

THE HOLY SEE'S CHARTER OF RIGHTS OF THE FAMILY AND THE FAMILY LAW OF CONTEMPORARY EUROPEAN STATES

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Abstract

After presenting the main provisions of the Charter of the Rights of the Family, announced by the Holy See on 22 October 1983, the paper discusses the key directions of changes taking place in almost all modern European states in the last three decades. Solutions concerning so-called same-sex marriages or partnerships, adoption of children by homosexual couples, and surrogacy are included. The manner in which the solutions in individual European countries are implemented is examined to illustrate the corresponding changes chronologically.

The paper also touches on the following: the evolution of the ECtHR jurisprudence in cases concerning relationships between homosexual persons, hate speech by reason of sexual orientation and gender identity, and the age of legal sexual intercourse. The ECtHR jurisprudence is illustrated with representative examples of judgements, and the latter two issues are highlighted on the basis of the adopted statutory solutions. Finally, the responses of the Polish legislator to the described changes are discussed, followed by conclusions.

Keywords: human rights, marriage, family, sex, homosexuality

Introduction

First, I will present the essential provisions of the Charter of the Rights of the Family, announced by the Holy See on 22 October 1983.¹ Next, we

¹ Pontifical Council for the Family, *Charter of the Rights of the Family* (22.10.1983), https://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html [henceforth: CRF]. The document was commissioned by Pope John Paul II, who, in his apostolic exhortation *Familiaris consortio* attended to the wish expressed by the 1980 synod of bishops held in Rome devoted to the tasks of the Christian family

will look at the key changes occurring in the family law of contemporary European states over the last three decades,² which I take to include solutions concerning so-called same-sex marriage, same-sex civil partnerships, adoption of children by same-sex couples, and surrogacy. Additionally, I address the following issues: the evolution of the case law of the European Court of Human Rights (ECtHR) in cases involving relationships between homosexual persons, hate speech based on sexual orientation and gender identity, and the age of consent. Finally, I discuss the measures taken by the Polish legislature with respect to the described changes, provide a summary, formulate conclusions.

1. Charter of the Rights of the Family

The CRF contains a preamble and twelve articles. Its footnotes reference the following encyclicals as the sources: *Rerum Novarum*,³ *Pacem in terriis*,⁴ *Humane vitae*,⁵ *Laborem exercens*,⁶ *Populorum progression*,⁷

in the modern world. John Paul II, II, Adhortatio apostolica *Familiaris consortio* de familiae christianae muneribus in mundo huius temporis (22.11.1981), AAS 74 (1982), p. 81-191; English text available at: https://www.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio.html.

² By family law I understand (similarly to Maciej Andrzejewski) the norms regulating the basic aspects of family functioning: concluding marriage, parents–children relations, determining the origin of the child, exercising parental authority, maintenance, the normalization of the possible (temporary or permanent) placement of the child outside the family [Andrzejewski 2004, 6].

³ Leo XIII, Litterae encyclicae de conditione opificum *Rerum novarum* (15.05.1891), ASS 23 (1890/91), p. 641-70; English text available at: https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html.

⁴ John XXIII, Litterae encyclicae de pace omnium gentium in veritate, iustitia, caritate, libertate constituenda *Pacem in terris* (11.04.1963), AAS 55 (1963), p. 257-304; English text available at: https://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html.

⁵ Paul VI, Litterae encyclicae de propagatione humanae prolis recte ordinanda *Humane vitae* (25.07.1968), AAS 60 (1968), p. 481-503; English text available at: https://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae.html.

⁶ John Paul II, Litterae encyclicae de labore humano, LXXXV explesio anno ab editis litteris encyclicis “Rerum novarum” *Laborem exercens* (14.09.1981), AAS 73 (1981), p. 577-647; English text available at: https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html.

⁷ Paul VI, Litterae encyclicae de populorum progressionem promovenda *Populorum progressio*

Divini illius Magistri,⁸ exhortation *Familiaris consortio*; and other documents of the Catholic Church, including the 1983 Code of Canon Law,⁹ and the essential documents issued by international organizations, including: Universal Declaration of Human Rights,¹⁰ Declaration on the Rights of the Child,¹¹ International Covenant on Civil and Political Rights,¹² International Covenant on Economic, Social and Cultural Rights,¹³ and European Social Charter.¹⁴

It can be seen that the CRF cites principles that are found not only in other ecclesiastical documents but also in documents of the international community. Considering that human rights are expressed “innately and vitally in the family”, the document mentions in the first place that (1) the family is based on marriage – an intimate and complementary union between a man and a woman, founded upon the indissoluble bond of matrimony contracted voluntarily and publicly and oriented towards the transmission of life; and that (2) marriage is recognised as a natural institution, exclusively entrusted with the mission of transmitting life, the family being a natural union, primary to the state or any other community, and enjoying its inherent and inalienable rights.

The CRF highlights the immense value of the family for societies and states as a community of solidarity and love, where cultural, spiritual ethical and economic values are transmitted, where life wisdom is achieved

(26.03.1967), AAS 59 (1967), p. 257-99; English text available at: https://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_26031967_populorum.html.

⁸ Pius XI, Litterae encyclicae de christiana iuventutis educatione *Divini illius Magistri* (31.12.1929), AAS 22 (1930), p. 49-86; English text available at: https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_31121929_divini-illius-magistri.html.

⁹ *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317; English text available at: https://www.vatican.va/archive/cod-iuris-canonici/cic_index_en.html [henceforth: CIC/83]; legal state as of 18 May 2022.

¹⁰ Universal Declaration of Human Rights, adopted by the UN General Assembly by Resolution 217/III/A of 10 December 1948 in Paris.

¹¹ The Declaration of the Rights of the Child was adopted by the UN General Assembly on 20 November 1959.

¹² See, e.g., *The Core International Rights Treaties*, New York–Geneva 2006, which is a collection of documents published by the Human Rights Council (UNHRC).

¹³ Ibid.

¹⁴ European Social Charter, open for signature on 18 October 1961 in Turin, ratified by Poland on 10 June 1997, Journal of Laws of 1999, No. 8, item 67.

and the rights of individuals are reconciled with the demands of social life. The document recognises the considerable role of the family for preserving and fostering social cohesion by linking the family and society together with vital and organic ties. The two complement each other in the protection and development of the well-being of humanity and every person.

Considering the above, the CRF urges states and international organizations to do their utmost to secure all possible assistance – political, economic, social, and legal – which is necessary to reinforce and maintain family stability.

The authors of the document note, however, that the rights, basic needs, the success and values of the family are often less accepted – worse still, they are threatened by various legal acts, institutions and socio-economic programmes, and poverty directly impacting the family. Therefore, they call on all states and international organisations, institutions and individuals to respect the rights of the family and ensure that they are truly recognised and respected.

In the specific part, the charter lays emphasis on the fundamental rights and freedoms of people that are crucial to the family and family life. At stake here is the right to freely choose one's way of life, including marriage and setting up a family, as well as the prospect of ensuring such conditions so that those intending to marry and have a family can consciously and responsibly exercise their rights to marriage. In this context, we find an important provision obliging public authorities to uphold the institutional value of marriage in such a way that other (non-married) couples may not enjoy the same status as marriages contracted properly (Article 1).

Further, our attention is drawn to the voluntary nature of marriage and mutual consent needed for it, respect for the spouses' religious freedom, their equal rights and dignity, and the complementary nature of man and woman (Article 2). Spouses are granted the inalienable right to start a family and determine the time of birth and the number of offspring, excluding contraception, sterilisation and abortion. The activities of public authorities or private organizations aimed at limiting the freedom of spouses to make such decisions are considered a grave insult to human dignity and justice (Article 3). It is underscored here that from the very beginning human life should be protected unconditionally; in keeping with the Declaration of the Rights of the Child, it is asserted that children, both before

and after birth, have the right to protection and special care; the same goes for women who are pregnant and after they give birth. Special care is provided to orphans and children deprived of their parents, as well as those with disabilities. The CRF grants equal rights to children born of married parents and those born out of wedlock with respect to social welfare and concern for their complete personality development. It considers abortion to be a violation of the right to life and excludes any experimental manipulation of the human embryo; any intervention in genetic heritage aimed at correcting anomalies is treated as a violation of the right to bodily integrity and contrary to the good of the family (Article 4).

Just like the later Convention on the Rights of the Child,¹⁵ the CRF recognizes in Article 5 that it is the parents who have the inalienable right to educate their offspring and are the first and main educators of their children. This right encompasses the parents' freedom to educate their children in compliance with their moral and religious beliefs, cultural traditions of the family, and their unimpeded choice of the schools or other means necessary for their education. Public authorities are to lend appropriate assistance and support to parents so that they can act as educators.

In this respect, the authors of the CRF emphasise that sexual education is inherent in the parents' fundamental right to educate their children and should always take place under their close supervision and must not be violated, also when religious formation is excluded from the compulsory education system. Also, parents are naturally entitled to demand that they be allowed to participate in the activities of the school and determine and pursue an educational policy. In this context, the family has the right to protect its youngest members from negative influences and abuse from the media.

The CRF is aware of the diversity of forms of family life and uses sociological terms such as "extended family" and "nuclear family"; families whose functioning has been disrupted by divorce, and family associations (Articles 6, 7, 8). Each form is endowed with natural rights related to the promotion of its dignity, rightful independence, the intimacy of integrity and stability. It is essential that the family contributes socially and politically to the building of society, the development and implementation of social, economic, legal, and cultural programmes that impact family life. The following articles

¹⁵ Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989; Journal of Laws of 1991, No. 120, item 526 [henceforth: CRC].

extend the catalogue of family rights to include rights to economic conditions that guarantee a decent standard of living and full development, to assistance in extraordinary situations (such as premature death, abandonment by one spouse, disability, illness, unemployment, disability, and even difficulties in raising children or those resulting from old age, etc.).

The CRF also points to the problem of children of detainees, demanding that the rights and needs of the family (the worth of family unity) be respected in political life and penal legislator. It proposes legislative changes to allow prisoners to stay in touch with their families during their detention (Article 9 letter d).

It further highlights the right to such social and economic systems that the work done by family members enables them to live together and does not threaten the unity, prosperity and stability of the family, and gives them access to healthy recreation. Remuneration for work should be sufficient to establish and support a family with dignity; other forms of support are stipulated, such as: “family wage”, family allowances or remuneration for work at home (Article 10 letter a). In this respect, the document speaks of the obligation to recognise and respect the work of the mother, according to the benefit it brings to the family and society (Article 10 letter b). Further, the family’s right to housing that is “fitting for family life”, in accordance with the number of family members and ensuring services that are necessary for its life (Article 11). The last, twelfth article was devoted to migrant families, who have the same rights as other families, but it is essential to observe their right to respect for their own culture, necessary support and care, the right to have their families united with them as soon as possible, and the assistance of public authorities and international organizations.

In the introduction to the Italian edition of the CRF we read that the purpose of the charter is “to present to all contemporary Christians and non-Christians a perspective [...] of the fundamental rights vested in the family as a natural and universal community. The document is addressed, among others, to all those who share responsibility for the common good, so that they have a model and a point of reference for the development of family legislation and policy, and guidance for action plans”.¹⁶

¹⁶ Pontificio Consiglio per la Famiglia, *Carta dei diritti della famiglia* (22.10.1983), w: *Enchiridion della Famiglia. Documenti Magisteriali e Pastoralis su Famiglia e Vita 1965-2004*, red. Pontificio Consiglio per la Famiglia, EDB, Bologna 2004, p. 1489-506.

Further, in the document in question, the Holy See points to violations of family rights in the modern world and makes a very strong point that nothing can replace the family in its mission, and that all to whom the CRF is addressed should strive to provide families and parents with the necessary support and assistance in fulfilling the tasks entrusted to them by God (*ibid.*).

Considering that three decades have passed since the presentation of the charter, it will be fitting to review the changes that have occurred in the legislation of European states over those years. Understandably, their law-making activities have also been influenced by other acts of international law, especially those with the force of law. Of particular importance here will be those enacted by the UN and the Council of Europe as many European countries belong to those. Therefore, there is no doubt the content of legislated legal norms is influenced by new philosophical trends, ideologies, political views, etc.

Considering the considerable importance of norms of international law for national legislation, we should recall that the UN adopted the Convention on the Right of the Child in as early as in 1989.¹⁷ Importantly, this document reiterated the wording of the 1959 Declaration of the Rights of the Child in regard of special care and protection of children both before and after birth. It defines the child as “every human being below the age of eighteen years unless under the law applicable to the child” (Article 1). But the lack of specification of the lower age limit at which an entity starts as a human being caused some states to make declarations.¹⁸ A number of important references can be found in the CRC, from which stem the child’s right to a family (upbringing in a family) and the right to be responsible as a parent. Article 5 is notable as it obliges states parties to respect

¹⁷ The CRC was adopted by the UN General Assembly on 20 November 1989, by Resolution 44/25, it entered into force on 2 October 1990. Poland ratified this convention on 30 April 1991, but submitted two objections and two declarations on the document. In the following years, the objections were withdrawn.

¹⁸ Argentina declared that Article 1 should be “construed bearing in mind that the term ‘child’ encompasses every human being from the moment of conception until the age of eighteen”. A similar declaration was made by Guatemala, which stated that it guarantees and protects human life from the moment of conception. The Holy See, in contrast, declared that it recognizes the CRC as an instrument that safeguards the protection of the child both before and after birth. The declarations can be found in UN Doc. CRC/C/Z 1991.

the responsibilities, rights, and duties of parents to provide, in a manner consistent with the child's development, appropriate direction and guidance in the exercise of the child of the rights recognised in the convention. Article 7 mentions the child's right to know his or her parents and be under their care. Article 8 recognizes the child's right to preserve his or her identity, including the nationality, name, and family relations. Article 9 obliges states to ensure that children are not separated from their parents against their will, unless such separation is necessary in the child's best interests and the right to receive relevant information about the whereabouts of his or her parents in the event of measures undertaken by the state (detention, imprisonment, exile, deportation or death of one or both parents). Article 10 lists the child's right to maintain regular, personal and direct contact with his or her parents residing in different countries except in extraordinary circumstances. Worth highlighting are the provisions of Article 14 as they recognise the rights and duties of parents to guide the child in his or her exercise of the right to freedom of thought, conscience, and religion. Moreover, it is stated in Article 18 that parents and legal guardians bear the primary responsibility for the upbringing and development of the child. Article 29.1.c says that the states parties agree to develop in the child respect for his or her parents, cultural identity, the language, and national values of the country in which he or she lives, the country of origin, and cultures other than his or her own. We should also refer to Article 22, which is important since it recognises the right of a refugee child to seek his or her parents. These and other provisions of the CRC make it possible to conclude that the convention is the most family-oriented and at the same time pro-social instrument of international law enacted after 1983.

Another UN initiative to embrace family values was to proclaim the year 1994 as the International Year of the Family. Speaking of these European initiatives, we should mention the European Convention on the Exercise of Children's Rights, adopted in 1996 by the Council of Europe.¹⁹ Further developments in the area of family life protection were helped by the African Charter on the Rights and Welfare of the Child, adopted by the Organisation

¹⁹ Journal of Laws of 2000, No. 107, item 1128. Poland was the second state to sign and then ratify it in 1997. The convention entered into force after a third country ratified it and has been in effect since 1 July 2000.

of African Unity in 1990.²⁰ This charter draws on the CRC, recognising the same rights, but it foregrounds values that are important to Africa, such as the child's privileged position in the family and the child's duties vis-à-vis the family community and the nation [Jabłoński 2003, 253-56]. It is also important to note that after the Charter of the Rights of the Family was presented, a number of legal acts were legislated by international organizations aimed at protecting family life, which deal with specific spheres of this life, being crucial for the proper functioning of the family. We must underscore in this context that three more additional protocols were adopted for the CRC: Optional Protocol on the Involvement of Children in Armed Conflict and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (both passed on 25 May 2000²¹), and the Optional Protocol on a Communications Procedure, passed on 19 December 2011.

Similarly, in the CoE area the following documents have been adopted: Convention on Cybercrime (23.11.2001),²² Convention on Contact with Children (15 May 2003),²³ or Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (25 October 2007).²⁴ It should also be noted that these acts of international law are not the only ones adopted by international organisations. In addition to these binding documents, others that have the nature of recommendations, declarations or guidelines have been adopted, for example Recommendation No. R (98) 8 of the Committee of Ministers to Member States on Children's Participation in Family and Social Life, CoE Parliamentary Assembly's Recommendation 1501 (2001) on Parents' and Teachers' Responsibilities in Children's Education, or the Committee of Ministers' Guidelines on Child-Friendly Justice. The instruments of international law presented above, as a matter of principle, implement the demands of the CRE, but none of them refers to the family in a comprehensive manner, addressing only some spheres of the family specified therein, or even of family members alone.

²⁰ M. Gose, *African Charter on the Rights and Welfare of Child*, Community Law Centre – University of the Western Cape, Belleville 2002, Annexes II-IXX.

²¹ Journal of Laws No. 2007, No. 91, item 608, and Journal of Laws of 2007, No. 76, item 494.

²² European Treaty Series (ETS No. 185).

²³ European Treaty Series (ETS No. 192). The convention was ratified by Poland, published in the Journal of Laws No. 2009, No. 68, item 576.

²⁴ European Treaty Series (ETS No. 201), the convention ratified by Poland.

As noted above, both the CRF and the above-mentioned documents of international law, plus above all the axiological foundations of these documents, have started to influence the domestic legislation of individual European states.

2. So-called same-sex marriage and same sex-union²⁵

This approach, however, with its underpinnings in the CRF catalogue of axiological values, already started to change in the late 20th century. At that time, same-sex civil unions were legalized in several European countries. Some allowed different-sex civil unions (partnerships). The first European state to do so was Denmark (in 1989). The chronology is as follows:

- Denmark (1989-2012, same-sex only),
- Norway (1993-2009, same-sex only),
- Sweden (1995-2009, same-sex only),
- Iceland (1996-2010, same-sex only),
- The Netherlands (1998, no gender distinction),
- France (1999, no gender distinction),
- Belgium (2000, no gender distinction),
- Germany (2001-2017, same-sex only),
- Finland (2002-2017, same-sex only),
- Luxembourg (2004, no gender distinction),
- Andorra (2005, no gender distinction),
- United Kingdom (2005, same-sex only; from 2019 no gender distinction in England and Wales; from 2020 no gender distinction in Northern Ireland; from 2021 in Scotland),
- Czech Republic (2006, same-sex only),
- Slovenia (2006, same-sex only),
- Switzerland (2007-2022, same-sex only),
- Greece (2008, initially only opposite sex; from 2015 no gender distinction),
- Hungary (2009, same-sex only),
- Austria (2010, same-sex only; from 2019 no gender distinction),
- Ireland (2011-2015, same-sex only),
- Liechtenstein (2011, same-sex only),

²⁵ In what follows, I shall address the term “same-sex marriage.”

- Malta (2014, no gender distinction),
- Croatia (2014, same-sex only),
- Andorra (2014, same-sex only),
- Cyprus (2015, no gender distinction),
- Estonia (2016, no gender distinction),
- Italy (2016, same-sex only),
- San Marino (2018, no gender distinction),
- Monaco (2020, no gender distinction),
- Montenegro (2021, same-sex only).

A look into the past, however, reveals that for many states, legalizing civil unions was only the first step before further changes were made to family law, namely, the legalization of so-called same-sex marriages. Chronologically, below are presented European states that have legalized same-sex marriage (as of 2023):

- The Netherlands (2001),
- Belgium (2003),
- Spain (2005),
- Norway, Sweden (2009),
- Portugal, Iceland (2010),
- Denmark (2012),
- France (2013),
- England and Wales, Scotland (2014),
- Luxembourg, Ireland (2015),
- Finland, Malta, Germany (2017),
- Austria (2019),
- United Kingdom (2020),
- Switzerland, Slovenia (2022),
- Andorra (2023).

As we can see, the overwhelming majority of countries preceded the legalization of so-called same-sex marriages with the legalization of same-sex unions. Paths to achieve that were diverse. Austria, for example, granted gay and lesbian couples the right to enter into civil partnerships in 2010, but in 2017 the Austrian Supreme Court ruled that these unions are discriminatory by nature. The court argued gay men and lesbians should be granted the option to marry until 1 January 2019.²⁶ The Austrian legisla-

²⁶ *Same-sex marriage. Distinction between marriage and registered partnership violates ban*

ture did not act to oppose the ruling, which led to the first same-sex marriages being “performed” in early 2019. In contrast, the Spanish parliament legalized same-sex “marriage” in 2005, guaranteeing equal rights to all married couples, regardless of sexual orientation, without prior legalization of civil unions.²⁷

In sum, as many as thirty European countries provide for the legal possibility of entering into a so-called same-sex marriage or partnership. The first country to introduce legislation permitting same-sex couples to marry was the Netherlands, in effect since 1 April 2001 [Pawliczak 2014, 265]. Subsequently, the right to marry was guaranteed for homosexual persons in: Belgium, Spain, Norway, Sweden, Portugal, Iceland, Denmark, France, England and Wales, Scotland, Luxembourg, Ireland, Malta, Finland, Germany, Austria, Switzerland, Slovenia and Andorra.²⁸

These countries are both EU member states and those outside of it, such as Norway and Iceland. Of the twenty-seven EU member states, the above-mentioned options (so-called same-sex marriages and civil partnerships of such persons) are excluded in only six: Poland, Lithuania, Latvia, Romania, Slovakia and Bulgaria. However, this state of affairs may soon change, due to scheduled parliamentary debates in some of them.

3. Evolution of the ECtHR judicial practice regarding the legalization of unions of same-sex couples

It needs to be emphasized that the European systems of human rights protection lack general solutions that explicitly mandate or prohibit states from introducing legal regulations allowing homosexual couples to marry on the same terms and conditions as heterosexual couples.

The Convention for the Protection of Human Rights and Fundamental Freedoms²⁹ adopts the traditional, that is, monogamous and heterosexual

on discrimination, www.vfgh.gv.at [accessed: 09.03.2023].

²⁷ *Same-Sex Marriage Around the World*, <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world> [accessed: 09.03.2023].

²⁸ *Same-sex relationship*, https://en.wikipedia.org/wiki/Same-sex_relationship [accessed: 09.03.2023].

²⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2; (Polish) Journal of Laws No. 1993, No. 61, item 284 [henceforth: ECHR].

model of marriage. In compliance with Article 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.” Within the meaning of the ECHR, marriage is a union between two people of different sexes, contracted in accordance with the requirements of the applicable national law. When the ECHR was adopted (4 November 1950), this model of marriage was taken for granted. For a long time to come, its provisions were interpreted in such a way that the introduction of the legal possibility for same-sex couples to marry depends on the state’s vision of marriage and family. The ECtHR underscored in its rulings³⁰ that states possess a wide margin of discretion in this regard, which was grounded in the recognition that national authorities are best informed about the customs and traditions functioning in a particular society. However, as can be seen over the years, this approach has undergone major changes. Let me outline the direction of this evolution, which will be illustrated by the several cases that follow.

3.1. Schalk and Kopf v. Austria

In its judgement of 24 June 2010, the ECtHR dismissed an application concerning the institutionalization of same-sex unions in domestic law.³¹

The applicants argued that they were discriminated against based on their sexual orientation because they were denied the right to marry and – until the law on registered partnerships came into force – were unable to legally recognise their relationship.

The Court did not find that the lack of institutionalized same-sex partnerships in Austrian law was an infringement of the ECHR. When stating the reasons, the Court held that there had been no violation of Article 12 (right to marry), or Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life). It explicitly indicated in § 101 that “Article 12 does not impose an obligation to extend the regulation of marriage to same-sex unions”, recognising that such an obligation could not be inferred from Article 14 in conjunction with Article 8 either. However, in § 108 of the reasons, the Court highlighted that “it is up to the signatory states, which are not hindered the provisions of Article

³⁰ The ECtHR rulings are available at <https://etpcz.ms.gov.pl/searchetpc> and [https://hudoc.echr.coe.int/eng#{"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\]}](https://hudoc.echr.coe.int/eng#{).

³¹ ECtHR judgement of 24 June 2010, application no. 30141/04.

12, as well as Article 14 in conjunction with Article 8 of the ECHR, to restrict access to marriage for same-sex unions. Not only did the Court not order the state to grant access to marriage for same-sex couples, but also explicitly refuted the argument that states that institutionalize homosexual unions in different form should do so in a way that follows the legal framing of marriage, arguing that states have been given a lot of leeway in such matters.

3.2. Gas and Dubuis v. France

Here the Court passed an almost identical ruling as in the above-cited case,³² reasoning that the right to same-sex marriage does not follow from the ECHR. Regulation in this respect belongs to individual states. In addition, the Court made clear in § 66 of its assessment that “Article 12 of the Convention does not impose an obligation on the governments of the Contracting States to grant same-sex couples access to marriage,” and the right to same-sex marriage cannot be derived from Article 14 in conjunction with Article 8 ECHR. It reiterated that states exercise a certain scope of discretion in this regard.

3.3. Härmäläinen v. Finland

The applicant, who was born male, married a woman in 1996. After that she underwent sex reassignment surgery in September 2009. In June 2006, the applicant changed her first names, but was unable to get her identification number changed to a number indicating female gender on public documents, due to her wife’s lack of consent to convert their marriage into a registered same-sex partnership. Since the relevant office refused to register the applicant as a woman, she argued that full official recognition of her new gender could only become effective after her marriage was transformed into a registered same-sex partnership, and on this basis she brought a complaint.

The Court, which ruled as a Grand Chamber, found in its 16 July 2014 judgement that there was no interference with Article 8 ECHR.³³ The Court reasoned that the civil partnership is a genuine alternative that provides

³² ECtHR judgement of 15 March 2010, application no. 25951/07.

³³ ECtHR judgement of 16 July 2014, application no. 37359/09.

legal protection for same-sex couples to almost the same extent as the protection of married couples. The slight differences between these institutions do not imply the deficiency of the Finnish legal system with respect to the positive obligation arising from Article 8 ECHR. Moreover, it found that the transformation of the union would not have any repercussions for the applicant's family life, as it would not affect parental relations or responsibility for the custody and maintenance of the child. The Court's position was that no other problems arose under Article 12 ECHR, and that there was no infringement of Article 14 in conjunction with Articles 8 and 12.

3.4. Chapin and Charpentier v. France

The case concerns an application lodged by a marriage of two men, contracted before the mayor of Bègles and later declared invalid by the courts. The applicants claimed that limiting access to marriage only to heterosexual couples constitutes discriminatory violations of the right to marry. They also alleged that they were discriminated against based on their sexual orientation when exercising their right to respect for family life.

In its judgement of 9 June 2016, the Court found there was no interference with Article 12 in conjunction with Article 14 or a violation of Article 8 in conjunction with Article 14 ECHR.³⁴ It reiterated the conclusions made in *Schalk and Kopf v. Austria* (see above) that neither Article 12 nor Article 8 in conjunction with Article 14 can be construed as obliging states to grant same-sex couples access to marriage. The Court underscored that it had ruled along the same lines in the cases *Hämäläinen v. Finland* (see above) and *Oliari and Others v. Italy*, and considering the short time that has elapsed since their issuance, it cannot but give the same reasons for its ruling.

3.5. Orlandi and Others v. Italy

This case involves an application lodged by six same-sex couples (eleven Italian citizens and one Canadian citizen) about the impossibility of registering or recognizing their marriages contracted abroad in Italy as any

³⁴ ECtHR judgement of 9 June 2016, application no. 40183/07.

kind of union. They also claimed they were subject to discrimination based on sexual orientation.

The Court, in its judgement of 14 December 2017, reasoned that there had been a violation of Article 8 of the ECHR because the state had not properly balanced competitive interests and owing to violations of the rights of couples.³⁵ In the Court's opinion, although the states had a wide discretion concerning the admission or registration of same-sex marriages, there were violations of the rights of those couples after they had married abroad. Moreover, Italy's failure to recognize same-sex marriages contracted abroad infringed the right to respect for the spouses' family life.

3.6. Fedotova and Others v. Russia

In the judgement of 17 January 2023, the ECtHR Grand Chamber ruled on the case *Fedotova and Others v. Russia*, which involved applications by three same-sex couples whose marriage applications had been rejected because Russian law stipulates that only a woman and a man can marry.³⁶ Alleging violations of Article 8 and Article 14 in conjunction with Article 8 ECHR, the applicants claimed that they could not in any way legalize their relationships in Russia, which constitutes discrimination on the basis of sexual orientation. The case was referred to the Grand Chamber after Russia requested that it hear the case after its ruling of 13 July 2021 that Article 8 ECHR had been violated. The Court took into account the apparent trend towards legalizing same-sex unions in CoE member states (§ 166–177 of the statement of reasons) and stated that Article 8 ECHR imposes a positive obligation to ensure a legal framework allowing same-sex couples to adequately recognize and protect their relationships (§ 178), but it rests with the states to decide in what form they will provide this (§ 189).

Notably, the Court did not accept the Russian government's arguments about the protection of the traditional family, since legalizing same-sex unions does not diminish the rights of heterosexual couples (§ 212), and about the beliefs of the majority of Russians, since the rights of a minority cannot depend on whether or not the majority agrees (§ 218), and on the protection of minors against the promotion of homosexuality, pointing out that by adopting laws prohibiting

³⁵ ECtHR judgement of 14 December 2017, application no. 26431/12.

³⁶ ECtHR judgement of 17 January 2023, applications nos. 40792/10, 30538/14, 43439/14.

the promotion of homosexuality, “the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society” (§ 222). The Grand Chamber ruled by a majority of 14 to 3 that Article 8 ECHR had been violated in the case. At the same time, the Chamber found it unnecessary to examine the allegation of interference with Article 8 in conjunction with Article 14 ECHR. Four dissenting opinions were filed with the verdict: 1) Judge Dariana Pavli of Albania and Judge Iulia Antoanella Motoc of Romania gave partially dissenting opinions, in which they criticized the lack of a ruling on the substantive issue regarding the allegation of a violation of Article 14 in conjunction with Article 8 ECHR; 2) Judge Krzysztof Wojtyczek, who opined that the ECtHR’s law-making role is very limited, and that new rights can be made by concluding new treaties, as done in the past by the Member States. When the ECHR was ratified, Russia could not have foreseen such an interpretation of Article 8 as the Grand Chamber did. In addition, he observed that Russia, which is no longer a CoE member, is not bound by the ECHR, so this judgement and any other issued against Russia after September 16, 2022 should not have effect *erga omnes*; 3) Judge Alena Poláčková of Slovakia argued that the composition of the Grand Chamber was unlawful due to the participation of a Russian judge in the ruling; 4) Judge Mikhail Lobov of Russia, who noted that there is no consensus within Europe on the legalization of same-sex unions, and that the Grand Chamber used the phrase “evident trend” illegitimately intending to ignore the fact that the population of countries where such unions have not been legalized constitutes almost half of the population of the CoE member states. He believes the ECtHR should not induce social change by means of judgements.

It should be noted that this ruling was made after Russia had been excluded from the CoE, but the Grand Chamber nonetheless determined that the ECtHR is competent to hear the case with respect to events prior to 16 September 2022.

Now, turning to a brief discussion of the ECtHR’s evolving case law, the cited rulings allow us to observe that the Court’s position evolved from granting the right to marry solely to heterosexual couples to thinking that the granting of such a right also to same-sex couples does not contravene the ECHR provisions. Also, the creation of opportunities for other forms of institutionalization of cohabitation for same-sex couples within

the internal legal order of states-parties to the ECHR was not considered by the Court as incompatible with the provisions of the Convention [Jaros 2015, 90]. This position, however, changed radically after the *Fedotova and Others v. Russia* judgement, in which it was considered that from Article 8 ECHR arises a positive obligation to ensure a legal framework for same-sex couples to have their relationship properly recognized and protected, and states have the discretion to determine how to achieve that.

To sum, the change in the ECtHR jurisprudence goes hand in hand with the dynamics of changes in the family legislation of European states that allow so-called same-sex marriages or introduce registration of civil unions.

4. Adoption of children by homosexual couples and surrogacy

Further changes in the area of family law that have been undertaken in many European countries have involved legalizing the adoption of children by homosexual couples. Currently, this option is available in twenty-one countries: Andorra, Austria, Belgium, Croatia, Denmark, Finland, France, Germany, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.³⁷ In these countries, as well as in Czechia, Estonia and Greece, same-sex couples can be appointed as foster families, while in San Marino and Estonia a homosexual partner can apply to adopt the other partner's child.³⁸

In Europe, too, the law on substitute maternity (surrogacy) has been amended. Regulations on surrogacy vary in countries that permit it. Despite the provision of Article 3 of the Charter of Fundamental Rights of the European Union³⁹ that “in the fields of medicine and biology, the following must be respected in particular: [...] c) the prohibition on making the human body and its parts as such a source of financial gain” and Article 21 of the Oviedo Convention,⁴⁰ ratified by twenty-nine countries, stipulating

³⁷ Based on *Same-sex adoption*, https://en.wikipedia.org/wiki/Same-sex_adoption [accessed: 20.03.2023].

³⁸ Ibid.

³⁹ *Charter of Fundamental Rights of the European Union* (2021/C 326/02) of 26 October 2012, OJ C 326/321.

⁴⁰ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights

a prohibition of financial gain, namely that “the human body and its parts shall not, as such, give rise to financial gain,” some states do allow commercial surrogacy.

My inquiry into the legislation of selected European states permits the following conclusions:

Austria

Surrogacy is prohibited by Austrian law.⁴¹

Belgium

Only paid surrogacy is prohibited in Belgium.⁴²

Czechia

In the Czech Republic surrogacy is only mentioned in § 804 of Law no. 89/2012, which provides an exception to the prohibition on adoption by immediate relatives and siblings. However, this does concern surrogacy [Svatoč and Konečná 2019, 200].

Finland

All surrogacy arrangements (both commercial and altruistic) are illegal.⁴³

France

In France, since 1994, any surrogacy arrangement that is commercial or altruistic in character is illegal or unlawful and not sanctioned by law (Article 16-7 of the French Civil Code). The French Court of Cassation adopted this point of view in 1991. It ruled that if any couple agrees or arranges with another person that she is to give birth to the husband’s child and hand over the baby after birth to that couple, and that she will decide not to keep the child, the couple entering into such an agreement cannot adopt the child. The court reasoned that such an arrangement is illegal pursuant to Articles 6, 353 and 1128 of the French Civil Code.⁴⁴

and Biomedicine), done at Oviedo on 4 April 1997. Available at <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=164>.

⁴¹ *Surrogacy*, <https://www.bmeia.gv.at/en/austrian-consulate-general-new-york/service-for-citizens/civil-status-family/surrogacy> [accessed: 20.03.2023].

⁴² *International Surrogacy Laws*, http://www.familylaw.com.ua/index.php?option=com_content&view=article&id=69&Itemid=99&lang=en [accessed: 20.03.2023].

⁴³ *Surrogacy abroad*, <https://um.fi/surrogacy-abroad> [accessed: 20.03.2023].

⁴⁴ *Cass., Ass. plén., May 31, 1991*, <https://www.casebooks.eu/contractLaw1/chapter3/excerpt.php?excerptId=2663> [accessed: 20.03.2023].

Greece

Greece is the only European Union country with a comprehensive framework for regulating and enforcing surrogacy, according to the explanatory memorandum to Article 17 of Law L. 4272/2014. This option is now also extended to applicants or surrogate mothers whose permanent residence is outside Greece.⁴⁵

Netherlands

Altruistic surrogacy is legal in the Netherlands. Only commercial surrogacy is illegal in both Belgium and the Netherlands.⁴⁶

Spain

While surrogacy is not allowed in Spain (the biological mother's arrangement to give up her right to the baby is legally void), surrogacy is legal in the country where it is recognized as long as the mother has citizenship of the same country.⁴⁷

Iceland

All forms of possible surrogacy are criminalized.⁴⁸

Germany

All surrogacy arrangements (both commercial and altruistic) are illegal.⁴⁹

Sweden

Surrogacy is illegal in Swedish health care, but it has no surrogacy regulations.⁵⁰

⁴⁵ *Surrogacy laws by country*, https://en.wikipedia.org/wiki/Surrogacy_laws_by_country [accessed: 20.03.2023].

⁴⁶ *Legal and illegal aspects of surrogacy*, <https://www.government.nl/topics/surrogate-mothers/surrogacy-legal-aspects> [accessed: 20.03.2023].

⁴⁷ *Surrogacy laws by country*, https://en.wikipedia.org/wiki/Surrogacy_laws_by_country [accessed: 20.03.2023].

⁴⁸ *Ibid.*

⁴⁹ *Germany: Federal Court of Justice Rules on Legal Motherhood of Surrogate*, <https://www.loc.gov/item/global-legal-monitor/2019-04-29/germany-federal-court-of-justice-rules-on-legal-motherhood-of-surrogate> [accessed: 20.03.2023].

⁵⁰ *Surrogacy laws by country*, https://en.wikipedia.org/wiki/Surrogacy_laws_by_country [accessed: 20.03.2023].

Switzerland

Surrogacy is regulated in the Bundesgesetz über die medizinisch unterstützte Fortpflanzung (Fortpflanzungsmedizingesetz, 18 December 1998) and is illegal. The law prohibits surrogacy, and Article 31 provides for the punishment of physicians who perform in vitro fertilization for surrogacy or those who arrange surrogacy. A surrogate mother is not punished by law.⁵¹

Ukraine

As of 2002, surrogacy and surrogacy combined with cell donation have been legal in Ukraine. There are surrogacy clinics in Kiev and Lviv. According to the law, the donor or surrogate mother has no parental rights to the born child, and it is legally the child of the intended parents.

Surrogacy is regulated by Article 123 of the Family Code of Ukraine and the Order of the Ministry of Health of Ukraine on Approval of the Use of Assisted Reproductive Technologies in Ukraine dated 9 September 2013, no. 787. No special authorisation from any regulatory authority is required for this. Written informed consent of all parties (the prospective parents and the surrogate mother) participating in the surrogacy programme is mandatory. The prospective mother is to prove that there is a medical reason preventing her from becoming pregnant.

However, Ukraine does not support surrogacy for same-sex couples.

Ukrainian legislation allows the names of prospective parents to be stated, from the very beginning, in the birth certificate of a baby born as a result of a surrogacy programme. The surrogate's name, in contrast, is not mentioned in it. The baby is treated as legally "belonging" to the prospective parents from the very conception. A surrogate mother cannot keep a child after birth. Even if a donation programme has been followed and there is no biological relationship between a child and a future mother, their names will be indicated in the birth certificate (clause 3 of Article 123 of the Ukrainian Family Code).

Ukrainian law also permits research and commercial donation of gametes and embryos.⁵²

⁵¹ Ibid.

⁵² Ibid.

United Kingdom

Altruistic surrogacy is legal in the UK, but commercial surrogacy arrangements are prohibited under Section 2 of the Surrogacy Arrangements Act 1985. In addition, surrogacy advertising has been criminalized under Section 3 of the Surrogacy Act, while the Human Fertilization and Embryology Act 2008 adds an exception allowing non-profit agencies to advertise their services. Regardless of contractual or financial compensation for expenses, surrogacy arrangements are not legally enforceable by virtue of Section 1A of the Surrogacy Arrangements Act; therefore, the surrogate mother retains the statutory right to determine the “status” of the child, even if the two are not genetically related. Unless a parental or an adoption order is issued, the surrogate mother remains the legal mother of the child.⁵³

Italy

According to the provisions of Law No. 40 approved by the Italian Parliament on 19 February 2004 (provisions on medically assisted procreation), the sale in any form of gametes or embryos, as well as surrogacy, is banned and punishable by imprisonment between three months and two years and a fine from 600,000 to one million euros (Article 12(6)). This ban was further supported by a judgement issued in 2017 by the Italian Constitutional Court (No. 272), which stated that “the practice of surrogacy constitutes an unbearable attack on women’s dignity and deeply undermines human relations.”⁵⁴

Poland

As regards Polish law, the Family and Guardianship Code,⁵⁵ in Article 61⁹ states explicitly that the mother of a child is the woman who gave birth to it. This provision is related to Article 189a of the Penal Code,⁵⁶ pursuant to which criminal liability for human trafficking can be incurred if a surrogacy arrangement is discovered. It is also worth citing Article 211a, which

⁵³ *International Surrogacy Laws*, http://www.familylaw.com.ua/index.php?option=com_content&view=article&id=69&Itemid=99&lang=en [accessed: 20.03.2023].

⁵⁴ *Surrogacy laws by country*, https://en.wikipedia.org/wiki/Surrogacy_laws_by_country [accessed: 20.03.2023].

⁵⁵ Act of 25 February 1964 – The Family and Guardianship Code, Journal of Laws No. 2020, item 1359, as amended [henceforth: FGC].

⁵⁶ Act of 6 June 1997 – The Penal Code, Journal of Laws No. 2022, item 1138, as amended [henceforth: PC].

criminalizes both the giving up a child for adoption by a person with parental authority over the child and the adoption of a child by a person from whom the child is not descended and who is not the child's biological parent. Liability under § 1 arises if a person acts "for the purpose of obtaining a financial gain," or under § 2 if a person acts "for the purpose of obtaining a financial or personal gain, concealing this purpose from the court."

The summary laid out above makes it clear that surrogacy is prohibited in the vast majority of the countries listed. This applies to both altruistic and commercial surrogacy. In contrast, commercial surrogacy is illegal in Belgium, the Netherlands, the UK and Greece, while in Ukraine it is not legally regulated as commercial, being more akin to altruistic.

5. Hate speech in Europe vs. sexual orientation and gender identity in selected European countries

Austria (as amended in 2020)

Public incitement of violence or hatred on the basis of such aspects as cultural gender or sexual orientation is punishable by imprisonment for up to two years (Article 283 of the Austrian Penal Code).⁵⁷

Croatia (as amended in 2019)

"Persecution of organizations or individuals promoting equality between people" is punishable by imprisonment for a term between six months to five years under Article 174 of the Croatian Penal Code.

It is punishable by imprisonment for up to three years to incite or make available material that incites violence or hatred based on such aspects as cultural gender, gender identification or sexual orientation through the press, radio, television, an information system or network, a public assembly, or otherwise in public.

Committing a hate crime on the basis of, among other things, cultural gender, gender identification or sexual orientation is an aggravating circumstance (Article 87 of the Croatian Penal Code).

⁵⁷ https://legislationline.org/search?q=lang:en,sort:most_read_first,country:4,page:1 [accessed: 21.03.2023].

Nine offences have qualified forms if they were motivated by hatred with respect to the above aspects, among other things.⁵⁸

France (as amended in 2022)

If a crime is accompanied, preceded or followed by words, written materials, images, objects or conduct in any way offensive to the honour or dignity of the victim or the group to which the victim belongs, based on, for example, gender, sexual orientation or gender identification, the upper limit of penalty is increased according to seven categories depending on the upper limit of penalty of the basic form (Article 132-77 of the French Penal Code).

It is punishable by up to three years' imprisonment and a fine to refuse to provide a service, deliver goods, rent out premises, obstruct business on the basis of, for example, gender, customs, sexual orientation or gender identification, as well as to make employment, admission to an internship, etc., dependent on these aspects (Articles 225-1 and 225-2 of the French Penal Code).

Practices, conduct and repeated proposals aimed at changing or suppressing sexual orientation are punishable by imprisonment for two years and a fine.

In qualified types, such as when an act is committed against a minor, a descendant, or a person under parental authority, the perpetrator faces a penalty of up to 3 years in prison and a higher fine (Article 225-4-13 of the French Penal Code).

Moreover, the court may deprive the perpetrator of parental authority or restrict it.⁵⁹

Greece

Committing a crime by reason of such things as the sexual orientation or gender identification of the victim is an aggravating circumstance, resulting in an increase in the lower and upper limits of the penal sanction, ruling out a suspended sentence (Articles 79 and 81A of the Greek Criminal Code).⁶⁰

⁵⁸ https://legislationline.org/search?q=lang%3Aen%2Csort%3Amost_read_first%2Ccountry%3A110%2Cpage%3A1 [accessed: 21.03.2023].

⁵⁹ <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070719> [accessed: 21.03.2023].

⁶⁰ https://legislationline.org/search?q=lang:en,sort:most_read_first,country:100,page:1

Spain (as amended in 2022)

Committing a crime because of, for example, gender, gender identification, sexual orientation and the perpetrator's gender role bias is an aggravating circumstance (Article 22 of the Spanish Penal Code).

It is punishable by imprisonment for a term between one year to four years to provoke hatred, hostility, discrimination or violence on the basis of, among other things, gender, gender identification or sexual orientation, and to produce, develop, possess for the purpose of distribution, make available, distribute and sell written material and other materials that can be used directly or indirectly to incite hatred, hostility, discrimination or violence for the aforementioned reasons (Article 510(1) of the Spanish Penal Code).

The following are punishable by one to four years in prison and a fine: infringement of a person's dignity by engaging in activities leading to humiliation, disparagement, discrediting of such persons, on the basis of such qualities as gender, gender identification or sexual orientation; production, development, possession for the purposes of distributing, sharing, disseminating and selling written and other materials that can be used directly or indirectly to inflict such humiliation, disparagement and discrediting. If the said acts promote or foster an atmosphere of hatred, hostility, discrimination or violence against the listed categories of persons (Article 510(2) of the Spanish Penal Code).

It is punishable to deny access to a public service on the basis of, among other things, gender, gender identification and sexual orientation – the sanction being from 6 months to 2 years of imprisonment, a fine and a ban on practising a profession or holding office from one to three years (Article 511 of the Spanish Penal Code).

It is punishable to refuse, in the course of a professional activity or enterprise, to perform a service because of such aspects as gender, gender identification and sexual orientation – the penalties being a ban on holding office, practicing a profession or business for a period of one to four years.⁶¹

[accessed: 21.03.2023].

⁶¹ *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*, <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444> [accessed: 21.03.2023].

Ireland

It is punishable to publish or distribute written materials, use words, behave, show written material, distribute, show, play audio or video recording, if these words, conduct or material can threaten, hurt, offend, incite hatred intentionally, or, given the circumstances, are likely to incite hatred against a group of people based on things like sexual orientation. The punishment is a fine or imprisonment for up to 2 years (Articles 1 and 2 of the Hate Crimes Act).⁶²

Iceland (as amended in 2015)

It is punishable to ridicule, slander, insult, threaten and otherwise attack a person or group of people on the basis of, among other things, sexual orientation or gender identification – the punishment being a fine or imprisonment for up to 2 years (Article 233a of the Icelandic Penal Code); to refuse to sell goods or provide a service, or to deny access to a public place or assembly to a person on the basis of such aspects as sexual inclination – the punishment being a fine or imprisonment for up to 6 months (Article 180 of the Icelandic Penal Code).⁶³

Malta

Committing a crime motivated by hatred on the basis of, for example, gender, gender identification or sexual orientation, increases the punishment by one or two degrees (Article 83B of the Maltese Penal Code).

Some chapters of the Penal Code additionally provide for an increase in punishment by one or two degrees if the crime is motivated by gender, gender identification or sexual orientation.

It is punishable to publish or distribute written material, use words, behave, show written material, distribute, show, play audio or video recording, if these words, conduct or material can threaten, hurt, offend, incite hatred intentionally, or, given the circumstances, are likely to incite hatred against a group of people based on things like sexual orientation. The punishment

⁶² https://legislationline.org/search?q=lang:en,sort:most_read_first,country:96,page:1 [accessed: 21.03.2023].

⁶³ https://legislationline.org/search?q=lang%3Aen%2Csort%3Amost_read_first%2Ccountry%3A97%2Cpage%3A1 [accessed: 21.03.2023].

is a fine or imprisonment for a term between 6 and 18 months (Article 82a of the Maltese Penal Code).⁶⁴

Monaco

It is punishable to provoke hatred or violence against persons or groups of people on the basis of such aspects as sexual orientation – the punishment being up to 5 years' imprisonment (Article 16 of the Law on Freedom of Expression).⁶⁵

Portugal (as amended in 2017)

It is punishable to establish and organise organisations and develop organised propaganda activities that incite discrimination, hatred and violence on the basis of, among other things, gender, sexual orientation and gender identification, and to participate in such organisation and activities. In these cases the punishment is up to 8 years' imprisonment (Article 240 § 1 of the Portuguese Penal Code).

It is punishable to provoke acts, violence, defame or insult a person or a group of people, threaten a person or a group of people, incite violence or hatred based on, among other things, gender, sexual orientation and gender identification. The punishment ranges from 6 months to 5 years in prison (Article 240 § 2 of the Portuguese Penal Code).

Murder and grievous bodily harm have qualified forms if they are motivated by hatred based on things like gender, sexual orientation and gender identification (Articles 132 and 145 of the Portuguese Penal Code).⁶⁶

Germany

It is punishable by imprisonment of up to 2 years or a fine to allow content that may violate the dignity of others by insulting, maliciously denigrating or defaming, among others, groups with a specific sexual orientation or a member of such a group, to reach the consciousness of a person belonging to such a group who does not wish that.

It is punishable to 1) incite – “in a manner suited to causing a disturbance of the public peace” – hatred against a national, racial, religious

⁶⁴ https://legislationline.org/search?q=lang:en,sort:most_read_first,country:88,page:1 [accessed: 21.03.2023].

⁶⁵ https://legislationline.org/search?q=lang:en,sort:most_read_first,country:86,page:1 [accessed: 21.03.2023].

⁶⁶ *Código Penal*, <https://www.codigopenal.pt/> [accessed: 21.03.2023].

group or group defined by ethnic origin, against sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population, or incite violent or arbitrary measures against them; 2) violate – “in a manner suited to causing a disturbance of the public peace” – the dignity of others by insulting, maliciously denigrating or defaming the said groups or sections of society, or persons belonging to one of the aforementioned groups or sections of the population. Such acts give rise to imprisonment of 3 months to 5 years (Section 130 (1) of the German Penal Code).⁶⁷

Romania

Committing a crime on account of such aspects as the sexual orientation of the victim is an aggravating circumstance that may justify the extraordinary aggravation of the penalty – the imposition of a punishment above the upper limit of the sanction (Articles 77 and 78 of the Romanian Penal Code).

There is no crime of “hate speech” on the grounds of sexual orientation *sensu stricto*, but it is punishable to incite the public to hatred or discrimination against a certain category of persons, which is punishable by 6 months to 3 years of imprisonment or a fine (Article 369 of the Romanian Penal Code).⁶⁸

San Marino (as amended in 2016)

It is punishable to commit or incite acts of discrimination or violence based on, among other things, sexual orientation; the sanction being second-degree imprisonment (Article 179 bis of the Penal Code of San Marino).

Committing a crime by reason of sexual orientation is an aggravating circumstance (Article 90 of the Penal Code).⁶⁹

⁶⁷ *German Criminal Code*, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [accessed: 21.03.2023].

⁶⁸ <https://legislatie.just.ro/Public/DetaliuDocumentAfis/24810> [accessed: 21.03.2023].

⁶⁹ https://legislationline.org/search?q=lang:en,sort:most_read_first,country:79,page:1 [accessed: 21.03.2023].

Slovakia

Several dozen types of offences have qualified forms if they were committed out of hatred motivated by, for example, gender or sexual orientation (§ 140 e of the Slovakian Penal Code).⁷⁰

Slovenia

It is punishable to publicly provoke or incite hatred, conflict, intolerance or “cause” inequality on the grounds of such aspects as sexual orientation; the penalty is imprisonment for up to 2 years (Article 297 of the Slovenian Penal Code).⁷¹

Switzerland (as amended in 2018)

It is punishable to 1) publicly arouse discrimination or hatred against persons or groups of people on the basis of, for example, their sexual orientation; 2) publicly promote an ideology that discredits or denigrates such persons or groups; 3) publicly – by words, written materials, images, gestures, acts or in any other way that violates human dignity – to discredit or discriminate against such a person or group; 4) refuse a publicly offered benefit on the basis of, for example, sexual orientation. These offences are punishable by imprisonment for up to 3 years or a fine (Article 261 bis of the Swiss Penal Code).⁷²

Sweden (as amended in 2018)

Motivation aimed at offending a person or a group of people on the grounds of, among other things, sexual orientation, gender identification or for similar reasons, is particularly noteworthy as an aggravating circumstance (Chapter 29 § 2 of the Swedish Penal Code).⁷³

United Kingdom

If an offence is motivated by hostility towards persons of a specific sexual orientation, or if the offender – prior to, immediately before or after

⁷⁰ https://legislationline.org/search?q=lang:en,sort:most_read_first,country:77,page:1 [accessed: 21.03.2023].

⁷¹ https://legislationline.org/search?q=lang:en,sort:most_read_first,country:76,page:1 [accessed: 21.03.2023].

⁷² *Codice penale svizzero del 21 dicembre 1937 (Stato 1° agosto 2023)*, https://www.fedlex.admin.ch/eli/cc/54/757_781_799/it#fn-d6e10045 [accessed: 21.03.2023].

⁷³ https://legislationline.org/search?q=lang:en,sort:most_read_first,country:74,page:1 [accessed: 21.03.2023].

committing the offence – demonstrated hostility towards the victim because of his or her sexual orientation, this is an aggravating circumstance that the court is obliged to take into account *ex officio* (Article 146 of the UK Criminal Justice Act 2003).⁷⁴

Italy

Currently, the Italian Penal Code does not contain provisions regulating hate crimes based on sexual orientation or transgenderism. Article 604-bis provides for punishability unless a given behaviour constitutes a more serious crime: 1) the proliferation of ideas related to the concepts of racial or ethnic superiority, or racial or ethnic hatred, incitement to discrimination or discrimination on racial, ethnic, national or religious grounds; these are punishable by a fine; 2) incitement to violence and acts of violence on racial, ethnic, national or religious grounds – punishable by up to 4 years of imprisonment.

According to Article 604-ter, when other crimes are committed for the purpose of discrimination or out of hatred for racial, ethnic, national or religious reasons, a penalty is to be imposed within the limits of the sanction increased by half. Membership in an organization whose purpose is to incite hatred or violence on racial, ethnic, national or religious grounds is punishable by 6 months to 4 years in prison.⁷⁵

Summing up the results of our review of the laws implemented by the European countries shown above, it appears that most of them have typified in their penal legislation the crime involving the use of various forms of violence or hatred against people based on their sexual orientation. It is noteworthy that until recently most of them (e.g. England, Ireland) criminalized homosexual intercourse. Countries like Greece, Romania and Sweden have not typified a hate crime against homosexuals, but such offences provide grounds for aggravating the penalty. Only Italy does not explicitly address hate crimes against persons based on their sexual orientation, but a careful reading of Italian penal regulations warrants a conclusion that such acts would be considered by the courts as an aggravating circumstance. Regarding Poland, the Penal Code does not provide for a separate criminal qualification of hate crime based on sexual orientation. However,

⁷⁴ <https://www.legislation.gov.uk/ukpga/2003/44/section/146/enacted> [accessed: 21.03.2023].

⁷⁵ *Dei delitti contro la persona*, <https://www.altalex.com/documents/news/2014/10/28/dei-delitti-contro-la-persona> [accessed: 21.03.2023].

considering the general provisions, the court, when examining a specific case, is obligated to take into account the motivation of the perpetrator, and therefore motivation based on hatred of homosexuals can be treated as an aggravating circumstance and exacerbate the penal sanction.

6. Age for legal expression of consent to sexual intercourse in Europe⁷⁶

Our review of the regulations concerning the provision of conditions favouring the creation and functioning of the family in European countries will be more complete if we supply some information on the age when sexual intercourse becomes legal, or put differently – the age from which consent to sexual intercourse does not give rise to criminal liability.

6.1. Countries where the age of consent is 14 years old

Albania

Andorra

This age limit is raised to 18 years if there occurs an abuse of trust or dependency, or a coercive situation (Articles 147, 148).⁷⁷

Austria

In a situation where the person is not mature enough to understand the meaning of the act, the limit is raised to 16 years.

The act is justifiable if the age difference between the parties is no more than 3 years.

It is also punishable to initiate sexual contact with a minor via the Internet.

Bosnia and Herzegovina

Bulgaria

The limit is raised to 18 years if the wronged party is one who does not understand the essence and meaning of the act.

⁷⁶ The main sources of information are: the U.S. online database – www.ageofconsent.net and https://en.wikipedia.org/wiki/Ages_of_consent_in_Europe [both accessed: 22.03.2023]. If other sources are used, they will be referenced in respective footnotes.

⁷⁷ *Llei 9/2005, del 21 de febrer, qualificada del Codi penal*, <https://www.bopa.ad/bopa/017025/Pagines/3BE2E.aspx> [accessed: 22.03.2023].

Montenegro

In cases where the perpetrator is a teacher, guardian, adoptive parent, stepfather, stepmother, or other person abusing authority or power over a minor, the limit is 18 years. It is punishable to persist in cohabitation with a minor. It is also punishable for a legal guardian to consent to the cohabitation of a minor.

Lichtenstein

Macedonia

Cohabitation of an adult with a minor (under 18) is punishable.

Germany

A penalty may be waived if the age difference between the parties is slight and the perpetrator did not exploit the other party's lack of capacity for sexual self-determination. It is also punishable for a person over 21 to have intercourse with a person under 16 if the older person has taken advantage of the other's lack of capacity for sexual self-determination. As a rule, this act is prosecuted if requested, and the court may desist from applying a penalty if, given the victim's behaviour, the harm was minor. It is punishable to have intercourse with a person under the age of 18 by exploiting the coercive situation of such a person (Sections 176 and 182).⁷⁸

Portugal

The age limit is increased to 18 years for offenders who exercise parental authority over the victim, who have been entrusted with the education or care of the victim. It is also punishable to use prostitution of persons under the age of 18. The limit is raised to 16 years if a minor's inexperience is exploited. It is also prohibited to encourage persons under 14 to engage in sexual activity (Articles 171, 172, 173, 174).⁷⁹

⁷⁸ *German Penal Code*, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1771 [accessed: 22.03.2023].

⁷⁹ *Código Penal*, <https://diariodarepublica.pt/dr/legislacao-consolidada/decreto-lei/1995-34437675> [accessed: 22.03.2023].

San Marino**Serbia**

If the offender is responsible for the education, upbringing, supervision or care of a minor, the limit is raised to 18 years. Cohabitation with a minor is also prohibited.

Hungary

Here, the age of 12 to 18 is a mitigating circumstance.

Italy

In the case of prostitution, the limit is raised to 18 years and to 16 years in certain situations (trusted persons), the justification being the age difference of less than 4 years and the fact that the partners are at least 13 years old but under 18. Indecent acts performed in the presence of a minor are punishable. Public praise of paedophilia is also punishable (Articles 414-bis, 519, 530, 600-bis, 609-quater).⁸⁰

6.2. Countries where the age of consent is 15 years old**Croatia**

The act is justifiable if the age difference between the parties is no more than 3 years.

Czech Republic

The limit is raised to 18 years if intercourse occurs in exchange for payment, benefit, privilege or promises thereof.

Denmark

The limit is increased to 18 years when the perpetrator is an adoptive parent, foster parent, stepfather, stepmother, teacher or other person entrusted with the education and upbringing of a minor.

France

The limit is raised to 18 years if the perpetrator is an ascendant or has legal or de facto authority over the victim or abuses the authority of his

⁸⁰ *Dei delitti contro la moralità pubblica e il buon costume*, <https://www.altalex.com/documents/news/2014/12/23/dei-delitti-contro-la-moralita-pubblica-e-il-buon-costume> [accessed: 21/03/2023]; *Dei delitti contro la persona*, <https://www.altalex.com/documents/news/2014/10/28/dei-delitti-contro-la-persona> [accessed: 21.03.2023].

or her position. As of 2021, intercourse with a person under 15 is regarded as rape, unless there is an age difference of less than 5 years between the parties. It is also punishable to organize encounters involving indecent acts or sexual intercourse with minors present or participating (Articles 222-22, 222-25, 222-27).⁸¹

Greece

Until 2015, the limit was raised to 17 years in the case of sexual intercourse between an adult male and a minor male.

The act is justifiable if the age difference between the parties is less than 3 years.

Iceland

Monaco

Poland

Slovakia

Slovenia

Sweden

This limit is raised to 18 years if the victim is a descendant of the perpetrator, is under the guardianship of the perpetrator or a similar relationship, or is under the guardianship of the perpetrator by decision of a government agency.

It is justifiable when “it is obvious that due to the small age difference between the parties and other circumstances, no rape occurred.”

6.3. Countries where the age of consent is 16 years old

Armenia

Azerbaijan

Belgium

The act is justifiable if the age difference between the parties is less than 3 years.

⁸¹ *Code pénal*, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070719/LEGISCTA000043405084/#LEGISCTA000043405084 [accessed: 21.03.2023].

Belarus**Estonia**

In June 2022, the age limit was increased from 14 years.

The act is justifiable if the victim is at least 14 years old and the age difference between the parties is no more than 5 years.

Finland

This limit is increased to 18 years if the victim is a subordinate of the perpetrator. A penalty can be waived if the age difference is not significant or if there is a difference in the mental and psychological maturity of those involved.

Georgia**Spain**

The limit is raised from 13 years in 2015, which is further raised to 18 years if the position, trust, power or influence has been abused.

The act is justifiable if the parties are of a similar age or stage of development and the intercourse is consensual. It is also punishable to contact a minor under the age of 16 for sexual purposes via the Internet and other means of distance communication, and to present sexual acts to a minor (Articles 181, 182, 183, 183 bis).⁸²

Kazakhstan**Lithuania****Luxembourg****Latvia****Malta**

In 2018, the age of consent was lowered from 18. The sanction varies depending on the age of the parties.

Moldova

The act is justifiable if parties are of similar age or maturity (Article 174 of the Moldovan Penal Code).⁸³

⁸² *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*, <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444> [accessed: 21.03.2023].

⁸³ *Codul Penal al Republicii Moldova*, https://www.legis.md/cautare/getResults?doc_id=122429&lang=ro [accessed: 21.03.2023].

The Netherlands

There is a justifying context for minors differing slightly in age and who have a relationship that is consistent with social and ethical norms.

Norway

The court may waive a penalty if the parties are of a similar age or level of maturity.

Russia

Only a person who has reached the age of 18 bears liability. Intercourse with a person under 12 is treated as rape and incurs much harsher penalties than “ordinary” paedophilia does.

Romania

In 2020, the age of consent was increased from 15. The limit is raised to 18 years if the older party abuses his or her power or influence to gain sexual access to the victim.

The act is justifiable if the age difference between the parties is less than 3 years. It is also punishable to engage in sexual intercourse in the presence of a minor under the age of 13 to present pornographic content to such a minor, and to seek to meet a minor for sexual purposes (Articles 220, 221, 222).⁸⁴

Switzerland

The act is justifiable if the age difference between the parties is 3 years or less. If the perpetrator is under 20 and there are special circumstances or the parties have entered into a marriage or registered partnership, prosecution or punishment may be waived. The limit is increased to 18 years when the perpetrator abuses a relationship of dependence based on teaching, trust, employment or still other dependence (Articles 187 and 188 of the Swiss Criminal Code).⁸⁵

⁸⁴ *Codul Penal*, <https://lege5.ro/gratuit/gezdmnrzgi/cuprins-codul-penal?dp=gqytsojshe4do> [accessed: 21.03.2023].

⁸⁵ *Codice penale svizzero*, https://www.fedlex.admin.ch/eli/cc/54/757_781_799/it#book_2 [accessed: 21.03.2023].

Ukraine

It is also punishable to propose an encounter with a minor for sexual purposes, also by means of remote communication (Articles 156, 156-1).⁸⁶

United Kingdom

6.4. Countries where the age of consent is 17 years old

Cyprus

Ireland

Not applicable to married persons.

The act is justifiable if the victim is at least 15 years old and the age gap between the parties is no more than 5 years. However, this does not apply to cases of abuse of trust or coercive situations.

6.5. Countries where the age of consent is 18 years old

Turkey

If the minor is at least 15 years old, the crime is prosecuted only when requested.

Vatican

The limit is lowered to 14 years for women and 16 for men regarding cohabitation with a spouse.

Moving on to discuss the necessary age for lawful consent to sexual intercourse, it should be noted that there is no uniform age limit across Europe. The most countries (21) have an age limit of 16 years. The fewest countries at the limit at 17 (Cyprus and Ireland) and at 18 (Turkey and the Vatican). Poland, along with 10 other countries, opted for an age limit of 15. The remaining 15 European countries have an age limit of 14. The above data, apparently, demonstrates a wide discrepancy between the age of majority, which is specified in Article 1 CRC as the upper limit of childhood, and the age from which sexual intercourse can be legally consented to. Only two countries, Turkey and the Vatican (but with notable exceptions), stipulate the limit at 18 years.

⁸⁶ Кримінальний кодекс України (Кримінал'нуу kodeks Ukrayiny), <https://zakon.rada.gov.ua/laws/show/2341-14#Text> [accessed: 21.03.2023].

Conclusions

Now it becomes necessary to explain the reasons why I have used the expression “so-called same-sex marriages” throughout the paper. Apparently, the very strong emphasis on the institutionalization of same-sex unions in the CoE member states as well as in others, as presented in this study, and the corresponding evolving case law of the ECtHR, exert a very strong influence on the potential need to redefine the concept of family – which is fundamental to the Polish Family and Guardianship Code – also in the Polish legal system. This necessity has become very pronounced after a draft law on registered partnerships for same-sex couples was tabled in the Polish Parliament already in 2003.⁸⁷ The presentation of subsequent legislative initiatives has been accompanied by a debate on the legalization of so-called same-sex marriage or same-sex partnerships [Jaros 2015, 91].

At the same time, the literature demonstrates a contradiction inherent in the possible institutionalization of such a union and highlights that labelling it as marriage will render the latter meaningless [Banaszkiewicz 2004, 386; Sobański 2003, 226ff.]. Jerzy Słyk believes the institutionalization of such unions is unnecessary because the absence of regulation does not entail their discrimination [Słyk 2004, 13]. It has been pointed out that, in the case of Poland, the potential equation of homosexual marriage with heterosexual marriage would constitute an attempt to circumvent the Polish Constitution,⁸⁸ since it would contradict the well-established values in society, the centuries-old tradition of European culture, Christian culture and other religions, plus it will compromise the prospects for population growth, which guarantees social, economic, cultural and all other kinds of development that nurtures human rights [Wiśniewski 2009, 157]. In contrast, in the opinion of the Supreme Court President, the correct interpretation of Article 18 of the Constitution leads to the recognition that same-sex unions cannot be marriages, nor can they be equated with marriages. Similarly, a union of persons of different sexes who have not contracted marriage cannot produce the same effects as marriage, or effects

⁸⁷ It was submitted to the Senate on 21 November 2003 (Senate Paper no. 548 of 10 December 2003). Another draft law on civil partnership agreements was filed on 19 May 2011 (Sejm Paper no. 4418).

⁸⁸ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483, as amended [henceforth: Constitution].

similar to those of marriage.⁸⁹ Aude Markovic took a similar stance, arguing that the introduction of marriage for same-sex couples is equal to denying its procreative potential, which would lead to the annihilation of the social dimension of marriage. In his view, demanding that a union that is not a marriage be granted marital rights stems from the failure to see what marriage is [Markovic 2019, 14]. Since the above-mentioned opinions overlap with mine, I use the term “so-called same-sex marriage” here.

Nevertheless, in order to formulate final conclusions we need to reference some representative but opposed opinions. In this context, the opinion held by Ryszard Piotrowski is of the essence, as he believes the assumption that granting rights to some parties means taking them away from others is unfounded. Also, one must take into account the mutability of legal culture and the concomitant changes in the catalogue of rights considered natural. In his view, Article 18 of the Constitution is not about banning the establishment of unions other than marriage, and a defence of marriage reduced to banning civil partnership unions would be a disproportionate interference in the sphere of freedom to choose a way of life, which forms the basis of individual freedom [Piotrowski 2012]. Also, of note are the demands addressed to states and included in a private document titled *Yogyakarta Principles* (2006).⁹⁰ The authors demand that states take all necessary legal measures to ensure the right to set up a family, also by having access to adoption or assisted procreation (including artificial insemination), without discrimination by reason of sexual orientation or gender identity.⁹¹ Another opinion that goes even further is presented in a recent document titled *The 8 March 8 Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty*.⁹² To illustrate the character of the document

⁸⁹ Comments of the Supreme Court to the parliamentary draft law on the civil partnership agreements for the Sejm Paper no. 4418 (6th term), p. 10.

⁹⁰ The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity; the original document can be found at https://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf.

⁹¹ *Ibid.*, Principle 24.

⁹² *The 8 March 8 Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty*, issued by the International Commission of Jurists in March 2023. The commission has consultative status with the UN Economic and Social Council, UNESCO, as well as the Council of Europe and the Organization of African Unity.

it will be sufficient to look at Principle 16 at length. It states: “Consensual sexual conduct, irrespective of the type of sexual activity, the sex/gender, sexual orientation, gender identity or gender expression of the people involved or their marital status, may not be criminalized in any circumstances. Consensual same-sex, as well as consensual different-sex sexual relations, or consensual sexual relations with or between trans, non-binary and other gender-diverse people, or outside marriage – whether premarital or extramarital – may, therefore, never be criminalized. With respect to the enforcement of criminal law, any prescribed minimum age of consent to sex must be applied in a non-discriminatory manner. Enforcement may not be linked to the sex/gender of participants or age of consent to marriage. Moreover, sexual conduct involving persons below the domestically prescribed minimum age of consent to sex may be consensual in fact, if not in law. In this context, the enforcement of criminal law should reflect the rights and capacity of persons under 18 years of age to make decisions about engaging in consensual sexual conduct and their right to be heard in matters concerning them. Pursuant to their evolving capacities and progressive autonomy, persons under 18 years of age should participate in decisions affecting them, with due regard to their age, maturity and best interests, and with specific attention to non-discrimination guarantees.”

This kind of recommendation no doubt greatly interferes with cultural and religious norms still endorsed by the vast majority of the human population. What we find alarming, however, is that the document seeks to relax the requirements specifically for sexual relations with persons under the age limit imposed domestically for consent to sexual intercourse. Recommendations such as those presented above, even if they do not attain the force of law in the near future, will erode the already heavily impaired family, and render the protection of children against depravity or even paedophilia illusory.

As for the reactions of the Polish legislature to the changes discussed in most European countries, it should be noted that they have generally not met with acceptance. The Polish Family and Guardianship Code does not provide for the possibility of so-called same-sex marriages or homosexual unions in any other form. Neither does it provide for the adoption of children by same-sex couples. The situation looks somewhat different regarding the criminalization of so-called hate speech against homosexual persons. In this case, the provisions of the Penal Code come into play, but the Polish

legislator has not expressed a desire to set apart hate crimes against homosexual persons. It seems that this state of affairs is based on the view that such a separation would result in unnecessary casuistry and unreasonably individual treatment of LGBTQ people, who in this regard should be treated and protected in the same way as other citizens. It is pointed out, however, that by virtue of Article 53 of the Penal Code (general directives for sentencing), the court (in addition to other circumstances listed in this provision) takes into account in particular the motivation and conduct of the perpetrator. On the other hand, Article 53 § 2a point 5, lists as an aggravating circumstance the commission of a crime resulting from a particularly culpable motivation, which increases the penal sanction.

Since the position of the Polish legislator with regard to the age for lawful consent to sexual intercourse, surrogacy and the evolution of ECtHR case law has been discussed in specific parts of this article, there is no need to do so again.

Due to a very fast-paced progress, which is inducing increasing degradation of the role of the family founded on marriage, I propose that legislative measures be taken so that family relations can be reinforced. In the area of Polish family law, it is necessary to overhaul the Family and Guardianship Code, which has been in effect since the 1960s, and to seriously consider the family code developed by the Family Law Codification Commission appointed by the Ombudsman for Children, along with the institution of parental responsibility envisaged therein. In regard to international law, I believe it would be desirable to take action to call for a Convention on the Protection of the Rights of the Family. I have developed a draft of such a convention based on my compilation of excerpts from certain provisions: the so-called Istanbul Convention (which is not biased ideologically), the draft Convention on Family Rights developed by experts of the Ordo Iuris association, the abovementioned draft of the Family Code, and my own reflections. To close, I would like to thank the employees of the International Procedures of Human Rights Protection Division of the Ministry of Justice Department of International Cooperation: Justyna Semenović-Yasina, Barbara Ubowska, Maciej Delijewski and Piotr Mioduszewski for their assistance in collecting statistical data and information about the ECtHR rulings presented in this paper.

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