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Abstract:

The article is dedicated to the case-law of the European Court of Human Rights on the legal status of same-sex couples. The author discusses the evolution of Strasbourg jurisprudence in this respect, including the redefinition of "family life" within the meaning of Article 8 of the Convention (Schalk and Kopf v. Austria), equalization of same-sex unions to extramarital different-sex unions (Vallianatos and Others v. Greece), positive obligation to legalize extramarital same-sex couples (Oliari and Others v. Italy) and prospects for imposing the obligation to legalize same-sex marriages under the Convention. In this context, he points out that the Court's case-law has produced some paradoxes. Firstly, the Court has decided that same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship, because they are just as capable as different-sex couples of entering into stable, committed relationships. It makes therefore an emotional factor as decisive in this matter. In parallel, the Court maintains that situation of same-sex couples is not relevantly similar to that of married couples since the exercise of the right to marry gives rise to social, personal and legal consequences. This then poses the questions of whether the legalization of same-sex couples has not social, personal and legal consequences, or whether the marriage is not based on emotional ties. Secondly, the Court incoherently uses the argument of European consensus. In Schalk and Kopf it was not relevant for the Strasbourg judges that only minority of state parties to the Convention had formally recognized same-sex unions to change the meaning of notion of “family life” under Article 8 and “marriage” under Article 12 of the Convention (including, in both cases, same-

sex couples), whereas the same fact became for them a significant argument to decide that the respondent government was not under obligation to grant same-sex couples equal access to registered partnership or marriage. Moreover, the Court applies a new concept of “marriage” only to those states that granted access to marriage for same-sex couples, whereas the new concept of “family life” is also applied to states that did not legally recognize same-sex unions in any way. Thirdly, the Court's jurisprudence places unnecessary constrains on domestic authorities as to how to regulate the family law. In Vallianatos and Others, the Court decided that, because same-sex couples are in a situation relevantly similar to different-sex couples, therefore the law having been allowed civil unions only between members of the different sex was the discrimination of same-sex couples. Then, it seems legally impermissible to retain marriage as a different-sex institution and to make civil unions or registered partnerships as institutions accessible only to same-sex couples. This is because, those of different-sex couples that do not want to enter into marriage as too formal and demanding institution are placed in a less favorable position than same-sex couples in this respect.