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THE 'RIGHT TO MARRIAGE' ACCORDING TO THE ECHR AND THE EUROPEAN FUNDAMENTAL RIGHTS CHARTER

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1. LEGAL TEXTS:

1.1. European Convention on Human Rights 1950 (ECHR):

Art 12: "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."

Comment: the bearers of the right are "men and women of marriageable age". This is understood as excluding any other set-up, such as marriages between children or marriages between persons of the same sex. Within the limits of this definition of marriage, it is for national laws to regulate the exercise of this right.

Art 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Comment: the function of Art 14 is ancillary: it prohibits discrimination only with regard to the rights set out in the Convention, but does not prohibit "discrimination" in general. Note also that 'sexual orientation' is not mentioned as one of the 'suspicious' grounds for discrimination.

If "marriage" in Art 12. means a marriage between persons of the opposite sex, Article 14 ensures that the right to contract *this* kind of marriage is not withheld arbitrarily on any of the grounds mentioned. Obviously, if in a country the right to 'marry' a person of the same sex is given to no one, there is no discrimination if homosexuals do not enjoy such a right.

1.2. Fundamental Rights Charter:

Art 9: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."

Legal Explanations*: This Article is based on Article 12 of the ECHR, which reads as follows: "Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right." The wording of the

* These "Legal Explanations" have been drafted by the members of the Convention that drafted the Charter. However, they do not form part of the Charter.

Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides.

Comment: It appears that, in drafting this text, a concession was made to those countries (at the time of drafting: one single country, the Netherlands) that granted the status of marriage to same-sex couples. As the “Legal Explanations” explicitly state, there was no intention to impose on any other Member State an obligation to follow that example. At the same time, it should be noted that it is the “Legal Explanations” alone (and not the text of the Charter itself!) where the notion of same-sex marriage appears; yet these “Explanations” are a mere interpretation of the text, and that interpretation may well be contested.

Indeed, there are serious doubts with regard to the conformity of this provision of the Charter with the ECHR:

- Firstly, it must be reminded that the Charter was drafted in order to make existing fundamental rights more visible, whereas any intention to create new rights was at the time explicitly denied by the drafters[†].
- Secondly, it must be noted that the term “marriage”, if it is understood exclusively as a permanent formal relationship between a man and a woman, obviously differs from the concept of a “marriage” that can be contracted by any two persons, including persons of the same sex. In the first case, the clear purpose of marriage is procreation and the founding of a natural family. In the second case, marriage does not serve this person any more. In the first case, sexuality is oriented towards the purpose of procreation; in the second case, it is not. In the first case, “family” has the meaning of two persons of opposite sex and their natural progeny, whereas in the second case “family” is turned into a mere social and legal construction.
- It follows that there is a radical contradiction between what the preamble says on “reaffirming existing rights” and what the “legal explanations” to Art 9 say with regard to “modernising” and “extending the coverage” of the term “marriage”. Through such a “modernisation” the term would undergoes a fundamental change in meaning, so that it would deviate from Art 12 ECHR.
- Consequently, therefore, there are now two possibilities: either Art 9 of the Charter is interpreted in line with Art 12 ECHR (which would exclude same-sex

[†] This has been broadly communicated at the time of the drafting. A clear statement that the Charter was not intended to create new “rights” is found in the Preamble of the Fundamental Rights Charter, which says:

*“To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by **making those rights more visible** in a Charter.*

*This Charter **reaffirms**, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.”*

marriages), or it is openly acknowledged that Art 9 of the Charter is in contradiction to Art 12 of the Convention (which, in turn, would be impossible to reconcile with the Preamble.

In addition to what is said here with regard to “marriage”, it must be noted that the both the Convention and the Charter are completely silent on “Registered Partnerships” or similar. The contracting of such partnerships is not a right guaranteed by either of the two documents. It clearly follows that, if and where a country provides for such formal partnerships (other than marriage), Article 9 of the Charter does not apply. (This does not, however, exclude that a principle of “non-discrimination”, if for seen in the Constitution of the Member State concerned, could be of application.)

Art. 21 (1): *“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”*

Legal Explanations: Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by [Article III-8] of the Constitution, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. Insofar as this corresponds to Article 14 of the ECHR, it applies in compliance with it.

There is no contradiction or incompatibility between paragraph 1 and Article [III-8]† of the Constitution which has a different scope and purpose: Article [III-8] confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in paragraph 1 does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under other articles of Parts I and III of the Constitution, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article [III-8] nor the interpretation given to that Article.

Comment: In a similar vein as above, it should be noted that Art 21 of the Charter does not have the same wording as Art 14 of the ECHR. It is difficult to reconcile this difference in wording with the assertion (in the Charter's Preamble) that the Charter only serves to “reaffirm” existing rights. However, it is clear that, in order to ensure consistency between the two texts, the Charter must be interpreted in the light of the Convention: “marriage” (Art 9) must be given the same meaning as in the Convention (Art 12), and “discrimination” in the Charter (Art 21) must have the same meaning as in the Convention (Art 14).

It follows that, with regard to access to marriage, Art 9 in combination with Art 21 of the Charter can only be understood as guaranteeing the access to a marriage of two persons of different sex. More specifically, Art 21 of the Charter does not entail an obligation for Member States to foresee specific institutions for homosexuals such as “registered partnerships” and the like.

† Art III-8 has been turned into Art 13 of the Treaty on the Functioning of the EU, which has become the legal basis for, inter alia, the “Anti-Discrimination Directive” currently under discussion.

2. THE CASE OF SCHALK AND KOPF VS. AUSTRIA (ECTHR, APPL. NO. 30141/04)

It becomes more and more frequent for LGBT lobbyists to file lawsuits in order to obtain judgments in which a “right to same-sex marriage” is legally recognised, even if the law does not foresee it. Through such “strategic litigation”, they hope to incite judges to act as legislators (“judicial activism”). The strategy is specifically targeted at the supreme instances of the judiciary (against whose decisions no appeal is possible), or at international human rights bodies.

One such attempt was the case of Schalk and Kopf vs. Austria, which was recently decided by the European Court of Human Rights (EctHR). In this case, the attempt of a homosexual couple to impose an obligation to legislate for “same-sex marriage” on all 47 Member States of the Council of Europe remained unsuccessful. The ECtHR decision includes the following findings:

*“54. The Court notes that Article 12 grants the right to marry to “men and women”. The French version provides « l’homme et la femme ont le droit de se marier ». Furthermore, Article 12 grants the right to found a family. 55. The applicants argued that the wording did not necessarily imply that a man could only marry a woman and vice versa. The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to “everyone” or state that “no one” is to be subjected to certain types of prohibited treatment. **The choice of wording in Article 12 must thus be regarded as deliberate.** Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex.”*

Comment: it very clearly and unambiguously results that in Article 12 of the Convention, “marriage” means a union of two persons of different sex.

“57. In any case, the applicants did not rely mainly on the textual interpretation of Article 12. In essence they relied on the Court’s case-law according to which the Convention is a living instrument which is to be interpreted in present-day conditions (see E.B. v. France [GC], no. 43546/02, § 92, ECHR 2008-..., and Christine Goodwin, cited above, §§ 74-75). In the applicants’ contention Article 12 should in present-day conditions be read as granting same-sex couples access to marriage or, in other words, as obliging member States to provide for such access in their national laws.

58. The Court is not persuaded by the applicants’ argument. Although, as it noted in Christine Goodwin, the institution of marriage has undergone major social changes since the adoption of the Convention, the Court notes that there is no European consensus regarding same-sex marriage. At present no more than six out of forty-seven Convention States allow same-sex marriage (see paragraph 27 above).”

Comment: The meaning of these observations is somewhat unclear. The Court seems to say that the term “marriage” in Article 12 of the Convention could change its meaning if

there were an apparent “consensus” among the Convention States. However, in this context “consensus” must have the same meaning as when the Convention was made: a State that has not signed up to the Convention cannot be bound by it. This is the meaning of “consensus” in International Law. Even a “consensus” among 46 Convention State would therefore not result in an obligation for the 47th State to provide for, or to recognise, same-sex marriage. And if there was such a “consensus” between all States, no applicant would need to revert to the ECtHR – because in that case there would be no Convention State in which same-sex “marriage” would not be available.

The ECtHR also used the occasion to comment on Art. 9 of the EU Charter on Fundamental Rights:

“60. Turning to the comparison between Article 12 of the Convention and Article 9 of the Charter of Fundamental Rights of the European Union (the Charter), the Court has already noted that the latter has deliberately dropped the reference to men and women (see Christine Goodwin, cited above, § 100). The commentary to the Charter, which became legally binding in December 2009, confirms that Article 9 is meant to be broader in scope than the corresponding articles in other human rights instruments (see paragraph 25 above). At the same time the reference to domestic law reflects the diversity of national regulations, which range from allowing same-sex marriage to explicitly forbidding it. By referring to national law, Article 9 of the Charter leaves the decision whether or not to allow same-sex marriage to the States. In the words of the commentary: ‘... it may be argued that there is no obstacle to recognize same-sex relationships in the context of marriage. There is however, no explicit requirement that domestic laws should facilitate such marriages.’

61. Regard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants’ complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.”

Comment: In the first place, it must be noted that the ECtHR has no competence for giving a binding interpretation to the EU Fundamental Rights Charter, and that these remarks must therefore be understood as a mere obiter dictum. The interpretation of the Charter falls into the Competence of the European Court of Justice (ECJ).

On substance, the argument made by the ECtHR is flawed. The Convention, the Charter and the domestic laws of each of the 47 Convention States must be interpreted **autonomously**. It is difficult to see how Art 9 of the Charter could affect the clear meaning (see above) of the term “marriage” in Art 12 of the ECHR; the reasoning of the ECtHR seems self-contradictory in this point. Technically, Art 9 can at best be understood as giving license to EU Member States to adopt a wider concept of “marriage” (which only a small group of countries have done so far); in that way, it can affect the meaning of the Convention no more than the legislation of a single country providing for same-sex marriage. But given that, as the ECtHR has itself pointed out, the term “marriage” has a very precise meaning in the ECHR, the question to be asked is whether the adoption of different concepts of “marriage” by a Convention State, or a group of Convention States could not be seen as a violation of the Convention.

By the second limb of the complaint, the applicants alleged a violation of Art 14 in conjunction with Art 8 of the ECHR. The ECtHR, albeit with a narrow minority, also rejected this allegation:

“101. Insofar as the applicants appear to contend that, if not included in Article 12, the right to marry might be derived from Article 14 taken in conjunction with Article 8, the Court is unable to share their view. It reiterates that the Convention is to be read as a whole and its Articles should therefore be construed in harmony with one another (see Johnston and Others, cited above, § 57). Having regard to the conclusion reached above, namely that Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either.”

Comment: This passage of the judgment states a mere self-evidence. Accepting the argument of the applicants would have been tantamount to saying that the Convention was in violation of itself. It is utterly disturbing to note that a minority of three ‘activist’ judges nevertheless voted in favour of finding a violation of Art 14 and 8: with one vote more they could have turned the Convention into a perfect paradox.

Although these are mere obiter dicta, the following passages also merit some critical attention:

- With regard to the notion of “family life”:

“92. (...) the Court’s case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes ‘private life’ but has not found that it constitutes ‘family life’, even where a long term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals, given the existence of little common ground between the Contracting States, this was an area in which they still enjoyed a wide margin of appreciation (...).

93. The Court notes (...) a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples (...). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of ‘family’.

94. In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would.

95. The Court therefore concludes that the facts of the present case fall within the notion of ‘private life’ as well as ‘family life’ within the meaning of Article 8. Consequently, Article 14 taken in conjunction with Article 8 applies.”

Comment: One fails to see why the Court needed to make any reference to the question of whether homosexual relations can, or cannot, be termed as “family life”: these considerations were completely unnecessary in the context of the decision, given that, as has been mentioned above, Articles 14 and 8 can in no case be understood as obliging Member States to legislate for same-sex marriages.

The reasoning seems to stand in contradiction with what is said elsewhere in the same judgment. In actual fact, the term “family” in Art 8 must be interpreted in the same way as in Article 12 of the Convention. And in Article 12, the notion of “founding a family” stands in a close context to the notion of “marriage”. It follows that the same rules which have been followed by the Court in order to interpret the term “marriage” must be followed when interpreting the term “family”: if, according to Article 12 a family can (only) be founded by “a man and a woman of marriageable age”, it clearly and unavoidably follows that a homosexual relationship cannot be termed as “family life”. In the same vein, the Court would have to base its assessment on the meaning that was generally given to the term “family” at the time when the Convention was enacted, i.e. 1950.

This obiter dictum is thus based on a flawed interpretative methodology; it probably must be viewed as a concession to a perceived “Zeitgeist”.

- With regard to an alleged obligation for States to provide a formal status other than “marriage” to same-sex partnerships:

105. The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes (see Courten, cited above; see also M.W. v. the United Kingdom (dec.), no. 11313/02, 23 June 2009, both relating to the introduction of the Civil Partnership Act in the United Kingdom).

Comment: Once again, a flawed statement results from a flawed methodology. In the first place, we may refer to what has already been mentioned above: “consensus” can only mean a consensus shared by *all* Convention States, whereas a position taken by 46 of 47 States cannot be termed a “consensus”. In that context, it must be noted that the legislation adopted by different countries in order to provide a legal status to same-sex partnerships are so diverse that it seems hardly justified to speak of a common trend. If anything, the trend is that those relationships are regulated in some way or other, but there is no convergence as to *how* they are regulated.

In addition, if the Convention explicitly obliges Member States to provide a formal legal status for “marriage” (as defined in Art 12 of the ECHR), it must be concluded *e contrario* that it foresees no similar obligation for any other type of relationship. It follows that even if, at some time in the future, 47 of 47 Convention States provided a legal status to same-sex relationships, this would not mean that the ECHR would henceforth include an obligation to adopt such legislation. To draw a parallel, the fact that all Convention States have legislation regulating the use of motor vehicles on public roads is not sufficient as an argument that the ECHR includes such obligation.

This passage must be seen as a dangerous attempt to encroach on the sovereignty of Convention States: As the argument runs, country A would be obliged to adopt a certain kind of legislation because countries B, C and D have done so.

In conclusion, the ECtHR Decision clearly and unambiguously states that Convention States are obliged to protect “marriage” as a permanent relationship between man and women with the purpose of providing a stable environment for the rearing of their natural progeny. By contrast, it does not, neither directly nor indirectly, impose any obligation on Member States to formally recognise any other kind of relationship.

The decision does contain some obiter dicta that seem to serve a purpose of “opening the door” for reading into the Convention, at a later occasion, an obligation to provide a formal status to same-sex partnerships. But these obiter dicta are clearly flawed from a methodological point of view and stand in contradiction both with the Court’s own reasoning and with the generally accepted methods of interpretation of international conventions.