Caught in a Balancing Act: The European Court of Human Rights and the Road to Recognition for Sexual Minorities

Liesker, H.J.

OSLO LAW REVIEW

SCANDINAVIAN UNIVERSITY PRESS

RESEARCH PUBLICATION

Volume 4, No. 3-2017, p. 172–194
ISSN online: 2387-3299
10.18261/issn.2387-3299-2017-03-04

Caught in a Balancing Act

The European Court of Human Rights and the Road to Recognition for Sexual Minorities

Henriette Jakobien Liesker
Research Assistant at the Norwegian Centre for Human Rights, University of Oslo
jet_l@live.nl

ABSTRACT

When the European Convention on Human Rights was drawn up in 1948, the issues of sexual orientation and gender identity were not considered by its drafters. At that time, the discussion of the rights of LGBT people (Lesbian, Gay, Bisexuals and Transsexuals), which has at present become very vivid, was virtually non-existent. As a consequence, the legal protection provided to heterosexual and cisgender people in the areas covered by the right to respect for private and family life (Article 8), the right to marry and found a family (Article 12), and the prohibition of discrimination (Article 14) was inaccessible to the non-heterosexual and non-cisgender community. The current article elucidates on the topic of the gradual opening up of the European Court of Human Rights in applying the Convention to sexual minorities, and argues that the Court has made significant progress in defending the rights of LGBT ever since its installation in 1959. The article describes the Court's ultimate balancing act, in which it oscillates between progressiveness and reticence, never fulfilling the role of protagonist but still aiming at providing a most fundamental principle of human rights law: equality.

Keywords

Sexual minorities, European Court of Human Rights, European Convention on Human Rights, sexual orientation, gender identity, discrimination

1 INTRODUCTION

With the landmark judgments *Dudgeon v United Kingdom* (1981)[1] and *Christine Goodwin v United Kingdom* (2002),[2] the European Court of Human Rights (the Court) opened the floodgates for other cases involving human rights protection for lesbian, gay, bisexual, and transgender (LGBT) people. Since then, the Court has handed down an extensive body of judgments dealing with sexual orientation and gender identity issues. These judgments have, however, not always been consistent and, at times, have even been paradoxical, which has led to a lack of legal certainty for the sexual minorities involved.[3]

One obvious explanation for the inconsistency in the Court's judicial discourse is that legal protection extended to LGBT people is still an evolving area of law and one that was not anticipated by the drafters of the European Convention on Human Rights (Convention) in the late 1940s. European states have not yet reached consensus on a great deal of issues relating to sexual minorities, which is clearly reflected in diverging state practices. Each of the current 47 Council of Europe member states maintain their own domestic laws and handle their own legal practices regarding this topic. Cognizant of this divisive nature of the issue among European countries, the Court generally allows them a large margin of appreciation when deciding to concede or refute their state practices. Although the Court thus does not seek to impose European uniformity at all cost, it does wield its power to go against national decisions, in order to fulfil its protective role effectively.

The fact that the Convention refers neither to 'sexual orientation' nor to 'gender identity', let alone defines these terms, considerably undercuts that role. Perhaps most problematic is the fact that these terms are missing from the Convention's list of prohibited grounds of discrimination, which otherwise ensures equal treatment regardless of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[4] As a consequence, the Convention does not prohibit discrimination against sexual minorities, which significantly complicates, and arguably curbs, the Court's attempts to define legal safeguards.

Operating within what appears to be a legal vacuum, the Court has to derive such safeguards from the extant corpus of human rights as implicit within it. In effect, this means that the Court has to strike a balance between, on the one hand, interpreting the Convention 'creatively'[5] when faced with complaints relating to sexual orientation and gender identity issues and, on the other hand, not overstepping its boundaries by appropriating for itself a role as legislator. It is through such judicial creativity that the Court has been

1. *Dudgeon v United Kingdom*, no 7525/76, ECtHR, 22 October 1981. The first successful complaint relating to homosexuality in the European Court of Human Rights.
2. *Christine Goodwin v United Kingdom*, no 28957/95, ECtHR [GC], 11 July 2002. The first successful complaint relating to transsexuality in the European Court of Human Rights.
3. The terms 'sexual minorities' and 'LGBT people' are used interchangeably throughout the article.
4. Article 14 European Convention on Human Rights.
5. Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 *Human Rights Law Review* 57.

able to play a pivotal role in the progressive development of LGBT rights in contemporary Europe, albeit not an uncontested one.[6]

While, as a matter of principle, member states are the key policy-makers in determining the scope of the rights guaranteed by the Convention, the Court has increasingly proven to be a vital backstop when national laws have failed to protect sexual minorities. The Court has stepwise challenged discrepancies between the *lex lata* and the demands and needs of sexual minorities in modern-day societies. The Court has mainly intervened in those cases that involve restrictions on private life, family life and marriage. Thence questions, pertaining to the most intimate aspects of life, such as sexuality, gender identity, matrimony, and parenthood, have found their way to the protective realm of the Court, and are no longer at the sole discretion of state powers. To this end, three Convention rights have played a key role: the right to respect for one's private and family life (Article 8), the right to marry and to found a family (Article 12), and, finally, the prohibition on discrimination (Article 14).[7]

In brief, this article analyses cases that have challenged restrictions on the aforementioned rights, and argues that the Court's rulings have substantially changed the legal position of sexual minorities under the Convention. It shows how these rulings have progressively contested the heteronormative[8] and cisnormative[9] morality of European societies, and, as such, increasingly compelled individual member states to protect sexual minorities under their national legal systems. It further argues that the Court's judgments in these rulings have, however, not always been consistent and that the Court is seen to fluctuate between change and immutability, often to the detriment of sexual minorities' legal certainty and quest for equality. The article starts (in section 2) with cases which concern the rights of the LGBT *individual*, and then in (in section 3) moves on to the rights of the LGBT *couple*; the order of presentation mirroring historical developments.

6. At this point it should be noted that whether, and to what extent, the heteronormative (see n 8) and cisnormative (see n 9) legal order is upheld through the Court's practice and related human rights innovations, is highly contested by queer legal theorists. In brief, queer legal theory explores and disputes the categorisation of gender and sexuality and challenges the law's and, hence, the Court's reliance on a male/female binary. This topic, however, greatly exceeds the scope of this article; for an initial introduction, see e.g. Damian A. Gonzalez-Salzberg, 'The Making of the Court's Homosexual: A Queer Reading of the European Court of Human Rights' Case Law on Same-sex Sexuality' (2014) 65 *Northern Ireland Legal Quarterly* 371; Genevieve R. Painter, 'Feminist Legal Theory' *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier 2015) 918; Dianne Otto (ed.), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge 2017).
7. To a lesser degree, the Court has also heard cases involving issues germane to sexual orientation and gender identity under Article 6 (the right to a fair trial), Article 10 (the right to freedom of expression) and Article 11 (the right to freedom of assembly and association) of the Convention. Moreover, since 2011 it has also accepted some Article 3 (prohibition of torture) complaints. Discussions of these cases, however, go beyond the scope of this article and are therefore not included.
8. A morality that promotes heterosexuality as the normal or preferred sexual orientation.
9. A morality that assumes that one's gender (psychological) matches one's sex (biological). See e.g. Carmen H. Logie, LLana James, Wangari Tharao, Mona R Loutfy, '"We Don't Exist": A Qualitative Study of Marginalization Experienced by HIV-positive Lesbian, Bisexual, Queer and Transgender Women in Toronto, Canada' (2012) 15 *Journal of the International AIDS Society*.

2 FROM DUDGEON TO GOODWIN: FIRST STEPS AND BROADER PERSPECTIVES

2.1 An unprecedented first move: The decriminalisation of homosexual activity

From the moment the Court first assumed its tasks in 1959, it staunchly rejected any and all applications relating to sexual orientation.[10] Although not necessarily different in content from earlier applications—the vast majority of the complaints so far had related to the criminalisation of (private) sexual activity—*Dudgeon v United Kingdom* (1981) would represent the long-awaited breakthrough in the Court's practice of dismissing petitions relating to homosexuality.

In the present case, the applicant complained about laws in force in Northern Ireland according to which homosexual acts between consenting adult males constituted a criminal offence. The applicant's house had been searched by police for drugs. On this occasion, private correspondence and diaries were confiscated. Since homosexual activities were described in these documents, the applicant was questioned by police about his private and sex life. In light of these events, the question arose of whether law criminalising male sexual behaviour was necessary for the protection of morals and the rights and freedoms of others in Northern Ireland.

Where it had previously accepted that member states enjoy a rather wide margin when it comes to the protection of morals,[11] the Court now felt that the state's interest in morality could no longer justify the criminalisation of private homosexual relations between two consenting adults.[12] It argued that such relations constituted a most intimate aspect of a person's *private* life, and that particularly weighty reasons would have to be brought forward in order to justify any interference by the state.[13] For lack of such reasons, the Court narrowed down the state's margin of appreciation and found that there had been a violation of the first limb of Article 8: *i.e.* the *privacy* guarantee.[14] In arriving at this conclusion, the Court took notice of an emerging consensus across member states that consensual homosexuality between adults in private ought not to be considered a crime.[15] Indeed, by the time the *Dudgeon* judgment was delivered, many European countries had already decriminalised homosexuality. It would therefore seem as if the Court merely consolidated what was already common practice in all but few member states. *Dudgeon* nevertheless represented a milestone in the legal history of European sexual minority rights for a variety of reasons.

First, *Dudgeon* succeeded where all of its predecessors had failed: it irreversibly opened up the Convention to sexual minorities, who had now established precedence. Second, by establishing that laws penalising homosexual acts run counter to the aims and objectives

10. For a complete overview of all applications lodged with the Court and the (former) Commission relating to sexual orientation see Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013).
11. *Handyside v United Kingdom*, no 5493/72, ECtHR, 7 December 1976.
12. *Dudgeon* (n 1) § 61.
13. Ibid, § 52.
14. Ibid, § 63.
15. Ibid, § 60.

of the right to respect for privacy, the Court established a minimum safeguard for sexual minorities under the Convention. Third, by turning national trends into a European standard, it urged those states 'lagging behind' to change their policies accordingly. Prior to *Dudgeon*, reform of the disputed law was obstructed by the strong opposition of Protestants in Northern Ireland; but shortly after the ruling became final, Northern Ireland decriminalised homosexual acts. Last, it cleared the way for the later similar rulings *Norris v Ireland* (1988)[16] and *Modinos v Cyprus* (1993),[17] which illustrated not only a fundamental change in societal attitudes toward homosexuality in Europe, but also the Court's willingness to respond to and foster that change accordingly.

Notwithstanding the successes of these three cases, legal scholars observed that the progressive attitude of the Court towards sexual minority issues was limited to the *decriminalisation* of homosexuality and that the Court did not provide comprehensive rulings based on more fundamental issues related to *discrimination*.[18] Indeed, every complaint brought to the Court after *Dudgeon*, *Norris* and *Modinos* was either declared inadmissible or the contested action was deemed not to disaccord with the Convention.[19]

2.2 Subsequent steps: Sexual orientation as a prohibited ground of discrimination

Nearly 16 years after the Court first committed itself to protecting consensual adult homosexual relations against criminal sanctions imposed by European authorities, the European Commission of Human Rights (Commission)[20] took an important next step. In *Sutherland v United Kingdom* (1997),[21] the Commission condemned the domestic courts' practice of differentiating between age of consent for same-sex and different-sex sexual activity. It considered the minimum age for lawful homosexual activities being set at eighteen rather than sixteen (the norm applied to heterosexual activities) to be in violation with the right to respect for private life under Article 8.[22] This was significant not only because it expanded

16. *Norris v Ireland*, no 10581/83, ECtHR, 26 October 1988. This judgment led to the establishment of the Criminal Law (Sexual Offences) Act in 1993, which effectively repealed the contended Irish laws that penalised homosexual conduct.
17. *Modinos v Cyprus*, no 15070/89, ECtHR, 22 April 1993. After various draft laws had been put before it, the Cypriot Parliament was finally forced to decriminalise homosexuality with this ruling, which it did in 1998.
18. See for example: Laurence R. Helfer, 'Finding A Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights' (1990) 65 *New York University Law Review* 1045; Michael T. McLoughin, 'Crystal or Glass?: A Review of Dudgeon v. United Kingdom on the Fifteenth Anniversary of the Decision' (1996) 3 *Murdoch University Electronic Journal of Law* 85; Yuval Merin, *Equality for Same-sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (The University of Chicago Press 2002) 312.
19. Paul Johnson, 'Chronological List of Decisions and Judgments of the European Court of Human Rights and former European Commission of Human Rights in Respect of Homosexuality' (2015). Accessed February 2017, available at: https://docs.google.com/file/d/0ByFm9fY-KH05bl8xekNXdGc2Zkk/edit.
20. Originally the Convention's enforcement mechanism consisted of two distinct components: the European Court of Human Rights and the European Commission of Human Rights. Following the entry into force of Protocol no 11 in 1998, however, the Court became a permanent, full-time Court with compulsory jurisdiction, and as such assumed all of the Commission's review functions from screening to final judgment.
21. *Sutherland v United Kingdom*, no 25186/94, ECommHR, 1 July 1997.
22. Ibid, §§ 64, 66.

the context in which the privacy limb of Article 8 applied to sexual minority cases, but also because the Commission believed that, since two groups in 'relevantly similar situations' were treated unequally, the difference in minimum age reached the threshold of *discriminatory treatment* and thus brought into play Article 14 of the Convention.[23]

Despite being appealed to by sexual minorities in various cases, Article 14 complaints had, thus far, not been entertained by the Court.[24] By arguing that the *Sutherland* complaint should be examined under Article 8, taken in conjunction with Article 14,[25] the Commission brought the issue of (sexuality) discrimination to the foreground, which required the Commission to clarify the scope of Article 14 with respect to sexual orientation. In doing so, the Commission did not seem to be hindered by the absence of an explicit reference to 'sexual orientation' in the list of prohibited discriminatory grounds enumerated in Article 14. Leaving open whether the difference in treatment on the basis of 'sexual orientation' should be accommodated under 'sex' or 'other status', the Commission cited the Convention's quality as a 'living instrument'[26] and decided that 'in either event, it is a difference in respect of which the Commission is entitled to seek justification'.[27] This was monumental because it established that sexual orientation fell within the scope of the non-discrimination grounds contained in Article 14. This meant that, from this moment forward, differences based on sexual orientation required particularly serious reasons by way of justification in the same way as differences based on, for example, sex or race. This judgment thus significantly curtailed the virtually unlimited discretion member states had thus far enjoyed in similar cases.

Interestingly enough, only about half of the contracting states had adopted an equal age of consent by the time the *Sutherland* decision was issued. The Commission's willingness to deal with cases pertaining to discrimination, even though there was no European consensus based on an overwhelming majority of states, demonstrated—in contrast to what the *Dudgeon* line of cases would have suggested—an even greater discretion in identifying an evolving socio-legal development than had been the case so far.

In terms of the Convention, *Sutherland* implied that, from now on, the principle of equal treatment of homosexuals and heterosexuals under the law was a principle contained

23. Article 14 provides that enjoyment of the rights under the Convention shall be secured without discrimination. It imposes a duty on the state and public authorities not to discriminate on the listed grounds or 'other status', unless the discrimination can be justified; as established by the Court's case law, 'particularly weighty and convincing reasons' should be brought forward in order for the difference in treatment to be justifiable. The right may not be invoked by someone wishing to complain of discrimination but unable to establish that another free-standing Convention right is engaged. Hence, Article 14 must be pleaded in relation to one of the substantive rights in the Convention. In the majority of the cases relating to sexual minority rights, Article 14 is raised in conjunction with Article 8.
24. Pertinent examples include: *Handyside v United Kingdom*, no 5493/72, ECtHR, 7 December 1976; *X. v United Kingdom*, no 7215/75, ECtHR, 5 November 1981; *Dudgeon v United Kingdom*, no 7525/76, ECtHR, 22 October 1981, and *Laskey, Jaggard and Brown v United Kingdom*, nos. 21826/93, 21627/93, 21974/93, ECtHR, 19 February 1997.
25. *Sutherland* (n 21) § 32.
26. The Court first ruled that the Convention is to be seen as a living instrument, which must be interpreted in the light of present day conditions, in *Tyrer v United Kingdom*, no 5856/72, ECtHR, 25 April 1978.
27. *Sutherland* (n 21) § 51.

within the Convention. This also affected legislation on the domestic level; thus the ruling prompted the British government to set the age of consent for all to sixteen.[28] *Sutherland* also showed how a ruling against *one* state potentially triggers a 'domino effect' in that it may result in policy changes in other contracting states as well. For example, the Hungarian and Portuguese constitutional courts relied heavily on the *Sutherland* ruling when they declared their own unequal age-of-consent laws unconstitutional.[29]

Shortly afterwards, the Court had the opportunity to build on the precedent the Commission had established in *Sutherland*. In the 1999 *Smith and Grady v United Kingdom*[30] and *Lustig-Prean and Beckett v United Kingdom*[31] decisions, it was asked to examine the discriminatory policies maintained in the British armed forces towards homosexuals. Rather than using the groundwork provided by the Commission, the Court followed the *Dudgeon* approach instead: it searched for and did not find particularly weighty reasons to justify the interference with the right to respect for *privacy* under Article 8, leaving the discriminatory possibilities of Article 14 unused.

Although the United Kingdom's blanket ban on homosexuals in the army was successfully challenged, the Court, by focusing exclusively on Article 8, addressed only the *consequences* of the policy rather than the *discriminatory substance* of the policy itself. Arguably, the Court failed to 'significantly address the more basic human rights ideal of equality'.[32] Indeed, a structural weakness in the Court's reasoning, observable in most of the cases discussed so far, was the profound lack of analysis of what the principle of non-discrimination implies in the specific context of discrimination on the basis of sexuality. Later the same year, however, the Court changed direction and began to acknowledge the importance of the Convention requirement of non-discrimination in cases revolving around sexual orientation.

It did so for the first time in the case of *Salgueiro Da Silva Mouta v Portugal* (1999).[33] The Court applied a standard of strict scrutiny as regards a distinction made on the basis of homosexuality, and found that a judge's denial of child custody to a gay father was a *discriminatory* violation of privacy.[34] The Court explicitly held that sexual orientation was 'undoubtedly'[35] covered by the non-discrimination guarantee of the Convention and thus changed earlier practice, where it repeatedly found it unnecessary to conduct a review of

28. Sexual Offences (Amendment) Act 2000 (United Kingdom). Under 'Explanatory notes' of the Amendment Act, at 5-6 ('Background'), a reference is made to the *Sutherland* case: '…in accordance with an agreement reached in the cases before the European Court of Human Rights of Sutherland …'. Accessed September 2017, available at: http://www.legislation.gov.uk/ukpga/2000/44/notes.
29. Laurence L. Helfer and Erik Voeten, 'Do European Court of Human Rights Judgments Promote Legal and Policy Change?' (2010) unpublished paper 89. Accessed at 1 February 2017, available at: http://www.law.uchicago.edu/files/files/HelferVoeten.Chicago.IL_.Workshop.14April.2011.pdf.
30. *Smith and Grady v United Kingdom*, nos. 33985/96 and 33986/96, ECtHR, 27 September 1999.
31. *Lustig-Prean and Beckett v United Kingdom*, nos 31417/96 and 32377/96, ECtHR, 27 September 1999.
32. The Harvard Law Review Association, 'International Law – Human Rights – European Court of Human Rights Rules That British military's Discharge of Homosexuals Is Illegal. Lustig-Prean and Beckett v. United Kingdom, App. Nos. 31417/96 and 32377/96 (Eur. Ct. H. R. Sept. 27, 1999), and Smith and Grady v. United Kingdom, App. Nos. 33985/96 and 33986/96 (Eur. Ct. H. R. Sept. 27, 1999)' (2000) 113 *Harvard Law Review* 1563.
33. *Salgueiro Da Silva Mouta v Portugal*, no 33290/96, ECtHR, 21 December 1999.
34. Ibid, §§ 29-36.
35. Ibid, § 28.

the claimed discrimination issue.[36] This marked the true beginning of the Court's effort to dismantle discriminatory laws on the basis of sexual orientation. In subsequent endeavours, the Court decried various domestic laws for discriminating against homosexuals, for instance in the regulation of housing provision,[37] insurance benefits[38] and the payment of child maintenance.[39]

2.3 The 'T' in LGBT: Gender recognition

Although part of the same denominator, transsexual and homosexual people have had a different trajectory towards legal recognition under the Convention. Five years after the gay civil rights movement experienced their first regional success with *Dudgeon*, the transgender community suffered a legal setback with *Rees v United Kingdom* (1986).[40]

Rees represented the first regional attempt to bridge the gap between a transsexual's *apparent* sex and his or her *legal* sex. The case revolved around a female-to-male transsexual, who argued that the United Kingdom infringed upon his right to respect for private life by refusing to change the sex on his birth certificate. This refusal not only caused him humiliation whenever he had to show his birth certificate, it also meant that he would still be treated as a female in the legal sense, which (1) significantly affected his possibilities to marry, (2) prevented him from claiming specific pension rights, and (3) automatically excluded him from certain employments.

In reviewing this case, the Court had to decide whether a *positive* obligation existed under Article 8 of the Convention on the part of the responding state to alter its legal system, and was reluctant to do so.[41] The Court considered the issue in the *Zeitgeist* of Europe in the 1980s and felt inclined to permit a very wide margin of appreciation to the United Kingdom because little common ground between member states existed on this subject.[42] The law appeared to be in a transitional stage, and it would therefore be unfair to require the United Kingdom to change their method of registry at this moment in time.[43] Notwithstanding the fact that the Court concluded there to be no violation of Article 8, it was careful not to be too definite on the matter and left the door open to future re-interpretation:

> It must for the time being be left to the respondent state to determine to what extent it can meet the remaining demands of transsexuals. However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances. The need for appropriate legal

36. See for example *Dudgeon* (n 1) §§ 64-70.
37. *Karner v Austria*, no 40016/98, ECtHR, 24 July 2003, and *Kozak v Poland*, no 13102/02, ECtHR, 2 March 2010.
38. *P.B. and J.S. v Austria*, no 18984/02, ECtHR, 22 July 2010.
39. *J.M. v United Kingdom*, no 37060/06, ECtHR, 28 September 2010.
40. *Rees v United Kingdom*, no 9532/81, ECtHR, 17 October 1986.
41. Ibid, § 44.
42. Several member states had, through legislation, by means of legal interpretation or by administrative practice, given transsexuals the option of changing their personal status to fit their newly-gained identity. In other states, however, such an option did not (or did not yet) exist.
43. *Rees* (n 40) § 37.

> measures should therefore be kept under review having regard particularly to scientific and societal developments.[44]

Although the Court would show similar leniency towards the responding state in the subsequent cases *Cossey v United Kingdom* (1990)[45] and *Sheffield and Horsham v United Kingdom* (1998),[46] the last case showed the Court's impatience on the matter and the push for legislative change:

> The Court cannot but note that despite its statements in the Rees and Cossey cases on the importance of keeping the need for appropriate legal measures in this area under review … it would appear that the respondent state has not taken any steps to do so …
>
> There is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it finds no breach of Article 8 in this case, the Court reiterates that this area needs to be kept under review by contracting states.[47]

The long anticipated change in the interpretation of transgender cases came in the landmark ruling *Christine Goodwin v United Kingdom* (2002). Virtually no different from the earlier cases *Rees*, *Cossey* and *Sheffield and Horsham*, the *Christine Goodwin* case revolved around a (male-to-female) transsexual who complained of the lack of legal recognition of her changed gender and, in particular, her treatment in terms of employment, social security and pension rights, and her inability to marry. By the time the case made its way to the Strasbourg chambers, the Court found that the issue could no longer be regarded as a matter of controversy.[48] Seated as a Grand Chamber, it decided that there was clear and uncontested evidence of an international trend towards increased social acceptance of transsexuals and of legal recognition of the new sexual identity of post-operative transsexuals.[49] The Court also relied heavily on the notion of 'personal autonomy',[50] a concept integrated in Article 8's privacy guarantee, which from now on should be understood as to cover also the right to establish one's *personal identity* and thus *gender* identity.[51] As such, the Court found a way to circumvent the fact that the Convention does not explicitly protect transgender rights. Rather than attempting to shape legal safeguards specifically applicable to sexual minorities, it chose to protect personal identity. The Court consequently denied the respondent state's claim that the matter fell within their margin of appreciation, and instead concluded in favour of the applicant.

44. Ibid, § 47.
45. *Cossey v United Kingdom*, no 10843/84, ECtHR, 27 September 1990.
46. *Sheffield and Horsham v United Kingdom*, no 22985/93, ECtHR, 30 July 1998.
47. Ibid, § 60.
48. *Christine Goodwin* (n 2) § 90.
49. Ibid, §§ 56, 85. Although the Court acknowledged that there was still only an 'emerging' consensus and that a common European approach to the matter had yet to materialise, it could look at 'the clear trend towards giving full recognition' that it found in the law of some non-European states.
50. Ibid, § 90. The concept of a right to a private life encompasses the importance of personal autonomy. The right to personal autonomy includes physical and psychological integrity, *i.e.* the right not to be physically interfered with.
51. Ibid, §§ 77, 90.

The impact of the ruling was substantial: as a direct consequence, the United Kingdom introduced a system whereby transsexuals could apply for a gender recognition certificate.[52] It additionally provided the legal impetus for the Irish Supreme Court's judgment *Foy v An t-Ard Chláraitheoir & Ors* (2007),[53] in which the judge found domestic laws prohibiting the change of a birth certificate following gender reassignment surgery to be incompatible with the Convention. As a result, a committee was tasked with drafting legislation granting legal recognition to a change of sex following gender reassignment.[54]

Christine Goodwin set a minimum standard of protection for transsexuals under Article 8 of the Convention, while simultaneously imposing a *positive* obligation on member states to grant transgender people the right to decide whether they want surgery to convert their bodies, as far as possible, from one sex to the other. Above all, *Christine Goodwin* constituted an unprecedented legal consideration of, and challenge to, the cisnormative social relations of contemporary European societies.

In the years following *Christine Goodwin*, the Court found itself on a fast track: it held that transgender people could not be expected to prove the medical necessity for gender reassignment surgery in order to get their medical expanses reimbursed by the state.[55] The Court specifically urged one member state to amend its domestic legislation within three months' time in order to give a transgender person access to surgery,[56] and exhorted another to refrain from applying its own law rigidly, thereby preventing that a person of age had to be placed under a two-year observation period before an operation would be possible.[57] It established that sterilisation could not be maintained as a prerequisite for individuals pursuing sex change,[58] since such a requirement would heavily infringe upon a person's personal identity. As a direct effect, more than twenty member states were obliged to reform their legislation with regard to legal gender recognition, and to remove the compulsory condition of sterility.[59]

Although Article 8's notion of the right to respect for personal identity applied in a rapidly increasing number of situations relating to transsexualism, a principle discussion under Article 14 had yet to materialise. Just as the Court refrained from broaching the subject of discrimination on the basis of sexual orientation before the case of *Salgueiro Da Silva Mouta*, it negated all discrimination claims on the basis of gender identity put forward in the cases brought before it to this point.

The Court's judicial dialogue up to this point attests to increased efforts to protect those aspects considered most *private* and fundamental to a person's identity, including sexuality and sex identity. As a result, these efforts have been based predominantly on the first limb

52. Gender Recognition Act 2004 (United Kingdom).
53. *Foy v An t-Ard Chláraitheoir & Ors* [2007] IEtHC 470 (2007).
54. Gender Recognition Act 2015 (Ireland).
55. *Van Kück v Germany*, no 35968/97, ECtHR, 12 June 2003.
56. *L. v Lithuania*, no 27527/03, ECtHR, 11 September 2007.
57. *Schlumpf v Switzerland*, no 29002/06, ECtHR, 8 January 2009.
58. *Y. Y. v Turkey*, no 14793/08, ECtHR, 10 March 2015, and *A.P., Garçon and Nicot v France*, nos. 79885/12, 52471/13 and 52596/13, ECtHR, 6 April 2017.
59. As per April 2017: Armenia, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, the Czech Republic, Finland, France, Georgia, Greece, Latvia, Lithuania, Montenegro, Romania, Russia, Serbia, Slovakia, Slovenia, Switzerland, Turkey and Ukraine.

of Article 8, i.e. the notion of respect for one's *private* life, rather than (or in combination with) the second, i.e the notion of respect for one's *family* life. A reason for the fragmented application is that a more extensive reading of the Article had not often been necessary thus far. Indeed, until early in the new millennium, the Court's judicial discourse chiefly revolved around the LGBT *individual* and his or her right to personal identity.

3 'NEW' FAMILY COMPOSITIONS: PARENTHOOD, MARRIAGE, AND CIVIL PARTNERSHIP

From 2002 onwards, the Court started accepting cases relating to 'family affairs'. As family compositions started changing, the recognition of family ties increasingly became the subject of the Court's legal discussion. By pronouncing on issues such as gay marriage, and adoption by same-sex couples, the Court gradually shifted focus not only from *private* to *family* matters, but also from the LGBT *individual* to the LGBT *couple*. As a result, a greater involvement of the 'underdeveloped' limb of Article 8, i.e. family life, Article 12, *i.e.* the right to marry and found a family, and the equality principle embedded in Article 14, appeared inevitable.

3.1 Parenthood and sexual orientation: A right to adopt?

3.1.1 Adoption by single homosexual individuals

In *Salgueiro Da Silva Mouta*, the Court set the legal precedent that sexuality ought not to be a factor in determining whether a parent should be granted custody over his or her own child, since such a consideration would amount to unlawful discrimination. In *Fretté v France* (2002),[60] the Court had to examine whether the same consideration would be equally unlawful in the case of adoption. The case concerned a French homosexual, who, after several unsuccessful attempts to have a child with a female friend, tried to adopt one. He relied on the French Civil Code, which provides that a single person over twenty-eight years of age may apply for adoption,[61] but was refused to proceed with the adoption process on the basis of his sexual orientation:

> Mr. Fretté has undoubted personal qualities and an aptitude for bringing up children. A child would probably be happy with him. The question is whether his particular circumstances as a single homosexual man allow him to be entrusted with a child.[62]

Mr. Fretté alleged that France violated Articles 8 and 14 of the Convention by interfering with his family and private life and by discriminating him on the basis of his sexuality—especially since the domestic law concerned otherwise allowed for single or unmarried

60. *Fretté v France*, no 36515/97, ECtHR, 26 February 2002.
61. Article 343-1 Civil Code (France).
62. *Fretté* (n 60) § 10. This was a consideration in the Paris social services report of 2 March 1993 in the application of Mr Fretté for authorisation to adopt.

individuals to adopt. By a narrow majority the Court concluded that there was no violation.[63] Although the Court agreed that the applicant had undoubtedly experienced a difference in treatment, it found that this was justified for reasons of a lack of a shared social, scientific and cultural consensus on the recognition of the right to adopt of (unmarried) homosexual people among the signatory states.[64] The Court held that the law appeared to be in a transitional phase and that the best interest of the child therefore had to be the paramount consideration.[65] It therefore concluded that the rejection of the homosexual applicant's request for authorisation to adopt was within the respondent state's margin of appreciation.[66]

Six years after *Fretté*, another case concerning homosexual adoption made its way to the Court. *E.B. v France* (2008)[67] involved a radical departure from previous holdings and in effect overruled *Fretté*. The case concerned an unmarried lesbian woman who wanted to adopt a child but was denied such a request predominantly on grounds of her sexual orientation. In Grand Chamber formation, the Court pleaded that since France had *voluntarily* provided for a right to single parent adoption—France went beyond its Convention duties by creating such a right, since the Convention does not provide for a right to adoption, either for (married) couples or for individuals—it needed to respect it and not allow for discrimination based on, among others, sexual orientation, when applying it.[68]

Even though France, and other European states with similar adoption laws, would no longer be allowed to evaluate a request for adoption on the basis of the prospective parent's sexuality, *E.B.* did not provide a blanket ruling that would oblige *all* member states to allow adoption by homosexuals. Moreover, the Court stuck to a heteronormative conception of family life: the applicant claimed that her refusal for authorisation to adopt a child constituted a violation of her right to family life, since it concerned an attempt to create a familial relationship with a child.[69] The Court did not pursue this part of the complaint, but instead focused solely on the interference with the applicant's private life.[70] The outcome of *E.B.* was nevertheless a novelty in the Court's case law on equal treatment of sexual minorities, especially since a consensus opinion on homosexual adoption had been inconceivable just six years earlier. The Court's change of direction therefore raises the question of what had changed in six years that required a complete reversal of *Fretté*.

A first reading of the judgment does not give a clear answer to that question. A common understanding among member states on a particular issue is usually the decisive factor in the Court's balancing act between adopting an evolutive or a cautious approach to the Convention right(s) concerned. In reaching the conclusion that the difference in treatment was contrary to Articles 8 and 14 of the Convention, the Court did not defer to a lack of consen-

63. Mr Fretté lost the case by a parsimonious four-to-three vote; see joint partly dissenting opinions from judge Sir Nicolas Bratza and judges Fuhrmann and Tulken.
64. *Fretté* (n 60) §§ 41-43.
65. Ibid, §§ 36, 42.
66. Ibid, §§ 40-42.
67. *E.B. v France*, no 43546/02, ECtHR [GC], 22 January 2008.
68. Ibid, §§ 49, 94.
69. Ibid, § 35.
70. Ibid, §§ 41, 43.

sus among the practice of the states, which had been the basis for the ruling in *Fretté* and in virtually all the other sexual minority cases up to this point. A principle discussion on changed views in the adoption procedures of member states is missing from this judgment.

A contextual reading of the case may however shed some light on the Court's decision to deviate from its earlier course. Although no common ground existed on the specific topic of adoption by a single homosexual individual among national laws by the time *E.B.* was issued, a more general consensus regarding gay and lesbian parenting was emerging. For example, a number of European states, including Denmark, Germany, Iceland, the Netherlands, Norway, Spain, Sweden, and the UK (England and Wales) began permitting second-parent or joint adoption to same-sex couples between 2000 and 2008. Moreover, between the *Fretté* and *E.B.* decisions, the European scientific community clarified that gay parenting was healthy and deserved support.[71] It would appear that the Court was led by these developments, as it relied heavily on the living instrument doctrine which expresses that the Convention should be appraised in the light of present-day conditions.[72]

3.1.2 Adoption by same-sex couples

Despite the watershed ruling on homosexual *single-parent* adoption in 2008, the Court did not show similar leniency in the case of *Gas and Dubois v France* (2012).[73] This case involved *second-parent* adoption, whereby one partner sought to adopt the other partner's child with the aim of achieving legal recognition for her parental status.

The applicants were two cohabiting, homosexual women who had been raising Dubois' (biological) daughter together ever since she was born. After the birth of the child, the couple entered into a civil partnership under French law and shortly afterwards Ms Gas applied to adopt the child, with the consent of her partner. The application was rejected by the French authorities because the adoption would have given all parental authority to Ms Gas, leaving Ms Dubois with no rights over her own biological daughter. Normally, to circumvent this strict requirement, couples could marry, since the law did allow married couples to share parental rights in the case of second-parent adoption. However, since the applicants were of the same sex, they could not take advantage of this possibility, since at that time, marriage in France was only open to opposite-sex couples. The applicants alleged that the legal impossibility of applying for second-parent adoption violated their right to non-discrimination based on their sexual orientation taken in conjunction with their right to respect for private and family life.

In reviewing the discrimination claim, the Court agreed with the argument brought forward by the French authorities, which was that the denial did not discriminate against

71. A detailed description of these and more developments that pointed towards a gradual trend towards full equality for same-sex couples with regard to second-parent adoption and joint adoption since the decision in *Fretté*, can be found in a brief that was written by Professor R. Wintermute and submitted to the *E.B. v France* judgment on behalf of the Fédération Intemationale des Ligues des Droits de l'Homme, the European Region of the International Lesbian and Gay Association, the British Agencies for Adoption and Fostering, and the Association des Parents et Futurs Parents Gays et Lesbiens in an attempt to encourage the Court to consider the issue in favor of same-sex couples. Ibid, § 135.
72. *E.B.* (n 67) §§ 46 and 92.
73. *Gas and Dubois v France*, no 25951/07, ECtHR, 15 March 2012.

same-sex couples, because opposite-sex couples in civil partnerships were equally denied a right to second-parent adoption.[74] Critics argued that the Court's reasoning completely missed the mark.[75] The crux of the matter was not that *all* unmarried couples were barred from second-parent adoption, but rather that opposite-sex couples could still meet the requirements for second-parent adoption by marrying, whereas same-sex couples could not. The Court's analysis did not go beyond the question of the lawfulness of the impugned law's *application*, and failed to examine whether the *actual law* was discriminatory in nature.

The Court, in Grand Chamber formation, did exactly that when given a 'do-over' in a different domestic context less than one year later. In the case of *X. and Others v Austria* (2013),[76] a cohabiting couple was in a stable relationship and the biological mother's partner wanted to adopt her partner's child, but the Austrian authorities rejected the adoption agreement as national law foreclosed second-parent adoption to same-sex couples. The reasoning of the Austrian authorities was by and large the same as that of the French: when the partner adopted its partner's child, the biological mother would lose her parental authority. The applicants objected to the very *existence* of this law rather than to the authorities' reasoning behind their rejection. Referring to Articles 8 and 14 of the Convention, the applicants argued that the contested law was discriminatory and that it led to an unjustified distinction between unmarried different-sex and unmarried same-sex couples.

As in *Gas and Dubois*, the Court opined that the Convention does not provide for a right to adoption, whether by single-parent or second-parent, which means that member states do not have to allow for this either.[77] As in *Gas and Dubois*, the respondent state had, on a voluntary basis, created the possibility for second-parent adoption. Unlike France, however, Austria had not reserved second-parent adoption for married couples only, but extended the possibility of second-parent adoption to *unmarried* couples as well. Following the *E.B.* line of reasoning, the Court held that Austria could not willingly provide for such a right and then apply it in a discriminatory fashion.[78]

3.2 Parenthood and transsexualism: Gender identity as a protected ground of discrimination

Despite its growlingly progressive attitude in addressing discrimination against homosexuals, the Court so far remained reluctant to act in similar cases involving gender identity. The first recognition of a prohibition of discrimination against transsexual persons came with the Court's judgment in the case *P.V. v Spain* (2010),[79] but although the ruling had all the potential to become a flagship case, it ended up not leaving port. The applicant was a male-to-female transsexual who, by court order, had been restricted in the contact arrange-

74. Ibid, § 69.
75. See, for example, Paul Johnson, 'Adoption, Homosexuality and the European Convention on Human Rights' (2012) 75 *The Modern Law Review* 1123.
76. *X. and Others v Austria*, no 19010/07, ECtHR [GC], 19 February 2013.
77. Ibid, § 135.
78. Ibid, § 153.
79. *P.V. v Spain*, no 35159/09, ECtHR, 30 November 2010.

ments with her son. The restrictions had been imposed on her, after gender reassignment surgery, on the ground that her emotional instability after her sex change entailed a risk of disturbing the child. According to the Spanish courts, it would therefore be in the best interest of the child to find ways to gradually accustom him to the gender reassignment of his father.

The applicant argued that her transsexualism, rather than her emotional state, had been paramount in making this decision, and that the decision therefore constituted an impermissible infringement with her right to a private life as well as a family life free from discrimination. The Strasbourg Court rejected this assertion and supported the domestic court's line of reasoning. It found that, considering the applicant's temporary emotional instability, the decisive ground for the curtailment in contact had been the child's well--being and not the the applicant's transsexualism.[80] The Court therefore explicitly distinguished this case from *Salgueiro da Silva Mouta*,[81] where it had found that a judge's decision to deny child custody to a gay father had not been taken on account of the best interest of the child but had resulted from a condemnation of the father's sexuality.[82] The Court did, however, issue a general statement that a parent's gender identity cannot be invoked to limit their parental rights. Moreover, it explicitly emphasised that although no issue of gender identity arose in the current case, 'transsexualism' was a notion covered by Article 14.[83] This meant that, tantamount to discrimination on the basis of sexual orientation, it had become illicit practice for member states to condone discrimination on the basis of gender identity under their respective national legal systems.

However encouraging, the procurement of 'prohibited ground of discrimination' does not necessarily translate to full protection against discrimination for the transsexual individual at all, given circumstances and loopholes continue to exist. As exemplified in the case of *P.V.*, a gender-identity based discrimination claim can easily be trumped by considerations of 'the best interest of the child'. Although frequently relied upon by the Court to pardon contingent human right's violations, 'the best interest of the child' remains a vague principle in legal discourse. So far, the Court has refrained from elaborating on how the principle of the best interests of the child should be applied in the context of the Convention; rather, it maintains the practice of employing the concept on a case-by-case basis. This proves to be especially problematic in cases lodged by LGBT applicants, since no procedural safeguards are in place to secure a non-biased approach to the issue on the basis of the applicant's gender identity or sexual orientation.[84]

80. Ibid, §§ 32-33.
81. Ibid, § 36.
82. *Salgueiro Da Silva Mouta* (n 33) § 36.
83. *P.V.* (n 79) § 15 and § 37.
84. For a detailed study on the Court's approach to the best interests of the child in LGBT parenting cases, see Gabriel Alves de Faria, 'Sexual Orientation and the ECtHR: What Relevance Is Given to the Best Interests of the Child? An Analysis of the European Court of Human Rights' Approach to the Best Interests of the Child in LGBT Parenting Cases' (2015) *Family & Law* DOI: 10.5553/FenR/.000018.

3.3 A right to marry?

3.3.1 Transgender marriage

After some fruitless efforts by transgender applicants to contract marriage in the 1980s and 1990s,[85] the Court decided to move away from earlier precedents on transgender marriage in 2002. Whereas the Court first proclaimed that *biological*—as opposed to anatomical and psychological—criteria prevailed in determining someone's (legal) sex, it now acknowledged that maintaining such a practice had impairing consequences for transgender individuals.[86]

Historically, the Court had interpreted the two limbs of Article 12, *i.e.* (1) the right to marry; and (2) the right to found a family, as interdependent. This means that the ability of a couple to conceive or parent a child was a prerequisite for their right to get married. It also perpetuated the traditional, cisnormative conception of marriage being a contract open only to persons of opposite biological sex,[87] basing itself on the exact wording of the Article.[88] In effect, transsexuals were therefore, quite literally 'by definition' excluded from this right.

In *Christine Goodwin*—the same case that brought transgender people the right to full legal recognition of their sex identity—the Court took a rather innovative approach to the right to marry. It gave up the idea that the second aspect of Article 12, *i.e.* founding a family, was a condition for the first, *i.e.* the right to marry.[89] Moreover, it found that a purely textual approach to the wording of the Article could no longer be upheld, since it was not persuaded that at the time of this case and with respect to the 'major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality'[90] it could still be assumed that the explicit terms of a 'man and woman' to marry 'refer to a determination of gender by purely biological criteria'.[91] For these reasons, the Court was not convinced that the matter lay within the margin of appreciation of member states, since this margin could not reasonably be expected to extend to the point where it effectively barred transsexuals from the right to marry.[92]

In sum, the Court's judgment in *Christine Goodwin* had advanced Article 12 in two major ways. First of all, it disconnected marriage and procreation, thereby abandoning the idea according to which marriage is the *form* and the family is the *substance*. Instead, it held that the right to marry exists *independently,* irrespective of the family. Second, it loosened the conditions for marriage by taking out the criterion of biological sex. In doing so,

85. *Rees* (n 40) *Cossey* (n 45) and *Sheffield* (n 46).
86. *Christine Goodwin* (n 2) § 101.
87. *Rees* (n 40) § 49.
88. Ibid. Notably, Article 12 of the Convention speaks of a right to marry for 'men' and 'women', rather than, for example, a right to marry for 'people', 'everyone' or 'no one'.
89. *Christine Goodwin* (n 2) §§ 97-98.
90. Ibid, § 100.
91. Ibid.
92. Ibid, § 103.

it opened up the right to marry to units other than the 'traditional' family and thereby displayed a willingness to push marriage beyond its traditional boundaries.

3.3.2 Same-sex marriage

Although *Christine Goodwin* represented a historic breakthrough for *transsexuals* seeking to contract marriage, it soon became evident that the Court would refrain from applying a similar degree of judicial discretion in the case of *homosexuals* seeking to contract marriage. When the issue of same-sex marriage was first brought to the attention of the Court in 2010, it was faced with the situation of the 47 European member states holding divergent views on the issue. Six states had, by then, legally redefined marriage to include same-sex relationships, making marriage a genderless institution,[93] while twelve others did exactly the opposite, narrowing the definition of marriage to the union of husband and wife.[94] The majority of the member states, however, did not allow for same-sex marriage but had passed some kind of legislation permitting same-sex couples to register their relationships.[95] Against the backdrop of this division among European states, the Court pronounced judgment in *Schalk and Kopf v Austria* (2010).[96]

With regard to Article 12, the Court disassociated itself from the liberal attitude it had adopted in *Christine Goodwin*. Although it initially acknowledged that the wording of the Article, *i.e.* the right to marry to men and women, 'might be interpreted so as to *not* exclude the marriage between two men or two women',[97] it observed that all other Convention articles did not make a gender-specific distinction but rather spoke of rights for everyone or no one.[98] A mere literal interpretation of the Article would therefore not suffice, but the provision had to be placed into context, *i.e.* its interpretation had to be based upon a *systematic* view of the whole treaty.[99] The Court thus emphasised that the gender-specific language of Article 12 was a *deliberate* choice on the part of the drafters of the Convention. To support this line of thinking, it gave a historical analysis of the original content of Article 12: back in 1950 'marriage was clearly understood in the traditional sense of being a union between partners of a different sex'.[100] Moreover, the diverging European practices on same-sex marriage and hence lack of a European consensus further strengthened the Court's conviction that the matter should be left to the appreciation of the contracting states.[101]

Despite the Court's reluctance to infringe on the margin of appreciation enjoyed by state powers in defining the scope of marriage, it did show some flexibility. It stated that

93. The Netherlands, Belgium, Spain, Sweden, Norway and Portugal.
94. Bulgaria, Hungary, Latvia, Lithuania, Moldova, Montenegro, Poland, Serbia, Slovakia, Ukraine, and Macedonia.
95. Andorra, Austria, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Luxembourg, Slovenia, Switzerland and the United Kingdom.
96. *Schalk and Kopf v Austria*, no 30141/04, ECtHR, 24 June 2010.
97. Ibid, § 55.
98. Ibid.
99. Ibid.
100. Ibid.
101. Ibid, § 58, § 62.

the right to marry was not *inapplicable* to the applicants' complaint and that Article 12 must not be limited to two persons of opposite sex in *all* circumstances.[102] At the time, this statement suggested that the Court could potentially rule in favour of gay marriage in the future. In the subsequent rulings *Hämäläinen v Finland* (2014)[103] and *Chapin and Charpentier v France* (2016)[104] it gainsaid this expectation, however, when it concluded that the findings in *Schalk and Kopf* remained valid despite the gradual evolution in the attitudes of contracting states—thirteen now permitting gay marriage.[105] It further concluded that Article 12 could not be construed so as to impose an obligation on the contracting states to grant access to marriage to same-sex couples; nor could reserving marriage to a man and a woman be regarded as discriminatory under Article 12 taken in conjunction with Article 14 of the Convention.[106] The Court thus reaffirmed the idea of marriage as a heteronormative institution and left little room for future debate on the matter.

Regarding the notion of 'family life', the Court did accept that an emotional and sexual relationship of a same-sex couple could be considered as such. The Court's case law so far had limited such a relationship to 'private life', but in view of a 'rapid evolution of social attitudes towards same-sex couples'[107] that had been taking place in many member states it considered it artificial to maintain the belief that, in contrast to a cohabiting different-sex couple, a cohabiting same-sex couple could not, for the purposes of Article 8, enjoy family life.[108] Although an important step, this statement constituted a mere *obiter dictum* that had no impact on the outcome of the case. It did, however, mean that from this judgment onwards, national authorities of the contracting states had to provide for some form of legal recognition of same-sex relationships.

When reading cases such as *Schalk and Kopf* and *Chapin and Charpentier*, one may ask what the Court's views are regarding its own established principle of 'particularly weighty and convincing reasons' which are required to justify differences based on sexuality. It has repeatedly held that, where a difference in treatment is based on sexual orientation, the state's margin of appreciation is narrow. Being unspecific about such a justification allows for and preserves the historically tenuous position of sexual minorities. These rulings seem to be the outcome of the Court's attempts to maintain common ground between the more progressive states and those who appear to be reluctant or even unwilling to implement same-sex marriage. At this point, it should of course be realised that the issue of same-sex marriage not only concerns a sensitive area of society in general, but actually touches on the strongly prescriptive and traditional (heteronormative) societal institution of religion. The fact that marriage is sanctified by most religions slows down the societal

102. Ibid, § 61.
103. *Hämäläinen v Finland*, no 37359/09, ECtHR [GC], 16 July 2014.
104. *Chapin and Charpentier v France*, no 40183/07, ECtHR, 9 June 2016.
105. As per 2016: Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.
106. *Chapin and Charpentier* (n 104) §§ 37-39.
107. *Schalk and Kopf* (n 96) § 93.
108. Ibid, § 94.

acceptance of same-sex marriage, and hence curtails the Court's progressiveness at this point.[109]

The question of gay marriage, thus, pushes the Court to the limits of its ability to interpret the Convention, as it encroaches on socially and culturally sensitive areas of contracting states' family laws and practices. The fact that the Court's judicial discretion in the matter is limited to the very wording of the Convention *and* the explicit consent of the signatory states, undermines its primary function: to recognise breaches of fundamental human rights by contracting states and to mandate legal change to address them.

Ultimately, the Convention does not impose a positive obligation on its member states to open up marriage to same-sex couples, and the Court has, so far, confined its judicial discretion accordingly. It will only be when more jurisdictions recognise the legal status of same-sex couples that a lack of regional consensus ceases to be an acceptable justification for the Court to reject the right to same-sex marriage. Up until now, the Court has not taken this major step and, for once, is a curbing, rather than a progressive force.

3.4 Civil partnership as an alternative?

If marriage is still a bridge too far, civil partnership is often presented as an alternative. In 2013, the Court's Grand Chamber issued its first judgment on same-sex civil partnerships in *Vallianatos and Others v Greece* (2013).[110] In this case, the Court scrutinised a recently enacted Greek 'civil union' law that was discriminatory towards same-sex couples under Articles 8 and 14 of the Convention. The contested law consciously and explicitly excluded gay couples from its definition of marriage: 'a contract between two different-sex adults'.[111] Since the wording of the contested law left no room for alternative interpretation, the Court conceded that there was a difference in treatment based on sexual orientation and found the state's adduced reasoning behind the differentiation, *i.e.* the protection of the traditional family, unconvincing.[112] To this regard, it iterated *Schalk and Kopf* and held that 'same-sex couples are just as capable as different-sex couples of entering into stable committed relationships'[113] and should therefore be treated in the same way as different-sex couples with regard to their need for legal recognition and protection of their relationship.

After *Vallianatos*, it was imperative that the contested Greek law be amended according to the principles set by the Court. Indeed, two years later, Greek authorities enacted a cohabitation agreement bill with an extended scope, now formally including same-sex relationships.[114] Moreover, the ruling meant that, from now on, when a European state issued laws which pertained to families, it had to 'take into account developments in society and changes in the perception of social and civil-status issues and relationships, including the

109. This topic far exceeds the boundaries of this article; for a first introduction, see e.g. W. Cole Durham, Jr. and Donlu Thayer (eds), *Religion and Equality: Law in Conflict* (Routledge 2016).
110. *Vallianatos and Others v Greece*, nos. 29381/09 and 32684/09, ECtHR [GC], 7 November 2013.
111. Law no. 3719/2008 (Greece).
112. *Vallianatos and Others* (n 110) §§ 84-92.
113. Ibid, § 81.
114. Law no. 4356/2015 (Greece).

fact that there is not just one way or one choice when it comes to leading one's family or private life'.[115]

Notwithstanding the predominantly progressive outcome of *Vallianatos*, the Court emphasised that in the present case the question at stake was by no means whether, more generally, *a right* to same-sex legal recognition existed under Article 8 of the Convention, which would mandate contracting states to provide for at least *one* form of legal recognition (other than marriage) for same-sex couples.[116] Shortly afterwards, however, it reconsidered this position in the similar case of *Oliari and Others v Italy* (2015)[117] and held that the silence of domestic laws on this matter was no longer acceptable.[118] In reaching this decision the Court built on the outcomes of its previous cases, *Schalk and Kopf*, *Hämäläinen* and *Vallianatos*, and significantly extended the scope of Article 8 by setting the precedent that henceforth states indeed have a *positive* obligation to provide some form of legal recognition for same-sex relationships.[119] Pressure from this decision prompted Italy to introduce a same-sex partnership bill in 2016.[120]

Drawing on its earlier judgment *Schalk and Kopf*—where it had accorded family life status to *cohabiting* same-sex couples—the Court made a further advancement extending family life to *non-cohabiting* same-sex couples as well.[121] The judgment therefore held the 'promise' that every differential treatment of same-sex couples and their family life would now be subject to the Court's scrutiny to a much greater extent.

3.5 The LGBT migrant: A right to family reunification?

Pursuant to its expanded understanding of the family life of same-sex couples—now extending beyond marriage-based relationships and including stable *de facto* same-sex partnerships irrespective of whether the couple cohabitate or not—the Court recommitted itself to the cause of protecting same-sex relationships on two similar but separate occasions.

In *Pajić v Croatia* (2016),[122] the Court further elaborated on sexual orientation discrimination in the area of family life. It buttressed the claim of the applicant, who alleged she had faced discrimination on the basis of her sexual orientation during her application for a residence permit in Croatia and, thus, that Croatia's immigration law violated human rights standards. More specifically, Ms Pajić asserted that her stable *de facto* same-sex relationship, which she maintained by constant visits to Croatia, should be considered as family life under Article 8 of the Convention. She also argued that the blanket exclusion of same-sex couples from the possibility of family reunification (which *is* open to unmarried different-

115. *Vallianatos and Others* (n 110) § 84.
116. Ibid, § 75.
117. *Oliari and Others v Italy*, nos. 18766/11 and 36030/11, ECtHR, 21 July 2015.
118. Ibid, § 184.
119. Ibid, § 185.
120. Legge 20 maggio 2016, n. 76 (Italy).
121. *Vallianatos and Others* (n 110) § 73.
122. *Pajić v Croatia*, no 68453/1, ECtHR, 23 February 2016.

sex couples), constituted direct discrimination in violation of Article 14. The Court found that the categorical exclusion of same-sex couples from the possibility to obtain a residence permit for family reunification amounted to unlawful discrimination on the basis of sexual orientation.[123]

Historically, matters of immigration law have been considered irreducible elements of national sovereignty and thus, just like issues related to family law, highly sensitive. As a result, the Court has generally accorded considerable latitude to member states when such issues have come up before it.[124] In this specific case it was less pliant, however. It subverted the Croatian government's claim for a wide margin of appreciation and sided with the applicant, condemning the assailed legislation as discriminatory.[125]

In spite of the fact that the ruling did not have significant practical implications for Croatia, since this country in fact already introduced a same-sex partnership act during the time *Pajić* was pending before the Court,[126] it did detail more generally the nature of states' positive obligations under the Convention with respect to same-sex relationships. By setting the stringent standard that same-sex couples cannot be rendered invisible for the purposes of family reunification, the Court sent out a clear warning to other member states whose immigration laws still discriminated same-sex couples.

In *Taddeucci and McCall v Italy* (2016),[127] the Court came across another such discriminatory immigration policy. This case also concerned a refusal by national authorities to grant a residence permit to an unmarried gay couple on family grounds, but was different from *Pajić* in that neither unmarried same-sex nor unmarried opposite-sex couples qualified for a residency visa. In this scenario, there thus appeared to be no unjustifiable difference in treatment. In previous cases, the Court has shown to be satisfied with this line of reasoning: in addressing complaints about discrimination on grounds of sexual orientation, the Court usually assessed the case by examining whether there was a difference in treatment of groups in 'relevantly similar situations'.[128] In the present case, unmarried same-sex couples were not necessarily treated differently from unmarried opposite-sex couples. Nevertheless, the Court felt it to be necessary to take its reasoning a step further. For the first time, it recognised the fact that, unlike heterosexual couples, same-sex couples do not have access to marriage under domestic law, making obtaining residency for same-sex couples by definition impossible.[129] The correct analogous analysis would therefore have been comparing a heterosexual couple *able* to marry but *choosing* not to, with a gay couple wanting to marry but *unable* to by law.[130] In this comparison, the latter

123. Ibid, §§ 82-86.
124. For example, in the case of *C. and L. M. v United Kingdom*, no 14753/89, ECommHR, 9 October 1989, the Commission held that 'although lawful deportation will have repercussions on such relationships, it cannot, in principle, be regarded as an interference with this Convention provision, given the State's right to impose immigration controls and limits', 1 (last paragraph).
125. *Pajić* (n 122) § 86.
126. Life Partnership Act 2014 (Croatia).
127. *Taddeucci and McCall v Italy*, no 51362/09, ECtHR, 30 June 2016.
128. See for example *Gas and Dubois* (n 73).
129. *Taddeucci and McCall* (n 127) §§ 83, 94-95.
130. Ibid, § 95.

group definitely endures a treatment that differs from other groups in circumstances that are otherwise exactly the same. This, for all that Article 14 stands for, amounts to unlawful discrimination.[131]

In sum, after the legal debate on the protection of LGBT people moved from the individual to the couple in the early 2000s, the Court saw itself increasingly confronted with family and relationship issues of sexual minorities. Delicate subjects such as same-sex couple adoption and transgender marriage found their way to its chambers. Step by step, the Court showed itself prepared to challenge most of these subjects, except for same-sex marriage. The heteronormative conception of marriage of the Convention is thus as yet left intact.

4 CONCLUDING REMARKS

An analysis of four decades of the Court's jurisprudence in relation to gender identity and sexual orientation shows that, step by step, with many standstills, and in a careful balancing act, the Court has helped to secure rights for sexual minorities. Through constant litigation the Court has been able to elevate the rights of sexual minorities from being a marginalised and criminalised subject matter to a major issue in legal debates on both the regional and the national level. Exceptionally conducive to the change of legal behaviour of individual member states towards sexual minorities have been those cases challenging restrictions on private life, family life and marriage. By gradually increasing the scope of these rights, the Court has been able to apply them in an ever-widening range of contexts and as such has increasingly expanded the obligation resting upon member states to protect sexual minorities under their national legal systems. However, to claim that such protection is solely to be attributed to the Court would be an unfair and incomplete assessment.

In the majority of sexual minority cases, the Court is led by what is considered common practice in all but a few member states. If a general consensus throughout a majority of member states can be identified on a certain topic, *i.e.* a European consensus, the Court, rather than introducing 'new' norms, usually picks up on this trend and solidifies it by ordering those states out of step to change their policies accordingly. Conversely, if no such consensus exists, the Court tends to carefully construct its rulings in such a way as not to tread on the toes of those states who, in the absence of a common ground, claim sovereignty in the matter. In such instances, the Court considers the issue to fall within the margin of appreciation of the state and consequently leaves it to the domestic authorities to consider and redress the alleged violation(s). The underlying rationale for this is that these authorities are generally better placed to evaluate local needs and conditions—a poignant reminder that the Court's entire legal framework rests on the foundations of the consent of the European states. In sum, the Court has, more than once, reversed earlier decisions, and set new precedents when no previous case law existed on the matter—a pattern that suggests a high degree of judicial discretion.

The Court has, however, equally well designed rulings which accomodate dissentient states, even if this has meant the witholding of rights to the LGBT individual or couple

131. Ibid, §§ 98-99.

involved. For example, the Court now expects state parties to provide proper legal recognition of some kind for same-sex partnerships, but is clearly not prepared to go as far as to oblige them to introduce marriage on equal terms for same-sex couples. It is at exactly this point that the process of improving judicial protection of LGBT people under the flag of the Convention appears to have come to a standstill. By explicitly defining marriage as a bond between a female and male partner, the Court blocks further progress in the attainment of full equality for all human beings, whatever their sexual orientation. In light of the progress made in other LGBT cases so far, a continuation of such an approach would appear to be illusionary and increasingly obsolete. With modern relationships no longer being exclusively between two people of the opposite-sex, and the notions of 'man' or 'woman' no longer being as straightforward as they maybe once were, it remains to been seen how long the Court can uphold this antiquated relic of the Convention.