Equal rights for all families: applying human rights principles in national and EU policy-making

Karine Lalieux, Member of the Belgian House of Representative (PS)

Joël Le Déroff, Board Member of Rainbow Rose LGBTI and of the Belgian PS

This article briefly describes the developments of the European human rights doctrine over the last 20 years as regards the right to family life of gay, lesbian and bisexual people. It shows how their couples and parenting relations are now clearly seen as protected under the notion of family life. The article then explores the way national governments and parliaments across the EU have dealt with this historical movement towards equality. The authors eventually identify the policy areas in which EU institutions, despite their limited competences in the area of family law, have a competence and a duty to act, and they make recommendations in that respect.

FEPS
POLICY BRIEF
SEPTEMBER
2016

FOUNDATION FOR EUROPEAN PROGRESSIVE STUDIES
FONDATION EUROPÉENNE D'ÉTUDES PROGRESSISTES

This article briefly describes the developments of the European human rights doctrine over the last 20 years as regards the right to family life of gay, lesbian and bisexual people. It shows how their couples and parenting relations are now clearly seen as protected under the notion of family life. The article then explores the way national governments and parliaments across the EU have dealt with this historical movement towards equality. The authors eventually identify the policy areas in which EU institutions, despite their limited competences in the area of family law, have a competence and a duty to act, and they make recommendations in that respect.

Family models have always been diverse. Over the last decades, the once dominant model of the married heterosexual couple with children has progressively stopped to be the only one recognised and protected by the legislation of Member States. Step by step, many other forms of families have been recognised. The list of variations is potentially endless: single parents, divorced and remarried parents, stepchildren and stepparents, legally recognized or *de facto* cohabitation, civil partnerships for different-sex and same-sex couples, equal marriage, adoption by single adults and same-sex couples.

This paper focuses on the evolution of the concept of private and family life and its implications in relation to lesbian, gay and bisexual (LGB) people[1]. From a human rights point of view, a series of decisions of the European Court of Human Rights (ECtHR) has since 2008 confirmed the full inclusion of LGB families in the concept of family life. This complements a move that has seen the EU and its Member States adopt anti-discrimination legislation covering sexual orientation as a protected ground.

In a relatively short time, LGB people, who were still regarded as mentally sick a few decades ago, have benefited from a social and political revolution. Yet, the situation remains uneven across Europe, which is no surprise, given that changes are quite recent in this area, not to mention the existence of strong opposition movements in some countries. The article shows how the EU and its Member States can and do play a role in adapting legislation to ensure that LGB people fully enjoy their human right to family life.

A new developing consensus in the area of human rights

The developing jurisprudence of human rights courts have begun to provide bedrock indications on the rights to be granted to same-sex couples and their families. More specifically, considering that the European Convention on Human Rights has been ratified by all EU Member States and that EU treaties provide for its ratification by the Union itself, ECtHR case-law should be regarded as providing the minimum standards all EU jurisdictions shall now comply with.

While there is no mechanism to ensure that all countries comply with all the implications of the Courts' decisions in the short term, good-willing law-makers should certainly consider them as a form of benchmark to review and amend their national legislation where needed.

The minimum standards found in ECtHR decisions include two main aspects, covering the recognition of same-sex couples and parenting-related rights. It is important to note that they have been developed quite quickly, and that this evolution is likely to continue, as cases covering new areas of

[1] It is worth clarifying that this article does not mention issues specific to trans people rights, although in practice the

law may now be decided based on the underlying principles identified by the Court in its recent decisions.

On the one hand, the Court has now fully clarified that same-sex relationships benefit from the right to family life on an equal footing with different-sex couples. In a series of cases coming from countries where no legal recognition of same-sex couples existed, the Court has built quite a clear reasoning.

In the Karner v. Austria case[2] of 2003, and later in the Kozak v. Poland case[3] of 2010, the Court found that where unmarried different-sex partners could succeed a tenancy after the death of the official tenant, Council of Europe Member States could not deny the same right to a same-sex partner, as this would be a violation of their right to private and family life combined with a discrimination.

Later in 2010, the Court built on this reasoning in the Schalk & Kopf v. Austria[4] and P.B. and J.S. v. Austria[5] cases to fully establish that the relationship of same-sex couples living in a stable *de facto* partnership fell within the ECHR's Article 8 notion of family life. It must be noted that in the same decision, however, the Court rejected the applicants' claim that the failure of Austria to provide for equal marriage constituted a violation of the Convention.

Since then, the Court has moved forward. In 2013, the Vallianatos and Mylonas v. Greece and C.S. and others v. Greece cases[6] resulted in further elaboration of this principle. The Court decided that the adoption of a "civil union" legislation excluding same-sex couples was a violation of these couples' right to the protection of their family life. The Court went a step further in 2015 with the Oliari and others v. Italy case[7], when it found that the failure to provide any form of legal recognition for same-sex couples, including in a country with no civil union or registered partnership at all, is a violation of the ECHR's Article 8.

To sum up, the parties to the Convention now have a positive obligation to make sure they consider same-sex couples as falling into the scope of family life, and to give them a form of recognition.

On the other hand, the Court has also been asked to decide on cases relating to parenting rights. Here as well, although only a limited number of cases have reached Strasbourg, the decisions show an evolution in line with the general European trend towards a better recognition of LGB people's families.

[2] http://hudoc.echr.coe.int/eng#{"fulltext":["Karner v. Austria"],"documentcollectionid2":["JUDGMENTS"],"itemid":["001-61263"]}
[3] http://hudoc.echr.coe.int/eng#{"fulltext":["Kozak v. Poland"],"documentcollectionid2":["JUDGMENTS"],"itemid":["001-97597"]}
[4] http://hudoc.echr.coe.int/eng#{"fulltext":["Schalk & Kopf v. Austria"],"documentcollectionid2":["JUDGMENTS"],"itemid":["001-99605"]}
[5] http://hudoc.echr.coe.int/eng#{"itemid":["001-100042"]}
[6] http://hudoc.echr.coe.int/eng#{"fulltext":["Vallianatos and Mylonas v. Greece"],"documentcollectionid2":["JUDGMENTS"],"itemid":["001-128294"]}
[7] http://hudoc.echr.coe.int/eng#{"fulltext":["Oliari and Others v. Italy case"],"documentcollectionid2":["JUDGMENTS"],"itemid":["001-156265"]}

As early as 1999, the Court has clarified, in its Mouta v. Portugal decision[8], that there could be no discrimination in relation to the custody rights of children after a divorce, in a case where one of the parents later engaged in a same-sex relationship.

In 2008, the Court has also made clear that countries which allow adoption by individuals should provide for adoption decisions to be made without discrimination based on sexual orientation (case E.B. v. France[9]).

More recently, in 2013, the Court, in the X and Others v. Austria case[10], based again on Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination), applied the same reasoning, grounded in the principle of equal treatment, to unmarried same-sex couples applying for second parent adoption.

In other words, the developing jurisprudence of the Court in the area of parenting is still far from covering all possible forms of families. However, it is unequivocally based on the core notion that LGB people, individually or in a couple, should be treated equally with single heterosexual people and different-sex couples.

As these principles are now firmly embedded in Europe's most fundamental human rights mechanisms, it becomes the role of policy-makers and legislatures to take responsibility for engaging into a comprehensive review of the applicable legislation. In the next sections, we'll explain how this principle can apply at national and European levels, and provide practical examples.

Implications for European and national level policy-makers

As it is often the case in today's complex European institutional environment, the developments of the human rights doctrine in relation to LGB people's families should arguably have consequences in the work of EU and national policy-makers.

In the case of national governments and legislatures, this is easy to demonstrate, as they retain the legislative competence in relation to substantial family law and civil code provisions. In practice, our governments and parliaments have to carefully implement the principles that inspire the evolutions of human rights law. This is crucial in order for citizens to be considered as full rights holders, and not to wait for ECtHR decisions to slowly force legislation to change.

In the case of EU policy-makers, the question of whether they hold a competence in the area of §family law has been the subject of debates. For example, at the time of the ratification of the Lisbon Treaty, Poland made a declaration annexed to the treaties, stating that the Charter of Fundamental Rights "does not affect in any way the right of member States to legislate in the sphere of public morality [and] family law […]."

8 http://hudoc.echr.coe.int/eng#{"fulltext":["mouta"],"documentcollectionid2":["JUDGMENTS"],"itemid":["001-58404"]}

9 http://hudoc.echr.coe.int/eng#{"fulltext":["E.B."],"documentcollectionid2":["JUDGMENTS"],"itemid":["001-84571"]}

10 http://hudoc.echr.coe.int/eng#{"fulltext":["E.B."],"documentcollectionid2":["JUDGMENTS"],"itemid":["001-116735"]}

However, while it is true that the EU cannot directly modify provisions related to marriage or parenting mechanisms, the Treaties are very clear that it is competent to adopt measures concerning family law with cross-border implications and in relation to third-country nationals' family reunification (articles 81 and 79 TFEU). This has implications on various areas such as the asylum seekers' and refugees' right to family unity, and of course freedom of movement for EU citizens and their families.

In this context, it becomes fully relevant that the Charter includes three articles that are very much similar to the ECHR ones on which the Strasbourg Court has based its jurisprudence applicable to LGB couples and families. One thinks mainly of Article 7 (private and family life), Article 9 (right to marry and found a family) and Article 21 (non-discrimination). It is absolutely clear that in the frame of its limited, but real areas of competences, the EU must also be held accountable for the implementation of LGB people' and families' rights.

Hence, both at national and EU levels, policy-makers must anticipate, based on a serious analysis of social situations. They should adequately review their national legal concepts to ensure they protect all families. In practice, this results in debates and choices that can be at the same time technical and passionate.

Paving the way towards equality: early leaders

The exercise of naming leader countries is somewhat artificial. Merely looking at the dates of adoption of equality legislation does not pay justice to the hard work of committed activists, academics, lawyers and politicians whose actions patiently created the conditions for change. Before the first historical votes took place on same-sex unions' recognition, the ground had been prepared by years of less visible actions. That one country comes before another is the result of contingency, as it is determined by a combination of factors such as change in the public opinion, the level of preparation of pro-equality activists, and the existence of a favourable political majority.

This said, it remains that a few European social-democratic-led and progressive governments and/or parliamentary majorities have taken the lead, more than 25 years ago, to open the way for the legal recognition of LGB couples and families. They have created a momentum: this handful of European countries made history and triggered a wave of legislative changes and debates that hit, to various extents, all regions of the world.

On 7 June 1989, Denmark became the first country world-wide to enact a law on registered partnerships. While this law did not allow for same-sex partners to jointly adopt children, it equated the rights of same-sex couples with those of married couples as regards all other legal and fiscal obligations. Other Scandinavian countries soon followed Denmark: Norway in 1993 under Gro Harlem Brundtland's government and Sweden in 1998 under Ingvar Carlsson's government.

In the late 1990s and in the first half of the 2000 decade, a double movement took place. The recognition of same-sex couples spread out of the Nordic region, and a new step emerged with the opening of equal marriage and adoption legislation in a number of countries.

On the one hand, the geographic change was intense in Europe as well as outside Europe. In Europe, The Netherlands, under Wim Kok's "purple" (socialist and liberal) government and Belgium, under a socialist and Christian-democratic government,, passed civil union legislation in 1998 and 1999, soon followed by France (1999, under Lionel Jospin's government) and Germany (2001, under Gerhard Schröder's government). In Spain, despite the opposition of the governing Popular Party, more

progressive regions introduced similar legislation: Catalonia in 1998, Aragon in 1999, Navarra in 2000, soon followed by others. Outside Europe, some US state introduced same-sex unions, such as for example California (1999) or Vermont (2000), followed by Quebec in Canada (2002).

On the other hand, moving quickly after their first civil partnership legislation, The Netherlands (2001), still under Wim Kok's government, and Belgium (2003), now ruled by a "rainbow" coalition (socialist, liberal and greens), became the first countries to authorise same-sex couples to marry. In Europe, they were followed by Spain (2005) just after the election of José Luis Zapatero's PSOE government. Outside Europe, Canada was the first country to make a similar move in 2005 by means of a parliamentary vote (in 2003, Massachusetts' Supreme Court had ordered the State's legislature to open marriage to same-sex couples). Interestingly, the first bill tabled on equal marriage was introduced in the Canadian House of Commons by a social-democratic (NDP) MP. In South Africa, following Constitutional Court Decisions, a marriage equality law was approved in 2006, later followed by many other countries in Oceania and Latin America.

Equal marriage and adoption rights: now a reality for half of the EU's population[11]

By the middle of the 2000 decade, it had become clear that the legal recognition of LGB couples and their families was a pan-European as well as a worldwide issue. The first relevant ECtHR decisions had also confirmed that it was to be considered as part of Europe's human rights doctrine. In the following years (2005-2016), a triple movement took place in Europe.

Firstly, same-sex partnerships were recognised by an increasing number of countries, including in the EU's new Central European and Mediterranean Member States. Secondly, more countries went for full marriage equality, including the right to adoption, with or without going first through the adoption of same-sex partnership legislation as a first phase. Some Member States also allowed joint adoption by same-sex couples in the frame of civil partnership. These two movements do of course not mean that discrimination has stopped and that all segments of society now are fully acceptant of LGB people. However, they mean that the law now is on the side of equality. More work certainly remains to be done in order for education and long-term cultural change to guarantee that LGB equality becomes consensual and non-questionable.

Thirdly, though, resistance to change became more organised, with strong demonstrations in countries like France, anti-marriage referendums in Slovenia and Croatia, and the introduction of equality marriage constitutional bans by a number of Central and Eastern European countries (Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, Slovakia), including in countries that have civil partnership legislation in place. As a result, despite the developments of the ECtHR's jurisprudence, a minority of countries seem to be moving backwards. Where this movement is backed or even organised by the political leadership, following the Russian model, this certainly means that deep political confrontations are to be expected.

By mid-2016, EU-28 statistics show evidence of how important the change has been in a quarter of a century. The figures below are very much tied to the question of how consistently LGB equality in the area of family law can and should be considered as human rights acquis. In fact, it is well-documented that human rights courts, particularly the ECtHR, apply the "emerging consensus"

[11] The data presented in this section have been checked on the Rainbow Europe index webpage of ILGA-Europe (Rainbow Index 2016) updated in May 2016: http://www.ilga-europe.org/resources/rainbow-europe/2016.

doctrine[12]. This doctrine means that when a majority of Council of Europe Member States protect a given human right, then the Court is more than likely to decide that it is a recognised right under the ECHR, and that the states that still fail to protect it violate the Convention. As a result, in the case of LGB people's rights, human right jurisprudence and national legislation changes clearly reinforce each other.

(Last checked: 31 August 2016)	Marriage equality	Joint adoption by same-sex couples	Civil partnership (in the absence of marriage equality)	Automatic co-parent recognition in same-sex married or registered couples	No recognition of same-sex couples whatsoever
Number of countries	11/28	13/28	10/28	8/28	6/28
Proportion of the population	47.4%	49.1%	37.6%	30.9%	15.0%

It is worth insisting that the proportions mentioned in the table would be significantly lower including all Council of Europe members, although we would still have a majority of states, representing a majority of the population, providing a form of recognition to LGB couples. With this reservation, it is impressive to note that 22 EU Member States out of 28, representing no less than 85% of the population, now provide legal recognition to couples that were totally ignored by family law only 27 years ago.

Furthering equality: the example of recent complementary steps in Belgium

In some European countries, the fight for marriage equality already sounds like an old battle. In all the countries that passed such legislation, polls show that the measure is broadly accepted by the society. So far, no newly elected political majority has taken the risk to challenge it. While a minority of Member States still fall short of delivering a first form of recognition for LGB couples, Belgium, but also Austria, Denmark, Ireland, The Netherlands, the United Kingdom and Malta have sought to go beyond the idea that marriage equality and adoption *per se* are the end of the road, a perception that is too often prevalent, due to the dramatic media coverage of the issue.

To fully explore the Belgian case, some complementary background information on the political dynamics is needed. In 2003, Belgium had become one of the first countries in the world to allow same-sex couples to marry, following The Netherlands. That this measure was adopted thanks to a secular "rainbow coalition" (socialist, liberal, green), after decades of Christian-democratic leadership, is no surprise. However, the Belgian situation was quite unique in that some Christian-democratic MPs joined the majority and backed the reform.

While other countries passed marriage and adoption equality in one go, Belgian same-sex couples needed to wait three more years (2006) for a second law to also grant them full adoption rights.

[12] http://www.jus.uio.no/pluricourts/english/projects/multirights/events/2015/2015-05-12-european-consensus-dothan.html (en ajouter d'autres)

Yet, same-sex couples still weren't equal in law. Secondary aspects of civil law still made a difference between them and different-sex couples. LGBTI civil society organisations soon came back to political parties and parliamentarians, pointing at yet another problem. Like in many other jurisdictions, the Belgian civil code has a lot of technical articles on birth certificates and the establishment of children's filiation, which had been left unchanged. Article 315 of the Civil Code, which provides for a woman's husband to automatically be considered the father of her child, is one of them:

> *"The child born in a marriage or less than 300 days after the dissolution or annulment of a marriage has the husband for father."*

In other words, even in a legal system providing for equal marriage and equal access to medically assisted procreation, a lesbian married couple had to undergo a long second-parent adoption process, and years of absence of legal protection, for the co- mother to be recognised as such. Belgium, following Spain and The Netherlands, has only found a legal solution to this problem in 2014, a few days before the end of the Di Rupo government, and with, again, broad cross-party support.

A new chapter of the civil code now regulates the establishment of the children's filiation with regard to the second parent. The historical legal concept of presumption of paternity is now complemented by a parallel concept: the presumption of co-maternity. This national example is to be understood as evidence that more efforts should be paid, in consultation with civil society organisations and legal experts, in order to complete Europe's journey towards equality.

Action at EU level: state of play and recommendations in the most relevant policy areas

In a previous section of this paper, we have clarified that the EU retains a limited, but yet real competence to adopt measures on family law with cross-border implications. There are in fact three areas of existing legislation that include a definition of the concept of family members: the directive on freedom of movement for EU citizens (Directive 2004/38/EC), the directive on third-country nationals' family reunification (Directive 2003/86/EC), and the directives and regulations that form the Common European Asylum System, which include provisions related to asylum seekers' and refugees' right to family unity. In addition, there are also directives and legislative debates around the notions of maternity, parental and paternity leave.

Most of the existing directives and regulations in this field do not go as far as they could and should. This is largely due to the fact that some relevant EU instruments were adopted already years ago. At the time, only a minority of Member States did recognise same-sex couples, and the unanimity decision procedure still covered legislative areas that have since the Lisbon Treaty been governed by co-decision and qualified majority in the Council[13].

It is now time to review EU legislation to make it fully comply with human rights requirements regarding LGB people's families. This is all the more necessary that the EU will sooner or later become a party to the ECHR, conform to the provisions introduced by the Lisbon Treaty. In other words, beyond the obligations embedded in the Charter, if no such review happens based on serious political commitments, it may well happen by means of long and painful Court proceedings. Socialists

[13] https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/111615.pdf.

and progressive are in a position to take the lead and fight for equality, as part of the European values.

Freedom of movement of EU citizens is a principle of the Union. It should benefit all citizens and families equally. This area is regulated by a Directive adopted in 2004 (2004/38/EC). At that time, only two countries had adopted equal marriage, and a handful had civil partnership laws. Despite this, the Directive's definition of family members includes not only married partners and their children, but also "the partner with whom the Union citizen has contracted a registered partnership", and his or her children. In addition, Member States must also "facilitate" the entry and residence of unmarried and unregistered partner with whom an EU citizen has "a durable relationship, duly attested."

In practice, there are many problems left, which have been documented by NGOs and EU institutions[14] and repeatedly acknowledged by the European Parliament since the adoption of its 2009 report on the application of the Directive[15]. Some Member States do not recognise same-sex spouses, and hence are discriminating citizens based on sexual orientation. Then, the Directive's obligation in relation to registered partners applies only to Member States which have domestic legislation on partnerships and treat then as "equivalent to marriage" – a terminology that leaves a form of uncertainty in the cases of couples who precisely opt for a civil partnership because they have no access to marriage. Lastly, there is a lack of clarity on what the "facilitation" applying to other unmarried partners means in practice, and on how relationships can be attested.

This unsatisfactory state of play ideally requires amendments to the Directive, and/or clear guidelines for a non-discriminatory application. The European Parliament, with consistent centre-left majorities, has been calling for such a clarification. Sadly, the subject is politically highly sensitive. The Commission has long been struggling to ensure that the current provisions are implemented, with many infringement procedures launched[16]. This probably explains why amending the Directive and launching a new legislative procedure has never been included in a Commission's work programme so far.

It is our recommendation that socialists and progressives now clearly aim at a universal mutual recognition rule. This will not be a consensual proposal: in December 2015, the Hungarian and Polish governments have vetoed simple regulation proposals on property regimes, only because they were applying this principle in a limited area of civil law[17]. However, setting a clear and ambitious objective is a good way to show that European institutions can also be a place where important battles are fought on values. It is also consistent with the Party of European Socialists' 2014 election manifesto, which stated: "freedom of movement is a right and a founding principle of the EU. The rights of citizens and their legally recognised families must be respected […].[18]"

In the case of family reunification for third-country nationals, the interpretation problems in relation to the definition of the family members entitled to family reunification are very similar to the ones observed in the case of Directive 2004/38/EC. The situation of registered and other unmarried

[14] http://www.statewatch.org/news/2009/feb/ep-free-movement-report.pdf
[15] http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0203&language=FR&ring=A6-2009-0186
[16] http://europa.eu/rapid/press-release_IP-11-981_en.htm?locale=en
[17] http://www.ilga-europe.org/resources/news/latest-news/disappointment-poland-and-hungary-block-eu-proposal-property-regimes
[18] http://d3n8a8pro7vhmx.cloudfront.net/partyofeuropeansocialists/pages/1101/attachments/original/1394819127/pes_manifesto_-_adopted_by_the_pes_election_congress_en.pdf?1394819127

partners and their children is even more difficult, as Member States have no actual obligation to consider them as family members.

This is a form of discrimination that would not resist a Strasbourg Court scrutiny. In fact, an ECtHR decision of 23 February 2016 has ruled that a decision by the Croatian authorities to refuse a residence permit to the Bosnian lesbian partner of a Croatian citizen was a form of discrimination based on sexual orientation, in conjunction with a violation of the right to family life[19]. Sooner or later, the same reasoning will be applied to the application of the EU Directive.

We recommend working for legislative improvements to grant all families with the same level of rights. We believe that socialists and progressives are in a position to take leadership and engage with all relevant EU law-makers to raise awareness and prepare change.

The legal definition of "family member" for asylum-seekers and refugees may soon open opportunities for change. In fact, since the adoption of the first asylum Dublin regulation and asylum directives from 2003 to 2005, family members have been defined in a way that is similar to the concept used in the freedom of movement Directive. They include the "unmarried partner in a stable relationship, where the law or practice of the Member State treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals", and the minor children of such couples.

From 2008 to 2013, the recast of the EU's asylum legislation has brought no change to this definition. Interestingly though, different other LGBT-related amendments were adopted, recognising the existence of persecution based on gender identity, and creating obligations to adequately process LGBT people's asylum claims.

A new recast of the Common European Asylum System has started in the spring 2016, all the EU's relevant regulations and directives are going to be reopened again. Yet, the initial proposals of the Commission make no change to the definition of family members, neither in the Dublin regulation[20], nor in the Qualification and Reception Conditions Directives[21]. Socialists and progressive, particularly from the Parliament, are in a position to build on their globally positive experience of the previous recast of EU asylum law, and to propose sensitive change in the current legislative process.

Maternity and parental leave represents another area where the EU can bring change. The current debate revolves around the revision of a Directive on pregnant workers and workers who have recently given birth, adopted in 1992. In 2008, the Commission had proposed a recast of this Directive. The European Parliament adopted a position, with significant amendments, in October 2010. Since then, the process has been stopped. As the Council seemed not to be in reach of a common position, the proposal has been withdrawn by the Commission in July 2015. Since then, new initiatives are awaited, following pre-announcements made in the summer 2015[22].

Resuming work in this legislative area could be an opportunity to push for a more gender-neutral parental leave, favouring at the same time gender equality and the recognition of LGB families. The 2010 amendments of the Parliament, thanks to the work of the then socialist rapporteur Edite

[19] http://hudoc.echr.coe.int/eng?i=001-161061#{"itemid":["001-161061"]}
[20] http://europa.eu/rapid/press-release_IP-16-1620_en.htm
[21] http://europa.eu/rapid/press-release_IP-16-2433_en.htm
[22] http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_xxx_maternity_leave.en.pdf

Estrela, show how part of the effort had already been undertaken[23]. Firstly, the Parliament had proposed to introduce provisions to take into consideration the case of parents following an adoption. Secondly, the Parliament had proposed to introduce provisions creating EU obligations in relation to paternity leave, with a correlated debate on the use of inclusive, gender-neutral legal terminology (the proposal should benefit to "workers whose life partner has recently given birth", and another amendment of the Parliament introduces the concept of "co-maternity leave").

We recommend that this work be continued, as soon as new policy proposals will be put on the table. Socialists and progressives are already well prepared to make proposals and negotiate efficiently. They are also in a position to think more global. For example, it remains to be seen how other EU provisions in this area, including the 2010 Directive on parental leave adopted on the basis of an agreement reached by European social partners[24], can be made inclusive of parents who may not be legally recognised (yet) in some Member States.

As a conclusion…

Although European Union policy bargaining happens on issues that are less symbolic and benefit from less media coverage than marriage equality and adoption by LGB couples, they focus on a lot of practical legal questions that are absolutely crucial in people's daily lives, and make a difference for millions of Europeans.

Implementing a serious and consistent EU policy agenda is of crucial importance.

Firstly, the adoption of an EU progressive agenda is good for the Union itself, which would otherwise be at risk of being caught violating the ECHR in a rapidly developing area of jurisprudence.

Secondly, it would also represent a chance to progressively acculturate the political and legal systems of many of the less advanced European states, including among the candidates to EU accession, hence combating a risk of European divide over the acceptation of families' diversity. The current situation is increasingly characterized by a division between a majority of European countries quickly moving towards equality, and a significant minority of nations (including non-EU members) where resistance to change is strongly organised. By introducing lower-intensity legal change in a homogeneous manner across the continent, the EU can contribute to a general harmonising dynamic.

Thirdly, some of the core EU competences allow the Union to be at the forefront of structural and long-term change: the fight against discrimination and hate crime, the strict scrutiny of the rule of law and human rights would, if used to their full potential, be powerful tools to embed equality in a pan-European social and political culture. It is indeed, according to the treaties, a duty of the EU to ensure that Member States do not breach their obligations.

Finally, the changes that EU law could introduce could also help to improve some blind spots in the legislation of various countries that already recognise marriage equality, a point that too often passes unnoticed.

May the EU live up to its promise!

---

[23] http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0373&language=EN&ring=A7-2010-0032

[24] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:068:0013:0020:en:PDF

Bibliography

Resources on the state of play of LGBT people's rights in Europe and on ECtHR case law:

- Rainbow Europe 2016, ILGA-Europe's Annual Review, Rainbow Europe Map and Index, May 2016.
  http://www.ilga-europe.org/resources/rainbow-europe/2016

- Sexual orientation and gender identity discrimination: the case law of the European Court of Human Rights and the Court of Justice of the European Union, Robert Wintemute, King's College London, July 2016.
  http://www.ilga-europe.org/resources/guide-european-institutions/council-europe/lgbti-rights/ECtHR

- Find cases and judgements regarding discrimination against unmarried same-sex partners (compared with unmarried different-sex partners) and parenting, ILGA-Europe's website, last checked August 2016.
  http://www.ilga-europe.org/resources/guide-european-institutions/council-europe/lgbti-rights/ECtHR/same-sex-family-related-issues

Academic resources:

- When States Come Out: Europe's Sexual Minorities and the Politics of Visibility. Phillipe Ayoub, Cambridge University Press, New York, 2016.

- Combating Sexual Orientation Discrimination in the European Union. Dorota Pudzianowska and Krzystof Smiszek, supervised and edited by Christa Tobler, European Commission, December 2014.

- La juridification ou la saisie des minorités par le droit: La revendication du droit au mariage entre personnes du même sexe. David Paternotte, Politiques et sociétés 31,2, 2013.

- Same-Sex Partnership, International Protection. Kees Waaldijk, Article, Max Planck Encyclopedia of Public International Law, last updated March 2013.

- Global Times, Global Debates? Same-Sex Marriage Worldwide, David Paternotte, Social Politics, 22, 4, December 2012.

- Revendiquer le « mariage gay », Belgique, France, Espagne. David Paternotte, Editions de l'Université de Bruxelles, Bruxelles, 2011.