ORIGINAL SCIENTIFIC ARTICLE
https://doi.org/10.20901/pp.13.1.04

Submitted: 22.12.2022.
Revised:17.4.2023.
Accepted: 25.4.2023.

European court of human rights caselaw on the right of the same-sex couples to marry. A view from a social justice perspective[1]

Aleksa Radonjić
Union University Law School

Abstract

ECtHR has established case law by which national authorities are obliged to legally recognize and regulate same-sex partnerships. However, they are not obliged to give the right to marry to same-sex partners taking into account dominant moral beliefs in society. This paper aims to test such an approach from the perspective of four theories of justice. The aim is to see if the consistent application of precepts and principles of these theories of justice to this case law makes such an approach of the ECtHR just from the viewpoint of any of these theories of justice. This way what may seem as intuitively just or unjust is tested against concrete and particular standards of justice.

Keywords: same-sex marriage, ECtHR, social justice, right to marry, LGBT+

Introduction

According to the case law of the European Court of Human Rights (ECtHR/ the Court), as will be shown in the second part of this paper, the member

Authors' contact:
The author is an assistant professor at the Union University Law School, Belgrade;
E-mail: aleksa.radonjic@pravnifakultet.edu.rs; ORCID-ID: https://orcid.org/0000-0002-9683-061X.

1 This paper is the result of the research I have done to prepare my presentation at the conference Marriage, Extramarital Union, Same-sex Union; Perspectives of Equality in the Context of Diversity (Brak, vanbračna zajednica, istopolna zajednica: Perspektive jednakosti u kontekstu različitosti) held on 26 November 2021 at the Union University Law School, Belgrade.

states of the Council of Europe (CoE) have to legally recognize and provide for the legal framework for same-sex partnerships. They are to regulate the mutual rights and obligations of the partners in same-sex unions to provide them with similar mutual rights and duties to those of married persons such as mutual assistance, inheritance rights etc. However, the ECtHR does not oblige the states to provide access to marriage to same-sex partners, taking the moral standards of a given society as a valid reason not to extend the right to marry to gay and lesbian couples.

Such an approach could be seen as pragmatic given that it solves most of the practical problems of same-sex couples such as the right to intestate inheritance, the right to a partner's pension, the right to visit a partner in a hospital, or not to testify against one's partner, etc. while in the same time it takes into the account conservative views about marriage. This paper aims to examine whether such a pragmatic approach is just. Therefore, in the third part of this article, a political analysis[2] of this established case law will be conducted by examining it through the lens of four social justice theories. The purpose of that analysis is to establish if such case law is consistent with any of these theories of justice. The conclusions will be summarised in the fourth part. I should make two clarifications before I move on. First, for the purposes of this analysis, marriage as a special form of a relationship between two consenting adults and their rights and obligations towards each other arising from that relationship are taken into the consideration, therefore leaving the matter of adoption of children by same-sex couples out of the scope of this paper. Second, the political analysis of the ECtHR case law that I am conducting in this paper is blind to the position of the ECtHR as a supra-national court and is blind to the constraints this Court has when deciding the cases before it, which may cause some of my statements to sound unfair toward the ECtHR. I will dwell more on this feature of my approach in the conclusion of this paper.

Relevant caselaw of the ecthr

2 The term political analysis is borrowed from Constitutional Aspects of European Private Law. Freedoms, Rights and Social Justice in the Draft Common Frame of Reference written by Martijn W. Hesselink, Chantal Mak, and Jacobien W. Rutgers accessible at Constitutional Aspects of European Private Law: Freedoms, Rights and Social Justice in the Draft Common Frame of Reference by Martijn W. Hesselink, Chantal Mak, Jacobien W. Rutgers:: SSRN [last accessed 14 June 2022]. As Hesselink notes on page 12 the authors "discuss some issues... where different social justice theories lead to different solutions and, reversely, where different solutions are more or less compatible with certain well-known notions of social justice." The latter is what I did in this paper. I examined whether ECtHR's case law on same-sex marriage is compatible with four well-known social justice theories.

In 2004 in the case of *Schalk and Kopf,* Application no. 30141/04, judgment ECtHR, 24 June 2010, the same-sex couple filed an application to the Court against Austria claiming that their right to marry, enshrined in Article 12 of the Convention was violated because Austria did not grant them the right to marry (*Schalk and Kopf v. Austria*, ECtHR judgment, para 39). Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms (CoE ECHR, 1950) reads that "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." The applicants claimed that the wording of Article 12 did not necessarily have to be read as men and women had to marry a person of the opposite sex (*Schalk and Kopf v. Austria*, ECtHR judgment, para 44). Indeed, it could be interpreted as if the words men and women were used to denote that every person has a right to marry, and not in the sense that only persons of the opposite sex can marry each other. However, in 2010 the Court found that Article 12 of the European Convention on Human Rights (ECHR/the Convention) safeguarding the right to marry is based on the traditional understanding of marriage (*Schalk and Kopf v. Austria*, ECtHR judgment, para 55). The Court based its conclusion on the fact that elsewhere in the Convention the substantive rights are given without a specification of sex, and that therefore, the use of words "man" and "woman" in Article 12 was intentional, especially taking into the account that at the time this rule was drafted the marriage was understood as a heterosexual union (*Schalk and Kopf v. Austria*, ECtHR judgment, para 55). Therefore, the Court concluded that the contracting States are not obligated to provide marriage access to same-sex couples (*Schalk and Kopf v. Austria*, ECtHR judgment, para 63). The Court noted that "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another", and that national authorities are in the best position to assess if they should allow same-sex couples to marry (*Schalk and Kopf v. Austria*, ECtHR judgment, paras 61–62). So, the national governments are not prevented from providing same-sex couples with a right to marry, but they do not have an obligation to do that. This reading of article 12 of the Convention could be changed with the help of the living instrument principle, however, the Court held that there was no existing consensus regarding same-sex marriage in Europe (*Schalk and Kopf v. Austria*, ECtHR judgment, paras 47 and 58).

The applicants from *Schalk and Kopf* alternatively claimed that restricting marriage to heterosexual couples only was a violation of the prohibition of discrimination in connection to their right to private and family life. Therefore, they relied on article 14 of the Convention in conjunction with article 8 of the Convention claiming that the right of same-sex couples to marry is included in these provisions (*Schalk and Kopf*

v. Austria, ECtHR judgment, para 101). However, the Court dismissed such a claim because the Convention has to be read as a whole without internal contradiction, so if article 12 of the Convention which regulates the right to marry does not impose an obligation on the national authorities to grant the right to marry to same-sex couples, neither can the more general rule such as the article 14 taken together with the article 8 (*Schalk and Kopf v. Austria*, ECtHR judgment, para 101).

On the other hand, the Court's case law gradually developed to impose an obligation upon the states to legally recognize and regulate same-sex partnerships in a form other than marriage. In *Schalk and Kopf* the Court found that "same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships" and are thus in a relevantly similar position to different-sex couples regarding the need for legal recognition and regulation of their relationships (*Schalk and Kopf v. Austria*, ECtHR judgment, para 99). However, at that time there was no clear consensus about the legal recognition of same-sex unions in any form in CoE countries thus the Court could not establish the positive obligation for national authorities to recognize and regulate these (*Schalk and Kopf v. Austria*, ECtHR judgment, para 105). Therefore, the margin of appreciation of national authorities to decide whether to recognize and protect same-sex partnerships was still wide. In *Valiantos and others v. Greece*, Applications nos. 29381/09 and 32684/09, judgment ECtHR, 7 November 2013, the Court noted that

> "extending civil unions to same-sex couples would allow the latter to regulate issues concerning property, maintenance and inheritance not as private individuals entering into contracts under the ordinary law but on the basis of the legal rules governing civil unions, thus having their relationship officially recognized by the State" (Valiantos and others v. Greece , judgment ECtHR, para 81).

This is important because, without this recognition, and regulation persons in same-sex partnerships would often have to go to court to realize their rights in situations in which married persons would not have to refer to court. As was stated in *Oliari and others v Italy,* Application nos 18766/11 and 36030/11, judgment ECtHR, 21 July 2015, this presents a significant hindrance for same-sex couples to obtain respect for their private and family life (*Oliari and others v Italy*, judgment ECtHR, para 171). To illustrate this a reference to Serbian law is made given that that is the system I am most familiar with. According to the Law on inheritance (Zakon o nasleđivanju, 1995, 2003 i 2015) in conjunction with the Family Code (Porodični zakon, 2005, 2011 i 2015), a same-sex partner does not

have a status of an heir at law.[3] This means that when a person dies intestate their same-sex partner does not inherit them. Therefore, the surviving partner would have to go to court to try to prove that they have a share in the deceased's estate. Another example is when the spouses buy an apartment, but only one of them gets registered as an owner, the Family Act prescribes that the other spouse will be deemed registered (Porodični zakon, 2005, 2011 i 2015, čl. 176, st. 2.). This is not the case when it comes to same-sex partners. They do not enjoy such protection. Now, imagine that same-sex partners buy an apartment, but only one of them gets registered as an owner, and then the registered one dies intestate. Chances are that the other partner would have to go through long litigation, uncertain of the outcome to protect their property. One could say that this can be prevented by getting registered in the first place, or by making deeds or contracts, but the point is that married couples do not have to do that when they are in the same situation. Although in *Valiantos* the Court did not establish the positive obligation of the state to legally recognize same-sex unions, it did find that among states who recognize forms of civil union alternative to marriage, the vast majority opens these alternative forms for same-sex couples which makes really hard to defend the stance that these alternative forms should be restricted to heterosexual couples only (*Valiantos and others v. Greece , judgment ECtHR, paras 91 and 92).* In *Oliari* the Court finally established that there is a thin, but still, a majority of CoE states recognizing same-sex unions and providing for protection (*Oliari and others v Italy*, judgment ECtHR, para 178), which led the Court to establish that there is a positive obligation of the state to provide for legal recognition of same-sex partnerships, and for the regulation of their relations (*Oliari and others v Italy,* judgment ECtHR, para 185). This stance was reaffirmed in the *Fedotova and others v Russia* where the Court stated that the states have a positive obligation "to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship" (*Fedotova and others v Russia*, Applications nos. 40792/10, 30538/14 and 43439/14, judgment ECtHR Grand Chamber, 17 January 2023, para 178). This legal framework should regulate their mutual moral and material rights and obligations such as mutual assistance, or issues regarding taxation, maintenance, inheritance etc. (*Fedotova and others v Russia*, judgment Grand Chamber ECtHR, para 190).

Finally, the Court underlined that the recognition of same-sex partnerships has an intrinsic value to the persons involved irrespective of

3 The Law on Inheritance in Article 8 enumerates the heirs at law one of them being the spouse of the deceased. Furthermore, the Law on Family in article 3(1) defines marriage as a union between a man and a woman, excluding the deceased's same-sex partner from the circle of heirs by law.

particular legal effects connected to that recognition (*Valiantos and others v. Greece*, judgment ECtHR, para 81), and that "the recognition would bring a sense of legitimacy to same-sex couples" (*Oliari and others v Italy*, judgment ECtHR, para 174). While this is true, it is also an inconsistency in the Court's reasoning. The marriage may also have an intrinsic value for those couples who wish their relationships to be recognized in such a form. How come this intrinsic value is relevant when it comes to affording forms other than marriage, but not giving the right to marry? Furthermore, doesn't it seem that the recognition of same-sex partnerships in a special form, and reserving marriage for heterosexual couples only is another way to strike the difference between homosexual and heterosexual couples? It is as if it is said you are recognized, but you are still not worthy enough.

If I would have to sum up the Court's approach to the issue at hand in just a few words I would call it a pragmatic approach. By imposing an obligation upon the national authorities to recognize and regulate same-sex partnerships the Court provides a solution to several practical problems. However, when it comes to the right to marry the Court gives way essentially to the feelings of a portion of society about two persons getting married. One may cloak this under notions such as social connotation, cultural connotation, etc. but what it comes down to is how other members of a particular society feel about same-sex couples getting married. The question is: is that a reason good enough to prevent grown-up persons from getting married should they wish so? Intuitively, an affirmative answer to this question seems like an injustice. To make a more elaborate assessment I need to move from intuition to a particular standard of justice. More on that in the next section.

The political analysis

Given that there is more than only one concept of justice I considered three different theories of justice which seemed to me to be the most dominant in political philosophy. These are utilitarianism, liberal-egalitarianism, and libertarianism. As representatives of these theories, I took Bentham and Mill, Rawls, and Nozick respectively. Each of these theories came about as a reaction: utilitarianism to natural law philosophy (Shapiro 2003, 19); Rawls developed his theory as an elaborate response to utilitarianism (Kymlicka 2003, 53), and Nozick tried to offer a third way. I also took into the account theory of justice of John Finnis as a proponent of the contemporary version of natural law philosophy who is also an opponent of same-sex marriage making this analysis even more interesting. What I want to do in this section is to see whether this pragmatic approach of the Court fits into any of these theories. Starting from the principles of justice of each of these theories I wish to see if there could be a coherent

line of reasoning to justify the restriction of access to marriage to different-sex couples on account of how other members of society would feel about granting same-sex couples right to merry, which is tolerated by the ECtHR. I do not intend to contest the principles upon which these theories rest, but to see if the consistent application of the proclaimed principles leads to the support for the pragmatic approach of ECtHR or not.

According to Bentham, every person is guided by the aversion of pain and inclination toward pleasure (Bentham 1823, 1). Therefore, the action of an individual and the government alike is moral if it tends to augment the pleasure or happiness of the subject whose interests the action may influence or to prevent the pain, unhappiness, or mischief from happening to the party whose interest is at stake (Bentham 1823, 2). This is how Bentham sees the principle of utility, as a cornerstone of utilitarianism. The action of a government is then in accordance with this principle if it is sought to augment the happiness, or pleasure of the community or to prevent from happening the pain, or unhappiness of the community, where the community is seen as the sum of all individuals who are members of that community (Bentham 1823, 3). Mill says in the same vein that the ultimate goals of any action are pleasure and avoidance of pain (Mill 1863, 10). How to choose the right action? Bentham offers several criteria: the intensity of the pleasure/pain that the action may cause; the duration of the pleasure/pain caused; the certainty or uncertainty of the realization of the pleasure/pain; whether the pleasure/pain is a remote or instantaneous consequence of the action; the probability that the pleasure or pain caused will be followed by the pleasure or pain or in other words the ability of the action to cause further pleasure or pain (Bentham 1823, 29–30). Finally, from the perspective of the government, it has to be taken into account how many individuals will be affected by the act, and in what way (Bentham 1823, 30). Ideally, the government should weigh whether the act causes more pleasure than pain for every individual affected by the act, and then calculate how many individuals are positively and how many are adversely affected by the act (Bentham 1823, 31). If there are more individuals positively affected by the act then the act is following the greatest happiness principle (Bentham 1823, 31).

Having this in mind it may seem that not allowing same-sex couples to marry is justifiable in utilitarian terms if the majority of individuals in a society would feel offended by same-sex couples getting married. After all, Mill did say that the institutions of society should harmonize the interest of an individual with the interest of the society and that individuals should be raised to equate their happiness with the common good (Mill 1863, 19). However, Mill also said the following:

"As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences." (Mill 1869, 135)

Applied to the topic at hand this means that the dissatisfaction of members of society with same-sex couples getting married is not a part of a utilitarian equation. It is not relevant, because marriage is a personal matter between persons getting married, and it does not limit anyone's freedom or rights. A same-sex couple getting married is conduct that affects essentially the interest of persons getting married and not the interests of other members of society. Allowing same-sex couples to marry increases the total amount of freedom in society. Therefore, from the utilitarian standpoint feelings of other members of society about same-sex couples getting married are not a relevant argument for preventing them from getting married.

What about Rawls' theory of justice? Rawls assumes that every person has a rational plan of a good life they wish to lead, and he is impartial towards particular plans (Rawls 1999, 79). To be able to follow their plan whatever it may be individuals need primary social goods such as rights, liberties, income, wealth, and opportunities (Rawls 1999, 79). The distribution of these primary social goods depends on the architecture of the basic social structure consisting of fundamental institutions one of which is a monogamous family (Rawls 1999, 6). Rawls provided for two principles of justice (Rawls 1999, 266). The first governs the distribution of fundamental rights and liberties (Rawls 1999, 266). The second governs the distribution of social and economic goods (Rawls 1999, 266). Given that the right to marry is considered a human right even by those who give quite a restrictive view of what human rights are[4] it is fair to say that access to the right to marry is under the jurisdiction of the first principle of Rawls' theory of justice.

4 Paul Tiedemann claims that human rights protect aspects of personhood which leads him to the conclusion that rights like the right to peaceful enjoyment of property or the right to a fair trial are fake human rights. The first one is fake because it is possible to preserve personhood without private property, and the second one is fake because it is merely a procedural right. While a right to marry is an expression of the freedom of will and thus of personhood. For more on this see Tiedeman, P., 2020, *Philosophical Foundation of Human Rights*, Cham: Springer, pp. 142, 321, 315, 207–209.

The first principle of Rawls' theory of justice reads "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all" (Rawls 1999, 266). The first principle has priority over the second one meaning that liberty may be restricted only for the sake of preserving this equal system of liberties for all (Rawls 1999, 220). The liberties of an individual may not be sacrificed for some economic or social goal (Rawls 1999, 182), only for the sake of equality in liberties. This means that the restriction may limit the extent of liberty but equally for everyone and that the reason for such a limitation is the prevention of "an even greater loss of liberties" (Rawls 1999, 217, 188). The best example is the restrictions on the freedom of speech where it is not allowed to spread hate or to call for the extinction of a class of humans. This is the limitation of the content, thus a true limitation of freedom of speech, but it applies to anyone and it is for the benefit of the total system of freedom of every person.

Now, if the right to marry is a human right, and marriage is a form of monogamous family, and if there are same-sex couples who, as part of their conception of the good life, wish to get married and live in such a form of monogamous family, then the restriction of their freedom to do so seems unjust from the perspective of Rawls' theory of justice. This is because their freedom is restricted, but the restriction is not equally applicable to everyone and is not for the benefit of the total system of freedom because recognizing the right to marry to same-sex couples does not endanger any other freedom of any other person, thus making the restriction uncalled for. The freedom of same-sex couples to marry is restricted because of the moral standards of other members of society, which is, according to Rawls unacceptable because the public authorities have to be impartial towards any religious or moral beliefs (Rawls 1999, 186).

However, Rawls does say that if the restriction of freedom is some kind of progress compared to the state of the art before that particular restriction was instituted, and if there are guarantees that the system is moving toward the full equality of freedom for everyone, then this inequality in liberties is acceptable from the perspective of his theory of justice. To illustrate this, he uses quite a radical example and says that slavery could be acceptable if it relieves 'even worse injustices' for example if enslaving prisoners of war come instead of killing them all, and if there is a perspective of abandoning slavery altogether (Rawls 1999, 218). Applying this way of thinking to the topic at hand would mean that the pragmatic approach of the ECtHR where the Court imposes an obligation upon the States to legally recognize and regulate same-sex partnerships, but not necessarily to grant the same-sex partners the right to marry is acceptable from the perspective of Rawls' theory of justice, but only as a stage towards the full

equality regarding the right to marry. The evolution of the Court's case law shown in the previous section showed the gradual move from welcoming the legal recognition and protection of same-sex unions but leaving it to the national authorities to asses if they should do so, to establishment of the positive obligation of the CoE states to legally recognize and protect these unions, reducing the margin of appreciation of the states to the matters of the form and content of the protection where margin remains wider regarding the content when dealing with still controversial issues (*Fedotova and others v Russia*, judgment Grand Chamber ECtHR, para 183). It is, therefore, safe to say that the living instrument principle allows for a gradual move toward full equality in freedoms which is in line Rawlsian concept of social justice.

Nozick's Entitlement Theory refers to the justice of the acquisition and of the transfer of material goods, or in his words: "holdings" (Nozick 1974, 150–153). His theory is a theory of the just distribution of material resources in a society. At a first glance, it is not relevant to the topic at hand. But let us take a look at the foundations of his theory of justice.

His theory of justice is grounded in the understanding that all individuals are goals in themselves, and not an instrument for the attainment of certain ends no matter how desirable they may be (Nozick 1974, ix, 32). No one, not even the state can sacrifice an individual for the benefit of society because there is no society as an entity having its own good, only individuals and their well-being (Nozick 1974, 32–33). Interfering with the well-being of one individual for the benefit of society means sacrificing an individual's well-being for the benefit of other individuals (Nozick 1974, 32–33). This is unacceptable because every person has equal moral weight (Nozick 1974, 33). Each person has their own life to lead (Nozick 1974, 34). Nozick suggests that the government forcing a person to do something they do not wish to do, or forbidding them to do something they wish to do is an act of joint aggression by other individuals through the instrument of government against that one person (Nozick 1974, 34).

Applied consistently to the issue at hand these precepts lead to the conclusion that not allowing same-sex couples to marry because of social connotations or moral standards of community etc. amounts to sacrificing the good of married life of certain individuals (when they perceive such life as something good) for the benefit of the distaste of other individuals for same-sex couples to be married. Such a result is unacceptable for a Nozickian having in mind the aforementioned precepts. Therefore, making the pragmatic approach of the ECtHR incompatible with the libertarian notion of justice.

Finnis's theory of justice rests on the understanding that life, play, knowledge, aesthetic experience, friendship, religion, and practical reason-

ableness are seven self-evident forms of the good (Finnis 2011, 85–90). These values are ultimate and self-evident because they are not derived from any higher value or values, but they are the points to which everyone strives and which are the essential motives of our actions which he demonstrates by elaborating on the good of knowledge (Finnis 2011, 59–75). Now, a person may strive or participate in these ultimate forms of the good more or less successfully either by following their urges or by pursuing the attainment of these ultimate goals intelligently (Finnis 2011, 84).

To pursue these goods intelligently one needs to follow the principles of practical reasonableness (Finnis 2011, 100–103). There are nine of these principles and they are: having a coherent plan of life; no arbitrary preference amongst values meaning that whichever of the seven values we choose to pursue we must not deny the rest of them the status of being the ultimate ones; no arbitrary preference amongst persons not excluding rational self-preference; detachment and commitment are two complementary principles securing the persistence in our pursuit for the good but being able to accept the failure and adapt the pursuit accordingly; efficiency within reason meaning limiting the application of maximizing principles such as the greatest utility principle to values that are comparable, and excluding the application of such principles when it comes to equally worthy and incomparable values; respect for every basic value – whichever basic value we choose to attain we must not attain it in a way which would mean hurting any other basic values; favouring the good of one's communities; following one's conscience (Finnis 2011, 100–126).

The question of what is social justice comes to light when individuals form political communities such as states whose purpose is the facilitation of personal self-realization of every individual (Finnis 2011, 147–148). So, the collaboration in the provision of conditions for the rational participation of every individual in ultimate values is the common good in a political community such as the state (Finnis 2011, 155). The matter of just allocation of material resources, opportunities, offices, etc. necessary for the realization of the common good is an object of distributive justice (Finnis 2011, 166). Resources, offices, opportunities, etc. can be put into the common good's service only when allocated to individuals (Finnis 2011, 167). For this allocation to be just Finnis suggests several principles of distributive justice (Finnis 2011, 173–176). These principles essentially come down to this: the allocation of material resources should not allow the accumulation of wealth in the hands of a few, and opportunities and offices should be open to those with adequate faculties who in turn should use their opportunities and offices not only for the self-realization but in the interest of the common good as well. The latter is closely connected to the second kind of justice called commutative justice pertaining to the

proper behavior between individuals and their groups (Finnis 2011, 179). One aspect of it indicates that when an individual holds a public office, they must act in the interest of the common good meaning they have a duty of commutative justice to those under the authority of the office which that individual holds (Finnis 2011, 184).

Now, given that the good of friendship is one of the basic goods, and that Finnis defines it as a state of affairs where each person involved takes the other's well-being as an integral part of their own well-being it is safe to say that such a definition covers friendships in their usual sense, but also relationships among parents and their children, among siblings, or among romantically involved persons (Finnis 2011, 141–144). Simply put it defines any type of love between individuals. It further means that marriage as one of the forms of participation in the good of friendship should be available to all persons equally under the same conditions (a distributive aspect of social justice) and that those holding public offices such as members of a parliament should make laws facilitating the access to marriage to heterosexual and homosexual couples just the same.

Well, Finnis would not agree with me on this. He argues that an inclination, as he calls it, to have sexual intercourse with persons of the same sex is not intelligent participation in the basic good of friendship or marriage as an aspect of it (Finnis 2011, 449). He claims that marriage has two elements: the friendship of a man and a woman and procreation (Finnis 1994, 1066). It does not matter if the couple is not able to have children due to medical reasons for instance, as long as the intercourse is such that it would normally lead to the conception of a child (Finnis 1994, 1068). If husband and wife have protected sex, or pleasure each other in a way not suitable to lead to procreation then they too do not participate in the good of marriage (Finnis 1994, 1068). The same goes then for same-sex couples. He goes as far as equating sexual intercourse between same-sex partners with that between two strangers or between a prostitute and a client (Finnis 1994, 1067).

These assertions are greatly inconsistent with his view that the understanding that one of the seven forms of the good is ultimate value becomes apparent to those who experienced the urge to reach these goods for the sake of reaching them. He demonstrates this by discussing the good of knowledge when he said:

the value of truth becomes obvious only to one who has experienced the urge to question, who has grasped the connection between question and answer, who understands that knowledge is constituted by correct answers to particular questions, and who is aware of the possibility of further questions and of other questioners who likewise could enjoy the advantage of attaining correct answers (Finnis 2011, 65).

If this is so, then his claims about the nature of same-sex relationships may not be true because he may lack the relevant experience. If he is not gay then he could not have reached his conclusions by analyzing his own experience (Radonjić 2018, 105). It seems that he also failed to account for the experience of the actual same-sex couples, and even if he did, he did not explain why their experience might have been irrelevant (Radonjić 2018, 105). On the other hand, ECtHR did admit that same-sex couples are just as capable of having lasting and committed relationships. Which is based on common knowledge.

Furthermore, even if we take for granted that the wish to have joint posterity is an essential part of the good of marriage, and if we note the fact that there are both homosexual and heterosexual couples wanting to have children then it is not clear why one objective obstacle to have children (medical reasons) is valued differently than the other objective obstacle (biological reasons) if the desire is what counts. There simply is not any rational or logical support for Finnis's conclusions. His statements are value judgments, represented as statements of fact.

Knowing this, and consistently applying the principles of justice and the values that are at the basis of the Finnis' conception of justice to the pragmatic approach of the ECtHR to the issue at hand it is fair to conclude that ECtHR goes against the Finnis' notion of justice as long as the Council of Europe may be viewed as one of the types of community in which individuals realize the common good.

Conclusion

The goal of this paper was to question the case law of the ECtHR regarding the obligation of member states of the Council of Europe to recognize the right of same-sex couples to marry from the perspective of social justice. As was shown the ECtHR holds that national authorities must recognize same-sex partnerships and regulate the rights and duties of the partners, but they do not have the obligation to grant them access to a particular form of partnership we know as marriage. In this way, many practical problems same-sex partners face, are being solved, while at the same time the feelings of conservative parts of societies about the institution of marriage are indulged. The question posed here was if this pragmatic approach is acceptable from the standpoint of four different theories of justice. The answer from the utilitarian, libertarian, and natural law points of view is no, and yes for a limited amount of time from a Rawlsian standpoint given that the Courts' evolutive interpretation of the Convention gives reason to believe that full equality will be reached in time.

Finally, one should ask themselves if it is fair to put a case law of a supranational court to such scrutiny. Is it really up to the ECtHR to impose

such moral standards that could be seen as controversial by a great number of citizens of the member states of the Council of Europe? The answer is no. The ECtHR cannot take the place of a supra-national legislator. However, these are purely legal dogmatic arguments, and the analysis conducted in this paper is not of such sort. It is a political analysis. The purpose of the analysis was not to criticize the Court and to argue for a change in the Court's methodology. The case law of the ECtHR was just the most convenient and accessible object to conduct this political analysis. The point of this was to offer a different viewpoint when discussing whether to allow same-sex couples to marry. The hope is that the fact that four different value systems; four different conceptions of social justice, endorse access to marriage to heterosexual and same-sex couples just the same might serve as a valid argument in the national debates. It offers a line of reasoning that it is just that everyone has the right to marry regardless of their sexual orientation independently of the case law of the Court, or of the public opinion. The case law of the court, as was said, just served as a playground for this political-philosophical exercise.

REFERENCES

Books and articles

Bentham, Jeremy. 1823. *Principles of Morals and Legislation.* Oxford: Calderon Press, Google has digitalized this book and it is freely accessible at https://books.google.rs/books/about/An_Introduction_to_the_Principles_of_Mor.html?id=00Gjaaaaqaaj&printsec=frontcover&source=kp_read_button&hl=en&redir_esc=y#v=onepage&q&f=false (June 21, 2022).

Finnis, John. 2011. *Natural Law and Natural Rights*, 2nd edition. New York: Oxford University Press

Finnis, John. 1994. "Law, Morality and 'Sexual Orientation'". *Notre Dame Law Review*, 69, 1049–1076, accessible at https://scholarship.law.nd.edu/law_faculty_scholarship/205/ (June 21, 2022).

Hesselink, W., Martijn., Mak, Chantal., & Rutgers, W., Jacobien. 2009. "Constitutional Aspects of European Private Law. Freedoms, Rights and Social Justice in the Draft Common Frame of Reference". Centre for the Study of European Contract Law Working Paper Series No. 2009/05, accessible at Constitutional Aspects of European Private Law: Freedoms, Rights and Social Justice in the Draft Common Frame of Reference by Martijn W. Hesselink, Chantal Mak, Jacobien W. Rutgers :: SSRN (June 14, 2022).

Kymlicka, Will. 2002. *Contemporary Political Philosophy.* An Introduction, 2nd edition. New York: Oxford University Press.

Mill, John, Stuart. 1869. *On Liberty*, 4th edition, London: Longmans, Green, Reader and Dyer. Google has digitalized this book and it is freely accessible at https://

books.google.rs/books?id=RbkAAAAAYAAJ&printsec=frontcover&dq=On+Liberty&hl=en&sa=X&redir_esc=y#v=onepage&q=As%20soon%20as%20any%20part%20of%20a%20person%E2%80%99s%20conduct%20affects%20prejudicially%20&f=false (June 21, 2022).

Mill, John, Stuart. 1863. *Utilitarianism*. London: Parker, Son and Bourn. Google has digitalized this book and it is freely accessible at https://books.google.rs/books?id=lyUCAAAAQAAJ&printsec=frontcover&dq=Utilitarianism&hl=en&sa=X&redir_esc=y#v=onepage&q=Utilitarianism&f=false (June 21, 2022).

Nozick, Robert. 1974. *Anarchy, State, and Utopia.* New York: Basic Books.

Radonjić, Aleksa. 2018. „Kodifikacija građanskog prava: Zašto I kako?" PhD Diss. Union University. Retrieved from http://union.edu.rs/wp-content/uploads/2018/06/Doktorska-disertacija-PDF-Aleksa-Radonji%C4%87.pdf.

Rawls, John. 1999. *Theory of Justice*, revised edition. Cambridge: The Belknap Press of Harvard University Press.

Shapiro, Ian. 2003. *Moral Foundations of Politics.* New Haven: Yale University Press.

Tiedeman, Paul. 2020. *Philosophical Foundation of Human Rights.* Cham: Springer.

Legal sources

ECHR, 1950. Council of Europe, The Convention for the Protection of Human Rights and Fundamental Freedoms, accessible at: https://www.echr.coe.int/documents/convention_eng.pdf (September 6, 2022).

Zakon o nasleđivanju, Službeni glasnik RS, br. 46(1995), 101(2003) – odluka USRS i 6(2015).

Porodični zakon, Službeni glasnik RS, br. 18(2005), 72(2011) – dr. zakon i 6(2015).

EctHR case law

Schalk and Kopf, Application no. 30141/04, judgment ECtHR, 24 June 2010.

Valianatos and others v. Greece, Applications nos. 29381/09 and 32684/09, judgment ECtHR, 7 November 2013.

Oliari and others v. Italy, Applications nos. 18766/11 and 36030/11, judgment ECtHR, 21 July 2015.

Fedotova and others v. Russia, Applications nos. 40792/10, 30538/14 and 43439/14, judgment Grand Chamber ECtHR, 17 January 2023.