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EUROPEAN UNION AND THE SAME GENDER RELATIONSHIP – A LEGAL VIEW

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Abstract

The paper intends to solve the following questioning: what is the current legal treatment given from European Union law to the homosexual relationship and if there is a regulamentation's need to the theme. Considering the European citizens mobility, the European Union foundation as the free movement, the values of non discrimination and respect for privacy, it is paradoxal the situation that exists in some countries that treat the theme in such a different legal position. This scenario leads the impossibility to exercise the individuals' rights from those who have relationship with people of the same sex. Alternatives were created as the possibility to establish registered partnerships instead of marriage, but even so a discrimination situation occurs, because these are different institutes that do not predict the same legal effects. In the first chapter will be analyzed the homosexual relationship's legal differences, including a contextualization about how some countries treat, on their national law, the marriage and the registered partnership of a homosexual relationship. In fact, some countries recognize the homosexual marriage, other only the registered partnership, while some allow the option between one of them. Besides that, some even do not recognize any of that possibility. In view of this divergence, will be analyzed what are the possible difficulties resulting of this situation, as when some cross-border element's occurs. The problem is evident when a couple intends to fix their residence in a country that doesn't recognize the marriage, or that changes its configuration to a registered partnership. In the second part of the paper, entering on the European Union, will be analyzed if and how the theme is treated on a regional scope, especially the regulations, treats, conventions and some European Court's decisions to conclude if there is enough legal treatment of the theme and what are the possibilities.

Key-words: EUROPEAN UNION, SAME-SEX RELATIONS. LEGAL TREATMENT, NEED OF REGULATION.

Initial considerations

This article aims to address the following issue: the current legal treatment given by the European Union to same-sex relationships and if there is the need for regulation of the matter by supranational law in order to preserve the fundamentals, values, and rights of European citizens.

Given the mobility of European citizens, the very foundation of the European Union to free movement, the values of non-discrimination, and respect for privacy; the situation that has been happening in countries that are part of the block, to treat the matter so divergently as to render impossible the exercise of individual rights by those who relate to people of the same gender, is paradoxical. Alternatives were created as the possibility of celebrating registered partnerships instead of marriages, but still, as it will be seen, there is discrimination, since they are different institutions which do not provide the same legal effects (LA VIOLETTE, Unable to divorce: registered partnership and same-sex marriage. p.13).

The European Parliament, using its legislative powers, intends to guarantee the right to freedom of movement, which is considered to be a fundamental principle of the European Union. Therefore, it encourages its Member States to comply with the provisions of the Treaty in regard to this principle, and also to ensure respect for the principle of equality. However, these acts, as they will be seen in the course of this work, are still inefficient if the concept of marriage is not expanded and legislated by Parliament, rather than to be left to the responsibility of the national legislation of its countries.

Considering that the United States is a federation with broad legislative autonomy, it is worth mentioning that the North-American Supreme Court, in a situation analogous to the European Union, has also

faced this divergence situation in addressing the issue in the Federated States, and decided, in 2015, to be unconstitutional regarding its federal law, that defines marriage as "a union of a man and a woman." Thus, the legality of same-sex marriage is ensured in the country. In addition, the judges have argued that the prohibition of marriage between two people of the same sex affronts the Fifth Amendment of the Constitution, which states that people are equally free.

The plan used for this study is the French one, and the method that has been adopted is the inductive one, starting from the concrete to the abstract. In point 1, the legal differences will be analyzed on same-sex relations in Europe, and, in Section A, a contextualization about how some countries of the European Union deal, in their national law, with marriage and same-sex partnership will be presented. In fact, some countries recognize same-sex marriage, while others just do the registered partnership; besides, there are countries that allow the choice of one of these institutions, while others neither recognize them. Given the divergence of regulation of the matter, in Section B, the possible difficulties arising from this situation, as when there is a cross-border element, will be examined. The problem is evident when the spouses intend to settle in a country where their marriage is not recognized, for example, or that its configuration to a partnership is modified.

In the second part, regarding the European Union Law, whether and how this issue is dealt with under unional scope will be examined in Section A, having into consideration existing regulations and treaties, the European Convention on Human Rights, and some decisions of the European Court, to finally conclude there is absence of sufficient and express treatment on the existing documents, although the evolution of the Court's decisions is evident.

Finally, in item B, regulations recently approved by the European Council will be examined on the property consequences of Registered Partnerships and marriage, an issue that had not been treated yet in any of the previous documents. Again, the subject was not addressed directly; hence, there are still doubts about its extension to same-sex relationships.

The issue is quite complex since it is as a matter that has not been yet regulated, there are much more difficulties than solutions.

Theoreticians of this study are the articles by Professor Katharina Boele-Woelki, entitled "The Legal Recognition of Same-Sex Relationships within the European Union" and by Professor Patrick Wautelet, entitled “Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe. Divided We Stand? Cool Recognition of Same -Sex Relationships in Europe”.

I. Legal Divergences on same-sex Relations in Europe

A. Marriage and same-sex partnership treatment by the national law of some countries of the European Union

Many countries have recognized same-sex marriage: Belgium (2003), the Netherlands, (2001), Spain (2005), Sweden (2009), Norway (2008), Portugal (2010), Iceland (2010), Denmark (2012), France (2013), England (2014), and Luxembourg (2014). Some countries just allow registered partnership for same-sex couples, such as Germany, Austria, Hungary, Ireland, Czech Republic, and Slovenia; among these, some jurisdictions also allow the possibility to same-sex couples to choose between marriage or registered partnership, such as Belgium and the Netherlands.

It is important to note that, in Europe, the recognition process occurs through legislation as a result of the efforts of organizations and politics. Nevertheless, out of Europe, it derives much of judgments.

It is clear that the different ways to recognize this relationship create different effects. In most countries, the registered partnerships have milder effects than marriage. They are seen as a "minus" of the later. Currently, for example, same-sex marriage allowed by some orders is recognized in other countries only as registered partnership, which leads to a "lowering" of the national institution and, consequently, discrimination is risen.

The absence of a specific conflict of law for same-sex marriage creates difficulty, since traditional marriage rules are applied on it. This is what happens, for example, in the Netherlands, Belgium, Sweden, and Norway. According to Bogdan, in Sweden, same-sex marriage is considered to be governed by the same laws that govern different-sex marriage (Wautelet, Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe. Divided We Stand? Cool Recognition of Same -Sex Relationships in Europe, p. 5). However, most of the effects are regulated by national law, which often does not recognize same-sex marriage.

To solve the dilemma, in Belgium, for example, Art. 46-2 of the International Private Law Code was edited (FIORINI, New Belgium law on same sex marriages and its PIL implications' International and Comparative Law Quarterly. p. 1042), which provides that whether the applicable law does not allow the marriage, it will not be applied since it violates international public policy. There is less difficulty in the

Netherlands, given that the system included the mechanism of "Favor matrimonii": the Hague Convention of 1978, Article 2 of WetConflictenrechtHuwelik provides that marriage is possible if both betrotheds meet the requirements of Dutch law. If this is not the case, then it will be possible if the requirements of national law are fulfilled (Wautelet, Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe. Divided We Stand? Cool Recognition of Same-Sex Relationships in Europe. p . 7).

What is the effect of all these factors? People began to look for certain countries since there their marriage would be allowed. The rules of these countries, therefore, have extended the possibility of realization of same-sex marriage. In order to avoid forum shopping, legislators created some requirements such as a connecting link to the country: the Article 2 of the Dutch law provides that one of the spouses must have the nationality of the country. In Sweden, the same result is achieved by another rule: if neither party is a Swedish citizen or an ordinary resident in the country, he or she must meet at least the requirements of the law from one of the countries that they are citizens or residents. In most countries, it is understood that the fact that the marriage would not be recognized in the country of origin of one of the spouses is not taken into consideration. Bogdan says that this is a problem considered to the country of origin, and not to the Swedish authorities (Wautelet, Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe. Divided We Stand? Cool Recognition of Same-Sex Relationships in Europe. p. 8).

Nevertheless, in countries where same-sex marriages are not allowed, other difficulties show up. One of them is whether same-sex marriage should be treated as marriage before a conflict of laws. If the country does not allow the marriage, any alternative must be adopted; in Sweden, the idea of applying the rules of the registered partnership has been developed, whose difficulties are analyzed in the course of this study.

Another option is considering the relationship as marriage. Nevertheless, even if the countries of the betrotheds allow same-sex marriage, this does not mean it is going to be held in their country of residence. There are mechanisms that would hinder this celebration; for example, if, in the country, the applicable law is the national one of the intending spouses, the exception of public order can be used to prevent the celebration. Another possibility to prevent the celebration is to characterize the requirement of the same-sex couples as a formal aspect of marriage, and thus, subject to the lex fori (Knezevic and Pavic, Private International Law Aspects of Homosexual Couples in Serbia. p. 2).

Another divergence is on the registered partnerships. A consensus to consider that they are family relationships that should be subject to specific rules has been developed. The one which was given recognition was that the partnership should be regulated by the law of the country where those involved wish to register their marriage or formalize it ((Wautelet, Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe. Divided We Stand? Cool Recognition of Same-Sex Relationships in Europe. p. 14). It was adopted in Belgium, Germany, France, Denmark, and recently in Austria. However, like marriage, countries also treat partnerships differently from each other. In 1989, Denmark was the first country to introduce registered partnership; afterwards, Sweden, in 1994, and then Finland, in 2001. Nevertheless, regarding its opening to same-sex relationships, only in 2007 that Sweden extended to both. In 2009, a review of the Swedish Registered Partnership Act was proposed, and those partnerships hitherto undissolved were treated as marriage (Boele-Woelki, The Legal Recognition of Same-Sex Relationships in Europe. p. 1955).

In 2001, Germany introduced the extensible registered partnership for same-sex couples. Luxembourg and England published their registered partnership statutes in 2005. The Eastern European countries are far behind in this regard (Scherpe, The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights. p .84).

The local law enforcement is also the rule for the formal requirements of its creation, generating the matrimonial tourism situation. Thus, many countries now require connection links. This connection should vary, and has changed over time. This is the case in Belgium, France, Luxembourg, Spain, and Switzerland.

A more limited number of countries require that at least one spouse is a national citizen. This is the case in Slovenia and the Czech Republic. In others, the application is based on the combination of residence and nationality, as in the Netherlands, where the spouses must reside in the country and one of them must have the Dutch nationality ((Wautelet, Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe. Divided We Stand? Cool Recognition of Same-Sex Relationships in Europe. p. 17).

Thus, the rules that are applicable to partnerships are based on the traditional treatment given to marriages, differing in the fact that the partnership is fully regulated by local law. For those who register it, it is much easier to apply it, especially in an area in which there is a growing and rapidly changing legislation. Besides the facility, there is another issue: although this institute is growing, it is still unknown in many countries. So, if the nationality requirement were adopted, many people could not establish the partnership since their countries of origin do not recognize it. So the local law criterion allows access to the partnership, which was the institute creation purpose ((Wautelet, Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe. Divided We Stand? Cool Recognition of Same-Sex Relationships in Europe. p. 18).

Given the divergence, there has been a difficulty in handling cases with cross-border elements. Despite the matter is evolved to enable the registration of same-sex couples, the issue still exists when there is any cross-border element, as buying a property in another country when the rules of succession of that place are applicable, or in relation to custody, adoption, and death elsewhere. There are several issues arising from this situation due to the lack of uniformity of treatment.

B. Difficulties arising from the divergence of legal treatment regarding a same-sex relationship with cross-border elements

Cases which the parties marry validly or establish partnership in a country and then move to another one are called mobile cases (Silberman, Same-Sex Marriages: Refining the Conflict of Laws Analysis. p. 2204.).

The cross-border element can occur between countries in which both recognize the marriage, for example, and, in these situations, there is no so much trouble. Obviously, the problem occurs when countries treat the matter differently.

Some problems arising from this divergence are identified hereafter.

One situation is when the law to be applied is from a country that does not recognize the marriage. For example, two Italian women live in Belgium and marry there. If, by chance, one of them want to divorce in a Belgian court, at first the Belgian law will be applied as the law of her habitual residence; but her spouse can require the application of the Italian law by the Court, as permitted by Article 55 (2) of the International Belgian Private Law Act. Then, the issue of whether the Court could not apply the Italian law rises. The same difficulty occurs if one spouse dies.

Another issue is when there is no jurisdiction for the claim, for example, of a divorce. Two same-sex partners married in Sweden, and they have been living in another country. It is assumed that they wish to divorce; this may become impossible in the country of their residence if it does not recognize their marriage. That is why some countries had to adapt their rules and make possible for spouses ask for divorce although, according to the rules, they cannot do it. For example, in Norway, a special degree of jurisdiction was adopted to allow spouses who got married there to be able to ask for divorce there if they prove they cannot get it in their country of origin or in the one they reside, as in section 30 b, letter f of the Norwegian Act on Marriage (Wautelet, Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe. Divided We Stand? Cool Recognition of Same-Sex Relationships in Europe. p. 25).

There is also the possibility of recharacterization. The existence of the family relationship is recognized, but the institution is modified. Instead of being recognized as a marriage, it is lowered. For example, in Switzerland, Finland, and Germany (Wautelet, Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe. Divided We Stand? Cool Recognition of Same-Sex Relationships in Europe. p. 27). Thus, a marriage concluded in Luxembourg between two men or two women would be a partnership if they lived in Germany.

To resolve the issue, in a first group of countries, a clear position has emerged, stating that the purpose of the partnership was governed by the law of the country of registry. The adoption of the "lex loci registrationis" took place in France, Belgium, and Netherlands; it was suggested by the European Commission in its draft regulation. The reason is clear: given the diversity of laws on partnership and its effects, breaking the umbilical cord between the partnership and the country of origin would be too early.

The application of the law of the country of registry entails some problems. For example, the law of the country of registry, in this case, the country of origin, determines the dissolution by an authority that has no equivalent in the country or has no competence. In the Netherlands, the use of a foreign country terminology is adopted only if the parties choose the foreign law to be used; otherwise, the dissolution is based on Dutch law. Another problem occurs when the conflict is related to a country that has not previously defined what the partnership would be, such as France. So it will rule not only the effects, but also its definition.

Since the applicable law can result in a substantial change in the relationship, in countries like Germany, the return to the origin law is possible if the law that can be applied does not guarantee any rights to the partners. The doctrine calls this situation "limping relationship", which is not new, neither specific to same-sex relations. It is common in divorce cases that were not recognized in other countries. The parties even celebrate a new relationship in the place they live. In France, for example, they celebrate a new union before buying any property (Wautelet, Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe. Divided We Stand? Cool Recognition of Same-Sex Relationships in Europe. p. 41). But, in the past few years, a lot of countries recognized the homossexual registred partnership and marriage,

fact that contributed to reduce the number of the matrimonial turism (GROOT, Private International Law Aspects Relating to Homosexual Couples, 16).

Anyway, only without distinguishing between different-sex and same-sex couples and also including specific rules for the conflicts, the European legislation will be adhering to human rights and the principles of free movement. It is noted that the jurisdiction of national courts is very limited: little has been done on the legislative gap. In fact, the Courts encourage national legislations, and the interested parties should await the appeal to the European Court of Human Rights.

Therefore, it is evident that there is a disagreement on the matter, which needs to be regulated.

II- Current treatment of the matter by the European Union

A. Analysis of existing legal instruments

At this part, an analysis of existing legal instruments on marriage, especially the European Convention, the Treaties, regulations, and decisions of the Court will be made to conclude whether they treat the issue related to same-sex relationships.

The European Convention on Human Rights provides in Articles 8, 12, and 14 the right of respect for family unity, to marry, and not to be discriminated because of gender. Nevertheless, the understanding about the fact that the existence of these particular rights would force the countries to recognize same-sex marriage or same-sex partnership is not peaceful, unlike what happened in the North-American Supreme Court, in a similar situation, as will be seen.

The Convention is used as a basis also to deny the claim, which proves not to be a safe solution to be adopted. An example is the case Wilkinson v. Kitzinger, decided in 2006 by the English High Court. A same-sex couple requested that their relationship was recognized as a marriage, and not as a partnership; the Court denied the request based exactly in Articles 8, 12, and 14 of the Convention. The fundament was that the fact that the English legislator had created a separate institute for same-sex relations, i.e., partnerships, and denied the possibility of such marriage, does not constitute a violation of the right to found a family, protected by the Article 8 of the Convention.

Another piece of legislation on the matter is the Brussels II bis Regulation, which deals with the jurisdiction, recognition, and grant exequatur of decisions related to divorce, legal separation, and marriage annulment. A particular aspect of it that should be mentioned is its Article 25, which provides that the recognition of a judgment cannot be refused based on the fact that the law of a Member State in which recognition is sought would not have allowed a divorce, a separation, or an annulment of marriage when there are the same facts. For the part regarding the doctrine, same-sex marriages, which are not considered marriages in other countries or just take limited legal effects, would be the case (JAEGER JUNIOR, Europeização do Direito Internacional Privado: caráter universal da lei aplicável e outros contrastes com o ordenamento jurídico brasileiro. p. 326).

The Rome III Regulation creates a closer cooperation on the domain of applicable law regarding divorce and legal separation. Part of the doctrine includes same-sex relationships, but the regulation provides that the requirements of existence, validity, or recognition of marriage and registered partnership are excluded (Boele-Woelki, The Legal Recognition of Same-Sex Relationships in Europe, 1973).

Cases decided by the European Court of Human Rights will be examined hereafter. It is noteworthy that they are applied to the European Union since it joins the Convention and composes the Council of Europe.

In 2010, in the case 30141\04 Shalck and Kopf\ Austria, it was decided that the European Convention on Human Rights does not require member states to legislate on the recognition of same-sex marriage. According to the authors, the non-recognition of marriage would be a violation of the constitutional right to respect private and family life and the principle of non-discrimination. The fact that Austria has the Convention as part of its constitutional right must be taken into consideration. The Austrian Court held that the fact that the same-sex relationship is part of the concept of private life and is protected by the 8th Article, in addition to the prohibition of discrimination, Article 14, does not confer an obligation on countries to change the marriage law.

The European Court then considered there was no violation of Article 12 of the Convention. This is because there is a clear understanding of "man and woman" differing genres. As in other articles, the Convention used the term "anyone or everyone," is because it ruled on the use of this expression. There would then be margin for countries to adopt their internal laws.

In a dissenting opinion, based on the principle of proportionality; Rozakis, Spielmann, and Tulkens, who are judges, have found that differences based on sexual orientation require specific and serious justifiable reasons, they have understood there was violation of both 14th and 8th Articles of the Convention because the country did not present any argument to justify the difference in treatment. Thus, appreciation would be possible. In "obiter dictum", Malinverni, a judge, have declared that Article 12 would not be applied to same-sex couples, but that Article 8 deliberately omitted the reference to men and women, and has delegated to the countries the decision to confer the right to same-sex marriage: right to marry and have a family in accordance with the national laws of countries that regulate this practice. So there would be no obstacle to recognition, but there would be no determination to countries to facilitate this marriage. Finally, in the dissenting opinion, Rozakis, Jeens, and Spielmann have argued that the legal gap of recognition to same-sex couples in Austria is a violation of Article 14 in conjunction with the 8th one, this vote that will usher in a future turn of understanding by the Court.

In 2013, in the case 29381\09, "Vallianatos and others," Greece was condemned for not assure same-sex couples the right to civil marriage, which led the country to the extent of this union to same-sex couples. A bill is awaiting to be voted. It was recognized that there should be justifiable reasons for not to allow the stable union to same-sex couples.

In July 2015, in the case Oliari and Others v Italy, ns. 18766\36030 and 11\11, the Court decided that Italy failed on not to provide adequate legal protection either not to recognize civil unions of same-sex couples. According to the sentence, the country must compensate the three couples who had their applications denied and took the case to the Court, besides creating legal mechanisms for recognition of civil unions of same-sex couples.

It was recognized that the country violates human rights that are safeguarded by the European Convention on Human Rights (ECHR) by failing to provide adequate legal protection and civil recognition to same-sex couples. It was noted that, in Article 1st of the ECHR, the right to marry same-sex couples is not provided, but that the Convention imposes positive obligations on countries to offer legal alternatives to couples, whether in the form of civil unions or registered partnerships. According to the plaintiffs, Italy would have violated Article 8 of the ECHR with regard to private and family life, Article 14, which deals with the prohibition of discrimination, and, in conjunction with Article 8, Article 12, which protects the right to marry.

The Court, in turn, understood that Article 12, together with Article 14, does not impose an obligation on the State to recognize the same-sex marriage. It understood, however, that Italy would not have respected Article 8 of the European Convention concerning the right to respect private and family life.

An analogy with the situation that occurred in the United States is made hereafter. Considering the legislative autonomy of the Federated States, the recognition of same-sex relationship was also treated in different ways. It is known that the recognition is distinct from the situation of the European Union, but the reasons for the decision can be also used, since they deal with basic rights and freedoms of the individual. In 2015, the North-American Supreme Court unified the treatment of the matter, recognizing that any decision of the Federated State which does not recognize the same-sex relationship, just by disregarding the right to freedom and equality, violates the Constitution, in particular, the Fifth Amendment.

The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights, and require courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. Some past precedents were utilized to decide the case about the same sex relationship and to get the conclusion. A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to Griswold v. Connecticut, which held the Constitution protects the right of married couples to use contraception. A third argument for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. For the end, that marriage is a keystone of our social order, and where the basic principles of order, power ponderation, real liberty and profound respect to the law don't exist; there is no Republic ECHR (Tocqueville, Democracia na América. p.2). The right of same-sex couples to marry is derived, too, from that Amendment's guarantee of the equal protection of the laws.

Within the European Union, the divergent treatment also violates the founding treaties and the European Convention on Human Rights.

It can be concluded, therefore, that there was an evolution of the European Court to determine the countries to provide some kind of public recognition to same-sex relationships, on the principle of proportionality. Reasonable fundaments are demanded to justify the necessity to exclude same-sex couples from private and family life.

Anyway, despite the progress observed by the European Court of Human Rights, the problem has not been solved when there is cross-border element, such as occurred in the United States.

B. European Council Regulation on the property effects of marriage and registered partnerships

Several other private international law regulations have been published in the field of family law; however, all of them put the property effects of marital relations out of their scope. The attempt to simplify the lives of international couples when they were allowed to choose the law applicable to the dissolution of the bond is almost useless, but not to its property effects, the law still remains determined by rules of national conflict, and they are different from one another within all 27 Member States.

So, in plenary vote on June 23rd, 2016, the European Parliament formally approved the two proposals on the property effects of civil unions, one is applicable to marriages while the other one to registered partnerships. They still must be formally adopted by 18 member states and published in the Official Journal of the European Union.

Both regulations provide the removal of the applicable law when it is manifestly incompatible with the public policy of the forum. However, they state that the exception of the mandatory law should not be applied, as well as the public order, to put the law of another Member State away or to refuse to recognize or enforce a decision, an authentic act, or a court settlement from another Member State when such exception is contrary to the Charter of Fundamental rights of the European Union, which may be applicable to same-sex relationships, on the evidence of a violation of the Charter.

However, concepts of marriage or partnership, or indications of how they should be understood and differentiated are missing. There is a paradox: according to the justifications of the committee, the proposed regulation should be neutral on gender, not differentiating a same-sex marriage from a different-sex marriage, for example. Therefore, it is clear that the legislator's intention is to eliminate this distinction as a factor of discrimination, creating a sort of European concept of marriage. (KRÜGER, As Propostas da Comissão Europeia para Regulamentos em matéria de regimes matrimoniais e em matéria de efeitos patrimoniais das parcerias registradas – um problema de qualificação. p. 20). However, Recital number 10 provides that "This regulation (...) does not cover the concept of marriage, which is defined by the national law of the Member States."

Given that the Commission does not determine sex difference as a requirement for the definition of marriage, adopting a neutral manner but delegating to the State this definition, and considering that an equal understanding of the institutes does not exist, the trend is a different application of the two regulations within the Member States.

The issue is that there is a qualification problem of the relationship, if the law of the forum or the "causae" law is applied to define the regulation to be applied. For example, a German male citizen marries a Portuguese male citizen in Portugal; they do not choose the law that will be applied on their marriage. Soon after, they begin to live together in Germany. During their marriage, a property issue that demands solution arises. As the couple's usual residence is Germany, the German Court has the jurisdiction to rule on the issue, regardless of what regulation will be implemented. Once the competence is established, the applicable law is searched. If the partnership regulation is applied, the qualification ignores the entire context and legal culture of the law that will be applied to the solution of the conflict. The spouses married because they would be subject to the effects of a marriage, not of a registered partnership. This is the effect, therefore, of considering to apply the law of each state (KRÜGER, As Propostas da Comissão Europeia para Regulamentos em matéria de regimes matrimoniais e em matéria de efeitos patrimoniais das parcerias registradas – um problema de qualificação. p. 25).

But if the understanding is in the sense that the concept of marriage is autonomous and thus the regulation on matrimonial regime is adopted, which is not done by most countries, the law to be applied is the German one. (Wautelet, Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe. Divided We Stand? Cool Recognition of Same-Sex Relationships in Europe. p. 27). However, this law ignores the same-sex marriage, leading to problems of interpretation by the national court. There is a paradox: the judge will have to decide on an institution like marriage, when its legal system expressly says that it is not.

A reversal of the principle of non-discrimination can be verified. A German male citizen marries a Portuguese male citizen, both have their marriage recognized by the German courts and the German Civil Code is applied to their case, while two German men or two German women do not have this relationship recognized. Therefore, the fundamental principle of non-discrimination of foreigners is reversed because a Member State cannot discriminate its own nationals. Thus, the regulations require a necessary harmonization of national institutions (KRÜEGER, As Propostas da Comissão Europeia para Regulamentos em matéria de

regimes matrimoniais e em matéria de efeitos patrimoniais das parcerias registradas – um problema de qualificação. p. 26).

At this point, there is most criticism to regulations: a harmonization of the substantive rules of the Member States is supposed, and since it does not exist, such harmonization is imposed by the "back door."

"Harmonization through the back door" is an expression adopted in the law of the European Union, which concerns the use of its powers under international law to enter into agreements or issue instruments of international European law which have implications on the substantive law of Member States in an area that is their exclusive or concurrent competence (KRÜEGER, As Propostas da Comissão Europeia para Regulamentos em matéria de regimes matrimoniais e em matéria de efeitos patrimoniais das parcerias registradas – um problema de qualificação. p. 26).

The States are thus with the dilemma of how to solve issues involving legal institutes they do not know.

There is a huge legal uncertainty for international couples, in all areas, not to mention the violation of their individual rights and freedoms, which would be different if there is the harmonization of private international law norms. Therefore, regulations that have been studied should be reformed to include a rule which determined that, if the law unawares or downgrades the marriage, the law of the country of its constitution relating to matrimonial regime would be applied. This last suggestion concerns the principle of "lex loci registrationis" and would have the advantage of, at least, to guarantee legal certainty to same-sex couples, without imposing harmonization through the back door (KRÜGER, As Propostas da Comissão Europeia para Regulamentos em matéria de regimes matrimoniais e em matéria de efeitos patrimoniais das parcerias registradas – um problema de qualificação. p. 30). Therefore, the use of the law of the country the marriage or the partnership was held would determine its effects. It is worth noting that this suggestion does not overcome the problem, but allows the grant of effects to the partnerships, if they are validly registered, and also to marriages.

Final considerations

This study differs in part from its theoretical framework, because, unlike this, it is considered that what has been achieved so far is negligible on the claims and principles of the European Union and the European Convention on Human Rights. With regard to advances, in fact, an evolution of the countries is denoted in the last decade, as acknowledging the possibility to celebrate same-sex marriages, as recognizing the registered partnership. This change derives significantly from the evolution of the Court's decisions that forced countries to adopt a form of recognition. From an understanding expressed in a dissenting opinion, the principle of proportionality prevailed and started to guide subsequent decisions. However, the European Court of Human Rights is an international instrument conferring a “floor of rights, but not a ceiling" (SCHERPE, The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights. p. 90). This means that the law has not already been safeguarded in a solid and secure way.

Thus, facing the current legal treatment given by the European Union to same-sex relationships, it is concluded that, since it does not address the concept of marriage and registered partnership, there is the need for regulation of the matter by supranational law.

The exclusion of discretion of the theme analysis by the national laws of the countries should be considered under the scope of the principle of proportionality, weighing rights and values up. On the one hand, the autonomy of countries to address the issue, and on the other, individual rights and freedoms of European citizens. Analyzing what most of the documents that guarantee individual liberties explain, there is no other conclusion that there are no gender differences in the application of the principles. Rights become consolidated from a necessary understanding of how constitutional imperatives define freedom as they are urgent in the current era. Otherwise, there is no evolution.

Therefore, the reasonableness of the prevalence of individual rights is observed. In fact, the Court has evolved to establish a form to recognize same-sex unions, but this is still not enough since there are many differences among countries that recognize marriage and partnership. So, without a sufficient system, it is not only the freedom of movement, the right to equality, and respect for private and family life, but also another key element of freedom: the freedom to use, or not to use the system itself.

Therefore, providing a regulation that understands marriage independently of gender, based on the legislative power of the European Union, conferred by its members, is reasonable, proportional, and consistent, or, if it does not occur, the European Court should adopt the position the North-American Supreme Court did: recognizing that the country that does not recognize same-sex marriage is violating the principles of the European Union. In fact, in view of the acceptance of participating in the block, and considering its fundaments of freedom of movement and non-discrimination, besides the need to respect the principles laid

down in the Convention, there is no reasonableness in granting this definition to the domestic law of each country. It is indisputable that the autonomy of the countries is limited when they compose the European Union; and delegating definitions of these institutions prevents the achievement of unional principles, which are unreasonable. Finally, the argument that this definition would hurt democracy at the supranational level, and each country would have the autonomy to set the matter, it should be noted that democracy itself succumbs to disrespect to rights and individual guarantees.

Thus, the solution of the problem is only possible through the direct conceptualization by the European Union, defining marriage and registered partnership, including the possibility of being formed by same gender spouses, without infringing its own founding principles.

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