WRITTEN OBSERVATIONS

submitted to the

EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

on the Application No. 35810/09 of

JOANNE CASSAR vs. MALTA

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EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

Application no. 36982/11
Joanne CASSAR against Malta
lodged on 1 June 2011

STATEMENT OF FACTS

by the registry of the Court

The applicant, Ms Joanne Cassar, is a Maltese national who was born in 1981 and lives in Cospicua. Her application was lodged on 1 June 2011. She was represented before the Court by Dr J. Herrera, a lawyer practising in Valletta.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background of the case

The applicant was born in 1981 and was registered on her birth certificate as male. She always felt she was in fact female and in October 2004 she sought medical help. On 20 January 2005 she successfully underwent gender reassignment surgery (involving penectomy, orchidectomy, clitoroplasty, urethral reduction, labiaplasty and penile inversion and vaginoplasty).

The applicant instituted proceedings under Article 257A of the Civil Code. On 28 June 2006 the First Hall of the Civil Court declared that the applicant had undergone an irreversible sex change and assumed the female sex (Art. 275A(2)) and it ordered that an annotation be made in the applicant's birth certificate whereby the applicant's details regarding sex be changed from male to female. The court further ordered that an annotation be made in respect of the applicant's name, which was to be changed from Joseph to Joanne.

The relevant annotations to the birth certificate were duly made.

Subsequently, the applicant and her boyfriend, T., applied to the Director of Public Registry to issue the appropriate marriage banns. Their request was refused on an unspecified date.

In consequence, the applicant applied under Article 8 of the Marriage Act (see the "Relevant domestic law" section below) to the Civil Court (Voluntary Jurisdiction Section), requesting that it order the Director of Public Registry to issue the marriage banns.

On 12 February 2007 the Civil Court (Voluntary Jurisdiction Section) ordered the banns to be issued.

The Director of Public Registry challenged that decision before the First Hall of the Civil Court, which on 21 May 2008 upheld the Director's application, finding that the decision of 12 February 2007 had been based on a premise that did not reflect reality because the relevant parties were not of the opposite sex. The court went on to find that a marriage between the applicant and a person of the male sex would be contrary to the provisions of the Marriage Act and that the annotation made on the applicant's birth certificate following the relevant court judgment was only intended to protect the applicant's privacy and did not give her any

right to consider herself female for the purposes of marriage. It therefore revoked the decision of 12 February 2007 which had ordered that the banns be issued.

2. Constitutional redress proceedings

On 29 July 2008 the applicant instituted constitutional redress proceedings. She complained that the fact that Maltese law did not recognise transsexuals as persons of the acquired sex for all intents and purposes, including that of contracting marriage, breached her rights under Articles 8 and 12 of the Convention. Moreover, she complained that the fact that a transsexual could not marry either a male or a female constituted inhuman and degrading treatment under Article 3 of the Convention. She requested redress in the form of a remedy, in particular a declaration that the Director of Public Registry could not refuse to issue her marriage banns just because she had undergone gender reassignment surgery, and compensation.

By a judgment of 30 November 2010, the First Hall of the Civil Court (in its constitutional jurisdiction) upheld her claims in part. It found a violation of Articles 8 and 12 of the Convention. It considered that the sex change annotated on the applicant's birth certificate could not only be relevant to certain circumstances which would avoid embarrassment for the applicant, but had to serve for any future event since her new gender had now been legally recognised. The fact that the law only allowed unmarried persons to make such a request implied that the legislator had in mind the effects that such a change would have on married life, and had thus limited it to unmarried persons who could in future wish to be married. Thus, the lack of recognition by the Government authorities, even for the purposes of marriage, as manifested by the Director of Public Registry's refusal to issue the banns, constituted a violation of the applicant's rights under Article 8. Similarly, as clearly stated in the European Court of Human Rights's case-law, the same circumstances also constituted a violation of Article 12 of the Convention. The court declared that the Director of Public Registry could not refuse to issue the applicant's marriage banns just because she had undergone gender reassignment surgery. Considering these declarations to be a sufficient remedy, it refused to award compensation. The court rejected her claim under Article 3 of the Convention.

On appeal, by a judgment of 23 May 2011 the Constitutional Court confirmed the part of the judgment finding a breach of Articles 8 and 12 of the Convention on the basis of different reasoning, but it overturned the part of the judgment declaring that the Director of Public Registry could not refuse to issue her marriage banns. The Constitutional Court considered that Article 8 was applicable in the present case as the applicant was denied the right to decide whether to get married or not, which was intrinsically linked to her private life. It, however, considered that the Government's plea that the applicant was only phenotypically female -- namely that she only had the external genital appearance of a woman but still retained her prostate gland, which was a basic difference between males and females, and could not therefore be classified as a woman who could marry a man according to the Marriage Act -- was not devoid of merit. In fact, the applicant could not be considered a woman for all purposes of law, particularly those in relation to marriage. It further considered that to accept the meaning of marriage to include a marriage between the applicant and a man would radically change the legal nature of the relationship between man and woman according to the Marriage Act, including the relationship of those who had already contracted marriage. Seen in this light, one had to consider the rights of those persons who were already married and safeguard the institution of marriage. The Constitutional Court further considered that the European Court's case-law was of little relevance, as the *Goodwin* case had been based on the fact that there had been major social changes in the institution of marriage since the adoption of the Convention. However, these social changes had not taken place in all of the

States parties and could not be imposed by a judicial organ, which was not legislative, by means of "social engineering". Nevertheless, although the Registrar's decision was not unlawful, it did not mean that the interference with the applicant's private life had been justified. In the legal situation as it stood, the applicant could neither form a registered life partnership with a man nor with a woman. It was thus, in the Constitutional Court's view, the lack of legislation providing for a registered life partnership for people in the applicant's position which breached the applicant's Article 8 rights, as the State had failed to fulfil its positive obligation. Such a registered life partnership, which could not be a marriage and which was to be regulated by the State, would suffice as a remedy. For the same reasons, namely only because of the lack of legal provision and therefore the opportunity for the applicant to enter into a registered life partnership, and not because of her inability to marry, there had also been a violation of Article 12. The Constitutional Court considered that the remedy provided by the first-instance court (namely the declaration that the Registrar could not refuse to issue the banns under the Marriage Act) would therefore not be an appropriate remedy in the circumstances of the case. In any event, the applicant had recently broken off her engagement – therefore the banns could not be issued. It ordered a copy of the judgment to be transmitted to the Speaker of the House of Representatives.

B. Relevant domestic law

Articles 257A and 257B of the Maltese Civil Code, Chapter 16 of the Laws of Malta, in so far as relevant, read as follows:

> "257A (1) It shall be lawful for any unmarried person domiciled in Malta to bring an action for an annotation regarding the particulars relating to sex which have been assigned to him or her in the act of birth.
>
> (2) Before delivering judgement, the Court shall appoint experts to verify whether the person who has brought the action has, in fact, undergone an irreversible sex change from that indicated in the act of birth or has otherwise always belonged to such other sex."
>
> "257B (1) The court shall allow the plaintiff's request if it is of the opinion that it has been sufficiently established that the plaintiff belongs to the sex claimed by him and that the plaintiff's condition can be considered as permanent.
>
> (2) The court may also order an annotation in the name or names of the plaintiff if it has allowed the request."

Article 8 of the Marriage Act, Chapter 255 of the Laws of Malta, reads as follows:

> "(1) If the Registrar is of the opinion that he cannot proceed to the publication of the banns or that he cannot issue a certificate of such publication he shall notify the persons requesting the publication of his inability to do so, giving the reasons therefore.
>
> (2) In any such case, either of the persons to be married may apply to the competent court of voluntary jurisdiction for an order directing the Registrar to publish the banns or to issue a certificate of their publication, as the case may require, and the court may, after hearing the applicant and the Registrar, give such directions as it may deem appropriate in the circumstances, and the Registrar shall act in accordance with any such directions."

COMPLAINTS

The applicant complains under Articles 8, 12 and 13 of the Convention that she was not granted an effective remedy in respect of the breach of her rights and therefore that she is still a victim of a violation of Articles 8 and 12 of the Convention.

QUESTION TO THE PARTIES

Has there been a violation of the applicant's right to marry contrary to Article 12 of the Convention? (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI)

WRITTEN OBSERVATIONS SUBMITTED BY THE ECLJ

Translation from French

The CASSAR case would be very simple to resolve if we still had a clear understanding of marriage and the role of the Court. This case gives the Court on opportunity to remold its jurisprudence on a solid foundation.

1. Preliminary Statements:

It is important, before beginning a study of this case, to recall three facts:

a. There is a Very Serious Doubt as to the Victim Status of Joanne Cassar

As stated in the Brighton Declaration, it is important that the Court "*continue to strictly and uniformly enforce the criteria for admissibility in order to increase confidence in the rigor of the system of the Convention, as well as to avoid undue weight on its workload.*" Thus, when serious doubts arise as to the admissibility of a query, it is in the interest of the proper administration of justice to first rule on the issue of admissibility before, where appropriate, considering the merits of the case. It is quite obvious that should be the case here. Acknowledging the absence of victim status does not mean denying that there is personal suffering.

b. Same-Sex Couples Do Not Have a Right to Marry

It is important to remember the constant position of the Court according to which "*Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either.*"[1]

c. Absence of the Right to Form "Civil Unions"

It is also worth recalling that the Convention does not guarantee a right to public legal recognition of different forms of civil unions and alternatives to marriage.[2] The Court stated that such a right could potentially arise in the future, resulting from a possible future consensus. It is therefore quite clear that no such right exists in the Convention as it stands.

2. Introduction

The fact that a Constitutional Court is able declare that a unanimous Grand Chamber decision is of *little to no import*, and has no authority because it is based only on *social evolution* and *social engineering*,[3] should cause serious reflection. In fact, a regard of the Court's authority as weakened is already widely spread throughout the Council of Europe; it exists in the current reform process of the Court, and extends beyond the *Goodwin* case. This case has

[1] *See Schalk and Kopf v. Austria*, Application No. 30141/04, ¶ 101, Council of Europe: European Court of Human Rights, 24 June 2010; see also *Gas and Dubois v. France*, Application No. 25951/07, Council of Europe: European Court of Human Rights ¶ 66, 15 March 2012 (available only in French).

[2] *Schalk and Kopf v. Austria*, ¶ 105: "there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes."

[3] The Constitutional Court further considered that the European Court's case-law was of little relevance, as the *Goodwin* case had been based on the fact that there were major social changes in the institution of marriage since the adoption of the Convention. However, these social changes had not taken place in all of the party States and could not be imposed by a judicial organ, which was not legislative, by means of "social engineering."

become iconic, emblematic of certain flexibility, in that it overturned another recent Grand Chamber decision, *Sheffield and Horsham*.[4]
The *Goodwin* case highlighted the need to not jeopardize the value and authority of the Convention by an excessive interpretation of its provisions, in particular Article 8. More generally, the ECLJ believes that it is necessary to preserve even the philosophy of the Convention, as it is from its philosophy that its authority is derived. The authority of human rights is derived from their reflection of man's nature; they are the result of what man is. Human rights focus primarily on all the characteristics (capacities) which distinguish man from animals: a capacity to think, to express themselves, to live in society, to pray, and to found a stable family, etc. Human rights are intended to guarantee the exercise of human capacities—capacities to think, speak, pray, have a family, move about—not to grant purely theoretic or symbolic rights. Thus, human rights are not arbitrarily defined according to the will of an individual concerning each subject. Subjectivism relative to individualism, by rejecting the reference to the nature of man, leads to the destruction of the basis and philosophy of human rights.

This practice of questioning the foundation of the philosophy of human rights is clearly visible as regarding the right to marry and found a family. This right, which exists because it is in the nature of human beings within society to marry and start a family, is fast becoming a subjective and relative right, so much so that it is no longer clearly distinguishable from the right given to protect private life.

3. The Right to Marry and Found a Family is a Natural Right

Eamon de Valera, then leader of the Irish government and former President of the General Assembly of the League of Nations, asked, during the creation of the Convention, "*Is there anybody in this Assembly who will not agree that it is a natural right that a man or woman should be permitted to marry and found a family? If this is so, then why do we have any doubt in our minds about proclaiming it as such?*"[5] Indeed, "*the right of a man and a woman to marry and found a family is a natural right*," that is to say that it exists in the nature of things, in this case in the nature of men and women. Thus, the conditions for the exercise and the consequences of the right to marry and to found a family are determined by natural law, which greatly predates positive law.
The law holds that two principle characteristics exist in marriage: its goal is the creation of a family, and it is a part of society. Marriage, as a social institution, seeks to give the family a protective environment, so that the family may contribute to the permanence and the common good of society. This dual characteristic is evident in the formulation of the various declarations of rights.

a. The Right to Marry is Inseparable from the Right to Found a Family

It is the right to found a family that gives meaning to the right to marry. The right to marry is almost an accessory to that of a family: it is an instrument in its service. This is the case in all declarations of rights: thus, for example, the recent Charter of Fundamental Rights of the European Union does not speak of the "right to marry," but of the "right to marry and found a family." (Art. 9): to marry and found a family is one and the same right. Article 16 of the Universal Declaration of Human Rights also states that "*Men and women of full age, without*

[4] *Sheffield and Horsham v. United Kingdom*, Application Nos. 22985/93, 23390/94, Council of Europe: European Court of Human Rights, 30 July 1998.
[5] Preparatory Work Report of the European Convention on Human Rights, Vol. II, 102, Consultative Assembly, First Session, 8 September 1949, (ed. Matinus Nijhoff, La Haye, 1975).

any limitation due to race, nationality or religion, have the right to marry and found a family." Also, the International Covenant on Civil and Political Rights of 1966 states, in Article 23 § 2, that "*[t]he right of men and women of marriageable age to marry and to found a family shall be recognized*."

Through these formulations of the right it is seen that marriage is an institution that serves the family: marriage is an instrument, the purpose of which is to serve the family. Thus, the conditions and impediments to marriage are not arbitrary, but are the consequences of the purpose of marriage. These conditions are primarily natural: these natural conditions require that the parties be of marriageable age, that is to say that the ability to procreate must exist, there is a difference between the sexes of the spouses, which is also a prerequisite to procreation, and there is no consanguinity, which presents an obstacle to healthy procreation.

b. The Right to Marry is Intended to Recognize and Protect the Family as a "Natural and Fundamental Unit of Society"

It is also a primary reality, naturally, that the family is the fundamental group unit of society. Society is not an artificial reality composed of juxtaposed individuals. This is strongly emphasized by the law: the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights both affirm that the "*family is the natural and fundamental unit of society, and is entitled to the protection of society and the state*." Article 16 of the Revised European Social Charter contains the same goal "*[w]ith a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life . . .*." The International Covenant on Economic, Social and Cultural Rights states in Article 10 that "*[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children*."

The latter provision demonstrates the natural relationship between children, their families, and society. It is for these reasons that the family is "the natural and fundamental group unit of society," in that it contributes in an essential manner, primarily to the common good according to which society survives, and it is natural for these reasons: first, preexisting positive law, and second, society grants special status to marriage in order to protect the family. The Court recognizes that the "*stability of the marriage is a legitimate aim in the public interest*."[6] It is very important for society that families are stable and are able to fulfill their role. In addition to the purposes of procreation and child rearing, and the propagation of culture, the family is also first in creating cohesion, especially between generations. Marriage is aimed in particular at ensuring protection for the weakest members of the family. By marrying, spouses make a public commitment. Therefore, it is not just an individual lifestyle, but also a social decision. The fact that they make their commitment publically is constitutive of marriage: a secret marriage is in most cases not a marriage.[7] This publicity allows, if necessary, the court to provide protection to an aggrieved spouse. In return for the commitment of the spouses to each other and to society, to which they provide the future, they receive social protection. The Preamble to the Convention on the Rights of the Childs states: "*the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the*

[6] *France v. Switzerland*, Application No. 11329/85, ¶ 36, Council of Europe: European Court of Human Rights, 18 December 1987.

[7] *See* Art. 191 of the French Civil Code; canon law accepted secret marriages only in serious and urgent cases, and then only with the permission of the bishop (Canon 1130).

community." In fact, "*[m]arriage confers special status to those who commit themselves. The exercise of the right to marry is protected by Article 12 of the Convention and has social, personal, and legal consequences.*"[8] Protection, including legal protection, of the family based on marriage requires the State to recognize its uniqueness when compared to other forms of unions, and the Court has done so in numerous cases, e.g. *Manec v. France*.[9] In this case, the Court found that partners bound by a civil union were not similarly situated or comparable to spouses. This also implies that the State does not grant the title of marriage and its subsequent protection to unions which by their nature do not exhibit the characteristics of marriage, including the ability to procreate. In *Sheffield and Horsham v. United Kingdom* the Grand Chamber affirmed, inter alia, that: "*Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family.*"[10] The Court, prior to the *Goodwin* decision, understood and respected the first social reality: marriage is inseparable from the family, which is part of society. Thus, according to its established jurisprudence, the Court stated that "*Article 12 (art. 12) lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.*"[11] For the drafters of the Convention and the other above mentioned instruments, there is no doubt that the essence of the right to marry is precisely that people may found a family within the protection of society. If we were to say, as the Court did in *Goodwin*, that essence of the right guaranteed by Article 12 is the merely the capacity to marry, we would be wrong: that would reduce marriage to only a formal aspect. We reiterate the former Commission's stance that marriage "*is not regarded in the Convention merely as the expression of an intention, conscience or religion, but also as a social institution.*"[12]

4. Article 12 Positively Defines Marriage (by Stating What It Is and What It Is Not)

Article 12, like the above cited provisions, defines the right to marry and to found a family. Due to the natural characteristics of the family, the conditions and consequences of the exercise of the right to marry and found a family are determined by the nature of things. Thus is the case with the prohibition of child marriages or incest, or the alterity of the spouses. Monogamy, equality of the spouses, and the mutual rights and obligation of the spouses also derive mainly from the nature of marriage. However, only the effort of Western, Roman, and Christian culture have made these rules clear, objective, and universal.

Thus, the provision of the Justinian *Corpus Juris Civilis* forbidding polygamy is reproduced verbatim in French positive law: "No person may contract a second marriage before the dissolution of the first" (Article 147 of the French Civil Code). The late classical jurist, Modestinus, wrote during the 3rd Century, in his digest *Ritu Nuptiae*: "*Nuptiae sunt conjunctio maris et feminae, consortium omnis vitae*," i.e. *marriage is the union of a man and a woman (between them only) for life.*[13] This definition, found in Canon 1055 of the Code of

[8] *Gas and Dubois v. France*, ¶ 68 (available only in French).
[9] Req. 66686/09, 21 September 2010.
[10] *Sheffield and Horsham v. United Kingdom*, ¶66.
[11] *Rees v. The United Kingdom*, judgment of 17 October 1986, Series A no. 106; *France v. Switzerland*, Application No. 11329/85, ¶ 32, 18 December 1987, A-128; *Sheffield and Horsham v. United Kingdom*, ¶ 66; *B and C v. United Kingdom*, Application No. 36536/02, ¶ 34, 13 September 2005.
[12] *Jolie v. Belgium*, Application No. 11418/85, 14 May 1986.
[13] Note the use of the terms *maris* and *feminae*, literally *male* and *female*, is extremely rare in Latin for man and woman, just as if Modestin precisely wanted to insist on the difference between sexes. Furthermore, in the

Canon Law of 1983, defines marriage as "*[t]he matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life.*" This Canon states the purpose of marriage—the procreation and education of children and the good of the spouses.

Usually, the practice is to define a thing by saying what it is, and to refrain from making a list of everything that it is not. This is how the law defines things. However, in *Schalk and Kopf*, the Court essentially said that Article 12 does not preclude that the right to marry may also apply to same-sex couples because it does not prohibit it. Just as it can be argued that Article 12 does not prevent homosexual marriage, it may also be accurately argued that it does not preclude the recognition of a right to marry "multiple" spouses or children. Requests for recognition of a right to marry multiple spouses[14] are perfectly possible, whether based on sexual orientation (including bisexuality[15]), personal fulfillment, or religion. Such a request may well reveal the cultural characteristic of arbitrariness in the recognition of gay marriage and the non-recognition of polygamous marriage.

Article 12 states what marriage is; it does not bother to say what it is not, and it does not prohibit States from giving public recognition of other unions; but these other types of unions or "marriage" are not the equivalent of marriage as defined by Article 12 and thus cannot benefit from the protection granted to marriage as defined in this article.
A departure from considering marriage in relation to what it is, and instead considering it as a function of "what-is-not-said-is-not," makes its definition is necessarily arbitrary, despite all efforts and goodwill to the contrary.
The right to marry is the right of a couple, composed of a man and a woman with the purpose of that union being to start a family, is recognized and protected by society. It is true that some couples do not have any children, but this is the exception to the rule. Thus, impediments to marriage are not restrictions on the ability to exercise the right to marry; they are determined only by the very definition of marriage—by its purpose. It is only by reference to what marriage it, to its definition, that the impediments to marriage can be justified. The impediments to marriage are not arbitrary cultural obstacles, but are the consequences of the definition, the ultimate purpose, of marriage.

5. <u>The Right to Marry is Not an Individual Right or Freedom</u>

It is enlightening to understand the particular nature of the right to marry, which is neither an individual right nor a *freedom*. In *Christine Goodwin*, the Court considered the right to marry as though it were a freedom or an individual right of which the applicant was deprived. However, unlike freedoms (Articles 8–11), the content of the right to marry is not determined by its subject: it is precisely defined by society. The right to marry and the right to express oneself in public are not the same thing.
The right to marry is not a right that belongs to a person as an individual, because it belongs to the couple, not the individual. Furthermore, while individual rights and freedoms protect the individual from the State, Article 12 enshrines a reciprocal commitment between the

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Institutes designed to teach law, Justinian employed the more common terms *vir* and *mulier*: "*Viri et mulieris conjunctio individuam vitae consuetudinem continens*" (the union of a husband and wife, starting a normal life undissociated); *See* Gabriel Debacq, *Les nullités de mariage en droit romain et en droit français*, Doctorate Thesis, (Imprimerie de Moquet, Paris 1863).

[14] Lionel Labosse, *The Universal Contract: Beyond "Gay Marriage"* 174 (ed. A poil).

[15] An article in *Le Monde* newspaper suggested that monogamous marriage, even open to homosexuals, would "biphobe," because it would deprive them of their bisexual orientations. It should be replaced by a "universal agreement," against civil unions, open to two or more persons. Lionel Labosse, *A "Universal Agreement" on a Number Rather than a Double Wedding, be it Gay*, LE MONDE, 19 May 2012.

couple and society: the spouses are committed vis-à-vis each other, and society, which in return gives them its protection because of the benefit received from the family established by that marriage. The right to marry involves three players: the man, the woman, and society, with a common interest—the family.

6. *Christine Goodwin* Deconstructs the Right to Marry and Found a Family

In *Christine Goodwin*, the Court stated that "*Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as* per se *removing their right to enjoy the first limb of this provision.*"[16] In so doing, the Court completely deconstructed the right to marry and found a family. It is true that the second aspect (a family) is not a legal requirement for the first (to marry), it is more: it is the purpose (ultimate goal).

a. The *Christine Goodwin* Judgement Severed Marriage from Its Purpose: The Family

By severing marriage from its *purpose*, the *Christine Goodwin* decision has destroyed the "de-*finition*" of marriage. The words "de*term*ine" and "de*fin*e" are synonymous: they indicate that a reality is designated by its term or purpose (its ultimate goal). Severing a reality from its term or purpose eliminates the determination or definition. Indeed, a right is defined by the purpose of its object. It seeks to ensure the attainment of its objects. Freedom of association or the freedom of union does not end with the formal establishment of the association or union. Freedom of association has the purpose of allowing trade union action; the formal establishment of the union is only the means by which the purpose, trade union action, is achieved. The means (the formation of the union) is defined by the end, by the purpose (the nature of the proposed action). To say that the right to marry exists independent of the right to start a family is like saying that the right to form a union exists independent of the right to conduct trade union action. Basically, to separate the right to marry from founding a family is to make marriage theoretical and illusory. Can we say to two people: *you have the right to marry, but not to found a family? Your right to marry is only formal?*[17] Being able to found a family under the protection of society is the very essence of the right to marry; these two aspects are inseparable. To sever marriage from its purpose not only changes its definition, but also transforms it into a purpose in and of itself, causing it to become merely symbolic, as there is no concrete purpose external to itself. The purpose of many claims it to access to the social symbol that is marriage.

Moreover, by severing the right to marry from its purpose, marriage is reduced to materiality: the union of a man and a woman recognized by society, i.e. formality with some publicity. The social, personal, and legal consequences of marriage, enjoyed by a married couple without children, are intended for the good, not of the couple, but of the family. In this respect, procreation is so constitutive of marriage that Roman law penalized those who married and had no legitimate children, by restricting their ability to receive inheritances.[18]

b. *Christine Goodwin* Removes the Need for Sexual Alterity

[16] *Goodwin v. United Kingdom*¸ Application No. 28957/95, ¶ 98, Council of Europe: European Court of Human Rights, 11 July 2002.

[17] This link between the right to marry and to found a family is so engrained that the opening of marriage to same-sex couples is almost always associated with the recognition of a right to adoption or artificial procreation.

[18] Gustave Hugo, *History of Roman Law, Volume II*, 42s, Library of Jurisprudence and Administration of Bavoux Antoine, Paris (1825).

When marriage is separated from its purpose—the founding of a family—the requirement of sexual alterity imposed by Article 12 loses its rationale. A difference between the sexes of the spouses is only a consequence of the purpose of marriage. It is not a "gender stereotype" nor a "homophobic" or "transphobic" prejudice.

c. The *Christine Goodwin* Decision Makes Marriage a Subjective Individual Right

The Court had "individualized" the right to marry, stating that marriage is independent of the founding of a family. This view of marriage from the perspective, not of the family—the fundamental unit of society—but from that of the individual, is a prerequisite for the transformation of marriage into a subjective right.

This transformation of the right to marry into a subjective right appears blatantly in the *Cassar* case, because—and it is important to point out—the request before the Court is presented by a single applicant, not by a couple (as the applicant has ended her relationship with her partner). However, the right to marry, unless it becomes a subjective right, belongs to the man and the woman who form a couple, and not to a single person. The same is true of the freedom of association, which belongs, by nature, to several people. Are we to imagine that a single person could complain to the Court of his or her inability to form an association?

d. *Christine Goodwin* Replaces the Concept of Gender in Sexual Reality

In the *Goodwin* decision, the Court stated that it "*is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria.*"[19] As such, the Court substituted the concept of "genre" (gender) for the reality that comprises the basis of sex. The law, particularly European, must distinguish carefully between three concepts that are the basis of sex, gender, and sexual orientation.

- *Sex* refers to biological sex—chromosome;
- *Gender* refers to social identity experienced by the person (feminine, masculine, androgynous, etc.);
- *Sexual Orientation* refers to the orientation of sexual attraction.

A transsexual person, operated on or not, can only change "gender." Social identity may be different from biological identity and is independent of sexual orientation. It was in reference to gender identity that the Court spoke, in view of Article 8, of the freedom of an individual to determine his or her gender:[20] such freedom can only be social in nature, not biological—only sexual appearance can be changed. It is by fiction that the law allows this, solely to ease the conflict between social appearance and the biological reality of a person; it is beyond the scope of the law to substitute gender theory for sex. Adherence to "gender theory," according to which gender identity is a social construction that takes precedence over biological reality, is a popular ideological choice, and the topic of many heated controversies. Adherence to this ideology can only harm the credibility of the institution and scope of the law.

That being said, because the purpose of Article 12 is intended only for biological sex, there can be no recognition of "gender identity" under the Convention. It is clear that under the respect due to his private life, a transsexual should be able to obtain certain services, such as changes in civil status, so that "*the discrepancy between [the] legal sex and [the] apparent sex*"[21] of a transsexual does not place them "*daily in a situation which, taken as a whole, is not compatible with the respect due to [] private life.*"[22] This right exists under the respect due for the privacy of the person. It has no effect on the right to marry and start a family, which

[19] *Christine Goodwin v. United Kingdom*¸ Application No. 28957/95, ¶ 100.
[20] *See Schlumpf v. Switzerland*, Application No. 29002/06 8 January 2009.
[21] *B. v. France*, ¶ 58, 25 March 1992, which is only on the grounds of Article 8.
[22] *B. v. France*, ¶ 63.

does not originate from the person (such as a subjective right), but rather directly from the essence of family and its contribution to society.

In accordance with the rules relating to the interpretation of treaties, a treaty must be "*interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."[23] There is no doubt that in Article 12 "man" and "woman" refer to sex, not gender. The context of these words, which links marriage to the foundation of a family, that is to say, procreation, confirms this obvious interpretation. Indeed, the Court recognized this in *Schalk and Kopf v. Austria* (¶55). It noted: while "*all other substantive Articles of the Convention grant rights and freedoms to 'everyone' or state that 'no one' is to be subjected to certain types of prohibited treatment*." The Court further noted that Article 12 uses the terms "man and woman," and it concluded that "*[t]he choice of wording in Article 12 must thus be regarded as deliberate.*"

7. The Risk of Reducing the Right to Marry to the Right to Privacy

Without the necessary reference to its purpose—starting a family—which justifies only its legal status, the distinctiveness of this status compared to other forms of non-family unions appears arbitrary.

A marriage without the purpose of a family is a private relationship made public. Such a marriage, by not becoming the proprietor of a legal and natural fundamental unit of society, no longer contributes to the common good: it is only for the private good of the couple. A marriage voluntarily severed from its purpose and reason for existence, (the family), is reduced to a couple, and, ultimately, to only the sphere of privacy which is provided sufficient protection under Article 8. It is also noted that many couples wait until they are married to have children. Then they are not only protected by Article 8, but also by Article 12, and benefit from the protection of society.

8. Destruction of the Natural Definition of Marriage Forces the Substitution of a Cultural Definition

If we destroy the definition of marriage and make it a social phenomenon independent of its purpose, then on what basis may the Court prevent recognition of the existence of a right to polygamous or child marriages? This issue will likely be soon brought before the Court.

Prohibiting children from marrying is not the result of a negative moral judgment against children, nor is it with regard to same-sex couples. If marriage is a social phenomenon independent of the family and of the sexual identity of the spouses, how do we then justify prohibiting polygamous families from marrying officially? The impossibility for polygamous Muslim families to access marriage is an interference with their private and family (and also religious) life, this makes their administrative and social life very complicated. They also endure suffering, humiliation, and misunderstanding on the part of society. Nevertheless, polygamous marriage does not meet the definition of marriage as it has been "objectified" in light of the nature of men and women, and in terms of their natural equality. By abandoning this objective definition and the purpose of marriage, the Fifth Session, in the *Stübing v. Germany* decision (No. 43547/08) of 12 April 2012, no longer had a means of justifying the prohibition of incestuous sexual relations, but only a reference to the "consensus," that is to say culture.[24]

[23] Vienna Convention on the Law of Treaties (1969), Article 31.

[24] "Applying the principles set out above to the instant case, the Court observes that there is no consensus between the member States as to whether the consensual commitment of sexual acts between adult siblings

Thus, it is only on the basis of developments of European consensus, that is to say the spirit of the times as perceived by the Court, that it could justify depriving a brother and a sister of the enjoyment of the right to marry. It is difficult to find a weaker, and, ultimately, less arbitrary argument. The Grand Chamber also noted that with regard to sensitive moral issues, the existence of a consensus is not a decisive factor.[25]

9. The Cultural Redefinition of Marriage Leads to the Relinquishment of the Universality of Human Rights

This cultural redefinition of marriage deprives the right to marry of the objectivity necessary to qualify it to be universal, as a right. A right to marry which is not defined in relation to the purpose of its object (to found a family) and means to this end (maturity and alterity), but is subject to evolving mentalities, ceases to be intrinsically binding.

As with any human right, the existence and the binding nature of the right to marry is not a result of cultural mentality; it exists because marriage is inherently useful, even necessary, for the establishment and good of a family, and in an integrated family, for the common good of society. Thus, to depend on cultural mentalities for the substance of the right to marry deprives it of its intrinsic binding force, i.e. changes its very nature, substituting it with the extrinsic authority of perception of evolving morality, which is always relative. Redefined by culture, the right to marry derives its value and its strength from this same culture; it becomes contingent and must renounce its universality. Also, the universality of human rights presupposes and requires a universal concept of man, and the universality of the right to marry requires a universal concept of marriage. However, the discovery of a universal concept of an object can only be done by an objective effort. The transformation of the right to marry and start a family into a subjective right or freedom, itself dependent on the evolution of social acceptability, destroys any objectivity in this right, causing it to lose both its universality and its intrinsic binding force.

10. Cultural Redefinition of Marriage Does Not Bind States

The problem arises in the same terms, although to a lesser extent, within the States that are parties to the Convention, as some States have abandoned the common concept of marriage in favor of a subjective approach. The Court, in several cases, has indicated a desire to follow this social evolution, and has even sought to impose its desire on other States.[26] But a cultural redefinition, inherently relative and expandable, and clearly detached from the objective definition of the Convention, is not binding upon a State. When it acceded to the Convention, Malta at no time committed to adopting the same concept of marriage; on the contrary, the

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should be criminally sanctioned (see paragraphs 28-30, above). Still, a majority of altogether twenty-eight out of the forty-four States reviewed provide for criminal liability. The Court further notes that all the legal systems, including those which do not impose criminal liability, prohibit siblings from getting married. Thus, a broad consensus transpires that sexual relationships between siblings are neither accepted by the legal order nor by society as a whole. Conversely, there is no sufficient empirical support for the assumption of a general trend towards a decriminalisation of such acts. The Court further considers that the instant case concerns a question about the requirements of morals. It follows from the above principles that the domestic authorities enjoy a wide margin of appreciation in determining how to confront incestuous relationships between consenting adults, notwithstanding the fact that this decision concerns an intimate aspect of an individual's private life" (§ 61).

[25] *A, B and C v. Ireland*, Application No. 25579/05, ¶ 237, Council of Europe: European Court of Human Rights, 16 December 2012.

[26] *See e.g., Schalk and Kopf*, ¶ 62, in which the Court "reiterates that it must not rush to substitute its own judgment in place of that of the national authorities."

terms of Article 12 continue to lead to an objective definition of marriage which is between a man and a woman for the purpose of starting a family as recognized and supported by society. In Malta, marriage closely adheres to its natural pattern. Thus, on this island where 95% of the population is Catholic, divorce was not legal until the summer of 2011. As had been always stated in the jurisprudence of the Convention, it is "*for the national legislation to lay down the rules according to which a marriage is not valid and to draw the legal consequences*."[27] "*In that connection the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another.*"[28] Malta has chosen to respect the letter and the spirit of the Convention by holding that marriage is the union of a man and a woman, according to their biological sex. Not only does "*Article 12 of the Convention [] not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage,*"[29] even if one of the partners has undergone an operation and artificially altered his or her gender, but to cover, under Article 12, unions that do not exhibit the characteristics of marriage, in particular the possibility of procreation, constitutes a misuse and a distortion of the meaning of the Convention. The Court cannot say that a State submitted to the treaty is under an obligation to waive the conventional definition of marriage. To claim that such an obligation exists in order to change the conventional definition of marriage tells the Convention what it does not say. In this sense we can understand the reluctance of the Constitutional Court of Malta and its reference to social engineering.

[27] *Benes v. Austria*, Application No. 18643/91, Commission decision, 6 January 1992.
[28] *Schalk and Kopf*, ¶ 62.
[29] *Schalk and Kopf*, ¶ 63.