

The European Court of Human Rights and Same-sex Marriage

The Consensus Approach

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Table of contents

1	INTRODUCTION	1
2	METHODOLOGY	4
3	KEY CONCEPTS.....	5
3.1	Convention Rights	5
3.1.1	Article 8.....	5
3.1.2	Article 12.....	6
3.1.3	Article 14.....	6
3.2	Margin of Appreciation	7
4	FROM DE-CRIMINALISATION TO RECOGNITION: THE POWER OF ARTICLE 8.....	9
4.1	Historical Context.....	9
4.1.1	The Struggle of the Commission.....	9
4.1.2	De-Criminalisation	10
4.1.3	The <i>Dudgeon</i> Effect	12
4.1.4	Transsexuals – Broadening the Acceptance.....	14
4.1.5	Article 8 – the Marriage Test: <i>Schalk and Kopf</i>	18
4.1.6	The Continued Expansion of Article 8: Progressive Protection	19
4.1.7	The <i>Hämäläinen</i> Reversal: The New Authority.	21
4.1.8	<i>Oliari</i> – The Current Status Quo.	24
4.2	Concluding Remarks	25
5	THE LEGALITY OF SAME-SEX MARRIAGE: ARTICLE 12	26
5.1	How does the Court decide?	26

5.1.1	Literal	27
5.1.2	Contextual	30
5.1.3	‘Object and Purpose’	33
5.2	Conclusion	37
6	POWER IN NUMBERS NOT WORDS	38
6.1	Only the European Consensus?	38
6.2	What’s in a Name?	39
6.3	Can’t we just have a Trend?	40
6.4	Do we really need 24 member states?	45
6.5	Conclusion	47
7	CONCLUSION	48
8	BIBLIOGRAPHY	51
8.1	Cases:	51
8.1.1	European Court of Human Rights:	51
8.1.2	European Commission of Human Rights	53
8.1.3	European Registry	53
8.2	Articles:	54
8.3	Books:	56
8.4	Book Chapters	57
8.5	Blogs/Websites	58
8.6	Legislation:	59

8.7 Other: 59

1 Introduction

Over the last fifteen years there has been a global movement to legalise same-sex marriage. Developments have been made in countries such as the United States of America (USA), South Africa, New Zealand and Colombia.¹ However, the European Court of Human Rights (Court) – arguably the most progressive and active human rights court in the world² – has not followed this movement and continues to deny the right to marry for homosexual couples. In light of the Court’s objective to protect and enforce human rights³ – it is perplexing to see the Court recognise equal legal status of same-sex couples to heterosexual couples,⁴ but then refrain from legalising same-sex marriage.⁵ This leads me to question why the Court has not interpreted the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention or ECHR) to include same-sex marriage?

For over half a century, the Court has engaged in a range of human rights through its implementation of the Convention in its member states (states). However, this engagement has yet to secure the full protection of rights for the Lesbian Gay Bisexual Transgendered Queer and Intersex (LGBTQI) community as can be seen in the Court’s lengthy case law. The Court is not the only protector of human rights for the LGBTQI community; states as well as third parties like non-governmental organisations, also play significant roles in the fight for equality.⁶ I do not wish to draw attention away from these other actors, but rather look at what the Court could do to increase protection for LGBTQI persons, such as changing its stance on same-sex marriage.

This puzzle of ‘why’ has a variety of answers in the existing literature. There is the normative perspective which asks ‘why the Court should protect same-sex marriage’.⁷ Further, the Court’s methodology has been critiqued when it sides with the state rather than

¹ Masci, Sciupac and Lipka (2015).

² Helfer and Voeten (2014), p.84; Helfer (1993), p.133; Wildhaber, Hjartarson and Donnelly (2013), p.248.

³ ECHR, Preamble.

⁴ *Schalk and Kopf v Austria*, para 94.

⁵ Lee (2010), p.55-6.

⁶ Burstein (2006), p.423.

⁷ Bribosia, Rorive and Van den Eynde (2014), p.5.

the individual's right to equality.⁸ Other critiques have tried to find whether there is a right to marry for same-sex couples through article 8 – right to respect for private and family life – due to the Court's progressive reading of this right.⁹ These arguments are important to the same-sex marriage debate as they look to the Court's judgments from different perspectives. However, it appears that these arguments lack a general legal analysis and reflection of the Court's decisions. This is especially the case when the theories that exist have either been denied by the Court in their decisions or offer only normative arguments and not realistic practical guidance for what the Court can change.

A recent study by Helfer and Voeten shows that states are more likely to legislate or judicially review in favour of the LGBTQI community if the Court has found a violation of the relevant right in that state.¹⁰ In light of more countries adapting to the Convention's protections of LGBTQI people, one could surmise that it is only a matter of time before the Court interprets the Convention in accordance with legalising same-sex marriage and that constant litigation through the Court is the way forward.¹¹

I agree that it is only a matter of time until the Court interprets the Convention to protect same-sex marriage;¹² however, as my findings will show, article 12 has a more restrictive nature – that cannot be so easily broadened by constant litigation. I want to understand what will motivate the Court to make this decision. This leads me to question: under what conditions will right to marry under the Convention include a right to same-sex marriage?

I have divided this overarching question into three research questions: 1) Can article 8 – including article 14 – be interpreted to allow for same-sex marriage? If not, then 2) Can article 12 be interpreted by the Court to protect same-sex marriage? If so, then 3) under what conditions will this be possible?

To answer these questions, I begin with a brief general overview of the relevant articles and the margin of appreciation (to help introduce the reader to the relevant articles and term). I then structure this paper into three chapters: chapter 4 addresses my first question on whether same-sex marriage can be read into article 8. Given the Court's interpretation of

⁸ Lee (2010), p.6.

⁹ Ibid, p.59; Johnson (2015a), p.72.

¹⁰ Helfer and Voeten (2014), p.89.

¹¹ Lee (2010), p.51.

¹² Sutherland (2011), p.98.

article 8, this is the more logical first step, as article 12 was not properly discussed in relation to same-sex marriage until 2010. Up until 2010, there had been attempts to broaden article 8 to include not only the recognition of partnerships but hopefully – at some point – marriage. Chapter 4 highlights the rate of progress in LGBTQI rights, beginning with the early cases before the European Commission on Human Rights (the Commission) and including the 2015 case: *Oliari and Others v Italy (Oliari)*. This historical review illustrates how the Court has significantly broadened the scope of article 8. Based on this, I conclude whether the Court can now grant homosexuals the right to marry under article 8.

Chapter 5 addresses the second research question on the application of article 12. I examine in-depth the Court's interpretation of article 12, and what the Court perceives is within its limits regarding the right to marry. The inclusion of article 14 – prohibition of discrimination – will be addressed in both chapters as it provides another avenue for the Court to oblige states to legalise same-sex marriage. With a firm understanding of the Court's current stance on this issue and the fact that neither articles 8 nor 14 are applicable, I answer the third question by illustrating the importance of the European consensus in the Court's decision-making process. My central claim is that the Court will look to the European consensus if it to include same-sex marriage under article 12.

In Chapter 6, I define the European consensus – given the division among scholars as to what constitutes a consensus – according to how it is applied by the Court in the same-sex marriage cases. This chapter concludes by arguing that a majority of 24 states legalising same-sex marriage is the necessary threshold for the Court to review same-sex marriage under article 12. I conclude by arguing that it is this magic number - 24 states - that will lead to the Court granting same-sex marriage under article 12. The implications of this claim are (i) all applications to the Court must focus only on article 12 as that is the only relevant right for same-sex marriage and (ii) rather than focusing on the Court, advocates should instead push for domestic legislation in states that do not have same-sex marriage.

2 Methodology

I take a positivist¹³ approach throughout this paper. This is primarily due to my dissatisfaction with the current academic thought on how the Court will legalise same-sex marriage. I want to strip the non-legal factors away from this discussion as it hinders our ability to assess the situation objectively. I recognise the importance of avoiding the formalist trap – strict adherence to hard law only¹⁴ – that is common with lawyers. However, I also think it is necessary to base my arguments on what currently exists in terms of the case law and more specifically what the judges are saying. This has led me to a legalist research question which requires an in-depth legal analysis of the Convention and the Court’s jurisprudence. I believe this ‘legal message’¹⁵ is also a more pragmatic and realistic way to contribute to this discussion.

The Court’s jurisprudence has evolved over time when discussing homosexuality, so I have based my case selection on significant moments in the history of LGBTQI equality. Outside those breakthrough cases, I have looked to other cases to see if they follow these precedents or if not then why this was so. I have focused on cases that broaden articles 8, 12 and 14 as they are the relevant rights to this discussion. This method is important as it provides a better understanding of the Court’s developing decisions on LGBTQI rights, rather than focusing on a breakthrough case that may have been overturned by a later ruling. This has been a common fault in the literature as there is a focus on the progressive decision in *Christine Goodwin v the United Kingdom (Goodwin)* from 2002 that was largely undone in *Hämäläinen v Finland (Hämäläinen)* in 2014.

My paper touches upon some highly contentious principles such as the margin of appreciation and methods of interpretation. However, due to space, I condensed my explanation to the relevant issues.

¹³ Ratner and Slaughter (1999), p.292.

¹⁴ Simma and Paulus (1999), p.304.

¹⁵ Ibid, p.303.

3 Key Concepts

3.1 Convention Rights

3.1.1 Article 8

Article 8 protects the right to ‘respect for private and family life’.¹⁶ There are two clauses, the first defines the right and the second looks to what limitations are placed on this right.¹⁷ Whilst the Court has not provided an exact definition of either private or family life,¹⁸ it has differentiated between these broad¹⁹ terms. The former relates to the development of an individual’s own integrity and their relationships with the outside world,²⁰ whereas the latter looks to ‘family ties’, where biology is not the necessary factor, but rather the intimacy of the relationship.²¹ There is approximately a thirty year gap between homosexuals being protected under ‘private life’ and ‘family life’. This is primarily due to family life having a more public scope²² and thus a greater possibility of impacting other Convention rights.²³

It has proved difficult for the Court to decide whether the obligation warranted for the fulfilment of article 8 is of a positive or negative nature.²⁴ This is largely due to the word ‘respect’ in article 8(1) which signifies that a state should not interfere in the right of an individual – a negative right.²⁵ Despite a case by case approach,²⁶ the Court has held that article 8 (both private and family life) can have positive obligations.²⁷ The Court looks to a ‘fair balance that has to be struck between the general interest of the community and the interests of the individual’.²⁸ If the protection of the right requires the state to act – such as

¹⁶ ECHR, article 8.

¹⁷ Schabas (2015), p.367.

¹⁸ Lagoutte (2003), p.292.

¹⁹ Ibid, p.369,389.

²⁰ Ibid.

²¹ *Schneider v Germany*, paras 79-80.

²² Hart (2009), p.557.

²³ Lagoutte (2003), p.301.

²⁴ Schabas, p.368; Lavrysen (2013), p.163.

²⁵ Ibid, p.367.

²⁶ *Rees v the United Kingdom*, para 37.

²⁷ *Marckx v Belgium*, para 31.

²⁸ *Rees*, para 37.

by implementing a legislative framework²⁹ – then the right is interpreted as positive by the Court;³⁰ the recognition of same-sex relationships is seen as a positive obligation on states, as will be demonstrated below.³¹ Further, whilst this is inherently an article 8 provision, the application of a positive right has been found in other Convention rights and there is support for it to apply to the whole Convention.³²

3.1.2 Article 12

The right to marry and found a family is enshrined in article 12. It is not separated into two separate clauses like article 8, however, this does not mean it is an absolute right either.³³ It is seen as *lex specialis* by the Court;³⁴ it is this specificity which creates difficulty in protecting this right under any other article in the Convention.³⁵ A conflict would result for the Court if article 12 is read as excusing states from having a positive right to enforce same-sex marriage but then article 8 steps in to carry this burden.³⁶ Similarly to the role of positive obligations in article 8, same-sex marriage has been seen as a positive obligation under article 12 as well.³⁷

3.1.3 Article 14

Article 14 prohibits discrimination on a multitude of grounds.³⁸ Whilst sexual orientation as a basis for discrimination has not been specifically stated in article 14, it has been included by the Court as Chapters 4 and 5 show.

Article 14 cannot be applied separately;³⁹ it relies on another Convention right such as articles 8 or 12 being invoked first. When article 14 is assessed the Court looks to whether (i) the differential treatment had a negative effect on the applicant, (ii) the state's defence

²⁹ Mowbray (2004), p.2, 130, 187.

³⁰ *Rees*, para 42; Campbell (2006), p.400.

³¹ *Oliari and Others v Italy*, para 185.

³² Campbell (2006), p.412.

³³ Schabas (2015), p.533.

³⁴ *Hämäläinen v Finland*, para 96.

³⁵ Schabas (2015), p.534; Mowbray (2012), p.786.

³⁶ *Hämäläinen*, paras 70-71.

³⁷ *Schalk and Kopf*, para 63.

³⁸ ECHR, article 14.

³⁹ Schabas (2015), p.562.

that the actions were reasonable and rational and (iii) balancing the proportionality of the state's claim to the actual policy they were pursuing.⁴⁰

It must be noted that the inclusion of the onerous burden on states to legislate for same-sex marriage (a positive obligation) features heavily in point (iii) for both articles 8 and 12. Consequently, when the Court finds no breach of either articles 8 or 12, thus article 14 cannot be applied.

3.2 Margin of Appreciation

The margin of appreciation (the margin) is a doctrine developed in the Court's jurisprudence and the Convention itself.⁴¹ It is a judicial tool that allows the Court to give the states 'an ambit of discretion' when aligning them with the Convention's rights. Despite its limitations, it is seen to be a 'safeguard' to reconcile a state's sovereignty with the Court's powers.⁴² It is not an absolute defence for states exercising discretion in good faith and remains subject to judicial review by the Court.⁴³ It took time to develop the margin into a judicial doctrine,⁴⁴ however, with the *Handyside v the United Kingdom* (*Handyside*) judgment, the Court now has a model for states and future benches to follow.⁴⁵ This model is used in assessing the principle of proportionality – a balancing act – for the Court as they weigh factors like the applicant's rights against the rights of the community.⁴⁶ If the Court finds the balance to be in favour of the applicant, the margin will be narrow, thus limiting state control on this right.⁴⁷ Conversely, the state may be given a wide margin if the Court finds: article 8(2) is engaged; the act required is positive and onerous; and there is a European consensus.⁴⁸

⁴⁰ Greer (2000), p.11; *Relating to Certain aspects of the laws on the use of languages in education in Belgium v Belgium*, p.30, para 10.

⁴¹ Arai-Takahashi (2013), p.66; Johnson (2013), p.70; Greer (2000), p.5.

⁴² Ibid, p.62; Kratochvíl (2011), p.327; Helfer (1991), p.162-3.

⁴³ Shany (2006), p.907, 910-111; Sajó (2013), p.186.

⁴⁴ *Ireland v UK* (1978) para 207; Arai-Takahashi (2013), p.66-8.

⁴⁵ Arai-Takahashi (2013), p.68; *Handyside v the United Kingdom*, para 48.

⁴⁶ Helfer (1993), p.137.

⁴⁷ Arai-Takahashi (2002), p.5-9.

⁴⁸ *The Sunday Times v the United Kingdom*, paras 66-67; *Rasmussen v Denmark*, para 40; *Fretté v France*, paras 36-42.

It is important to note that the margin is not used by the Court in every case, nor for every article of the Convention.⁴⁹ In this paper, the margin will be primarily discussed when analysing article 8 due to the open ended nature of the right itself.⁵⁰ The difficulty for trying to legalise same-sex marriage under article 8 is that it is seen as a positive obligation and thus the Court has held repeatedly that the margin begins broad due to the demands placed on the state.⁵¹ However, the Court doesn't use the margin when looking at article 12 and same-sex marriage as the proportionality element found in article 8 – its limitation clause – does not exist in article 12. Instead, the European Consensus – a factor of the margin – is used by the Court to help interpret the right to marry.⁵² This is common practice for the Court as is seen in their jurisprudence on the right to life.⁵³

I do not wish to embark on a debate as to the pros and cons of this doctrine as there are many.⁵⁴ I only aim to draw attention to the fact that the margin is used by the Court for a proportionality rationale under article 8 and is implemented regularly by the Court in LGBTQI cases.

⁴⁹ Greer (2000), p.14.

⁵⁰ Peters (2015), p.292; Schabas (2015), p.366; Arai-Takahashi (2013), p.68.

⁵¹ *Schalk and Kopf*, para 108; *Hämäläinen*, para 71; *Oliari*, para 162.

⁵² Dzehtsiarou (2015), p.17.

⁵³ *Evans v the United Kingdom*, para 54.

⁵⁴ Shany (2006), p.912; *Hämäläinen*, p.33, para 5; Benvenisti (1999), p.847.

4 From De-Criminalisation to Recognition: The Power of Article 8

Whilst this thesis is concerned with same-sex couples being able to marry, this fight for equality began a lot earlier than the first same-sex marriage case in 2010. Before looking to article 12, one must analyse and evaluate the argument for article 8 and its slow progression of protecting LGBTQI rights as resulting in a possible loophole for the Court to legalise same-sex marriage.

This chapter will answer my first research question by (i) explaining the context of these cases – including the margin of appreciation and the positive obligation – as a source of historical understanding of the struggle for LGBTQI rights in the Convention which will lead to (ii) a conclusion of the Court’s current approach to article 8 (and where applicable the inclusion of article 14) to see whether it has expanded enough to include the right to marry for same-sex couples.

4.1 Historical Context

4.1.1 The Struggle of the Commission

The Commission became engaged with the legality of homosexuality soon after its formation in 1954.⁵⁵ There were particularly many applications against Germany and the United Kingdom (UK), which criminalised homosexuality.⁵⁶ In an early application, the Commission stated that adult men (over 18) could not legally have consensual sex with men over 21 years old. The argumentation was that this would protect minors who had homosexual tendencies from becoming homosexual later on in life.⁵⁷ However, in the same case – and for the first time – the Commission also found that an individual’s ‘sexual life is undoubtedly part of his private life of which it constitutes an important aspect’.⁵⁸ This opened the door for the protection of article 8(1) to be more vigilant; even though it was

⁵⁵ Kane (1988), p.451-2; Grigolo (2003), p.1029.

⁵⁶ Johnson (2013), p.20; Grigolo (2013), p.1029; *Application no.530/59*, para 3; *Application no.7215/75*, para 20.

⁵⁷ *Application no.5935/72*, p.54.

⁵⁸ *Ibid.*

restricted by article 8(2) due to the Commission's view that homosexuality was an immoral and dangerous issue for the public.⁵⁹ This became the common answer from the Commission, dismissing applications for almost 18 years.

In 1978, however, the smallest of cracks in the Commission's logic were beginning to emerge. It noted in Application No. 7215/75 that more and more states had decriminalised homosexuality.⁶⁰ The case is the first to be seen admissible by the Commission, but it was still not referred to the Court as article 8(2) still applied.⁶¹

It is with an appreciation of this archaic reasoning and sluggish progression of LGBTQI rights that this chapter turns to the breakthrough case: *Dudgeon v the United Kingdom* (*Dudgeon*). Decided in 1981 – it is the first challenge brought before the Court on decriminalising homosexuality.

4.1.2 De-Criminalisation

In *Dudgeon*, the applicant was a gay man living in Northern Ireland where homosexuality was criminalised. The Court did not accept the UK's argument that despite the formality of the law, the applicant had never been officially charged.⁶² The Court confirmed the Commission's findings: that sexual activity does come under article 8(1) in terms of a 'personal life'.⁶³ However, this right could be legitimately curtailed if it clashed with someone else's personal interests.⁶⁴ With homosexuality being protected under article 8(1), the Court then looked to article 8(2) to see if any of the previously accepted limitations still applied.

For article 8(2) to be satisfied, the UK needed to prove that criminalisation was: (i) in accordance with the law, (ii) pursued a legitimate aim and was (iii) 'necessary' in a democratic society.⁶⁵ The first two requirements were easily met given that homosexuality was criminalised by the law itself and the Court agreed with the UK that it was for the

⁵⁹ *Ibid*, p.53.

⁶⁰ *Application no.7215/75*, para 152.

⁶¹ *Ibid*, para 156.

⁶² *Dudgeon v the United Kingdom*, paras 90, 93.

⁶³ *Ibid*, para 88; *Application no.5935/72*, p.46; *Application no.6959/75*, para 55.

⁶⁴ *Application no.6959/75*, para 56

⁶⁵ *Dudgeon*, para 98; *Handyside*, para 49.

protection of morals.⁶⁶ To decide the final requirement – the test for necessity - the Court weighed certain factors such as the current standing on European morals and the fact that there needs to be a ‘pressing social need’ for the protection of morals to be legitimately implemented.⁶⁷ Otherwise ‘pluralism, tolerance and broadmindedness’⁶⁸ – staples to a democratic society – would be ignored. The Court did acknowledge how sensitive this legislation would be given the nature of homosexuality at that time and how it was effectively seen as a taboo.⁶⁹ Consequently, it followed the rule it set in *Sunday Times v United Kingdom*, by giving considerable weight to the state’s authority when it came to the protection of morals, as they had a better understanding on how to legislate for such an aim.⁷⁰ For these reasons, the Court held it important to look to what power should be given to the states on this issue versus the right of the individual; it was here that the margin of appreciation – albeit not with this title due to it being a developing doctrine at the time – was first applied in a case on LGBTQI rights. As a result, despite the Court’s view of homosexuals as a minority group, it did not mean that their rights – especially in relation to a private and deeply personal act – could be violated on the basis that the majority actively disliked them, only if it was ‘necessary’ to protect the society as a whole.⁷¹ There was no convincing argument put forward by the state that this was the case,⁷² especially when its neighbours, England and Wales had decriminalised the act.

It must be noted that the case was only in part a victory for the progression of LGBTQI rights as the Court still upheld the age of consent for homosexual sex should stay at 21 (as opposed to 18 for heterosexuals) as it fulfilled all three requirements of the necessity test. However, it did mean that in the privacy of their own homes, homosexual sex was not illegal.

⁶⁶ Ibid, para 101.

⁶⁷ Ibid, paras 107-108.

⁶⁸ *Handyside*, para 49.

⁶⁹ *Dudgeon*, paras 47, 56-7.

⁷⁰ Ibid, para 107; *The Sunday Times v the United Kingdom*, para 59.

⁷¹ Ibid, paras 112-113.

⁷² Ibid, para 61.

4.1.3 The *Dudgeon* Effect

Dudgeon opened the door for LGBTQI rights to be included under the Convention, however, just because a case could get to the Court did not guarantee a protection of rights. Indeed, there was no substantial change in the Court until the early to mid-1990s when it began to decide in favour of the applicant.⁷³ To continue this progression on the merits would result in many failed attempts⁷⁴ - comparable to the struggle for admissibility pre-*Dudgeon* – especially when invoking article 14 to legitimise the equal treatment of homosexuals.

For the purposes of a clear progression of LGBTQI rights protection, there was much accomplished from the mid-1990s until the case of *Goodwin* in 2002, such as the ability to serve in the military as an open homosexual male or female.⁷⁵ Additionally, states that had encountered many cases against homosexual applicants in the Commission's early days – the UK – had begun to pass legislation progressing LGBTQI rights such as equalising the age of consent for homosexual males from 21 to 16.⁷⁶

However, these cases specialised on the privacy of article 8, rather than its more public aspect – the right to family life. The Commission did not accept the inclusion of the LGBTQI community into this public domain for many years. This is particularly clear when the Court weighs the best interest of the child in cases with homosexual or transsexual parents.⁷⁷ As studies on families outside the heteronormative sphere were in their infancy in the 1980s-1990s, the Court always erred on taking a more cautious approach to extending article 8 if it was unsure whether it would negatively affect the child.⁷⁸ It is clear from the case law that homosexuality made their case extremely difficult to argue.⁷⁹ Further, the decision in *Dudgeon* was interpreted by the Commission as legitimising the privacy part of article 8 but not the family.⁸⁰ For the Commission, one

⁷³ Helfer (2001), p.422.

⁷⁴ *Laskey and Others v the United Kingdom*, para 51; *Rees*, para 47; *Cossey v the United Kingdom*, para 42; *Sheffield and Horsham v the United Kingdom*, paras 61, 76-77.

⁷⁵ *Lustig-Prean and Beckett v the United Kingdom*, paras 103-4; *Smith and Grady v the United Kingdom*, paras 110-12.

⁷⁶ *Sutherland v the United Kingdom*, para 15.

⁷⁷ *X, Y and Z v the United Kingdom*, para 47.

⁷⁸ *Ibid.*

⁷⁹ Toner (2004), p.104; *Application no.9369/81*, p.222.

⁸⁰ *Application no.9369/81*, p.221.

could be gay as long as it was in private. Recognition of a gay relationship and the ability to have a family was not protected under article 8.⁸¹

Moving forward to 2000, one sees a shift in the Court's standing on homosexuals under 'family life' in *Salgueiro Da Silva v Portugal*. This case concerned custody arrangements between a gay father and his ex-wife. The Court held that the father had been discriminated by Portuguese law as he was denied access to the child on the basis of his sexual orientation.⁸² Here, article 14 was used in conjunction with article 8 for the first time on the basis of sexual orientation.⁸³ However, this only meant that the state had acted discriminately towards the father – not to any homosexual relationships. Thus, the full protection of article 8 extended only to heterosexual couples.

Salgueiro did open the way for family life, however, only if the homosexual applicant was single and there was no positive obligation on the state. The Court continued to deny homosexual couples to be protected under the right to family under article 8 as that would require a positive obligation to recognise their relationship. This was apparent in another restrictive decision by the Court in *Mata Estevez v Spain* in 2001 where a homosexual man could not claim a survivor's pension when his partner died as it was only available to married or unmarried heterosexual couples. The Court again confirmed that 'long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life'.⁸⁴ Using articles 8 and 14 together – as done in *Salgueiro* – was struck down as the issue concerned a homosexual couple and were thus not discriminatory due to its legitimate aim under article 8(2).⁸⁵ The Court did recognise a 'growing tendency' among the states to recognise de facto homosexual relationships, however, there wasn't a consistent European view to override the wide margin already allocated to states on this issue.⁸⁶ Thus, the opportunity to broaden 'family life' rested on the Court seeing a more standardised European view in favour of homosexuals.

⁸¹ *Application no.15666/89*, p.4.

⁸² *Salgueiro Da Silva Mouta v Portugal*, para 36.

⁸³ Helfer (2001), p.427; *Salgueiro*, paras 25, 28.

⁸⁴ *Mata Estevez v Spain*, p.4; *Application no.15666/89*, p.4.

⁸⁵ *Ibid*, p.5.

⁸⁶ *Ibid*, p.4.

4.1.4 Transsexuals – Broadening the Acceptance

The above cases are more related to the LGB part of the LGBTQI community. As far as the T – transgendered (however, for the purposes of this paper, the T will be used for transsexuals as that is the term used by the Court⁸⁷ – applicants are to be considered in this historical overview, they are, substantially further behind the LGB movement. They are grouped as a whole – LGBTQI – as the decisions of the Court affect both gay and transsexuals. However, the issue here is that their beginnings did differ and did progress at different rates.

Rees v the United Kingdom (Rees) and *Cossey v the United Kingdom (Cossey)* decided in 1986 and 1990 respectively, provide good insights into how the Court viewed transsexual rights. Both cases denied finding a violation of article 8 when the applicants were refused reissuance of birth certificates and the right to marry once legally changing their genders. The Court held in both cases that the margin of appreciation should be broad – in favour of the state – on the basis that (a) the positive obligations required were onerous and should not be so readily imposed by the Court by extending article 8,⁸⁸ and (b) to say other states allow it would mean that the UK government would have to implement another state’s civil registry which was also too demanding.⁸⁹ The Court did state it was aware of transsexuals but decided to do no more than constantly review the situation;⁹⁰ there is not even a trend for the Court to allude to at this stage. Arguably, there was some progress for transsexual rights at this time,⁹¹ however, the rule passed on from *Rees* to *Cossey* had remained the guiding principle for *Sheffield and Horsham v the United Kingdom (Sheffield and Horsham)* in 1998.⁹² For the Court, important factors were the lack of European consensus on this issue and the ambiguity of transsexuals themselves as gender-reassignment operations did not necessarily result in the identification of all of the other biological features of their identified gender.⁹³ For over fifteen years after *Rees*, the Court relied on a

⁸⁷ *Rees*, para 38.

⁸⁸ *Ibid*, para 44; *Cossey*, paras 38-40.

⁸⁹ *Ibid*, para 42; *Cossey*, paras 38-39.

⁹⁰ *Ibid*, para 47; *Cossey*, para 40.

⁹¹ *B v France*, paras 59-60.

⁹² *Sheffield and Horsham*, para 58.

⁹³ *Ibid*, paras 56, 58.

European consensus or scientific advancement to take the Convention in a more progressive direction.

The privacy issue plaguing transsexuals was also apparent under the family provision of article 8. Both the Commission and Court were well aware of the growing acceptance towards transsexuals,⁹⁴ however, deciding on family rights under article 8 was especially burdensome for the Court as they viewed it to be a positive obligation on the state to enforce.⁹⁵ Parallel to its LGB decisions, the Court relied on the lack of European consensus on transsexual family rights to deny finding a violation of the Convention.⁹⁶

It is important to note that the Commission-Court structure was replaced with a permanent sitting Court after the adoption of Protocol 11.⁹⁷ As one can see from this historical background, a significant hurdle for LGBTQI applicants was admissibility - which was always decided by the Commission. Helfer claims that with a permanent court that now decided on its own admissibility, this hurdle is significantly diminished as the Court hasn't referenced these contrary commission hearings in their recent case law on LGBTQI rights.⁹⁸ Whilst this argument does have merit in the Court not quoting Commission practice, this doesn't necessarily mean that one will see a progression of the right itself. Admissibility is the first step and I am inclined to agree with Helfer that this is largely overcome now with the enforcement of Protocol 11. However, the question of merits under article 8 is still largely under-developed in the cases shortly after *Dudgeon*. One does see progress although it is neither linear nor fast. These cases are significant in slowly opening up the Court to LGTBQI issues, however, it isn't until *Goodwin* that the next big breakthrough comes.

Like in *Dudgeon*, *Goodwin* is seen as a breakthrough against the Court's reasoning after many failed attempts. *Goodwin* defies the firm precedent established by the Court on the European consensus held on transsexual rights as found above in *Cossey*, *Rees* and *Sheffield and Horsham*.

⁹⁴ *X, Y and Z*, para 40.

⁹⁵ *Ibid*, para 41.

⁹⁶ *Ibid*, para 44.

⁹⁷ Convention, Protocol 11.

⁹⁸ Helfer (2001), p.428.

In *Goodwin*, the applicant was a post-operative male to female transsexual. Her claim circled on three issues: (a) her inability to complain about being harassed at work, as by law she was still considered to be a man; (b) when applying for jobs she had to provide her National Identity number which still stated that she was a man and (c) she was not eligible for the pension at the same time as other women – at 60 years old – but would have to wait until she was 65, the same as men.

The Court took a very strong stance on the protection afforded to the applicant according to article 8's 'protection...to the personal sphere of each individual, including the right to establish details of their identity as individual human beings'.⁹⁹ For the Court, it was necessary to find whether there was a positive obligation to make the state provide for these rights through legislation and subsequent implementation. The Court would do this by looking to 'the fair balance' between the applicant's interests and those of the public.¹⁰⁰ There were many factors for the Court to consider, namely: (i) the applicant's situation, (ii) the European consensus, (iii) the impact on the birth register (the state's burden) and (iv) the current medical or scientific breakthroughs that could alter the current perception of transsexuals.¹⁰¹ Depending on which factors weighed the most heavily, the Court would determine the existence of a positive obligation.

When the Court looked at its previous decisions concerning transsexuals, it had not enforced a positive obligation due to its onerous nature and the greater interest of the community.¹⁰² Despite this firm authority, the Court repeated the above balancing test and found that the state did have a positive obligation to protect the applicant. The Court noted the difficulty for the government to make these changes (the state's burden), especially in family law and social security, but held it was not impossible¹⁰³ nor did it outweigh the struggles the applicant faced by being a transsexual.¹⁰⁴ It was also not a reliable reason to let the margin remain broad – as was the norm – as the state could not show that there was

⁹⁹ *Christine Goodwin v the United Kingdom*, para 90.

¹⁰⁰ *Ibid*, para 72; *Cossey*, para 37.

¹⁰¹ *Ibid*, paras 76, 81, 86.

¹⁰² *Ibid*, para 73; *Rees*, para 42, *Cossey*, para 38-9.

¹⁰³ *Ibid*, para 91.

¹⁰⁴ *Ibid*, para 89-90.

any ‘concrete or substantial hardship or detriment to the public interest’.¹⁰⁵ The Court also placed a substantial weight on the applicant’s hardship as ‘society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost’.¹⁰⁶ The Court held it was time to hold states accountable for not providing protection on this human rights issue.¹⁰⁷ The influence of the second factor – the European consensus – is an example of the Court taking an evolutive interpretation as it recognises that there can be no consensus given that the very nature of this right polarises states (discussed further in Chapter 6). Additionally, the Court maintained that ‘[i]t is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure [to do so]...would indeed risk rendering it a bar to reform or improvement.’¹⁰⁸ With these three factors falling on the side of the applicant - and (iv) the current medical considerations being of an insignificant regard to the Court¹⁰⁹ - it was clear to the Court that there was a breach of article 8.

It was thus seen as outdated to deny transsexuals from enjoying the rights that society has been granted in general, and that by waiting for there to be less controversy was unacceptable given how clear the violation was to the Court.¹¹⁰ The fact that the Court takes such a deliberative and progressive step in including transsexuals under the protection of article 8 does create some cracks in the hetero-normative discussion that had remained a constant for the Court. The decision given in *Goodwin* was a monumental step for the Court, as one can see from the arduous attempts at litigation discussed above just how difficult it was for the LGBTQI community to be recognised and protected by article 8. However, the right to marry for the applicant was only discussed by the Court under article 12 (discussed in Chapter 5) and therefore cannot be seen as a case that extended article 8 to include the right to marry.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid, para 91.

¹⁰⁷ Ibid, para 120.

¹⁰⁸ Ibid, para 74.

¹⁰⁹ Ibid, para 83.

¹¹⁰ Ibid, para 90.

4.1.5 Article 8 – the Marriage Test: *Schalk and Kopf*

From 2002 until 2010, there was a variety of LGBTQI cases brought before the Court which enhanced the scope of article 8 and consequently article 14.¹¹¹ There is undeniable evidence from the above case law that the LGBTQI community was slowly falling under the Convention’s protection. However, my first research question, on whether article 8 – including article 14 – could provide the Court with another avenue to protect same-sex marriage, has still not been answered in the affirmative. Arguably, this question has not been adequately discussed by the Court throughout any of the aforementioned cases except in passing. It is in *Schalk and Kopf v Austria (Schalk and Kopf)* that the Court truly questions same-sex marriage under articles 8 and 14.

In *Schalk and Kopf*, a same-sex couple wished to get married despite Austrian law stating that marriage is only between a man and a woman.¹¹² After finding there to be no violation of article 12 (discussed in Chapter 5), the Court looked to whether articles 8 and 14 could allow same-sex marriage. As the applicants were arguing that their right to family – under article 8 – was at stake, the Court had to reassess its previous case law on recognising same-sex couples. The Court held that due to the ‘evolution’ of European law both in the recognition of same-sex couples at the domestic and European level, it would be ‘artificial’ for the Court to find same-sex couples cannot enjoy a family life.¹¹³ With this momentous statement, same-sex couples now entered the full protection of article 8 – the public and private sphere were both applicable to their relationships. It also meant that the Court could look to article 14 (now that article 8 was embraced).

To assess the combination of articles 8 and 14, the Court undertook a balancing act. On the one hand it had the discrimination facing the individual which is considered especially serious when it is based on sex versus the state’s justification for such treatment.¹¹⁴ Despite this case concerning discrimination based on sexual orientation, the Court held that the government could be justified in this discrimination due to the obligation required to

¹¹¹ *Karner v Austria*, para 33; *E.B. v France*, para 93; *Schalk and Kopf*, para 93.

¹¹² *Schalk and Kopf*, paras 8-9.

¹¹³ *Ibid*, para 94.

¹¹⁴ *Ibid*, para 96-7.

recognise same-sex marriage.¹¹⁵ This follows from its previous reasoning under article 12 (discussed in Chapter 5) that the right to marry did not include same-sex couples.¹¹⁶ Despite same-sex couples being included under the right to family life in article 8, this did not equate to the right to marry as one could have a family life with a registered partnership.¹¹⁷ Further, it would be difficult for them to try and squeeze through this right on broadening the scope of articles 8 and 14 to allow for same-sex marriage when the specific right itself gave no ability for the Court to read outside of it.¹¹⁸ The Court also held that even if the case concerned the formal recognition of same-sex couples, there was no European consensus on this positive obligation and thus the margin would remain broad – in favour of the state.¹¹⁹ The large minority (a 4:3 ratio on the application of articles 8 and 14) correctly pointed out the paradoxical view that the majority were stating: same-sex couples should be seen the same as heterosexual couples in all matters relating to the recognition of relationships, however, they don't have the same rights when it comes to marriage and that isn't discriminatory.¹²⁰ Despite this minority view, it was held by the Court that articles 8 and 14 did not equate to the right to marry for same-sex couples.¹²¹ Therefore, the first case to assess my first research question denied the inclusion of same-sex marriage under articles 8 and 14.

4.1.6 The Continued Expansion of Article 8: Progressive Protection

Schalk and Kopf halted any momentum on article 8 protecting same-sex marriage. However, there was still a continued push on other aspects of family life that were being expanded by the Court; seen in two 2013 decisions: *X and Others v Austria (X and Others)* and *Vallianatos and Others v Greece (Vallianatos)*.

In *X and Others*, the applicants were two women (first and third applicant) in a relationship and their son (second applicant). The first applicant wanted to adopt the second applicant who was the biological child (born out of wedlock) of the third applicant. Austrian law

¹¹⁵ Ibid, para 101.

¹¹⁶ Ibid, para 63.

¹¹⁷ Ibid, para 91.

¹¹⁸ Ibid, para 101.

¹¹⁹ Ibid, para 105; Mowbray (2013), p.28-9.

¹²⁰ Ibid, p.27, para 2.

¹²¹ Ibid, para 101.

stated that second parent adoption could only be done by heterosexual couples, married or unmarried.¹²²

The Court had faced this issue in previous cases,¹²³ however, they were examples of rights only afforded to heterosexual couples due to the requirement of marriage; something that same-sex couples had no access to. Whereas, in *X and Others*, the issue was that unmarried heterosexual – not homosexual – couples had access to second parent adoption; the difference here was sexual orientation, not marital status.¹²⁴ The legitimacy test under article 14 was again discussed by the Court as it looked to whether the state was justified in its differential treatment of the applicants.¹²⁵ The emphasis on the rights of the child was a critical point for the Court.¹²⁶ However, instead of looking back to its antiquated doctrine,¹²⁷ the Court found that there was no evidence that a child was at risk living with a same-sex couple nor could Austria successfully argue such a claim when (under their laws) a single homosexual could adopt a child.¹²⁸ The significance of this decision is that states can no longer depend on the best interest of the child argument to convince the Court that their discriminatory legislation against same-sex couples has a legitimate purpose. However, it is important to note that the Court took a novel approach to finding the consensus in favour of the applicant. It faced a large amount of criticism by the large dissenting opinion¹²⁹ and has not been repeated again in interpreting the consensus for LGBTQI cases as will be highlighted in Chapter 6.

The second case, *Vallianatos* involved a combination of cases brought to the Court (nine applicants in total) accusing recently passed legislation of discriminating against same-sex couples. The legislation in question enabled heterosexual couples to register their relationship as a civil union instead of being obligated to get married for similar recognition. The issue was that this option for civil union was only open to heterosexual couples. The Court confirmed the equal standing heterosexual and homosexual couples

¹²² *X and Others v Austria*, p.12-5.

¹²³ *Fretté v France*, para 28; *Gas and Dubois v France*, para 62; *E.B.*, paras 44-45.

¹²⁴ *X and Others*, p.31.

¹²⁵ *Ibid*, p.32; *Kozak v Poland*, para 98.

¹²⁶ *Ibid*, p.26-7.

¹²⁷ *X, Y and Z*, paras 51-2.

¹²⁸ *X and Others*, p.33.

¹²⁹ *Ibid*, p.42.

have according to *Schalk and Kopf*.¹³⁰ Further, the Court also held that even though some of the applicants did not live together due to professional and social reasons, this did not mean that their relationship could not be protected under the right to family in article 8.¹³¹ There is a clear logical flow from *Schalk and Kopf* that homosexual couples are recognised on the same level as heterosexual couples and are thus equally protected under article 8 when discussing family rights. Due to Greece's differential treatment, the Court found a violation of articles 8 and 14 – thus broadening its scope.

4.1.7 The *Hämäläinen* Reversal: The New Authority.

In *Hämäläinen*, the applicant was born male and married to a woman with whom he had a biological child. In 2009, the applicant underwent gender reassignment surgery and was subsequently denied changing her male identity number to a female one. This was due to Finnish law requiring her to be single, or that her spouse must agree to a registered partnership due to same-sex marriage being illegal.¹³² The government argued that the applicant could get a registered partnership, thereby retaining their legal rights as a couple. However, for the couple, who were deeply religious, getting divorced was not an option.¹³³ The applicant claimed that both articles 8 and 12 were violated, as she had to choose between being married and her gender. This case not only saw the Court addressing same-sex marriage four years after *Schalk and Kopf* but it also looked at the rights of transsexuals in 2014.

The Court's assessment began with the state owing a positive obligation as the applicant's claim involved 'special measures' under article 8,¹³⁴ thus the margin began in favour of the state. To weigh this personal private right with the state's obligation under article 8, the Court looked to what was currently available to the applicant under Finnish law. There were three options, the first was to stay married but with a male identity number. This was seen by the Court as an inconvenience the applicant would have to tolerate. The second option

¹³⁰ *Vallianatos and Others v Greece*, para 73.

¹³¹ *Ibid.*

¹³² *Hämäläinen*, paras 11-14.

¹³³ *Ibid.*, paras 15, 49.

¹³⁴ *Ibid.*, para 63; *Odièvre v France*, para 42; *Glass v UK*, paras 74-83; *Airey v Ireland*, para 33.

was to change genders and thus change from a marriage to a registered partnership, and the last option was to get a divorce.¹³⁵ The Court held that the second option was the most realistic given the applicant's need to change genders and the wife not willing to divorce.¹³⁶ It wasn't a 'forced divorce' as the couple's marriage would be switched to a partnership automatically – thus only a change of title – upon consent from both couples, just as when a registered partnership is made into a marriage.¹³⁷ Following *Goodwin*, the Court found it mandatory for states to 'recogni[s]e the change of gender undergone by post-operative transsexuals through...amend[ing] the data relating to their civil status, and the ensuing consequences'.¹³⁸ The fact that the applicant was already married was seen to be covered under article 8 – not 12.¹³⁹ However, the Court feared that finding a violation of article 8 would lend itself to the slippery slope effect,¹⁴⁰ as well as contradict the Court's standing in *Schalk and Kopf*.¹⁴¹

Importantly, what cannot be overlooked, is how at odds the Court's view in *Hämäläinen* about the applicant's decision to stay a man so as to save her marriage is a 'regrettable inconvenience' is with its decision in *Goodwin*. In *Goodwin*, the Court had held 'the stress and alienation arising from a discordance between the position in society...and the status imposed by law which refuses to recognise the change of gender cannot...be regarded as a minor inconvenience'.¹⁴² Arguably, this comparison is incomplete as there was no mention of same-sex marriage in *Goodwin* but rather her pursuing a heterosexual relationship.¹⁴³ However, in *Hämäläinen*, due to the conflict of same-sex marriage, the deep personal connection to one's gender and the right to be recognised by the law was not sufficiently taken into consideration by the Court.

The dissenting opinion does bring forth a variety of arguments, all of which could be seen as an acceptance of *Goodwin* and thus reasons to find the government's actions as violating the Convention. First, the minority found that the complaint shouldn't have been analysed

¹³⁵ Ibid, para 76.

¹³⁶ Ibid, para 79.

¹³⁷ Ibid, para 80.

¹³⁸ Ibid, para 68; *Goodwin*, paras 71-93.

¹³⁹ Ibid, paras 97, 85.

¹⁴⁰ Ibid, para 70.

¹⁴¹ Ibid, para 71; *Schalk and Kopf*, para 101.

¹⁴² Ibid, p. 33, para 8; *Goodwin*, para 77.

¹⁴³ *Goodwin*, para 101.

from a positive obligation to begin with – also agreed upon in the separate concurring opinion.¹⁴⁴ The fact that the state had to refuse to grant something which would in other circumstances be given if the applicant was single was an example of interference not a positive obligation.¹⁴⁵

Second, they supported *Goodwin* by critiquing the majority when it was assumed that the applicant had a ‘real choice between maintaining her marriage and obtaining a female identity number’, essentially requiring her to oppose her own religious convictions as divorce was not an option for her or her wife.¹⁴⁶ When one takes into consideration that it took several years for the applicant to come to this decision including the seeking of medical help,¹⁴⁷ it is clear that such a decision - when including the Court’s views of post-operative transsexuals from *Goodwin* - that remaining a man was never an option to her.

Third, the ‘slippery slope’ argument was flawed given that the institution of marriage would not have been damaged by such a small number of people getting married as this case would only apply to transgendered same-sex couples who were already married as a heterosexual couple.¹⁴⁸ There is great difficulty in comprehending how or why the public would be morally affected by the applicant remaining married as a woman when she had already been publically identifying as a woman since 2009.

Lastly, with regard to articles 8 and 14, the minority argued that the majority should have compared the situation to married heterosexual couples who don’t need to decide between their gender and their marriage.¹⁴⁹ This further illustrates the Court’s oversimplification of the applicant’s marriage as a homosexual relationship when her wife still identified as a heterosexual and remained married due to her religious beliefs.¹⁵⁰

Therefore, *Hämäläinen* takes a very different approach than *Goodwin*. The progressive interpretation to article 8 is no longer apparent as the Court is becoming increasingly wary of it being caught in a right to marry trap. It reiterates its view that same-sex marriage

¹⁴⁴ *Hämäläinen*, p.32, para 4; p.30, para 4; *Fadeyeva v Russia*, para 96; *A, B and C v Ireland*, paras 248-9; 266.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid*, p.34, para 6.

¹⁴⁷ *Ibid*, para 11.

¹⁴⁸ *Ibid*, p. 36, para 12.

¹⁴⁹ *Ibid*, p.39, para 19.

¹⁵⁰ *Ibid*, p.39, para 20; *Thlimmenos v Greece*, para 44.

cannot be found under article 8,¹⁵¹ which consequently meant that article 14 could not be invoked.¹⁵² For the Court, the emotional value of the individual claiming discrimination is no longer the power it once was in *Goodwin*. It even pushes down the personal violations the applicant may feel on the basis of sex as being subordinate to the state's authority if there can be an equally legal option available. There is evident trepidation within the Court to go further into the public domain of article 8 as it comes in closer range of article 12. *Hämäläinen* confirms the rights of transsexuals to be equally protected under article 8, but not to include any other factor that is viewed as too subjective, such as their personal suffering.

4.1.8 *Oliari* – The Current Status Quo.

One year after *Hämäläinen*, *Oliari* set the stage for articles 8 and 14 to once again be the focus of the LGBTQI's fight for equality. Here, three homosexual couples all requested marriage certificates only to be rejected by the Italian Constitutional Court.¹⁵³

As the Court held in *Hämäläinen*, in regards to article 8, the analysis must begin from a positive obligation on states to recognise same-sex couples, not a negative one to 'respect' the private lives of homosexual couples.¹⁵⁴ Thus, in *Oliari*, the Court viewed the obligation to legislate for same-sex partnerships under article 8 to be a positive obligation¹⁵⁵ – despite the minority and separate opinions.¹⁵⁶

When enforcing a positive right, the Court held that states do have a 'certain margin'; however, there is a list of factors that must be taken into consideration.¹⁵⁷ Namely, is it a 'particularly important facet' of the applicant's 'existence or identity' and is there a consensus among the states. There will be a wider margin where issues raise sensitive moral or ethical dilemmas for the state or when the state will have to balance between individual, societal interests or Convention rights.¹⁵⁸ If one follows this list, then same-sex

¹⁵¹ *Ibid*, para 71.

¹⁵² *Ibid*, para 112.

¹⁵³ *Oliari*, para 99.

¹⁵⁴ *Hämäläinen*, para 64.

¹⁵⁵ *Oliari*, para 164.

¹⁵⁶ *Ibid*, p.63, para 5.

¹⁵⁷ *Oliari*, para 162.

¹⁵⁸ *Ibid*.

couples face a conflict in their everyday life when they live openly as gay couples but are not recognised legally by their own country.¹⁵⁹ Additionally, this recognition would ‘bring a sense of legitimacy’ to their relationship, especially as it impacts their ‘core rights’ which are relevant to a relationship not facing any unnecessary hardships.¹⁶⁰ There was also a thin consensus as 24 of the 47 states had legislated in recognition of same-sex partnerships.¹⁶¹ Therefore, the Court held that this positive obligation was outweighed by the above factors as well as the five years of ‘legal uncertainty’ the applicants’ faced with their relationship status that were seen to be so ‘excessive’ by the Court that Italy’s actions could be seen as ‘defective’.¹⁶² Consequently, the Court held there was a violation of article 8, however, it could not be extended to same-sex marriage.¹⁶³

4.2 Concluding Remarks

This chapter has detailed the efforts of the LGBTQI community to fight for protection under articles 8 and 14. It has been a judicial battle enduring several decades as well as being held in multiple different domestic judicial systems. I do not deny that article 8 has been dramatically widened since the early Commission cases; however, does this mean that it has been widened to include same-sex marriage? The answer can only be no at this point from the above case law. Article 8 is broader than article 12, however, this doesn’t include the right to marry as well. Furthermore, the argument for articles 8 and 14 has also been denied by the Court. Despite the minority in *Schalk and Kopf* approving this argument, the Court has not accepted articles 8 and 14 in any further same-sex marriage cases, with *Oliari* being the final nail in the coffin for this argument. The only avenue for same-sex marriage to be legalised under the Convention is through article 12; I will show how this is possible in the two subsequent chapters.

¹⁵⁹ Ibid, para 173.

¹⁶⁰ Ibid , 174.

¹⁶¹ Ibid, para 178.

¹⁶² Ibid, p.64, para 7.

¹⁶³ Ibid, para 193.

5 The Legality of Same-Sex Marriage: Article 12

With an understanding from Chapter 4 that neither article 8 alone nor with article 14 can secure same-sex marriage, this chapter looks to article 12, the right to marry. This chapter will examine (i) the interpretation method used by the Court. I will investigate in-depth the treaty interpretations the Court has available to it under international law and how this has been used in the Court's jurisprudence – especially from transsexual cases – including the consequential effect it has had on the Court's reading of article 12. Then, (ii) the importance of the consensus for the Court when discussing same-sex marriage under article 12.

There are two positions in support of same-sex marriage being protected by article 12. The first is that it can be read into article 12 from the application of article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT). The second is that the case law is developing and it shows a strong trend in favour of same-sex marriage that the Court cannot deny.¹⁶⁴ I disagree with both of these arguments as they do not give enough weight to the European consensus which the Court has shown through *Shalk and Kopf*, *Hämäläinen* and *Oliari* to be the deciding factor

5.1 How does the Court decide?

The seminal case for same-sex marriage is *Schalk and Kopf*. Chapter 4 has already given an overview of the facts and the arguments in relation to articles 8 and 14. This chapter turns to the Court's interpretation of article 12 in *Schalk and Kopf* to see if same-sex marriage could be read into article 12. The Court is the 'ultimate interpretative authority' on the Convention,¹⁶⁵ and its decision reflects the traditional interpretation methods of international law,¹⁶⁶ as stated in articles 31 and 32 of the VCLT. The Court had to: (i) determine the 'original meaning of the text',¹⁶⁷ (ii) the context of the article itself that has multiple criteria such as relevant international law provisions and subsequent state practice

¹⁶⁴ Letsas (2013), p.122.

¹⁶⁵ ECHR, article 32(1); De Londras and Dzehtsiarous (2015), p.525.

¹⁶⁶ *Loizidou v Turkey*, para 43; Klabbers (2010), p.18; Drzemczewski (1980), p.58.

¹⁶⁷ VCLT, article 31(1).

related to article 12,¹⁶⁸ and (iii) objects and purpose of the Convention.¹⁶⁹ Importantly, if there was any textual ambiguity then the Court could look to the *travaux préparatoires*.¹⁷⁰ However, this chapter will show that the Court has a very clear meaning of article 12 and thus the use of the *travaux préparatoires* were not necessary. Due to space and an absence of Court discussion, the issue of good faith under the VCLT will not be discussed.

The applicable article 12 states:

‘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.’

5.1.1 Literal

In regards to (i) the ‘original meaning’ of the text, this is also known as the literal or textual reading.¹⁷¹ The VCLT has not fully defined the term ‘original meaning’,¹⁷² however, a literal reading must at least look to the natural meaning or everyday language of the text.¹⁷³ The Court finds in *Schalk and Kopf* that looking at article 12 on its own: ‘might be interpreted so as to not exclude the marriage between two men and two women.’¹⁷⁴ Thus, the gender of a spouse is not set out in the text. In addition to this finding, the Court also looks to its decisions from previous transsexual cases where the textual bounds of article 12 have been pushed. Most notably in *Goodwin* where the Court held (i) the right to marry and found a family are not dependent on one another as married couples may not be able to procreate and consequently shouldn’t be denied the right as a whole,¹⁷⁵ and (ii) the biological criteria for article 12 is not as stringent as it first appeared. The argument under (ii) is particularly revolutionary as the biological criteria for gender may no longer be as important as it was at the time the Convention was being drafted.¹⁷⁶ Prima facie, *Goodwin* does seem to support same-sex marriage as a post-operative transsexual may wish to marry

¹⁶⁸ Ibid, article 31(2) and (3).

¹⁶⁹ Ibid, article 31(1).

¹⁷⁰ Ibid, article 32.

¹⁷¹ Linderfalk (2007), p.62; VCLT Commentary, p.220; Dothan (2014), p.510.

¹⁷² Ibid, p.63.

¹⁷³ VCLT Commentary, p.221.

¹⁷⁴ *Schalk and Kopf*, para 55.

¹⁷⁵ *Goodwin*, para 98.

¹⁷⁶ Ibid, para 100.

someone that matches their desired gender, however the Court continued to explicitly state that this ‘right to marry’ for transsexuals is only when they wish to marry someone of their opposite gender.¹⁷⁷

Despite *Goodwin*’s broadening of article 12, the Court looks to the meaning of marriage when the Convention was drafted. That is, in the 1950s, when the Court was founded, gay marriage would not have been even considered as a possibility at this time.¹⁷⁸ This weakens the Court’s original finding that article 12 could be read to include same-sex marriage.

Moreover, to oblige states to enact new legislation on same-sex marriage would be a ‘major social change’, demanding a positive obligation.¹⁷⁹ The Court cannot make this demand when there is no indication in article 12 that same-sex marriage can be included. This is especially due to the ‘deep-rooted social and cultural connotations’ of marriage and the differences that each member state places on this institution.¹⁸⁰ The insertion of ‘according to the national laws governing the exercise of this right’ in Article 12 would indicate that the states play a very important role. Whilst the state cannot act outside the Convention,¹⁸¹ it can only be up to the national legislature to decide on this issue.¹⁸² Thus, for the Court it is ‘clearly understood’ from the text that article 12 was not supposed to have included the right to same-sex marriage and it was for the state to decide whether they wanted to include same-sex couples under article 12.¹⁸³

There is no need to look at article 32 – *travaux préparatoires* – of the VCLT at this point as the meaning of marriage is not ‘ambiguous’ or ‘manifestly absurd’ to the Court. However, the Court’s clarity on this issue is partly based on the assumption that the drafters would not have thought of same-sex marriage in article 12, and therefore, this meant it was the drafters’ intention to exclude same-sex marriage. The drafters did specify gender in Article 12, a marked difference from other Convention rights which state ‘everyone’. However, this specification of gender was to ensure women had equal rights in a marriage.¹⁸⁴ For

¹⁷⁷ *Schalk and Kopf*, para 103.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid*, paras 58, 63.

¹⁸⁰ *Ibid*, para 62.

¹⁸¹ *Engel and Others v the Netherlands*, para 81; *Konstantin Markin v Russia*, para 126.

¹⁸² *Schalk and Kopf*, paras 53, 58, 60; *Parry v the United Kingdom*, p.12.

¹⁸³ *Ibid*, para 55.

¹⁸⁴ Schabas (2015), p.535; Johnson (2015b), p.215.

Johnson, the Court's interpretation has a blatant favouritism towards heteronormativity and, more importantly, doesn't take account of the real reasoning – protection of women – that article 16 of the Universal Declaration of Human Rights (UDHR), the source of article 12 was based on.¹⁸⁵ Thus, according to Johnson, the drafters didn't foresee same-sex marriage and they only specified gender in article 12 for the protection of women. This is markedly different from the Court's understanding that the drafters specified 'men and women' to exclude same-sex couples.

I agree with Johnson that this part of the interpretation was incorrectly interpreted by the Court. However, if we follow Johnson's reasoning, then article 12 – based on a literal interpretation – would allow for same-sex marriage to be included.¹⁸⁶ Even if the Court could see that the drafters did not wish to exclude same-sex couples, this doesn't immediately clarify article 12 for the Court. At the time of drafting, there is no mention of same-sex marriage, only the protection of women. The drafter's lack of consideration does not equate to immediate acceptance by the Court, especially when this right is enshrined in state authority. I agree that the drafters did not word article 12 to exclude same-sex marriage, why would they when homosexuality itself was widely criminalised at the time? Arguably, the drafters would not have envisaged that they would be protecting homosexuals under article 8 either.¹⁸⁷ However, the Court was entitled to a more flexible interpretation of article 8 due to its broad nature.¹⁸⁸ Conversely, the Court has stated their clear interpretation of article 12 to have a stricter and a more onerous nature – in regards to same-sex marriage – than article 8.¹⁸⁹ There is no reason that the Court should look to supplementary interpretation tools like the *travaux préparatoires* to overturn the authoritative interpretation given under article 31 VCLT.¹⁹⁰ Johnson's argument does not clarify article 12 any further and the Court would still move to a contextual approach, one they move to anyways as will now be discussed.

¹⁸⁵ Johnson (2015b), p.222.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid, Letsas (2013), p.124.

¹⁸⁸ *Goodwin*, para 90.

¹⁸⁹ *Johnston and Others v Ireland*, para 57; *Schalk and Kopf*, paras 101, 108.

¹⁹⁰ VCLT Commentary, p.220.

5.1.2 Contextual

The importance of the contextual reading is for the right to marry to not be interpreted in ‘abstract’,¹⁹¹ but rather in light of its place in the whole treaty. The Preamble is naturally seen to be counted within this contextual interpretation,¹⁹² however it can also be discussed under the ‘object and purpose’ approach as seen below.¹⁹³ In addition to the Convention, the VCLT has stated that additional documents related to the article can be used in the contextual reading.¹⁹⁴ The contextual criteria relevant to article 12 and same-sex marriage are (i) international sources¹⁹⁵ and (ii) subsequent state practice¹⁹⁶.

First, in *Schalk and Kopf*, the Court acknowledges the influence of international sources when it discusses the gender neutral right to marry found in article 9 of the European Union Charter (EU Charter). There is a lack of international sources used by the Court in this decision as well as their discussion of article 12 in *Oliari*.¹⁹⁷ This absence of international sources highlights the importance of the European consensus – the determinant factor – for same-sex marriage. Arguably, the EU Charter is influential at the beginning stages of the Court’s reasoning when it’s factored into their decision to article 12 no longer applying solely to heterosexual couples.¹⁹⁸ However, the Court’s reasoning does not extend past a passive acceptance of same-sex marriage – as it views article 12 to still be a matter of state authority.¹⁹⁹ The Court places no further weight on the EU Charter, appearing to go against its practice of frequently looking to and coordinating the effects of international sources for treaty interpretation.²⁰⁰ Although, if one looks closer to the text of the EU Charter, it merely provides another interpretation for the right to marry with its gender neutral clause;²⁰¹ it doesn’t create a positive obligation on states to legislate for same-sex marriage,

¹⁹¹ Ibid.

¹⁹² VCLT Commentary, p.221.

¹⁹³ *Abi-Saab* (2010), p.104.

¹⁹⁴ VCLT Commentary, p.221.

¹⁹⁵ VCLT, article 31(3)(c).

¹⁹⁶ Ibid, article 31(3)(b).

¹⁹⁷ *Oliari*, paras 192-3.

¹⁹⁸ *Schalk and Kopf*, para 61.

¹⁹⁹ Ibid.

²⁰⁰ Merkouris (2014); *Nada v Switzerland*, para 170; Research Report (2011), p.3; *Demir and Baykara v Turkey*, para 76.

²⁰¹ Lee (2010), p.49.

just an option for them to have it if they so choose to do so.²⁰² Indeed, the EU has recently encouraged states to ‘further contribute to reflection on the recognition of same-sex marriage or same-sex civil union’,²⁰³ not to force every state to legalise same-sex marriage. The Court is thus following the EU Charter on this point by allowing states to read same-sex marriage into article 12, but not obliging states to enforce a positive obligation, a much higher threshold for the Court to meet. This opens the door for states to take a progressive reading of the Convention if they so wish.

Whilst it is argued that this open door approach is really a retreat by the Court to the drafters’ 1950s vision,²⁰⁴ or a deference to states on the basis of ‘deep-rooted heteronormative standards’,²⁰⁵ such claims are ultimately misleading. Even though the Court did not legalise same-sex marriage in either *Schalk and Kopf* or *Oliari*, it found that a European consensus could allow the Court to read same-sex marriage into article 12. The acceptance and dependence on the consensus can be seen as the Court’s way of reuniting the Convention’s aims with those of a modern day Europe.

This leads to (ii) regarding state practice. This is a difficult subject as it comes under both the VCLT and the Court’s own dynamic approach of interpreting the Convention (to be discussed in the next section). The VCLT approach is a logically sound argument as the Court will only allow for same-sex marriage under article 12 when the state sees fit. Proponents of same-sex marriage could reasonably argue that this is article 31(3)(b) of the VCLT in action and therefore something the Court should take into consideration when interpreting article 12 – as it allows them to read in same-sex marriage. I agree that article 31(3)(b) can be used by the Court to legitimise their decision when interpreting the Convention in line with modern Europe. However, I disagree with the conclusion that the Court could use article 31(3)(b) *today* to legalise same-sex marriage under article 12 for two reasons.

First, state practice is overwhelmingly opposed to same-sex marriage,²⁰⁶ as there are less than a third of states who have same-sex marriage.²⁰⁷ Further, there is no clarity as to what

²⁰² EU Charter Commentary, p.102; Sutherland (2011), p.99.

²⁰³ European Parliament Res (2015), p.162.

²⁰⁴ Hodson (2011), p.178.

²⁰⁵ Johnson (2011a), p. 362.

²⁰⁶ ILGA Europe (2016).

threshold the Court must take into account when interpreting article 12.²⁰⁸ This lack of understanding has enticed scholars to comment on a trend approach being a worthy legal argument for article 12.²⁰⁹ Such commentary is unhelpful to the same-sex marriage debate as article 12 has been regarded as *lex specialis*²¹⁰ and thus the trend approach from article 8 cannot be generically applied for the sake of proving state practice. Whilst I do agree that the Court observes state practice, it will not act on it until there is a minimum 24 state consensus on same-sex marriage.

Second, article 31(3)(b) specifies that the state practice must lead to an agreement among the states that they want the article to now be read this way. The individual state practice does not equate to such an agreement, it is just an example of state practice.²¹¹ The concurring opinion of Judge Malinverni and Judge Kovler in *Schalk and Kopf* agreed with this reading as they held that the ‘number of states... provide for the possibility for homosexual couples to marry cannot...be regarded as a “subsequent practice in the application of the treaty” within the meaning of [article 31(3)(b)].’²¹² Arguably, this is a formalistic reading of the article 31(3)(b) as the VCLT doesn’t explicitly states that there must be a formal agreement between the states, rather it is the practice itself that lends an objective standard for the Court to base its interpretation on.²¹³ However, this formalistic view is persuasive, as how else does one tell whether the state passed same-sex marriage on its interpretation of article 12 or the gender neutral marriage clause under the EU Charter? Must the Court question each state’s motive every time a case for same-sex marriage appears? The Court cannot use article 31(3)(b) unless it can see that the states’ practices are based on an agreement which confirms they are interpreting article 12 to include same-sex marriage. A formal agreement is thus more desirable as it is evidence the Court can use rather than constantly questioning the state’s motives.²¹⁴

²⁰⁷ Ibid.

²⁰⁸ VCLT Commentary, p.222, paragraph 15.

²⁰⁹ Johnson (2013), p.161.

²¹⁰ Schabas (2015), p.534; *Hämäläinen*, para 96.

²¹¹ Peters (2015), p.26.

²¹² *Schalk and Kopf*, p.29.

²¹³ VCLT Commentary, p.221, para 15.

²¹⁴ Brownlie (2012), p.382.

If we applied this same logic to the European consensus without this debated article 31(3)(b), then the Court wouldn't require a motive or a connection to article 12 as the mere presence of same-sex marriage legislation would be enough for the Court. It is easier for the Court to take this option, rather than looking to ways to justify article 31(3)(b). The Court understands that whether same-sex marriage can be protected under article 12 relies on state practice. However, this state practice is not article 31(3)(b) at work, it's the application of the European consensus.

5.1.3 'Object and Purpose'

This is the final step for the Court's interpretation of article 12. Whilst the preamble is an integral part of the contextual approach, it is more commonly used by the Court when discussing the object and purpose of a right.²¹⁵ Here, the Court must give weight to the Convention 'as an instrument for the protection of individual human beings' and its 'collective enforcement of human rights and fundamental freedoms'.²¹⁶ This is a more progressive view – promoting human rights²¹⁷ – which the Court has interpreted as applying the Convention in the 'light of present-day conditions'.²¹⁸ There have been many names given to this interpretation, such as the 'evolutive'²¹⁹ or 'teleological'²²⁰ approach. Either way, the basis for this approach is the Court finding the object and purpose of the Convention and thus requires the Court to integrate the view of society now not when the Convention was drafted.²²¹

It would be naïve to say the Court is not guided by the literal and contextual interpretations discussed above. This is evident by the Court agreeing with the text that the right to marry should remain under state control. The Court accepts that it cannot do anything – according to the ordinary meaning of article 12 – to oblige states to legalise same-sex marriage. However, it recognises that due to the Convention also needing to be interpreted according to current European standards – in line with the object and purpose interpretation under

²¹⁵ *Golder v the United Kingdom*, para 34.

²¹⁶ *Soering v United Kingdom*, paras 87-88.

²¹⁷ Peters (2015), p.13.

²¹⁸ *Tyrer v the United Kingdom*, para 31; *Marckx*, para 41.

²¹⁹ Helfer (1993), p.154.

²²⁰ Dothan (2014), p.510; Klabbers (2010), p.29.

²²¹ Dothan (2011a), p.131.

article 31(1) of the VCLT – it needs to look to what its states as a whole want if the status quo is to be changed. To do this, the Court relies on the European consensus as its primary tool of interpretation.²²²

The last section of this chapter will show not only how the European consensus is used to interpret article 12 in light of its object and purpose, but also that it is the deciding factor for the Court.

5.1.3.1 European Consensus.

There is debate among scholars as to whether the European consensus can be used by itself or is just one criterion among many in helping the Court find the object and purpose of a right.²²³ From an article 12 perspective though, the European consensus has not been elevated to the status that I argue below. I will do this by showing (i) the evolutive interpretation of the Convention and (ii) the argument to apply article 14 with article 12 has been dismissed. This is not to state that other factors shouldn't be more prominent, but rather that the case law has effectively shown that it views the European consensus as the most influential factor.

First, when article 12 has been discussed outside the context of same-sex marriage, the Court does not look to a consensus, but rather the national laws and their direct relationship with the Convention.²²⁴ A good example is seen in *Johnston and Others v Ireland (Johnston)* where the applicant was claiming that he had a right to divorce under article 12. The Court agreed with the Commission's findings that the ordinary meaning of article 12 covered only the formation of marriage, and thus there could not be a right to divorce.²²⁵ The Court acknowledged the importance of the Convention being a living instrument, but found this method too evolutive as there was no literal allowance in article 12 and the text stated that national laws should dictate the parameters of the right.²²⁶ There is no explanation why the Court finds looking to a consensus in a non-same-sex marriage case as too evolutive, but not when two men wish to marry. By using the consensus, the Court

²²² Helfer (1993), p.140; De Londras and Dzehtsiarou (2015), p.544.

²²³ Dzehtsiarou (2011), p.537; Mowbray (2013), p.36; Arai-Takahashi (2002), p.216.

²²⁴ *B and L v the United Kingdom*, paras 36-7.

²²⁵ *Application No.9697/82*, para 92; *Johnston*, paras 52-3.

²²⁶ *Ibid*, paras 52-3.

illustrates that they understand the conflict they face with the progressive change of social values versus the member state's right to maintain the heteronormativity of married couples.

Schalk and Kopf departs from the principle in *Johnston* by acknowledging the influence of the changing times in modern society and that states have chosen to interpret article 12 by allowing same-sex marriage.²²⁷ It thus uses the European consensus to determine the limits of article 12;²²⁸ giving the Court room to interpret the Convention in a more progressive light. This is exactly what happened in *Oliari* when the Court looked to the consensus. It affirmed the broader definition of article 12 it previously held in *Schalk and Kopf*, where the Court 'no longer consider[ed] that the right to marry must in all circumstances be limited to marriage between two persons of the opposite sex'.²²⁹ It is on this basis that the Court must look to a more convincing factor to support the legitimacy of its decision. This can only be a clear consensus illustrating the direction Europe is moving in.²³⁰ Thus, allowing the Court to be seen as implementing the common European standard rather than the Court's standard.

Second, whilst there has been a continued argument for the inclusion of article 14 on this issue,²³¹ it has been dismissed by the Court on admissibility grounds.²³² Marriage is differentiated from any other type of relationship as it has 'social, personal and legal consequences'; which the Court sees as a right that is to be protected primarily by the states given their proximity to the issue.²³³ Thus, the Court dismissed article 14 as it did not wish to overstep its authority on a right that was very closely intertwined with a state's cultural identity.²³⁴ This was a highly questionable ruling from a discrimination standpoint,²³⁵ especially when the Court held in *Bączkowski and Others* that 'democracy does not simply mean that the views of the majority must always prevail'.²³⁶ There must be a

²²⁷ *Schalk v Kopf*, para 53.

²²⁸ Wildhaber, Hjartarson and Donnelly (2013), p.256.

²²⁹ *Oliari*, para 191.

²³⁰ Johnson (2011b), p.590; Hodson (2011), p.172.

²³¹ Wintemute (2011); Tatchell (2015).

²³² Application No. 8254/11; *Oliari*, para 194.

²³³ *Schalk and Kopf*, para 62.

²³⁴ *Oliari*, paras 193-4.

²³⁵ Johnson (2015 b), p.208.

²³⁶ *Bączkowski and Others v Poland*, para 63.

balance ‘which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position’.²³⁷ Despite the prominence of sex-based discrimination,²³⁸ when it comes to the right to marry it seems it is readily ignored by the Court. Further, issues such as ‘emotional attachments, commitment and support are treated as irrelevant’ by the Court, however, if the applicant was heterosexual then it would be given the full weight it deserved.²³⁹ The Court’s response to same-sex marriage has been to see relationships between homosexuals and heterosexuals as equal legally, but not culturally. Critics would argue that by having two separate institutions – registered partnerships versus marriage – for homosexual and heterosexual couples is still discriminatory.²⁴⁰ However, for the Court, the discrimination is based on cultural differences – not sexual orientation grounds. It is the individual state, not the Court, who determines these cultural differences as it is ‘best placed to assess and respond to the needs of society.’²⁴¹ It is this culture of tradition that is steeped in the wording and context of article 12. This view still holds marriage to have a ‘special status’,²⁴² however, for article 14 to be invoked, the Court must be convinced that article 12 demands same-sex marriage rather than allows it. Further, critics of using article 14, have held that affording equal rights to same-sex couples under registered partnerships is ‘equality in practice – all part of the ‘incremental’ progress of gay rights.’²⁴³ Such an argument matches the Court’s stance when they went to great lengths in *Oliari* to state that article 14 has no application on this issue as article 12 cannot be invoked at this point in time without a European consensus backing same-sex marriage.²⁴⁴

Whilst it can be seen from the arguments above that the right to marry is inherently in the states’ control, the Court can get past this by using the European consensus. The Court recognises the importance of allowing the states room to move on certain issues, however, it cannot deny the role it plays as an instrument in the protection of human rights.²⁴⁵ The Court is not limiting article 12, as the current interpretation doesn’t allow same-sex

²³⁷ Ibid.

²³⁸ *Alekseyev v Russia*, para 81; *Karner*, para 37; *Schalk and Kopf*, para 97.

²³⁹ Tahmindjis (2005), p.17.

²⁴⁰ Koppelman (1988), p.145; Sutherland (2011), p.102.

²⁴¹ *Schalk and Kopf*, para 62.

²⁴² Johnson (2015a), p.246; *X and Others*, p.27; *Burden v the United Kingdom*, para 63.

²⁴³ Eskridge (2000-2001), p.871, 876.

²⁴⁴ *Oliari*, paras 192-3.

²⁴⁵ *Konstantin Markin*, para 126; *Weller v Hungary*, para 28.

marriage. When the consensus favours same-sex marriage, this will help the Court to read in a right that was originally excluded.²⁴⁶ This is a more valid argument to overcoming this issue, although it will take longer due to its reliance on the states themselves. It is this European view that the Court holds as an important source for the direction of progress in human rights – or the ‘fatal blow’ for the legalisation of same-sex marriage.²⁴⁷

5.2 Conclusion

It is outside the scope of this paper to delve into what other ways the Convention could be amended, such as by including a protocol. It suffices to say that the literal reading of article 12 no longer automatically strikes out a claim for same-sex marriage as the Court confirmed in *Schalk and Kopf*. The Court recognises that due to the literal and contextual readings of same-sex marriage, it is a positive right that cannot be read into article 12. However, the Court must also interpret the Convention in light of modern European standards – its object and purpose. There is no doubt that LGBTQI’ rights have managed to advance without this consensus as the Court has favoured a trend approach or even a more progressive reading of articles 8 and 14. However, it is the European consensus which is the deciding factor for the Court to be convinced that article 12 protects same-sex marriage.

²⁴⁶ Dzehtsiarou (2015), p.127.

²⁴⁷ Sutherland (2011), p.99.

6 Power in Numbers not Words

With an understanding that the confirmation of the consensus is a turning point for same-sex marriage, this section now turns to what this consensus is. There are three main critiques to my argument that same-sex sex marriage requires a majority vote of 24 member states. Firstly, that the Court uses multiple consensuses when deciding a case,²⁴⁸ however, I only centre on the European consensus. Secondly, there are different names given to the consensus itself,²⁴⁹ which leads commentators to question the legitimacy of the consensus as the Court has no standardised application for it.²⁵⁰ Lastly, the Court could use a trend – requires less states – rather than a consensus to read same-sex marriage into article 12.

I rebuke these critiques with my analysis of the relevant cases, as they will show the most accurate understanding of what the Court is looking at. From this analysis, I will show that (i) it is the European consensus – not an emerging consensus or a trend – that the Court looks to when discussing same-sex marriage cases and (ii) the consensus required for same-sex marriage is one that requires 24 states to legalise same-sex marriage.

6.1 Only the European Consensus?

From the literature, there are several types of consensuses found in the Court's case law, such as: consensus of European states' legislation; international treaties; European people's consensus; and expert consensus.²⁵¹ This paper does not have the scope to go through all of the different types of consensuses, especially as there is no definite list.²⁵² However, one can see that the principle of looking to state's legislation and their interpretation of the Convention is seen as one type of European consensus.²⁵³ I do not disagree with the concept of other consensuses, such as an international consensus or using the public opinion in that state as a citizen consensus, nor the fact that the Court considers them in its

²⁴⁸ Helfer (1993), p.140; Dzehtsiarou (2015), p.39.

²⁴⁹ Dothan (2015), p.5; Hodson (2011), p.172.

²⁵⁰ Helfer (1993), p.135; Dzehtsiarou (2011), p.536.

²⁵¹ Dzehtsiarou (2015), p.39

²⁵² Helfer (1993), p.139.

²⁵³ Ibid, p.140; Dzehtsiarou (2015), p.39; Arai-Takahashi (2002), 215; Wildhaber, Hjartarson and Donnelly (2013), p.253; Sutherland (2011), p.99.

decisions.²⁵⁴ However, as I have shown in Chapter 5, the Court has placed the European consensus above all others.

6.2 What's in a Name?

The name itself – European consensus – has differing names such as ‘common European standard’²⁵⁵ or ‘common European approach’,²⁵⁶ supporting the view that the Court has not actually defined what the European consensus is.²⁵⁷ Similarly, another critique is that one doesn't know whether the Court is looking to European legislation or other factors such as a development in the government's social policy.²⁵⁸ I counter that whether one says the European consensus or not, the meaning is the same. Additionally, anybody reading a same-sex marriage case would be able to see that the Court only counts the states that have passed legislation in favour of same-sex marriage.

Further, the three principle cases on same-sex marriage, all use the word European consensus,²⁵⁹ and more specifically, *Hämäläinen* uses the term consensus when agreeing with previous case law that used the term ‘common European standard’.²⁶⁰ Thus, I do not believe the discrepancy in titles creates a significant identification problem. It is clear from these terms that the Court is looking at a standardised view of legislation amongst its states,²⁶¹ and in relation to same-sex marriage under the Convention, the name European consensus is used.

In terms of the application of the consensus, it is historically a convoluted principled that does create confusion around the Court's reasoning.²⁶² I do agree with Helfer that this idea of the consensus has not been adequately discussed – in general – by the Court on Convention rights.²⁶³ However, I do not find from the clear, methodical and unanimous reasoning in *Oliari* that the Court has difficulty in finding a consensus when discussing

²⁵⁴ Ibid; *Oliari*, para 181.

²⁵⁵ *X, Y and Z*, para 44.

²⁵⁶ *Sheffield and Horsham*, para 57.

²⁵⁷ Wildhaber, Hjartarson and Donnelly (2013), p.249; Brauch (2009), p.290.

²⁵⁸ Brauch (2009), p.284; Burstein (2006), p. 438.

²⁵⁹ *Schalk and Kopf*, para 58; *Hämäläinen*, paras 67, 74; *Oliari*, para 163.

²⁶⁰ *Hämäläinen*, para 75; *X, Y and Z*, para 44.

²⁶¹ Dzehtsiarou (2015), p.11.

²⁶² Wildhaber, Hjartarson and Donnelly (2013), p.249; Brauch (2009), p.290.

²⁶³ *Hämäläinen*, p.31, para 5.

same-sex marriage under article 12.²⁶⁴ Further, there is a real link between the Court not finding a consensus and thus no violation of the Convention.²⁶⁵ There are of course exceptions to the rule,²⁶⁶ however, this link illustrates that the leading cases on same-sex marriage are consistent rulings and will not change until the consensus does.

6.3 Can't we just have a Trend?

There are still misunderstandings on whether a trend or an emerging consensus can equate to the European consensus. It is imperative to first identify the terminology in this discussion. I find academics confuse the use of 'emerging' with the consensus principle. This is evidenced when Shai Dothan states '[i]f the [Court] takes too long to find an Emerging Consensus, states are deprived of the privilege of rapidly identifying the European consensus by the following of the [Court's] judgments.'²⁶⁷ This idea of the emerging consensus is not fully explained by Dothan, except as a doctrine applied by the Court.²⁶⁸ It could be that Dothan is trying to explain the emerging consensus as a prerequisite to the actual consensus. In this way, I would argue that the term emerging is a synonym for trend,²⁶⁹ which the Court has found influential for other Convention rights.²⁷⁰ It has been so important for some scholars that they equate a trend with a consensus.²⁷¹ Whilst the Court did use the trend in article 8 cases on homosexuality, it is not the convincing principle for same-sex marriage under article 12. To discuss this point in greater detail I will now refer to the relevant case law.

Prior to *Goodwin*, the Court did not mention a 'consensus', but only other member states and any relevant LGBTQI provisions that they had implemented in relation to any Convention rights.²⁷² Thus, the other state practices were taken into consideration but nothing at that time could provide a substantial argument in favour of the applicant. In fact,

²⁶⁴ *Oliari*, paras 192-4.

²⁶⁵ Wildhaber, Hjartarson and Donnelly (2013), p.250; Mahoney and Kondak (2015), p.127.

²⁶⁶ *A, B and C v Ireland*, paras 235-6.

²⁶⁷ Dothan (2015), p.10.

²⁶⁸ *Ibid*, p.5.

²⁶⁹ Wildhaber, Hjartarson and Donnelly (2013), p.248-263, 257-8.

²⁷⁰ Mahoney and Kondak (2015), p.122.

²⁷¹ *Ibid*.

²⁷² *Cossey*, para 40; *Rees*, para 37.

it was the lack of states with legislation in favour of LGBTQI rights which confirmed the Court's suspicion that no expansion of the Convention should take place just yet.

However, in *Goodwin*, the Court looked at a trend when looking to narrow or broaden the margin of appreciation,²⁷³ consequently, overturning *Sheffield and Horsham* as 'the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions [was] hardly surprising'.²⁷⁴ Thus, *Goodwin*'s rule was that it could not be expected for all states to agree on this issue and that the 'clear and uncontested evidence' of a trend will be prioritised over an absence of domestic legislation on this issue.²⁷⁵ However, this was a rule that had only been applied to article 8 not 12 as it was not an issue of same-sex marriage or even a same-sex relationship.²⁷⁶

The importance of the trend continued in *Schalk and Kopf*, when the Court observed that there is an increasing trend among states to recognise same-sex couples as de facto since 2001.²⁷⁷ However, this applied only to article 8, not to the right to marry. When discussing article 12, the Court counted 6 out of the 47 states that had passed same-sex marriage legislation.²⁷⁸ Despite the progress made in *Goodwin*, the Court was unconvinced that this equally applied to same-sex marriage. Even though there were more states legalising same-sex marriage in 2010 than at the time of *Goodwin*, the Court did not find a trend for same-sex marriage, only a trend for legal recognition of same-sex partnerships – which still wasn't convincing enough to demand Convention protection. The large minority strongly opposed the sole use of the European consensus to justify this decision.²⁷⁹ However, the Court remained resolute in concluding that due to the lack of European consensus on article 12 – and despite an 'emerging...[and] rapidly developed' trend in favour of the applicants²⁸⁰ - same-sex marriage could not be read into article 12.

In looking to article 8 again, the Court held in *X and Others* that consensus does play a part, however in this case, no consensus could be seen from a small sample of the relevant ten

²⁷³ *Goodwin*, para 85

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*, para 101.

²⁷⁷ *Schalk and Kopf*, para 93.

²⁷⁸ *Ibid.*, para 58.

²⁷⁹ *Ibid.*, p.28, para 8.

²⁸⁰ *Ibid.*, para 105.

states (6 for same-sex adoption and 4 against).²⁸¹ The reasoning from *X and Others* has not been repeated as the Court did not look to all 47 member states as it had done in *Goodwin* and *Schalk and Kopf* but rather only to the 10 states that were seen as relevant as they had some kind of domestic legislation about same-sex adoption.²⁸² Conversely, the large dissenting opinion found 4 out of 10 states not having same-sex adoption laws could be seen as ‘sharply divided’, not a consensus.²⁸³ With so many states not included in this consensus, the Court took neither the rule in *Goodwin* nor *Schalk and Kopf* as it formulated a new formula for the consensus. This new formula was viewed by the dissenting opinion as anticipating change and trying to impose it on states rather than seeing where the trend was eventually going.²⁸⁴ There was no rebuking of the Convention being an evolving document, but that the evolution begins with the member states not with the Court. In that same year, *Vallianatos* mixed both *Schalk and Kopf* and *Goodwin* when it discussed article 8. Here, the Court held that the European consensus was an important factor in the Court’s decision, however, a violation could still be found without a consensus due to a clear ‘trend emerging’ among its member states.²⁸⁵ The Court did make it clear that a member state would not be in the wrong if they have not joined the gradual evolution of a right.²⁸⁶ However, the member state would have to provide ‘convincing and weighty reasons’ to justify their behaviour.²⁸⁷ Thus, the Court recognised the importance of following the trend, even when it was only ‘emerging’, and consequently a higher standard of proof was required by member states if they wished to avoid being found violating the Convention. Further, the Court did not follow *X and Others*’ convoluted reasoning, as it looked to all 47 member states – also the approach taken in *Schalk and Kopf* – and found a slight increase in both states that have legislated for same-sex marriage and the recognition of same-sex partnerships.²⁸⁸

²⁸¹ *X and Others*, p.33-4.

²⁸² *Ibid*, p.34.

²⁸³ *Ibid*, p.42, para 14.

²⁸⁴ *Ibid*, p.44, para 23.

²⁸⁵ *Vallianatos*, para 91.

²⁸⁶ *Ibid*, para 92.

²⁸⁷ *Ibid*.

²⁸⁸ *Ibid*.

Whilst *X and Others* and *Vallianatos* did not examine article 12, their approach to the consensus and trend – when discussing LGBTQI relationships – has influenced the two recent cases: *Hämäläinen* and *Oliari*.

In 2014, same-sex marriage was again discussed in *Hämäläinen*. The argument for same-sex marriage under article 12 was quickly dismissed by the Court, however, it was still discussed under article 8 in terms of the couple remaining married and thus potentially broadening the same-sex marriage application. Despite the Court finding no violation of article 8 (as discussed in Chapter 4), it affirmed the *Vallianatos* approach by examining the existence of a European consensus in regards to marriage (albeit using the margin of appreciation in regards to article 8). However, the Court dismissed the importance of a trend that was seen as the next line of reasoning in *Vallianatos*. This is important as it shows a consistent line of reasoning and methodology by the Court to use the consensus approach as the basis for legally recognising same-sex relationships – following the authoritative case on same-sex marriage – *Schalk and Kopf*.

Whilst the majority in *Hämäläinen* discussed the importance of the interests at stake and the impact on the applicant, they identified the margin straight away and held that the margin will only be constricted when there is a ‘particularly important facet of an individual’s existence or identity is at stake’.²⁸⁹ However, they did not follow this factor to its logical conclusion and instead sided with there being no European consensus on this right and thus they could go back to making the margin broader under article 8.²⁹⁰

The Court’s concern to avoid contradicting *Schalk and Kopf* clearly overrode any concern it had to follow its previous rule in *Goodwin*. In *Goodwin*, the Court held that the number of transsexuals getting married would be so small that there was little chance of it having a detrimental effect on society.²⁹¹ Similarly in *Hämäläinen*, the group in question would be a transsexual marrying someone of the same-sex which prima facie would not be a high number of people.²⁹² The difference between these two cases was that in *Goodwin* the applicant wanted her right to marry to be protected under the auspices of a heterosexual one,

²⁸⁹ *Hämäläinen*, para 67.

²⁹⁰ *Ibid*.

²⁹¹ *Goodwin*, para 91.

²⁹² *Hämäläinen*, p.36, para 12.

not a homosexual one. However, in *Hämäläinen*, the applicant wanted recognition of her same-sex marriage. Thus, the Court had to change focus in *Hämäläinen* (its precedent now being *Schalk and Kopf*) as the right to marry for homosexuals is a positive right. In *Goodwin*, she wanted to marry a man and so it required no positive obligations on the state to provide for this, only to step back and not interfere.

For the Court, two factors favoured a broad margin; the first was that issues of marriage and gender change are regulated by the state,²⁹³ and the second being that the Court considered the legal recognition available to the applicant to be an ‘adequate option’ as it was legally equivalent to the legal status of marriage.²⁹⁴ However, from the applicant’s point of view, a narrow margin could have applied if the Court found it to be a violation of ‘fundamental values or essential aspects of private life’,²⁹⁵ it affected their day to day life in society and under the law and in addition the domestic system could easily cater to protecting this right.²⁹⁶

The European consensus – or lack thereof – played a pivotal role for the Court as it balanced these criteria to help decide how personal this right was to the applicant. It was a difficult decision for the Court as these rights raised ‘ethical’ and ‘moral issues’ which would normally fall within the state and not the Court’s domain.²⁹⁷ As the Court does not even mention the existence of a trend to help find in favour of the applicant – dismissing the trend approach in *Vallianatos* – it undid much of its progressive stance from *Goodwin*.²⁹⁸ The Court disagreed with *Goodwin* that it was to be expected that all of the member states might not agree on this issue given their ‘widely diverse legal systems and traditions’²⁹⁹ by adopting a ‘lowest common denominator’ approach. For the Court, it was the absence of a consensus in favour of the applicant that resulted in widening the margin; disregarding the role of the trend that was used in both *Vallianatos* and *Goodwin*.³⁰⁰

²⁹³ Ibid, para 71; *Goodwin*, para 103.

²⁹⁴ Ibid, para 71; *Karner*, para 40.

²⁹⁵ Ibid, para 66.

²⁹⁶ Ibid; *B v France*, para 63; *Goodwin*, paras 77-78.

²⁹⁷ Ibid, paras 67, 75.

²⁹⁸ Ibid, p.33, para 5.

²⁹⁹ *Goodwin*, para 85.

³⁰⁰ Ibid; *Hämäläinen*, p.33, para 5; *Vallianatos*, para 91.

Conversely, the vocal minority found that the Court gave too much importance to the European consensus; factors such as the couple already being married and wishing to stay married should have been weighed heavily in their favour considering only a negative obligation was required here.³⁰¹ This is an important point in the role that the consensus plays as it thus effectively overrode the personal voice that the Court had strived to protect in *Goodwin*. Further, *Hämäläinen* dictated that if there was no consensus there would be no second chance with progressing same-sex marriage on the basis of a trend.³⁰² The Court deemed it too evolutive to make its member states legislate for a right they could not definitively argue from treaty interpretation. The Court acknowledged the importance of the Convention remaining relevant and current by looking to a consensus, however, a trend did not have the same amount of sway on article 8 when discussing the right to marry. Turning to the latest authoritative case on this issue – *Oliari* – the Court rejected the claim of an article 12 violation as there was only a ‘gradual evolution’ of states legislating for same-sex marriage.³⁰³ Yes, there was an apparent trend to the Court that the perception of marriage is changing; however, this did not mean that the Court could impose an obligation on states to legislate for same-sex marriage.³⁰⁴ For the Court, it was vital that they did not ‘rush to substitute’ their own view in the place of the member states’.³⁰⁵ Thus, one sees a confirmation in *Oliari* that the consensus – and not the trend – approach taken in *Schalk and Kopf* and *Hämäläinen* is the only way forward for same-sex marriage.

6.4 Do we really need 24 member states?

I established the importance of the consensus in Chapter 5 and how it is defined and used by the Court above. I will conclude this chapter by demonstrating the requirement of 24 states (50% of states) is the determining factor for the Court to undertake a review of article 12 in relation to same-sex marriage.

When looking to a consensus in *Schalk and Kopf*, the Court held that there was no majority for legal recognition of same-sex couples as it was seen to be ‘evolving rights with no

³⁰¹ *Hämäläinen*, p.33, para 8; p.37, para 16.

³⁰² *Ibid*, p.33, para 5.

³⁰³ *Oliari*, para 192.

³⁰⁴ *Ibid*.

³⁰⁵ *Ibid*, para 191.

established consensus.³⁰⁶ In *Oliari*, there were 11 out of 47 states that recognised same-sex marriage, with 18 states (including some of those states who had legalised marriage, such as France) having some form of civil partnership.³⁰⁷ In total, 24 out of 47 states (a thin majority) had some kind of legislation recognising same-sex relationships.³⁰⁸ However, this thin majority was only for recognising same-sex partnerships under article 8, not same-sex marriage under article 12. For the Court, the only numbers that mattered were the 11 out of 47 member states legislating for same-sex marriage, a clear minority for the Court. The Court did not deny the existence of a trend in *Oliari*, however, it wasn't enough to overcome the explicit wording of article 12 and to impose an obligation on states to provide for same-sex marriage.³⁰⁹ Thus, it reinforced its decision in *Hämäläinen* and *Schalk and Kopf* by not obliging states to have same-sex marriage unless there is a consensus, not a trend.

It is significantly problematic that the Court has not specified the magic number to be 24 to legalise same-sex marriage. The Court does not have any standardised structure – in general – in deciding what counts as a consensus.³¹⁰ Academics have found that it need not be a super majority of states,³¹¹ however, it should be more than just slightly over 50%.³¹² Conversely, Letsas argues that the European consensus does not use a mathematical formula but is based on substance and ‘common values’.³¹³ Additionally, critics of the consensus have found that even where there is a consensus, the Court may not apply it.³¹⁴ This does challenge my theory as the Court has not stated that it will include same-sex marriage under the Convention when there are 24 states, only when there is a European consensus. I contend that if there are 24 states then the Court will at least review the situation. The recent authority in *Oliari*, held it needed at least 24 states (as 23 states would only be 48.94% of the member states) – 51.06% - to satisfy a progressive reading – a

³⁰⁶ *Oliari*, para 163; *Schalk and Kopf*, para 105.

³⁰⁷ *Ibid*, para 53.

³⁰⁸ *Ibid*, para 54.

³⁰⁹ *Ibid*, para 192.

³¹⁰ Zwart (2013), p.90

³¹¹ Helfer and Voeten (2014), p.93.

³¹² Wildhaber, Hjartarson and Donnelly (2013), p.257.

³¹³ Letsas (2010), p.540; Letsas (2013), p.121.

³¹⁴ Zwart (2013), p.90.

consensus – of the Convention.³¹⁵ When it found a thin majority under article 8, it could then oblige states to pass same-sex registered partnerships. Despite this formula being applied under article 8 in *Oliari*, it is still the enforcement of a positive obligation that recognises same-sex relationships – requirements for same-sex marriage – whilst simultaneously referring to the majority rule first discussed in *Schalk and Kopf*.³¹⁶ It is the best indication the Court would not have any difficulty in following the above 50% quota.

6.5 Conclusion

This chapter has shown that the term European consensus has only one clear meaning for same-sex cases. It has also demonstrated that 24 member states is the necessary minimum for the Court to reconsider its view of same-sex marriage under the Convention. The importance of the trend in *Goodwin* is firmly rejected in *Schalk and Kopf*, *Hämäläinen* and *Oliari*; one now sees the importance of a majority of states to equate to a consensus. *Oliari* was a decision which pushed article 8 to its limit in requiring homosexual relationships to be recognised by a state. Likewise, the Court will only reassess same-sex marriage when there is a different European consensus:³¹⁷ a minimum of 24 member states.

³¹⁵ *Oliari*, paras 163, 178.

³¹⁶ *Ibid.*

³¹⁷ Sutherland (2011), p.100.

7 Conclusion

Same-sex marriage is not – yet – an obligation under article 12 which the Court can force upon states. Chapter 4 detailed the Court’s jurisprudence and analysed the evolution of their reasoning under the Convention. It answered my first research question by concluding that there is no possibility for Article 8 (alone or with article 14) to include same-sex marriage.

Chapter 5 examined the interpretation of Article 12 in accordance with the Court’s decisions in *Schalk and Kopf*, *Hämäläinen* and *Oliari*. Whilst the literal interpretation has stopped the Court from obliging states to legislate for same-sex marriage, the importance of the Convention being a living instrument still applies to the Court’s interpretation. In light of this reading, I answered my second research question by finding that article 12 doesn’t currently provide for same-sex marriage, but it could in the future.

This led me to my final research question – to see under what circumstances article 12 could protect same-sex marriage. I concluded that the Court’s only solution to reading in same-sex marriage rests on what the current view of its states are – the European consensus. Chapter 6 led to a definition of the European consensus that matches its current application in the Court’s jurisprudence on same-sex marriage. On this discussion, I claimed that 24 states are required before the Court will even reopen the same-sex marriage discussion.

One limitation to my argument is that I have not fully accounted for the role of international sources. I have mentioned the impact of international sources in the Court’s jurisprudence, but it is difficult to gauge their weight in the Court’s reasoning. It would be interesting given the Court’s wish to be seen as a trailblazer in human rights³¹⁸ and the recent same-sex marriage legalisation in the USA and other non-European states such as New Zealand,³¹⁹ to see whether this would have any effect on the Court. However, I don’t believe this would be enough to change the Court’s current stance as they have favoured the European consensus over any other consensus.³²⁰ Arguably, in *Oliari*, the Court did take into account the changes in other non-European countries, however, this only helped

³¹⁸ Wildhaber, Hjartarson and Donnelly (2013), p.256.

³¹⁹ Ibid, p.255.

³²⁰ *Schalk and Kopf*, paras 48, 58-59.

the Court to push the small majority of member states in favour of expanding article 8,³²¹ not article 12. A clear international trend is not enough for the Court when discussing same-sex marriage under article 12. This is because the Court has backed itself into a corner on article 12 and the required European consensus needed to pass on this positive obligation to states.

Another limitation is that my argument would suggest that it is essentially pointless to keep bringing same-sex marriage cases to the Court until there is this majority. Such a claim would appear to ignore the importance of the flow-on effect observed by Helfer and Voeten. Here, they found that ‘European judgments increase the likelihood of all European nations...[to] adopt pro-LGBT reforms.’³²² I do not dismiss this argument, however, there are no judgments in favour of same-sex marriage, and thus no flow-on effect can currently be observed. Importantly, Helfer and Voeten continue to state that the Court will expand previously rejected LGBTQI claims once it has ‘at least a majority of states’.³²³ Thus, their ‘majoritarian’³²⁴ view of the Court’s decision-making supports my argument that the Court will not include same-sex marriage under article 12 until there is a European consensus in support of this approach. I put forward that the smarter game plan to legalise same-sex marriage is to look to states that don’t have same-sex marriage and see how other rights – namely under article 8 which is easier to violate given its broad application – can be enforced by the Court. This would comply with Helfer and Voeten’s conclusion, and with more progressive legislation on LGBTQI rights, it is more likely that the state will tolerate homosexuality better.³²⁵

The ramification of waiting for 24 states (there are currently only 13 states) could mean a considerably longer time to have same-sex marriage. Especially when this consensus will require at least two or three non-Western states³²⁶ – that are historically homophobic.³²⁷ Letsas argues that the Court will use a moral compass – a quicker method – to guide its decisions rather than a mathematical formula. This may be true for other Convention rights,

³²¹ *Oliari*, para 178.

³²² Helfer and Voeten (2014),105.

³²³ Helfer and Voeten (2014), p.106.

³²⁴ *Ibid.*

³²⁵ Hooghe and Meeusen (2013), p.26.

³²⁶ United Nations Regional Information Centre (2016).

³²⁷ Helfer and Voeten (2014), p.85; Bribosia, Rorive and Van den Eynde (2014), p.2.

however, Letsas supports his claim by viewing *Schalk and Kopf*'s consensus approach to be an outlier to his theory.³²⁸ I disagree with Letsas as the Court doesn't have one approach to all of the Convention's rights, as is evident in the Court using the margin in article 8 but not article 12 as I have shown above. *Schalk and Kopf* is the beginning of the Court's first real attempt to interpret article 12 and same-sex marriage. Originally, this could have been seen as an outlier for Letsas' argument for all Convention rights. However, with *Hämäläinen* and *Oliari* in support of *Schalk and Kopf*'s ruling, Letsas' view has not been followed by the Court when articles 8 and 12 concerns a positive obligation and same-sex relationships. It could be a very long wait until this 24 state consensus is achieved, however, this is not unusual given the Court's progression of LGBTQI rights since its formation. With this in mind, scholars and practitioners need to look to how this '24-state-consensus' can be achieved not at other ways of bypassing the issue when the Court has made it very clear that this is the only way forward. The next step for all proponents of same-sex marriage is to push for domestic legislation in the remaining 34 states that do not have same-sex marriage. It is a difficult task, but the European consensus argument has been endorsed by the Court for over 6 years, and thus is the most convincing voice for same-sex marriage to be included under article 12.

³²⁸ Letsas (2013), p.121

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