

Tabled 3/5/12

LCA - Marriage Equality Amend
Bill
2010.

OUTLINE OF ORAL SUBMISSIONS OF LAWYERS FOR THE PRESERVATION
OF THE DEFINITION OF MARRIAGE TO SUPPLEMENT THEIR PREVIOUS
WRITTEN SUBMISSIONS

Introduction

1. The Bill under consideration:
 - 1.1. would effect a fundamental change to a well-established social institution;
 - 1.2. is, on the current state of High Court authority, beyond constitutional power;
 - 1.3. could and should only be legislated if a referendum has conferred power.
2. In the past, important changes to social institutions have been placed before the people by way of referendum so that they can either accept or reject the proposed change.
3. Plebiscites and referenda have been held to give constitutional powers on a broad range of issues. This Bill is as important as, if not more important than, any number of previous proposals put, including those that were successful.
4. Its importance is akin to that of any of those earlier constitutional changes that were fundamental to the manner in which our Australian society is ordered.
5. It must rank as being at least as important as the amendment that brought legal recognition to the original inhabitants of this land (1967).
6. It is certainly a more important than the age at which Judges should retire the national anthem and the manner in which simultaneous elections are conducted and casual Senate vacancies filled (1977). It deals with, and attempt to change, the most basic of human relationships.
7. If the Bill is passed and the Act is subsequently declared to be unconstitutional, the hurt caused to all sides of the debate will be incalculable.
8. The certainty that either a referendum (or referral of powers) would bring is of no comparison in its cost to the raising of expectations on a proposition, that which expectations on the current state of the authorities, are likely to be dashed that may be dashed. At that point, if the Act were declared unconstitutional, there would still be a need for a referendum in any event if the Parliament were truly committed to the policy.

Constitutional Issues

The Marriage Power

9. It is clear that statutory interpretation starts with the text of the legislation.¹
10. The expositions of the marriage power by Brennan J (as he then was) in *Fisher v Fisher*,² and by Mason and Deane JJ³ are important.
11. The common law position as set out in *Hyde v Hyde* is that of a union between a man and a woman for life to the exclusion of all others⁴. That definition has been accepted in Australia in the High Court.⁵
12. The connotation/denotation distinction is dealt with at [7] of the Submission and at page 9 of the *Parliamentary Library Background Note in relation the Same-Sex Marriage* dated 10 February 2012. The Bill, if made law would be interpreted by way of connotation rather than denotation.

The External Affairs Power

13. The external affairs power is sometimes proffered as a possible justification for the Bill. This is dealt with briefly in the Submission at [38].
14. First, there is no international covenant that creates a right to Same-Sex Marriage:
 - 14.1. Article 16 of the *Universal Declaration of Human Rights* men and women of full age have the right to marry;
 - 14.2. Article 23(2) of the *International Covenant on Civil and Political Rights* similarly recognises the right of men and women of marriageable age to marry and found a family. *Joslin v New Zealand* held that States were only required to recognise the union between a man and a woman who wanted to marry each other.⁶
 - 14.3. The *Hague Convention on the Celebration and Recognition of the Validity of Marriages* in that it does not define marriage may be argued to broaden the definition of marriage. However the Hague Conference on Private International law held this convention was only an implementation of Article 23 and so it does not add anything.

¹ *Alcan*, Submission at [6].

² Submission at [10].

³ Submission at [11].

⁴ Submission at [25].

⁵ *Calverley v Green* Submission at [26].

⁶ Law Council Submission to the Senate Inquiry dated 2 April 2012 at [74-75].

15. The most recent judicial consideration of these matters is in the European Court of Human Rights where closely analogous instruments containing similar covenants have been construed:
- 15.1. ECHR Article 12 – right to marry;
 - 15.2. ECHR Article 14 – prohibition of discrimination;
 - 15.3. ECHR Article 8 – right to respect for private and family life;
 - 15.4. Cases:
 - 15.4.1. *Schalk and Kopf v Austria* (2010) – case of male same-sex couple who wanted state recognition by way of marriage, which was refused. They brought proceedings against the state for contraventions of Articles 12 and 14. It was held there was no breach. The majority found there was no obligation to provide marriage for same-sex couples. The concurring judgment held there was no basis for evolution of rights not expressly conferred by covenants in the instrument;
 - 15.4.2. *Gas et Dubois c. France* (2012) – lesbian couple refused adoption. They brought proceedings for a breach of Articles 8 and 14. The Court followed *Schalk*, which had followed *Johnston v Ireland*;
 - 15.4.3. *Johnston v Ireland* (1986) dealt with whether divorce was a right. The Court at [52] – [53] adopted an interpretative similar to *Alcan*⁷. This approach is consistent with the Vienna Convention on the Law of Treaties.⁸

Policy Issues

16. When the objects of the Marriage Equality Amendment Bill are considered the questions that Parliament must answer in relation to that Bill and the Marriage Amendment Bill include:
- 16.1. what logical reason exists not to extend marriage to those who wish to contract polygamous marriages both polygenous and polyandrous?⁹
 - 16.2. given that Parliament is now considering marriages that cannot have natural progeny, why should there be any retention or those relationships of the restriction on consanguinity?

⁷ Law Council Submission to the Senate Inquiry dated 2 April 2012 at [74-75].

⁸ See note 1 and Submission at [6].

⁹ The Submission made by the Law Council to the Senate refers to South Africa which has two separate Acts, one for heterosexual unions and the other for same-sex – as an example to be emulated. That example includes polygamous marriages.

16.3. what logical reason would there be to prohibit two siblings of the same sex from marrying?

Conclusions

17. The proposed Bills are attended by uncertainty at a number of levels: constitutional; construction; and policy.
18. In legislation of this importance to all sections of the community, certainty is necessary.
19. That certainty can and should be achieved in one of two ways:
 - 19.1. Amendment to the *Constitution* under section 128 referendum processes – the method that provides both certainty and gives the entire electorate a voice;
 - 19.2. Referral of powers from the States to legislate for civil unions;

1 May 2012

Lawyers for the Preservation of the Definition of Marriage

The Universal Declaration of Human Rights

Full Text

History

Human Rights Law

Drafters

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their

universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

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Article 1.

- All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

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Article 2.

- Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

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Article 3.

- Everyone has the right to life, liberty and security of person.

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Article 4.

- No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

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Article 5.

- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

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Article 6.

- Everyone has the right to recognition everywhere as a person before the law.

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Article 7.

- All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

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Article 8.

- Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

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Article 9.

- No one shall be subjected to arbitrary arrest, detention or exile.

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Article 10.

- Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

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Article 11.

- (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
- (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

[^ Top](#)**Article 12.**

- No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

[^ Top](#)**Article 13.**

- (1) Everyone has the right to freedom of movement and residence within the borders of each state.
- (2) Everyone has the right to leave any country, including his own, and to return to his country.

[^ Top](#)**Article 14.**

- (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
- (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

[^ Top](#)**Article 15.**

- (1) Everyone has the right to a nationality.
- (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

[^ Top](#)**Article 16.**

- (1) 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.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.

- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

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Article 17.

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.

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Article 18.

- Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

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Article 19.

- Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

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Article 20.

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

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Article 21.

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.

- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

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Article 22.

- Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

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Article 23.

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (4) Everyone has the right to form and to join trade unions for the protection of his interests.

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Article 24.

- Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

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Article 25.

- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

- (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

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Article 26.

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
- (3) Parents have a prior right to choose the kind of education that shall be given to their children.

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Article 27.

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

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Article 28.

- Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

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Article 29.

- (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
- (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and

respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

- (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

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Article 30.

- Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Uio : The Faculty of Law

Convention on Celebration and Recognition of the Validity of Marriages

Done at: The Hague

Date enacted: 1978-03-14

In force: 1991-05-01

Content

Chapter I – Celebration of marriages

Chapter II – Recognition of the validity of marriages

Chapter III – General clauses

Chapter IV – Final clauses

The States signatory to the present Convention,

Desiring to facilitate the celebration of marriages and the recognition of the validity of marriages,

Have resolved to conclude a Convention to this effect, and have agreed on the following provisions –

Chapter I – Celebration of marriages

Article 1

This Chapter shall apply to the requirements in a Contracting State for celebration of marriages.

Article 2

The formal requirements for marriages shall be governed by the law of the State of celebration.

Article 3

A marriage shall be celebrated –

1. where the future spouses meet the substantive requirements of the internal law of the State of celebration and one of them has the nationality of that State or habitually resides there; or
2. where each of the future spouses meets the substantive requirements of the internal law designated by the choice of law rules of the State of celebration.

Article 4

The State of celebration may require the future spouses to furnish any necessary evidence as to the content of any foreign law which is applicable under the preceding Articles.

Article 5

The application of a foreign law declared applicable by this Chapter may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the State of celebration.

Article 6

A Contracting State may reserve the right, by way of derogation from Article 3, subparagraph 1, not to apply its internal law to the substantive requirements for marriage in respect of a future spouse who neither is a national of that State nor habitually resides there.

Chapter II – Recognition of the validity of marriages

Article 7

This Chapter shall apply to the recognition in a Contracting State of the validity of marriages entered into in other States.

Article 8

This Chapter shall not apply to –

1. marriages celebrated by military authorities;
2. marriages celebrated aboard ships or aircraft;
3. proxy marriages;
4. posthumous marriages;
5. informal marriages.

Article 9

A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law shall be considered as such in all Contracting States, subject to the provisions of this Chapter.

A marriage celebrated by a diplomatic agent or consular official in accordance with his law shall similarly be considered valid in all Contracting States, provided that the celebration is not prohibited by the State of celebration.

Article 10

Where a marriage certificate has been issued by a competent authority, the marriage shall be presumed to be valid until the contrary is established.

Article 11

A Contracting State may refuse to recognize the validity of a marriage only where, at the time of the marriage, under the law of that State –

1. one of the spouses was already married; or
2. the spouses were related to one another, by blood or by adoption, in the direct line or as brother and sister; or
3. one of the spouses had not attained the minimum age required for marriage, nor had obtained the necessary dispensation; or
4. one of the spouses did not have the mental capacity to consent; or
5. one of the spouses did not freely consent to the marriage.

However, recognition may not be refused where, in the case mentioned in sub-paragraph 1 of the preceding paragraph, the marriage has subsequently become valid by reason of the dissolution or annulment of the prior marriage.

Article 12

The rules of this Chapter shall apply even where the recognition of the validity of a marriage is to be dealt with as an incidental question in the context of another question.

However, these rules need not be applied where that other question, under the choice of law rules of the forum, is governed by the law of a non-Contracting State.

Article 13

This Convention shall not prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign marriages.

Article 14

A Contracting State may refuse to recognize the validity of a marriage where such recognition is manifestly incompatible with its public policy ("ordre public").

Article 15

This Chapter shall apply regardless of the date on which the marriage was celebrated.

However, a Contracting State may reserve the right not to apply this Chapter to a marriage celebrated before the date on which, in relation to that State, the Convention enters into force.

Chapter III – General clauses

Article 16

A Contracting State may reserve the right to exclude the application of Chapter I.

Article 17

Where a State has two or more territorial units in which different systems of law apply in relation to marriage, any reference to the law of the State of celebration shall be construed as referring to the law of the territorial unit in which the marriage is or was celebrated.

Article 18

Where a State has two or more territorial units in which different systems of law apply in

relation to marriage, any reference to the law of that State in connection with the recognition of the validity of a marriage shall be construed as referring to the law of the territorial unit in which recognition is sought.

Article 19

Where a State has two or more territorial units in which different systems of law apply in relation to marriage, this Convention need not be applied to the recognition in one territorial unit of the validity of a marriage entered into in another territorial unit.

Article 20

Where a State has, in relation to marriage, two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the system of law designated by the rules in force in that State.

Article 21

The Convention shall not affect the application of any convention containing provisions on the celebration or recognition of the validity of marriages to which a Contracting State is a Party at the time this Convention enters into force for that State.

This Convention shall not affect the right of a Contracting State to become a Party to a convention, based on special ties of a regional or other nature, containing provisions on the celebration or recognition of validity of marriages.

Article 22

This Convention shall replace, in the relations between the States who are Parties to it, the Convention Governing Conflicts of Laws Concerning Marriage, concluded at The Hague, the 12th of June 1902.

Article 23

Each Contracting State shall, at the time of signature, ratification, acceptance, approval or accession, inform the Ministry of Foreign Affairs of the Netherlands of the authorities which under its law are competent to issue a marriage certificate as mentioned in Article 10 and, subsequently, of any changes relating to such authorities.

Chapter IV – Final clauses

Article 24

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Thirteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 25

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 26

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 27

A Contracting State which has two or more territorial units in which different systems of law apply in relation to marriage may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall apply to all its territorial units or only to one or more of them, and may extend its declaration at any time thereafter.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial unit to which the Convention applies.

Article 28

Any State may, not later than the time of ratification, acceptance, approval or accession, make one or more of the reservations provided for in Articles 6, 15 and 16. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made.

The withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 29

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 24 and 25.

Thereafter the Convention shall enter into force –

1. for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;
2. for a territory to which the Convention has been extended in conformity with Article 26, on the first day of the third calendar month after the notification referred to in that Article.

Article 30

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 29 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at

least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 25, of the following –

1. the signatures and ratifications, acceptances and approvals referred to in Article 24;
2. the accessions referred to in Article 25;
3. the date on which the Convention enters into force in accordance with Article 29;
4. the extensions referred to in Article 26;
5. the declarations referred to in Article 27;
6. the reservations referred to in Articles 6, 15 and 16, and the withdrawals referred to in Article 28;
7. the information communicated under Article 23;
8. the denunciations referred to in Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 14th day of March, 1978, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States Members of the Hague Conference on Private International Law at the date of its Thirteenth Session.

PRÉCIS



THE LAW COUNCIL'S ACTIVITY BRIEF

ISSUE #140 • 21 FEBRUARY 2012

POLICY UPDATE

LAW COUNCIL WELCOMES FUNDING FOR CONSTITUTIONAL RECOGNITION EDUCATION

The Law Council of Australia has welcomed the Commonwealth Government's announcement of \$10 million in funding to build public awareness and community support for constitutional recognition of Indigenous Australians.

Law Council of Australia President Catherine Gale said the funding is essential to ensure all Australians are informed about the importance of constitutional change, to recognise Aboriginal and Torres Strait Islander peoples.

"The Law Council of Australia commends the Commonwealth Government for committing these funds to such an important cause—it shows a demonstrable commitment to Aboriginal and Torres Strait Islander peoples," Ms Gale said.

"Education as well as building public awareness and community support will be vital in ensuring the Australian public understand why constitutional change is important.

"The Law Council of Australia is a strong proponent of constitutional recognition of Aboriginal and Torres Strait Islander peoples. However, recognition should be

accompanied by removal of provisions which are based on the notion of racial superiority, which was prevalent at the time our Constitution was drafted.

"But we also recognise there is already a lot of debate in the community about this issue and by making these funds available, the Commonwealth Government is helping the community inform themselves about how constitutional recognition of Indigenous Australians would work."

The public awareness campaign will be led by Reconciliation Australia, supported by a reference group of business and community groups, the Australian Human Rights Commission and the National Congress of Australia's First People and members of the Expert Panel.

The funding will allow Reconciliation Australia to support community groups and activities aimed at giving Australians the opportunity to learn more about constitutional recognition.

A copy of the Law Council's submission on Constitutional Recognition of Aboriginal and Torres Strait Islander Australians is available on the Law Council website.

The Mahla Pearlman Oration

The following invitation is from the Environment and Planning Law Association (NSW) Inc.

The Environment and Planning Law Association (NSW) Incorporated is proud to announce it will host, on behalf of her family, many friends and colleagues, the inaugural Mahla Pearlman Oration—an event which honours the career, contribution and memory of one of New South Wales' most distinguished public servants.

The Oration will be delivered annually by an eminent person concerned with environment and planning law. We are delighted the inaugural Oration will be delivered by Emeritus Professor Ben Boer of the Faculty of Law, University of Sydney on Thursday 29th March 2012 at the Dixon Room, State Library of NSW at 5pm.

Refreshments will be served after the address.

To assist with catering please confirm your attendance by 22nd March, 2012 to the EPLA Secretary, Michele Kearns: kearns@mpchambers.net.au; or (02) 8227 9600.

CONTACT PRÉCIS

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PRÉCIS



The Hague Marriage Convention

The *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages* may be seen as implementing, for international and in particular cross-border situations, the provision of Article 23 of the *United Nations International Covenant on Civil and Political Rights*,¹ which places the right of marriage of men and women of marriageable age in the foreground, and bases marriage on the free and full consent of the intending spouses. To that end, the Hague Convention does two things: it facilitates the **celebration** of marriages, and it ensures the **recognition** of the validity of marriages across national borders. Part I of the Convention deals with celebration of marriage; Part II with the recognition of foreign marriages.

The international aspects of the celebration of marriages

Part I, on celebration, makes the law of the place of celebration, the *lex loci celebrationis*, the primary reference. This applies first of all to the **formal** requirements for the marriage: formalities, witnesses, etc (Article 2). This is hardly surprising, because this is one of the few questions of choice of law on which most systems of private international law agree. But it also applies to the **material or substantive** requirements of the marriage (Article 3, paragraph 1). This is in accordance with the approach some countries, in particular immigration countries, have taken, but is new to many countries of the civil law, and some of the common law tradition, which tend to apply the personal law of each future spouse to determine the substantive requirements of the marriage.

The law of the celebration approach of Article 3, paragraph 1, is simple and has **three major advantages**: (1) local authorities can apply the requirements of their **own law** in respect of consent of the parties or age and degree of prohibited relationship (e.g., uncle and niece), and not the requirements of the law of the domicile, nationality or community of foreign marriage candidates; (2) it **avoids characterisation problems**, for example, the problem of determining whether a parent's consent is a matter of form or of substance, because the applicable laws will coincide; and (3) it allows **unusual or oppressive requirements** of a foreign law (e.g., any requirements based on race or colour) **to be ignored**.

¹ Article 23 of the International Covenant on Civil and Political Rights of 16 December 1966 reads as follows:

- "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

It should be noted that Articles 3-6 apply a technique which leaves Contracting States a certain flexibility. On the one hand, they may, under Article 6, reserve the right to maintain certain exceptions to the reference rule in Article 3 (1) (*i.e.* that of applying the *lex celebrationis* to the substantive requirements for the celebration of marriages). None of the States Parties to the Convention, however, has made the reservation of Article 6.

On the other hand, Contracting States may **extend** the *lex loci celebrationis* to **all** marriage celebrations. This is what Australia has done when it ratified the Convention.² Accordingly, a marriage must be celebrated in that State where the future spouses meet the substantive requirements of its internal law. This approach also works as a simplification of Articles 3-6, because the only law applied will be the internal law, not any foreign law.

Recognition of the validity of foreign marriages

While Part I of the Convention, on celebration, is optional and may be excluded, Part II, on the recognition of the validity of marriage, in contrast is mandatory. The question of the recognition of the validity of marriages is critical in an age of exponential growth of mobility. The basic rule of the Convention is a simple one: the State of celebration – it is important to note that this may be **any** State, not just another *Contracting* State – determines the validity of the marriage, and the Contracting States are bound, subject to a limited number of exceptions and subject of course to the mandates of their *ordre public*, to recognise the validity of the marriage **if valid according to the law of the State of celebration** (Article 9). This has the great advantage of avoiding the need to review the applicable law under the conflict of laws rules of the recognising State. Special provision is made for marriages concluded by diplomats or consuls. Where a competent authority of the State where the marriage was celebrated has issued a marriage certificate, the marriage shall be presumed to be valid until the contrary is established (Article 10).

A limited number of exceptions are allowed (Article 11): a Contracting State *may* (not *must*) only refuse to recognise the validity of a marriage where at the time of the marriage under the law of the requested State, (1) one of the spouses was **already married**; or (2) the spouses were **related to one another, in the direct line** or as **brother and sister**; or (3) one of the spouses had **not attained the minimum age** required for marriage; or (4) if one of the spouses **lacked the capacity** to give their consent or (5) did **not freely consent** to the marriage. In addition, *ordre public* may be invoked by the requested State, for example, when in a concrete case the marriage certificate, or the underlying marriage itself, is a fake or is otherwise fraudulent. So, while the Convention favours the recognition of marriages, it avoids the possibility of resorting to “marriage heavens”.

The rules on recognition of the validity of a marriage also apply where the recognition question arises in the context of another question, *e.g.*, in the context of a re-marriage: the validity of the previous marriage is then referred back to the law of the place of celebration.

Although the Convention has not yet been ratified by many States (currently Australia, Luxembourg and the Netherlands are States Parties), it is very modern in its approach. It has been a model for recent work by the International Commission on Civil Status. The Convention is simple, straightforward, and, in many ways ahead of its time. It deserves to be looked at more closely than has perhaps been the case thus far.

² The Australian Marriage Act Amendment Act (1985) chose not to maintain the preexisting rule requiring the application of the law of the domicile of the future spouses to questions of material validity, and streamlined the Australian choice of law rule entirely according to the *lex loci celebrationis*.

European Convention on Human Rights

as amended
by Protocols Nos. 11 and 14

Council of Europe Treaty Series, No. 5

Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and

is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions,

restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ARTICLE 12

Right to marry

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 13

Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

ARTICLE 14

Prohibition of discrimination

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.

ARTICLE 15

Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe

FIRST SECTION

CASE OF SCHALK AND KOPF v. AUSTRIA

(Application no. 30141/04)

JUDGMENT

STRASBOURG

24 June 2010

FINAL

22/11/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Schalk and Kopf v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President*,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 25 February 2010 and on 3 June 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 30141/04) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Austrian nationals, Mr Horst Michael Schalk and Mr Johan Franz Kopf (“the applicants”), on 5 August 2004.

2. The applicants were represented by Mr K. Mayer, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicants alleged in particular, that they were discriminated against as, being a same-sex couple, they were denied the possibility to marry or to have their relationship otherwise recognised by law.

4. On 8 January 2007 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. The applicants and the Government each filed written observations on the admissibility and merits of the application. The Government also filed further written observations. In addition, third-party comments were received from the United Kingdom Government, who had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). A joint third-party comment was received from four non-governmental organisations which had been given leave by the President to intervene, namely FIDH (*Fédération Internationale des ligues des Droits de l'Homme*), ICJ (International Commission of Jurists) AIRE Centre (Advice on Individual Rights in Europe) and ILGA-Europe (European Region of the International Lesbian and Gay Association). The four non-governmental organisations were also given leave by the President to intervene at the hearing.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 25 February 2010 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mrs B. OHMS, Federal Chancellery, *Deputy Agent*,

Mrs G. PASCHINGER, Federal Ministry of European and International Affairs

Mr M. STORMANN, Federal Ministry of Justice, *Advisers*;

(b) *for the applicants*

Mr K. MAYER, *Counsel*,

Mr H. SCHALK, *Applicant*;

(c) *for the Non-governmental organisations, third-party interveners*

Mr R. WINTEMUTE, Kings College, London *Counsel*,

Mrs A. JERNOW, International Commission of Jurists, *Adviser*.

The Court heard addresses by Mrs Ohms, Mr Mayer and Mr Wintemute.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicants were born in 1962 and 1960, respectively. They are a same-sex couple living in Vienna.

8. On 10 September 2002 the applicants requested the Office for matters of Personal Status (*Standesamt*) to proceed with the formalities to enable them to contract marriage.

9. By decision of 20 December 2002 the Vienna Municipal Office (*Magistrat*) refused the applicants' request. Referring to Article 44 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), it held that marriage could only be contracted between two persons of opposite sex. According to constant case-law, a marriage concluded by two persons of the same sex was null and void. Since the applicants were two men, they lacked the capacity for contracting marriage.

10. The applicants lodged an appeal with the Vienna Regional Governor (*Landeshauptmann*), but to no avail. In his decision of 11 April 2003 the Governor confirmed the Municipal Office's legal view. In addition he referred to the Administrative Court's case-law according to which it constituted an impediment to marriage if the two persons concerned were of the same sex. Moreover, Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reserved the right to contract marriage to persons of different sex.

11. In a constitutional complaint the applicants alleged that the legal impossibility for them to get married constituted a violation of their right to respect for private and family life and of the principle of non-discrimination. They argued that the notion of marriage had evolved since the entry into force of the Civil Code in 1812. In particular, the procreation and education of children no longer formed an integral part of marriage. In present-day perception, marriage was rather a permanent union encompassing all aspects of life. There was no objective justification for excluding same-sex couples from concluding marriage, all the more so since the European Court of Human Rights had acknowledged that differences based on sexual orientation required particularly weighty reasons. Other European countries either allowed homosexual marriages or had otherwise amended their legislation in order to give equal status to same-sex partnerships.

12. Finally, the applicants alleged a breach of their right to peaceful enjoyment of their possessions. They argued that in the event that one partner in a homosexual couple died, the other was discriminated against since he would be in a much less favourable position under tax law than the surviving partner in a married couple.

13. On 12 December 2003 the Constitutional Court (*Verfassungsgerichtshof*) dismissed the applicants' complaint. The relevant parts of its judgment read as follows:

“The administrative proceedings that resulted in the impugned decision were exclusively concerned with the issue of the legitimacy of the marriage. Accordingly, the complainants' sole applicable grievance is that Article 44 of the Civil Code only recognises and provides for marriage between “persons of opposite sex”. The allegation of a breach of the right of property is simply a further means of seeking to show that this state of affairs is unjustified.

With regard to marriage, Article 12 of the ECHR, which ranks as constitutional law, provides:

'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.'

Neither the principle of equality set forth in the Austrian Federal Constitution nor the European Convention on Human Rights (as evidenced by “men and women” in Article 12) require that the concept of marriage as being geared to the fundamental possibility of parenthood should be extended to relationships of a different kind. The essence of marriage is, moreover, not affected in any way by the fact that divorce (or separation) is possible and that it is a matter for the spouses whether in fact they are able or wish to have children. The European Court of Human Rights found in its *Cossey* judgment of 27 September 1990 (no. 10843/84, concerning the particular position of transsexual persons) that the restriction of marriage to this “traditional” concept was objectively justified, observing

'... that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage.'

[The subsequent change in the case-law concerning the particular issue of transsexuals (ECHR, *Goodwin*, no. 28957/95, 11 July 2002) does not permit the conclusion that there should be any change in the assessment of the general question at issue here.]

The fact that same-sex relationships fall within the concept of private life and as such enjoy the protection of Article 8 of the ECHR – which also prohibits discrimination on non-objective grounds (Article 14 of the ECHR) – does not give rise to an obligation to change the law of marriage.

It is unnecessary in the instant case to examine whether, and in which areas, the law unjustifiably discriminates against same-sex relationships by providing for special rules for married couples. Nor is it the task of this court to advise the legislature on constitutional issues or even matters of legal policy.

Instead, the complaint must be dismissed as ill-founded."

14. The Constitutional Court's judgment was served on the applicants' counsel on 25 February 2004.

II. RELEVANT DOMESTIC AND COMPARATIVE LAW

A. Austrian law

1. *The Civil Code*

15. Article 44 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) provides:

"The marriage contract shall form the basis for family relationships. Under the marriage contract two persons of opposite sex declare their lawful intention to live together in indissoluble matrimony, to beget and raise children and to support each other."

The provision has been unchanged since its entry into force on 1 January 1812.

2. *The Registered Partnership Act*

16. The purpose of the Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*) was to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships. In introducing the said Act the legislator had particular regard to developments in other European states (see the explanatory report on the draft law – *Erläuterungen zur Regierungsvorlage*, 485 *der Beilagen XXIV GP*).

17. The Registered Partnership Act, Federal Law Gazette (*Bundesgesetzblatt*) vol. I, no. 135/2009, entered into force on 1 January 2010. Its section 2 provides as follows:

"A registered partnership may be formed only by two persons of the same sex (registered partners). They thereby commit themselves to a lasting relationship with mutual rights and obligations."

18. The rules on the establishment of registered partnership, its effects and its dissolution resemble the rules governing marriage.

19. Registered partnership involves co-habitation on a permanent basis and may be entered into between two persons of the same sex having legal capacity and having reached the age of majority (section 3). A registered partnership must not be established between close relatives or with a person who is already married or has established a still valid registered partnership with another person (section 5).

20. Like married couples, registered partners are expected to live together like spouses in every respect, to share a common home, to treat each other with respect and to provide mutual assistance (section 8(2) and (3)). As in the case of spouses, the partner who is in charge of the common household and has no income has legal authority to represent the other partner in everyday legal transactions (section 10). Registered partners have the same obligations regarding maintenance as spouses (section 12).

21. The reasons for dissolution of registered partnership are the same as for dissolution of marriage or divorce. Dissolution of a registered partnership occurs in the event of the death of one partner (section 13). It may also be pronounced by a judicial decision on various other grounds: lack

of intent to establish a registered partnership (section 14), fault of one or both partners, or breakdown of the partnership due to irreconcilable differences (section 15).

22. The Registered Partnership Act also contains a comprehensive range of amendments to existing legislation in order to provide registered partners with the same status as spouses in various other fields of law, such as inheritance law, labour, social and social insurance law, fiscal law, the law on administrative procedure, the law on data protection and public service, passport and registration issues, as well as the law on foreigners.

23. However, some differences between marriage and registered partnership remain, apart from the fact that only two persons of the same sex can enter into a registered partnership. The following differences were the subject of some public debate before the adoption of the Registered Partnership Act: while marriage is contracted before the Office for matters of Personal Status, registered partnerships are concluded before the District Administrative Authority. The rules on the choice of name differ from those for married couples: for instance, the law speaks of “last name” where a registered couple chooses a common name, but of “family name” in reference to a married couple's common name. The most important differences, however, concern parental rights: unlike married couples, registered partners are not allowed to adopt a child; nor is step-child adoption permitted, that is to say, the adoption of one partner's child by the other partner (section 8(4)). Artificial insemination is also excluded (section 2 (1) of the Artificial Procreation Act - *Fortpflanzungsmedizingesetz*).

B. Comparative law

1. European Union law

24. Article 9 of the Charter of Fundamental Rights of the European Union, which was signed on 7 December 2000 and entered into force on 1 December 2009, reads as follows:

“The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”

25. The relevant part of the Commentary of the Charter states as follows:

“Modern trends and developments in the domestic laws in a number of countries toward greater openness and acceptance of same-sex couples notwithstanding, a few states still have public policies and/or regulations that explicitly forbid the notion that same-sex couples have the right to marry. At present there is very limited legal recognition of same-sex relationships in the sense that marriage is not available to same-sex couples. The domestic laws of the majority of states presuppose, in other words, that the intending spouses are of different sexes. Nevertheless, in a few countries, e.g., in the Netherlands and in Belgium, marriage between people of the same sex is legally recognized. Others, like the Nordic countries, have endorsed a registered partnership legislation, which implies, among other things, that most provisions concerning marriage, i.e. its legal consequences such as property distribution, rights of inheritance, etc., are also applicable to these unions. At the same time it is important to point out that the name 'registered partnership' has intentionally been chosen not to confuse it with marriage and it has been established as an alternative method of recognizing personal relationships. This new institution is, consequently, as a rule only accessible to couples who cannot marry, and the same-sex partnership does not have the same status and the same benefits as marriage. (...)

In order to take into account the diversity of domestic regulations on marriage, Article 9 of the Charter refers to domestic legislation. As it appears from its formulation, the provision is broader in its scope than the corresponding articles in other international instruments. Since there is no explicit reference to 'men and women' as the case is in other human rights instruments, 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. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples. (...)

26. A number of Directives are also of interest in the present case:

European Council Directive 2003/86/EC of 22 September 2003, on the right to family reunification, deals with the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States.

Its Article 4, which carries the heading “family members”, provides:

“(3) The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country

national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), ...”

Directive 2004/38/EC of the European Parliament and Council of 29 April 2004 concerns the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Its Article 2 contains the following definition:

“(2) 'Family member' means:

(a) the spouse

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage in accordance with the conditions laid down in the relevant legislation of the host Member State.

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)

(d) the dependent direct relative in the ascending line and those of the spouse or partner as defined in point (b).”

2. *The state of relevant legislation in Council of Europe member States*

27. Currently six out of forty-seven member States grant same-sex couples equal access to marriage, namely Belgium, the Netherlands, Norway, Portugal, Spain and Sweden.

28. In addition there are thirteen member States, which do not grant same-sex couples access to marriage, but have passed some kind of legislation permitting same-sex couples to register their relationships: Andorra, Austria, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Luxembourg, Slovenia, Switzerland and the United Kingdom. In sum, there are nineteen member States in which same sex couples either have the possibility to marry or to enter into a registered partnership (see also the overview in *Burden v. the United Kingdom* [GC], no. 13378/05, § 26, ECHR 2008).

29. In two States, namely in Ireland and Liechtenstein reforms intending to give same-sex couples access to some form of registered partnership are pending or planned. In addition Croatia has a Law on Same-Sex Civil Unions which recognises cohabiting same-sex couples for limited purposes, but does not offer them the possibility of registration.

30. According to the information available to the Court, the vast majority of the States concerned have introduced the relevant legislation in the last decade.

31. The legal consequences of registered partnership vary from almost equivalent to marriage to giving relatively limited rights. Among the legal consequences of registered partnerships, three main categories can be distinguished: material consequences, parental consequences and other consequences.

32. Material consequences cover the impact of registered partnership on different kinds of tax, health insurance, social security payments and pensions. In most of the States concerned registered partners obtain a status similar to marriage. This also applies to other material consequences, such as regulations on joint property and debt, application of rules of alimony upon break-up, entitlement to compensation on wrongful death of partner and inheritance rights.

33. When it comes to parental consequences, however, the possibilities for registered partners to undergo medically assisted insemination or to foster or adopt children vary greatly from one country to another.

34. Other consequences include the use of the partner's surname, the impact on a foreign partner's obtaining a residence permit and citizenship, refusal to testify, next-of-kin status for medical purposes, continued status as tenant upon death of the partner, and lawful organ donations.

THE LAW

I. THE GOVERNMENT'S REQUEST TO STRIKE THE APPLICATION OUT OF THE COURT'S LIST

35. In their oral pleadings the Government argued that the Registered Partnership Act allowed same-sex couples to obtain a legal status adjusted as far as possible to the status conferred by marriage on different-sex couples. They submitted that the matter might be regarded as being resolved and that it was justified to strike the application out of the Court's list. They relied on Article 37 § 1 of the Convention which, so far as material, reads as follows:

“1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

...

(b) the matter has been resolved;

...

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.”

36. To conclude that Article 37 § 1 (b) of the Convention applies to the instant case, the Court must answer two questions in turn: firstly, it must ask whether the circumstances complained of directly by the applicants still obtain and, secondly, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see *Shevanova v. Latvia* (striking out) [GC], no. 58822/00, § 45, 7 December 2007).

37. The Court observes that the gist of the applicants' complaint is that, being a same-sex couple, they do not have access to marriage. This situation still obtains following the entry into force of the Registered Partnership Act. As the Government themselves pointed out, the said Act allows same-sex couples to obtain only a status similar or comparable to marriage, but does not grant them access to marriage, which remains reserved for different-sex couples.

38. The Court concludes that the conditions for striking the case out of its list are not met and therefore dismisses the Government's request.

II. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

39. The applicants complained that the authorities' refusal to allow them to contract marriage violated Article 12 of the Convention, which provides 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 exercise of this right.”

The Government contested that argument.

A. Admissibility

40. The Court observes that the Government raised the question whether the applicants' complaint fell within the scope of Article 12, given that they were two men claiming the right to marry. The Government did not argue, however, that the complaint was inadmissible as being incompatible *ratione materiae*. The Court agrees that the issue is sufficiently complex not to be susceptible of being resolved at the admissibility stage.

41. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

B. Merits

1. The parties' submissions

42. The Government referred to the Constitutional Court's ruling in the present case, noting that the latter had had regard to the Court's case-law and had not found a violation of the applicants' Convention rights.

43. In their oral pleadings before the Court, the Government maintained that both the clear wording of Article 12 and the Court's case-law as it stood indicated that the right to marry was by its very nature limited to different-sex couples. They conceded that there had been major social changes

in the institution of marriage since the adoption of the Convention, but there was not yet any European consensus to grant same-sex couples the right to marry, nor could such a right be inferred from Article 9 of the Charter of Fundamental Rights of the European Union. Despite the difference in wording, the latter referred the issue of same-sex marriage to national legislation.

44. The applicants argued that in today's society civil marriage was a union of two persons which encompassed all aspects of their lives, while the procreation and education of children was no longer a decisive element. As the institution of marriage had undergone considerable changes there was no longer any reason to refuse same-sex couples access to marriage. The wording of Article 12 did not necessarily have to be read in the sense that men and women only had the right to marry a person of the opposite sex. Furthermore, the applicants considered that the reference in Article 12 to "the relevant national laws" could not mean that States were given unlimited discretion in regulating the right to marry.

2. *The third party interveners' submissions*

45. The Government of the United Kingdom asserted that the Court's case-law as it stood considered Article 12 to refer to the "traditional marriage between persons of the opposite biological sex" (see *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, § 66, *Reports of Judgments and Decisions* 1998-V). In their view there were no reasons to depart from that position.

46. While the Court had often underlined that the Convention was a living instrument which had to be interpreted in present-day conditions, it had only used that approach to develop its jurisprudence where it had perceived a convergence of standards among member States. In *Christine Goodwin v. the United Kingdom* [GC] (no. 28957/95, ECHR 2002-VI), for instance, the Court had reviewed its position regarding the possibility of post-operative transsexuals to marry a person of the sex opposite to their acquired gender, having regard to the fact that a majority of Contracting States permitted such marriages. In contrast there was no convergence of standards as regards same-sex marriage. At the time when the third-party Government submitted their observations only three member States permitted same-sex marriage, and in two others proposals to this effect were under consideration. The issue of same-sex marriage concerned a sensitive area of social, political and religious controversy. In the absence of consensus, the State enjoyed a particularly wide margin of appreciation.

47. The four non-governmental organisations called on the Court to use the opportunity to extend access to civil marriage to same-sex couples. The fact that different-sex couples were able to marry, while same-sex couples were not, constituted a difference in treatment based on sexual orientation. Referring to *Karner v. Austria*, (no. 40016/98, § 37, ECHR 2003-IX), they argued that such a difference could only be justified by "particularly serious reasons". In their contention, no such reasons existed: the exclusion of same-sex couples from entering into marriage did not serve to protect marriage or the family in the traditional sense. Nor would giving same-sex couples access to marriage devalue marriage in the traditional sense. Moreover, the institution of marriage had undergone considerable changes and, as the Court had held in *Christine Goodwin* (cited above, § 98), the inability to procreate children could not be regarded as *per se* removing the right to marry. The four non-governmental organisations conceded that the difference between the case of *Christine Goodwin* and the present case lay in the state of European consensus. However, they argued that in the absence of any objective and rational justification for the difference in treatment, considerably less weight should be attached to European consensus.

48. Finally, the four non-governmental organisations referred to judgments from the Constitutional Court of South Africa, the Courts of Appeal of Ontario and British Columbia in Canada, and the Supreme Courts of California, Connecticut, Iowa and Massachusetts in the United States, which had found that denying same-sex couples access to civil marriage was discriminatory.

3. *The Court's assessment*

a. *General principles*

49. According to the Court's established case-law Article 12 secures the fundamental right of a man and woman to marry and to found a family. The exercise of this right gives rise to personal,

social and legal consequences. It is “subject to the national laws of the Contracting States”, but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see *B. and L. v. the United Kingdom*, no. 36536/02, § 34, 13 September 2005, and *F. v. Switzerland*, 18 December 1987, § 32, Series A no. 128).

50. The Court observes at the outset that it has not yet had an opportunity to examine whether two persons who are of the same sex can claim to have a right to marry. However, certain principles might be derived from the Court's case-law relating to transsexuals.

51. In a number of cases the question arose whether refusal to allow a post-operative transsexual to marry a person of the opposite sex to his or her assigned gender violated Article 12. In its earlier case-law the Court found that the attachment to the traditional concept of marriage which underpins Article 12 provided sufficient reason for the continued adoption by the respondent State of biological criteria for determining a person's sex for the purposes of marriage. Consequently, this was considered a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry (see *Sheffield and Horsham*, cited above, § 67; *Cossey v. the United Kingdom*, 27 September 1990, § 46, Series A no. 184; see also *Rees v. the United Kingdom*, 17 October 1986, §§ 49-50, Series A no. 106).

52. In *Christine Goodwin* (cited above, §§ 100-104) the Court departed from that case-law: It considered that the terms used by Article 12 which referred to the right of a man and woman to marry no longer had to be understood as determining gender by purely biological criteria. In that context, the Court noted that there had been major social changes in the institution of marriage since the adoption of the Convention. Furthermore, it referred to Article 9 of the Charter of Fundamental Rights of the European Union, which departed from the wording of Article 12. Finally, the Court noted that there was widespread acceptance of the marriage of transsexuals in their assigned gender. In conclusion the Court found that the impossibility for a post-operative transsexual to marry in her assigned gender violated Article 12 of the Convention.

53. Two further cases are of interest in the present context: (*Parry v. the United Kingdom* (dec.), no. 42971/05, ECHR 2006-XV, and *R. and F. v. the United Kingdom* (dec.), no. 35748/05, 28 November 2006). In both cases the applicants were a married couple, consisting of a woman and a male-to-female post-operative transsexual. They complained *inter alia* under Article 12 of the Convention that they were required to end their marriage if the second applicant wished to obtain full legal recognition of her change of gender. The Court dismissed that complaint as being manifestly ill-founded. It noted that domestic law only permitted marriage between persons of opposite gender, whether such gender derived from attribution at birth or from a gender recognition procedure, while same-sex marriages were not permitted. Similarly, Article 12 enshrined the traditional concept of marriage as being between a man and a woman. The Court acknowledged that a number of Contracting States had extended marriage to same-sex partners, but went on to say that this reflected their own vision of the role of marriage in their societies and did not flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950. The Court concluded that it fell within the State's margin of appreciation how to regulate the effects of the change of gender on pre-existing marriages. In addition it considered that, should they chose to divorce in order to allow the transsexual partner to obtain full gender recognition, the fact that the applicants had the possibility to enter into a civil partnership contributed to the proportionality of the gender recognition regime complained of.

b. Application in the present case

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.

56. As regards the connection between the right to marry and the right to found a family, the Court has already held that the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing the right to marry (*Christine Goodwin*, cited above, § 98). However, this finding does not allow any conclusion regarding the issue of same-sex marriage.

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).

59. As the respondent Government as well as the third-party Government have rightly pointed out, the present case has to be distinguished from *Christine Goodwin*. In that case (cited above, § 103) the Court perceived a convergence of standards regarding marriage of transsexuals in their assigned gender. Moreover, *Christine Goodwin* is concerned with marriage of partners who are of different gender, if gender is defined not by purely biological criteria but by taking other factors including gender reassignment of one of the partners into account.

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.

62. In that connection the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society (see *B. and L. v. the United Kingdom*, cited above, § 36).

63. In conclusion, the Court finds that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage.

64. Consequently, there has been no violation of Article 12 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

65. The applicants complained under Article 14 taken in conjunction with Article 8 of the Convention that they were discriminated against on account of their sexual orientation, since they

were denied the right to marry and did not have any other possibility to have their relationship recognised by law before the entry into force of the Registered Partnership Act.

Article 8 reads as follows:

“1. Everyone has the right to respect for his private and family life, ...

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

Article 14 provides as follows:

“The enjoyment of the rights and freedoms set forth in [the] 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.”

A. Admissibility

1. *Exhaustion of domestic remedies*

66. The Government argued in their written observations that, before the domestic authorities, the applicants had complained exclusively about the impossibility to marry. Any other points raised explicitly or implicitly in their application to the Court, such as the question of any alternative legal recognition of their relationship, were to be declared inadmissible for non-exhaustion. However, the Government did not explicitly pursue that argument in their oral pleadings before the Court. On the contrary, they stated that the issue of registered partnership could be regarded as being inherent in the present application.

67. The applicants contested the Government's non-exhaustion argument, asserting in particular that the aspect of being discriminated against as a same-sex couple formed part of their complaint and that they had also relied on the Court's case-law under Article 14 taken in conjunction with Article 8 in their constitutional complaint.

68. The Court reiterates that Article 35 § 1 of the Convention requires that complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV).

69. The domestic proceedings in the present case related to the authorities' refusal to permit the applicants' marriage. As the possibility to enter into a registered partnership did not exist at the material time, it is difficult to see how the applicants could have raised the question of legal recognition of their partnership except by trying to conclude marriage. Consequently, their constitutional complaint also focused on the lack of access to marriage. However, they also complained, at least in substance, about the lack of any other means to have their relationship recognised by law. Thus, the Constitutional Court was in a position to deal with the issue and, indeed, addressed it briefly, albeit only by stating that it was for the legislator to examine in which areas the law possibly discriminated against same-sex couples by restricting certain rights to married couples. In these circumstances, the Court is satisfied that the applicants complied with the requirement of exhausting domestic remedies.

70. In any case, the Court agrees with the Government that the issue of alternative legal recognition is so closely connected to the issue of lack of access to marriage that it has to be considered as being inherent in the present application.

71. In conclusion, the Court dismisses the Government's argument that the applicants failed to exhaust domestic remedies in respect of their complaint under Article 14 taken in conjunction with Article 8.

2. *The applicants' victim status*

72. In their oral pleadings before the Court the Government also raised the question whether the applicants could still claim to be victims of the alleged violation following the entry into force of the Registered Partnership Act.

73. The Court reiterates that an applicant's status as a victim may depend on compensation being awarded at domestic level on the basis of the facts about which he or she complains before the Court and on whether the domestic authorities have acknowledged, either expressly or in substance, the breach of the Convention. Only when those two conditions are satisfied does the subsidiary nature of the Convention preclude examination of an application (see, for instance, *Scordino v. Italy* (dec.), no. 36813/97, ECHR 2003-IV).

74. In the present case, the Court does not have to examine whether the first condition has been fulfilled, as the second condition has not been met. The Government have made it clear that the Registered Partnership Act was introduced as a matter of policy choice and not in order to fulfil an obligation under the Convention (see paragraph 80 below). Therefore, the introduction of the said Act cannot be regarded as an acknowledgement of the breach of the Convention alleged by the applicants. Consequently, the Court dismisses the Government's argument that the applicants can no longer claim to be victims of the alleged violation of Article 14 taken in conjunction with Article 8.

3. Conclusion

75. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

B. Merits

1. The parties' submissions

76. The applicants maintained that the heart of their complaint was that they were discriminated against as a same-sex couple. Agreeing with the Government on the applicability of Article 14 taken in conjunction with Article 8, they asserted that just like differences based on sex, differences based on sexual orientation required particularly serious reasons for justification. In the applicants' contention the Government had failed to submit any such reasons for excluding them from access to marriage.

77. It followed from the Court's *Karner* judgment (cited above, § 40) that the protection of the traditional family was a weighty and legitimate reason, but it had to be shown that a given difference was also necessary to achieve that aim. In the applicants' assertion nothing showed that the exclusion of same-sex couples from marriage was necessary to protect the traditional family.

78. In their oral pleadings, reacting to the introduction of the Registered Partnership Act, the applicants argued that the remaining differences between marriage on the one hand and registered partnership on the other were still discriminatory. They mentioned in particular that the Registered Partnership Act did not provide a possibility to enter into an engagement; that, unlike marriages, registered partnerships were not concluded at the Office for matters of Personal Status but at the District Administrative Authority; that there was no entitlement to compensation in the event of wrongful death of the partner; and that it was unclear whether certain benefits which were granted to "families" would also be granted to registered partners and the children of one of them living in the common household. Although differences based on sexual orientation required particularly weighty reasons, no such reasons had been given by the Government.

79. The Government accepted that Article 14 taken in conjunction with Article 8 of the Convention applied. So far the Court's case-law had considered homosexual relationships to fall within the notion of "private life" but there might be good reasons to include the relationship of a same-sex couple living together in the scope of "family life".

80. Regarding compliance with the requirements of Article 14 taken in conjunction with Article 8, the Government maintained that it was within the legislator's margin of appreciation whether or not same-sex couples were given a possibility to have their relationship recognised by law in any other form than marriage. The Austrian legislator had made the policy choice to give same-sex couples such a possibility. Under the Registered Partnership Act which had entered into force on 1 January 2010 same-sex partners were able to enter into a registered partnership which provided them

with a status very similar to marriage. The new law covered such diverse fields as civil and criminal law, labour, social and social insurance law, fiscal law, the law on administrative procedure, the law on data protection and public service, passport and registration issues, as well as the law on foreigners.

2. *The third parties' submissions*

81. As to the applicability of Article 8, the third-party Government submitted that although the Court's case-law as it stood did not consider same-sex relationships to fall within the notion of "family life", this should not be excluded in the future. Nonetheless Article 8 read in conjunction with Article 14 should not be interpreted so as to require either access to marriage or the creation of alternative forms of legal recognition for same-sex partnerships.

82. Regarding the justification for that difference in treatment, the third-party Government contested the applicants' argument drawn from the Court's *Karner* judgment. In that case the Court had found that excluding same-sex couples from protection provided to different-sex couples under the Rent Act was not necessary for achieving the legitimate aim of protecting the family in the traditional sense. The issue in the present case was different: what was at stake was the question of access to marriage or alternative legal recognition. The justification for that particular difference in treatment between different-sex and same-sex couples was laid down in Article 12 of the Convention itself.

83. Finally, the third-party Government submitted that in the United Kingdom the Civil Partnership Act 2004 which had come into force in December 2005 had introduced a system of partnership registration for same-sex couples. However, the said Act was introduced as a policy choice in order to promote social justice and equality, while it was not considered that the Convention imposed a positive obligation to provide such a possibility. In the Government's view this position was supported by the Court's decision in *Courten v. the United Kingdom* (no. 4479/06, 4 November 2008).

84. The four non-governmental organisations pleaded in their joint comments that the Court should rule on the question whether a same-sex relationship of cohabiting partners fell under the notion of "family life" within the meaning of Article 8 of the Convention. They noted that the question had been left open in *Karner* (cited above, § 33). They argued that by now it was generally accepted that same-sex couples had the same capacity to establish a long-term emotional and sexual relationship as different-sex couples and, thus, had the same needs as different-sex couples to have their relationship recognised by law.

85. Were the Court not to find that Article 12 required Contracting States to grant same-sex couples access to marriage, it should address the question whether there was an obligation under Article 14 taken together with Article 8 to provide alternative means of legal recognition of a same-sex partnership.

86. The non-governmental organisations answered that question in the affirmative: firstly, excluding same-sex couples from particular rights and benefits attached to marriage (such as for instance the right to a survivor's pension) without giving them access to any alternative means to qualify would amount to indirect discrimination (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV). Secondly, they agreed with the applicants' argument drawn from *Karner* (cited above). Thirdly, they asserted that the state of European consensus increasingly supported the idea that member States were under an obligation to provide, if not access to marriage, alternative means of legal recognition. By now almost 40% had legislation allowing same-sex couples to register their relationships as marriages or under an alternative name (see paragraphs 27-28 above).

3. *The Court's assessment*

a. *Applicability of Article 14 taken in conjunction with Article 8*

87. The Court has dealt with a number of cases concerning discrimination on account of sexual orientation. Some were examined under Article 8 alone, namely cases concerning the prohibition under criminal law of homosexual relations between adults (see *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *Norris v. Ireland*, 26 October 1988, Series A no. 142; and *Modinos v.*

Cyprus, 22 April 1993, Series A no. 259) and the discharge of homosexuals from the armed forces (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI). Others were examined under Article 14 taken in conjunction with Article 8. These included, *inter alia*, different age of consent under criminal law for homosexual relations (*L. and V. v. Austria*, nos. 39392/98 and 39829/98, ECHR 2003-I), the attribution of parental rights (*Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, ECHR 1999-IX), permission to adopt a child (*Fretté v. France*, no. 36515/97, ECHR 2002-I, and *E.B. v. France*, cited above) and the right to succeed to the deceased partner's tenancy (*Karner*, cited above).

88. In the present case, the applicants have formulated their complaint under Article 14 taken in conjunction with Article 8. The Court finds it appropriate to follow this approach.

89. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, for instance, *E.B. v. France*, cited above, § 47; *Karner*, cited above, § 32; and *Petrovic v. Austria*, 27 March 1998, § 22, *Reports* 1998-II).

90. It is undisputed in the present case that the relationship of a same-sex couple like the applicants' falls within the notion of “private life” within the meaning of Article 8. However, in the light of the parties' comments the Court finds it appropriate to address the issue whether their relationship also constitutes “family life”.

91. The Courts reiterates its established case-law in respect of different-sex couples, namely that the notion of family under this provision is not confined to marriage-based relationships and may encompass other *de facto* “family” ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso jure* part of that “family” unit from the moment and by the very fact of his birth (see *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII; *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290; and also *Johnston and Others v. Ireland*, 18 December 1986, § 56, Series A no. 112).

92. In contrast, 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 (see *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI, with further references). In the case of *Karner* (cited above, § 33), concerning the succession of a same-sex couples' surviving partner to the deceased's tenancy rights, which fell under the notion of “home”, the Court explicitly left open the question whether the case also concerned the applicant's “private and family life”.

93. The Court notes that since 2001, when the decision in *Mata Estevez* was given, 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 (see above, paragraphs 27-30). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of “family” (see paragraph 26 above).

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.

b. Compliance with Article 14 taken together with Article 8

96. The Court has established in its case-law that in order for an issue to arise under Article 14

there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Burden*, cited above, § 60).

97. On the one hand the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (see *Karner*, cited above, § 37; *L. and V. v. Austria*, cited above, § 45; and *Smith and Grady*, cited above, § 90). On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see, for instance, *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 52, ECHR 2006-VI).

98. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see *Petrovic*, cited above, § 38).

99. While the parties have not explicitly addressed the issue whether the applicants were in a relevantly similar situation to different-sex couples, the Court would start from the premise that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.

100. The applicants argued that they were discriminated against as a same-sex couple, firstly, in that they still did not have access to marriage and, secondly, in that no alternative means of legal recognition were available to them until the entry into force of the Registered Partnership Act.

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.

102. Turning to the second limb of the applicants' complaint, namely the lack of alternative legal recognition, the Court notes that at the time when the applicants lodged their application they did not have any possibility to have their relationship recognised under Austrian law. That situation obtained until 1 January 2010, when the Registered Partnership Act entered into force.

103. The Court reiterates in this connection that in proceedings originating in an individual application it has to confine itself, as far as possible, to an examination of the concrete case before it (see *F. v. Switzerland*, cited above, § 31). Given that at present it is open to the applicants to enter into a registered partnership, the Court is not called upon to examine whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8 if it still obtained today.

104. What remains to be examined in the circumstances of the present case is whether the respondent State should have provided the applicants with an alternative means of legal recognition of their partnership any earlier than it did.

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).

106. The Austrian Registered Partnership Act, which entered into force on 1 January 2010, reflects the evolution described above and is thus part of the emerging European consensus. Though

not in the vanguard, the Austrian legislator cannot be reproached for not having introduced the Registered Partnership Act any earlier (see, *mutatis mutandis*, *Petrovic*, cited above, § 41).

107. Finally, the Court will examine the applicants' argument that they are still discriminated against as a same-sex couple on account of certain differences conferred by the status of marriage on the one hand and registered partnership on the other.

108. The Court starts from its findings above, that States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples. Nevertheless the applicants appear to argue that if a State chooses to provide same-sex couples with an alternative means of recognition, it is obliged to confer a status on them which – though carrying a different name – corresponds to marriage in each and every respect. The Court is not convinced by that argument. It considers on the contrary that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition.

109. The Court observes that the Registered Partnership Act gives the applicants a possibility to obtain a legal status equal or similar to marriage in many respects (see paragraphs 18-23 above). While there are only slight differences in respect of material consequences, some substantial differences remain in respect of parental rights. However, this corresponds on the whole to the trend in other member States (see paragraphs 32-33 above). Moreover, the Court is not called upon in the present case to examine each and every one of these differences in detail. For instance, as the applicants have not claimed that they are directly affected by the remaining restrictions concerning artificial insemination or adoption, it would go beyond the scope of the present application to examine whether these differences are justified. On the whole, the Court does not see any indication that the respondent State exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership.

110. In conclusion, the Court finds there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

111. The applicants complained that, compared with married couples they suffered disadvantages in the financial sphere, in particular under tax law. They relied on Article 1 of Protocol No. 1, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Admissibility

112. In their written observations the Government argued that the applicants' complaint about possible discrimination in the financial sphere was to be declared inadmissible for non-exhaustion. They did not, however, explicitly pursue that argument in their oral pleadings before the Court.

113. The Court notes that the applicants touched upon the issue of discrimination in the financial sphere, in particular in tax law, in their complaint before the Constitutional Court in order to illustrate their main complaint, namely that they were discriminated against as a same-sex couple in that they did not have access to marriage.

114. In the circumstances of the present case, the Court is not called upon to resolve the question whether or not the applicants exhausted domestic remedies. It notes that in their application to the Court the applicants did not give any details in respect of the alleged violation of Article 1 of Protocol No. 1. The Court therefore considers that this complaint has not been substantiated.

115. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's request to strike the application out of the Court's list;
2. *Declares* by six votes to one admissible the applicants' complaint under Article 12 of the Convention;
3. *Declares* unanimously admissible the applicants' complaint under Article 14 taken in conjunction with Article 8 of the Convention;
4. *Declares* unanimously inadmissible the remainder of the application;
5. *Holds* unanimously that there has been no violation of Article 12 of the Convention;
6. *Holds* by four votes to three that there has been no violation of Article 14 taken in conjunction with Article 8 of the Convention.

Done in English, and notified in writing on 24 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach Christos Rozakis
Deputy Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Joint dissenting opinion of Judges Rozakis, Spielmann and Jebens;
- (b) Concurring opinion of Judge Malinverni joined by Judge Kovler.

C.L.R.
A.M.W

JOINT DISSENTING OPINION OF JUDGES ROZAKIS, SPIELMANN AND JEBENS

1. We have voted against point 6 of the operative part. We cannot agree with the majority that there has been no violation of Article 14 taken in conjunction with Article 8 of the Convention, for the following reasons.

2. In this very important case, the Court, after a careful examination of previous case-law, has taken a major step forward in its jurisprudence by extending the notion of “family life” to same-sex couples. Relying in particular on developments in European Union law (see Directives 2003/86/EC of 22 September 2003 on the right to family reunification and 2004/38/EC concerning the right to citizens of the Union and their family members to move and reside freely within the territory of the Member States), the Court identified in paragraph 93 of the judgment “*a growing tendency to include same-sex couples in the notion of 'family'*”.

3. The Court solemnly affirmed this in paragraph 94 of the judgment:

“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.”

4. The lack of any legal framework before the entry into force of the Registered Partnership Act (“the Act”) raises a serious problem. In this respect we note a contradiction in the Court’s reasoning. Having decided in paragraph 94 that “*the relationship of the applicants falls within the notion of 'family life'*”, the Court should have drawn inferences from this finding. However, by deciding that there has been no violation, the Court at the same time endorses the legal vacuum at stake, without imposing on the respondent State any positive obligation to provide a satisfactory framework, offering the applicants, at least to a certain extent, the protection any family should enjoy.

5. In paragraph 99, the Court also decided, of its own motion, that

“same-sex couples are just as capable as different-sex couples of entering into stable committed relationships [and that] [c]onsequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.”

6. The applicants complained not only that they were discriminated against in that they were denied the right to marry, but also – and this is important – that they did not have any other possibility of having their relationship recognised by law before the entry into force of the Act.

7. We do not want to dwell on the impact of the Act, which entered into force only in 2010, and in particular on the question whether the particular features of this Act, as identified by the Court in paragraphs 18 to 23 of the judgment, comply with Article 14 taken together with Article 8 of the Convention, since in our view the violation of the combination of these provisions occurred in any event prior to the Act.

8. Having identified a “*relevantly similar situation*” (paragraph 99), and emphasised that “*differences based on sexual orientation require particularly serious reasons by way of justification*” (paragraph 97), the Court should have found a violation of Article 14 taken in conjunction with Article 8 of the Convention because the respondent Government did not advance any argument to justify the difference of treatment, relying in this connection mainly on their margin of appreciation (paragraph 80). However, in the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment, there should be no room to apply the margin of appreciation. Consequently, the “*existence or non-existence of common ground between the laws of the Contracting States*” (paragraph 98) is irrelevant as such considerations are only a *subordinate* basis for the application of the concept of the margin of appreciation. Indeed, it is only in the event that the national authorities offer grounds for justification that the Court can be satisfied, taking into account the presence or the absence of a common approach, that they are better placed than it is to deal effectively with the matter.

9. Today it is widely recognised and also accepted by society that same-sex couples enter into stable relationships. Any absence of a legal framework offering them, at least to a certain extent, the same rights or benefits attached to marriage (see paragraph 4 of this dissent) would need robust justification, especially taking into account the growing trend in Europe to offer some means of

CONCURRING OPINION OF JUDGE MALINVERNI
JOINED BY JUDGE KOVLER

(Translation)

I voted together with my colleagues in favour of finding no violation of Article 12 of the Convention. However, I cannot subscribe to some of the arguments set out in the judgment in reaching that conclusion.

1. Thus, I am unable to share the view 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” (see paragraph 55 of the judgment).

By Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties of 23 May 1969, which lays down the general rule on interpretation of international treaties, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

In my view, “the ordinary meaning to be given to the terms of the treaty” in the case of Article 12 cannot be anything other than that of recognising that a man and a woman, that is, persons of opposite sex, have the right to marry. That is also the conclusion I reach on reading Article 12 “in the light of its object and purpose”. Indeed, Article 12 associates the right to marry with the right to found a family.

Article 31, paragraph 3, of the Vienna Convention provides that, as well as the context, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” must be taken into account (point (b)).

I do not consider that this provision of the Vienna Convention can be relied on in support of the conclusion set out in paragraph 55 of the judgment. The fact that a number of States, currently five, provide for the possibility for homosexual couples to marry cannot in my opinion be regarded as a “subsequent practice in the application of the treaty” within the meaning of the provision in question.

Literal interpretation, which, according to the Vienna Convention, represents the “general rule of interpretation”, thus precludes Article 12 from being construed as conferring the right to marry on persons of the same sex.

I come to the same conclusion if I interpret Article 12 by reference to other rules of interpretation, although such rules, as is rightly noted in the title of Article 32 of the Vienna Convention, are merely supplementary means of interpretation, and literal interpretation remains the general rule (Article 31).

In accordance with Article 32 of the Vienna Convention, recourse may be had to supplementary means of interpretation, particularly in order to “determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable”.

Bearing in mind that supplementary means of interpretation include, as stated in Article 32 of the Vienna Convention, “the preparatory work of the treaty and the circumstances of its conclusion”, I consider that the so-called historical interpretation to which Article 32 of the Vienna Convention refers can only serve to “confirm the meaning resulting from the application of Article 31” (Article 32).

There is therefore no doubt in my mind that Article 12 of the Convention cannot be construed in any other way than as being applicable solely to persons of different sexes.

Admittedly, the Convention is a living instrument which must be interpreted in a “contemporary” manner, in the light of present-day conditions (see *E.B. v. France* [GC], no. 43546/02, § 92, ECHR 2008-..., and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §§ 74-75, ECHR 2002-VI). It is also true that there have been major social changes in the institution of marriage since the adoption of the Convention (see *Christine Goodwin*, cited above, § 100). However, as the Court held in *Johnston and Others v. Ireland* (18 December 1986, § 53, Series A no. 112), while the Convention must be interpreted in the light of present-day conditions, the Court cannot, by means of an evolutive

interpretation, “derive from [it] a right that was not included therein at the outset”.

2. Nor can I accept the statement that “regard being had to Article 9 of the Charter ... 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' complaints” (see paragraph 61 of the judgment).

On the contrary, I consider that Article 12 is inapplicable to persons of the same sex.

Admittedly, in guaranteeing the right to marry, Article 9 of the Charter of Fundamental Rights of the European Union deliberately omitted any reference to men and women, since it provides that “the right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”.

In my opinion, however, no inferences can be drawn from this as regards the interpretation of Article 12 of our Convention.

The commentary on the Charter does indeed confirm that the drafters of Article 9 intended it to be broader in scope than the corresponding articles in other international treaties. However, it should not be forgotten that Article 9 of the Charter guarantees the right to marry and to found a family “in accordance with the national laws governing the exercise of these rights”.

By referring in this way to the relevant domestic legislation, Article 9 of the Charter simply leaves it to States to decide whether they wish to afford homosexual couples the right to marry. However, as the commentary quite rightly points out, “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.”

In my view, Article 9 of the Charter should therefore have no bearing on the interpretation of Article 12 of the Convention as conferring a right to marry only on persons of different sexes.

It is true that the Court has already referred to Article 9 of the Charter in the *Christine Goodwin* judgment (cited above, § 100). However, in that case the Court considered whether the fact that domestic law took into account, for the purposes of eligibility for marriage, the sex registered at birth, and not the sex acquired following gender reassignment surgery, was a limitation impairing the very essence of the right to marry. After her operation, the applicant lived as a woman and wished to marry a man. The case did not therefore concern marriage between persons of the same sex.

SCHALK AND KOPF v. AUSTRIA JUDGMENT

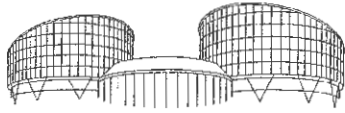
SCHALK AND KOPF v. AUSTRIA JUDGMENT

SCHALK AND KOPF v. AUSTRIA JUDGMENT – SEPARATE OPINIONS

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SCHALK AND KOPF v. AUSTRIA JUDGMENT – SEPARATE OPINIONS



The refusal to allow a woman to adopt her same-sex partner's child was not discriminatory

In today's Chamber judgment in the case of *Gas and Dubois v. France* (application no. 25951/07), which is not final¹, the European Court of Human Rights held, by six votes to one, that there had been:

No violation of Articles 14 (prohibition of discrimination) and 8 (right to respect for private and family life) of the European Convention on Human Rights.

The applicants are two cohabiting women. The case concerned the refusal of Ms Gas' application for a simple adoption order² in respect of Ms Dubois' child.

The Court saw notably no evidence of a difference in treatment based on the applicants' sexual orientation, as opposite-sex couples who had entered into a civil partnership were likewise prohibited from obtaining a simple adoption order.

Principal facts

The applicants, Valérie Gas and Nathalie Dubois, are French nationals who were born in 1961 and 1965 respectively and live in Clamart (France). They have been cohabiting since 1989. In September 2000 Nathalie Dubois gave birth in France to a daughter, A., who had been conceived in Belgium by means of medically-assisted procreation with an anonymous donor. The child does not have an established parental tie with the father, in accordance with Belgian law. She has lived all her life in the applicants' shared home. In April 2002 Ms Gas and Ms Dubois entered into a civil partnership agreement.

On 3 March 2006 Ms Gas applied to the Nanterre *tribunal de grande instance* for a simple adoption order in respect of her partner's daughter; her partner had given her express consent before a notary. On 4 July 2006 the court observed that the statutory requirements for the adoption had been met and that it had been demonstrated that Ms Gas and Ms Dubois were actively and jointly involved in the child's upbringing, caring for and showing affection to her. However, it refused the application on the grounds that the adoption would have legal implications which ran counter to the applicants' intentions and the child's best interests. This finding was upheld by the Versailles Court of Appeal, which considered that, since the applicants would be unable to share parental responsibility as permitted by the Civil Code³ in the case of adoption by the spouse of the child's biological mother or father, the adoption would deprive Ms Dubois of all rights

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

² Simple adoption enables a second legal parent-child relationship to be established in addition to the original parent-child relationship based on blood ties (as opposed to full adoption, where the new legal relationship replaces the original one).

³ Article 365 of the Civil Code governs the transfer of parental responsibility in the event of simple adoption. Parental responsibility is transferred to the adoptive parent; the biological parent or parents thus cease to exercise parental responsibility, except where the adoptee is the child of the husband or wife, in which case the couple share parental responsibility. This exception does not apply to the parties in a civil partnership.

in relation to her child. The applicants appealed on points of law but did not pursue the appeal to its conclusion.

Complaints, procedure and composition of the Court

The applicants complained of the refusal of Ms Gas's application to adopt Ms Dubois's child. They maintained that this decision had infringed their right to private and family life in a discriminatory manner, in breach of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life).

The application was lodged with the European Court of Human Rights on 15 June 2007. It was communicated to the French authorities on 19 May 2009 and declared admissible on 31 August 2010. A hearing was held in the Human Rights Building, Strasbourg, on 12 April 2011.

The International Federation for Human Rights (FIDH), the International Commission of Jurists (ICJ), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the British Association for Adoption and Fostering (BAAF) and the Network of European LGBT Families Associations (NELFA) were given leave to intervene as third parties in the proceedings (Article 36 § 2 of the Convention).

Judgment was given by a Chamber of seven, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,
Jean-Paul **Costa** (France),
Karel **Jungwiert** (the Czech Republic),
Boštjan M. **Zupančič** (Slovenia),
Mark **Villiger** (Liechtenstein),
Isabelle **Berro-Lefèvre** (Monaco),
Ganna **Yudkivska** (Ukraine), *Judges*,

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 14 in conjunction with Article 8

The Court pointed out that, according to its settled case-law, a difference in treatment between persons in relevantly similar situations was discriminatory if it did not pursue a legitimate aim or if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court further reiterated that differences based on sexual orientation required particularly serious reasons by way of justification. In the case of E.B. v. France⁴, the Court had found that no such reasons had been advanced by the Government. It had taken the view that the refusal of E.B.'s adoption application had been based on discriminatory grounds since French law allowed single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual like the applicant.

The present case was different, however. As the applicants were not married, they had been unable to exercise parental responsibility jointly as permitted by the Civil Code in the case of simple adoption by the spouse of the child's mother or father. In the context of simple adoption, the only exception to the transfer of parental responsibility to the adoptive parent – entailing the loss of parental responsibility on the part of the biological parent – was in cases where the adoptive parent was the biological parent's husband or

⁴ Grand Chamber judgment of 22 January 2008.

wife. The French courts had taken the view that the consequences of the transfer of parental responsibility to Ms Gas – thereby depriving Ms Dubois of parental responsibility – would have been contrary to the child's interests.

With regard to the applicants' criticism of the legal implications of medically assisted procreation with an anonymous donor, the Court noted that, in France, this possibility was mainly confined to infertile opposite-sex couples, a situation that was not comparable to that of the applicants.

Ms Gas and Ms Dubois maintained that their right to private and family life had been infringed in a way which discriminated against them in comparison with opposite-sex couples, whether married or not. With regard to married couples, the Court considered that, in view of the social, personal and legal consequences of marriage, the applicants' legal situation could not be said to be comparable to that of married couples when it came to adoption by the second parent. The Court reiterated that the European Convention on Human Rights did not require member States' Governments to grant same-sex couples access to marriage⁵. If a State chose to provide same-sex couples with an alternative means of recognition, it enjoyed a certain margin of appreciation regarding the exact status conferred. As to unmarried couples, the Court stressed that opposite-sex couples who had entered into a civil partnership were likewise prohibited from obtaining a simple adoption order. It therefore saw no evidence of a difference in treatment based on the applicants' sexual orientation. In reply to the applicants' argument that opposite-sex couples in a civil partnership could circumvent the aforementioned prohibition by marrying, the Court reiterated its findings regarding access to marriage for same-sex couples.

The Court therefore held that there had been no violation of Article 14 taken in conjunction with Article 8.

Separate opinions

Judge Costa expressed a concurring opinion, joined by Judge Spielmann. The latter expressed a concurring opinion, joined by Judge Berro-Lefèvre. Judge Villiger expressed a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

⁵ See the Chamber judgment in *Schalk and Kopf v. Austria* of 24 June 2010.

7

ANCIENNE CINQUIÈME SECTION

AFFAIRE GAS ET DUBOIS c. FRANCE

(Requête n° 25951/07)

ARRÊT

STRASBOURG

15 mars 2012

Cet arrêt deviendra définitif dans les conditions définies à l'article 44 § 2 de la Convention. Il peut subir des retouches de forme.

En l'affaire Gas et Dubois c. France,

La Cour européenne des droits de l'homme (ancienne cinquième section), siégeant en une chambre composée de :

Dean Spielmann, *président*,

Jean-Paul Costa,

Karel Jungwiert,

Boštjan M. Zupančič,

Mark Villiger,

Isabelle Berro-Lefèvre,

Ganna Yudkivska, *juges*,

et de Claudia Westerdiek, *greffière de section*,

Après en avoir délibéré en chambre du conseil les 12 avril 2011 et 14 février 2012,

Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE

1. A l'origine de l'affaire se trouve une requête (n° 25951/07) dirigée contre la République française et dont deux ressortissantes de cet Etat, M^{mes} Valérie Gas et Nathalie Dubois (« les requérantes »), ont saisi la Cour le 15 juin 2007 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la Convention »).

2. Les requérantes sont représentées par M^e C. Mécary, avocat à Paris. Le gouvernement français (« le Gouvernement ») a été représenté par son agent, M^{me} E. Belliard, directrice des affaires juridiques au ministère des Affaires étrangères.

3. Les requérantes alléguaient en particulier qu'elles avaient fait l'objet d'une discrimination par rapport aux couples hétérosexuels car il n'existe pas en France de possibilité juridique permettant aux couples homosexuels d'avoir accès à l'adoption par le second parent. Invoquant l'article 14 de la Convention combiné avec l'article 8, les requérantes alléguaient avoir subi un traitement discriminatoire fondé sur leur orientation sexuelle et portant atteinte à leur droit au respect de la vie privée et familiale.

4. Par une décision du 31 août 2010, la chambre a déclaré la requête recevable. Le 30 novembre 2010, la chambre a décidé de tenir une audience sur le bien-fondé de l'affaire.

5. Tant les requérantes que le Gouvernement ont déposé des observations écrites complémentaires (article 59 § 1 du règlement). Des observations écrites ont également été reçues de la Fédération internationale des ligues des droits de l'Homme (FIDH), la Commission internationale des Juristes (ICJ), l'European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), la British Association for Adoption and Fostering (BAAF) et le Network of European LGBT Families Associations (NELFA) que le Président de la Cour a autorisés à intervenir. Les parties ont répondu à ces commentaires (article 44 § 5 du règlement). Ces organisations ont en outre été autorisées à participer à la procédure orale.

6. Une audience s'est déroulée en public au Palais des droits de l'homme, à Strasbourg, le 12 avril 2011 (article 59 § 3 du règlement).

Ont comparu :

– *pour le Gouvernement*

M^{me} A.-F. TISSIER, sous-directrice des droits de l'homme, direction des affaires juridiques du ministère des Affaires étrangères, *co-agent*,

M. J.-C. GRACIA, secrétariat général du ministère de la Justice, *conseil*,

M^{me} C. BLANC, direction des affaires civiles et du sceau du ministère de la Justice,

M^{me} M.-A. RECHER LAMBEY, secrétariat général du ministère de la Justice,

M^{me} A. TALBOT, secrétariat général du ministère de la Justice,
 M^{me} M. SCHULTZ, direction générale de la Cohésion sociale du
 ministère des Affaires sociales du ministère des Solidarités et de la
 Cohésion sociale,
 M^{me} J. SPITERI, direction des Affaires financières, juridiques et des
 services du ministère du Travail, de l'Emploi et de la Santé,
 M^{me} E. TOPIN, direction des Affaires juridiques du ministère des
 Affaires étrangères et européennes, *conseillères* ;

– *pour les requérantes*

M^e C. MÉCARY, avocat,
 M^e Y. STREIFF, avocat, *conseils*,
 M. T. BOUZENOUNE, *conseiller* ;

– *pour la tierce partie*

M. R. WINTEMUTE, professeur, droits de l'homme, King's College
 Londres, *conseiller*,

au nom de la Fédération internationale des Ligues des Droits de l'homme (FIDH), de la
 « International Commission of Jurists » (ICJ), de l'« European Region of the International
 Lesbian and Gay Association » (ILGA-Europe), de la « British Association for Adoption and
 Fostering » (BAAF) et du « Network of European LGBT Families Associations » (NELFA).

7. La Cour a entendu en leurs déclarations M^e Mécary, M^{me} Tissier et M. Wintemute. Elle a également entendu M^e Mécary et M^{me} Tissier en leurs réponses à des questions posées par des juges.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

8. Les requérantes sont nées respectivement en 1961 et 1965 et résident à Clamart.

9. Vivant en concubinage depuis 1989 avec Madame Valérie Gas (« la première requérante »), Madame Nathalie Dubois (« la deuxième requérante ») donna naissance en France, le 21 septembre 2000, à une fille, A. conçue en Belgique par procréation médicalement assistée avec donneur anonyme. A. n'a pas de filiation établie à l'égard du père, qui est un donneur anonyme conformément à la loi belge. L'enfant vit depuis sa naissance au domicile commun des requérantes. Le 22 septembre 2000, l'enfant a été inscrite sur les registres de l'état civil de la mairie de Clamart. Elle a été reconnue par sa mère le 9 octobre 2000.

10. Les deux requérantes conclurent ensuite un pacte civil de solidarité (PACS), enregistré le 15 avril 2002 au greffe du tribunal d'instance de Vanves.

11. Le 3 mars 2006, la première requérante forma devant le tribunal de grande instance de Nanterre une requête en adoption simple de la fille de sa partenaire, avec le consentement exprès de celle-ci donné devant notaire.

12. Le 12 avril 2006, le procureur de la République s'opposa à la demande d'adoption de la première requérante sur le fondement de l'article 365 du code civil (voir paragraphe 19).

13. Par un jugement du 4 juillet 2006, le tribunal constata que les conditions légales de l'adoption étaient remplies et qu'il était démontré que les requérantes s'occupent activement et conjointement de l'enfant, lui apportant soin et affection. Toutefois, le tribunal rejeta la demande aux motifs que l'adoption sollicitée aurait eu des conséquences légales contraires à l'intention des requérantes et à l'intérêt de l'enfant, en transférant l'autorité parentale à l'adoptant et en privant ainsi la mère biologique de ses propres droits sur l'enfant.

14. La première requérante interjeta appel de cette décision, et la deuxième requérante intervint volontairement dans la procédure.

Devant la cour d'appel de Versailles, les requérantes réaffirmèrent leur volonté d'établir, grâce à l'adoption, un cadre juridique sécurisant pour l'enfant conforme à la réalité sociale vécue par lui. Elles soutinrent par ailleurs que la perte de l'autorité parentale subie par la mère de l'enfant pouvait être corrigée par une délégation totale ou partielle de cette autorité, et arguèrent de l'admission par d'autres pays européens de l'adoption d'enfant établissant un lien entre personnes de même sexe.

15. Par un arrêt du 21 décembre 2006, la cour d'appel confirma le rejet de leur demande.

Si, à l'instar des premiers juges, la cour releva que les conditions légales de l'adoption étaient réunies et qu'il était établi que la première requérante participait activement au bien-être affectif et matériel de l'enfant, elle confirma que les conséquences légales de cette adoption n'étaient pas conformes à l'intérêt de l'enfant, dès lors que les requérantes ne pouvaient bénéficier du partage de l'autorité parentale prévu par l'article 365 du code civil en cas d'adoption par le conjoint du père ou de la mère, et que donc Madame Dubois se trouverait privée, du fait de l'adoption, de tout droit sur son enfant. La cour estima par ailleurs qu'une simple délégation ultérieure éventuelle de l'exercice de cette autorité ne suffisait pas à pallier les risques pour l'enfant résultant de la perte de l'autorité parentale par sa mère. La requête ne répondrait dès lors, selon la cour, qu'au souhait des requérantes de consacrer et légitimer une parenté conjointe à l'égard de l'enfant.

16. Le 21 février 2007, les requérantes formèrent un pourvoi en cassation, mais ne menèrent pas à son terme la procédure engagée devant la Cour de cassation. Le 20 septembre 2007, le premier président de la Cour de cassation rendit une ordonnance de déchéance du pourvoi.

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

A. Adoption

17. Il existe en droit français deux types d'adoption, l'adoption plénière et l'adoption simple.

1. *L'adoption plénière*

18. Elle ne peut être prononcée que durant la minorité de l'enfant et peut être demandée par des conjoints mariés ou par une personne seule. Elle a pour effet de conférer à l'enfant adopté une filiation qui se substitue à sa filiation d'origine (si elle existe) et de lui conférer le nom de l'adoptant. Un nouvel acte de naissance est établi et l'adoption est irrévocable (articles 355 et suivants du code civil).

2. *L'adoption simple*

19. En revanche, l'adoption simple ne rompt pas les liens entre l'enfant et sa famille d'origine, mais crée un lien de filiation supplémentaire (articles 360 et suivants du code civil). Elle peut être réalisée quel que soit l'âge de l'adopté, y compris lorsqu'il est majeur. Elle ajoute le nom de l'adoptant au nom déjà porté par l'adopté. Ce dernier conserve des droits successoraux dans sa famille d'origine et en acquiert vis-à-vis de l'adoptant. Elle crée des obligations réciproques entre l'adoptant et l'adopté, notamment une obligation alimentaire. Les parents de l'adopté ne sont tenus de lui fournir une aide financière que s'il ne peut les obtenir de l'adoptant.

Si l'adopté est mineur, l'adoption simple a pour effet d'investir l'adoptant de tous les droits d'autorité parentale dont le père ou la mère de l'enfant se trouve dès lors dessaisi. Le législateur a aménagé une exception à cette règle : lorsque l'adoption simple est réalisée par le conjoint marié du père ou de la mère de l'enfant adopté. Dans cette hypothèse, l'autorité parentale est partagée entre les époux. Ainsi :

Article 365 du code civil

« L'adoptant est seul investi à l'égard de l'adopté de tous les droits d'autorité parentale, inclus celui de consentir au mariage de l'adopté, à moins qu'il ne soit le conjoint du père ou de la mère de l'adopté ; dans ce cas, l'adoptant a l'autorité parentale concurremment avec son conjoint, lequel en conserve seul l'exercice, sous réserve d'une déclaration conjointe avec l'adoptant devant le greffier en chef du tribunal de grande instance aux fins d'un exercice

en commun de cette autorité. (...) »

De plus, contrairement à l'adoption plénière, l'adoption simple peut être révoquée, à la demande de l'adoptant, de l'adopté, ou, lorsque celui-ci est mineur, du ministère public.

L'adoption simple est destinée, pour l'essentiel, et s'agissant de mineurs, à pallier les défaillances du ou des parents biologiques. Dans la pratique, les cas d'adoptions plénières concernent majoritairement des adoptions internationales d'enfants, alors qu'une large majorité des adoptions simples prononcées dans un cadre intrafamilial concernent des majeurs et ont souvent un objectif successoral.

B. Autorité parentale

20. L'autorité parentale est définie comme l'ensemble des droits et des devoirs des parents à l'égard des enfants mineurs. Elle vise à protéger l'enfant « dans sa sécurité, sa santé et sa moralité pour assurer son éducation et permettre son développement » (article 371-1 du code civil). En principe, dès lors que le lien de filiation est établi, tout parent d'un enfant mineur est titulaire de l'autorité parentale, qui ne peut lui être retirée que pour des causes graves. L'autorité parentale prend fin lors de la majorité, en principe à dix-huit ans. L'autorité parentale se distingue de l'exercice de l'autorité parentale. Ce dernier peut être confié à un seul des parents pour des motifs tenant à l'intérêt de l'enfant. Le parent auquel l'exercice de l'autorité parentale n'a pas été confié conserve le droit et le devoir de surveiller l'entretien et l'éducation de ses enfants. Il doit être informé des choix importants relatifs à leur vie et un droit de visite et d'hébergement ne peut, sauf motifs graves, lui être refusé.

21. Il existe des possibilités de délégation de l'autorité parentale à des tiers (articles 376 et suivants du code civil). Depuis la loi du 4 mars 2002 relative à l'autorité parentale, la délégation « classique » d'autorité parentale, régie par l'article 377 du code civil, prévoit que, lorsque les circonstances l'exigent, les parents ou l'un des deux peuvent saisir le juge aux affaires familiales pour que l'exercice de l'autorité parentale soit délégué à un tiers (un particulier, un établissement agréé ou le service départemental de l'Aide sociale à l'enfance). La délégation n'est pas définitive et ne peut comporter le droit de consentir à l'adoption. Dans ce cadre, il y a transfert total ou partiel de l'autorité parentale : les parents demeurent titulaires de l'autorité parentale, mais sont dépossédés de son exercice au profit d'un tiers.

22. Au sein de la procédure de délégation classique, la loi du 4 mars 2002 a institué une mesure plus souple de délégation-partage de l'autorité parentale (article 377-1 du code civil). Ainsi, le jugement de délégation de l'autorité parentale peut prévoir, « pour les besoins d'éducation de l'enfant », que les parents ou l'un d'entre eux, partageront tout ou partie de l'exercice de l'autorité parentale avec le tiers délégataire, sans être dépossédés d'une autorité partagée. Cette mesure permet l'organisation des rapports entre l'enfant, le couple séparé et les tiers, qu'il s'agisse des grands-parents, des beaux-parents ou des concubins. Chaque parent reste titulaire de l'autorité parentale et en conserve l'exercice. La délégation n'entraîne pas de transfert de nom ni d'établissement d'un lien de filiation, elle est provisoire et disparaît à la majorité de l'enfant.

C. Mariage et pacte civil de solidarité (PACS)

23. En France, le mariage n'est pas autorisé pour les couples homosexuels (article 144 du code civil). Ce principe a été réitéré par la Cour de cassation qui a rappelé, dans un arrêt rendu le 13 mars 2007, que « selon la loi française, le mariage est l'union d'un homme et d'une femme ».

24. Le pacte civil de solidarité (PACS) est défini par l'article 515-1 du code civil comme « un contrat conclu par deux personnes physiques majeures, de sexe différent ou de même sexe, pour organiser leur vie commune ». Le PACS implique pour les partenaires un certain nombre d'obligations dont celles de maintenir une vie commune et de s'apporter une aide matérielle et une assistance réciproques.

Le PACS confère également aux partenaires certains droits, accrus depuis l'entrée en vigueur au 1^{er} janvier 2007 de la loi du 23 juin 2006 portant réforme des successions et des libéralités. Les partenaires forment ainsi un seul foyer fiscal ; ils sont par ailleurs assimilés aux conjoints mariés

pour l'exercice de certains droits, spécialement au titre de l'assurance maladie et maternité et de l'assurance décès. Certains effets propres au mariage restent inapplicables aux partenaires du PACS, la loi notamment ne créant pas de lien d'alliance ou de vocation héréditaire entre partenaires. En particulier, la dissolution du PACS échappe aux procédures judiciaires de divorce et peut intervenir sur simple déclaration conjointe des partenaires ou décision unilatérale de l'un d'eux signifiée à son cocontractant (article 515-7 du code civil). De plus, le PACS n'a aucune incidence sur les dispositions du code civil relatives à la filiation adoptive et à l'autorité parentale.

D. Procréation médicalement assistée (PMA)

25. L'assistance médicale à la procréation, qui désigne les pratiques permettant la conception *in vitro*, le transfert d'embryons et l'insémination artificielle est régie par les articles L. 2141-1 et suivants du code de la santé publique. Aux termes de l'article L. 2141-2 du même code, la PMA n'est autorisée en France que dans un but thérapeutique en vue de « remédier à l'infertilité dont le caractère pathologique a été médicalement diagnostiqué » ou « d'éviter la transmission à l'enfant ou à un membre du couple d'une maladie d'une particulière gravité ». La PMA est autorisée au profit d'un homme et d'une femme formant un couple, en âge de procréer, mariés ou justifiant d'une vie commune.

26. Dans ce cas, l'article 311-20 du code civil prévoit une reconnaissance judiciaire de paternité pour le second parent dans les termes suivants :

« Les époux ou les concubins qui, pour procréer, recourent à une assistance médicale nécessitant l'intervention d'un tiers donneur, doivent préalablement donner, dans des conditions garantissant le secret, leur consentement au juge ou au notaire, qui les informe des conséquences de leur acte au regard de la filiation.

(...)

Celui qui, après avoir consenti à l'assistance médicale à la procréation, ne reconnaît pas l'enfant qui en est issu engage sa responsabilité envers la mère et envers l'enfant.

En outre, sa paternité est judiciairement déclarée. L'action obéit aux dispositions des articles 328 et 331. »

E. Jurisprudence

1. Sur le refus de l'adoption simple de l'enfant mineur du partenaire d'un PACS

27. La Cour de cassation a statué sur cette question à plusieurs reprises. Les deux premiers arrêts rendus le 20 février 2007 concernaient des espèces mettant en cause des femmes homosexuelles vivant en partenariat (PACS) et ayant des enfants tous rattachés légalement à leur mère, la filiation paternelle n'étant pas établie. Dans les deux cas, l'adoption simple des enfants avait été demandée, avec le consentement de la mère, par la partenaire. Une des requêtes avait été accueillie favorablement par la cour d'appel de Bourges, aux motifs notamment que « l'adoption était conforme à l'intérêt de l'enfant » et l'autre avait été rejetée par la cour d'appel de Paris. Au visa de l'article 365 du code civil, la première chambre civile de la Cour de cassation cassa et annula le premier arrêt d'appel :

« Qu'en statuant ainsi, alors que cette adoption réalisait un transfert des droits d'autorité parentale sur l'enfant en privant la mère biologique, qui entendait continuer à élever l'enfant, de ses propres droits, de sorte que, même si M^{me} Y... avait alors consenti à cette adoption, en faisant droit à la requête la cour d'appel a violé le texte susvisé ; »

Elle confirma le second arrêt d'appel :

« Mais attendu qu'ayant retenu à juste titre que M^{me} Y ..., mère des enfants, perdrait son autorité parentale sur eux en cas d'adoption par M^{me} X ..., alors qu'il y avait communauté de vie, puis relevé que la délégation de l'autorité parentale ne pouvait être demandée que si les circonstances l'exigeaient, ce qui n'était ni établi, ni allégué, et qu'en l'espèce, une telle délégation ou son partage étaient, à l'égard d'une adoption, antinomique et contradictoire, l'adoption d'un enfant mineur ayant pour but de conférer l'autorité parentale au seul adoptant, la cour d'appel, qui a procédé à la recherche prétendument omise, a légalement justifié sa décision ; » (1^{re} Civ. 20 février 2007, 2 arrêts, Bulletin civil 2007 I n^{os} 70 et 71).

La Cour de cassation confirma par la suite cette approche :

« d'une part, que (le père ou) la mère de l'enfant perdrait son autorité parentale en cas d'adoption de son enfant alors qu'(il ou) elle présente toute aptitude à exercer cette autorité et ne manifeste aucun rejet à son égard, d'autre part, que l'article 365 du code civil ne prévoit le partage de l'autorité parentale que dans le cas de l'adoption de l'enfant du conjoint, et qu'en l'état de la législation française, les conjoints sont des personnes unies par les liens du mariage, la cour d'appel, qui n'a contredit aucune des dispositions de la Convention européenne des droits de l'homme, a légalement justifié sa décision. » (1^{re} Civ. 19 décembre 2007, Bulletin civil 2007 I n° 392 ; voir aussi, dans le même sens, 1^{re} Civ. 6 février 2008, inédit, pourvoi n° 07-12948 et 1^{re} Civ. 9 mars 2011).

28. Les deux premiers arrêts rendus le 20 février 2007 furent publiés au Bulletin d'information de la Cour de cassation, sur internet et au rapport annuel.

2. Sur la délégation d'autorité parentale

29. Dans un premier arrêt de principe (Cass. 1^{re} civ., 24 février 2006, publié au Bulletin), la Cour de cassation autorisa un couple homosexuel pacsé à bénéficier de ce dispositif. Elle jugea que l'article 377 al. 1 du code civil « ne s'oppose pas à ce qu'une mère seule titulaire de l'autorité parentale en délègue tout ou partie de l'exercice à la femme avec laquelle elle vit en union stable et continue, dès lors que les circonstances l'exigent et que la mesure est conforme à l'intérêt supérieur de l'enfant ». Par la suite, la Cour de cassation restreignit les conditions requises pour l'octroi d'une délégation d'autorité parentale (Cass. 1^{re} civ., 8 juillet 2010, publié au Bulletin). Si les conditions posées restent identiques (il faut que les circonstances l'exigent et que la mesure soit conforme à l'intérêt supérieur de l'enfant), la Cour de cassation exige désormais que les demanderesses justifient qu'une telle mesure permettrait d'améliorer les conditions de vie des enfants et qu'elle présente un caractère indispensable. Cette conception restrictive est désormais appliquée par les juges du fond (TGI Paris, 5 novembre 2010).

3. Décision du Conseil constitutionnel du 6 octobre 2010

30. Dans le cadre d'une espèce concernant des faits similaires à ceux de la présente affaire, les requérantes alléguèrent une atteinte au principe constitutionnel d'égalité et demandèrent la transmission d'une question prioritaire de constitutionnalité (QPC) au Conseil constitutionnel, ce que la Cour de cassation accepta.

31. Dans une décision du 6 octobre 2010, le Conseil constitutionnel précisa qu'il ne lui appartenait pas de statuer *in abstracto* sur la constitutionnalité des dispositions légales contestées, mais à la lumière de l'interprétation jurisprudentielle constante qu'en fait la Cour de cassation. En l'espèce, la constitutionnalité de l'article 365 du code civil devait donc s'apprécier en ce que cette disposition a pour effet (consacré par la Cour de cassation le 20 février 2007) d'interdire par principe l'adoption de l'enfant par un partenaire ou un concubin.

En premier lieu, le Conseil rappela que les dispositions de l'article 365 ne font pas obstacle à la liberté des couples de vivre en concubinage ou de conclure un PACS, pas plus qu'elles n'empêchent le parent biologique d'associer son concubin ou son partenaire à l'éducation de l'enfant. Il jugea cependant que le droit de mener une vie familiale, tel que garanti par la Constitution, n'ouvre pas droit à l'établissement d'un lien de filiation adoptive entre l'enfant et le partenaire de son parent.

En second lieu, il constata que le législateur a délibérément décidé de réserver la faculté d'une adoption simple aux couples mariés et qu'il ne lui appartient pas de substituer son appréciation à celle du législateur.

III. TEXTES ET DOCUMENTS DU CONSEIL DE L'EUROPE

A. La Convention européenne en matière d'adoption des enfants (révisée)

32. Ouverte à la signature le 27 novembre 2008, cette Convention est entrée en vigueur le 1^{er} septembre 2011. Elle n'a pas été signée ni ratifiée par la France. Elle prévoit, en ses dispositions pertinentes :

« Article 7 – Conditions de l'adoption

1 La législation permet l'adoption d'un enfant :

a par deux personnes de sexe différent

i qui sont mariées ensemble ou,

ii lorsqu'une telle institution existe, qui ont contracté un partenariat enregistré ;

b par une seule personne.

2 Les Etats ont la possibilité d'étendre la portée de la présente Convention aux couples homosexuels mariés ou qui ont contracté un partenariat enregistré ensemble. Ils ont également la possibilité d'étendre la portée de la présente Convention aux couples hétérosexuels et homosexuels qui vivent ensemble dans le cadre d'une relation stable.

(...)

Article 11 – Effets de l'adoption

1 Lors de l'adoption, l'enfant devient membre à part entière de la famille de l'adoptant ou des adoptants et a, à l'égard de l'adoptant ou des adoptants et à l'égard de sa ou de leur famille, les mêmes droits et obligations que ceux d'un enfant de l'adoptant ou des adoptants dont la filiation est légalement établie. L'adoptant ou les adoptants assument la responsabilité parentale vis-à-vis de l'enfant. L'adoption met fin au lien juridique existant entre l'enfant et ses père, mère et famille d'origine.

2 Néanmoins, le conjoint, le partenaire enregistré ou le concubin de l'adoptant conserve ses droits et obligations envers l'enfant adopté si celui-ci est son enfant, à moins que la législation n'y déroge.

(...)

4 Les Etats Parties peuvent prévoir des dispositions relatives à d'autres formes d'adoption ayant des effets plus limités que ceux mentionnés aux paragraphes précédents du présent article. »

B. Recommandation du Comité des ministres

33. La recommandation CM/Rec(2010) du Comité des ministres, adoptée le 31 mars 2010, sur des mesures visant à combattre la discrimination fondée sur l'orientation sexuelle et sur l'identité de genre recommande notamment aux Etats membres :

« (...)

24. Lorsque la législation nationale reconnaît les partenariats enregistrés entre personnes de même sexe, les Etats membres devraient viser à ce que leur statut juridique, ainsi que leurs droits et obligations soient équivalents à ceux des couples hétérosexuels dans une situation comparable.

25. Lorsque la législation ne reconnaît ni confère de droit ou d'obligation aux partenariats enregistrés entre personnes de même sexe et aux couples non mariés, les Etats membres sont invités à considérer la possibilité de fournir, sans aucune discrimination, y compris vis-à-vis de couples de sexes différents, aux couples de même sexe des moyens juridiques ou autres pour répondre aux problèmes pratiques liés à la réalité sociale dans laquelle ils vivent. »

EN DROIT

34. Les requérantes allèguent avoir subi un traitement discriminatoire fondé sur leur orientation sexuelle et portant atteinte à leur droit au respect de la vie privée et familiale. Elles invoquent l'article 14 de la Convention combiné avec l'article 8, qui se lisent comme suit :

Article 8

« 1. Toute personne a droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance.

2. Il ne peut y avoir ingérence d'une autorité publique dans l'exercice de ce droit que pour autant que cette ingérence est prévue par la loi et qu'elle constitue une mesure qui, dans une société démocratique, est nécessaire à la sécurité nationale, à la sûreté publique, au bien-être économique du pays, à la défense de l'ordre et à la prévention des infractions pénales, à la protection de la santé ou de la morale, ou à la protection des droits et libertés d'autrui. »

Article 14

« La jouissance des droits et libertés reconnus dans la (...) Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation. »

I. SUR L'EXCEPTION PRÉLIMINAIRE DU GOUVERNEMENT

35. A titre principal, le Gouvernement réitère que l'article 8 de la Convention n'est pas applicable en l'espèce. Reprenant l'argumentation déjà développée lors de l'examen de la recevabilité de l'affaire, le Gouvernement se réfère à la jurisprudence de la Cour selon laquelle il s'agit d'apprécier *in concreto* l'existence d'une vie familiale, qui n'est pas limitée au cadre juridique du mariage. Toutefois, le Gouvernement souligne que, selon une jurisprudence constante de la Cour, l'article 8 ne garantit aucun droit à l'adoption, ni à l'établissement d'une filiation entre l'adulte et l'enfant avec lequel il entretient une vie familiale, et moins encore un droit à l'enfant. Or, dès lors que le droit à l'adoption ne relève pas de la Convention, le Gouvernement estime que les requérantes ne peuvent se prévaloir d'une discrimination dans le bénéfice de ce droit puisque l'article 14 de la Convention n'a pas d'existence indépendante.

36. Les requérantes se réfèrent aux arguments exposés dans le cadre de l'examen de la recevabilité de l'affaire.

37. La Cour constate que les requérantes se fondent sur l'article 14 combiné avec l'article 8 de la Convention et que cette dernière disposition ne garantit ni le droit de fonder une famille, ni le droit d'adopter, ce dont les parties conviennent (*E.B. c. France* [GC], n° 43546/02, § 41, 22 janvier 2008). Toutefois, force est de constater que l'examen *in concreto* de la situation des requérantes permet de conclure à la présence d'une « vie familiale » au sens de l'article 8 de la Convention. De plus, l'orientation sexuelle relève de la sphère personnelle protégée par l'article 8 de la Convention. Il s'ensuit que les faits de la cause tombent « sous l'empire » de l'un au moins des articles de la Convention, qui pourra être complété par l'article 14 invoqué en l'espèce.

38. La Cour renvoie à cet égard à sa décision du 31 août 2010 sur la recevabilité de la requête laquelle a conclu à l'applicabilité en l'espèce de l'article 14 de la Convention combiné avec l'article 8.

39. Il y a lieu en conséquence de rejeter l'exception préliminaire du Gouvernement et de poursuivre l'examen au fond du grief.

II. SUR LE BIEN-FONDÉ

A. Thèses des parties

1. Les requérantes

40. Les requérantes se plaignent du rejet de l'adoption sollicitée par la première requérante de l'enfant de sa compagne. Elles soutiennent que le motif pris des conséquences légales d'une telle adoption opérant retrait de l'autorité parentale de la mère ne constitue un obstacle définitif à l'adoption que pour les couples de même sexe puisque, contrairement aux personnes de sexe différent, elles ne peuvent pas contracter mariage, et donc bénéficier des dispositions de l'article 365 du code civil. Elles estiment que le refus ainsi opposé, par une position de principe, de prononcer l'adoption simple de A. par la première requérante a porté atteinte à leur droit à la vie privée et familiale et ce de façon discriminatoire.

41. Les requérantes rappellent que A. a été conçue en Belgique par insémination artificielle avec donneur anonyme. Bien qu'élevée depuis sa naissance par les deux femmes, A. n'a, sur le plan juridique, qu'un seul parent, la deuxième requérante. Celle-ci a transmis son nom à A., exerce seule l'autorité parentale, et lui transmettra ses biens à sa mort. En revanche, sur le plan juridique, la première requérante n'a ni devoir ni droit vis-à-vis de l'enfant. Les requérantes expliquent avoir souhaité remédier à cette situation par une demande d'adoption simple, celle-ci permettant d'établir un lien de filiation qui s'ajoute au lien de filiation d'origine. A. aurait donc eu juridiquement deux

parents et la sécurité juridique qui en découle, ce qui leur a été refusé par les instances nationales.

42. Les requérantes feraient donc l'objet d'une discrimination fondée sur leur orientation sexuelle puisque les autorités françaises ont exclu de l'adoption simple les partenaires d'un couple de personnes du même sexe, mais pas les personnes unies par un mariage. Les requérantes rappellent en effet que le mariage homosexuel demeure interdit en France, comme l'a indiqué la Cour de cassation dans un arrêt rendu le 13 mars 2007.

Cette différence de traitement discriminatoire se vérifierait également entre la situation des concubins et pacsés de même sexe et ceux de sexe différent, puisque les hétérosexuels peuvent échapper à la rigueur de l'article 365 du code civil en se mariant, ce qui n'est pas possible pour les homosexuels. Les requérantes exposent ne pas demander en l'espèce l'accès au mariage, mais soulignent la neutralité seulement apparente des dispositions du code civil, qui créent une discrimination indirecte.

43. A l'audience, pour illustrer leur propos, les requérantes ont comparé la situation d'A. à celle d'une autre enfant, A.D. Celle-ci aurait été conçue par insémination artificielle avec un donneur anonyme par une femme vivant en concubinage avec un homme, Monsieur D. Or, alors que les situations d'A. et d'A.D. seraient en tous points comparables, leur statut juridique est différent, puisque par application de l'article 311-20 du code civil Monsieur D. est le père juridique de l'enfant, sans même avoir à faire de demande d'adoption simple (voir paragraphe 26). Ainsi, que ce soit pour des actes de la vie courante (inscription à l'école et suivi scolaire) ou dans des circonstances plus graves (accident de la circulation), A. ne peut être accompagnée que par sa mère, alors qu'A.D. peut être prise en charge par Monsieur D. De plus, en cas de décès de la mère biologique, A. devient orpheline et peut être confiée à un tuteur ou à une famille d'accueil, alors qu'A.D. sera confiée à son père juridique. Les requérantes en déduisent que la législation française concernant l'adoption simple et l'insémination avec donneur anonyme (IAD) empêche l'établissement d'un lien de filiation adoptif entre A. et la première requérante, alors que cela serait possible si cette dernière était un homme. Même si les requérantes soulignent ne pas souhaiter remettre en cause l'accès à l'IAD tel que prévu par le droit français, il y aurait une différence de traitement juridique selon que les couples élevant les enfants sont composés de deux femmes vivant en concubinage ou ayant conclu un PACS, ou d'un homme et d'une femme concubins ou pacsés.

44. Ajoutant un autre exemple, les requérantes évoquent la possibilité que, suite au décès de Monsieur D., la mère d'A.D. rencontre un autre homme, Monsieur N., et décide de vivre en concubinage ou de se marier avec lui. Monsieur N. pourrait demander l'adoption simple d'A.D. alors que celle d'A. serait refusée à la première requérante.

45. Il y aurait donc une différence de traitement entre la situation de deux femmes vivant en concubinage ou ayant conclu un PACS, qui ne peuvent pas se marier, et la situation d'une femme et d'un homme qui, s'ils se marient, autorise le conjoint de la mère à demander l'adoption simple de l'enfant avec un partage automatique de l'autorité parentale.

46. Or, selon les requérantes, cette différence de traitement ne poursuit aucun but légitime. En tout cas, l'intérêt de l'enfant commanderait de lui assurer la protection juridique de deux parents plutôt que d'un seul. De plus, selon elles, la délégation partage de l'autorité parentale (DPAP), qu'elles n'ont d'ailleurs pas demandée aux instances nationales, serait insuffisante. En effet, la DPAP ne concerne que l'autorité parentale, est temporaire et n'est pas accordée aisément par les juridictions nationales depuis le 8 juillet 2010 (voir paragraphe 29). Elles soulignent que la meilleure protection de l'intérêt de l'enfant est assurée par l'adoption simple, et non par la DPAP.

47. Les requérantes concluent que le refus d'adoption simple qui leur a été opposé constitue une discrimination à la fois directe et indirecte fondée sur l'orientation sexuelle et contraire à la Convention. Elles considèrent que le gouvernement français devrait proposer des modifications législatives pour mettre fin à cette discrimination.

2. Le Gouvernement

48. Le Gouvernement rappelle d'abord les régimes juridiques de l'adoption en droit français ainsi que celui relatif à la délégation de l'autorité parentale, et leurs fondements (voir paragraphes 17 à 22 ci-dessus). Quant à la présente espèce, à l'audience le Gouvernement a noté que les requérantes n'ont pas formulé de demande de DPAP, alors que celle-ci peut être justifiée par les circonstances (par

exemple, départ en voyage de la deuxième requérante).

49. Ensuite, le Gouvernement considère qu'aucune discrimination objective ne résulte de l'article 365 du code civil, puisque cette disposition est applicable de la même façon à tous les couples non mariés, et ce quelle que soit la composition du couple. La seule exception prévue par l'article litigieux, le conjoint marié, a été mise en place par le législateur dans un souci de protection des intérêts de l'enfant. En effet, selon le Gouvernement, le mariage demeure une institution garantissant une stabilité du couple plus importante que d'autres types d'unions. De plus, en cas de dissolution du mariage, l'intervention du juge aux affaires familiales est automatique. Au contraire, le PACS présente une grande souplesse aussi bien pour le conclure que pour le défaire, et n'emporte aucune conséquence en matière familiale et aucun effet en matière de filiation. Compte tenu de ces éléments, le législateur a donc voulu limiter les possibilités d'adoption simple afin d'assurer à l'enfant un cadre pérenne, tant dans sa prise en charge que dans son éducation.

50. Le Gouvernement réfute également l'existence d'une discrimination par ricochet ou indirecte invoquée par les requérantes, découlant de ce que le mariage est réservé en France aux couples hétérosexuels. Le Gouvernement expose à cet égard que, selon la jurisprudence de la Cour, la vie familiale peut s'exercer en dehors du seul cadre du mariage, comme elle peut s'exercer en dehors de liens juridiques de filiation.

51. En tout état de cause, si la Cour venait à considérer qu'il existe une différence de traitement, le Gouvernement considère que celle-ci est justifiée et ne constitue pas une discrimination, qu'il s'agisse de la comparaison de la situation des requérantes avec celle d'un couple marié ou avec celle d'un couple hétérosexuel pacsé ou vivant en concubinage.

52. A l'audience, le Gouvernement a souligné en particulier que l'ensemble du droit français de la filiation est fondé sur l'altérité sexuelle. Compte tenu de cette approche, qui relève d'un choix de société, le Gouvernement estime que la mise en place de la possibilité pour un enfant d'avoir une filiation établie uniquement à l'égard de deux femmes ou de deux hommes constitue une réforme de principe qui ne pourrait émaner que d'un Parlement. Cette question devrait donc être traitée globalement à l'occasion d'un débat démocratique, et non par des biais détournés comme le partage de l'autorité parentale dans l'adoption simple.

3. *Les tiers intervenants*

53. La Fédération internationale des ligues des droits de l'Homme (FIDH), la Commission internationale des Juristes (ICJ), l'European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), la British Association for Adoption and Fostering (BAAF) et le Network of European LGBT Families Associations (NELFA) soumettent à la Cour une intervention commune.

54. Ces organisations précisent d'abord que l'adoption par des homosexuels relève de trois situations bien distinctes : en premier lieu, il peut s'agir d'un célibataire souhaitant adopter, dans un pays membre où cela est autorisé, même à titre exceptionnel, étant entendu que tout partenaire n'aura aucun droit à l'égard de l'enfant adopté (adoption individuelle) ; en deuxième lieu, l'un des membres d'un couple du même sexe peut souhaiter adopter l'enfant de son partenaire, permettant ainsi aux deux membres de ce couple d'exercer l'autorité parentale vis-à-vis de l'enfant adopté (adoption par un second parent) ; enfin, les deux membres d'un couple du même sexe peuvent vouloir adopter ensemble un enfant qui n'a aucun lien avec eux, de sorte que les deux partenaires acquièrent simultanément les droits parentaux à l'égard de l'enfant adopté (adoption conjointe). Dans l'affaire *E.B. c. France* précitée, la Cour s'est prononcée en faveur d'un accès égal à l'adoption simple pour toute personne, quelle que soit son orientation sexuelle. En l'espèce, c'est l'adoption par un second parent qui est en cause.

55. En 2011, dix Etats membres du Conseil de l'Europe sur quarante-sept autorisaient l'adoption par le second parent, et des modifications législatives dans le même sens sont à l'étude dans d'autres pays. Selon les tiers intervenants, un consensus paraît donc se dégager de plus en plus dans le sens suivant : lorsqu'un enfant est élevé par un couple homosexuel stable, la reconnaissance juridique du statut du deuxième parent renforce le bien-être de l'enfant et assure une meilleure protection de ses intérêts.

56. Dans d'autres Etats, la législation et la jurisprudence suivent la même orientation. Ainsi,

l'adoption par le second parent est possible pour les couples homosexuels dans treize provinces du Canada, dans au moins seize des cinquante Etats américains et dans d'autres pays tels que le Brésil, l'Uruguay, la Nouvelle Zélande et certaines parties de l'Australie.

57. Se référant à la Convention des Nations Unies sur les droits de l'enfant, à la jurisprudence pertinente de la Cour ainsi qu'à celle de certaines cours nationales (comme la Chambre des Lords britannique ou la Cour constitutionnelle d'Afrique du sud), les tiers intervenants demandent à la Cour de consacrer cette approche, qui privilégie selon eux la protection de l'intérêt de l'enfant.

B. Appréciation de la Cour

1. Principes généraux applicables

58. Selon la jurisprudence constante de la Cour, pour qu'un problème se pose au regard de l'article 14, il doit y avoir une différence dans le traitement de personnes placées dans des situations comparables. Une telle distinction est discriminatoire si elle manque de justification objective et raisonnable, c'est-à-dire si elle ne poursuit pas un but légitime ou s'il n'y a pas un rapport raisonnable de proportionnalité entre les moyens employés et le but visé. Par ailleurs, les Etats contractants jouissent d'une certaine marge d'appréciation pour déterminer si et dans quelle mesure des différences entre des situations à d'autres égards analogues justifient des distinctions de traitement (*Burden c. Royaume-Uni* [GC], n° 13378/05, § 60, CEDH 2008), y compris des distinctions de traitement juridique (*Marckx c. Belgique*, 13 juin 1979, § 38, série A n° 31).

59. D'une part, la Cour a maintes fois dit que, comme les différences fondées sur le sexe, les différences fondées sur l'orientation sexuelle doivent être justifiées par des raisons particulièrement graves (*Karner c. Autriche*, n° 40016/98, § 37, CEDH 2003-IX, *L. et V. c. Autriche*, n°s 39392/98 et 39829/98, § 45, CEDH 2003-I, *Smith et Grady c. Royaume-Uni*, n°s 33985/96 et 33986/96, § 90, CEDH 1999-VI, et *Schalk et Kopf c. Autriche*, n° 30141/04, §§ 96 et 97, CEDH 2010).

60. D'autre part, la marge d'appréciation dont jouissent les Etats pour déterminer si et dans quelle mesure des différences entre des situations à d'autres égards analogues justifient des distinctions de traitement est d'ordinaire ample lorsqu'il s'agit de prendre des mesures d'ordre général en matière économique ou sociale (voir, par exemple, *Schalk et Kopf*, précité, § 97).

2. Application de ces principes au cas d'espèce

61. Avant tout, la Cour relève que la présente affaire diffère de l'affaire *E.B. c. France* précitée. Celle-ci concernait le traitement d'une demande d'agrément en vue d'adopter présentée par une personne célibataire homosexuelle. Dans cette affaire, la Cour a rappelé que le droit français autorise l'adoption d'un enfant par un célibataire, ouvrant ainsi la voie à l'adoption par une personne célibataire homosexuelle. Compte tenu de cette réalité du régime légal interne, elle a en revanche considéré que les raisons avancées par le Gouvernement ne pouvaient être qualifiées de particulièrement graves et convaincantes pour justifier le refus d'agrément opposé à la requérante. Celle-ci s'était donc vue opposer des motifs tenant à sa situation, que la Cour a jugés discriminatoires (*E.B. c. France*, précitée, § 94).

62. La Cour constate que tel n'est pas le cas en l'espèce dès lors que les requérantes se plaignent du refus d'adoption simple qui leur a été opposé concernant l'enfant A. A l'appui de leur décision, les juridictions nationales ont estimé que puisque l'adoption simple réalise un transfert des droits d'autorité parentale à l'adoptante, elle n'est pas conforme à l'intérêt de l'enfant dès lors que la mère biologique entend continuer à élever cet enfant. Les juridictions ont ainsi appliqué les dispositions de l'article 365 du code civil qui régit la dévolution de l'exercice de l'autorité parentale dans l'adoption simple. N'étant pas mariées, les requérantes n'ont pas pu bénéficier de la seule exception prévue par ce texte.

63. S'agissant de l'insémination artificielle avec donneur anonyme (IAD) telle que prévue par le droit français, la Cour constate que, sans remettre en cause les conditions d'accès à ce dispositif, les requérantes en critiquent les conséquences juridiques et allèguent une différence de traitement injustifiée (paragraphe 43 *in fine*). Or, la Cour observe d'abord que les requérantes n'ont pas contesté cette législation devant les juridictions nationales. Surtout, la Cour relève que si le droit français ne

prévoit l'accès à ce dispositif que pour les couples hétérosexuels, cet accès est également subordonné à l'existence d'un but thérapeutique, visant notamment à remédier à une infertilité dont le caractère pathologique a été médicalement constaté ou à éviter la transmission d'une maladie grave (voir paragraphes 25 et 26). Ainsi, pour l'essentiel, l'IAD n'est autorisée en France qu'au profit des couples hétérosexuels infertiles, situation qui n'est pas comparable à celle des requérantes. Il s'ensuit, pour la Cour, que la législation française concernant l'IAD ne peut être considérée comme étant à l'origine d'une différence de traitement dont les requérantes seraient victimes. La Cour constate également que ces normes ne permettent pas l'établissement du lien de filiation adoptif qu'elles revendiquent.

64. Les requérantes soutiennent que le refus opposé par les juridictions françaises de prononcer l'adoption simple de A. par la première requérante a porté atteinte à leur droit à la vie privée et familiale de façon discriminatoire. Elles allèguent subir une différence de traitement injustifiée en tant que couple homosexuel par rapport aux couples hétérosexuels, qu'ils soient mariés ou non.

65. D'abord, la Cour estime donc nécessaire d'examiner la situation juridique des requérantes par rapport à celle des couples mariés. Elle constate que l'article 365 du code civil aménage un partage de l'autorité parentale lorsque l'adoptant se trouve être le conjoint du parent biologique de l'adopté, ce dont ne peuvent bénéficier les requérantes, compte tenu de l'interdiction de se marier qui leur est faite en droit français.

66. D'emblée, la Cour rappelle qu'elle a déjà énoncé, dans le cadre de l'examen de l'affaire *Schalk et Kopf* précitée, que l'article 12 de la Convention n'impose pas aux gouvernements des Etats parties l'obligation d'ouvrir le mariage à un couple homosexuel (*Schalk et Kopf*, précité, §§ 49 à 64). Le droit au mariage homosexuel ne peut pas non plus se déduire de l'article 14 combiné avec l'article 8 (*ibid.*, § 101). De plus, elle a estimé que lorsque les Etats décident d'offrir aux couples homosexuels un autre mode de reconnaissance juridique, ils bénéficient d'une certaine marge d'appréciation pour décider de la nature exacte du statut conféré (*ibid.*, § 108).

67. La Cour relève qu'en l'espèce, les requérantes précisent ne pas demander l'accès au mariage, mais, se trouvant, selon elles, dans une situation analogue, elles allèguent une distinction discriminatoire.

68. La Cour n'est pas convaincue par cet argument. Elle rappelle, comme elle l'a déjà constaté, que le mariage confère un statut particulier à ceux qui s'y engagent. L'exercice du droit de se marier est protégé par l'article 12 de la Convention et emporte des conséquences sociales, personnelles et juridiques (*Burden*, précité, § 63, et *Joanna Shackell c. Royaume-Uni* (déc.), n° 45851/99, 27 avril 2000 ; voir aussi *Nylund c. Finlande* (déc.), n° 27110/95, CEDH 1999-VI, *Lindsay c. Royaume-Uni* (déc.), n° 11089/84, 11 novembre 1986, et *Şerife Yiğit c. Turquie* [GC], n° 3976/05, 2 novembre 2010). Par conséquent, la Cour estime que l'on ne saurait considérer, en matière d'adoption par le second parent, que les requérantes se trouvent dans une situation juridique comparable à celle des couples mariés.

69. Ensuite, et pour en venir à la deuxième partie du grief des requérantes, la Cour doit examiner leur situation par rapport à celles des couples hétérosexuels non mariés. Ces couples peuvent avoir conclu un PACS, comme les requérantes, ou vivre en concubinage. Pour l'essentiel, la Cour relève que des couples placés dans des situations juridiques comparables, la conclusion d'un PACS, se voient opposer les mêmes effets, à savoir le refus de l'adoption simple (voir paragraphes 19, 24 et 31). Elle ne relève donc pas de différence de traitement fondée sur l'orientation sexuelle des requérantes.

70. Certes, les requérantes allèguent une discrimination indirecte fondée à nouveau sur l'impossibilité de se marier, alors que les couples hétérosexuels peuvent échapper à l'article 365 du code civil par ce biais.

71. Toutefois, à cet égard, la Cour ne peut que se référer au constat déjà effectué précédemment (voir paragraphes 66 à 68).

72. Enfin, et à titre subsidiaire, la Cour observe qu'elle a déjà reconnu que la logique de la conception de l'adoption litigieuse, qui entraîne la rupture du lien de filiation antérieur entre la personne adoptée et son parent naturel est valable pour les personnes mineures (voir, *mutatis mutandis*, *Emonet et autres c. Suisse*, n° 39051/03, § 80, 13 décembre 2007). Elle estime que, compte tenu du fondement et de l'objet de l'article 365 du code civil (voir paragraphe 19), qui régit

la dévolution de l'exercice de l'autorité parentale dans l'adoption simple, l'on ne saurait, en se fondant sur la remise en cause de l'application de cette seule disposition, légitimer la mise en place d'un double lien de filiation en faveur de A.

73. Partant, la Cour conclut qu'il n'y a pas eu violation de l'article 14 de la Convention combiné avec l'article 8.

PAR CES MOTIFS, LA COUR

1. *Rejette* à l'unanimité, l'exception préliminaire du Gouvernement ;
2. *Dit*, par six voix contre une, qu'il n'y a pas eu violation des articles 14 et 8 combinés de la Convention.

Fait en français, puis prononcé en audience publique au Palais des droits de l'homme, à Strasbourg, le 15 mars 2012.

Claudia Westerdiek Dean Spielmann
Greffière Président

Au présent arrêt se trouve joint, conformément aux articles 45 § 2 de la Convention et 74 § 2 du règlement, l'exposé des opinions séparées suivantes :

- opinion concordante du juge Costa à laquelle se rallie le juge Spielmann ;
- opinion concordante du juge Spielmann à laquelle se rallie la juge Berro-Lefèvre ;
- opinion dissidente du juge Villiger.

D.S.
C.W.

OPINION CONCORDANTE DU JUGE COSTA À LAQUELLE SE RALLIE LE JUGE SPIELMANN

J'ai voté pour la non-violation de l'article 14 de la Convention, combiné avec son article 8. J'aimerais exprimer quelques réserves par rapport à cette solution et quelques remarques sur la suite qui pourrait être donnée à cette affaire, notamment par l'Etat défendeur, la France.

Les faits sont simples. M^{mes} Gas et Dubois, la première et la seconde requérantes, vivent en couple. D'abord concubines, elles ont ensuite conclu un pacte civil de solidarité (PACS). La seconde requérante a mis au monde une petite fille, conçue par procréation médicalement assistée, d'un donneur anonyme, qu'elle a reconnue. Puis sa compagne, la première requérante, avec son consentement exprès, a demandé à adopter l'enfant. Les juridictions nationales ont rejeté cette demande, en se fondant sur l'article 365 du code civil, qui n'interdit pas en soi l'adoption dans un tel cas, mais parce que celle-ci aurait eu pour effet de transférer à la première requérante l'autorité parentale, en privant la seconde requérante de celle-ci. L'article 365 ne prévoit en effet qu'une seule exception à ce transfert exclusif, lorsque l'adoptant est le conjoint du parent. Or M^{me} Gas n'est pas le conjoint de M^{me} Dubois et, en l'état du droit français, ne peut pas l'être, puisqu'elles sont du même sexe.

Les deux requérantes ont donc soutenu devant notre Cour que ce refus était discriminatoire au sens de l'article 14.

La situation résultant de cette application – à mon sens correcte – de l'article 365 révèle quelques paradoxes.

Tout d'abord, si les requérantes avaient été un homme et une femme, mais non mariés, ils n'auraient pas pu davantage mener à bien un tel projet d'adoption ; il est donc difficile de dire qu'il s'agit ici d'une discrimination en fonction du sexe, ou encore moins homophobe.

Ensuite, il est exact que les deux requérantes ne pouvaient pas se marier. Certes, elles ont soutenu qu'elles ne réclamaient pas de droit au mariage homosexuel (ou de droit au mariage pour deux personnes du même sexe), mais il est clair que si la prohibition d'un tel mariage venait à tomber, et qu'elles décident de passer entre elles du PACS au mariage, l'adoption de la petite fille ne se heurterait plus à l'obstacle sur lequel se sont fondés les tribunaux français. Quant au fait que l'adoptante serait homosexuelle, il ne s'opposerait pas par principe à son projet d'adoption, comme la Cour l'a jugé dans l'affaire *E.B. c. France* (arrêt de Grande Chambre du 22 janvier 2008).

En définitive, le seul terrain sur lequel une discrimination pourrait être trouvée est l'inégalité de traitement entre deux adoptants, quel que soit leur sexe, selon que l'un est le conjoint du parent biologique et légal, et que l'autre ne l'est pas, mais cela ne concerne pas directement nos requérantes. L'arrêt n'a donc pas tort de dire au paragraphe 69 que le grief des requérantes, en tant qu'il touche à leur orientation sexuelle, n'est pas fondé, puisque l'article 365, à mon avis, ne distingue pas ses effets en fonction de l'orientation sexuelle.

J'ajoute cependant que j'ai été quelque peu ébranlé par l'opinion dissidente de mon collègue le juge Villiger. Il estime, en indiquant quelques aspects pratiques importants, que la situation à la base de la présente affaire est incompatible avec l'« intérêt supérieur de l'enfant ». Or il est constant que cette notion occupe une place importante dans la Convention internationale relative aux droits de l'enfant, notamment à l'article 3 et, spécialement en matière d'adoption, à l'article 21. Il est non moins certain que la jurisprudence de la Cour, dans diverses matières, s'appuie largement sur ce critère, depuis longtemps (voir *Johansen c. Norvège*, 7 août 1996, § 77, *Recueil des arrêts et décisions* 1996-III, et de nombreux arrêts depuis lors).

Mais je ne peux suivre mon collègue que jusqu'à un certain point. Il n'est d'abord pas évident que l'intérêt supérieur de l'enfant soit d'être adoptée par M^{me} Gas, ce qui retirerait son autorité parentale à sa mère, M^{me} Dubois. Et quand bien même cela serait vrai, il est difficile de l'affirmer sans succomber au péché de la « quatrième instance ». Fuyons cette tentation.

En réalité, il faudrait pousser le raisonnement du juge Villiger jusqu'à son terme logique, et écarter l'article 365 du code civil au profit de la Convention. Il est certes tout à fait possible de le faire, comme la Cour l'a fait dans l'affaire *Mazurek c. France* (n° 34406/97, 1^{er} février 2000, CEDH 2000-II). Mais je ne considère pas que, dans une matière comme celle-ci, qui touche à de

vrais problèmes de société, il incombe à la Cour de censurer aussi radicalement le législateur (ce que, d'ailleurs, le Conseil Constitutionnel – il est vrai au regard de la Constitution et non de la Convention – n'a pas fait : voir sa décision n° 2010-39 QPC du 6 octobre 2010).

En réalité, et ce sera ma dernière remarque, la jurisprudence admet qu'il y a des domaines dans lesquels le législateur national est mieux placé que le juge européen pour changer des institutions qui concernent la famille, les rapports entre les adultes et les enfants, la notion de mariage. Je prends un exemple. La question du mariage homosexuel est un sujet de débat démocratique, dans plusieurs pays d'Europe. C'est largement pour cette raison que la Cour, dans un arrêt récent, a préféré exercer un contrôle restreint sur les choix nationaux (*Schalk et Kopf c. Autriche*, n° 30141/04, CEDH 2010). Il me semble que la cohérence de la politique jurisprudentielle commande une démarche aussi réservée dans la présente affaire, même si l'économie de l'article 365 du code civil ne me paraît guère convaincante ... Puisse donc le législateur français ne pas se contenter de la non-violation à laquelle nous avons conclu, et décider, si je puis dire, de revoir la question.

OPINION CONCORDANTE DU JUGE SPIELMANN À LAQUELLE SE RALLIE LA JUGE BERRO-LEFÈVRE

Je me rallie à l'opinion concordante du juge Costa, car je partage son avis que le seul terrain sur lequel « une discrimination pourrait être trouvée est l'inégalité de traitement entre deux adoptants, quel que soit leur sexe, selon que l'un est le conjoint du parent biologique et légal, et que l'autre ne l'est pas ».

Je suis d'avis que, contrairement à ce qui est affirmé au paragraphe 68 de l'arrêt, en matière d'adoption par le second parent, les requérantes se trouvent dans une situation juridique comparable à celle des couples mariés.

La raison pour laquelle j'ai en définitive voté pour la non-violation de l'article 14 de la Convention combiné avec l'article 8, est que, tout bien pesé, il ne me paraît pas évident que cette différence de traitement soit contraire à la Convention.

Si la fille des requérantes ne peut avoir de lien juridique qu'avec sa mère, il me semble que cela n'empêche pas la vie familiale de se dérouler normalement. En cas de crise, la délégation de l'autorité parentale reste possible « lorsque les circonstances l'exigent » et surtout « dans l'intérêt de l'enfant », par exemple en cas de maladie ou d'accident grave frappant la mère. De plus, en cas de décès, M^{me} Gas pourra devenir la tutrice d'A. Enfin, l'adoption simple est toujours possible à la majorité de l'enfant.

Surtout, et plus fondamentalement, j'estime que cette affaire porte sur des questions pour lesquelles aucun consensus ne se dégage au niveau européen. Selon les tiers intervenants (organisations non gouvernementales spécialisées dans ce domaine et dont la compétence est reconnue), en février 2011, l'adoption par le second parent était possible dans dix des quarante-sept Etats parties à la Convention (soit 21,3 % de ces Etats : Belgique, Danemark, Finlande, Allemagne, Islande, Pays-Bas, Norvège, Espagne, Suède et Royaume-Uni).

Mais l'obstacle de l'article 365 du code civil reste problématique même s'il ne heurte pas en soi la Convention. Le statut juridique de l'enfant demeure empreint de précarité, ce qui n'est assurément pas dans l'intérêt de l'enfant, comme le démontre de manière particulièrement éloquente le juge Villiger dans son opinion dissidente.

C'est la raison pour laquelle je souscris à l'exhortation du juge Costa selon laquelle le législateur devrait revoir la question en adaptant le texte de l'article 365 du code civil aux réalités sociales contemporaines.

OPINION DISSIDENTE DU JUGE VILLIGER

(Traduction)

Je ne suis pas en mesure de souscrire à l'arrêt, qui conclut à la non-violation de l'article 14 combiné avec l'article 8 de la Convention.

Mon désaccord a trait à la perspective adoptée par l'arrêt, qui, à mon avis, n'identifie pas les éléments à prendre en compte pour déterminer si la mesure en cause était justifiée. L'arrêt se concentre sur les adultes et non sur l'enfant, qui pourtant fait partie intégrante des griefs des requérantes. A mon sens, il faudrait plutôt rechercher si la différence de traitement litigieuse est justifiée du point de vue de l'intérêt supérieur de l'enfant.

Il ressort de l'arrêt – et les intéressées l'ont bien dit lors de l'audience – que les requérantes ne souhaitent pas se marier. Ce qu'elles veulent, c'est l'obtention d'une autorité parentale partagée. Or l'article 365 du code civil français ne leur permet pas d'accéder à une adoption, parce qu'elles constituent un couple homosexuel. Une telle adoption ainsi que le partage consécutif de l'autorité parentale seraient cependant possibles dans le cas de deux adultes (dont l'un a un enfant) qui forment un couple hétérosexuel et qui contractent mariage.

Ce qui me préoccupe, c'est la situation des enfants au sein de tel ou tel type de relation. Les enfants d'un couple hétérosexuel bénéficient de la responsabilité parentale partagée si le couple est marié ; il en va autrement pour les enfants d'un couple homosexuel, car, dans ce cas, l'adoption est exclue. C'est là que réside pour moi la différence de traitement vue sous l'angle de l'article 14 combiné avec l'article 8.

Je dois préciser à ce stade que j'ai la conviction profonde – et selon moi ce point ne prête pas à controverse – que l'autorité parentale partagée correspond à l'intérêt supérieur de l'enfant.

Je ne vois pas de justification à cette différence de traitement. A mes yeux, tous les enfants doivent recevoir le même traitement. Je ne vois pas pourquoi certains enfants, et d'autres non, devraient être privés de ce qui est dans leur intérêt supérieur, à savoir l'autorité parentale partagée.

En effet, qu'y peuvent les enfants s'ils sont nés d'un parent membre d'un couple homosexuel et non hétérosexuel ? Pourquoi l'enfant devrait-il pâtir de la situation des parents ? Comme la Cour l'a déclaré dans l'affaire *Mazurek c. France* (n° 34406/97, § 54, CEDH 2000-II) au sujet de la situation défavorable d'un enfant adultérin :

« (...) l'enfant adultérin ne saurait se voir reprocher des faits qui ne lui sont pas imputables : il faut cependant constater que le requérant, de par son statut d'enfant adultérin, s'est trouvé pénalisé (...). »

Dire, comme en l'espèce, que cette différence de traitement est justifiée parce que le mariage jouit d'un statut particulier dans la société ne me convainc pas. Ce raisonnement peut éventuellement être justifié du point de vue du législateur lorsqu'il s'agit de faire la distinction entre le mariage et d'autres formes de vie commune. Cependant, cela ne constitue pas l'unique perspective dans la mise en balance des différents intérêts protégés par les articles 14 et 8. En effet, la position de la société ne devrait même pas représenter le principal point de vue (et encore moins le seul, comme dans le présent arrêt). La situation de l'enfant ne devrait-elle pas être tout aussi importante ? Justifier la discrimination vis-à-vis des enfants en soulignant que le mariage confère un statut particulier aux adultes qui s'y engagent est à mon avis insuffisant dans cet exercice de mise en balance.

En fait, l'origine du problème en l'espèce semble être l'interdiction générale visant le partage de l'autorité parentale à l'égard des enfants du parent membre d'un couple homosexuel. C'est le point faible de toute législation qui régit un ensemble de situations sur la base d'une seule norme. Ces législations générales engendrent immédiatement des problèmes de proportionnalité, en particulier – et j'insiste sur ce point – dans les affaires ayant trait à la vie familiale.

La Cour a été confrontée à ce type de législation générale sur le terrain de l'article 8 de la Convention, notamment dans des affaires dirigées contre l'Allemagne, où, dans certaines circonstances, la loi empêchait tous les pères d'avoir des contacts avec leurs enfants. Dans ces affaires, la Cour a estimé que la législation était rigide au point d'être disproportionnée et que, dans l'intérêt supérieur de l'enfant, il convenait plutôt que le juge statuât au cas par cas (*Zaunegger c. Allemagne*, n° 22028/04, 3 décembre 2009, *Anayo c. Allemagne*, n° 20578/07, 21 décembre 2010).

Concernant l'espèce, je ne prétends nullement que les requérantes devraient être autorisées à se

marier, ce que de toute façon elles ne souhaitent pas. Je ne me prononce pas non plus sur les questions d'adoption. J'attire simplement l'attention sur une discrimination qui lèse l'intérêt supérieur de l'enfant.

Dans l'intérêt supérieur de l'enfant né dans le cadre d'une relation homosexuelle, je pense que l'intéressé doit recevoir le meilleur des traitements offerts aux enfants nés dans le cadre d'une relation hétérosexuelle, à savoir l'autorité parentale partagée.

Pour ces raisons, je conclus que dans cette affaire seule une justification insuffisante a été fournie en ce qui concerne la discrimination en cause. Dès lors, il y a eu à mon sens violation de l'article 14 de la Convention combiné avec l'article 8.

ARRÊT GASSET DUBOIS c. FRANCE

ARRÊT GASSET DUBOIS c. FRANCE

ARRÊT GASSET DUBOIS c. FRANCE – OPINIONS SÉPARÉES

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66. D'emblee, la Cour rappelle qu'elle a deja enonce, dans le cadre de l'examen de l'affaire Schalk et Kopf precitee, que l'article 12 de la Convention n'impose pas aux gouvernements des Etats parties l'obligation d'ouvrir le mariage a un couple homosexuel. Le droit au mariage homosexuel ne peut pas non plus se deduire de l'article 14 combine avec l'article 8. De plus, elle a estime que lorsque les Etats decident d'offrir aux couples homosexuels un autre mode de reconnaissance juridique, ils beneficent d'une certaine marge d'appréciation pour decider de la nature exacte du statut

66. On the outset, the Court recalls that it has already enunciated, as part of the consideration of the case Schalk and Kopf cited above, that Article 12 of the Convention does not require the governments of States Parties the obligation open marriage has a gay couple. The right to gay marriage can not be deduced from Article 14 in conjunction with Article 8. Moreover, she believes that when states decide to offer gay couples another mode of legal recognition, they enjoy a certain margin of appreciation in deciding on the exact nature of the statute confers.

67. The Court notes that in the present case, the applicants state does not seek access to marriage, but found they believed in a similar situation, they allege a discriminatory distinction.

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COURT (PLENARY)

CASE OF JOHNSTON AND OTHERS v. IRELAND

(Application no. 9697/82)

JUDGMENT

STRASBOURG

18 December 1986

In the case of **Johnston and Others***

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court and composed of the following judges:

Mr. R. RYSSDAL, *President*,
 Mr. J. CREMONA,
 Mr. Thór VILHJÁLMSSON,
 Mr. G. LAGERGREN,
 Mr. F. GÖLCÜKLÜ,
 Mr. F. MATSCHER,
 Mr. J. PINHEIRO FARINHA,
 Mr. L.-E. PETTITI,
 Mr. B. WALSH,
 Sir Vincent EVANS,
 Mr. R. MACDONALD,
 Mr. C. RUSSO,
 Mr. R. BERNHARDT,
 Mr. J. GERSING,
 Mr. A. SPIELMANN,
 Mr. J. DE MEYER,
 Mr. J.A. CARRILLO SALCEDO,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,
 Having deliberated in private on 30 June, 1 July and 27 November 1986,
 Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 21 May 1985, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 9697/82) against **Ireland** lodged with the Commission in 1982 under Article 25 (art. 25) by Roy H.W. **Johnston**, an Irish citizen, Janice Williams-Johnston, a British citizen, and Nessa Williams-Johnston, their daughter, an Irish citizen.

2. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby **Ireland** recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The request sought a decision from the Court as to the existence of violations of Articles 8, 9, 12 and 13 (art. 8, art. 9, art. 12, (art. 13) and of Article 14 (taken in conjunction with Articles 8 and 12 (art. 14+8, art. 14+12)).

3. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, Roy **Johnston** and Janice Williams-Johnston stated that they wished to take part in the proceedings pending before the Court, adding that their declaration was to be construed as including their daughter as the third applicant; they also designated the lawyers who would represent them (Rule 30). The Government of the United Kingdom of Great Britain and Northern **Ireland**, having been informed by the Registrar of their right to intervene (Article 48, paragraph (b) (art. 48-b), of the Convention and Rule 33 § 3 (b)), did not indicate any intention of so doing.

4. The Chamber of seven judges to be constituted included, as ex officio members, Mr. B. Walsh, the elected judge of Irish nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 28 June 1985, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. W. Ganshof van der Meersch, Mr. J. Cremona, Mr. G. Lagergren, Mr. F. Gölcüklü and Mr. R. Macdonald (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

5. Mr. Ryssdal, who had assumed the office of President of the Chamber (Rule 21 § 5), consulted, through the Registrar, the Agent of the Irish Government ("the Government"), the

Commission's Delegate and the applicants' representative on the necessity for a written procedure (Rule 37 § 1). Thereafter, in accordance with the Orders and directions of the President of the Chamber, the following documents were lodged at the registry:

- on 31 October 1985, applicants' memorandum setting out their claim under Article 50 (art. 50) of the Convention;

- on 28 November 1985, memorial of the Government and memorial of the applicants.

By letter of 31 January 1986, the Secretary to the Commission informed the Registrar that the Delegate would present his observations at the hearing.

6. On 24 January 1986, the Chamber decided under Rule 50 to relinquish jurisdiction forthwith in favour of the plenary Court.

7. After consulting, through the Registrar, the Agent of the Government, the Commission's Delegate and the applicants' representative, the President directed on 30 January that the oral proceedings should open on 23 June 1986.

8. The hearings were held in public at the Human Rights Building, Strasbourg, on 23 and 24 June 1986. Immediately before they opened, the Court had held a preparatory meeting. There appeared before the Court:

- for the Government

Mrs. J. LIDDY, Deputy Legal Adviser,
Department of Foreign Affairs, *Agent*,

Mr. D. GLEESON, Senior Counsel,

Mr. J. O'REILLY, Counsel, *Counsel*,

Mr. M. RUSSELL, Office of the Attorney General,

Mr. P. SMYTH, Department of Foreign Affairs, *Advisers*;

- for the Commission

Mr. Gaukur JÖRUNDSSON, *Delegate*;

- for the applicants

Senator M. ROBINSON, Senior Counsel,

Dr. W. DUNCAN, Lecturer in Law, *Counsel*,

Mrs. M. O'LEARY, Solicitor.

The Court heard addresses by Mr. Gleeson and Mr. O'Reilly for the Government, by Mr. Gaukur Jörundsson for the Commission and by Senator Robinson and Dr. Duncan for the applicants, as well as replies to questions put by the Court and one of its members.

9. Various documents were filed by the Government during the hearings and, at the request of the President of the Court, by the Commission on 16 June and 30 July 1986.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

10. The first applicant is Roy H.W. **Johnston**, who was born in 1930 and is a scientific research and development manager. He resides at Rathmines, Dublin, with the second applicant, Janice Williams-Johnston, who was born in 1938; she is a school-teacher by profession and used to work as director of a play-group in Dublin, but has been unemployed since 1985. The third applicant is their daughter, Nessa Doreen Williams-Johnston, who was born in 1978.

11. The first applicant married a Miss M in 1952 in a Church of **Ireland** ceremony. Three children were born of this marriage, in 1956, 1959 and 1965.

In 1965, it became clear to both parties that the marriage had irretrievably broken down and they decided to live separately at different levels in the family house. Several years later both of them, with the other's knowledge and consent, formed relationships and began to live with third parties. By mutual agreement, the two couples resided in self-contained flats in the house until 1976, when Roy **Johnston's** wife moved elsewhere.

In 1978, the second applicant, with whom Roy **Johnston** had been living since 1971, gave birth to Nessa. He consented to his name being included in the Register of Births as the father (see paragraph

26 below).

12. Under the Constitution of **Ireland** (see paragraphs 16-17 below), the first applicant is unable to obtain, in **Ireland**, a dissolution of his marriage to enable him to marry the second applicant. He has taken the following steps to regularise his relationship with her and with his wife and to make proper provision for his dependents.

(a) With his wife's consent, he has consulted solicitors in Dublin and in London as to the possibility of obtaining a dissolution of the marriage outside **Ireland**. His London solicitors advised that, in the absence of residence within the jurisdiction of the English courts, he would not be able to do so in England, and the matter has therefore not been pursued (see also paragraphs 19-21 below).

(b) On 19 September 1982, he concluded a formal separation agreement with his wife, recording an agreement implemented some years earlier. She received a lump-sum of IR£8,800 and provision was made for maintenance of the remaining dependent child of the marriage. The parties also mutually renounced their succession rights over each other's estates.

(c) He has made a will leaving his house to the second applicant for life with remainder over to his four children as tenants in common, one half of the residue of his estate to the second applicant, and the other half to his four children in equal shares.

(d) He has supported the third applicant throughout her life and has acted in all respects as a caring father.

(e) He contributed towards the maintenance of his wife until the conclusion of the aforementioned separation agreement and has supported the three children of his marriage during their dependency.

(f) The second applicant has been nominated as beneficiary under the pension scheme attached to his employment.

(g) He has taken out health insurance in the names of the second and third applicants, as members of his family.

13. The second applicant, who is largely dependent on the first applicant for her support and maintenance, is concerned at the lack of security provided by her present legal status, in particular the absence of any legal right to be maintained by him and of any potential rights of succession in the event of intestacy (see also paragraph 23 below). As is permitted by law, she has adopted the first applicant's surname, which she uses amongst friends and neighbours, but for business purposes continues to use the name Williams. According to her, she has felt inhibited about telling employers of her domestic circumstances and although she would like to become an Irish citizen by naturalisation, she has been reluctant to make an application, not wishing to put those circumstances in issue.

14. The third applicant has, under Irish law, the legal situation of an illegitimate child and her parents are concerned at the lack of any means by which she can, even with their consent, be recognised as their child with full rights of support and succession in relation to them (see paragraphs 30-32 below). They are also concerned about the possibility of a stigma attaching to her by virtue of her legal situation, especially when she is attending school.

15. The first and second applicants state that although they have not practised any formal religion for some time, they have recently joined the Religious Society of Friends (the Quakers) in Dublin. This decision was influenced in part by their concern that the third applicant receives a Christian upbringing.

II. RELEVANT DOMESTIC LAW

A. Constitutional provisions relating to the family

16. The Constitution of **Ireland**, which came into force in 1937, includes the following provisions:

"40.3.1^o The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

40.3.2^o The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

41.1.1^o The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

41.1.2^o The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

(...)

41.3.1^o The State pledges itself to guard with special care the institution of Marriage, on which the family is founded, and to protect it against attack.

41.3.2^o No law shall be enacted providing for the grant of a dissolution of marriage.

(...)

42.1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

(...)

42.5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

17. As a result of Article 41.3.2^o of the Constitution, divorce in the sense of dissolution of a marriage (*divorce a vinculo matrimonii*) is not available in **Ireland**. However, spouses may be relieved of the duty of cohabiting either by a legally binding deed of separation concluded between them or by a court decree of judicial separation (also known as a *divorce a mensa et thoro*); such a decree, which is obtainable only on proof of commission of adultery, cruelty or unnatural offences, does not dissolve the marriage. In the remainder of the present judgment, the word "divorce" denotes a *divorce a vinculo matrimonii*.

It is also possible to obtain on various grounds a decree of nullity, that is a declaration by the High Court that a marriage was invalid and therefore null and void *ab initio*. A marriage may also be "annulled" by an ecclesiastical tribunal, but this does not affect the civil status of the parties.

18. The Irish courts have consistently held that the "Family" that is afforded protection by Article 41 of the Constitution is the family based on marriage. Thus, in *The State (Nicolaou) v. An Bord Uchtála The Adoption Board* 1966 Irish Reports 567, the Supreme Court said:

"It is quite clear from the provisions of Article 41, and in particular section 3 thereof, that the family referred to in this Article is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the law for the time being in force in the State. While it is quite true that unmarried persons cohabiting together and the children of their union may often be referred to as a family and have many, if not all, of the outward appearances of a family, and may indeed for the purposes of a particular law be regarded as such, nevertheless as far as Article 41 is concerned the guarantees therein contained are confined to families based upon marriage."

The Supreme Court has, however, held that an illegitimate child has unenumerated natural rights (as distinct from rights conferred by law) which will be protected under Article 40.3 of the Constitution, such as the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being, as well as the same natural rights under the Constitution as a legitimate child to "religious and moral, intellectual, physical and social education" (*G v. An Bord Uchtála* 1980 Irish Reports 32).

B. Recognition of foreign divorces

19. Article 41.3.3^o of the Constitution provides:

"No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage dissolved."

20. A series of judicial decisions has established that the foregoing provision does not prevent the recognition by Irish courts, under the general Irish rules of private international law, of certain decrees of divorce obtained, even by Irish nationals, in another State. Such recognition used to be

granted only if the parties to the marriage were domiciled within the jurisdiction of the foreign court at the time of the relevant proceedings (*Re Caffin Deceased: Bank of Ireland v. Caffin* 1971 Irish Reports 123; *Gaffney v. Gaffney* 1975 Irish Reports 133; however, since 2 October 1986 a divorce will be recognised if granted in the country where either spouse is domiciled (Domicile and Recognition of Foreign Divorces Act 1986). To be regarded as domiciled in a foreign State, a person must not only be resident there but also have the intention of remaining there permanently and have lost the *animus revertendi*. Moreover, the foreign divorce will not be recognised if domicile has been fraudulently invoked before the foreign court for the purpose of obtaining the decree.

21. If notice is served for a civil marriage before a Registrar of Births, Marriages and Deaths in **Ireland** and he is aware that either of the parties has been divorced abroad, he must, under the regulations in force, refer the matter to the Registrar-General. The latter will seek legal advice as to whether on the facts of the case the divorce would be recognised as effective to dissolve the marriage under Irish law and as to whether the intended marriage can consequently be permitted.

C. Legal status of persons in the situation of the first and second applicants

1. Marriage

22. Persons who, like the first and second applicants, are living together in a stable relationship after the breakdown of the marriage of one of them are unable, during the lifetime of the other party to that marriage, to marry each other in **Ireland** and are not recognised there as a family for the purposes of Article 41 of the Constitution (see paragraphs 17 and 18 above).

2. Maintenance and succession

23. Such persons, unlike a married couple, have no legal duty to support or maintain one another and no mutual statutory rights of succession. However, there is no impediment under Irish law preventing them from living together and supporting each other and, in particular, from making wills or dispositions *inter vivos* in each other's favour. They can also enter into mutual maintenance agreements, although the Government and the applicants expressed different views as to whether these might be unenforceable as contrary to public policy.

In general, the married member of the couple remains, at least in theory, under a continuing legal obligation to maintain his or her spouse. In addition, testamentary dispositions by that member may be subject to the rights of his or her spouse or legitimate children under the Succession Act 1965.

3. Miscellaneous

- 24. As compared with married couples, persons in the situation of the first and second applicants:
 - (a) have no access, in the event of difficulties arising between them, to the system of barring orders instituted to provide remedies in respect of violence within the family (Family Law (Maintenance of Spouses and Children) Act 1976, as amended by the Family Law (Protection of Spouses and Children) Act 1981); they can, however, obtain analogous relief by seeking a court injunction or declaration;
 - (b) do not enjoy any of the rights conferred by the Family Home Protection Act 1976 in relation to the family home and its contents, notably the prohibition on sale by one spouse without the other's consent and the exemption from stamp duty and Land Registry fees in the event of transfer of title between them;
 - (c) as regards transfers of property between them, are less favourably treated for the purposes of capital acquisition tax;
 - (d) enjoy different rights under the social welfare code, notably the benefits available to deserted wives;
 - (e) are unable jointly to adopt a child (see also paragraph 29 below).

D. Legal situation of illegitimate children

1. Affiliation

25. In Irish law, the principle *mater semper certa est* applies: the maternal affiliation of an

illegitimate child, such as the third applicant, is established by the fact of birth, without any requirement of voluntary or judicial recognition.

The Illegitimate Children (Affiliation Orders) Act 1930, as amended by the Family Law (Maintenance of Spouses and Children) Act 1976 and the Courts Act 1983, provides procedures whereby the District Court or the Circuit Court may make an "affiliation order" against the putative father of a child directing him to make periodic payments in respect of the latter's maintenance and also whereby the court may approve a lump-sum maintenance agreement between a person who admits he is the father of an illegitimate child and the latter's mother. Neither of these procedures establishes the child's paternal affiliation for all purposes, any finding of parentage being effective solely for the purposes of the proceedings in question and binding only on the parties.

26. Under the Registration of Births and Deaths (**Ireland**) Act 1863, as amended by the Births and Deaths Registration (**Ireland**) Act 1880, the Registrar may enter in the register the name of a person as the father of an illegitimate child if he is so requested jointly by that person and the mother. The act of registration does not, however, establish paternal affiliation.

2. Guardianship

27. The mother of an illegitimate child is his sole guardian as from the moment of his birth (section 6(4) of the Guardianship of Infants Act 1964) and has the same rights of guardianship as are jointly enjoyed by the parents of a legitimate child. The natural father can apply to the court under section 11(4) of the same Act regarding the child's custody and the right of access thereto by either parent; however, he cannot seek the court's directions on other matters affecting the child's welfare nor is there any means whereby he can be established as guardian of the child jointly with the mother, even if she consents.

3. Legitimation

28. An illegitimate child may be legitimated by the subsequent marriage of his parents, provided that, unlike the first and second applicants, they could have been lawfully married to one another at the time of the child's birth or at some time during the preceding ten months (section 1(1) and (2) of the Legitimacy Act 1931).

4. Adoption

29. Under the Adoption Act 1952, as amended, an adoption order can only be made in favour of a married couple living together, a widow, a widower, or the mother or natural father or a relative of the child.

5. Maintenance

30. The effect of the Illegitimate Children (Affiliation Orders) Act 1930, as amended by the Family Law (Maintenance of Spouses and Children) Act 1976, is to impose on each of the parents of an illegitimate child an equal obligation to maintain him. This obligation cannot be enforced against the father until an "affiliation order" has been made against him (see paragraph 25 above).

6. Succession

31. The devolution of estates on intestacy is governed by the Succession Act 1965 which provides, basically, that the estate is to be distributed in specified proportions between any spouse or "issue" who may survive the deceased. In *O'B v. S* 1984 Irish Reports 316, the Supreme Court held that the word "issue" did not include children who were not the issue of a lawful marriage and that accordingly an illegitimate child had, under the Act, no right to inheritance on the intestacy of his natural father. Whilst also holding that the resultant discrimination in favour of legitimate children was justifiable by reason of sections 1 and 3 of Article 41 of the Constitution (see paragraph 16 above), the Supreme Court stated that the decision to change the existing rules of intestate succession and the extent to which they were to be changed were primarily matters for the legislature. The relevant rules in the Act formed part of a statute designed to strengthen the protection of the family in accordance with Article 41, an Article which created not merely a State interest but a State

obligation to safeguard the family; accordingly, the said discrimination was not necessarily unjust, unreasonable or arbitrary and the said rules were not invalid having regard to the provisions of the Constitution.

An illegitimate child may, on the other hand, in certain circumstances have a right to inheritance on the intestacy of his mother. A special rule (section 9(1) of the Legitimacy Act 1931) lays down that where the mother of an illegitimate child dies intestate leaving no legitimate issue, the child is entitled to take any interest in his mother's estate to which he would have been entitled if he had been born legitimate.

32. As regards testate succession, section 117 of the Succession Act 1965 empowers a court to make provision for a child for whom it considers that the testator has failed in his moral duty to make proper provision. An illegitimate child has no claim against his father's estate under this section, but may be able to claim against his mother's estate provided that she leaves no legitimate issue.

33. An illegitimate child inheriting property from his parents is potentially liable to pay capital acquisition tax on a basis less favourable than a child born in wedlock.

E. Law reform proposals

1. Divorce

34. In 1983, a Joint Committee of the Dáil (Chamber of Deputies) and the Seanad (Senate) was established, *inter alia*, to examine the problems which follow the breakdown of marriage. In its report of 1985, it referred to figures suggesting that approximately 6 per cent of marriages in **Ireland** had broken down to date, but noted the absence of accurate statistics. The Committee considered that the parties to stable relationships formed after marriage breakdown and the children of such relationships currently lacked adequate legal status and protection; however, it expressed no view on whether divorce legislation was at present necessary or desirable.

In a national referendum held on 26 June 1986, a majority voted against an amendment of the Constitution, which would have permitted legislation providing for divorce.

2. Illegitimacy

35. In September 1982, the Irish Law Reform Commission published a Report on Illegitimacy. Its basic recommendation was that legislation should remove the concept of illegitimacy from the law and equalise the rights of children born outside marriage with those of children born within marriage.

After considering the report, the Government announced in October 1983 that they had decided that the law should be reformed, and that reform should be concentrated on the elimination of discrimination against persons born outside marriage and on the rights and obligations of their fathers. However, the Government decided not to accept a proposal by the Law Reform Commission that the father be given automatic rights of guardianship in relation to a child so born.

36. In May 1985, the Minister of Justice laid before both Houses of Parliament a Memorandum entitled "The Status of Children", indicating the scope and nature of the main changes proposed by the Government. On 9 May 1986, the Status of Children Bill 1986, a draft of which had been annexed to the aforesaid Memorandum, was introduced into the Seanad. If enacted in its present form, the Bill - which has the stated purpose of removing as far as possible provisions in existing law which discriminate against children born outside marriage - would have, *inter alia*, the following effects.

(a) Where the name of a person was entered on the register of births as the father of a child born outside marriage, he would be presumed to be the father unless the contrary was shown (cf. paragraph 26 above).

(b) The father of a child born outside marriage would be able to seek a court order making him guardian of the child jointly with the mother (cf. paragraph 27 above). In that event, they would jointly have all the parental rights and responsibilities that are enjoyed and borne by married parents.

(c) The proviso qualifying the possibility of legitimation by subsequent marriage would be removed by the repeal of section 1(2) of the Legitimacy Act 1931 (see paragraph 28 above).

(d) The legal provisions governing the obligation of both of the parents of a child born outside marriage to maintain him would be similar to those governing the corresponding obligation of married parents (see paragraph 30 above).

(e) For succession purposes, no distinction would be made between persons based on whether or not their parents were married to each other. Thus, a child born outside marriage would be entitled to share on the intestacy of either parent and would have the same rights in relation to the estate of a parent who died leaving a will as would a child of a family based on marriage (cf. paragraphs 31 and 32 above).

The Explanatory Memorandum to the Bill states that any fiscal changes necessitated by the proposed new measures would be a matter for separate legislation promoted by the Minister for Finance.

3. Adoption

37. Work is also in progress on legislation reforming the law of adoption, following the publication in July 1984 of the Report of the Review Committee on Adoption Services. That Committee recommended that, as at present (see paragraph 29 above), unmarried couples should not be eligible to adopt jointly even their own natural children.

PROCEEDINGS BEFORE THE COMMISSION

38. The application of Roy **Johnston**, Janice Williams-Johnston and Nessa Williams-Johnston (no. 9697/82) was lodged with the Commission on 16 February 1982. The applicants complained of the absence of provision in **Ireland** for divorce and for recognition of the family life of persons who, after the breakdown of the marriage of one of them, are living in a family relationship outside marriage. They alleged that on this account they had been victims of violations of Articles 8, 9, 12 and 13 (art. 8, art. 9, art. 12, art. 13) of the Convention and also of Article 14 (taken in conjunction with Articles 8 and 12) (art. 14+8, art. 14+12).

39. The Commission declared the application admissible on 7 October 1983.

In its report adopted on 5 March 1985 (Article 31) (art. 31), the Commission expressed the opinion that:

- there was no breach of Articles 8 and 12 (art. 8, art. 12) in that the right to divorce and subsequently to re-marry was not guaranteed by the Convention (unanimously);
- there was no breach of Article 8 (art. 8) in that Irish law did not confer a recognised family status on the first and second applicants (twelve votes to one);
- there was a breach of Article 8 (art. 8) in that the legal regime concerning the status of the third applicant under Irish law failed to respect the family life of all three applicants (unanimously);
- there was no breach of the first applicant's rights under Article 9 (art. 9) (unanimously);
- there was no breach of Article 14 in conjunction with Articles 8 and 12 (art. 14+8, art. 14+12) in that the first and second applicants had not been discriminated against by Irish law (twelve votes to one);
- it was not necessary to examine the third applicant's separate complaint of discrimination;
- there was no breach of Article 13 (art. 13) (unanimously).

The full text of the Commission's opinion is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS MADE TO THE COURT

40. The applicants invoked before the Court the same Articles (art. 8, art. 9, art. 12) as they did before the Commission, other than Article 13 (art. 13).

At the hearings on 23-24 June 1986, the Government maintained in substance the submissions in their memorial of 28 November 1985, whereby they had requested the Court:

"(1) With regard to the preliminary submission: to decide and declare that (a) the applicants cannot claim to be

victims within the meaning of Article 25 (art. 25) of the Convention; (b) the applicants have not exhausted their domestic remedies.

(2) With regard to Articles 8 and 12 (art. 8, art. 12): to decide and declare that there has been no breach of Articles 8 and 12 (art. 8, art. 12) of the Convention in regard to the claim of the first and second-named applicants of a right to divorce and re-marry.

(3) With regard to Article 8 (art. 8): to decide and declare that there has been no breach of Article 8 (art. 8) of the Convention in respect of the family life of all three applicants or any of them.

(4) With regard to Article 9 (art. 9): to decide and declare that there has been no breach of Article 9 (art. 9) of the Convention.

(5) With regard to Article 14 in conjunction with Articles 8 and 12 (art. 14+8, art. 14+12): to decide and declare that there has been no breach of Article 14 read in conjunction with Article 8 and Article 12 (art. 14+8, art. 14+12) of the Convention.

(6) With regard to Article 13 (art. 13) of the Convention: to decide and declare that there has been no breach of Article 13 (art. 13) of the Convention.

(7) With regard to Article 50 (art. 50): (i) to decide and declare that an award of compensation is not justified or appropriate; (ii) alternatively, if and in so far as a breach of any Article of the Convention is found, to decide and declare that a finding of violation in itself constitutes sufficient just satisfaction."

The Government noted, however, that the claim of violation of Article 13 (art. 13) had been abandoned by the applicants; they also made some additional submissions regarding the admissibility of certain of the applicants' complaints (see paragraph 47 below).

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY PLEAS

A. Whether the applicants are entitled to claim to be "victims"

41. The Government pleaded that the tranquil domestic circumstances of the applicants showed that they were not at risk of being directly affected by those aspects of Irish law of which they complained. In a dispute which was manufactured or contrived, they had raised problems that were purely hypothetical and could therefore not properly claim to be "victims", within the meaning of Article 25 § 1 (art. 25-1) of the Convention, which, so far as is relevant, provides:

"The Commission may receive petitions ... from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention ..."

42. The Government had already - unsuccessfully - made this plea at the admissibility stage before the Commission; accordingly, they are not estopped from raising it before the Court (see, amongst various authorities, the Campbell and Fell judgment of 28 June 1984, Series A no. 80, p. 31, § 57).

However, the Court considers that the plea cannot be sustained. Article 25 (art. 25) entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it (see the Marckx judgment of 13 June 1979, Series A no. 31, p. 13, § 27). And, in fact, the applicants raise objections to the effects of the law on their own lives.

Furthermore, the question of the existence or absence of detriment is not a matter for Article 25 (art. 25) which, in its use of the word "victim", denotes "the person directly affected by the act or omission which is in issue" (see, amongst various authorities, the de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 20, § 41).

The applicants are therefore entitled in the present case to claim to be victims of the breaches which they allege.

43. The Court does not consider that it should accede to the Government's invitation to defer judgment until after the enactment of the Status of Children Bill, which is designed to modify the relevant Irish law in a number of respects (see paragraph 36 above). On several occasions the Court

has proceeded with its examination of a case notwithstanding the existence of proposed or intervening reforms (see, for example, the *Marckx*, the *Airey* and the *Silver and Others* cases, judgments of 13 June 1979, 9 October 1979 and 25 March 1983, Series A nos. 31, 32 and 61).

B. Whether the applicants have failed to exhaust domestic remedies

44. According to the Government - which had already raised a similar plea at the appropriate time before the Commission -, the constitutionality of each of the provisions of Irish law complained of by the applicants could have been tested in the Irish courts. Since, however, they had failed to exhaust such domestic remedies as they might have been advised, the Commission had erred in declaring their application admissible.

45. The only remedies which Article 26 (art. 26) of the Convention requires to be exhausted are those that relate to the breaches alleged; the existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; and it falls to the respondent State, if it pleads non-exhaustion, to establish that these various conditions are satisfied (see, amongst many authorities, the above-mentioned *de Jong, Baljet* and *van den Brink* judgment, Series A no. 77, p. 19, § 39).

46. In so far as the applicants' complaints relate to the prohibition of divorce under the Constitution of **Ireland**, no effective domestic remedy is available.

As regards the remaining issues, the Court, bearing particularly in mind the established case-law of the Irish courts (see paragraphs 18 and 31 above), does not consider that the Government have established with any degree of certainty the existence of any effective remedy.

C. Whether certain of the applicants' complaints are inadmissible on other grounds

47. At the hearings on 23-24 June 1986, the Government maintained that since the Commission's admissibility decision in the present case the applicants had advanced, before both the Commission and the Court, a number of new complaints, relative to their status under Irish law, which had not been declared admissible in that decision. In the Government's view, these complaints - which concerned the availability of barring orders, the applicability of the Family Home Protection Act 1976, rights of intestate succession as between the first and second applicants, the incidence of taxation and stamp duty, entitlement under the social welfare code and alleged discrimination in employment - were "not properly before the Court".

48. The Commission's Delegate pointed out that these matters were relied upon by the applicants as illustrations of the general complaint submitted to and declared admissible by the Commission, namely that the applicants "are placed in a position whereby it is impossible to establish a recognised family status under Irish law or to ensure that their child becomes a fully integrated member of their family".

Likewise, the Court notes that the applicants' original application to the Commission states that they "complain that, by the manner in which their family relationships are treated under law, **Ireland** is in breach of Article 8 (art. 8)...". Moreover, at the hearings before the Court the Government argued that the case presented to the Court and to which they had to respond was "a package".

In these circumstances, the matters in question do not fall outside the compass of the case brought before the Court, which compass is delimited by the Commission's admissibility decision. Besides, the Court has already found, at paragraph 46 above, that none of them is inadmissible for non-exhaustion of domestic remedies (see the *James and Others* judgment of 21 February 1986, Series A no. 98, p. 46, § 80).

II. SITUATION OF THE FIRST AND SECOND APPLICANTS

A. Inability to divorce and re-marry

1. Articles 12 and 8 (art. 12, art. 8)

49. The first and second applicants alleged that because of the impossibility under Irish law of obtaining a dissolution of Roy **Johnston**'s marriage and of his resultant inability to marry Janice Williams-Johnston, they were victims of breaches of Articles 12 and 8 (art. 8, art. 12) of the

Convention. These provisions read as follows:

Article 12 (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."

Article 8 (art. 8)

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

This allegation was contested by the Government and rejected by the Commission.

50. The applicants stated that, as regards this part of the case, the central issue was not whether the Convention guaranteed the right to divorce but rather whether the fact that they were unable to marry each other was compatible with the right to marry or re-marry and with the right to respect for family life, enshrined in Articles 12 and 8 (art. 12, art. 8).

The Court does not consider that the issues arising can be separated into watertight compartments in this way. In any society espousing the principle of monogamy, it is inconceivable that Roy **Johnston** should be able to marry as long as his marriage to Mrs. **Johnston** has not been dissolved. The second applicant, for her part, is not complaining of a general inability to marry but rather of her inability to marry the first applicant, a situation that stems precisely from the fact that he cannot obtain a divorce. Consequently, their case cannot be examined in isolation from the problem of the non-availability of divorce.

(a) Article 12 (art. 12)

51. In order to determine whether the applicants can derive a right to divorce from Article 12 (art. 12), the Court will seek to ascertain the ordinary meaning to be given to the terms of this provision in their context and in the light of its object and purpose (see the Golder judgment of 21 February 1975, Series A no. 18, p. 14, § 29, and Article 31 § 1 of the Vienna Convention of 23 May 1969 on the Law of Treaties).

52. The Court agrees with the Commission that the ordinary meaning of the words "right to marry" is clear, in the sense that they cover the formation of marital relationships but not their dissolution. Furthermore, these words are found in a context that includes an express reference to "national laws"; even if, as the applicants would have it, the prohibition on divorce is to be seen as a restriction on capacity to marry, the Court does not consider that, in a society adhering to the principle of monogamy, such a restriction can be regarded as injuring the substance of the right guaranteed by Article 12 (art. 12).

Moreover, the foregoing interpretation of Article 12 (art. 12) is consistent with its object and purpose as revealed by the travaux préparatoires. The text of Article 12 (art. 12) was based on that of Article 16 of the Universal Declaration of Human Rights, paragraph 1 of which reads:

"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."

In explaining to the Consultative Assembly why the draft of the future Article 12 (art. 12) did not include the words found in the last sentence of the above-cited paragraph, Mr. Teitgen, Rapporteur of the Committee on Legal and Administrative Questions, said:

"In mentioning the particular Article of the Universal Declaration, we have used only that part of the paragraph of the Article which affirms the right to marry and to found a family, but not the subsequent provisions of the Article concerning equal rights after marriage, since we only guarantee the right to marry." (Collected Edition of the Travaux préparatoires, vol. 1, p. 268)

In the Court's view, the travaux préparatoires disclose no intention to include in Article 12 (art. 12) any guarantee of a right to have the ties of marriage dissolved by divorce.

53. The applicants set considerable store on the social developments that have occurred since the

Convention was drafted, notably an alleged substantial increase in marriage breakdown.

It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions (see, amongst several authorities, the above-mentioned *Marckx* judgment, Series A no. 31, p. 26, § 58). However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate.

It should also be mentioned that the right to divorce is not included in Protocol No. 7 (P7) to the Convention, which was opened to signature on 22 November 1984. The opportunity was not taken to deal with this question in Article 5 of the Protocol (P7-5), which guarantees certain additional rights to spouses, notably in the event of dissolution of marriage. Indeed, paragraph 39 of the explanatory report to the Protocol states that the words "in the event of its dissolution" found in Article 5 (P7-5) "do not imply any obligation on a State to provide for dissolution of marriage or to provide any special forms of dissolution."

54. The Court thus concludes that the applicants cannot derive a right to divorce from Article 12 (art. 12). That provision is therefore inapplicable in the present case, either on its own or in conjunction with Article 14 (art. 14+12).

(b) Article 8 (art. 8)

55. The principles which emerge from the Court's case-law on Article 8 (art. 8) include the following.

(a) By guaranteeing the right to respect for family life, Article 8 (art. 8) presupposes the existence of a family (see the above-mentioned *Marckx* judgment, Series A no. 31, p. 14, § 31).

(b) Article 8 (art. 8) applies to the "family life" of the "illegitimate" family as well as to that of the "legitimate" family (*ibid.*).

(c) Although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life. However, especially as far as those positive obligations are concerned, the notion of "respect" is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see the *Abdulaziz, Cabales and Balkandali* judgment of 28 May 1985, Series A no. 94, pp. 33-34, § 67).

56. In the present case, it is clear that the applicants, the first and second of whom have lived together for some fifteen years (see paragraph 11 above), constitute a "family" for the purposes of Article 8 (art. 8). They are thus entitled to its protection, notwithstanding the fact that their relationship exists outside marriage (see paragraph 55 (b) above).

The question that arises, as regards this part of the case, is whether an effective "respect" for the applicants' family life imposes on **Ireland** a positive obligation to introduce measures that would permit divorce.

57. It is true that, on this question, Article 8 (art. 8), with its reference to the somewhat vague notion of "respect" for family life, might appear to lend itself more readily to an evolutive interpretation than does Article 12 (art. 12). Nevertheless, the Convention must be read as a whole and the Court does not consider that a right to divorce, which it has found to be excluded from Article 12 (art. 12) (see paragraph 54 above), can, with consistency, be derived from Article 8 (art. 8) a provision of more general purpose and scope. The Court is not oblivious to the plight of the first and second applicants. However, it is of the opinion that, although the protection of private or family life may sometimes necessitate means whereby spouses can be relieved from the duty to live together (see the above-mentioned *Airey* judgment, Series A no. 32, p. 17, § 33), the engagements undertaken by **Ireland** under Article 8 (art. 8) cannot be regarded as extending to an obligation on its part to introduce measures permitting the divorce and the re-marriage which the applicants seek.

58. On this point, there is therefore no failure to respect the family life of the first and second applicants.

2. Article 14, taken in conjunction with Article 8 (art. 14+8)

59. The first and second applicants complained of the fact that whereas Roy **Johnston** was unable to obtain a divorce in order subsequently to marry Janice Williams-Johnston, other persons resident in **Ireland** and having the necessary means could obtain abroad a divorce which would be recognised de jure or de facto in **Ireland** (see paragraphs 19-21 above). They alleged that on this account they had been victims of discrimination, on the ground of financial means, in the enjoyment of the rights set forth in Article 8 (art. 8), contrary to Article 14 (art. 14), which reads as follows:

"The enjoyment of the rights and freedoms set forth in the 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."

This allegation, contested by the Government, was rejected by the Commission.

60. Article 14 (art. 14) safeguards persons who are "placed in analogous situations" against discriminatory differences of treatment in the exercise of the rights and freedoms recognised by the Convention (see, as the most recent authority, the Lithgow and **Others** judgment of 8 July 1986, Series A no. 102, p. 66, § 177).

The Court notes that under the general Irish rules of private international law foreign divorces will be recognised in **Ireland** only if they have been obtained by persons domiciled abroad (see paragraph 20 above). It does not find it to have been established that these rules are departed from in practice. In its view, the situations of such persons and of the first and second applicants cannot be regarded as analogous.

61. There is, accordingly, no discrimination, within the meaning of Article 14 (art. 14).

3. Article 9 (art. 9)

62. The first applicant also alleged that his inability to live with the second applicant other than in an extra-marital relationship was contrary to his conscience and that on that account he was the victim of a violation of Article 9 (art. 9) of the Convention, which guarantees to everyone the "right to freedom of thought, conscience and religion".

The applicant supplemented this allegation, which was contested by the Government and rejected by the Commission, by a claim of discrimination in relation to conscience and religion, contrary to Article 14 taken in conjunction with Article 9 (art. 14+9).

63. It is clear that Roy **Johnston**'s freedom to have and manifest his convictions is not in issue. His complaint derives, in essence, from the non-availability of divorce under Irish law, a matter to which, in the Court's view, Article 9 (art. 9) cannot, in its ordinary meaning, be taken to extend.

Accordingly, that provision, and hence Article 14 (art. 14) also, are not applicable.

4. Conclusion

64. The Court thus concludes that the complaints related to the inability to divorce and re-marry are not well-founded.

B. Matters other than the inability to divorce and re-marry

65. The first and second applicants further alleged that, in violation of Article 8 (art. 8), there had been an interference with, or lack of respect for, their family life on account of their status under Irish law. They cited, by way of illustration, the following matters:

(a) their non-recognition as a "family" for the purposes of Article 41 of the Constitution of **Ireland** (see paragraph 18 above);

(b) the absence of mutual maintenance obligations and mutual succession rights (see paragraph 23 above);

(c) their treatment for the purposes of capital acquisition tax, stamp duty and Land Registry fees (see paragraph 24 (b) and (c) above);

(d) the non-availability of the protection of barring orders (see paragraph 24 (a) above);

(e) the non-applicability of the Family Home Protection Act 1976 (see paragraph 24 (b) above);

(f) the differences, in the social welfare code, between married and unmarried persons (see paragraph 24 (d) above).

The Government contested this allegation. The Commission, for its part, considered that the fact

that Irish law did not confer a recognised family status on the first and second applicants did not give rise to a breach of Article 8 (art. 8).

66. In the Court's view, there has been no interference by the public authorities with the family life of the first and second applicants: **Ireland** has done nothing to impede or prevent them from living together and continuing to do so and, indeed, they have been able to take a number of steps to regularise their situation as best they could (see paragraph 12 above). Accordingly, the sole question that arises for decision is whether an effective "respect" for their family life imposes on **Ireland** a positive obligation to improve their status (see paragraph 55 (c) above).

67. The Court does not find it necessary to examine, item by item, the various aspects of Irish law relied on by the applicants and listed in paragraph 65 above. They were put forward as illustrations to support a general complaint concerning status (see paragraph 48 above) and, whilst bearing them in mind, the Court will concentrate on this broader issue.

68. It is true that certain legislative provisions designed to support family life are not available to the first and second applicants. However, like the Commission, the Court does not consider that it is possible to derive from Article 8 (art. 8) an obligation on the part of **Ireland** to establish for unmarried couples a status analogous to that of married couples.

The applicants did, in fact, make it clear that their complaints concerned only couples who, like themselves, wished to marry but were legally incapable of marrying and not those who had chosen of their own volition to live together outside marriage. Nevertheless, even if it is circumscribed in this way, the applicants' claim cannot, in the Court's opinion, be accepted. A number of the matters complained of are but consequences of the inability to obtain a dissolution of Roy **Johnston's** marriage enabling him to marry Janice Williams-Johnston, a situation which the Court has found not to be incompatible with the Convention. As for the other matters, Article 8 (art. 8) cannot be interpreted as imposing an obligation to establish a special regime for a particular category of unmarried couples.

69. There is accordingly no violation of Article 8 (art. 8) under this head.

III. SITUATION OF THE THIRD APPLICANT

A. Article 8 (art. 8)

70. The applicants alleged that, in violation of Article 8 (art. 8), there had been an interference with, or lack of respect for, their family life on account of the third applicant's situation under Irish law. In addition to the points mentioned at paragraphs (d) and (e) of paragraph 65 above, they cited, by way of illustration, the following matters:

(a) the position regarding the third applicant's paternal affiliation (see paragraphs 25 and 26 above);

(b) the impossibility for the first applicant to be appointed joint guardian of the third applicant and his lack of parental rights in relation to her (see paragraph 27 above);

(c) the impossibility for the third applicant to be legitimated even by her parents' subsequent marriage (see paragraph 28 above);

(d) the impossibility for the third applicant to be jointly adopted by her parents (see paragraph 29 above);

(e) the third applicant's succession rights vis-à-vis her parents (see paragraphs 31 and 32 above);

(f) the third applicant's treatment for the purposes of capital acquisition tax (see paragraph 33 above) and the repercussions on her of her parents' own treatment for fiscal purposes (see paragraph 24 (b) and (c) above).

The Government contested this allegation. The Commission, on the other hand, expressed the opinion that there had been a breach of Article 8 (art. 8), in that the legal regime concerning the status of the third applicant under Irish law failed to respect the family life of all three applicants.

71. Roy **Johnston** and Janice Williams-Johnston have been able to take a number of steps to integrate their daughter in the family (see paragraph 12 above). However, the question arises as to whether an effective "respect" for family life imposes on **Ireland** a positive obligation to improve her legal situation (see paragraph 55 (c) above).

72. Of particular relevance to this part of the case, in addition to the principles recalled in

paragraph 55 above, are the following passages from the Court's case-law:

"... when the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8 (art. 8), respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 (art. 8-1) without there being any call to examine it under paragraph 2." (above-mentioned *Marckx* judgment, Series A no. 31, p. 15, § 31)

"In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention ... In striking this balance the aims mentioned in the second paragraph of Article 8 (art. 8-2) may be of a certain relevance, although this provision refers in terms only to 'interferences' with the right protected by the first paragraph - in other words is concerned with the negative obligations flowing therefrom ... " (Rees judgment of 17 October 1986, Series A no. 106, p. 15, § 37)

As the Government emphasised, the *Marckx* case related solely to the relations between mother and child. However, the Court considers that its observations on the integration of a child within his family are equally applicable to a case such as the present, concerning as it does parents who have lived, with their daughter, in a family relationship over many years but are unable to marry on account of the indissolubility of the existing marriage of one of them.

73. In this context also, the Court will concentrate on the general complaint concerning the third applicant's legal situation (see, *mutatis mutandis*, paragraph 67 above): it will bear in mind, but not examine separately, the various aspects of Irish law listed in paragraph 70 above. It notes in any event that many of the aspects in question are inter-related in such a way that modification of the law on one of them might have repercussions on another.

74. As is recorded in the Preamble to the European Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock, "in a great number of member States of the Council of Europe efforts have been, or are being, made to improve the legal status of children born out of wedlock by reducing the differences between their legal status and that of children born in wedlock which are to the legal or social disadvantage of the former". Furthermore, in **Ireland** itself this trend is reflected in the Status of Children Bill recently laid before Parliament (see paragraph 36 above).

In its consideration of this part of the present case, the Court cannot but be influenced by these developments. As it observed in its above-mentioned *Marckx* judgment, "respect" for family life, understood as including the ties between near relatives, implies an obligation for the State to act in a manner calculated to allow these ties to develop normally (Series A no. 31, p. 21, § 45). And in the present case the normal development of the natural family ties between the first and second applicants and their daughter requires, in the Court's opinion, that she should be placed, legally and socially, in a position akin to that of a legitimate child.

75. Examination of the third applicant's present legal situation, seen as a whole, reveals, however, that it differs considerably from that of a legitimate child; in addition, it has not been shown that there are any means available to her or her parents to eliminate or reduce the differences. Having regard to the particular circumstances of this case and notwithstanding the wide margin of appreciation enjoyed by **Ireland** in this area (see paragraph 55 (c) above), the absence of an appropriate legal regime reflecting the third applicant's natural family ties amounts to a failure to respect her family life.

Moreover, the close and intimate relationship between the third applicant and her parents is such that there is of necessity also a resultant failure to respect the family life of each of the latter. Contrary to the Government's suggestion, this finding does not amount, in an indirect way, to a conclusion that the first applicant should be entitled to divorce and re-marry; this is demonstrated by the fact that in **Ireland** itself it is proposed to improve the legal situation of illegitimate children, whilst maintaining the constitutional prohibition on divorce.

76. There is accordingly, as regards all three applicants, a breach of Article 8 (art. 8) under this head.

77. It is not the Court's function to indicate which measures **Ireland** should take in this connection; it is for the State concerned to choose the means to be utilised in its domestic law for performance of its obligation under Article 53 (art. 53) (see the above-mentioned *Airey* judgment, Series A no. 32, p. 15, § 26, and the above-mentioned *Marckx* judgment, Series A no. 31, p. 25, §

58). In making its choice, **Ireland** must ensure that the requisite fair balance is struck between the demands of the general interest of the community and the interests of the individual.

B. Article 14 (art. 14)

78. The third applicant alleged that, by reason of the distinctions existing under Irish law between legitimate and illegitimate children in the matter of succession rights over the estates of their parents (see paragraphs 31-32 above), she was the victim of discrimination contrary to Article 14, taken in conjunction with Article 8 (art. 14+8).

The Government contested this allegation.

79. Since succession rights were included amongst the aspects of Irish law which were taken into consideration in the examination of the general complaint concerning the third applicant's legal situation (see paragraphs 70-76 above), the Court, like the Commission, does not consider it necessary to give a separate ruling on this allegation.

IV. THE APPLICATION OF ARTICLE 50 (art. 50)

80. Under Article 50 (art. 50) of the Convention,

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicants sought under this provision just satisfaction in respect of material loss, non-pecuniary loss and legal costs and expenses.

A. Material loss

81. By way of compensation for material loss, the first applicant claimed specified amounts in respect of the potential loss of the tax allowance available to married persons and in respect of accountant's fees relative to this issue; the second applicant claimed IR£2,000 for curtailment of job opportunities attributed to her lack of family status. The Government pleaded the absence of any supporting evidence.

82. The Court finds that these claims have to be rejected. They both stem from matters in respect of which it has found no violation of the Convention, namely the inability to divorce and re-marry and other aspects of the second applicant's status under Irish law (see paragraphs 49-64 and 65-69 above).

B. Non-pecuniary loss

83. The applicants claimed IR£20,000 as compensation for non-pecuniary loss in the shape of the severe emotional strain and worry which they had endured as a direct result of the lack of recognition of their family relationship and the inability to marry. The Government submitted that it was not necessary to award just satisfaction under this head.

84. In support of their claim, the applicants listed a number of inconveniences or areas of concern affecting them. The Court notes, however, that several of those matters originate either in the inability of the first and second applicants to marry or in other aspects of their own status under Irish law. Since these issues have not given rise to any finding of violation of the Convention, they cannot ground an award of just satisfaction under Article 50 (art. 50).

If and in so far as the remaining matters are connected with the legal situation of the third applicant - a point which does not emerge clearly from the material before the Court -, they could in principle form the object of such an award. Nevertheless, the Court considers that, in the particular circumstances of the case, its findings of violation on that issue (see paragraphs 70-76 above) of themselves constitute sufficient just satisfaction.

The applicants' claim cannot therefore be accepted.

C. Legal costs and expenses

85. The applicants sought reimbursement of their costs and expenses referable to the proceedings before the Commission and the Court. Whilst particulars of their claim were incomplete in some respects, they indicated at the hearings before the Court that they could supply further information in writing if so requested. The Government confined themselves to submitting that details of the computation of the fees should have been furnished initially.

Notwithstanding the foregoing, the Court considers that this aspect of the question of the application of Article 50 (art. 50) can also be regarded as ready for decision.

86. The applicants had the benefit of legal aid before the Convention institutions. However, the Court sees no reason to doubt that they have incurred liability for costs additional to those covered by the legal aid or that the quantified items of their claim satisfy the Court's criteria in the matter (see, amongst many authorities, the Zimmermann and Steiner judgment of 13 July 1983, Series A no. 66, p. 14, § 36).

Nevertheless, although the proceedings in Strasbourg have led to findings of violation as regards the legal situation of the third applicant, the applicants' remaining complaints were unsuccessful. In these circumstances, the Court considers that it would not be appropriate to award them the full amount (some IR£20,000) of the fees incurred (see the *Le Compte, Van Leuven and De Meyere* judgment of 18 October 1982, Series A no. 54, p. 10, § 21). Making an assessment on an equitable basis, as is required by Article 50 (art. 50), the Court finds that the applicants should be awarded IR£12,000 in respect of their costs and expenses. This figure is to be increased by any value added tax that may be chargeable.

FOR THESE REASONS, THE COURT

1. Rejects unanimously the Government's preliminary pleas;
2. Holds by sixteen votes to one that the absence of provision for divorce under Irish law and the resultant inability of the first and second applicants to marry each other do not give rise to a violation of Article 8 (art. 8) or Article 12 (art. 12) of the Convention;
3. Holds by sixteen votes to one that the first and second applicants are not victims of discrimination, contrary to Article 14 taken in conjunction with Article 8 (art. 14+8), by reason of the fact that certain foreign divorces may be recognised by the law of **Ireland**;
4. Holds by sixteen votes to one that Article 9 (art. 9) is not applicable in the present case;
5. Holds unanimously that, as regards the other aspects of their own status under Irish law complained of by the first and second applicants, there is no violation of Article 8 (art. 8);
6. Holds unanimously that the legal situation of the third applicant under Irish law gives rise to a violation of Article 8 (art. 8) as regards all three applicants;
7. Holds by sixteen votes to one that it is not necessary to examine the third applicant's allegation that she is a victim of discrimination, contrary to Article 14 taken in conjunction with Article 8 (art. 14+8), by reason of the disabilities to which she is subject under Irish succession law;
8. Holds unanimously that **Ireland** is to pay to the three applicants together, in respect of legal costs and expenses referable to the proceedings before the Commission and the Court, the sum of twelve thousand Irish pounds (IR£12,000), together with any value added tax that may be chargeable;
9. Rejects unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 18 December 1986.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

A declaration by Mr. Pinheiro Farinha and, in accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the separate opinion of Mr. De Meyer are annexed to the present judgment.

R.R.
M.-A.E.

DECLARATION BY JUDGE PINHEIRO FARINHA

(Translation)

With great respect to my eminent colleagues, I consider that the following sentence should have been added to sub-paragraph (b) of paragraph 55 of the judgment: "The Court recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy."

This is a citation from paragraph 40 of the Marckx judgment of 13 June 1979, the omission of which might cause the present judgment to be interpreted - incorrectly - as meaning that the Court attaches no importance to the institution of marriage.

SEPARATE OPINION, PARTLY DISSENTING AND PARTLY CONCURRING,
OF JUDGE DE MEYER

(Translation)

I. The impossibility for the first applicant to seek the dissolution of his 1952 marriage and the resultant inability of the first and second applicants to marry each other

1. As the Court observes, in paragraph 50 of the judgment, these two questions cannot be separated: in fact, they come down to a single question, namely the first.

The fact that the first and second applicants are unable to marry each other so long as the first applicant's 1952 marriage is not dissolved cannot, of itself, constitute a violation of their fundamental rights.

It is only the fact that the first applicant cannot seek the dissolution of his 1952 marriage that may constitute such a violation. It may, of itself, do so, as regards the first applicant, in that he is a party to that marriage. It may also do so, as regards the second as well as the first applicant, in that it necessarily means that neither of them can marry the other during the lifetime of the first applicant's wife.

2. In the present case, the facts found by the Commission are, basically, fairly simple.

The first applicant and the lady whom he married in 1952, in a Church of **Ireland** ceremony, separated by mutual consent in 1965, having recognised that their marriage had irretrievably broken down². They entered into a separation agreement that regulated their own rights and also those of their three children³, who were born in 1956, 1959 and 1965⁴. They have complied with their obligations under that agreement⁵. Each of them, with the other's consent, entered into a new relationship with another partner⁶: in the first applicant's case, this relationship was established with the second applicant in 1971 and it led to the birth, in 1978, of the third applicant⁷.

Since divorce is forbidden in **Ireland**, the first applicant, apparently with his wife's consent, sought advice as to the possibility of obtaining a divorce elsewhere. For this purpose he consulted lawyers in Dublin and in London, but he has not pursued the matter since they indicated that he could not obtain a divorce in England unless he was resident within the jurisdiction of the English courts⁸.

3. These findings on the part of the Commission were not contested.

The respondent Government confined themselves to observing that the attitude of the first applicant's wife and of their children towards the divorce which he wishes to obtain was not known for certain⁹.

This point would have merited clarification, but it is not decisive for the issue raised in the present case. This is because the sole question is whether the fundamental rights of the first and second applicants have or have not been violated in that, in the factual situation recalled above, the first applicant cannot request the dissolution of his 1952 marriage: if that were possible, his wife would of necessity have to be invited to participate in the proceedings, to the extent that she had not associated herself with the request, and the deciding authority would of necessity have to have regard to the interests of the children.

4. Of course, the issue raised in the present case concerns only the civil dissolution of the marriage, since the latter, as a religious marriage celebrated in a Church of **Ireland** ceremony, cannot fall within the respondent State's jurisdiction: it can only do so as a marriage recognised by that State as regards its civil effects.

5. We are thus faced with a situation in which, by mutual consent and a considerable time ago, two spouses separated, regulated their own and their children's rights in an apparently satisfactory fashion and embarked on a new life, each with a new partner.

In my view, the absence of any possibility of seeking, in such circumstances, the civil dissolution of the marriage constitutes, firstly and of itself, a violation, as regards each of the spouses, of the

rights guaranteed in Articles 8, 9 and 12 (art. 8, art. 9, art. 12) of the Convention. Secondly, in that it perforce means that neither spouse can re-marry in a civil ceremony so long as his wife or husband is alive, it constitutes a violation of the same rights as regards each of the spouses and each of the new partners.

The absence of the aforesaid possibility is consonant neither with the right of those concerned to respect for their private and family life, nor with their right to freedom of conscience and religion, nor with their right to marry and to found a family.

In fact, it seems to me that in cases like the present the effective exercise of these rights may require that the spouses be allowed not only to apply to be relieved of their duty to live together but also to apply to be completely released in civil law from their marital ties, by means of legal recognition of their definitive separation¹⁰.

The prohibition, under the Constitution of the respondent State, of any legislation permitting the dissolution of marriage is, as seems already to have been recognised in 1967 by a Committee of that State's Parliament, "coercive in relation to all persons, Catholics and non-Catholics, whose religious rules do not absolutely prohibit divorce in all circumstances" and "at variance with the accepted principles of religious liberty as declared at the Vatican Council and elsewhere". Above all, it is, as that Committee stated, "unnecessarily harsh and rigid"¹¹.

In what the Convention, in several provisions and notably those concerning respect for private and family life and freedom of conscience and religion, calls "a democratic society", the prohibition cannot be justified.

On more than one occasion, the Court has pointed out that there can be no such society without pluralism, tolerance and broadmindedness¹²: these are hallmarks of a democratic society¹³.

In a society grounded on principles of this kind, it seems to me excessive to impose, in an inflexible and absolute manner, a rule that marriage is indissoluble, without even allowing consideration to be given to the possibility of exceptions in cases of the present kind.

For so draconian a system to be legitimate, it does not suffice that it corresponds to the desire or will of a substantial majority of the population: the Court has also stated that "although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position"¹⁴.

In my opinion, this statement must also be applicable in the area of marriage and divorce.

6. The foregoing considerations do not imply recognition of a right to divorce or that such a right, to the extent that it exists, can be classified as a fundamental right.

They simply mean that the complete exclusion of any possibility of seeking the civil dissolution of a marriage is not compatible with the right to respect for private and family life, with the right to freedom of conscience and religion and with the right to marry and to found a family.

7. I also believe that there is discrimination as regards the exercise of the rights involved.

Although it totally prohibits divorce within **Ireland** itself, the respondent State recognises divorces obtained in other countries by persons domiciled there at the time of the divorce proceedings¹⁵.

Thus, Irish citizens who move abroad and stay there long enough for it to be accepted that they intend to remain there permanently escape their inability to obtain a divorce in **Ireland**.

This state of affairs is in unfortunate contradiction with the absolute character of the principle of indissolubility of marriage, in that the principle thus appears to warrant observance only in **Ireland** itself and not elsewhere.

The distinction so made between Irish citizens according to whether they are domiciled in **Ireland** itself or elsewhere appears to me to lack an objective and reasonable justification¹⁶.

8. Unlike the majority of the Court, I am therefore of the opinion that in the present case the first and second applicants rightly complain of a violation of their right to respect for their private and family life, of their right to freedom of conscience and religion and of their right to marry and to found a family, as well as of discrimination in the exercise of these rights.

II. The other aspects of the situation of the first and second applicants, independently

of their relations with or concerning the third applicant

On this issue I consider, like the other members of the Court, that no fundamental right has been violated in the present case.

From the point of view of fundamental rights, the State has no positive obligation vis-à-vis couples who live together as husband and wife without being married: it is sufficient that the State abstains from any illegitimate interference.

It is only to the extent that children are born of unions of this kind, and of transient relationships also, that there may arise positive obligations on the part of the State concerning the situation of those children, including, of course, their relations with their parents¹⁷ and with the latter's families¹⁸.

Such obligations may likewise arise, to the extent that the interests of those children so require, as regards the mutual relations of their parents or the latter's families.

In cases of this kind, it is therefore always a question solely of obligations concerning the situation of those children. This is particularly so in the present case.

III. The situation of the third applicant and the situation of the first and second applicants in their relations with or concerning the third applicant

1. On this issue, I agree almost entirely with what is said in the judgment concerning the violation, as regards the three applicants, of the right to respect for private and family life.

However, it seems to me that it is not sufficient to say that the third applicant should be placed "in a position akin to that of a legitimate child"¹⁹: in my view, we ought to have stated more clearly and more simply that the legal situation of a child born out of wedlock must be identical to that of a child of a married couple and that, by the same token, there cannot be, as regards relations with or concerning a child, any difference between the legal situation of his or her parents and of their families that depends on whether he or she was the child of a married couple or a child born out of wedlock.

I also note that, as a daughter of the first applicant - who is still bound by his 1952 marriage -, the third applicant is a child of an adulterous union: this does not exclude the applicability in her case, as well as in that of any other child born out of wedlock, of the principles enounced in both the present and the Marckx judgments.

2. I consider that in the present case the Court should, as in the Marckx case, have found not only a violation of the right to respect for private and family life but also a violation, as regards that right, of the principle of non-discrimination.

In my view, the latter violation arises from the very fact that, on the one hand, the legal situation of the third applicant, as a child born out of wedlock, is different from that of a child of a married couple and that, on the other hand, the legal situation of the first and second applicants in their relations with or concerning the third applicant is different from that of the parents of a child of a married couple in their relations with or concerning that child.

In this respect, the facts of the case thus disclose not only a violation of the right to respect for private and family life but also, at the same time, a violation, as regards that right, of the principle of non-discrimination.

I would observe, for the sake of completeness, that the principle of non-discrimination appears to me to have been so violated as regards the first and second applicants as well as the third applicant, and as regards those aspects of the legal situation of the persons concerned that do not relate to their succession rights as well as those aspects that do so relate.

IV. The just satisfaction claimed by the applicants

1. Although I dissent from the majority as regards points 2, 3, 4 and 7 of the operative provisions of the judgment, I agree, in principle, with the Court's decision on the applicants' claim for just satisfaction. However, my reasons are somewhat different.

The applicants are not the only victims of the situation complained of, a situation which affects, in

a general and impersonal manner, everyone whose circumstances are similar to theirs.

In my view, the just satisfaction to be afforded to the applicants in such a case should normally be confined to reimbursement of the costs and expenses referable to the proceedings before the Commission and the Court and should not include compensation for material or non-pecuniary loss.

However, such compensation would be warranted if there were measures or decisions which, in the guise of provisions of general or impersonal application, had had the object or the result of affecting the applicants directly and individually. But that is not the situation here.

2. As regards the quantum of the reimbursement, I agree, having regard to the majority's decision on the merits of the case, with point 8 of the operative provisions of the judgment.

* Note by the Registrar: The case is numbered 6/1985/92/139. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

² Commission's report, § 34.

³ *Ibid.*, § 38 (b).

⁴ *Ibid.*, § 34.

⁵ *Ibid.*, § 38 (e).

⁶ *Ibid.*, § 35.

⁷ *Ibid.*, §§ 35 and 36.

⁸ *Ibid.*, § 38 (a).

⁹ Observations of Mr. Gleeson at the hearing on 23-24 June 1986.

¹⁰ See, *mutatis mutandis*, the Airey judgment of 9 October 1979, A 32, § 33.

¹¹ "It can be argued, therefore, that the existing constitutional provision is coercive in relation to all persons, Catholics and non-Catholics, whose religious rules do not absolutely prohibit divorce in all circumstances. It is unnecessarily harsh and rigid and could, in our view, be regarded as being a variance with the accepted principles of religious liberty as declared at the Vatican Council and elsewhere" (Report of the Informal Committee on the Constitution, 1967, § 126, cited in the Report of the Joint Committee on Marriage Breakdown, 1985, § 7.8.8, which document formed Annex 3 to the respondent Government's memorial of 28 November 1985).

¹² See the Handyside judgment of 7 December 1976, A 24, § 49, and the Lingens judgment of 8 July 1986, A 103, § 41.

¹³ See the Young, James and Webster judgment of 13 August 1981, A 44, § 63.

¹⁴ *Ibid.*, *loc. cit.*

¹⁵ See §§ 19-21 of the judgment.

¹⁶ See the judgment of 23 July 1968 in the case relating to certain aspects of the laws on the use of languages in education in Belgium, A 6, § 10.

¹⁷ See the Marckx judgment of 13 June 1979, A 31, § 31.

¹⁸ *Ibid.*, §§ 45-48.

¹⁹ § 74 of the judgment.

ASHINGDANE v. THE UNITED KINGDOM JUDGMENT

JOHNSTON AND OTHERS v. IRELAND JUGDMENT

JOHNSTON AND OTHERS v. IRELAND JUGDMENT

JOHNSTON AND OTHERS v. IRELAND JUGDMENT
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Vienna Convention on the Law of Treaties
1969

Done at Vienna on 23 May 1969. Entered into force on 27 January 1980.
United Nations, *Treaty Series*, vol. 1155, p. 331



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Article 30
Application of successive treaties relating to
the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States Parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES

Article 34
General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.