

NEW TENDENCIES REGARDING SAME-SEX MARRIAGE IN THE MEMBER STATES OF THE EUROPEAN UNION: – A BRIEF INSIDE AND OUTSIDE PERSPECTIVE –

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Abstract

Sexual orientation discrimination has been recently outlined within the Plenary Session of the European Parliament that took place in Brussels, on 24th May 2012 as a priority in the fight against discrimination of all kind, making a “call on EU member states to consider giving access to cohabitation, registered partnerships or marriage to lesbian, gay, bisexual and transgender (LGBT) people”.

Taking this statement as a starting point, this paper aims first to briefly analyse the European Union’s legislation defending sexual orientation discrimination and its limits. After that, a comparison between the Spanish and Romanian legislations will be made, choosing thus two countries within the EU that have very different paths and views in this matter, finally assessing the recent Tribunal Constitucional judgment regarding the constitutionality of same-sex marriage. In the same line our analysis will also focus on giving an overview of the EU panorama focusing on those countries that have extreme and opposite views about the matter.

This study would not be complete without taking into account the contrary situation that is taking place in certain non-Member States of EU such as: Ukraine, Russia or Moldova. This fact was also highlighted by the European Parliament in the last Plenary Session saying that “in the European Union [and in other European states, referring to the recent situations occurred in Ukraine, Russian Federation or Moldova], the fundamental rights of LGBT people are not yet fully upheld”.

Key words: *European Union, same sex marriage, sexual orientation discrimination, Treaty of Lisbon*

1. Introduction

Same-sex marriage¹ is legal in fourteen countries in the world: Argentina (2010), Belgium (2003), Canada (2005), Iceland (2010), Netherlands (2001), Norway (2008), Portugal (2010), South Africa (2006), Spain (2005), Sweden (2009), Denmark (2012), Uruguay (2013), New Zealand (2013) and France (2013). It is also legal in twelve states of the United States², as well as the district of Columbia and the native-American tribes of Coquille, Little Traverse Bay Bands of Odawa Indians and Suquamish; in some of the states in Mexico (Mexico D.F., Oaxaca and Quintana Roo); and in fourteen out of twenty-six Brazilian states³.

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¹ This term (same sex marriage) will be used regarding lesbian and gay marriages, as is the term used in the global academic world.

² Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington. GayMarriageProCon, “Should gay marriage be legal?” <http://gaymarriage.procon.org/>, accessed 20 May 2013.

³ EFE Agency, “México DF legaliza el matrimonio homosexual”, *El País*, December 22, 2009, accessed March 11 2013, http://elpais.com/diario/2009/12/22/sociedad/1261436409_850215.html

There are also some states that recognize same-sex marriage but do not carry them out, such as: the states of Brazil which do not perform same-sex marriage, Aruba, Curaçao and St Martins (which recognizes marriages carried out in the Netherlands), Israel, Mexico (for marriages taken place in Mexico) and some US states⁴. Outside the European Union (EU), it is being studied in many places such as Colombia⁵ or Brazil. In both states right now it is possible to registry same sex marriages in front of a public notary following important sentences in both countries but there is not an approved law allowing it yet. In Nepal remains in agenda but the future of the law remains uncertain.

Meanwhile, in the EU Member States a heterogeneous map is being drawn in the issue of same sex marriage. On one hand, more than a half of the countries that perform same-sex marriage in equality with the heterosexual ones in the world are member states of the EU. On the other hand, there are others that have modified their laws in order to state clearly that marriage can only be performed between a man and a woman.

The EU itself has made, by ways of producing laws (such as 2000/42⁶ and 2000/78 Directives⁷) which form part of the *acquis communautaire*, efforts to eradicate sexual orientation discrimination but harmonization of this issue remains undone.

An analytical description of the issue will be offered, describing the efforts made by the EU in this respect via the primary law, secondary law and multiple resolutions from the European Parliament or statements from the heads of the institutions.

Also, an analysis of the Spanish and Romanian situation will be given. The choice of these case-studies was made based in the different situations they are living towards same-sex marriage. Both are Members of the EU, but whereas Spain entered in 1986, Romania joined in 2007. Both have applied the above mentioned Directives in their territory but the outcome of that application has been very different. Spain approved same-sex marriage in 2005, but it was claimed unconstitutional from one of the political parties (the right-winged *Partido Popular*) and its future remained uncertain until the Constitutional Tribunal sentence reaffirmed its constitutionality last November. In Romania same-sex couples do not have the right to marry nor to civil unions.

After the analysis of the two specific cases, an overview of the issue in the EU will be offered, stating which countries have already approved same-sex marriage, which have it in the agenda and which ones have made changes in their constitutions so that heterosexual marriage is reinforced. A look to the Ukrainian, Russian and Moldavian situations will be offered so as to compare the situation inside and outside the borders of the EU, where strong anti-homosexual movements are taking place. Finally, some concluding remarks will be given.

EFE Agency, "Solo en once países del mundo está legalizado el matrimonio homosexual", *Rtve.es*, November 6, 2012, accessed March 11 2013, <http://www.rtve.es/noticias/20121106/solo-once-paises-del-mundo-esta-legalizado-matrimonio-homosexual/573157.shtml>.

⁴ FREEDOM TO MARRY, "The Freedom to Marry Internationally", December 2012, accessed March 11, 2013 [http://www.freedomtomarry.org/landscape/entry/c/international](http://www.freedomtomarry.org/landscape/entry/c/international;); USA Today, "Israeli high court orders gay marriage recognition" November 21, 2006, accessed March 11 2013, http://usatoday30.usatoday.com/news/world/2006-11-21-israel-gay-marriage_x.htm.

⁵ As for 25th of April 2013 Colombia's parliament rejected same sex marriage law, although, as stated, in 2007 approved the possibility following a Constitutional Court ruling. It gives same sex marriages similar inheritance, pension and social security rights that heterosexual marriages do.

⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, published in Official Journal of the European Union, L 180 of 19/07/2000.

⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, published in Official Journal of the European Union, L 303 of 02/12/2000.

2. Anti-discrimination laws in the EU regarding sexual orientation

The principle of equal treatment constitutes a fundamental value of the European Union, first established as a principle in trade law, specifically in the context of the Economic Liberties and clearly protected for first time in the Treaty establishing the European Economic Community (1957), by requiring that men and women should receive equal pay for equivalent work⁸.

Regarding the principle of equal treatment, the European Union made in time significant progress in achieving gender equality⁹, in recognising the principle of non-discrimination based on sex, race, nationality etc. and in banning these forms of discrimination. In this context, it is worth to mention that former article 13 of the Amsterdam Treaty (1997) represents a milestone and was the first time sexual orientation discrimination was introduced as a protected ground in a EU Treaty¹⁰. This article was subsequently modified by the Nice Treaty (2001) to allow for the adoption of “stimulus measures” in order to support initiatives of each member state. This way the EU aims to show a coherent and integrated focus in the fight against discrimination, thus recognizing areas in which discrimination is common in order to combat it. In the same way, the wording lets the door open to legislate about situations of multiple discrimination¹¹.

Discrimination was also taken into account when drafting the European Constitution which finally was rejected, establishing the fight against discrimination (in general, not establishing a list of protected grounds, thus not including sexual orientation specifically) a priority, a fundamental objective in the EU.

In December 2000, the Charter of Fundamental Rights of the European Union was adopted, but won't be enforceable until 2009 along with the Treaty of Lisbon. The 3rd chapter of this document is dedicated to Equality and contains 7 articles (20-27). Article 21st is the one containing specific provisions about discrimination on the ground of sexual orientation discrimination¹². Much more, according to the Lisbon Treaty, the Union promotes equality (article 3 of TEU) and combats inequalities through the actions it implements (Article 8 of TFEU).

Also in 2000 two important Directives¹³ were approved in the area of non-discrimination: Council Directive 2000/78/EC¹⁴ establishing a general framework for equal treatment in employment and occupation (hereinafter the “Employment Equality Directive”) and Council Directive 2000/43/EC¹⁵ implementing the principle of equal treatment between persons irrespective of racial or ethnic origin in the following fields: employment, education, social security, health care and access to goods and services (Known as “Race Equality Directive”).

⁸ Article 119 of the Rome Treaty, 1957: Sex Equality was regarded as a principle to guide the European Economic Community.

⁹ M. Koutselini, S. Savva, And S. Agathangelou, “Indicators of Gender Mainstreaming in European Union and Comparison with Genders’ Depictions in Cyprus Mass Media”, University of Cyprus (2007) 1, accessed March 11 2013, www2.ucy.ac.cy/~currinst/cur/pdf/.../sinedrio_patra_arthro_final.doc.

¹⁰ “The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament [to] take appropriate action to combat **discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**”.

¹¹ Jone Itxaro Elizondo Urrestarazu, “Discriminación racial y de origen étnico en la Europa de los Derechos”, *Revista de Derechos Fundamentales. Universidad Viña del Mar*, no.6, (2011), 90-91.

¹² Article 21 of the Charter of Fundamental Rights of the European Union: “1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.

¹³ Report “Discrimination in the European Union”, January 2007, accessed March 11 2013, p.4, http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_en.pdf,

¹⁴ See footnote 9.

¹⁵ See footnote 8.

Despite this variety of provisions, only the Employment Equality Directive mentions sexual orientation but focused solely in discrimination in employment and occupation. As a matter of fact, in line with the habitual “prudence” of the EU institutions when sensible matters are being discussed, the preamble of the Directive it is expressly mentioned, that none of the provisions shall be interpreted as to oblige the Member States to change the Civil and Family Law. These two directives were complemented by the creation of a Community action programme to combat discrimination¹⁶ with a budget of 100 million euros between the years 2001-2006 including sexual orientation discrimination.

The European Parliament on the other hand has been much more clear in its approach to this topic and has adopted a great number of resolutions since the ‘90s regarding sexual orientation discrimination accepting same-sex marriage and encouraging Member States as well as the European institutions to take steps forward the recognition of same-sex unions, including marriage. Although not legally-binding the resolutions from the EU Parliament are seen as a strong political tool.

The first resolution adopted in this regard was the Resolution on equal rights for homosexuals and lesbians in the EC (A3-0028/94) the 8 February 1994¹⁷ which aimed to finish the prohibition on same-sex marriage or provide access to equivalent regimes. It was based in what is known as the “Roth report” and asked for a Directive which should legislate about (among others) marriage equality for same sex couples¹⁸.

The 3rd of July of 1997 a written question was presented to the Commission asking why there was still no Directive on the issue, to which the Commission answered that in the time the Roth report was adopted, the Community Treaties did not “bestow on the institutions any specific powers for tackling discrimination based on sexual orientation”¹⁹. The answer also stated that the Treaty of Amsterdam was going to give the Community powers in that respect. The Commission did not give any specifics about a possible Directive in this respect though, and the only Directive approved that tackled sexual orientation discrimination has been 2000/78 so far, which stated, as mentioned before, specifically that “(22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.”²⁰

Among other resolutions it is remarkable that in December 2008, the European Parliament voted 401 – 220 in favour of a report which calls for same-sex marriage and civil unions to be recognised across all EU states and at the same time, while adopting a Report on the Situation of Fundamental Rights in the EU recommended mutual recognition of same-sex partnerships²¹.

¹⁶ Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006), *Official Journal of the European Union* L 303, 2 of December 2000, p. 23–28

¹⁷ Resolution A3-0028/94 of the European Parliament on equal rights for homosexuals and lesbians in the EC, adopted the 8th of February 1994, published in the *Official Journal of the European Communities* C 61/41 of the 24th of February 1994, p.40.

¹⁸ Believes that the Recommendation should, as a minimum, seek to end:

... - all forms of discrimination in labour and public service law and discrimination in criminal, *civil*, contract and commercial law

... - the barring of lesbians and homosexual *couples form marriage or from an equivalent legal framework, and should guarantee the full rights and benefits of marriage, allowing the registration of partnerships,*

.....- any restrictions on the rights of lesbians and homosexuals *to be parents or to adopt or foster children (italics added by author).*

¹⁹ Written question no. 2307/97 by Laura González Álvarez, Angela Sierra González, María Sornosa Martínez, Antoni Gutiérrez Díaz to the Commission. Establishment of a directive on equal rights for homosexuals and lesbians in the EC, made on 3 July 1997, published in the *Official Journal of the European Communities* C 76 of 11 March 1998, p. 94.

²⁰ See note 9, pp. 16 – 22.

²¹ Recommendations 75, 76 and 77 of the Report of the 5th December 2008 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI)) for the Committee on Civil Liberties, Justice and Home

Plenary Session of the European Parliament that took place in Brussels, on 24th May 2012 outlined as a priority in the fight against discrimination of all kind, making a “*call on EU member states to consider giving access to cohabitation, registered partnerships or marriage to lesbian, gay, bisexual and transgender (LGBT) people*”²².

3. Situation in the European Union member states

A. Spain

Same sex marriage came as an electoral promise of the socialist government of Jose Luis Rodriguez Zapatero. After winning the elections in 2004 the socialist government passed the law²³ that allowed same-sex marriage in the *Congreso de los Diputados* and in the Senate the 30th of June 2005, making Spain the third country in the EU and the world allowing same-sex marriage.

The socialist group found a lot of opposition (even if a 56.9% of the population approved the policy-change²⁴) from social groups linked in their majority to the Catholic Church (Bishops and *Foro de la familia*²⁵ mostly) and the right-winged party *Partido Popular* (PP). Indeed this last political party filed an appeal claiming the unconstitutionality of the law in September 2005.

There were no political changes until November 2011, moment in which the right-winged *Partido Popular* won the elections with an absolute majority and fear came that they would overrule directly the law now they were in charge and had the necessary power to do so. Because of that spread fear the new-elected government had to state that they would respect what the Constitutional Court would rule about this issue²⁶. Until that moment, 22.442 same-sex weddings were at stake²⁷.

In the 6th of November 2012, the Sentence of the Constitutional Tribunal²⁸ came out, rejecting any kind of unconstitutionality in the law. The three conservative judges out of 8 that voted against the sentence wrote dissenting votes.

Affairs of the European Parliament, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A6-2008-0479&language=EN>, accessed March 11 2013.

²² “Parliament strongly condemns homophobic laws and violence in Europe” in the Plenary Session Justice and Home Affairs, on 24th of May 2012, accessed March 11 2013, <http://www.europarl.europa.eu/news/en/pressroom/content/20120523IPR45696/html/Parliament-strongly-condemns-homophobic-laws-and-violence-in-Europe>.

²³ Law 13/2005 of the 1st of July 2005 by which the Civil Code in matters of law to contract marriage is amended, published in the Official Journal (BOE) no. 157 of the 2nd of July 2005, pp. 23632 -23634.

²⁴ When asked about Civil marriage for same-sex couples by the CIS a 56.9% answered in favour, a 32.3% against and a 10.9% did not respond. Centro de Investigaciones Sociológicas, Study on “Opiniones y actitudes sobre la familia” no.2578 October-November 2004, accessed March 11 2013, p.16, http://www.cis.es/cis/export/sites/default-Archivos/Marginales/2560_2579/2578/Es2578.pdf.

²⁵ Foro de la Familia is an association self-declared defendant of the family. accessed March 11 2013, <http://www.forofamilia.org/nosotros/quienes-somos/spanish-family-forum/>.

²⁶ La Vanguardia, “El Gobierno esperará a la sentencia del TC para decidir sobre el matrimonio homosexual”, November 6, 2012, accessed March 11 2013, <http://www.lavanguardia.com/politica/20121106/54354891548/gobierno-fallo-tc-decidir-matrimonio-gay.html>.

²⁷ Javier Garcia Pedraz and Emilio de Benito, “Siete años, 22.442 bodas y un recurso contra el matrimonio gay”, *El Pais*, November 6, 2012, accessed March 11, 2013 http://sociedad.elpais.com/sociedad/2012/07/13/actualidad/1342215460_536337.html.

²⁸ Sentence 198/2012 of the 6th of November 2012. Unconstitutionality Appeal 6864-2005. Filed by more than fifty members of the Popular Group of the Congress in relation to Law 13/2005 of July 1, by which the civil code in matters of law to contract marriage is amended. Institutional guarantee of marriage and protection of the family: constitutionality of the legal regulation of marriage between persons of the same sex. Published in the *Official Journal (BOE)*, no. 286, 28 of November 2012, sec. TC., pp. 168-219.

The appeal petition was based in 8 reasons of unconstitutionality²⁹, the central one being the statement by PP that the wording of article 32 of the Spanish Constitution did not permit such a thing as same-sex marriages³⁰.

The adoption of the Law meant a change of some of the words used in secondary legislation (man or woman changed by the spouses, for example), that the PP interpreted as by changing some words, a mayor change was taking place including the total change and de-naturalization of the marriage institution.

For proving the law was unconstitutional, they claim a breach in article 32 of the Spanish Constitution of 1978. The article states as follows:

1. *Man and woman have the right to marry with full legal equality.*
2. *The law shall make provision for the forms of marriage, the age and capacity for concluding it, the rights and duties of the spouses, the grounds for separation and dissolution, and their effects.*³¹

In this respect, the sentence stated that the article permitted a margin for interpretation, and even if it same-sex marriage was not probably what the legislator had in mind at the time of writing it, it provided the necessary margin not to have to change the Constitution for the adoption of same-sex marriage. That is to say that it did not implicitly bring same-sex marriage but neither excluded it of the marriage institution. The article was phrased like that due to the discriminatory situations lived by women during the Franco dictatorship³², in order to prevent this situation from happening again this was a way of highlighting the equality between man and woman once more in the constitutional text.

At the same time, the Tribunal defended that the law, as well as the society was a “living tree” that required an evolutionary interpretation.

Spain was also the first country in the world permitting adoption in equality to heterosexual couples. In the same sentence we have mentioned in the previous paragraphs, the Tribunal stated that since same-sex marriage was equal to heterosexual marriages they had the same right to access the adoption of children. The Tribunal stated that the child’s interest had to prevail at all times, thus every case had to be studied in its own, but that there was no reason of unconstitutionality³³.

Still, there are voices claiming that marriage should only be called like that when it is formed between a man and a woman, the last case being the Minister of Home Affairs (Ministro del Interior) Jorge Fernández Díaz stated in March 2013 that the “survival of the species won’t be guaranteed in the case of same-sex marriages”, declarations that have been criticised even from his own political party.

²⁹ Breach of articles: 9.3, 10.2, 14 (in relation to articles 1.1 and 9.2), 32, 39.1, 2 and 4. 53.1 (in relation to article 32) and 167 of the Spanish Constitution.

³⁰ Fundamentos de Derecho (the held, unofficial translation) no.6 of the Sentence 198/2012.

³¹ English version of the Spanish Constitution, accessed March 11 2013, available in http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf.

³² Elvira Aranda Alvarez, “Sinopsis del artículo 32 de la Constitución española”, updated by Sara Sieira, on January 2011, accessed March 2013, <http://www.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=32&tipo=2>.

³³ C. Guindal, “El TC legaliza también la adopción de menores por los matrimonios gay”, *El Confidencial*, November 6, 2012, accessed March 11 2013, <http://www.elconfidencial.com/espana/2012/11/06/el-tc-legaliza-tambien-la-adopcion-de-menores-por-los-matrimonios-gay-108723/#>, and Sentence 198/2012... See footnote 30.

B. Romania

According to the European surveys³⁴ Romania is “guilty” of having one of the strongest negative attitudes towards the Lesbian, Gay, Bisexual and Transsexual (LGTB for now on) community in the European Union. This attitude is contrary to the European values of protecting human rights that include the rights of the LGBT community, values which have been made their own by Romania when it joined the EU in 2007. With this occasion, the country was asked by the European Union legislation to “facilitate” the recognition of the same-sex relationships registered in other EU member states (e.g.: same-sex marriage, civil unions or domestic partnerships) and to eliminate as much as possible the discrimination based on sexual orientation at national level.

There are a range of positive aspects to be mention in which Romania has made significant progress as regards the LGBT rights legislation since 2000 when it fully decriminalised homosexuality: it has introduced and enforced wide-ranging anti-discrimination laws, equalised the age of consent and introduced laws against homophobic hate crimes. Also at the institutional level a new body in charge of analysing all the forms of discrimination has been formed, namely National Council for Combating Discrimination (CNCD). This council has the power to impose fines when discriminatory situations are taken place, both to natural and legal persons and includes the protected ground of sexual orientation³⁵.

But we should highlight the fact that even after 6 years from the Romanian accession to the EU this topic is still a very sensitive subject to be discussed and analysed either by the NGOs for protection of human rights and in particular of LGBT rights or by the politicians.

The institutional and legislation modifications occurred in the last years have allowed the LGBT community to become more visible, for example by organizing social and cultural events. However, from the legal point of view there are still few achievements in this field, since the Romanian legislation does not recognise yet the partnership or same-sex marriage. Furthermore, in 2009 the Romanian Parliament decided to change the words “between spouses” from the Family Code, considered to be too vague into more concrete terms: “*between a man and a woman*”, banning, least for the next couple of years, the possibility of future same-sex marriages³⁶.

This rigid attitude of the Romanian authorities and *expressis verbis* provision into the new Civil Code that the marriage will only be that between a man and a woman has been considered to be discriminatory by the national and international NGOs (e.g.: group ACCEPT, the International Gay and Lesbian Human Rights Commission, and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) which required for measures to be taken in order to eliminate this discrimination from the national legislation and harmonizing with the European one in the field³⁷.

Also, there were three articles of the mentioned new Civil Code that were regarded as discriminatory by the European Network of Legal Experts in the Non-discrimination Field: Article 277 (prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages registered in other countries for Romanians), Article 462 (the

³⁴ Danish Institute For Human Rights, COWI, *Report: The social situation concerning homophobia and discrimination on grounds of sexual orientation in Romania*, European Union Agency for Fundamental Rights (FRA), March 2009, accessed March 11 2013, p. 11. http://fra.europa.eu/sites/default/files/fra_uploads/389-FRA-hdgs0-part2-NR_RO.pdf.

³⁵ Consiliul National Pentru Combaterea Discriminariilor, accessed March 11 2013, <http://www.cncd.org.ro/?language=en>.

³⁶ Rex Wockner, “Romania enacts discriminatory laws”, *Asylumlaw*, August 10, 2009, accessed March 11 2013, <http://www.asylumlaw.org/docs/showDocument.cfm?documentID=7959>.

³⁷ *Ibid.*

prohibition of adoption by two persons of the same sex), and Article 258 (definition of family as marriage between a man and a woman)³⁸.

Taking into consideration the above mentioned, a similar situation can be noticed as regards the same-sex partnerships or marriages celebrated abroad by the Romanian citizens, which are not recognised by the Romanian authorities, except for the partnerships or same-sex marriages made abroad where one or both partners are foreigners and have a valid partnership in their Member State of origin. In this context, the couple can be registered as such on the Romanian territory³⁹.

C. Overview of the situation regarding same-sex marriage in the other Member States of the EU

Referring to same-sex marriages in the EU a really heterogeneous map can be drawn. Out of the 14 states that perform same-sex marriages in the world, 7 are members of the EU. In this part we will have an overview of the situation of same-sex marriage in the EU, showing which states have already approved, in which it is being discussed right now and which states have a constitutional provision stating that marriage is between “a man and a woman” exclusively, what has come to be known as a constitutional ban.

As it has already been mentioned, there are seven EU member states that have approved same-sex marriage: The Netherlands, Belgium, Denmark, Spain, Sweden, Portugal and France. There are other member states which are currently discussing the issue: England and Wales, Ireland, Germany, Luxemburg, Finland or Andorra (even if it is not a member state of the EU it has a very special relationship with the EU).

In Ireland it seems movements in favour of same-sex marriage are driving the incorporation of the issue in the agenda of the government. In the case of Finland, it seems that for the moment there will be no change in the actual law, although it was one of the first states that approved registered partnership. On the other hand there are some states who have recently introduced modifications in their constitutions in order to reinforce the statement that marriage is between a man and a woman, which are Latvia, Lithuania, Poland, Hungary and Bulgaria.

The modification of Family Law contained usually in the Civil Code has been done both by introducing the possibility of different and same-sex marriages or by making the provision gender-neutral, thus not stating the sex of the spouses.

The first EU state member to approve same-sex marriage was The Netherlands⁴⁰ in a law passed the 7th of December 2001. This made the Dutch the first ones to have the right to same-sex marriage. Following the conclusions of a special commission created for the study of the issue in 1995, and after approving gay civil-unions in 1998, the final draft of the legislation was presented in September 2000 and was adopted by an overwhelming 107 votes against 33 in the House of Representatives⁴¹. The main article changed in marriage law stated that “A marriage can be contracted by two people of different or the same sex”⁴².

Belgium, the second state member to approve same-sex marriage did on the 30th of January 2003. The next state to approve same-sex marriage was Spain in 2005, whose case has been studied

³⁸ Romanita Iordache, “News report from the 28th June 2009”, *European Network Of Legal Experts In The Non-Discrimination Field*, June 28 2009, accessed March 11 2013, p.1, http://www.non-discrimination.net/content/media/RO-15-RO-FLASH%20REPORT_New%20Civil%20Code%20adopted.pdf

³⁹ See note 36, p.10.

⁴⁰ The New York Times, “Same-sex Dutch couples gain marriage and adoption rights”, December 20 2000, accessed March 11 2013, <http://www.nytimes.com/2000/12/20/world/same-sex-dutch-couples-gain-marriage-and-adoption-rights.html>.

⁴¹ BBC, “Dutch legalise gay marriage”, September 12 2000, accessed March 11 2013, <http://news.bbc.co.uk/2/hi/europe/922024.stm>.

⁴² Article 30 in the marriage law originally: “Een huwelijk kan worden aangegaan door twee personen van verschillend of van gelijk geslacht.” Taken from A. Llanza I Sicart, and S. Navas Navarro, *Matrimonio homosexual a opción: Perspectiva Nacional e Internacional*. Madrid: Editorial Reus, 2006, p. 298.

in depth in another part of this article. In Sweden, same-sex marriage law passed the 1st of May 2009, followed by the decision of the church of Sweden of also marrying same sex couples the 1st of November 2009 by a 70% of the votes⁴³.

Portugal passed the Law 119/XI⁴⁴ allowing same-sex marriage in January 2012 after an intense social debate. Francisco Assis, socialist member of the Parliament stated that “The living world has defeated the prejudice one”⁴⁵.

Denmark adopted legislation allowing same-sex marriage in June 2012, but since 1989 couples of the same sex could access registration as a couple with similar juridical effects as marriage (not in some aspects regarding adoption the parental rights o assisted reproduction). The change in the law has been done by making gender neutral the bill allowing gay marriages (both church and civil registry weddings)⁴⁶.

France was the last EU member state to approve same sex marriage. Like in the case of Spain it was an electoral promise of the socialist party, in this case ruled by François Hollande and has been a really controversial law that has moved a great number of French citizens both against and in favour of the law, followed by incidents and violence against the LGTB community. In spite of these attitudes approval rate (in August 2012) was of 65% for same sex marriages and 53% for allowing same sex unions to adopt children⁴⁷. The law passed the 23rd of May 2013 but it was not signed by the President until the Council ruled it was a constitutional the 17 of May 2013⁴⁸.

Some other EU member states have the issue on the political and legislative agenda or are working on it. These are: England and Wales (expected this year), Scotland, Germany and Ireland. It is still in Finland’s agenda even if it was but put aside the 20th of February 2013th, when the Finnish Parliament’s Legal Affairs Committee voted narrowly to reject a gender-neutral marriage bill proposed by National Coalition Party minister Alexander Stubb and others, meaning it will not be brought before the full legislature for consideration. Slovenia asked their citizens via referendum the 25th of March 2012 only a 26% of the population voted and the results where 55% against 45%.⁴⁹

⁴³ AFP, “Sweden’s Lutheran church to celebrate gay weddings”, October 23 2009, accessed March 11 2013, <http://www.google.com/hostednews/afp/article/ALeqM5gBRXyAD2aAX4i7H5M0LujkDR0RhQ>.

⁴⁴ Law 119/XI, that creates and gives legal protection to registered civil unions between persons of the same sex. Published in the *Official Journal* the 7 of January 2010. Available in <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheIniciativa.aspx?BID=35011>.

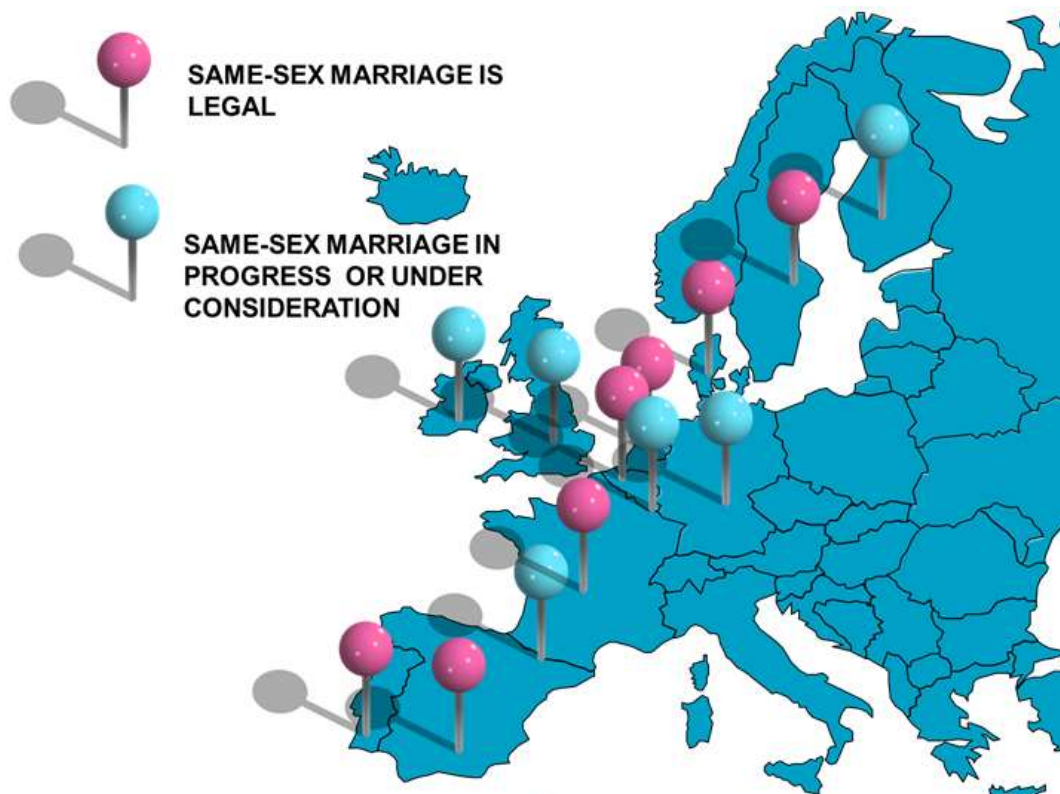
⁴⁵ “El mundo de la vida ha vencido al mundo de los prejuicios”, stated Francisco Assis in Francesc Relea, “Portugal aprueba el matrimonio homosexual tras un intenso debate”, *El País*, January 8 2010, accessed March 11 2013, http://sociedad.elpais.com/sociedad/2010/01/08/actualidad/1262905216_850215.html.

⁴⁶ BBC, “Denmark approves same-sex marriage and church weddings”, June 7 2012, accessed March 20 2013, <http://www.bbc.co.uk/news/world-europe-18363157>.

⁴⁷ Xavier Heraud, “Sondage: 65% des Français-e-s sont favorables à l’ouverture du mariage pour les homos”, August 15 2012, accessed March 20 2013, <http://yagg.com/2012/08/15/selon-sondage-ifop-65-des-francais-sont-favorables-a-louverture-du-mariage-pour-les-homosexuels/>.

⁴⁸ Leigh Thomas, “France’s Hollande signs gay marriage law”, *Reuters*, May 18 2013, accessed May 18 2013, <http://www.reuters.com/article/2013/05/18/us-france-gaymarriage-idUSBRE94G0JH20130518>.

⁴⁹ ACEPRENSA, “Eslovenia rechaza en referendum el matrimonio gay”, March 30 2012, accessed March 11 2013, <http://www.acepresa.com/articulos/eslovenia-rechaza-en-referendum-el-matrimonio-gay/>.



Map: Made by the author

On the other hand, there are some countries, as explained earlier that had or have recently introduced or modified their constitution in order to expressly state that marriage is a union between a man or a woman: Poland (article 18), Latvia (article 110 changed in 2005), Lithuania (article 38, changed in 2010), Hungary (article L.1., changed in 2012) and Bulgaria (article 46). This movement towards a reinforcement of the heterosexual nature of marriage has been strong in ex-communist countries. In fact, the modification of the constitutions arose many protests from LGTB associations and worried NGOs. Reactions include a European Parliament Resolution⁵⁰ on violation of freedom of expression and discrimination on the basis of sexual orientation in Lithuania.

⁵⁰ European Parliament Resolution of 19 January 2011 on violation of freedom of expression and discrimination on the basis of sexual orientation in Lithuania (2012/C 136 E/10) Published in the *Official Journal of the European Union* C136 E/50 of the 11 of May 2012 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:136E:0050:0052:EN:PDF>.



It is also interesting to address the different support rates regarding same-sex marriage in the different Member States. A Eurobarometer Discrimination Survey in 2006 found that existed major differences between EU Member States also exist regarding public opinion towards LGBT people and issues. For instance, the majority of the population in The Netherlands (82%), Sweden (71 %) and Denmark (69 %) was in favour of same-sex marriage, but only a small minority in Romania, (11 %), Latvia (12 %) and Cyprus (14 %). Also, while in the Netherlands 91 per cent of the population was comfortable with having a homosexual as a neighbour, in Romania only 36 per cent was of the same opinion. The Eurobarometer Discrimination Survey in 2008, using a ten point 'comfort scale', produced similar results: Swedes (9.5%), Dutch and Danish respondents (9.3%) were the most 'comfortable' with the idea of having a homosexual as a neighbour, but a much lower 'comfort' level was recorded in Bulgaria (5.3%), Latvia (5.5%) and Lithuania (6.1%)⁵¹.

⁵¹ Data found in Fundamental Rights Agency of the European Union, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member State, Part II: The Social Situation* (2009), pp.9-10.

4. Legal Status in Non-Member States: Ukraine, Moldova and Russia

A. Ukraine

In 1991 Ukraine became one of the first ex-Soviet countries where homosexuality has been decriminalized. This fact permitted the LGTB community to become more visible at the national level, more precisely, by having their own bars, publications, and human rights organizations.

Except the positive part of the visibility and changing the legislation as regards decriminalizing of the homosexuality, there are still problems in recognizing all the rights to this community since the political and social perception is still at a very low level, followed violent attacks on LGBT activists took place during the commemoration March of the international Human Rights Day in 2003 or during other public events, such as “Kiev Pride” in 2012 and 2013.

From the legal point of view, the new Constitution, approved in 1991, apart from mentioning the basic human rights, it does not mention *expressis verbis* the terms of sexual orientation or gender identity. Furthermore, article 51 of the Constitution specifically defines only the marriage as a voluntary union between a man and a woman⁵².

In recent years a couple of bills regarding the ban to discuss in public or in media about the homosexuality, bring into Ukraine various videos, photos or audio products or other similar products have been discuss. In fact, both Bill n°0945 (formerly Bill n°8711) and Bill n°1155 are pending second voting in the parliament and if approved it would mean that a person who offers information about LGTB associations (for instance) could face up to 5 or 6 years of prison. According to Human Rights Watch, the approval of these laws would “create an environment of state-promoted discrimination against LGTB people”⁵³.

This situation has been qualified by the local NGOs, Amnesty International organisation, the European Union, Human Right Watch and the United Nations to be serious “homophobic” actions which means that if the situation remains the same in the next period and no improvements are made in order to eliminate these bans, Ukraine will experience difficulties in the negotiations process to the European Union led under the EU-Ukraine Association Agreement, which entered into force in 1998. In fact, in the context of a Ukraine- EU visa liberalization negotiations the Foreign Minister of Ukraine was obliged in February 2013 to announce the adoption of anti-discrimination laws to reach at least one of the benchmarks for the process to be successful⁵⁴.

Moreover, in the opinion of the EU officials, “these homophobic bills are unacceptable for a country that aspires to deeper relations with the European Union”⁵⁵ and be part of a Europe of 28 Member States already, taking into account that Croatia will be fully Member states starting with the 1st of July 2013. The same statement has been made during the EU-Ukraine summit that took place in February 2013, where the main goal of the summit was the Ukraine’s reform agenda, including the situation of the human rights, linked to the possible signature of the EU-Ukraine Association Agreement.

⁵² Article 51. “Marriage shall be based on free consent between a woman and a man. Each of the spouses shall have equal rights and duties in the marriage and family.

Parents shall be obliged to sustain their children until they are of full age. Adult children shall be obliged to care for their parents who are incapable to work.

The family, childhood, motherhood, and fatherhood shall be under the protection of the State.”

Ukrainian Constitution, accessed March 18 2013, available in: <http://www.president.gov.ua/en/content/chapter02.html>.

⁵³ Human Rights Watch, “Ukraine: EU Should Raise LGBT Rights at Summit”, February 21 2013, accessed March 1, <http://www.hrw.org/news/2013/02/21/ukraine-eu-should-raise-lgbt-rights-summit>.

⁵⁴ The Guardian, “Ukraine gay pride marchers ready to defy violence”, May 18 2013, accessed May 18 2013, <http://www.guardian.co.uk/world/2013/may/18/ukraine-gay-pride-marchers-violence>.

⁵⁵ See note 55.

Nowadays, there are no anti-discrimination laws covering sexual orientation or gender identity in Ukraine. There is though a national hate crime law that could be interpreted as including sexual orientation and gender identity.

It is necessary that Ukraine issues concrete laws in this field in order to eliminate as much as possible all the negative situations in which the LGBT community is put so far, as well as clarify the contradictory laws being discuss right now. In addition, if Ukraine wants to become a full member State of the European Union it will be obliged to align and harmonize its legislation with the European one and also it will have to protect the LGBT citizens from certain forms of discrimination and harassment.

B. Moldova

Starting in 1991, an important moment in the history and evolution of Moldova, several progresses in decriminalizing homosexual relations were made, being in the same line with the general attitude of Moldova to guarantee protection of human rights by laws⁵⁶. Thus, in 1995, homosexuality between consenting adults was legalised⁵⁷ while in Transnistria, the self-proclaimed autonomous republic, “*homosexuality is illegal*”⁵⁸.

In addition, in September 2002 new laws were introduced in order to equalise the age of consent. As from January 2003, amongst other things, the position of gays and lesbians in Moldova looks to have improved in a very good manner, especially when nowadays Moldova shows to be very committed to the European values in the field of human rights as well as respecting these.

Nevertheless, nor same-sex marriage nor civil unions are legally recognised since the Constitution of Moldova is banning same-sex marriage⁵⁹. Other laws mention in a general manner the terms of “sexual orientation” or “sexual orientation discrimination” but without defining them, examples are: the Law on Application of Lie Detector /Polygraph no.269 from 12.12.2008; the Law on Asylum no.270 from 18.12.2008 and the Law on Freedom of Expression no.64 from 23.04.2010⁶⁰. That lead to the approval of anti-discrimination Law no.101/2012⁶¹ the 25th of May 2012 that will enter into force this 2013 and even if they don't mention sexual orientation as a protected ground in the first article where a list of general discrimination protected grounds is given (it is important to state that the list is not closed, thus sexual orientation could be interpreted

⁵⁶ Vera Turcanu-Spatari, *Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Legal Report: Moldova*, CoE, (2011), accessed March 11 2013, p.8, http://www.coe.int/t/Commissioner/Source/LGBT/MoldovaLegal_E.pdf.

⁵⁷ Immigration And Refugee Board Of Canada, *Moldova: The situation regarding gay men and lesbians, including the laws on homosexuality, the treatment of gay men and lesbians, protection offered by the State and the existence of support services (2008 - June 2010)*, UNHCR, June 30 2010, accessed March 11 2013, http://www.unhcr.org/refworld/publisher_IRBC,,MDA,4e0302912,0.html.

⁵⁸ Freedom House, “Transnistria”, 2012, accessed March 11 2013, <http://www.freedomhouse.org/report/freedom-world/2012/transnistria>.

⁵⁹ Article 48(2) *The family is founded on the freely consented marriage of husband and wife, on the spouses equality of rights and on the duty of parents to ensure their children's upbringing and education.*

Constitution of the Republic of Moldova, accessed March 11 2013, available in English in: <http://www.presedinte.md/const.php?lang=eng>.

⁶⁰ See footnote 58, pp. 3 and 9.

⁶¹ This law transposed the Council Directive 2000/43/EC and the Council Directive 2000/78/EC into the legislation of Republic of Moldova, accessed March 11 2013, <http://lex.justice.md/viewdoc.php?action=view&view=doc&id=343361&lang=1>.

to be included in “any other similar ground”), it does mention sexual orientation during the text regarding discrimination protection as regards to employment (article 7)⁶².

At the international scene, in 2011 Moldova used its vote in the United Nations Human Rights Council to vote against the first UN resolution condemning discrimination and violence against individuals based on their sexual orientation and gender identity⁶³, which “*represents a historic moment to highlight the human rights abuses and violations that lesbian, gay, bisexual and transgender people face around the world based solely on who they are and whom they love*” according to the U.S. Secretary of State Hillary Rodham Clinton.

As a final remark, during 2011, Moldova was subjected to the periodic reviewing process in the field of human rights in general and equality and non-discrimination policies in particular, taken by the UN, which final report was published in 2012. One of the recommendations made in the report was to “*intensify efforts to address discrimination against LGBT people; to investigate and prosecute crimes against LGBT community members*” but most of all “*to take action to build broad support for [their] rights in the context of the new anti-discrimination law*”⁶⁴.

C. Russia

In the Russian Federation, until 1993 homosexual relations made by adult males were punished under the Russian Federation Criminal Code by imprisonment. After this year and under the strong pressure coming from the European community and after the new Criminal Code came into force in 1997, this incrimination was repealed. Presently, the male homosexual acts are decriminalized⁶⁵, while the lesbian relations were not criminalised at all. Also, in 2003 the age of consent was modified and established in 16 regardless of sexual orientation.

The Russian Constitution in Article 19.2⁶⁶ it is stipulated very clearly the equality of all women and men, including the fact that the state will “*guarantee the equality of rights and liberties regardless of sex, race, nationality, language, origin [...]*”, stipulating in the same time that “*any restrictions of the rights of citizens on social, racial, national, linguistic or religious grounds shall be forbidden*”. Sexual orientation discrimination is not, hence, protected as a ground of discrimination, nor is it in secondary legislation. This leaves Russia with no general or specific laws that protect against discrimination on the basis of sexual orientation or gender identity. In the same line, there is no recognition of same-sex couples (married or not) by the Russian laws. The family code establishes in its article 1.3 that “*Family relations shall be regulated in conformity with the principles of a voluntary conjugal union between a man and a woman*”⁶⁷, which has been an argument invoked defend the thesis according to which marriage is celebrated only between man and woman by the Constitutional Court of the Russian Federation in a case introduced against

⁶² ILGA Europe, “Mixed reactions to adoption of Moldova’s anti-discrimination law”, May 25 2012, accessed March 20 2013, http://www.ilga-europe.org/home/news/for_media/media_releases/moldova_anti_discrimination_law.

⁶³ AP, “UN backs gay rights for first time ever”, *Updated News*, June 17 2011, accessed March 11 2013, <http://updatednews.ca/2011/06/17/un-backs-gay-rights-for-first-time-ever/>.

Paul Ciocoiu, “Moldova focuses on human rights”, *SETimes.com*, February 19 2013, accessed March 11 2013, http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2013/02/19/feature-03.

⁶⁴ ILGA Europe, “Annual Review” 2011, accessed March 11 2013, p.113, http://www.ilga-europe.org/home/guide_europe/country_by_country/moldova/ilga_europe_annual_review_2011_on_moldova

⁶⁵ Immigration And Refugee Board Of Canada, *Russia: Update to RUS13194 of 16 February 1993 on the treatment of homosexuals*, February 29 2000, accessed March 11 2013, <http://www.unhcr.org/refworld/docid/3ae6ad788c.html>.

⁶⁶ The Constitution of the Russian Federation in English, accessed March 11 2013, available on <http://www.constitution.ru/en/10003000-03.htm>.

⁶⁷ Family Code of the Russian Federation, accessed 20 March 2013, available in English in <http://www.jafbase.fr/docEstEurope/RussianFamilyCode1995.pdf>.

the provisions of the Family Code, which considered that “*in order to register a marriage, the mutual free consent of a man and a woman was necessary*”⁶⁸.

Also, some laws similar to the Ukrainian under-consideration gay-propaganda laws have been approved in different regions of the Russian Federation, establishing “*administrative punishment for the so-called “promotion of homosexuality among minors*”⁶⁹”; as well as bans for the prides⁷⁰ in some major cities. The situation is unbearable for the LGTB community since violence from the authorities and ultra-orthodox groups has been increasing.

5. Conclusions

A clear and opposite double movement is taken place in the EU. On one hand, there is the “Western Europe” and on the other the “Eastern” one, formed by the countries that once belonged to the URSS. This can be seen in the maps incorporated to the present article.

“Western Europe” is clearly working toward marriage equality and has already some kind of Civil Union system established, along with the guidelines of the EU. On the contrary, in “Eastern Europe”, although a clear step against sexual orientation discrimination has been made to fulfil the EU’s requirements, there is still a long way to go. In the last years many countries have changed their laws (both the Constitutions of Family or Civil Codes) against the recommendations from the European Institutions and NGOs to reinforce the idea of the heterosexuality of marriage. A study should be made to find out the reasons of that rejection to homosexuality in order to fight it from the core. It is senseless to provide a society with legal provisions (such as Directive 2000/43/EC or Directive 2000/78/EC) if social attitude remains archaic.

Another phenomena that requires our attention is that there are many times that society is prepared to make a change and acceptance levels are high but the government rejects to take the necessary measures, for instance in Germany or Finland. The lack of relation and understanding between citizens and the government is also affecting rights.

Moreover one of the main problems same-sex couples find is that even if they get married in a member state that permits it their union won’t be recognized in other member states if that legal figure does not exist in that same country. A system of recognition if not performance of same sex marriages is absolutely necessary across EU member states.

In the times there are yet to come, all this has to be beard in mind, since we cannot forget that we are *United in Diversity*⁷¹; and to be united, we have to be equal both in rights and obligations. This won’t happen until the whole society possesses a whole citizenship; something that does not happen in all the Member states of the EU.

As President Mr. Van Rompuy said on the occasion of the International Day against Homophobia, “*Combating homophobia is thus enshrined in the EU’s founding act and statement of values. It is something that distinguishes Europe from many other parts of the world*”. He also stressed three ideals that in his view represented European values⁷²:

⁶⁸ The Decision of the Constitutional Court of 16 November 2006 No.496; Report on “The Situation of Lesbians, Gays, Bisexuals, and Transgender People in the Russian Federation”, *Russian LGBT Network*, 2008, p.8.

⁶⁹ Report on The Situation of Lesbian, Gay, Bisexual and Transgender People in the Russian Federation (Last Three Months 2011 – First Half 2012), 2012, accessed March 11 2013, p.4, <http://www.civilrightsdefenders.org/files/Russian-Federation-LGBT-situation.pdf>.

⁷⁰ Steve Clemons, “Not the Onion: Moscow bans gay pride for next 100 years”, *The Atlantic*, June 8 2012, accessed March 11 2013, <http://www.theatlantic.com/international/archive/2012/06/not-the-onion-moscow-bans-gay-pride-for-next-100-years/258296>.

⁷¹ EU motto since 2000, accessed March 11 2013, http://europa.eu/about-eu/basic-information/symbols/motto/index_en.htm.

⁷² Statement by President Herman Van Rompuy on the International Day Against Homophobia on May 17 2010, PCE 88/10, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/114351.pdf, accessed March 11 2013; Statement by President Herman Van Rompuy on the International Day Against Homophobia on May 17

“European values at their best:

- accepting difference, not fearing it;*
- living with diversity, not fleeing it;*
- defending rights and responsibilities, not ignoring them”.*