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Author: Koffeman, Nelleke Renate
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Case Study II – Legal Recognition of Same-Sex Relationships

Chapter 8
ECHR

8.1. Framework of ECHR rights

This first section provides for a brief introduction to a number of ECHR rights that have been most important in the case law of the ECtHR on legal recognition of same-sex relationships. The first is the right to respect for private life (Article 8 ECHR). It has been on the basis of this Article that the Court has ruled that criminalisation of homosexual acts was in violation of the Convention (section 8.1.1). The second subsection discusses the right to respect for private and family life (Article 8 ECHR), while sections 8.1.3 and 8.1.4 discuss the right to marry (Article 12) and the prohibition on discrimination (Article 14 ECHR), which includes a prohibition on grounds of sexual orientation. For a discussion of the rights of the child under the Convention, reference is made to Chapter 2, section 2.1.3.

8.1.1. Sexual orientation as most intimate aspect of private life (Article 8 ECHR)

The first line of ECtHR judgments which have improved the legal position of persons with a homosexual orientation date back to the 1980s and concerned national legislation criminalising homosexual conduct or acts. The Court examined these complaints on the basis of the right to respect for private life (Article 8 ECHR).

In *Dudgeon* (1981),[1] the applicant complained about the fact that homosexual acts, even if committed in private by consenting males over the age of 21, were criminal offences under the law of Northern Ireland. The then existing European Commission of Human Rights (ECmHR) observed that the applicant's complaint related only to the prohibition of private, consensual acts, and found that the complaint therefore fell within the scope of Article 8 ECHR.[2] The Court subsequently saw no reason to differ from these views and held that the maintenance in force of the impugned legislation constituted a continuing interference with the applicant's right to respect for his private life – including his sexual life – within the meaning of Article 8(1).[3] In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affected his private life.[4]

1 ECtHR [GC] 22 October 1981, *Dudgeon* v. *the United Kingdom*, no. 7525/76.
2 ECmHR 13 March 1980 (report), *Dudgeon* v. *the United Kingdom*, no. 7525/76.
3 ECtHR [GC] 22 October 1981, *Dudgeon* v. *the United Kingdom*, no. 7525/76, para. 41.
4 *Idem*, para. 41.

In its examination of whether this interference could be justified, the Court accepted that the general aim pursued by the legislation was the protection of morals.[5] The Court furthermore acknowledged that some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of the criminal law could be justified as 'necessary in a democratic society', as the overall function served by the criminal law in this field was to preserve public order and decency and to protect the citizen from what is offensive or injurious. The Court stressed the fact that the case at hand concerned a most intimate aspect of private life,[6] and that the right affected by the impugned legislation 'protects an essentially private manifestation of the human personality.'[7] Accordingly there had to be particularly serious reasons before interferences on the part of the public authorities could be justified.

The Court found that it could not be maintained that there was a pressing social need to make such acts criminal offences, as there was no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public.[8] On the issue of proportionality, the Court considered that such justifications as there were for retaining the law in force unamended were outweighed by the detrimental effects which the very existence of the legislative provisions in question could have on the life of a person of homosexual orientation like the applicant.[9] The Court concluded that the restriction imposed on the applicant under Northern Ireland law was disproportionate by reason of its breadth and absolute character.[10] As regards the prohibition on conducting homosexual acts for males under the age of 21, the Court ruled that it fell in the first instance to the national authorities to decide upon the question.[11] The ECtHR did not find a violation in this respect.

The Court repeated this line of reasoning in two later cases concerning the criminalisation of male homosexual conduct by adults.[12] It took the Court remarkably longer to apply this reasoning also in regard of homosexuality in the military. In 1983 the Commission was of the opinion that a ban on homosexuality in the military could be justified for the protection of morals and for the prevention of disorder, as it found that homosexual conduct by members of the armed forces could pose a particular risk to order within the forces which would not arise in civilian life. In 1999 however, the Court ruled in *Smith and Grady* that there were no convincing and weighty reasons that could justify discharging homosexuals from the military

[5] *Idem*, para. 46.
[6] *Idem*, para. 52.
[7] *Idem*, para. 60.
[8] See also ECtHR 19 February 1997, *Laskey, Jaggard and Brown* v. *the United Kingdom*, nos. 21627/93 a.o.
[9] ECtHR [GC] 22 October 1981, *Dudgeon* v. *the United Kingdom*, no. 7525/76, para. 60.
[10] *Idem*, para. 61.
[11] *Idem*, para. 62.
[12] ECtHR 26 October 1986, *Norris* v. *Ireland*, no. 10581/83 and ECtHR 22 April 1993, *Modinos* v. *Cyprus*, no. 15070/89. For a pending case on this matter see *H.Ç.* v.*Turkey*, no. 6428/12, lodged on 30 January 2012.

because of their homosexuality.[13] The Court has furthermore held differing ages of consent under criminal law for homosexual relations to be in violation of Article 8 the Convention.[14]

By qualifying sexual orientation as a most intimate aspect of private life, and as an essentially private manifestation of the human personality, the Court has placed sexual orientation at the centre of the right to private life as protected by Article 8. This finding has been an important ground for the formulation and application of a strict test in cases where a difference in treatment was based on sexual orientation (see section 8.1.4 below).

8.1.2. Same-sex relationships and the right to respect for private and family life (Article 8 ECHR)

After the Court had accepted in *Dudgeon* that sexual orientation forms part of private life and enjoys protection under Article 8 ECHR, the Commission and the Court soon thereafter also accepted that relationships between persons of the same sex fell within the notion of 'private life' under Article 8.[15] However, for a long time, the Commission – and later the Court – held that stable homosexual relationships did not fall within the scope of the right to respect for family life within the meaning of that provision.[16] This was so despite the fact that the Court had ruled yet in the late 1970s that also *de facto* family relations enjoyed protection under Article 8.[17] Relevant factors to decide whether a relationship [could] be said to amount to 'family life', included whether the couple lived together, the length of their relationship and whether they had demonstrated their commitment to each other by having children together or by any other means.[18]

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13 Accordingly, the Court considered that the applicants' complaints under Art. 14 in conjunction with Art. 8 did not give rise to any separate issue. ECtHR 27 September 1999, *Smith and Grady* v. *the United Kingdom*, nos. 33985/96 and 33986/96.

14 ECtHR 9 January 2003, *L. and V.* v. *Austria*, nos. 39392/98 and 39829/98.

15 E.g. ECmHR 3 May 1983 (dec.), *X. and Y* v. *the United Kingdom*, no. 9369/81 and ECmHR 9 October 1989 (dec.), *C. and L.M.* v. *the United Kingdom*, no. 14753/89. See also *Mata Estevez*, where the Court acknowledged 'that the applicant's emotional and sexual relationship [with a same-sex partner] related to his private life within the meaning of Art. 8 para. 1 of the Convention'. ECtHR 10 May 2001 (dec.), *Mata Estevez* v. *Spain*, no. 56501/00.

16 ECmHR 3 May 1983 (dec.), *X. and Y* v. *the United Kingdom*, no. 9369/81; ECmHR 14 May 1986 (dec.), *S.* v. *the United Kingdom*, no. 11718/85 and ECmHR 19 May 1992 (dec.), *Kerkhoven and Hinke* v. *the Netherlands*, no. 15666/89. In *Mata Estevez* (2001), the Court referred to these decisions, while reiterating that '[…] long-term homosexual relationships between two men [did] not fall within the scope of the right to respect for family life protected by Article 8 of the Convention.' ECtHR 10 May 2001 (dec.), *Mata Estevez* v. *Spain*, no. 56501/00. Hodson observed that the *X. and Y* decision 'set a precedent that proved fatal to the family rights claims of all same-sex couples before the Commission, even where they were raising a child together.' L. Hodson, 'A Marriage by any other Name? Schalk and Kopf v. Austria,' 11 *Human Rights Law Review* (2011) p. 170 at p. 174.

17 ECtHR 13 June 1979, *Marckx* v. *Belgium*, no. 6833/74, para. 31. See also ch. 2, section 2.1.3.

18 ECtHR 27 October 1994, *Kroon a.o.* v. *the Netherlands*, no. 18535/91, para. 30.

The Court held on to this line of reasoning for many years, considering that there was too little common ground within the Council of Europe to hold that same-sex relationships constituted 'family life'.[19] Later, the Court explicitly left the issue to the Contracting Parties,[20] or it left the question open.[21] Only in 2010, in the landmark case *Schalk and Kopf* – a judgment that will be discussed in more detail below – the Court for the first time ruled that the relationship of a same-sex couple enjoyed protection under the notion of 'family life' within the meaning of Article 8 ECHR. The Court reiterated that the notion of 'family' under Article 8 was not confined to marriage-based relationships and could encompass other *de facto* family ties where the parties were living together.[22] The Court noted 'a rapid evolution of social attitudes towards same-sex couples' since 2001, resulting in a considerable number of States having afforded these couples legal recognition. It continued:

> 'In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.'[23]

This ruling has been confirmed in subsequent case law.[24] In *Vallianatos and Others* (2013) the Court once again stressed that '[…] same-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples'.[25] The Court held that it was immaterial if the couple was living together, since – in any case in the case before it – the fact of not cohabiting did not deprive the couples concerned of the stability which brought them within the scope of family life within the meaning of Article 8.[26]

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[19] ECtHR 10 May 2001 (dec.), *Mata Estevez* v. *Spain*, no. 56501/00.

[20] *Idem*. The Court considered 'that […] despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation.'

[21] E. g. ECtHR 24 July 2003, *Karner* v. *Austria*, no. 40016/98, para. 33 and ECtHR 28 September 2010, *J.M.* v. *the United Kingdom*, no. 37060/06, para. 50.

[22] ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 91.

[23] *Idem*, para. 94.

[24] The first case after *Schalk and Kopf* in which the Court repeated this finding was ECtHR 22 July 2010, *P.B. and J.S.* v. *Austria*, no. 18984/02. Remarkably, in some other rulings delivered soon after *Schalk and Kopf*, such as ECtHR 21 September 2010 (dec.), *Manenc* v. *France*, no. 66686/09 and ECtHR 28 September 2010, *J.M.* v. *the United Kingdom*, no. 37060/06, the Court did not repeat this finding. In later cases, it was confirmed, however.

[25] ECtHR [GC] 7 November 2013, *Vallianatos a.o.* v. *Greece*, nos. 29381/09 and 32684/09, para. 81.

[26] *Idem*, para.73.

8.1.3. The right to marry (Article 12 ECHR)

Article 12 ECHR protects the right to marry and to found a family.[27] The connection between these two rights laid down in Article 12 has yet been discussed in Chapter 2.[28] The discussion here accordingly focuses on the first limb of the Article, containing the right to marry.

The Court has repeatedly confirmed that 'notwithstanding social changes',[29] '[…] marriage remains an institution which is widely accepted as conferring a particular status on those who enter it'.[30] It has been held to be 'singled out for special treatment under Article 12 of the Convention'.[31] States are accordingly free to promote marriage, for instance by granting limited benefits to surviving spouses,[32] and to strengthen the institution of marriage within society.[33]

The wording of Article 12 makes clear that the exercise of the right to marry is governed by the national laws of the Contracting Parties to the ECHR. Even though the Article does not contain a justification clause like Articles 8 to 11 do, it is thus clear that the right to marry is not absolute, but may be restricted.[34] It is the States that may introduce limitations since matrimony is '[…] closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit'.[35]

States may introduce limitations on this right by way of 'formal rules concerning such matters as publicity and the solemnisation of marriage', as well by '[…] substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy.'[36] Any limitation of the right to marry must, however, be accessible and foreseeable[37] and moreover '[…] must not restrict or reduce the right

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[27] Art. 12 ECHR 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.'

[28] Section 2.1.1.

[29] ECtHR 4 November 2008 (dec.), *Courten* v. *the United Kingdom*, no. 4479/06.

[30] ECtHR 27 April 2000 (dec.), *Shackell* v. *the United Kingdom*, no. 45851/99. Confirmed in ECtHR [GC] 29 April 2008, *Burden* v. *the United Kingdom*, no. 13378/05, para. 63. See also section 8.2.3.1 below.

[31] E.g. ECtHR 22 May 2008, *Petrov* v. *Bulgaria*, no. 15197/02, para. 53.

[32] ECtHR 27 April 2000 (dec.), *Shackell* v. *the United Kingdom*, no. 45851/99.

[33] ECtHR [GC] 7 November 2013, *Vallianatos a.o.* v. *Greece*, nos. 29381/09 and 32684/09, para. 83.

[34] See P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen, Intersentia 2006) p. 842 and Harris et al., *Law of the European Convention on Human Rights* (Oxford, Oxford University Press 2009) p. 550.

[35] ECtHR 18 December 1987, *F.* v. *Switzerland*, no. 11329/85, para. 33.

[36] ECtHR 5 January 2010, *Frasik* v. *Poland*, no. 22933/02, para. 89. In the context of immigration laws and for justified reasons, the States may be entitled to prevent marriages of convenience, entered solely for the purpose of securing an immigration advantage.

[37] *Idem*, para. 89, under reference to ECmHR 13 December 1979 (report), *Hamer* v. *the United Kingdom*, no. 7114/75, para. 55 et seq.; ECmHR 10 July 1980 (report), *Draper* v. *the United Kingdom*, no. 8186/78, para. 49; ECmHR 16 October 1996 (dec.), *Sanders* v. *France*, no. 31401/96; ECtHR 18 December 1987, *F.* v. *Switzerland*, no. 11329/85 and ECtHR 13 September 2005, *B. and L.* v. *the United Kingdom*, no. 36536/02, para. 36 et seq.

in such a way or to such an extent that the very essence of the right is impaired'.[38] Hence,

> '[…] the matter of conditions for marriage in the national laws is not left entirely to Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far […]'.[39]

In *Frasik* (2010) the Court clarified that national legislation may not deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice. The Court explained the relevant test under Article 12 as follows:

> 'In contrast to Article 8 of the Convention, which sets forth the right to respect for private and family life, and with which the right "to marry and to found a family" has a close affinity, Article 12 does not include any permissible grounds for an interference by the State that can be imposed under paragraph 2 of Article 8 "in accordance with the law" and as being "necessary in a democratic society", for such purposes as, for instance, "the protection of health or morals" or "the protection of the rights and freedoms of others". Accordingly, in examining a case under Article 12 the Court would not apply the tests of "necessity" or "pressing social need" which are used in the context of Article 8 but would have to determine whether, regard being had to the State's margin of appreciation, the impugned interference was arbitrary or disproportionate […].'[40]

The *Frasik* case concerned a prisoner who was not allowed to marry. The Court stressed that there was no place under the Convention for an automatic interference with his right to establish a marital relationship with the person of his choice, '[…] based purely on such arguments as what – in the authorities' view – might be acceptable to or what might offend public opinion.'[41] The Court thereby noted that tolerance and broadmindedness were the acknowledged hallmarks of a democratic society under the Convention system.

The Court has furthermore defined 'marriage' under Article 12 ECHR, as 'traditional marriage', that is as between man and woman only. This line of case law is extensively discussed in section 8.2 below.

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38 *Idem*, para. 88, under reference to ECtHR 18 December 1987, *F.* v. *Switzerland*, no. 11329/85, para. 32 and ECtHR [GC] 11 July 2002, *Christine Goodwin* v. *the United Kingdom*, no. 28957/95, para. 29.

39 ECtHR 5 January 2010, *Jaremowicz* v. *Poland*, no. 24023/03, para. 48, referring to ECtHR 28 November 2006 (dec.), *R. and F.* v. *the United Kingdom*, no. 35748/05.

40 ECtHR 5 January 2010, *Frasik* v. *Poland*, no. 22933/02, para. 89.

41 *Idem*, para. 93, referring to: *mutatis mutandis*, ECtHR [GC] 6 October 2005, *Hirst (no. 2)* v. *the United Kingdom*, no. 74025/01, para. 70; ECtHR [GC] 4 December 2007, *Dickson* v. *the United Kingdom*, no. 44362/04, paras. 67–68; ECmHR 13 December 1979 (report), *Hamer* v. *the United Kingdom*, no. 7114/75, para. 67; ECmHR 10 July 1980 (report), *Draper* v. *the United Kingdom*, no. 8186/78, para. 54; and ECtHR 18 December 1987, *F.* v. *Switzerland*, no. 11329/85 43 et seq.

8.1.4. Discrimination on grounds of sexual orientation

The prohibition on discrimination of Article 14 ECHR has played an important role in the Court's case law on homosexuals' rights. Article 14 may apply as soon as a case comes within the scope of one or more of the substantive Convention rights. In cases concerning homosexuals or same-sex relationships, Article 14 has often been invoked and applied in combination with the right to respect for private and family life (Article 8 ECHR), the right to property (Article 1 First Protocol to the ECHR) and – less relevant for the present research – the right to freedom of association (Article 11 ECHR).[42] There have also been various cases where the Court considered examination of a complaint under Article 14 no longer necessary, as it had already found a violation of a material Convention Article.[43]

When examining discrimination complaints under Article 14, the first matter to be assessed is whether there is a difference in treatment of persons in relevantly similar situations.[44] This entails that the comparability of situations has to be examined in relation to a certain matter, for example in relation to a certain entitlement, such as a survivor's pension. As further explained in section 8.2.3 below, in cases involving civil status, the Court has taken a rather formalistic approach in respect of this part of the Article 14 test.

For a difference in treatment of persons in relevantly similar situations not to constitute discrimination under Article 14 ECHR, it must have an objective and reasonable justification. This means that the difference in treatment must pursue a legitimate aim and that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment.[45] However, where a difference of treatment is based on sexual orientation, the State's margin of appreciation is narrow.[46] It has become standing case law that differences in treatment on the basis of sexual orientation require 'convincing and weighty reasons'[47] or, 'particularly serious reasons by way of justification',[48] while differences based solely on

[42] *Inter alia*, ECtHR 3 May 2007, *Baczkowski a.o.* v. *Poland*, no. 1543/06; ECtHR 21 October 2010, *Alekseyev* v. *Russia*, nos. 4916/07 a.o. and ECtHR 12 June 2012, *Genderdoc-M* v. *Moldova*, no. 9106/06.

[43] This was, for instance, the case in ECtHR 22 October 1981, *Dudgeon* v. *the United Kingdom*, no. 7525/76.

[44] E.g. ECtHR [GC] 29 April 2008, *Burden* v. *the United Kingdom*, no. 13378/05, para. 60 and ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09, para. 108.

[45] *Inter alia* ECtHR [GC] 29 April 2008, *Burden* v. *the United Kingdom*, no. 13378/05, para. 60.

[46] The Court referred to ECtHR 2 March 2010, *Kozak* v. *Poland*, no. 13102/02, para. 92 and ECtHR 24 July 2003, *Karner* v. *Austria*, no. 40016/98, para. 41.

[47] ECtHR 24 July 2003, *Karner* v. *Austria*, no. 40016/98. See also ECtHR 2 March 2010, *Kozak* v. *Poland*, no. 13102/02.

[48] ECtHR 24 July 2003, *Karner* v. *Austria*, no. 40016/98, para. 37, referring to ECtHR 27 September 1999, *Smith and Grady* v. *the United Kingdom,* nos. 33985/96 and 33986/96, para. 90 and ECtHR 9 January 2003, *S.L.* v. *Austria*, no. 45330/99, para. 37.

considerations of sexual orientation are unacceptable under the Convention.[49] The Court explained this strict scrutiny test in *Karner* (2003). In that case the Court did not accept that a blanket exclusion of persons living in same-sex relationships from succession to a tenancy was necessary for the protection of the family. In respect of the proportionality of the measure, the Court considered:

> 'In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of [the relevant provision of national law].'[50]

In *Karner*, the Court found a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for home).[51] Most other cases in which application of this 'very weighty reasons test' resulted in the finding of a violation, concerned matters in the social policy sphere, such as the extension of a sickness insurance.[52] The Court has furthermore found violations of Article 14 in conjunction with Article 8 in cases concerning parental issues, as discussed in section 8.2.4 below. Section 8.2.3 explains how the Court has dealt with discrimination complaints where civil status also played a role.

8.2. Legal recognition of same-sex relationships and the ECHR

This section discusses the ECtHR case law on legal recognition of same-sex relationships. First, the Court's case law on the implications of Article 12 ECHR in cases involving same-sex couples is examined. Thereafter, in section 8.2.3, a detailed overview is given of the Court's approach in cases where same-sex couples complained that they did not enjoy the same rights and entitlements as different-sex couples. As will become clear, it has proven decisive what civil status was involved in such cases. This has been (partly) confirmed by the Court's case law on parental rights, as discussed in subsection 8.2.4. The availability of alternative forms of registration has also played a role in the Court's case law in respect of legal recognition of same-sex relationships (see subsection 8.2.5). All in all, the question has come to the fore whether the Convention provides for a right to some form of legal recognition of (same-sex) relationships, as set out in subsection 8.2.6.

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[49] *Inter alia* ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, para. 99, under reference to: ECtHR [GC] 22 January 2008, *E.B.* v. *France*, no. 43546/02, paras. 93 and 96 and ECtHR 21 December 1999, *Salgueiro da Silva Mouta* v. *Portugal*, no. 33290/96, para. 36.

[50] ECtHR 24 July 2003, *Karner* v. *Austria*, no. 40016/98, para. 41.

[51] See also ECtHR 2 March 2010, *Kozak* v. *Poland*, no. 13102/02.

[52] ECtHR 22 July 2010, *P.B. and J.S.* v. *Austria*, no. 18984/02. The Court also found a violation in cases concerning differing ages of consent under criminal law for homosexual relations. See ECtHR 9 January 2003, *L. and V.* v. *Austria*, nos. 39392/98 and 39829/98.

The first cases where the Court expressly dealt with the question as to the sex of the two persons claiming a right to marry, concerned transsexuals. This case law formed a prelude to the landmark case of *Schalk and Kopf* (2010), as discussed in detail in subsection 8.2.2 below. As will become clear, the Court has repeatedly held that the right to marry of Article 12 ECHR referred to the traditional marriage between persons of different biological sex.

8.2.1. Early case law on transsexuals' right to marry

In its case law on the recognition of the post-operative sex of transsexuals, the Court also made clear statements about the right to marry of post-operative transsexuals. The legal recognition of the post-operative sex of transsexuals has for a long time been a delicate issue in the Council of Europe Member States. For decades the ECtHR was reluctant to find a refusal of state authorities to change the sex of a person in the birth register after a change sex operation in violation of the Convention.[53]

Rees (1986)[54] was the first case concerning the legal recognition of the post-operative sex of transsexuals where a complaint under Article 12 ECHR (the right to marry) was also assessed. The question arose as to whether a refusal to allow a post-operative transsexual to marry a person of the post-operative different sex violated this Convention Article. The Court was of the opinion that the right to marry, as guaranteed by Article 12, referred to the traditional marriage between persons of a different biological sex. According to the ECtHR this appeared also from the wording of the Article which made it clear that Article 12 was 'mainly concerned to protect marriage as the basis of the family.'[55] The Court held that the legal impediment in the United Kingdom on the marriage of persons who were of the same biological sex could not be said to restrict or reduce the right marry in such a way or to such an extent that the very essence of the right was impaired.[56] Accordingly the Court unanimously held that Article 12 ECHR was not violated.[57]

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53 ECmHR 1 March 1979 (report), *Van Oosterwijck* v. *Belgium*, no. 7654/76; ECtHR [GC] 6 November 1980, *Van Oosterwijck* v. *Belgium*, no. 7654/76; ECtHR [GC] 17 October 1986, *Rees* v. *the United Kingdom*, no. 9532/81 and ECmHR 15 December 1988 (dec.), *Paula James* v. *the United Kingdom*, no. 10622/83. To make an such alteration in the birth register possible would require detailed legislation from those States where for purposes of social security, national insurance and employment, a transsexual was recorded as being of the sex recorded at birth, the Court noted. Having regard to the wide margin of appreciation to be afforded to the State in this area and to the relevance of protecting the interests of others in striking the requisite balance, the Court ruled that the positive obligations arising from Article 8 ECHR could not be held to extend that far. E.g. ECtHR [GC] 17 October 1986, *Rees* v. *the United Kingdom*, no. 9532/81, paras. 42–47.

54 ECtHR [GC] 17 October 1986, *Rees* v. *the United Kingdom*, no. 9532/81.

55 *Idem*, para. 49.

56 *Idem*, para. 50.

57 *Idem*, para. 51.

In the subsequent and comparable *W* v. *the UK* (1989),[58] *Cossey* (1990),[59] and *Sheffield and Horsham* (1998)[60] cases, neither the ECmHR nor the Court found any violation of the Convention. It must be noted however that these decisions were no longer adopted by unanimity.[61] In *Cossey*, the Court held in favour of the traditional concept of marriage and did not see any evidence of 'any general abandonment' of that traditional concept. It therefore did not consider it '[…] open to it to take a new approach to the interpretation of Article 12'.[62] In the Court's view, attachment to the traditional concept of marriage provided '[…] sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry.'[63]

Judge Schermers was the only judge at the time who was of the opinion that '[…] the fundamental human right underlying Article 12 should also be granted to homosexual and lesbian couples'. In his dissent to *W* v. *the United Kingdom* (1989), he held that denial of this right meant 'condemnation to solitude and loneliness' and he therefore found that good reasons had to be given for denying these couples the right to found a family.[64] As Schermers also acknowledged, this question was not, however, at stake in the cases of post-operative transsexuals, as all cases concerned applicants who wished to marry a person of a *different* sex. None of the other dissenting judges to the three abovementioned decisions or judgments made a comparable plea. On the contrary, some judges explicitly stressed that by speaking of 'men and women', Article 12 'clearly' indicated that marriage was the union of two persons of different sex.[65]

In *Christine Goodwin* (2002)[66] the Grand Chamber of the ECtHR departed from the previously followed line of case law and found a violation of both Articles 8 and 12 ECHR. For 16 years the Court had held that there was no violation of the right to respect for private life if a post-operative transsexual was refused an alteration of his or her sex in the birth register. In this case the Court for the first time found that the respondent government could no longer claim that the matter fell within their margin of appreciation. The Court thereby had regard to the applicants' personal

58 ECmHR 17 March 1989 (report), *W.* v. *the United Kingdom*, no. 11095/84.

59 ECtHR [GC] 27 September 1990, *Cossey* v. *the United Kingdom*, no. 10843/84.

60 ECtHR [GC] 30 July 2007, *Sheffield and Horsham* v. *the United Kingdom,* nos. 22985/93 and 23390/94, para. 66.

61 In *Cossey* the Grand Chamber of the ECtHR held by 10 votes to 8 that there was no violation of Art. 8 ECHR and by 14 votes to 4, the Court also did not find a violation of Art. 12 ECHR. In *Sheffield and Horsham* 11 judges voted against a violation of Art. 8 ECHR against 9 who did find the situation to be in violation of Art. 8; as for Art. 12 ECHR the vote was 18 to 2.

62 ECtHR [GC] 27 September 1990, *Cossey* v. *the United Kingdom*, no. 10843/84, para. 46.

63 *Idem*.

64 Partly dissenting opinion of Judge Schermers to ECmHR 17 March 1989 (report), *W.* v. *the United Kingdom*, no. 11095/84.

65 Dissenting opinion of Judge Martens to ECtHR [GC] 27 September 1990, *Cossey* v. *the United Kingdom*, no. 10843/84, para. 4.5.1. See also para. 5 of the the joint dissenting opinion of Judges Palm, Foighel and Pekkanen to this judgment.

66 ECtHR [GC] 11 July 2002, *Christine Goodwin* v. *the United Kingdom*, no. 28957/95.

circumstances as a transsexual, to the prevailing medical and scientific considerations at the time, to the state of European and international consensus, and to the impact on the birth register and social and domestic law developments. As there were no significant factors of public interest to weigh against the interests of the individual applicant in obtaining legal recognition of her gender re-assignment, the Court reached the conclusion that the fair balance that was inherent in the Convention now tilted decisively in favour of the applicant. The Court accordingly found a violation of Article 8.

In its examination of the complaint under Article 12 ECHR, the Court considered that the fact that fewer countries permitted the marriage of transsexuals in their assigned gender than recognised the change of gender itself, could not support an argument for leaving the matter entirely to the Contracting States as being within their margin of appreciation. The Court held that the margin of appreciation could not be extended so far as that '[…] would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry.'[67] The ECtHR concluded that the very essence of the applicant's right to marry had been infringed by the allocation of sex in national law to that registered at birth, and unanimously found a violation of Article 12 ECHR.

The Court's finding of a violation of Article 12 in this case in itself had no direct implications for the same-sex marriage discussion, as the applicant wished to marry a person of post-operative *different* sex, and thus claimed a right that encompassed the traditional definition of marriage as between man and woman. The considerations of the Court are nevertheless of a certain relevance. The Court held, for instance, that '[…] the inability of any couple to conceive or parent a child [could not] be regarded as *per se* removing their right to enjoy the first limb of this provision.'[68] It also observed 'major social changes in the institution of marriage since the adoption of the Convention'.[69] The Court furthermore noted that Article 9 of the Charter of Fundamental Rights of the European Union departed, 'no doubt deliberately', from the wording of Article 12 of the Convention in removing the reference to men and women.[70]

Later cases on transsexuals' right to marry concerned the effects of the change of sex on pre-existing marriages.[71] Married couples from the UK, consisting of a woman and a male-to-female post-operative transsexual, unsuccessfully complained before the ECtHR that they were required to end their marriage if the transsexual partner wished to obtain full legal recognition of her change of sex, because the domestic law did not permit same-sex marriages. Under reference to *Rees* the ECtHR held

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67 *Idem*, para. 103.

68 *Idem*, para. 98.

69 *Idem*, para. 100.

70 *Idem*.

71 ECtHR 28 November 2006 (dec.), *Parry* v. *the United Kingdom*, no. 42971/05 and ECtHR 28 November 2006 (dec.), *R. and F.* v. *the United Kingdom*, no. 25748/05.

in *Parry* that '[…] Article 12 of the Convention similarly enshrines the traditional concept of marriage as being between a man and a woman.' The Court continued:

> 'While it is true that there are a number of Contracting States which have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not, perhaps regrettably to many, flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950.'[72]

Accordingly the Court held that the regulation of the effects of the change of sex in the context of marriage fell within the appreciation of the Contracting State. States could not be required to make allowances for the small number of marriages where both partners wished to continue that marriage notwithstanding the change of sex of one of them. Interesting to note is that the Court considered it '[…] of some relevance to the proportionality of the effects of the gender recognition regime that the civil partnership provisions allow[ed] such couples to achieve many of the protections and benefits of married status'.[73] The Court furthermore noted that the applicants had referred 'forcefully' to the historical and social value of the institution of marriage which gave it such emotional importance to them, but also noted, however, that it was that value, as at the time recognised in national law which excluded them. In conclusion, the ECtHR dismissed the complaints as being manifestly ill-founded. Even more recently, in a judgment of 2014 the Grand Chamber of the Court found no violation of Article 8 ECHR in a Finnish case where the full recognition of the new sex of a post-operative was made conditional on the transformation of her marriage into a civil partnership.[74] This case is discussed in greater detail in section 8.2.5 below.

In the discussed case law concerning transsexuals as well as in subsequent cases in a different context,[75] the Court repeatedly held that the right to marry of Article 12 enshrines 'the traditional concept of marriage' as being between a man and a woman. It has held the formation of a legal union of a man and a woman to be the essence of the right to marry.[76] The fact that 'major social changes in the institution of marriage since the adoption of the Convention'[77] have taken place, has not to date altered this conclusion.[78] These rulings laid a basis for case law to follow on the issue of access to marriage for same-sex couples. The complaint of the Austrian same-sex couple Schalk and Kopf, lodged in 2004, was the first to provide the ECtHR with '[…] an opportunity to examine whether two persons who are of the same sex can claim to have a right to marry.'[79]

[72] ECtHR 28 November 2006 (dec.), *Parry* v. *the United Kingdom,* no. 42971/05.
[73] On this point, see more extensively section 8.2.5 below.
[74] ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09.
[75] E.g. ECtHR [GC] 29 April 2008, *Burden* v. *the United Kingdom*, no. 13378/05, para. 63.
[76] ECtHR 5 January 2010, *Jaremowicz* v. *Poland*, no. 24023/03, para. 60.
[77] ECtHR [GC] 11 July 2002, *Christine Goodwin* v. *the United Kingdom*, no. 28957/95, para. 100.
[78] This research was concluded on 31 July 2014.
[79] ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 50.

8.2.2. The case of *Schalk and Kopf* v. *Austria* (2010)

In 2002 the Austrian cohabiting same-sex couple Mr. Schalk and Mr. Kopf asked the competent authorities to allow them to marry. Their request was refused on the grounds that under Austrian law marriage could only be contracted between two persons of different sex. The couple subsequently brought their case before the Austrian Constitutional Court, but to no avail. In 2004 Schalk and Kopf lodged a complaint with the ECtHR. While their application was pending, on 1 January 2010, the Austrian Registered Partnership Act entered into force, which provided for a registered partnership for same-sex couples. The main differences in rights and obligations for spouses and those for registered partners concerned rules on the choice of name and parental rights.

Before the ECtHR the couple primarily argued that the authorities' refusal to allow them to marry violated Article 12 ECHR (the right to marry). The applicants furthermore invoked Article 14 in conjunction with Article 8 complaining that they were discriminated against on account of their sexual orientation since they were denied the right to marry and did not have any other possibility to have their relationship recognised by law before the entry into force of the Registered Partnership Act.

8.2.2.1. The Court's examination of the complaint under Article 12 ECHR

The ECtHR first examined whether the right to marry granted to 'men and women' in Article 12 could be applied to the applicants' situation. In that respect the Court noted that from its case law relating to transsexuals certain principles could be derived. The Court did not spell out what those principles were exactly, but one of the findings the Court referred to came from *Christine Goodwin*, where the Court had held, as noted above, that '[…] the inability of any couple to conceive or parent a child [could not] be regarded as *per se* removing the right to marry'.[80] In *Schalk and Kopf* the Court held – without any further motivation – that '[…] this finding [did] not allow any conclusion regarding the issue of same-sex marriage.'[81]

In order to answer the question of whether the right to marry granted to 'men and women' in Article 12 of the Convention could be applied to the situation of the applicants, the Court next resorted to textual, contextual and historical interpretation methods. In principle, the reference to 'men and women' in the English version could be interpreted as including couples consisting of two 'men' and two 'women'. The French version of the Article – to which the Court also referred – was, however, phrased in the singular: '*l'homme et la femme ont le droit de se marier*'. The Court held that '[…] looked at in isolation, the wording of Article 12 might be interpreted

[80] ECtHR [GC] 11 July 2002, *Christine Goodwin* v. *the United Kingdom*, no. 28957/95, para. 98 (see above).
[81] ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 56.

so as not to exclude the marriage between two men or two women.'[82] However, when contrasting the wording of Article 12 ECHR to the other substantive Articles of the Convention, the Court observed that the latter all '[granted] rights and freedoms to "everyone" or [stated] that "no one" [was] to be subjected to certain types of prohibited treatment.'[83] In the Court's view this showed that the choice of wording in Article 12 had to be regarded as 'deliberate'. Thirdly, the Court held that regard had to be had to the historical context in which the Convention was adopted. As the Court noted, '[…] in the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex.'[84]

On the basis of the 'living instrument' doctrine, the Convention is usually interpreted in the light of present day conditions.[85] In particular the textual and historical interpretation methods have often been overruled by this evolutive interpretation method. It was therefore not surprising that the applicants in this case relied primarily on this doctrine of the Court. They contended that in present day conditions Article 12 had to be read as granting same-sex couples access to marriage or, in other words, as obliging Member States to provide for such access in their national laws. The Court was not, however, persuaded by this argument. It repeated its previous acknowledgement that the institution of marriage had undergone 'major social changes since the adoption of the Convention',[86] but attached decisive value to the lack of European consensus on this point. As the Court noted, at that time only 6 out of 47 Convention States allowed same-sex marriage.

The Court furthermore referred to the right to marry as provided for in Article 9 of the EU Charter of Fundamental Rights, which contains no reference to 'men and women', and which leaves the decision whether or not to allow same-sex marriage to regulation by Member States' national law.[87] The Court therefore 'no longer' considered '[…] that the right to marry enshrined in Article 12 [had to] in all circumstances be limited to marriage between two persons of the opposite sex' and held that it could not be said that Article 12 was inapplicable to the applicants' complaint.[88] The applicant's case did not benefit from this cautiously worded finding however, for the Court continued that because marriage had 'deep-rooted social and cultural connotations differing largely from one society to another', national

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82 *Idem*, para. 55. Judges Maliverni and Kovler were unable to share that view. In their concurring opinion they held that, '"the ordinary meaning to be given to the terms of the treaty" in the case of Art. 12 [could not] be anything other than that of recognising that a man and a woman, that is, persons of opposite sex, have the right to marry.'

83 *Idem*.

84 *Idem*.

85 *Inter alia*, ECtHR 25 April 1978, *Tyrer* v. *the United Kingdom*, no. 5856/72, para. 31; ECtHR [GC] 8 July 2004, *Vo* v. *France*, no. 53924/00, para. 82 and ECtHR [GC] 4 February 2005, *Mamatkulov and Askarov* v. *Turkey*, nos. 46827/99 and 46951/99, para. 121.

86 ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, paras. 52 and 58 under reference to *Christine Goodwin*.

87 *Idem*, para. 61.

88 ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 61. Two concurring judges did not subscribe to this finding. Concurring opinion of Judge Malinverni joined by Judge Kovler to ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 2.

authorities were best placed to assess and respond to the needs of society in this field.[89] The Court accordingly concluded that Article 12 ECHR does not impose an obligation on States to grant same-sex couples access to marriage. The Chamber was unanimous in its conclusion that there had been no violation of this provision.

Now that the Court declared Article 12 applicable in the present case, some wondered if an absolute prohibition on the right to marry for same-sex couples impaired the essence of that right (see 8.1.3 above).[90] The Court, however, did not assess this question.

8.2.2.2. The Court's examination of the complaints under Articles 8 and 14 ECHR

As discussed in section 8.1.2 above, in *Schalk and Kopf* the Court held for the first time that the relationship of cohabiting same-sex couples living in a stable partnership, fell within the notion of 'family life', within the meaning of Article 8. While a lack of consensus was reason for the Court not to find a violation of Article 12, here the Court considered there to be sufficient consensus to interpret the notion 'family life' of Article 8 in the light of present day conditions. Just like the applicability of Article 12 did not benefit the applicants' case under Article 12, also this finding did not result in any material consequences to the applicants' benefit.[91]

Having found that the case fell within the ambit of Article 8, the Court next examined whether a violation had occurred of this Article in conjunction with Article 14 (the prohibition of discrimination). The Court held that because 'same-sex couples are just as capable as different-sex couples of entering into stable committed relationships', the applicants were in a relevantly similar situation to different-sex couples as regards their need for legal recognition of their relationship.[92] The ECtHR made a distinction between three limbs of the applicants' complaint: (1) that they still did not have access to marriage; (2) that no alternative means of legal recognition was available to them until the entry into force of the Registered Partnership Act; and (3) that certain differences existed in rights and obligations for spouses and those for registered partners under Austrian law.

As regards the first limb, the Court was brief: now that the Court had concluded that Article 12 did not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8 – a provision of more general purpose and scope – could not be interpreted as imposing such an obligation either. As regards the second limb, the Court considered it not its task to

89 *Idem*, para. 62.

90 N.R. Koffeman, 'Case note to ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04', 11 *European Human Rights Cases* 2010/92 (in Dutch).

91 In this regard Cooper noted that in *Schalk and Kopf* the Court made 'a number of major, but seemingly contradictory rulings.' S.L. Cooper, 'Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights', 12 *German Law Journal* (2011) p. 1743 at pp. 1746–1747, online available at: www.germanlawjournal.com/pdfs/Vol12-No10/PDF_Vol_12_No_10_1746–1763_Articles_Cooper.pdf, visited June 2014.

92 ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 99.

establish whether the lack of any means of legal recognition for same-sex couples would have constituted a violation of Article 14 taken in conjunction with Article 8 if this situation had still persisted at the time, now that the Registered Partnership Act had entered into force in Austria. The Court next examined whether Austria should have provided the applicants with an alternative means of legal recognition of their partnership any earlier than it did. The Court noted an emerging European consensus towards legal recognition of same-sex couples, but concluded that there was not yet a majority of States providing for it:

> 'The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes […].'[93]

The Court concluded that 'though not in the vanguard', the Austrian legislature could not be reproached 'for not having introduced the Registered Partnership Act any earlier.' Whether this reasoning implies that States are under an obligation to give some form of legal recognition to same-sex relationships cannot be said with certainty (on this point, see more extensively 8.2.6 below). The Court in any case avoided the difficult question of the moment from which sufficient consensus existed to come to any such conclusion.[94]

Finally, in its examination of the third limb of the complaint, the Court found that it did not have to examine every one of the differences in rights and obligations for spouses and those for registered partners in detail, as the applicants had not claimed that they were directly affected by any of these differences. The Court observed that, following a trend in other Member States, the Austrian Registered Partnership, was equal or similar to marriage in many respects, while some substantial differences remained in respect of parental rights. The Court was not convinced by the applicants' argument that if a State chooses to provide same-sex couples with an alternative means of recognition, it is obliged to confer a status on them which – though carrying a different name – corresponds to marriage in each and every respect. On the contrary, it considered that 'States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition.'[95] The Court repeated its standing case law that different treatment based on sexual orientation

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93 ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 105, referring to ECtHR 4 November 2008 (dec.), *Courten* v. *the United Kingdom*, no. 4479/06. See also ECtHR 23 June 2009 (dec.), *M.W.* v. *the United Kingdom*, no. 11313/02.

94 The difficulty of this question is well illustrated by the case *P.B and J.S.* v. *the United Kingdom*. The dissenters to this judgment criticised the fact that the majority decided the case on the basis of a then existing consensus, which had not yet been visible in 1997 from when the case originated. Joint partly dissenting opinion of Judges Vajic and Malinverni to ECtHR 22 July 2010, *P.B. and J.S.* v. *Austria*, no. 18984/02.

95 ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 108.

requires 'particularly serious reasons' by way of justification,[96] but did not assess if there was any justification at all for the difference in treatment here complained of.[97] Instead, it dealt with the case on the basis of the margin of appreciation to be accorded to States in issues where there is no consensus amongst the Contracting Parties.[98] In this regard it also noted that the margin is usually wide in respect of general measures of economic or social strategy.[99] 'On the whole', the Court did not see 'any indication' that Austria had exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership. In conclusion, the Court found, by four votes to three, that there had been no violation of Article 14 in conjunction with Article 8 in this case.

Hence, while on the one hand, the Court was very clear that the Convention did not impose any obligation on States to open up marriage to same-sex couples, on the other hand, the Court left clear openings for further development of its case law to at least some form of legal recognition of same-sex relationships.[100] The Court stressed that there was *not yet* a majority of States providing for legal recognition of same-sex couples[101] and that States were *still* free to restrict access to marriage to different-sex couples.[102] The Court furthermore held that States enjoyed a margin of appreciation in the *timing* of the introduction of legislative changes[103] and that they enjoyed 'a certain margin of appreciation as regards the exact status conferred by alternative means of recognition'.[104] This point is further developed below in subsection 8.2.6 below.

All in all, in its assessment of the complaint under Article 8 in combination with Article 14, the Court attached considerable weight to the lack of common ground among the Contracting Parties.[105] Consequently the Court did not assess the discrimination complaint in substance. This can be held to be somewhat difficult to

[96] *Idem*, para. 97, referring to ECtHR 24 July 2003, *Karner* v. *Austria*, no. 40016/98, para. 37; ECtHR 9 January 2003, *L. and V.* v. *Austria*, nos. 39392/98 and 39829/98, para. 45 and ECtHR 27 September 1999, *Smith and Grady* v. *the United Kingdom*, nos. 33985/96 and 33986/96, para. 90. See also section 8.1.4 above.

[97] In *Karner* and *Mata Estevez* the Court had accepted that 'protection of the family in the traditional sense [was], in principle, a weighty and legitimate reason which might justify a difference in treatment.' In *Schalk and Kopf* (in para. 108), the Court merely considered that States were '[…] 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.' ECtHR 24 July 2003, *Karner* v. *Austria*, no. 40016/98, para. 40 and ECtHR 10 May 2001 (dec.), *Antonio Mata Estevez* v. *Spain*, no. 56501/00.

[98] ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 98. The Court referred to ECtHR 27 March 1998, *Petrovic* v. *Austria*, no. 20458/92, para. 38.

[99] *Idem*, para. 97. The Court referred to ECtHR [GC] 12 April 2006, *Stec a.o.* v. *the United Kingdom,* no. 65731/01, para. 52.

[100] See also M. Melcher, 'Private international law and registered relationships: an EU perspective', 20 *European Review of Private Law* (2012) p. 1075 at pp. 1080–1081.

[101] ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 105.

[102] *Idem*, para. 108.

[103] *Idem*, para. 105.

[104] *Idem*, para. 108.

[105] See also F. Hamilton, 'Why the margin of appreciation is not the answer to the gay marriage debate', 13 *European Human Rights Law Review* (2013) p. 47.

reconcile with the earlier finding of the Court in this very same judgment that there was – by 2010 – a sufficient consensus for extending the protection of the right to respect for family life to same-sex couples.

The three dissenting judges were critical of the fact that the majority did not draw inferences from its finding that same-sex relationships enjoyed a right to respect for family life. They claimed:

> 'Having decided […] that "the relationship of the applicants falls within the notion of 'family life'", the Court should have drawn inferences from this finding. However, by deciding that there has been no violation, the Court at the same time endorses 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.'[106]

These judges were of the opinion that '[a]ny absence of a legal framework offering [same-sex couples in stable relationships], at least to a certain extent, the same rights or benefits attached to marriage would need robust justification, especially taking into account the growing trend in Europe to offer some means of qualifying for such rights or benefits.'[107] They concluded that the Court should have found a violation of Article 14 taken in conjunction with Article 8 of the Convention in this case, because the Austrian government had not put forward any cogent reason to justify the difference of treatment between same-sex and different-sex couples in stable committed relationships, as regards legal recognition and protection of their relationship.

The four-to-three Chamber judgment in *Schalk and Kopf* became final in November 2010 after the applicants' request for referral of the case to the Grand Chamber had been rejected.[108]

8.2.2.3. Affirmation of the special status of traditional marriage in subsequent case law

After the landmark *Schalk and Kopf* judgment, the Court has on various occasions repeated that the right to marry ex Article 12 ECHR sees at marriage between man and woman only. In *Hämäläinen* (2014), the Grand Chamber held:

> 'While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples […]'[109]

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106 Joint Dissenting Opinion of Judges Rozakis, Spielmann and Jebens to ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 8.
107 *Idem*, para. 9.
108 ECtHR press release no. 906 of 29 November 2010. Hodson called this 'surprising and disappointing'. Hodson 2011, *supra* n. 16, at p. 170.
109 ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09, para. 96. See section 8.2.5 below.

The Court has furthermore – including in cases outside the context of same-sex relationships – reiterated that marriage confers a special status on those who enter into it.[110] As explained in the following section, the Court has repeatedly accepted this special status as justification for a difference in treatment between married and unmarried couples, and possibly also between spouses and registered partners.

8.2.3. Spouses, registered partners and stable partners compared under Article 14 ECHR

As explained in section 8.1.4 above, for any exanimation of a discrimination complaint it must be assessed whether there is a difference in treatment of persons in relevantly similar situations, and if so, whether this difference in treatment can be justified. The following subsections analyse these questions for four comparative groups that have been compared in the relevant Strasbourg case law, namely: (1) spouses and unmarried partners, (2) spouses and registered partners, (3) registered partners and unmarried partners, and (4) same-sex unmarried partners compared to different-sex unmarried partners. While this is already apparent from the definition of the latter comparative group, in respect of all four groups there have been cases where not only the civil status of the partners was at issue, but also their sexual orientation. To date there have[111] been no cases decided where complaints were brought in respect of differences in treatment between different-sex spouses and same-sex spouses, or different-sex registered partners and same-sex registered partners.[112]

8.2.3.1. Spouses compared to unmarried partners

The Court has held on several occasions that unmarried couples and married couples were not in relevantly similar situations. While 'unmarried' is, of course, a broad term, the focus in this subsection lies on stable partners; the comparability of spouses and partners who concluded (some form of) registered partnership is assessed in the next subsection. It is understandable that the Court has used the broader term 'unmarried', because at the time it first decided upon such matters, none of the High Contracting Parties had introduced any alternative form of legal recognition of relationships.

In *Lindsay* (1986) the ECmHR found that different-sex married couples could not claim to be in an analogous situation with different-sex unmarried couples where tax allowances were concerned.[113] The Commission held that marriage was characterised by 'a corpus of rights and obligations' which differentiated it 'markedly' from the

[110] E.g. ECtHR [GC] 11 November 2010, *Şerife Yiğit* v. *Turkey*, no. 3976/05, para. 72 and ECtHR 3 April 2012, *Van der Heijden* v. *The Netherlands*, no. 42857/05, para. 69.

[111] This research was concluded on 31 July 2014.

[112] See T. Loenen, 'Gelijk recht op tweede-ouderadoptie voor ongehuwde homoseksuele en heteroseksuele paren. X e.a. tegen Oostenrijk' ['Equal right to joint adoption for unmarried homosexual and heterosexual couples. X. a.o. v. Austria'], 38 *NJCM-Bull/NTM* (2013) p. 627 at p. 643.

[113] ECmHR 11 November 1986 (dec.), *Lindsay* v. *the United Kingdom*, no. 11089/84.

situation of a man and woman who cohabited. This conclusion was confirmed by the Court in various cases where same-sex stable partners claimed to be in a comparable situation to different-sex married couples. In *Courten* (2008), upon the death of his same-sex partner with whom he had been cohabiting for over 25 years, a man applied for extra-statutory tax concession equivalent to the exemption from inheritance tax which a spouse would have received under the law in force at the time. The Court ruled that the applicant could not claim that his situation was analogous to that of married couples.[114] It reiterated that 'notwithstanding social changes', marriage remained an institution that was widely accepted as conferring 'a particular status' on those who entered it and that it was 'singled out for special treatment' under Article 12 ECHR. The applicant in *Courten* submitted that the Court had to take into consideration that he was unable at the relevant time 'to enter into a legally-binding arrangement akin to marriage', because at the time that he applied for the tax exemption UK law did not allow same-sex partners to conclude a civil union, or to marry. The Court did not let this fact have a bearing on the finding of a lack of comparability of the situation of the applicant and that of spouses. It merely noted in respect of this claim that '[…] in the area of evolving social rights where there [was] no established consensus', States enjoyed a margin of appreciation in the timing of the introduction of legislative changes. The government could therefore not be criticised for not having introduced the 2004 registered partnership legislation at an earlier date.[115]

This finding of non-comparability has been upheld in cases concerning parental matters. In *X. and Others* v. *Austria* (2013), the Grand Chamber of the Court held that same-sex stable partners were not in a relevantly similar situation to different-sex married couples in respect of second-parent adoption.[116] By way of justification, the Court, *inter alia*, reiterated that neither Article 12 ECHR nor Article 8 in conjunction with Article 14 ECHR imposed an obligation on the Contracting States to grant same-sex couples access to marriage, that marriage conferred a special status on those who enter into it, and that the exercise of the right to marry as protected by Article 12 of the Convention gave rise to social, personal and legal consequences.[117]

In other cases where unmarried couples complained about a difference in treatment when compared to married couples, the Court did not explicitly assess whether there were relevantly similar situations, but implicitly accepted that this was the case and

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114 ECtHR 4 November 2008 (dec.), *Courten* v. *the United Kingdom*, no. 4479/06. See also ECtHR 23 June 2009 (dec.), *M.W.* v. *the United Kingdom*, no. 11313/02.

115 See again also ECtHR 23 June 2009 (dec.), *M. W.* v. *the United Kingdom*, no. 11313/02.

116 ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, paras. 105–110. The Court, however, found the applicants to be in a similar situation with different-sex unmarried couples (see section 8.2.4.1.2 below).

117 Concurring Judge Spielmann was the only judge in the Grand Chamber to believe that the situation of the applicants was comparable to that of a married different-sex couple in which one partner wished to adopt the other partner's child. He held that the fact that the Convention does not require Contracting States to make marriage available to same-sex couples and that marriage confers a special status on those who enter into it had no bearing on that finding. Still, he did not vote in favour of finding a violation of Art. 14 ECHR taken in conjunction with Article 8 because he believed that it was not necessary to examine this issue. Concurring opinion Judge Spielmann to ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, para. 2.

held that the difference in treatment could in any case be justified on the basis of the protection of marriage. In *Şerife Yiğit* (2010), the Grand Chamber noted in this regard:

> 'The protection of marriage constitutes, in principle, an important and legitimate reason which may justify a difference in treatment between married and unmarried couples […]. Marriage is characterised by a corpus of rights and obligations that differentiate it markedly from the situation of a man and woman who cohabit […]. Thus, States have a certain margin of appreciation to treat differently married and unmarried couples, particularly in matters falling within the realm of social and fiscal policy such as taxation, pensions and social security […].'[118]

As noted above, and as confirmed in this ruling, the matter at stake is relevant for determining comparability and for the question of whether a difference in treatment can be justified. The Court here stressed that '[…] particularly in matters falling within the realm of social and fiscal policy such as taxation, pensions and social security', States could treat married and unmarried couples differently. These policy areas cover many issues, of course, and it has consequently only exceptionally been that the Court held a difference in treatment between married and unmarried couples not to be justified.[119] Such a finding has, moreover, only occurred in cases involving different-sex couples.

Differences in treatment between unmarried and married couples have also been upheld in situations where same-sex couples had no access to marriage. An example is *Mata Estevez* (2001).[120] The applicant, who had been in a stable same-sex relationship for more than ten years when his partner deceased, was refused a right to a survivor's pension. Under Spanish law marriage constituted an essential precondition for eligibility for such a pension at the time, while same-sex couples were barred from access to marriage. The Court, 'even supposing' that this refusal constituted an interference with respect for his private life, held that this interference was justified under Article 8(2) and that there was no violation of this Article in conjunction with Article 14. It accepted that the relevant Spanish legislation pursued the legitimate aim of 'the protection of the family based on marriage bonds'.[121] The Court considered the difference in treatment to fall within the State's margin of appreciation and ruled that the refusal did not constitute a discriminatory interference with the applicant's right to respect private life contrary to Article 8, taken in conjunction with Article 14

[118] ECtHR [GC] 11 November 2010, *Şerife Yiğit* v. *Turkey*, no. 3976/05, para. 72. In the Chamber judgment preceding this Grand Chamber judgment, the Court had accepted 'the protection of the traditional family based on the bonds of marriage' as legitimate aim and objective and reasonable ground. ECtHR 20 January 2009, *Şerife Yiğit* v. *Turkey*, no. 3976/05, para. 30.

[119] In *Petrov* the Court held it 'not readily apparent', why different-sex married and different-sex unmarried partners who have an established family life were to be given disparate treatment as regards the possibility to maintain contact by telephone while one of them is in custody. ECtHR 22 May 2008, *Petrov* v. *Bulgaria*, no. 15197/02, para. 55.

[120] ECtHR 10 May 2001 (dec.), *Antonio Mata Estevez* v. *Spain*, no. 56501/00.

[121] The Court referred to *mutatis mutandis*, ECtHR 13 June 1979, *Marckx* v. *Belgium*, no. 6833/74, para. 40.

ECHR. The Court accordingly declared the application manifestly ill-founded and thus inadmissible.

The discussed case law thus shows that the special status of marriage has been a ground for the Court both for not finding comparability of married and unmarried couples, and, in those cases where it did (implicitly) find such comparability, for justifying the difference in treatment between these groups. In cases involving same-sex couples, the fact that these couples did not at all have access to marriage, was considered to have no bearing on these findings.[122]

8.2.3.2. Spouses compared to registered partners

The Court's findings in respect of the question of whether (same-sex) couples in a registered partnership or civil union were in a relevantly comparable situation to spouses have differed from case to case. In a 2008 ruling, the Grand Chamber of the Court implicitly accepted comparability of the situation of different-sex spouses and same-sex partners in a civil union under UK law. In *Burden* the Grand Chamber of the Court held:

> 'As with marriage, the Grand Chamber considers that the legal consequences of civil partnership under the 2004 Act, which couples expressly and deliberately decide to incur, set these types of relationship apart from other forms of co-habitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. Just as there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand […], the absence of such a legally binding agreement between the applicants renders their relationship of co-habitation, despite its long duration, fundamentally different to that of a married or civil partnership couple.'[123]

At first sight, this phrasing still seems to leave some room for doubt as to whether the Court indeed considered spouses and civil partners to be in relevantly similar situations, as it can be held that the quoted paragraphs only contrasted these two groups with stable partners (on this point, see the next subsection), and does not say much about the interrelationship between marriage and civil partnership. The Court itself has nonetheless made clear how the above quoted paragraph must be read, as in *Courten* (2008) it held that in *Burden* it had '[…] equated civil partnerships between homosexual couples with marriage'.[124]

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122 See also section 8.2.3.4 below.

123 ECtHR [GC] 29 April 2008, *Burden* v. *the United Kingdom,* no. 13378/05, para. 65, under reference to ECtHR 27 April 2000 (dec.), *Shackell* v. *the United Kingdom*, no. 45851/99.

124 ECtHR 4 November 2008 (dec.), *Courten* v. *the United Kingdom*, no. 4479/06. See also Cooper 2011, *supra* n. 91, at p. 1759.

The finding of this comparability is all the more interesting now that in subsequent French cases, the Court by contrast held that partners who had concluded a civil partnership agreement under French law (*pacte civil de solidarité* (PACS)) were not in a comparable situation with married partners.

In *Manenc* (2010),[125] the Court held that the applicant's situation, a surviving partner who had concluded a PACS with his same-sex partner, was not comparable to that of a surviving spouse. While the French PACS created certain rights and obligations for the partners in respect of taxes, property and social benefits, it was only spouses in a civil marriage who were under an obligation to maintain financial solidarity, the Court observed. It found the fact that civil marriage was not open to same-sex couples under French law in itself not sufficient to hold that the applicant was in a relevantly similar situation to surviving spouses. It considered that the applicant's sexual orientation played no role in the refusal of his request for the award of a survivor's pension, as different-sex PACS partners were also refused such pensions. In this regard the Court noted that the vast majority of PACS partnerships concerned different-sex partners. The Court accepted that the relevant French legislation pursued the legitimate aim of the protection of the marriage-based family ('*protection de la famille fondée sur les liens du mariage*') and that it fell within the wide margin of appreciation that States enjoyed in this area.[126] The Court did not make explicit why the margin was wide.[127] Without any examination of the proportionality of the refusal, the Court declared the complaint manifestly ill-founded.

The Court applied the same line of reasoning in *Gas and Dubois* (2012),[128] concerning second-parent adoption by same-sex partners. In the year 2000 Ms. Dubois had given birth to a daughter, conceived by means of anonymous donor insemination, and had formally recognised her. Her partner, Ms. Gas, had subsequently applied to adopt the child, with Dubois' express consent. They wished to obtain a simple adoption order under French law in order to create a parent-child relationship between the child and Ms. Gas with the possibility of sharing parental responsibility. The domestic courts had refused the adoption request on the ground that it would transfer parental rights from the child's biological and legal mother, Ms. Dubois, to Ms. Gas, which was

[125] ECtHR 21 September 2010 (dec.), *Manenc* v. *France*, no. 66686/09.

[126] In legal scholarship it was noted that other case law of the ECtHR gave the impression that civil status was in itself a suspect ground, that narrowed the margin of appreciation to be accorded to States in these matters. N.R. Koffeman, 'Case note to ECtHR 21 September 2010 (dec.), *Manenc* v. *France*, no. 66686/09', 12 *European Human Rights Cases* 2011/28 (in Dutch), referring to ECtHR 4 June 2002, *Wessels-Bergervoet* v. *the Netherlands*, no. 34462/97, para. 49.

[127] In legal scholarship it has been noted that this was presumbably so because a measure of economic or social strategy was concerned. Koffeman 2011A, *supra* n. 126, referring to ECtHR [GC] 16 March 2010, *Carson a.o.* v. *the United Kingdom*, no. 42184/05, para. 61. Koffeman has furthermore noted that in *Şerife Yiğit* v. *Turkey* (ECtHR [GC] 11 November 2010, no. 3976/05, para. 72) the Court ruled that '[…] States have a certain margin of appreciation to treat differently married and unmarried couples, particularly in matters falling within the realm of social and fiscal policy such as taxation, pensions and social security.' On the other hand, so Koffeman has observed, other case law has given the impression that in cases concerning civil status, the margin of appreciation must be narrowed. See also ECtHR 4 June 2002, *Wessels-Bergervoet* v. *the Netherlands*, no. 34462/97.

[128] ECtHR 15 March 2012, *Gas and Dubois* v. *France*, no. 25951/07.

not in the child's interests. The national law provided for only one exception to this rule, namely where the adoptive parent was the spouse of the biological parent. At the time same-sex couples were not allowed to marry under French law, rendering it impossible for the applicant couple to qualify for this exception.

Before the ECtHR the applicants complained under Article 14 taken in conjunction with Article 8 ECHR about the fact that Ms. Gas could not adopt Ms. Dubois' child. The Court held that for the purposes of second-parent adoption, the applicants' legal situation could not be said to be comparable to that of a married couple.[129] The Court reiterated in this regard that no right to same-sex marriage could be derived from the Convention, that marriage conferred a special status on those who enter into it and that the exercise of the right to marry was protected by Article 12 of the Convention and gave rise to social, personal and legal consequences. The applicants had also alleged indirect discrimination because it was impossible for them to marry, but the Court's only answer to this argument was that 'in that connection' it could only refer to its earlier findings regarding, *inter alia*, the special status of marriage.[130] The Court subsequently compared the situation of the applicants with unmarried different-sex couples and concluded that '[…] any couple in a comparable legal situation by virtue of having entered into a civil partnership would likewise have [had] their application for a simple-adoption order refused'.[131] The Court therefore did not observe any difference in treatment based on the applicants' sexual orientation and concluded that there had been no violation of Article 14 taken in conjunction with Article 8 ECHR.

Concurring, Judge Costa underlined that the national legislature was better placed than the Strasbourg Court '[…] to bring about change in institutions concerning the family, relations between adults and children, and the concept of marriage'.[132] His call for the legislature to revisit the issue by bringing the relevant French law into line with contemporary social reality, was echoed by concurring Judge Spielmann, who was in turn joined by Judge Berro-Lefèvre. The latter Judges were, furthermore, of the opinion that for the purposes of second-parent adoption the applicants' legal situation was comparable to that of a married couple. They did not find this difference in treatment to be contrary to the Convention, however, as it did not appear to them to stand in the way of 'a normal family life'.[133]

Dissenting Judge Villiger adopted a reasoning that was fundamentally different from that of the majority. He argued that in this case it had to be assessed if the child concerned was suffering from a difference in treatment. The Judge held:

[129] *Idem*, para. 68.
[130] *Idem*, paras. 70–71.
[131] *Idem*.
[132] Concurring opinion of Judge Costa, joined by Judge Spielmann to ECtHR 15 March 2012, *Gas and Dubois* v. *France*, no. 25951/07.
[133] Concurring opinion of Judge Spielmann, joined by Judge Berro-Lefèvre to ECtHR 15 March 2012, *Gas and Dubois* v. *France*, no. 25951/07.

> 'My difficulty lies with the position of the children of the various relationships. The children of a heterosexual couple benefit from joint parental responsibility if the couple are married; those of a same-sex couple do not as, in such a case, adoption is excluded. Therein lies for me the difference of treatment viewed under Article 14 of the Convention taken together with Article 8. At this stage I should add that I firmly believe – and I consider this undisputed – that joint parental custody is in the best interests of the child. I fail to see a justification for this difference in treatment. In my view, all children should be afforded the same treatment. I cannot see why some children, but not others, should be deprived of their best interests, namely of joint parental custody. Indeed, how can children help it that they were born of a parent of a same-sex couple rather than of a parent of a heterosexual couple? Why should the child have to suffer for the parents' situation? […] To say in the present case that this difference in treatment is justified because marriage has a special status in society does not convince me. This reasoning may, possibly, be justified from the point of view of the legislator when distinguishing marriage from other forms of cohabitation. But this is not the only point of view as regards the balancing of the various interests under Articles 14 and 8. Indeed, society's views should not even be the main point of view (let alone, as in the present judgment, the only one). Should not the child's position be equally important? Justifying discrimination in respect of the children by pointing out that marriage enjoys a particular status for those adults who engage in it is, in my view, insufficient in this balancing exercise.'[134]

As also discussed below in section 8.2.4 below, the approach as suggested by Judge Villiger has – so far – not been adopted by the Court, although the best interests of the child have been given increasingly more weight in cases concerning parental rights of same-sex couples.

In *Manenc* and *Gas and Dubois* the Court thus found the situations of PACS partners and spouses to be not relevantly similar. This stands in clear contrast with the above quoted finding of comparability between civil partners and spouses in *Burden*. It must be noted that the French PACS is open to both different-sex and same-sex couples, and that the rights and obligations that it confers upon the partners are more limited than those involved in marriage.[135] The UK civil partnership as referred to in *Burden*, on the other hand, was introduced exclusively for same-sex couples and as alternative to marriage, and was thus (generally) equivalent to marriage. Therefore it may be presumed that the Court found no comparability in the discussed French cases, because of the nature of the French PACS. This reading is furthermore confirmed by the fact that the Court itself has in *X. and Others* (2013) referred to *Gas and Dubois* as a case concerning two women who were 'living together as a same-sex couple', without mentioning the fact that the applicants in *Gas and Dubois* had concluded a PACS.[136]

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[134] Dissenting opinion of Judge Villiger to ECtHR 15 March 2012, *Gas and Dubois* v. *France*, no. 25951/07.

[135] See the discussion of the *Hay* case in Ch. 9, section 9.3.3.3.

[136] ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, paras. 105–106.

There is on the other hand a German case of a later date, which seems to refute this reading of the Court's case law. In *Boeckel and Gessner-Boeckel* (2013)[137] the Court found two women in a registered civil partnership under German law to be not in a relevantly similar situation to a married different-sex couple when it came to the issue of the entries to be made on a child's birth certificate (see also 8.2.4.2 below). As extensively discussed in Chapter 10, the German registered partnership is almost equivalent to marriage, except for certain parental matters. Also, it is open to same-sex couples only.

The conclusion must therefore be that the Court has thus far only implicitly accepted the comparability of the situation of spouses and registered partners. In concrete cases it has held that these situations are not comparable and has declared the application manifestly ill-founded or has found no violation of the Convention. In these cases, as was the case in *Mata Estevez* (see above), the Court again did not find indirect discrimination, nor did it otherwise take into account that, other than different-sex couples, same-sex couples had (at the time) no access to marriage under domestic law.[138] As further explained in section 8.2.5 below, in 2014 the Court found existing (small) differences between marriage and registered partnerships not in themselves to be sufficient to find a violation of the Convention in a Finnish case where the marriage of a post-operative transsexual had to be converted into a registered partnership in order to gain legal recognition as being of the post-operative sex.

8.2.3.3. Registered partners compared to unmarried partners

In *Burden* the Court thus made very clear that registered partners and stable partners were not in similar situations, as in the latter situation the parties had not undertaken public and binding obligations towards each other.[139] As noted above, the Court held:

> 'Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature.'[140]

Because the *Burden* case concerned two cohabiting sisters who wished to have tenancy succession rights on an equal footing with spouses and civil partners, the 'purely platonic' nature of their relationship – 'a relationship of economic dependency

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137 ECtHR 7 May 2013 (dec.), *Boeckel and Gessner-Boeckel* v. *Germany*, no. 8017/11.

138 See also N.R. Koffeman, 'Case-note to ECtHR 15 March 2012, *Gas and Dubois* v. *France*, no. 25951/07', 13 *European Human Rights Cases* 2012/114.

139 ECtHR [GC] 29 April 2008, *Burden* v. *the United Kingdom,* no. 13378/05, para. 65. See also ECtHR 4 November 2008 (dec.), *Courten* v. *the United Kingdom*, no. 4479/06.

140 ECtHR [GC] 29 April 2008, *Burden* v. *the United Kingdom*, no. 13378/05, para. 63. This finding was later confirmed in ECtHR [GC] 11 November 2010, *Şerife Yiğit* v. *Turkey*, no. 3976/05, para. 72, and ECtHR [GC] 3 April 2012, *Van der Heijden* v. *the Netherlands*, no. 42857/05, para. 69.

rather than a long-lasting life community'[141] – also contributed to the Court's finding of no comparability.[142]

The Court has in subsequent case law confirmed that it is particularly the legal consequences of civil partnerships 'which couples expressly and deliberately decide to incur'[143] which set these types of relationship apart 'from informal personal relationships, however permanent and supportive.'[144] In a 2012 judgment, the Court even spoke of a 'special status' that States may confer not only on marriage but also on registered partnerships. The Court held that the relationship of cohabiting partners differed 'fundamentally' from that of married couples or couples in a registered partnership. On a more practical note, the Court observed:

> 'The Court would add that, were it to hold otherwise, it would create a need either to assess the nature of unregistered non-marital relationships in a multitude of individual cases or to define the conditions for assimilating to a formalised union a relationship characterised precisely by the absence of formality.'[145]

A partnership status has thus proven a clear factor for holding situations as being dissimilar.

8.2.3.4. Same-sex unmarried partners compared to different-sex unmarried partners

In cases where no legally recognised relationships were involved, the Court has had less difficulty in establishing relevantly similar situations. In other words, if there is no 'special legal status' involved, there is no ground for holding same-sex couples and different-sex couples not to be in a similar situation, as confirmed by the Court in *X. and Others* v. *Austria* (2013):

> 'The Court observes that, in contrast to the comparison with a married couple, it has not been argued that a special legal status exists which would distinguish an unmarried heterosexual couple from a same-sex couple.'[146]

Consequently the Court has also often found differences in treatment between same-sex unmarried partners and different-sex unmarried partners not to be justified. This has not, however, always been the case. During the 1980s and 1990s the European Commission of Human Rights accepted in various decisions that a difference in treatment between same-sex couples in stable relationships and

141 The Court chose this wording in ECtHR 12 May 2009, *Korelc* v. *Slovenia*, no. 28456/03, when referring to ECtHR [GC] 29 April 2008, *Burden* v. *the United Kingdom*, no. 13378/05, para. 65.

142 Cooper rightly observed that '[…] by holding that the relationship shared by cohabiting same-sex siblings was not qualitatively the same as that shared by civil partners, the ECtHR [had] not dilute[d] the significance of same-sex relationships in general'. Cooper 2011, *supra* n. 91, at p. 1759.

143 ECtHR 12 May 2009, *Korelc* v. *Slovenia*, no. 28456/03, para. 90, referring to ECtHR [GC] 29 April 2008, *Burden* v. *the United Kingdom*, no. 13378/05, para. 65.

144 ECtHR 23 June 2009 (dec.), *M.W.* v. *the United Kingdom*, no. 11313/02.

145 ECtHR [GC] 3 April 2012, *Van der Heijden* v. *the Netherlands*, no. 42857/05, para. 69.

146 ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, para. 112.

different-sex stable partners could be justified on grounds of the protection of the family. For instance, in a case concerning succession to the tenancy of a home by the cohabiting same-sex partner of the tenant, the Commission held:

> 'The Commission considers that the family (to which the relationship of heterosexual unmarried couples living together as husband and wife can be assimilated) merits special protection in society and it sees no reason why a High Contracting Party should not afford particular assistance to families. The Commission therefore accepts that the difference in treatment between the applicant and somebody in the same position whose partner had been of the opposite sex can be objectively and reasonably justified.'[147]

In subsequent cases where a complaint was lodged that the domestic immigration policy gave better protection to heterosexual couples than to homosexual couples, the Commission adopted the same reasoning. It held that no discrimination existed contrary to the Convention where the Immigration Rules gave priority and better guarantees 'to established couples living in a family relationship as opposed to other established relationships such as lesbian or homosexual relationships'.[148] The Commission found that the difference in treatment pursued the legitimate aim of '[…] protecting family based relationships (including relationships existing outside marriage) in a manner proportionate to the achievement of that aim.'[149]

Later – once the Court had established that same-sex relationships came within the scope of the right to respect for private life and particularly once it had held that they also enjoyed the right to respect for their family life (see 8.1.2 above) – the Court applied its strict scrutiny test in cases where a difference in treatment between unmarried partners was based on sexual orientation. It no longer accepted such differences in treatment on the ground of protection of the family, or any other ground.[150] As a result, differences in treatment of unmarried same-sex couples and unmarried different-sex couples in respect of matters like tenancy,[151] the extension of insurance cover,[152] and also certain parental matters (see 8.3.7 below), have been held to constitute discrimination on grounds of sexual orientation in violation of Article 14 ECHR.

Moreover, in 2013 the Grand Chamber of the Court found in *Vallianatos and Others*[153] that States which have introduced a registered partnership in their national

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[147] ECmHR 14 May 1986 (dec.), *S.* v. *the United Kingdom*, no. 11716/85, para. 7. See also ECmHR 9 October 1989 (dec.), *C. and L.M.* v. *the United Kingdom*, no. 14753/89, para. 2 and ECmHR 10 February 1990 (dec.), *B.* v. *the United Kingdom*, no. 16106/90, para. 2.

[148] ECmHR 9 October 1989 (dec.), *C. and L.M.* v. *the United Kingdom*, no. 14753/89, para. 2.

[149] ECmHR 10 February 1990 (dec.), *B.* v. *the United Kingdom*, no. 16106/90, para. 2.

[150] ECtHR 22 July 2010, *P.B. and J.S.* v. *Austria*, no. 18984/02. In some cases (such as *Gas and Dubois* as discussed above), the Court found no difference in treatment as unmarried different-sex couples and unmarried same-sex couples were treated alike in respect of a certain matter (in *Gas and Dubois* in respect of second-parent adoption).

[151] ECtHR 24 July 2003, *Karner* v. *Austria*, no. 40016/98. See 8.1.4 above.

[152] ECtHR 22 July 2010, *P.B. and J.S.* v. *Austria*, no. 18984/02.

[153] ECtHR [GC] 7 November 2013, *Vallianatos a.o.* v. *Greece*, nos. 29381/09 and 32684/09.

laws may not limit access to that civil status to different-sex couples only. Greece was one of the two Council of Europe Member States that had introduced a civil union that was open to different-sex couples only. The applicants in this case were four same-sex couples and a LGBT interest group, who complained that this law was discriminatory. The Chamber relinquished jurisdiction in this case to the Grand Chamber.

The Court delimited the scope of the case and explicitly held that the applicants' complaint did not relate '[…] in the abstract to a general obligation on the Greek State to provide for a form of legal recognition in domestic law for same-sex relationships.' Their complaint was not '[…] that the Greek State failed to comply with any positive obligation which might be imposed on it by the Convention'.[154] The issue to be examined was therefore

> '[…] whether the Greek State was entitled, from the standpoint of Articles 14 and 8 of the Convention, to enact a law introducing alongside the institution of marriage a new registered partnership scheme for unmarried couples that was limited to different-sex couples and thus excluded same-sex couples'.[155]

Under reference to *Schalk and Kopf*, the Court held that the applicants were in a comparable situation to different-sex couples as regards their need for legal recognition and protection of their relationship.[156] It also had no difficulty in establishing that the relevant Greek law had introduced a difference in treatment based on sexual orientation.[157] The government had put forward two sets of arguments to justify this difference. The first was readily dismissed by the Court. It found the argument that the applicants could already provide for the rights and obligations involved in civil unions on a contractual basis unconvincing because this argument disregarded that the Greek civil partnership '[…] as an officially recognised alternative to marriage [had] an intrinsic value for the applicants irrespective of the legal effects, however narrow or extensive, that they would produce'.[158] Also, the option of entering into a civil partnership would have been the only opportunity available to same-sex partners under Greek law '[…] of formalising their relationship by conferring on it a legal status recognised by the State', which would allow them '[...] to regulate issues concerning property, maintenance and inheritance not as private individuals entering into contracts under the ordinary law but on the basis of the legal rules governing civil unions, thus having their relationship officially recognised by the State.'[159]

The government had further alleged that the relevant legislation aimed to protect children born out of wedlock, to protect single-parent families, to respond to the

[154] *Idem*, para. 75.
[155] *Idem*, para. 75.
[156] *Idem*, para. 78.
[157] *Idem*, para. 79.
[158] *Idem*, para. 81.
[159] *Idem*, para. 81.

wishes of parents to raise their children without being obliged to marry, and, ultimately, to strengthen the institutions of marriage and the family in the traditional sense.[160] In respect of these aims the Court considered the following:

> 'The Court considers it legitimate from the standpoint of Article 8 of the Convention for the legislature to enact legislation to regulate the situation of children born outside marriage and also indirectly strengthen the institution of marriage within Greek society by promoting the notion, as explained by the Government, that the decision to marry would be taken purely on the basis of a mutual commitment entered into by two individuals, independently of outside constraints or of the prospect of having children […]. The Court accepts that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment […]. It goes without saying that the protection of the interests of the child is also a legitimate aim […].'[161]

The Court was not, however, convinced that it was necessary, in pursuit of the legitimate aims which the Greek government invoked, to bar same-sex couples from entering into the civil unions. It noted that the Greek civil union had been designed 'first and foremost' to afford legal recognition to a new form of non-marital partnership, which allowed different-sex couples, whether or not they had children, 'to regulate numerous aspects of their relationship'.[162] The Greek government had not justified why same-sex couples without children were treated differently from different-sex couples without children.[163] While different-sex couples had no less than three ways to have their relationship legally recognised (marriage, civil union or *de facto* partnerships), same-sex couples had none. The Court held that:

> '[c]onsequently, same-sex couples would have a particular interest in entering into a civil union since it would afford them, unlike different-sex couples, the sole basis in Greek law on which to have their relationship legally recognised.'[164]

The Court considered it possible for the legislature '[…] to include some provisions dealing specifically with children born outside marriage, while at the same time extending to same-sex couples the general possibility of entering into a civil union.'[165] It noted 'in addition' that a trend was emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Out of the nineteen who opted to enact some form of partnership other than marriage, only two States, Lithuania and Greece, reserved it exclusively to different-sex couples.[166] The Court concluded that the government had not given convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the Greek civil union and found a violation of Article 14 taken in conjunction with Article 8 ECHR.

160 *Idem*, para. 80.
161 ECtHR [GC] 7 November 2013, *Vallianatos a.o.* v. *Greece*, nos. 29381/09 and 32684/09, para. 83.
162 *Idem*, para. 88.
163 *Idem*, para. 89.
164 *Idem*, para. 90.
165 *Idem*, para. 89. The implications of this finding are further discussed below in section 8.2.6.
166 *Idem*, para. 91.

The judgment gives the impression that there is no room for any conclusion other than that also different-sex couples who wish to have access to a registered partnership that is available in their country for same-sex couples only, can take a successful case before the ECtHR.[167] Still, it is not entirely ruled out that the Court would in those cases accept that the difference in treatment could be justified because different-sex couples have the alternative and 'real option'[168] of concluding a marriage. This point is further developed in subsection 8.2.5 below, where the role of existing alternative forms of registration in the ECtHR's case law is discussed.

8.2.4. Parental rights for same-sex couples

As discussed above in section 8.1.2 above, for a long time the Commission and the Court ruled that same-sex relationships did not enjoy protection of the right to respect for family life under Article 8 ECHR. This also had implications for the parental rights of persons in same-sex relationships. For instance, in a case of 1992, where a woman wished to get parental rights over the child of her female partner, the Commission was of the opinion

> '[…] that the […] positive obligations of a State under Article 8 do not go so far as to require that a woman such as the first applicant, living together with the mother of a child and the child itself, should be entitled to get parental rights over the child. The Commission therefore considers that there has been no interference with the applicants' right to respect for their family life. […] the relationship of a homosexual couple constitutes a matter affecting their private life. However, the Commission considers that the statutory impossibility for the first applicant to be vested with the parental authority over the third applicant does not entail any restriction in the applicants' enjoyment of their private life.'[169]

Later, the Court made clear that sexual orientation may not be the decisive factor in decisions on parental rights. The applicant in *Salgueiro da Silva Mouta* (1999)[170] was a homosexual who lived with another man. The national judge had awarded parental responsibility for the applicant's daughter to his ex-wife rather than to himself. In granting the custody to the child's mother, the national court had stated that the child had to live in 'a traditional Portuguese family', that homosexuality was an abnormality and that children were not to grow up 'in the shadow of abnormal situations'. The ECtHR considered that the judgment of the domestic court

[167] N.R. Koffeman, 'Case note to ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07', 14 *European Human Rights Cases* 2013/104 (in Dutch).

[168] See the *Hämäläinen* judgment as discussed in section 8.2.5 below.

[169] ECmHR 19 May 1992 (dec.), *Kerkhoven and Hinke* v. *the Netherlands*, no. 15666/89. See also ECtHR [GC] 22 April 1997, *X, Y and Z* v. *the United Kingdom*, no. 21830/93. The latter case concerned *X*, a female-to-male transsexual who was living in a stable relationship with a woman, *Y*, and their child, *Z*, born after artificial insemination with donated sperm. The applicants complained that *X*'s role as *Z*'s father was not recognised and that their situation amounted to discrimination. Noting that transsexuality raised complex issues in respect of which there was no generally shared approach in Europe, the Court found no violation of the right to respect for family life (Art. 8 ECHR).

[170] ECtHR 21 December 1999, *Salgueiro da Silva Mouta* v. *Portugal*, no. 33290/96.

constituted an interference with the applicant's right to respect for his family life as protected under Article 8 ECHR. It found that the applicant's homosexuality had been a decisive factor in the final decision and ruled that the distinction based on considerations regarding the applicant's sexual orientation constituted a violation of Article 8 taken in conjunction with Article 14.[171] In view of that conclusion the Court did not consider it necessary to rule on the allegation of a violation of Article 8 taken alone.

Yet later the Court brought same-sex relationships within the scope of the right to respect for family life.[172] This holds not only for the relationship between the partners but also for their relationships with children born and/or raised within those relationships.[173] The right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family.[174] Where family life has not yet been established, for example in joint adoption cases, the right to respect for private life generally applies.

Most complaints lodged with the ECtHR in respect of parental rights of same-sex couples have been phrased as discrimination complaints. Same-sex couples or individuals with a homosexual orientation have claimed entitlement to the same rights as different-sex couples or heterosexual individuals. Parental matters further often concern issues which in themselves do not constitute rights under the Convention, for example adoption, but which nonetheless come within its scope. As will become clear from the discussion below, in those situations where a State has voluntarily created a particular right or entitlement at the national level, it is not allowed to take discriminatory measures when it comes to applying it.[175]

The following subsections discuss the Court's case law on parental rights for same-sex couples and lesbians and gays thematically, addressing matters like adoption (subsection 8.2.4.1), legal parenthood by operation of the law (subsection 8.2.4.2) and access to AHR treatment (subsection 8.2.4.3). Some of the relevant cases, or aspects thereof, have yet been referred to or briefly discussed in section 8.2.3 above. Here, the focus lies not so much on the comparability question, but on the material findings of the Court.

It is noted that at the time this research was concluded (i.e., 31 July 2014), there were two more French cases pending before the ECtHR which related to parental matters. The one application concerned two female PACS partners, who both had a child using medically assisted procreation. They complained about the authorities' refusal to grant them parental authority each in respect of the other's child (see also

171 *Idem*, paras. 35–36.
172 ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, paras. 91 and 94.
173 *Inter alia*, ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09, para. 85 (under reference to ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, paras. 91 and 94) and ECtHR 15 March 2012, *Gas and Dubois* v. *France*, no. 25951/07. See also ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07.
174 ECtHR 13 June 1979, *Marckx* v. *Belgium*, no. 6833/74, para. 31 See also ch. 2, section 2.1.3.
175 ECtHR [GC] 22 January 2008, *E.B.* v. *France*, no. 43546/02.

Chapter 2, section 2.3.6).[176] In the other case two female PACS partners complained about the refusal to grant one of them paternity leave on the occasion of the birth of her partner's child.[177]

8.2.4.1. Adoption by same-sex partners or couples

The ECtHR has repeatedly held that '[a]doption means "providing a child with a family, not a family with a child"'.[178] Accordingly, where a family tie is established between a parent and a child, '[…] particular importance must be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent'.[179] While the ECtHR has only ruled in cases concerning single-parent adoption and second-parent adoption, the implications of this case law for successive adoption and joint adoption are also discussed.

8.2.4.1.1. Single-parent adoption

The ECtHR's case law in respect of single-parent adoption by homosexuals, has evolved over the years. Two French cases are the main authorities in this regard. In *Fretté* (2002),[180] a homosexual man complained under Article 14 in combination with Article 8 ECHR about the refusal by the French authorities of his request for authorisation to adopt a child, on the ground that owing to his 'choice of lifestyle' the applicant did not provide the requisite safeguards for adopting a child. The Court concluded on the basis of the case file that this criterion 'implicitly yet undeniably made the applicant's homosexuality the decisive factor' and that the refusal for authorisation was thus based on the applicant's sexual orientation.[181] This was ground for the Court to hold Article 14 taken in conjunction with Article 8 applicable in the case.[182]

According to the Court there was 'no doubt' that this refusal pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure.[183] The Court considered it impossible 'to find in the legal and

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176 *Francine Bonnaud and Patricia Lecoq* v. *France* (no. 6190/11), communicated on 3 February 2012. In May 2013 the Court invited the government to submit observations 'in the light of the judgments in *Gas and Dubois* v. *France* and *X a.o.* v. *Austria*, and the adoption in France of the law of 17 May 2013 opening marriage to same sex couples.' See also ch. 2, section 2.3.6.

177 *Hallier and Lucas* v. *France*, no. 46386/10, application communicated to the French Government on 6 April 2011.

178 *Inter alia*, ECtHR 26 February 2002, *Fretté* v. *France*, no. 36515/97, para. 42.

179 ECtHR 26 February 2002, *Fretté* v. *France*, no. 36515/97, para. 42, under reference to ECtHR 16 November 1999, *E.P.* v. *Italy*, no. 31127/96, para 62 and ECtHR 7 August 1996, *Johansen* v. *Norway*, no. 17383/90, para. 78.

180 ECtHR 26 February 2002, *Fretté* v. *France*, no. 36515/97.

181 *Idem*, para. 32.

182 *Idem*, paras. 32–33. Judge Costa, joined by Judges Jungwiert and Traja, was very critical of this finding in his partly concurring opinion to the judgment. He called the majority's reasoning on this point circular. Partly concurring opinion by Judge Costa, joined by Judges Jungwiert and Traja to ECtHR 26 February 2002, *Fretté* v. *France*, no. 36515/97.

183 *Idem*, para. 38. The respondent government had asserted that the difference in treatment stemmed from the doubts that prevailed, in view of what was at the time known about the subject, about the

social orders of the Contracting States uniform principles on these social issues' and it observed that 'generally speaking', the law appeared to be in a transitional stage. For these reasons, the Court left States a wide margin of appreciation to make rulings on such matters.[184] In respect of the competing interests of the applicant and children eligible for adoption, the Court noted that the scientific community was divided over the possible consequences of a child being adopted by one or more homosexual parents. Also, until that time only a limited number of scientific studies had been conducted on the subject and there were wide differences in national and international opinion.[185] The Court concluded that the refusal to authorise adoption had not infringed the principle of proportionality and that, accordingly, the justification given by the government appeared objective and reasonable and the difference in treatment complained of was not discriminatory within the meaning of Article 14 ECHR.[186] Three dissenting Judges noted that the refusal had been based '[…] on the view that to be brought up by homosexual parents would be harmful to the child at all events and under any circumstances'. They pointed out that the domestic authorities and courts had failed to explain why and how the child's interests militated in the instant case against the authorisation of the applicant's adoption request.[187]

Six years later, in the case of *E.B.* v. *France* (2008),[188] the Grand Chamber reversed this position.[189] This time a woman who was living with another woman in a stable same-sex relationship, was refused authorisation to adopt a child. The Court explained the subject-matter of the case and its approach in the case as follows:

> 'The present case does not concern adoption by a couple or by the same-sex partner of a biological parent, but solely adoption by a single person. Whilst Article 8 of the Convention is silent as to this question, the Court notes that French legislation expressly grants single persons the right to apply for authorisation to adopt and establishes a procedure to that end. Accordingly, the Court considers that the facts of this case undoubtedly fall within the ambit of Article 8 of the Convention. Consequently, the State, which has gone beyond its obligations under Article 8 in creating such a right – a possibility open to it under Article 53 of the Convention – cannot, in the application of that right, take discriminatory measures within the meaning of Article 14 […].'[190]

development of a child brought up by a homosexual and deprived of a dual maternal and paternal role model. It held (as quoted in para. 36 of the judgment) that '[t]here was no consensus about the potential impact of being adopted by an adult who openly affirmed his homosexuality on a child's psychological development and, more generally, his or her future life, and the question divided both experts on childhood and democratic societies as a whole.'

184 *Idem*, para. 41. The Court considered it 'quite natural' to leave such a wide margin.

185 ECtHR 26 February 2002, *Fretté* v. *France*, no. 36515/97, para. 42.

186 *Idem*, paras. 42–43.

187 Joint partly dissenting opinion of Judge Sir Nicolas Bratza and Judges Fuhrmann and Tulkens to ECtHR 26 February 2002, *Fretté* v. *France*, no. 36515/97.

188 ECtHR [GC] 22 January 2008, *E.B.* v. *France*, no. 43546/02.

189 See also K.A. Doty, 'From *Fretté* to *E.B.*: The European Court of Human Rights on Gay and Lesbian Adoption', 18 *Law and Sexuality Rev. Lesbian Gay Bisexual & Legal Issues* (2009) p. 121.

190 ECtHR [GC] 22 January 2008, *E.B.* v. *France*, no. 43546/02, para. 49.

The Court held that although the authorities had based their decision on an overall assessment of the applicant's situation, two grounds played a primordial role in the decision-making, namely the lack of a 'paternal referent' in the applicant's household or immediate circle of family and friends and the lack of commitment on the part of her declared partner. According to the Court these grounds had to be assessed concurrently, implying that the illegitimacy of one ground contaminated the entire decision.[191] While the second main ground was reasonable and had nothing to do with any consideration relating to the applicant's sexual orientation, the first ground could have served as a pretext for rejecting the applicant's application on grounds of her homosexuality.[192] The illegitimacy of this ground had 'the effect of contaminating the entire decision'.[193] After a detailed examination of the domestic authorities' reasoning, the Court concluded that the applicant's avowed homosexuality had indeed influenced the assessment of her application and had been a determining factor in refusing her authorisation to adopt.[194] The applicant had therefore suffered a difference in treatment, the Grand Chamber held.[195]

The Court reiterated that a difference in treatment based on sexual orientation could only be justified if 'particularly convincing and weighty reasons' were present[196] and that differences in treatment based solely on considerations regarding the applicant's sexual orientation amounted to discrimination in violation of the Convention.[197] The Grand Chamber pointed out that under French law any unmarried person, man or woman, was allowed to adopt and that it was not disputed that this opened up the possibility of adoption by a single person with a homosexual orientation. The Court considered the reasons put forward by the government[198] not particularly convincing and weighty such as to justify refusing to grant the applicant authorisation. The authorities had made a distinction on the basis of the applicant's sexual orientation which was therefore not acceptable under the Convention.[199] With ten votes to seven, the Court found a violation of Article 14 taken in conjunction with Article 8 ECHR. The dissenting Judges all had difficulties with the 'contamination theory' propounded by the majority, following which also the second ground for the refusal – the lack of commitment on the part of the applicant's partner – could not in itself justify the adoption refusal.[200]

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191 *Idem*, para. 80.
192 *Idem*, para. 71.
193 *Idem*, para. 80.
194 *Idem*, para. 89.
195 *Idem*, para. 90.
196 *Idem*, para. 91.
197 *Idem*, para. 93.
198 Para. 37 of the judgment reads: 'The reason for refusing [the adoption] authorisation 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.'
199 ECtHR [GC] 22 January 2008, *E.B.* v. *France*, no. 43546/02, para. 96.
200 Dissenting opinion of Judge Costa joined by Judges Türmen, Ugrekhelidze and Jočienė; dissenting opinion of Judge Zupančič, dissenting opinion of Judge Loucaides and dissenting opinion of Judge Mularoni to ECtHR [GC] 22 January 2008, *E.B.* v. *France*, no. 43546/02. See also the Concurring Opinion of Judges Lorenzen and Jebens to this judgment.

It is important to note that in these single-parent adoption cases no 'special' civil status was involved which could be held to (indirectly) set registered or married (different-sex) partners apart from (same-sex) stable partners (see 8.2.3.1 above). This was different in some cases concerning second-parent adoption.

8.2.4.1.2. Second-parent and successive adoption

The ECtHR has decided two cases concerning adoption of a child by the same-sex partner of the child's legal and genetic parent (second-parent adoption). In *Gas and Dubois* – as discussed in section 8.2.3.2 above – the Court held that the applicants, who were in a stable same-sex relationship, were not treated differently from different-sex unmarried partners in respect of second-parent adoption and therefore it found no violation of Article 14 ECHR in combination with Article 8. In *X. and Others* v. *Austria* (2013)[201] such a difference in treatment was instead established and the Court's reasoning for holding this treatment unjustified warrants a more extensive discussion at this place.

The *X. and Others* case concerned two women who were living together in a stable homosexual relationship. One of them had a son. She had sole custody of the child while his father had recognised paternity. The women had been living in a common household since the son was about five years old and cared for him jointly. In 2005 the women, wishing to obtain legal recognition of their *de facto* family unit, concluded an adoption agreement. The father of the child did not consent to the adoption, but the women submitted that it was in the best interests of the child and asked the competent district court to override his refusal to consent. The district court refused to approve the adoption agreement, because under the applicable provisions of the Austrian Civil Code, the child's adoption by the female partner of the mother would sever his relationship with his mother. The appeals court upheld this ruling, taking the view that the relevant Austrian law was clearly based on the premise that the term 'parents' necessarily referred to two persons of different sex. It noted furthermore that the child had two parents (his mother and father) and held that there was no need to replace one of them by an adoptive parent. The applicants appealed on points of law to the Supreme Court, holding that the relevant provisions of the Civil Code were unconstitutional, but in September 2006, this Court dismissed their appeal. The Supreme Court held that:

> '[n]ot least in view of the wide differences in national and international opinion concerning the possible consequences of a child being adopted by one or more homosexual parents, and bearing in mind the fact that there were not enough children to adopt to satisfy demand, States had to be allowed a broad margin of appreciation in this sphere'.[202]

The applicants had not demonstrated, nor was there any other evidence to suggest, that the relevant provisions of the Austrian Civil Code overstepped the margin

[201] ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07.
[202] As quoted in ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, para. 20.

of appreciation accorded by the European Court, or that they infringed the proportionality principle. In 2010 the Austrian Registered Partnership entered into force, which explicitly outlawed second-parent adoption by same-sex registered partners.

Before the ECtHR the applicants complained that they had been discriminated against on grounds of sexual orientation because so-called second-parent adoption was possible for married or unmarried heterosexual couples but not for same-sex couples. Presumably having studied the ECtHR case law carefully, they focused on the unequal treatment between unmarried different-sex couples and unmarried same-sex couples and held that the gist of their complaint was that they were automatically excluded from any chance of adoption.[203] The respondent government on the other hand submitted that Austrian law gave priority to the biological parents when it came to the care of their child. Second-parent adoption was only to be authorised if it was clearly in the child's interests and if the replaced parent consented. In the case at hand there was no difference in treatment on grounds of sexual orientation, because decisive for the refusal of the adoption agreement had been that the father of the child did not consent to it. They furthermore argued that if the Court was to find a difference in treatment, 'recreating the biological family and securing the child's well-being' were legitimate aims.[204] The relevant law did not aim to exclude same-sex couples but sought, as a general rule, to avoid situations where a child had two mothers or two fathers for legal purposes. The government furthermore put forward that States enjoyed a wide margin of appreciation in the area of adoption law, in particular on the issue of second-parent adoption by same-sex couples.

The Chamber relinquished jurisdiction in favour of the Grand Chamber in this case. As set out in section 8.2.3.4 above, the Court found that the applicants were not in a similar situation to spouses in respect of second-parent adoption. It did accept, however, that their situation was comparable to that of unmarried different-sex couples.

The Court expressly delineated the scope of the case; it was not about the general question of same-sex couples' access to second-parent adoption, 'let alone […] the question of adoption by same-sex couples in general', but only about the difference in treatment between unmarried different-sex couples and unmarried same-sex couples in respect of this type of adoption.[205] Also, it was not about the question of whether the adoption request of the applicants had to be granted in this particular case.[206] There was no obligation under Article 8 ECHR to extend the right to second-parent adoption to unmarried couples. Because the Austrian legislature had chosen to allow second-parent adoption by unmarried different-sex couples, however, the Court had to examine whether refusing that right to (unmarried) same-sex couples served a

203 *Idem*, para. 66.
204 *Idem*, para. 76.
205 *Idem*, paras. 134 and 149.
206 *Idem*, para. 152.

legitimate aim and was proportionate to that aim.[207] The central question was '[…] whether the applicants [had been] discriminated against on account of the fact that the courts had [had] no opportunity to examine in any meaningful manner whether the requested adoption was in the second applicant's interests, given that it [had] in any case [been] legally impossible.'[208]

The Austrian government had thus argued that the law was aimed at 'recreating the circumstances of a biological family'.[209] As the Court noted they '[…] relied on the protection of the traditional family, based on the tacit assumption that only a family with parents of different sex could adequately provide for a child's needs.' The Court reiterated that 'the protection of the family in the traditional sense' was, in principle, a weighty and legitimate reason which could potentially justify a difference in treatment on grounds of sexual orientation. It added that the protection of the interests of the child was indisputably a legitimate aim.[210]

As the Court thus quite readily accepted that the Austrian adoption law pursued a legitimate aim, the proportionality test proved crucial in the *X. and Others* case. The Court first reiterated the following principles:

> 'The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it […]. Also, given that the Convention is a living instrument, to be interpreted in present-day conditions, the State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life […].'[211]

The Court noted that where a difference in treatment on grounds of sexual orientation was concerned, a strict scrutiny test applied. The government had not adduced any evidence showing that it was not in the child's best interests to be raised by two parents of the same sex.[212] Quite the contrary, they had conceded that '[…] same-sex couples could be as suitable or unsuitable as different-sex couples when it came to adopting children'.[213] Also, single-parent adoption by persons in a same-sex relationship was possible under Austrian law. The Court found the domestic law incoherent; on the one hand it accepted that a child grew up with same-sex parents, 'thus accepting that this [was] not detrimental to the child', on the other hand it insisted that a child was not have two mothers or two fathers. The Court also stressed the importance of granting legal recognition to *de facto* family life and noted that second-parent

207 *Idem*, para. 136.
208 *Idem*, para. 152.
209 *Idem*, para. 137.
210 *Idem*, para. 138.
211 *Idem*, para. 139.
212 *Idem*, para. 142.
213 *Idem*, para. 142.

adoption was aimed at doing exactly that, as it served to confer rights *vis-à-vis* the child on the partner of one of the child's parents.[214] All in all, there was considerable doubt about the proportionality of the relevant Austrian law. The Court held:

> 'Unless any other particularly convincing and weighty reasons militate in favour of such an absolute prohibition, the considerations adduced so far would seem rather to weigh in favour of allowing the courts to carry out an examination of each individual case. This would also appear to be more in keeping with the best interests of the child, which is a key notion in the relevant international instruments […].'[215]

While yet the Court had earlier – albeit implicitly – noted that a narrow margin applied in this case, and had therefore applied a strict scrutiny test, it nonetheless next addressed the argument raised by the government that a wider margin of appreciation had to be accorded in the sphere of adoption law, as it involved the balancing of different interests, and as there was no European consensus on the issue of second-parent adoption by same-sex couples. The Court thereby implied that this would have been an argument that could justify the difference in treatment complained of.[216] Still, it was not accepted by the Strasbourg Court. The ECtHR reaffirmed that in situations involving a difference in treatment on the basis of sexual orientation, a narrow margin applied. In respect of the alleged absence of consensus, the Court took an unprecedented approach, which linked in with the way in which it had earlier delineated the scope of the case before it (see above). Because the case was only about the question of whether a State, once it decided to introduce second-parent adoption for unmarried couples, was allowed to differentiate between different-sex couples and same-sex couples,[217] only those States which allowed for second-parent adoption in unmarried couples could be used for comparison. This concerned a group of ten States, of which six allowed both same-sex and different-sex partners to adopt the child of their partners, while four had excluded same-sex couples from second-parent adoption. The Court held this sample to be too narrow to draw a conclusion as to the existence of a possible European consensus on this issue.[218]

The Court acknowledged that '[…] striking a balance between the protection of the family in the traditional sense and the Convention rights of sexual minorities [was] in the nature of things a difficult and delicate exercise, which [could] require the State to reconcile conflicting views and interests perceived by the parties concerned as

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[214] *Idem*, para. 145, referring to ECtHR 28 June 2007, *Wagner and J.M.W.L.* v. *Luxembourg*, no. 76240/01, para. 119; ECtHR 25 January 2007, *Eski* v. *Austria*, no. 21949/03, para. 39 and ECtHR 13 December 2007, *Emonet a.o. v. Switzerland*, no. 39051/03, paras. 63–64.

[215] ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, para. 147, referring to ECtHR [GC] 22 January 2008, *E.B.* v. *France*, no. 43546/02, para. 95.

[216] The Court held: 'The Government advanced another argument to justify the difference in treatment complained of. Relying on Art. 8 of the Convention, they asserted that the margin of appreciation was a wide one in the sphere of adoption law, which had to strike a careful balance between the interests of all the persons involved. In the present context it was even wider, as there was no European consensus on the issue of second-parent adoption by same-sex couples.' ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, para. 147.

[217] ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, para. 149.

[218] *Idem*, para. 149.

being in fundamental opposition […]'.[219] It nonetheless found that the government had failed to adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. The Court accordingly – by ten votes to seven – found a violation of Article 14 in conjunction with Article 8 of the Convention.

The seven Judges who wrote a dissenting opinion to this judgment held that the majority had gone 'beyond the usual limits of the evolutive method of interpretation'.[220] They were particularly critical of the Court's methodology in determining the relevant consensus, which resulted in an 'unduly technical – and hence reductive – view of the situation Europe-wide'. In their view 'a clear trend' was discernible whereby the great majority of the States Parties did 'not authorise second-parent adoption for unmarried couples in general, still less for unmarried same-sex couples' and held that this trend was reflected in international instruments.[221] The dissenters furthermore found that the Court should have paid more attention to the particular facts of the case, such as the fact that the father of the child objected to the adoption by his mother's female partner. It should also have considered what the best interests of the child required in this particular situation.

Both *Gas and Dubois* and *X. and Others* concerned second-parent adoption, whereby the legal mother whose same-sex partner wished to adopt her child, was also the biological and genetic mother of the child. The Court has not yet dealt with a case involving successive adoption, where a partner adopts the child of an adoptive parent. While this matter may be more sensitive for some States,[222] the emphasis the Court placed on legal recognition of *de facto* family life in the *X. and Others* judgment may equally apply in a case concerning successive adoption. It is, by contrast, exactly for the reason that no family life has yet been established that joint adoption may be distinguished from this situation.

8.2.4.1.3. Joint adoption

The Court has so far not dealt with any complaint of same-sex couples who were not allowed to jointly adopt a child.[223] The *X. and Others* case gives ground for concluding that where the legislation of a State allows different-sex unmarried, but not same-sex unmarried couples to jointly adopt, this would constitute discrimination contrary to Article 14 ECHR. As noted above, it may also be, however, that the Court would attach (decisive) weight to the fact that in that situation no family life has been established. Further, if the national law allows only spouses to jointly adopt a child,

219 *Idem*, para. 151, under reference to ECtHR 2 March 2010, *Kozak* v. *Poland*, no. 13102/02, para. 99.

220 Joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos to ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, para. 23.

221 *Idem*, para. 15.

222 See as an illustration Ch. 10, section 10.3.5.3.

223 It is recalled that this research was concluded on 31 July 2014.

while marriage is open to different-sex couples only under the relevant jurisdiction, the Court may rule that, because of the special status of marriage, same-sex couples are not in a relevantly similar situation to spouses in respect of the joint adoption of a child.

8.2.4.2. Legal parenthood by operation of the law

So far the Court has ruled in only one case concerning legal parenthood for same-sex partners in situations other than adoption. The applicants in *Boeckel and Gessner-Boeckel* (2013)[224] were two German women, Ms. Sabine Boeckel and Ms. Anja Gessner-Boeckel who had entered into a civil partnership (*Eingetragenes Lebenspartnershaft*) in 2001. In 2008 Ms. Anja Gessner-Boeckel gave birth to a son. The birth certificate issued named her as the child's mother, but left the space provided in the form for the father's name blank. The competent Court subsequently granted an adoption order, allowing for the adoption of the child by Ms. Sabine Boeckel. The child thereby was legally recognised as a child of both applicants. In the meantime the applicants requested the competent District Court to rectify the child's birth certificate, by inserting Ms. Sabine Boeckel as the child's second parent. They put forward that under German law the father was the man who was married to the mother of the child at the time of birth, whether he was also the biological father of the child or not, and claimed that this presumption had to be applied analogously to their situation.

As discussed above in section 8.2.3.2, the Court ruled that the applicants were not in a relevantly similar situation to that of a married different-sex couple in which the wife gave birth to a child. The Court accepted that biological differences between different-sex couples and same-sex couples, which had also been grounds for the relevant domestic law, decisively distinguished these groups in this respect. It held:

> 'The Court takes note of the domestic courts' reasoning according to which section 1592 § 1 of the Civil Code contained the – rebuttable – presumption that the man who was married to the child's mother at the time of birth was indeed the child's biological father. This principle is not called into question by the fact that this legal presumption might not always reflect the true descent. The Court also notes that it is not confronted with a case concerning transgender or surrogate parenthood. Accordingly, in case one partner of a same-sex partnership gives birth to a child, it can be ruled out on biological grounds that the child descended from the other partner. The Court accepts that, under these circumstances, there is no factual foundation for a legal presumption that the child descended from the second partner.'[225]

Because there was thus no appearance of a violation of the Convention, the Court declared this complaint manifestly ill-founded. This decision leaves unanswered the question of whether the Court would have come to a different conclusion if same-sex

[224] ECtHR 7 May 2013 (dec.), *Boeckel and Gessner-Boeckel* v. *Germany*, no. 8017/11.
[225] *Idem*, para. 30.

couples and different-sex couples who had acquired the same civil status (e.g. both spouses), would have been treated differently in this regard.[226]

8.2.4.3. Access to AHR treatment

As discussed in Chapter 2, in the case *S.H. and Others* v. *Austria* (2011),[227] the Court ruled that '[…] the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Article 8, as such a choice is an expression of private and family life'.[228] The Court has not made explicit whether the term 'couple' in this context includes same-sex couples.

The question of whether in respect of access to AHR treatment same-sex couples are in a comparable situation to different-sex couples, was shortly addressed in *Gas and Dubois* (see 8.2.3.2 above).[229] In this case, the Court dismissed the applicants' complaint that they were discriminated against on the ground of their sexual orientation because under French law IVF treatment with the use of anonymously donated gametes was available only to married and cohabiting different-sex couples of reproductive age, and for therapeutic purposes only. The applicants had not brought this complaint before the national courts, which in itself was a ground for declaring this part of the complaint inadmissible for non-exhaustion of domestic remedies. The ECtHR, however, in addition noted that such treatment was available in France only for different-sex couples and '[…] for therapeutic purposes only, with a view in particular to remedying clinically diagnosed infertility or preventing the transmission of a particularly serious disease'. Without explaining this further, the Court considered that this situation was not comparable to that of the applicants and held that they were therefore no victim of a difference in treatment.[230]

In the *Gas and Dubois* case,[231] civil status was not the decisive distinguishing factor as under French law cohabiting different-sex couples could also acquire access to AHR treatment. The fact that AHR treatment was furthermore only available for specific therapeutic reasons, may thus have been even more important for the Court to find that the situations were not comparable. This may prove indicative for future cases. On the other hand, as the Court did not explain its finding any further, not too many conclusions can be drawn from this case. It is, for instance, insufficiently clear if States are allowed to generally limit access to AHR treatment to different-sex couples only.[232] The area of AHR treatment is in any case one in which the Court is generally reluctant to intervene with State practices. It has left States a wide margin of appreciation both in respect of their decision to intervene in the area and, '[…]

[226] See Loenen 2013, *supra* n. 112, at p. 643.
[227] ECtHR [GC] 3 November 2011, *S.H. a.o.* v. *Austria*, no. 57813/00. See ch. 2, section 2.3.3.
[228] *Idem*, para. 82.
[229] ECtHR 15 March 2012, *Gas and Dubois* v. *France*, no. 25951/07.
[230] *Idem*, para. 63.
[231] See section 8.2.3.2 above.
[232] Koffeman 2012A, *supra* n. 138.

once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests' (see also Chapter 2).[233]

8.2.5. The role of existing alternative forms of registration in the Court's case law

The ECtHR case law paints a mixed picture when it comes to how alternative forms of recognition of relationships are weighed in the Court's assessment of a complaint. In a judgment of 2007 the Court had held that it was not for the national authorities to take the place of those concerned in reaching a decision regarding the form of communal life they wished to adopt. The case concerned a man who wished to adopt the child of his partner, but under the relevant domestic law this was only possible if the parental links between the mother and her daughter were severed. The government had asserted that the links would not be severed if the couple married, but the Court thus refuted that it was not for the authorities to take the applicants' place in deciding on their 'form of communal life'.[234]

In *Van der Heijden* (2012) a different view was expressed. The applicant had been cohabiting with her partner for more than 18 years and wished to be exempted from testifying against him in a criminal case, just like spouses and registered partners who were entitled to immunity from testifying against their spouses or registered partners respectively under Dutch law. The Court held that the applicant had had realistic options to have her relationship formally registered and that she therefore had to accept the legal consequences of having chosen not take up such options:

> 'The applicant has chosen not to register, formally, her union and no criticism can be made of her in this regard. However, having made that choice she must accept the legal consequence that flows therefrom, namely that she has maintained herself outside the scope of the "protected" family relationship to which the "testimonial privilege" exception attaches. That being so, the Court does not consider that the alleged interference with her family life was so burdensome or disproportionate as to imperil her interests unjustifiably.'[235]

The Court in this case thus held that authorities may legitimately ask from a couple to have their relationship formally registered in order to enjoy certain rights.

The argument that an alternative registration option was available has also played a role in the ECtHR's case law on the effects of gender reassignments on pre-existing marriages. As discussed above (see section 8.2.1), in cases pre-dating *Schalk and Kopf* the Court held the fact that such couples could conclude a civil partnership under which they enjoyed 'many of the protections and benefits of married status' to be of 'of some relevance to the proportionality of the effects of the gender

233 ECtHR [GC] 3 November 2011, *S.H. a.o.* v. *Austria*, no. 57813/00, para. 97.

234 ECtHR 13 December 2007, *Emonet a.o.* v. *Switzerland*, no. 39051/03, para. 82.

235 ECtHR [GC] 3 April 2012, *Van der Heijden* v. *the Netherlands*, no. 42857/05, para. 76.

recognition regime'.[236] A similar issue arose in the more recent case of *Hämäläinen* (2014),[237] where a male-to-female transsexual complained that the full recognition of her post-operative sex was made conditional on the transformation of her marriage into a civil partnership.

In the *Hämäläinen* case the Chamber in 2012 had found no violation of the Convention.[238] In its assessment of the complaint under Article 8 ECHR (the right to respect for private life) the Chamber had considered that there were two competing rights which needed to be balanced against each other, '[…] namely the applicant's right to respect for her private life by obtaining a new female identity number and the State's interest to maintain the traditional institution of marriage intact.' The Chamber noted that the applicant had two options: to have her marriage converted into a civil partnership, or to divorce.[239] It found that civil partnership, which provided legal protection for same-sex couples and which was almost identical to that of marriage, was a 'real option' for the applicant.[240] The Court furthermore noted that the applicant's child, would not be adversely affected if her marriage were turned into a civil partnership, as the applicant's rights and obligations arising either from paternity or parenthood would not be altered in such circumstances.[241] The Chamber concluded that a fair balance had been struck between the competing interests in the case before it and that there was therefore no violation of Article 8 ECHR.[242] In view of those findings, the Chamber found it unnecessary to examine the facts of the case separately under Article 12 of the Convention.

At the request of the applicant, the case was referred to the Grand Chamber, which in July 2014 confirmed the Chamber's finding that the Convention had not been violated in this case.[243] The Grand Chamber, however, chose a different approach in assessing the complaint under Article 8 ECHR, which it found to be applicable under both its private-life and family-life aspects.[244] Instead of examining it as a case in which the applicant's Article 8 rights had been interfered with, the Grand Chamber considered it more appropriate to analyse the applicant's complaint with regard to the positive aspect of that Article. It accordingly held that the question to be determined by the Court was:

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236 In *Schalk and Kopf* the Court itself explained that in *Parry* and *R.F.* it had '[…] considered that, should they chose to divorce in order to allow the transsexual partner to obtain full gender recognition, the fact that the applicants had the possibility to enter into a civil partnership contributed to the proportionality of the gender recognition regime complained of.' ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 53.

237 ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09.

238 ECtHR 12 November 2012, *H.* v. *Finland*, no. 37359/09.

239 *Idem*, para. 50.

240 *Idem*, para. 50.

241 *Idem*, para. 51.

242 *Idem*, para. 52.

243 ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09. While the name of the applicant had been anonymised in the Chamber judgment, it was revealed in the Grand Chamber ruling.

244 *Idem*, para. 61.

> '[…] whether respect for the applicant's private and family life entail[ed] a positive obligation on the State to provide an effective and accessible procedure allowing the applicant to have her new gender legally recognised while remaining married.'[245]

The three Judges who wrote a joint dissenting opinion to this judgment disagreed in doctrinal terms with this approach and held that the granting of a new identity card neither required any major steps by the authorities, nor entailed important social or economic implications.[246]

The Court was mindful of the fact that the applicant was not advocating same-sex marriage in general but merely wanted to preserve her own marriage.[247] However, according to the Court accepting the applicant's claim 'would in practice lead to a situation in which two persons of the same sex could be married to each other', and such was outlawed under Finnish law. The Court therefore held that it first had to examine whether the recognition of such a right was required in the circumstances by Article 8 of the Convention.[248]

The Court reiterated that Article 8 ECHR could not be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage. It noted that there was no European consensus on allowing same-sex marriages, nor was there any consensus in those States which did not allow same-sex marriages as to how to deal with gender recognition in the case of a pre-existing marriage. Because of this absence of a European consensus and because the case at stake 'undoubtedly' raised 'sensitive moral or ethical issues', the Court considered that the margin of appreciation to be afforded to the respondent State 'still' had to be a wide one.[249] The dissenters disagreed also on this point, pointing out that the margin was to be narrow, where a particularly important facet of an individual's existence or identity was at stake. Also, they adduced that proof of the existence of a consensus was not to depend 'on the existence of a common approach in a super-majority of States' and that the Court had some discretion regarding its acknowledgment of trends.[250]

The majority of the Court found that the applicant had several options under Finnish law, including maintaining the status quo, converting her marriage into a registered partnership or divorce. In respect of the second option, around which the complaint revolved, the Court held that the differences between a marriage and a registered partnership were 'not such as to involve an essential change in the applicant's legal situation' and that the applicant would be able 'to continue enjoying in essence, and in practice, the same legal protection under a registered partnership as afforded by

[245] *Idem*, para. 64.

[246] Joint dissenting opinion of Judges Sajó, Keller and Lemmens, to ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09, para. 4.

[247] ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09, para. 70.

[248] Critical on this point was Judge Ziemele in her concurring opinion to the *Hämäläinen* judgment.

[249] ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09, para. 75.

[250] Joint dissenting opinion of Judges Sajó, Keller and Lemmens to ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09, para. 5, under reference to ECtHR [GC] 7 November 2013, *Vallianatos a.o.* v. *Greece*, nos. 29381/09 and 32684/09, para. 91.

marriage'.[251] This was the third assumption underlying the majority's reasoning with which the dissenters disagreed. They felt that the majority had overlooked the fact that the applicant and her wife felt united by a religious conviction which did not allow the transformation of their relationship into a partnership.[252]

What was furthermore specific to the *Hämäläinen* case was that in the case of the conversion of her marriage into a registered partnership, the applicant and her family would not lose any of the rights which they had earlier established by marrying, and it would not affect the paternity of the applicant's child, nor the responsibility for the care, custody or maintenance of the child. The effect of the conversion of the marriage into a registered partnership on the applicant's family life would thus be 'minimal or non-existent'.[253] The Court concluded that the Convention had not been violated, noting the following:

> 'While it is regrettable that the applicant faces daily situations in which the incorrect identity number creates inconvenience for her, the Court considers that the applicant has a genuine possibility of changing that state of affairs: her marriage can be converted at any time, *ex lege*, into a registered partnership with the consent of her spouse. If no such consent is obtained, the possibility of divorce, as in any marriage, is always open to her. In the Court's view, it is not disproportionate to require, as a precondition to legal recognition of an acquired gender, that the applicant's marriage be converted into a registered partnership as that is a genuine option which provides legal protection for same-sex couples that is almost identical to that of marriage […]. The minor differences between these two legal concepts are not capable of rendering the current Finnish system deficient from the point of view of the State's positive obligation.'[254]

The applicant had further submitted before the Grand Chamber that the Court had to assess under Article 12 whether the compulsory termination of marriage affected 'the substance of the right to marry' in line with the Court's case law. The Grand Chamber, however, found as the Chamber had done, that this question had already been examined under Article 8 and had resulted in the finding of no violation of that Convention right. In these circumstances, the Court considered that no separate issue arose under Article 12, and accordingly made no separate finding under that Article.[255]

As noted above, the three dissenters in this case felt that the case had to be examined from the perspective of negative instead of positive obligations under the Convention. They concluded that the applicant had suffered an interference with her Article 8 rights and noted that the only two legitimate aims that could possibly be claimed

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[251] ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09, para. 83, referring *mutatis mutandis* to ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 109.

[252] Joint dissenting opinion of Judges Sajó, Keller and Lemmens, to ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09, para.8.

[253] ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09, paras. 84–86.

[254] *Idem*, para. 87.

[255] *Idem*, para. 97.

to be pursued by this interference were the protection of the rights and freedoms of others or morals. They were brief in rejecting the first aim, as they believed that the continuation of the applicant's marriage would have no detrimental effects for the rights and freedoms of others. Also, while acknowledging that the protection of the traditional family could be justified 'by certain moral concerns', they felt that the protection of morals did not provide sufficient justification for the interference in this case, as the government had not shown that the danger to morals was substantial enough to warrant the interference in issue. The dissenters held:

> 'The only interest in issue is, in plain terms, the public interest in keeping the institution of marriage free of same-sex couples. While we do not purport to deny the legitimacy of the State's interest in protecting the institution of marriage, we do consider that the weight to be afforded to this argument is a different question and one that must be considered separately. In our view, the institution of marriage would not be endangered by a small number of couples who may wish to remain married in a situation such as that of the applicant. In the light of the above, we are not able to conclude that the respondent State can invoke a pressing social need to refuse the applicant the right to remain married after the legal recognition of her acquired gender.'[256]

The dissenting Judges accordingly found a violation of Article 8 in this case. Given that finding, they felt that no separate issue under Article 12 arose. However, given the approach that the majority had taken, they believed that the majority should have assessed under Article 12 whether this Article also guaranteed '[…] a right to remain married unless compelling reasons justify an interference with the civil status of the spouses.'[257]

8.2.6. (Towards) a right to some form of legal recognition of (same-sex) relationships?

So far the Court has never directly addressed the question of whether the Convention imposes a positive obligation on States to introduce some form of legal recognition of same-sex relationships.[258] Although there have been cases were this issue has been (indirectly) put before it, the Court has held the answering of this question as not or no longer necessary, or 'not its task', in the respective cases. For instance, in *Schalk and Kopf*, the Court referred to the fact that the respondent State had introduced legislation on registered partnerships in the meantime (see above)[259] and

[256] Joint dissenting opinion of Judges Sajó, Keller and Lemmens to ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09, para.12.

[257] *Idem*, para.16.

[258] State of affairs on 31 July 2014.

[259] The three dissenters to this judgment were also critical in this regard. They held: 'We do not want to dwell on the impact of the Act, which came into force only in 2010, and in particular on the question whether the particular features of this Act, as identified by the Court in paragraphs 18 to 23 of the judgment, comply with Art. 14 of the Convention taken in conjunction with Art. 8, since in our view the violation of the combination of these provisions occurred in any event prior to the entry into force

in *Vallianatos* the Court explicitly stressed that the case before it was not about that general question in the abstract (see 8.2.3.4 above).

Still, in the more recent case law of the Court some hints may be found of a development towards the formulation of such an obligation.[260] The first is the fact that the Court has stressed at a number of times that practice in this area is evolving in Europe. It expressly kept the option open that at some point there would be a consensus, which could constitute a ground for the Court to apply an evolutive interpretation of the Convention on this matter. The employment by the Court of terms like 'not yet' and 'still' in the relevant case law (see 8.2.2 above)[261] may be telling in this regard.[262] Accordingly, the Court may in the future come to formulate of a (minimum) positive obligation for States to recognise same-sex relationships in some form.[263]

The Court has at the same time made clear that European consensus does not necessarily imply that a State holding on to a different position is in violation of the Convention. In *Vallianatos* the Court reiterated its older case law, where it had held that:

> 'The fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field – matrimony – which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit.'[264]

Still, in that case, Greece was obliged to change its civil union legislation in order to open it up to same-sex couples. Hence, the relevant cultural and historical traditions of the Greek society and its deep-rooted ideas about the family unit were outweighed by the individual interests of same-sex couples. It must be noted, however, that in this case the State had made the first step itself by introducing partnership legislation, and that the case was about the question of whether it could be justified that this newly introduced institute was available to different-sex couples only.

The Court has in any case expressly left States a margin of appreciation as regards the *timing* of the introduction of legislative changes in the '[...] area of evolving

of the Act.' Joint Dissenting Opinion of Judges Rozakis, Spielmann and Jebens to ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 7.

260 N.R. Koffeman, 'Case-note to ECtHR [GC] 7 November 2013, *Vallianatos a.o.* v. *Greece*, nos. 29381/09 and 32684/09', 15 *European Human Rights Cases* 2014/34 (in Dutch).

261 ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 105 and ECtHR 15 January 2013, *Eweida a.o.* v. *the United Kingdom*, nos. 48420/10 a.o., para. 105.

262 Koffeman 2014A, *supra* n. 138. See also N. Bamforth, 'Families But Not (Yet) Marriages? Same-Sex Partners and the Developing European Convention 'Margin of Appreciation', 23 *Child and Family Law Quarterly* (2011) p. 128.

263 See Cooper 2011, *supra* n. 91, at p. 1763 and Hodson 2011, *supra* n. 16, at p. 176.

264 ECtHR 18 December 1987, *F.* v. *Switzerland*, no. 11329/85, para. 33, as referred to by the Court in ECtHR [GC] 7 November 2013, *Vallianatos a.o.* v. *Greece*, nos. 29381/09 and 32684/09, para. 92.

social rights where there is no established consensus'.[265] It held that it was not to '[…] rush to substitute the legal provisions of national authorities, who [were] best placed to assess and respond to the needs of society'.[266] Accordingly, it has held that States 'not in the vanguard',[267] could not be 'criticised'[268] or 'reproached'[269] for not having introduced their civil partnership legislation any earlier. This phrasing makes one wonder if these States could have been reproached if they had introduced such legislation much later, and even more if States who have not introduced any partnership legislation could be reproached for not having introduced it at all. The answer may, again, depend on whether a European consensus can be held to exist. As the Court explained in *M.W.* v. *the UK* (2009) the UK could not be criticised because there existed at the material time no sufficient consensus:

> 'The comparative material before the Court is not such as to suggest that at the relevant point in time (10 April 2001) there was sufficient consensus among the Contracting Parties to the Convention on the formal recognition of same-sex relationships that would have significantly narrowed the United Kingdom's margin of appreciation in this respect. Nor can the enactment of the Civil Partnership Act be taken as an admission by the domestic authorities that the non-recognition of same-sex couples, and their consequent exclusion from many rights and benefits available to married couples, was incompatible with the Convention. Instead, by acting as they did and when they did, the United Kingdom authorities remained within their margin of appreciation. Moreover, the comprehensive manner in which the Act ensures equal entitlements for same-sex couples who enter into a civil partnership means that, although it was not in the vanguard, the United Kingdom is certainly part of the emerging European consensus described by the third party interveners.'[270]

This approach is understandable from the perspective that it may be very complex for the Court to decide at what point in the past consensus has come into being.[271] It may be easier for the Court to decide at some point that a consensus on legal recognition of same-sex relationships exists and to set a new standard from then on.[272]

[265] Under reference to ECtHR 27 March 1998, *Petrovic* v. *Austria*, no. 20458/92, paras. 36–43 and ECtHR [GC] 12 April 2006, *Stec a.o.* v. *the United Kingdom*, no. 65731/01, paras. 63–65.

[266] ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 62.

[267] ECtHR 23 June 2009 (dec.), *M.W.* v. *the United Kingdom*, no. 11313/02 and ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 106.

[268] ECtHR 4 November 2008 (dec.), *Courten* v. *the United Kingdom*, no. 4479/06 and ECtHR 23 June 2009 (dec.), *M.W.* v. *the United Kingdom*, no. 11313/02.

[269] ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 106.

[270] ECtHR 23 June 2009 (dec.), *M. W.* v. *the United Kingdom*, no. 11313/02.

[271] Koffeman 2010, *supra* n. 90. On this time aspect, see also the Joint partly dissenting opinion of Judges Vajic and Malinverni to ECtHR 22 July 2020, *P.B. and J.S.* v. *Austria*, no. 18984/02.

[272] In *J. M.* v. *the United Kingdom* where the relevant facts equally dated back to 2001, the Court had less difficulty in finding discrimination on grounds of sexual orientation. This case may be distinguished however, in that it concerned not the question of legal recognition of same-sex relationships as such, but a difference in treatment between unmarried same-sex couples and unmarried different-sex couples in respect of child support (see section 8.2.3.4 above). ECtHR 28 September 2010, *J. M.* v. *the United Kingdom*, no. 37060/06.

Hence, since the Court has so far noted at several occasions that a consensus in the area of legal recognition of same-sex relationships is emerging, it is conceivable, although not inescapable, that at some point it will hold this to have developed sufficiently so as to find that a lack of any such recognition is incommensurable with the Convention. The formulation of a positive obligation to provide for some form of legal recognition of same-sex relationships has also been held to be a logical consequence of the importance the Court attaches to legal recognition of *de facto* family life and the Court's finding that same-sex relationships fall within the scope of the right to respect for family life. Indeed, as Hodson has observed, it may be '[…] hard to see how family life can be fully enjoyed without some form of legal recognition being offered to those in same-sex relationships.'[273]

The exact shape that such legal recognition would have to take, remains an open question. In *Schalk and Kopf* the Court underlined that where a State chose to provide same-sex couples with an alternative means of legal recognition, it enjoyed a certain margin of appreciation as regards the exact status conferred.[274] It was thus not required that registered partnership had the same legal consequences as marriage.[275] Also, *Vallianatos* implied that such an institution would not have to exhaustively regulate for parental matters.[276]

The Court has also noted an 'evolving consensus on same-sex marriages in the European context'.[277] Nevertheless, the Grand Chamber as recent as in 2014 emphasised that 'it [could not] be said that there [existed] any European consensus on allowing same-sex marriages'.[278] Here, it seems less likely that the Court will in the near future rule differently on this point. On the other hand, the fact that it has declared Article 12 applicable to the complaint in *Schalk and Kopf*, is an important step that leaves further development of the case law in this area open.[279]

The questions raised here may be addressed in two cases that were pending before the Court at the time of conclusion of this research (i.e., 31 July 2014). The first is *Chapin and Charpentier*,[280] in which two men complained that their marriage as conducted by the Mayor of the French commune, Bègles, was subsequently declared

273 Hodson 2011, *supra* n. 16, at p. 176.

274 ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 108, ECtHR 15 March 2012, *Gas and Dubois* v. *France*, no. 25951/07, para. 66 and ECtHR [GC] 19 February 2013, *X. a.o.* v. *Austria*, no. 19010/07, para. 106.

275 Hodson considered it likely that the Court would '[…] tolerate a degree of differentiation between marriage and registered partnership for some time to come.' Hodson 2011, *supra* n. 16, at p. 177.

276 The Court considered it 'possible for the legislature to include some provisions dealing specifically with children born outside marriage, while at the same time extending to same-sex couples the general possibility of entering into a civil union.' ECtHR [GC] 7 November 2013, *Vallianatos a.o.* v. *Greece*, nos. 29381/09 and 32684/09, para. 89.

277 ECtHR 12 November 2012, *H.* v. *Finland*, no. 37359/09, para. 49.

278 ECtHR [GC] 16 July 2014, *Hämäläinen* v. *Finland*, no. 37359/09, para. 74.

279 *Idem*, para. 61. Hodson also observed that '[…] the Court's decision on Article 12 [contained] progressive elements and hints at a future in which the right to marry is extended to same-sex couples […]. Hodson 2011, *supra* n. 16, at p. 173.

280 *Chapin and Charpentier* v. *France*, no. 40183/07, application lodged 6 September 2007.

null and void by the courts.[281] The other set of pending cases is potentially even more interesting. These concern complaints originating from Italy about refusals of the Italian authorities to register same-sex marriages contracted abroad. Apart from this cross-border aspect – which is of course highly relevant to the present research (see also 8.3.1 and 8.3.2 below) – the complaints also concern the fact that in Italy it is impossible for same-sex couples to obtain any legal recognition of their relationship.[282] Because there is no national partnership legislation to refer to, it seems inescapable that the Court will have to examine whether a sufficient consensus has evolved for the Court to rule that the right to respect for private and family life requires States to provide for some form of legal recognition of same-sex couples. If it indeed rules accordingly, another question – which is most likely to be answered in the affirmative – is whether that alternative registration form must then be available to different-sex couples (see 8.2.3.4 above).

8.3. Cross-border cases

As yet there have not been any cross-border cases decided by the Court in matters directly pertaining to this case study.[283] There are, however, very interesting (mostly Italian) cases pending. Further, inspiration for deciding these cases may be drawn from a handful of other cross-border cases. For example, an often quoted judgment in this context has been *Wagner* (2007),[284] in which the Court held that a Peruvian single-parent adoption decision had to be recognised in Luxembourg. As also discussed in Chapter 2, section 2.4.2, the Court noted that there was a consensus in Europe on single-parent adoption and stressed that the child's best interests were paramount in such a case. It concluded that the right to respect for family life as protected by Article 8 ECHR had been violated as the Luxembourg courts could not reasonably have refused to recognise the family ties that pre-existed *de facto* between the child and its adoptive mother.[285] The case has been held to be a possible authority for the claim that respect for family life requires States to recognise civil statuses legally established elsewhere.[286] The subsequent cross-border surrogacy cases *Mennesson* and *Labasssee* (2014) – that were decided on the basis of the right

281 The Court communicated the application to the French Government on 7 April 2009 and put questions to the parties under Art. 14 (prohibition of discrimination) in conjunction with Art. 12 (right to marriage) and in conjunction with Art. 8 (right to respect for private and family life) of the Convention.

282 *Orlandi and Others* v. *Italy*, no. 26431/12 a.o., applications lodged on 20 April 2012 and subsequent dates. The Court communicated the applications to the Italian Government on 3 December 2013 and put questions to the parties under Art. 8 (right to respect for private and family life) and under Art. 14 (prohibition of discrimination) read in conjunction with Art. 8 and/or Art. 12 (right to marry) of the Convention. See also *Enrico Oliari and A.* v. *Italy and Gian Mario Felicetti a.o.* v. *Italy*, nos. 18766/11 and 36030/11, lodged on 21 March 2011 and 10 June 2011 respectively.

283 It is recalled that this research was concluded on 31 July 2014.

284 ECtHR 28 June 2007, *Wagner and J.M.W.L.* v. *Luxembourg*, no. 76240/01.

285 See also ECtHR 3 May 2011, *Negrepontis-Giannisis* v. *Greece*, no. 56759/08.

286 J. Rijpma and N. Koffeman, 'Free Movement Rights for Same-Sex Couples Under EU Law; What role to Play for the CJEU?', in: D. Gallo et al. (eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Berlin, Springer 2014) p. 455 at pp. 462–463.

to personal identity of the child (see Chapter 2, section 2.4.2) – may also prove relevant in this regard.

8.3.1. Recognition of foreign same-sex marriages and partnerships

In 2010 a complaint was lodged with the Court by two Russian women, Irina Fedotova-Fet and Irina Shipitko, who had married in Canada in 2009.[287] They complained about the refusal of the Russian authorities to register their marriage in the Russian register on the ground that under the Russian Family Code a marriage could only be registered between a man and a woman. Before this case was given an application number, it disappeared from the Court's docket and could no longer be traced in the search engine *HUDOC* on the Court's website, for reasons unknown to the present author.[288] Yet earlier, however, another set of cases concerning the recognition of foreign same-sex marriages, this time originating from Italy, had been brought before the Court.[289] These cases were still pending at the time this research was concluded (i.e., 31 July 2014).

8.3.2. Refusal of a residence permit to a same-sex partner

In September 2009 a same-sex couple, one of whom is an Italian and the other a New Zealand national, made an application to the ECtHR against Italy (see also 8.2.6 above).[290] They complained that the Italian authorities had refused to issue the second applicant with a residence permit because the national immigration legislation did not allow unmarried partners to obtain a family member's residence permit. The applicants claimed that they had no other means of living together as a couple in Italy. At the time of writing, these cases are still pending for the Court.

8.3.3. Cross-border cases involving children

So far the ECtHR has not decided any cross-border cases involving a same-sex couple with children and the present author is not aware of any such cases pending. As discussed extensively in Chapter 2, the Court has, however, decided cross-border surrogacy cases. The judgments in *Mennesson* and *Labassee* are also relevant for same-sex couples who engage in international surrogacy, in any case as long as one of them is genetically related to the child. In these cases the Court ruled that a refusal to recognise the legal parenthood of a father whose genetic children were born

[287] According to an earlier version of the ECtHR's factsheet on 'Sexual orientation issues' the complaint by Fedotova-Fet and Shipitko v. Russia, was lodged on 21 July 2010.

[288] See also www.archive.gayrussia.eu/en/inf/detail.php?ID=16197, visited October 2010.

[289] *Orlandi and Others* v. *Italy*, no. 26431/12 a.o., applications lodged on 20 April 2012 and subsequent dates.

[290] *Taddeucci and McCall* v. *Italy*, no. 51362/09, application lodged in September 2009 and communicated to the Italian Government on 10 January 2012.

following surrogacy arrangements abroad, violated the right to respect for private life of the children concerned, in particular their right to personal identity. There is no indication in the judgments that this reasoning would not apply if the intended parents had been a same-sex couple. This is even more so, now that the reasoning adopted by the Court in *Mennesson* and *Labassee* did not focus on the (non-genetic) intended mother, while no importance was attached to the civil status of the intended parents (in those cases spouses).[291]

8.4. Conclusions

A number of findings of the ECtHR have been important for the advancement of the rights of persons with a homosexual orientation and (consequently) for same-sex couples. The first is the finding that a person's sexual orientation forms part of the most intimate aspects of private life and that consequently discrimination on grounds of sexual orientation requires particularly serious reasons by way of justification. The other is the finding that same-sex relationships come within scope of right to respect for private *and* family life under Article 8 ECHR.

When it comes to legal recognition of same-sex relationships, however, no enforceable rights have followed from the ECtHR's case law. The Court has acknowledged that same-sex couples have, just as much as different-sex couples, a 'need for legal recognition of their relationship',[292] and has even ruled that they come within the scope of the right to marry (Article 12 ECHR). Still it has not (yet) ruled that they therefore have a right to (some form of) legal recognition of their relationship. For one thing, they do not have a right under the Convention to marry. The Court has repeatedly held that 'marriage' under Article 12 ECHR concerns traditional marriage between a man and a woman only. While it has noted that the institution of marriage has undergone 'major social changes since the adoption of the Convention', it has attached decisive value to the lack of European consensus on this point. It has been noted that by holding on to this traditional concept of marriage, '[t]he Court is in danger of treating marriage as an untouchable, almost sacred, category.'[293]

In cases where same-sex couples claimed that they were treated unequally from different-sex couples, the special status of marriage has often been a ground for not even finding comparability in the situations of same-sex couples and those of different-sex couples, or in any case for justifying a difference in treatment between these groups. The fact that same-sex couples did not at all have access to marriage, was not considered to have a bearing on these findings.

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291 Compare N.R. Koffeman, 'Case-note to ECtHR 26 June 2014, *Mennesson* v. *France*, no. 65192/11 and ECtHR 26 June 2014, *Labassee* v. *France*, no. 65941/11', 15 *European Human Rights Cases* 2014/222 (in Dutch).

292 ECtHR 24 June 2010, *Schalk and Kopf* v. *Austria*, no. 30141/04, para. 99.

293 Hodson 2011, *supra* n. 16, at p. 177.

Generally, in discrimination cases, the Court has held it determinative whether 'a special legal status' was involved – in other words 'a public undertaking, carrying with it a body of rights and obligations of a contractual nature'. Only where no such status was involved, has the Court applied its strict scrutiny test for cases involving a difference in treatment on grounds of sexual orientation. In those cases the Court has furthermore tested if the relevant national law was coherent (*X. and Others* v. *Austria* (2013)). In this context it has been submitted that there is also Strasbourg case law that implies that civil status in itself is a suspect ground, that attracts a weighty reasons test,[294] but such a finding has clearly not been upheld in cases involving same-sex couples. Further, the critique has been issued that by taking this formalistic approach, the Court has overlooked the indirect discrimination involved in cases where same-sex couples simply had no access to a particular civil status.[295] The Court's approach in these cases has also been held as being more difficult to reconcile with those cases in which it held that the applicants could and should have resorted to alternative forms of registration.[296]

In cases concerning parental matters, the Court has accepted protection of the family in the traditional sense, as well as the best interests of the child, as legitimate aims for a difference in treatment, but it has been increasingly stricter in its examination of the proportionality of the measure in these cases. In choosing means to protect the family, States must take into account developments in society and changes in the perception of social and civil status and relationship issues. An examination of each individual case must also be made possible, as that is most in keeping with the best interests of the child. In *X. and Others* v. *Austria*, the Court even concluded that it was in fact in the interest of the child that no difference in treatment was made between same-sex couples and different-sex couples in respect of second-parent adoption. While the Court has not adopted reasoning purely from the perspective of the child, as advocated by some of its Judges,[297] it has increasingly taken the bests interests of the child into account in its reasoning. It has at the same time accepted that biological differences between different-sex couples and same-sex couples, decisively distinguish these groups in respect of parental matters.

The Court has accepted that a consensus in respect of alternative forms of registration for same-sex couples is evolving in Europe and in its case law some hints can be found that the Court may go in the direction of the definition of a positive obligation for the States to provide for some form of legal recognition of same-sex relationships. This precise question has to date only come indirectly before the Court, and in those cases the Court – for different reasons – has not addressed the matter. It therefore remains to be seen what the future case law may bring in this regard. What is clear, is that, *when* States choose to provide for some alternative form of registration, they must guarantee that this alternative registration option is also accessible for

294 Koffeman 2011A, *supra* n. 126.
295 *Idem*.
296 Koffeman 2014A, *supra* n. 138.
297 Dissenting opinion of Judge Villiger to ECtHR 15 March 2012, *Gas and Dubois* v. *France*, no. 25951/07. See section 8.2.3.2 above.

same-sex couples. States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition, and the Court has indicated that differences between same-sex partners and different-sex partners in respect of parental matters could potentially be justified.

All in all, from the case law as discussed in this chapter it becomes clear that States are generally given a lot of room in this area of law. Because marriage has 'deep-rooted social and cultural connotations differing largely from one society to another', States may each decide for themselves whether or not they want to open up marriage to same-sex couples. They are furthermore free to grant certain rights or entitlements only to couples with a specific civil status, even when that status is not accessible for same-sex couples. Where no such special status is involved, however, the Court has been much stricter, and in cases concerning parental matters it has increasingly ruled out discrimination on grounds of sexual orientation on the basis of the best interests of the child.