1. Approach

Study of the right to marry contemplated in art. 12 of the Convention must start with the commentary on art. 8 in this present work. There we recalled how since its early decisions, the European Court of Human Rights has opted for material context of family making no distinction between “legitimate family” and “natural family” but simply noting the existence of ties of mutual dependence equivalent to family ties. With this approach the Court’s case law provides a clearly differentiated treatment of the right to marry and the right to family life which were the object of separate articles in the Rome Convention in contrast to other international texts on human rights where they are frequently treated together.

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2 Thus art. 16.1 of the Universal Declaration of Human Rights speaks of the right “to marry and found a family”. Marriage and family are also dealt with together in the same art. in the International Covenant on Civil and Political Rights (art. 23), the International Covenant on Economic, Social and Cultural Rights (art. 10) and the Charter of Fundamental Rights of the European Union (art. 9).
This separation is simply the result of recognition of the plurality of marriage systems in Europe and the social evolution in this field in very interesting issues such as the new types of *more uxorio* cohabitation. Legislatures cannot ignore these developments which can hardly be satisfactorily regulated in law on the basis of traditional models or on the future role of religious denominations in marriage law in a society which is evolving towards a secular and multi-cultural configuration, or in short, the trend towards configuring marriage as an institution available to same sex couples that has received considerable support in the line of case law culminating in the cases I and Christine Goodwin v. United Kingdom, referred to below.

These new trends include the vitally important difference between the drafting of art. 12 of the Convention that defines the rights holders as “men and women” and that of the subsequent art. 9 in the Charter of Fundamental Rights of the European Union. According to the Praesidium’s explanations “the wording of the art. [9] has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This art. neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides”. Hence the drafters of the Charter intended above all to enable legislations to extend the cases and subjects for marriage. That intention, however, respects national decisions on these matters, but seemed to achieve a greater dimension at least as regards transsexual marriage in I and Christine Goodwin, almost immediately. In those cases, the Court noted that there was an emerging international consensus on providing legal recognition following gender reassignment, and declared that the State could no longer claim that the matter fell within its national margin of appreciation.

Based on these premises, European Court of Human Rights case law on this matter can be grouped by way of summary around three thematic clusters. Firstly, problems with the recognition of access to marriage due to age, previous marriage and homosexuality; secondly, the wealth of case-based decisions on extra marital relations; and finally, the problem of State recognition of decisions handed down by non-state religious courts.