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**EQUALITY, INCLUSION AND OPPORTUNITIES FOR LGBT+
FAMILIES**

LIMITS IN CONTESTING LGBT+ FAMILY RIGHTS BEFORE THE ECtHR

Dissertation to obtain a Master's Degree in
Law, in the specialty of International and
European Law

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Anti-plagiarism Statement

I hereby declare that the work I present is my own work and that all my citations are correctly acknowledged. I am aware that the use of unacknowledged extraneous materials and sources constitutes a serious ethical and disciplinary offence.

To Prof. Nausica Palazzo, who has guided me through this thesis with much dedication.

To everyone I love.

To my Mami, who is all the family I could ever wish for.

To Franzi, who has been a father to me.

To all the people I have chosen to be my family.

Thank you for helping me grow into the person I am today.

“There are as many forms of love as there are moments in time.”

Jane Austen

List of Abbreviations

cc	Communicated Case
CoE	Council of Europe
CEDH	Convenção Europeia dos Direitos do Homem
CFR	Charter of Fundamental Rights of the European Union
dec.	Decision
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GC	Grand Chamber of the European Court of Human Rights
LGBT+	Lesbian, Gay, Bisexual, and Transgender +
MoA	Margin of Appreciation
PACE	Parliamentary Assembly of the Council of Europe
PACS	Pacte Civil de Solidarité
RP s	Registered Partnerships
SOGI	Sexual Orientation and Gender Identity
TEDH	Tribunal Europeu dos Direitos do Homem

Declaration

The body of the dissertation, including spaces and notes, occupies a total of 199,964 characters.

Resumo: Um número crescente de pessoas identifica-se como LGBT+. LGBT+ é um termo genérico que inclui, mas não se limita a, pessoas com identidade lésbica, gay, bissexual e transgénero. Os sistemas jurídicos ocidentais estão a alargar as protecções legais a estas minorias, embora os progressos não tenham sido isentos de retrocessos e as reformas continuem a ser muito controversas. Em consequência, muitos países da Europa ainda não dispõem de plena igualdade, inclusão e oportunidades para as famílias LGBT+.

Esta tese aborda este enigma, nomeadamente os progressos alcançados em matéria de direitos das pessoas LGBT+ e os retrocessos que se seguiram, em particular no que respeita aos direitos da família. Abordando a questão na perspectiva das famílias LGBT+, a tese analisa alguns dos casos que foram levados ao Tribunal Europeu dos Direitos do Homem (TEDH) sobre questões relacionadas com as parcerias registadas, o casamento, a adoção e a barriga de aluguer. No cerne das suas reivindicações está o facto de as autoridades nacionais terem interferido com o ‘direito ao respeito pela vida privada e familiar’ e o ‘direito ao casamento’ das famílias LGBT+, bem como das terem discriminado com base na orientação sexual de (alguns) membros da família, impedindo assim a sua capacidade de constituir uma família legal. Por conseguinte, a tese examina a forma como o TEDH contribui ou é limitado na sua contribuição para a igualdade, a inclusão e as oportunidades acima referidas; visa compreender a forma como o TEDH interpreta os artigos relevantes da Convenção Europeia dos Direitos do Homem (CEDH) à luz das condições contemporâneas; explora os desafios enfrentados pelas famílias LGBT+ na sua vida quotidiana; e analisa as implicações práticas das decisões do TEDH.

Palavras-chave: LGBT+ - Família - Orientação Sexual e Identidade de Género – CEDH

Abstract: A growing number of people identify as LGBT+. LGBT+ is an umbrella term that includes, but is not limited to, people with lesbian, gay, bisexual and transgender identities. Western legal systems are extending legal protections to these minorities, although progress has not been without setbacks, and reforms remain highly controversial. As a result, many countries across Europe still lack full equality, inclusion and opportunities for LGBT+ families.

This thesis addresses this conundrum, namely the progress made for the rights of LGBT+ individuals and the setbacks that have followed, particularly in relation to family rights. Approaching the issue from the perspective of LGBT+ families, the thesis analyses some of the cases that have been brought before the European Court of Human Rights (ECtHR) on issues related to registered partnerships, marriage, adoption and surrogacy. At the heart of their claims is the fact that national authorities have interfered with LGBT+ families' 'right to respect for private and family life' and their 'right to marry', as well as discriminated against them on the basis of the sexual orientation of (some) family members, thereby hindering their ability to form a legal family. Therefore, the thesis examines how the ECtHR contributes or is limited in its contribution, to the above-mentioned equality, inclusion and opportunities; aims to understand how the ECtHR interprets relevant articles of the European Convention on Human Rights (ECHR) in the light of contemporary conditions; explores the challenges faced by LGBT+ families in their daily lives; and analyses the practical implications of the ECtHR's decisions.

Keywords: LGBT+ – Family – SOGI – ECHR

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Comments by the Author

The gender-neutral singular third person pronoun ‘they, them, their’ is used throughout this thesis.

Although the terms ‘LGBT+¹ individual(s)’, ‘LGBT+ couple(s)’ and ‘LGBT+ families’ may seem overused at certain points in this thesis, they are used explicitly to indicate that the issue at hand may not be equally relevant to individuals, couples and families who have not experienced discrimination, inequality and exclusion on the basis of their sexual orientation or gender identity². The term ‘LGBT+ family’ will refer to the loving relationship between LGBT+ partners, between them and their child(ren) or between an LGBT+ person and their child(ren)³.

¹ Umbrella term that includes, but is not limited to, people of lesbian, gay, bisexual, and transgender identity

² HODSON, Loveday - **The Rights of Children Raised in Lesbian, Gay, Bisexual or Transgender Families: A European Perspective**, p. 7; hereafter: HODSON, 2008

³ *Ibid.*

1. Introduction

The subject of this thesis are LGBT+ families. Specifically, it focuses on a selection of applications to the *European Court of Human Rights*⁴ by LGBT+ families who claimed that national authorities had interfered with their '*right to respect for private and family life*'⁵ or their '*right to marry*'⁶. In some cases, they will also have claimed that such authorities' interference with these rights discriminated against them based on their sexual orientation and thus disproportionately affected their ability to form a family.

The fact that some national laws only recognise and protect 'traditional' families is often the starting point for these applications. For example, some States define marriage as a union between a man and a woman⁷. The problem is that such provisions exclude LGBT+ families and expose them to discrimination, exclusion and marginalisation⁸. As a result, until national and international legal systems begin to adequately protect them, profound inequalities will persist.

As will be seen, even though there are already several international treaties, for example, that contain one or more articles prohibiting discrimination and explicitly include sexual orientation as a protected ground of discrimination and although they link this ground to other rights⁹, much remains to be done by legislators to achieve full equality, inclusion and opportunity for LGBT+ families. Therefore, as an essential step towards the elimination of inequality based on sexual orientation and/or gender identity¹⁰, legislators need to address the issues faced by LGBT+ families by developing concrete policies and revising existing legislative measures¹¹.

⁴ Hereafter: ECtHR/Court

⁵ Article 8 ECHR

⁶ Article 12 ECHR

⁷ *Chapin and Charpentier v. France*, no. 40183/07, § 37, 9 June 2016; hereafter: *Chapin and Charpentier*

⁸ HUMAN RIGHTS PROGRAM - **Indirect Discrimination and Sexual Orientation or Gender Identity**, pp. 55-57

⁹ For example, Article 14 – '*prohibition of discrimination*' – ECHR is, for example, linked to the '*right to respect for private and family life*' or the '*right to marry*' because it has no independent existence

¹⁰ Hereafter: SOGI

¹¹ COMMITTEE OF MINISTERS - **Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity**; hereafter: COMMITTEE OF MINISTERS, 2010

As LGBT+ families are in many ways still “at the mercy of judicial discretion”¹² and face obstacles in building their families, which is contrary to the principle of equality¹³, a central question that this thesis aims to answer is whether equality, inclusion and opportunities for LGBT+ families exist before the ECtHR.

To provide such an answer, this thesis takes the LGBT+ families’ perspective. In doing so, it aims to give the reader an understanding of how the Court interprets the provisions of Articles 8, 12 and 14 of the European Convention on Human Rights¹⁴ and, accordingly, how states should apply them. It will show what problems LGBT+ families face in their daily lives and whether their needs have been met in decisions affecting them, how these decisions have worked in practice, how scholars and judges interpret the Court’s judgments, how the Court deals with and what reasoning it applies to cases on issues related LGBT+ family rights, and what prevents it from contributing to equality, inclusion and opportunities for LGBT+ families and how it could overcome these obstacles. The thesis will guide its readers through the different legal and social norms associated with ‘traditional’ and ‘new’ families and the Court’s application of its interpretations of the concepts of private and family life, marriage and discrimination (based on SOGI) in cases involving LGBT+ registered/civil partnerships/unions¹⁵, marriage, adoption and surrogacy.

In particular, Chapter II forms the theoretical framework of this thesis, providing a introduction to the normative underpinnings of the family (‘traditional’ v. ‘new’) and an overview of queer theory and heteronormativity. Chapter III looks at the Protection System of the European Convention on Human Rights, explaining the role of the ECtHR and the scope and application of the articles of the ECHR that are most relevant to the case law analysis in chapter IV. Finally, Chapter IV analyses the Court’s case law on the legal recognition of horizontal/vertical LGBT+ family relationships. It provides valuable insights into the extent to which LGBT+ families can seek redress from the Court for violations of their rights under Articles 8, 12 and 14 ECHR. The analysis will show that the Court’s contribution to equality, inclusion and opportunity for LGBT+ families is limited and that it

¹² *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 107, 21 July 2015; hereafter: *Oliari and Others*

¹³ Equal rights on equal terms for all

¹⁴ Hereafter: ECHR/Convention

¹⁵ Hereafter: registered partnerships/RPs

often uses heteronormative reasoning. It will also make clear that when the Court has used queer theory reasoning in its cases, these have contributed to legislative breakthroughs.

2. General Definitions and Concepts

2.1. Normative Underpinnings of the Family: ‘Traditional’ v. ‘New’

One of the most important human relationships that everyone has, to some extent, is with their family¹⁶.

Defining the term ‘family’ is complex¹⁷. Generational differences, the *zeitgeist*, the social, legal, economic and political environment, and cultural, religious and ethnic factors all influence the interpretation of the term.¹⁸ In Europe, the definition has evolved with the changing attitudes, practices and structures of the family, resulting, for example, from the spread of more liberal views on marriage, cohabitation and separation, particularly over the last half century¹⁹. The concept of ‘family’ has thus been broadened to include a whole new ‘*curriculum*’ of family forms²⁰.

Reading the various definitions developed by early 20th-century sociological research, the already ‘modern’ family consisted of a married, monogamous, heterosexual couple and their children²¹. Meanwhile, international law has sought to obscure (traditional) notions of ‘family’²². Today, however, it is clear that it has moved towards a perspective in which the ‘family’ is based on kinship and affinity and a ‘*family (life)*’ that includes factual relationships rather than horizontal relationships sealed only by legal contracts²³. As a consequence, institutions such as the ECtHR have begun to protect the rights of ‘unconventional’ families^{24,25}.

¹⁶ THOMAS, Patricia A.; LIU, Hui; UMBERSON, Debra - Family Relationships and Well-Being. **Innovation in Aging**, p. 2

¹⁷ SHARMA, Rahul - The family and family structure classification redefined for the current times. **Journal of Family Medicine and Primary Care**, p. 306

¹⁸ KINNEAR, Pamela - **New Families for Changing Times**, p. 5

¹⁹ SOBOTKA, Tomáš; BERGHAMMER, Caroline - Demography of family change in Europe. In SCHNEIDER, NORBERT F.; KREYENFELD, MICHAELA (Eds.) - **Research Handbook on the Sociology of the Family**, pp. 163-164

²⁰ *Ibid.*

²¹ HASTY, Jennifer; LEWIS, David G.; SNIPES, Marjorie M. - **Introduction to Anthropology**, p. 355

²² STYCH, Marek - The Definition of Family in International and EU Law. **MEST Journal**, p. 194

²³ *C.E. and Others v. France*, nos. 29775/18 and 29693/19, § 49, 24.3.2002

²⁴ e.g., those composed of single parents, same-sex couples, etc.

²⁵ DERMOTT, Esther; FOWLER, Tim - What Is a Family and Why Does It Matter? **Social Sciences**, p. 86

Concerning these 'new' family forms, some conservative voices in favour of the 'traditional' family claim that they are contemptuous of traditional values²⁶. In the course of this thesis, it will become clear that this is not the truth. It does not mean that they no longer care about 'family values'²⁷ if they adopt alternative practices and do not conform to 'traditional' family norms. Rather, they share some of such values with 'traditional' families but may reject others as lifelong commitment or power asymmetries.

'Tradition' is no longer a fundamental principle to be adhered to. It has become a matter of political debate and a primary source of state legitimacy²⁸. According to Merriam-Webster²⁹, tradition is a combination of an "inherited, established, or customary pattern of thought, action, or behaviour", "the handing down of information, beliefs, and customs by word of mouth" that pertain "to the past" and "are commonly accepted"³⁰. The very fact that this definition states that 'traditions' relate to the past and are unwritten rules leaves room to imagine how outdated some of them may be, and suggests that their original intent has little to do with their incorporation into formal laws. This is not to say that 'traditions' are meaningless, but they should not be enforced by state authorities³¹. Yet many states insist on the legitimacy of traditions and incorporate them into their systems to 'maintain' social order and strengthen their authority³². The problem is that new social developments are not taken into account by states that cling to 'traditions' and use them as a basis for legislation³³.

The ECtHR limits the use of tradition as a 'legitimate' state interest. Although the Court has stated on many occasions that the "protection of the family in the traditional sense is, in principle, a weighty and legitimate reason"³⁴, it also found that the objective of this protection remained "abstract and a broad variety of concrete measures may be used to implement it", thus, "the State, in its choice of means designed to protect the family [...], must [...] take into account developments in society [...] including the fact that there is not

²⁶ POWELL, Elizabeth Caroline - **The Political Use of «Family Values» Rhetoric**, pp. 4-6

²⁷ e.g., support, love, care

²⁸ RÜSEN, Jörn - Tradition: A Principle of Historical Sense-Generation and its Logic and Effect in Historical Culture. **History and Theory**, p. 45

²⁹ An English dictionary

³⁰ MERRIAM-WEBSTER - **Tradition**

³¹ OECD - The State's Legitimacy in Fragile Situations. In **Conflict and Fragility**, p. 28

³² *Ibid.*

³³ FEINBERG, Jessica - Exposing the Traditional Marriage Agenda. **Northwestern Journal of Law & Social Policy**, p. 302

³⁴ *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 83, ECHR 2013 (extracts); hereafter: *Vallianatos and Others*

just one way or one choice when it comes to leading one's family or private life"³⁵. In the Court's view, although the "support and encouragement of the traditional family [...] [may be] legitimate or even praiseworthy"³⁶, there is "no basis for considering that affording legal recognition [...] to same-sex couples [...] could in itself harm families constituted in the traditional way"³⁷. The protection of the 'traditional' family and the "traditions, stereotypes and prevailing social attitudes in a particular country" can therefore not justify a "difference in treatment based on sexual orientation"³⁸.

Recently, some sociologists have identified intimacy as it is lived today as promoting the abandonment of traditions³⁹. They identify the reflexive, autonomous and pluralising nature of intimate practices as one of the main drivers of the 'de-traditionalisation' of family life⁴⁰. However, new family functions, dynamics and constellations have also emerged as a result of social change, making 'traditional' behaviours, institutions and gender roles less 'legitimate' and giving rise to more liberal approaches to relationships that are now common in most parts of the world⁴¹.

According to Giddens⁴², the "de-traditionalisation" of family life was due to recent globalisation⁴³. The latter has helped capitalist systems to acquire social power, with which they were able to introduce new 'traditions' that allow greater individual freedom⁴⁴. New 'traditions' include modern and rational rules; they are 'decentred' from 'traditional' ones that are being overthrown⁴⁵. For example, according to old 'traditions', intimacy was a means of procreation within a married couple, a couple for whom obligations to one's partner were paramount⁴⁶. This is in contrast to today, where partners value self-development⁴⁷. In

³⁵ *Ibid.*, § 84

³⁶ *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, § 207, 17 January 2023; hereafter: *Fedotova and Others*

³⁷ *Ibid.*, § 212

³⁸ *Ibid.*, § 217

³⁹ STEVENS, Liesbet; HOOGHE, Marc - The swing of the pendulum: the detraditionalisation of the regulation of sexuality and intimacy in Belgium (1973–2003). *International Journal of the Sociology of Law*, p. 133; hereafter: STEVENS *et al.*, 2003

⁴⁰ GROSS, Neil - The Detraditionalization of Intimacy Reconsidered. *Sociological Theory*, pp. 286-287

⁴¹ STEVENS *et al.*, 2003, p. 133

⁴² Sociologist who wrote some of the most important publications on "de-traditionalisation"

⁴³ CAETANO, Ana - Reflexivity and social change: A critical discussion of reflexive modernization and individualization theses. *Portuguese Journal of Social Science*, pp. 95-96

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

what Giddens calls the “post-traditional order”, partners have “pure relationships” of sexual and emotional equality, associate love with self-fulfilment, and embrace sexuality⁴⁸. As a result of this increased autonomy and reduced social control by the family, it has become easier for individuals to explore and question who they are, to understand themselves and their identity and to come to terms with their sexuality, gender identity and sexual orientation⁴⁹.

For Giddens, there is no explicit link between ‘pure relationships’ and heterosexual love; they have been extended to include homosexuals, and despite the existence of ‘traditional’ ways of relating, such pure relationships challenge normative forms of intimacy, romanticism, sexuality, love, and private and family life⁵⁰

⁴⁸ GIDDENS, Anthony - **The Transformation of Intimacy: Sexuality, Love, and Eroticism in Modern Societies**, p. 40

⁴⁹ JASTRZEBSKA, Julia; BŁAŻEK, Magdalena - Questioning Gender and Sexual Identity in the Context of Self-Concept Clarity, Sense of Coherence and Value System. **International Journal of Environmental Research and Public Health**, pp. 1-2

⁵⁰ LAMONT, Ellen - “We Can Write the Scripts Ourselves”: Queer Challenges to Heteronormative Courtship Practices. **Gender & Society**, p. 625

2.2. Queer Theory and the Critique to Heteronormativity: An Overview

Families are becoming increasingly diverse, but diversity has always existed. Apart from the apparent biodiversity that surrounds humans, also social environments have become more diversified since the existence of humankind. In this way, diversity has been the driving force behind people's need to be part of a community that will protect them for their survival⁵¹.

An individual's group membership is determined by the physical characteristics they inherit at birth and by non-physical elements such as overtly held norms, beliefs and behaviours⁵². Diversity is about the variety of individual attributes that are subjective, dynamic and dependent on self and social identity⁵³.

The problem with diversity is that while individual differences enrich humanity, it takes time for legal and political debates to catch up with the latest social developments⁵⁴. In recent decades, therefore, the diversity, individualism and pluralism at the heart of the European way of life have led not only to social change, but also to political and legislative rethinking, with the concept of 'diversity' gaining in importance to the extent that it has become a central matter in the protection of human rights in democratic societies⁵⁵. New social, political and legislative attitudes and approaches have also meant that the needs of LGBT+ people have finally been taken into account⁵⁶. Such attitudes and approaches were shaped by the lesbian and gay movements of the mid-70s to mid-80s and the long-term queer activism in the 90s⁵⁷. Moreover, they were brought about by feminists who adopted the dichotomy of sex and gender⁵⁸ to show that physical characteristics could not be the only determinants of specific roles in the patriarchal matrix of society⁵⁹. In parallel, social scientists once again interpreted sex and gender differently and developed a set of theories about sexuality and gender known

⁵¹ HAMILTON, Rebecca W.; PUNTONI, Stefano; TAVASSOLI, Nader T. - Categorization by groups and individuals. **Organizational Behavior and Human Decision Processes**, p. 71

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ BECK, Ulrich; BECK-GERNSHEIM, Elisabeth - **Individualization: Institutionalized Individualism and its Social and Political Consequences**, pp. 22–23

⁵⁵ RAUD, Rein - Zygmunt Bauman's Critique of Multiculturalism: a Polemical Reading. **Revue internationale de philosophie**, pp. 386–387

⁵⁶ PIANTATO, G. - How has queer theory influenced the ways we think about gender? **Working Paper of Public Health**, p. 3; hereafter: PIANTATO, 2016

⁵⁷ *Ibid.*

⁵⁸ It opposed to the idea that gender was one's 'destiny'

⁵⁹ ESPINHAÇO GOMES, Inês - **Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity**, p. 6; hereafter: ESPINHAÇO GOMES, 2019

as ‘queer theory’⁶⁰. Originally, the notion of ‘queer’ has been used as an informal and derogatory expression to identify homosexual people⁶¹. Today, it describes people whose SOGI ‘differs’ from the socially dominant ‘norm’⁶².

As mentioned earlier, personal and social identities are multifaceted, contextual and complex, as are people’s gender identity and sexual orientation⁶³. Gender identity refers primarily to the psychological aspect of gender; it provides an insight into how individuals experience, name and express their gender⁶⁴. Sexual orientation refers to an individual’s emotional and sexual attraction to one or more people of the same or different (non)biological sex⁶⁵. Queer theory has addressed the fact that both gender identity and sexual orientation are broad⁶⁶.

Before the ‘queer-volution’, many people assumed that there were two types of gender identity: female or male, and one type of sexual orientation: heterosexual⁶⁷. This was long the only way that society and its institutions thought of SOGI, which is why this hetero-and cis-normative dichotomy was embedded in social, educational, legal, employment, health and economic systems⁶⁸. Hetero- and cis-normative thinking highlights hegemonic social discourses that assume that cis-individuals are heterosexual and therefore superior and privileged to those who are not⁶⁹.

Today, gender is no longer just about biology, and people no longer identify with the binary division of gender into women and men⁷⁰. ‘New’ genders and sexualities have emerged⁷¹. There is no quantifiable number of independent and mutually exclusive SOGI groups to

⁶⁰ PIANTATO, 2016, p. 3

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ GIDDENS, Anthony - Modernity and Self-Identity: Self and Society in the Late Modern Age. In SEIDMAN, STEVEN; ALEXANDER, JEFFREY C. (Eds.) - **The New Social Theory Reader**, p. 217; hereafter: GIDDENS, 2008

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ ESPINHAÇO GOMES, 2019, p. 2

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, p. 9

⁶⁹ PIANTATO, 2016, p. 7

⁷⁰ GIDDENS, 2008, p. 217

⁷¹ *Ibid.*

which one can belong⁷². Also, individuals have always engaged in various intimate activities that have not always been exclusively heterosexual⁷³.

Queer theory questions the relationship between gender, gender identity, sexual desire and orientation in various social and cultural contexts⁷⁴. It seeks to problematise how heteronormativity is absurdly normative, pervasive, produced and reinforced in society⁷⁵. It also attempts to resist hetero- and cis-normative oppression of LGBT+ people by deconstructing gender and sexual binarism, challenging inequalities and transgressing centralised institutions that universalise and legitimise hetero- and cis-normativity⁷⁶. Queer theory has furthermore pointed out that there is not always uniformity or conformity to hetero- or cis-normative practices, which is why hetero- and cis-normativity do not only marginalise LGBT+ people, but even exclude heterosexual cis-people if they go beyond the ‘norm’⁷⁷.

Hetero- and cis-normativity creates ‘LGBT+ phobia’ and often leads to violent encounters, which is why LGBT+ advocates call for equal rights for LGBT+ people⁷⁸. As will be seen in the following chapters, in recent decades policy, legislation and social science have begun to seriously develop (mainly legal) solutions that have provided a basis for social norm change and supported the campaign for LGBT+ equality and (human) rights around the world⁷⁹.

⁷² *Ibid.*

⁷³ TILSEN, Julie; NYLUND, David - Heteronormativity and Queer Youth Resistance. In **Counselling Ideologies**, p. 97

⁷⁴ *Ibid.*, p. 101

⁷⁵ POLLITT, Amanda M. *et al.* - Heteronormativity in the Lives of Lesbian, Gay, Bisexual, and Queer Young People. **Journal of Homosexuality**, p. 524

⁷⁶ CARROLL, Rachel - Introduction: feminism, queer theory and heterosexuality. In **Rereading Heterosexuality: Feminism, Queer Theory and Contemporary Fiction**, pp. 6-8

⁷⁷ *Ibid.*

⁷⁸ BROWNE, Evie - **Gender norms, LGBTQI issues and development: a topic guide**, p. 6

⁷⁹ *Ibid.*

3. The Protection System of the Convention on Human Rights

3.1. Introducing the ECHR and the ECtHR

3.1.1. The Convention and Court – General Principles

The ECHR came into force in 1953⁸⁰. The Convention upholds and promotes human rights to ensure the fundamental rights and freedoms of all persons (citizens and other nationals) in the 46⁸¹ Council of Europe⁸² member states⁸³. Upon signing and ratifying the Convention, these member states⁸⁴ also become High Contracting Parties^{85,86} to the ECHR⁸⁷.

The ECHR has brought with it a whole new system⁸⁸ of collective responsibility for protecting human rights⁸⁹. The ECtHR, established in 1959, is part of this system⁹⁰. The Court is an external, independent and impartial body with jurisdiction over *‘all matters concerning the interpretation and application of the Convention and the Protocols thereto’*^{91,92}. The Protection System of the European Convention on Human Rights marks a turning point in international law⁹³. This was also underlined by Sicilianos⁹⁴ when, on the occasion of the Court’s 60th anniversary⁹⁵, he noted that the fact that the ECHR provided for the establishment of a court “capable of leading to a binding judicial decision” is “the

⁸⁰ EUROPEAN COURT OF HUMAN RIGHTS - The ECHR in 50 questions, p. 3; hereafter: EUROPEAN COURT OF HUMAN RIGHTS, 2021a

⁸¹ Status as of 16 March 2022, when the Committee of Ministers of the Council of Europe, in the context of a procedure launched under Article 8 of the Statute of the Council of Europe, adopted Resolution CM/Res(2022)2, by which the Russian Federation ceased to be a member of the Council of Europe as from 16 March 2022

⁸² Hereafter: CoE

⁸³ EUROPEAN COURT OF HUMAN RIGHTS, 2021a, p. 1

⁸⁴ Hereafter: the States

⁸⁵ 46 High Contracting Parties as from 16 September 2022, as the Court, at its plenary session of 22 March 2022, adopted, pursuant to Rule 20 § 1, adopted the “Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights”. It stated that the Russian Federation would cease to be a High Contracting Party to the Convention on 16 September 2022

⁸⁶ Hereafter: Contracting Parties/Parties

⁸⁷ VILJANEN, Jukka - **Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol nº 62/63**, p. 249

⁸⁸ The Protection System of the European Convention on Human Rights

⁸⁹ COUNCIL OF EUROPE - **The European Court of Human Rights**

⁹⁰ *Ibid.*

⁹¹ Article 32 (1) ECHR

⁹² EUROPEAN COURT OF HUMAN RIGHTS, 2021a, p. 4

⁹³ COUNCIL OF EUROPE - **The Convention in 1950**

⁹⁴ Former President of the ECtHR

⁹⁵ 30 September 2019

strength of the European system of human rights protection”⁹⁶. The Court acts as a supranational body that can appeal decisions of the national courts of the Parties⁹⁷. It prioritises human rights over national law, “produced a considerable body of case law, adapting the Convention norms to the evolution of European societies” and “refined and expanded human rights [...] in Europe to a higher and substantially uniform standard”⁹⁸; a minimum standard for protecting human rights which must be respected by all Parties⁹⁹. The strength of this system and, more importantly, the Court also lies in the fact that the individual applicant (as a human rights holder) has the opportunity to address human rights directly by having their claim determined without the intervention and mediation of a State and thus independently of any political pressure¹⁰⁰.

The Court’s task is “to elucidate, safeguard and develop the rules instituted by the Convention”¹⁰¹. It is also empowered to monitor the “engagements undertaken by [...] Parties”¹⁰², to verify their compliance with the ECHR and to grant remedies to natural or legal persons whose rights under the Convention have been violated by a Party¹⁰³.

The Court assumes a role similar to that of a constitutional court in all its functions, but it is more restrained due to its international and subsidiary nature¹⁰⁴. Parties have the primary responsibility to secure the rights enshrined in the Convention and effectively address domestic violations¹⁰⁵. They must “interpret and apply domestic law in a manner that gives full effect to the Convention”¹⁰⁶. In its dispositive role, the Court uses argumentative methods to provide general definitions that give meaning to the text of the Convention¹⁰⁷. Its definitions help to establish common standards for the interpretation of legal theories and

⁹⁶ SICILIANOS, Linos-Alexandre - **The European Court of Human Rights marks 60 years of work for peace, democracy, and tolerance**; hereafter: SICILIANOS, 2019

⁹⁷ *Ibid.*

⁹⁸ SICILIANOS, 2019

⁹⁹ REPETTO, Giorgio - The ECHR and the European Constitutional Landscape: Reassessing Paradigms. In REPETTO, GIORGIO (Ed.) - **The Constitutional Relevance of the ECHR in Domestic and European Law: an Italian Perspective**, p. 5; hereafter: REPETTO, 2013

¹⁰⁰ AMOS, Merris - The Value of the European Court of Human Rights to the United Kingdom. **European Journal of International Law**, p. 767

¹⁰¹ *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25

¹⁰² *Ibid.*

¹⁰³ EUROPEAN COURT OF HUMAN RIGHTS - **Grand Chamber**

¹⁰⁴ REPETTO, 2013

¹⁰⁵ *Ibid.*, p. 6

¹⁰⁶ *Grzęda v. Poland [GC]*, no. 43572/18, § 324, 15 March 2022

¹⁰⁷ ARNARDÓTTIR, Oddný Mjöll - Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights. **European Journal of International Law**, p. 819

principles¹⁰⁸. The Court's case law has the status of *res interpretata*, meaning that the Parties' national authorities must follow the interpretations and definitions given by the Court within its case law¹⁰⁹.

3.1.2. The Court's Review

As will be seen, the Court often leaves a wide margin of appreciation¹¹⁰ to Parties in the implementation of the Convention's rights, given the rights' wide range and scope¹¹¹. It seems natural, therefore, that the Court relies on different approaches when reviewing alleged violations of such rights¹¹². This review is conducted in three stages.

In the first stage, the Court examines whether a right invoked by the applicant falls within the scope of a provision of the Convention and is therefore applicable to the case¹¹³. It then declares the case inadmissible and suspends further consideration or proceeds with its assessment¹¹⁴.

In the latter case, the Court determines whether the right claimed by the applicant has been infringed (and if so, which right) and thus whether the case is manifestly ill-founded¹¹⁵.

In the third stage, despite having found an interference with a right in the second stage, the Court must decide whether there has or has not been an actual violation of the Convention and, thus, whether the State has or has not struck a fair balance between the legitimate aim pursued and individual interest interfered with and whether it can or cannot justify such interference¹¹⁶. Suppose the Court finds that an interference was unjustifiable and disproportionate and there has therefore been a violation of the Convention. In that case, the

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Hereafter: MoA

¹¹¹ MCGOLDRICK, Dominic - A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee. **International and Comparative Law Quarterly**, p. 23; hereafter: MCGOLDRICK, 2016

¹¹² KLEINLEIN, Thomas - The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution. **International and Comparative Law Quarterly**, pp. 93-94

¹¹³ GERARDS, Janneke - **General Principles of the European Convention on Human Rights**, p. 13; hereafter: GERARDS, 2019

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, p. 14

¹¹⁶ *Ibid.*, p. 18

Party must provide the applicant with a remedy and eliminate the consequences of the breach, sometimes by amending its national legislation¹¹⁷. The manner in which a Party implements a judgment and remedies the applicant's situation is left to the Party without being subject to specific procedural requirements, but the Party has to put an end to the violation in question, mitigate its consequences as far as possible (*restitutio in integrum*) and ensure that no similar violation occurs so that no one else becomes a victim of it¹¹⁸.

3.1.3. Testing the Principle of Fair Balance and Necessity

As seen, a Party's interference with a Convention right must be justified (principle of necessity) and proportionate *stricto sensu* (principle of fair balance)¹¹⁹. To determine the necessity and fair balance, the Court, in the third stage of its review, applies a series of tests:

First, the Court examines whether a Party's reason for interfering with a right is sufficiently necessary to safeguard a presumed interest¹²⁰ of a democratic society¹²¹. But, since "it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity'"¹²² and to identify the areas involving "the exercise of the discretionary powers intrinsic to State sovereignty where the interests of the individual must give way"¹²³, the Court may accept interests that are very distant from those mentioned (if even) in the limitation clause of an article. The nature of interference and type of right are also crucial for the Court to determine whether or not a Party's interference with a right is justifiable¹²⁴. For example, there is no justification for interference with non-derogable rights¹²⁵ or absolute rights^{126,127}. An interference with the latter rights will have the direct consequence that the Court will find a violation of the Convention. An interference with

¹¹⁷ EUROPEAN COURT OF HUMAN RIGHTS - **The European Convention on Human Rights: A Living Instrument**, pp. 6-7; hereafter: EUROPEAN COURT OF HUMAN RIGHTS, 2022a

¹¹⁸ ZWAAK, Leo F. - Effectiveness and Fulfilment of the Judgements on Human Rights: The Experience of the European System. **Revista IIDH**, pp. 342-344

¹¹⁹ EUROPEAN COURT OF HUMAN RIGHTS, 2022a, pp. 6-7

¹²⁰ e.g., 'public safety' (Article 8 ECHR)

¹²¹ MCBRIDE, Jeremy - **The Doctrines and Methodology of Interpretation of the European Convention on Human Rights by the European Court of Human Rights**, p. 50; hereafter: MCBRIDE, 2021

¹²² *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24; hereafter: *Handyside*

¹²³ *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 61, ECHR 2007-II

¹²⁴ MCGOLDRICK, 2016, p. 23

¹²⁵ e.g., Article 3 ECHR – 'prohibition of torture'

¹²⁶ e.g., Article 5 ECHR – 'right to liberty and security'

¹²⁷ GERARDS, 2019, p. 20

derogable rights, which have specific¹²⁸, general¹²⁹ or no limitation clauses¹³⁰, will lead the Court to evaluate the justifications put forward by the State, but, unless there is no reasonable basis for a State's interference, the Court will generally respect them¹³¹. Even if an interference is justified, States are "required to strike a balance between competing private [(a fundamental right)] and public [(a democratic society)] interests or Convention rights"¹³². Thus, the Court also considers "whether the interference [...] was proportionate [(balanced)] to the legitimate aim pursued"¹³³. Its decision will depend on whether the Party's interference has affected an aspect of a right, similar to a core value of the Convention, and whether there is a firm European consensus on the importance of such a right¹³⁴. Although the Convention articles do not explicitly mention the principle of fair balance, the Court pays particular attention to it in cases where there has been an interference with a right which may give rise to positive obligations^{135,136}.

3.1.4. *The Margin of Appreciation*

As seen, the Convention assigns a role to the Parties based on the principle of 'primarity'¹³⁷. Within this framework, the Court leaves a discreet MoA to the Parties to choose the means by which they protect the Convention rights, particularly since, as noted above, it considers that national authorities are generally in a better position to assess the need for a restriction¹³⁸. Numerous provisions of the Convention leave a broad MoA to Parties' national authorities¹³⁹. However, they are not given an unlimited MoA for all provisions; the scope of the MoA also depends on the case's circumstances, subject matter and background¹⁴⁰. It is therefore for the Court, which under Article 19 of the ECHR is concerned with the '*observance of the engagements*' of the Parties, to decide ultimately whether "the reasons

¹²⁸ e.g., Article 2 ECHR – '*right to life*'

¹²⁹ e.g., Article 8 ECHR

¹³⁰ e.g., Article 12 ECHR

¹³¹ MCGOLDRICK, 2016, p. 26

¹³² *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V

¹³³ *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 105, ECHR 2013 (extracts)

¹³⁴ GREER, Steven - **The exceptions to Article 8 to 11 of the European Convention on Human Rights**, p. 14

¹³⁵ i.e., Article 8 ECHR

¹³⁶ MCBRIDE, 2021, p. 24

¹³⁷ GERARDS, 2019, p. 3

¹³⁸ DIJK, Pieter VAN; HOOFF, Godefridus J. H. VAN - **Theory and Practice of the European Convention on Human Rights**, pp. 16-17

¹³⁹ GERARDS, 2019, p. 160

¹⁴⁰ *Ibid.*, p. 161

given by the national authorities to justify the actual measures of ‘interference’ they take are relevant and sufficient”¹⁴¹.

3.1.5. *Living Instrument*

Cases before the Court increasingly involve some of the most controversial issues in today’s world, such as abortion, assisted suicide, adoption by same-sex couples, *etc.*, and unprecedented situations which require account to be taken of newly emerging norms which vary “from time to time and from place to place”, particularly in an “era which is characterised by a rapid and far-reaching evolution of opinions”^{142,143}. In parallel with the changes in society, the general approach of the Court has gradually evolved since its creation. On several occasions it held that it “cannot but be influenced by the developments and commonly accepted standards”¹⁴⁴ of the Parties and that the ECHR must “be interpreted in the light of present-day conditions”, making it a strong, modern and “living instrument”¹⁴⁵.

The principle of living instrument is particularly important for the rights of LGBT+ people, as it allows the Court to extend the scope of the protection of Convention rights. One of the landmark judgments on the rights of LGBT+ families in which the Court interpreted the ECHR as a living instrument is *Schalk and Kopf*¹⁴⁶, as will be seen in Chapter IV. Prior to the case the Court had only “accepted that the emotional and sexual relationship of a same-sex couple constitutes ‘private life’ but has not found that it constitutes ‘family life’”¹⁴⁷. However, in *Schalk and Kopf*, it held that, since “a rapid evolution of social attitudes towards same-sex couples has taken place in many member States”¹⁴⁸, with a growing tendency to include same-sex couples within the concept of family, it found it “artificial to maintain” that same-sex couples could not “enjoy ‘family life’ for the purposes of Article 8” ECHR¹⁴⁹.

¹⁴¹ *Handyside*, § 50

¹⁴² *Ibid.*, § 48

¹⁴³ EUROPEAN COURT OF HUMAN RIGHTS, 2022a, p. 7

¹⁴⁴ *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26

¹⁴⁵ *Fretté v. France*, no. 36515/97, § 34, ECHR 2002-I; hereafter: *Fretté*

¹⁴⁶ *Schalk and Kopf v. Austria*, no. 30141/04, ECHR 2010; hereafter: *Schalk and Kopf*

¹⁴⁷ *Ibid.*, § 92

¹⁴⁸ *Ibid.*, § 93

¹⁴⁹ *Ibid.*, § 94

3.2. Scope and Application of the Relevant Articles of the ECHR

Among the provisions of the ECHR, the following sections will provide an overview of the scope and application of Articles 8, 12, and 14 ECHR, as they are the most recurring articles in the case law analysis of Chapter IV and the most important ones in terms of LGBT+ family rights.

3.2.1. Article 8 ECHR

Article 8 ECHR¹⁵⁰ provides the basis for protecting the fundamental ‘*right to respect for private and family life*’ and aims to prevent an interference by public authorities in an individual’s private and family life, home and correspondence¹⁵¹. It reads:

‘1. Everyone has the right to respect for his private and family life, his home and his 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 health or morals, or for the protection of the rights and freedoms of others.’

When the Article is broken down, its provisions state not only that a person has a sphere of personal interest (paragraph 1) but also that if a government has a legitimate aim to interfere with that sphere, it may do so only within the limits of the limitation clause of paragraph 2.

3.2.1.1. Private Life

‘*Private*’ life within the meaning of Article 8 is a “broad concept which does not lend itself to exhaustive definition”¹⁵². The meaning of ‘*private*’ life in the case law of the Court has evolved in line with social and political developments. Today, it “covers the physical and

¹⁵⁰ Hereafter: Article 8

¹⁵¹ SCHABAS, William A. - **The European Convention on Human Rights: A Commentary**, p. 359; hereafter: SCHABAS, 2015

¹⁵² *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 159, 24 January 2017; hereafter: *Paradiso and Campanelli*

psychological integrity of a person”, encompasses “multiple aspects of the person’s physical and social identity”¹⁵³ and concerns values such as well-being and dignity, the right to personal development and thus personal autonomy and self-determination and the right “to establish and develop relationships with other human beings and the outside world”¹⁵⁴¹⁵⁵. It also extends to aspects of a person’s social and gender identity, sexual orientation, and the intimate sphere of an individual’s sexual life¹⁵⁶. It would therefore be too restrictive to limit ‘private’ life to “an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle”¹⁵⁷.

3.2.1.2. Family Life

The Court interprets ‘family life’ as an autonomous concept¹⁵⁸. In *Paradiso and Campanelli*¹⁵⁹ the Court held that “the existence or non-existence of ‘family life’ is essentially a question of fact depending upon the existence of close personal ties” and that the concept of ‘family’ also includes *de facto* ‘family ties’ where the parties are “living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy”¹⁶⁰. The Court acknowledges that ‘family life’ may also include biological kinship between family members, family reunification, the relationship between parents and their adult child, or personal ties between foster or adoptive parents and their child. Article 8 presupposes “the existence of a family” or at least the (potential) relationship “between, for example, a child born out of wedlock and his or her natural father [...], [...]”

¹⁵³ *Denisov v. Ukraine* [GC], no. 76639/11, § 95, 25 September 2018; hereafter: *Denisov*

¹⁵⁴ *Ibid.*, § 95

¹⁵⁵ EUROPEAN COURT OF HUMAN RIGHTS - **Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence**, pp. 26-29; hereafter: EUROPEAN COURT OF HUMAN RIGHTS, 2022b

¹⁵⁶ *Ibid.*, p. 47

¹⁵⁷ *Denisov*, § 96

¹⁵⁸ Concepts whose content is defined by the Court independently of their meaning in the individual States to protect the Protection System of the European Convention on Human Rights from abuse and to prevent the Parties from adopting authoritarian approaches or evading their responsibilities, as well as to ensure that an equal level of protection is maintained between the Parties

¹⁵⁹ Where the applicants claimed that their ‘right to respect for private and family life’ and that of their child had been violated because, after their return to Italy following the birth of the child through a surrogate mother in Russia, they were unable to register the child’s birth on the ground that both applicants had no genetic link to the child

¹⁶⁰ *Paradiso and Campanelli*, § 140

between a father and his legitimate child even if it proves, years later, to have had no biological basis [...] or the relationship that arises from [...] adoption”¹⁶¹.

3.2.1.3. Negative and Positive Obligations under Article 8

The primary purpose of Article 8 is to protect the individual against arbitrary interference by a national authority of a Contracting State with the individual’s ‘*right to respect for his private and family life*’. Such respect is primarily a negative obligation¹⁶². Therefore, in many cases, the Court has held that the mere fact that Parties refrain from interfering with the article is not always sufficient since it also imposes positive obligations on the Parties to ensure that they also take measures to guarantee the right¹⁶³.

The Court has not yet established a standard as to how and to what extent such obligations can be imposed on States¹⁶⁴. When the Court has to determine the existence of a positive obligation, it also closely examines the principle of proportionality¹⁶⁵; “a number of factors are relevant for the assessment of the content of those positive obligations”, namely, the “‘fundamental values’ and ‘essential aspects’” of an individual’s private life at stake, the (in)consistency of “administrative and legal practices within the domestic system”, “whether the alleged obligation is narrow and precise or broad and indeterminate [...], or [...] the extent of any burden the obligation would impose on the State”¹⁶⁶. However, given “the diversity of practices followed and the situations obtaining in the Contracting States, the [positive obligation] [...] requirements will vary considerably from case to case”¹⁶⁷. States have a MoA in implementing their positive obligations, the extent of which is determined in the light of the above factors, the legal *status quo*, the European consensus, *etc.*

3.2.1.4. Relationship between Article 8 and Article 14

¹⁶¹ *Ibid.*, § 141

¹⁶² EUROPEAN COURT OF HUMAN RIGHTS, 2022b, p.8

¹⁶³ *Ibid.*

¹⁶⁴ GÓMEZ-AROSTEGUI, H. Tomás - Defining Private Life Under the European Convention on Human Rights by Referring to Reasonable Expectations. **California Western International Law Journal**, p. 157

¹⁶⁵ EUROPEAN COURT OF HUMAN RIGHTS, 2022b, p. 8

¹⁶⁶ *Hämäläinen v. Finland* [GC], no. 37359/09, § 66, ECHR 2014; hereafter: *Hämäläinen*

¹⁶⁷ *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 72, ECHR 2002-VI; hereafter: *Christine Goodwin*

Article 8 is often read in conjunction with Article 14 ECHR due to the “parasitic” nature of Article 14 ECHR¹⁶⁸. In cases involving alleged violations of Article 8 and Article 14 ECHR in conjunction with Article 8, the Court may decide whether or not to conduct a separate analysis of Article 14 ECHR, in conjunction with Article 8, ECHR¹⁶⁹. The case-law analysis in Chapter IV will show that in the section on RP, *Vallianatos and Others*, in the section on marriage, *Schalk and Kopf*, in the section on adoption, *X and Others*¹⁷⁰, and in the section on surrogacy, *S.-H.*¹⁷¹ are important examples of the relationship between Article 14 and Article 8.

3.2.2. Article 12 ECHR

Article 12 ECHR¹⁷² guarantees the ‘*right to marry*’. The subject of this article is the personal bonds, the social choices and the legal union that underlie the concept of marriage¹⁷³. In several judgments, the Court has stated that many States “have a similar bar in their law, reflecting apparently similar concerns about allowing marriage”¹⁷⁴. It can thus be said that the ‘*right to marry*’ “shall be subject to the national laws” of the Parties and that restrictions on the right must not “reduce the right in such a way” that “the very essence of the right is impaired”¹⁷⁵. It reads:

‘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.’

Unlike Article 8, “Article 12 does not include any permissible grounds for an interference by the State that can be imposed”¹⁷⁶. Article 12 is therefore narrow in scope; in most cases the Court’s interpretation does not extend the scope of the text¹⁷⁷. It is clear from the provisions of Article 12 that the ‘*right to marry*’ is governed by the procedural and

¹⁶⁸ FREDMAN, Sandra - Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights. **Human Rights Law Review**, p. 273

¹⁶⁹ SCHABAS, 2015, p. 407

¹⁷⁰ *X and Others v. Austria* [GC], no. 19010/07, ECHR 2013; hereafter: *X and Others*

¹⁷¹ *S.-H. v. Poland* (cc), nos. 56846/15 and 56849/15, 16 November 2021; hereafter: *S.-H.*

¹⁷² Hereafter: Article 12

¹⁷³ EUROPEAN COURT OF HUMAN RIGHTS - **Guide on Article 12 of the European Convention on Human Rights: Right to marry**, p. 3; hereafter: EUROPEAN COURT OF HUMAN RIGHTS, 2022c

¹⁷⁴ *B. and L. v. the United Kingdom*, no. 36536/02, § 36, 13 September 2005; hereafter: *B. and L.*

¹⁷⁵ *Rees v. the United Kingdom*, § 50, 17 October 1986, Series A no. 106; hereafter: *Rees*

¹⁷⁶ *Frasik v. Poland*, no. 22933/02, § 90, ECHR 2010 (extracts)

¹⁷⁷ EUROPEAN COURT OF HUMAN RIGHTS, 2022c, p. 5

substantive rules of the relevant national law of the Parties. Typically, the Court does not seem to distinguish between the '*right to marry*' and the right '*to found a family*', interpreting the latter as conditional on marriage and leaving all other family ties under Article 8, as it follows from the provision that no one outside a married couple has the right '*to found a family*'¹⁷⁸.

Article 12 has often been criticised for its wording¹⁷⁹ and for reflecting a more traditional view of marriage, which is why the scope of the right has recently been debated in light of the emerging rights of LGBT+ families¹⁸⁰.

3.2.2.1. Right to Marry

The Court has held that the “essence of the right to marry is the formation of a legal union”¹⁸¹. The '*right to marry*' therefore does not enshrine “the right not to marry”¹⁸², nor does it mention marriage-like relationships, the right to divorce or the prohibition of remarriage¹⁸³. However, the Court’s interpretation of the '*right to marry*' implies that marriage is between two consenting, monogamous and legally competent adults¹⁸⁴.

3.2.2.2. Right to Found a Family

Although many applicants before the Court invoke their right to '*found a family*' in the context of '*family life*', such a right is only guaranteed by Article 12 and is conditional on marriage. By contrast, the opposite, for example, “the inability of any couple to conceive or parent a child”, cannot be understood as restricting the '*right to marry*'¹⁸⁵. Nor can the right to '*found a family*' be understood as a right to procreate or adopt¹⁸⁶. While '*private and family life*' is interpreted by the Court more progressively, including, for example, 'unconventional' forms of family, the Court’s interpretation of the right to '*found a family*'

¹⁷⁸ SCHABAS, 2015, p. 534

¹⁷⁹ '*men and women*' rather than 'all persons'

¹⁸⁰ *Ibid.*

¹⁸¹ *Jaremwicz v. Poland*, no. 24023/03, § 60, 5 January 2010; hereafter: *Jaremwicz*

¹⁸² *Marckx v. Belgium*, 13 June 1979, § 67, Series A no. 31; hereafter: *Marckx*

¹⁸³ SCHABAS, 2015, p. 538

¹⁸⁴ *Ibid.*, p. 534

¹⁸⁵ *Christine Goodwin*, § 98

¹⁸⁶ *Fretté*, § 32

remains more traditionalist¹⁸⁷. In comparison, Article 9¹⁸⁸ of the EU Charter of Fundamental Rights¹⁸⁹, derived from Article 12, is *per se* more progressive¹⁹⁰. It reads:

‘the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.’

The Article comprises two distinct rights: the ‘*right to marry*’ and ‘*to found a family*’¹⁹¹. These are separate because the Article covers situations where national legislation recognises arrangements other than marriage for forming a family¹⁹². Article 9 CFR does not prohibit or oblige states to grant marriage to same-sex couples¹⁹³.

3.2.2.3. Relation between Article 12 and Articles 8 and 14

Concerning the relationship between Articles 12 and 8, both provisions are often invoked in the Court’s applications. However, there can be no simultaneous violation of Article 12 if the Court finds that the interference with ‘*family life*’ is justified under Article 8¹⁹⁴. Even in cases where the Court finds a violation of Article 8, there will be no separate examination of a complaint under Article 12¹⁹⁵. For this reason, Article 12 has often been described as a *lex specialis* in the sense that it limits the scope of Article 8¹⁹⁶.

Relevant case law on the relationship between Articles 12 and 14 includes, *inter alia*, *Hämäläinen*, *Oliari and Others*, *Chapin and Charpentier*, *Orlandi and Others*¹⁹⁷. These cases are discussed in Chapter IV. Article 12 has to this day never been successfully invoked by LGBT+ couples.

3.2.3. Article 14 ECHR

¹⁸⁷ *Ibid.*, p. 542

¹⁸⁸ ‘*right to marry and right to found a family*’

¹⁸⁹ Hereafter: CFR

¹⁹⁰ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS - **EU Charter of Fundamental Rights**

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ SCHABAS, 2015, p. 534

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, 14 December 2017

Article 14 ECHR¹⁹⁸ prohibits discrimination. It reads:

‘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.’

In addition to clauses such as ‘sex, race, colour’, etc., the provision includes ‘other status’. These have been interpreted widely, always taking into account contemporary conditions. According to the Court’s case law, ‘other status’ includes an unlimited number of characteristics of an individual, including age, SOGI, health and disability, parental, marital, immigration, employment and prisoner status, etc.¹⁹⁹.

Article 14 protects the individual against discrimination in the enjoyment of the substantive provisions set out in the Convention and its Protocols²⁰⁰. For this reason, it does not have an independent existence and has always been invoked in conjunction with other rights of the Convention; it merely complements them²⁰¹. This does not mean that Article 14 can only be invoked when a Convention right has been violated. Article 14 can go “beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee”²⁰² and applies to all additional rights that fall within the general scope of any article of the ECHR for which the State has voluntarily decided to provide protection²⁰³.

The Court defines discrimination as a situation where the applicant is treated differently and less favourably than another person (the comparator) in an analogous or relevant but significantly similar situation, where there is no objective and reasonable justification for such difference in treatment in a democratic society, and where the means employed are disproportionate to the aim pursued²⁰⁴. Thus, in the case of an alleged violation of Article 14 in conjunction with another article of the ECHR, the State must justify the difference in

¹⁹⁸ Hereafter: Article 14

¹⁹⁹ EUROPEAN COURT OF HUMAN RIGHTS - **Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: Prohibition of discrimination**, p. 44; hereafter: EUROPEAN COURT OF HUMAN RIGHTS, 2022d

²⁰⁰ *Ibid.*, p. 6

²⁰¹ *Ibid.*, p. 6-7

²⁰² *Andrle v. the Czech Republic*, no. 6268/08, § 28, 17 February 2011

²⁰³ SCHABAS, 2015, p. 562

²⁰⁴ *Ibid.*, p. 563

treatment by explicitly establishing a link between the legitimate aim pursued and the means employed²⁰⁵.

3.2.3.1. Horizontal Effect

The Court has often held that Article 14 also has horizontal effect²⁰⁶. This means that the principle of non-discrimination also applies to the (non-)intervention of national authorities in situations between private parties²⁰⁷. For example, in *Pla and Puncernau*^{208,209}, the Court held that Article 14, read in conjunction with Article 8, not only requires a State to refrain from arbitrary interference, but since the provisions of Article 8 may impose positive obligations on a Party, the latter should also have protected the applicant's rights under Article 14, which it failed to do, constituting a violation of Article 14, read in conjunction with Article 8²¹⁰.

²⁰⁵ *Ibid.*

²⁰⁶ EUROPEAN COURT OF HUMAN RIGHTS, 2022d, p. 8-9

²⁰⁷ *Ibid.*

²⁰⁸ *Pla and Puncernau v. Andorra*, no. 69498/01, ECHR 2004-VIII

²⁰⁹ Where a national court had ruled that one of the applicants (the adopted child of the other) could not inherit from his grandmother's will because he could not be considered the child of a lawful and canonical marriage, which was the only clause in the will

²¹⁰ EUROPEAN COURT OF HUMAN RIGHTS, 2022d, p. 8-9

4. Legal recognition of LGBT+ Family Relationships in the CoE Member States

4.1. Diverse Attitudes and Legal Approaches in Europe

Of the 46 CoE member States, only 19 have marriage equality^{211,212}. This is a poor result given that the majority of States do not have a constitutional restriction on same-sex marriage^{213,214}. The States with marriage equality are Andorra (2023), Austria (2019), Belgium (2003), Denmark (2012), Finland (2017), France (2013), Germany (2017), Iceland (2010), Ireland (2015), Luxembourg (2015), Malta (2017), the Netherlands (2001), Norway (2009), Portugal (2010), Slovenia (2022), Spain (2005), Sweden (2009), Switzerland (2022) and the United Kingdom (2020)^{215,216}. In nine of these States (Austria, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain²¹⁷, Switzerland and the United Kingdom), same-sex couples can also enter into “strong”^{218,219} RPs²²⁰. In addition, a further six States (Croatia (2014), Cyprus (2015), Greece (2015), Hungary (2009), Italy (2016) and Liechtenstein (2011)) allow same-sex couples to enter into a “strong” RP as the highest form of legal recognition of same-sex partnerships, making a total of fifteen States in which same-sex registered partners enjoy rights similar to those of married different-sex couples²²¹. In Belgium, France, Malta, Slovenia and Spain²²², same-sex couples can marry but can also enter into “weak”^{223,224} RPs²²⁵. A further five States (Czech Republic (2006), Estonia (2016), Monaco (2020), Montenegro (2021) and San Marino (2018)) offer as the highest form of legal recognition of same-sex partnerships “weak”²²⁶ RPs²²⁷. There are therefore eleven

²¹¹ The freedom of same-sex partners to choose a marriage from which they derive the same rights as opposite-sex couples under the same circumstances

²¹² RAINBOW EUROPE – **About**; hereafter: RAINBOW EUROPE, 2023a

²¹³ *E.g.*, exclusively between a man and a woman

²¹⁴ RAINBOW EUROPE, 2023a

²¹⁵ Estonia is next on the list: On 20 June 2023, its parliament passed a law legalising same-sex marriage, which will enter into force on 1 January 2024

²¹⁶ RAINBOW EUROPE – **Rainbow Map**; hereafter: RAINBOW EUROPE, 2023b

²¹⁷ Only in some regions

²¹⁸ Registered partners enjoy rights similar to those of married couples

²¹⁹ PALAZZO, Nausica - Marriage Apostates: Why Heterosexuals Seek Same-Sex Registered Partnerships. *Columbia Journal of Gender and Law*, p. 192; hereafter: PALAZZO, 2022

²²⁰ RAINBOW EUROPE, 2023b

²²¹ *Ibid.*

²²² Only in some regions

²²³ Registered partners enjoy different and much weaker rights compared to those of married couples

²²⁴ PALAZZO, 2022, p. 192

²²⁵ RAINBOW EUROPE, 2023b

²²⁶ PALAZZO, 2022, p. 192

²²⁷ RAINBOW EUROPE, 2023b

States that allow same-sex couples to enter into RPs as highest form of legal recognition of horizontal same-sex partnerships²²⁸.

Regarding parent-child relationships, 20 States, namely Andorra, Austria, Belgium, Croatia, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland and the United Kingdom, allow both joint adoption by same-sex couples and second-parent adoption^{229,230}. In addition, Estonia allows adoption by a second parent²³¹.

²²⁸ RAINBOW EUROPE, 2023b

²²⁹ Adoption of the biological child of a same-sex partner

²³⁰ RAINBOW EUROPE, 2023b

²³¹ *Ibid.*

4.2. A Queer Theory Analysis: Exposing Heteronormative Underpinnings of the ECtHR's Approaches to Advancing LGBT+ Family Rights

The following analysis resonates with elements of queer theory. It aims to expose heteronormative underpinnings of the ECtHR's current legal approaches to LGBT+ family litigation. In particular, the analysis concerns the Court's approach to the legal recognition of LGBT+ family relations. In the cases analysed, issues brought before the Court concern four selected areas: RPs and marriage for (intimate) horizontal LGBT+ family relationships and adoption and surrogacy for (parental) vertical LGBT+ family relationships. Although there are many other issues related to the legal recognition of LGBT+ horizontal or vertical family relationships (*i.e.*, child custody), not to mention LGBT+ human rights in general, the four discussed in the following sections seem to be the most pressing issues discussed in the Court's case law on the legal recognition of LGBT+ family relationships. The case law presented has been selected from the most "leading, major, and/or recent"²³² judgments and decisions of the European Court of Human Rights. As this case law is extensive this thesis will not attempt to cover all the case law in detail. Instead, it will highlight which parts of the landmark cases on the legal recognition of LGBT+ family relationships signalled a shift in the Court's reasoning. This will provide a comprehensive overview of the state of affairs and help to contextualise the concluding remarks which will concern the Court's limitations in its case law on the different issues related to legal recognition of LGBT+ family relationships.

4.2.1. Registered Partnerships

4.2.1.1. Overview

While no provision of the Convention includes a right for same-sex couples to have access to RPs²³³, various CoE bodies have called on States to recognise same-sex RPs. The Committee of Ministers, for example, stated in its CM/Rec(2010)5 that "where national

²³² EUROPEAN COURT OF HUMAN RIGHTS - **Guide on the case-law of the European Convention on Human Rights: Rights of LGBTI persons**, p. 5; hereafter: EUROPEAN COURT OF HUMAN RIGHTS, 2022e

²³³ The term is used to refer to any legally recognised union for which a couple must take formal steps to obtain recognition (legal status) and which is provided for by some States, irrespective of the different material scope and contractual nature it may take in a given State

legislation does not recognise [...] same-sex [...] couples, member States are invited to consider the possibility of providing [...] [them] with legal or other means to address the practical problems related to the social reality in which they live”²³⁴. Similarly, the Parliamentary Assembly²³⁵ of the CoE noted in Resolution 1728 (2010) that “the denial of rights to *de facto* ‘LGBT [+] families’ in many member States must [...] be addressed, including through the legal recognition [...] of these families”²³⁶. Furthermore, the Court has stated on several occasions that “same-sex couples are in need of legal recognition [...] of their relationship”²³⁷. All of these wake-up calls to governments, combined with developments in LGBT+ policy, thanks in large part to LGBT+ family rights litigation, have led to a positive trend in the number of CoE States that allow same-sex couples to enter into RPs. Twenty-two States now provide legal recognition of same-sex RPs, of which eleven (still) have only RPs as the highest form of legal recognition for same-sex couples²³⁸.

The nature of the rights granted to same-sex RPs varies considerably from one State to another²³⁹. In particular, some States have adopted “weak” RP models, such as the French *pacte civil de solidarité*²⁴⁰, which contains a limited number of obligations²⁴¹ and rights²⁴² that apply to the partners who enter them, while other States have opted for “strong” models of RPs²⁴³. The latter are those in which the rights and obligations of partners entering them resemble those of married couples in terms of citizenship, surname, income tax rights, *etc.*²⁴⁴.

In the Court’s jurisprudence on same-sex RPs, most applications concern a violation of the applicants’ rights under Article 8, sometimes in conjunction with Article 14. Often, these applications also include further claims relating to the breach of the applicants’ ‘*right to marry*’. This is because applicants in the respondent State have not only been unable to enter RPs, but have also been unable to marry²⁴⁵. The claims may therefore include arguments that

²³⁴ COMMITTEE OF MINISTERS, 2010

²³⁵ Hereafter: PACE

²³⁶ PARLIAMENTARY ASSEMBLY - **Discrimination on the basis of sexual orientation and gender identity Resolution 1728 (2010)**

²³⁷ *Oliari and Others*, § 165

²³⁸ RAINBOW EUROPE, 2023b

²³⁹ PALAZZO, 2022, p. 193

²⁴⁰ Hereafter: PACS

²⁴¹ *e.g.*, partners provide each other with material support and mutual assistance

²⁴² *e.g.*, in the event of the death of one partner, the surviving partner has an exclusive right to the lease

²⁴³ PALAZZO, 2022, p. 192

²⁴⁴ PALAZZO, 2022, p. 193

²⁴⁵ EUROPEAN COURT OF HUMAN RIGHTS, 2022e, p. 25

apply to both RPs and marriage, as the former, although fundamentally different from the latter in many respects, has often been presented by politics as a functional equivalent to marriage²⁴⁶. In particular, RPs have often functioned as a temporary solution to avoid the controversial issue of same-sex marriage and to satisfy same-sex couples' desire for recognition of their relationship until States are ready to open marriage to all couples²⁴⁷.

In general, the arguments put forward by applicants (same-sex couples) regarding their legal recognition (RP or marriage) are based either on choice, where they claim that they prefer one form of recognition to the other because it is more valuable to them (legally or personally), or on status, where they argue that they want their social status to be recognised because they suffer from the inability to have their relationship recognised and are therefore also excluded from their benefits and legal effects^{248,249}.

The Court's interpretation of '*private*' and '*family life*' under Article 8 has gradually changed as LGBT+ people have fought for their rights. In *Schalk and Kopf*, the Court held for the first time that it was "artificial to maintain the view that [...] a same-sex couple cannot enjoy '*family life*'"²⁵⁰. This and similar judgments have led to the social acceptance that "same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships"²⁵¹ and to the understanding that the recognition of same-sex couples is not merely a social purpose or a legal arrangement, but an individual freedom and/or value for LGBT+ couples²⁵². The Court's jurisprudence shows that legal recognitions of same-sex couples "have an intrinsic value" of an emotional and practical nature and that, in particular, "in the absence of marriage, same-sex couples [...] have a [...] interest in obtaining the option of entering into a [...] registered partnership"²⁵³. However, even in cases where same-sex couples can enter into a marriage, it remains to be seen whether they are interested in being married or prefer RPs as a form of legal recognition of their relationship. As more applicants have begun to argue the merits of choosing between different forms of legal recognition, and as opposite-sex couples have also sought RPs, the value of such a choice

²⁴⁶ PUPPINCK, Gregor - **Same sex unions and the ECHR**, p. 3; hereafter: PUPPINCK, 2015

²⁴⁷ *Ibid.*

²⁴⁸ e.g., property rights, that flow from such recognition

²⁴⁹ PALAZZO, 2022, p. 190

²⁵⁰ *Schalk and Kopf*, § 94

²⁵¹ *Oliari and Others*, § 165

²⁵² EUROPEAN COURT OF HUMAN RIGHTS, 2022e, p. 26

²⁵³ *Oliari and Others*, § 174

has become increasingly apparent. RPs may be preferred to marriage by all types of couples for a variety of reasons, including that marriage may be associated with religious significance, that RPs may be seen as a more egalitarian version of partnership “neither based on a long-standing discriminatory tradition and deep-rooted social connotations”, or that RPs may be “more modern and ‘lighter’ than marriage”²⁵⁴²⁵⁵.

The most landmark rulings on same-sex RPs are *Vallianatos and Others, Oliari and Others, Fedotova and Others, Buhuceanu and Others*²⁵⁶ and *Maymulakhin and Markiv*²⁵⁷. As will be seen, of the four selected areas (RPs, marriage, adoption and surrogacy) of issues brought before the Court by LGBT+ families analysed in this chapter, cases involving RPs are the ones in which the Court applies the queerest reasoning.

4.2.1.2. Vallianatos and Others

Vallianatos and Others is a case in which several same-sex couples claimed that they were discriminated against because a new law, which for the first time in Greece provided for an official form of partnership (‘civil union’) other than marriage, was reserved only for different-sex couples²⁵⁸.

The Greek government argued that the provisions of the law should be regarded as enabling parents to bring up their children without the couple being obliged to marry²⁵⁹. The Court did not accept this argument since the law introduced a form of RP enabling different-sex couples to regulate many aspects of their relationship, whether or not they had children²⁶⁰. Excluding same-sex couples from the legislation therefore resulted in a difference treatment based on the applicants’ sexual orientation²⁶¹. This difference in treatment required convincing and weighty grounds²⁶², which the government had failed to establish²⁶³. The

²⁵⁴ *Ratzenböck and Seydl v. Austria*, no. 28475/12, § 9, 26 October 2017

²⁵⁵ HAYWARD, Andy - Mixed-sex civil partnerships and relationality: a perspective from law. **Families, Relationships and Societies**, p. 206

²⁵⁶ *Buhuceanu and Others v. Romania*, nos. 20081/19 and 20 others, 23 May 2023; hereafter: *Buhuceanu and Others*

²⁵⁷ *Maymulakhin and Markiv v. Ukraine*, no. 75135/14, 1 June 2023; hereafter: *Maymulakhin and Markiv*

²⁵⁸ *Vallianatos and Others*, § 9

²⁵⁹ *Ibid.*, § 62

²⁶⁰ *Ibid.*, § 88

²⁶¹ *Ibid.*, § 79

²⁶² *Ibid.*, § 77

²⁶³ *Ibid.*, § 89

Court however accepted that the protection of the family in the traditional sense could, in principle, justify a difference in treatment²⁶⁴. Nevertheless, in line with its approach in *Karner*²⁶⁵, the objective of protecting the family in the traditional sense was abstract and a wide variety of concrete measures could be used for its achievement²⁶⁶. Ultimately, the Court found a violation of Article 14, read in conjunction with Article 8.

Although *Vallianatos and Others* is an important judgment on the legal recognition of LGBT+ families, the Court only went so far as to find that same-sex couples were treated differently. Thus, the Court limited its reasoning to focusing on the fact that Greek 'civil unions' excluded same-sex couples from their scope without introducing a positive obligation for the State to provide for some form of legal recognition of same-sex partnerships.

The ruling was a step forward in that it extended the scope of '*family life*' from the one found in *Schalk and Kopf* by making it applicable to same-sex couples who may or may not be living together. The decision of the Court also paved the way for the Greek legislature to reform the above-mentioned law. In December 2015, the Greek parliament voted to extend 'civil unions' to same-sex couples.

4.2.1.3. Oliari and Others

Another landmark judgment is *Oliari and Others*, in which the applicants (same-sex couples) claimed that the absence of a legal provision allowing them to marry or enter into a 'civil union' constituted a discrimination based on sexual orientation and therefore violated their rights under Article 14, read in conjunction with Article 8.

The case is a progressive step towards the protection of the rights of LGBT+ families, particularly as the Court 'ordered' the State to introduce a specific legal framework providing for the recognition of same-sex couples²⁶⁷.

²⁶⁴ *Ibid.*, § 83

²⁶⁵ *Karner v. Austria*, no. 40016/98, ECHR 2003-IX

²⁶⁶ *Vallianatos and Others*, § 84

²⁶⁷ *Oliari and Others*, § 200

The Court found that, by failing to provide a legal framework for recognising same-sex relationships, Italy had gone beyond its MoA and had not fulfilled its positive obligation to ensure that the applicants could have their relationships recognised²⁶⁸. In doing so, the Court found a violation of Article 8, extending its position on the issue of legal recognition of same-sex couples and building on cases such as *Schalk and Kopf* and *Vallianatos and Others*. However, it was still unclear from the decision whether, by finding a positive obligation on Italy and basing its conclusion on a combination of factors which may not necessarily apply to similar cases, the Court would uphold the judgment in future situations where positive obligations arise for Parties concerning the recognition of same-sex partnerships.

The fact that the Court did not go so far as to find a violation of Article 12 in conjunction with Article 14 is less progressive. In this respect, the Court noted that as things stood²⁶⁹, the question of whether to allow same-sex marriage was left to a State's domestic law²⁷⁰. The Court thus failed to give a reasoned opinion as to whether not recognising same-sex couples constituted unjustified discrimination. It merely stated that the conclusions reached in other cases remained valid²⁷¹ and held that the claims under Article 12 and Article 14 in conjunction with Article 12 were ill-founded²⁷².

The problem is that the Court did not have sufficient regard for the applicants' submissions, their concerns and their account of their impact. This would have been particularly important given the very different situations faced by the applicants in *Schalk and Kopf*. Instead, the Court decided to revert to the positive obligation approach by reiterating that: "in assessing a State's positive obligations regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole"²⁷³; a step backwards compared to *Hämäläinen*, where the legitimate interest of the government was not even taken into account by the Court.

4.2.1.4. Fedotova and Others

²⁶⁸ *Ibid.*, § 185

²⁶⁹ At the time six States allowed same-sex marriage

²⁷⁰ *Ibid.*, § 191

²⁷¹ e.g., *Schalk and Kopf*

²⁷² *Ibid.*, § 194

²⁷³ *Ibid.*, § 175

Fedotova and Others concerns a case in which three same-sex couples, who applied for marriage at local register offices and were refused, argued before the ECtHR that the facts fell within the scope of the right to '*private and family life*'. They contended that the Russian State was under a positive obligation to recognise their relationship²⁷⁴. On the other hand, the government argued that extending marriage to same-sex couples was contrary to the Russian constitution and public policy since the family in its traditional form was a fundamental value of Russian society²⁷⁵.

The Court held that Article 8 must be interpreted as requiring States to ensure legal recognition of same-sex couples through a "specific legal framework"²⁷⁶. It confirmed that the State is obliged to allow same-sex couples to have their relationship recognised. However, it still had to determine the Party's MoA for implementing its obligation.

There was a clear and continuing trend towards recognising same-sex couples within States, which were free to choose the means to be used to fulfil their positive obligations under Article 8. However, as Russian law provided no possibility of legal recognition, the State exceeded its MoA. The State had failed to provide a legitimate reason²⁷⁷ for the lack of legal recognition of same-sex couples, in particular because "traditions, stereotypes and prevailing social attitudes [...] cannot [...] be considered to amount to sufficient justification for a difference in treatment based on sexual orientation"²⁷⁸.

The case is of great importance for the 16 States²⁷⁹ that still do not provide for legal recognition of same-sex relationships. They will have to adapt their legal frameworks in line with the outcome of the judgment.

Although the judgment may appear similar to *Oliari and Others* or *Orlandi and Others*, a closer look reveals that this time, the Court explicitly refers to "States Parties have a positive obligation"²⁸⁰. In contrast, in the other two judgments it merely followed that Italy had a

²⁷⁴ *Fedotova and Others*, § 103

²⁷⁵ *Ibid.*, §§ 113-115

²⁷⁶ *Ibid.*, § 164

²⁷⁷ The State had relied on the arguments that it needed to protect the traditional family, the feelings of the majority of the population and minors against promoting homosexuality

²⁷⁸ *Fedotova and Others*, § 217

²⁷⁹ Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Georgia, Latvia, Lithuania, North Macedonia, Poland, Republic of Moldova, Romania, Serbia, Slovak Republic, Türkiye, Ukraine

²⁸⁰ *Vallianatos and Others*, § 166

positive obligation, an obligation which, unlike in *Fedotova and Others*, the Court had not yet directly extended to all States that did not grant any form of legal recognition.

A positive aspect of the judgment is that the Court, moving away from its previous reasoning, recognised that there was “a clear ongoing trend within the States Parties towards legal recognition of same-sex couples”²⁸¹. The Court found that such a trend was to be interpreted as a consensus. From this it concluded that the Party’s MoA had been significantly reduced when granting legal recognition to same-sex couples²⁸². Problematically, however, the Court then stated that it would leave Parties a broad MoA in determining the precise nature of such a legal regime, so long as it was “adequate”²⁸³. The point is this: While ‘adequate’ recognition will be in favour of same-sex couples, it will differ from such recognition in other States, and the more disparities are created between States, the greater the likelihood that same-sex couples will bring more cases before the Court, with “future legal battles on the rights of same-sex couples [...] [playing] out in the space between the ‘significantly reduced’ and the ‘more extensive’ benchmarks of the States’ margin of appreciation”²⁸⁴. Thus, although this thesis does not share his view, Judge Wojtyczek may be right when he states that “the legal obligations of the Convention should become more precise and specific” to give “clearer guidance to its addressees”²⁸⁵. However, it must be recalled that the Court has already identified certain characteristics that officially recognised alternatives to same-sex marriage must offer, namely that they must have “an intrinsic value for the applicants”²⁸⁶ and must satisfy “basic needs which are fundamental to the regulation of a relationship between a couple [...], such as, *inter alia*, the mutual rights and obligations they have towards each other, including moral and material support, maintenance obligations and inheritance rights”²⁸⁷.

Another problem with the judgment relates to how the Court found a clear trend; it lumped together in this trend States that allow same-sex marriage and those that only allow RPs. While this may have helped to build a ‘consensus’, it is problematic given that marriage is different from RP and therefore falls under Article 12, meaning that two separate issues could

²⁸¹ *Fedotova and Others*, § 175

²⁸² *Ibid.*, § 187

²⁸³ *Ibid.*, §§ 188-190

²⁸⁴ Partly dissenting opinion of Judge Pavli, joined by Judge Motoc, *Fedotova and Others*, § 6

²⁸⁵ Dissenting opinion of Judge Wojtyczek, *Fedotova and Others*, § 2.1

²⁸⁶ *Vallianatos and Others*, § 81

²⁸⁷ *Oliari and Others*, § 169

have been raised, especially since the Court itself has stressed on several occasions that the right to same-sex marriage cannot be derived from any other right than the '*right to marry*'. The lumping together of all these States in the consensus reasoning is confusing to the reader and makes little sense, as the Court only assessed issues raised under Article 8, not Article 12. It also begs the question: why were no issues raised under Article 14 read in conjunction with Article 8 or Article 12? The applicants themselves had chosen to raise only the issue under Article 8 before the Grand Chamber. Still, since the applicants had first applied to the ECtHR²⁸⁸ with a complaint also based on Article 12 and the President of the Section found the application under Article 12 inadmissible, the Court seems to apply heteronormative reasoning, as it gives the impression that Article 12 is only theoretically, but not practically, applicable to same-sex couples.

As to why no issue was raised under Article 14 of the, one can only say that the Court should have raised the question of whether a violation of Article 14 in conjunction with Articles 12 or Article 8 has occurred, especially since "sexual orientation was the sole basis for denying them [(the applicants)] any form of legal recognition or protection"²⁸⁹ and as the Court based its entire outcome on a reasoning that had in mind the principle of equality, an equality that it could have emphasised even more by comparing same-sex couples with different-sex couples and equating them by stating that there is a difference in treatment if one is granted recognition and the other is not. The lack of examination under Article 14 in conjunction with Articles 8 or 12 could therefore be an indication of a heteronormative position of the Court that leads to "the conclusion that the majority consider that the situation of same-sex couples is different from the situation of different-sex couples"²⁹⁰, as Judge Wojtyczek points out.

4.2.1.5. Buhuceanu and Others

In the *Buhuceanu and Others* case, the applicants' applications for marriage had been rejected, which is why they applied to the Court, claiming that the refusal to allow them to marry constituted a violation of Article 8, read alone or in conjunction with Article 14²⁹¹.

²⁸⁸ Third Section

²⁸⁹ Partly dissenting opinion of Judge Pavli, joined by Judge Motoc, *Fedotova and Others*, § 4

²⁹⁰ Dissenting opinion of Judge Wojtyczek, *Fedotova and Others*, § 3.5

²⁹¹ *Buhuceanu and Others*, § 1

Given that only four months had passed between the present case and *Fedotova and Others* and the facts of the case were similar, it is plausible that the outcome was the same: the Court found a violation of Article 8 and did not consider it relevant to examine further whether there had been a violation of Article 14, in conjunction with Article 8²⁹². However, some parts of the judgment still differ from *Fedotova and Others*. These make the case a landmark judgment.

In particular, in its assessment, the Court pointed out that it had already held that States had positive obligations and that the States' MoA was significantly reduced when it came to granting some form of legal recognition to same-sex couples²⁹³. The Court examined the interests relied on by the State to justify the interference with the applicants' rights to determine whether the State had complied with its positive obligation to ensure the recognition of the applicants' relationships²⁹⁴.

Interestingly, this time, the Court did not delve into a reasoning that contains a clear continuing trend. The main reason why the Court found a violation of Article 8 was that the State had no justification for not granting recognition to same-sex couples, especially as this would mean that the applicants would be deprived of access to numerous social and civil rights²⁹⁵²⁹⁶. In particular, the reasons given by the State for not recognising same-sex couples were that it had to protect public opinion in Romania. The majority of people did not agree with the idea that "gay, lesbian and bisexual people should have the same rights as heterosexual people"²⁹⁷. The Court noted that it had already rejected such arguments because the negative or hostile attitude of the heterosexual majority could not be set against the applicants' interest²⁹⁸. In the Court's view, the government had failed to provide details supporting its assertion that same-sex couples could exercise numerous social and civil rights through private contractual arrangements²⁹⁹. The part of the judgment in which the Court stated that legal recognition of same-sex relationships would enable same-sex couples to

²⁹² *Ibid.*, §§ 84-86

²⁹³ *Ibid.*, §§ 72-74

²⁹⁴ *Ibid.*, § 75

²⁹⁵ Mentioned by the applicants in § 38

²⁹⁶ *Buhuceanu and Others*, § 78

²⁹⁷ *Ibid.*, § 50

²⁹⁸ *Ibid.*, § 80

²⁹⁹ *Ibid.*, § 78

regulate fundamental aspects of their lives led the Court to conclude that the applicants had a particular interest in having their relationship recognised³⁰⁰ and that there had been a violation of Article 8.

The problem here is that the Court has only considered practical aspects of the applicants' lives as fundamental, without mentioning their "intrinsic value"³⁰¹. Although this intrinsic value has been discussed in other judgments, it should be highlighted in each judgment as it is the first value to appear in an argument on the principle of equality, which is based on the premise that "same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships" and are "in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship"³⁰². Furthermore, the intrinsic value (equality consideration) should always be discussed in an application such as the present one, in which Article 14, in conjunction with Article 8, was invoked by the applicants who claimed "that the lack of legal recognition [...] of their families deprived them of their dignity as spouses, stigmatised them and harmed them – validating and even inviting prejudice towards them"³⁰³, as the judgment otherwise lacks a clear statement that recognition should not only be about (legal) protection but also (social) equality.

4.2.1.6. Maymulakhin and Markiv

In *Maymulakhin and Markiv*, the applicants claimed that their right under Article 14, read in conjunction with Article 8, had been violated because they had tried to contract a marriage but had been rejected because, under Ukrainian law, they could not marry or enter into a civil union because of their sexual orientation.

The case differs from *Fedotova and Others* and *Buhuceanu and Others* in that the applicants brought the claim only under Article 14, read in conjunction with Article 8, and the Court further restricted the justifications for States to discriminate on grounds of sexual orientation.

³⁰⁰ *Ibid.*

³⁰¹ *Vallianatos and Others*, § 81

³⁰² *Schalk and Kopf*, § 99

³⁰³ *Buhuceanu and Others*, § 36

Interestingly, the Court unanimously found that there had been a violation of Article 14, read in conjunction with Article 8, and there were no dissenting opinions. This can be interpreted as the Court finally coming to the point of interpreting the provisions of Article 8 as including a right to legal recognition of LGBT+ couples and that there is no reasonable justification for any discrimination of same-sex couples in terms of legal recognition. Indeed, in its analysis, the Court noted that the recognition of same-sex couples serves the ideals and values of the Convention in that it confers legitimacy on such couples and promotes their inclusion in a society that is founded on the equal dignity of the individual, sustained by diversity and rejects any stigmatisation based on sexual orientation³⁰⁴. The Court also noted that the existing legal framework in Ukraine recognised marriage and *de facto* family unions of different-sex couples. It pointed out that the choice of one or the other of these legal statuses was purely the couple's choice, a choice the applicants did not have³⁰⁵. The Court therefore considered whether it was justified that the State treated the applicants differently.

It followed that the Court did not accept the government's submission that there was a prospect of legislative changes in this regard, as these remained remote, had no practical impact on the applicants' daily lives, and it could not speculate on a piece of legislation that did not yet exist³⁰⁶. It also noted that, due to numerous petitions from local authorities, religious organisations and non-governmental organisations, Ukraine refused to introduce a law on RPs for different-sex and same-sex couples in 2019³⁰⁷. The fact that the Court did not elaborate on this argument further indicates that a government's mere intention to introduce a law recognising same-sex relationships would never be a convincing justification for discrimination based on sexual orientation. The Court did, however, take a few paragraphs to discuss the fact that the government had abandoned the idea of introducing legal recognition of same-sex relationships because it appeared that the petitions preventing such an introduction concerned the need to protect traditional family values. Here, the Court stated that there was no basis for believing that granting legal recognition to same-sex couples could harm traditionally constituted families³⁰⁸. It is interesting to note that although the Court had reached the same conclusions in *Fedotova and Others*, it stated once and for all that the protection of the traditional family could not be accepted as a valid public interest

³⁰⁴ *Maymulakhin and Markiv*, § 64

³⁰⁵ *Ibid.*, §§ 67-68

³⁰⁶ *Ibid.*, §§ 70-74

³⁰⁷ *Ibid.*, § 74

³⁰⁸ *Ibid.*, § 75

ground justifying the refusal of any legal recognition to same-sex couples, probably because such a ground is too abstract and broad and because “the recognition of same-sex couples does not in any way prevent different-sex couples from marrying or founding a family corresponding to their conception of that term”³⁰⁹. With the phrase “corresponding to their conception of that term [(family)]”³¹⁰, the Court shows queer reasoning as it implies that there are multiple conceptions, definitions *etc.* of the term ‘family’. The most groundbreaking part of the judgment is that the Court focused on the alleged violation of Article 14 in conjunction with Article 8, using a reasoning based on the principle of equality. Indeed, the Court found that the applicants complained that they should be treated with equal dignity³¹¹. Although the applicants themselves had chosen to bring only a claim for an alleged violation of Article 14 in conjunction with Article 8, this has the advantage over a claim under Article 8 that, following discrimination based on sexual orientation, the State has to respond to one of the core values underlying the Convention: equality. “Equal dignity”³¹² and non-discrimination are therefore only realised through the legal recognition of same-sex relationships, a positive obligation imposed on a State since (at the very latest) *Fedotova and Others*. The judgment is therefore a landmark, as the Court, with its equality reasoning, has finally shown that it would recognise that a violation of Article 14 in conjunction with Article 8 occurs when a State denies legal recognition to same-sex couples.

4.2.2. Marriage

4.2.2.1. Overview

The legal recognition of same-sex marriage continues to be fragmented from State to State³¹³. There are many reasons why a State should provide for same-sex marriage³¹⁴. The most pressing is to ensure full equality for same-sex couples, as being married would allow them to enjoy many other rights, such as the right to adopt³¹⁵. Thus, advocates of LGBT+ rights continue to bring cases to the Court in order for it to push its jurisprudence further

³⁰⁹ *Ibid.*, §§ 75-76

³¹⁰ *Ibid.*, § 75

³¹¹ *Ibid.*, § 77

³¹² *Ibid.*

³¹³ EUROPEAN COURT OF HUMAN RIGHTS, 2022e, p. 25

³¹⁴ MUIŽNIEKS, Nils - **Access to registered same-sex partnerships: it's a question of equality**; hereafter: MUIŽNIEK, 2017

³¹⁵ *Ibid.*

while preventing extreme political and social repercussions from States³¹⁶. In particular, LGBT+ families, hoping that the Court will change its approach to same-sex marriage, especially in light of the growing European consensus among States on this issue, are filing applications of alleged violations of their ‘*right to marry*’, sometimes with alleged violations of their right to ‘*prohibition of discrimination*’. The case law also includes applications by post-operative transsexuals to remain married to the person who has become their same-sex partner following the transsexual partner’s gender reassignment³¹⁷.

The Court has not yet moved from its current heteronormative position to a more liberal and queer approach, as it has done, for example, in cases involving same-sex RPs or other issues affecting LGBT+ people, so it has not yet had a significant impact on same-sex marriage issues. The question is why, when the Court has accepted such developments on other occasions where ‘traditional’ marriage has been challenged, it does not seem to accept that there have been developments concerning ‘traditional’ marriage in cases involving same-sex marriage. For example, in *B. and L.*, the Court found a violation of Article 12 because national law prevented the applicants from marrying based on their (former) family relationship as father-in-law and daughter-in-law. Similarly, in *Jaremowicz*, the Court found a violation of Article 12 because the State did not allow a prisoner to marry his partner, despite the Court’s view that “the choice of a partner and the decision to marry [them] [...] is a strictly private and personal matter and there is no universal or commonly accepted pattern for such a choice or decision” and that “authorities are not allowed under Article 12 to interfere with a [...] [person’s] decision to establish a marital relationship with a person of his choice, especially because the relationship is not acceptable to them or deviates from prevailing social conventions and norms”^{318,319}.

As has been seen, through all of its bodies and all kinds of recommendations, resolutions and cases, the promotion of same-sex RPs has been pushed by the CoE. However, these have never explicitly supported same-sex marriage³²⁰. In particular, the Court has declared that

³¹⁶ HELFER, Laurence R.; RYAN, Clare - Contesting Sexual Orientation Rights Before the ECtHR. **SSRN Electronic Journal**, pp. 33-35; hereafter: HELFER *et al.*, 2023

³¹⁷ EUROPEAN COURT OF HUMAN RIGHTS, 2022c, p. 9

³¹⁸ *Jaremowicz*, § 59

³¹⁹ JOHNSON, Paul; FALCETTA, Silvia - Same-Sex Marriage and Article 12 of the European Convention on Human Rights. Em ASHFORD, CHRIS; MAINE, ALEXANDER (Eds.) - **Handbook on Gender, Sexuality and the Law**, p. 93; hereafter: JOHNSON *et al.*, 2020

³²⁰ PUPPINCK, 2015, p. 1

the ECHR “does not guarantee any right to marriage for same-sex couples [...] but, on the other hand, it seems to be building a right to “legal recognition” [(RPs)] for same-sex couples”³²¹. Since many States allow same-sex RPs, which entail similar rights to same-sex marriage, this kind of recognition has on several occasions been seen by the Court as an alternative to same-sex marriage³²². However, an ‘alternative’ remains an alternative. It is not the same as an equivalent. Legislators, judges and policymakers have often unconsciously or deliberately overlooked this ‘small’ detail, compromising its responsibility and leaving same-sex persons in a state of legal uncertainty³²³. This has the potential to undermine the effectiveness of the Court and makes one question the values and fundamental principles that underpin the ECHR³²⁴. It also raises the question of why, if RPs are equally ‘good’, they have often been erased when same-sex marriage was introduced in a particular legal system and registered partners have been ‘forced’ to convert their RPs into marriage because they were considered ‘useless’ or because it was considered difficult to ‘manage’ two different regimes of legal recognition from an administrative point of view³²⁵.

The problem is that there is no natural balance between same-sex marriage and RPs being both a ‘legal’ regime and same-sex marriage not existing, while same-sex RPs being used only as a temporary solution, making it seem inferior or secondary to the status of marriage³²⁶. Compared to the fact that the choice between marriage and RPs is valuable in itself, or that marriage is “very much alive and continues to be attractive to a large number of couples”³²⁷, meaning that same-sex marriage advocates will not be satisfied with RPs because for them marriage has some added value over RPs (whatever that may be), an even more pressing issue is that in all this one might lose sight of the fact that in some States there is no legal recognition of horizontal LGBT+ partnerships at all. Moreover, one might forget that there is still no provision in the Convention that has been interpreted as including the right to same-sex marriage in all circumstances³²⁸.

³²¹ *Ibid.*, pp. 1-2

³²² MUIŻNIEK, 2017

³²³ SHAHID, Masuma - The Right to Same-Sex Marriage: Assessing the European Court of Human Rights’ Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights. **Erasmus Law Review**, p.195, hereafter: SHAHID, 2017

³²⁴ *Ibid.*

³²⁵ PALAZZO, 2022, pp. 188-189

³²⁶ *Ibid.*, pp. 199-200

³²⁷ *Ibid.*, p. 203

³²⁸ HAMILTON, Frances - The Case for Same-Sex Marriage Before the European Court of Human Rights. **Journal of Homosexuality**, p. 1583; hereafter: HAMILTON, 2018

As will be seen, the heteronormative position of the Court in its reasoning on the (non-)recognition of same-sex marriages is still present in many cases. The Court continues to hold³²⁹ that the provisions of the Convention do not impose a legal obligation on the Parties to allow same-sex couples to marry. This is mainly because, according to Article 12, marriage is left to ‘*the national laws governing the exercise of this right*’, and because marriage involves formal rules, significant legal consequences and deep-rooted social, cultural and ‘traditional’ connotations, as well as being linked to a myriad of further issues that may or may not have been mentioned before³³⁰. As a result, many States do not yet provide for same-sex marriage^{331,332}. The fact that the number of States that allow same-sex marriage is still ‘modest’ has significant consequences for LGBT+ people, especially as this has not allowed the Court to find a European consensus in this regard to date. Access to same-sex marriage is an issue of equality before the law for LGBT+ people. Although Article 12 has never been successfully invoked by an LGBT+ person, and therefore only time will tell which arguments and situations will ultimately determine whether Article 12 does apply to same-sex couples, the following paragraphs show that landmark cases (*Schalk and Kopf*, *Hämäläinen*, *Chapin and Charpentier* and *Orlandi and Others*) on same-sex marriage have at least contributed to some new insights.

4.2.2.2. Schalk and Kopf

In *Schalk and Kopf*, the applicants were refused to marry because marriage could only be between two persons of different sex³³³. In their application to the Court, they complained that the refusal of the Austrian authorities to authorise their marriage was contrary to Article 12³³⁴.

The case is the first in which the Court dealt with the issue of same-sex marriage. The ground-breaking part of the judgment is that the Court finally recognised that same-sex relationships not only fall within the category of ‘*private*’ life of Article 8 but since the concept of ‘family’ under the Convention is not limited to marital relationships but may

³²⁹ *Schalk and Kopf*, § 63

³³⁰ HAMILTON, 2018, p. 1586

³³¹ 19 States allow for same-sex marriage with marriage equality

³³² RAINBOW EUROPE, 2023b

³³³ *Schalk and Kopf*, § 9

³³⁴ *ibid.*, § 39

include other *de facto* family ties based on kinship and/or affection, the Court considered it artificial to maintain that a same-sex couple could not enjoy '*family life*' within the meaning of Article 8, with the result that the applicants' situation fell also within the scope of '*family life*', making Article 14, read in conjunction with Article 8, applicable to the case³³⁵.

A positive aspect of the judgment is that by arguing that "States are still free [...] to restrict access to marriage to different-sex couples"³³⁶, the Court left room for the possibility that in the future, it would find a violation of Article 12 where applications alleging a breach of Article 12 are brought by same-sex couples who have been denied access to marriage in the respondent State. Problematically, however, based on this argument, the Court found that the State had not exceeded its MoA and concluded that there had been no violation of Article 14 in conjunction with Article 8³³⁷. This was criticised by the joint dissenting opinion of Judges Rozakis, Spielmann and Jebens, who argued that the Court had not answered the question of whether Austria should have provided the applicants earlier with an alternative means of legal recognition of their partnership, because the Court only found that there was "no established consensus", that States enjoy a MoA "in the timing of the introduction of legislative changes" and "the Austrian legislator cannot be reproached for not having introduced the Registered Partnership Act any earlier"³³⁸. According to the Judges, the Court failed to provide an in-depth analysis of the difference in treatment based on sexual orientation which, in their view, had taken place. They argued that the government had not even put forward an argument to justify the difference in treatment. By failing to recognise this, the Court appeared to endorse "the legal vacuum at stake, without imposing on the respondent State any positive obligation to provide a satisfactory framework, offering the applicants, at least to a certain extent, the protection any family should enjoy"³³⁹. According to the Judges, the lack of justification was swept under the carpet by the Court's brief reference to the State's broad MoA. In their view, "the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment" should leave "no room [for the Court] to apply the margin of appreciation" because 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

³³⁵ *ibid.*, §§ 90-95

³³⁶ *ibid.*, §108

³³⁷ *ibid.*, §§ 109-110

³³⁸ *ibid.*, §§ 104-106

³³⁹ Joint dissenting opinion of Judges Rozakis, Spielmann and Jebens, *Schalk and Kopf*, § 4

of appreciation”, so that “only in the event that the national authorities offer grounds for justification”³⁴⁰ could an argument based on the State’s MoA be raised.

Another good part of the judgment was that the Court at least rejected the government’s argument that Article 12 was inapplicable to same-sex couples in all circumstances. The problem with this, however, is that not only did it leave the question of what those circumstances might be up in the air, but it also made the provisions of Article 12 conditional on some unknown events, even though Article 12, unlike other articles, does not contain a limitation clause.

4.2.2.3. Chapin and Charpentier

Chapin and Charpentier is also considered a landmark judgment on issues raised concerning same-sex marriage. In particular, in their application to the ECtHR, the applicants had alleged a violation of Article 14, read in conjunction with Articles 8 and 12³⁴¹. The Court held that there had been no violation of Article 12 read in conjunction with Article 14 or of Article 8 read in conjunction with Article 14.

Although the Court’s reasoning reaffirmed previous rulings and added little to the Court’s jurisprudence and interpretation of same-sex marriage, it highlights the Court’s position on the issue.

One of the criticisms of the case was that the Court did not go so far as to extend the scope of Article 12 to same-sex couples. As in many other cases, the Court was reluctant to rule that the applicants’ situation violated Article 14, read in conjunction with Article 12. It did not elaborate on why the applicants’ situation did not amount to a violation or what circumstances would have. Instead, the Court recalled that the present case was distinguishable from *Vallianatos and Others* or *Oliari and Others*³⁴². It argued that in *Vallianatos and Others*, the only form of recognition other than marriage available to the applicants was expressly available only to heterosexual couples only. It noted that Italian law made no provision for the legal recognition of same-sex couples in the comparable situation

³⁴⁰ *Ibid.*, § 8

³⁴¹ *Chapin and Charpentier*, § 3

³⁴² *Ibid.*, § 50

in *Oliari and Others*³⁴³. The applicants' case was therefore different since under French law they could enter into a *PACS*³⁴⁴. The applicants had pointed out that there were differences between marriage and *PACS*, but the Court reiterated that it was not necessary for it to rule on these differences in detail, mainly because the nature of any form of legal recognition of same-sex relationships was a matter for the discretion of the State. Therefore, the legislative choice to recognise same-sex couples through *PACS* rather than through marriage was not contrary to Article 14, read in conjunction with Article 12, ECHR. This was all the more so as same-sex marriage had already been legalised in France at the time of the application. The Court also stated that, given the short time which had elapsed since *Vallianatos and Others* and *Oliari and Others*, it was not prepared to overturn them and thereby once again denied same-sex couples their 'right to marry'³⁴⁵.

Although the outcome was probably inevitable, it underlines the Court's heteronormative reasoning with regard to same-sex marriage, particularly as the Court used the European consensus argument³⁴⁶ and accepted the Party's choice not to include same-sex marriage in its national legislation in light of the Party's MoA. Speaking of choice, the judgment has been criticised for the fact that the Court found that the applicants could enter into a *PACS*, which would give them rights similar to those they would receive if they were married, without considering that the choice between marriage and *PACS* could be valuable in itself.

4.2.2.4. Orlandi and Others

In *Orlandi and Others*, the applicants claimed that the Italian authorities had violated their rights under Articles 8, 12 and 14 of the ECHR by refusing to register their marriages. They considered that the situation was discriminatory and based solely on their sexual orientation³⁴⁷. The government argued that same-sex couples wishing to give a legal framework to various aspects of their life together could enter cohabitation agreements³⁴⁸. The applicants interpreted this as the government's avoidance of facing up to reality, whereas

³⁴³ *Ibid.*, § 50

³⁴⁴ *Ibid.*, § 51

³⁴⁵ *Ibid.*, § 39

³⁴⁶ *Chapin and Charpentier*, § 36

³⁴⁷ *Orlandi and Others*, § 137

³⁴⁸ *Ibid.*, § 165

their truth was that public authorities were reluctant to promote the rights of same-sex couples³⁴⁹.

Although *Orlandi and Others* had some similarities to *Oliari and Others*, the issue before the Court in *Orlandi and Others* was the applicants' inability to register their same-sex marriage, which they had contracted elsewhere.

The Court reiterated *Schalk and Kopf* and *Chapin and Charpentier*, emphasising that States remained free, under Article 12 and Article 14, read in conjunction with Articles 8 or 12 ECHR, to restrict access to marriage to opposite-sex couples. However, it recognised that same-sex couples needed legal recognition and protection of their relationship, reiterating *Oliari and Others*. The Court found that the government had failed to advance any overriding community interest against which the applicants' substantial interests could be balanced³⁵⁰. However, as there might be a legitimate interest in ensuring that legislative prerogatives were respected and that decisions of democratically elected governments were not circumvented, the Court accepted that national rules on the registration of marriages could serve the legitimate aim of preventing disorder³⁵¹. Nevertheless, the decisions refusing to register the applicants' marriage in any form failed to take account of social realities³⁵². According to the Court, the crux of the case lay precisely in the fact that the applicants' position was not provided for in the domestic law³⁵³. However, it could not see that the refusal to register the applicants' marriage deprived them of any rights previously recognised in Italy³⁵⁴ and that they could still benefit from rights acquired by marriage in the State in which they had contracted it³⁵⁵. Therefore, the Court could only find a violation of Article 8 because the State failed to strike a fair balance between the competing interests³⁵⁶.

³⁴⁹ *Ibid.*, § 162

³⁵⁰ *Ibid.*, § 199

³⁵¹ *Ibid.*, §§ 200-207

³⁵² *Ibid.*, § 209

³⁵³ *Ibid.*, § 201

³⁵⁴ They were allowed to enter into civil unions since the 5th of June 2016

³⁵⁵ *Orlandi and Others*, § 208

³⁵⁶ *Ibid.*, §§ 210-211

It is interesting to note that although the Court recalled that it “has already held Article 12 to be applicable to a same sex-couple wishing to marry”³⁵⁷, within one sentence³⁵⁸, the Court ‘examined’ the complaint under Article 12 and went straight on to consider only the complaints under Article 8, thereby accepting the fact that a State would prohibit same-sex marriage. It is curious that the applicability of Article 12 remains, once again, nothing more than a theoretical principle rather than a concrete one. This was even noted in the dissenting opinion of Judges Pejchal and Wojtyczek³⁵⁹: “granting access to marriage within the meaning of Article 12 to same-sex couples is conceptually impossible”³⁶⁰. The problem is that, although the situation of the applicants differed from that of other applicants in other cases, the Court did not consider that the applicants’ situation was a ‘circumstance’ for which marriage would not be limited to a union between two persons of the opposite sex. This renders the reasoning on the applicability and, consequently, the admissibility of Article 12 somewhat pointless and exemplifies the Court’s heteronormative approach to Article 12.

The latter is particularly evident in the reasoning of the two dissenting Judges, Pejchal and Wojtyczek; although their arguments may seem secondary in the light of the outcome of the judgment, they are worrying given that only five judges were involved in this case³⁶¹. In particular, the two dissenting Judges noted that, while the majority concluded that Articles 8 and 12 ECHR were applicable, they viewed that “this assertion is based upon a fundamental methodological error”, since what had mattered in the case were “not the factual circumstances presented by an applicant, but the grievances raised in the application”³⁶². In their view the State did not have a positive obligation to ensure that the applicants received legal recognition because “any couple, be they heterosexual or homosexual, have the means to preserve their relationship without any assistance from the State. The ability to live a happy life as a couple does not depend on any positive action by the State authorities but on the absence of State interference”³⁶³. They went on to observe that “in Italy as in other European States a growing number of heterosexual couples decide freely neither to marry nor to enter into a civil union and find their situation fully satisfactory. They assert their right

³⁵⁷ *Ibid.*, § 145

³⁵⁸ “[...] States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples [...] the same holds for Article 14 taken in conjunction with Article 12”

³⁵⁹ This thesis does not share their general view

³⁶⁰ Dissenting opinion of Judges Pejchal and Wojtyczek, *Orlandi and Others*, § 6

³⁶¹ Judgment by the First Section

³⁶² Dissenting opinion of Judges Pejchal and Wojtyczek, *Orlandi and Others*, § 8

³⁶³ *Ibid.*, § 10

to live their family lives outside any legal framework provided by legislation”³⁶⁴. The most problematic aspect of their heteronormative argument, apart from the fact that they deny that Italy has failed to fulfil its positive obligations and apart from the fact that they base their entire discourse on what they consider to be the most appropriate definition of marriage³⁶⁵, a version that is over a hundred years old and therefore not valid for interpreting a provision of the Convention in the light of present-day conditions, they completely missed the point that the applicants could not choose to enter into a marriage or RPs solely based on their sexual orientation. The judgement thus shows once again the value of choice.

What is also interesting about the case, though it must be viewed with both tears and joy, is that the Court held that “States are still free, under Article 12 of the Convention [...], to restrict access to marriage to different-sex couples”, leaving open the hope that, as even Judges Pejchal and Wojtyczek remind the reader, “the Court intends to revise this view in the future”³⁶⁶. Of course, the two Judges downplayed the essence of this statement, noting that they disagreed “with such an approach” because it “presupposes that the scope of treaty obligations may be adapted by the Court based on societal changes”³⁶⁷. According to them, “the Court has no mandate to favour or inhibit societal changes”³⁶⁸, which is an incorrect statement since the Convention is a living instrument that has to be read in light of present-day conditions and since States must comply with the interpretations given by the Court, which may require States to make changes to comply with common European standards of human rights.

4.2.3. Adoption

4.2.3.1. Overview

Protecting children’s rights and the child’s best interests are at the forefront of many international and national adoption laws³⁶⁹. The concept of best interests is mentioned in the 1990 UN Convention on the Rights of the Child³⁷⁰. Article 3 (1) CRC reads as follows:

³⁶⁴ *Ibid.*

³⁶⁵ The definition was taken from *Modestinus, Digesta Iustiniani* 23.2.1 and *Institutiones Iustiniani*, 1. 10

³⁶⁶ Dissenting opinion of Judges Pejchal and Wojtyczek, *Orlandi and Others*, § 6

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*

³⁶⁹ HODSON, 2008, p. 7

³⁷⁰ Hereafter: CRC

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'

Essentially, the provision states that while the child's best interests have a primary function in making decisions and applying laws that impact children, other considerations may also be taken into account³⁷¹. Today, all CoE member states are parties to the CRC and therefore share the fundamental belief that the child's best interests must be a key consideration in any decision affecting children³⁷². Although children have rights in their own right, their ability to enjoy these rights may also depend on their family and how the child's family is legally recognised and protected³⁷³. Therefore, international and national legislation must seek to protect the family to ensure that children grow up in a stable and caring environment³⁷⁴.

Apart from a few judgments³⁷⁵, there is no explicit mention of children's rights in the Court's case law or the ECHR. However, as we have seen, the *'right to respect for private and family life'* can also impose positive obligations on the State in guaranteeing the right to individuals in certain relationships³⁷⁶. Thus, the ECHR requires States to respect, recognise and protect the family from disruption³⁷⁷. LGBT+ families and the rights of their children are not sufficiently addressed by the Court, although children's happiness, security and the exercise of their rights are at the heart of the family, depend on the family, and many national and international laws recognise 'new' family forms. On many occasions, the Court has preferred to avoid taking a position on the matter of LGBT+ adoption, simply stating that States may decide what legal recognition LGBT+ families may or may not receive³⁷⁸. Consequently, children of LGBT+ parents and the LGBT+ family as a whole often lack the same recognition and protection as 'traditional' families³⁷⁹. However, family rights are essential because respect for *'family life'* implies, *inter alia*, that States "render possible as from the

³⁷¹ ALVES DE FARIA, Gabriel - Sexual Orientation and the ECtHR: what relevance is given to the best interests of the child? An analysis of the European Court of Human Rights' approach to the best interests of the child in LGBT parenting cases. **Familie & Recht**, p. 3; hereafter: ALVES DE FARIA, 2015

³⁷² *Ibid.*

³⁷³ HODSON, 2008, p. 7

³⁷⁴ *Ibid.*, p. 11

³⁷⁵ *Fretté*

³⁷⁶ EUROPEAN COURT OF HUMAN RIGHTS, 2022b, p. 8

³⁷⁷ HODSON, 2008, p. 11

³⁷⁸ *Ibid.*

³⁷⁹ *Ibid.*

moment of birth the child's integration in his family"³⁸⁰, that they guarantee that children can effectively participate in '*family life*' and that the parent-child relationship is recognised and protected.

As more and more LGBT+ families have children, *e.g.*, in the Netherlands in 2008, 9%³⁸¹ of LGBT+ families had at least one child, a figure that increased exponentially to 61%³⁸² by 2013, legal recognition of their parent-child relationship is urgently needed. However, even though it cannot be in the best interests of children to have their caring and loving relationships excluded from a legal framework (family law) designed to protect their interests simply because of the SOGI of their parents, it appears that the Court continues to take a rather abstinent approach to cases involving LGBT+ family issues and rarely applies the principle of the best interests of the child³⁸³.

The family is a protected institution under the Convention. Many issues relating to adoption concern not only individuals' '*family life*' but also their '*private*' life. Adoption cases involving LGBT+ families are therefore primarily concerned with alleged violations of the applicants' rights under Article 8 or their rights under Article 14, read in conjunction with Article 8. The problem is that the '*right to respect for private and family life*' is a derogable right with general limitation clauses, meaning that States may interfere with such rights³⁸⁴. Thus, in applications relating to LGBT+ adoption, the Court will primarily examine whether the State had a legitimate aim in interfering with the applicants' '*right to respect for private and family life*', whereas Parties will often justify this interference by claiming that they had to protect the '*morals*'³⁸⁵ and '*the rights and freedoms of others*'³⁸⁶³⁸⁷.

National laws on adoption of children by LGBT+ people vary widely across the States. Second-parent and/or joint adoption is legal in 21 States³⁸⁸. Although Denmark was the first State in the world to recognise two legal same-sex parents in 1999, joint adoption in States

³⁸⁰ *Marckx*, § 31

³⁸¹ HODSON, 2008, p. 8

³⁸² ALVES DE FARIA, 2015, p. 1

³⁸³ HODSON, 2008, p. 10

³⁸⁴ TRYFONIDOU, Alina - The Parenting Rights of Same-Sex Couples under European Law. **Marriage, families & spirituality**, p. 184; hereafter: TRYFONIDOU, 2019

³⁸⁵ *e.g.*, Article 8 (2) ECHR

³⁸⁶ *Ibid.*

³⁸⁷ TRYFONIDOU, 2019, *ibid.*

³⁸⁸ RAINBOW EUROPE, 2023b

became possible in the Netherlands in 2001 with the introduction of same-sex marriage into national legislation³⁸⁹. However, the introduction of same-sex marriage, let alone RPs, did not always automatically lead to the extension of a LGBT+ couple's right to adopt. For example, although Portugal allowed same-sex marriage in 2010, married same-sex couples did not have the same parental rights as opposite-sex couples until 2016³⁹⁰.

The legal recognition of same-sex parenting has been as controversial as all forms of legal recognition of LGBT+ families. It has taken a long time for it to be recognised in law and society. The problem is that adoption and surrogacy are often the only ways for same-sex couples to have a child. In cases on the latter matters, it may be possible for at least one of the parents to be biologically related to the child and therefore it may be easier to get the parent-child relationship recognised, but what about the other parent? Second-parent adoption could be an option. However, as has been seen, second-parent adoption is allowed in only about half of the States. In many cases, the Court has therefore struggled to find a European consensus, which has led it to conclude that “national authorities, [...] within the limits of their jurisdiction, [...] should enjoy a wide margin of appreciation when they are asked to make rulings on such matters”³⁹¹.

*Kerkhoven and Others*³⁹², which concerned an application for second-parent adoption of a child born to the applicant's same-sex partner by donor insemination, was one of the Court's first cases on adoption by LGBT+ families. The case was not even considered admissible by the Court, as there was no obligation under Article 8 for the State to grant parental rights over the child to a woman living with the child's mother and the child itself since the relationship between two women could not be “equated to a man and a woman living together”³⁹³.

4.2.3.2. Fretté

³⁸⁹ DENMARK.DK - **Denmark - a very LGBT+ friendly country**

³⁹⁰ TAKÁCS, Judit; SZALMA, Ivett; BARTUS, Tamás - Social Attitudes Toward Adoption by Same-Sex Couples in Europe. **Archives of Sexual Behavior**, p. 1789

³⁹¹ *Fretté*, § 41

³⁹² *Kerkhoven and Others v. the Netherlands* (dec.), no. 15666/89, Series A

³⁹³ *Ibid.*, § 2

In *Fretté*, the Court at least declared admissible the applicant's claim that he had been the victim of discrimination on the grounds of his sexual orientation, in breach of Article 14 in conjunction with Article 8, because the French national authorities had rejected his application for prior authorisation to adopt a child³⁹⁴.

The case illustrates a heteronormative position of the Court since it found that having regard to the wide MoA left to States in this area and the need to protect the best interests of the child, the refusal to authorise adoption did not infringe the principle of proportionality³⁹⁵. It concluded that the government appeared to be objective and reasonable in its decision and that the difference in treatment complained of was not discriminatory³⁹⁶, finding no violation of Article 14, read in conjunction with Article 8.

The Court's decision was criticised for several reasons, including its heteronormative approach. One of these reasons was that the Court disregarded the principle of proportionality as it did not analyse it comprehensively in assessing the MoA. In doing so, the Court was inconsistent with its own standards. In particular, concerning the Party's legitimate aim to interfere with the applicant's '*right to respect for private and family life*', the Court found, without further analysis, that there was no doubt that the decisions pursued a legitimate aim, namely the protection of the health and rights of children³⁹⁷. The point is that the Court's inconsistency here lies not only in the fact that the Court had already recognised in previous judgments that sexual orientation is a protected ground against discrimination but also in the fact that the Court was satisfied with the government's justification³⁹⁸, which was not supported by evidence, apart from flawed arguments, including the claim that the exclusion of homosexuals from adoption was in the best interests of the child and that the difference in treatment was due to doubts about the development of a child raised by a homosexual³⁹⁹. Furthermore, the Court's inconsistency lies in accepting the government's argument that there was a lack of common ground, even though it

³⁹⁴ *Fretté*, § 26

³⁹⁵ *Ibid.*, § 42

³⁹⁶ *Ibid.*, § 43

³⁹⁷ *Ibid.*, § 38

³⁹⁸ The government had submitted that "scientific community [...] is divided over the possible consequences of a child being adopted by [...] homosexual parents"

³⁹⁹ *Fretté*, § 36

recognised that most States did not expressly prohibit homosexuals from adopting where single heterosexuals could⁴⁰⁰.

Another reason why the Court has been criticised is that by deciding to extend the MoA on the basis of the 'precautionary principle', a principle that does not even belong to the standards of the Court but to those of other international courts, and by basing its decision on the lack of "common ground"⁴⁰¹ without determining how such common ground should be defined and when it is truly significant, the Court runs the risk of losing credibility. Moreover, by relying too much on a consensus reasoning in a case involving discrimination on the grounds of sexual orientation, the Court appears to be "liable to take the protection of fundamental rights backwards"⁴⁰², which poses a severe threat to the Convention, its value and its principles. The Court should therefore have used the European consensus reasoning to form a more progressive view that there was no consensus on banning homosexual adoption when determining the scope of the MoA. However, it chose to rule in favour of the French authorities' position. Although the decision was split (four to three), the Court remained ambivalent and hesitated taking a position in favour of LGBT+ families.

Probably as a result of much criticism, *E.B.*, which is considered one of the cases in which the Court applied one of the most queer and liberal line on LGBT+ families was soon to overturn *Fretté*. With *E.B.*, it became clear that the Court would not accept that LGBT+ people be treated differently regarding adoption-related issues. In particular, the Court has emphasised that the '*prohibition of discrimination*' extends beyond the enjoyment of the rights of the Convention, which means that the general scope of the provisions of Article 14 also applies to additional rights which the State has voluntarily chosen to provide and that "a State which creates [such] a right [...] may not apply that right in a manner which is discriminatory within the meaning of Article 14"⁴⁰³.

4.2.3.3. Gas and Dubois

⁴⁰⁰ *Ibid.*, § 41

⁴⁰¹ *Ibid.*, § 41

⁴⁰² Dissenting opinion of Judge Sir Nicolas Bratza and Judges Fuhrmann and Tulkens, *Fretté*, § 2 (c)

⁴⁰³ *X and Others*, § 135

Other landmark judgments followed *E.B.*. For example, in *Gas and Dubois*⁴⁰⁴, the Court found no violation of Article 14 in conjunction with Article 8. It held that a same-sex couple and their child(ren) could enjoy ‘*family life*’ within the meaning of Article 8 because even if one of the parents was not biologically related to their child⁴⁰⁵, this did not prevent all of them from constituting a ‘family’, as their relationship could also be based on a *de facto* family bond⁴⁰⁶. Thus, for the first time, the Court accepted that for LGBT+ couples with children, biological factors are not the most important, but committed and enduring family relationships play a more important role⁴⁰⁷. This means that once the *de facto* bond has been established, the family can enjoy the same protections as any other family⁴⁰⁸.

4.2.3.4. X and Others

A year later, the Court delivered another landmark judgment⁴⁰⁹ concerning the adoption by a second parent. In this judgment, the applicants, two women living together with the child of one of them, complained that they had been discriminated against based on their sexual orientation. The non-biological parent could not adopt child of her partner, which she would have been able to if they would have been a heterosexual couple. The Court found that there had been a violation of Article 14 in conjunction with Article 8⁴¹⁰.

The outcome of this judgment is ground-breaking, not only because the Court has never made a similar decision about second-parent adoption, but also because this time, it specifically took into account the parents’ viewpoint and examined the issue from the perspective of the principle of equality. The Court found much to criticise in the arguments put forward by Austria. Although it began its analysis by accepting the government’s arguments based on the protection of the family in the traditional sense, it reiterated that, in choosing the means of protecting the family and ensuring respect for ‘*family life*’, the State must take account of developments and changes in social, civil and relationship matters⁴¹¹. It stressed that it was for the government to prove that protecting the traditional family

⁴⁰⁴ *Gas and Dubois v. France*, no. 25951/07, ECHR 2012; hereafter: *Gas and Dubois*

⁴⁰⁵ As was the case in *Gas and Dubois*

⁴⁰⁶ TRYFONIDOU, 2019, p. 180

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *X and Others*

⁴¹⁰ EUROPEAN COURT OF HUMAN RIGHTS, 2022e, p. 41

⁴¹¹ *X and Others*, §§ 138-139

required excluding same-sex couples from second-parent adoption and found that the Government had failed to do so for two reasons⁴¹². First, since Austria had accepted that adoption by any person, including a homosexual, was possible even if that person had a registered partner, and accordingly accepted that a child would be raised by a same-sex couple, the government's argument lacked coherence concerning a situation such as the applicants'⁴¹³. Secondly, since the government had not adduced any evidence to show that a family with two parents of the same sex could not meet the needs of a child, or could even be detrimental to the child, this argument had no valid basis, let alone a legitimate justification. The Court found that the government's arguments raised serious doubts as to the proportionality of the absolute prohibition on second-parent adoption by same-sex couples⁴¹⁴. It decided that it would not accept the government's argument that there was no European consensus on the question of second-parent adoption since the issue before the Court was not the general question of second-parent adoption but the difference in treatment between unmarried heterosexual and same-sex couples with regard to this type of adoption. The Court noted that only the ten States that allow second-parent adoption by unmarried couples could be used as a basis for comparison, and of those ten States, six treat heterosexual and same-sex couples in the same way, while four adopt the same position as Austria⁴¹⁵.

According to the joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Siciliano, the Court "went beyond the usual limits of the evolutive method of interpretation"⁴¹⁶ by placing itself above the law in support of its evolving understanding of rights. It endorsed a non-biological definition of the family, in which the family can take many forms. The Court also supported the idea that same-sex couples have the same right to have children as opposite-sex couples and therefore showed that it is equally beneficial for a child to have two parents of the same or different sex, with or without biological descent.

⁴¹² *Ibid.*, § 141

⁴¹³ *Ibid.*, §§ 137-144

⁴¹⁴ *Ibid.*, §§ 142-146

⁴¹⁵ *Ibid.*, § 149

⁴¹⁶ Joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Siciliano, *X and Others*, § 23

Although the Court's judgment found a violation of Article 14, read in conjunction with Article 8, when comparing the applicants' situation with that of an unmarried opposite-sex couple, it could not find one when comparing the applicants' situation with that of a married couple, since they "are not in a relevantly similar situation to a married couple in respect of second-parent adoption"⁴¹⁷. Some criticism has arisen in this respect⁴¹⁸, mainly as Austria did not then provide for the legal recognition of same-sex marriages and the Court thus legitimised the discrimination resulting from excluding same-sex couples from marriage.

With this ruling, the Court has paved the way for second-parent adoption by LGBT+ people in Austria. It has also encouraged other States to make second-parent adoption available to same-sex couples. It is clear from the judgment that the Court would not accept that "the State, which has gone beyond its obligations under Article 8 in creating [...] a right [(the right for single persons to adopt)], cannot, in the application of that right, take discriminatory measures within the meaning of Article 14"⁴¹⁹ against an individual on the basis of his or her sexual orientation. Despite this, LGBT+ families still do not receive the legal protection and support they need, particularly if they wish to have a child. The Court has not yet taken a position or given a (landmark) judgement on same-sex joint adoption, nor has there ever been a judgement that has given the words right to '*found a family*' the meaning of accepting that it can go so far as to require member States to allow couples to have a child, for example, by adoption. On the contrary, the Court has held that neither Article 12 nor Article 8 "safeguard the mere desire to found a family"⁴²⁰ or "guarantee either the right to found a family or the right to adopt"⁴²¹. It has stated on various occasions that States may decide whether to allow single (LGBT+) persons and LGBT+ couples to adopt or to use other means to '*found a family*'⁴²². Thus, neither Article 12 nor Article 8 requires a State to grant parental rights to anyone who has been excluded from this right, unless this is incompatible with principles mentioned above. Moreover, the Court has never found that a State's decision to allow adoption only to married couples, even if such marriage is reserved to couples of different sexes, would be contrary to the rights set out in the Convention, since "marriage

⁴¹⁷ *X and Others*, § 109

⁴¹⁸ That the difference in treatment between unmarried same-sex couples and married different-sex couples does not amount to discrimination

⁴¹⁹ *E.B.*, § 49

⁴²⁰ *Fretté*, § 32

⁴²¹ *Paradiso and Campanelli*, § 120

⁴²² TRYFONIDOU, 2019, p. 180

confers a special status on those who enter into it”^{423,424}. This is particularly problematic because marriage is the most effective means of securing legal recognition of a paternal relationship with a child and the rights⁴²⁵ that flow from it⁴²⁶. Moreover, this is problematic because, as noted above, only 19 States allow same-sex marriage, whereas in most States, the birth of a child to a married couple automatically results in full legal recognition of the parental relationship of two legal parents, regardless of the biological connection between the parents and the child and regardless of how the child was conceived, which clearly disadvantages children of LGBT+ parents, who in most cases have only one parent with whom they have a biological connection⁴²⁷.

4.2.4. Surrogacy

4.2.4.1. Overview

Because surrogacy is a highly sensitive issue, raising serious questions about the commercialisation of children and the exploitation of surrogate mothers, national legislation on the matter, which either prohibits, regulates or does not regulate surrogacy, varies widely between States, regardless of who wishes to have their child through surrogacy⁴²⁸. The Court thus finds it difficult to rule on cases involving surrogacy-related issues, mainly because many of them often involve cross-border surrogacy, which makes them legally complex due to the multiplicity of national legal systems involved and leaves it to decide on the adverse effects of not recognising the parent-child relationship on the applicants and the prohibition of surrogacy by the State. However, it is not only the Court that finds it difficult to make a judgement on this issue, other bodies of the CoE also seem to be reluctant to take action on this issue. In 2016, for example, the PACE rejected a draft recommendation on surrogacy arrangements⁴²⁹. Nevertheless, in 2019, the ECtHR issued its first advisory opinion on surrogacy abroad following a request from the French *cour de cassation*⁴³⁰. Although the

⁴²³ *Gas and Dubois*, § 68

⁴²⁴ TRYFONIDOU, 2019, p. 181

⁴²⁵ *i.e.*, parental responsibility and authority, property rights, parental leave, financial benefits for parents, citizenship, surnames, *etc.*

⁴²⁶ HODSON, 2008, p. 27

⁴²⁷ *Ibid.*, p. 24

⁴²⁸ MÄRZ, Julian W. - What makes a parent in surrogacy cases? Reflections on the Fjölvisdóttir et al. v. Iceland decision of the European Court of Human Rights. *Medical Law International*, p. 276; hereafter: März, 2021

⁴²⁹ TRIMMINGS, Katarina - **Review of the Implementation of the European Convention on the Legal Status of Children Born out of Wedlock**, p. 11

⁴³⁰ *Ibid.*

opinion was not binding and therefore not respected by the majority of States it did raise awareness of the issue, with more States working on legal solutions to surrogacy agreements⁴³¹. Since then, there has been an increasing number of cases brought before the Court concerning surrogacy. These cases mainly raise issues under Article 8.

From the first advisory opinion on surrogacy, it can be concluded that the Court's general view is that surrogacy is compatible with human rights. Nevertheless, in *Mennesson*⁴³² and *Labassee*⁴³³, the Court could not find a violation of Article 8 concerning the applicants' right to 'family life' and accepted the French national authorities' refusal of surrogacy. However, in both cases, it found a violation of the 'right to respect for private life' of the first and second applicants' children⁴³⁴ because France had "overstepped the permissible limits of its margin of appreciation"⁴³⁵ by preventing a legal relationship between the genetic fathers and their respective children. In both cases, the Court made clear that the existence of a biological link between at least one of the intended parents and their children was crucial to the outcome of the case, as "an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned"⁴³⁶. However, it left open the possibility that the ban on surrogacy did not violate the Convention, stating that it "can accept that France may wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction"⁴³⁷. Had it not been possible to establish a biological link between the applicants⁴³⁸, the outcome in these cases would probably not have been the same⁴³⁹.

Mennesson and *Labassee* certainly contributed to the jurisprudence of the Court and its development of political and ethical decisions. The judgments show that, especially considering how the family has changed in Europe in recent decades, Article 8 stands out as one of the most comprehensive articles of the Convention and one of the most open to

⁴³¹ BRACKEN, Lydia - The ECtHR's first advisory opinion: Implications for cross-border surrogacy involving male intended parents. **Medical Law International**, p. 18

⁴³² *Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts); hereafter: *Mennesson*

⁴³³ *Labassee v. France*, no. 65941/11, 26 June 2014; hereafter: *Labassee*

⁴³⁴ The third and fourth and the third applicant, respectively

⁴³⁵ *Mennesson*, § 100

⁴³⁶ *Ibid.*, § 80

⁴³⁷ *Ibid.*, § 99

⁴³⁸ *Paradiso and Campanelli*

⁴³⁹ MARGARIA, Alice - Parenthood and Cross-Border Surrogacy: What Is 'New'? The ECtHR's First Advisory Opinion. **Medical Law Review**, p. 417

interpretation in the light of contemporary conditions⁴⁴⁰. They also show that the *ultima ratio* in family matters is sometimes to be found in the truth that lies between the claims of the applicants and a strictly legal approach⁴⁴¹. However, the Court is still far from delivering a landmark judgment on surrogacy cases and even farther from providing such a decision involving surrogacy and LGBT+ families. Indeed, in the latest case⁴⁴² in which same-sex and heterosexual couples challenged the (Italian) national authorities' restrictions on recognising children born abroad through surrogacy, the Court dismissed the appeals.

S.-H. and *Valdís Fjölnisdóttir and Others*⁴⁴³ are examples of issues relating to surrogacy and LGBT+ families.

4.2.4.2. S.-H.

In *S.-H.*, the applicants claimed that by refusing to recognise the legal parent-child relationship of the applicants (who were born in the United States via surrogacy and are the two children of same-sex parents (one of whom is Polish) residing in Israel) and their biological father and by refusing to confirm their Polish citizenship based on their parents' sexual orientation, the Polish national authorities had violated their rights under Article 8, read alone and in conjunction with Article 14. The Court held that because it did not appear that "the family has had to overcome any practical obstacles on account of the Polish authorities' decisions", "since the applicants' family resides in Israel" where they can enjoy their right to '*family life*', "the applicants' complaint under Article 8 of the Convention to be incompatible *ratione materiae* with that provision"⁴⁴⁴.

Apart from the fact that the Court considered problematic only the situation in which the applicants would be stateless, that this reasoning deprived the applicants of the possibility of improving their legal, material and social status through Polish citizenship, and that such reasoning was based on the mere fact that the family had no plans to move to Poland, the

⁴⁴⁰ PUPPINCK, Gregor; HOUQUE, Claire - ECHR: Towards the Liberalisation of Surrogacy: Regarding the *Mennesson v. France* and *Labassee v. France* Cases (N°65192/11 & N°65941/11). *Revue Lamy Droit Civil*, p. 88

⁴⁴¹ *Ibid.*, p. 90

⁴⁴² 22 June 2023

⁴⁴³ *Valdís Fjölnisdóttir and Others v. Iceland*, no. 71552/17, 18 May 2021; hereafter: *Valdís Fjölnisdóttir and Others*

⁴⁴⁴ *S.-H.*, § 80

problem with the case is that the Court, in assessing the alleged violation of Article 8, did not examine the reason put forward by the State for the denying them of Polish citizenship, although it had relied on the ‘reason-based approach’⁴⁴⁵. This would have been particularly important as the applicants’ citizenship was denied in the context of surrogacy and LGBT+ families, two issues which should have raised issues under Article 8⁴⁴⁶ and Article 14⁴⁴⁷. A further problem with the case was that the Court did not take into account the best interests of the child, although it had done so on several other occasions⁴⁴⁸, a consideration which would at least raise an issue under Article 8.

4.2.4.3. Valdís Fjölnisdóttir and Others

The case of *Valdís Fjölnisdóttir and Others* concerns the alleged violation of the applicants’ rights under Article 14, in conjunction with Article 8 and Article 8 alone, following the refusal of the Icelandic national authorities to recognise a parental link between the intended parents and their child, who was born through surrogacy in the United States but had no genetic link to either parent. The Court held that there had been no violation of Article 8 and, consequently, that the alleged breach of Article 14 read in conjunction with Article 8 was manifestly ill-founded.

Although the Court had no difficulty in finding that there was a ‘*family life*’ between the intended parents and the child based on their *de facto* relationship, it could not find a violation of Article 8, mainly because the refusal of the Icelandic national authorities to recognise the relationship between the parents and the child had not particularly affected that relationship, since the child had been placed in the permanent foster care of at least one of the parents, had acquired Icelandic nationality and had the possibility of being adopted by at least one of the parents. A problem with the judgment was however that since the applicants’ “complaint concerning respect for their ‘*private*’ life are in principle the same as those submitted concerning their complaint concerning respect for their ‘*family life*’”, the Court did not consider the ‘*private life*’ aspects⁴⁴⁹. The fact that this aspect had not been adequately assessed was criticised because, as the concurring opinion of Judge Lemmens puts it, this

⁴⁴⁵ GANTY, Sarah - **Surrogacy as Citizenship Deprivation in S.-H. V. Poland**

⁴⁴⁶ Because of the State’s interference in the applicants’ ‘*family life*’

⁴⁴⁷ Because of the State’s differential treatment of the applicants based on their parents’ sexual orientation

⁴⁴⁸ e.g., *Mennesson*

⁴⁴⁹ Valdís Fjölnisdóttir and Others, § 76

“right is deemed to be part of the child’s right to establish details of its identity as an individual human being” and because the lack of a proper assessment was due to the lack of a biological link, although the child’s right to respect for their ‘*private*’ life “applies to all children born through a surrogacy arrangement carried out abroad”⁴⁵⁰. Finally, the fact that there is still no recognition of the parent-child relationship between the applicants is also contrary to what the Court stated in the above-mentioned advisory opinion. In particular, the Court held that “the Court considers that the general and absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is incompatible with the child’s best interests”⁴⁵¹. However, “the child’s best interests [...] cannot be taken to mean that recognition of the legal parent-child relationship between the child and the intended mother [...] entails an obligation for States to register the details of the foreign birth certificate [...] other means may also serve those best interests in a suitable manner [...] which, [...], produces similar effects to registration of the foreign birth details”⁴⁵². Disregarding the best interests of the child in surrogacy cases is therefore contrary to the recommendations of the United Nations ‘Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material’, which state, *inter alia*, that at the national level, States should “protect the rights of all surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law, including by protecting the best interests of the child, protecting rights to identity and to access to origins, and cooperating internationally to avoid statelessness”⁴⁵³.

As can be seen, surrogacy remains a dilemma, particularly with regard to the best interests of the child. The Court has not yet made any ground-breaking progress because it does not seek to replace national authorities in cases of delicate moral and ethical character. The problem is that no matter what the Court would or could decide, it runs the risk of either encouraging international surrogacy tourism if it recognises the intended parents as legal

⁴⁵⁰ Concurring Opinion of Judge Lemmens, Valdis Fjölvisdóttir and Others, § 4

⁴⁵¹ EUROPEAN COURT OF HUMAN RIGHTS - **Advisory Opinion: concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother**

⁴⁵² *Ibid.*

⁴⁵³ UNITED NATIONS GENERAL ASSEMBLY - **Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material**

parents, or violating the child's rights if it refuses to recognise them⁴⁵⁴. The Court's jurisprudence should therefore remind States Parties to develop comprehensive legislative frameworks to address the problem of cross-border surrogacy⁴⁵⁵.

⁴⁵⁴ März, 2021, p. 285

⁴⁵⁵ *Ibid.*

4.3. Case Study

Although the above analysis has already resonated with elements of queer theory and exposed the Court's biases, this section will offer a more comprehensive overview of what is meant by a 'heteronormative' or 'queer' reasoning by presenting a case study on the Court's heteronormative reasoning in *Hämäläinen* for the case law concerning the legal recognition of horizontal LGBT+ family relationships and a case study on the Court's queer reasoning in *E.B.* for the case law concerning the legal recognition of vertical LGBT+ family relationships.

4.3.1. Case Law Concerning the Legal Recognition of Horizontal LGBT+ Family Relationships

The case of *Hämäläinen* concerned a situation in which a transgender woman could not obtain legal recognition of her post-operative gender identity because this would have required her to divorce her wife and convert her marriage into a RP, as same-sex marriage did not exist in Finland at the time. The applicant argued that her rights under Article 14⁴⁵⁶, read in conjunction with Articles 8⁴⁵⁷ and/or 12 ECHR⁴⁵⁸, had been violated by making the recognition of her gender identity conditional on the conversion of her marriage into a RP.

Referring to the judgment in *Parry*^{459,460}, the Court stated that, in the present case, too, it was not disproportionate to require, as a precondition for legal recognition of the applicant's acquired gender, that her marriage be converted into a RP since it would offer a legal protection that was almost identical to that of marriage⁴⁶¹. The Court also confirmed the judgment in *Schalk and Kopf* by holding that Article 12 did not oblige States to grant same-sex couples access to marriage⁴⁶². Consequently, it held that there had been no violation of

⁴⁵⁶ *Hämäläinen*, § 98

⁴⁵⁷ *Ibid.*, § 34

⁴⁵⁸ *Ibid.*, § 90

⁴⁵⁹ Which also concerned a post-operative transsexual who had been married prior to her gender reassignment treatment, in which the Court had held that, although the applicants had no access to marriage if they wished to have the new gender of one of them recognised, they could continue their relationship in all its essentials and even give their relationship a legal status

⁴⁶⁰ *Parry v. the United Kingdom* (dec.), no. 42971/05, ECHR 2006-XV

⁴⁶¹ *Ibid.*, § 87

⁴⁶² *Ibid.*, § 96

Article 8, that there was no need to examine the case under Article 12, and that there had been no violation of Article 14, read in conjunction with Articles 8 and 12.

The case is particularly interesting because it has been the subject of much controversy. In particular, the Court's heteronormative reasoning attracted criticism for the following reasons:

First, although the Grand Chamber, contrary to the Chamber's judgment, had not followed the line of argument that the preservation of the traditional institution of marriage was a legitimate interest of the Government, it had not approached the situation from the perspective of negative obligations, as the Chamber had done⁴⁶³. The Court had analysed the case from the point of view of whether the State was under a positive obligation to guarantee the applicant's '*right to respect for private and family life*' by recognising her (now) same-sex marriage. If the Court had instead adopted a negative obligation approach, part of the analysis would have been whether it was legitimate that the State had used arguments about the primacy of 'traditional' marriage. However, the Court held that the applicant's situation did not interfere with her '*right to respect for private and family life*'.

This was in contrast to the joint dissenting opinion of Judges Sajó, Keller and Lemmens, who argued that the applicant had indeed suffered a violation of her rights under Article 8, as the alleged interference was not justified by overriding social needs and was not necessary for a democratic society. This, according to the Judges, would have been even clearer if a negative obligations approach had been applied. Such an approach would have required a stricter test under the necessity test than the fair balance test applied under the positive obligations approach. In their view, the specific details of the applicant's situation were not given sufficient weight. Indeed, the Court did not consider the practical difficulties, *i.e.*, the recognition of gender identity and the conversion of a marriage into a RP, that the applicant and any other post-operative transsexual in this situation would face. The Judges considered that the negative obligation perspective would also have considered the applicant's standpoint more. Not having a real choice between continuing her marriage or obtaining legal recognition of her acquired gender would be detrimental and expose her to

⁴⁶³ *Ibid.*, § 38

discrimination, not to mention the emotional distress of choosing between two fundamental rights.

The case illustrates the blurred line between the negative and positive duty approaches. As a result, the choice between the two is critical. It can influence the outcome of a decision. This is all the more so because positive obligations give States more room for manoeuvre than negative obligations. The problem with the positive obligation approach is that the Court has ruled that, in the absence of a European consensus, the State has a wide MoA with regard to the applicant's situation.

Second, the European consensus argument is always critical, especially when it does not help to rule in favour of the applicant(s) because it considers whether or not a particular issue is the 'norm' and is therefore inherently heteronormative, and because the answer to this question also depends on how the question is asked, making it vulnerable to manipulation. Moreover, 'consensus' can also be a reference to an evolutionary trend rather than a clear majority. In *Hämäläinen*, however, the Court argued that, given the small number of States that allow same-sex marriage^{464,465}, it could not find a consensus, which is why the MoA granted to the State would be wider⁴⁶⁶. Thus, as the Judges pointed out that the Court, instead of focusing on the absence of same-sex marriage in some States, could have assessed the trend towards it, which the Court itself had recognised, for example, in *Vallianatos and Others*. In general, the use of the consensus argument is ambiguous, as the Court does not always clearly define it and construes it inconsistently. On the one hand it allows "the 'lowest common denominator' among the member States to prevail"⁴⁶⁷, but on the other this approach has become the scourge of cases such as *Hämäläinen*⁴⁶⁸. Therefore, the Judges stated that the Court's deference to that approach must have its limits, and it must hold that the absence of consensus cannot serve to widen the narrow MoA of the State in the present case, especially if this strengthens a heteronormative position.

Third, in this case, the entire dilemma regarding the legal recognition of the applicant's gender identity can be derived from a specific objective: to protect marriage as a union

⁴⁶⁴ At the time only ten member States of the CoE allowed same-sex marriage

⁴⁶⁵ *Hämäläinen*, § 31

⁴⁶⁶ *Ibid.*, § 67

⁴⁶⁷ Joint dissenting opinion of Judges Sajó, Keller and Lemmens, *Hämäläinen*, § 5

⁴⁶⁸ *Hämäläinen*, § 53

between partners of different sexes. Thus, the Court's choice of a positive obligation approach once again seems to serve as a means of applying heteronormative reasoning. In particular, such reasoning is evident when the Court argues, for example, that "Article 8 of the Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage"⁴⁶⁹ and that the same is true for Article 12⁴⁷⁰ or that "States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples"⁴⁷¹.

The problem here is that not only had the applicant not initially invoked Article 12 in her application to the Court, but that the Chamber had decided of its own motion to give notice of the application under the provisions of Article 12⁴⁷² and the Court has used that application to express its heteronormative position on such provision. In particular, by failing to consider the issues raised under Article 12 as a separate issue because "Article 12 of the Convention is a *lex specialis* for the right to marry", which "secures the fundamental right of a man and woman to marry and to found a family" and "enshrines the traditional concept of marriage as being between a man and a woman"⁴⁷³, the Court's heteronormative reasoning is underlined by the fact that its position on same-sex marriage under Article 12 remained static, as it has been for a long time, by interpreting the '*right to marry*' as a right that can only be claimed by a heterosexual couple. The latter reasoning has made *Hämäläinen* one of the Court's most heteronormative cases, as have all the other same-sex marriage cases that have come before the Court. Indeed, while LGBT+ individuals, and in particular LGBT+ families, have gained legal recognition in many ways in recent decades, LGBT+ couples have not yet successfully invoked the '*right to marry*' under Article 12. Even in situations such as that of the applicant in *Christine Goodwin*, where the Court appeared to have broadened its interpretation of marriage in finding a violation of Article 12 because the applicant, a transsexual living as a woman, was denied legal recognition of her gender and was therefore legally treated as a man and prevented from marrying her partner because same-sex marriage was not recognised under UK law, and where the Court did not insist on the requirement that both partners be cisgender, the concept of marriage still retained the notion of a heterosexual couple.

⁴⁶⁹ *Ibid.*, § 71

⁴⁷⁰ *Ibid.*, § 96

⁴⁷¹ *Orlandi and Others*, § 192

⁴⁷² *Hämäläinen*, § 90

⁴⁷³ *Ibid.*, §§ 96-97

Thus, with respect to *Christine Goodwin*, the Court's position in the present case has backtracked, showing that the Court accepts the conservative view of the traditional concept of marriage as between a man and a woman and that States may have a legitimate interest in protecting marriage in the 'traditional' sense. It also showed that it is fundamentally opposed to assessing whether there is discrimination against LGBT+ persons in cases where the '*right to marry*' is potentially at stake since an issue under Article 14 can only arise where there is a difference in treatment between persons in relevantly similar situations⁴⁷⁴. However, because "the applicant's situation and the situation of cissexuals are not sufficiently similar to be compared with each other", the applicant could not claim to be in the same situation as a cissexual or an unmarried transsexual – a relatively weak argument considering that cissexuals do not need legal gender recognition as they automatically receive it at birth and as their marriages would never be at risk of 'forced' divorce, and as issues of marriage for married and unmarried transsexuals remain spared because of the Court's heteronormative approach to the '*right to marry*'⁴⁷⁵.

4.3.2. Case law Concerning the Legal Recognition of Vertical LGBT+ Family Relationships

E.B. concerns a case in which the applicant claimed to be a victim of discrimination on the grounds of her sexual orientation, in violation of Article 14, read in conjunction with Article 8, following the decision of the national authorities to reject her application for authorisation to adopt. She did not claim the right to adopt, which she was aware did not exist, but argued that the application for authorisation to adopt fell within the scope of '*private life*' "since it concerned the creation of a new relationship with another individual" and '*family life*' "since it was an attempt to create a family life with the child being adopted", and that also her "sexual orientation, which was an aspect of their private life" fell within the scope of Article 8⁴⁷⁶.

The government contended, however, that the complaint did not fall within the scope of Article 8 and, consequently, Article 14 because, unlike in the *Fretté* case, the refusal to grant

⁴⁷⁴ *Ibid.*, § 108

⁴⁷⁵ *Ibid.*, §§ 111-112

⁴⁷⁶ *E.B.*, § 35

the applicant authorisation had not been based on her sexual orientation and could therefore not amount to direct or indirect discrimination on the ground of her homosexuality⁴⁷⁷. Rather, such a refusal “had been dictated by the child’s interests alone and had been based on two grounds: lack of a paternal referent and the ambivalence of the applicant’s partner’s commitment to her adoption plans”⁴⁷⁸. It went on to state that “a model of sexual difference was an important factor in a child’s identity and that it was perfectly understandable that the social services of the *département* should take into consideration the lack of markers enabling a child to construct its identity with reference to a father figure” and “that any [...] heterosexual applicant whose immediate circle of family and friends did not include a member of the opposite sex would have had their application refused on the same ground”⁴⁷⁹. In addition, “the lack of commitment on the part of the applicant’s partner was an established fact”; such “lack of involvement could be seen as a source of insecurity for the child”⁴⁸⁰. “The French [...] authorities had given paramount consideration to what lay in the best interests of the child”⁴⁸¹. The Government also noted that “there was no right to a child or right to authorisation to adopt one”, “accordingly, the desire for a child must not prevail over the child’s interests”⁴⁸².

As can be seen, the scope of the case is very similar to that of *Fretté*, which is why the Court drew several parallels with its reasoning in *Fretté*, including recalling that the national authorities should enjoy a wide MoA when they are called upon to decide on the issues at stake. However, the Court noted that there were some details in which the present case differed from *Fretté*, *i.e.*, the authorities “did not – expressly at least – refer to E.B.’s ‘choice of lifestyle’”, the applicant “was deemed to have had difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child”, and “the attitude of E.B.’s partner” was a factor in the authorities’ decision⁴⁸³. Although in *E.B.*, as in *Fretté*, the Court held that the right to respect for “family life does not safeguard the mere desire to found a family; it presupposes the existence of a family” “or the relationship that arises from a lawful and genuine adoption”⁴⁸⁴, the Court noted that it had “previously held that the notion of

⁴⁷⁷ *Ibid.*, § 36

⁴⁷⁸ *Ibid.*, § 37

⁴⁷⁹ *Ibid.*, § 38

⁴⁸⁰ *Ibid.*, § 39

⁴⁸¹ *Ibid.*, § 40

⁴⁸² *Ibid.*

⁴⁸³ *Ibid.*, § 71

⁴⁸⁴ *Ibid.*, § 41

“private life” within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to establish and develop relationships with other human beings”⁴⁸⁵. The Court noted that since the case “concern the adoption of a child as such, but an application for authorisation to adopt one subsequently” and “raises the issue of the procedure for obtaining authorisation to adopt rather than adoption itself”⁴⁸⁶, it had to consider whether the applicant had been discriminated against on the basis of her sexual orientation. This time, the Court acknowledged that “the manner in which certain opinions were expressed” by the French authorities showed that they had based their decision on the applicant’s sexual orientation⁴⁸⁷. In contrast to *Fretté*, the Court in the present carried out a full assessment of the matter. It focused on the details of both the applicant’s and the government’s submissions and found that the government’s argument on the best interests of the child was not considered to be particularly weighty to justify the refusal to grant the applicant authorisation, as the applicant had “personal qualities [...] for bringing up children” which were in the best interests of the child⁴⁸⁸. Finally, the Court found a violation of Article 14, read in conjunction with Article 8.

E.B. has taken LGBT+ family litigation to the next level: it is the first of its kind to deal with vertical LGBT+ family relationships, with a result in favour of the applicant, and where such a relationship does not involve biological links between parent and child⁴⁸⁹, but arises from a possible adoption where no relationship has yet been established.

Diverse scholars consider the judgment one of those in which the Court applied its most queer reasoning⁴⁹⁰. This is particularly evident for the following reasons:

First of all, the Court found, contrary to *Fretté*, that the applicant’s “sexual orientation was consistently at the centre of deliberations in her regard and omnipresent at every stage of the administrative and judicial proceedings”⁴⁹¹ and that “in rejecting the applicant’s application for authorisation to adopt, the domestic authorities made a distinction based on

⁴⁸⁵ *Ibid.*, § 43

⁴⁸⁶ *Ibid.*, § 44

⁴⁸⁷ *Ibid.*, § 84

⁴⁸⁸ *Ibid.*, § 94

⁴⁸⁹ *i.e.*, *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, ECHR 1999-IX

⁴⁹⁰ JOHNSON, Paul - Heteronormativity and the European Court of Human Rights. **Law and Critique**, p. 58; hereafter: JOHNSON, 2012

⁴⁹¹ *E.B.*, § 88

considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention”⁴⁹², especially since “the applicant presented, in the terms of the judgment of the *Conseil d’Etat*, “undoubted personal qualities and an aptitude for bringing up children””⁴⁹³. With these statements, the Court shows a new commitment to acknowledge the mutually reinforcing nature of heteronormativity and discrimination against LGBT+ people. By further emphasising that the State had essentially attempted to maintain its heteronormative practices through “systematic” and “excessive”⁴⁹⁴ efforts, the Court once and for all overturned *Fretté’s* leeway. This represents a shift in the Court’s understanding of adoption by LGBT+ people and a stricter approach to differential treatment based on sexual orientation.

Although it is uncertain why the Court decided to break so suddenly with its previous line of reasoning, for example, in the *Fretté* case, it most likely wanted to take into account new developments in society. These developments include the entry into force of Protocol 12 to the Convention and its Article 1⁴⁹⁵, which explicitly states: ‘*the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, [...] or other status*’⁴⁹⁶. Another development is the ‘Draft European Convention on the Adoption of Children’, cited in the judgment under ‘*Relevant Law and Practice*’. Article 7 (2) of the draft convention reads as follows: ‘

States are free to extend the scope of this convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this convention to different-sex couples and same-sex couples who are living together in a stable relationship’. This demonstrates a shift in European *opinio juris* on same-sex adoption⁴⁹⁷.

What also shows the Court’s queer reasoning, despite reminding the reader that “the provisions of Article 8 do not guarantee either the right to found a family or the right to

⁴⁹² *Ibid.*, § 96

⁴⁹³ *Ibid.*, § 95

⁴⁹⁴ *Ibid.*, § 87

⁴⁹⁵ ‘*general prohibition of discrimination*’

⁴⁹⁶ DOTY, Kathleen A. - From Frette to E.B.: The European Court of Human Rights on Gay and Lesbian Adoption. *Tulane Journal of Law and Sexuality*, p. 134

⁴⁹⁷ *Ibid.*

adopt⁴⁹⁸, and confirming the MoA granted to States in their assessment of adoption applications, is that the Court in this judgment found a violation of Article 14 in conjunction with Article 8 because of indirect discrimination. Indeed, Johnson⁴⁹⁹, is convinced that those who, like Judge Costa in his dissenting opinion, still believe that “it was not her [(the applicant’s)] homosexuality that had prevented her from obtaining authorisation”⁵⁰⁰, “acknowledge that the reproduction of heteronormativity [...] constitutes the reproduction of a political and social system that ensures the privilege of some at the expense of others”⁵⁰¹. The fact that the Court has bucked this heteronormative vicious cycle even in a situation of “hidden discrimination” shows that the Court takes a queer position in this case⁵⁰². Such ‘hidden’ or indirect discrimination occurs where the “difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure [by national authorities of a State] which, though couched in neutral terms”, has an adverse effect⁵⁰³ on individuals or groups protected by Article 14 of the ECHR, even where such authorities have no “discriminatory intent”⁵⁰⁴. Indirect discrimination, in this case, is therefore the prejudice that is generated by the maintenance of heterosexual privilege, which includes implicit contempt for homosexuality, and which further supports the view that heteronormative family formations are the only valid ones and are presented as crucial to a child’s moral, psychological and social development⁵⁰⁵. The Court thus recognises that, even where national authorities do not make a clear reference to homosexuality in their decisions, they still impose heteronormative practices, practices which are embedded and reproduced in many kinds of institutions, legal systems, *etc.*, which exclude homosexuals from reasonable participation in aspects of social and civil life, thus extending to abuses in the ‘*private*’ sphere of their lives, and which violate Article 14 read in conjunction with Article 8.

The judgment stands out for the progressive reasoning of the Court, which, in its assessment of the means used by the French national authorities to exclude non-heterosexuals from adoption, upholds the idea that homosexuals are capable of providing a family life conducive to the upbringing of children and will not tolerate any form of justification to the contrary,

⁴⁹⁸ *E.B.*, § 41

⁴⁹⁹ Sociologist who conducts research in the fields of law, human rights and sexual orientation

⁵⁰⁰ Dissenting opinion of Judge Costa joined by Judges Türmen, Ugrekhelidze And Jočienė, *E.B.*, § 8

⁵⁰¹ JOHNSON, 2012, p. 62

⁵⁰² *Ibid.*

⁵⁰³ *i.e.*, implied disadvantage, prejudice and disproportionality

⁵⁰⁴ EUROPEAN COURT OF HUMAN RIGHTS, 2022d, p. 11

⁵⁰⁵ JOHNSON, 2012, p. 62

thus not only focusing on the legal recognition of vertical LGBT+ family relationships but also challenging the very indirect discrimination that heteronormative social relations entail⁵⁰⁶.

The uniqueness of this judgment does not make it any less valuable. It has laid down standards that provide LGBT+ families with a significant basis for claims of discrimination against sexual orientation by the heteronormative assumptions of national authorities and that seek to prevent national authorities from claiming the supremacy of heterosexuality⁵⁰⁷. The judgment shows that the Court is also actively constructing the picture of the 'present-day condition' and transforming LGBT+ family issues into ontological effects across States⁵⁰⁸.

⁵⁰⁶ *Ibid.*, p. 63

⁵⁰⁷ JOHNSON, 2012, p. 64

⁵⁰⁸ *Ibid.*, p. 65

5. Concluding Remarks

5.1. The Beginnings of LGBT+ Rights Litigation at the ECtHR

Debates on LGBT+ rights have occurred since the 80s⁵⁰⁹. In particular, since the late 80s, there has been an increase in transnational advocacy on behalf of sexual minorities and their rights. This advocacy began as a political discourse, first on rights-restrictive issues⁵¹⁰ and soon after on rights-extending issues^{511,512}. It has then expanded into disciplines of international law that have established a growing number of protections for sexual minorities and into a potpourri of LGBT+ litigation, with sexual minorities challenging their rights in all sorts of courts around the world⁵¹³.

The first cases in which LGBT+ people fought for their rights at the ECtHR were related to criminal law⁵¹⁴. A landmark case in this respect was *Dudgeon*⁵¹⁵; it was the first case in which the Court ruled in favour of an LGBT+ person. In the case, the Court held that the State had unjustifiably interfered with an “essentially private manifestation of the human personality” and therefore with the applicant’s right to respect for ‘private’ life⁵¹⁶. Cases like *Dudgeon* not only paved the way for the decriminalisation of homosexual acts in CoE member states and the increased social recognition and visibility of LGBT+ people but also had a positive impact on the advancement of LGBT+ human rights and family rights in Europe⁵¹⁹.

⁵⁰⁹ HELFER, Laurence R.; RYAN, Clare - LGBT Rights as Mega-politics: Litigating before the ECtHR. **SSRN Electronic Journal**, p. 59; hereafter: HELFER *et al.*, 2021

⁵¹⁰ Issues regarding bodily integrity and political rights, *etc.*

⁵¹¹ Issues regarding privacy, non-discrimination, and recognition of LGBT+ families, *etc.*

⁵¹² HELFER *et al.*, 2021, pp. 59-61

⁵¹³ *Ibid.*, p. 59

⁵¹⁴ SOGI NEWSROOM - The 40th anniversary of a key European Court of Human Rights case that led to the decriminalisation of homosexuality - a turning point for LGBTI persons

⁵¹⁵ In the case the applicant claimed that he was subject to discrimination based on his sexual orientation because the Northern Ireland criminal code criminalised private, consensual homosexual acts between consenting male adults.

⁵¹⁶ *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; hereafter: *Dudgeon*

⁵¹⁷ This was the first time that sexual orientation was deemed to be an intimate part of an individual’s ‘private’ life

⁵¹⁸ *Dudgeon*, § 60

⁵¹⁹ BANENS, Maks - Doing same-sex families in Europe. Em RUPP, MARINA; KAPPELLA, OLAF; SCHNEIDER, NORBERT F. (Eds.) - **Die Zukunft der Familie: Anforderungen an Familienpolitik und Familienwissenschaft**, p. 207

Although the ECtHR has, since its inception, sought to extend further the protection of LGBT+ people and their rights, many States still fail to meet the standards that have been developed and are being implemented in other States. LGBT+ people respond to this lack of equality, inclusion and opportunity and absence or uneven progress by continuing to turn to their national courts and, where these fail to advance their rights, to the ECtHR. In particular, as Helfer and Ryan put it, “two divergent forces are pushing these [LGBT+] cases to Strasbourg”, namely how the Court interprets the Convention as a living instrument and how it approaches cases involving LGBT+ rights in post-Soviet states, leading States to expand the scope of and protect LGBT+ rights in a way that no other court has done before⁵²⁰. This makes it unique and the court of first resort for LGBT+ family disputes⁵²¹.

The most important cases before the ECtHR for this thesis have been those in which LGBT+ families have brought claims on issues relating to LGBT+ RPs, marriage, adoption and surrogacy. Their analysis has attempted to give the reader an idea of whether there is equality, inclusion and opportunity for LGBT+ families before the ECtHR. Before this analysis, one might have thought, well, yes, the Convention and consequently the Court protect human rights. However, the analysis has shown that there have been more than enough judgments in which this was not the case. The following paragraphs summarise how, as has been seen, the Court seeks to contribute to equality, inclusion and opportunities for LGBT+ families. In doing so, the focus will be on the types of limits the Court encounters or sets itself in such contribution. It will also be shown that the final word on the legal recognition of LGBT+ family relationships is far from being spoken and that there is no reason to believe that a case before the Court would be a lost cause

⁵²⁰ HELFER *et al.*, 2021, p. 60

⁵²¹ *Ibid.*

5.2. The Incremental Approach

In order to overcome the various problems and arguments put forward by the respondent States ‘against’ LGBT+ families, the Court, instead of immediately issuing an unprecedented judgment applying a queer reasoning, adopts a cautious incremental approach. As the Convention is considered to be a living instrument, the Court may “adapt, over time, the text of the Convention to legal, social, ethical or scientific developments”⁵²² and to changing standards to which most States are gradually converging, through an evolving interpretation of the Convention in the light of contemporary conditions, with which it can expand the scope of protection of the rights of LGBT+ families⁵²³.

For Parties, the dynamic nature of the Convention sometimes makes it unwieldy to keep abreast of the latest advances, especially when it comes to incorporating new interpretations of the Convention text into domestic law⁵²⁴. These may not have the same meaning as the original drafters intended, which is why they are often criticised by dissenting judges⁵²⁵. However, the principle of the living instrument is constrained; new obligations within the Convention cannot result in the jurisprudence of the Court assuming the function of a binding treaty. The Court does not adopt an evolutive interpretation if this would lead to the introduction of new provisions into the Convention⁵²⁶. The Court made this clear in *Johnston and Others*^{527,528}. The Court held that, although the Convention must be interpreted in the light of “present-day conditions”, it could not “by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset”⁵²⁹.

Many scholars argue that the incremental approach is one of the most preferable in all kinds of situations where LGBT+ family rights are at stake⁵³⁰. In their view, if the Court had immediately ruled in absolute favour of same-sex marriage in *Schalk and Kopf*, for example,

⁵²² Concurring opinion of Judge Sicilianos, joined by Judge Raimondi, *Magyar Helsinki Bizottság*, § 3

⁵²³ HELFER *et al.*, 2023, p. 8

⁵²⁴ GERARDS, 2019, p. 54

⁵²⁵ *Ibid.*, p. 55

⁵²⁶ *Ibid.*, p. 54

⁵²⁷ In the case the first and second applicants, one of whom could not dissolve his previous marriage because divorce was unconstitutional under Irish law, claimed that such law violated their ‘right to marry’ in that the reason why the married applicants could not obtain a divorce was the couple’s limited financial resources, which prevented them from travelling abroad to obtain a divorce

⁵²⁸ *Johnston and Others v. Ireland*, 18 December 1986, Series A no. 112

⁵²⁹ *Ibid.*, § 53

⁵³⁰ PALAZZO, 2022, p. 196

this would have been essentially tantamount to the Court placing itself above national legislation and jurisdiction⁵³¹. In doing so, it would not only have taken away the State's decision on what legal recognition to grant to same-sex couples, but it would have 'forced' the State to grant same-sex couples access to marriage, potentially leading to non-compliance with the Court's final rulings and political backlash and resistance in other States⁵³². This, in turn, would not only have brought more cases to the Court but would have clashed with cases brought by LGBT+ people against repressive governments, for example, on rights-restrictive issues⁵³³. Thus, the timely introduction of new interpretations by the Court also has advantages. While not always ground-breaking, it leads to a growth of consciousness and collective morality and brings positive developments to the international picture⁵³⁴. These benefits are also the reason why the Court uses the incremental approach and why it reaches its limits in promoting equality, inclusion and opportunities for LGBT+ families. Such reasons are not only of a jurisdictional nature⁵³⁵ but may derive from the Court's own reasoning or arguments, which can take a more queer or heteronormative position. The analysis above has already demonstrated this. In particular, the Court's heteronormative position often includes consensus and (broad) MoA reasoning, while its 'queer' position often includes a reasoning based on *de facto* family ties. However, this is not something that can be standardised. As been seen, the Court is torn between both types of reasoning. The Court's incremental approach to issues relating to LGBT+ families is therefore not a linear process⁵³⁶. It evolves, but also regresses⁵³⁷ with the Court establishing principles that it later 'ignored'⁵³⁸. Therefore, only time will tell which path (heteronormative/queer) the Court will ultimately take. In the meantime, the Court will continue to adhere to the incremental approach, but why? The following sections explore the reasons in detail

⁵³¹ HAMILTON, 2018, p. 1584

⁵³² SHAHID, 2017, p. 195

⁵³³ HELFER *et al.*, 2021, p. 80

⁵³⁴ JOHNSON, Paul - **Homosexuality and the European Court of Human Rights**, p. 13; hereafter: JOHNSON, 2013

⁵³⁵ Article 32(1) ECHR

⁵³⁶ JOHNSON, 2012, p. 63

⁵³⁷ *e.g.*, from *Christine Goodwin* to *Hämäläinen*

⁵³⁸ JOHNSON, 2012, p. 63

5.3. The Court's Limits

5.3.1. *The Court's Role*

The Court is caught in an inherent tension between its role, which is limited by its international and subsidiary nature, and the role reserved to the States, which have the primary responsibility to guarantee the rights enshrined in the Convention⁵³⁹. In particular, the Court often finds it difficult to decide between the individual and the general, as the latter encompasses a wide variety of values, traditions and legal systems, which vary considerably from one State to another, and as new social realities are constantly emerging within it⁵⁴⁰. The role of the Court is therefore one of the reasons for it to use an incremental approach.

In order to protect their role, States have become resourceful in their justifications for interfering with the rights of applicants. Particularly in cases involving LGBT+ rights issues, they often argued that the introduction of, for example, same-sex marriage would be a “threat to the family” because marriage (equality) would extend same-sex couples’ rights to additional rights⁵⁴¹⁵⁴². The need to protect the ‘traditional family’ is only one justification for interfering with the rights of applicants; Parties have also begun to argue that it is incompatible with the ‘public interest’ to extend certain rights to LGBT+ families⁵⁴³. In particular, they claim that LGBT+ family rights threaten national sovereignty and order because “homosexual propaganda”⁵⁴⁴ supports the values of Western European identity. In *Fedotova and Others*, for example, the State claimed that same-sex marriage would “harm the health and morals of minors and instil in them ‘a distorted image of the social equivalence of traditional and non-traditional marital relations’”⁵⁴⁵. It ‘justified’ its refusal to recognise same-sex marriage with the need to protect minors and the views of the majority of Russian people. These types of claims can be traced back to the “threat to the nation” ideology of some States⁵⁴⁶. The “threat to the nation” claims have been most evident in recent cases against the former Soviet bloc states, but have been identified by the Court as embodying “a

⁵³⁹ CHRISTOFFERSEN, J. - The Principle Of Primarity (Formal Aspect). In **Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights**, p. 360

⁵⁴⁰ *Ibid.*

⁵⁴¹ e.g., parentage rights, which eventually would lead to further issues related to assisted reproductive technologies, adoption, surrogacy, etc.

⁵⁴² HELFER *et al.*, 2023, pp. 28-29

⁵⁴³ *Ibid.*, p. 28

⁵⁴⁴ *Ibid.*, pp. 21-22

⁵⁴⁵ *Fedotova and Others*, § 220

⁵⁴⁶ HELFER *et al.*, 2023, pp. 22-24

predisposed bias on the part of the heterosexual majority against the homosexual minority”⁵⁴⁷ and were immediately undermined because by making such allegations, “authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society”⁵⁴⁸, a society that “rejects any stigmatisation based on sexual orientation” and is built “on the equal dignity of individuals and is sustained by diversity, which it perceives not as a threat but as a source of enrichment”^{549,550}.

For the Court, this means that when States invoke the “threat to the nation” and/or “threat to the family” arguments, by virtue of its role, it often finds it legally ‘impossible’ to rule in favour of LGBT+ rights, as this would ‘oblige’ States to introduce such rights into their legal systems and undermine their sovereignty. The Court therefore mostly does not change its position on issues related to LGBT+ family rights until States’ practices and policies reach a certain common standard. Thus, fearing the risk of losing its credibility and authority with States, it finally relies on consensus and (wide) MoA reasoning, appearing hesitant to find violations of Articles 8 or 12 alone and/or in conjunction with Article 14 and to play a more active role in extending such rights⁵⁵¹. Therefore, due to its jurisdiction and subsidiary role, the Court can only intervene more drastically when a State has deviated significantly from European standards, thus only taking baby (incremental) steps towards the realisation of LGBT+ human rights⁵⁵².

5.3.1.1. The consensus reasoning

The consensus and the broad MoA reasoning are another limit that the Court encounters in issues related to the recognition of the rights of LGBT+ families, a limit that it sets itself. The latter are both two of the Court’s main interpretive tools when dealing with LGBT+ family rights and SOGI-based discrimination. They are used when there is a need to find a specific remedy for a particularly sensitive moral or ethical issue and when such a solution may (or may not) be comparable to the means (solutions) adopted by the majority of the

⁵⁴⁷ *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, § 91, 20 June 2017; hereafter: *Bayev and Others*

⁵⁴⁸ *Ibid.*, § 83

⁵⁴⁹ *Fedotova and Others*, § 180

⁵⁵⁰ HELFER *et al.*, 2023, pp. 21-22

⁵⁵¹ SHAHID, 2017, p. 195

⁵⁵² HELFER *et al.*, 2023, p. 28

Parties⁵⁵³. The reasonings live in a dynamic relationship; if consensus is reached, the MoA will be limited, whereas if there is no consensus “either as to the relative importance of the interest at stake or as to the best means of protecting it, [...] the margin will be wider”⁵⁵⁴. A wide MoA applies, for example, to the timing of the introduction of legislative changes or the decision on the status to be granted to same-sex couples⁵⁵⁵. In the absence of consensus, interference with individual rights may therefore be justified. This is particularly so because, the Court cannot force a State to adopt a uniform approach that does not exist⁵⁵⁶.

The interrelationship between MoA and consensus strikes a balance between the dynamics of national and supranational actors and therefore between the role of the Court and that of the State⁵⁵⁷. National legislation and jurisprudence influence the judgments of the Court in a bottom-up process, generally tending towards majoritarianism⁵⁵⁸. When a consensus is reached, it is time for the Court to act⁵⁵⁹. In a top-down approach, and because the Court's judgments are binding *inter partes*, it pressures national authorities to accept the standards reached through CoE recognition⁵⁶⁰.

Consensus reasoning seems progressive in that, for example, due to a clear ongoing trend⁵⁶¹, the Court may raise its bar for human rights protection that States must follow⁵⁶². However, it is ambidextrous because it can be shaped in accordance with the situation and the need for use⁵⁶³. It mainly supports and reinforces an already dominant position rather than maintaining a lead that embraces new social realities⁵⁶⁴. The reasoning has often been ‘misused’ by the Court in the sense that it contradicted its precedents⁵⁶⁵. This was noted, for example, in the joint dissenting opinion of Judges Sajó, Keller and Lemmens in *Hämäläinen*. They argued that the “decisive argument for the majority’s finding is the fact that there is no

⁵⁵³ RAGONE, Sabrina; VOLPE, Valentina - An Emerging Right to a “Gay” Family Life? The Case *Oliari v. Italy* in a Comparative Perspective. **German Law Journal**, p. 474; hereafter: RAGONE *et al.*, 2016

⁵⁵⁴ *Oliari and Others*, § 162

⁵⁵⁵ SHAHID, 2017, p. 188

⁵⁵⁶ MEMOLI, Renato - The prohibition of discrimination based on sexual orientation in the case-law of the ECtHR and the CJEU. **Zeitschrift für europarechtliche Studien**, p. 365; hereafter: MEMOLI, 2018

⁵⁵⁷ RAGONE *et al.*, 2016, p. 475

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

⁵⁶¹ *i.e.*, Fedotova and Others

⁵⁶² SHAHID, 2017, p. 185

⁵⁶³ THEILEN, Jens T. - The Future of Sexual Orientation and Gender Identity in Human Rights. **Völkerrechtsblog**, p. 2; hereafter: THEILEN, 2023

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*, p. 1

consensus among the member States [...] on issues concerning transgender persons”⁵⁶⁶. The consensus reasoning was used as essentially the only criterion for determining the scope of the State’s MoA while ignoring other criteria that might also apply to the case, such as “a particularly important facet of an individual’s existence or identity is at stake”⁵⁶⁷, which, in their view, should have influenced the State’s MoA, particularly in a situation such as the applicants’, where a State has interfered with an aspect of the applicants’ right that is similar to a core value of the Convention. However, the problem with the consensus reasoning is not only the way the Court (methodologically) constructs consensus⁵⁶⁸ or problems already mentioned in this thesis, but the fact there may be many more problems that arise. The use of MoA and/or consensus reasoning therefore is a very delicate undertaking.

The consensus and/or MoA reasoning is part of the Court’s incremental approach, as it has often been applied by the Court when, for example, it has avoided making evolutionary decisions in cases against respondent States that have previously demonstrated⁵⁶⁹ to be utterly dissatisfied with the recent development of the Court’s position. In so doing, the Court has often used both reasonings to justify a respondent State’s heteronormative position on LGBT+ rights⁵⁷⁰. This does not mean that the Court is intimidated by the Parties. However, it hinders the pace of progressive steps, making the incremental approach appear even slower (or static). It also seems to demonstrate an attitude on the part of the Court that is more inclined towards a heteronormative line of reasoning⁵⁷¹. Nevertheless, it cannot be said that consensus reasoning is always used negatively or that it is only tainted by hetero- and cis-normative assumptions. The Court has recently referred to a “a clear ongoing trend within the States Parties towards legal recognition of same-sex couples”⁵⁷². This trend has once again brought the controversial consensus reasoning to the forefront of the Court’s various approaches, but this time, it has been used in favour of LGBT+ people⁵⁷³.

⁵⁶⁶ Joint dissenting opinion of Judges Sajó, Keller and Lemmens, *Hämäläinen*, § 5

⁵⁶⁷ *Hämäläinen*, § 67

⁵⁶⁸ The Court has not yet reached a standard on how to assess it; sometimes it uses comparative law, sometimes it does not even consider it, *i.e.*, in “*A, B and C v. Ireland* [...] the Grand Chamber accepted the societal constraints of a single State in justifying the ban on abortion despite the existence of an impeccable European consensus to the contrary” (dissenting opinion of Judge Lobov, *Fedotova and Others*, § 14)

⁵⁶⁹ *i.e.*, by failing to comply with judgments, *etc.*

⁵⁷⁰ *RAGONE et al.*, 2016, 475

⁵⁷¹ *HELPER et al.*, 2023, p. 32

⁵⁷² *Fedotova and Others*, § 175

⁵⁷³ *THEILEN*, 2023, p. 1

5.3.2. *The Wording of Article 12*

There is another reason why the Court is limited in the legal recognition of LGBT+ relationships: the wording of Article 12.

An above analysis shows that, based on its wording, it could be argued⁵⁷⁴ that the provisions of Article 12 refer specifically to ‘*men and women*’. The Court has long understood the ‘*right to marry*’ to mean that marriage must be “between persons of opposite biological sex” since “the wording of the Article [...] makes it clear that Article 12 [ECHR] [...] is mainly concerned to protect marriage as the basis of the family”⁵⁷⁵. However, the latter argument became at some point flawed, given that “there have been major social changes in the institution of marriage since the adoption of the Convention”, which is why the Court had to admit in *Christine Goodwin* that it was “not persuaded that at the date of this case it can still be assumed that [the wording] [...] must refer to a determination of gender by purely biological criteria”⁵⁷⁶. This led the Court, for the first time, to compel a State to stop enforcing only ‘traditional’ arrangements for marriage and family life. From there, however, the Court’s momentary spark of more progressive reasoning fizzled out and reverted to a heteronormative one, showing in *Hämäläinen* that it considered Article 12 to enshrine “the traditional concept of marriage as being between a man and a woman”⁵⁷⁷. By making such a statement, the Court undermined that there had been developments in the States and that “Article 12 might be interpreted so as not to exclude the marriage between two men or two women”⁵⁷⁸. It ‘legitimised’ the statement by arguing that “the choice of wording in Article 12 must [...] be regarded as deliberate” since “all other substantive Articles of the Convention grant rights and freedoms to “everyone” or state that ‘no one’ is to be subjected to certain types of prohibited treatment”⁵⁷⁹.

In *Orlandi and Others*, the Court finally held that Article 12 was “applicable to a same sex-couple wishing to marry”^{580,581}. Prior to *Orlandi and Others*, it often appeared that the Court

⁵⁷⁴ *i.e.*, *Rees*

⁵⁷⁵ *Rees*, § 49

⁵⁷⁶ *Christine Goodwin*

⁵⁷⁷ *Hämäläinen*, § 96

⁵⁷⁸ *Schalk and Kopf*, § 63

⁵⁷⁹ *Ibid.*, § 55

⁵⁸⁰ *Orlandi and Others*, § 145

⁵⁸¹ JOHNSON, Paul - LGBT People, the Council of Europe and the European Court of Human Rights. **SSRN Electronic Journal**, p. 32; hereafter: JOHNSON, 2022

could forever conclude, ‘simply’ from the wording of Article 12, that there had been no violation of Article 12 in relation to issues raised in the context of same-sex marriage⁵⁸². A turning point in this respect was *Schalk and Kopf*, where the Court held that in the light of other provisions of comparative law⁵⁸³, it could “no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex”⁵⁸⁴. However, it did not specify the circumstances in which same-sex couples would be allowed to marry but there are some cases in which the Court has established some principles under Article 12. These could potentially extend the ‘*right to marry*’ of same-sex couples⁵⁸⁵. For example, the Court has stated that “national laws of the Contracting States [...] 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”⁵⁸⁶, and that although “national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage” and “they may also include substantive provisions [...] concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy”, the “relevant laws [...] may not otherwise deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice”⁵⁸⁷. To this day, because of the wording of Article 12 ECHR, the Court appears to continue to ‘allow’ States to ban same-sex marriage.

Another reason for the Court’s limited ability to promote equality, inclusion and opportunity for LGBT+ families, which is still linked to the wording of Article 12 ECHR, is that one of the Court’s principles is that it does not interpret the provisions of the ECHR in isolation, but as a whole. For example, in *Schalk and Kopf*, the Court held that the ‘*right to marry*’ could not be derived, for example, from Article 14 read in conjunction with Article 8, because “the Convention is to be read as a whole and its Articles should therefore be construed in harmony with one another”⁵⁸⁸. It is because the Convention must be read as a whole that the fact that LGBT+ couples are still excluded from the ‘*right to marry*’ has often

⁵⁸² *Ibid.*

⁵⁸³ Article 9 CFR

⁵⁸⁴ *Schalk and Kopf*, § 61

⁵⁸⁵ JOHNSON, 2022, p. 33

⁵⁸⁶ *Rees*, § 50

⁵⁸⁷ *O’Donoghue and Others v. the United Kingdom*, no. 34848/07, § 83, ECHR 2010 (extracts)

⁵⁸⁸ *Schalk and Kopf*, §101

been referred to as “sexual apartheid”⁵⁸⁹, primarily since such exclusion does not serve a justified and legitimate aim⁵⁹⁰

⁵⁸⁹ *Hörmann and Moser v. Austria* (cc), no. 31176/13, 29 May 2015

⁵⁹⁰ STAIANO, Fulvia - **(In)Comparable Situations: Same-Sex Couples' Right to Marriage in European Case Law**, p. 15

5.4. Future Developments

Court judgments, and in particular the Court's incremental approach, have shown to increase the likelihood of overcoming "domestic opposition to policy change under particular institutional and political circumstances", leading to lasting change and engaging States in pro-LGBT+ reforms⁵⁹¹. Their *erga omnes* effect⁵⁹² applies mainly to former Soviet-bloc States⁵⁹³. The Court needs to find a better balance between interventionism and passivity, because avoiding controversy cannot be a solution, especially if this leads the Court to neglect its function of protecting human rights, compromises its legitimacy, position of power and integrity, contributes to the disadvantageous treatment of minorities and furthermore supports a heteronormative system⁵⁹⁴.

The incremental development of the Court's jurisprudence can be seen, as Shahid likes to quote Wintemute, as an "evolution from 'basic rights' to 'sex rights', to eventually 'love rights' "⁵⁹⁵, or, as Ragone and Volpe⁵⁹⁶ quote Waaldijk, as "a five-step path⁵⁹⁷, or "standard sequences" that the process of legal recognition of homosexuality traditionally follows at the national level"⁵⁹⁸. The problem with it is that the Court is currently stuck between each of the last two steps, which is why its contribution to equality, inclusion and opportunities for LGBT+ families is limited; eight States change their policies within a decade⁵⁹⁹. In particular, the limitations have been shown to stem from two reasons: the role of the Court and the wording of Article 12 ECHR. These limitations have brought the Court to a new turning point with regard to the shifting positions it has previously taken⁶⁰⁰. The following paragraphs show what future developments in its jurisprudence might look like.

⁵⁹¹ HELFER, Laurence R.; VOETEN, Erik - International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe. **International Organization**, p. 79; hereafter: HELFER *et al.* 2014

⁵⁹² Their influence extends from the applicant to the States where public support for LGBT rights is relatively low

⁵⁹³ *Ibid.*, p. 106

⁵⁹⁴ HELFER *et al.*, 2021, pp. 88-90

⁵⁹⁵ SHAHID, Masuma - Equal marriage rights and the European Courts. **ERA Forum**, p. 409; hereafter: SHAHID, 2023

⁵⁹⁶ Scholars of public law, European law, comparative law, democracy promotion and human rights

⁵⁹⁷ Repeal of the ban of sodomy; equalization of ages of consent; introduction of anti-discrimination legislation; adoption of legal partnership; and recognition of homosexual parenthood

⁵⁹⁸ RAGONE *et al.*, 2016, p. 482

⁵⁹⁹ HELFER *et al.* 2014, p. 106

⁶⁰⁰ HELFER *et al.*, 2023, p. 32

The reason that the Court's contribution to equality, inclusion and opportunity for LGBT+ families is limited because of its role is not an inevitable reason, because, although the Court has to date often engaged in majoritarian activism, neither the MoA nor the consensus is static; the MoA can change with a changing consensus, while the consensus can change with new legislation in States⁶⁰¹. In particular, there has been a trend of progress, with States "moving in the same direction – forward. There is no reason to think that this trend, [...] will soon decline. Demographic data reinforce this prediction; young people are the most supportive segment of the population with respect to [for example] gay marriage"⁶⁰². Therefore, as more States introduce, for example, same-sex marriage, the Court will be able to "close the circle" and encourage them to bring their national systems into line with the higher standards set across Europe, just as it did for same-sex RPs in *Oliari and Others*⁶⁰³. In addition, there has been a recent move by the Court to recognise *de facto* family relationships within the scope of 'family life'. For example, 'family life' could exist between a cohabiting couple who are "commitment to each other by having children together or by any other means"⁶⁰⁴ or who have shown that their "relationship had sufficient constancy"⁶⁰⁵, etc. Therefore, by recognising that an LGBT+ family is at least a *de facto* family, it could be argued in the future that "states [should] have a positive obligation to legally recognize these different family models", as Hamilton⁶⁰⁶ likes to quote *Bribosia et al.*⁶⁰⁷.

The reason why the Court is limited in its contribution to equality, inclusion and opportunity for LGBT+ families because of the heteronormative wording of Article 12 is also not inevitable "because the phrase 'men and women' could be understood to encompass same-sex relationships and, moreover, Article 12 could be read in light of Article 1 of the Convention which requires contracting states to 'secure to everyone' the right to marry contained in Article 12"⁶⁰⁸. Johnson and Falcetta⁶⁰⁹ encourage LGBT+ couples to bring same-sex marriage-related claims to the ECtHR using Article 3 ECHR, believing that "the open-ended wording of the provision and its applicability and scope [...] could more effectively address discrimination against sexual minorities by developing Convention

⁶⁰¹ MEMOLI, 2018, p. 365

⁶⁰² RAGONE *et al.*, 2016, 485

⁶⁰³ *Ibid.*

⁶⁰⁴ *X, Y and Z v. the United Kingdom*, 22 April 1997, § 36, Reports of Judgments and Decisions 1997-II

⁶⁰⁵ *Paradiso and Campanelli*, § 140

⁶⁰⁶ Researcher within the area of Gender, Sexuality and the Law

⁶⁰⁷ HAMILTON, 2018, p. 1595

⁶⁰⁸ JOHNSON *et al.*, 2020, p. 96

⁶⁰⁹ Researcher on sexual orientation and human rights

jurisprudence in a more holistically and comprehensive way and enable a more sociological understanding of and response to a variety of ways in which discrimination against sexual minorities is socially organised and experienced”⁶¹⁰, making the discourse on same-sex marriage also a discourse on respect for human dignity and autonomy, and an issue of equality for which the Court is an advocate⁶¹¹. New ways of interpreting the ‘*right to marry*’, even if this means invoking it through new and original ways of bringing claims, are particularly important because, as Shahid likes to quote Dzehtsiarou, “the ECHR should be an instrument of development and improvement rather than an ‘end game’ treaty, which froze the state of affairs that existed sixty years ago”⁶¹².

Some other scholars believe that the best way to make an argument in favour of same-sex marriage is to invoke Article 12 in conjunction with Article 14, as the right to ‘*prohibition of discrimination*’ has the potential to develop⁶¹³. In particular, they see the ‘*right to respect for private life*’ as involving a more “negative freedom” compared to the equality discourse, implying ““equal concern and respect across differences”” as Hamilton cites the South African constitutional court in *Minister of Home Affairs and Another v. Fourie and Another*⁶¹⁴ who had stated that the exclusion of same-sex couples from marriage was “represented a ‘harsh if oblique statement [...] that same-sex couples are outsiders’”, that they ““do not fit into normal society’ and that their ‘capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples””⁶¹⁵. Equality arguments have proved fundamental in many same-sex marriage cases around the world. For example, in the *Obergefell v. Hodges*⁶¹⁶ decision, the US supreme court found that “the right to marry was “derived from the Fourteenth Amendment’s guarantee of equal protection””⁶¹⁷. Thus, scholars believe that the equality argument “and the evolving nature of the family case law concerning same-sex couples under Article 8 [...] could lead to a dynamic interpretation of Article 12” ECHR⁶¹⁸.

⁶¹⁰ SHAHID, 2017, pp. 196-197

⁶¹¹ PUPPINCK, 2015, p. 1

⁶¹² SHAHID, 2017, p. 188

⁶¹³ HAMILTON, 2018, p. 1587

⁶¹⁴ *Ibid.*

⁶¹⁵ JOHNSON *et al.*, 2020, p. 95

⁶¹⁶ SWIMELAR, Safia - Nationalism and Europeanization in LGBT Rights and Politics: A Comparative Study of Croatia and Serbia. **East European Politics and Societies**, p. 607

⁶¹⁷ HAMILTON, 2018, p. 1587

⁶¹⁸ HAMILTON, 2018, p. 1600-1601

Also, there is hope that the Court will choose “a counter-majoritarian approach by interpreting Article 12 evolutively”, as “an overwhelming majority of authors share the view that such an interpretation would not be contrary to international law”, they argue that such an approach “could even *enhance* the legitimacy of the political system as the whole”⁶¹⁹. Otherwise, if no development on the issue is conceivable in the near future, the Court could “used the idea and symbol of Europe or “European values” [,] [which are based on the principle of equality] [,] to advance [...] [LGBT+] rights” and convince opponents of same-sex marriage that a “sufficient consensus has arrived”⁶²⁰.

Finally, some other scholars suggest that LGBT+ couples should insist that they see no need to be excluded from same-sex marriage because “the necessity test is very hard to satisfy”⁶²¹.

As can be seen, the Court “in order to move forward in the future and to ensure equal protection to [...] [LGBT+ families, the Court is therefore] urged to continue applying strict scrutiny to the behavior of the member states and request them to provide weighty reasons to justify any discriminatory treatment on the basis of sexual orientation”⁶²², especially since “in producing, sustaining and imposing a moral view, the Court [...] [is] one of the most important mechanisms through which [...] ideas about the ‘present-day conditions’ of Europe are fashioned. [...] [T]he Court possesses a unique capacity to challenge the established moral relations of European states and, using the symbolic authority of law, ‘socialize’ contracting states within the terms of its own moral vision. It [...] [therefore] has become a vital instrument for contesting the heteronormative morality of European societies”⁶²³

⁶¹⁹ SHAHID, 2017, p. 195

⁶²⁰ HAMILTON, 2018, p. 1599

⁶²¹ HODSON, 2008, p. 27

⁶²² SHAHID, 2023, p. 410

⁶²³ JOHNSON, 2013, p. 14

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