Legal recognition of same-sex family life in the jurisprudence of the European Court of Human Rights.

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Tiivistelmä/Referat – Abstract

The aim of this master's thesis is to examine the jurisprudence of the European Court of Human Rights ('the Court') regarding same-sex couples and families in order to determine how their need for protection and legal recognition has been met by the Court. The primary method applied is legal dogmatics although the study will, to some extent, go beyond the traditional legal dogmatics and try to identify the major problems in, as well as the reasons behind the Court's current approach. In addition, a *de lege ferenda* aspect is present in the thesis.

The 'right to respect for family life' and the 'right to marry and found a family' are human rights that are guaranteed in article 8 and article 12 respectively in the European Convention of Human Rights ('the Convention'). Furthermore, article 14 provides that enjoyment of these rights shall be secured without discrimination. These rights are protected, at first hand, in the national level in each contracting state, but in case of alleged breach, the European Court of Human Rights ('the Court') has the final jurisdiction and its judgment is binding.

This thesis clarifies, through an analysing of the Court's jurisprudence on same-sex family life, what is the Court's current position on the legal recognition of same-sex families. Especially the most recent judgments strongly support the conclusion that any discrimination between unmarried different-sex couples and same-sex couples is unacceptable under the Convention. However, the special status of marriage still justifies the continuing exclusion of same-sex families from rights and benefits only available to marital families. Furthermore, the Convention does not require the contracting states to set up any kind of separate legal framework for same-sex couples.

Given that the same-sex families have equal need for affirmation and legal recognition as different-sex families, the situation remains unsatisfactory until the same level of protection is afforded to them. Also, considering how much the Court's position has evolved in the past twenty years it is very likely that in the coming decades the Court will find that the Convention requires the states to legally recognise same-sex families, first through civil partnership legislation and ultimately through marriage legislation. Meanwhile, it is important that the convention states do not hinder positive development in the field of same-sex family rights only because the Court currently allows them a wider margin of appreciation. Ideally, the contracting states should comply with the evolving human rights standards on their own accord.

Avainsanat – Nyckelord – Keywords

European Convention on Human Rights, homosexuality, supranational judicial review, prohibition of discrimination, right to family life, right to marry, same-sex marriage, second-parent adoption

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Tiivistelmä/Referat – Abstract

Tämän valtiosääntöoikeudellisen tutkielman tarkoituksena on tutkia Euroopan ihmisoikeustuomioistuimen (EIT) oikeuskäytäntöä, joka koskee samaa sukupuolta olevia pareja ja heidän perheitään. Tutkielmassa selvitetään, miten EIT on vastannut heidän tarpeeseensa tulla juridisesti tunnustetuksi ja suojelluiksi perheinä. Tutkielmassa on käytetty pääosin oikeusdogmaattista metodia, joskin tutkielma menee myös osittain perinteisen lainopin ulkopuolelle pyrkiessään erittelemään ongelmia EIT:n nykyisessä ratkaisukäytännössä ja selvittämään syitä sen tämänhetkiselle lähestymistavalle. Tämän lisäksi tutkielmassa on *de lege ferenda* näkökulma.

’Oikeus nauttia perhe-elämän kunnioitusta’ ja ’oikeus avioliittoon’ ovat ihmisoikeuksia, jotka on turvattu Euroopan ihmisoikeussopimuksen (EIS) 8 ja 12 artikloissa. Lisäksi sopimuksen 14 artikla takaa, että näistä oikeuksista nauttiminen turvataan ilman minkäänlaista mm. henkilön seksuaalisesta suuntautumisesta johtuvaa syrjintää. Ihmisoikeussopimukseen perustuvan järjestelmän tarkoituksena on, että siinä taatut oikeudet turvataan ensisijaisesti kansallisella tasolla, mutta väitetyissä oikeuksien loukkaustapauksissa EIT:lla on yksinomainen toimivalta tutkia loukkaukset, minkä jälkeen sen tuomio on jäsenvaltiota sitova.

Tutkielmassa selvitetään oikeustapausanalyysin avulla, mikä on EIT:n tämän hetkinen kanta samaa sukupuolta olevien perheiden juridiseen tunnustamiseen. Erityisesti tuomioistuimen viimeisimmät tätä asiaa koskevat ratkaisut tukevat johtopäätöstä, että kaikenlainen syrjintä samaa sukupuolta olevien parien ja naimattomien eri sukupuolta olevien parien välillä on kiellettyä. Sen sijaan avioliittoinstituution erityisasema edelleen oikeuttaa avioliiton säilyttämisen pelkästään eri sukupuolta olevia pareja koskevana. Tällä perusteella on myös oikeutettua olla myöntämättä samaa sukupuolta oleville pareille kaikkia samoja avioparien nauttimia oikeuksia ja etuja. EIS ei myöskään velvoita sopimusvaltiota luomaan erillistä vain samaa sukupuolta oleville pareille tarkoitettua instituutiota, kuten rekisteröityä parisuhdetta.

Kun otetaan huomioidaan, että samaa sukupuolta olevilla pareilla ja heidän perheillään on sama suojelun ja juridisen tunnustuksen tarve kuin eri sukupuolta olevilla pareilla ja heidän perheillään, oikeustila pysyy epätyydyttävänä kunnes heille suodaan samat juridiset oikeudet. Ottaen huomioon myös sen, miten paljon tuomioistuimen kanta on muuttunut viimeisen parinkymmenen vuoden aikana, on hyvin todennäköistä, että EIT sisällyttää tulevina vuosikymmeninä myös samaa sukupuolta olevien parien juridisen tunnustamisen EIS:n turvaamien oikeuksien piiriin. Tämä tapahtuisi todennäköisesti ensin rekisteröidyn parisuhteen ja lopulta avioliittolainsäädännön kautta. Sitä odotellessa on tärkeää, että sopimusvaltiot eivät tarkoituksella viivyttele samaa sukupuolta olevien perhe-elämää koskevia uudistuksia vain koska EIT tällä hetkellä myöntää niille laajan harkintamarginaalin. Ihanteellisesti sopimusvaltiot seuraavat mukana ihmisoikeuskehityksessä omasta tahdostaan eivätkä tuomioistuimen pakottamina.

Avainsanat – Nyckelord – Keywords

Euroopan ihmisoikeussopimus, homoseksuaalisuus, perheensisäinen adoption, oikeus aviolittoon, perhe-elämän suoja, syrjinnän kielto, tasa-arvoinen avioliitto, ylikansallinen tuomioistuinvalvona

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Data sets used:

1) The answers percentage of EU LGBT Average per ‘Partner’ when asked ’Do any children (under the age of 18) live in your household?’

http://fra.europa.eu/DVS/DVT/lgbt.php?locale=EN&dataSource=LGBT&media=png&width=740&plot=inCountry&topic=1.+Daily+Life&question=h9&superSubset=1&subset=samesexpartner&country=EU27

2) The percentage of the LGBT survey respondents for every Country per answer for ‘Partner - Same sex partner’ when asked ’Do any children (under the age of 18) live in your household?’.

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ABBREVIATIONS

AID	artificial insemination by donor
CoE	Council of Europe
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	Court of Justice of the European Union
EU	European Union
FRA	Fundamental Rights Agency of the European Union
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association.
LGBT	Lesbian, Gay, Bisexual and Transsexual
PACS	Pacte civil de solidarité, a French civil partnerships agreements
P1-1	Article 1 in Protocol No. 1

1. INTRODUCTION

1.1 Background

During the past 30 years a lot has happened in the field of LGBT[1] rights in Europe. LGBT rights have moved from margins of society to an important topic in mainstream political and legal discussions, and discrimination on grounds of sexual orientation and gender identity has secured its place on the list of prohibited grounds alongside, *inter alia*, race, gender and age in a number of international legal instruments. Currently, ten European countries allow marriage for both different-sex and same-sex couples and another fifteen allow registered partnership. Nevertheless, the question whether same-sex couples should have the right to marry, the right to raise children, or even the right to be accepted as families remains well-disputed around the Council of Europe member states.

The developments of LGBT rights in Europe have largely followed a standard sequence: decriminalisation, anti-discrimination provisions and finally partnership legislation.[2] However, the pace is uneven and different European countries are in different stages of the development process. A rapid evolution is taking place in mostly Western and Northern European countries which are one by one inevitably progressing towards full equality between different-sex and same-sex families. While in many mainly Eastern European countries the parliaments are amending constitutions to define marriage as an institution exclusively meant for different-sex couples.[3]

A major role in the development that has occurred in Europe has been played by the European Court of Human Rights (hereinafter 'the Court'), which monitors the compliance with the European Convention on Human Rights ('the Convention') in the 47 signatory states. Since it in 1981 ruled that criminalisation of same-sex sexual activity violates the right to private life under the Convention, the Court has been called upon to decide a number of issues relating to the daily lives of LGBT persons and families.

The right to respect for private and family life under article 8 of the Convention has been described as the 'powerhouse' for sexual orientation complaints. Article 8 along with

[1] Lesbian, Gay, Bi-sexual and Transsexual

[2] Waaldijk 2000, 62.

[3] ILGA-Europe Rainbow Map (Index) 2013; Itaborahy & Zhu 2013, 30–32.

article 14 of the Convention (prohibition on discrimination) have provided a basis for a number of successful complaints challenging sexual orientation discrimination under the Convention, thereby making the Court essential in bringing about the change in Europe.[4]

However, while sexual orientation as 'an important aspect of private life' and as 'an essentially private manifestation of the human personality' has already quite an established protection under the Convention, the 'family life' aspect have bee absent in the Court's case law until very recently. It was not until 2010 that the Court finally accepted that same-sex couples enjoy family life for the purposes of article 8. Subsequently the Court has both upheld and dismissed complaints alleging discrimination between same-sex and different-sex couples, the result being largely dependent on the exact status conferred on same-sex couples in the national legislation. Given rapid social changes occurring in Europe, the evolving equality standards and growing public acceptance of same-sex families, it is unlikely that the Court has had its final say in the matter.

1.2 Purpose of the study and structure

In my opinion, we are past the time of discussing whether and why sexual orientation and homosexuality deserves protection, or whether homosexuals are as capable of loving family relationships and child rearing as heterosexuals.[5] Therefore, this thesis starts from the simple premise that homosexuals:

> […] have the same human capacity as heterosexual and non-transsexual individuals to fall in love with another person, or to establish a long-term emotional and physical relationship with them, and potentially to want to raise children with them. When they choose to do so, they will often want the same opportunities as heterosexual individuals to be treated as a 'couple', as 'spouses', as 'partners', as 'parents', as a 'family'.[6]

Thus, the purpose of this master's thesis is to study the Court's jurisprudence on same-sex families and to examine how this need, *i.e.*, their need for legal recognition and protection has been met by the Court.

I have formulated this purpose into two more concrete research questions:

1) How the Court has recognised and protected same-sex family life and what is the current level of protection afforded to them?

[4] Johnson 2012b, 93.

[5] For further reading on sexual orientation as a human right see: Heinze, 1995; Wintemute 1995.

[6] Wintemute 2005, 191.

2) Has the Court been consistent in its case law and is the protection afforded satisfactory?

By examining the present situation and the arguments used by the Court, I shall also try to identify the main problems in the Court's current approach, possible reasons for the current situation and to propose some ways forward.

For the purposes of this thesis, legal recognition of 'same-sex family life' is essentially the same as the concept Wintemute calls as 'love rights', that is, "legal recognition and equal treatment of the relationships between LGBT individuals and their partners".[7] It derives from the Court's inclusive concept of 'family life' and encompasses both the relationship between same-sex partners, as well as the parent-child relationship between same-sex parents and their children, without making a distinction whether two adult living together as a couple constitutes a 'family' or whether the existence of a 'family' requires the presence of children.[8]

Legal recognition of same-sex family life ultimately means equal access to civil marriage. It may also mean an 'alternative registration system' intended as a substitute for marriage which may be equal, almost equal, or substantially inferior to a civil marriage.[9] Legal recognition may also occur in specific situations when same-sex couples are granted a particular right or benefit, which previously were only granted to different-sex couples, without granting same-sex couples the full right to marry or contract a civil union.[10] Finally, legally recognising the family tie between a child and a social parent (also 'second-parent' or 'co-parent'), who is the same-sex partner of the child's biological mother or father and not biologically related to the child, is a form of legal recognition of same-sex family life.

As to the structure of this thesis, in the first chapter I shall introduce the Court and its main interpretation methods and in the second chapter I shall present the relevant articles of the Convention and their scope. In the third chapter the Court's case law on the issue of same-

[7] Wintemute 2005, 191.

[8] Sörgjerd 2012, 14. For the purposes of this thesis the terms 'same-sex family' and 'same-sex couple' are for the most part interchangeable. Usually 'same-sex family' is used both as an umbrella term to refer all family units comprising a same-sex couple with or without children, and more specifically to refer only to families with children. It is always evident from the context when this distinction is important. 'Same-sex couple' always refers to same-sex partners.

[9] Also terms 'registered partnership', 'civil union' and 'civil partnership' are used interchangeably.

[10] Wintemute 2005, 200–206.

sex family life will be analysed. I have allocated the cases thematically under different aspects of the legal recognition of same-sex family life. In some cases this has proven not to be very straightforward and same cases may appear under different themes when appropriate. In the fourth chapter, I shall shortly look into the limits of the Court's supervision and the Court as a part of European-wide human rights regime. Finally, in the last chapter I shall present my findings on the current level of protection afforded to same-sex family life by the Court. I shall also present some possible explanations for the current situation and suggest some ways forward.

1.3 Method and Materials

The subject of this thesis belongs with the field of constitutional law, and more precisely with the constitutional and human rights law. In addition, the issue at hand is connected to several other fields such as family law, international public law, and law and gender.

The starting point in this thesis is the method of legal dogmatics. The purpose of legal dogmatics is to describe and systematise legal sources and legal arguments.[11] The choice of this method is justified because I shall, through a case law analysis, try to identify and systematise what is the current approach of the Court towards same-sex couples' right to respect for family life and right to marry. However, I shall also go beyond the traditional legal dogmatics and try to unveil the reasons behind the Court's current position on same-sex family life. This specific approach is justifiable because the Court's case law and its methods of interpretation are already quite thoroughly researched and systematised, and purely legal dogmatics approach would not bring much new considerations.

This thesis also has a *de lege ferenda* aspect, which according to Peczenik means "making justified recommendations for the lawgiver".[12] As I shall make some suggestions as how the Court could better accommodate the needs of same-sex.

The Court's judgments analysed in this thesis have been chosen as follows: I have identified the relevant judgments and decision by using the chronological list of all the Court's decisions and judgments relating to homosexuality provided by Paul Johnson.[13] For each case the list provides information, *inter alia*, on the articles invoked, and the key issue of the complaint. From the list I have selected those decisions and judgments that

[11] Peczenik 2005, 11; Hirvonen 2011, 22–23.
[12] Peczenik 2005, 4.
[13] Johnson 2014.

concerned same-sex family life such as housing, immigration and adoption, and where at least one of the articles 8, 12 and 14 was invoked. I have also included several other judgments and decisions which I have identified with the help of research literature, although not all of these cases concern same-sex family life. For example cases concerning transsexuals' right to marry in their post-operative gender and *de facto* family life of opposite-sex couples have been included as a reference point in order to illustrate the Court's evolving notion of 'family life' and 'marriage'.

As to the other materials, commentaries to the selected cases and the extensive literature on the Convention, the Court and its methods of interpretation constitute the bulk of my research literature. In addition, I have used legal literature in the field of family law, LGBT rights and human rights in general. Since this thesis also includes some considerations mainly over changing attitudes and moral values of the society some sources from other disciplines, mostly historical and sociological, have been used. The focus will be on the European level and national situation or legislation will be referenced only when it is necessary for the understanding of the Court's case law. Finland is sometimes used as an example due to obvious reasons.

1.4 Some central concepts

1.4.1 Concepts of marriage and family

Here, in the end of the introduction chapter, I shall shortly address the problematic behind the 'traditional' concepts of marriage and family.[14] It is important to note, however, that in the Convention system, these concepts have an autonomous meaning, which can differ from what is presented here. The Court's notion of 'family life' will be described in chapter 3.1.2.

Several scholars agree that marriage has never been a fixed institution but a social one that derives from the historical, cultural and religious context of the society in which it exists.[15] Therefore, institution and concept of marriage have always changed and evolved over time. Consequently, the argument often used by the opponents of same-sex marriage that

[14] For a more comprehensive study on the changes in the institutions of marriage and family see for example: Eskridge 1993, 1447–1453, 1469–1484; Sörgjerd 2012, Nieminen 2013.

[15] Sörgjerd 2012, 3, 6. See also: Utrio 1984, 72–96; Eskridge 1993, 1485, 1494–1497; Waaldijk 2000, 62–66.

allowing same-sex couples to marry would irrevocably change the institution of marriage and disconnect it from its tradition and historical background, is flawed.[16]

Consider for example the status of women. Until the beginning to mid 20th century, upon entering marriage, the wife became the property of her husband. She did not have the right to own property, to vote, to sign contracts or the right over her own body. As Mah notes, "this was part of the concept of marriage – it was socially acceptable as well as legal"[17] and at the time, the equality between spouses was opposed just as vigorously as same-sex marriage is opposed to day, and much with the same arguments.[18] Another example is the ban on interracial marriage to which the ban on same-sex marriage has been compared. Today such a restriction seems archaic, shameful or even bizarre.[19] However, when the United States Supreme Court in *Loving v. Virginia* in 1967 ruled the ban to be unconstitutional, there were laws prohibiting it were still enforce in 17 states.[20]

The same plurality applies to the concept of family. Numerous scholars agree that there is no such thing as 'traditional' family. As Anderson points out:

> There is not, nor ever has there been, a single family system. The West has always been characterised by diversity of family forms, by diversity of family functions and by diversity in attitudes to family relationships not only over time but at any one point in time. There is, except at the most trivial level, no Western family type.[21]

Rather there has always been an ideal family form promoted by the state and/or the church, often as a means to regulate moral behaviour. However, the ideals have never reflected the exiting reality to one hundred percent.[22]

Also the 'traditional' concept of family is routinely invoked by the opponents of same-sex marriage as one of the main arguments for maintaining marriage as a heterosexual institution.[23] For instance in the Finnish Parliament discussion on Equal Marriage Act, biology, religion and the child's right to both a mother and a father were frequently used to

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[16] See for example: Eskridge 1993, 1423–1434, 1493–1502; Saez 2011, 39–47; Record of the Finnish Parliament's Plenary Session 12/2014.

[17] Mah 2005, 26.

[18] Graff 2000, 47.

[19] Perry v. Schwarzenegger (2010), § 112; Johnson 2011, 359.

[20] Loving v. Virginia (1967); Loving Day, Legal Map. See also: Eskridge 1993, 1504–1510.

[21] Anderson 1980/1995, 2. See also Utrio 1984; 208–270; Hareven 1991; Häggman 1996, 15–16.

[22] Häggman 1996, 15–16; Sörgjerd 2012, 8.

[23] See for example in Berthelet 2003, 14; Record of the Finnish Parliament's Plenary Session 12/2014.

legitimate the continuing reference to the traditional concepts.[24] In truth, there have always been different kinds of families, *inter alia,* marital, non-marital, single parent, step-parent even same-sex families.[25] For example, currently 'non-traditional' families constitute almost 40 percent of all families in Finland.[26]

The dominant definitions of 'marriage' and 'family' hold great societal power, because they are reflected in all national and international policies and legal instruments governing relationships between people. As Hodson aptly summarises:

> The traditional idea of 'the family' in Europe is represented by the nuclear family: a married opposite-sex couple and their children. The notion of the family is an ideal type that retains considerable influence in framing national and international laws and policies affecting personal relationships. However, it is becoming increasingly distant from the lived reality of very many European families and their children.[27]

1.4.2 Heteronormativity

When researching on topics such as equal marriage and same-sex family life, one cannot avoid encountering the concept of heteronormativity. Although I have eschewed from using it because such analysis would require more profound understanding of the concept and the theories behind it, than I have had the possibility to obtain in the course of this thesis. However, it was frequently used in my research literature and therefore it also appears in this thesis. Consequently, I feel that it is necessary to provide an elementary explanation of the concept.

Heteronormativity is a concept used especially in feminist and queer[28] theory to describe heterosexuality as a norm in our society. In simple terms it is the assumption that everyone

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[24] Record of the Finnish Parliament's Plenary Session 12/2014.

[25] Utrio 1984, 216–224; Eskridge 1993; Boswell 1994; Waaldijk 2000, 64.

[26] Statistics Finland 2013. Here, 'family' only refers to families with children and 'non-traditional' families to all other family types than married couples with biological children, that is, non-marital families, single-parent families and same-sex families.

[27] Hodson 2008, 7.

[28] It is impossible to define 'queer theory' briefly yet exhaustingly. Merriam-Webster online dictionary defines queer theory as "an approach to literary and cultural study that rejects traditional categories of gender and sexuality". According to ILGA glossary: "Queer has become an academic term that is inclusive of people who are not heterosexual - includes lesbians, gay men, bisexuals and trans. Queer theory is challenging heteronormative social norms concerning gender and sexuality, and claims that gender roles are social constructions."
"Queer theory is interested in exploring the borders of sexual identities, communities, and politics. How do categories such as "gay," "lesbian," and "queer" emerge? From what do they differentiate themselves, and what kinds of identities do they exclude? How are these borders demarcated, and how can they be contested? What are the relations between the naming of sexuality and political organization it adopts, between identity and community? Why is a focus on the discursive production of social identities useful? How do we make

is heterosexual and that the normal and natural way to live is heterosexual.[29] Jackson describes it as ”a shorthand for numerous ways in which heterosexual privilege is woven into the fabric of social life, pervasively and insidiously ordering everyday existence”.[30]

Heteronormativity is not something that just exists, on the contrary, it is constantly maintained, mobilised and reproduced in almost ”every aspect of the forms and arrangements of social life” such as law, language, commerce, education or conventions and narratives of the popular culture,[31] *i.e.*, in basically any ”routine activities in which gender, sexuality and heterosexuality interconnect”.[32]

The maintenance of heterosexual privilege is dependent on the exclusion and marginalisation of other sexualities for its legitimacy.[33] According to Johnson, law is central in this process when heterosexual privilege is sustained by the legal discrimination of non-heterosexuals such discrimination being characteristic to the majority of the states worldwide. The law is used to exclude non-heterosexuals from civil rights and social participation enjoyed by heterosexuals. He argues that:

> Heteronormative law ‘distorts’ lives because it helps to enforce a ‘silence’ in contemporary societies about heterosexuality which means that, instead of speaking about heterosexuality as a social and political construction and mode of social organization, it is ‘taken for granted’ as a ‘normal’ aspect of human life.[34]

In the context of equal marriage and the legal recognition of same-sex family life, the key dispute lies in ”to what extent the legal protection of ‘traditional’ marriage relies upon the discrimination of non-heterosexuals to maintain its social and cultural status”.[35]

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sense of the dialectical movement between inside and outside, heterosexuality and homosexuality? […] Queer theory recognizes the impossibility of moving outside current conceptions of sexuality. We cannot assert ourselves to be entirely outside heterosexuality, nor entirely inside, because each of these terms achieves its meaning in relation to the other. What we can do, queer theory suggests, is negotiate these limits. We can think about the how of these boundaries – not merely the fact that they exist, but also how they are created, regulated, and contested. The emphasis on the production and management of heterosexuality and homosexuality characterizes the poststructuralist queer theory project.” Namaste 1994, 224. See also Turner 2000, 1–35.

[29] Rosenberg 2002, 100.

[30] Jackson 2006, 108.

[31] Berlant & Warner 1998, 554–555.

[32] Jackson 2006, 114.

[33] Jackson 2006, 107.

[34] Johnson 2011, 350–352.

[35] Johnson 2011, 351.

2. THE CONVENTION SYSTEM OF PROTECTING HUMAN RIGHTS

2.1 The Court and the Convention - general principles

The European system under the Convention is unique in international law and is considered to be the most effective human rights protection regime in the world.[36] It is a multilateral treaty-based, divided-power system, which has been set up in order to guarantee the protection of basic human rights within the contracting states. The contracting states have agreed to respect the rights and freedoms guaranteed in the Convention and to effectively resolve any violations at the national level. Thus, the Court acts as a final remedy, in other words, a safeguard for violations that have not been solved at the national level and exercises authoritative supervision over the contracting states as the ”ultimate interpreter of the law of the Convention”.[37] It is compulsory for all the contracting states to recognise the right to individual application before the Court as well as the binding nature of the Court’s final judgments.[38]

The growing awareness of the significance of the Court in redressing human rights violations has resulted in an increasing caseload.[39] To ensure the future viability of the Court, the contracting states prepared the Brighton declaration which, among other things, amended the application period from six months to four months after exhausting domestic remedies. The Brighton Declaration subsequently led to the new Protocol No. 15 which will enter into force as soon as all contracting states have signed and ratified it.[40]

The Court’s special position as a supranational human rights court exercising its judicial power over sovereign states gives rise to issues that national supreme or constitutional

[36] Helfer 1993, 133; Ryssdall 1996, 18.

[37] Brighton declaration, § 3; Yourow 1995, 2–4. Prior to 1998 and the entry into force of Protocol No. 11, there was also a judicial body called the European Commission of Human Rights. The Commission made all admissibility decisions and decided which applications were directed to the Court for further examination of the merits.

[38] ECHR articles 34 and 46.

[39] ECtHR 2014b, 3–7. In the end of 2013 there were almost 100 000 applications pending before the Court. In 2013 the Court delivered approximately 3600 judgments while almost 90 000 were declared inadmissible or struck out. The countries that top the statistics in both pending applications and delivered judgments are: Russia, Turkey, Romania, Ukraine, Italy and Serbia. Over two thirds of the judgments in which the Court found a violation concerned right to fair trial; prohibition of torture and inhuman treatment, and right to liberty and security.

[40] Brighton Declaration; Protocol No. 15 was opened for signature in June 2013, as of 18 March 2014 there were 29 signatures and 6 ratifications.

courts do not encounter. The current forty-seven contracting states comprise a considerable cultural and legal diversity: the English common law and the continental civil law, and the old liberal democracies in West and the post-socialistic East being just few of the fault lines Yourow identifies.[41] This makes it often hard to identify a uniform standard of human rights in all the contracting states. Therefore, the protection must be gradual, in order to maintain the ”fragile foundations of the consent” of contracting states, on which the entire legal framework of the Court rests upon.[42]

Starting point for the Court's interpretation of the Convention has been international law codified in the Vienna Convention on the Law of Treaties.[43] Although the Vienna Convention has been seldom cited in its judgments, it is nevertheless a constant source of inspiration.[44] However, given the 'special character' of the Convention, the Court has over the years developed a distinctive set of creative interpretation methods of its own.[45] Johnson notes that although the way the Court applies its interpretation methods is often subject to criticism for lacking coherence and consistency; they are, on the other hand, an important framework through which it strives to sustain judicial consistency and legal stability. He agrees that it is important that the Court's judgements appear to be based on a legal principle rather than judicial interest of the judges, in order to warrant a creative interpretation of the Convention.[46]

In this chapter I shall explain some of the most central interpretation methods used by the Court. These interpretation methods have been developed in the Court's case law and have previously not been included in the actual text of the Convention. However, the new Protocol No. 15 will add a reference to the principle of subsidiarity and the doctrine of the margin of appreciation in the preamble of the Convention.

2.2 Autonomous concept

The principle of autonomous concept implies that the terms used in relation to the Convention have an independent meaning which is not necessarily congruent with the meaning in national law. The definition of any concept in national law constitutes only a

[41] Yourow 1995, 4–5.
[42] Council of Europe 2008.
[43] White & Ovey 2010, 64.
[44] Mowbray 2005, 59 footnote 10.
[45] Mowbray 2005, 59–60; White & Ovey 2010, 64.
[46] Johnson 2012b, 65–67.

starting point, but its meaning may transcend what most people in the contracting state think or how national officials classify the concept.[47]

Using autonomous concepts ensures, first, that the Convention terms have the same meaning in all the contracting states, and second, that the contracting states do not try to circumvent the Convention by classifying something in a way that escapes the guarantees of the Convention.[48] This principle first emerged in *Engel and Others v. the Netherlands* (1976) where it was applied to the meaning of 'criminal charge' in the Convention context. The concepts used in relation to family have an autonomous meaning as well, although the principle has not been explicitly used by the Court in any of the cases examined in this thesis.

2.3 Evolutive interpretation

The evolutive interpretation was first introduced in *Tyrer v. the United Kingdom* (1978) regarding whether a judicial corporal punishment was degrading treatment prohibited by article 3 in the Convention. The Court stated that "the Convention is a living instrument which […] must be interpreted in the light of present-day conditions".[49] In other words, the effective protection of human rights requires that the Convention is interpreted in the context of "democratic European society of today" and not in that of sixty years ago when the Convention was drafted.[50] The evolutive approach allows the Court to consider the changing social, cultural, moral and legal context of European societies as well as to update its case law with regard to changes that the original drafters of the Convention were not able to foresee or conceive.[51] The living instrument doctrine is constantly relied by both, the Court and the applicants, in order to justify the expansion of the scope of the Convention rights. This doctrine has been of particular importance when it comes to LGBT rights under the Convention.[52]

The evolutive interpretation is closely linked with the 'object and purpose' of the Convention which derives from the Vienna Convention. The Court stated in *Soering v. the United Kingdom* that:

[47] Letsas 2007, 43, 46.
[48] Letsas 2007, 40–42; Danelius 2012, 51.
[49] Tyrer v. the United Kingdom (1978), § 31.
[50] Matscher 1993, 68; Yourow 1995, 57.
[51] Yourow 1995, 57; Johnson 2012b, 85; Nieminen, 2013, 124 footnote 225.
[52] See for example Johnson 2012b, 84–88.

> In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society'.[53]

The evolutive interpretation is also linked to the consensus analysis which is used in order to establish the present-day conditions or the current level of fundamental rights protection in contracting states.[54] The European consensus method will be further explained in chapter 2.6.

2.4 Principle of proportionality

In order to ensure that the rights laid down in the Convention are not interfered with unnecessarily, the Court applies the principle of proportionality. This principle requires that there is a "reasonable relationship between the means and the aim sought to be realised",[55] and that there is "a fair balance between the demands of the general interest of the community and the requirement of the protection of the individual's fundamental rights".[56]

The Court relies on the principle of proportionality often in the context of articles 8–11, the second paragraph of which expressly allows restrictions upon those rights as long as it is 'necessary in a democratic society' for certain listed public interest purposes. This has been interpreted to mean that the restrictions must be 'proportionate to the legitimate aim pursued'. In some cases the proportionality test has been invoked in determining whether a positive obligation has been satisfied. The principle of proportionality is also a part of the non-discrimination rule under article 14; for a difference in treatment not to infringe the prohibition of discrimination, there has to be a "reasonable relationship of proportionality between the means employed and the aim sought to be pursued".[57]

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[53] Soering v. the United Kingdom (1989), § 87.
[54] Mowbray 2005, 61.
[55] James and Others v. the United Kingdom (1986), § 50.
[56] Soering v. the United Kingdom (1989), § 89.
[57] E.B. v. France [GC] (2008), § 91; Harris et al. 2009, 10–11.

The Court takes account of a several factors when deciding whether an interference with a Convention rights is proportionate. One important factor is to which extent the interference restricts the right in question. The Court will consider an interference as disproportionate if it impairs the very essence of the right and the justification for the interference cannot be proved.[58]

2.5 Margin of Appreciation

The margin of appreciation doctrine is one of the key methods that the Court uses to review complaints; it has had a long history in the jurisprudence of the Court since it was first explained in *Handyside v. the United Kingdom* (1976).[59] The margin of appreciation can be defined as a certain measure of discretion or 'space for manoeuvre' subject to European supervision that the contracting states enjoy when fulfilling their obligations under the Convention.[60] The doctrine reflects the subsidiary nature of the Convention in relation to safeguarding human rights at the national level, and that the domestic authorities are in principle better placed to make assessments of the local needs and conditions.[61] The margin goes "hand in hand with supervision under the Convention system".[62] It is the Court's role to review the compatibility of decisions taken by national authorities with the Convention, having due regard to the State's margin of appreciation.[63] However, the doctrine also gives the Court "the flexibility needed to avoid damaging confrontations between the Court and the Member States and enables the Court to balance the sovereignty of Member States with their obligations under the Convention".[64]

Letsas distinguishes between two different ways the doctrine has been used by the Court: the 'substantive' and the 'structural' concept. The substantive concept is used to "address the relationship between individual freedoms and collective goals", whereas the structural concept is used to "address the limits or intensity of the review of the European Court of Human Rights in view of its status as an international tribunal".[65] The structural concept "amounts to the claim that the Court should often defer to the judgment of national

[58] Council of Europe 2008.
[59] Handyside v. the United Kingdom (1976), § 48; Harris et al. 2009, 11; Johnson 2012b, p. 69–70.
[60] Yourow 1995, 13; Harris et al. 2009, 11.
[61] Olsson v. Sweden (No. 2) (1992); Kilkelly 2003, 8; Brighton declaration, § 11.
[62] Brighton declaration, § 11.
[63] Brighton declaration, § 11.
[64] Council of Europe 2008.
[65] Letsas 2007, 80–81.

authorities on the basis that the ECHR is an international convention, not a national bill of rights".[66] Further, the ideas of subsidiarity and European consensus are often invoked to support the structural use of the margin of appreciation doctrine.[67]

The substantive concept of the margin of appreciation doctrine, on the other hand, is most often relied upon when balancing the rights contained in the first paragraphs of articles 8–11 against the permissible interferences which may be justified according to the limitation clauses found in second paragraphs of those articles.[68] In assessing whether or not an interference to an article 8–11 right is justifiable the Court applies a three-stage test: 1) the interference must be in accordance with the law, 2) the interference must pursue one of the legitimate aims listed, and 3) the interference must be proportionate, 'necessary in a democratic society' or respond to a 'pressing social need'. The margin of appreciation is most closely linked to the third part of that test, namely the principle of proportionality, and it is used in assessing the proportionality of the state's acts when weighting the competing public and individual interest.[69] The Court has often stated that when evaluating the pressing social need, its necessity, and the extent of the interfering measures, the contracting states enjoy "a certain but not unlimited margin of appreciation", however, the power to give the final ruling on whether the limitations are compatible with the Convention remains with the Court.[70]

The contracting states enjoy a margin of appreciation also in respect to the prohibition of discrimination under article 14. The states have discretion in when they assess whether and to what extent differences in otherwise similar or comparable situations justify a different treatment.[71]

The limits of the margin of appreciation differ according to the context it is applied to. Sometimes the margin afforded to the competent national authorities is broad and sometimes narrow. This depends on the circumstances of each case, the rights at issue or on the balancing of competing rights.[72] Factors to be taken into account when determining the scope of margin of appreciation include: the existence of common approach among the

[66] Letsas 2007, 81.
[67] Letsas 2007, 81.
[68] White and Ovey 2010, 79.
[69] Letsas 2007, 86; Harris et al. 2009, 12.
[70] Silver v. the United Kingdom (1983), §97; Kilkelly 2003, 7; Van Dijk et al 2006, 341.
[71] Gas and Dubois v. France (2012), § 58.
[72] Kilkelly 2003, 7, 32; White & Ovey 2010, 326.

laws of contracting states, the sensitivity of the area being considered and the variety of customs, policies and practices throughout contracting states.[73] States have been allowed a wide margin of appreciation in cases concerning the protection of public morals because the Court has found there to be little common ground between, or a lack of ”a uniform conception of morals” in the contracting states.[74] The Court frequently states that the national authorities are better placed to give an opinion on the exact content of public morals in their contracting state.[75] Wide margin of appreciation is applicable also, for instance, when it comes to general measures of economic and social strategy.[76]

On the other hand, where a particularly important element of an individual's existence or identity is in issue, the Court is less likely to afford the contracting state a broad discretion.[77] For example in *Dudgeon v. the United Kingdom* the Court held that because the applicable criminal law prevented the applicant from enjoying "a most intimate aspect of private life", particularly serious reasons should have been shown before the interference would have be accepted as necessary.[78] Furthermore, in cases where a difference of treatment is based on sex or sexual orientation the margin of appreciation is narrow.[79]

In many of the cases examined in this thesis, the issues of individual's identity requiring a narrow margin, and public interest or morals clash. The legal recognition of one's emotional family ties is very important element of one's existence but the claims of legal recognition of same-sex family life are often rejected with reference to the public interest in protecting the traditional family. No clear rules emerges from the Court's case law as to which right preceded the other, instead the Court performs the balancing on a case-by-case basis.

[73] Kilkelly 2003, 7–8, 32.

[74] Council of Europe 2008.

[75] Handyside v. the United Kingdom (1976), §48; Müller and Others v. Switzerland (1988), § 35; Open Door and Dublin Well Woman (1992), § 68; Vo v. France [GC] (2004), § 82; A, B and C v. Ireland [GC] (2010), § 223.

[76] Gas and Dubois v. France (2012), § 60.

[77] White & Ovey 2010, 327.

[78] Dudgeon v. the United Kingdom (1981). The case concerned criminalisation of homosexual conduct. White & Ovey 2010, 327.

[79] Vallianatos and Others v. Greece (2013), § 77.

2.6 European consensus

European consensus can be described as a common European approach amongst the majority of Council of Europe member states regarding certain values and moral principles;[80] as the existence of similar patterns of practice, regulation and law across the member states;[81] or as a consensus on the relative importance of the interests at stake and as to the best means of protecting them.[82]

However, according to Bribosia et al. "the consensus argument is not a strictly legal tool but rather the instrument of a judicial policy lead by the Court in a context where it must pay attention to the effectiveness of its rulings".[83] Furthermore, Wintemute observes that European consensus "serves to anchor the court in legal, political and social reality on the ground" compared to UN "human rights law [that] often loses all contact with Earth, and floats off into the stratosphere".[84]

European consensus often plays a key role in both determining the extent of the margin of appreciation afforded to the contracting states as well as legitimising the evolutive interpretation.[85] In determining the extent of the state's margin of appreciation, a lack of European consensus usually results in wider margin of appreciation. On the other hand, the existence of common European ground will severely limit the state's margin. Consequently, if the respondent state deviates too much from the practice followed in other member states, the Court will more likely to found a violation.[86] For instance, in *Handyside* the Court stated that:

> […] it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The vie taken by their respective laws of the requirements of morals varies from time to time and from place to place […] State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements […].[87]

European consensus may also provide evidence of the evolved European standard, which eventually provides a basis for the evolution of Convention standards through the Court's

[80] Dzehtsiarou 2009, 10.
[81] Council of Europe 2008.
[82] Dzehtsiarou 2009, 10.
[83] Bribosia et al. 2014, 14.
[84] Wintemute 2010.
[85] Council of Europe 2008; Dzehtsiarou 2011, 1733, 1736.
[86] Yourow 1995, 194; Council of Europe 2008.
[87] Handyside v. the United Kingdom (1976), § 48.

case law. The Court frequently uses European consensus as a way to legitimate departure from its previous case law; on the other hand, a lack of consensus may prevent a dynamic reading of the Convention.[88] For instance, in *Marckx v. Belgium*, the Court used European consensus as a basis for evolutive interpretation of the Convention:

> […] the Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments […] there is a clear measure of common ground in this area amongst modern societies.[89]

Much research has been put into as what exactly constitutes European consensus in the Court's view and how it is measured, since it is not always evident from the Court's judgments.[90] Furthermore, a crucial problem with the European consensus standard arises in the context of minority rights, such as LGBT rights, because existence of European consensus is dependent on the majority opinion.[91]

[88] Kovler et al. 2008; Dzehtsiarou 2011, 1736.
[89] Marckx v. Belgium (1979), § 41.
[90] See for example: Helfer 1993, 138–140.
[91] Benvenisti 1999, 847; Letsas 2007, 121.

3. THE RELEVANT PROVISIONS OF THE CONVENTION

3.1 Article 8: the right to respect for private life and family life

The article 8 of the Convention protects the fundamental right to respect for private and family life. The essential object of this provision is to prevent any arbitrary interference by the public authorities in the private and family sphere of every individual. In addition, a positive obligation may arise from this right.[92]

Article 8 of the Convention reads as follows:

> 1. Everyone has the right to respect for [their] private and family life, [their] home and [their] correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of heath or morals, or for the protection of the rights and freedoms of others.

When faced with a complaint brought under article 8, the Court will first consider whether the right, which an individual complains has been interfered with, is a right actually guaranteed by article 8.[93] This means that the Court will analyse whether the relationship described by the applicant can be characterised as 'private life' or 'family life' within the meaning of article 8(1).[94] Once it has been established that the application in fact falls within the scope of article 8, the Court will go on to determine whether there has been an interference with the right to respect for 'private life' or 'family life' and if that interference can be justified with reference to the requirements under article 8(2), namely, that the interference was in accordance with law, pursues a legitimate aim listed in the paragraph and is necessary in a democratic society.[95] In some cases the Court will consider whether the state in question had a positive obligation to act to comply with the 'respect' requirement and whether it failed to act.[96]

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[92] Kilkelly 2003, 20; Almeida, 1.
[93] Kilkelly 2003, 8.
[94] Almeida, 2.
[95] Kilkelly 2003, 9; Almeida, 2.
[96] Kilkelly 2003, 9; Almeida, 2.

3.1.1 Court's notion of 'private life'

The focus of this thesis is on the 'family life' branch of article 8 in the Court's jurisprudence. However, 'private life' and 'family life' are two limbs of the same article and the Court does not always make a distinction between the two but states that a complaint falls within the scope of article 8 in general. Although, the cases analysed in this thesis essentially concern the right to family life of same-sex couples, prior to *Schalk and Kopf v. Austria* (2010) all applications concerning same-sex family life were examined under the 'private life' limb of article 8, because same-sex relationships did not qualify as 'family life' in the Court's and the Commission's opinion.[97] Accordingly, it is relevant to include here some considerations on the Court's notion of 'private life'.

'Private life' is a broad concept and so far, the Court has declined to give an exhaustive definition.[98] However, there are many definitions and descriptions to be found in the Court's jurisprudence as well as in literature. One description of 'private life', for instance, can be found in the *Pretty* case:

> It covers the physical and psychological integrity of a person […] It can sometimes embrace aspects of an individual's physical and social identity […] Elements such as, for example, gender identification, name and *sexual orientation* and *sexual life* […] Article 8 also protects a right to personal development and the *right to establish and develop relationship with other human beings* and the outside world.[99]

A very apt definition, in my opinion, has been given by Jean Rivero:

> Private life is the sphere of each individual life into which no one can intrude without having been asked. Freedom of private life is the recognition, to everyone's benefit, of a zone of activity which is one's own and whose entry one is free to prohibit to anyone.[100]

It was established already in *X. v. the Federal Republic of Germany* (1975) that sexual life is an important aspect of one's private life and that sexual life includes the right to establish sexual relationships and thus the choice of affirming and assuming one's sexual identity.[101]

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[97] Schalk and Kopf v. Austria (2010), § 92.
[98] van Dijk et al. 2006, 664.
[99] Pretty v. the United Kingdom (2002), § 61, (emphasis added); van Dijk et al. 2006, 665.
[100] Rivero 1989, 76; Cohen-Jonathan 1993, 406.
[101] X. v. the Federal Republic of Germany [dec.] (1975), § 2; Kilkelly 2003, 11; Johnson 2012b, 36.

3.1.2 The Court's notion of 'family life'

The notion of 'family life' is an autonomous concept, which means that it must be interpreted independently from the national law of the contracting states.[102] However, as is the case with the notion of 'private life', the Court has avoided giving an exhaustive definition of the concept; rather, it has taken a case-by-case approach as to determine its applicability. This flexible approach allows the Court to take into account different factors concerning social, legal and technological developments such as diversity of modern family arrangements and the implications of divorce and medical advance across the Council of Europe member states, as well as the social and emotional realities of modern family ties without being tied by definitions of the family found in national laws. As a result, the concept of 'family life' has evolved steadily through the lifetime of the Convention. However, as a result of the Court's case-by-case approach, it is not always possible to exhaustively distinguish those relationships that constitute a family life and those that do no.[103]

The general principle to be applied, when deciding on the existence of family life, is whether there are close personal ties between the parties.[104] The mere existence of a biological tie is not enough for the article 8 to be applicable, only sufficiently close factual ties amount to family life. The existence of such ties is determined by the nature of the family relationship invoked by the applicant.[105] The factors to be considered in order to examine if the relationship is indeed genuine and has sufficient constancy to create 'family life' may include e.g. did the couple live together, the length of the relationship, do they have any children and are there any elements of financial or psychological dependency that goes beyond normal emotional ties.[106]

For married couples and their children as well as for other close family relationships the existence of family ties is assumed unless their absence is evident or proven. For other relationships the genuineness of the family ties is determined usually by using the above-mentioned criteria.[107] For instance, cohabiting different-sex de *facto couples* have enjoyed

[102] van Dijk et al. 2006, 690.
[103] Kilkelly 2003, 10, 15–16.
[104] Kilkelly 2003, 16.
[105] van Dijk et al. 2006, 693–694; Hodson, 2011, 174.
[106] Almeida, 7.
[107] van Dijk et al. 2006, 694.

family life in the Court's jurisprudence for quite long time.[108] Also a child born out of such a relationship is *ipso jure* part of that family unit from the moment of the child's birth.[109] A child enjoys family with both parents even though they are not in a relationship together and only one of the parents is cohabiting with the child.[110] However, the right to respect for family life does not protect the mere desire to found a family; it presupposes the existence of a family or at least the potential relationship between a child and a parent.[111]

Same-sex couples and families, on the other hand, were excluded from the scope of 'family life' until 2010 and their relationship was only considered to be a part of their 'private life'.[112] However, the recent case law of the Court have extended the scope of 'family life' not only to cohabiting same-sex couples, but also in some cases to same-sex couples who are not cohabiting for professional and social reasons.[113]

Also other relationships, such as, children and their grandparents and aunts and uncles, siblings, parents and their children born as a result of extra-marital affair, children and adoptive parents, and children and foster parents have been found to constitute family life. Once family life has been established it does not come to an end upon divorce or break up. Subsequent events such as adoption or expulsion may break the family tie but only in exceptional circumstances.[114]

On basis of the above considerations the concept of 'family life' in the Court's jurisprudence is very diverse and encompasses many different family relationships. There are also some other elements that suggests the same, namely, that "the Court places clear emphasis on the social rather than the biological reality of a situation" when determining whether family life exists;[115] and "[t]he traditional European concepts common to the member States of the Council of Europe is not considered decisive; a family composed according to a different cultural pattern – e.g. a polygamous family – is equally entitled to protection",[116] although it does not constitute an obligation to recognise such unions as

[108] See for example Johnston and Others v. the United Kingdom (1986) ; S v. the United Kingdom [dec.] (1986).
[109] Schalk and Kopf v. Austria (2010), § 91. van Dijk et al. 2006, 690.
[110] Keegan v. Ireland (1994); van Dijk et al. 2006, 690–691.
[111] E.B. v. France [GC] (2008), § 41.
[112] Hodson 2011, 174.
[113] Schalk and Kopf v. Austria (2010), § 94; Vallianatos and Others v. Greece (2013), § 73.
[114] Kilkelly 2003, 18–19; van Dijk et al. 2006, 691.
[115] Kilkelly 2003, 17.
[116] van Dijk et al. 2006, 690.

formal marriages.[117] The Court has also recently emphasised the necessity to take into account the developments in society, civil-status issues and relationships. It has also highlighted the fact that there is not just one right way or one right choice when it comes to leading one's family life.[118]

3.1.3 Positive obligation under article 8

In *Marckx v. Belgium* (1979) the Court introduced the concept of positive obligations in its case law:

> […] the object of the Article [8] is "essentially" that of protecting the individual against arbitrary interference by the public authorities. Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life. This means, amongst other things, that when the State determines in its domestic legal system the regime applicable to certain family ties […], it must act in a manner calculated to allow those concerned to lead a normal family life.[119]

Since then, the Court has held in numerous occasions that there may be a positive obligation inherent in the effective respect of the rights protected under article 8. This means that contracting states may have to act affirmatively in order to guarantee individuals the effective enjoyment of their private and family life.[120] For instance, in the above-mentioned *Marckx* case the positive obligation under article 8 required the state legally recognise the relationship between an unwed mother and her biological child to allow them to lead a normal family life.[121]

However, the notion of 'respect' is not clear-cut, but the Court will take account of the diversity of practices and the varying circumstances of each contracting state. Accordingly, the requirements to ensure effective respect for family life may vary considerably from case to case.[122] In determining whether a positive obligation exists, regard must be had to "whether a fair balance has been struck between the general interests of the community and the interests of the individual".[123] The difference between the use of a positive

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[117] Alam and Khan v. the United Kingdom [report] (1986); Almeida, 9.

[118] Vallianatos and Others v. Greece (2013), § 84.

[119] Marckx v. Belgium (1979), § 31.

[120] Kilkelly 2003, 20; Akandji-Kombe 2007, 6. For cases see for example: X and Y v. the Netherlands (1985); Kroon and Others v. the Netherlands (1994), § 31; Christine Goodwin v. the United Kingdom [GC] (2002), § 72.

[121] Marckx v. Belgium (1979), § 45.

[122] Christine Goodwin v. the United Kingdom [GC] (2002), § 72; Kilkelly 2003, 21.

[123] Kilkelly 2003, 21.

obligations approach and the more traditional negative obligations approach is often apparent from the Court's reasoning, but not from its conclusions.[124]

3.2 Article 12: the right to marry and to found a family

Article 12 guarantees the right to marry and to found a family:

> 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 right to marry and to found a family is a *lex specialis* in relation to the right to family life in article 8. The applicants who rely on article 12 usually rely on article 8 as well. However, when two persons have entered into marriage, interference with their marital life constitutes an issue under article 8 and not under article 12.[125] The article contains two distinguishable aspects 'the right to marry' and 'the right to found a family'. The Court has stated that the second aspect is not a condition of the first and that "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 the provision".[126]

Article 12 does not include a second paragraph, similar to that of article 8, which lays down possibilities for restrictions. Nevertheless, in the last part of the article "according to the national laws governing the exercise of this right", the national legislation has been left a certain margin for subjecting the exercise of the rights to certain conditions such as the regulation of the legal consequences of marriage and laying down provisions concerning the resulting family ties.[127] The scope of national law, however, is not unlimited and the limitations introduced by national law "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".[128] The restrictions placed on the right by national law must be imposed for a legitimate purpose and must not go beyond a reasonable limit to attain that purpose.[129]

The Court has interpreted the explicit reference to "men and women of marriageable age" to mean that only two persons of different sex has the right to marry, although the determination of gender should no longer be limited to purely biological criteria. In this

[124] Kilkelly, 2003, 21.
[125] van Dijk et al. 2006, 841–842.
[126] Christine Goodwin v. the United Kingdom [GC] (2002), § 98.
[127] van Dijk et al. 2006, 842; White & Ovey 2010, 353.
[128] Christine Goodwin v. the United Kingdom [GC] (2002), § 99; van Dijk et al. 2006, 842.
[129] White & Ovey 2010, 353.

context, the Court has made reference to article 9 of the European Union Charter of Fundamental Right which also contains 'a right to marry' but with different wording: "The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." The deliberate omission of the reference to 'men and women' makes future application to same-sex couples possible, although the mention of 'national laws' leaves member states some room for discretion.[130]

3.3 Article 14 – Prohibition of discrimination

Article 14 of the Convention provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 is not an autonomous provision but has effect only in relation to other Convention rights. The application of article 14 does not presuppose or require a violation of any of the substantive rights of the Convention but it is not applicable unless the facts of the complaint fall within the scope of one or more of the other substantive provisions.[131]

When reviewing complaints concerning article 14, the Court employs a four-stage analysis to find out whether any difference in treatment amounts to discrimination under the Convention.[132] First, the Court examines whether the application falls within the scope of at least one of the substantive provisions. For article 14 to be applicable, "either the *opportunity* denied or the *ground* for the denial must fall 'within the ambit' of the other Convention right".[133] However, if a state has gone beyond its contracted duties and introduced additional rights than the minimum required by the Convention, article 14 prohibits discrimination also in respect to those rights if they relate to any substantive provision of the Convention.[134] Ultimately determining the scope of Article 14, according to Baker, "calls for an open-textured consideration of whether the claimant's enjoyment of a Convention right or freedom on a basis of equality with other members of society has been impaired by a state measure or decision".[135]

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[130] Christine Goodwin v. the United Kingdom [GC] (2002), § 100.
[131] E.B. v. France [GC] (2008), § 47; Fretté v. France (2002), § 27; Johnson 2012b, 123.
[132] Johnson 2012b, 123.
[133] Wintemute 2004b, 371 (emphasis in original).
[134] E.B. v. France [GC] (2008), § 48; Johnson 2012b, 123.
[135] Baker 2006, 737.

In the second stage of the analysis, the Court considers whether the reason for the alleged discrimination is one of the grounds listed in article 14. Even though sexual orientation is not explicitly listed in the article, the Court has held that it is, indeed, a ground covered by 'other status' in article 14.[136] The Court has even stated that differences based on sexual orientation require particularly serious reasons by way of justification;[137] and that differences based *solely* on considerations of sexual orientation are unacceptable under the Convention.[138]

The third stage of the analysis involves determining whether the applicant is in a relatively similar or analogous situation with a class of persons who are treated more favourably.[139] This strives to enable the Court to determine whether the discriminatory treatment is attributable to one of prohibited grounds of discrimination under article 14 and not to other factors. The situation of the applicant and the comparator must be analogous in all material respects in order to properly conclude that the difference in treatment arises from a ground prohibited under article 14.[140]

The fourth and final stage of the test is analysing whether any difference in treatment by public authority had a reasonable and objective justification.[141] This means that the difference in treatment must pursue 'a legitimate aim' or there has to be "a reasonable relationship of proportionality between the means employed and the aim sought to be realised". Margin of appreciation afforded to the contracting states by the Court plays an important role in assessing whether and to what extent differences in treatment in otherwise similar situations justify a different treatment.[142] For instance, in situations where a difference in treatment is based on sex or sexual orientation, the margin of appreciation is narrow.[143] On the other hand, the margin is usually wide when it comes to general measures of economic or social strategy, such as whether the states should provide registered partnership for same-sex couples.[144]

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[136] Sutherland v. the United Kingdom, Commission report (1997), §§50–51; Johnson 2012b, 124.
[137] Gas and Dubois v. France (2012), § 59.
[138] Vallianatos and Others v. Greece (2013), § 77.
[139] Johnson 2012b, 124.
[140] White & Ovey 2010, 558–559.
[141] Johnson 2012b, 125.
[142] Gas and Dubois v. France (2012), § 58.
[143] Vallianatos and Others v. Greece (2013), § 77.
[144] Gas and Dubois v. France (2012), § 60.

3.4 Article 1 of Protocol No. 12

In addition to article 14, the Convention contains a general prohibition of discrimination in the Protocol No. 12 which entered into force in 2005 and currently has18 ratifications.[145]

Article 1 of Protocol No. 12 reads:

> 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

To date, the Court has issued only one judgment concerning Protocol No. 12,[146] and considering that less than half of the contracting states have ratified the Protocol, its practical effect is still quite little. However, as Wintemute argues, if every state ratified the Protocol No. 12, it would supersede article 14 and its requirement that a complaint must fall within the scope of one of the substantial provisions.[147] In such case the Court would be free to examine any differential treatment by a public authority in respect of legal rights and decide whether there is an objective and reasonable justification.[148]

On the other hand, Johnson thinks that most likely the Protocol No. 12 will not dramatically change the situations for applicants complaining on sexual orientation discrimination since the Court is already ”willing to engage in a wide reading of the other substantive provisions of the Convention and accept that discrimination on the grounds of sexual orientation falls within their ambit for the purposes of Article 14”. For example in *E.B. v. France* the Court held that although the Convention does not guarantee a right to adopt *per se*, if a contracting state has gone beyond its Convention duties and decided to allow adoption for single persons, it must do so without discrimination based on, among others, sexual orientation.[149] According to Johnson, the Protocol No. 12 is important only

[145] Simplified Chart of signatures and ratifications, Status as of: 14 March 2014.

[146] Sejdić and Finci v. Bosnia and Herzegovina [GC] (2009). The applicants complained on their inability to stand for national elections on the ground of their origin.

[147] Wintemute 2004a, 484–485.

[148] Johnson 2012b, 144.

[149] E.B. v. France [GC] (2008).

insofar it puts beyond any doubt the principle that sexual minorities must not be discriminated against in the enjoyment of any right set forth in law.[150]

[150] Johnson 2012b, 144.

4. LEGAL RECOGNITION OF SAME-SEX FAMILY LIFE

4.1 Acknowledging same-sex 'family life'

As Sörgjerd observes, the distinction between private life and family life is essential for the level of protection guaranteed by the Convention, the 'family life' limb offering more extensive protection. It includes, *inter alia*, a right for family members to live together, an obligation for the national legislator to protect the family in national family laws, and to guarantee the same social benefits to same-sex couples as those applicable to unmarried cohabiting different-sex couples.[151] On the other hand, Nieminen suggests that the Court has in fact already recognised a pluralistic family model by protecting same-sex families through the 'private life' limb of article 8, which would have made it possible to maintain a more traditionalistic approach to the 'family life' limb.[152]

In any case, the Court's acknowledgement that same-sex couples enjoy 'family life' for the purposes of article 8, is a prerequisite for the future extension of positive obligation to require the legal recognition of same-sex family life.

The need for recognition of same-sex relationships as 'family life', or at least as being in a comparable situation with different-sex couples, first emerged in several complaints concerning the immigration regime of the United Kingdom in the 1980s. Common to these complaints was that the first applicant, who was being deported, was in a same-sex relationship with the second applicant who was a UK citizen.[153] The UK immigration rules did not recognise any form of same-sex relationship as a basis for granting a residence permit to an alien, whereas different-sex marriage or engagement formed a basis for staying in the United Kingdom.[154] The Commission found all these applications manifestly ill-founded and therefore inadmissible. Usually, it did not give any explanation as to why it came to this conclusion. For example in one of the first cases, *X and Y v. the United Kingdom* (1983), the Commission simply stated that "despite the modern evolution of

[151] Sörgjerd 2012, 295, 296.
[152] Nieminen 2013, 20.
[153] X. and Y. v. the United Kingdom [dec.] (1983); W.J. and D.P. v. the United Kingdom [dec.] (1987); C. and L.M. v. the United Kingdom [dec.] (1989); Z.B. v. the United Kingdom [dec.] (1990).
[154] Abdulaziz, Cabales and Balkandali v. the United Kingdom (1985), §§ 20–32.

attitudes towards homosexuality […] the applicants' relationship does not fall within the scope of the right to respect for family life". [155]

The Commission's statement in the decision *S v. the United Kingdom* (1986) which concerned succession to a tenancy, summarises its approach to same-sex family life:

> […] the family (to which the relationship of heterosexual unmarried couples living together as husband and wife can be assimilated) merits special protection in society and it sees no reason why a High Contracting Party should not afford particular assistance to families. The Commission therefore accepts that the difference in treatment between the applicant and somebody in the same position whose partner had been of the opposite sex can be objectively and reasonably justified. [156]

The Commission distinguished between traditional established families, *i.e.*, heterosexual families and other established relationships such as homosexual partnerships that did not fall within the definition of 'family life.[157] In *Kerkhoven and Others v. the Netherlands* (1992), a case that concerned second-parent adoption of a child born through artificial insemination by donor (AID), the Commission stated that "as regards parental authority over a child, a homosexual couple cannot be equated to a man and a woman living together".[158]

The judgment *X, Y and Z v. the United Kingdom* (1997) suggests that the same-sex relationship seems to have been the main obstacle for 'family life'. In that case the applicants were X, a female-to-male transsexual, his female partner Y and Y's biological daughter born through AID. X and Y had applied for AID together and had gone through the treatment as a couple. However, because the United Kingdom legislation at the time did not allow transsexual persons to register their post-operative gender, Y remained female for legal purposes; therefore he could not be registered as the child's father. Although not finding a violation the Court, nevertheless, concluded that 'family life' existed between the applicants because X lived in society as a man and to all appearance as Y's male partner. Therefore, their situation was "indistinguishable from the traditional notion of family life".[159]

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[155] X and Y v. the United Kingdom [dec.] (1983).

[156] S. v. the United Kingdom [dec.] (1986).

[157] Z.B. v. the United Kingdom [dec.] (1983); C. and L.M. v. the United Kingdom [dec.] (1989), § 2; Johnson 2012, 116.

[158] Kerkhoven and others v. the Netherlands [dec.] (1992), § 2.

[159] X, Y and Z v. the United Kingdom [GC] (1997), §§ 1–19, 29, 35–37.

The decision *Mata Estevez v. Spain (*2001) was the first same-sex family life complaint that the Court itself found inadmissible according the new rules under Protocol No. 11. The case concerned ineligibility of a homosexual partner to a survivor's pension. However, the Court followed the Commission's example and stated that the same-sex relationship did not fall within the scope of 'family life' under article 8. The reasons were that "despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnership between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation".[160]

Throughout the 2000s the Court insisted that intimate same-sex relationship did not constitute 'family life' but only 'private life'. However, the Court did not leave same-sex couples totally without protection. In both *Karner v. Austria* (2003) and *Kozak v. Poland* (2010) the Court upheld the applicants' complaint concerning their inability to succeed to a tenancy previously held by their deceased same-sex partner. In these cases the Court deliberately circumvented the question about 'private life' and 'family life' and stated that the complaint concerned the applicants' right to respect for their home.[161]

Finally, in the judgment *Schalk and Kopf v. Austria* (2010), the Court noted that:

> [A] rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples. Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of 'family'. In view of this evolution the Court considers it artificial to maintain the view that in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would.[162]

After *Schalk and Kopf* the question whether same-sex couples can enjoy family life for the purposes of the Convention has no longer been a contested issue but a statement of fact.[163] Although the acceptance of 'family life' may seem trivial, especially since the Court still did not find a violation in *Schalk and Kopf*, the Court's statement is nonetheless an important one. It opened whole new doors for the promotion of same-sex family rights. It

[160] Mata Estevez v. Spain [dec.] (2001).

[161] Karner v. Austria (2003), § 33; Kozak v. Poland (2010), § 83–84.

[162] Schalk and Kopf v. Austria (2010), §§ 93–94.

[163] See: Gas and Dubois v. France (2012), § 37; X and Others v. Austria [GC] (2013), § 95; Vallianatos and Others v. Greece (2013), § 73.

is a long term principle of the Court that the right to respect for family life gives rise to positive obligation for the state to take positive action to guarantee the effective enjoyment of the right to family life through legal recognition. By accepting that a same-sex relationship constitutes 'family life' the Court has paved way for the possible future expansion of the scope of positive obligations under article 8 to cover the obligation to legally recognise same-sex family life by providing access to a partnership institution.

4.2 Legal recognition through marriage or registered partnership legislation

The core issue in the discrimination against same-sex couples and same-sex families is the lack of legal recognition for their family life through marriage or similar institution such as civil partnership. If convention states were required to allow same-sex marriage or provide similar protection through civil partnership legislation, this would remedy most of the differential treatment same-sex couples now complain to the Court.

The Court frequently refers to the traditional concept of marriage and its "deep rooted social and cultural connotations"[164] to justify the special status of marriage in European societies and in its own jurisprudence. However, by examining the Court's case law in the matter, it is clear that 'marriage' has not been a static concept. Therefore I shall first examine how the concept of marriage have emerged in the Court in respect of divorce and transsexuals' right to marry before examining how the applications claiming the right to same-sex marriage and civil partnerships have been addressed by the Court.

4.2.1 Right to divorce

In *Johnston and Others v. Ireland* (1986) the applicants were a cohabiting different-sex couple and their daughter. The parents were unable to marry because the Irish constitution prohibited divorce and the father was already married but separated from his legal wife. This situation further affected their daughter's rights. As a result of her 'illegitimate' status, she suffered numerous disadvantages such as being unable to inherit her father; she could not have been legitimated even by her parents' subsequent marriage. The applicants alleged that the Irish law violated their rights under articles 8, 12 and 14.[165]

The Court rejected the applicant's claims as regards to article 12 and stated that the right to divorce cannot be derived from that article. In order to come to this conclusion, the Court

[164] Schalk and Kopf v. Austria (2010), § 62.
[165] Johnston and Others v. Ireland (1986), § 70.

referred to the ordinary meaning of the words 'right to marry', which covers the formation of marital relationships but not their dissolution. This interpretation, in the Court's opinion, was consistent with the object and purpose of the Convention and its *travaux préparatoires*, which showed that the drafters had deliberately deleted the words pertaining to marriage dissolution compared to the United Nations Universal Declaration of Human Rights, on which the article 12 was based on.[166]

In this respect, it is important to note that such deliberate omission had not hindered the Court before. In a case that concerned freedom of association (article 11) in 1981, the Court reached an exact opposite conclusion. The negative freedom of association, i.e., the right not to join (in that case) a trade union, was likewise, according to the *travaux préparatoires*, deliberately left out of the Convention but was included in the UN Declaration. Nevertheless, the Court ruled that the freedom of association also included a negative freedom of association, at least to some extent, because if article 11 was read as permitting every kind of compulsion to join a trade union, it would interfere with the very substance of the right.[167] To nominally distinguish the Johnston case from that one, the Court stated that "in a society adhering to the principle of monogamy, [prohibition on divorce] can [not] be regarded as injuring the substance of the right [to marry]".[168]

As regards the applicants' article 8 complaint, the Court found them to be a family for the purposes of that article despite the fact that their relationship existed outside of marriage. However, the positive obligation under article 8 did not extent so far as to require the respondent state to introduce measures permitting divorce and re-marriage.[169]

When it came to the rights of the child, the Court followed its precedent in *Marckx* and ruled that the 'illegitimate' daughter should be placed, legally and socially, in a position akin to that of a 'legitimate' child. Here the European consensus and margin of appreciation worked in the applicant's favour: the existence of European consensus in the matter being established already in *Marckx* judgement. As regards to the margin of appreciation, despite it being wide in the area in question "the absence of an appropriate

[166] Johnston and Others v. Ireland (1986), § 52.
[167] Young, James and Webster v. United Kingdom (1981), §§ 51–52; Letsas 2007, 65–67.
[168] Johnston and Others v. Ireland (1986), § 52.
[169] Johnston and Others v. Ireland (1986), §§ 56–57.

legal regime reflecting the third applicant's natural family ties amounts to a failure to respect her family life".[170]

Dillon strongly criticises the outcome of the *Johnston and Others*. According to her, there would have been plenty of reasons for the Court to find a violation also in respect of the parents' situation. Non-marital couples were considerably discriminated against in Irish statutory law: among others, the summary remedies for domestic violence did not apply to non-marital family, and non-marital family did not enjoy the same benefits under the social welfare system.[171] According to Dillon, the Irish constitutional prohibition of divorce had failed to prevent marital breakdown and the formation of 'non-traditional families' and she further argued that allowing divorce and remarriage would have remedied most of the problems and stigmatisation unmarried couples and their children suffered. Even the European consensus, which was totally absent from the Court's reasoning regarding divorce, was in the applicants' favour: Ireland was the only major Western European country that maintained its ban on divorce.[172]

The most probable reason why the Court did not find a violation of article 12, is that there had earlier that year been a national referendum to amend the constitution to allow divorce but the amendment had been rejected by majority. It has been proposed that after such a referendum it was impossible for the Court, as a supranational institution, to go against the will of the democratic majority despite the fact that European consensus would have supported the finding of a violation.[173] Borrowing from Salzberg's analysis in Marckx, the Court clearly could not afford to be judicially active in the Johnston case where it meant declaring the Irish constitution incompatible with the Convention.[174]

4.2.2 Transsexuals' right to marry

Prior to the landmark judgment in *Christine Goodwin* in 2002, the Court had examined three similar cases concerning the legal recognition of gender reassignment: *Rees* (1986), *Cossey* (1990) and *Sheffield and Horsham* (1998), all against the United Kingdom. All four cases concerned the refusal by the United Kingdom to legally recognise a post-operative transsexual's new gender identity and among other things, the right to marry someone of

[170] Johnston and Others v. Ireland (1986), §§ 74–75.
[171] Johnston and Others v. Ireland (1986), § 65; Dillon 1989, 68 footnotes 39 and 40, 89–90.
[172] Dillon 1989, 64 footnote 3, 71.
[173] Dillon 1989, 72, 75, 88–89.
[174] Salzberg 1984, 291–292.

their present opposite-sex. For instance, Ms. Goodwin who was a male-to-female post-operative transsexual could not marry a man because she still remained legally male.

It is interesting for the purposes of this thesis, how the Court's position on transsexuals' right to marry in their new gender changed from *Rees* to *Christine Goodwin*. In *Rees* the Court merely stated that the right to marry in article 12 "refers to the traditional marriage between persons of opposite biological sex [and] is mainly concerned to protect marriage as a basis of the family". In the Court's opinion, the legal impediment of transsexual persons to marry in their new gender did not impair the very essence of the right to marry.[175]

In *Cossey*, the Court already reflected upon the European consensus, evolutive interpretation and the margin of appreciation doctrine:

> Although some Contracting States would now regard as valid a marriage between a person in Miss Cossey's situation and a man, the developments which have occurred to date cannot be said to evidence any general abandonment of the traditional concept of marriage. In these circumstances, the Court does not consider that it is open to it to take a new approach to the interpretation of article 12 on the point at issue. It finds, furthermore, that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry.[176]

The Court reviewed the situation once more in 2002 in *Christine Goodwin v. the United Kingdom*, this time finding a violation of both articles 8 and 12. For the first time the Court departed from the traditional concept of marriage between persons of opposite sex and the interdependence between the 'right to marry' and the 'right to found a family' in article 12, and observed that the latter was not a precondition of the former. Therefore, "the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy" the right to marry. The Court also put significant weight on the evolutive interpretation and found that the terms 'man' and 'woman' in article 12 must no longer always refer to a determination of gender by purely biological criteria, considering that there had been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought by about developments in medicine and science in the field of transsexuality. The Court also noted, that in the article 9 of the

[175] Rees v. United Kingdom (1986), § 49–50.
[176] Cossey v. United Kingdom (1990), § 46.

European Union Charter of Fundamental Rights, adopted in 7 December 2000, the reference to a man and a woman had been deliberately removed.[177]

In the present day conditions it was artificial to assert that post-operative transsexuals had not been deprived of the very essence of their right to marry: ”The applicant […] lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so.” No longer could the respondent state resort to its margin of appreciation, because it appeared to the Court that the domestic courts, to which the matter according to the respondent government should be left, ”tend to view that the matter is best handled by the legislature, while the Government have no present intention to introduce legislation”.[178]

Even the European consensus, which often is an important reason why the Court affords wide margin of appreciation for the respondent state, was in the applicant’s favour. The Court went so far as to attach ”less importance to the lack of evidence of a common European approach […] than to *the clear and uncontested evidence of a continuing international trend* in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals”.[179] Although, the Court noted that ”fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself”, it would have been very inconsistent if the Court had found that recognition of transsexual’s post-operative gender did not require allowing them to marry in their new gender. Therefore, the margin of appreciation did not extent so far as to leave the question of marriage of transsexuals entirely to the contracting states. That would have been ”tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry.”[180]

The Christine Goodwin judgment is also important from the same-sex marriage point of view. It paved the way for a less rigid concept of marriage and the significance of self-determination as part of human rights protection.

[177] Christine Goodwin v. United Kingdom [GC] (2002), §§ 98, 100.
[178] Christine Goodwin v. United Kingdom [GC] (2002), §§ 101–102.
[179] Christine Goodwin v. United Kingdom [GC] (2002), §§ 84–85 (emphasis added).
[180] Christine Goodwin v. United Kingdom [GC] (2002), § 103.

4.2.3 Same-sex marriage

In *Schalk and Kopf v. Austria* (2010) the applicants challenged the Austrian law that limited the capacity to marry to two persons of the opposite sex. The applicants brought their claim under article 12 and article 14 taken in conjunction with article 8. They argued firstly, that article 12 should be read in the present-day conditions as obliging member states to grant same-sex couples access to marriage, and secondly, that excluding same-sex couples from marriage and the absence of any other form of legal recognition constituted discrimination contrary to the Convention.[181] By the time the Court heard the case, Austria had passed the Registered Partnership Act, which came into force in January 2010. There were however, a number of differences between marriage and registered partnership legislation mainly concerning parental rights, and it was because of these difference that the Court refused an application from the Austrian government to struck the case from the Court's list.[182]

The Court rejected the applicants' argument that the Convention, being a living instrument, should be interpreted in the light of present-day conditions in their case. Once again, it resorted to the drafters intention interpretation and explained that the choice of wording in article 12 ('men and women' instead of 'everyone' or 'no one') and the historical context clearly indicate that the right to marry in article 12 refers to marriage in the traditional sense of being a union between partners of opposite sex.[183] However the Court also rejected that article 12 was inapplicable in all circumstances to same-sex couples and thereby opened up discussion about the scope of contracting states' obligations under it. Nevertheless, it preferred to leave the matter to contracting states because of the lack of European consensus and the "deep-rooted social and cultural connotations" the marriage has, thereby warranting a wide margin of appreciation.[184]

As regards to the issue under articles 14 and 8, as already mentioned in chapter 4.1, the Court took a remarkable step forward and chose to depart from its earlier case law on same-sex couples and their incapability of enjoying 'family life'.[185] However, the Court's judgment falls short when it comes to the positive obligation under article 8 that require the

[181] Schalk and Kopf v. Austria (2010), §§ 7–9, 39, 57–58, 65; Johnson 2011, 360.
[182] Schalk and Kopf v. Austria (2010), § 16–23, 35–38; Johnson 2011, 360.
[183] Schalk and Kopf v. Austria (2010), §§ 55, 57–58.
[184] Schalk and Kopf v. Austria (2010), § 61–62; Hodson 2011, 172.
[185] Schalk and Kopf v. Austria (2010), §§ 93–94.

state to establish a legal framework that enables the normal enjoyment of family life and the development of family ties. The Court followed the article 14 test until its third stage and found a same-sex couple to be in relevantly similar situation compared to a different-sex couple ”as regards their need for legal recognition and protection of their relationship”. The Court even recalled that ”differences based on sexual orientation require particularly serious reasons”.[186] However, instead of requiring the respondent state to provide any justification for the exclusion of same-sex couples from marriage, the Court simply referred to its conclusion under article 12. It stated, *inter alia*, that the Convention should be read as a whole and article 8 having more general purpose and scope than article 12, could not be interpreted as to impose an obligation on the contracting states to grant same-sex couples access to marriage.[187]

Because of the Registered Partnership Act had been passed in Austria just prior to the judgment in *Schalk and Kopf*, the Court was ”not called upon to examine whether the lack of any means of legal recognition for same-sex couples would constitute a violation” of articles 14 and 8. It had also been within Austria’s margin of appreciation to not to provide legal recognition for same-sex couples any sooner that it had, as is the exact status of such ”alternative means of recognition”.[188]

The Court distinguished *Schalk and Kopf* from *Christine Goodwin* on two accounts, in order to explain why the principles established in the Goodwin case did not apply to same-sex marriage. Firstly, there was no European consensus regarding same-sex marriage.[189] However, in the Goodwin case the Court circumvented ”the lack of evidence of a common European approach” by referring to ”the clear and uncontested evidence of a continuing international trend”. Why was this not possible in Schalk and Kopf? There seems to be a somewhat clear international trend towards acceptance of same-sex marriage as well.[190] Secondly, the *Goodwin* case concerned marriage between partners of different genders, and it therefore fell within the heteronormative conception of marriage and accordingly, as

[186] Schalk and Kopf v. Austria (2010), §§ 96–99.
[187] Schalk and Kopf v. Austria (2010), § 101; Hodson 2011, 175.
[188] Schalk and Kopf v. Austria (2010), §§ 103, 106, 108.
[189] Schalk and Kopf v. Austria (2010), § 58; Johnson 2011, 361.
[190] See for example: Wintemute 2011, §§ 162–195; International Center for Advocates Against Discrimination 2013.

Bamforth notes, there was no need ”for more radical attempts to reconceptualise or move beyond ‘conventional’ notions of ‘male’ and ‘female’ when interpreting the Article”.[191]

The judgment in *Schalk and Kopf* has attracted much criticism. Hodson sees it as falling short of the equal protection the Convention promises to everybody regardless of, *inter alia*, his or her sexual orientation. This creates a situation ”in which a Convention right is currently enjoyed by a particular category of persons only with the say-so of the States themselves”. She further states that it is highly inadequate for a human rights tribunal of the Court’s status ”to look for State consensus when faced with a situation of acknowledged discrimination”, when the respondent state was not even asked to give any cogent reasons for discriminatory treatment. Consequently, the applicants’ complaint was ”not accorded the high-level of scrutiny that the Court has promised those complaining of sexual-orientation discrimination”.[192]

As the main reason for the outcome in *Schalk and Kopf*, Hodson sees the still prevalent prejudices against homosexuality. She argues that the Court used the reference to drafters’ intention not as an absolute relapse to more conservative interpretation methods, but as a ”smokescreen through which to conceal present day prejudice”. She continues: ”[i]t is the current struggle that Europe still faces to overcome preconceived ideas about marriage and the family to the exclusion of same-sex couples that is the real story in *Schalk and Kopf*”.[193]

Johnson provides a very comprehensive analysis of the case arguing how the Court reiterates a heteronormative understanding of marriage and declines to engage in a critical consideration on how ”ideas of gender difference are used to justify the preservation of the heteronormative social construction of marriage”. In doing so ”the Court has played a performative role in (re)constructing the heteronormative ‘tradition’ of marriage’”.[194] The higher courts in other jurisdictions have adopted totally different approach and found the exclusion of same-sex couples from the institution of marriage to be unconstitutional and

[191] Bamforth 2011, 137.
[192] Hodson 2011, 173.
[193] Hodson 2011, 178.
[194] Johnson 2012b, 159.

to violate basic human rights. They have even compared the marriage restriction based on gender to marriage restrictions based on race.[195]

The Court has later, in *Gas and Dubois v. France* and *X and Others v. Austria* unanimously confirmed its view that:

> Article 12 does not impose an obligation on the Contracting States to grant same-sex couples access to marriage. Nor can a right to same-sex marriage be derived from Article 14 taken in conjunction with Article 8. Where a State chooses to provide same-sex couples with an alternative means of legal recognition, it enjoys a certain margin of appreciation as regards the exact status conferred. Furthermore, the Court has repeatedly held that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences.[196]

In the Court's view same-sex couples are not discriminated against when they are denied legal rights available to married couples. Johnson sees this unanimous statement as a "clear sign that the Court intends no evolution in its case law on same-sex marriage in the near future". He argues that using the margin of appreciation to allow the contracting states to "maintain the heterosexual exclusivity of marriage [the Court] perpetuates a wide range of discrimination suffered" by same-sex families who cannot complain under article 14 about discrimination, that results from "being outside the 'special status' of marriage because such exclusion is permitted" under article 12. Since same-sex marriage is not allowed in the majority of contracting states, the Court essentially allows them to maintain forms of discrimination based solely on the grounds of sexual orientation.[197]

4.2.4 Same-sex civil partnerships

In *Vallianatos and Others v. Greece* (2013) several same-sex couples complained on the blanket exclusion of same-sex couples from the new civil union legislation passed in Greece. The law that entered into force in 2008 made provisions for an official form of partnership called 'civil unions' which was distinct from marriage and could only be entered by different-sex couples. The applicants brought their claims under article 14 taken in conjunction with article 8. The Greek government argued, *inter alia*, that the civil union law aimed to regulate the existing social phenomenon of unmarried different-sex couples

[195] Johnson 2012b, 159. See also: Minister of Home Affairs v. Fourie & Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs (2005) in South Africa; Perry v. Schwarzenegger (2010) in the United States District Court for the Northern District of California.
[196] X and Others v. Austria [GC] (2013), § 106. See also Gas and Dubois v. France (2012), §§ 66, 68.
[197] Johnson 2013c.

with children so that parent-child relationship would be legally protected even when the parents did not want to marry. However, civil unions were also accessible for different-sex couples without children.[198]

In determining the applicability of article 8, the Court took a small but significant step forward in its jurisprudence. It found that as to the scope of 'family life', there was no basis in distinguishing between cohabiting same-sex couples and same-sex couples who did not live together for professional and social reasons, thereby expanding the scope of 'family life' from what was the situation in Schalk and Kopf.[199]

Although *Vallianatos and Others* is a very important judgment as regards to the right to legal recognition of same-sex couples, the Court was very clear that it was only ruling on the specific situation when a state has already introduced a civil union legislation which excludes same-sex couples from its scope. Therefore it was not concerned with whether there was a general obligation to a convention state to provide a form of legal recognition in its domestic law.[200]

The Court applied its common article 14 test in order to approach the issue complained. The Court found that because "same-sex couples are just as capable as different-sex couples of entering into stable committed relationships", the applicants were in a comparable situation to a different-sex couple "as regards their need for legal recognition and protection of their relationship".[201] Also, the Court noted that "where a difference in treatment is based on […] sexual orientation the State's margin of appreciation is narrow" and that "differences based solely on considerations of sexual orientation are *unacceptable* under the Convention".[202]

As regards to the final stage of article 14 test, namely whether there had been objective and reasonable justification for the differential treatment, the Court concentrated on the reasons advanced by the government for excluding same-sex couples from the scope of the new law. Firstly, the government argued that the rights and obligations created by the civil union (relating to property status, the financial relations within each couple and their inheritance rights) could also be accessed by same-sex couples on a contractual basis under

[198] Vallianatos and Others v. Greece (2013), §§ 8–10, 62–65.
[199] Vallianatos and Others v. Greece (2013), § 73; Johnson 2013b.
[200] Vallianatos and Others v. Greece (2013), § 75; Johnson 2013b.
[201] Vallianatos and Others v. Greece (2013), § 78; Johnson 2013b,
[202] Vallianatos and Others v. Greece (2013), § 77, (emphasis added).

ordinary law. The Court rejected this argument by stating that the government's argument did not take account on the fact that a civil union as an officially recognised alternative to a marriage would have an "intrinsic value for the applicants irrespective of the legal effects, however narrow or extensive that they would produce".[203] The Court further observed that:

> Same-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples. Accordingly, the option of entering into a civil union would afford the former the only opportunity available for them under Greek law of formalising their relationship by conferring on it a legal status recognised by the State. […] 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 recognised by the State.[204]

The Court thereby acknowledged the importance of legal recognition of same-sex relationships, even when it ultimately is just a matter of symbolic recognition and the same legal effects could be achieved by other means as well.[205]

The second reason advanced by the government was that the civil union legislation was designed to achieve several goals such as protecting children born outside marriage, responding to the wishes of parents to raise their children being obliged to marry, and ultimately strengthening the institution of marriage and the family in the traditional sense. The Court reiterated its well-established position that the protection of the family in the traditional sense, as well as, the protection of the interests of children are weighty and legitimate reasons.[206] However, it also observed that since the Convention is a living instrument:

> The State in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social and civil status issues and relationships, including the fact that there is not jus one way or one choice when it comes to leading one's family or private life.[207]

The Court observed that despite the government's declared intentions of the civil union law, it was evident that its provisions were not confined to regulating the status of children born outside of marriage. The law clearly introduced a new form of non-marital partnership, a civil union, which excluded same-sex couples while being applicable to

[203] Vallianatos and Others v. Greece (2013), §§ 80–81.
[204] Vallianatos and Others v. Greece (2013), § 81.
[205] Johnson 2013b.
[206] Vallianatos and Others v. Greece (2013), §§ 80, 82–83.
[207] Vallianatos and Others v. Greece (2013), § 84.

different-sex couples with or without children. Therefore, the government in focusing its arguments on the situation of different-sex couples with children failed to justify the difference in treatment arising out of the legislation between same-sex and different sex couples who are not parents. The Court further stated that it had not been necessary to exclude same-sex couples from civil unions in order to pursue the legitimate aim of protecting children: ”It would not have been impossible for the legislature to include some provisions dealing specifically with children born outside marriage, while at the same time extending to same-sex couples the general possibility of entering into a civil union”.[208]

Finally, the Court noted that currently seventeen convention states recognise some form of civil partnership for same-sex couples, in addition two countries, Greece and Lithuania, authorise civil partnerships exclusively to different-sex couples. Consequently, the Court observed the emergence of a clear trend that when the convention states decide to provide a form of registered partnership as an alternative to marriage for unmarried couples, they include same-sex couples in its scope.[209] However, Johnson point out a problem behind this consensus analysis. According to him, the Court seems to suggest that ”there is a ‘trend’ in Europe for introducing legislation to make available to all unmarried couples an alternative system of registered partnership and that Greece and Lithuania are out of step with this”. When in fact, probably most of these states aimed to create a system of partnership regulation for same-sex couples which is not marriage.[210]

Vallianatos and Others is an important judgment and represents yet another small step forward for rights of same-sex families. However, it is only applicable to the specific situation where a state decides to or has already set up a civil partnership as an alternative to marriage, as a result of this judgment they must now include same-sex couples under its scope. The judgment falls short in dealing with the lack of same-sex partnership rights in contracting states in general.[211]

4.2.5 Cases currently pending at the Court

Several cases concerning the legal recognition of same-sex partnership are currently pending at the Court.

[208] Vallianatos and Others v. Greece (2013), §§ 86–89.
[209] Vallianatos and Others v. Greece (2013), § 91.
[210] Johnson 2013b.
[211] Johnson 2013b.

Hämäläinen v. Finland (previously *H. v. Finland*) concerns a transgender woman who cannot get her post-operative gender officially recognised because she and her wife refuse to divorce and nor do they want to transfer their marriage into a registered partnership. The Fourth section of the Court found no violation of any Convention rights and the case was subsequently referred to Grand Chamber which held a hearing in October 2013.[212] The Grand Chamber judgment will be important also from the same-sex marriage point of view, although the applicant has been very clear to distance her case from same-sex marriage.

In *Chapin and Charpentier v. France* the applicants are two men and their marriage conducted by a local mayor and which was subsequently declared void by the national courts. The applicants brought they claims under article 14 taken in conjunction with article 12 and in conjunction with article 8. The case was communicated already in April 2009.[213] Given that France authorised same-sex marriage in 2013, it is probable that the Court will struck this case out of its list, since the French law affords same rights to married same-sex couples as to married different-sex couples except for the access to assisted reproduction services. It is, however, unlikely that the Court will address this difference since it is not at issue in this specific case.

There are two cases pending against Italy both of which were communicated to the Italian government in December 2013. The first, *Orlandi and Others v. Italy,* is a complaint from six couples who have contracted same-sex marriage abroad and who complain on the refusal of Italian authorities to register these marriages. They also raise the issue of the inability to have any other legal recognition of same-sex relationships in the Italian legal order. They invoked articles 8, 12 and 14.[214] The second case, *Oliari and Others v. Italy* concerns the inability of same-sex couples to contract marriage or any other type of civil union in Italy. The applicants have invoked articles 8 and 14.[215] As Italy does not currently recognise any rights for same-sex couples, it would be very important that the Court should have a change to decide on the question of whether the contracting states should offer any form of legal recognition to same-sex couples. Also, Italy is clearly behind in the

[212] H. v. Finland (2012). See also previous decisions regarding this issue: Parry v. the United Kingdom [dec.] (2006) and R. and F. v. the United Kingdom [dec.] (2006).
[213] Chapin and Charpentier v. France; ECtHR 2014a, 2.
[214] Orlandi and Others v. Italy; ECtHR 2014a, 2
[215] Oliari and Others v. Italy; ECtHR 2014a, 12

development of same-sex family rights; it is the only major Western European country that does not offer any kind of legal recognition to same-sex couples.

Ferguson and Others v. the United Kingdom is a joint application from four different-sex and four same-sex couples. The application was lodged with the Court on 2 February 2011 and has not yet been communicated to the United Kingdom government. The applicants argue that separate legal provisions for the registration of different-sex and same-sex partners is discriminatory and violates article 14 taken in conjunction with article 12. This is a different approach than in *Schalk and Kopf* where the applicants complained under article 14 taken in conjunction with article 8 and article 12 alone. This strategy is "designed to encourage the Court to consider whether excluding same-sex couples from an opportunity that is provided to the majority under article 12 amount to discrimination under article 14".[216] The application, written by Professor Robert Wintemute, contains some very interesting argumentation and comparative case law. However, since the United Kingdom have now authorised same-sex marriages, this application will most likely to be struck out from the Court's list.[217]

4.3 Parent-child relationship

4.3.1 Same-sex couples and parenting

One important aspect of the legal recognition of same-sex family life is the legal recognition of parent-child relationships. According to the FRA's EU LGBT survey, 10% of households headed by a same-sex couple had children living in their household; in the individual EU member states the figures ranged between 7–15%.[218] Also a study conducted by the Council of Europe notes that many LGBT persons in Council of Europe member states raise children whether alone or with their partner, some of them may have brought children from previous heterosexual relationships to the partnership, and some of them have adopted children, or accessed services for medically assisted reproduction.[219]

The Committee of Ministers has recommended that the *child's best interest* should be the primary consideration in decisions regarding the child, such as, parental responsibility for,

[216] Johnson 2012b, 159–160.
[217] Wintemute 2011.
[218] FRA EU LGBT survey data explorer.
[219] Council of Europe 2011, 97.

guardianship of or adoption of a child.[220] An expert report focusing on the rights and legal status of children brought up in various forms of families found that the well-being of children in families depends also on the legal framework existing in each country:

> Children do not live in a vacuum, but within a family, and an important part of their protection is that the family unit, no matter what form it takes, enjoys adequate and equal legal recognition and protection. In other words, it is as discriminating to the child to limit legal parenthood, or to deny significant carers legal rights and responsibilities, as it is to accord the child a different status and legal rights according to the circumstances of their birth or upbringing.[221]

Also an ILGA-Europe report on the rights of children raised in LGBT families noted:

> […] it cannot be in the best interest of […] children to leave their important relationships of care outside of the legal framework of rights and responsibilities that are specifically designed to protect their interests simply on the basis of their parent's sexual orientation or gender identity.[222]

The biological parent-child relationship has always been protected under the Convention.[223] Further, the Court found already in 1999 that the sexual orientation of a biological parent must not be a factor when deciding on the parental custody over a child.[224] However, the child's status in same-sex families and especially the relationship between the second-parent and the child is often left without any legal protection even when the relationship between the parents is protected. As Hodson notes, "differences between partnership laws and marriage laws are most likely to be found in the matters relating to children".[225] Even when a country allows same-sex marriage, the same-sex spouses' access to parenthood (through inter alia adoption, surrogacy or AID) might be inferior to that of different-sex spouses.[226]

4.3.2 Second-parent adoption

Usually three different types of adoption are recognised: 1) Individual or single adoption when one person becomes adoptive parent alone. 2) Second-parent or step-parent adoption when one partner adopts the other partner's biological or adopted child without terminating the first parents legal rights and thereby giving both of them legally recognised parental

[220] Recommendation CM/Rec(2010)5, §§ 26–27.
[221] Lowe 2010, 3.
[222] Hodson 2008, 7, 10.
[223] Marckx v. Belgium (1979); Johnston and Others v. Ireland (1986); Hokkanen v. Finland (1994).
[224] Salgueiro da Silva Mouta v. Portugal (1999).
[225] Hodson 2012, 514.
[226] Saez 2011, 3–13, 42, 48.

status. 3) In joint adoption a couple adopts a child jointly.[227] A single adoption and a joint adoption are usually aimed at creating a relationship with a child who is unrelated to the adopter(s), whereas second-parent adoption ”serves to confer rights *vis-à-vis* the child on the partner of one of the child’s parents”.[228] Consequently, allowing second-parent adoption would be the best way to protect children already being raised in same-sex families.

The first complaint that concerned second-parent adoption was *Kerkhoven and Others v. the Netherlands* (1989) which the Commission dismissed as manifestly ill-founded. The Commission noted among other things that the positive obligation under the Convention ”does not go so far as to require that a woman […] living together with the mother of a child and the child itself, should be entitled to get parental rights over the child” and that ”as regards parental authority over a child, a homosexual couple cannot be equated to a man and woman living together”.[229]

The issue was not again raised again until *Gas and Dubois v. France* in 2012. The applicants were two women who had cohabited since 1989 and had, in 2002, entered into a civil partnership agreement (*Pacte civil de solidarité*, PACS). In 2000 Ms. Dubois had given birth to a child, conceived in Belgium through AID, and the child had lived all her life in the applicants’ shared home and been co-parented by both applicants. Ms. Gas had applied for a simple adoption in order to legally establish her parental responsibility over, and relationship with the child. However, her application was rejected on the grounds that second parent adoption was only available to married couples and in the applicants’ case it would have the effect that the legal relationship between the child and her biological mother would be severed contrary to their intentions. The applicants submitted that the reasons given for the refusal definitely ruled out adoption by same-sex couples because they were unable to marry under the French law. They complained that the refusal to grant them second-parent adoption violated their rights under articles 8 and 14.[230]

The applicants further submitted that because of their sexual orientation their child was deprived of her right to a second legal parent. Whereas a child, conceived by AID, born to a cohabiting different-sex couple, would have the man automatically registered as the legal

[227] Council of Europe 2011, 97.
[228] X and Others v. Austria [GC] (2013), § 145.
[229] Kerkhoven and Others v. the Netherlands [dec.] (1992).
[230] Gas and Dubois v. France (2012), §§ 8–16, 40.

father.[231] The Court ruled that for the purposes of second-parent adoption, the applicants were not in a comparable situation to married different-sex couple, only for whom the second-parent adoption was possible, because of the differences between PACS and marriage. When compared to a different-sex couple in a PACS, there was no discrimination, because they would likewise have their application for second-parent adoption rejected. By finding that the applicants were not in an analogous situation compared to a married different-sex couple, the Court was able to avoid progressing to the fourth stage of article 14 analysis, namely considering whether there was an objective and reasonable justification for excluding unmarried same-sex couples from second parent adoption and whether such distinction was necessary in a democratic society to protect families based on marriage.[232]

The fact that the applicants were legally unable to marry, unlike a different-sex couple in the same situation, was not important in the Court's view. It had already ruled in *Schalk and Kopf* that article 12 did not impose an obligation on the contracting states to grant same-sex couples access to marriage and that providing any other means of recognition were within the state's margin of appreciation.[233] The commentator in the European Human Rights Law Review finds it disappointing, that the Court refuses to consider the indirect discrimination that the applicants clearly suffer and concentrate on the direct discrimination which does not exist because a PACS is not in analogous to a marriage.[234]

Although the Court is supposed to place "clear emphasis on the social rather than the biological reality of a situation",[235] this was not at all apparent in *Gas and Dubois* although 'social reality' clearly proofed the existence of family ties. The existence of family life between the applicants, which was not disputed, should have led to a positive obligation imposed on the state to legally recognise the existing family ties. For instance, in the *Marckx* and *Johnston and Others* cases the respondent state was required to legally recognise the bond between the child and her biological parent(s) in order to allow the persons concerned to lead a normal family life.[236] The same should apply even in the

[231] Gas and Dubois v. France (2012), § 43.
[232] Johnson 2012a, 1142–1143.
[233] Gas and Dubois v. France (2012), §§ 62, 66–69.
[234] European Human Rights Law Review 2012, 445.
[235] Kilkelly 2003, 17.
[236] Marckx v. Belgium (1979), §§ 31, 45

absence of biological ties especially as in *Gas and Dubois* where the child only had one legal parent.

Further, Judges Spielman and Berro-Lefèvre observed in their concurring opinion that the fact that ”the applicants' daughter can have a legal tie only with her mother […] does not appear to me to stand in the way of a normal family life”, especially where the delegation of parental responsibility was an option in the event of a crisis.[237] However, as Johnson note, this argument is rather unconvincing since they later acknowledged that the French provision challenged was problematic because the ”legal status of the child remains full of uncertainty, which is certainly not in the interest of the child”.[238]

The best interest of the child is, in fact, totally absent from the Court's reasoning in the case, as Judge Villiger points out in his dissenting opinion:

> Justifying discrimination in respect of the children by pointing out that marriage enjoys a particular status for those adults, who engage in it, is in my view insufficient in this balancing exercise […] In the best interest of the child born into a same-gender-relationship, I believe the child should be offered the best possible treatment afforded to other children born into a heterosexual relationship - which is joint parental custody.[239]

Johnson further argues that the concurring opinion of Spielmann and Berro-Lefèvre explicitly shows that the sitting judges recognised that sexual orientation was the sole ground for a difference in treatment in *Gas and Dubois*, but nevertheless failed to follow the Court's own principle, established in *Kozak v Poland* that ”if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention”.[240]

Johnson proposes several political reasons for the Court's decision in *Gas and Dubois*, such as, the criticism directed towards it and the drafting of the Brighton declaration by the United Kingdom, or the ongoing French presidential elections campaign. However, these reasons do not satisfy him but instead he states that the Court ”lacked 'teeth' to confront one of its most powerful contracting states” and continued its long-term tendency ”to

[237] Gas and Dubois v. France (2012), Concurring opinion of Judge Spielmann joined by Judge Berro-Lefèvre.
[238] Johnson 2012a, 1144; Gas and Dubois v. France (2012), Concurring opinion of Judge Spielmann joined by Judge Berro-Lefèvre.
[239] Gas and Dubois v. France (2012), Dissenting opinion of Judge Villiger.
[240] Kozak v. Poland (2010), § 91; Johnson 2012a, 1145.

dismiss complaints from gay and lesbian applicants in respect of a wide range of social and civil rights".[241]

The latest judgment concerning second-parent adoption is *X and Others v. Austria* (2013). The applicants complained that the Austrian courts' refusal to grant the co-parent the right to adopt the biological son of the other partner without severing the mother's legal ties with the child amounted to discrimination under article 14 taken in conjunction with article 8. This case differed from *Gas and Dubois* because the Austrian Civil Code allowed second-parent adoption for both married and unmarried couples. These provisions, however, were not applicable to same-sex couples because the second-parent adoption severed the parent-child relationship between the child and the parent who is of the same sex as the adoptive parent, therefore a second-parent adoption by the female partner of the child's mother would sever the relationship between the child and the mother.[242]

The existence of 'family life' between the applicants was not disputed.[243] As to the alleged discrimination on ground of sexual orientation, the Court took the same approach as in cases *E.B. v. France*, *Kozak v. Poland* and *P.B and J.S. v. Austria*, that differences based on sexual orientation require particularly convincing and weighty reasons, and that differences based solely on considerations of sexual orientation are unacceptable under the Convention.[244] The Court found the applicants to be in a relevantly similar situation compared to an unmarried different-sex couple to whom second-parent adoption was available, because it had "not been argued that a special legal status exists which would distinguish an unmarried heterosexual couple from a same-sex couple".[245]

Secondly, the Court observed that there had been difference of treatment between the applicants and an unmarried different-sex couple and that this difference was "inseparably linked to the fact that [they] formed a same-sex couple, and was thus based on their sexual orientation".[246] The Court paid particular attention to the fact that the Austrian courts had only relied on the legal impossibility of second-parent adoption in a same-sex couple as a

[241] Johnson 2012a, 1148–1149.

[242] X and Others v. Austria [GC] (2013), §§ 9–15. Austria's Registered Partnership Act, which was not applicable in this case since entered into force in 2010, explicitly excluded same-sex couples from both second-parent and joint adoption.

[243] X and Others v. Austria [GC] (2013), § 95.

[244] X and Others v. Austria [GC] (2013), § 99.

[245] X and Others v. Austria [GC] (2013), § 112.

[246] X and Others v. Austria [GC] (2013), § 130.

ground for dismissal; and had not examined the circumstances of the case in detail, for instance, such as whether the adoption was in the child's best interest or whether there existed any conditions for overriding the biological father's refusal to consent to the adoption. The Court noted that this would not have been the case, if the applicants were an unmarried different-sex couple, "then the domestic courts would not have been able to refuse the adoption request as a matter of principle".[247]

The Court, however, emphasised the fact that it was not ruling on whether the applicants' adoption request should be granted, but whether "the applicants were discriminated against on account of the fact that the courts had no opportunity to examine in any meaningful manner whether the requested adoption was in the [child's] interest given that it was in any case legally impossible".[248] This meant that the applicants' second-parent adoption request should have been examined in substance, as would have been a similar request from a different-sex couple in similar situation.[249]

The government's argumentation relied on the implied but unproven assumption that only a family with opposite-sex parents could adequately provide for a child's needs. The Court noted, however, that Austrian legislation appeared to lack coherence: Adoption by one person, including one homosexual, was possible, and if this person had a registered partner the latter had to consent. Nevertheless, second-parent adoption was explicitly prohibited in the Registered Partnership Act. The Court observed that "[t]he legislature therefore accepts that a child may grow up in a family based on same-sex couple, thus accepting that this is not detrimental to the child. Nevertheless, Austrian law insists that a child should not have too mothers or two fathers."[250]

Finally, the Court noted the importance of obtaining legal recognition and protection to existing *de facto* family life. Although the Court stated that "*de facto* families based on same-sex couple exist but are refused the possibility of obtaining legal recognition and protection".[251] Its judgment still leaves most same-sex families in Europe without protection, the judgment only being applicable to situations where contracting states

[247] X and Others v. Austria [GC] (2013), §§ 118–119, 124–125.
[248] X and Others v. Austria [GC] (2013), §§ 152.
[249] X and Others v. Austria [GC] (2013), §§ 134, 152.
[250] X and Others v. Austria [GC] (2013), §§ 137, 142, 144.
[251] X and Others v. Austria [GC] (2013), § 145.

authorise second-parent adoption for unmarried different-sex couples, which is four countries in addition to Austria.[252]

There have been no complaints concerning joint adoption by same-sex couples in the Court. However, for example Portugal allows same-sex marriage but not joint adoption by a same-sex couple,[253] and in Finland marriage and registered partnership are virtually equal except that same-sex couples are not allowed to adopt jointly.[254] It would be very interesting to see what kind of conclusion the Court would reach in such situations. Would it apply the principles established in the case *X and Others* and *Burden*[255] that when same-sex couples are in comparable situation to different-sex couples difference in treatment is not allowed, which should be the case if same-sex marriage is allowed, or when registered partnership is nearly equal to marriage in its legal effects.

4.3.3 Recording same-sex parents on a birth certificate

The applicants in *Boeckel and Gessner-Boeckel v. Germany* (2013) were two women in a registered civil partnership. Following the birth of their son by AID, the local authorities issued a birth certificate where the second applicant was named as the mother and the space provided for the father's name was left blank. The applicants requested that the first applicant's name should be recorded on the birth certificate as the second parent, since in the case of married different-sex couple the father was the man who was married to the mother at the time of birth even though he was not the child's biological parent. Second-parent adoption was available to the applicants.[256]

The applicants complained under article 8 on its own and taken in conjunction with article 14. They submitted that there were no reasonable justifications for the differential treatment. The Court, however, concluded that the applicants were not in a similar situation to a married different-sex couple and dismissed the application as manifestly ill-founded. The Court's main argument was that the national law was based on the presumption that the man married to the mother at the time of birth was indeed the child's biological father, and this principle was "not called into question by the fact that this legal presumption might not always reflect the true descent". On the other hand, in the case of a

[252] X and Others v. Austria [GC] (2013), § 57.
[253] Euronews 2014.
[254] Finnish Act on Registered Partnerships (950/2001), § 9.
[255] See further in chapter 4.4.2.
[256] Boeckel and Gessner-Boeckel v. Germany [dec.] (2013), §§ 3–6; See also Johnson 2013a.

same-sex couple, it could, with certainty, be ruled out on biological grounds that the child only descends from one of the partners. Therefore, there was ”no factual foundation for a legal presumption” that the child descends from the other partner as well. [257]

The Court also noted that it was not ”confronted with a case concerning transgender or surrogate parenthood”, which is important because if the father was a transsexual, the biological parenthood could also be ruled out but he still could be registered on the birth certificate as the father. Therefore, the Court’s argument seems to lack coherence.[258] Moreover, the Court did not even consider that there are several European countries which allow the automatic co-parent recognition for same-sex registered partners.[259]

It is noteworthy that the Court did not apply its own principle established in *Burden* regarding the comparability of marriage and civil partnership, but instead concentrated on the biological differences between different-sex and same-sex couples. This decision, according to Johnson, once again demonstrates ”the Court’s reluctance to address clear inconsistencies in laws that create discrimination on the grounds of sexual orientation”.[260]

4.4 Legal recognition in the context of individual rights

For the purposes of this thesis, the legal recognition of same-sex family life does not only mean recognition by means of marriage or civil partnership legislation. Especially in the absence of such legislation it would be important that same-sex families are recognised at least in the context of various individual rights and benefits.

Instead of challenging their exclusion from the institution of marriage, some same-sex couples have chosen to challenge sexual orientation discrimination in respect to individual rights or benefits that under national legislation are only available to different-sex couples. This was the case especially prior to *Schalk and Kopf* judgment. The right to respect for private and family life have been claimed by same sex couples in relation to different economic benefits, such as housing, insurance, pension taxation and social security.

[257] Boeckel and Gessner-Boeckel v. Germany [dec.] (2013), §§ 21, 29–31.
[258] Boeckel and Gessner-Boeckel v. Germany [dec.] (2013), § 30.
[259] At least in Denmark, Iceland, the Netherlands, Norway, Spain, Sweden and the UK. Isyyslain uudistaminen OM 56/2013, 14–15; ILGA-Europe Rainbow Map (Index) 2013.
[260] Johnson 2013a.

4.4.1 Housing

Same-sex couples, or rather, surviving partners of same-sex couples, have been most successful in their claims challenging sexual orientation discrimination in respect of the right to succeed to the tenancy of the deceased partner. Probably because the Court has been able to review these cases under the right to respect for home and has thus avoided taking a stand on the issue of family life.

In *Röösli v. Germany* (1996) the applicant was refused succession to the tenancy of his dead male partner. The German legislation of the time extended the tenancy succession rights to unmarried heterosexual couples living together as wife and husband but not to same-sex couples. The application was found inadmissible by the Commission and therefore never reached the Court. The Commission found that this difference in treatment was objectively and reasonably justified because "family, to which the relationship of heterosexual unmarried couples living together can be assimilated, merits special protection in society", thereby accepting discrimination between unmarried different-sex and unmarried same-sex couples as justified. Furthermore, it observed that the question of proportionally between the means employed and the aim pursued did not even arise, "as the complaint was that the legislation in question did not apply to the surviving partner of a homosexual couple, but gave a benefit to the claims of certain persons ("family") only".[261]

However, already in 2003, in *Karner v. Austria*, the Court upheld the applicant's complaint concerning his inability to succeed to tenancy previously held by his deceased same-sex partner. It came to same conclusion in the subsequent case, *Kozak v. Poland*, in 2010. However, in both cases the Court deliberately sidestepped the question about 'private life' and 'family life' and found that the applications fell within the scope of the applicants' right to respect for their home.[262] In these cases the Court established that "the protection of the 'traditional' family is not an objective or reasonable justification for the blanket exclusion of same-sex partners from benefits available to different-sex partners".[263]

Further, in *Kozak*, the Court made explicit reference to the living instrument doctrine by stating that:

> […] given that the Convention is a living instrument, to be interpreted in the light of present-day conditions, the State, in its choice of means designed to protect family and secure […] respect for

[261] Röösli v. Germany [dec.] (1996).
[262] Karner v. Austria (2003), § 33; Kozak v. Poland (2010), § 83–84.
[263] Kozak v. Poland (2010), § 99; Johnson 2012b, 136.

> family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life.[264]

4.4.2 Economic benefits

In *Mata Estevez v. Spain* (2001), the applicant complained that his ineligibility for a survivor's pension after the death of his same-sex partner violated his rights under articles 8 and 14. The Court dismissed the application as inadmissible. The Court first noted that the part where the applicant claimed interference with his 'family life' was materially incompatible, *ratione materiae*, with the Convention, since homosexual relationships did not fall within the scope of 'family life'. The Court accepted that the complaint related to the applicant's 'private life', and that he might have been treated differently if his partner had been of opposite sex. However, the Court observed that marriage constituted an essential precondition for eligibility for a survivor's pension and that the Spanish legislation had a legitimate aim, namely protecting the family based on marriage. Consequently, the difference in treatment fell within the state's margin of appreciation.[265]

In *Manenc v. France* (2010), the Court came to a similar conclusion. The applicant had been refused access to a survivor's pension after the death of his male partner with whom he had cohabited and entered into PACS. The Court concluded that because of the differences, especially regarding joint financial responsibilities, between marriage and PACS the applicant had not been in an analogous situation with a married different-sex couple. Since survivor's pension was only available to a married spouse, the differential treatment was not based on the applicant's sexual orientation because also different-sex couples in PACS would not have access to survivor's pension. The application was dismissed as manifestly ill-founded.[266]

Burden v. the United Kingdom (2008) did not concern a same-sex couple *per se*, but two cohabiting sisters who argued that they should be exempt from an inheritance tax as a survivor from marriage or a civil partnership would. The Court ruled that there had been no violation, but neither the outcome nor most part of the reasoning behind it, is relevant here. However, in this judgment the Court equated marriage and civil partnership:

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[264] Kozak v. Poland (2010), § 98.

[265] Mata Estevez v. Spain [dec.] (2001).

[266] Manenc v. France [dec.] (2010). Johnson 2012b, 136–137.

> […] the Grand Chamber notes that it has already held that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences […]
>
> Since, the coming into force of the Civil Partnership Act in the United Kingdom, a homosexual couple also has the choice to enter into a legal relationship designed by Parliament to correspond as far as possible to marriage.
>
> As with marriage, the Grand Chamber considers that the legal consequences of civil partnership under the 2004 Act, which couples expressly and deliberately decide to incur, set these type of relationship apart from other forms of cohabitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. Just as there can be no analogy between married and Civil Partnership, on the one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand, the absence of such a legally binding agreement between the applicants renders their relationship of cohabitation, despite its long duration, fundamentally different to that of a married or civil partnership couple. This view is unaffected by the fact that […] member States have adopted a variety of different rules of succession as between survivors of a marriage, civil partnership and those in a close family relationship and have similarly adopted different policies as regards the grant of inheritance tax exemptions to the various categories of survivors […][267]

The Court's statement in *Burden* was central in two subsequent complaints *Courten v. the United Kingdom* (2008) and *M.W. v. the United Kingdom* (2009). The applicant in *Courten* had been denied a tax exemption from inheritance tax after the death of his male partner of over 25 years, and the applicant in *M.W.* was excluded from a certain social security benefit after the death of his male partner. Both benefits were only available to a surviving spouse from different-sex marriage. Both applicants argued on basis of the *Burden* case that because at the time of death of their respective partners, the civil partnerships which later extended these rights to same-sex civil partners had not been available; thus they had not had the possibility of entering into a binding legal relationship.[268]

In *Courten* the applicant argued further that it had been the element of choice which same-sex couples did not have that "made it possible to compare and distinguish married heterosexual couples and civil partners and those who cohabited without a legally binding agreement." The Court rejected the applicability of its *Burden* statement about the similarity of marriage and civil partnership between homosexual partners, because the

[267] Burden v. the United Kingdom [GC] (2008), §§ 63–65.
[268] Courten v. the United Kingdom [dec.] (2008); M.W. v. the United Kingdom [dec.] (2009).

applicant and his deceased partner had not been in a civil partnership but in a long term yet still informal relationship. As to the applicant's argument that his partner had died before the Civil Partnership Act was passed and therefore they had not had the ability to enter one, the Court merely stated that "in the area of evolving social rights where there is no established consensus, States must enjoy a margin of appreciation in the timing of the introduction of legislative changes".[269]

The applicant in *M.W.* submitted that "to deny the analogy [between cohabiting same-sex couple and married different-sex couple because the former did not have the possibility of legalising their relationship] gave rise to the curious situation that same-sex couples would not be able to complain of discrimination under Article 14 until the State took steps to grant them equality of treatment with married couples by formally recognising relationships". He argued further that "it would be discriminatory to treat him in the same manner as the survivor of an unmarried heterosexual couple, given the significant differences between these situations".[270]

However, according to the Court, the government could not be criticised for not having introduced civil partnerships any earlier than it did. The Court also noted, that there is nothing to suggest that at the relevant moment there would have been a sufficient consensus among the contracting states on the formal recognition of same-sex relationships "that would have significantly narrowed the United Kingdom's margin of appreciation in this respect".[271]

> Nor can the enactment of the Civil Partnership Act be taken as an admission by the domestic authorities that the non-recognition of same-sex couples, and their consequent exclusion from many rights and benefits available to married couples, was incompatible with the Convention. Instead, by acting as they did and when they did the United Kingdom authorities remained within their margin of appreciation. Moreover, the comprehensive manner in which the Act ensures equal entitlements for same-sex couples who enter into a civil partnership means that, although it was not in the vanguard, the United Kingdom is certainly part of the emerging European consensus described by the third party interveners.[272]

The Court dismissed both *Courten* and *M.W.* complaints as manifestly ill-founded.

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[269] Courten v. the United Kingdom [dec.] (2008).
[270] M.W. v. the United Kingdom [dec.] (2009).
[271] M.W. v. the United Kingdom [dec.] (2009).
[272] M.W. v. the United Kingdom [dec.] (2009).

In *P.B. and J.S. v. Austria* (2010) a cohabiting same-sex couple claimed to be victims of discrimination because of the impossibility to have the cover of the second applicant's health and accident insurance, which he enjoyed as a civil servant, extended to include the first applicant. According to the national legislation such an extension was only open to married or cohabiting different-sex couples.

The Court found that the applicants enjoyed 'family life' and that although the Convention did not guarantee a right to insurance cover *per se*, when the state had gone beyond its obligations under article 8 and created such a right, it must not discriminate in the application of that right. The government failed to give any sufficient justifications for the differential treatment between unmarried different-sex and same-sex couples. Accordingly, there had been a breach of article 14 taken in conjunction with article 8.[273] It is noteworthy that the Court found that the discrimination had started already in 1997 when the applicants had initiated the national proceedings and afforded the applicants damage from that day onwards. This is remarkable since at the material time the Court did not even recognise the analogy between unmarried different-sex and same-sex couples.[274]

The applicant in *J.M. v. the United Kingdom* (2010) was a divorced mother of two children who lived mostly with their father. She was living with a female partner in a "close, loving and monogamous relationship characterised by long-term sexual intimacy" in a house they owned jointly.[275] As the non-resident parent, she was required to pay child maintenance and thus contribute financially to the costs of her children's upbringing. According to the national legislation applicable at that time, the amount of the maintenance payment was reduced when the absent parent had entered into a new relationship, married or unmarried, but it took no account on same-sex couples. The applicant complained of discrimination based on sexual orientation under article 14 taken in conjunction with article 8 and article 1 of Protocol No. 1 (P1-1, protection of property). It is noteworthy that the applicant's complaint was upheld by three domestic courts but finally overturned in the House of Lords.[276]

As such, the judgment does not provide anything new compared to previous judgments. The Court did not even consider the complaint under article 8 because the issue fell within

[273] P. B. and J. S. v. Austria (2010), §§ 30, 34.
[274] Röösli v. Germany (1996).
[275] J.M. v. the United Kingdom (2010), § 5.
[276] J.M. v. the United Kingdom (2010), §§ 1–19; ECtHR 2014a, 12.

the scope of P1-1. The Court found that there had not been reasonable justifications for the differential treatment which was based solely on the applicant's sexual orientation. The violation had existed even before the enactment of the Civil Partnership Act which later remedied the situation.[277]

4.4.3 Immigration and family reunification

Currently, a significant gap in the Court's case law concerning same-sex families remains in the sphere of immigration law. The first complaints in the 1980's claiming same-sex family life concerned immigration regime in the United Kingdom.[278] In all of these cases, the applicants complained that that the refusal by immigration authorities to allow them to remain in the United Kingdom on the basis of their same-sex relationships violated their rights under articles 8 and 14. The Commission found all these complaints inadmissible and as there have not been any new complaints regarding this issue since the 1980's, the Court has not yet had a change to examine such complaint.

Taking into account the Court's current view that same-sex couples are in a comparable situation to unmarried different-sex couples and that differential treatment between them requires convincing and weighty justifications, the Court would most likely apply the same principle to immigration law that differentiates between unmarried same-sex and different-sex couples. However, as Johnson notes, the absence of any case law on the issue leaves the situation uncertain.[279] The situation might change in few years since there is currently one same-sex immigration case pending at the Court.[280]

4.4.4 Employment pension – A short detour into European Union law

For the most part, especially for the sake of limited space, European Union law has been excluded from this thesis. However, the European Union and the Council of Europe and thereby also the Court are becoming increasingly interconnected. The European Union Charter of Fundamental Rights refers to the Convention as setting the minimum standard

[277] J.M. v. the United Kingdom (2010).

[278] X. and Y. v. the United Kingdom [dec.] (1983); W.J. and D.P. v. the United Kingdom [dec.] (1987); C. and L.M. v. the United Kingdom [dec.] (1989); Z.B. v. the United Kingdom [dec.] (1990).

[279] Johnson 2012b, 141–142.

[280] Taddeucci and McCall v. Italy, Communicated 10 January 2012. ECtHR 2014a, 7.

of human rights protection in the EU,[281] the Court has referred to the Charter in its case law,[282] and the EU is currently preparing for its accession to the Convention.[283]

I shall here shortly present two judgments by the Court of Justice of the European Union (ECJ) concerning sexual orientation discrimination under the EU law. My aim is to illustrate how the issue has been addressed by the ECJ and to be able to consider later whether the Court might learn something from the ECJ's approach. However, it is important to note the different character of the EU law and that it is not entirely comparable to the Convention system. While the Convention system comprises one Convention drafted over 60 year ago, the EU law consists, in addition to its primary legislation (the Union Treaties), of ever-growing number of secondary law drafted and passed by the EU legislative bodies. The EU member states have also surrendered some of their sovereign rights to the EU and have bestowed on it powers to act independently.[284] The ECJ is "the highest and […] sole judicial authority in matters of Union Law".[285]

In *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* (VddB) (2008), the defendant was a pension scheme for employees of German theatres. The applicant, Mr Maruko, was denied survivor's pension after the death of his registered partner because such benefit was, according to the VddB's statutes, only available to married partners. The ECJ ruled in the applicant's favour and stated that the treatment amounted to a direct discrimination to the degree that registered couple can be said to be in a comparable situation to a married couple.[286]

In *Maruko* the ECJ also established a principle that Wintemute calls "obligation of consistency". The ECJ ruled that it was up to Germany to decide whether to have a registered partnership law for same-sex couples and how many rights to grant to them. However, once Germany voluntary decided to pass a registered partnership law and to put

[281] Article 52.3 of the European Union Charter of Fundamental Rights: In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

[282] See for example: Christine Goodwin v. the United Kingdom [GC] (2002), § 100; Schalk and Kopf (2010), § 52.

[283] 'European Convention of Human Rights: Accession of the European Union'

[284] Borchard 2010, 11.

[285] Borchard 2010, 70.

[286] Tadao Maruko v. VdB (2008), §§ 70–73; Graupner 2012, 274–277.

registered partners to a comparable situation with a married couple, it could not exclude them from rights that fell within the scope of EU anti-discrimination law.[287]

The subsequent case, *Jürgen Römer v. Frey und Hansestadt Hamburg* (2011), concerned the applicant, Mr Römer, who had a registered partner and received lower retirement pension than other former employees of the city of Hamburg who were married. The ECJ ruled that even if marriage and family law legislation remains in the competence of the EU member states, when ”a Member State excludes same-sex couples from marriage, employment benefits must not be restricted to married couples”.[288]

The ECJ further specified its ‘individual-specific comparison‘ test by ruling that the criteria must be comparable, and not identical, situations, and that the comparison has to be ”specific and concrete” instead of ”global and abstract”.[289] This meant that the comparison had to be made between people and not as an overall comparison between marriage and registered partnership as abstract institutions.[290] The ECJ also stated that the ”goal of the protection of marriage and the family in a national constitution as such is not a valid justification for discrimination, as Union law supersedes also national constitutional law”, however, the ECJ emphasised that this is the case only if the discrimination complained falls within the scope of EU law.[291]

[287] Wintemute 2011, §§ 188–191.

[288] Jürgen Römer v. Freie und Hansestadt Hamburg (2011); Graupner 2012, 280.

[289] Jürgen Römer v. Freie und Hansestadt Hamburg (2011); § 42. Graupner 2012, 280–281. See also: Tadao Maruko v. VdB (2008), § 73; Graupner 2012, 276–277.

[290] Jürgen Römer v. Freie und Hansestadt Hamburg (2011); § 42–43. Graupner 2012, 280–281.

[291] Jürgen Römer v. Freie und Hansestadt Hamburg (2011); §§ 37, 51, 60. Graupner 2012, 279–281.

5. THE LIMITS OF THE COURT'S SUPERVISION

5.1 The Court's role

The Court operates in a European-wide context where it has to accommodate 47 different national systems.[292] Therefore, the Court's role as a supranational human rights court distinguishes it significantly from highest courts in other jurisdictions in *inter alia* United States, Canada and South Africa, where courts have ruled the exclusion of same-sex couples from marriage to be unconstitutional.[293]

According to the article 32 of the Convention, "[t]he jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention". However, the Court's competence is not limited only to enforcing obligations that are explicitly or implicitly stated in the Convention or in its drafting documents (*travaux préparatoires*). The Court has held in numerous occasions that it also has the "power to update" the Convention rights.[294] As Mahoney notes "[t]he special nature of the [Convention] compels a flexible and evolutive interpretation of its open-textured terms if the Convention is not to become progressively ineffective with time".[295]

According to Uoti, the Court cannot extend its interpretation so far that it risks loosing the support of the contracting states. He points out that since the Court lacks any real coercive measures, its authority and the compliance with its judgements are therefore ultimately dependent on the goodwill of the contracting states. Consequently, it is important for the fulfilment of the rights of individuals that the Court does not overstep its legitimacy.[296]

During its existence the Court has attracted criticism for both overstepping its role as well as not fulfilling it, or in other words, for being too active and introducing new rights that

[292] Gerards 2008, 411; Helfer & Voeten 2014, 84.

[293] See for example judgments: Canada: Halpern v. Canada (2003) in the Court of Appeal for Ontario which the state did not appeal; South Africa: Minister of Home Affairs v. Fourie (2005); Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs (2005); United States: Goodridge v. Department of Public Health (2003) in the Supreme Judicial Court of Massachusetts; Perry v. Schwarzenegger (2010) in the United States District Court for the Northern District of California. See also Johnson 2011.

[294] Mahoney1990, 60–61.

[295] Mahoney 1990, 65; Gerards 2008, 412.

[296] Uoti 2004, 167; Gerards 2008, 412; Johnson 2012b, 66–69.

originally were not intended to be part of the Convention,[297] and for being too conservative and using the margin of appreciation doctrine to avoid tackling with sensitive or controversial issues.[298] Since the issue of legal recognition of same-sex family life still remains sensitive and controversial in many countries around Europe, it is relevant to ask here, in the end of this thesis, what are the limits of the Court's human rights supervision and what should be the Court's role in promoting the rights of same-sex couples.

5.2 Judicial activism v. judicial self-restraint

The concepts of 'judicial activism' and 'judicial self-restraint' derive from the American judicial discourse, but have also been used in the context of the ECtHR. Judicial activism exists when "judges [modify] the law from what it previously was or was stated to be in the existing legal sources, often thereby substituting their decision for that of elected representative bodies",[299] whereas judicial self-restraint means that "judges should avoid transgressing beyond their traditional roles as interpreters of the law".[300] However, given the nature of the Convention provisions, the Court needs a certain amount of creativity when interpreting it.[301]

It can be said that for the most part, the Court is judicially active.[302] On many occasions it has interpreted the Convention in a way that has certainly gone beyond what the drafters intended and thereby significantly raised the level protection of human rights in Europe. For example, the scope of 'access to Court' in *Golder v. the United Kingdom*, positive obligations in *Marckx v. Belgium* and the negative freedom of association in *Young, James and Webster v. United Kingdom* being part of article 11 despite the deliberate omission from the Convention by the drafters, just to identify a few.

[297] Dissenting opinion of Judge Sir Gerald Fitzmaurice in Golder v. the United Kingdom; in Tyrer v. the United Kingdom and in Marckx v. Belgium. See also Uoti 2004, 174–181.
[298] See for example: Hodson 2012; Johnson 2012b, 69–76.
[299] Mahoney 1990, 58.
[300] Popovic 2009, 365.
[301] Popovic 2009, 363.
[302] Uoti 2004, 156–157; Popovic 2009, 396.

5.3 The Court's case-by-case approach

One very central feature of the Court's jurisprudence is its case-by-case approach.[303] The Court stated in the already mentioned freedom of association case *Young, James and Webster* that "in proceedings originating in an individual application, it has, without losing sight of the general context, to confine its attention as far as possible to the issues raised by the concrete case before it".[304]

The Court's case-by-case approach is greatly contributed by the Convention rules on the admissibility, *i.e.*, the way applications are brought to the Court and which applications the Court is qualified to examine. The Court supervision limits to those cases that fulfil the Convention admissibility criteria that require, *inter alia*, that the applicant must be a victim of a concrete human rights violation. Accordingly, the Court cannot initiate proceedings by itself nor will it consider *actio popularis* complaints or complaints *in abstracto*.[305]

The Court's examination of the merits of each case is "concrete rather than abstract and focuses on the individual rights violation in question rather than on the general compability of a legal situation with the Convention". This results in a "flexible and highly individualised jurisprudence, which clearly offers individuals relief and which enables the Court to send a message to both the states and their citizens that individual fundamental rights really matter".[306]

On the other hand, the case-by-case approach might also result in gaps in the Court's jurisprudence as it only concentrates on the specific facts of each case. For instance in *Schalk and Kopf*, the Court noted the substantial differences regarding parental rights between marriage and registered partnership but it was "not called upon in the present case to examine each and every one of these differences in detail".[307] It would have to address one of those difference in a subsequent case that specifically concerned discrimination in respect of parental rights.[308]

However, as both Gerards and Kuijer note, the case-by-case approach does not necessarily reflect the whole truth, but in reality, the Court pays quite a lot attention to coherence and

[303] Gerards 2008, 415.
[304] Young, James and Webster v. the United Kingdom (1981), § 53.
[305] Gerards 2008, 415; ECtHR 2011, § 10.
[306] Gerards 2008, 416.
[307] Schalk and Kopf v. Austria (2010), § 109.
[308] X and Others v. Austria [GC] (2013).

consistency in its case law.[309] For instance in *Ireland v. the United Kingdom* (1978) the Court stated that its ”judgments in fact serve not only to decide those cases brought before the Court, but more generally, to elucidate, safeguard and develop the rules instituted by the Convention”.[310] Later it observed in *Karner* that:

> ”[a]lthough the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy ground in the common interest, thereby, raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention states”[311]

Further, the establishment of the Grand Chamber also indicates the Court’s growing awareness of the problems in the case-by-case approach and the increasing significance precedent has in its case law. The Grand Chamber is principally asked to decide cases which raise difficult interpretative questions, disclose legal inconsistencies, or touch upon national or political sensitivities.[312]

5.4 Precedent v. evolutive interpretation

Several commentators agree that the doctrine of *stare decisis*, *i.e.*, that judges are bound by the precedent, does not apply in the Court system, but that the Court generally follows its own precedent.[313] Mowbray identifies three different justifications the Court have offered in order to warrant departure from its precedent: ”uncertainty in the existing jurisprudence”, ”rapidly increasing number of complaints to the Court” in a specific matter, and the application of the living instrument doctrine, *i.e.*, evolutive interpretation. However, he also notes that the Court often avoids expressly stating that it is overruling precedent. [314]

According to Mowbray, it is currently ”primarily up to the parties to an application or the Court itself to raise the issue as to whether a precedent should be overruled. Campaigning organisations may be able to play a secondary role in advocating change in the

[309] Kuijer 2004, 18–19; Gerards 2008, 419.
[310] Ireland v. the United Kingdom (1978), § 154.
[311] Karner v. Austria (2003), § 26.
[312] Gerards 2008, 420. ECHR, articles 30 and 43.
[313] Balcerzak 2004–2005, 139; For a compilation of comments see Mowbray 2009, 179–183, 200.
[314] Mowbray 2009, 187, 191, 193, 198.

jurisprudence by seeking the Court's permission to submit third-party comments on the matter in a relevant case".[315]

Next, the application of the living instrument doctrine as a justification for departing precedent will be examined in more detail. When considering issues such as same-sex family rights, where the developments across Europe occur in a rapid pace but unevenly, the Court is often faced with the question whether it should follow its previous case law or to adopt an evolutive approach. The evolutive interpretation aims to ensure that "the Convention is interpreted in a manner that reflects contemporary standards".[316] The contemporary standards are generally determined through a consensus analysis where an evolved European standard or sometimes a clear international trend justifies subsequent upgrading of the Convention standards.[317] Consequently, a lack of European consensus usually results in the Court following its precedent. In the context of precedent versus evolutive interpretation, the Court has stated that:

> While the Court is not formally bound to follow its previous judgments, in the interests of legal certainty and foreseeability it should not depart, without good reason, from its own precedents. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.[318]

When assessing the role of its precedence in a case at hand, the Court first takes notice whether the current case is distinguishable on its facts from the previous case. Secondly, the Court considers whether there are any cogent reasons for departing the previous case law.[319] Therefore, where the previous case and the current case are indistinguishable on their judicially relevant facts, the Court should follow its precedent unless there are compelling reasons for departing it. Such reasons may exist when the Court identifies, for instance, "changing conditions", "scientific and societal developments", "societal change" or "evolving convergence as to the standards to be achieved". Where any such changes or

[315] Mowbray 2009, 199.
[316] Mowbray 2009, 193.
[317] Mowbray 2009, 193–197.
[318] Mamatkulov and Abdurasulovic v. Turkey (2003), § 105. See also Mamatkulov and Askarov v. Turkey [GC] (2005), § 121.
[319] Uoti 2004, 274–275. See also Cossey v. the United Kingdom (1990), §§ 31, 34–35.

developments can be detected, the Court must revise its interpretation. A failure to do so would jeopardise the practical and effective human rights protection in Europe.[320]

5.5 The *erga omnes* effect of the Court's judgments on LGBT rights

Erga omnes effect indicates a situation where the influence of a international court's judgment extends beyond the applicant and the respondent state in a particular case, for example when a judgment against one contracting state trigger policy or legal changes in other contracting states.[321] In their recently published article Helfer & Voeten have demonstrated this by using the Court's case law on LGBT rights as an example.[322] Their empirical study shows that the Court's judgment against one country increases the likelihood that other countries will adopt the same pro-LGBT reforms in policy or legislation. Furthermore, they find that the Court's rulings have the greatest marginal effect in countries where public acceptance of LGBT rights is low. Their findings also indicate that the Court does not aggressively push countries to reform, but nevertheless applies a kind of "majoritarian activism" meaning that it usually recognises LGBT rights claims when at least a simple majority of contracting states have already done so.[323]

According to Waaldijk, the legislative developments in LGBT rights in Europe have tended to follow a standard sequence where decriminalisation of homosexual activity is followed by anti-discrimination provisions and finally by partnership legislation.[324] His analysis suggests that that each step paves way for the next and that the previous step is required before a country can progress to the next stage. Accordingly, those countries that first enacted registered partnership legislation and eventually equal marriage were among the first countries to decriminalise homosexual activity and to provide anti-discrimination provisions prohibiting sexual orientation and gender identity discrimination.[325]

Waaldijk's standard sequence can also be detected in the Court's jurisprudence on LGBT rights. In the beginning of 1990's the Court gave its last ruling in decriminalisation of

[320] Uoti 2004, 274–280. See also Rees v. the United Kingdom (1986), § 47; Cossey v. the United Kingdom (1990), § 35; Christine Goodwin v. the United Kingdom [GC] (2002), § 74.
[321] Helfer & Voeten 2014, 77.
[322] The specific rights/topics examined were decriminalisation of consensual homosexual sexual activity; equal age of consent for homosexual sexual activity; prohibition of homosexuality in armed forces and transsexuals' right to change of identity documents and right to marry.
[323] Helfer & Voeten 2014, 79–80, 105–106.
[324] Waaldijk 2000, 62.
[325] Waaldijk 2000, 87–88.

homosexual activity, since then the applications have mainly centred around different antidiscrimination issues, among others, minimum age of sexual consent, freedom of expression, freedom of assembly and hate speech. Currently, the focus is slowly shifting towards partnership rights.

The findings of Waaldijk and Helfer & Voeten combined suggest that the Court has been instrumental in pushing contracting states forward to the next stage of development. Especially since both Council of Europe and European Union have used the Convention standards in LGBT rights as criteria for new accession countries.[326]

5.6 The Court as a part of European-wide human rights regime

The results of Helfer & Voeten support the argument that the Court, while not being in the vanguard of LGBT rights, has nevertheless had a major role in bringing about pro-LGBT reforms throughout Council of Europe member states. Thus, reinforcing the conclusion that the Court mostly remains judicially active. This added with the Court's authority and status as well as the binding nature of its judgments, makes the Court an appealing forum not only for applicants but also for LGBT rights advocates to challenge the prevailing discrimination. On the other hand, it should be kept in mind that the Court is not a fast lane for passing pro-LGBT reforms and it can take years before the Court reaches a judgment.

However, the Convention's first and foremost purpose was not to be used by the Court to find violations and to scrutinise contracting states. It was created to provide the Council of Europe member states a framework for achieving greater unity and higher human rights standards through policy and legislation. Hence ideally, the contracting states should comply with the Convention standards by themselves, and the Court should be the final remedy in protecting human rights in Europe and be resorted to only when national remedies fail.

Furthermore, the Court does not operate in a vacuum but Europe is almost buzzing with human rights bodies and organisations, both governmental and non-governmental, and they all have a role to play. Other official European-wide human rights bodies such as Council of Europe, the CoE Commissioner for Human Rights, the Fundamental Rights Agency of the European Union, and even the institutions of the European Union such as

[326] Helfer & Voeten 2014, 90.

the European Parliament have been much more outspoken about the same-sex families' need for legal recognition.[327]

For instance the European Parliament only recently called for the Commission and all EU member states to more effectively enforce the Free Movement Directive without discrimination on grounds of sexual orientation[328] and the Council of Europe Committee of Ministers recommended in 2010 that:

> Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.[329]

To sum up, it will be the continuing interaction and cooperation of all these bodies and organisations and not the Court alone that will guarantee the best results for same-sex families on a pan-European level as well as in the individual countries. Although, the Court certainly has a special role in ensuring that all the contracting states comply with the overall progress and if necessary issue a legally binding kick in the butt.

[327] See for example: Council of Europe CM/Rec (2010)5; ILGA-Europe 2013, 6; FRA 2010; FRA 2013.
[328] European Parliament Resolution (2014) on the situation of fundamental rights in the EU (2012), § 31.
[329] Council of Europe CM/Rec (2010)5, § 25.

6. SUMMARISING THE MAIN FINDINGS AND SOME CONCLUDING REMARKS

6.1 Recalling the purpose of this study

The purpose of this thesis was to study the Court's jurisprudence on same-sex families and to examine how the Court has met their need for legal recognition and protection. I had formulated this purpose into two research questions:

1) How the Court has recognised and protected same-sex family life and what is the current level of protection afforded to them?

2) Has the Court been consistent in its case law and is the protection afforded satisfactory?

In this chapter, these questions will be answered and, in addition, I shall identify main problems in the Court's current approach, consider possible explanations for the current situation as well as suggest some ways forward.

6.2 Results of the case law analysis

6.2.1 How has the Court recognised and protected same-sex family life?

Looking back, the developments in same-sex family rights have happened in relatively rapid pace especially during the past ten years. The first complaints by same-sex couples claiming right to family life and access to rights and benefits available to different-sex couples, were lodged in 1980's. During the 1980's and the 1990's none of the same-sex family life complaints reached the Court, but the Commission dismissed all as manifestly ill-founded. The first such complaint was found admissible in the beginning of 2000, and in 2003 the Court, for the first time, found a situation where same-sex couples were excluded from a right that was available to unmarried different-sex couples to violate article 14 taken in conjunction with article 8.

On the basis of the case law analysis in chapter 4, two major turning points can be identified in the Court's jurisprudence regarding same-sex family rights. The first would be *Karner v. Austria* which was the above mentioned first successful complaint concerning discrimination against same-sex couples. In that case the Court established that protection

of the traditional marriage does not justify exclusion of same-sex couples from rights afforded to unmarried different-sex couples. However, the Court was able to circumvent the question of 'family life' by examining the complaint under the 'home' limb of article 8.[330] It is important to note that in 1996, only seven years before the *Karner* judgment, the Commission still had regarded discrimination between unmarried different-sex and same-sex couples as acceptable under the Convention.[331]

The second turning point would be *Schalk and Kopf* where, although not finding a violation, the Court extended the definition of 'family life' to cover the relationship between a same-sex couple. *Schalk and Kopf* also marks a shift in the Court's jurisprudence to more favourable treatment of same-sex families. Since *Schalk and Kopf*, the Court has found a larger portion of applications by same-sex couples admissible than ever before.[332] In its subsequent judgments, such as *X and Others*, *P.B. and J.S.* and *Vallianatos and Others*, the Court has systematically applied the principle that differential treatment based on sexual orientation requires "particularly convincing and weighty reasons by way of justification" and that in such cases the state's margin of appreciation is narrow.[333]

The Court seems to also have followed the standard sequence of LGBT rights reforms.[334] It has already ruled extensively on decriminalisation and discrimination against homosexuals, among others, in age of consent legislation and in armed forces.[335] The Court is also currently shifting towards partnership rights which can be seen in the increasing amount of complaints regarding same-sex family rights. This is supported by the fact that *Schalk and Kopf* also seems to have marked a change in the nature of the complaints concerning same-sex family rights lodged with the Court. Prior to *Schalk and Kopf*, all applicants complained of discrimination in respect to specific rights and benefits, *inter alia*, housing, pension and insurance. After *Schalk and Kopf*, applicants are

[330] Karner v. Austria (2003).

[331] Röösli v. Germany [dec.] (1996).

[332] In 1980–1990 all complaints related to same-sex family life were found inadmissible. In 2000–2010 two complaints (*Karner*, *Kozak*) were found admissible and three complaints (*Mata Estevez*, *Courten*, *M.W.*) inadmissible. Since *Schalk and Kopf* in 2010 six complaints (*Schalk and Kopf*, *P.B. and J.S.*, *J.M.*, *Gas and Dubois*, *X and Others*, *Vallianatos and Others*) have been found admissible and two inadmissible (*Manenc*, *Boeckel and Gessner-Boeckel*).

[333] Vallianatos and Others (2013), § 77.

[334] Waaldijk 2000.

[335] Johnson 2014. See for instance: Dudgeon v. the United Kingdom (1981); Smith and Grady v. the United Kingdom (1999); L. and V. v. Austria (2003).

increasingly challenging the absence of partnership legislation that would allow same-sex couples to legalise their relationship.

6.2.2 What is the current level of protection afforded

From the case law analysis, certain trends can be detected and the Court's current position on same-sex family life can be summarised as follows: "no recognition unless unmarried different-sex couples are recognised".[336]

The Court currently accepts that unmarried different-sex and same-sex couples are in an analogous situation and should be treated equally. Therefore, the Court will most likely find a violation of article 14 taken in conjunction with article 8 in situations where there is differential treatment between unmarried different-sex and same-sex couples, and where the respondent state is unable to provide convincing justification for the discrimination.[337] It is significant that the Court has found the prohibition of such discrimination to extend retroactively as far back as a concrete discrimination can be shown to have taken place, despite the fact that at the material time such discrimination would have been accepted.[338]

On the other hand, the Court still accepts the protection of the traditional family as a weighty and legitimate reason for maintaining the special status of marriage and excluding same-sex families from the rights and benefits available to marital families. Therefore, the Court will most likely not find a violation in cases where same-sex couples allege discrimination compared to married couples. This outcome is not affected by the fact that it is legally impossible for same-sex couples to marry or contract civil partnership and thereby gain access to the rights and benefits available to marital families.

Furthermore, it is not possible for same-sex couples to challenge their exclusion from marriage under any combination of the relevant articles. The Court has stated unanimously several times that the Convention does not impose an obligation on the contracting states to grant same-sex couples access to marriage, nor is there an obligation to provide same-sex couples any alternative means of legal recognition. If a state chooses to do so, it enjoys a certain margin of appreciation as to the exact status conferred. Consequently, the Court

[336] Wintemute 2011, § 188.

[337] J.M. v. the United Kingdom (2010); P.B. and J.S. v. Austria (2010); X and Others v. Austria [GC] (2013); Vallianatos and Others v. Greece (2013).

[338] For example in: J.M. v. the United Kingdom (2010); P.B and J.S v. Austria (2010). Compare to Röösli [dec.] (1996).

will not define a minimum standard for rights to be included in civil union legislation but this is left to the discretion of contracting states.[339]

It is noteworthy that while the prohibition of discrimination between unmarried differed-sex couples and same-sex couples applies retroactively, that is not the case when it comes to discrimination between married couples and civil partners. It is entirely up to contracting states to decide when they want to enact civil partnership legislation, and the Court will not reproach them for not introducing such legislation earlier. Accordingly, although a state currently provides civil partnership legislation for same-sex couples, they, nevertheless, cannot complain of discrimination between married different-sex couples and unmarried same-sex couples that occurred before the entry into force of the civil partnership legislation.[340]

Although, in *Burden* the Court paralleled marriage and civil partnership in cases where a state has made them comparable in their scope of rights and obligations. However, the Court's recent judgment in *Boeckel and Gessner-Boeckel* suggest that the Court is still willing to accept discrimination between married couples and civil partners. On the other hand, it would be very interesting to see what the Court would decide in situations where a state have authorised same-sex marriage but continues to exclude married same-sex couples from rights available to married different-sex couples, such as assisted reproduction services in France[341] or joint and second-parent adoption in Portugal.[342]

6.2.3 *Has the Court been consistent in its case law and is the protection afforded satisfactory?*

My second research question was whether the Court has been consistent in its case law regarding same-sex family life and whether the current level of protection afforded is satisfactory. I chose to include this question because the Court is often being accused of being inconsistent and arbitrary when it comes to same-sex family rights and also to LGBT rights in general. The consistency/satisfaction binary in the question was deliberate, because being consistent means 'conformity in the application of something' whereas satisfactory means 'the meeting or fulfilment of expectations, standards, or requirements'

[339] Schalk and Kopf (2010), § 62; X and Others v. Austria [GC] (2013), § 106.
[340] Courten v. the United Kingdom [dec.] (2008); M.W. v. the United Kingdom [dec.] (2009); Schalk and Kopf (2010), § 106.
[341] French Public Healt Code, article L2141-1.
[342] Euronews, 17 January 2014.

therefore one may be consistent in one's actions yet the outcome of the actions may be unsatisfactory.[343]

My answer for the first question is indefinite. On the one hand, the Court has, since *Karner* in 2003, *consistently* held that discrimination between unmarried different-sex and same-sex couples is not justified but that it is within a state's margin of appreciation to maintain the special status of marriage without providing same-sex couples an alternative means of recognition. Accordingly, complaints concerning discrimination between married different-sex couples and unmarried same-sex couples, such as, *Courten*, *Manenc* and *M.W.* have been found inadmissible, whereas the Court has found a violation in cases where same-sex couples where discriminated in comparison to unmarried different-sex couples in cases *X and Others, P.B. and J.S., J.M.*, and *Vallianatos and Others.*

On the other hand, the Court treats same-sex families differently in different contracting states; the status of same-sex families being dependent on the level of protection an individual state affords to unmarried different-sex couples. Consequently, the Court has ruled that same-sex couples should have the right to second-parent adoption in Austria but not in France; and same-sex couples same-sex couples should have the right to contract a civil union in Greece but not in some other country that does not offer any alternative institutions to marriage. Therefore, one can argue that the Court is *inconsistent* in its treatment of individual same-sex couples while being consistent when it comes to abstract issues.

As to the second question whether the current level of protection is satisfactory? I began this thesis with the premise that same-sex families are capable of the same love and commitment as different-sex families and therefore deserve the same level of protection. Currently, they are not afforded the same level of protection and therefore my answer for this question is negative. The situation will remain unsatisfactory until the same level of protection is reached.

6.3 Further analysis

6.3.1 Main problems in the Court's current approach to discrimination

Finally, I shall present some of the main problems in the Court's current approach. I shall first identify the major problems in the way the Court approaches discrimination between

[343] New Oxford American Dictionary.

married different-sex couples and unmarried same-sex couples, and after that highlight some other aspects of the Court's case law on same-sex family life.

The Court is not taking the discrimination seriously.[344] The Court has, in numerous occasions, emphasised that "differences based solely on considerations of sexual orientation are unacceptable under the Convention", and that such differences require "particularly convincing and weighty reasons" to be justified".[345] However, by refusing to address the indirect discrimination same-sex couples suffer when they are excluded from marriage, the Court fails to apply the strict scrutiny it has promised to all sexual orientation complaints. Instead, it grants the states a wide margin of appreciation to determine by themselves whether such difference of treatment is justified.[346]

Absence of objective and reasonable justifications: By rejecting the analogous situation between same-sex couples and married different-sex couples, the Court avoids progressing to the fourth and final stage of article 14 test which would involve an analysis of the proportionality of the alleged discrimination.[347] Consequently, the Court has never considered whether there are any objective and reasonable justifications for excluding same-sex couples from the rights available to married couples.

The absence of any justifications is also linked to the way margin of appreciation is used in these cases. As the dissenting judges in *Schalk and Kopf* argue:

> […] in the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment, there should be no room to apply the margin of appreciation. Consequently, the "*existence or non-existence of common ground between the laws of the Contracting States*" is irrelevant as such considerations are only a *subordinate* basis for the application of the concept of the margin of appreciation. […] it is only in the event that the national authorities offer grounds for justification that the Court can be satisfied, taking into account the presence or the absence of a common approach, that they are better placed than it to deal effectively with the matter.[348]

Absence of the best interest of the child perspective: In cases concerning parental rights and second-parent adoption, the Court focuses exclusively on the relationship between the parents and whether they are in a comparable situation to different-sex parents, thus,

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[344] Bribosia et al. 2014, 11–12.

[345] Among others in: Vallianatos and Others v. Greece (2013), § 77; X and Others v. Austria (2013), § 99.

[346] Lau 2012, 244; Bribosia et al. 2014, 12. Hodson 2011, 173.

[347] Johnson 2012a, 1142.

[348] Schalk and Kopf (2010), Joint dissenting opinion of Judges Rozakis, Spielmann and Jebens § 8. (emphasis in original)

ultimately circling back to the same approach it has when children are not involved. Therefore, the same principle "no recognition unless unmarried different-sex couples are recognised" applies. This leaves a great number of children raised in same-sex families without protection in most part of Europe that only afford protection to marital families. Furthermore, the Court has not addressed the situation directly from the child's perspective and specified the appropriate actions for the member states to guarantee the compliance with the best interest of the child under the ECHR and under the UN Convention on the Rights of the Child.[349]

Separate but equal: By stating that it is within the contracting states' margin of appreciation to decide what kind of legal recognition they want to offer to same-sex couples. The Court is ultimately contributing to the creation of 'separate but equal' partnership regulation regime in Europe. However, it has been established over and over again that "separate is *not* equal", not when concerns race and not when it concerns sexual orientation, even if same-sex couples had access to all of the rights of marriage but under another name.[350]

The Court's approach through the prohibition of discrimination is problematic in general. The core issue in all the analysed cases were whether same-sex couples were discriminated against when compared to a different-sex couple in similar situation. While this might be the best way for the Court to approach the problems that result from the lack of legal recognition of same-sex families, such approach also gives rise to a presumption that same-sex families are only recognised in reference to different-sex families. As though they do not have any inherent value of their own and are not subjects worthy of protection by themselves but only when compared to different-sex families. Same-sex families should have rights by the virtue of the fact that they are families by their own right, not because they just resemble the hegemonic different-sex family.

Uneven protection: Furthermore, the Court's "no recognition unless unmarried different-sex couples are recognised" principle also results in uneven protection around Europe. It can also produce paradoxical effects by allowing the Court to punish those states that already have recognised more rights while not affecting those that do not recognise any

[349] Hodson 2012, 514–515.
[350] Wintemute 2011, §§ 162–183 (emphasis added)

rights at all.[351] For instance the majority of same-sex family life complaints have been brought against the United Kingdom, France and Austria. They are currently in places 1, 5 and 13 respectively, in the ILGA-Europe Rainbow Map 2013. While the Court's judgments have, no doubt, had a positive effect on the LGBT rights development in these countries, there are a great number of other countries that could certainly need the Court's attention more.[352]

6.3.2 Main problems in the Court's approach – some additional aspects

Positive obligation under article 8: The Court has often held that the effective respect of 'family life' requires the contracting states to act affirmatively to ensure normal enjoyment of 'family life'. The positive obligation may even include providing legal recognition for family ties. However, the Court has not been consistent in its application of positive obligations when it comes to same-sex families. As dissenting judges in *Schalk and Kopf* argued, as soon as the Court held that a same-sex relationship falls within the notion of 'family life', it should have drawn interferences from this finding and deduced a "positive obligation to provide a satisfactory framework, offering the applicants, at least to certain extent, the protection any family should enjoy".[353]

Interpretation principles: One of the Court's most important interpretation principles is that "the Convention is a living instrument, to be interpreted in present-day conditions". However, to reach the conclusion that the Convention does not obligate the contracting states to allow same-sex marriage, the Court did not apply the living-instrument doctrine but resorted to the ordinary meaning of words and the historical context of the Convention. The Court concluded that the deliberate choice of wording ('men and women' instead of 'everyone' or 'no one') and the fact that Convention was drafted in the 1950's when marriage was "clearly understood in the traditional sense of being a union between partners of different sex", had to mean that article 12 only applies to different-sex couples.[354] However, the Court has, numerous times, expressly departed from the drafters' intention and ruled that keeping the Convention safeguards 'real and effective' requires evolutive reading of the Convention. Moreover, it would have been impossible for the drafters to

[351] Hervieu 2013; Bribosia et al. 2014, 31.
[352] ILGA-Europe Rainbow Map 2013; ILGA-Europe Rainbow Map (Index) 2013.
[353] Schalk and Kopf v. Austria (2010), Joint dissenting opinion of Judges Rozakis, Spielmann and Jebens § 4; Bribosia 2014, 9.
[354] Schalk and Kopf v. Austria (2010), § 54.

foresee the emergence of LGBT rights in the mainstream European agenda. Therefore, in the context of same-sex family rights, use of the living instrument doctrine would be of particular importance in order to make the Convention guarantees practical and effective.

Tradition: Finally, a major problem lies in the way the Court embraces the 'traditional' concepts of marriage and family without any critical assessment of the concepts. The Court accepts that the protection marriage and family in the traditional sense is a weighty and legitimate reason to justify the exclusion of same-sex couples from marriage. [355] However the Court does not engage in any critical examination of how these 'traditional' concepts "are used to justify the preservation of the heteronormative social construction of marriage".[356] Moreover, "tradition on its own cannot be a sufficient justification for a difference in treatment".[357] If it was, women would still be without the vote and racial and ethnic discrimination would be accepted and enforced by the governments themselves.

In contrast, the tradition argument has been critically inspected by several courts in other jurisdictions which have ruled on same-sex marriage. For instance one U.S. court observed that:

> "[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide" [358]

Role of European consensus: European consensus is another way the Court incorporates the tradition argument in its rulings on same-sex family rights. The Court's statement that there is not yet European consensus regarding the legal recognition of same-sex family life could also be read that the 'tradition' to discriminate same-sex couples still prevails in Europe. Consequently, the same counterargument applies, the fact that majority of European countries think that some form of discrimination is permissible, and still enforce it through law and policy, does not constitute a sufficient justification. It is unreasonable that the Court requires European consensus before it can rule discriminatory treatment to be in violation of the Convention. It is clearly wrong that one group of people is excluded from the most elementary protection of family life only because majority of contracting

[355] Schalk and Kopf v. Austria (2010), § 5; Vallianatos and Others v. Greece (2013), § 83.
[356] Johnson 2010, 156–157, 159.
[357] Wintemute 2011, § 158.
[358] Goodridge v. Department of Public Health (2003), Concurring opinion of Judge Greaney, 11.

states accept this. To remedy these kinds of situations is one of the very reasons the Convention was drafted in the first place.

6.3.3 Possible explanations for the current approach

Especially on basis of the most recent judgments concerning same-sex family life, it seems that the Court already has all the pieces in the puzzle to make the protection of same-sex family life 'real and effective' under the Convention. The Court has stated very clearly that "differences based solely on considerations of sexual orientation are unacceptable under the Convention" and that "where a difference in treatment is based on […] sexual orientation the State's margin of appreciation is narrow".[359] It has also recognised the importance of legal recognition of same-sex families by the states,[360] and that the right to marry under article 12 must not necessarily be limited to different-sex couples.[361]

Therefore, the question remains: why is the Court not willing to go further and rule that positive obligation under article 8 and the right to marry also extend to legal recognition of same-sex family life. Evidently, the Court does no longer object to same-sex family rights and as it still did in the 1990s. Accordingly, its current approach to same-sex family rights cannot be explained by its reluctance to admit that same-sex families are essentially the same as different-sex families, as regards to their capability of love and commitment as well as their need for legal recognition, because it is not true, the Court clearly accepts this. Hence, reasons for the Court's unwillingness to address the discrimination between same-sex couples and married different-sex couples have to be looked for elsewhere.

It is, of course, impossible to find a definite explanation for the Court's current position. However, one possible explanation seems to be the Court's role as a supranational court. The Court's need to maintain its legitimacy and the support of the contracting states could explain why it is not advocating same-sex family rights more actively when it clearly recognises the major problems in their situation and their need for same legal protection as all the other families. This argument is supported by the Court's statement in *Schalk and Kopf* that "it must not rush to substitute its own judgement in place of that of the national

[359] Vallianatos and Others v. Greece (2013), § 77.
[360] Vallianatos and Others v. Greece (2013), § 81; X and Others v. Austria [GC] (2013), § 145.
[361] Schalk and Kopf v. Austria (2010), § 61.

authorities, who are best placed to assess and respond to the needs of society".[362] This is also what Wintemute suggests:

> Is this consensus-based approach a strength or a weakness of the court? Although I found it frustrating at first, I consider it a strength. The court looks for consensus because its judgments are binding. When it takes a stand on a particular human rights issue, it expects 47 European countries to follow, sooner or later. Expulsion from the Council of Europe is the ultimate sanction for failure to comply with a judgment of the court. If the court appeared to force the views of a small minority of countries on all 47, it would risk a political backlash, which could cause some governments to threaten to leave the convention system. As a result, the ability of the court to assist, with regard to a particular issue in a particular country, depends on the state of "European consensus".[363]

6.4 Ways forward

To conclude, I shall offer some suggestions for what the Court could do in order to enhance the protection of same-sex families under the Convention. Obviously, this is not just a strategy for the Court. It is advisable that the contracting states should adopt these measure on their own initiative.

The Court should consider examining the next complaint concerning the exclusion of same-sex couples from marriage under article 14 taken in conjunction with article 12 as the issue falls within the ambit of the right to marry. Through this approach the Court should focus on the reasons why the minority, same-sex couples, has been excluded from the opportunity that is provided to the majority.[364]

In this respect the Court could start by concluding that since same-sex couples are in a similar situation to different-sex couples as regards their need for legal recognition. Accordingly, the Court should conclude that they are in analogous situation also for the purposes of article 14. In justifying this, the ECJ's approach in comparing individuals and not abstract institutions could be useful. After establishing the comparability between same-sex and different-sex couples, the respondent states should be required to provide justifications for the exclusion same-sex couples from marriage. Sometimes just "publicly setting out the reasons in writing" may have a positive effect in LGBT rights advocacy in national policy making and legislation.[365] However, the Court should also be critical of the

[362] Schalk and Kopf v. Austria (2010), § 62.
[363] Wintemute 2010.
[364] Wintemute 2011, §§152.
[365] Bribosia et al. 2014, 32.

reasons offered for justification especially since stigmatisation and segregation through law are not legitimate aims of the government under the Convention.[366]

The next step would be to extent the positive obligation under article 8 to cover same-sex families and to require legal recognition of their family life to ensure the effective enjoyment of their right to family life. At minimum, this would require enacting some form of registered partnership legislation. Although, the Court should be extremely careful not to advocate a 'separate but equal' family regulation regime, this step could be used as a transitional period especially for those countries that currently do not offer any kind of legal protection to same-sex families.

Moreover, the Court should be especially discouraging against differences in parental rights. As it is currently a major problem that even countries which are enacting 'equal' marriage legislation make same-sex spouses' parental rights and access to parenthood inferior to those of different-sex spouses. Since the child's best interest should be of utmost importance in all matters involving children, the Court should apply stricter scrutiny than in cases concerning consenting adults. It is a fact that children are raised in same-sex families across Europe. Affording the states a wide margin of appreciation as regards the legal recognition of these children's "important relationships of care" is certainly not in their best interest.[367]

Alternatively, instead of requiring the legal recognition of same-sex couples, the Court could require that even if the states are not ready to enact civil partnership regulation, the status of children and their right to two legal parents should be equalised. There is certainly enough scientific and sociological evidence to rebut any lack of European consensus as to the uncertainty of the possible consequences in growing up in a same-sex family.

Another step further, the Court could consider adopting an 'obligation of consistency' approach similar to the ECJ. Accordingly, the Court should, in the name of consistency, impose higher standards upon those contracting states that have voluntarily created a legal framework for same-sex families. This approach would also counter the formation and the persistence of a 'separate but equal' regime. This would also ensure that the progress of same-sex family rights is not stagnated in the more advanced countries because some other countries hinder the formation of European consensus.

[366] Wintemute 2011, § 145.
[367] Hodson 2008, 10.

Naturally, the obvious final step would be defining marriage a human right that should be accessible both different-sex and same-sex couples without discrimination. It is, of course, unlikely that the Court will come to this conclusion in the near future, but it could already start signalling in its judgments that it will not tolerate the exclusion of same-sex couples from marriage indefinitely. The Court could already now explicitly state that "same-sex couples have the right to marriage equality" but that it will not fully implement this principle until European consensus supports it.[368]

Such an approach would shift the locus of the Court's scrutiny from whether same-sex couples should have right to legal recognition of their family life, to *how* and *when* they should have this right, thereby better reflecting the Court's current position.[369] This strategy would also contribute to the transparency of the Court's approach in this matter by clarifying its position on the subject matter and clearly indicating why it currently cannot proceed any further. It would also be important to start the process towards marriage equality as soon as possible, given the fact that the Court cannot self decide when it has the change to examine complaints concerning same-sex marriage.

Finally, when European consensus has been reached, the Court should rule that same-sex couples have the right to marry on equal basis with different-sex couples.

On a final note. During the writing of this thesis, I tried hard to understand and accept why the Court is proceeding cautiously in this matter. In the end, when balancing between the same-sex families' right to dignity and to equal protection under the law, and the contracting states' right to cling to a fantasy of the 'traditional' family in the 21st century, there is no doubt in my mind which way the scale should tip.

[368] Lau 2012, 252–255. Bribosia 2014, 15. This approach would be in line with the Court's method in *Christine Goodwin* and the preceding cases regarding the legal recognition of transsexuals' post-operative gender.
[369] Lau 2012, 244.