to impose its law is felt now. In Belgium the law of the 16th. April 1935 transformed the prevention of remarriage of Article 298 of the Civil Code in a waiting period of three years for the adulterous partners. This was abrogated by law of the 15th. May 1973. Thus certain legislations had retained the temporary prohibition of remarriage after divorce to prevent the adulterous person and accomplice from remarrying. In 1983 Switzerland was the only country of Western Europe to hold this prohibition. This temporary prohibition was suppressed in Germany in 1976, in Spain in 1978 and in Austria in 1983. This prohibition had a criminal value and was directed to the stability of marriage. Though Strasbourg held these ends as legitimate, but not proportional to the protection of the right to marry which was thus hindered.

It was held in Article 178 of the Swiss Civil Code that in the case of a divorce by offence the adulterous spouse could only contract a subsequent marriage after a certain period of time. The judge upon pronouncing divorce could fix a minimum delaying period of one year or a maximum of two years, while a three year period could be fixed for the guilty party in case of adultery. The Swiss legislator wanted to protect marriage as a social institution and to protect the future spouse and the divorced spouse - as a social need. The Federal Courts then saw that a remarriage in a foreign country could not be annulled in Switzerland. This discretionary power was given to judges in 1981 only when the fault of the spouse was grave and played a determining role leading to divorce. However, in 1984 a decision from the Canton of Vaud imposing a prohibition of remarriage of three years was held. A Swiss citizen F born in 1943 and divorced twice remarried on the 26th. February 1983 after 6 weeks. On the 11th. March of the same year he demanded divorce in front of the Tribunal of Lausanne[342].

Limitations to the right to marry should be reasonable and justifiable. In ***V vs. Switzerland*** the European Court held that if: **'a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field - matrimony - which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit'.**

---

[340] Countries in which remarriage is low relative to first marriage include primarily Catholic countries such as Peru, the Philippines, Portugal, Dominican Republic, Ecuador, Italy and Chile. Furstenberg F., & Spanier G., Recycling the Family - Remarriage after Divorce, Gage Publications Inc., California, 1984, ISBN 0-8039-2260-4.

[341] St. Jerome said thus about re-marriage: **'It is better that she prostitutes herself to one man rather than to many'** in his Letter to Pammachius. The Christian Emperor Theodosius held that such unions entailed forfeiture of dower in favour of the children of the first marriage.

[342] *Vide* Internet http://www.admin.ch. Assistance and information obtained from the Office Fédéral de la Justice, Bern, Switzerland.

III. Pre-marriage Check up and Illness

Certain European legislation accept this next to marriageable age and difference of sex. States have put responsibility (only moral in some States) on persons who suffer from serious diseases vis-à-vis their future spouse. In France one cannot stop anyone from marrying, despite of these tests. Medical secret reinforces the respect of marriage liberty. How can one hold information regarding a grave disease which might affect the future spouse? What about integrity of consent? In El Salvador[343] clear, permanent and incurable physical impotency preventing coitus makes a person absolutely incapable of contracting marriage. In Finland and Iceland, for example, mental illness, severe mental deficiency and venereal disease are impediments to marriage. Under Article 13(3)(1) of the 1985 Bulgarian Family Code[344] a person whose illness may affect his spouse and/or offspring is impeded from marrying. An exemption is granted where the other spouse knows about it and is dangerous to the latter only. A pre-nuptial medical certificate is obligatory here.

Family perpetuates society and future generations thus should be protected. By a German law of the 16th. October 1935 each partner should present a medical certificate to the health office to prove that one is free of contagious diseases and hereditary mental diseases prior to marriage. In the same period Swedish and Danish laws impeded the marriage of persons who had a venereal disease[345]. The Recommendation of Vienna of the International Commission of Civil Status of the 8th. September 1978 was against the making of marriage validity depend on a medical examination. Certain national legislation made certain diseases a cause of nullity of marriage. Thus in England marriage is annullable if the partner suffered from a sexually transmitted disease at the moment of marriage[346]. Venereal diseases are a cause of nullity at Norwegian law[347]. The Swiss Civil Code holds epilepsy as an impediment if it can affect the faculty to discern[348]. At Turkish law a general medical test is required but is not obligatory. Tuberculosis can be a cause of marriage impediment[349]. In Cyprus the Orthodox Church obliges partners (Greek-Cypriots) to present a genetical test before marriage to check for any case of thalassemia. Though there is no prohibition of marriage in case of such finding. The Chicago Bar suggested to the legislative authorities to examine the genetic characteristics of the future spouses. A Recommendation[350] of the Ministers of the Council of Europe adopted on the 21st. June 1990 is clearer since its basis is free and clear consent of the spouses.

---

[343] Article 102 of the Civil Code of El Salvador.
[344] Nenova L., Impediments to marriage according to Bulgarian law, *Obshtstvo i pravo*, No.8, 108/1988, p.27.
[345] Abrogated in 1968 and 1969 respectively.
[346] Matrimonial Causes Act of 1973, Section 12(e).
[347] Article 35, no.3 of marriage law of the 31st. May 1918.
[348] Article 97, Part 2 of the Swiss Civil Code.
[349] Articles 122 and 124 of the Turkish Civil Code.
[350] Rec. No.R(90)13; principles 7, 126.3.

At French law a pre-marriage medical certificate is required to certify that the person was medically checked not earlier than two months before marriage. It is a prohibitory impediment not affecting marriage validity unlike an absolute impediment. By a law of the 27th. January 1993, Article 153 of the French Civil Code invites doctors to propose an AIDS test; a non-obligatory test. No result can be communicated to anybody. Consequently a sick person is free to marry or not. It appeals to the person's moral conscience only. The family legislation of Ukraine states thus: **'The spouses should be mutually informed about one another's health conditions'**[351]. Its violation does not engender any legal sanction, so its effectivity depends on the good will of the spouses. In Malta no medical test is required prior to marriage, making it easier for persons suffering from some particular disease(s) to marry without any questions regarding his or her health condition. The Marriage Registrar may request it in case he knows of a psychological condition which may affect the marriage stability. This has become practice now in Malta, though not required at law.

A. Non-resolved Dilemma

Should the State protect the physical and moral integrity of the person who goes to contract marriage with a person whose health status is unknown? The sick person's liberty to marry is protected, but not his future spouse's private life. Should the medical secret be broken here in the interest of a healthy person? Should an HIV test be obligatory? People who cohabit and do not intend to marry, should they make an obligatory HIV test? The European Court decided against making medical records accessible to the public[352]. No State has limited the right to marry due to AIDS. The WHO held that the right to marry cannot be suppressed because of AIDS (Geneva 1987). I think that there can be two solutions: firstly, the medical doctor can advise the sick partner to share the information with the other partner and secondly, marriage can be celebrated after making the partners share the medical results.

In France during 1994 the Conseil d'Ordre and Académie de Médecine was in favour of a break in of professional secret in the interest of the partner of an HIV positive person. After all one will protect human health and it is not so grave next to the violation of the Hippocratic oath[353]. One can consider the medical secret question as a protection of consent and a person's integrity, but equally as a restriction of matrimonial liberty. Is the life of a person worth more than matrimonial liberty? The right to life of a human being is one of the intangible human rights. According to the UN Committee of Human Rights it is the **'supreme human right of the human being'**[354]. One must consider the

[351] Article 18 of the Marriage and Family Code of Ukraine (1992).
[352] **Z vs. Finland** - App. No. 2209/93, decided on the 25th. February 1997.
[353] *Le Monde*, 7th. And 12th. April 1994.
[354] **Baboeram vs. Surinam**, no.146/1983.

general and superior interests when a just motive exists as to protect children and vulnerable persons. Whatever are the juridical and political choices taken to guarantee general and the individual's interest. Marriage should not be obstructed by the State, family and society.

In the West German Marriage Code[355] a marriage concluded by an HIV/PWA is null and void. The legal consequences were the same as for divorce. Thus a marriage impediment was considered since HIV is partly sexually transmitted. Four African States in their national programs for fight against AIDS favour the reduction of the number of marriages between persons infected - Cameroon, Zaire, Gabon and Central Africa. Still a more effective measure would be that introduced in the USA where people are informed about HIV and testing services made available for them. The American Medical Association has since 1990 removed the medical secret with regard to a future spouse. WHO held that the medical secret should be held in all circumstances. Neither should people be treated by extreme measures such as compulsory sterilisation as happened in the past.

An interesting case arose in India in front of the Supreme Court of India, ***Mr. X vs. Hospital Z***[356] after a PWA was refused marriage. His petition premises the right to marriage which is constitutionally protected. The right to marry has been guaranteed under Articles 19 and 21 of the Constitution of India which recognise the right to life and liberty[357]. Many States like the United States recognise this right as a constitutionally protected right and repealed laws abridging this right. The petition argues that since the right to marry is a constitutionally protected fundamental right, only a valid statutory law passed by legislature can abridge it. Courts have no right to restrict or suspend the right to marry for an HIV person. This is arbitrary, unjust and discriminatory in nature, thus violates Articles 14 and 16 of the Constitution of India.

The petition further argues that laws[358] regarding marriage in India do not make marriage void in case that a party has a communicable venereal disease. It is a ground for divorce and thus it cannot be used to prevent people from marrying. Moreover, there are many communicable diseases like TB and Hepatitis B, yet no restrictions have been placed on persons suffering from such illnesses. The Utah Code enacted legislation prohibiting HIV positive individuals the right to marry which law was repealed, since a Court found that it violates the Federal American Disabilities Act. The Utah Code was amended in 1993 and the **'validation of marriage to a person with AIDS or other STD's -**

---

[355] EheG Para.32 of the West German Marriage Code.

[356] Supreme Court of India, (1998) 8 SCC 296.

[357] **Kharak Singh vs State of U.P.** AIR 1963 SC 1295; **Gobind vs State of Madhya Pradesh** AIR 1975 SC 1378 and **R. Rajagopal vs State of T.N.** AIR 1995 SC 264: these judgements protect the right to marry under Articles 19 and 21 of the Indian Constitution.

[358] Dissolution of Muslim Marriages Act, 1939 Section2; Parsi Marriage and Divorce Act, 1936 Section 32; Indian Divorce Act, 1869 Section 10 and the Special Marriage Act, Section 27.

the marriage is valid and legal'. In another case **A.C. vs. Union of India et**.[359] the intervenor held that where the legislature failed to introduce necessary legislations to protect women and children, the Courts have the duty to intervene and protect the right of vulnerable sections through judicial interventions. The Counsel for Petitioners[360] submitted that the right to marry and found a family is protected as is the right to bear children by the Constitution and no Court of Judicial Authority can take away this right.

The Commission on Human Rights[361] held in 1989 that **'all human rights must apply to all patients without exception and that non-discrimination in the field of health must apply to all people and in all circumstances'.** In this case S. Saghir Ahmed J., held thus: **'... as long as the person is not cured of the communicable venereal disease or impotency, the RIGHT to marry cannot be enforced through a court of law and shall be treated to be a 'SUSPENDED RIGHT''**[362]. In my opinion if the free, full and well informed consent of the other prospective spouse is obtained then the right to marry shall not be restricted.

In this case Sections 269 and 270 of the Penal Code were taken into consideration. These two sections spell out two separate and distinct offences by providing that if a person, negligently or unlawfully, does an act which he knew was likely to spread, the infection of a disease, dangerous to life, to another person, then, the former would be guilty of an offence punishable with imprisonment. In the case of HIV/AIDS this spread can be suppressed by the proper use of contraceptives. Is it proper to suppress a basic human right as the right to marry by claiming its danger to society or/and partner when remedies exist? Persons with AIDS/HIV can spread the disease easily if they opt to have various partners whom they do not inform of the disease and thus underground spreading occurs.

B. Do Persons with AIDS have the Right to Marry at Canon law?

Marriage is fundamental to society, to communal life and to various institutions. With marriage being essential to secular and religious society, both Canon and Civil law protect the fundamental human right to marry. Marriage is seen to exist for the good of the parties themselves, for the good of their possible children and for the good of the larger community. This being so, the right to marry is not seen as absolute. Thus, throughout history, tension has existed with regard to the individual's right to marry and the limitation of that right for the sake of the common or public good.

---

[359] High Court of Bombay, Writ Petition no.1322 of 1999, judgement of the 18th. November 1999.
[360] Paragraph 33 of the same judgement.
[361] United Nations, Commission on Human Rights, (1989).
[362] **Mr. X vs Hospital Z**, judgement of the 21st. September 1998, Reported in (1998) 8 SCC 296 - AIR 1998 SCW 3662; Civil Appeal No. 4641 of 1998.

Some secular and religious voices proclaim that an infected person has no right to marry. Others claim that an infected person cannot marry because they cannot consummate the marital union. Some claim that while a person infected has a right to and can marry, they should be prohibited from marrying. Still others state that an infected person can marry and may consummate the marriage as well. Voices that speak on the issue of the inability of an infected person to marry do so claiming that they have no right to marry; they are prohibited by law from doing so. Certain others claim that, while an infected person may marry, that person cannot consummate the marriage and is, therefore, prevented from entering marriage.

The 1983 Code of Canon law reflects this principle of limitation. Canon 1058 reads: **'All persons who are not prohibited by law can contract marriage.'** This Canon is comparable to Canon 1035 of the 1917 code and hears the exact same wording. Like its predecessor, Canon 1058, while safeguarding the right to marry, also states that the right is not absolute. In addition, because marriage between two baptized persons is a sacrament,[363] this qualified right to marry for Christians, and specifically for Latin Rite Catholics, also finds articulation in other Canons of the code. Commenting on Canon 1058, Federico Aznar clarifies not only the strength of the natural right to marry but also the proper, and at times necessary, limitation of the right itself.

Following the magisterial tradition of the Church the present text regards as derived from the natural law, the right a person claims for themselves to contract matrimony, and establishes the more extended and general presumption of law in favor of the full capacity to act on the part of the contracting parties.[364] But the right to marry in the Canonical legislation, is not an absolute right, in as much as there is an essential social right by which its exercise can and should be regulated, this regulation cannot be understood as the possibility to take away from a person, who is naturally capable, in a total and absolute manner. Prohibitions are not impediments in the strict sense as they affect one's right to marry but usually result in an illicit rather than an invalid marriage. The prohibitions which will be considered can be classified into three categories: (1) prohibitions in the law itself; (2) prohibitions set by competent authorities; arid (3) prohibitions set by others, that is, usually civil authorities. Church teachings and authority has defended the individual's right to marry.

Various papal pronouncements of this century from Pius XI's Casti Connubii to John XXIII's Pacem in Terris to John Paul II Familiaris Consortio have sought to reinforce and uphold the individual's right to marry. The Second Vatican Council, in Gaudium et Spes made the **'first conciliar pronouncement in history that the right to marry (*intima cummunitas vitae et amoris*) is universal and inviolable.'**

[363] *Vide* Canon 1055(1).

Gaudium et Spes stated, **'there is a growing awareness of the exalted dignity proper to the human person, since he stands above all things, and his rights and duties are universal and inviolable .... the right to choose a state of life freely and to found a family'**. Commenting on this passage, it has been said, **'the right to marry, as an inviolable and universal right, must always remain in the disposition of the person, as canonical tradition and the practice of the Holy Office has uniformly maintained.'** To forbid marriage is a grave interference with the fundamental freedom of a person.

Impediments and/or prohibitions may be found in Civil law which restrict marriage due to conditions such as venereal disease and/or other hereditary diseases. Such laws seek to control the spread of a venereal disease or social disease or serve to protect the health and well-being of the children that may be born from a given union. The State of Utah had a statute that prohibited anyone with AIDS from marrying. Such civil prohibitions may prevent a marriage from being civilly celebrated and/or recognized. The church has cautioned and spoken out against such civil prohibitions.

In 1930, Pius XI, in his encyclical letter Casti Connubii, addressed the subject of eugenics and sterilisation of the unfit:

> **'That pernicious practice must be condemned which closely touches upon the natural right of man to enter matrimony but affects also in a real way the welfare of the offspring. For there are some who...by public authority wish to prevent from marrying all those whom, even though naturally fit for marriage, they consider, according to the norms and conjectures of their investigations, would, through hereditary transmission, bring forth defective offspring ... Although these individuals are to be dissuaded from entering into matrimony certainly it is wrong to brand men with stigma of crime because they contract marriage, on the ground that, despite the fact they are in every respect capable of matrimony, they will give birth only to defective children, even though they use all care and diligence'.**

This issue was addressed once again in 1958 by Pius XII in an allocution to the Seventh International Hematological Congress in Rome. Pius XII was responding to questions that had been posed regarding a specific illness. The Pope stated, **'when a subject is the carrier of the ... illness, one may advise him against marriage but one cannot forbid it. Marriage is one of the fundamental rights, the use of which may not be prevented.'** When queried about a person with this hereditary disease having children, the Pope said, **'you may advise a couple not to have children but you cannot forbid it ... There is no objection to complete continence, to the rhythm system'** to be used so as to prevent the conception of offspring and the transmission of hereditary defects.

---

[364] *Vide* Canons 219 and 226(1).

C. Consent to Marriage and AIDS Impediment

When people exercise their right to marry, they do so by giving their consent for **'consent ... is the constitutive factor ... The only efficient cause of the matrimony is the consent of two persons.'** Canon 1057 affirms this and also defines consent:

> **1. Marriage is brought about through the consent of the parties, legitimately manifested between persons who are capable according to law of giving consent; no human power can replace this consent. 2. Matrimonial consent is an act of the will by which a man and a woman, through an irrevocable covenant, mutually give and accept each other in order to establish marriage.**

Canon 1055(1) states, in part, the **'matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life, is by its very nature ordered toward the good of the spouses and the procreation and education of offspring'.** The Church lets marriages take place for the sake of companionship only. For ages theologians and Canonists debated the question of whether spouses could exchange the marriage right, in essence give consent, if they entered into a mutual agreement never to use the marriage right and consummate the marriage. Benedict XIV argued for the invalidity of such a marriage while others did not.

From canonical information regarding the right to marry and consent the following points can be concluded: A person possesses a fundamental natural right to marry that is strongly defended by the church and upheld in Canon law, while derived from the very nature of the human person, this right is not absolute and is restricted by impediments and checked by prohibitions in the law, these impediments and prohibitions, in turn, must be strictly interpreted due to the fact that they limit the exercise of what is a person's natural and basic fundamental right to many, the supreme authority has not declared that the HIV virus constitutes a divine or natural impediment and papal teaching cautions against restricting the right to marry based on fear that a disease will be transmitted to offspring, the right to marry, when exercised, is done so by giving consent, an act of the will, which makes marriage, a partnership of the whole of life and not ordered just to the procreation of children.

An incident that occurred in 1987 in New York City served to focus this concern.[365] The incident involved a baptized non-Catholic man dying of AIDS who wanted to validate his three year old civil marriage to a baptized Catholic at the cathedral church. At first, there seemed to be no problem. However, the rector of the cathedral would not permit the validation to take place citing his belief that the pastoral marriage preparation could be handled best in the couple's local parish. The concern for

[365] A.L.Goldman. "Man With AIDS Is Denied A Wedding at St.Patrick's, 9 January 1987, *Vide* Patricia Schartler Lefevere, "N.Y. Church won't *Marry* Couple: The Reporter, 16 January 1987, p.24.

such pre-marital counseling was due to the nature of the man's condition and the fact AIDS was a sexually transmitted disease. There was no official diocesan policy to assist in making such a decision and it was said that **'this (a person with AIDS seeking marriage) is a new area that will have to be addressed by the church.'** Three days later, the newspaper reported that Cardinal O'Connor was reviewing the decision. The following day the newspaper stated the decision of the rector had been reversed by the cardinal.

Four days later, an article in a Catholic diocesan newspaper reviewed the incident and cited William B. Smith, a professor of moral theology, who was said to have stated **'that marriage of an AIDS patient might be canonically impossible, or at least imprudent'**. The issue continued to be discussed. Of the many published reflections, before and after the New York incident, six opinions specifically regarding marriage and a person with HIV/AIDS have been selected for consideration as representing the major canonical opinions published to date. They are: Griese, Smart, Geringer, Varvaro, Coleman, and Watts. Each author examined the subject of HIV/AIDS and marriage.

D. Several Canonists' Opinions

Griese[366] is firm in stating that AIDS does not constitute an impediment **'to the validity of marriage in the canonical jurisprudence of the Church.'** However, as a general principle, **'every effort must be made'** to dissuade a couple from marrying. Griese is firm in stating that AIDS does not constitute an impediment **'to the validity of marriage in the canonical jurisprudence of the Church.'** Pius Smart[367] is the second author to address the subject of marriage and a person with AIDS. His presentation was first made in May 1987 at the Convention of the Canonical Society of Great Britain and Ireland. His remarks were later published in September 1987 in the society's newsletter. Smart does not make reference to the New York incident. He approaches the concern by examining three situations: (1) a couple asking to celebrate the sacrament of marriage with full knowledge that the man has AIDS, (2) a couple already married where one or both spouses contract AIDS, and (3) a couple seeking marriage where one party has AIDS and knows and conceals it. From these scenarios, one can get a focus on his views.

Smart states the fact that a **'person has contracted AIDS has no direct canonical or moral significance.'** That person's suitability for marriage may be a point of concern. In citing Canon 1058, Smart believes that **'it is difficult to see how'** an informed couple insisting on their right to marry **'can**

[366] Griese, Orville N., AIDS and the Right to Marry, Ethics & Medics 11 (August 1986), p.2-3.

be prevented from marrying.' Smart favors civil legislation requiring that civil authorities be informed of the identity of an infected person as with other diseases. Society, for the sake of the common good, has a right to know and the right to knowledge that an infected person knows how to avoid spreading the disease. He does not seem to support civil legislation that would infringe on a person's right to marry.

Karl-Theodor Geringer[368] published in 1987. The original German work did not make reference to the New York case. Geringer approaches the subject matter by trying to evaluate the capacity for marriage of those infected with AIDS and examines two scenarios: (1) marriage where one person is infected and (2) marriage where both persons are infected. Geringer states his surprise that, up to this time according to his knowledge, **'no bishop ever had the idea to impose a canonical prohibition of marriage according to Canon 1077(1) and request the highest church authority to impose a sanction of invalidity.'** Geringer believes the exercise of the right is morally forbidden and, as such, cannot even be exchanged or acquired.

Varvaro firmly states that he believes **'cases like AIDS situations ... fall into the category of a divine law prohibition to marriage.'** Varvaro bases this claim on the fifth commandment and believes the natural law forbids a person from placing themselves in a given situation that is extremely dangerous to life and/or health. Varvaro believes Canon 1077 should be invoked in the case of an AIDS carrier who perseveres in their intention to marry. Because there is no cure for AIDS at the present, this prohibition could be renewed in an individual case. As far as civil impediments are concerned, Varvaro states, **'the common good demands that AIDS related persons not he permitted to marry.'** Past civil legislation that prevented a person with venereal disease from obtaining a marriage license should be **'re-imposed'**.

The Church could have allowed a death-bed marriage as is done in other cases involving serious danger or imminence of death. In some cases based upon the accepted moral principles governing the so-called Brother-Sister Relationship, i.e., the man and would be permitted to cohabit provided there is no sexual inter-course occurring between them. Varvaro concludes, stating his opinion: **'An AIDS victim can marry in the Church, provided suitable and adequate counseling is given, since he/she is always in a danger of death.'** A legal prohibition cannot be presumed from a moral prohibition; it has to be stated in the law. In the case of a PWA, there is no legal prohibition. If one concludes a moral prohibition, it must be understood and applied as such. It should not be presented as a canonical

---

[367] Smart, Pius, Canon 1058: Prohibition Against Marriage of AIDS Victims - Another Opinion, In Roman Replies and CLSA Adv. *Goinions* 1981, Cd. William A. Schumacher and James J. Cunco, p.123-125.

[368] Geringer, Karl-Theodor, Zur Ehefahigkit Von AIDS Infizierten, Archivien Katholisches Kirchenreclit 156 (1987), p.140-148.

prohibition and applied as such.

While some say AIDS is a divine law impediment, Coleman is quick to point out that **'no such impediment has been declared'** and only the supreme authority of the Church (Canon 1075) could do this. Coleman's opinion is that marriage involving an HIV infected person, or a PWA, is **'relative to moral considerations'** as marriage, in this situation, could lead to the **'highest form of injury'** to others. The moral concerns are of greater weight than the canonical and should help in the application of the law.

Citing Canon 1058, Watts[369] states that the Church upholds the freedom and right of a person to marry. For PWA's there is specific protection of this right in the civil sector by the 'Terrence Higgins Trust' and 'The United Kingdom Declaration of the Rights of People with HIV and AIDS'. This human right, like all rights, also implies a duty. Watts states that the right to marry correlates with the **'duty to be able to fulfill the demands of marriage.'** A death-bed marriage to **'put the relationship right in the eyes of God and the Church'** would be a pastoral situation such as the New York incident and be acceptable. At other stages of infection and/or illness, Watts's concern is to determine the person's capacity to live out the duties and obligations and the interpersonal relationship of marriage. Obviously each case must stand on its own.

Griese, Smart, Varvaro, Coleman and Watts stand in agreement on the basic right to marry pointing out that it is not absolute, but rather a limited right. Griese states that civil law cannot deny this right. Smart believes that the civil law should address the issue to inform prospective spouses and society. Watts states that British law protects the right to marry in such cases. There is a natural, fundamental, human right to marry that, while not absolute, is strongly safeguarded by church teaching and law. Restrictions of this right must be strictly interpreted and whenever there is a doubt concerning one's right, canonical opinion sides in favour of the person's right to marry. Thus, there is strong canonical consensus to support a seropositive HIV person's right to seek marriage in the church.

With regard to impediments and prohibitions Coleman affirms that no impediment has been declared. Geringer argues that the virus constitutes a moral impediment which renders a person incapable of the rights and obligations of marriage. Varvaro personally believes that the virus constitutes a divine law impediment. Griese, Smart, Varvaro, Coleman and Watts support, on a case-by-case basis, the possible invocation of a prohibition in accord with Canon 1077. Smart considers a couple who wish to prevent transfer of the virus and whether this amounts to an intention *contra bonum prolis*. He believes

[369] Watts, John, AIDS and Canon Law - Some Considerations, London, Canon Law Society of Great Britain and Ireland, 1993.

such an intention impedes valid marriage. Varvaro alone argues for civil authority to establish impediments to marriage in the case of HIV infection.

Moral impediments or prohibitions are not the same as canonical impediments or prohibitions. In regard to those that are canonical, HIV/AIDS is not among the impediments in the current law. Minority opinion argues for a moral impediment and thus a legal one. However, a strict interpretation of the current law does not permit it to be seen as an impediment. To date, the supreme authority has not declared HIV/AIDS to be an impediment of divine or ecclesiastical law. While allowing for discouragement, past papal teaching strongly cautions against the forbidding of marriage for eugenic reasons. Thus, there is strong canonical tradition and opinion that supports viewing a seropositive HIV person as not being impeded by law from marrying. However, a local ordinary may, after thorough investigation and according to the norms of law[370], prohibit marriage in a particular case and for a grave cause. This prohibition would not be invalidating unless the supreme authority intervenes.

With regards to consensual capacity Griese believes the virus does not necessarily impact upon one's consensual capacity. He does support full disclosure to one's prospective spouse as an informed and willing person does not incur injury. Smart, Varvaro, Coleman and Watts believe a lack of disclosure can be cause for invalidity in accord with Canon 1098. Geringer argues for a change in the wording of Canon 1095 to rule out any and all such marriages when one cannot assume the necessary rights and obligations. Smart, Coleman and Watts agree that an infected person choosing to marry may lack the necessary discretion in accord with Canon 1095. Varvaro believes such a person should be dissuaded from marriage. Canonical debate has ceased in that the decision has been made and codified that consent makes marriage. For consent to be valid, a minimal understanding is required and such understanding is to be presumed.

Questions remain concerning the impact of HIV/AIDS on the discretionary judgment of the infected person regarding their decision to marry.[371] Both persons need to know the full medical prognosis and the risks and burdens involved. A couple seeking marriage, where one person is seropositive HIV, may have a need for far greater discretion than any other couple. A couple discerned to be lacking such discretionary judgment may provide a grave enough cause for a prohibition as provided in the law. However, regarding this consensual capacity, as with any couple presenting themselves for marriage, such capacity and readiness must be determined by the preparing ministerial person in light of the information presented and the examination and inquiry undertaken which is to precede any celebration of marriage. Canonical opinion supports full disclosure of a seropositive HIV person's status to, at least,

[370] *Vide* Canon 1077.

their intended spouse and, hopefully, to the preparing ministerial person. Speculation remains as to just how many persons, aware that their intended is seropositive, will truly want to pursue a marital relationship.

There is also strong support for the opinion that undisclosed seropositivity on the part of one person could be reason to attack the validity of a marriage if it constitutes dolo.[372] Canonical jurisprudence in this area awaits further development. As with any couple seeking marriage, should the circumstances warrant it in view of the information presented to the preparing ministerial person and in light of the pre-marital counseling provided, canonical opinion supports the prohibition of marriage of a seropositive HIV person in accord with the norm of law.

---

[371] *Vide* Canon 1095(2).
[372] *Vide* Canon 1098.

CHAPTER 5

THE CONTROL OF NATIONAL LAWS GUARANTEEING THE INSTITUTIONAL ASPECT OF MARRIAGE

The right to marriage does not have an absolute reach, a man and a woman of a marriageable age cannot contract marriage without observing certain conditions of form and of depth which result from the social and institutional dimension of marriage. The exercise of the right to marriage obeys to the national laws of the contracting states according to the same terms of Article 12 of the European Convention of Human Rights. A priori, the States dispose of a wide margin of a national assessment to regulate marriage, its celebration and its effects in taking note of their diverse traditions yet, the authorities of Strasbourg make sure so that the national regulation of the right to marriage does not carry attack of substantial manner.

Eternal arbiters between individual liberties and the protection of the institution of marriage, the Commission and the European Court have been led on diverse occasions to contract direct or indirect national measures which are not in principle destined to react to this genre of relations notably those concerning the penitentiary systems and the control of immigration. Amongst these national measures which appear as much of restrictions of social order, most have been recognised in their principle as licit because contributing to the recognition and to the enforcement of the matrimonial tie. Whereas others have been condemned on the motive that they carried attack of a substantial manner to the right of getting married.

I. The Respect of the Legal Restrictions to the Right of Getting Married

Marriage is an important stage so that the couple benefits from a social and juridical recognition as a base of the family cell. The right to marriage, although it has been sanctioned to the title of individual liberties by the authors of the ECHR, does not remain less fragile by the weight of society which continues to maintain the institutional aspect of marriage. Thus, the prohibition of polygamy and the prohibition of divorce are direct legal restrictions to the right of getting married which obeys to the principles of unity and of indissolubility of marriage. The rules of celebration and of publicity may carry attack to the respect of private life of the candidates to marriage and be considered in a certain measure, as attempts to hinder matrimonial liberty, but it participates in a rite imposed by the law. Moreover, the right to get married and to found a family may be seem limited by the legal dispositions and the

administrative measures relative to the immigration policy of the Member States. In these manners, the margin of appreciation of States is widely respected by the authorities of control of the ECHR.

A. The Principles of Unity and of Indissolubility of Conjugal Ties

i. Restrictions for persons already married

In every society, principles of moral or religious order concur to render stable the matrimonial union among the various manners of forming a family within distinct societies and between persons of different States, polygamy and monogamy appear as the most dissimilar, that it is a matter those of a man and a woman (monogamy) of a man and several women (polygamy) or even, which is much more rare, of a woman and of several men (polyandry). If the right to marriage has always known polygamy, all the States making part of the ECHR have instituted monogamic marriage. Monogamy is of a Roman-Christian tradition, it is therefore prohibited to the same man to have two or several spouses, to a woman to have two or several spouses.

But one of the most serious limits to the right of getting married results without any doubt from the impossibility of divorcing and therefore, of being able to contract a new union. To the prohibition of simultaneous polygamy is added therefore, the prohibition of a 'successive' polygamy. Although, under the joint effect of the evolution of morals and of mentalities, the Christian conception of the indissolubility of marriage has lost of its authority in the majority of European States, it doesn't remain any less that have not intended to acknowledge the right to divorce.

Second marriage called bigamy is condemned by many States. This means that a second marriage is contracted during the subsistence of another and both parties to the first marriage are alive. In Malta a **'husband or wife, who during the subsistence of a lawful marriage, contracts a second marriage, shall on conviction be liable to imprisonment for a term from 13 months to 4 years'**[373]. It was punishable by death in England and Wales by Statute of James I. In Sweden[374] the Criminal Code BrB 7:1 makes bigamy a criminal offence punishable up to 2 years imprisonment. In Malawi[375] it is punished with 5 years imprisonment keeping in mind the customary law and marriage practices of African

[373] Criminal Code. Crimes affecting the Good Order of Families, Title VII, Sub-title I, Section 196. **'A person bound by a previous bond of a previous marriage'** cannot marry either at Canon law under Canon 1085(1). Under Section 6 of our Marriage Act 1975 such a marriage is void.

[374] Assistance and information obtained from the Ministry of Justice, S-103 33, Stockholm, Sweden.

[375] Chibambo T.N., Marriage Laws of Malawi, The Evolution of African Marriage Laws under Colonial Rule, School of Oriental and African Studies, London, 1987. Section 43 of the Marriage Ordinance 1902.

communities. In ***R vs. Allen,***[376] Court held that the UK Parliament could not have intended not impossible to commit because D was charged of marrying during the lifetime of his former wife and he claimed that the second marriage was invalid. According to the Supreme Court of Hong Kong in 1975 in the case Kao Yeung Lun Luk a marriage was annulled since the husband lived with another wife from a traditional domestic marriage.

B. The Prohibition of Polygamy - The Confrontation of Civilisations to Different Cultures

In the Roman Empire Constantine, the Christian Emperor, practised polygamy, Valentinian II issued a public ordinance stating that all men could practise polygamy without limitation of the number of wives. Diocletian was the first Emperor who punished polygamy. All civilisations whatever the diversity of their institutions have always considered this question as very important: **'The union of the sexes is a common problem to all humanity'** and the solutions that it receives in every country must **be 'classified in the marriage category in spite of the notable differences between them'**. Whereas the countries of Europe of Roman-Christian tradition prohibit bigamy, the countries of Moslem law and certain countries of Far East have established it to the rank of tradition. It is in controlling the compatibility of prohibition of bigamy with the respect of liberty of marriage that the authorities of Strasbourg have affirmed that such a rule did not carry attack of a substantial manner to the right of getting married.

Can an individual contract a union, whereas he is already engaged in the ties of a prior marriage? Although being more than a question of civil right, the polygamous or monogamous marriage comes before everything from religion. In fact, force is to acknowledge that in this domain, the right only ratifies the religious conceptions proper to every civilisation. From a historic point of view, polygamy has been practised by several peoples of antiquity and admitted at the beginning of the Christian era in pre-Islamic Arabia. However, abandoned since a long time in the Christian era, in the Hebrew environments,[377] a latent polygamy was envisageable in certain limited cases. Up to 1959, the rabbinical authorities authorised the doubles of marriages for sterility of the spouse or refusal of her part to divorce. It was by a law of the 20th. July 1959 that the prohibition of bigamy was posed for all Israeli nationals or residents of more than three months.

[376] **R vs Allen**, (1872) LR 1 CCR 367, CCR.
[377] We find Abraham, Jacob, Esau, examples in Judges VIII, 30, II Samuel V, 13, I Kings XI, 1-3 etc.

In Islam, polygamy is essentially founded on demographic and juridical considerations. In fact, Mohammed authorised multiple marriage by reason of the death of young Muslims at the battles around Medina and for the conquest of Mecca. Yet, the number of possible marriages was limited to four. This rule, however has nothing absolute, the Surah 'The Women' (IV, verse 3) precises: **If you fear to be unjust, do not marry but one wife.** If a husband cannot maintain a second wife Article 17 of the Syrian Code gives the judge right to refuse second marriage. He sees a means of avoiding unilateral divorce of the husband in certain cases of sterility or adultery of the woman. This is the spirit of the Iraqi law of 1967[378], of the Egyptian law of 1975 and of Article 8 of the Algerian Code of the Family[379]. It is the same for the laws of Togo and of Cameroon, but it is suitable to emphasise that in black Africa, polygamy is totally separate from Islam. In Ivory Coast[380] and Guinea[381] polygamy was made illegal. In India polygamy was abolished in 1955 by the Hindu Marriage law, but in Pakistan it subsists. Now in practice, polygamy only concerns a small fraction of the population, monogamy being widely in majority. Prior to British colonisation of Sri Lanka, the Kanduan Sinhalese law and Tibet recognised polyandry.

Beyond the problems of conditions of basis of the marriage a duality of cultures and of civilisations is designed. The principle of monogamy supposes that it is prohibited to a person of being simultaneously engaged in the ties of marriage with two or several partners[382]. But what happens when a person of whom the personal law admits polygamy wishes to contract a civil union when she is living on the territory of a State which adheres to the principle of monogamy? The Court of Paris had occasion to remind that if the conditions of basis of marriage are determined by the personal law of the spouses in the frame of private international law, it does not rest any less that the French conception of international public order may lead to the eviction of the foreign law from when that this appears contrary to the fundamental principles of France[383]. In France an Algerian man who married a French woman married a second time in Algeria and Court held that if the marriage seems monogamous the second marriage is not rendered null once celebrated abroad. If the first marriage is annulled the other woman and the husband can live in France[384]. French law is antagonistic to polygamous marriage celebrated in

---

[378] Iran Law of 15th. June, 1967. (25 Khordad 1345) Concerning the Protection of the Family, Section 14.

[379] A circular from the Ministry of Justice (No.102/84 of the 23rd. September 1984 justifies polygamy only in **'extreme necessity'**, consisting of wife's sterility or illness preventing normal married life supported by a medical certificate. The Registrar should not conclude marriage if such problems are known prior to marriage.

[380] By a law of the 7th. October 1964.

[381] By a law of the 5th. February 1968.

[382] Article 147 of the French Civil Code: One cannot contract a second marriage before the dissolution of the first. The prohibition is such that bigamy was enacted as penal infraction (Article 433-20 NCP): **'The fact for an engaged person in the ties of marriage, to contract another before the dissolution of the precedent is punished by a year of imprisonment and by 300 000 Francs of fines. The public officer having celebrated this marriage in knowing the existence of the precedent will be punished with the same'**. In the German law, no one can contract marriage as long as his prior conjugal union has not been dissolved (Paragraph 5 of the law on marriage of 1946). Bigamy is a cause of nullity, to the authorities of French law, it is also a penal infraction.

[383] Paris, 7th. June 1994 and Court of Cassation making application of the theory of French Public Order: Cass. Civs. 1st. 17th. February 1987.

[384] Cass. Civs.1st Hall, decided on the 17th. February 1982.

France between two foreigners. Therefore, it is considered bigamy if one is already married. In Germany at German law a marriage in Germany of a person whose residence and nationality render polygamous a marriage is impossible. If a marriage is celebrated abroad the notion of a potentially polygamous marriage is ignored thus a marriage between a German woman and an Egyptian man celebrated in Egyptian in Islamic polygamous form was considered valid.

Until recently English law would not recognise any actually or potentially polygamous marriage, where either party is domiciled in the UK[385]. This stance has been modified, however, by Section 5 of the Private International Law (Miscellaneous Provisions) Act 1995, a marriage contracted abroad between parties not already married is not void in English law merely because the law of that country permits polygamy. However, polygamous marriage involving a UK domiciliary and polygamous marriage contracted abroad are not recognised for all purposes. The right to marriage as it is protected by Article 12 of the ECHR can it keep in check the French and English conceptions of international public order which prohibit polygamy? To answer this question, it is suitable to determine the compatibility of this rule with Article 12 of the ECHR. The definition of marriage in the doctrine and practice of private international law must be determined by the rules of conflict of laws in every State extending it too. However, the extension cannot include all the different conceptions of marriage all over the world.

C. A Basic Condition for Marriage compatible with Article 12 of the ECHR

The confrontation of these two conceptions concerning the legal manner of forming a family, between the Western countries and countries of Islamic confession, has been brought in front of the authorities of Strasbourg under the angle of the question of human rights: the prohibition of bigamy is it compatible with Article 12 of the ECHR? The Commission as certainly recognised that as soon as the conclusion of marriage brings factors of attachment with various national juridical systems, the referral to national laws contained in Article 12 is not opposed to the application of foreign laws in virtue of rules of conflict of laws which compose the internal law of the concerned State[386]. But, in that which concerns the prohibition of bigamy, the Commission considered that such a prohibition was not incompatible with the terms of Article 12[387].

In the species a Pakistani living in the UK, took his case to the European Commission, notably that the British authorities refused to grant him the possibility to marry the mother of his son. British law

[385] In **Shanaz vs Rizwan** (1965) it was held that polygamy does not offend rules of decency at English law. But since the Matrimonial Causes Act of 1973 held a more restrictive position on the part of law and jurisprudence, thus a polygamous marriage celebrated outside England is null if one of the spouses is domiciled in England.

[386] Appl.No. 9057/80, **X vs Switzerland**, judgement of the 5th October 1981.

excludes marriage between two persons, when one of them is already engaged in the ties of a first union. Now the claimant did not bring the proof that his prior marriage concluded in Pakistan was dissolved. The Commission taking the arguments of the defending government declared that the request could not be received. The legality of the prohibition of bigamy will be reaffirmed by the Commission on the occasion of the Hamer case[388].

Although more than a principle founded on human rights the Commission sided with the defense of a culture which is that of all Member States of the Council of Europe. The European Court has besides reaffirmed this principle on the occasion of the Johnston judgement concerning the constitutional prohibition of divorce in Ireland : **'... in a society adhering to the principle of monogamy...'**[389].

II. Divorce is not a Fundamental Right recognised by the ECHR

The indissolubility of marriage is a rule inherited from the Christian church in response to the matrimonial practices of the Roman empire. The two systems have often been confronted notably in that which concerns the eternal hypothesis of rupture of the matrimonial tie. The Bible proclaims **'that which God has united, man should not separate it'** (Matthew 19, 3). Christian marriage is indissoluble[390], separation should be of the most exceptional. From the height of the Middle Ages, epoch where the Church led by itself the matrimonial institution, it imposes the rule of indissolubility in elevating marriage to the rank of sacrament. Countries within the Catholic family of nations do not justify divorce to the same degree depending on religiosity of people[391]. Malta remains an exception in Europe[392]. In 1998 the Church reported that the majority of the Maltese are against divorce legislation[393]. In 1986, when practically all the Member States of the Council of Europe recognised the right to divorce, the European Court did not condemn Ireland for prohibiting the dissolution of marriage through divorce [394], only State to maintain this rule in its constitution. Thus the Court refused by a significant manner to fire an evolutive interpretation of the Convention and to extract from it a right

---

[387] Appl.No. **X vs UK**, judgement of the 22nd. July 1970.
[388] Report of the 13th. December 1979
[389] Case numbered 6/1983/92/139, judgement of the 18th. December 1986.
[390] Canon 1056 of the Canon code holds unity and indissolubility as essential properties of marriage.
[391] Abela A.M., Who Wants Divorce? Marriage Values and Divorce in Malta and Western Europe, International Review of Sociology, Vol..II, No1, 2001. In a Gallup poll survey of 1992 22% of the Maltese were pro-divorce, The Times,24th.March,1992. In the Alternattiva Demokratika's Electoral Programme of 1996, divorce was a major issue. In Malta even unmarried cohabitation is discouraged. *Vide* The Times, Bill on Married Couples Rejected', 15th. September, 1994.
[392] These Southern European family of Catholic states have divorce: Portugal (1974), Italy (1978) and Spain (1981). *Vide* Ufficju Stampa, Archbishop's Curia, 1,782 Catholic marriages in 2000 were communicated to the media on the 25th. January, 2001. Still civil marriage is on the increase since 1975 when there where 8 civil marriages alone reported, today it counts up to approx.250.
[393] The Times, 13th. May, 1998 reported that the Church Family Commission slammed the report of the Government's Commission as superficial and extremely negative.
[394] Ireland had a case of right to marry as far as 1965: **Ryan vs Attorney General** (1965) I.R. 294; on personal rights which stem from the Christian and democratic nature of the State.

which had not been inserted in the beginning. But this refusal is equally that of taking into account the posterior social evolution in the drafting of the Convention which illustrates a more individualistic approach of family relations.

To claimants who complain of that which Irish law prohibits divorce in the name of the protection of the family, and by way of the consequence, the right to contract a second marriage, the authorities of Strasbourg replied that the terms 'right to get married' refers to the formation of conjugal relations and not their dissolution, conforming to the interpretation which should have been made of the Convention.

A. The Constitutional Prohibition of Divorce in Ireland

The Irish constitution of the 1st July 1937 took the rule of the indissolubility of marriage in order to assure to the family a protection that one can qualify as maximum. In fact, it recognises the family as a **'first and fundamental natural cell of society and as a moral institution having inalienable rights, anterior and superior to all positive law'**[395]. It equally foresees that the state must protect without particular care the institution of marriage on which the family is founded, notably against all that which can dissolve it: **'no law can be promulgated to grant the dissolution of marriage'**[396].

On the 26th. June 1986, the Irish government consulted the population by a referendum on the subject of the abrogation of the constitutional prohibition of divorce, as well as on the project to institute a procedure of divorce by judicial authorisation after five years of conjugal separation. 60% of the votes rejected this project. The 80,000 disunited couples which were in Ireland in 1995[397] waited for the 24th. November 1995 so that the new referendum on the vote of the legislation on divorce is submitted to the population. The 'yes' triumphed as justice, thanks to the votes obtained in the cities adhering to the liberal conception to divorce, whereas the countryside was relatively hostile to the idea that a marriage may be dissolved by the sole will of one or two of the spouses. This tendency is not proper to the Irish population, it was also observed in Switzerland on the debate on the introduction in the right to divorce, divorce by mutual consent. henceforth, since the 27th. February 1997, divorce is legal in the Republic of Ireland.

---

[395] Article 41(1) of the Chapter of Fundamental Rights.
[396] Article 41(3).
[397] 14,529 out of a total of 15,623 marriages were celebrated by the Roman Catholic Church rite in 1995; Shatter A.J., Shatter's Family Law, 4th. Edition, Butterworths, 1997, ISBN 1-85475-1247. *Vide* The Case for Divorce in the 1990's - A study of arguments, Irish Council for Civil Liberties, 1995, ISBN 0-9515425-4-0.

This law puts an end to inextricable and juridical and social situation for all these disunited couples, wishing to found a new family. Up to 1997, a person engaged in the ties of a first marriage having failed could not valuably to the risk of committing bigamy contract a new marriage while the first spouse is still alive. Only, the separation of the body permitted to the spouses to see taken the duty of cohabitation of an act of separation concluded between them and which ties than, by a judgement. A similar decision necessitates the proof of an adultery, of cruelty or practices against nature, and it does not dissolve in any case the marriage. The separated spouses were thus prevented to contract a new union. The families which recomposed could not pretend to exceed to the rank of family in the sense of Article 41(1) of the Constitution and of this fact, were socially and juridically considered as illegitimate. This was the situation of Mr. Roy Johnston, an Irish national and of Janice Williams-Johnston, British citizen, his companion and of Nessa Williams-Johnston, their daughter who seized the European Commission of human rights on the 16th. February 1982.

Mr. Johnston got married in 1952 and has three children of this marriage. His wife and him agreed in 1965 to leave and concluded following an official agreement of separation of body. Since 1971, he lived in cohabitation with Janice Williams who was in great part in his care. He took care of the needs of the child who was born of this relationship and whom he has acknowledged. He took besides dispositions regarding the will in favour of his daughter, of his concubine and of his other children issued from his marriage. Couples like Mr. Johnston and Mrs. Williams living together and in the frame of stable relationships after the rupture of marriage of one of them, cannot, while the other part to the marriage is living get married in Ireland and are not considered as a legitimate family. In their request, they argued that the Constitutional prohibition of divorce in Ireland prevents them from getting married and to regularise their family situation because in the facts, they constitute a true family, animated by matrimonial intention. They affirm that the incapacity of which Mr. Johnston was hit to obtain divorce to be able to marry his concubine, and moreover, the mother of his child, constitutes an interference in the exercise of their right to the respect of family life (Article 8) and of their right to contract marriage (Article 12). In defence the Irish government sustains, simply, that the right to divorce is not a matter arising from the ECHR.

In order to resolve the dispute the authorities of Strasbourg did not want to answer to the question of the incapacity of Mr. Johnston and Miss Williams to get married as constituting a violation to the right to marriage and to a family life as was suggested by the claimants, because a right to divorce was not sanctioned by the Convention. In answering in the negative the authorities of Strasbourg have confirmed the argumentation of the Irish government founding their decisions on a literal interpretation of the Convention.

B. The Recourse to the Literal Interpretation of the Texts

Already in 1981, the European Commission recognised that Article 12 did not require from the States making part of the Convention that they foresee in their national matrimonial legislation the possibility of a complete divorce bringing dissolution of the conjugal tie on the motive that restriction to the right of contracting marriage existed everywhere in Europe. It is thus that the Commission declared irreceivable the request[398] of an Argentinean who was living in cohabitation with a Swiss national who was refused authorisation to get married in Switzerland, a fault on his side to prove that his future marriage will be recognised in Argentina, his first marriage not having been dissolved. The Commission emphasises that the fact of not foreseeing divorce existed at the time of the drafting of the Convention and that not one of the First Signatory States endowed with such a juridical system did not judge it necessary to formulate a formal reservation to this regard, it was the same for the States who have later adhered to the Convention.

In the Johnston case the Commission retook these arguments but this time by developing them. In its report of the 5th. March 1985[399], it states, firstly that the right to divorce and afterwards to marry does not come out of wording of Articles 8 and 12 of the ECHR because, neither the ordinary sense, nor the context do not impose to the contradicting States, an obligation of foreseeing the dissolution of family or matrimonial ties. Being a question of Article 8 the European Court had admitted by implication that the right to respect of private life may bring the necessity in certain cases to the spouses to separate, but it had been very clear in affirming that the effective respect of private or family life, imposing to Ireland to render the separation of body effectively accessible, does not bring the acknowledgment of a right to divorce. Being a question of Article 12 the Commission was of the opinion that it is restricted to confer the right to create a juridical tie , by opposition to the right to break a tie or to dissolve a status.

To establish that the ECHR does not contain any right to divorce, the Commission goes into the preparatory works to interpret Articles 8 and 12. It results that the drafting of Article 12 differs from that of Article 16 of the UDHR. This latter Article in fact mentions equal rights of spouses as regards to marriage and on its dissolution whereas this mention has been voluntarily omitted from Article 12. Then the Commission emphasises that when the Convention enters into force, the legislation of several member States did not permit divorce. At this moment no member State had omitted reservations regarding this voluntary omission what it would not have failed to do if it had estimated that the Convention guaranteed any right to divorce. Finally, the Commission reminds that the fact that the

[398] Appl.No.9057/80, **X vs. Switzerland**, judgement of the 5th. October 1981.
[399] Appl.No.9697/82, **Johnston and others vs. Ireland**, Report of the 5th. March 1985.

Convention must be interpreted in keeping note of the social changes does not permit to these organs of control to create new guaranteed rights.

The Convention thus poses limits to an evolutive interpretation of the Convention. It considers that such a method of interpretation must be limited to the rights which figure in the text of the Convention and that it cannot serve to conclude matters which have been expressly and deliberately excluded, only the additional protocols to the Convention are able to fill this role. Thus to refuse to recognise the violation of Article 12 with regards of the claimants, the Commission founded its decision on the only will of the contracting States at the time of conclusion of the Convention being thirty years before.

The Court in its judgement given on the 18th. December 1986, sanctions the arguments sustained by the Commission to the subject of divorce. It is clear in fact for the Court that Article 12 treats exclusively **'of the formation of conjugal relationships and not of their dissolution'** it gets support equally from the preparatory works. The same it refuses to see in the interpretation that can be taken from Article 8, any positive obligation for Ireland to institute divorce. Here again the Court refuses an evolutive interpretation of the Convention. It does not believe to be able to take any other obligation in what concerns disunited couples that of permitting the end of cohabitation. It acknowledges that an interpretation of Article 8, the very clear exclusion of the right to divorce is acknowledged with regard to Article 12.

Finally, the Court equally refers to Article 5 of Protocol No.7 ratified by various States which foresees the equality of the spouses **'in the marriage and when it is dissolved'**, but which does not include the right to divorce, according to the interpretation which has been made of this Article[400]. The Court has equally rejected the arguments involved by Mr. Johnston according to which there will be an inequality from the fact of admission of certain divorces in foreign countries by reason of rules of private international law and that there will be attack to the liberty of conscience in that the claimant will be forced to live in cohabitation.

This decision was not unanimous amongst the judges. For example, according to the Judge Meyer, the absence of dispositions on divorce does not reconcile neither with the right of the interested persons to the respect of their private and family life, nor with their right to liberty of conscience and of religion, nor with their right to get married and to found a family. The rule of indissolubility appears of a hardness and of a vigour not much compatible with the principles of religious liberty, as well as with

[400] Protocol No.7, explanatory report, Council of Europe, Doc.17(84)5, 8th. October 1984. Article 5 sees uniquely the consequences of the dissolution when the latter is expressly foreseen by a law of State control, i.e. that it envisages the equality of spouses as to the effects of dissolution in matters of parental rights or patrimonial rights.

the respect of democratic society. It reminds that the Court must assure itself in certain circumstances, that although sometimes one must subordinate the interests of the individual to those of a group, democracy restores the constant supremacy of the opinion of a majority, because it must demand an equilibrium which assures to minorities a just treatment and which avoids all abuse of a dominant position[401].

Whatever it is, in virtue of which justification in the name of public interest can one constrain two persons to stay united by marriage, when they do not have anything in common and no will of living together animates them? For what good is to maintain a 'phantom family' which is void of its sense and of its content? To whom can such a situation be advantageous? Why such a negation of matrimonial intention which must be in all cases the basis of a couple engaged in the ties of marriage? In these circumstances the Convention seems inoperative under the weight of traditions of State control, notably constitutional. To these arguments, one can oppose the limits of evolutive interpretation of the texts. In fact, from a strictly juridical point of view, a text is not indefinitely extensible by its interpretation and the European Court cannot go up to dispossessing the States of their legislative competence. Yet, the prudence of which the Court showed proof as a consequence negated the social evolution in the matter of divorce which was then very marked in Europe.

C. The Refusal by the Authorities of Strasbourg to take into account the posterior Social Evolution in the drafting of the Convention

The prudence of which the authorities of Strasbourg give proof is criticisable and surprising in two regards. From one side in 1979 the European Court had admitted by implication that the right to the respect of private life can bring the necessity to permit in certain cases to the spouses to separate: one cannot oblige a couple to live together, if this is not its will. From another side refusing an evolutive interpretation of the Convention has contributed to marginalise a little more these families considered as illegitimate with regard of the Irish constitution to the profit of the stability of the institution of marriage, whereas a little everywhere in Europe reforms had been operated: democratisation of divorce by mutual consent, suppressing of divorce by fault

Relieving the spouses from the duty of cohabitation comes from the protection of private and family life as held in the Airey case. Up to 1979 Irish law did not foresee any judicial aid to permit a married person to be assisted by a advocate at the time of a procedure of judicial separation in front of the High

[401] Airey case of the 9th. October 1979: right of entry to the Tribunal for the persons wishing to separate when the divorce is not even foreseen.

Court then only the possibility to be declared legally separated victim of an alcoholic and brutal husband, Mrs. J. Airey, Irish citizen, tried in vain during 8 years to sign an amicable agreement of separation with her husband. In 1972 she decided to ask for a judicial separation, but her financial means do not permit her to be assisted by a lawyer. Mrs. Airey referred to the Commission on the 14th. June 1973. Amongst the numerous grievances presented in the request the Commission only retains that concerning the inaccessibility of the procedure of judicial separation estimating in unanimity that Article 6(1) had been violated[402].

The Court has equally recognised the violation of Article 8 in that the protection of private and family life of the claimant had not been assured for lack of being able to refer to the High Court. From the point of view of the European Court foreseeing the possibility of a judicial separation is equivalent to recognising that the protection of private and family life of the spouses demands sometimes the raising of the duty of cohabitation. The obligation of assuring the protection and permit the spouses to start a procedure of legal separation has been put under the charge of the Irish State. This case could be interpreted as constituting a first step of looking into the constitutional prohibition of divorce in Ireland, to a time where the Member States of the Council of Europe liberalised divorce, a sign of adaptation to the evolution of morals in matrimonial matters.

Marriage can be defined as an act which should remain as it started. Canon law holds this concept with regards to the formation of the union. The indissolubility of marriage is attacked by most Western States. One must not forget the human aspect of marriage and due to the evolution of morals divorce is today accepted in most European States. Some hold that divorce makes marriage contracted with more easiness, since the knot can be untied. Marriage is contracted with the intent of eternity and exclusiveness, but dissolution is usually sought easily. In ***Nachimson vs. Nachimson***, Lord Hanworth M.R., admitted that: **'Our minds trained to regard marriage in some cases sanctified by religious rites ... recoil at the recognition of a union capable of being dissolved so easily as the marriage of these spouses when contracted in Russia appears to have been'**[403].

The Catholic Church has for a long time asked civil legislators of Catholic countries to condemn divorce, even to prohibit it. In certain States the religious moral was very strong which led legislators to conform to this moral as in Italy and Spain. In Italy the indissolubility was guaranteed by the agreements of Lateran of 1929 concluded with the Holy See. In Spain the civil effects of marriage celebrated according to canonical norms were recognised by the Accord of 1979 with the Holy See rendering Catholic marriage indissoluble. These two States as Ireland had inscribed the rule of the

[402] Report of the Commission of 9th. March 1978.

indissolubility of marriage in their Constitution. But in 1971 and 1981 respectively they have put this into question due to the evolution of morals.

In Belgium several laws have successively alleviated the conditions of basis and softened the procedure of divorce by mutual consent without however disrupting the economy of this form of divorce, as has been conceived by the legislator of 1804. In Austria it was by law of the 1st. July 1978 on marriage which instituted divorce by mutual consent. In Greek law, the reform of family law of 1982 introduced divorce due to marriage failure. This is a matter of discretion of States however they should not attack by substantial manner the right of contracting marriage.

---

[403] **Nachimson vs Nachimson**, (UK) (1930).

CHAPTER 6

THE RIGHT TO MARRY OF FOREIGNERS, PRISONERS AND OTHER PERMITTED AND PROHIBITED RESTRICTIONS

I. The Scope of Measures tied to the Politics of Immigration and the Formation of the Matrimonial Tie

The rules relative to the conditions of entry of foreigners are a matter of exclusive competence of each State according to classical international law under reserve in Europe of the dispositions of the Treaty of Amsterdam[404] on free movement of persons. The foreigner is by definition the one who has not nationality of a considered State and who cannot enter or stay on the territory of that State if not by respecting certain legal conditions. Foreigners can benefit from the principles of the Treaty of Rome of the 25th. March 1957[405]. The Convention does not guarantee the right for a foreigner to enter and to establish himself in a country of which he is not a national, conforming to the will of its authors and not to interfere in the immigration policy of the States parties to the Convention. On numerous occasions the European Commission of Human Rights has reminded the application *ratione materiae* of the ECHR[406]. If therefore, in most cases the States have enough margin of power, except discretionary to accept or refuse the entry of foreigners on their territory, there are nevertheless situations where this margin of appreciation is reduced because the exercise of the power must be conciliated with the exercise of a right guaranteed by the Convention.

This is notably the case for the right to marriage. In fact, one must not lose from sight that the State which has signed and ratified the European Convention must be reputed as having accepted to restrain the free exercise of the rights which the international law accords to it, in the measure and limits of obligations which it has assumed in virtue of this Convention[407]. One must remember that the right to marriage was elevated to the rank of fundamental human right which must be recognised to all the persons of the State where it applies (Article 1 of the ECHR). But this principle has no specific dispositions regarding its application on foreigners who can benefit from marriage in a Member State.

---

[404] The Treaty of Amsterdam has been adopted on the 16th. And 17th. June 1997 and signed by the States of the European Union on the 2nd. October 1997. The Sovereignty of Member States is in a certain measure.

[405] The situation of foreigners with regard to the ECHR, Report on Human Rights, No.8, Council of Europe, 1993.

[406] Appl.No.12068/86, **K.Paramanathan vs. Federal Republic of Germany**, decision of the 1st. December 1986; Appl.No.16360/90, **F. vs. Switzerland**, decision of the 2nd. March 1994: the Convention has not guaranteed as such the right to enter and reside in a State of which you are not a national. *Vide* also **L.L. vs. Sweden**, decision of the 8th. September 1993, **'The Convention does not guarantee as such neither the right to political asylum nor the right for a foreigner to reside in a determined State or not to be expelled'.**

[407] Appl.No.6315/73, **X vs. Federal Republic of Germany**, decision of the 30th. September 1974.

The rule of qualified majority in the procedure of co-decision in such matters can affect the essential conditions of exercise of national sovereignty. National measures assuring the control of immigration may affect the liberty of marriage without a substantial hindrance of the right of getting married. But can one affirm that all the measures which regulate the conditions of entry of foreigners do not attack the liberty of marriage?

A. The Right to Marry of Foreigners with regard to the ECHR

The control of immigration is a political question too emphasised since the beginning of the 70's by the economic difficulties tied to the first petrol crash. Numerous States have put an end to immigration of extra-community persons limiting at law and in fact the entry of foreigners on their national territories. Certain States allow some categories of persons: students, trainees, persons endowed with an exceptional professional qualification and especially the members of the family of a foreign or who establishes himself and the right to asylum. These policies of control of migratory flux which can touch the right to marry are essentially founded on economic and security considerations. From this fact the absence of particular statute to the benefit of the foreigner as well as the respect of migratory policies by the authorities of Strasbourg limit the protection of the right to the marriage of foreigners.

B. The Absence of a Particular Statute to the Benefit of the Foreigner

i. The Principle of Equality of Treatment of Foreigners

In the spirit of the Convention foreigners benefit from the same rights and liberties that the nationals to which they are assimilated to this title under reserve however of specific limitations of the clause of public order. This reserve is accentuated by the specificity of the right of foreigners which is for the discretionary power of the States. In order to realise a united Europe in the respect of human rights, the founding fathers of the Council of Europe took care to edict in Article 3 of the Statute of the Council of Europe that: **'Every member of the Council of Europe recognises the principle of the preeminence of the right and the principle in virtue of which every person placed under its jurisdiction must enjoy the human rights fundamental liberties ...'**.

The distinction between foreigners and nationals has equally been dismissed from the First Article of the ECHR. This Article stipulates that the contracting parties **'recognise to each person relevant of their jurisdiction the rights and liberties guaranteed in this instrument'**. The notion of nationality does not intervene as a condition sine qua non of the protection; the latter is applied therefore to each

individual as it is revealed by the general formulas used by the Convention: **'Every person has the right to ...** (Title of Articles 2, 5, 6, 8 to 11, 13) and **'Nothing can be ...** (Articles 3, 4, 7), **'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'** (Article 12). The same, the enjoyment of the rights and liberties enumerated in the Convention must be assured, in terms of Article 14 **'without any distinction founded notably on race, colour, religion, political opinion or any other opinions, national or social origin, the belonging to a national minority, fortune, birth or any other situation'.**

A priori, the equality in rights of foreigners and of nationals of Member States seems fulfilled, foreigners enjoying the same rights and liberties as the nationals, whether the foreigner is or is not in a regular situation on the territory of a Member State. But this equality is not effective with regard to the Convention, if the foreigner has been regularly admitted on the territory of the considered Member State. In fact, Article 2.1 of Protocol No. 4 guarantees to whoever is regularly on the territory of a State the right to circulate there in liberty and to choose his residence in liberty. This general disposition is submissive to certain restrictions touching public order found in paragraphs 3 and 4. Consequently, a foreigner who fulfills the conditions may contract marriage and benefit from the protection enacted by Article 12 of the ECHR.

C. The Specificities of the Rights of Foreigners

According to the interpretation *a contrario* of Article 2 of Protocol no.4, a foreigner who is illegally on the territory of a State party having ratified Protocol No.4 is not protected by Article 2, the discretionary power of a State to regulate the entry and the residence of foreigners on its territory remains outside the field of application of this disposition. The State can therefore define the conditions rendering regular the presence of a foreigner on its territory[408]. Conforming to classical international law Article 2 of Protocol No.4 has been restrictively interpreted on its adoption by the Committee of Ministers.

The Committee estimated that paragraph 1 of Article 2 does not guarantee to the foreigner who has a temporary title the right to obtain his admission to definite title on the said territory. The Committee estimated besides that in the case where a foreigner is allowed to enter under certain conditions and that he transgresses or does not fulfill the said conditions, this foreigner cannot be considered any more as staying regularly in the country. In fact, up to a recent time it was admitted that in virtue of traditional international law, the States were not obliged to admit foreigners on their territory. This general rule has besides as corollary that the States can ask them at any moment to leave their territory. Compared to the

[408] **Piermont vs France**, ECHR judgement of the 26th. April 1995.

situation of nationals the liberty to go and come of foreigners knows more severe restrictions. Moreover, no substantial disposition of the Convention prohibits a State from making a distinction between its nationals and foreigners. There is therefore a breach of equality of treatment of foreigners, founded on necessities of immigration control.

Yet, in the exercise of its powers in the matter of policing of foreigners, the State should not attack the rights guaranteed to the interested by the Convention. States should not be the cause of violation of other rights protected by the Convention and submitted to the control of the organs of the ECHR[409]. The most frequent breach is the refusal to admit a foreigner in a State or the decision to expel or extradite him. It was not rare that foreigners founded their request on the violation of Article 12, considering that the refusal to remain on the territory, or the measures of removal constitute attacks their freedom of contracting marriage with a national of the State on which one finds himself. If in principle the right to marriage of foreigners is also well-protected as for the nationals, in virtue of Article 1 of the ECHR, it can happen that some exercise the right to obtain the right to establish themselves there.

D. A Relative Protection of the Right to Marriage

A claimant may put in front of the European Commission his case of expulsion from the territory which attacks his liberty of getting married, as guaranteed by Article 12. Foreigners invoke Article 12 on its own or in conjunction to Article 8 and the Strasbourg organs have respected the migratory policies of States **'... according to a principle of international law well established the State has the right, without prejudice of engagements ensuing for them from treaties, to control the entry of non-nationals on their territory'**[410]. Besides they have defined by a strict manner the conditions in which the rules of the right of foreigners could constitute attack to the right of getting married.

Being a question of Article 12 taken in isolation, the Commission pronounced itself on the question of the fact that the German authorities did not grant a permit of residence to an Italian national, domiciled in Berlin constituted a violation of Article 12. In answering in the negative, the Commission[411] posed two conditions so that such a violation of Article 12 be recognised. From one side, the foreigner candidate to marriage must render plausible his engagement and consequently his plans of marriage. From another side, he must establish that that fact of having to leave the territory will prevent him from getting married and to lead a conjugal life outside the considered territory with the person that he wishes to marry.

---

[409] **Abdulaziz, Cabales, Balkandali vs UK**, judgement of the ECHR of the 28th. May 1985.
[410] **Abdulaziz, Cabales, Balkandali vs UK**, judgement of the ECHR of the 28th. May 1985.
[411] Appl.No.7175/75. **X vs Federal Republic of Germany**, judgement of the 12th. July 1976.

Being a question of Article 12 with Article 8, the Commission had to pronounce itself on the question of knowing if the fact of expelling a foreigner when the latter is on the point of getting married, is a violation of his right to marry, but equally a violation of his private and family life. Although the Commission interpreted the notion of private life as including in a certain measure, **'the right to establish and to maintain relations with other human beings, notably in the affective sphere, for the development and the enjoyment of his own personality'**[412], this interpretation cannot be sufficient to guarantee that a foreigner may freely establish this type of relations by the ties of marriage in the country where he is living. Article 8 does not oblige a State to let a foreign national to enter on its territory to create there new family ties[413].

In fact, it is a matter that the jurisprudence of the European Court regarding Article 8 guarantees the exercise of the right to respect of a 'sufficient' family life, which supposes that the family cell is pre-existent, i.e. that the spouses are legally married and that they cohabit or at least if they are prevented from doing so, they really desire it[414]. It is suitable yet to remark that today the European authorities extend the application of Article 8 to non-married couples from when they cohabit and that they maintain close personal ties such as financial ties, birth of a common child etc. Consequently, in default of an existing family life the applicants to marriage cannot profitably invoke Article 8 as support of the grievance of the violation of Article 12.

The margin of appreciation to regulate the exercise of the right to marriage held by the States in virtue of Article 12 seems substantial. However, the authorities of Strasbourg must be careful that national legislation does not attack the substance itself to the right to marriage. In order to satisfy this need, the Court can following the example of the dispositions of Article 8, control the appropriateness between the objective by legitimate hypothesis (protection of order) and the means put into work to attack it (measures of removal). The principle of proportionality permits in fact to verify that the means used to realise this aim are not very energetic, i.e. that they do not affect the very substance of the right to marriage[415].

Such a control will suppose from the part of European jurisprudence an examination of the balance of interests present which are in the sort the interest for the foreigner to get married and to reside on the territory of a Member State and the interest for this State to control and to limit the entry and the

---

[412] Appl.No.6825/74, **X vs. Iceland**, judgement of the 18th. May 1976.

[413] The Commission held that in the case of expulsion of a spouse is not a violation of Articles 8 or 12 as it does not prevent the other spouse from following the spouse: Appl.No. 7031/75, **X vs. Switzerland**, judgement of the 12th. July 1976.

[414] Abdulaziz, Cabales, Balkandali case cited above.

[415] This principle of proportionality has already been used by the European Court in the judgement **F. vs. Switzerland**, dated 18th. December 1987.

establishment of foreigners on its territory in the name of the respect of public order. To this title, according to the constant jurisprudence of the Court some questions must be verified: Is there a plan of marriage which is made to be likely, notably by a community of life, financial dependence, the arrival of a child? Is there an interference of State control in the private or family life of the claimant? Is this interference foreseen by law? Does this interference follow a legitimate aim? Is this interference necessary in a democratic society? With regards to control of the proportionality of the measure the right to marriage weighs very little to the imperatives of defense of public order. This explains without doubt restrained control exercised by the Commission estimating simply **'that there has not been interference in the exercise of the right of the claimants of getting married ... and that their right of founding a family has not been violated'**[416].

The protection of the right to marry of foreigners is limited: it fades in front of the necessities of the control of immigration. So that the violation of Article 12 is recognised, it is therefore necessary that the claimant can prove that the fact of having to leave the territory of a country constitutes a constraint to his right of contracting marriage or to found a family[417]. Up to now no relevant measure of policing of foreigners has been condemned by the authorities of Strasbourg, as attacking by substantial manner the right of getting married. Yet, such a jurisprudence is not immutable. Although the decisions and the judgements given by the authorities of Strasbourg do not have to be applied *erga omnes* no State is sheltered from an eventual condemnation in case of violation of Article 12 of the ECHR.

In the future, the margin of appreciation of the States in matter of residence and admission of foreigners may be found reduced so that the equilibrium of interests in presence is assured by a better taking into account of the interests of the claimants. In fact, the fact of having to establish oneself in the country of origin of the foreigner or in any other country to get married and found a family may be prejudicial for the two future spouses, with regards to all the difficulties that this situation may engender in the affective, social or financial level. The spouse of the foreigner besides is deprived of his right of living in a family with his spouse in his own country.

II. The Mitigation of Legal Restrictions to the Right of Getting Married

If the exercise of the right to marriage is left to the discretion of the States making part of the ECHR, the national authorities must take care not to edict orders which can attack to a substantial manner the right of contracting marriage. The legal restrictions must remain proportioned to the aim looked for and the

[416] Appl.No.5269/71, **X and Y vs. UK**, decision of the 8th. February 1972.
[417] Document of information drafted on the occasion of the Colloquium Human Rights without Frontier, Strasbourg, 30th. November 1989-1st. December 1989, Council of Europe.

maintenance of the institutional aspect must not lead the national authorities to deprive an individual from the right of marriage if it is not justified. Applying these principles the authorities of Strasbourg have attacked certain legal restrictions in condemning the principle of prohibition of marriage of the detained, as well as the principle of the temporary prohibition of remarriage because such rules were not justified any longer with regards to the right of marriage such as it is guaranteed by Article 12 of the ECHR.

A. The Slow Recognition of the Right to Marriage of Prisoners: The Prohibition of Marriage of Detained Persons

Up to the 1980's, the impossibility of having conjugal relationship and to procreate just as the absence of cohabitation were considered by numerous national legislations as obstacles to marriage. Some detained persons estimating that certain repressive dispositions paralysed the exercise of their rights on the ground of Article 8, but equally on that of Article 12 of the ECHR took hold of the European Commission of Human Rights. They had to wait for almost 20 years before the Commission recognised that a person deprived of circumstances can oppose to the exercise of this right. This recognition of the right to marriage of prisoners necessitated a redefinition of the right to marriage distinct from the right to start a family. The Commission will go up confirming this jurisprudence in the case of a prisoner for life estimating that the national legislation cannot deprive a person or a category of persons of full juridical capacity of the right to contract marriage.

At the beginning to refuse to recognise the right to marriage of prisoners, the Commission interpreted in a wide sense, the notion of 'national law', as it is represented to Article 12 of the ECHR, thus according to penitential authorities a large margin of appreciation. It is redefining the right to marriage as the acquisition of a juridical statute, that the Commission finished by recognising the right to marriage of prisoners. The contours of this right to marry were established in the U.S. case ***Zablocki vs. Redhail***[418], where the Court struck down a Wisconsin law that required noncustodial parents who had child support obligations to obtain court permission before marrying. Then in 1987, the Court struck down a Missouri regulation that prevented prisoners from marrying without the prison superintendent's permission and which restricted that permission to **'compelling'** circumstances.[419] Thus, the Supreme Court has placed important limits on what States can do in their regulation of marriage.

[418] Supreme Court, 434 U.S. 374 (1978). A Wisconsin statute prohibiting marriage to whom does not pay support payments was found violative of the equal-protection clause.
[419] **Turner vs. Safley**, 482 U.S. 78 (1987).

B. A Minimum Control of Penitential Measures

The Commission illustrated this tendency in a decision of the 13th. April 1961[420]. A recidivist finding himself in preventive custody was refused authorisation by the German authorities to get married on the grounds from one hand, that he had to wait to a weighty punishment which deprives of liberty and he cannot live with the wife before a long time, a condition considered essential to marriage. On the other hand, that his personality and the lengthiness of the engagement will give reason to think that he did not have the intention of marrying his companion and finally, that the marriages of prisoners necessarily attack the internal order of penitential establishments. It must be noted that German legislation does not regulate the exercise of rights by prisoners not in the case of a condemned person serving a punishment in prison, but not that of a person in preventive detention.

However, after having reminded that it seems to be admitted in German law that the question of knowing if one must or must not authorise a prisoner to get married during his detention depends from particular circumstances to each case, the Commission took as its own the grounds of refusal given by the German Tribunal, which held to the circumstances of the case and thus refused to recognise to the applicant the right to get married. The Commission posed the principle according to which the refusal by the German judicial authorities authorise a prisoner to be wed does not attack the right found in Article 12.

However, the Commission will progressively come back on this restrictive jurisprudence of rights for prisoners starting from 1962, considering that the detention did not deprive the prisoner of the rights guaranteed by the Convention[421]. In this case, it was a question of verifying that the system of detention did not attack the right of the prisoner to suffer inhuman or degrading treatment in the sense of Article 3 of the ECHR. The Commission pronounced itself in the sense of the rules '*minima*' of the regulation concerning the treatment of prisoners which foresees in its Article 60 that **'the system of the establishment should seek to reduce the differences which may exist between life in prison and free life in the measure where these differences tend to establish the sense of the responsibility of the prisoner or the respect of the dignity of the person'**[422]. This principle was extended to the right to marriage in 1979, and it is with a very great attention that the Hamer[423] case was studied by the Commission. It is in effect in this case that European jurisprudence initiated its reversal.

---

[420] Appl.No.892/60, **X vs. The Federal Republic of Germany**, judgement of the 13th. April 1961.
[421] Appl.No.1270/61, **Koch vs. Federal Republic of Germany**, decision of the Commission of the 8th. March 1962.
[422] These rules were adopted by the First Congress of the UN for the Prevention of Crime and the Treatment of Delinquents held at Geneva on the 30th. August 1955 and approved by the economic and social council on the 31st. July 1957.
[423] Appl.No.7114/75, **S.Hamer vs. UK**, Report of the Commission of the 13th. December 1979.

C. The Redefinition of the Right to Marriage

On the 19th. December 1974 in Great Britain, Mr. Hamer had been condemned to five years imprisonment for the commission of several offences. Before his arrest he had started a relationship with Miss J. They had live together for some time, just before his arrest. Then there was no juridical obstacle to their marriage. When he had been placed in preventive detention he asked the Governor of the Prison on the 21st. October 1974 the authorisation to get married. This request was rejected. During the month of March 1975, he requested the same to the Ministry of the Interior. Again, a refusal founded on the regulations was sent to him. A regulation granting temporary liberty to a prisoner to get married only in the aim to legitimate a child born or to be born was in the Prison officials' discretion to be exercised. Claimant sought authorisation to contract marriage, but it was all in vain.

Moreover, it is not possible in the UK to get married by proxy, nor to celebrate marriage in prison. In fact, save for two exceptions marriage can be celebrated only in places prescribed in the law of 1949. Prison is not one of these places. In spite of the theoretical possibility for a prisoner to obtain a special authorisation which besides only exists in the case of a marriage celebrated according to the English church rite, the disposition contained in the law of 1949 have thus as effect not to permit in practice to a prisoner to get married only if he is in the measure of leaving the prison and to celebrate the marriage in one of the places prescribed by law outside prison. The possibility for a prisoner to get married is therefore subordinated to the authorisation to get out which is granted in a discretionary manner by the Minister of Interior and the Director of Prison. Finding himself in the impossibility of getting married, Mr. Hamer laid a claim in front of the European Commission of Human Rights on the 25th. May 1975.

The British Government in his memorandum of defense in a previous time referred to the decision of the Commission of the 13th. April 1961, inviting the Commission to conclude in the same manner in this case. The circumstances were incomparable. In the case *X vs. Federal Republic of Germany* in 1961 the Commission highlighted notably that in German law existed particular rules on the right of contracting marriage and the possible restrictions to prisoners' rights too. Now, to appreciate the compatibility of legislation put before Article 12 of the ECHR the Commission had to take account of the jurisprudence of the Court on the scale of limitations authorised to the rights sanctioned by the Convention and examine the facts which were presented to them in the light of the conditions of modern life. It is thus that in the Hamer case the Commission took note of the general tendency in the European repressive systems to reduce the differences between life in prison and life in liberty and to insist more and more on the social re-insertion of the prisoner. **'To accord prisoners the right to marry involves no general threat to prison security or good order, nor is it in any way harmful to the public**

interest ... the imposition of any substantial period of delay on the exercise of the right to marry is an injury to its substance'.

For a second time the defending Governor invited the Commission to resume the reasoning that it had held in the case ***X vs. UK***[424], where it declared that the right to start a family sanctioned by Article 12 did not find itself infringed by the refusal to authorise conjugal relationships in prison: **'In fact, although the right to start a family is an absolute right, in this sense that no restriction similar to that of paragraph 2 of Article 8 has been expressly foreseen it did not follow that a person should always be put in a manner to start a family'.**

The Commission estimated that the jurisprudence to which reference was made is hardly useful. For it the right to marriage essentially implies the right to create a juridical relationship, to acquire a statute. The essence of the right to get married and to form an association which generates a juridical solidarity between a man and a woman, such an association may be created even if the spouses cannot live together. Its exercise by prisoners does not bring for security or the well-functioning of the prison any menace. A ceremony of marriage can take place under the surveillance of the penitential authorities. The Commission reminds thus that Article 12 guarantees a fundamental right to contract marriage whose exercise is governed by national laws, but that its interpretation does not mean for as much that the domain of national laws is unlimited. On the contrary Article 12 will be superfluous. The Court confirmed this principle by declaring that a measure regulating the exercise of the right to education (Article 2 of Protocol No.1) or that of the right of access to Tribunals (Article 6) should not bring attack to the substance of the right itself[425].

Thus the Commission judged that the British government had attacked the exercise to the right of the claimant to get married by not recognising as pertinent the fact that the interested person was not able to live together with his spouse, not even to consummate the marriage while he served his sentence. In the species the aptitude of the claimant to exercise his right to marriage had been delayed by the combined effects of national legislation and of the fact of administrative legislation which according to the opinion of the Commission was equivalent to an attack to the substance of the right of the claimant to get married.

[424] Appl.No.6564/74, decision of the 21st. May 1975.
[425] **Belgian *linguistic* case**, judgement of the ECHR of the 23rd. July 1968.

D. The Sanctioning of the Right to Marriage of Prisoners

The Commission sanctioned this jurisprudence a year later in the ***Draper vs. UK***[426] case in 1980. Mr. Draper was serving imprisonment. In 1977 claimant asked the Director of the Prison the permission to leave the prison to get married. His request was referred to the Minister of the Interior who rejected it in September 1977. This refusal was founded on the basis that prisoners who serve perpetual imprisonment do not have the right to temporary liberty to contract marriage, except if it has the effect to legitimise a child or if a provisional date of liberty has been fixed. The claimant in his request presented to the Commission on the 6th. March 1978, a claim that Article 12 was devoid of its sense. The UK Government held the same previous arguments while the Commission dismissed them. The Commission has taken the same relative preambles of non-necessity of cohabitation[427]. According to the Commission the right to get married is by essence the right to form a generative association of solidarity between a man and a woman. The latter can decide to create such an association even if they are prevented from living together and so from consummating the marriage. The liberty of the person is not a necessary prerequisite to the exercise of the right to marry. The national laws governing this right can control it, but not attack it in a substantial manner: waiting till a prisoner gets liberty. What about life imprisonment?

The Committee of Ministers got the Hamer and Draper cases Reports and on the 2nd. April 1981 adopted Resolutions DH (81)5 and DH (81)4 where it held the same as the Commission. The UK in the meantime modified its practice so that prisoners marry in prison, hence no further action was taken by the Strasbourg organs. A distinction between Articles 8 and 12 were made - Article 12 protects individual actions: getting married and/or having children, whereas, Article 8 protects a permanent state. It is obvious that States cannot prohibit prisoners from getting married, but can prevent them from living with their spouse. I opine that this change happened due to the evolution of morals dissociating marriage and procreation and one day possibly marriage and family life removing marriage from its present pedestal.

In France[428] the Tribunal of Grand Instance held that the imprisonment of the future spouse did not prevent that certain effects of marriage are produced as the aid or the resistance between spouses independently of the possibility in which they happen to cohabit. However, the definition of marriage of

---

[426] Appl.No.8186/78, **S. Draper vs UK**, report of the Commission of the 10th. July 1980.

[427] At Canon jurisprudence this is held too. Coram Masala, Sacra Romana Rota, 12th. March, 1975, 5, SRRD LXVII 131. '***Qua significatione communio vitae domesticae, iuxta communem canonistarum et theologorum doctrinam, potius ad integratatem quam ad essentiam coniugii pertinet, ideoque de se non est obiectum contractus matrimonialis quam iam in suo esse constitutem requirit'.*** Cohabitation is required *ad integratetem* and not *ad essentiam matrimonii.*

[428] 2nd. May 1991, TGI La Rochelle.

the Commission understood in a restrictive manner as the acquisition of a juridical status has not yet received the guarantee of the European Court[429].

III. Unjust and Illegal Restrictions

A. Restrictions due to Functions, Work, Donations and Legacies of candidates to marriage and Conditions of Widowhood or Celibacy

In a juridical act, contract, donation/legacy or in a regulamentary act concerning certain personnels' status a condition is inserted according to which the interested's marriage leads to the annulment or conclusion of the juridical act or profit of status. It can also be that such a marriage has to be preceded by certain authorisations or in respect of certain conditions required by law such as age conditions. The condition does not prohibit one's right to marry, but his liberty is strongly hindered. He is led to choose between marriage on one side and the advantages arising from the contract or donation/legacy or status on the other side. Hence, the condition imposes on him a pressure proportional to the advantages. Holding so, one can say that marriage will be out of someone's reach[430]. Such is the effect of the inescapable condition. Certainly this effect would be wanted and the condition would be included to dissuade the interested to marry. Even though the condition was not made completely to hinder the celibate's will still that is the result. An example can be that of a testator who wanted to regulate his succession differently according to whether the heir marries or not, considering that the heir loses his or her state of need upon marriage[431].

At Italian law Article 636(1)of the Civil Code holds that:

> ***'...è illecita la condizione testamentaria che impedisce le prime nozze o le ulteriori, ha lo scopo di tutelare la liberta' di contrarre matrimonio della persona e non è quindi violato nei casi in cui la condizione non sia detta dal fine di impedire le nozze ma preveda per l'istituito un trattamento piu' favorevole in caso di mancato matrimonio e, senza perciò influire sulle relative decisioni, abbia di mira di provvedere, nel modo piu' adeguato, alle esigenze dell'istituito, connesse ad una scelta di vita che lo privi degli aiuti materiali e morali di cui avrebbe potuto godere con il matrimonio'***[432]***. 'La clausola testamentaria che attribuisce al legatario l'usufrutto di determinati beni a condizione (e per il tempo che) mantenga lo stato di nubilato deve considerarsi lecita indipendentemente dall'indagine sull'effettiva portata della volontà del testatore'***[433].

French law focuses on the aim not the result, but protection of matrimonial liberty can be better achieved if we look at the result, focusing on the purpose of the clause. French tribunals went into the

---

[429] *Vide* **Cossey** and **Rees** judgements.
[430] Raymond, *Le Consentement des Epoux au Mariage*, th. Paris, 1963, p. 26.
[431] A restriction can be made with reference to a particular person, religion or social position.
[432] Cass. Civs. Sez. II, 21st. February, 1992; N.2122- Pres.Parisi, Est.Di Cio.: Grava G et. *vs.* Grava P. et..
[433] Trib. Civs. Lucca, 12th. August, 1992, N. 790-Pres.Est. Cupido: **Bertolini vs. Landucci.**

validity of such clauses. In case of a donation or legacy the burden of proof encumbers on the person rewarded, while in contracts of work it is the employer who had the burden of proving that it is just. In acts of onerous title the question was posed before the tribunals with regard to the clauses of celibacy inserted in contracts of work. Certain cases before the *Cour de Paris* and the *Cour de Cassation* were presented by an airhostess[434] and a social assistant to precise the doctrine. The Court held such clause null, unless it is justified by grave and peremptory reasons or peremptory necessities, elements which are valued with regard to the nature or conditions of exercise of functions of the celibate worker. This shows that the condition is judged in view of the cause, i.e. the conditions are seen through their object rather than through the motives to which they proceed. The question posed by the judges is that to know whether the employment of the worker requires celibacy: if not so then the condition has no cause, no place in the contract and consequently null.

Public law has the same attitude without speaking in terms of cause. The *Conseil d'Etat* annulled a rule consisting of a condition of celibacy, since it was unrelated to the particular necessities resulting from the nature of the various functions performed or the conditions of exercise of these functions[435] . Hence one concludes that at caselaw the condition of celibacy is not null in itself, by its own object, but solely by the failure of serious justification, defect of a licit cause. The choice of cause as the criterion of appreciation of the condition of celibacy presents two grave inconveniences. Firstly, the person disposing never knows whether his will be executed or not. The person benefiting from such a disposition or the worker usually hesitate to marry due to fear of getting a Court's decision against them. The incertitude concerning the validity of the clause can lead to its respect and hence its efficacy is enhanced at the dispense of matrimonial liberty. Secondly, matrimonial liberty is out or reach in case that the clause's validity is recognised. The right to marry is strongly impeded by the sacrifice that the celibate as to make to exercise it.

In order to liberate the celibate from this one should see the condition from the side of the object rather than its cause. In order for the protection to be efficient, the rest of the act shall subsist without the nullity having the same effects as the validity: the advantages arising from the act will be upheld. France adopted this regarding donations and legacies during its revolutionary law. Jurisprudence has never followed this since it affirms that the clause itself is not illicit. It is true that there is a conflict between liberty to dispose and liberty to marry. Had the law given the right to marry a better place vis-à-vis

[434] **Epoux Barbier vs Cie Air France** (1963). *Vide* US case **Cooper vs Delta Air Lines Inc.** (1967). In **Air France vs Fossiez**, the Cour de Cassation 1st. March, 1951 (Paris) held that the status of air hostess does not confer on the Company any right to interfere with an employee's marriage engagement.

[435] Ibid. Raymond. th. P.27.

conditions, then the nullity of the condition due to illicit object would have had the advantage of removing the pressure exercised by these means.

Since 1867 the Cour the Cassation proclaimed that the condition of widowhood imposed by testator is not against morality[436]. From the nineteenth century onwards various authors upheld that the clause should be judged null in itself, thus criticising previous tribunals' position. The debate had surfaced again the cases regarding celibacy clauses in contracts of work. The solution proposed was that of respecting the fundamental right to marry. In South Africa a condition in a will in general restraint to marriage is taken as *pro non scripto* and the beneficiary takes unconditionally[437]. A condition in partial restraint of marriage, not against public policy leads to the forfeiture of inheritance if he marries out of a specified race, nationality or religion[438]. This impinges on the right by unreasonable discrimination.

Marriage interests society as well as the State in certain States. Certain categories of public service officials fall under an authorisation regime to contract marriage. In France diplomatic agents, consular officers and military persons are such up to an extent; also in Greece, officers and sub-officers of the armed forces. These legal restrictions are justified in the interest of the nation, public interest and to protect secrets of defense. This is a prohibitory impediment and not a total impediment. The person who goes over this rule will be penalised. These sanctions are a direct interference with matrimonial liberty. It seems that the nation's interest comes before that of the individual. Greece could not be condemned as violating Article 12 since this was no prohibition, but indirect pressures.

In France after the law of the 13th. July 1972 No. 72-662 the principle was that ***'les militaires peuvent librement contracter mariage'*** [439]. But the authorisation of the Ministry of Defense was retained. Military persons who marry without authorisation lose their right to pension or military compensation to themselves, their widow and their children. Since the law of the 27th. March 1985 diplomatic agents and consular officers need no authorisation before marrying save informing their ministry of their future marriage[440]. The Conseil d'Etat declared a 1969 law[441] as unconstitutional on the 18th. June 1980 since authorisation was required. In case of marriage to a foreigner conditions were stricter. The future spouse had to request for French nationality. A diplomat who passed over this he had to appear before a disciplinary council.

---

[436] 18th. March, 1867, D. 1867. J.332.
[437] **Re. Johnson's Will Trusts** (1967) 1 All ER 553.
[438] **Stevenson vs. Greenberg**, NO 1960 (2) SA 276 (W).
[439] Article 14(1) of the French Civil Code.
[440] Article 68 of decree no.85-375 of the 27th. March 1985.
[441] Decree no. 69-222 of the 6th. March 1969 (unconstitutional since it emanated from an incompetent authority).

Female employees of the municipality of Strasbourg lost their employment upon marriage. This clause was annulled as it was not necessary or justified. These restrictions should not be arbitrary or discriminatory and should be justified in the name of an interest superior to matrimonial liberty. In France in a decision of the Cour de Cassation of the 7th. February 1968 held the right to marry as a matter of *ordre public*. It held employer's right to terminate a contract upon marriage of employee as void and infringing a fundamental personal right, even if the clause is valid under the law of contract. Married female army personnel can be engaged only if they are widows, divorced or separated. Still they can marry, save for air conveyors since this leads to the dissolution of their work contract. This was declared by a decree of the 15th. October, 1951. This public law dispositions should be valued by an administrative judge as regards its compatibility to the functions and status of married and unmarried women.

At Belgian law a clause in an employment contract authorising the employer to dismiss the employee upon marriage or remarriage is invalid. A new law enacted on the 21st. November 1969 was intended to end this discrimination against women and maternity. The Court of Cassation of Belgium held an opposite opinion than France in a case of a divorced teacher who wanted to remarry, since if a clause of celibacy is included is held to be illicit as that of remarriage[442]. Belgium is a State which secularised marriage. The reference to 'national laws' in Article 12 of the ECHR refers to civil law including the right to remarry after a marriage dissolved by divorce.

According to the ECHR a private person cannot make a case against another as was held in ***Durini vs. Italy***[443]. A State can be part of a law suit if it permits an interference to matrimonial liberty by a private person. This horizontal effect is controversial and the issue is decided on a case by case basis. The State should guarantee non-interference in any person's liberty. According to the ECHR this is effective where it is directly applicable at matrimonial law level. In Iceland, Greece, Italy, Switzerland, Germany and Austria it is an integral part of the internal law. In the UK it was considered up till recently as a guide of interpretation only as in Cyprus.

In Denmark, Sweden and Norway it does not have this status at internal law. This makes the Convention a living institution of protection of human rights. Can the State remain passive in case of private persons who breach others' right to marry? The State has the duty to protect against interference as well as to render the liberty to marry effective. The European Court can condemn a State for its failure to intervene to protect its nationals' interests under Article 12. In the Golder case the ECHR stated that: **'hindering the effective exercise of a right may account to a breach of that right, even if the**

[442] Belgian Court of Cassation decisions of the 8th. December 1976 and 12th. January 1977.

hindrance is of a temporary character'[444]. On the other hand the European Court can consider them as indirect pressures resulting from a voluntary behaviour such as that of ministers of worship, for example Catholic priests. The right to marry includes both the liberty to choose and equally to marry the one freely chosen.

B. Prohibited Restrictions to the Right to Marry due to Race, Nationality and Religion

The Pentateuch strictly prohibits marriage between Jews and others[445]. St. Paul said: **'Let marriage be had in honour among all'**[446], he defended marriage even for Bishops[447], even with non-Christian husband or wife[448] and he threatened those who would prohibit marriage[449]. Moreover, he specifies that: **'If any brother had an unbelieving wife, and she is content to dwell with him, let him not leave her'**[450].

Legal restrictions to this liberty of choice based on race, colour, religion, national or social origin, national minority, birth have disappeared from European national legislation and are prohibited by Articles 12 and 14 of the ECHR. Article 16 of the UDHR expressly excludes all restrictions to marriage based on race, nationality or religion. Article 3 of the Greek law[451] reforming family law abrogated Article 1366 of the Greek Civil Code prohibiting marriage between a Christian and a non-Christian, thus ministers of different religions can celebrate marriage. Article 2 of the UDHR already prohibits discrimination, but Article 16 strengthens this. Egypt explained that Moslem countries accept restrictions emanating from religion. Moslem women cannot marry men of other religions[452]. Thus, this paragraph was necessary to curb suffering due to racial and religious discrimination.

Muslim women cannot marry non-Muslim men, unless they go in agreement of conversion to Islam and growing up children in Islam. The difference of religion almost makes marriage non-existent. A Moslem man may marry a woman who believes in a revealed religion[453], but he may not marry an idolatress or atheist under any circumstances. In Kuwait marriage with an apostate is prohibited.

---

[443] App. No. 172/56 decided on the 20th. December 1957.
[444] **Golder vs. UK**, ECHR judgement of the 21st. February 1975, Ser. A, No.18, 21, para.26.
[445] Genesis, 24/1-4, 28/1, Exodus, 24/III-16, Deuteronomy, 7/1-6.
[446] St. Paul's Epistle to the Hebrews, 13/4.
[447] St. Paul's First Epistle to Timothy, 3/2. 12.
[448] St. Paul's First Epistle to the Corinthians, 7/12-15.
[449] St.Paul's First Epistle to Timothy, 4/1-3.
[450] St.Paul's First Epistle to the Corinthians, 7/12, 13.
[451] Greek law of 1982 no.1250/1982.
[452] Cour d'Appel of Paris, 1st. Instance, 9th. June, 1995 - held that French public order opposes religious obstacles to matrimonial liberty.
[453] Quran2, 221: 9, 30.

People of the Druse school may marry only persons of the same sect[454]. In Egypt the Copt community prohibits mixed marriages between two of different Christian beliefs. So they tried to formulate a civil marriage in the presence of witnesses.

Under Hebrew law the religious competence of Courts is equal to a civil one. Each member of a community can invoke the religious prohibition. A Jewish cannot marry a non-Jewish. This prohibition is extended internationally. In the case ***Tepper vs. State of Israel***, the Supreme Court refused to recognise the validity of marriage of an Israeli man and a Christian Swiss woman. They tried to make their marriage recognised in Israel by cohabitation and reputation, but the Court declared that this concept is alien to Israeli law. This allegiance between religion and marriage is not found in the West. Marriage is not secular as in the West. Moreover, as stated under impediments a Jewish Cohen can : **'... but a virgin of *his own* people he shall take to wife'**. Israeli law obstructs the right to marry limiting it on religious grounds.

Religious limitations on marriage are justified by conferring exclusive jurisdiction on Rabbinical Courts to prevent the splitting of the Jewish community[455]. Moreover, the burden of religious divorce is imposed on persons who did not want a religious marriage from the beginning. Does Israeli law violates freedom of thought, conscience and religion? A special rapporteur on 'Discrimination on Religious Customs and Rights' (1960) argued that in States where a marriage ceremony can be conducted only by religious way, this is imposed on people who are not members of the religion mentioned at law. The rapporteur suggested that: **'... no one should ... be compelled to undergo a religious marriage ceremony not in conformity with his convictions'**[456]. Unfortunately, Israeli law grants authority over all matters of marriage of Jews in Israel to the Orthodox Rabbinate. The law does not provide for civil marriage. This monopoly violates Israel's Declaration of Independence protecting freedom of religion and the International Covenant on Civil and Political Rights to which Israel is a signatory. Article 23 of the Covenant states: **'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution'**. A survey reveals majority favours civil marriage regardless of religion or nationality. In fact 60% of the Jewish respondents and 58% of the Arab respondents said that they favour people to marry without regard for religion or nationality. Among secular Jews 83% were in favour, while 38% of those identifying themselves as traditional and

[454] Rubinstein A., The Right to Marriage, Israel Yearbook on Human Rights, 1973, p.240.

[455] Ben-Gurion, the first Prime Minister of Israel, during whose period the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law was enacted stated: **'...if we did not establish by statute that marriages must be in accordance with Jewish law, many Jews would have to begin investigating who (the person) they are about to marry is - and what would be the result?'**. Davar, (Hebrew Daily Newspaper) of the 24th. July, 1970.

[456] UN Doc. E/CN4/sub2/200/Revs.1.p.38 (1960).

31% of the religious also favoured such freedom[457]. Justice Minister Yossi Beilin prepared an alternative to civil law marriage - the law of partnership. The couple would not be obliged to divorce at a rabbinical court. This was part of the 'Civil Revolution' of Prime Minister Ehud Barak[458].

Among the rights of the International Convention on the Elimination of All Forms of Racial Discrimination[459] based on the UNUDHR states the right to marriage and choice of spouse in Article 5d (iv): **'without distinction as to race, colour or national, or ethnic origin, to equality before the law'**. Under the ECHR discrimination is mentioned in Article 14 and Article 12 is subject to this general prohibition. Also Article 1 of the American Convention on Human Rights[460] obliges the guarantee of right to marry to all persons subject to their jurisdiction without any discrimination for reasons of race. The Covenant on Civil and Political Rights too provides that the rights shall be ensured by the member States **'without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'**[461]. The International Court of Justice imposes such obligation *erga omnes* as in the case Concerning the Barcelona Traction, Light and Power Company Limited[462].

'...There is only one most sacred human right ... to see to it that the blood is preserved pure, so that by its preservation of the best human material a possibility is given for a more noble development of these human beings'. This quotation is from Hitler's *Mein Kampf*. In fact the most remarkable case of racial discrimination was that of the third Reich in Germany by a law called 'Of the Protection of German Blood and Honour' which prohibited marriage and extra marital sexual relations between Jews and Aryans. This model was adopted in 1949 by General Malan in South Africa - the apartheid regime. So people were assigned a label as 'White', 'Indian', 'African' or 'half breed'. Marriage between persons of different race was prohibited by Act 23 of 1957 called 'Law about Immorality'[463]. This law was abolished in 1985, but the prohibition of mixed marriages continued. In a U.S. case ***Loving vs. Virginia***[464], Mr. Chief Justice Warren held thus: **'Almighty God created the races...the fact that he separated the races shows that he did not intend for the races to mix ...'**. Thus a Virginia statute was unconstitutional violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

---

[457] Jerusalem Post, Haim Shapiro, 22nd. August, 2000.
[458] Ha'aretz, Shahar Ilan, 21st. August, 2000.
[459] 660 UNTS, 195, adopted on the 21st. December 1965 and entered into force on the 4th. January 1969.
[460] The prohibition comprises colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
[461] Article 2 of the International Covenant on Civil and Political Rights, 1966.
[462] (Second Phase), ICJ Reports 1970, p.32, paras. 33-34.
[463] The Prohibition of Mixed Marriages Act 55 of 1949. Such marriage is void and without effect, save if contracted outside the Republic.
[464] **Loving vs Virginia**, Supreme Court of the United States, (1967) 388US1, 87 S.Ct., 1817, 18 L.Ed.2d 1010. The right to marriage is a liberty of free people not to be denied except through reasonable means for a proper social objective.

With regards to nationality marriage is discouraged rather than codified at law. In China and Vietnam marriage with foreigners is officially discouraged and arrest is used to prevent them too. Saudi Arabians cannot marry without special government permission. Even Syrians require special permission form the Minister of the Interior to marry foreigners. In Libya authorisation of the General Popular Commission of External Security is given only for 'serious reasons' only if the applicant is neither married nor divorced. In Romania under Communist rule mixed marriages were discouraged, since authorisation was rejected or given after a long time. Iraq decided by a Ministerial decision of the 13th. September 1973 that marriage with a foreigner is prohibited even though Iraq ratified the International Convention regarding the Elimination of Racial Discrimination. Certain States force locals who marry in a foreign State to get a Governmental or Ministerial authorisation. This disappeared from Czechoslovakia and USSR since their break up, but subsists in Rumania by a decree of the 31st. March 1950 under Article 134 of the Civil Code and in Albania by a decree of the 4th. December 1966.

The UN Human Rights Committee received a petition on the 2nd. May 1978. Twenty nationals of Mauritius[465] complained of the removal of alien men, husbands of local nationals, but not in the opposite case. They held that Article 23[466] of the Covenant on Civil and Political Rights was breached. Mauritius denied this. It was held that the right to marry was not breached neither for the unmarried one nor for the married ones. So on the 9th. April 1981 it held that applicants were not **'facing a personal risk of being affected in the enjoyment of their right to marry'**. In another case a Canadian citizen[467], a Maliseet Indian, held that discrimination founded on grounds of ethnicity arose when she married a non-Indian national. These women were at a disadvantage, but Canada was not part of the Covenant on Civil and Political Rights yet when this disadvantage was applied to applicant.

An interesting case was that of ***Perez et. vs. Sharp***[468], decided by the Supreme Court of California in 1948. Petitioners wanted to challenge the constitutionality of Section 60 and 69 of the Civil Code providing: **'... no license may be issued authorising the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race'**. Traynor J.[469] held that **'since the right to marry is the right to join in marriage with the person of one's choice, a statute that prohibits an individual from marrying a member of a race other than his own restricts the scope of his choice and thereby restricts his right to marry'**. Respondent relied on ***Buck vs. Bell***[470] for the proposition that the State **'may properly protect itself as well as the children by taking steps which will prevent the birth of**

---

[465] S. Aumeeruddy Cziffra and 19 other women.

[466] Article 23(2) of the International Covenant on Civil and Political Rights of 1966 provides that: **'The right of men and women of marriageable age to marry and to found a family shall be recognised'.**

[467] Communication No.24/1977 of the 29th. December 1977.

[468] **Perez et vs. Sharp**, Surpreme Court of California, 1st. October 1948, 32 Cal.2d 711, 198 P.2d 17

[469] Ibid., p.715.

[470] **Buck vs. Bell**, 274 U.S. 200 (47 S.Ct.584, 71 L. Ed. 1000).

offspring who will constitute a serious social problem, even though such legislation must necessarily interfere with a natural right'. This case involved an imbecile and her sterilisation.

Carter J. Held that **'the statutes here involved are the product of ignorance, prejudice and intolerance, and I am happy to join in the decision of this court holding that they are invalid and unenforceable'**. In fact even the Apostle St. Paul[471] declared that: **'God ... hath made of one blood all nations of men for to dwell on all the face of the earth ...'**. The freedom to marry has always existed in America since the early colonial period. The infringement of the right to marry is restricted on the basis of race is an unlawful infringement of one's liberty.

The State can exercise control over marriage and in ***Sharon vs. Sharon***[472] the Supreme Court of the United States stated: **'Marriage, as creating the most important relation in life, as having more to do with the morals and civilisation of a people than any other institution, has always been subject to the control of the legislature'**. In ***State vs. Jackson***[473], the Supreme Court of Missouri held: **'If the State desires to preserve the purity of the African blood by prohibiting intermarriage between whites and blacks, we know of no power on earth to prevent such legislation'**. Even in ***Eggers vs. Olson***[474], the Supreme Court of Oklahoma said: **'... Statutes forbidding intermarriage by the white and black races were without doubt dictated by wise statesmanship, and have a broad and solid foundation in enlightened policy, sustained by sound reason and common sense'**. Hence, up to the middle of the last century this was the reasoning in America.

---

[471] Ch.17. vs. 26.
[472] 75 Cal. 1 (16 P. 345), 16 Cal. Jur. 909.
[473] 80 Mo. 175.
[474] 104 Okla. 297 (231 P. 483, 486).

CHAPTER 7

AN ALTERNATIVE TO MARRIAGE

I. Cohabitation

It may not be marriage law which intrudes into the life of married people so much as society's expectations about the roles of married people. Some reject marriage because it makes no difference, so why marry? On the other hand if we reverse the question why not marry then? Certain couples see legalisation as an act of opportunism which has not relevance to reality. On the other hand why should law cover cohabitation too? It cannot be assumed that all cohabiting couples want to be under a legal regime. If one opts not to marry why should their relationship be equated to marriage[475]. From the fact of non-marriage one can deduce that the parties did not intend to marry. Hence, if this was the choice why should the State impose obligations upon them which obligations they decided to avoid? Cohabitation is resorted to for various reasons among which is poverty, such as in the West Indies where a man is not economically stable and thus cannot establish a family and marry. Hence, he cohabitates with his chosen woman. In Europe cohabitation is mostly resorted to by separated and divorcees rather than single women. In the UK in a study conducted in 1979 20% of the divorcees, 16% of the separated and only 8% of single women cohabited. Possibly people who were previously married prefer not to tie another tie which can be costly and time consuming to untie.[476]

A legal policy is desired in Malta in the absence of law regarding cohabitation. Problems arise regarding social and financial policy. We lack legislation covering general cohabitation. Normally, cohabitation means extra-marital cohabitation. Cohabitation without marriage is faced by common tradition laid down in Roman law[477] and confirmed by Canon law that monogamous marriage is the only institution under which cohabitation is fully accepted as a social fact generating legal consequences in terms of status and property.

In 1948[478] the UK Law Commission[479] defined it thus: **'Cohabitation consists in the husband acting as a husband, the wife rendering housewifely duties to the husband and the husband cherishing and supporting his wife as a husband should.'** For the purposes of various UK statutes

[475] This was taken into consideration too by the Queensland Law Reform Commission (1992:v).
[476] International Journal of Law, Policy and the Family, June 2001.
[477] Gai Institutiones 1, 63: *Neque eodem doubis nupta esse potest, neque idem duas uzores habere.*
[478] Lord Goddard in ***Thomas vs. Thomas*** [1948] 2 K.B. 294, p.297.

cohabitation was defined as **'two persons cohabiting as man and wife'**[480], as **'a woman who has been living in permanent association with a man'**[481] and as **'cohabitation with a man as his wife'**[482]. If we go to the recognition of the relationship, we find social scientists[483] who attempted to define on the basis of certain criteria such as that of Macklin (1972) **'sharing a bedroom during at least four nights per week during at least three consecutive months with someone of the opposite sex'** and **'two people of the opposite sex who live together in a common residence for five days and nights out of the week'**.

From the above it is obvious that only heterosexuals are seen in the context of cohabitation, thus excluding homosexual couples and other types of relationships where people live together. Moreover, it is problematic as to the definition of *living together*. This problem arose in many cases in the UK among which we find ***Gammans vs. Etkins***[484]. In ***Bernard vs. Josephs***[485] Griffiths L.J. held that cohabitees should be treated as partners just for establishing the partners' respective beneficial interests in the shared home, only if, the relationship **'...was intended to involve the same degree of commitment as marriage...'**. But what can these persons be called? Some call the woman common law wife, others broomer or mistress and by others consort or cohabitant, ummer or pretentiously meaningful associate. I believe that cohabitee is morally neutral and can be used for both heterosexual and homosexual persons living together. A Tasmanian Judge, Burbury C.J., complained that **'*de facto* wife'** was too euphemistic and **'concubine'** was to be preferred[486].

In the Victorian Property Law Act 1958 a *de facto* relationship is defined as **'the relationship between the *de facto* partners of living or having lived together as if they were husband and wife although not married to each other'. From the definition of '*de facto* relationship'** in Section 275 one can discern a heterosexist bias which operates to strengthen the traditional model of 'normality' conceived as the heterosexual couple and, at least potentially, nuclear family. Same-sex relationships are excluded, considering that a *de facto* relationship is a shadow of a culturally dominant institution of heterosexual marriage in the West. In 1984 New South Wales enacted the *De facto* Relationships Act 1984 providing for financial adjustments between parties to a *de facto* relationship, defined as:

---

[479] Number 97, para. 2.32.
[480] Supplementary Benefits Act 1976.
[481] Immigration rules, H.C. 79,para.42.
[482] Social Security Act, 1975.
[483] Collated by Trost, Unmarried Cohabitation, 1979, pp. 13-19.
[484] [1950] 2 K.B., 328 et al.
[485] [1982] 2 W.L.R., 1052, p. 1061.
[486] ***Maddock vs. Beckett*** [1961] Tas. S.R. 46, p. 52.

'The relationship between *de facto* partners, being the relationship of living or having lived together as husband and wife on a bona fide domestic basis although not married to each other.'[487]

Marriage in the UK is protected under the 1998 Human Rights Act incorporating the ECHR and accepting Article 16 of the UDHR[488]. Cohabitation has not many constraints compared to marriage. For example, persons who are married cannot remarry unless the marriage was void *ab initio*. Parties of the same sex and transsexuals cannot marry and where more than two persons want to marry. On the other hand all these can cohabit without restraints. With regards to age marriage cannot be celebrated by persons under 16 years, unless celebrated abroad and accepted by the *lex domicilii* of each party. A man will be guilty of unlawful sexual intercourse if the female is under 16 years old. This does apply to cohabiting partners too.

With regard to relationships marriage cannot be contracted among persons related by consanguinity and affinity in diverse levels. There some 25 relationships at UK law in the Marriage Act. With regards to cohabitation only relationships between grandfather and granddaughter, father and daughter, brother and sister, son and mother are incestuous[489]. This occurs only where the accused had knowledge of such relationship. With regard to money married spouses are a question of fact whether one is the bread owner, common funds or personal bank accounts are used. With regard to taxation[490] those of high incomes may be better off if they cohabit or go into pre-nuptial contracts. Marriage may be a better deal for those with valuable capital assets or low joint incomes. Cohabitants are eligible for the same income tax allowances as married couples in England. With regards to capital gains tax married couples have exemptions which non-married couples do not enjoy. In case of capital transfers married persons are not taxed for capital transfers, while non-married are.

---

[487] Cohabitation may be defined thus for private law purposes as an extra-marital cohabitation involving two or more persons of any gender sharing, for the time being at least, the same household, comparable to that found in a functioning marriage (although not necessarily including a sexual relationship), but whose partnership has not been marked by a wedding ceremony sufficient to attract the law of marriage or which, if celebrated abroad, is not one which would be recognised as a marriage here.

[488] As far as 1976 the Socialist Republic of Slovenia enacted a Law on Marriage and Family Relationships under which unmarried and married persons living in long-term cohabitation are to have the same rights as married persons unless there are grounds preventing them from getting married. Even in 1978 the Socialist Republic of Slovenia a draft for a Family Law laid before the National Assembly covered both married and unmarried couples distinguishing only the latter group with or without children. Despite of certain attempts to legislate a recognition of a legal status for cohabitees this has developed through case law rather than newly enacted legislation in United States and in European Civil systems. From Zakon o braku i porodicnim odnosima SR Slovenje, Uredni list SR Slovenje, broj 15/76, clan 12. Nacrt zakona o porodici, 18 Mart 1978, clanovi 38-39. Bruch, Non-Marital Cohabitation in Common Law Countries, (1981), 29 Amer Jrnl of Comp Law 359.

[489] Sexual Offences Act, Section

[490] The Swedish taxation system has for a long time known a definition for cohabitation and states that if an unmarried man and woman have a 'long-lasting' period of living together and they have had children together or they have been married to each other they are counted as if they were married as regards taxation. It is interesting that it is restricted to those who have children together or have been married to each other. No indications of what 'long-lasting common life' is are found.

English law at present adopts a negative attitude to cohabitation in benefit and social security areas. With regard to social security spouse is entitled to benefits arising from each others' contributions, but not so in the case of cohabiting partners. With regard to insurance each spouse has an insurable interest in the other's life and property, while no automatic insurable interest arises between cohabitees and they have to choose suitably worded insurance policies. With regard to land and home paraphernal property is exclusively owned by the person bringing it in the marriage, save in case of sale of such during marriage and usufruct going in the community of acquests.

In case of a married couple where a spouse is a party to any civil action the other is compellable and competent to give evidence for any party[491]. For the defense in criminal cases the accused's spouse is generally competent but not compellable. For the prosecution he or she is generally neither compellable nor competent. On the other hand cohabitees are both compellable and competent witnesses against each other in a criminal case. Finally, married persons have the privilege not to be asked questions about communications between them during their marriage.

Traditionally our law followed the *'societa coniugale'* as we find in the Code de Rohan originating from the *'Antiche Consitudine'* of Lamentis. Prior to the promulgation of our Civil Code it was necessary that a child is born to the married persons so that this structure will come into existence. At Maltese law married persons only can establish a community of acquests, separation of property or a community of residue under separate administration, while the law does not provide for cohabitees. Prof. Caruana Galizia compares the community of acquests to a partnership, managed, *ex lege*, by the husband at that time under the powers conferred on him by law which cannot be restricted and regulated by agreements[492].

Adoption can be made jointly only by married persons. Parental rights are held equally by the spouses and exerciseable by either one without the other while in case of cohabitation the rights are held exclusively by the mother. Joint adoption was extended to same sex couples under the equality right of Section 15 of the Canadian Charter of Rights and Freedoms. ***In Re K***, Nevins J held that: **'There is no cogent evidence that homosexual couples are unable to provide the very type of family environment that the legislation attempts to foster, protect and encourage, at least to the same extent as 'traditional' families parented by heterosexual couples ...'.**

---

[491] UK Evidence Amendment Act 1853, Section 1.

[492] Just to mention one form. Section 1320 of the Civil Code establishes what is comprised in the community of acquests. Mainly, what each spouse acquires by work or industry, the fruits of their property acquired before or after marriage under succession, donation or other title, unless a condition opposes this. Property acquired from acquests' money by one or both spouses and property acquired with money possessed by a spouse before or after marriage celebration, saving the right of reimbursement and fortuitous winnings. Those who opt to separation of property will be in the same position as cohabitees in front of the law.

Now we go to some international aspects of nationality, domicile and immigration. Cohabitees' nationality is not affected by their relationship. Under the Immigration Rules of 1980 only patrials and their wives have free right of entry and patriality is not automatic on marriage. In case of cohabitees a permanent relationship may facilitate entry on similar terms to a wife. I will turn to another UK position, the Fatal Accidents Act 1976. By Section 1(3)(a) a spouse who has suffered pecuniary loss may obtain damages from a person who would have been liable had the other spouse lived. Section 3(b) of the 1982 Act extends such a right to any person who had lived as the husband or wife of the deceased in the same household for at least two years before the date of the death. Children[493] have the same right be they born to married persons or cohabitees. Moreover, in the Pneumoconiosis etc. (Workers' Compensation) Act 1979 as I succinctly stated above, **'a reputed spouse who was residing with the deceased'** at the time of his death, or who was entitled to receive maintenance from him, may claim lump sum payments from the Department of Employment.

In the Alberta Workers' Compensation Act (1981) the Davies Report recommended that the definition of 'spouse' should be amended. At that time it was defined as including a common law spouse who has lived with the worker for at least five years immediately preceding the worker's death or at least two years preceding the worker's death it there is a child of the common law relationship. Moreover, it was recommended that upon a worker's death pension should be apportioned between the legal spouse and the common law spouse. On the other hand a surviving spouse not living with the deceased can claim any benefit under car insurance law[494]. In Canada cohabitants are included with relatives for the purposes of claims of fatal accidents laws[495].

There are some cases where a limited type of cohabitee is treated as a spouse for certain legal consequences. The Alberta Employment Pension Plans Act defines **'spouse'** as a cohabitee too as **'a person of the opposite sex who lived with that other person for a three year period immediately preceding the relevant time and was during that period held out by that other person in the community in which they lived as his consort'**[496]. The Canadian Supreme Court in appeal ***Egan vs. Canada***[497] reserved its decision. The Federal Court of Appeal held that the definition of **'spouse'** in the Old Age Security Act[498] was limited to married and cohabiting heterosexual partners not discriminatory because it was based on spousal status than sexual orientation. The Egan case

---

[493] Fatal Accidents Act. Section 13(e).
[494] Alberta Insurance Act R.S.A. 1980 c.I-5 s313(2).
[495] This is found in Ontario and Prince Edward Island.
[496] Alberta Employment Pension Plans Act, S.1(1)(hh).
[497] Egan and Nesbit vs. Her Majesty the Queen in Right of Canada (1992), 87 D.L.R (4th.) 320 (Fed.Ct.T.D); (1993) 103 D.L.R(4th.)336(Fed.C.A); leave to appeal to the Supreme Court of Canada granted.
[498] The Old Age Security Act, R.S.C.1985, c.0-9 defines 'spouse' as including, any person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife.

provided the Supreme Court with an opportunity to rule on the *Charter* in defining same-sex rights. La Forrest J. upheld the challenged law by a slight majority. The 1995 decisive judgement of Sopinka J., found a breach of right, but was considered justifiable under Article 1. He permitted Parliament to legislate and change this situation avoiding it himself. In ***M vs. H***[499], plaintiff argued that upon the breakdown of a relationship same-sex partners can claim spousal support. The Ontario Family Law Act provides this for heterosexual partners only[500].

The Family Relationships Act 1975 of South Australia gave the person the possibility to apply for a declaration of status as a putative spouse if such cohabit for at least 4 years before or had had a natural child[501]. The successful claimant is then entitled to marital benefits of intestate succession, fatal accidents compensation and state pension entitlement. This creates problems to define the minimum degree of qualifying relationship and to resolve competing claims of lawful spouse and putative spouse. A married spouse should be automatically entitled by virtue of status, but a cohabitee can acquire rights only after enquiry as to the subjective nature of the partnership.

English law treats cohabitation as marriage to exclude entitlement in the case of the ongoing maintenance provisions, such as widows' benefits. Though at the same time legislation treats cohabitation as not a marriage to deny a claimant the right to grants such as the death grant and the maternity grant. Contrastingly, in Sweden an unmarried cohabitee is entitled to a basic pension on the death of her partner as a widow. Moreover, remarriage does not automatically terminate support payments[502]. In 1987 the enactment of the Cohabitees (Joint Homes) Act and a new Marriage Code and revision of the Inheritance Code significantly extended the legal rights of cohabitees. Thus the gap between the legal status of married and unmarried cohabitation was narrowed.

Moreover, the Homosexual Cohabitees Act was enacted contemporaneously which expressly applies the other Act to **'two persons (who are) living together in a homosexual relationship'**[503]. There has been little from the European Court of Human Rights in Strasbourg for homosexual relationships, whereas by contrast heterosexual unmarried cohabitation has been recognised[504]. A salient judgement of the 25th. July 1995 given by the TGI of Belfort in France rewarded the partner of a lesbian deceased in a traffic accident, 652 000 F in damages and interests and 80 000 F in moral damages. The important aspect of this decision is that the magistrates deemed this couple as

[499] (1994) 1 R.F.L., (4th), 413 (Ont.Gen.Div.).
[500] Bill 167 did not pass on 9th. June 1994: An Act to Amend Ontario Statutes to Provide for the Equal Treatment of Persons in Spousal Relationships, 3rd. Sess., 35th. Leg.Ont.,1994.
[501] Family Relationships Act, Section 1, Section 11(1) South Australia.
[502] Swedish Marriage Code, Chapter 6, Section 11.
[503] SFS 1987: 813 as amended by SFS 1987:1207.
[504] ***Marckx vs. Belgium*** (1979), ***Johnson vs. Ireland*** (1986), ***Keegan vs. Ireland*** (1994) and ***McMichael vs. UK*** (1995).

spouses: *'La stabilité et la fidelité des relations existant au moment du décès ... commandent que, pour le calcul du montant du préjudice économique subi ..., il soit fait application des mêmes principes que ceux qui dictent la détérmination du préjudice d'un conjoint survivant alors qu'il n'existe pas d'enfant à charge'*. This judgement was given by a Court of First Instance and is isolated of its type till date. A sparrow does not make spring ... (but it announces it).

At UK law the spouses[505] have equal rights to succeed to each other's tenancy on the death of a protected or statutory tenant provided they were living together at the time of the death and there had been no more than one previous succession[506]. With regard to cohabitees there is a statutory right for one cohabitee to take over a tenancy held by the other if they have been living together as husband and wife[507]. The surviving spouse can succeed to the tenancy of agricultural property[508] if they cohabited at the time of death. As regards tenancy it is possible to transfer it into the name of a heterosexual cohabitant upon the death of the partner or separation. However, the English Court of Appeal in ***Fitzpatrick vs. Sterling Housing Association Ltd.*** (1997) and the French Cour de Cassation in ***Vilela vs. Weil*** (1998) both rejected the claim of a homosexual man to be entitled to succeed to the tenancy in the name of his deceased partner, since the former is not a **'spouse'**.

After separation of married persons one may be obliged by a court order or by agreement to provide maintenance to the other spouse, but not in the case of cohabitees. In the Northern Territory (Australia) and in Tasmania law provides for maintenance entitlements for *de facto* partners[509] and the Queensland Law Reform Commission expressed concern that: **'... under the existing law, serious injustice can arise on the breakdown of a *de facto* relationship if one partner is not entitled to claim maintenance from the other'**[510].

After the death of a partner[511] the other is best to be covered by a will. At Maltese law only married[512] persons can make an *unica carta* will which is a joint will, cohabitees cannot make such a will. If an *unica carta* will is revoked[513] by one spouse it continues to valid for the other's estate. In case that a married partner dies intestate then the law provides for the surviving spouse. They can make single wills too. Cohabitees are more advised to make wills since they cannot inherit

---

[505] Housing Act [1980], Section 30.
[506] Rent Act [1977], Schedule 1.
[507] Housing Act, [1980].
[508] Rent (Agriculture Act) 1976, Sections 3, 4.
[509] *De facto* Relationships Act 1984 (NSW), ss26-37; *De facto* Relationships Act 1991 (NT), ss24-35; Maintenance Act 1967 (Tas)s16.
[510] Queensland Law Reform Commission, 1992:v.
[511] As regards inheritance neither France nor England confer any automatic inheritance rights upon cohabitants. If provision is made in a will that will be reduced by the high rates of tax: 40% on gifts over £223,000 and 60% on gifts over 10,000 F respectively. French law reserves a proportion of the estate for lineal ascendants and descendants which reduces the amount available. In England the position is slightly favourable.
[512] Maltese Civil Code, Section 595.
[513] Maltese Civil Code, Section 592(2).

intestately from the other partner. With regard to cohabitation it is interesting to look into the UK ***Re Hanlon***[514] case a condition invalidating a gift on the ground of cohabitation with a named person may be upheld. Moreover, a person who makes a will and decides to marry, his/her will is revoked as Section 18 of the UK Wills Act [1837] holds.

The surviving spouse[515] has the right **'to the usufruct of one-half of the estate of the deceased'** if the deceased is survived by children, legitimate or illegitimate descendants or by adopted children or their descendants. In case the surviving spouse is not survived by children or descendants she/he **'shall be entitled to one-fourth part of the estate in full ownership'**[516]. This is only one right which the surviving spouse enjoys. The spouse is also a co-heir with the children. If the deceased spouse had drawn up a will and left his surviving spouse usufructuary over the predeceased's share of the estate, as many couples do, the spouse will be protected from eviction. But the legislator included habitation clauses in the 1991 Draft Bill to protect the surviving spouse[517].

At Maltese law if the surviving spouse remarries she/he **'shall forfeit the ownership of all things which he or she may have received under a gratuitous title from the predeceased spouse, including donations in contemplation of marriage, and shall only retain the usufruct thereof, unless the predeceased spouse has otherwise ordained'**[518]. The descendants are vested with the ownership then. I find that this section in intended not to discourage the surviving spouse from remarrying only, but also to contain the deceased's spouse's property donated or bequeathed in the same family nucleus, rather than be shared with a foreigner (and his heirs) whom the surviving spouse marries.

A. Illegitimacy

At common law the ex-nuptial child was *filius nullius* - unable to inherit property or status. in the Middle Ages in Europe the ex-nuptial child was virtually without rights[519]. In New Zealand the Polynesian society traditionally makes no distinction between nuptial and ex-nuptial children. In fact they are accorded equal inheritance rights[520]. The Law Reform Commission of South Australia relating to illegitimacy of children quoted a section from New Zealand law[521] stating that **'all**

---

[514] ***Re Hanlon*** [1933], Ch. 254.
[515] Maltese Civil Code, Section 631.
[516] Maltese Civil Code, Section 633.
[517] According to Section 633A(1) 'the surviving spouse shall be entitled to the right of habitation over the tenement occupied as the principal residence by the said spouse at the time of the decease of the predeceased spouse, where the same tenement is held in full ownership or emphyteusis by the deceased spouse either alone or jointly with the surviving spouse'.
[518] Maltese Civil Code, Section 637.
[519] Krause, H., Illegitimacy and Social Policy, Bobbs-Merrill, [1971], p.1.
[520] New Zealand - Maori Affairs Act (1953).
[521] New Zealand law, Section 3.

children (are) of equal status ... the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other ...'. It is interesting to note that today in several States illegitimate children are treated differently from legitimate ones at succession law.

We find more Sections in our Civil Code in which we can see this discriminatory treatment[522]. Under Section 839(1) the illegitimate child entitled by law to a portion of deceased's property has to demand delivery of possession from whom the rest of the estate devolves by testate or intestate succession. Finally, an illegitimate person shall offer sufficient security prior to the opening of succession by Court. This security[523] consists of a joint and several surety with the spouse, enter into a recognizance and a security by a general hypothecation of their property, to restore the inheritance to the heirs of the deceased and shall register the property in the Public Registry. Illegitimate children and the spouse have a limitation of action for demanding inheritance of ten years[524] from the day of the opening of the succession.

Several questions arise regarding unmarried cohabitation and whether it should be legally recognised. For example, does a cohabitation lead to the loss of support entitlements, whether from the state or from a former spouse? Does a cohabitee enjoy protective remedies against the other partner and do support claims arise? What happens when a child is born? There are no uniform answers. The birth of child can make the difference. The rights of a child are affected by his status at birth. If legitimate he is favoured at law, unlike the illegitimate. A general equality provision should be envisaged as one finds in England in the Family Law Reform Act [1987]. This enactment does not abolish illegitimacy, but its sections are construed not according to whether an individual's parents' were married cohabitees or otherwise. The forms of discrimination against illegitimacy are mostly abolished, except for those concerning citizenship[525] and succession to the Crown and hereditary peerages.

---

[522] In fact illegitimate children acknowledged or legitimated as the law requires under Section 640 'shall be entitled to a portion of the estate of the parent who has so acknowledged or legitimated them'. Their portion will be of one-third of the legitim to which they would have been entitled had they been legitimate. While in default of children or descendants the portion will be that of one-half of the legitim. The same applies to non-acknowledged children on their mother's property according to Section 641. On the other hand legitimate children are entitled to one-third of the deceased's property if they are not more than four, or one-half if they are five or more. Moreover, our Civil Code holds that 'an illegitimate child has no right to the succession of his parents, unless he has been legitimated by a decree of court, or acknowledged ...or his filiation has been declared by a judgement of the competent court'. Our Civil Code does not promote cohabitation by imposing disadvantages to these innocent persons. In fact under Section 822 an illegitimate person has no right over the property of the relations of either of his parents and vice-versa, eventhough he is 'acknowledged or legitimated otherwise than by subsequent marriage'. *Vide* Maltese Civil Code, Section 640(a)(b), 616(1) and 817.

[523] Maltese Civil Code, Section 841(1).

[524] Maltese Civil Code, Section 845(1).

[525] British Nationality Act, 1948: UK rule - citizenship by descent if the child's father was a citizen at the time of birth. However, an ex-nuptial child whose mother is a citizen can may apply for citizenship.

Sections 15 and 16 of the 1987 Act extend the Court's powers to vary maintenance agreements to include illegitimate children as well. Moreover, a father of an illegitimate child can apply for maintenance for his child, though not for his own benefit. Illegitimate children are burdened with a stigma for what is not their fault to be born out of wedlock and they have the right to know who are their true parents. Even in case of children born in wedlock our Civil Code provides for the case where **'the husband can repudiate a child conceived in wedlock'.**

Is it a solution to apply marriage rules to cohabitation? I opine that the rules of marriage cannot be applied analogously to cohabitation as this would impose the very rules which the cohabitees preferred to avoid by not marrying. Through their act of cohabitation the partners show in a definite way that they do not wish to enter a legally binding contract such as marriage. Moreover, such a relationship can lead to marriage any time. Ergo the solution of applying marriage law to cohabitation is not viable.

B. Contracts and Private Agreements

Private arrangements are allowed to govern the union of domestic partners. I consider that when a contract is to be made available for cohabitees to structure their relationships, that must inevitably pose a dilemma for the development of marriage law. It would be absurd if the married are denied any such rights when their relationship is favoured at law. Moral attitudes and public opinion as to matters of sex and sexuality have slightly changed in Malta during these last decades. As staunch Catholics most of the people oppose such alternatives to marriage, though unmarried cohabitation is on the increase. I opine that due to the fact that we have no divorce in Malta separated partners cannot remarry, so they can just cohabit. There are those who do not desire to marry, those who cannot marry, such as homosexuals and the already married as above. Many argue that no prejudice is caused to the institution of marriage by permitting cohabitation and to organise their partnerships by agreement.

The Californian Supreme Court had been specific in the famous case of ***Marvin vs. Marvin*** (18 Cal. 3d 660). These were the main principles: **'A contract between non-marital partners in unenforceable only to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual services'**, in the absence of an express contract, the Court should be prepared to look at the possibility of implied contracts and equitable remedies; and household services can constitute sufficient consideration for property division.

Another Court in another continent, the New South Wales Court held that cohabitees should '**... in their own interests, as well as for the assistance of the courts...record in a clear and legally binding form what ... are intended to be their respective rights**' held by Powell J. in ***Jardany vs. Brown*** [1981]. In the Minnesota, Minn. Stat. 513.076 (Cum. Supp. 1980) the Court can dismiss as against public policy any claim for earnings or property based on the parties' mutual cohabitation unless they have previously executed a contract which complies with section 513.075. The contract should be in writing and signed by the parties and enforcement is to be sought when the relationship is over.

In the Ontario (Family Law Reform Act 1980), Prince Edward Island (Family Reform Act 1978), New Brunswick (Marital Property Act 1980) and Newfoundland (Matrimonial Property Act 1979) statutes we find similarities. In the Ontario legislation was one of the first to provide for 'domestic contracts' including cohabitation agreements[526]. The parties can included terms regarding property ownership, support obligations, education and moral training of their children excluding custody and access. Should the parties marry the agreement serves as a 'marriage contract'. By Section 53 marrieds and unmarrieds may enter separate agreements. Cohabitation contracts in these countries apply to heterosexuals only as I have noted above too. A Californian decision, ***Jones vs. Daly*** 122 Cal. App. 3d 500 [1981] involved the dismissal of a homosexual's action against his cohabitee's estate. The dismissal was due to an express term about sexual services formed a non-severable part of their Marvin-style agreement.

C. Arguments in Favour and Against the Recognition of Cohabitation

The arguments against recognition of cohabitation are that it would diminish the institution of marriage, problems of prioritisation arise as happens in polygamous and polyandrous systems, partners who reject marriage would have their intentions frustrated, homosexual union will be promoted, a legal definition of such union is difficult and some changes might upset existing arrangements or create uncertainty. Arguments against giving full recognition to cohabitation arise from the difficulty of identifying which situations merit full legal recognition and the possibility that rights given to a cohabitant will compete with those given to a lawful spouse. Moreover, shall the law recognise situations where a man cohabits with two or more women or vice-versa? Shall the law recognise homosexual relationships? Finally, the law can give cohabitation no recognition, partial recognition or full recognition as the equivalent of a normal marriage. In an interesting

[526] In Canada the minimum to be found is in the British Columbia's Family Relations Act of 1979 enabling written custody or maintenance agreements to be enforced as if they were court orders. The parties are considered as if married, but this applies to heterosexual couples only. The Canadian efforts were advanced but we find no restrictions of whether the parties are free to marry, or by a minimum period of cohabitation.

Canadian case Darby J., held that the law should not appear to favour cohabitation over marriage since it would **'place a man's mistress in a better legal position than a lawfully wedded wife'**[527].

On the other hand arguments in favour of recognition are that extra-marital unions exist and resemble functioning marriage and it is unjust that the law denies recognition, parties will often be prone to the same sufferings of married partners and deserve the same solutions as the law provides for marrieds, as regards a definition, the law has already provided tests for deciding when a relationship will qualify for existing legal recognition, certain persons reject marriage and its laws, thus would prefer to go in their own arrangements, people should have more choice rather than just marriage as a form of establishing the family and *de facto* relationships nearest to marriage should be regulated, not necessarily homosexual partnerships can claim similar rights.

Is cohabitation a deviant phenomenon? In Sweden and other countries it is a statistically pattern normal to start with cohabitation and ending by separation, death of one of the partners or a marriage. In 1969 directives for the reform of domestic relations law held the 'neutrality principle' which is ambiguous: **'new legislation ought (so far) as possible to be neutral in relation to the different forms of living together and different moral vies. Marriage has and ought to have a central position in the family law, but one should try to see that the family law legislation does not create any provisions which create unnecessary hardships or inconveniences for those who have children and build families without marrying'**[528].

Sweden is a jurisdiction where restrictions on the right to marry have been cut back. The fact that legal marriage as become less exclusive - easier to enter and leave - and its virtual demise as a support institution for spouses, means that marriage itself has become more like informal, unmarried cohabitation in some respects. In the aftermath of the neutrality principle the Swedish started to ask "why marry?" rather than "why live together without marrying?". Legal incentives to marry have been reduced, but not eliminated altogether. As a result marriage and unmarried cohabitation have been retained as separate options. The more extensive legal rights which make up marital status are likely to be compatible with the expectations and commitment of spouses. Formal marriage has clearly been deliberately displaced as the sole legitimate institution for sexual relations, procreation and companionship.

---

[527] Dwyer Case, Prince Edward Island Supreme Court.
[528] Protocol on Justice Department Matters (1969), Stockholm, Ministry of Justice.

CONCLUSION

In conclusion I would like to propose some changes to Maltese law in particular. Firstly, I find that no definition of marriage is found at Maltese law. So to start with a definition of marriage should be adopted to fill in this lacuna. Most judgements define marriage in terms of other foreign codes and the Canon code to date. Even the difference of sex is not highlighted. We find a reference to 'husband' and 'wife' only once in Article 15 of our Marriage Act of 1975. It would be simpler if the difference of sex would be expressly stated by a prohibition of same-sex marriages or a statement that marriage between a man and a woman will be recognised at the exclusion of all other forms. This would curb cases requesting the right to marry and recognition of same-sex persons in the future.

If lifestyles follow the law even the law can follow what happens in society. I would suggest an increase in the marital age to 18 years. Since the last decade many couples prefer to marry when they are in their twenties. Thus, I would suggest an increase in marriage age with a dispensation for grave causes such as pregnancy and imminent death such as in case of fatal diseases and accidents.

Secondly, we do not find the right to marry expressly guaranteed in the Maltese Constitution. Though this right is protected at Maltese law under Act XIV of 1987, a clause guaranteeing marriage as a fundamental human right is desirable. I would follow the clause of Article 12 of the ECHR in conjunction with Article 16 of the UDHR. Thus the right to marry will include also the prohibition of restrictions due to race, nationality and religion too.

Thirdly, I would suggest more amendments for our Civil Code. I opine that the State's power to legislate in protection of social needs not hinder others' rights. Hence, the State has every right to legislate about and regulate marriage, but illegitimate people's rights should not be sacrificed on the altar of marriage. It is discriminatory to decrease their succession rights among other rights.

Another amendment I would suggest is with reference to marriage of adopting person and his/her relatives or widow/er to the adopted person after the dissolution of adoption. Let us say Mr. X adopted Miss A and Miss K adopted Miss A after some years from Mr. X. Should Mr. X and his relatives be permitted to marry Miss A?

These are just some necessary amendments to which one finds reference in foreign legislations such as in the UK, Italy and France.

Bibliography

Reviews, Conferences and Congresses

1. Address to the International Conference on AIDS sponsored by the Pontifical Council for Pastoral Assistance to Health-Care Workers in Rome held on the 15th. November 1989.
2. Cambridge Law Journal.
3. Canonical Colloquium of the School of Canon Law, The Catholic University of America, 11 May 1972, Canonical Reflections on Priestly Life and Ministry, 166 (1972).
4. Cardinal: AIDS Victim Can Wed at Church, Brooklyn Tablet, 17 January 1987.
5. Conference of Bishops, United States National Catholic, Called to Compassion and Responsibility: A Response to the HIV/AIDS Crisis, Origins 19 (30th. November 1989)421, 423A34.
6. Demain la Famille, Notaires de France, 95th. Congress, Marseille, 9-12 May 1999.
7. Epstein, L.M., Marriage laws in the Bible and the Talmud, Harvard Semitic Series No. 12, Harvard University Press, 1942.
8. Fifth European Conference on Family Law, Civil Aspects of Emerging Forms of Registered Partnerships, Legally regulated forms of non-marital cohabitation and registered partnerships, Private International Law issues, Council of Europe, The Hague, 15-16 March 1999.
9. Goodwill, C. J., Christian Marriage and People who are Disabled, Catholic Medical Quarterly 41 (November 1990) 178-182.
10. Griese, N. Orville. The Marriage Contract and the Procreation of Offspring, Canon Law Studies 226, Washington, D.C.: The Catholic University of America, 1986.
11. Griese, Orville N., AIDS and the Right to Marry, Ethics & Medics 11 (August 1986) 2-3.
12. Herbert, A. P., The Right to Marry, London, Methuen, Government Publication (Great Britain, Church of England and Divorce) , 1984.
13. International Journal of Law, Policy and the Family
14. L'Osservatore Romano Text., Prevention of AIDS: Aspects of Christian Ethics, Origin, 17(24 March 1988)707-708.
15. M.Savolainen, Finland: the New Marriage Act enters into force, Journal of Family Law, 1988-1989, 27, p.127-144, University of Louisville.
16. Marriage and Venereal Infection - A Reply, The Ecclesiastical Review, (January-June 1939) 331-334.
17. McIntyre J., Married Priests; a research report, Canon Law Society of America Proceedings 56 (1994) 130-152 and Married Priests and Canon Law, Smolinski D.S., Canada, 9th. July, 1999.
18. Smart Pius, AIDS - Some Medico/Juridical Considerations, Newsletter: Canon law Society of Great Britain and Ireland 71 (September 1987) 53-59.
19. Smart, Pius, Canon 1058: Prohibition Against Marriage of AIDS Victims - Another Opinion, In Roman Replies and CLSA Adv. *Goinions* 1981, Cd. William A. Schumacher and James J. Cunco, 123-125.
20. Strasser M., Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution, University of Pittsburgh Law Review 58, 1997: 279.
21. The Cambridge Law Journal
22. The Catholic Health Association of the United States and The Conference of Major Religious Superiors of Men, Institutes of the United States, Inc. The Gospel Alive: Caring for Persons with AIDS and Related Illnesses, N.P., 1988
23. Varvaro, William A., An Opinion: Can An AIDS Victim Marry? Fellowship of Catholic Scholars Newsletter, 11 December 1987, p.11.
24. Varvaro, William A., Canon 1058: Prohibition Against Marriage of AIDS Victim, In Roman Replies and CLSA Advisor, Opinions 1988, ed. William A. Schumacher and James J. Cunco, 113-123.

Local and Foreign Newspapers

1. Dagbladet, Norwegian Tabloid
2. Davar (Israel)
3. De Gay Krant, Dutch Gay Newspaper
4. Dutch Staatsblad (Government Gazette)
5. Expresso (Portugal)
6. Ha'aretz (Israel)
7. Il-Gens
8. Il-Mument
9. In-Nazzjon
10. It-Torca
11. Jerusalem Post (Israel)
12. Le Monde (France)
13. L-Orizzont
14. New York Times (U.S.A.)
15. One Magazine (U.S.A.)
16. Petites Affiches (France)
17. San Antonio Express (U.S.A)
18. The Economist
19. The Malta Independent (Sunday and daily)
20. The Reporter (N.Y. - USA)
21. The Times (Malta: Sunday and daily) & (London)

Codes of Law

1. Civil Codes of Hungary, Switzerland, Poland, Portugal, Spain, Germany, Austria, France, Greece, Tunisia, Italy and Malta.
2. Codex Iuris Canonici 1917, Liber III, ParsI, Titulus VII, Cc.1012-1143.
3. Codex Iuris Canonici 1983, Liber IV, ParsI, Titulus VII, Cc.1055-1065.
4. Codex Iuris Canonici, Vatican City: Libreria Editrice Vaticana, 1983.
5. Codigo De Derecho Canonico: Edition Bilingue Y Anotoda Pamplona: Universidad De Navarra (EUNSA), Facultad De Derecho Canonico, 1987.

State Publications

1. A Choice by Right, Report of the Working Committee on Forced Marriage, 2000.
2. Department of Equality and Law, The Right to Remarry: a government information paper on the divorce referendum, Stationery Office, Dublin, 1995, ISBN 0707616905.
3. *Ehe und Familienrecht*, Bundesministerium der Justiz, Januar y 1999, ISSN 0177-1663.
4. *EheG samt Nebengesetsen*, 1st. April, 1999, Juris Verlag, ISBN 3-906264-07-6.
5. Irish Council for Civil Liberties, The Case for Divorce in the 1990's - A study of arguments, 1995, ISBN 0-9515425-4-0.
6. Khlat, M., Les mariages consanguins à Beyrouth: traditions matrimoniales et santé publique, Travaux et documents, Cahier No.125, Government Publication, Paris, 1989, ISBN 2733201255.
7. Law Commission: Great Britain, Polygamous Marriages, Working Paper No. 21, London, 1968.
8. Recognising Same-Sex Relationships, Study Paper 4, Law Commission (*Te Aka Matua O Te Ture*), Wellington, 1999, ISSN 1174-9776, para.4, p.2.
9. Shore T., A summary of the chief arguments for and against marriage with a deceased wife's sister, London, Marriage Law Reform Association, 1883.

10. Swedish Partnership Commission Report on Homosexuals and Society, (SOU1984:63).
11. Tanzanian Government Paper No.1 of 1969 regarding marriage age.
12. The Dutch Law Commission's recommendations and Paper of the Ministry of Justice ublished in November 1999 about adoption and gay parenting.
13. UK Home Office Consultation Paper Supporting Families (1998).
14. New Zealand Ministry of Justice Paper regarding adoption and gay parenting of November 1999.

General Publications

1. Baird R.M., & Rosenbaum S.E., Same-Sex Marriage: the moral and legal debate, Amherst, Prometheus Books, New York, 1997, ISBN 1573921297.
2. Bartolo Romina, Transsexuals and the Right to Marry, LL.D Thesis, Faculty of Laws, University of Malta, June 1997.
3. Borg P.P., La Questione Matrimoniale in Malta: Studio Filosofico, Canonico e Politico con appendici, Stabilimento Tip. Librario A.E.S.Festa, Napoli,1900.
4. Boswell John, Same-Sex Unions in PreModern Europe, Vintage Books, New York, (1994), ISBN 0-679-75164-5.
5. Boswell, John, Same-Sex Unions in Premodern Europe, New York, Villard Books, 1994.
6. Brain R., Bangwa Kinship and Marriage, Cambridge, University Press, 1972, ISBN 0-521-083117.
7. Cheshire and North's, Private International Law, 10th. Edition, Butterworths, London, 1979, ISBN 0-406-56567-8.
8. Chibambo T.N., Marriage Laws of Malawi, The Evolution of African Marriage Laws under Colonial Rule, School of Oriental and African Studies, London, 1987.
9. Coit S., Socialism and Marriage, Labour Message Series 1, Wakefield and District Labour Party, 1909.
10. Cooper B.M., Marriage in Maradi: gender and culture in a Hausa society in Niger, James Currey Publishers, Oxford, 1997, ISBN 0852556772.
11. Davenport W.H., Pi'o: an inquiry into the marriage of brothers and sisters and other close relatives in old Hawaii, Lanham, University Press of America, 1994, ISBN 081919395X.
12. De Felice F.B., *Encyclopedie*, Yverdon, (1770-1780).
13. De Padue M., *Tractatus de Jurisdictione imperiali in causis matrimonialibus*, s.d., M.Goldast Edition, Book 2, pp.1383-1391.
14. De Vattel E., Of the Law of Nations or Principles of Natural law applied to the management of Nations and Sovereigns (1758).
15. Dikov L., *Semeino Pravo*, Sofia, 1937, p.30.
16. Eriksson M.K., The Right to Marry and to Found a Family, A World-Wide Human Right, Iustus Förlag, Uppsala, Sweden, 1990, ISBN 91-7678-166-6.
17. Eskridge W.N., Jr, The Case for Same-Sex Marriage: From Sexual Liberty to Civilised Committment, New York, Free Press, 1996.
18. Eskridge, W.N.,Jr., The Case for Same-Sex Marriage: From Sexual Liberty to Civilised Commitment, New York, Free Press, 1996.
19. Eskridge, William N., Jr., The Case for Same-Sex Marriage: From Sexual Liberty to Civilised Commitment, New York, Free Press, 1996.
20. Farge, J., Marriage, Family and Law in Medieval Europe, Collected Studies, University of Toronto Press, 1996, ISBN 0-8020-0709-0.
21. G.D'Occam, *Consultatio de causa matrimoniali* (1342), M.Goldast Edition, Monarchia S.Romani Imperii, Book 1, 1668, p.21-24.
22. Geringer, Karl-Theodor, Zur Ehefahigkit Von AIDS Infizierten, Archivien katholisches Kirchenreclit 156 (1987), p.140-148.
23. Grotius H., *De Imperio Summarum Potestatum circa sacra* (1614).
24. Grotius H., *De Jure Belli ac Pacis*, Paris, (1625).
25. Guillot O., Suisse - *De la Liberte Personelle et des Devoirs de Famille, Regard sur le droit de la famille dans le monde*, Ed. CNRS, 1992, p.206.

26. Hambly D. & Turner J.N., Cases and Materials on Australian Family Law, The Law Book Co. Ltd., 1971.
27. Hamell-Bond B.E., Modern Marriage in Sierra Leone, Mouton, Netherlands, 1975, ISBN 90-279-7871-9.
28. International Commission on Civil Status (ICCS), Council of Europe Publication, Transsexualism in Europe, June 2000, ISBN 92-871-4343-9.
29. Karadaghy, M.SS., Marriage and Customs in Mohammedan Law and Current Customs in Kurdistan, University of London, Bachelor of Arts, 1961-1962.
30. Lamb C., Marriages between Christians and Muslims: pastoral guidelines for Christians and churches in Europe, London, CCBI on behalf of the Islam in Europe Committee of the Conference of European Churches and the Council of European Episcopal Conferences, 1998, ISBN 0851692427.
31. Mackin, Theodore., What Is Marriage? New York/Ramsey: Paulist Press, 1982.
32. Mann, K., Marrying Well - Marriage, Status and Social Change among the Educated Elite in Colonial Lagos, Cambridge University Press, 1985, ISBN 0-521-30701-5.
33. Palsson L., Marriage in comparative conflict of laws: substantive conditions, The Hague, Nijhoff, 1981, ISBN 9024725488.
34. Pope John XIII, Encyclical Letter Pacem in Terris, 11 April 1963.
35. Pudendorf, S., *Specimen controversiarum circa jus naturale*, Uppsala, 1678, Chapter IV, Part 12.
36. Pufendorf, *De Habitu Religionis Christianae ad vitam civilem* (1687).
37. Pufendorf, *De Jure Naturae et Gentium*, Lund, (1672).
38. Raymond, *Le Consentement des Epoux au Mariage*, th. Paris, 1963.
39. Robertson, S.W., Kinship and Marriage in Early Arabia, Cambridge University Press, 1885.
40. Roland H. & Boyer L., *Locutions Latines et Adages du Droit Français Contemporain*, L'Hermes, 1978, no.25, p.100.
41. Rousseau, J.J., *Du Contrat Social* (1762).
42. Sacred Congregation for the Doctrine of the Faith, Declaration, Personae Humanae, 29 December 1975:(1976)77-96.
43. Shatter A.J., Shatter's Family Law, 4th. Edition, Butterworths, 1997, ISBN 1-85475-1247.
44. Shore T., A summary of the chief arguments for and against marriage with a deceased wife's sister, London, Marriage Law Reform Association, 1883.
45. Smith, Janet E. Humane Vitae: A Generation Later, Washington, D.C.: Catholic University of America Press, 1991.
46. Stoddard Thomas, Why Gay People Should Seek the Right to Marry, in W.B. Rubenstein, ed., Lesbians, Gay, Men and the Law, New York, Free Press, 1993, p.398-400.
47. Stone L., Kinship and Gender-An Introduction, Westview Press, Harper Collins Publishers, (1997), ISBN 0-8133-2858-6.
48. Strasser, M., Legally Wed: Same-Sex Marriage and the Constitution, Ithaca, Cornell University Press, 1997.
49. Sullivan A., Same-Sex Marriage: Pro and Con a reader, Vintage Books, New York, 1st. Edition, 1997, ISBN 0-679-77637-0.
50. Sullivan A., Virtually Normal: An Argument About Homosexuality, 1995, p.139.
51. Sutton G., Une Anneé d'Adoption d'Enfants Etrangers au Tribunal de Grande Instance de Paris, in L'Adoption d'Enfants Etrangers under the direction of Foyer J. and Labrusse-Riou C., Economica, 1986.
52. The Swiss Civil Code by Ivy Williams, Volume I, reprint by Remak Verlag Zürich, 1976.
53. Thomasius, *Institutiones Jurisprudentiae Divinae*, Frankfurt, (1688).
54. Tiberg H., Sterzel F., Cronhult P., Swedish Law - a survey, Juristförlaget, 1994, Chap.3.7.
55. Treggiari S., Roman Marriage: Iusti Coniuges from the time of Cicero to the time of Ulpian, Clarendon Press, Oxford, 1991, ISBN 0198148909.
56. Uthman M.R., The Laws of Marriage in Islam, Dar al Taqwa, London, 1995, ISBN 1870582306.
57. Van Dijk P., & Van Hoof, Theory and Practice of the European Court of Human Rights, Deventer, London, 1990.
58. Vatican Council II Pastoral Constitution on the Church in the modern world Gaudium et Spes, 7 December 1965:58(1966) 1025-1115.

59. Vella Gauci, J., Islamic Law and Mixed Marriages in Malta, University of London, 1991.
60. Voltaire, *Dictionnaire Philosophique*, Paris, (1824).
61. Vorgrimler, Herbert, Commentary on the Documents of Vatican II. 5, Vols New York: Herder and Herder, 1967-1969.
62. Watts, John, AIDS and Canon Law - Some Considerations, London, Canon Law Society of Great Britain and Ireland, 1993.
63. Westermarck E., The History of Human Marriage, 3rd. Edition, Macmillan, London, 1891.

INDEX