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The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights

Masuma Shahid*

Abstract

This contribution assesses the consensus-based analysis and reasoning of the European Court of Human Rights in recent judgments concerning equal marriage rights and compares it to the Court's past jurisprudence on European consensus and the margin of appreciation awarded to Member States regarding the issue of equal marriage rights. The contribution aims to analyse whether there is a parallel to be seen between the rapid global trend of legalisation of same-sex marriage and the development or evolution of the case law of the ECtHR on the same topic. Furthermore, it demonstrates that the Court's consensus-based analysis is problematic for several reasons and provides possible alternative approaches to the balancing of the Court between, on the one hand, protecting rights of minorities (in this case same-sex couples invoking equal marriage rights) under the European Convention on Human Rights and, on the other hand, maintaining its credibility, authority and legitimacy towards Member States that might disapprove of the evolving case law in the context of same-sex relationships. It also offers insights as to the future of European consensus in the context of equal marriage rights and ends with some concluding remarks.

Keywords: same-sex marriage, gay marriage, European consensus, margin of appreciation, consensus-based analysis by the ECtHR

* Lecturer, Department of International and European Union Law, Erasmus School of Law, Rotterdam. I am deeply grateful to Professor Jeroen D. Temperman and Dr Anastasia Karatzia for their constructive and valuable comments and suggestions. I would also like to thank Professor Ellen Hey and Professor Kristin Henrard for the fruitful conversations. Last, but not least, thank you Lana Said, for your valuable insights and your amazing sense of humour.

1 Introduction

1.1 Historical Developments Concerning Same-Sex Relationships

Same-sex couples have long sought access to civil unions[1] and marriage in several countries within and outside of Europe.[2] Many of these challenges were with a view to have the (heteronormative) legislation changed in favour of same-sex couples. Denmark was the first country in the world in 1989 to offer the possibility of civil unions to same-sex couples.[3] The Netherlands made history in 2001 when it was the first country in the world to legalise same-sex marriage.[4] Other countries such as Belgium,[5] Spain,[6] Canada[7] and South Africa[8] followed suit. More than twenty countries in the world now offer the possibility of marriage to same-sex cou-

1. The term 'civil unions' will be used as the generally accepted generic term for various same-sex unions such as registered partnerships, life partnerships, domestic partnerships, civil partnerships and anything other than same-sex marriage and cohabitation by same-sex couples.
2. P. Johnson, *Homosexuality and the European Court of Human Rights* (2013), at 147.
3. The Danish Registered Partnership Act, 1 June 1989, D/341 H ML Act No. 372.
4. N.G. Maxwell, 'Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison', 18 *Arizona Journal of International and Comparative Law*, at 141-57 (2001).
5. A. Fiorini, 'New Belgium Law on Same-sex Marriage and Its PIL Implications', 52 *The International and Comparative Law Quarterly* 4, at 1039-49 (2003).
6. R. Platero, 'Love and the State: Gay Marriage in Spain', 3 *Feminist Legal Studies* 15, at 329-40 (2007).
7. C. Cortina *et al.*, 'Same-Sex Marriages and Partnerships in Two Pioneer Countries, Canada and Spain', 27th IUSSP International Population Conference, Busan (2013).
8. C. Mubangizi and B.K. Twinomugisga, 'Protecting the Right of Freedom of Sexual Orientation: What Can Uganda Learn from South Africa?', 22 *Stellenbosch Law Review* 330, at 330-51 (2011).

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ples and more than thirty the possibility of civil unions.[9] Fourteen of the States (and territories) that have legalised same-sex marriage are Member States of the Council of Europe ('CoE' from this point on), while two other Member States, Malta and Germany, recently voted positively in their parliaments to legalise same-sex marriage and whose laws will come into force at the end of the year. Despite these developments in legislation, many international courts have been and still are hesitant to develop their jurisprudence dealing with same-sex relationships because of the sensitive nature of the topic. As a result of this, there is hardly any evolution in the case law. The same can be said for the European Court of Human Rights (hereinafter 'the ECtHR' or 'the Court').

This contribution assesses the consensus-based analysis and reasoning of the ECtHR in the judgments *Hämäläinen*, *Oliari and Others*, and *Chapin and Charpentier* in Section 2 and aims to fill the gap in existing literature by comparing it to the Court's past jurisprudence on European consensus and the margin of appreciation awarded to Member States regarding the issue of equal marriage rights. The consensus-based analysis of the ECtHR in such cases consists of looking for the existence of rights-enhancing practices and policies amongst the Member States that affect human rights.[10] When these practices achieve a certain measure of uniformity, also known as 'European consensus', the Court then raises the standard of rights protection to which all Member States must adhere. This entails that the Court first looks for consensus amongst the Member States in order to oblige other States to follow similar practices. The three judgments have specifically been chosen as these are the most recent cases in the last five years on these topics (European consensus, margin of appreciation and equal marriage rights) and this contribution aims to investigate whether there is a parallel to be seen between the rapid global trend of legalisation of same-sex marriage and the case law of the ECtHR on the same topic.

In Section 3, this contribution analyses whether or not there is visible evolution in the reasoning of the Court on equal marriage rights, demonstrates that the ECtHR's consensus-based analysis is problematic for several reasons and provides possible alternative approaches to the balancing of the Court between, on the one hand, protecting rights of minorities (in this case, same-sex couples) under the European Convention on Human Rights ('ECHR' or 'the Convention' from here on further)[11] and, on the other hand, maintaining its credibility, authority and legitimacy towards Member States that might disapprove of the evolving case law in the context of same-sex relationships. It also offers insights as to the future of European consensus on equal marriage rights and ends with some concluding remarks.

1.2 Article 12 ECHR and the Right to Marry and to Found a Family

Applicants dealing with equal marriage rights have challenged different provisions of the ECHR before the ECtHR. Mainly Articles 8 (the right to respect for private and family life), 12 (the right to marry and to found a family) and 14 ECHR (the prohibition of discrimination) have been invoked. In the context of this contribution, the most relevant provision is Article 12, which is as follows:

> 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.

There is a noticeable difference between Article 12 and other provisions in the Convention. Namely, Article 12 refers to 'men and women' while other ECHR provisions speak of 'everyone' (for instance Arts. 1, 2, 5, 6, 8, 9, 10, 11 and 13) or 'no one' (Arts. 3, 4 and 7). This differentiation in Article 12 is probably due to the fact that the provision is based on[12] and inspired by[13] Article 16 of the Universal Declaration of Human Rights ('UDHR'),[14] which contains a similar provision. Article 12 ECHR can lend itself to different interpretations.[15] One interpretation is that Article 16 UDHR, when read in light of Article 2 UDHR, which contains a general prohibition on discrimination, grants the right to marry to everyone under the UDHR.[16] Similarly, Article 1 ECHR grants rights to everyone in the jurisdiction of the CoE Member States; Article 12 read in combination

9. Same-sex marriage is legal in Argentina, Belgium, Brazil, Canada, Colombia, Denmark, Finland, France, Greenland, Iceland, Ireland, Luxembourg, The Netherlands, New Zealand, Norway, Portugal, Slovenia, South-Africa, Spain, Sweden, The United States and Uruguay. In addition, same-sex marriages performed within Mexico are recognised by all 31 of its states without exception, while legislation to change the laws is officially pending in several states. A similar situation is applicable to The United Kingdom, as Northern Ireland is the only part of The United Kingdom where same-sex marriage is not legalised, whereas England, Wales and Scotland allow it. Recently, the High Court of Northern Ireland even rejected petitions from applicants who wanted to marry or have a legally solemnised marriage in England recognised in Northern Ireland, *see In Re X*, 17 August 2017. Australia is holding a postal survey in the fall of 2017 to have the population vote on same-sex marriage. The results will be non-binding, but may help to convince the parliament to vote positively whenever a new bill to change the marriage laws is submitted. As mentioned previously, Malta and Germany recently passed same-sex marriage laws in parliament. For more information, *see* <http://news.trust.org/item/20170301175104-eik56/> and <https://www.britannica.com/topic/same-sex-marriage>. For a full overview, *see* the LawsAndFamilies Database which was recently launched and covers 60 legal aspects of marriage, partnership and cohabitation over the last 50 years of same-sex and different-sex couples in more than twenty countries, available at: <https://www.lawsandfamilies.eu/>.
10. L.R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights', 26 *Cornell International Law Journal* 133, at 134-65, 139-40 (1993).
11. Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 005.
12. K. Waaldijk, 'Vijftien jaar openstelling huwelijk: Naar een huwelijksrecht ongeacht gerichtheid en geslacht', *Ars Aequi*, 237-46, at 240 (2016).
13. B. Van der Sloot, 'Between Fact and Fiction: An Analysis of the Case Law on Article 12 ECHR', 26 *Child and Family Law* 1-24, at 2 (2014).
14. Universal Declaration of Human Rights, 10 December 1948, General Assembly resolution 217 A.
15. Van der Sloot, above n. 13, at 2.
16. *Ibid.*, at 4.

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with Article 1 ECHR could therefore be interpreted as encompassing persons of the same sex. The other interpretation is that, since Article 12 ECHR only speaks of 'men' and 'women', the rights under it for marriage are confined to persons of the opposite sex. This latter interpretation is the one that the ECtHR has embraced and that came to light in numerous cases which will be discussed in the first part of the next section.

2 The ECtHR's Consensus-Based Analysis on Equal Marriage Rights

2.1 The Court's Heteronormative Approach to Article 12 ECHR in Established Judgments

One of the first cases in which the Court elaborated on Article 12 ECHR was *Rees*.[17] The ECtHR was of the opinion that the right envisioned in Article 12 refers to the traditional marriage between persons of the opposite sex and that the provision serves to protect marriage as the basis of the family.[18] The most extensive discussion of this matter by the ECtHR took place in the case of *Schalk and Kopf*; a same-sex couple in Austria invoked Article 12 because they wanted to marry and the State did not allow them to do so.[19] The Court indicated that the chosen wording of Article 12 'must be regarded as deliberate and regard must be had to the historical context in which the Convention was adopted. In the 1950s, marriage was clearly understood in the traditional sense of being a union between partners of different sex'.[20] This historical or teleological interpretation of the Convention is contradictory to the Court's own case law; more on this in Section 3 of this contribution. The applicants were of the opinion that the provision should be interpreted as to current conditions and the society we live in today and that same-sex couples should also be able to enjoy rights under it.[21] The ECtHR acknowledged that the institution of marriage had undergone major social changes since the adoption of the Convention, but concluded that there was no European consensus on same-sex marriage. The most notable aspect of the case was that the Court took into consideration Article 9 of the Charter of Fundamental Rights of the European Union (which makes no reference to 'men' or 'women')[22] and no longer considered the right to marry under Article 12 ECHR *in all circumstances* to be limited to marriage between persons of the opposite sex.[23] Unfortunately, the Court did not elaborate on what these circumstances could be. However, the statement of the Court can be seen as an opening for a different view in the future, which is a good development for equal marriage rights. Even so, in the case at hand, the Court found that national authorities are the ones that are best placed to assess and respond to the needs of society[24] and concluded that Article 12 ECHR does not impose an obligation on the contracting States to grant same-sex couples access to marriage.[25] Thus, the matter is left to the States to act within their margin of appreciation. As explained in Section 3, this can lead to a deterioration in the treatment of minorities.

It can be said that up through *Schalk and Kopf*, the Court had followed a heteronormative approach to cases dealing with questions on same-sex marriage. Johnson calls it a 'strong heteronormative conceptualisation of marriage',[26] meaning that the focus of the concept is on heterosexual persons of the opposite sex and that same-sex couples are denied any rights that are linked to it. Interestingly enough, this heteronormative interpretation of the Court came to light mostly in cases concerning the rights of transsexuals and not homosexuals themselves. These cases led the ECtHR to express itself also on same-sex relationships on the basis that some of the transitions of the applicants led or could lead to them being in a relationship with a person of the same (acquired) sex. One of these cases was *C and L.M.*[27] where the Court expressed that there was no right for the couple at issue, a (female) transsexual in a relationship with her lesbian partner, to marry and found a family under Article 12 as the case concerned a same-sex couple.[28] This line of thinking was continued in *Cossey* v. *The United Kingdom*.[29] Applicant Cossey had been registered at birth as a man and had later in life transitioned to a woman. She wanted to marry an Italian man, but couldn't as she herself was biologically not considered a man. According to the ECtHR, attachment to the traditional concept of marriage justified the use of *biological* criteria for determining a person's sex for the purposes of marriage.[30] The fact that post-operative transsexuals were experiencing problems when trying to enjoy or invoke their marriage rights was apparently not enough reason for the Court to abandon this. It wasn't until the *Christine Goodwin* v. *The United Kingdom* case that the ECtHR sought a new approach.[31] The case concerned a transsexual, born a male and later transitioned to a female, that suffered distress due to the fact that the government had not taken any constructive steps to address the issues experienced by the applicant and other post-operative transsexuals. The lack of legal recognition of her changed gender had been the cause of

17. *Rees* v. *The United Kingdom*, ECHR (1986), No. 9532/81.
18. *Ibid.*, para. 49.
19. *Schalk and Kopf* v. *Austria*, ECHR (2010), No. 30141/04.
20. *Ibid.*, para. 55.
21. *Ibid.*, para. 57.
22. Charter of Fundamental Rights of the European Union, 26/10/2002, C 326/391. Art. 9 of the Charter states that the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.
23. *Schalk and Kopf* v. *Austria*, above n. 19, para. 61 (emphasis added).
24. *Ibid.*, para. 62.
25. *Ibid.*, paras. 58 and 101.
26. Johnson, above n. 2, at 150.
27. *C. and L.M.* v. *The United Kingdom*, ECHR (1989), No. 14753/89.
28. *Ibid.*, para. 3.
29. *Cossey* v. *The United Kingdom*, ECHR (1990), No. 10843/84.
30. *Ibid.*, para. 46 (emphasis added).
31. *Christine Goodwin* v. *The United Kingdom*, ECHR (2002), No. 28957/95.

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numerous discriminatory and humiliating experiences in her everyday life.[32] The Court acknowledged that there had been major social changes in the institution of marriage since the adoption of the ECHR as well as dramatic changes resulting from developments in medicine and science in the field of transsexuality. It therefore found that a test of congruent biological factors could no longer be decisive in denying legal recognition of transsexuals, but attention needed also to be given to the social role of the *assigned* gender.[33] This meant that Article 12 could now finally be understood as to include men and women that were post-operative transsexuals. There have been more cases since *Goodwin* that dealt with transsexuals and equal marriage rights,[34] but *Goodwin* can specifically be considered a breakthrough for transsexuals seeking to gain legal rights and recognition of their acquired sex. Unfortunately, this did not entail that same-sex couples could now derive any rights as the ECtHR emphasised that the applicant lived as a woman, was in a relationship with a man and would only wish to marry a man; in other words, this was a heterosexual couple.[35]

The issue of equal marriage rights and same-sex relationships continued to also be raised in cases concerning civil unions and its characteristics. One of such cases was *Burden* v. *The United Kingdom*.[36] The case involved two unmarried sisters that had lived together for more than thirty years in a house inherited by their parents. The sisters were concerned that when one of them would die, the other would be forced to sell the house to pay inheritance tax, while spouses or 'civil partners' were exempt from charge. The ECtHR expressed that a relationship between siblings or other people in cohabitation is (legally) different from that between married couples and homosexual civil partners.[37] Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. The Court made it clear that there was no analogy between married and civil partnership couples on the one hand and different-sex or same-sex couples who choose to live together, but not become husband and wife or civil partners on the other hand.[38] This statement was interesting as it was made without the distinction in the sex of the persons in the marriage or civil union. The ECtHR went a little further in *Vallianatos and Others* v. *Greece* and expressed the equality between different-sex and same-sex couples in relation to civil unions.[39] Greece had introduced a law that allowed only different-sex couples to enter into civil unions. The applicants claimed this infringed their right to respect for their private and family life (Art. 8) and amounted to unjustified discrimination (Art. 14) between different-sex and same-sex couples, to the detriment of the latter. The ECtHR reiterated *Schalk and Kopf* to the fact that same-sex couples are comparable to different-sex couples as regards their need for legal recognition and protection of their relationship.[40] The Court found that by excluding same-sex couples from its scope, the law in question introduced a difference in treatment based on the sexual orientation of the persons concerned, which is not allowed.[41] The ECtHR made its point even stronger by stating that civil partnerships as an officially recognised alternative to marriage have an intrinsic value for the applicants and would provide for legal recognition by the State.[42] The same can be said for same-sex couples in general as well of course in situations where they cannot marry; however, that was not the issue in this case. The law at issue was meant to provide a new form of non-marital partnership in Greece; for same-sex couples this would mean the sole basis in Greek law to have the relationship legally recognised. This trend was one that the ECtHR had noticed also elsewhere in Europe. It pointed out that *although there was no consensus* among the Member States, *a trend was emerging* with regard to the introduction of forms of legal recognition of same-sex relationships.[43] Nineteen States had thus far authorised some form of registered partnership other than marriage; Lithuania and Greece were the only ones at that time to reserve it exclusively for different-sex couples.[44] The Court found that the Greek government had not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of the domestic law, resulting in discrimination. Consequently, the ECtHR concluded that there had been a violation of Article 14 taken in conjunction with Article 8 ECHR. As a consequence of the case, Greece introduced civil unions for same-sex couples in December of 2015 and furthermore, a year later the Greek parliament passed a bill for the abolition of discrimination based on sexual orientation.[45] The judgment in *Vallianatos* was a breath of fresh air, but it did not encourage equal marriage rights.

The ECtHR's heteronormative approach to equal marriage rights is sometimes elaborated on in the concurring opinions. For instance, in *Burden* v. *The United Kingdom*, judge Björgvinsson[46] concluded that the institution of marriage was closely linked to the idea of the family, consisting of a man and a woman and their children, as one of the cornerstones of the social structure in

32. *Ibid.*, paras. 60-63.
33. *Ibid.*, para. 100 (emphasis added).
34. For a complete overview, *see* the ECtHR's Fact Sheet on Gender Identity Issues of April 2017, available at: <http://echr.coe.int/Documents/FS_Gender_identity_ENG.pdf>.
35. *Christine Goodwin* v. *The United Kingdom*, above n. 31, para. 101.
36. *Burden* v. *The United Kingdom*, ECHR (2008), No. 13378/05.
37. *Ibid.*, para. 62.
38. *Ibid.*, para. 65.
39. *Vallianatos and Others* v. *Greece*, ECHR (2013) Nos. 29381/09 and 32684/09.
40. *Schalk and Kopf* v. *Austria*, above n. 19, para. 99.
41. *Vallianatos and Others* v. *Greece*, above n. 39, para. 79.
42. *Ibid.*, para. 81.
43. *Ibid.*, para. 91 (emphasis added).
44. *Ibid.*
45. M. Kowalski, 'Civil Partnerships in Greece, A Year Later', available at: <https://medium.com/athenslivegr/civil-partnership-in-greece-a-year-later-d1f571ac1ab0> (last accessed on 15 September 2017). Lithuania unfortunately does not provide same-sex couples the possibility to conclude civil unions.
46. Johnson, above n. 2, at 150.

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the UK, as well as in other States of the CoE. Björgvinsson felt that extending these rights to same-sex couples could potentially have important and far-reaching social and legal consequences in those States.[47] This argument is quite odd, as this was not the case in many States at the time of *Burden* that *did* allow same-sex marriage or had just introduced it.[48] Björgvinsson continued that it was not the role of the ECtHR to take the initiative in this matter and impose upon Member States a duty to extend the applicability of these rules without, according to him, a clear view of the consequences that it may have. In his view, it must fall within the margin of appreciation of the respondent State to decide when and to what extent this will be done.[49] Judges Malinverni and Kovler in their concurring opinion in *Schalk and Kopf*[50] took it a step further by stating that Article 12 ECHR is not applicable to same-sex couples at all. According to them, the literal interpretation of the provision represents the 'general rule of interpretation' in the Vienna Convention on the Law of Treaties ('The Vienna Convention')[51] and thus precludes the provision from being construed as conferring the right to marry on persons of the same sex. However, an overwhelming majority of authors in general share the view that an evolutive interpretation of the ECHR by the ECtHR is allowed by the general rule of interpretation in the Vienna Convention.[52] Dzehtsiarou is of the opinion that the ECHR should be an instrument of development and improvement rather than an 'end game' treaty, which froze the state of affairs that existed sixty years ago;[53] I agree with this line of thinking; originalism, the intent of the contracting parties with regard to specific treaty provisions, plays a very limited role with regard to human rights treaties.[54] Pitea even finds it difficult to argue that an evolutive interpretation as such is at odds with the Vienna Convention.[55]

In the same judgment, there was also a joint dissenting opinion of judges Rozakis, Spielmann and Jebens.[56] These judges did not agree with the majority that there had been no violation of Article 14 taken in conjunction with Article 8 ECHR and stressed that because Austria did not advance any argument to justify the difference of treatment, there should be no room for the ECtHR to apply the margin of appreciation. According to them, only when a State offers grounds for justification can the ECtHR be satisfied, taking into account the presence or the absence of a common approach that States are better placed than the Court is to deal effectively with the matter.[57] In addition, the judges found that any absence of a legal framework offering same-sex couples the same rights or benefits attached to marriage would need robust justification, especially taking into account the growing trend in Europe to offer some means of qualifying for such rights or benefits. I agree with this view; it would also provide more consistency in the Court's assessment of the application of justifications and the proportionality principle, as well as enhance legal certainty not only for applicants, but also for anyone wanting to analyse and understand the Court's reasoning. A similar argument in favour of equal marriage rights was given by Mr Schermers in *W.* v. *The United Kingdom*.[58] He found that the fundamental human right underlying Article 12 ECHR should also be granted to same-sex couples, even though that was not the issue in that case. He was of the opinion that the right to marry and to found a family is of paramount importance for the individual and denial of this right would mean condemnation to solitude and loneliness. Schermers advocates that there must be strong arguments to justify such condemnation. He also discusses the principle of proportionality and the point often made that public order would be disturbed if persons of the same sex could found a family, but doubts whether that is a valid argument because it would be unacceptable discrimination if only those who are able to procreate had the right to family life. Schermers finds very little on that side of the scale to justify the discrimination against the individual interest of same-sex couples. This is similar to the views of judges Rozakis, Spielmann and Jebens in *Schalk and Kopf* concerning Article 14 ECHR and the robust justifications needed.

Despite the occasional dissenting opinion in favour of equal marriage rights, the main view of the ECtHR is still that of the heteronormative approach. In the next subsections, the three most recent cases dealing with equal marriage rights and the Court's consensus-based analysis therein are discussed.

47. Concurring opinion of judge Björgvinsson in *Burden* v. *The United Kingdom*, above n. 36.
48. We can also draw a similarity with the case of *Oliari* (discussed in Section 2.2.2 of this contribution) where the Court, in the Italian situation of a lack of recognition and protection of same-sex unions, stated that it would not amount to any particular burden on the Italian State be it legislative, administrative or other to provide recognition and protection of same-sex couples. *See Oliari and Others* v. *Italy*, ECHR (2015), Nos. 18766/11 and 36030/11, para. 173.
49. Concurring opinion of judge Björgvinsson in *Burden* v. *The United Kingdom*, above n. 36.
50. Concurring opinion of judge Malinverni joined by judge Kovler in *Schalk and Kopf* v. *Austria*, above n. 19.
51. Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, 1155, 331.
52. C. Pitea, 'Interpreting the ECHR in the Light of "Other" International Instruments: Systemic Integration or Fragmentation of Rules on Treaty Interpretation?', in N. Boschiero *et al.* (eds), *International Courts and the Development of International Law: Essays in Honor of Prof. Tullio Treves* (2013) 545, at 553.
53. K. Dzehtsiarou, 'European Consensus and The Evolutive Interpretation of the European Convention on Human Rights', 12 *German Law Journal* 1730, at 1730-45 (2011).
54. G. Letsas, *A theory of interpretation of the ECHR* (2007), at 59. *Also see* M. Killander, 'Interpreting regional human rights treaties', 7 *SUR International Journal on Human Rights* 13, para. 2.2 (2010). *See* Section 3 of this contribution for more information on this argument.
55. *Ibid*.
56. Joint dissenting opinion of judges Rozakis, Spielmann & Jebens, in *Schalk and Kopf* v. *Austria*, above n. 19; *also see* para. 80 of the judgment itself.
57. *Schalk and Kopf* v. *Austria*, above n. 19, para. 98.
58. Dissenting opinion of judge Schermers in *W.* v. *The United Kingdom*, ECHR (1989), No. 11095/84.

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2.2 The Court's Heteronormative Approach to Article 12 ECHR in Three Recent Judgments

2.2.1 *Consensus-Based Analysis of the ECtHR in* Hämäläinen *v.* Finland[59]

As we saw in the previous paragraph of this contribution, cases dealing with transsexuals sometimes relate to the topic of equal marriage rights. *Hämäläinen* is an example of such a case involving a Finnish national born male that transitioned later to a female. Prior to transition, the applicant had married a woman and had a child together. After transition, the applicant wanted to have her identity number changed into a female one, which was refused by the local registry office. Confirmation of such status required that the person was unmarried or that the spouse gave their consent to have the marriage changed into a registered partnership. Underlying this odd rule was the fact that only a man and a woman could marry under Finnish law. Understandingly, both the applicant as well as the wife wished to remain married to each other. However, this meant that the applicant had no other means of registering herself as a female. The applicant therefore instituted proceedings at the local Court claiming that a divorce would be against their religious convictions and a registered partnership did not provide the same security as marriage meaning, among other things, that their child would be placed in a different situation from children born within wedlock. The Finnish Administrative Court as well as the Supreme Court dismissed the applicant's complaint. An appeal was also denied, therefore the applicant lodged an application to the ECtHR disputing a violation of her rights under Article 8 (the right to respect for private and family life), Article 12 (the right to marry and to found a family) and Article 14 ECHR (the prohibition of discrimination) for making the registering of her gender conditional on the transformation of her marriage into a registered partnership.

An interesting aspect of this case was that the Court analysed it from the perspective of same-sex marriage and not the practical difficulties (such as gender recognition or a forced conversion of the marriage) that post-operative transsexuals face after transition. The ECtHR started its assessment by reiterating its standing in *Schalk and Kopf*[60] according to which Article 8 cannot be interpreted as imposing an obligation on contracting States to grant same-sex couples access to marriage. It also referred to the *Goodwin*-case in its acknowledgment that the regulation of the effects of gender-change in the context of marriage falls to a large extent within the margin of appreciation of the contracting State.[61] At the time of *Hämäläinen*, only ten Member States allowed same-sex couples to marry. Exceptions allowing a married person to gain legal recognition of the acquired gender without having to end a pre-existing marriage existed in only three Member States.[62] The ECtHR thus concluded that there was no European consensus on allowing same-sex marriages. Nor was there any consensus in those States that do not allow same-sex marriages as how to deal with gender recognition in the case of a pre-existing marriage. The exceptions afforded to married transsexuals were even fewer. According to the Court, there had been no signs that the situation in the Member States had changed significantly since it delivered its latest rulings on these issues.[63] In the absence of a European consensus and taking into account that the case raised sensitive moral or ethical issues,[64] the ECtHR considered that the margin of appreciation to be afforded to the State was a wide one.

Unfortunately, the ECtHR also did not uphold the applicant's complaint that the conversion of a marriage into a registered partnership would be comparable to a 'forced' divorce, nor did it take into account the (symbolic) or religious value that the marriage had for the applicant and her wife. In the Court's view, the differences between a marriage and a registered partnership did not involve an essential change in the applicant's legal situation nor would the change of the marriage into a civil partnership have any implications for the applicant's family life.[65] The minor differences between the two concepts did not mean that the Finnish system was lacking with regard to the State's positive obligation.[66] Hence, the Court found the requirement of transformation of the marriage into a registered partnership not disproportionate as the latter provided legal protection to same-sex couples similar to marriage. The conclusion therefore was that Article 8 had not been breached.[67]

The applicant did not initially invoke Article 12 in her application to the ECtHR; however, the Chamber decided of its own motion to communicate the application under this provision as well using this opportunity to again emphasise its heteronormative interpretation of the provision. The ECtHR in its assessment of the provision again referred to *Rees*, reiterating that Article 12 enshrines the traditional concept of marriage as being between a man and a woman[68] and repeated from *Schalk and Kopf* that there is no obligation under this provision for States to allow same-sex marriage.[69] Furthermore, considering that the consequences of the applicant's change of gender for the marriage between her and her spouse had already been assessed under Article 8 and no

59. *Hämäläinen* v. *Finland*, ECHR (2014), No. 37359/09.
60. *Schalk and Kopf* v. *Austria*, above n. 19, para. 101.
61. *Christine Goodwin* v. *The United Kingdom*, above n. 31, para. 103.
62. *Hämäläinen* v. *Finland*, above n. 59, paras. 31-33.
63. *Ibid.*, paras. 73-74.
64. *Ibid.*, para. 67. *Also see X, Y and Z* v. *The United Kingdom*, ECHR (1997), No. 21830/93, para. 44.
65. According to the Court, the only changes it would cause would be for the establishment of paternity, adoption outside of the family and the family name, all of which were settled in the applicant's case and therefore not at issue. Civil partnership would not affect the paternity of the applicant's daughter as it had already been validly established during the marriage. Nor did the gender reassignment have any legal effects on the responsibility for the care, custody, or maintenance of the child, as responsibility in Finland was based on parenthood, irrespective of sex or form of partnership. *See Hämäläinen*, above n. 59, paras. 83-86.
66. *Ibid.*, para. 87.
67. *Ibid.*, para. 89.
68. *Rees*, above n. 17, para. 49.
69. *Schalk and Kopf* v. *Austria*, above n. 19, para. 63 and *Hämäläinen*, above n. 59, para. 96.

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violation was found, the ECtHR considered that no separate issue arose under Article 12.[70] If that was the case, then why communicate the application under this provision at all (if it was not invoked by the applicant in the first place) other than to reiterate its heteronormative approach to the provision?

With regard to Article 14 taken together with Articles 8 and 12, the ECtHR noted that Article 14 complements the other substantive provisions of the ECHR and its Protocols and has no independent existence; there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (the ECtHR had already established this in *E.B.* v. *France* and in *Vallianatos*).[71] Furthermore, in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. But when are situations 'relevantly similar'? According to the Court, the applicant's situation, the situations of cissexuals[72] and unmarried transsexuals were not sufficiently similar to be compared with each other. This reasoning of the Court is rather a circular one; the reason that the applicant's situation is not comparable to those of unmarried transsexuals and cissexuals is because they are either not married and would not have the problem of being 'forced' to change their marriage into a registered partnership in the first place, or that they have a heterosexual orientation or never transitioned into another gender, meaning that they can marry (or remain married) without problems in almost all situations. However, does the fact that there are no 'other victims' to compare the situation of the applicant to mean that there is no discrimination suffered by the applicant? The Court indeed concludes that it finds no violation of Article 14 in conjunction with Articles 8 and 12.[73] This conclusion does bring up the question of how likely it is that Article 14 (in combination for instance with Art. 8 and/or 12) could ever be applicable in situations where the invocation of equal marriage rights is compared to situations of people that do not experience discrimination (to the same extent).

2.2.2 *Consensus-Based Analysis of the ECtHR in* Oliari and Others *v.* Italy[74]

Another recent case concerning equal marriage rights is *Oliari and Others* v. *Italy*. The case involved three Italian same-sex couples that wanted to marry or enter into another type of alternative union to marriage, but whose marriage banns were refused on the ground that marriage was only open to persons of the opposite sex and were offered no alternatives to marriage. The couples' challenges of the refusals were all rejected including Mr Oliari and Mr A.'s subsequent appeal. All three couples lodged an application to the ECtHR claiming that Italian legislation did not provide the possibility to marry or enter into any other type of alternative union to marriage and thus offered no legal means of recognition of their relationship.[75] The couples felt they were being discriminated against on the basis of Article 8 and 12 alone, and in conjunction with Article 14.

The ECtHR stated that it would assess whether Italy failed to comply with a positive obligation to ensure respect for the applicants' private and family life (Art. 8). What is so refreshing about this case is that the Court found it important to emphasise the value legal recognition has for same-sex couples and how the Italian legislation was lacking in this case. The Court started its analysis with a repetition of its views from *Schalk and Kopf* and *Vallianatos* that same-sex couples are capable of entering into stable committed relationships and that they have a similar need for legal recognition and protection of their relationship.[76] The Court took note that the possibility of registering same-sex unions in Italy had mere symbolic value and no official civil status. Cohabitation agreements could also not be considered as giving recognition and protection because they failed to provide the core needs relevant to couples in stable committed relationships.[77] In addition, the law provided for recognition of same-sex partners in very limited circumstances; even the most regular needs arising in the context of a same-sex relationship needed to be determined judicially. The Court recognised that the constant referral to domestic courts, especially in an overburdened justice system such as the one in Italy, would amount to even more hindrance to applicants' efforts to obtain respect for their private and family life.[78]

Furthermore, there was a conflict between the social reality of the three couples and the law, which did not afford any official recognition of the relationship that they openly had in Italy. The ECtHR was of the opinion that providing recognition and protection of same-sex unions would not amount to any particular legislative, administrative or other burden on the Italian State. Moreover, such legislation would serve an important social need.[79] According to the Court, in the absence of marriage, same-sex couples have a particular interest in entering into a form of civil union or registered partnership to obtain relevant protection without necessary hindrance. The ECtHR found that such recognition has an intrinsic value and would bring a sense of legitimacy to

70. *Hämäläinen*, above n. 59, para. 97.
71. *E.B.* v. *France*, ECHR (2008), No. 43546/02, para. 47 and *Vallianatos and Others*, above n. 39, para. 72.
72. Cissexuals or 'cisgenders' are people whose gender identity matches the sex that they were assigned to at birth. *See* <http://advocate.com/transgender/2015/07/31/true-meaning-word-cisgender> for more information.
73. *Hämäläinen*, above n. 59, paras. 112-3.
74. *Oliari and Others* v. *Italy*, above n. 48.
75. *Ibid.*, paras. 34, 39 and 42.
76. *Ibid.*, para. 165, *Schalk and Kopf* v. *Austria*, above n. 19, para. 99 and *Vallianatos*, above n. 39, paras. 78 and 81.
77. Cohabitation agreements are open to anyone cohabiting irrespective of whether they are a couple in a stable relationship and they are also dependent on cohabitation, while it has already been established that the existence of a stable union is independent thereof, *see Vallianatos*, above n. 39, paras. 49 and 73 and *Oliari and Others* v. *Italy*, above n. 48, paras. 168-170. Furthermore, it had not been proved that Italian courts could issue a statement of formal recognition of such agreements, nor what the implications of such a statement would be.
78. *Oliari*, above n. 48, para. 171.
79. The Court here referred to official statistics on the significant number of persons of same-sex or bisexual orientation living in Italy, *see* para. 173.

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same-sex couples[80]; something similar expressed before in *Vallianatos*.[81] This line of reasoning of the Court is fascinating as the same could also be said of same-sex marriage and the value and meaning that has for same-sex couples. Furthermore, in cases where same-sex couples invoke Article 12, there is also often a conflict between the social reality of the applicants and the law, which does not always afford them equal marriage rights.

Continuing in *Oliari*, the ECtHR also found the rapid movement towards legal recognition of same-sex couples in Europe relevant. At the time of *Oliari*, twenty-four out of forty-seven CoE States already provided some form of legal protection and recognition of same-sex couples, whether it was same-sex marriage or a form of registered partnership or civil union. The same rapid development was to be seen globally to which the ECtHR could not but attach some importance.[82] The Italian legislation unfortunately had not attached particular importance to the national community, the general population and the highest judicial authorities in the country, even though the Italian Constitutional Court and the Court of Cassation had previously declared in a series of cases the need for legal recognition of same-sex unions.[83] The ECtHR observed that the position of the two Italian courts reflected the sentiments of a majority of the Italian population; official surveys and statistics indicated that there was a popular acceptance amongst the Italian population of homosexual couples and the support for their recognition and protection.[84]

The ECtHR established that the repetitive failure of legislators potentially undermined the responsibilities of the judiciary and left same-sex individuals in a situation of legal uncertainty[85]; especially considering there was no legitimate public interest or interests of the community against which to balance the applicants' interest. On the contrary, the failure is capable of undermining the credibility and authority of the judiciary and of jeopardising its effectiveness, factors that are of the utmost importance from the point of view of the fundamental principles underlying the ECHR.[86] The Court concluded that Italy had overstepped its margin of appreciation and failed to fulfil its positive obligation in providing a specific legal framework to ensure protection and recognition for same-sex unions.[87] For this reason, there had been a violation of Article 8. However, the Court considered it unnecessary to examine whether there had also been a violation of Article 14 in conjunction with Article 8. I think this is a missed opportunity as it would have been interesting to see the Court's analysis of Article 14 on the topic of equal marriage rights.

With regard to Articles 12 and 14, we see the same heteronormative approach the Court has displayed before in previous cases dealing with equal marriage rights. The ECtHR noted that despite the gradual evolution of States on the matter since *Schalk and Kopf* and *Hämäläinen*,[88] the findings reached in those cases remained pertinent. Only eleven CoE States had recognised same-sex marriage thus far, hence the Court saw no reason to conclude that Article 12 would impose an obligation on Member States to also allow same-sex couples access to marriage[89]; the same was concluded for Article 14 in conjunction with Article 12. Both complaints under those provisions were ill-founded and rejected by the Court. A lost opportunity, as the Court could have taken a more progressive approach here and for instance applied an evolutive interpretation of Article 12. More on this and a critical analysis of the ECtHR's findings in Section 3 of this contribution.

2.2.3 *Consensus-Based Analysis of the ECtHR in* Chapin and Charpentier *v.* France[90]

The last recent case relating to equal marriage rights is *Chapin and Charpentier* and concerns a French same-sex couple wanting to marry. The marriage application was rejected by the public prosecutor as only persons of different sex were able to marry, but the mayor of the municipality decided to perform the marriage ceremony anyway and registered the marriage entry in the local civil registrar. The public prosecutor brought proceedings against the couple, seeking to have the marriage annulled, which succeeded. The couple appealed this decision, but were denied. The Court of Cassation also dismissed the couple's application.

The applicants decided to lodge an application to the ECtHR relying on Article 12 taken together with Article 14 contending that the limitation of marriage to different-sex couples amounted to a discriminatory infringement of the right to marry. Furthermore, relying on Article 8, the applicants felt they had been discriminated against on the basis of their sexual orientation. The argumentation behind this was that if they had been a different-sex couple, they would have several possibilities of legal recognition of their relationship such as cohabitation, the possibility of a civil union[91] or marriage. As a same-sex couple, there was only the possibility of cohabitation or a civil union, which in their eyes provided less legal protection than marriage. Furthermore, they were of the opinion that the discrimination did not pursue a legitimate goal (protecting the family) and was therefore not proportionate.

It was no surprise that the Court again started its assessment of Article 12 taken together with Article 14 from

80. *Ibid.*, para. 174.
81. *Vallianatos*, above n. 39, para. 81.
82. *Ibid.*, paras. 65, 135 and 178. The Court here makes a reference to different cases on same-sex marriage worldwide that were revolutionary, in particular emphasising the ground-breaking *Obergefell* case before the United States Supreme Court which legalised same-sex marriage in all of the fifty States, *see Obergefell* v. *Hodges,* 26 June 2015, 576 US.
83. *Oliari*, above n. 48, para. 180.
84. *Ibid.*, paras. 144 and 181.
85. *Ibid.*, paras. 184-185.
86. *Ibid.*, *also see Broniowski* v. *Poland*, ECHR (2004), No. 31443/96, para. 175.
87. *Oliari*, above n. 48, para. 185.
88. *Schalk and Kopf* v. *Austria*, above n. 19, paras. 61-63 and *Hämäläinen*, above n. 59, para. 96.
89. *Oliari*, above n. 48, para. 192.
90. *Chapin and Charpentier* v. *France*, ECHR (2016), No. 40183/07.
91. Civil unions in France are known as '*pacte civil de solidarité*' or '*PACS*'.

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its heteronormative point of view. As always, the assessment started with a reference to *Schalk and Kopf*. What was encouraging was the acknowledgment that the institution of marriage had undergone major social changes since the adoption of the ECHR, but the Court showed no hesitation in declaring that there was no European consensus on same-sex marriage.[92] It accepted the application of Article 12[93] (unlike in *Oliari*) but went on to repeat its statement from *Hämäläinen* that the provision enshrined the traditional concept of marriage as being between a man and a woman.[94] One could ask to what extent is it necessary to repeat this (heteronormative) statement.[95] The Court added that while some contracting States have extended marriage to same-sex partners, Article 12 could not be construed as imposing an obligation on the Member States to grant same-sex couples access to marriage.[96] Marriage has deeply rooted social and cultural connotations that are likely to differ in each State; therefore, the Court found that national authorities are best to judge the needs of the society and respond to it accordingly. In *Oliari*, the ECtHR went a little further than it did in *Hämäläinen* by stating that despite the gradual evolution of States on the matter (at the time of *Oliari*, eleven CoE States recognised same-sex marriage), the aforementioned findings on Article 12 (alone and in conjunction with Art. 14) remained pertinent.[97] The ECtHR determined in the case at issue (*Chapin and Charpentier*) that it could not conclude differently given the short time that had elapsed since the two judgments.[98] This statement is peculiar, considering later on in the assessment, the ECtHR admitted that this case was different than that of *Oliari* and that of *Vallianatos*.[99] In addition, the Court explained that subsequent to the application of *Chapin and Charpentier* being lodged, France had changed its laws in May of 2013 allowing same-sex couples access to marriage; according to the ECtHR, the applicants were now free to marry if they desired to. Consequently, this fact led the ECtHR to conclude that there was no violation of Article 12 in combination with Article 14. Again, a remarkable conclusion. The question that comes to mind is whether the Court would have been bolder and/or gone further in its reasoning if France had not yet allowed same-sex marriage; would it then have found a violation of the provisions? Furthermore, the Court's argument can also be reversed; because France had changed its laws in the meantime, one could also interpret this as an admittance of a previous wrong practice. There are numerous cases where such a recent legal change in legislation is actually held against the State party.[100]

As for Article 8 taken together with Article 14, the applicants had contended that they were victims in the exercise of the right to respect for their private and family life and that this amounted to discrimination based on sexual orientation.[101] The ECtHR was of the opinion that States in this matter enjoyed a certain margin of appreciation in deciding whether to grant same-sex couples access to marriage and as to the exact nature of the status conferred by other forms of legal recognition.[102] Although, at the material time marriage was not open to French nationals under French law, the applicants could have concluded a civil union (a *PACS*), which confers to partners a number of rights and obligations in tax, patrimonial and social matters.[103] The fact that marriage has a different value to the applicants and that, in their view, a *PACS* provided less protection, was not relevant to the Court. Accordingly, insofar as the applicants pointed to the differences between marriage and civil unions, the ECtHR stressed that it was not required to give a ruling on each of these differences in detail,[104] but that these differences were generally consistent with the trend observed in other Member States anyway and did not discern any indication that France had exceeded its margin of appreciation in the choice made of the rights and obligations conferred by the civil union. What strikes me is that the Court then again stressed the fact that from 2013 on, France had provided same-sex couples the possibility to marry each other.[105] That the applicants could get married now does in my view not change the fact that they felt they were being discriminated against at the time that they wanted to get married; their marriage was even annulled. However, the ECtHR consequently found no violation of Article 8 combined with Article 14.

92. *Schalk and Kopf* v. *Austria*, above n. 19, paras. 58-63.
93. *Chapin and Charpentier*, above n. 90, para. 36.
94. *Hämäläinen*, above n. 59, para. 96.
95. As we see in Section 3 of this contribution, it is the Court's own case law to consider the ECHR a living instrument and to apply an evolutive or dynamic interpretation of the provisions of the ECHR. However, with regard to same-sex marriage, the Court continues to remain conservative in its approach of the topic.
96. *Chapin and Charpentier*, above n. 90, para. 37 and *Schalk and Kopf* v. *Austria*, above n. 19, para. 63.
97. *Oliari*, above n. 48, paras. 192-194.
98. The two judgments were delivered eleven months apart.
99. *Chapin and Charpentier*, above n. 90, para. 50.
100. J. Temperman for instance gives the example of *Kuznetsov* v. *Ukraine*, ECHR (2003), No 39042/97 in 'Freedom of religion or belief in prison: A critical analysis of the European Court of Human Rights' jurisprudence', 6 *Oxford Journal of Law and Religion* 1, 1-45, at 7 (2017). An example of a private party that also changed its rules or policy from a previous wrong practice is *Eweida and Others* v. *The United Kingdom*, ECHR (2013), Nos. 48420/10, 59842/10, 51671/10 and 36516/10.
101. The applicants contented that their differential treatment did not pursue a legitimate goal (protecting the family), nor was it proportionate.
102. *Chapin and Charpentier*, above n. 90, para. 48, *Schalk and Kopf* v. *Austria*, above n. 19, para. 108 and *Gas and Dubois* v. *France*, ECHR (2012), No. 25951/07, para. 66.
103. *Chapin and Charpentier*, above n. 90, paras. 25 and 49.
104. *Schalk and Kopf* v. *Austria*, above n. 19, para. 109 and *Chapin and Charpentier*, above n. 90, para. 51.
105. *Chapin and Charpentier*, above n. 90, para. 51.

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3 Critical Analysis of the ECtHR's Case Law on Equal Marriage Rights

3.1 European Consensus on Same-Sex Marriage?

The biggest similarity in all three cases discussed is the rationale of the ECtHR that Member States of the CoE are under no obligation to grant same-sex couples access to marriage, regardless of whether the applicants' case is based on Article 8 (right to respect for private and family life) or Article 12 (right to marry) alone or either provision in combination with Article 14 ECHR (prohibition of discrimination). In *Schalk and Kopf*, the Court found that the institution of marriage had undergone major social changes, but that there was no European consensus on same-sex marriage. In *Hämäläinen*, it went further by not even willing to consider the case under Article 12 and only reiterating its findings in *Rees* and *Schalk and Kopf*. This approach was repeated in *Oliari*, but even more strongly. The ECtHR did mention the gradual evolution of States on the issue of same-sex marriage, but found the outcomes reached previously in *Schalk and Kopf* and *Hämäläinen* to remain pertinent. Not only was Article 12 dismissed, but both the complaint under Article 12 alone as well as in combination with Article 14 were found to be manifestly ill-founded and rejected.[106] The ECtHR took it in *Chapin and Charpentier* again a step further by stating that Article 12 was finally applicable, but unsurprisingly, it determined that it could not conclude differently than it did in *Oliari* given the short time that had elapsed since the two previous judgments and found no violation of Article 12 (in combination with Art. 14). In all three cases, the ECtHR referred to the number of States that had legalised same-sex marriage and implied that because there was no majority, there was no European consensus on that topic. It then left the decision to the contracting States themselves whether or not to grant same-sex couples access to marriage by pointing out that this topic falls within the States' margin of appreciation.[107] In addition, the ECtHR acknowledged that the margin is to be considered wide[108] when the cases at hand raise sensitive moral or ethical issues.[109] All in all, we can conclude that, unfortunately, there is hardly any evolution to be seen in the views of the ECtHR on equal marriage rights in these recent judgments, despite the fact that more and more Member States (as well as other countries globally) are legalising same-sex marriage.

3.2 The 'Problematic' Consensus-Based Analysis by the ECtHR

The consensus-based analysis by the ECtHR may prove to be problematic for several reasons. First, offering a wide margin of appreciation to States may lead to a discriminatory treatment of minorities, considering that States do not always have the best interest of minorities in mind when dealing with sensitive moral or ethical issues and trying to strike a balance between the public interest and the interest of the individual. With the case of same-sex marriage, certain States might choose public or political interests over equal marriage rights. For this reason, it would be better if the ECtHR would apply a more assertive role in protecting and promoting equal marriage rights instead of applying the consensus-based analysis approach. Kavanagh has pointed out that since a court upholding a bill of rights has no interests of its own to further, it is relatively unaccountable to the various political interests in society. Furthermore, a

106. *Oliari*, above n. 48, para. 194.

107. For more information on the margin of appreciation, *see* R.S.J. Macdonald, 'The Margin of Appreciation', in R.S.J. Macdonald, F. Matscher & H. Petzold (eds.), *The European System for the Protection of Human Rights* (1993), 83-124; H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996); E. Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', 56 *Zeitschrift für Auslandisches Öffentliches Recht und Volkrecht* 240 (1996); M.R. Hutchinson, The Margin of Appreciation Doctrine in the European Court of Human Rights, 3 *International & Comparative Law Quarterly* 638 (1999); S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (2000); G. Letsas, 'Two Concepts of the Margin of Appreciation', in *A Theory of Interpretation of the European Convention on Human Rights* (2007), at 80-99; J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the ECHR* (2009); J. Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', 29 *Netherlands Human Rights Quarterly* 324 (2011); J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', 17 *European Law Journal* 80 (2011); A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012); F. Fabbrini, 'Margin of Appreciation and the Principle of Subsidiarity', in M. Andenas, E. Bjorge & G. Bianco (eds.), *A Future for the Margin of Appreciation?* (2015), iCourts Working Paper Series, No. 15.

108. A wide or broad margin also leads to a low standard of proof, meaning a lenient scrutiny by the Court of the respondent's arguments. In fact, as Ambrus states, the main point of critique with this is that it replaces the proportionality test in many of the cases dealing with a broad margin. *See* M. Ambrus, 'The European Court of Human Rights and Standards of Proof. An Evidentiary Approach towards the Margin of Appreciation', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2008), at 241.

109. For a parallel approach by the Court in the area of the freedom of religion, *see* K. Henrard, 'How the European Court of Human Rights' Concern Regarding European Consensus Tempers the Effective Protection of Freedom of Religion', 3 *Oxford Journal of Law and Religion* 398 (2015).

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court is preferred because judges are not directly affected by their own decision and can therefore provide a corrective to some of the energies that animate normal politics, such as those of political interest and power.[110] It is also the ECtHR's (counter-majoritarian) task to protect rights of minorities under the ECHR;[111] applying the consensus-based analysis to equal marriage rights does not do justice to this task of the Court.

Second, the use of the term 'European consensus' is vague as it is not always clear how the ECtHR defines it, nor is the Court consistent in its application.[112] Consensus has been based on the existence or non-existence of common ground in national laws, on practices, on common social trends or even on ongoing debates in Member States.[113] This differentiation is prone to manipulation as the answer depends on the question one is asking.[114] Furthermore, European consensus does not always necessarily mean a clear majority, as it may also refer to an emerging trend.[115] This is confusing in light of the recent judgments discussed in the previous section of this contribution where the ECtHR referred to the existing number of CoE Member States that have provided some form of recognition of same-sex relationships (although the ECtHR does not find this enough to determine an existence of an European consensus), but also to the emerging global trend of legalisation of same-sex marriage in various other countries.[116] The Court could have assessed this emerging trend more in terms of proof of the existence of European consensus instead of focusing on the lack of legislation on same-sex marriage in certain Member States, especially considering that such a lack does not always mean that there is opposition to it; a study by the German Anti-Discrimination Agency at the beginning of 2017 for instance demonstrated that 83% of the German population expressed support for same-sex marriage and that 95% believed in the legal protection of LGBT rights.[117] It therefore was not a surprise that the German parliament recently legalised same-sex marriage.[118]

Third, by relying on the consensus-based analysis, the ECtHR shies away from providing clarity[119] on the interpretation and/or application of Article 12, especially in the context of same-sex couples. In *Oliari*, the case was inadmissible under Article 12, while in *Chapin and Charpentier* it was admissible. Also, while the ECtHR keeps on referring to Article 12 as enshrining the traditional concept of marriage between a man and a woman, the provision is actually based on Article 16 UDHR. That latter provision refers to 'men *and* women' (emphasis added) with a view to award women equal rights,[120] not to establish a distinction between different-sex couples and same-sex couples; this distinction was never an issue at the time of drafting of the UDHR. The *travaux préparatoires* for instance do not mention anything on a possible heterosexual nature of the chosen wording.[121] The wording of Article 12 ECHR is actually quite ambiguous and could be interpreted in different ways. Even the ECtHR acknowledges that it could be read so as not to exclude the marriage between persons of the same sex.[122] This would be logical assuming that the wording was deliberately drafted with the intention to award women equal rights or to emphasise that only adults could marry and not children. It is either way peculiar that the ECtHR to this day refers to the historical context in which the ECHR was adopted while it has been almost sixty years since its adoption. Now of course there is the argument that, at the time of the ECHR's drafting, marriage between men and women was the only option in the minds of the drafters, but that brings us to the following issue: It is the Court's own case law that the Convention is to be considered a living instrument and that it should be interpreted in the light of present-day conditions.[123] As mentioned previously, originalism plays a very small role with regard to human rights treaties.[124] Even if Article 12 ECHR was initially adopted to enshrine the traditional concept of marriage between a man and a woman, in present-day conditions the ECtHR could choose for an evolutive or dynamic interpretation of the provision[125] so that same-sex couples in stable committed relationships are allowed to marry and enjoy the same legal protection and recognition as different-sex couples do under that provision.

110. A. Kavanagh, 'Participation and judicial review: A reply to Jeremy Waldron', *Law and Philosophy* 22, 451-86, at 472 (2003).
111. F. Rigaux, 'La liberté d'expression et ses limites', 13 *Revue trimestrielle des droits de l'homme* 401, at 411 (1995).
112. P. Martens, 'Perplexity of the national judge faced with the vagaries of European consensus', in A. Kovler, V. Zagrebelsky, L. Garlicki, D. Spielmann, R. Jaeger & R. Liddell (eds.), *Dialogues between judges* (2008) 53, at 58.
113. Helfer, above n. 10, at 134. *Also see* H. Fenwick, 'Same-sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?', 3 *European Human Rights Law Review*, 249-72, at 253 (2016).
114. For more on consensus, please *see* L. Wildhaber, A. Hjartarson, S. Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights', 33 *Human Rights Law Journal* 7, 248-63 (2013); M. Ambrus, 'Comparative law method in the jurisprudence of the European Court of Human Rights in light of the rule of law', 2 *Erasmus Law Review* 3, 353-71 (2009); K. Henrard, 'How the ECtHR's use of European Consensus Considerations allows Legitimacy Concerns to Delimit its Mandate', in P. Kapotas and V.P. Tzevelekos (eds.), *Building Consensus on European Consensus* (to be published in 2018).
115. Fenwick, above n. 113, at 251.
116. *See* for instance *Vallianatos*, above n. 39, para. 91, and *Oliari*, above n. 48, paras. 65, 135 and 178.
117. *See* <www.dw.com/en/germans-not-opposed-to-same-sex-marriage/a-37110913> for more information.
118. Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts, 07-07-2017, BT-Drs. 18/66665.
119. F. Hamilton, 'Why the Margin of Appreciation Is not the Answer to the Gay Marriage Debate', 1 *European Human Rights Law Review*, 47-55 (2013).
120. Waaldijk, above n. 12, at 238. *Also see* W.A. Schabas (ed.), *The Universal Declaration of Human Rights – The Travaux Préparatoires* (2013), at 304, 420, 859, 1074, 1154 and 1198-1200.
121. *Ibid.*, Waaldijk, at 238 and Schabas, at 283. The same can be said about Article 23 of the International Covenant on Civil and Political Rights (ICCPR) which contains the right to marry, *see* 16 December 1966, General Assembly resolution 2200 A.
122. *Schalk and Kopf* v. *Austria*, above n. 19, para. 55.
123. *E.B.* v. *France*, above n. 71, para. 92 and *Christine Goodwin*, above n. 31, paras. 74-75.
124. G. Letsas, above n. 107, at 59, and Killander, above n. 54, para. 2.2.
125. Dzehtsiarou, above n. 53, at 1731.

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This is of course easier said than done, but if the ECtHR would follow such an evolutive interpretation, it would not only be welcomed by same-sex couples, but also follow the global trend towards same-sex marriage that we are seeing in the last sixteen years. The ECtHR itself acknowledges in its judgments that the institution of marriage has undergone major social changes since the adoption of the ECHR and refers to the aforementioned global attitude and trend towards same-sex marriage. Furthermore, it also emphasises that civil unions have an intrinsic value and would bring a sense of legitimacy to same-sex couples; the same can also be said of same-sex marriage. The Court even makes a reference to the ground-breaking judgment of the United States Supreme Court in *Obergefell* v. *Hodges*[126] which was delivered just a month before *Oliari* legalising same-sex marriage in all fifty States of the US. Instead, the ECtHR chooses to hold on to the teleological and heteronormative interpretation of the ECHR and justifies its lack of scrutiny of the justifications and proportionality requirements put forward by States by referring to the lack of European consensus.

3.3 Credibility, Authority and Legitimacy of the ECtHR

Against the aforementioned background, one cannot but wonder why the Court chooses the particular approach on the topic of same-sex marriage and equal marriage rights. It should be emphasised that the ECtHR operates in the context of international law based on State sovereignty and that the Court is based on the notion of subsidiarity.[127] Article 1 ECHR places primary responsibility on States Parties to secure fundamental rights and freedoms to everyone within their jurisdiction and the judgments of the ECtHR are to be implemented by those Member States.[128] There is already some resistance to the Court's judgments and a considerable number of States are seemingly failing to comply with their duty to ensure the respect of Convention rights and adhere to the final judgments of the ECtHR.[129] It is for reasons like this that the principle of subsidiarity and the margin of appreciation are now even going to be mentioned in the ECHR pursuant to Protocol 15.[130] The topic of same-sex marriage raises sensitive moral, ethical and/or religious issues, especially for conservative Member States. If the ECtHR would choose a *pro* same-sex marriage stance, it could risk losing its credibility and authority in the eyes of these Member States.[131] Furthermore, steering away from a wide margin of appreciation into a narrow one for the Member States could cause some hostility towards implementing the Court's judgments.[132]

The aforementioned are all disadvantages of the ECtHR's judicial review. The Court therefore exercises self-restraint[133] and is hesitant in taking a more active role in encouraging States to facilitate equal marriage rights. But then again, if the ECtHR continues choosing this (type of) consensus-based analysis and allowing Member States a wide margin of appreciation, it could contribute to a detrimental treatment of minorities, in this case same-sex couples, with regard to basic rights and legal protection, which are not always guaranteed by cohabitation and/or civil unions the way marriage sometimes does. This way, the ECtHR could risk undermining its role and legitimacy as the guardian of the ECHR.[134] The Court therefore tries to strike a balance between upholding the rights of the ECHR while at the same time trying to maintain and preserve its authority. The ECtHR could also flex its muscles and choose a counter-majoritarian approach by interpreting Article 12 evolutively. An overwhelming majority of authors share the view that such an interpretation would not be contrary to international law.[135] This counter-majoritarian approach is not only one of the tasks of a human rights court and would protect human rights, but most importantly could even *enhance* the legitimacy of the political system as the whole.[136] Even the president of the ECtHR himself has declared that the ECHR concept of democracy goes beyond crude majoritarianism, and the ECtHR will, as required, exercise a coun-

126. *Oliari*, above no. 48, para. 65 (reference to *Obergefell*, above n. 82).
127. Fenwick, above n. 113, at 250. For more on subsidiarity and the ECtHR, *see* A. Mowbray, 'Subsidiarity and the European Convention on Human Rights', 15 *Human Rights Law Review* 2, 313-41 (2015), G. Füglistaler, 'The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence', Cahier de l'IDHEAP 295/2016 Unité Droit public, 2016 IDHEAP, Lausanne, and A. Follesdal, 'Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights-or Neither?', 79 *Law and Contemporary Problems* 147, 147-63 (2016).
128. Art. 46(1) ECHR states that The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The Committee of Ministers shall supervise the execution of the judgments (*see* para. 2 of Art. 46).
129. Report of the Committee on Legal Affairs and Human Rights, The effectiveness of the European Convention on Human Rights: the Brighton Declaration and beyond, 33 AS/Jur (2014), para. 35.
130. Protocol 15 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 24 June 2013, CETS 213.
131. Fenwick, above n. 113, at 249.
132. The European Court of Justice of the European Union (CJEU) finds itself in a comparable situation. LGBT-rights in general and equal marriage rights especially are sensitive issues which cause the CJEU to tread cautiously as these matters are delicate from the point of view of the EU Member States. We can see this apprehension in recent cases, such as *Léger* (Case 528/13, *Geoffrey Léger* v. *Ministre des Affaires sociales, de la Santé et des Droits des femmes, Établissement français du sang* [2015], ECLI:EU:C:2015:288) and *Parris* v. *Trinity College Dublin* (Case 443/15, *David L. Parris* v. *Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills* [2016], ECLI:EU:C:2016:897).
133. M. Marochini, 'The interpretation of the European Convention on Human Rights', 51 *Collected Papers of the Faculty of Law in Split* 1, 63-84, at 67 (2014).
134. Letsas, above n. 107, at 122-23.
135. Pitea, above n. 52, at 553.
136. R. Fallon, 'The Core of an Uneasy Case for Judicial Review', 121 *Harvard Law Review* 1693, 1693-1736, at 1699 (2008). *Also see* K. Dzehtsiarou, *European Consensus and the legitimacy of the European Court of Human Rights* (2015), at 170-71.

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ter-majoritarian function for the sake of pluralism, tolerance and the rights of minorities.[137]

3.4 The Future of European Consensus in the Context of Equal Marriage Rights?

In light of the criticisms of the consensus-based analysis (or actually, this type of consensus-based analysis as I also refer to Fenwick's alternative below), it is worth analysing the potential alternative approaches that could have been followed by the Court or which are still viable options for the ECtHR in future cases. The evolutive or dynamic interpretative method has already been mentioned previously in this contribution and for the reasons mentioned there, it is in my eyes one of the most preferable approaches to equal marriage rights' situations. However, if parting completely from a consensus-based analysis is too big of a step, the ECtHR could also choose to apply the same analysis in a different way. Fenwick suggests consensus-based analysis where the analysis of the consensus is discerned not only in a single State, but on broadly comparable States as a significant, but not solely determinative aspect of the general European consensus.[138] As Fenwick indicates, placing some reliance on such a consensus would appear at first glance to be more likely to slow down the pace of change in this context than would relying on the general European consensus but, perhaps paradoxically, doing so might encourage the Court to take a more proactive approach since any underlying concerns judges might have as to the reception of their judgments in certain states might be allayed to an extent.[139] The reasoning behind the argument of regional consensus or regional customary international law[140] is that there is a distinction between Western European and Central and Eastern European States in the intensity of trends towards the consolidating of democracy and of the values of tolerance and acceptance of diversity in those States.[141] This can also be seen in the fact that (mostly) Western European States have legalised same-sex marriage and States that have not or have even changed the definition of marriage in their Constitution to that being between a man and a woman are predominantly in Central and Eastern Europe.[142] The disadvantage is that placing emphasis on this other method of consensus-based analysis would foster a gradualist approach to eroding discrimination (in comparison to the consensus-based analysis) against same-sex couples in a number of CoE States. Then again, it could also avoid the perception that the ECtHR is trying to impose 'Western' human rights' standards on Central and Eastern Member States in cases dealing with sensitive moral, ethical and/or religious issues.[143] This method can therefore be considered more of a middle ground approach.

Another option for the ECtHR in its assessment could be having an analysis of Article 14 in combination with Article 8 play a bigger role. These provisions had been invoked in the *Oliari* judgment, but the ECtHR found it unnecessary to analyse Article 14, stating that there had already been a violation of Article 8. In *Schalk and Kopf*, the ECtHR found a relatively similar situation and emphasised that discrimination based on sexual orientation requires particularly serious reasons by way of justification.[144] The dissenting judges in that case were of the opinion that Article 14 should have been applicable as well. To have Article 14 (in conjunction of Article 8) play a bigger role could give the ECtHR the opportunity to elaborate on the types of discrimination of same-sex couples in Member States, the justifications put forward and their proportionality, and also on how the European consensus should be interpreted in (future) situations involving the application of the provision(s). Considering the fact that Article 14 (in combination with other provisions, such as Article 8) has not been assessed in many same-sex relationship relating cases, chances are small that the Court would apply a different approach in the near future, but this option could provide significant clarity with regard to those situations and perhaps even offer some legal certainty.

Johnson and Falcetta[145] encourage applicants to utilise Article 3 ECHR (the prohibition of torture, inhuman or degrading treatment or punishment) to address discrimination of sexual orientation in the area of marriage. Because of the open-ended wording of the provision and its applicability and scope not being circumscribed to particular areas of social life, Johnson and Falcetta think the Court could more effectively address discrimination against sexual minorities by developing Convention jurisprudence in a more holistically and comprehensive way and enable a more sociological understanding of and response to a variety of ways in which discrimination against sexual minorities is socially organised and experienced.[146] A creative invocation of Article 3 may

137. *See* J.P. Costa's speech 'The Inks Between Democracy and Human Rights Under the Case Law of the European Court of Human Rights', delivered in Helsinki on 5 June 2008, available at: <http://.echr.coe.int/Documents/Speech_20080605_Costa_Helsinki_ENG.pdf>. For more information on counter-majoritarianism by different courts in favour of LGBT rights, *see* S.G. Mezey, *Queers in court: Gay rights law and public policy* (2007), at 7.
138. Fenwick, above n. 113, at 263.
139. *Ibid*.
140. Killander, above n. 54, para. 2.2.
141. *Ibid*.
142. Plausible explanation for this East-West division in Europe may be the role that religion plays in certain States or the economic hardships experienced by the region's citizens which cause populist politicians using anti-gay rhetoric to gain momentum, *see* 'The East/West Divide on LGBT Rights in Europe', available at: <https://freedomhouse.org/blog/east-west-divide-lgbt-rights-europe> and F. Buhuceanu, 'Tradition values, Religion and LGBT Rights in Eastern Europe', ECP 2014.
143. Fenwick, above n. 113, at 263.
144. Joint dissenting opinion of judges Rozakis, Spielmann & Jebens in *Schalk and Kopf* v. *Austria*, above n. 19, at 8. *Also see* Hamilton, above n. 119, at 54-5.
145. P. Johnson and S. Falcetta, 'Sexual Orientation Discrimination and Article 3 of the European Convention on Human Rights: Developing the Protection of Sexual Minorities', *European Law Review*, in print (2018).
146. *Ibid*., at 5. *See* for instance *X* v. *Turkey* which established a new, strong framework for holding national authorities to account for sexual orientation discrimination in respect of their positive obligations under Art. 3 in conjunction with Art. 14 ECHR, *X* v. *Turkey*, ECHR (2012), No. 24626/09. A similar approach was applied by the Court in *Identoba and Others* v. *Georgia*, ECHR (2015), No. 73235/12, *see* Johnson and Falcetta, above n. 145, at 21-22.

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lead to be fruitful in the future as Johnson and Falcetta claim that the close connection between the right to marry and respect for human dignity has been thoroughly explored by courts as well as by scholars.[147]

It will also be interesting to see if and how Protocol 12[148] to the ECHR could play a role in the debate surrounding equal marriage rights. The Protocol can be applicable when there is discrimination on grounds of sexual orientation.[149] The idea behind it initially was to broaden in a general fashion the field of application of Article 14, containing a non-exhaustive list of discrimination grounds[150] and having an autonomous application, free of the applicability of the provisions of the ECHR; this makes it different from Article 14 ECHR, which can only be applicable in conjunction with one of the other provisions of the Convention. Of course, the applicability of the Protocol does depend on its ratification and as of 2017, only twenty CoE States have ratified it. Unsurprisingly, many States that do not allow same-sex marriage also have not ratified this Protocol, but the amount of ratifications is steadily growing each year. The meaning of the notion of discrimination both under Article 14 as well as Protocol 12 have been subject to consistent interpretation by the Court.[151] However, in some cases, the Court seems to extend the 'ambit' of Article 14 ECHR very far,[152] effectively amounting to bringing about the implementation of Protocol 12 to the ECHR, even for those States that had not ratified Protocol 12.[153] It is unclear if the Court would ever apply such an approach to cases dealing with equal marriage rights, but with the aforementioned cases, the Court certainly opened up the possibility for it.

Finally, another option is Johnson's solution of looking at *de facto* marriage rights and protection.[154] When there is discrimination on grounds of sexual orientation between unmarried different-sex couples and unmarried same-sex couples, Johnson finds that the ECtHR should undermine the heteronormativity of *de facto* marriage law as it did in the cases *Karner* v. *Austria* and *Kozak* v. *Poland*.[155] The relevant rights and benefits in those cases were available to unmarried different-sex couples and were strongly materially and symbolically attached to marriage. This was discriminatory as unmarried same-sex couples did not have the same rights and benefits. Johnson claims that looking at the requirement of whether the couple (same-sex or different-sex) is living as if it was 'in a marriage' or in a '*de facto* marital cohabitation', contributes to disrupting the heteronormativity of marriage itself.[156] According to Johnson, by regarding same-sex and different-sex couples as analogous in respect of *de facto* marriage, the judgments disturbed the 'sacredness' of (heterosexual) marriage and represent a basis from which to evolve future ECtHR jurisprudence in respect of same-sex marriage.[157] I agree with Johnson and think this approach will put the emphasis on the *de facto* situation of couples instead of on their sexuality or gender, which will also take away the problem of couples not being 'relevantly similar,';[158] a requirement that is needed for an issue to arise under Article 14 ECHR and which has caused the provision not to be assessed in many same-sex relationship relating cases as the Court found the situations of same-sex couples not being relevantly similar to that of different-sex couples. This approach might lead to Article 14 possibly being applicable more often in situations dealing with equal marriage rights.

Whichever way, approach or method the ECtHR chooses, its jurisprudence has the power to change State practice. We saw this after the *Vallianatos* case in Greece and the *Oliari* case in Italy; as a result of the two judgments, both Greece and Italy changed their laws and allowed same-sex couples to conclude civil unions.[159] The fact that these States effectively needed to change and in fact did change their legislation shows that the ECtHR's case law can act as a catalyst for change. Of course, there is some circularity in this situation, but a more progressive Court could lead to more Member States providing same-sex relationships with legal protection and recognition in the form of civil unions, but also same-sex marriage. That development is then taken into consideration by the ECtHR when assessing the question whether there is European consensus on the matter or not or even the fact whether there is an emerging trend in the legislation of Member States on the matter of same-sex marriage or same-sex relationships in general. In other words, the ECtHR has a hand in shaping this consensus if it so wishes. The fact that there is currently hardly any evolution to be seen in the views of the ECtHR concerning equal marriage

147. Johnson and Falcetta, above n. 145, at 34. *Also see* W.N. Eskridge, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (1996); R. Wintemute, 'From "Sex Rights" to "Love Rights": Partnership Rights as Human Rights', in N. Bamforth (ed.), *Sex Rights: The Oxford Amnesty Lectures* (2005), at 186.
148. Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, 4 November 2000, ETS 177.
149. Explanatory Report – ETS 177 – Human Rights (Protocol No. 12), at 5.
150. *Ibid.*, at 3.
151. L.G. Loucaides, 'The prohibition of discrimination under Protocol 12 of the European Convention on Human Rights', in *The European Convention on Human Rights: Collected Essays* (2007), at 63.
152. *See* for instance the concurring opinion of Judge Borrego Borrego in the case *Stec* v. *United Kingdom*, ECHR (2006), Nos. 65731/01 and 65900/01. This extension of the ambit seems to be confirmed in *Luczak* v. *Poland*, ECHR (2007), No. 77782/01.
153. R. O'Connell, 'Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR', 29 *Legal Studies: The Journal of the Society of Legal Scholars* 211, at 216-17 (2009).
154. P. Johnson, 'Marriage, heteronormativity, and the European Court of Human Rights: A reappraisal', 29 *International Journal of Law*, 56-77 (2015).
155. *Karner* v. *Austria*, ECHR (2003), No. 40016/98 and *Kozak* v. *Poland*, ECHR (2010), No. 13102/02.
156. Johnson, above n. 154, at 58.
157. *Ibid*.
158. *See* para. 2.2.1 of this contribution where this issue has been mentioned previously.
159. *See* 'Italy Approves Same-Sex Civil Unions', available at: <https://www.nytimes.com/2016/05/12/world/europe/italy-gay-same-sex-unions.html> and 'Greece ends discrimination of gay people in civil union law', <https://euobserver.com/lgbti/131660>.

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rights does not mean that this has to stay that way in the (near) future.

4 Conclusion

We have seen that the ECtHR often chooses a heteronormative approach to the concept of marriage whenever Article 8 or 12 ECHR are invoked in the context of same-sex relationships; the Court often refers to the historical context in which the Convention was adopted and states that same-sex couples have no right to marry under the ECHR. We are also seeing an emerging global trend of more and more countries around the world, predominantly in Western and Northern Europe, that are legalising same-sex marriage. Even so, there are currently only fourteen CoE Member States that allow same-sex marriage (sixteen, if you count Malta and Germany, whose marriage equality laws will come into force soon), hence the ECtHR has thus far concluded, as it did in the recent cases *Hämäläinen*, *Oliari and Others*, and *Chapin and Charpentier* on equal marriage rights, that there is no European consensus on this matter. With the choice of this type of consensus-based analysis, the ECtHR offers States a margin of appreciation to make rules on granting same-sex couples access to marriage or not. This margin is also wide if the topic concerns a sensitive moral, ethical and/or religious issue, which is the case with same-sex marriage. This contribution argued that the current (type of) consensus-based analysis by the ECtHR may prove to be problematic for several reasons and may lead to problems such as the detrimental treatment of minorities by the majority in different Member States. The ECtHR tries to strike a balance between, on the one hand, protecting minorities such as same-sex couples, and on the other hand maintaining its own credibility and authority towards Member States that might not agree to promoting rights and providing legal protection to same-sex couples. The contribution has also highlighted different solutions to this problem. The ECtHR can, for instance, choose an evolutive approach or alternatively, apply consensus-based analysis in a different way (focusing on broadly comparable States), look at the possible application of Article 14 (in conjunction with Article 8 ECHR), apply Article 3 in a more creative, holistic and comprehensive way or possibly assess couples on their *de facto* marriage-situation instead of their gender and sexual orientation.

It is to be seen what the ECtHR will do in the next few years when faced with new cases dealing with equal marriage rights. The situation will become particularly interesting when half (or more) of the CoE Member States will have legalised same-sex marriage. In *Oliari* the ECtHR stated that civil unions have an intrinsic value and would bring a sense of legitimacy to same-sex couples. The same can be said for same-sex couples and marriage. With its statement in *Schalk and Kopf* that Article 12 ECHR could be read so as not to exclude the marriage between persons of the same sex, the ECtHR offered an opening that can be used in the future to interpret Article 12 and the right to marry and found a family as including persons of the same-sex. We have seen that the ECtHR has a hand in shaping the interpretation of European consensus if it so wishes and with its case law it can also influence State practice. After offering a narrow opening in *Schalk and Kopf*, now it is up to the Court to allow future same-sex applicants to benefit from this opportunity and someday enjoy full equal marriage rights.

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