

**THE LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS
BEFORE THE HUMAN RIGHTS COMMITTEE
AND THE EUROPEAN COURT OF HUMAN RIGHTS****

Abstract

This article examines the legal recognition of same-sex relationships within the frameworks of the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), focusing on the jurisprudence of the Human Rights Committee and the European Court of Human Rights. Although neither instrument explicitly addresses sexual orientation or same-sex unions, their interpretation has evolved to encompass issues of privacy, family life, equality, and non-discrimination. Using a doctrinal methodology and case law analysis, the article explores how both bodies have approached claims concerning the recognition of same-sex relationships, identifying key principles and interpretative trends. It highlights areas of convergence, particularly regarding the prohibition of discrimination, as well as divergences in the scope and pace of recognition, notably in relation to positive obligations imposed on states. The article further assesses the role of concepts such as the margin of appreciation and the emergence of European and international consensus. It concludes by evaluating whether an emerging standard of legal recognition can be discerned in international human rights law and considers its implications for future legal developments.

* LL.M, Research Assistant, Institute of Comparative Law, Belgrade, Serbia, e-mail: a.mihajlovic@iup.ac.rs, ORCID: <https://orcid.org/0000-0001-8309-7896>.

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I Introduction

The legal recognition of same-sex relationships remains one of the most dynamic and contested areas within contemporary human rights law. While international and regional human rights instruments were not originally drafted with explicit reference to sexual orientation or diverse family forms, their interpretative evolution has increasingly brought these issues within their protective scope. In this context, the jurisprudence of the Human Rights Committee (HRC) under the International Covenant on Civil and Political Rights¹ (ICCPR) and the European Court of Human Rights (ECtHR) under the European Convention on Human Rights² (ECHR) plays a pivotal role in shaping normative standards regarding the rights of same-sex couples.

International human rights law does not recognize sexual orientation as a personal characteristic protected from discrimination, nor there is an international or regional human rights treaty which is dealing exclusively with the rights of LGBT+³ people, such as conventions which are related to women's rights (e. g. the CEDAW Convention or the Istanbul Convention) or rights of persons with disabilities. The legal frameworks which recognize same-sex couples are not unique and they vary among continents and countries. The Western societies have showed a more progressive approach toward this topic than some other parts of the world where LGBT+ people are still criminalized and tortured because of whom they love.⁴ There are three ways how

¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

² The Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by protocols Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS No 005 (European Convention on Human Rights - ECHR).

³ LGBT+ is an abbreviation which represents different types of sexual orientation and gender identity, such as lesbian, gay, bisexual and transsexual people, while the "+" represents other identities that are not directly covered by the previous letters such as intersex people, asexual people, non-binary people and queer people.

⁴ See more the comparative legal analysis of the recognition of same-sex relationships in Europe: O. Nikolić, *Komparativni pogled na istopolne zajednice u nekim državama Evropske unije*, *Revija za evropsko pravo* 27(2025), 58-63.

LGBT+ people can fight for their right to be recognized legally: first, through national legislatures which pass concrete laws; second, through judgements delivered by the highest national courts or constitutional courts which are used to overturn existing laws and grant benefits to LGBT+ people; and, third, through an international litigation strategy before international or regional human rights institutions.⁵ This third approach will be the subject of this paper, based on the analysis of the case law from the HRC and the ECtHR. The main research question is to what extent these two international bodies have recognized the right of same-sex couples to be recognized legally before their states.

This article examines how these two bodies have approached the question of legal recognition of same-sex relationships, focusing on the extent to which existing provisions – particularly those relating to privacy, family life, equality, and non-discrimination – have been interpreted to encompass such relationships. Through a doctrinal method and detailed case law analysis, the paper explores both convergences and divergences in the reasoning of the HRC and the ECtHR, as well as the implications of their jurisprudence for state obligations. The doctrinal method will be applied in the context of the analysis of concrete articles of the ICCPR and the ECHR, while the case law analysis will be used to explore the current practice of the HRC and the ECtHR. By situating these developments within broader debates on the universality of human rights and the margin of appreciation afforded to states, the article seeks to assess whether an emerging international standard on the legal recognition of same-sex relationships can be identified, and what its limits may be.

In the following parts of the article, firstly the legal nature of protection human rights before the HRC and the ECtHR will be analysed and secondly, the current case law issued by these two institutions will be examined. This second part will show how these two human rights institutions were dealing with the cases where applicants, as LGBT+ persons, stressed the violations of the right to equal treatment, the right to privacy and the right to marry. This comparative analysis will show which of these two mechanisms was more or less progressive and effective toward the improvements of the position of LGBT+ people through their legal recognition.

⁵ L. R. Helfer, “Will the United Nations Human Rights Committee Require Recognition of Same-Sex Marriages?”, in: *Legal Recognition of Same-Sex Partnerships – A Study of National, European and International Law* (eds. R. Wintemute, M. Andenæs), Hart Publishing 2001, 733.

II Key Features of the HRC and the ECtHR Mechanisms of Human Rights Protection and the Relevant Legal Framework for the Research

The HRC represents a treaty body as a part of the United Nations (UN) system which monitors the implementation of the ICCPR by states which ratified this instrument. Until now there are 175 contracting states parties.⁶ The HRC can receive individual complaints of alleged human rights violations from individuals only against a state which has ratified the Optional Protocol to the International Covenant on Civil and Political Rights (the ICCPR-OP1).⁷ So far, 119 states have ratified the ICCPR-OP1.⁸ The HRC conducts a “quasi-judicial” procedure; an alleged victim must fulfil the admissibility criteria so that their case can be accepted to be processed; decisions called “views” or “opinions” are passed by consensus, but experts, who are members of the HRC and do not agree with the majority, can append their opinions (dissenting or concurring) to the final decisions; and, the final decisions issued by the HRC (general comments, concluding observations and views) are not legally binding and cannot be enforced.⁹ When the HRC is dealing with an individual complaint, its mission is double: first, it is the arbiter of a dispute between a state and an individual, and in this role it has the “individual justice” function; second, processing an individual complaint, the HRC acts as an interpreter of an international human rights treaty.¹⁰ It is also important to mention that a state’s readiness to ratify an international instrument does not guarantee that it will

⁶ Status of Ratification – Interactive Dashboard – International Covenant on Civil and Political Rights, <https://indicators.ohchr.org/>, last visited: 30. 3. 2026.

⁷ Optional Protocol to the International Covenant on Civil and Political Rights (19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR-OP1) Article 1 states: “A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.”

⁸ Status of Ratification – Interactive Dashboard – Optional Protocol to the International Covenant on Civil and Political Rights, <https://indicators.ohchr.org/>, last visited: 30. 3. 2026.

⁹ J. Connors, “United Nations”, in: *International Human Rights Law* (eds. D. Moeckli, S. Shah, S. Sivakumaran, consultant ed. D. Harris), Oxford University Press 2018, 393-395.

¹⁰ L. R. Helfer, *op. cit.*, 735.

implement decisions issued by a monitoring body, because such decisions are not legally binding.¹¹

The other human rights institution, whose decisions will be in the focus, is the ECtHR, as a regional human rights institution, a part of the Council of Europe (CoE), and a body which monitors the implementation of the ECHR. All 46 member states of the CoE are parties to this Convention and they have automatically accepted the jurisdiction of the ECtHR. The Protocol No 11 to the ECHR¹², which entered into force in 1998, abolished the European Commission of Human Rights, and individuals have had direct access to the ECtHR since that time. Before this Protocol, individuals had to apply first to the European Commission of Human Rights, which would decide if a complaint was well established and then could refer a case to the ECtHR. This characteristic is very important because the access to the ECtHR is guaranteed automatically to potential claimants, while in the case of the HRC the access is conditional and depends on the ratification of the ICCPR-OP1. The Committee of Ministers of the CoE is responsible to supervise the implementation of judgments issued by the ECtHR, although the Committee's power is limited as it cannot enforce the execution of judgments. In the case of the HRC there is no such monitoring body. The last key characteristic about the ECtHR, which is not common for the HRC, is the use of the margin of appreciation (MoA). The MoA is a doctrine related to the limitations of rights through the interpretation of the ECHR as a "living instrument".¹³ It allows states to have some discretion to decide how concrete rights can be exercised in a concrete country in accordance with the ECHR, and the width of the MoA depends on the context of each case.¹⁴ In other words, socio-cultural differences among the European countries are preconditions how some rights will be implemented and how

¹¹ *Ibid.*, 736. See more: V. Shikhelman, Implementing Decisions of International Human Rights Institutions – Evidence from the United Nations Human Rights Committee, *The European Journal of International Law* 30(2019)3, 753-777.

¹² Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 11 May 1995, entered into force 1 November 1998) ETS No 155.

¹³ D. McGoldrick, A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee, *International & Comparative Law Quarterly* 65(2016)1, 23.

¹⁴ M. Marochini, The Interpretation of the European Convention on Human Rights, *Zbornik radova Pravnog fakulteta u Splitu* 51(2014)1, 70. See more about the MoA in the regional human rights systems in: B. Çali, "Regional Protection", in: *International Human Rights Law* (eds. D. Moeckli, S. Shah, S. Sivakumaran, consultant ed. D. Harris), Oxford University Press 2018, 421-423.

their evolution will be developed. The MoA allows each country, as a member state of the CoE, to adjust its legislature in accordance with its own legal tradition but still following the human rights standards established by the ECtHR through the case law. This approach will be explained later through the concrete judgments and the ECtHR's reasoning about the legal recognition of same-sex couples.

The prohibition of discrimination and the right to privacy are guaranteed by both the ICCPR and the ECHR.¹⁵ Regarding marriage, the ICCPR states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The right of men and women of marriageable age to marry and to found a family shall be recognized.”¹⁶ The ECHR contains the same provision about marriage stipulating that “[m]en 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.”¹⁷ For instance, the CEDAW Convention, which is focused exclusively on women's rights, provides guarantees that states will ensure to conduct all necessary measures to combat discrimination of women in one society and also states about the equality between women and men in the context of the right to marry and relations in marriage.¹⁸ Although it is focused on women in comparison to men, the CEDAW Convention does not mention diverse forms of families, lesbian or trans women, and its approach is very heteronormative.¹⁹ It is worth mentioning the Istanbul Convention, which represents a regional human rights treaty in the framework of the CoE, and it is the first treaty-based human rights instrument which explicitly mentions gender and defines it, as well as cohabiting partners in the part about the aggravating circumstances in the determination of the sentence for committed crimes.²⁰ Human rights lawyers tried to fulfil the lack of a concrete international human rights

¹⁵ ICCPR Art. 2(1), Art. 26 and Art. 17; ECHR Art. 14 and Art. 8.

¹⁶ ICCPR art. 23 (1, 2).

¹⁷ ECHR art. 12.

¹⁸ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 1 (CEDAW Convention), Art. 2 and Art. 16.

¹⁹ D. Otto, “Women's Rights”, in: *International Human Rights Law* (eds. D. Moeckli, S. Shah, S. Sivakumaran, consultant ed. D. Harris), Oxford University Press 2018, 319.

²⁰ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS 210 (Istanbul Convention), Art. 3 and Art. 46.

instrument dealing with the LGBT+ rights through the Yogyakarta Principles (YP) and the Yogyakarta Principles plus 10 (YP+10), with a starting point that the principles of universality and non-discrimination were applicable also to LGBT+ people.²¹ There are three main functions of these Principles: first, they should focus precisely on human rights violations experienced by people of diverse sexual orientation and gender identity; second, the implementation of international human rights law in such cases should be articulated; and, third, the explanation of states' obligations regarding the LGBT+ rights would be explained in more details.²² Although these two documents represent important soft law instruments on the global level, they do not guarantee in any of their provisions explicitly the right to same-sex marriage.

III Case Law Before the HRC and the ECtHR Related to Same-Sex Couples

This section is dealing with the case law related to the legal recognition of same-sex couples. Firstly, the case law before the HRC will be presented and secondly, the case law before the ECtHR.

1. Case Law of the Legal Recognition of Same-Sex Couples Before the HRC

The HRC delivered the first ever decision related to gay and lesbian rights in the case *Hertzberg et al v Finland* in 1982.²³ The case was about the Finnish penal law which prohibited any kind of public encouragement of the homosexual activity between two persons, aiming to protect public moral, and radio and television programmes were targeted.²⁴ The applicant complained that the freedom of expression was violated in that way. The HRC ruled in favour of Finland, finding no violation of the concrete right and stated that “[i]t has to be noted, first, that public morals differ widely. There is no universally applicable

²¹ M. O’Flaherty, J. Fisher, Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles, *Human Rights Law Review* 8(2008)2, 232-237.

²² M. O’Flaherty, The Yogyakarta Principles at Ten, *Nordic Journal of Human Rights* 33(2015)4, 283-284.

²³ *Hertzberg et al v Finland* (061/1979), CCPR/C/15/D/61/1979 (1982).

²⁴ D. Sanders, Human Rights and Sexual Orientation in International Law, *International Journal of Public Administration* 25(2002)1, 27.

common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.”²⁵

The following case from 1994, *Toonen v Australia*,²⁶ was the first in which the HRC delivered a communication that the law criminalizing homosexuality represented the violation of the right to privacy. The HRC did not say that the criminalization exclusively of the male homosexual activity represented discrimination based on “sex”, and did not include “sexual orientation” within “other status”, but decided that “sex” covered “sexual orientation”.²⁷ The HRC stated in the Communication that:

“[t]he State party has sought the Committee’s guidance as to whether sexual orientation may be considered an “other status” for the purposes of Article 26. The same issue could arise under Article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”²⁸

Although other UN human rights treaty bodies have interpreted that “sexual orientation” comes within “other status”,²⁹ it is very important that the HRC concluded that discrimination based on sexual orientation could violate Article 26, which is a general, a free-standing provision, and in that way has provided the protection from discrimination based on sexual orientation in the field of social and economic rights.³⁰

In the case *Joslin et al v New Zealand*,³¹ the HRC cemented the interpretation of marriage as a union between a man and a woman. The lesbian couple, who applied for the marriage licence before the New Zealand’s authority, were

²⁵ *Hertzberg et al v Finland* (061/1979), CCPR/C/15/D/61/1979 (1982) at para 10.3.

²⁶ *Toonen v Australia* (488/1992), CCPR/C/50/D/488/1992 (1994).

²⁷ E. Baisley, Reaching the Tipping Point: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity, *Human Rights Quarterly* 38(2016)1, 140.

²⁸ *Toonen v Australia* (488/1992), CCPR/C/50/D/488/1992 (1994) at para 8.7.

²⁹ Committee on Economic, Social and Cultural Rights said in the General Comment No 20 that “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights includes also sexual orientation. See more: UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No 20: Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20 at para 32.

³⁰ D. McGoldrick, The Development and Status of Sexual Orientation Discrimination under International Human Rights Law, *Human Rights Law Review* 16(2016)4, 628-629.

³¹ *Joslin et al v New Zealand* (902/1999), CCPR/C/75/D/902/1999 (2002).

refused because, the domestic family law recognized only marriage between persons of different sexes, and the applicants complained that they were discriminated based on their sex and sexual orientation.³² The HRC did not find the violation of Article 26 (a free-standing anti-discrimination provision), explaining that in the following way:

“Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2 of the Covenant is *the only substantive provision* in the Covenant which defines a right by using the term “men” and “women”, rather than “every human being”, “everyone” and “all persons”. Use of the term “men and women”, rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from Article 23, paragraph 2 of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.”³³

Mr. Lallah and Mr. Scheinin, as the HRC members, delivered an individual opinion, although they supported the final decision about the interpretation of the right to marry. They underlined that applicants did not explain which kind of a human rights violation was provoked by the denial to be recognized by the laws. Only in a case, where their non-recognition could provoke breaches of some other rights in comparison to opposite-sex couples who were married or in *de facto* unions, the HRC could find potentially the violation of Article 26.³⁴ The HRC missed the opportunity to recognize same-sex couples as a form of family which should be protected by states in accordance with Article 23(1) of the ICCPR, although the HRC confirmed in the General Comment No. 19 that diverse forms of family exist.³⁵

In *Young v Australia*³⁶ the HRC found the violation of Article 26 because the same-sex partner was excluded from pension rights benefits from his partner, although this right was guaranteed to the unmarried opposite-sex couples. The Committee stated

“[t]hat not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party provided no

³² P. Gerber, J. Gory, The UN Human Rights Committee and LGBT Rights: What is it Doing? What Could it be Doing?, *Human Rights Law Review* 14(2014)3, 431.

³³ *Joslin et al v New Zealand* (902/1999), CCPR/C/75/D/902/1999 (2002) at para 8.2.

³⁴ *Joslin et al v New Zealand* (902/1999), CCPR/C/75/D/902/1999 (2002) at page 15.

³⁵ UN Human Rights Committee (HRC), *CCPR General Comment No 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990 at para 2.

³⁶ *Young v Australia* (941/2000), CCPR/C/78/D/941/2000 (2003).

arguments on how this distinction between same-sex partners, who were excluded from pension benefits under law, and unmarried heterosexual partners, who were granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced.”³⁷

In the similar case *X v Colombia*,³⁸ the HRC found again the violation of Article 26 because the same-sex partner was denied exercising pension rights benefits. The HRC also recalled the case *Danning v The Netherlands*³⁹ where it stated that a different treatment in the receipt of benefits between married and unmarried opposite-sex couples did not constitute discrimination because, unmarried heterosexual couples could marry and exercise concrete benefits. On the other hand, in *Young v Australia* and *X v Colombia*, these couples could not marry or be recognized legally as unmarried heterosexual couples, and the HRC confirmed the violation of Article 26. Although these two cases represent a positive approach by the HRC toward same-sex couples, the HRC did not recognize them as family. This is a confirmation that international human rights law is in a “transitional phase” regarding the rights of lesbian and gay people and it shows some steps forward, but still very slow and inconsistent.⁴⁰

2. Case Law of the Legal Recognition of Same-Sex Couples Before the ECtHR

The ECtHR was following the similar argumentation to some extent as the HRC did in the cases related to the legal recognition of same-sex couples. The case law delivered by the ECtHR, which will be investigated in the following paragraphs, is related to the right to respect for private and family life (Article 8), the right to marry (Article 12) and the prohibition of discrimination (Article 14) in the ECHR. The selected cases will be analysed to determine the extent to which the HRC and the ECtHR have provided legal protection for same-sex couples through their recognition.

The first cases related to the gay rights before the ECtHR were those about the decriminalisation of homosexuality. In *Dudgeon v The United Kingdom*,⁴¹ the

³⁷ *Young v Australia* (941/2000), CCPR/C/78/D/941/2000 (2003) at para 10.4.

³⁸ *X v Colombia* (1361/2005), CCPR/C/89/D/1361/2005 (2007).

³⁹ *Danning v The Netherlands* (180/1984), CCPR/C/29/D/180/1984 (1987) at para 14.

⁴⁰ A. Zanghellini, To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men?, *Melbourne Journal of International Law* 9(2008)1, 146.

⁴¹ *Dudgeon v The United Kingdom* App no 7525/76 (ECtHR, 22 October 1981).

ECtHR found the violation of Article 8, because the homosexual activity was still criminalized in the Northern Ireland, but did not analyse the criminalization in the relation to the prohibition of discrimination. This approach was explained as follows:

“Where a substantive Article of the Convention has been invoked both on its own and together with Article 14, and a separate breach has been found of the substantive Article, it is not generally necessary for the Court also to examine the case under Article 14, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case.”⁴²

There are also cases where the ECtHR found the violation of the right to privacy when applicants, as homosexuals, were dismissed from their jobs.⁴³

In the case *Schalk and Kopf v Austria*,⁴⁴ the ECtHR was very explicit in the interpretation of marriage as a union between a man and a woman, and it also used the linguistic interpretation of Article 12, similar to the interpretation delivered by the HRC in the case *Joslin et al v New Zealand*. The judgment stated that:

“[t]he 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.”⁴⁵

Concurrently, the ECtHR did not find the violation of Article 14 taken in conjunction with Article 8, and, it can be said this decision also cemented the interpretation of marriage as a heteronormative institution. Something positive in this judgment is the fact that it recognized that same-sex couples who lived in *de facto* stable unions could establish the family life in accordance with Article 8, in the same way as different-sex couples did it.⁴⁶ In one much older case, *Rees v The United Kingdom*,⁴⁷ the ECtHR interpreted the traditional marriage

⁴² *Dudgeon v The United Kingdom* App no 7525/76 (ECtHR, 22 October 1981) at para 67.

⁴³ See more: *Sutherland v The United Kingdom* App no 25186/94 (ECHR, 1 July 1997); *Smith and Grady v The United Kingdom* App nos 33985/96 and 33986/96 (ECtHR, 27 September 1999); *Lustig-Prean and Beckett v The United Kingdom* App nos 31417/96 and 32377/96 (ECtHR, 27 September 1999).

⁴⁴ *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010).

⁴⁵ *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010) at para 55.

⁴⁶ *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010) at para 94.

⁴⁷ *Rees v The United Kingdom* App no 9532/81 (ECtHR, 17 October 1986) at para 49.

as a union of two persons of opposite *biological sex*, and the purpose of Article 12 to protect marriage as a basis of family. This approach was followed in *Schalk and Kopf v Austria*, but same-sex couples were confirmed that they had the capacity to form the family life. The ECtHR had the same legal reasoning toward same-sex marriage in the case *Chapin and Charpentier v France*,⁴⁸ finding no violation of Articles 8 and 12 in conjunction with Article 14.

The case *Vallianatos and Others v Greece*⁴⁹ was “a breath of fresh air”⁵⁰ in the ECtHR’s approach toward the legal recognition of same-sex couples. This case confirmed the violation of Article 14 taken in conjunction with Article 8, because same-sex couples in Greece were not allowed to enter civil unions which were available only to opposite-sex couples. The ECtHR stated that

“[...], same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. [...] The Court notes that extending civil unions to same-sex couples would allow the latter to regulate issues concerning property, maintenance and inheritance *not as private individuals* entering into contracts under the ordinary law, but *on the basis of the legal rules governing civil unions*, thus having their relationship *officially recognised by the State*.”⁵¹

The fact that the battle for equality is a continuous process represents the case *Ferguson and Others v The United Kingdom*⁵² before the ECtHR, when applicants, *as opposite-sex couples*, claimed that they were discriminated because they could not enter civil union which was available only for same-sex couples.⁵³ The case was dismissed by the ECtHR because the admissibility conditions were not fulfilled (the applicants did not exhaust all domestic legal remedies). Another couple, Rebecca Steinfeld and Charles Keidan, won the legal battle before the UK Supreme Court in 2018 that civil unions should be

⁴⁸ *Chapin and Charpentier v France* App no 40183/07 (ECtHR, 9 June 2016).

⁴⁹ *Vallianatos and Others v Greece* App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013).

⁵⁰ M. Shahid, The Right to Same-Sex Marriage: Assessing the European Court of Human Rights’ Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights, *Erasmus Law Review* 10(2017)3, 187.

⁵¹ *Vallianatos and Others v Greece* App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013) at para 81.

⁵² *Ferguson and Others v The United Kingdom* App no 8254/11.

⁵³ F. Hamilton, The Case for Same-Sex Marriage before the European Court of Human Rights, *Journal of Homosexuality* 65(2018)12, 1582-1583. See more: L. Ferguson, The Denial of Opposite-Sex Couples’ Access to Civil Partnership as Discrimination?, *Journal of Social Welfare and Family Law* 38(2016)4, 450-455.

opened for both, same-sex and opposite-sex couples.⁵⁴ This example from the United Kingdom can be seen as a “golden standard” how individual governments should treat their citizens and provide the full marriage and civil union equality available to opposite-sex and same-sex couples.

The current case law from the ECtHR dealing with the right to marriage equality can be summed up as *strictly heteronormative* and can be related to the concept of “*the marriage apartheid*”, which refers to marriage as an institution reserved only for heterosexuals, while homosexuals are not welcome to join “the club”.⁵⁵ The ECtHR has treated marriage as a socially non-changeable institution, with the strong “citizenship” effects which are related only to opposite-sex couples, granting them the full status in a society.⁵⁶ The fact that marriage is not available for same-sex couples, the ECtHR has not seen until now as a form of discrimination based on sexual orientation. The heteronormative approach was also confirmed in several cases related to transsexual people who wanted to marry a person of an opposite sex to them after their transition.

In the case *C and L M v The United Kingdom*,⁵⁷ the ECtHR found that there was no right for the female transsexual applicant to marry her lesbian partner, because it was not in accordance with the legal nature of Article 12.⁵⁸ In the case *Cossey v The United Kingdom*,⁵⁹ the ECtHR did not recognize the right of the applicant Cossey who was registered as a man in the birth certificate, but

⁵⁴ O. Bowcott, Civil partnerships to be opened to heterosexual couples, *The Guardian*, 2 October 2018, <https://www.theguardian.com/uk-news/2018/oct/02/civil-partnerships-to-be-opened-to-heterosexual-couples>, last visited: 30. 3. 2026; N. Iqbal, Let’s keep it civil ... meet the first couples embracing partnerships under new law, *The Guardian*, 29 December 2019, <https://www.theguardian.com/uk-news/2019/dec/29/first-of-84000-couples-get-set-for-a-civil-partnership>, last visited: 30. 3. 2026; B. Quinn, Couple who won battle to open up civil unions register partnership, *The Guardian*, 31 December 2019, <https://www.theguardian.com/uk-news/2019/dec/31/couple-who-won-battle-to-open-up-civil-unions-register-partnership>, last visited: 30. 3. 2026.

⁵⁵ M. C. Dunlap, The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties, *Law & Sexuality: A Review of Lesbian & Gay Legal Issues* (1991)1, 67-68.

⁵⁶ See more about the citizenship and the sexual citizenship in: N. Bamforth, Sexuality and Citizenship in Contemporary Constitutional Argument, *International Journal of Constitutional Law* 10(2012)2, 477-492.

⁵⁷ *C and L M v The United Kingdom* App no 14753/89 (ECHR, 9 October 1989).

⁵⁸ M. Shahid, *op. cit.*, 186.

⁵⁹ *Cossey v The United Kingdom* App no 10843/84 (ECtHR, 27 September 1990).

later transitioned to a woman, that she could marry an Italian man. The legal reasoning was based on *the biological criteria* for determining a person's sex, and the judgment stated

"[...], 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, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry."⁶⁰

This strict principle of using just the biological approach without taking in consideration *the social criteria* for determining a person's sex was changed in the case *Christine Goodwin v The United Kingdom*,⁶¹ where the ECtHR stated that

"[t]here have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can *no longer be decisive* in denying legal recognition to the change of gender of a post-operative transsexual."⁶²

This judgment was a huge progress in the ECtHR's approach toward the transsexual people's rights, but still not enough that same-sex couples could derive their rights for the marriage equality.⁶³ The ECtHR explained that Mrs. Goodwin's right to marry was violated because, after the transitioning process she became a woman and wanted to marry a man, and that was acceptable for the ECtHR's well established legal reasoning about the heteronormative nature of marriage.⁶⁴

The most progressive decision by the ECtHR until now regarding the legal recognition of same-sex couples was related to the case *Oliari and Others v Italy*.⁶⁵ Although the ECtHR repeated again its attitude toward marriage as a heteronormative institution, it created a *positive obligation under Article 8* that states should provide some legal framework for the legal recognition of same-sex relationships.⁶⁶ It means that member states of the CoE still have the MoA

⁶⁰ *Cossey v The United Kingdom* App no 10843/84 (ECtHR, 27 September 1990) at para 46.

⁶¹ *Christine Goodwin v The United Kingdom* App no 28957/95 (ECtHR, 11 July 2002).

⁶² *Christine Goodwin v The United Kingdom* App no 28957/95 (ECtHR, 11 July 2002) at para 100.

⁶³ M. Shahid, *op. cit.*, 187.

⁶⁴ *Christine Goodwin v The United Kingdom* App no 28957/95 (ECtHR, 11 July 2002) at para 101.

⁶⁵ *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015).

⁶⁶ *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015) at para 185.

to decide which legal format will be introduced, because the social acceptance of same-sex couples varies around Europe, but, the lack of the legal recognition will establish the violation of the right to respect for private and family life. Andy Hayward in the case comment highlighted *three key points* from this decision: first, *the positive obligation* for states to introduce a legal scheme which will grant the legal status to same-sex relationships; second, *the criteria* which should be used for assessing if a state has breached the MoA in relation to this positive obligation; and, third, because of the fact that the ECtHR introduced the new positive obligation for the member states, it *refused to analyse* the right to marry and the right to freedom from discrimination.⁶⁷ The same approach was confirmed by the latest judgement *Orlandi and Others v Italy* from 2017.⁶⁸

3. Synthetic Overview of the Analysed Case Law Before the HRC and the ECtHR

Based on the analysed cases, it can be said that the HRC and the ECtHR have provided the legal protection toward same-sex couples, but with different strength. Both passed decisions which decriminalised homosexuality as a precondition for all further improvements of the LGBT+ rights. Same-sex marriage has been denied by the HRC and the ECtHR, and both institutions are very persistent in the heteronormative interpretation of marriage. This kind of approach was also confirmed by the ECtHR in relation to transsexual people. Although the ECtHR found the violation of the right to respect for private and family life because trans people were not allowed to marry after changing their sexes, this legal reasoning was following the heteronormative nature of marriage, because the applicants after the transition wanted to marry a person of the opposite sex.

The HRC has not recognized the legal capacity of same-sex couples to establish family life, although it confirmed the act of discrimination in the cases

⁶⁷ A. Hayward, Same-Sex Registered Partnerships – A Right to Be Recognized, *Cambridge Law Journal* 75(2016)1, 29-30.

⁶⁸ *Orlandi and Others v Italy* App nos 26431/12; 26742/12; 44057/12 and 60088/12 (ECtHR, 14 December 2017). See more about the analysis of this case in: C. Poppelwell-Scevak, Oliari, Orlandi and Homophobic Dissenting Opinions: The Strasbourg Approach to the recognition of same-sex marriages, *The Strasbourg Observers Blog*, 2 February 2018, <https://strasbourgobservers.com/2018/02/02/oliari-orlandi-and-homophobic-dissenting-opinions-the-strasbourg-approach-to-the-recognition-of-same-sex-marriages/#more-4088>, last visited: 30. 3. 2026.

where same-sex couples could not exercise pension rights benefits as opposite-sex couples. The greatest achievement until now was done by the ECtHR in the decision *Oliari and Others v Italy* because it established for the first time the positive obligation for the member states of the CoE to recognize same-sex couples in a suitable legal form. Taking into account the MoA, which is not used by the HRC, it has provided that a country can decide which legal form should be used for the legal recognition, based on different socio-cultural conditions and levels of the social acceptance of same-sex couples. In that way, the ECtHR supported the wider MoA in the field of the legal recognition of same-sex relationships, ensuring the possibility for the states to adjust their laws in accordance with their legal tradition and culture.

Concurrently, both institutions did not deal with the prohibition of discrimination in the cases related to the legal recognition of same-sex couples,⁶⁹ but always put in the context of the right to respect for private and family life. The case law represented the strict division between homosexuals and heterosexuals as two different groups of people, and some authors suggested the necessary shift to the term *sexualities* as more neutral, inclusive and without fixed boundaries.⁷⁰ The legal protection afforded to same-sex couples is the reflection of the different legal nature of these two institutions: the ECtHR interprets the ECHR ratified by all the CoE member states and its judgments are legally binding in international law; the HRC, while having strong authority, is still not very influential in the UN system and toward States' Parties, and its decisions are not legally binding.⁷¹ The ECtHR has a jurisdiction over a smaller group of countries which still share relatively similar socio-cultur-

⁶⁹ This approach of using anti-discrimination provisions in relation to the recognition of same-sex marriage was used by the Constitutional Court of South Africa and the Supreme Court of the United States in the cases which legalized same-sex marriage in those countries: *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005) and *Obergefell v Hodges*, 576 U.S. 644 (2015). For instance, see more about the legal battle for the legal recognition of same-sex marriage in the United States: O. Nikolić, *Istopolni brak – kako je sve počelo u SAD, Strani pravni život* 67(2023)3, 395-407.

⁷⁰ M. Grigolo, *Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject*, *European Journal of International Law* 14(2003)5, 1025-1026. The inclusion of the term "sexualities" in the legal framework should provide two basic rights: 1. "the right to choose sexual activity and sexual identity"; and, 2. "the right to establish relationships and family in accordance with chosen sexual activity and sexual identity". M. Grigolo, *op.cit.*, 1028.

⁷¹ E. Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural Sensitivity*, *Michigan Journal of International Law* 22(2001)2, 293.

al background, while the HRC encompasses countries all around the world and it is much more complicated to achieve some level of consensus toward the LGBT+ rights. The ECtHR uses the ECHR as a living instrument which evolves through the time, while it is not common for the HRC's practice of the interpretation of the ICCPR.

IV Conclusion

The investigated research question showed that the HRC and the ECtHR provided the inconsistent protection toward same-sex couples regarding their legal capacity to be recognized under law. The common for case law of both bodies is the denial of the right to same-sex marriage. Nevertheless, the ECtHR has supported a progressive approach that member states of the CoE should provide some appropriate form of the legal recognition for same-sex couples, which necessarily does not have to be marriage. This achievement was followed by the ECtHR's usage of the MoA, which is not used by the HRC in the process of the ICCPR interpretation. Until now the European states have showed the biggest achievements in that field. The doctrinal approach helped to identify the relevant articles from the ICCPR and the ECHR which interpretation was followed through the case law delivered by the HRC and the ECtHR. The relation between these two concepts have been alleviated by the ECtHR through the MoA, especially in the case of *Oliari and Others v Italy*, while the HRC refused to use such doctrine in the interpretation of the ICCPR.

The evolution of the LGBT+ rights in general, from decriminalisation to the improvements of the right to recognition, could be illustrated through the protest school of human rights which means that only the continuous fight and the usage of strategic litigations could bring some positive changes. It means that the ideal of the universality of human rights which is the heart of human rights law has not been achieved for same-sex couples. The lack of a concrete human rights treaty on the international and regional level, which would focus just on people of diverse sexual orientation, causes difficulties for providing the adequate protection for same-sex couples.

Based on the international norm dynamic approach we are still on the first level of the norms' life cycle – the norm emergence. This level represents the effort by the human rights lawyers and activists to create “a critical mass” which will be enough to support the concept of the LGBT+ rights and be a step forward for the creation of a concrete human rights instrument. The legal nature of the HRC and the ECtHR was also influential in the context of their

decisions. The former is a treaty-based UN body which authority is very limited toward contracting states. Concurrently, the applicants cannot use this legal remedy automatically, but only if their respective country has ratified the ICCPR-OP1. This is not the case with the latter mechanism which provides direct access to the ECtHR when a country ratifies the ECHR, and its decisions are judgments which are legally binding, although their execution cannot be enforced like in the case of domestic judgments.

We can expect the further development that the ECtHR will recognize the right to same-sex marriage, because its current case law and the evolution of the convention rights have paved the strong legal base to achieve this aim. The only unknown remains how long the ECtHR will be waiting more for this step in its future decisions. On the other hand, the HRC's approach does not suggest that the right to same-sex marriage will be recognized in the near future. HRC could follow the example of the ECtHR and the judgment in *Oliari and Others v Italy* and to interpret the right to respect for private and family life like it was done by this decision. It is also important to emphasize that the process of the development of the right of same-sex couples to be recognized legally cannot be supported only by the decisions of the relevant human rights bodies. Different activities which can be conducted by different UN agencies⁷² and the CoE bodies⁷³ can also support the improvement of the social acceptance of same-sex couples and provide the decrease of prejudices toward LGBT+ people in general.

⁷² For instance, the United Nations Free & Equal Campaign led by the United Nations Human Rights Office which aims to improve the LGBT+ rights globally and actualizes this matter in the work of different UN offices.

⁷³ The Commissioner for Human Rights of the Council of Europe and the Council of Europe Sexual Orientation and Gender Identity Unit are also very useful in combating discrimination of LGBT+ people and concretely same-sex couples through the variety of activities, such as campaigns, publications and other forms of soft-law interventions.

Aleksandar D. Mihajlović*

Pravno prepoznavanje istopolnih veza pred Komitetom za ljudska prava i Evropskim sudom za ljudska prava

Sažetak

Ovim radom se analizira pravno prepoznavanje istopolnih veza u okvirima Međunarodnog pakta o građanskim i političkim pravima i Evropske konvencije o ljudskim pravima, fokusirajući se na praksu Komiteta za ljudska prava i Evropskog suda za ljudska prava. Iako se nijedan od ova dva instrumenta eksplicitno ne bavi seksualnom orijentacijom ili istopolnim zajednicama, njihovo tumačenje se razvilo tako da obuhvati pitanja privatnosti, porodičnog života, jednakosti i nediskriminacije. Koristeći doktrinarnu metodologiju i analizu prakse Komiteta i Evropskog suda, članak istražuje kako su oba tela pristupila zahtevima koji se tiču priznavanja istopolnih veza, identifikujući ključne principe i trendove tumačenja. Ističu se oblasti konvergencije, posebno u pogledu zabrane diskriminacije, kao i razlike u obimu i tempu pravnog priznavanja, posebno u vezi sa pozitivnim obavezama nametnutim državama. Članak dalje procenjuje ulogu konceptata kao što su polje slobodne procene i pojava evropskog i međunarodnog konsenzusa. Zaključuje se procenom da li se novi standard pravnog priznanja može uočiti u međunarodnom pravu ljudskih prava i razmatraju se njegove implikacije na budući pravni razvoj u ovoj oblasti.

Ključne reči: istopolne veze, pravno priznanje, Komitet za ljudska prava, Evropski sud za ljudska prava, Međunarodni pakt o građanskim i političkim pravima, Evropska konvencija o ljudskim pravima, nediskriminacija, pravo na porodični život, margina procene.

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* Istraživač saradnik, Institut za uporedno pravo u Beogradu, Srbija.

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