FACULTY OF LAW
Lund University

Assi Eliina Uuskallio

Human rights versus the traditional family: Implications of the European Court of Human Rights' standard of review in cases concerning Articles 8 and 12

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Daria Davitti

Term: Spring 2022

Table of Contents

Summary

Against the background of a conservative push against LGBTI+ and women's rights, in which courts have already become battlefields, it is important to look at how the European Court of Human Rights, a leading human rights adjudicator both in Europe and globally, would respond to arguments made in the name of human rights but whose real purpose is to limit the rights and freedoms of women and LGBTI+ people. One such argument that has so far been successfully used is the protection of the "traditional family" or "traditional marriage". In this thesis, I will assess the Court's standard of review in cases concerning Articles 8 and 12 of the European Convention on Human Rights, protecting private and family life and the right to marry and where such an argument is presented, and its implications to women's and LGBTI+ rights. "Traditional marriage" and "traditional family" are often used as a hailed or at least neutral concept, but studies show that they have deeply oppressive roots and their promotion is harmful.

I have identified three main groups of cases divided by topic: transgender persons and the right to marry, the protection of same-sex relationships, and cases concerning gender equality and other issues. I assess how consistently the Court uses its established methodologies and principles, as well as applying criticisms drawing from feminist and queer legal theory. It transpires that the Court's standard of review varies depending on the type of case it is assessing. Cases in which the heterosexuality of marriage is directly challenged are scrutinized leniently, while in cases that don't challenge it, and especially in cases that concern gender equality, the Court applies a much stricter scrutiny. This implies that its standard of review especially on the issue of same-sex marriage is toothless against conservative attempts to halt the progress in this field, unless the Court changes its approach. It already has the tools of strict review, but it appears remarkably reluctant to use them in cases concerning the right of same-sex couples to marry.

Keywords: traditional family, traditional marriage, LGBTI+ rights, gender equality, discrimination

Preface

On the basis of my previous studies touching on LGBTI+ rights, I became suspicious of the use of the protection of the "traditional family" as a justification for policies that limit the rights of minorities. The developments in the anti-LGBTI+ movement in recent years motivated me to look into the issue more deeply, and it quickly became apparent that the use of "the traditional family" is more widely connected to policies whose aim is to restrict human rights.

Writing this thesis has been a tumultuous but inspiring experience. My most sincere thanks to my supervisor Daria Davitti, without whose support this thesis would not have been possible. I also wish to thank my colleagues in the LL.M. programme who took the time to read and comment on my work. Special thanks to the Raoul Wallenberg Library staff, especially Lena Olsson.

Since many of the policies and organizations which seek to restrict human rights have a religious background, I wish to quote Herbert Kremer's words in the musical Les Misérables: "To love another person is to see the face of God".

Assi
Lund, 25 May 2022

Abbreviations

ADF	Alliance Defending Freedom
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECLJ	European Centre for Law and Justice
ECtHR	European Court of Human Rights
EU	the European Union
FRA	European Union Agency for Fundamental Rights
LGBTI+	Acronym referring to lesbian, gay, bisexual, transgender, intersex, and other queer individuals
PACE	Parliamentary Assembly of the Council of Europe
UK	the United Kingdom of Great Britain and Northern Ireland
US	the United States of America
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background and research question

The day of writing this introduction, news had broken of United States Supreme Court Justice Alito's leaked draft opinion that would overturn the Supreme Court's decision in *Roe v Wade*, the 1973 case that made abortion a constitutionally protected freedom. The leaked opinion has been interpreted as opening the doors for overturning judgements such as *Obergefell v Hodges*, which made same-sex marriage legal across the US, and *Lawrence v Texas*, the case that prohibited the criminalization of homosexuality as unconstitutional, since the reasonings criticize such rights as not having "any claim to being deeply rooted in history".[1] The US is not a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), whose Articles 10, 12 and 16 protect women's right to health care, family planning, and reproductive rights. In the absence of international commitments to protect reproductive rights, the overturning of *Roe* is a purely constitutional matter. Part of the reason provided for the decision by the US not to ratify CEDAW is the fear that it would undermine the country's privacy and family policies, and especially "traditional family roles".[2]

This turn of events in the US is not unexpected and can be seen as a part of a larger conservative movement to restrict the rights of women and minorities across the globe. In the US alone, there have already been several state-level bills restricting reproductive rights, as well as Florida's infamous so-called "Don't Say Gay" bill that prevents the teaching of sexuality and gender identity issues to children in schools and kindergartens until they reach a certain age.[3] Such a movement is not restricted to the US, but exists in Europe, too. In January 2022, the Parliamentary Assembly of the Council of Europe (PACE) issued a resolution on combating rising hate against LGBTI[4] people in Europe (Res. 2417/2022), condemning the attacks on LGBTI rights in counties such as the United Kingdom, Hungary, Poland, the Russian Federation, and Turkey. The Resolution notes that such hate is part of a larger conservative movement and is being encouraged by leading political figures. It is not a case of individual prejudice, but rather a "result of sustained and often well-organised attacks on the human rights of LGBTI people throughout the European continent".[5]

[1] Page 32 of the first draft judgement; Eg. juris doctor Matthew J. Kuiken and transgender activist Brynn Tannehill voiced such interpretations on their social media accounts shortly after the news broke.
[2] Blanchfield (2010), p. 12.
[3] "Parental Rights in Education", House Bill 1557.
[4] Elsewhere in this thesis, I will use the acronym LGBTI+, but the "+" is not included in the acronym used by PACE.
[5] Para. 4 of the resolution.

There is indeed a well-organized push against the human rights of women and LGBTI+ people in Europe. Already in 2013, European and US campaigners started drafting a strategy, titled '*Restoring the Natural Order: an Agenda for Europe*', to roll back sexuality and reproduction related human rights. The campaigners, called Agenda Europe, are a professional advocacy network led by the Vatican, and associated with several conservative organizations and political parties across Europe, such as Hazte Oír in Spain, Ordo Iuris in Poland, and La Manif pour Tous in France. Agenda Europe's goals include repealing laws that allow divorce, same-sex partnership rights, contraception, abortion, as well as equality legislation such as Articles 21 and 23 of the EU Charter of Fundamental Rights. Laws that they are pushing to adopt include laws that treat marriage more favorably compared to other relationships, anti-sodomy laws, and anti-gay propaganda laws.[6]

In terms of strategy, Agenda Europe employs a variety of measures such as national campaigns and referenda, attempting to become a respected interlocutor at the international level, and strategic litigation, although only in cases where they have a good reason to expect to prevail on the basis of previous case law.[7] It has so far been successful especially in protecting the concept of "traditional family", *i.e.* by blocking laws that would extend marriage and partnership rights to same-sex couples at the national level. For example, Agenda Europe members in Croatia (2013) and Slovenia (2015) launched successful referenda to delimit the definition of marriage to different-sex couples only. They have also launched similar attempts in other European countries and at the EU level.[8] Accordingly, it is a campaign that must be taken seriously and not overlooked simply on the basis that some of the goals seem unrealistically extremist at the moment – the very idea of Agenda Europe is to gradually shift the political atmosphere, and select strategies that they expect to work in a given country and that could then be extended to other contexts too.

The PACE Resolution notes that hate against sexual minorities is fueled by deliberately mischaracterizing these minorities and their rights as "gender ideology" or "LGBTI ideology" that are claimed to be in conflict with women's and children's rights, as well as societal and family values in general.[9] Crucially for the purposes of this thesis, it is the strategy of highly conservative movements to utilize human rights language when campaigning for the restriction of the human rights of women and gender and sexual minorities. Agenda Europe explicitly states this in their manifesto:

[6] Datta (2018), p. 27.
[7] *Ibid,* p. 17.
[8] *Ibid,* p. 28.
[9] Para. 5 of the resolution.

issues must be named in terms of human rights, and human rights must be "colonized" by contorting religiously-inspired positions on the relevant issues to "artificially resemble classic human rights language" and redefining human rights terminology.[10] The wording of the manifesto indicates that they are clearly not genuinely committed to the promotion and protection of human rights, but rather use them as a strategic tool to advance their own regressive ends. They in fact claim to pursue the goal of "contaminating" existing human rights language and that such language has originally been created by their "opponents".[11] It is clear that their goals go against established human rights law and the liberal and democratic values of the Council of Europe (CoE) framework. Accordingly, it is not an exaggeration to say that this movement sets out to undermine the inherent meaning of human rights, and to destabilize from within the protections that the human rights system currently affords. If the human rights system is to resist such an attack, a necessary response is to critically examine claims made in the name of human rights and utilizing its vocabulary.

Against this background, it is not unlikely that the European Court of Human Rights (ECtHR), being one of the leading human rights adjudicators on both a European and global scale, becomes a battling ground for reproduction and sexuality related rights. This could happen for example if a law originating from Agenda Europe's campaigning is challenged in the ECtHR, or if Agenda Europe affiliates, such as the legal advocacy powerhouse Alliance Defending Freedom (ADF), take up a case as representatives or as third party interveners in national courts and ultimately in the ECtHR. Agenda Europe affiliates have used strategic litigation for example in pushing for a right to conscientious objection to abortion in the Nordic countries.[12] The question arises, then, what is the likelihood that such anti-human rights campaigns would succeed in the ECtHR. That is the central problem addressed by this thesis: the findings of this thesis will help us reflect on whether the ECtHR is prepared for a sufficiently critical assessment of arguments made in the language of human rights, but whose aim is in substance to restrict the rights of others.

Since Agenda Europe has so far been most successful on the issue of protecting the "traditional family", and on the basis of the above, the protection of the "traditional family" is invoked in the context of both women's and LGBTI+ rights, I am limiting myself to assessing the ECtHR's standard of review in cases where an argument about the protection of the "traditional family" or "traditional marriage" is made. The interconnection between these two will be explained in chapter 2. Given the

[10] Datta (2018), p. 16.
[11] *Ibid.*
[12] *Ibid,* p. 28.

family rights context, such arguments are most likely made in cases that concern the protection of private and family life under Article 8 and the right to marry under Article 12 of the European Convention on Human Rights (ECHR). I will assess the ECtHR's standard of review in these cases and what its potential implications are for women's and LGBTI+ rights. I will be making the argument that especially in the field of LGBTI+ rights, there is a risk that the standard of review is lenient and toothless in posing a challenge to Agenda Europe's goals, specifically that of halting the progress of equal marriage and partnership rights.

There is plenty of research of the ECtHR's case law on specific rights, on its methods such as the margin of appreciation[13] and critique of certain individual cases.[14] Plenty has also been written about the Court's position on LGBTI+ For example Paul Johnson[15] and Damian Gonzalez-Salzberg[16] have studied the Court's approach to cases of the rights of homosexual and transgender people. A book project edited by Eva Brems[17] explores the Court's argumentation in cases with minorities through rewritten judgements. However, a study of how the Court treats a specific argument in this context has not been conducted before. My thesis is intended to build on the existing research and contribute with an approach that is so far missing, *i.e.* examining what is the Court's standard of review in cases where the "traditional family" argument is invoked and whether there are differences depending on the type of case the Court is adjudicating. Given the breadth of current attacks on human rights by conservative movements, as outlined at the beginning of this introduction, this thesis does not claim to be conclusive on the Court's approach to different argumentative strategies. Rather, I consider it important to study other potential arguments used, for example those relating to freedom of religion and expression, as well as the implications of and responses to the movement's strategy outside of a court setting. Further research would be needed on these topics, as it is not possible to cover them in the space of this thesis.

1.2 Method and theoretical framework

1.2.1 Method of conducting the research

In order to assess the standard of review of the ECtHR, I am performing a case law analysis. As explained above, I have selected cases that concern the rights under Articles 8 and 12 where an argument is made about the protection or promotion of the "traditional family" or "traditional

[13] Yourow (1995).
[14] Sandland (2003); Gonzalez-Salzberg (2015); Lau (2013); Scheinin (2014).
[15] Johnson, Paul (2013).
[16] Gonzalez-Salzberg (2018).
[17] Brems (2013).

marriage". To find the relevant cases, I have done a word search with "traditional family" and "traditional marriage" in the ECtHR's Hudoc database limited to cases concerning the relevant Articles, as well as mapped the Council of Europe's handbooks[18] on these Articles as well as thematic guides on LGBTI+ issues.[19] In many of the cases, Article 14 has been invoked as well, which makes it necessary to discuss its scope and application to some extent. However, Article 14 has not been a search criterion when mapping cases. Given that the problem at hand concerns especially the rights of women and sexual and gender minorities, I have limited the case selection to cases that concern gender equality and LGBTI+ rights. In order to capture the issue as extensively as possible, I have included cases where the "traditional family" or "traditional marriage" is used either as a way to limit the scope of the right or where their promotion has been submitted as a justification of the State's policy. I have left out cases where the terms are simply mentioned in passing and instead selected cases where it is a key argument of one or more of the parties, or where the Court otherwise expressly discusses it. By looking at the CoE guides and handbooks, I have also found cases that do not contain the exact words "traditional family" or "traditional marriage", but where there is an express argument about an essential aspect of the "traditional family" model. For a more well-rounded analysis I have decided to include these cases, since the arguments concern the "traditional family" model in substance. However, I have left out cases where the "traditional family" model operates more implicitly, since it's not possible to conduct such a sophisticated in-depth analysis in the space of this thesis. This means that for example many cases concerning children's and parental rights are excluded.

Relevant questions are how the Court defines the rights and legitimate aims and how strict of a review it conducts in the proportionality test and which arguments it uses to back its approach. The analysis will be carried out by looking at arguments made about the scope of the rights in question, the existence of a legitimate aim, the necessity or proportionality test and the relevance of the State's margin of appreciation in that context. On the basis of this, I attempt to see if there are any patterns in the Court's treatment of the "traditional family" argument on the basis of what type of a case it is assessing. The main analysis happens inside the ECHR framework. I will look at the principles and methods established in the case law of the ECtHR and see how consistently the Court applies them in the selected cases and what choices it makes between different interpretative methods. Given that the Court's case law has evolved and not every case is assessed by applying a neatly tailored test, some of the relevant elements mentioned above are not present in all of the cases analyzed. The

[18] ECtHR (2021).
[19] ECtHR (2022).

elements mentioned are intended as a means of drawing out issues that are present in many cases and that would help flesh out the research question.

Since one of my main arguments is that the ECtHR's treatment of the "traditional family" argument is not only inconsistent but problematic in its very acceptance of the promotion of the "traditional family" as a legitimate aim, it is necessary to discuss the definition, history, and uses of this concept. While the background of the research problem already reveals that the "traditional family" argument is being used deliberately to roll back human rights, a more comprehensive examination shows that the question is not just of the misuse of a concept that is neutral or even good as such, but rather a concept that has deeply oppressive roots, thus making its promotion problematic unless a clear break is taken from its harmful aspects. In this discussion, and in order to perform a more nuanced case law analysis that would be possible by looking only at the principles and methods established by the ECtHR, I will draw critiques from both queer and feminist legal theory to examine the patterns that emerge on the basis of this exercise. In the next section, I will attempt to define both theories and their interrelationship, as well as what role each theory plays in this work.

1.2.2 Theoretical framework: feminist and queer legal theory

There are multiple branches of feminist legal theory and multiple different "feminisms". Critical legal feminism includes e.g. radical, Marxist, cultural, and materialist approaches., with authors such as MacKinnon, Dworkin, Otto and Okin representing different approaches. According to Halley, all feminist theory entails a separation between *m* and *f*, be it between male and female or masculinity and femininity, and the subordination of *f* to *m*, and in this power relationship, feminist theory takes the side of *f*.[20] Indeed, feminist theory has long been about making "women's experiences" visible, and feminist legal theory in particular has focused on how law affects women. However, defining feminist legal theory like that would be overly simplistic. Critical legal feminism, inspired by critique from for example critical race theory and lesbian feminists, acknowledges that there is no singular "women's experience", and currently feminist legal theory looks at the intersection of different identities and experiences.[21] Romero criticizes Halley for her too narrow definition of feminism, and describes feminism rather as "asking the gender question", applying a non-essentialist conception of gender.[22]

[20] Halley (2008).
[21] Hunter (2019).
[22] Romero (2009), p. 187.

Queer theory is a much more recent branch of theory, coined as a term by de Lauretis who used it as a conference title on gay and lesbian studies in 1990.[23] Foundational works of queer theory include Sedgwick's *The Epistemology of the Closet*[24] and Butler's *Gender Trouble: Feminism and the Subversion of Identity,*[25] the latter already showcasing the proximity of feminist and queer theories. Although the word "queer" is sometimes used as an umbrella term to describe members of the LGBTI+ community, queer theory is not simply about advancing LGBTI+ rights, nor is it about "asking the sexuality question" in the same vein as feminism "asks the gender question". Rather, as Romero puts it, "queer" is a methodological description that refers to taking a position that is opposed to things that are considered normal or dominant.[26] It resists rigid binary, or indeed any, categorizations and draws from Foucault's work on how subjects are fluid, shaped and naturalized by discourse.[27] Queer *legal* theory is somewhat paradoxical, since legal institutions "transmute regularity (that which is done regularly) into a rule (that which must be done), factual normalcy into legal normalcy",[28] making law into a tool of normalization. Queer legal theory, first outlined by Carl Stychin,[29] recognizes law's repressive and disciplinary power that is directed, among other things, to gender and sexuality. Law operates through categories, and one of queer legal theory's main methods is deconstructing and showing the incoherence of these categories. Because of queer's uneasy relationship with law, many queer theorists do not endorse for example the campaign for legalizing same-sex marriage. They argue that making marriage more inclusive does not change its privileged status compared to other relationship types, and this is seen as a way of normalizing certain types of relationships while enforcing the deviance of others.[30] Yet, others consider campaigning for same-sex marriage worthwhile because as long as a privileged relationship category exists, it should at least be accessible to all.[31]

The difference between feminist and queer legal theory is not always evident, and their relationship is dynamic. Halley has argued that it is necessary to "take a break from feminism", apparently to the advantage of queer theory, because not every problem can be situated in the framework of $m > f$ and as a consequence one must look beyond feminism.[32] However, for example Romero has pointed out

[23] The conference was held at the University of California, Santa Cruz, where de Lauretis was professor.
[24] Sedgwick (1990).
[25] Butler (1990).
[26]Romero (2009), p. 193–195.
[27] Croce (2019), p. 80.
[28] Bourdieu (1987).
[29] Stychin (1995).
[30] Croce (2019), p. 63–66.
[31] Gonzalez-Salzberg (2018).
[32] Halley (2008), p. 165.

that Halley is making this proposition on the basis of an overly strict definition of feminism. Romero argues that, on the one hand, different feminisms are already "looking beyond" this strict definition, and on the other hand, "specific queer projects can break from feminism, and vice versa, but a general or foundational differentiation between queer theory and feminism is neither possible nor desirable"; what is feminist is often also queer, but not necessarily or by definition.[33] Indeed, there are many similarities between feminist and queer theory. According to Hunter, "[t]he hallmark of all critical approaches is their attention to the operations of power and power relations".[34] Like queer theory, especially critical legal feminisms make marginalized experiences visible and acknowledge the non-essential and fluid nature of its subjects as well as the discursive power of law in shaping them. It challenges the status quo, not simply by seeking to add more voices but by destabilizing current systems of power.[35] Moreover, some critical legal feminists share queer legal theory's skepticism towards law, from the perspective of women: according to Smart, law is harmful to women and shouldn't be used as a strategic tool.[36]

Accordingly, I do not consider it fruitful to try to draw a neat distinction between feminist and queer legal theories in this thesis. In order to properly analyze the topic, I find it necessary to use both theories in order not to overlook relevant criticisms. Such an approach is even encouraged by feminist and queer theories, since both recognize that no one single theory can wholly capture a problem. However, it is possible to draw some distinctions between the roles of the theories in this thesis. Since feminist theory has a rich history of problematizing the family for example by criticizing the division between the public and private spheres, feminist arguments are useful in showing many of the concrete harms of the traditional family and marriage model. That being said, my criticism of it is not solely feminist, since as Graham notes, the privilege afforded to marriage is harmful not only to heterosexual women, but also to queer people (who are often excluded from marriage) and unmarried heterosexual couples.[37] In addition, queer legal theory is useful in the case law analysis. Many of the cases involve a distinction between relationship categories, married heterosexual relationships being privileged, which makes queer's deconstruction method especially suitable. In this context, I draw from the work of Gonzalez-Salzberg, who has carried out a detailed analysis of the ECtHR's shifting conceptions of gender and sexuality.[38]

[33] Romero (2009), p. 190.
[34] Hunter (2019), p. 45.
[35] *Ibid,* p. 53.
[36] Smart (1989).
[37] Graham (2004).
[38] Gonzalez-Salzberg (2018); see also Gonzalez-Salzberg (2014).

1.3 On terminology

This thesis deals with issues relating to gender and sexuality, and some clarification of the terminology I use is required. In feminist theory, the concept of *gender* was created to mean the social and performed differences between men and women, while sex meant the biological differences between males and females.[39] However, this distinction is not as clear as it appears. Firstly, biological sex is a complex concept. It consists of chromosomes, gonads, internal and external genitalia, as well as secondary sex characteristics, and these do not always align. Therefore, biological sex is a spectrum rather than a binary.[40] Secondly, some branches of feminist and queer theory point out that not only gender but also the idea of biological sex as a binary is socially construed; in nature, biological variations simply exist, but humans assign to them meaning and categories that have already been created. Since both sex and gender are culturally created categories, some theorists hold that it's not necessary to differentiate between them.[41] This being the basis of my understanding of sex and gender, I will use established terms such as *same-sex marriage* and *gender identity* without intending to imply that one refers only to biology and one only to social and cultural factors.

When it comes to the Court's terminology, it uses rather simplistic and binary terms. To a degree, this is understandable; for example, the issue of whether biological sex is a spectrum or a binary (as opposed to the division between biological and social) would likely only arise before the Court if it was a relevant factor in the case, and this would require the applicants to submit medical information that might not be readily available (how many of us have verified which chromosomes we have?). Thus, the Court mainly deals with the distinction between a person's biological sex that consists of the anatomical factors that can be observed by the naked eye, and gender identity/social gender. When I refer to biology in discussing a given case, I am adopting the Court's view of biology versus identity. This does not mean that I disregard the complexity of the issue, but rather that in the scope of this thesis and in the context of discussing the Court's case law, I think it is the most useful way to draw distinctions.

The term *transgender* is used to refer to people whose gender identity and/or expression is different from the gender they were assigned at birth. A *cisgender* person is someone whose gender identity and expression match the gender they were assigned at birth. Transgender people have also been

[39] Eg. Oakley (1972).
[40] See eg. Ainsworth (2015).
[41] Delphy, (1993).; Gonzalez-Salzberg (2018), p. 14–15.

referred to as *transsexuals*, and for example the ECtHR uses this term. According to ILGA-Europe, an organization for the promotion of the rights of sexual and gender minorities in Europe, the term is an older medical term that some people still prefer.[42] Further, for example queer theorist Gonzalez-Salzberg uses the term transsexual to refer to those transgender people who have undergone or wish to undergo gender reassignment surgery.[43] However, apart from direct quotes, I will not use this word as it can be interpreted as misleadingly referring to sexuality (the modes of sexual desire and attraction) when the question is of an individual's gender/sex. For this reason, some trans rights organizations discourage the use of the term.[44]

Sexual minorities will sometimes be referred to with the umbrella term LGBTI+ people or the LGBTI+ community, which is how people belonging to these minorities often call their community. The acronym refers to lesbian, gay, bisexual, transgender, and intersex people. There has been debate over which letters belong to the acronym, and I have added the "+" to indicate that more non-heterosexual and non-cisgender identities are included in the community, for example asexual, pansexual, and genderqueer people. No letter is left out with a deliberate attempt to exclude an identity.[45] However, as queer theory proposes, it's impossible to create clear and fixed categories of identity, and in essence anything that is not heterosexual and cisgender is queer in the context of gender and sexuality. The "+" thus encompasses all such identities, and it is added to the acronym except for when referencing a source that does not include it. I will not use the term *queer community,* as queer is a word that, although used in an academic sense in this thesis, has also been used as a slur and there are members in the LGBTI+ community who do not wish to be called queer.

1.4 Structure

In the introduction, I have explained the background of the research question, the argument I am making, and the method and theoretical framework of this thesis. In chapter 2, I will look at the definition and history of the "traditional family" model, as well as the effects of promoting it as a matter of policy and the arguments put in favor of this. I will arrive at the conclusion that not only has the concept deeply oppressive roots, its promotion has harmful effects not only to those who don't live in a "traditional family" but also on those who do, especially women. Further, the concept has historically been used to prevent the extension of civil rights to women and, as stated above, it

[42]ILGA-Europe's glossary, https://www.ilga-europe.org/resources/glossary/letter_t
[43] Gonzalez-Salzberg (2014), p. 801.
[44] Finnish transgender rights association Trasek's glossary, https://trasek.fi/perustietoa/kasitteita/
[45] This is a real issue, as for example LGB associations deliberately omit the T to exclude transgender people from their advocacy.

continues to be used especially to roll back and prevent the progression of LGBTI+ rights. This discussion serves as a basis for critiquing the ECtHR's lenient treatment of the "traditional family" argument, since the promotion of the "traditional family" is not a policy that is in compliance with human rights.

In chapter 3, I will go over the ECtHR's relevant case law. Chapter 3.1. will briefly explain the scope and application of the Articles in question as well as the Court's general methods and principles of interpretation. This is necessary in order to critically look at the Court's arguments and methodological choices in chapter 4, *e.g.* whether it uses the principles consistently. On the basis of what the central issue in the cases are, I have divided them into three main groups. This is done not only to give the reader a more coherent look into the case law, but for practical reasons as well to avoid unnecessary repetition, since it emerges that the Court does indeed resort to different methodological choices on the basis of what the central issue of the case is. The strictest review and explicit condemnation of (aspects of) the "traditional family" are afforded to cases of gender equality issues, as well as outright hate against LGBTI+ persons. The most lenient review is applied in cases where the heterosexual nature of the "traditional family" is directly challenged. Cases that concern LGBTI+ partnership rights but do not directly contradict the supremacy of the heterosexual marriage are assessed strictly, but the legitimacy of the "traditional family" model is rarely questioned. The final subchapter of chapter 4 will provide an alternative, queer version of the reasonings in one of the cases.

The emerging patterns and their implications will be discussed in chapter 5. I will conclude that the Court does not have a consistent standard of review, but rather one that changes depending on the type of case it is adjudicating. It appears that the Court is making deliberate methodological choices that allow it to avoid confronting the issue of the supremacy of the heterosexual marriage. This means that at least in the question of same-sex marriage, ultra-conservatives may count on succeeding before the Court, were their initiatives ever brought there. On the basis of this thesis, there is no such danger in other issues. This makes the mobilization of LGBTI+ allies at the national level increasingly important.

2 The definition of traditional marriage and traditional family

2.1 A historical concept?

In order to fully understand the implications of the Court's treatment of the "traditional marriage" and "traditional family" arguments, it is necessary to first define these concepts and look at their historical, political, and legal roots. The Court itself defines "traditional marriage" as being between a man and a woman. Until 2002, it held that the Convention protected marriage as the basis of the family unit, but this position has been abandoned and nowadays the Court only expressly refers to the gender of the spouses; [46] this will be further discussed in chapter 3. It does not follow, however, that the gender of the spouses is the only factor defining the traditional marriage and family model. According to Fineman, the traditional marriage is a cross-disciplinary concept that refers to the monogamous, exclusive, permanent, and reproductive union between a cisgender man and a cisgender woman.[47] Traditional family is the nuclear family formed by the married couple and their common biological children. The concept also includes a rigid gendered distinction of work between the breadwinner husband and homemaker wife.[48] The concepts of traditional marriage and traditional family are necessarily interlinked and the Court uses them in such a manner even interchangeably. Therefore, these concepts are understood as "two sides of the same coin" and used interchangeably unless there is reason to do otherwise.

Although the word "traditional" implies something age-old, timeless or even natural, it is important to understand that the traditional family model is none of these things. According to Sear, the idea of an autonomous nuclear family where childrearing is the sole responsibility of the mother is a historical misconception. On the contrary, children have been raised in cooperative units consisting of not just the parents, but also grandparents, and other relatives and members of the community.[49] Nousiainen and Pylkkänen locate the emergence of the nuclear family at the rise of the market economy. Previously, (farm) work was done in a larger *"oikos"* or "*Das Ganze Haus"* family unit, which consisted of the patriarch husband-father and his wife and children, as well as other relatives and household members. The division of work was gendered, but less rigid, and all members worked for the good of the whole household, under the discipline of the husband-father. With the rise of the market economy, work was increasingly located outside of the family, creating the breadwinner-husband and homemaker-wife division, on the one hand, and the family as an intimate private sphere

[46] See eg. *Cossey v the United Kingdom, Schalk and Kopf v Austria, Christine Goodwin v the United Kingdom*
[47] Fineman, (2009), p. 45–63.
[48] See eg. Okin (1989).
[49] Sear (2021).

on the other hand. Thus, the traditional family is a fairly modern concept, dating back to the 19th century.[50]

As Nousiainen and Pylkkänen explain, marriage as an institution is likewise not static, and it is wrong to imply that "traditional marriage" is natural or inevitable, since the institution has instead undergone many changes. Historically, it has been a privilege of the upper societal classes, with members of the lower classes lacking the economic resources and/or social status that was required for marriage. [51] The nature of marriage has varied from an economic agreement to a sexual agreement, and the party whose consent is necessary to seal the agreement – the families, the bridegroom and the guardian of the bride, or the bridegroom and bride themselves – has changed.[52] The legal status and rights of the spouses have also changed drastically. The legal equality of the spouses started to emerge in the 20th century, whereas before, the husband was the wife's guardian, and the wife had limited property rights and no political rights. Indeed, for a long time marriage was a legal obstacle for women's citizenship rights. In Finland, for example, the higher age of reaching maturity and thus full legal personhood for women was defended on the grounds that since the woman would marry and enter under her husband's guardianship, it was unnecessary for her to be considered an independent legal person. For the same reason, single women's civil rights developed before those of married women.[53]

For men, on the other hand, being married was advantageous because marriage determined the fatherhood of the couple's children (with a presumption that the husband is the father) and gave the husband rights over the wife. According to Nousiainen and Pylkkänen, well into the 20th century, the protection of family life, i.e. protecting the privacy of the family from state interference, has therefore in reality been the protection of the privileged position of the husband-father.[54] The idea that marriage is a love-based union of two equal companion-spouses is a fairly modern idea, and certainly not the way in which the term 'traditional marriage' is employed. While it has been held that through the gendered division of work, the spouses in a traditional marriage complement each other and that both are in that sense equally necessary, the primacy of the husband over the wife still remains,[55] giving him authority and rights that the wife lacks, and making the wife economically dependent on him.

[50] Nousiainen and Pylkkänen (2001) , chapter 3.
[51] Nousiainen and Pylkkänen (2001), p. 96–101.
[52] *Ibid.*
[53] *Ibid.*
[54] *Ibid.*
[55] Grisez (1993), p. 615.

2.2 Theoretical and ideological underpinnings

Thus, "traditional family" or "traditional marriage" are not historically accurate depictions of family or marriage. Sear warns against using the term "traditional", since it is often used as a value-loaded term, linked to "natural" and "good", and indicating that what is not considered traditional is therefore unnatural and bad.[56] Since the concept of traditional family is not really age-old, it is necessary to look at its political and ideological roots. The ideology of the gendered division of work stems from the theory of qualitative sex difference, according to which men are naturally more inclined to work outside of the home and participate in political life, whereas women are naturally inclined to bear and rear children. These ideas date back to 17th century natural law. According to Samuel Pufendorf, the family was "original", *i.e.* existed before and outside of law and contractual agreements, and its purpose was procreative, which meant that issues of consent had no place in familial matters. This gave the husband rights over the wife's body regardless of her consent.[57] The idea of the qualitative sex difference was used by enlightenment philosophers to oppose the extension of liberal principles to women, who were seen as fundamentally different from men.[58]

In modern times, the culmination point of the idolization of the traditional family, especially its male breadwinner aspect, was in the period after the World Wars. According to Sear, some governments promoted the traditional family with the intention to get women out of the work force in order to facilitate the servicemen's return to the labor market. The rise of new forms of mass media made this job easier.[59] It is worth noting that this was also the time of the drafting of major human rights instruments such as the Universal Declaration of Human Rights and the ECHR. It is difficult to see how the drafters could have avoided being influenced by this politically motivated understanding of family at the time, incorporating it into the family and marriage rights of the human rights instruments of the time.

In contemporary legal theory, the ideology of the traditional family is supported by new natural law theorists such as John Finnis.[60] According to Bamforth and Richards,[61] new natural law is an attempt to create a legal theory equivalent to Catholic religious and ethical theories. They demonstrate that the work of key new natural law theorists such as Finnis is directly influenced by the ideas of Germain

[56] Sear (2021).
[57] Nousiainen and Pylkkänen (2001), p. 80–81.
[58] *Ibid,* p. 24–26.; Bamforth and Richards (2008), p. 234.
[59] Sear (2021), p. 2–3.
[60] Finnis (1980).
[61] Bamforth and Richards (2008).

Grisez,[62] a developer of conservative Catholic religious theory, and that the intelligibility of new natural law is dependent upon accepting the teachings of the Catholic church. New natural law theorists' ideas on family and marriage are built on the idea that marital sexual intercourse is a "one-flesh union", which Bamforth and Richards criticize as being pseudo-scientific and contradictory to its own logic.[63] On the basis of this core idea of "one-flesh union", new natural law theorists oppose abortion, contraception, non-marital sexual relationships, same-sex relationships, and any other forms of sexual activity that do not constitute such "one-flesh union", i.e. marital sex for the purpose of procreation.[64]

Through the heavy reliance on Catholic religion, new natural law's theoretical and ideological roots are in the teachings of Saint Augustine and Thomas Aquinas. Saint Augustine, a theologian in the 400th century, thought of women as seductresses whose weak nature could lead men into peril, corresponding to the idea of Eve being responsible for the "original sin" by offering Adam the apple.[65] He became a proponent of celibacy in order to devote his life to religion. The roots of the sexual morale and gender relations ideas of natural law are biblical, and Bamforth and Richards describe new natural lawyers' views on family as "little – or nothing – more than a set of religiously-derived gender stereotypes".[66]

New natural lawyers and the conservative theologians on whose writings new natural law is based on have been influential in senior levels of the Roman Catholic church. For example, Grisez is credited for persuading Pope Paul VI to hold onto the church's strict prohibition on contraception.[67] The Vatican has, during Pope John Paul II's papacy, held that homosexual relationships do not in any way resemble "God's plan for marriage and family", that legalizing same-sex behavior would mean approval of deviant behavior, that legalizing evil is different than tolerating it, and that the legalization of same-sex relationships would devalue the institution of marriage.[68] The Vatican has also stood against the recognition of women's rights as human rights, and it lead a coalition of religious conservatives at the Beijing Conference on Women.[69] New natural lawyers' advocacy has

[62] Grisez (1993).
[63] Bamforth and Richards, p. 229–232.
[64] *Ibid,* p. 83–84.
[65] In his personal life, Augustine had had to separate from a woman he had a child with, and what is thought to be a love union, in order to enter into a marriage arranged by his family, which some think influenced his thoughts on women. On this topic, see Bamforth and Richards (2008), p. 311.
[66] Bamforth and Richards (2008), p. 234
[67] *Ibid*, p. 76–77.
[68] Ratzinger and Amato (2003).
[69] Buss (1998).

consistently opposed LGBTI+ rights in the US. In the landmark case of *Lawrence v Texas* (2003), where the US Supreme Court struck down Texas' anti-sodomy laws as unconstitutional, Finnis wrote an amicus brief on behalf of the Family Research Council supporting the anti-sodomy laws.[70] New natural lawyers drafted a proposed amendment to the US Federal Constitution that would define marriage as a union between "opposite sexes". Their opposition is not only towards same-sex relationships, but LGBTI+ rights in general: new natural law advocacy has included supporting a bill in Colorado that would have stripped homosexuals from protection against discrimination. This bill was however struck down by the US Supreme Court.[71]

To conclude, traditional marriage and traditional family are not historically accurate descriptions of marriage or family. Rather, they are rooted in an ideology of sex difference and the subordination of women, and in legal theory, this idea has deep religious ties. The ideology has historically been used to deny rights to women and is still connected to societal structures that disadvantage women. Contemporarily, it has also been used to oppose LGBTI+ rights. As the Vatican's view on the harms of homosexuality highlights, it is difficult to disentangle the ideology of the traditional marriage from homophobic opinions: same-sex relationships must not be legalized because homosexuality is evil, and it is evil because it is not traditional marriage. Given its political and ideological roots, and indeed the current uses of the ideology, it is difficult to reconcile the traditional family with modern human rights thinking.

2.3 The (non)legitimacy of preserving the traditional marriage and family

Despite the historically and ideologically anti-women and anti-gay roots of traditional marriage and traditional family, their preservation may arguably still be legitimate if such a policy nonetheless serves a beneficial purpose. In this chapter, I will examine the arguments that are usually given to support it. By preservation and promotion, I mean laws and policies that define marriage and family according to the "traditional" idea and thus exclude all non-"traditional" relationships from their scope. This is due to the fact that in the cases analyzed in this thesis, the argument has been presented to defend policies that exclude people from the scope of legal protection and benefits. As will be seen in chapter 3, there are rarely any substantive arguments presented in support of this exclusion in the ECtHR's case law. Therefore I am looking at arguments that have been presented in literature and in litigation outside of the ECtHR.

[70] In line with new natural law, they called for a ban on not only sodomy but all non-marital sexual relations, arguing that marriage was threatened by all non-marital sexual acts by anyone.
[71] Bamforth and Richards (2008), p. 83–88.

In her paper from 2004, Jennifer Johnson engages with several arguments in favor of preserving traditional marriage as a legal and political ideal, despite the fact that the majority of families in the US at the time did not fall into this model. In light of Eurostat's crude marriage and divorce rates from 2019, the same is true in today's Europe: most families do not fit into the traditional family model.[72] According to Johnson, the preservation of traditional family as the ideal family structure hurts both the people who do not live in traditional families, and people who do.[73] She identifies several pro-traditional family arguments. Firstly, traditional family should be preferred because family is important to most people and it signifies values such as security, commitment, and stability. Secondly, traditional marriage is usually procreative, and marriage and the ability to take responsibility are linked, and that marriage gives the couple parenting skills. Thirdly, children suffer if they are not raised by their married biological parents, and that marriage creates happiness for all involved. Fourthly, women naturally know how to nurture, which signifies that their place is in the family. She refers to authors such as Gallagher and Becker.[74] Lau identifies similar arguments being presented in litigation, e.g. the promotion of healthy families and the well-being of children.[75]

Concerning the value argument, Johnson points out that values associated with traditional family – e.g. safety, stability, and commitment – are not exclusive to the traditional family and are associated to other relationships as well. She argues that marriage is not the origin of these values: relationships do not become important because of marriage, but instead, people choose to enter into marriage because the relationship is important to them.[76] This way, positive family values pre-exist marriage. It is worth pointing out that the content of "traditional family values" is not clear. Johnson engages with a set of values relating to important intimate relationships, but this is not the only interpretation of the term. According to Joseph B. Tamney and Steven D. Johnson, "traditional family values" mean that the purpose of families is to raise children to be disciplined in their sexual and other behavior, and this is best done in a two-parent family where the wife's main role is being a mother and raising children,[77] linking it to the fourth argument about women's natural capacity to nurturing and motherhood. Both arguments follow from the ideology underpinning the concept of traditional family and the gendered division of work and for this reason I argue that they can be dismissed on the on

[72] Marriage and Divorce Statistics, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics.
[73] Gallagher (2001) and Becker (2001), cited in Johnson, Jennifer (2004), p. 128.
[74] Johnson, Jennifer (2004), p. 132.
[75] Lau (2013), p. 250–251.
[76] Johnson, Jennifer (2004)., p. 132.
[77] Johnson, Stephen D. and Tamney, Joseph B. (1996).

the grounds that such a division is not "natural" but rather based on gender stereotypes that have a deeply oppressive history, explained above in chapters 2.1 and 2.2, without needing to look further into whether it is important to teach children discipline, and what discipline in that context would mean.[78]

That marriage should be promoted because it is beneficial for children is the most complex argument to deal with, because there is empirical evidence pointing in different directions. Gallagher supports the promotion of the "traditional marriage" by referring to numerous studies that show that in many aspects, children in families with "intact marriages" fare better than children whose parents are divorced, or who were raised by single mothers. She also argues that children need a mother and a father, and marriage is the tool by which the biological father and his family are tied to the child. She therefore concludes that it functions as a constraint that prevents families from breaking apart, or more specifically, fathers from leaving.[79]

One fundamental problem with Gallagher's first argument is that the research she cites does not prove what she says it does. Comparing children in families with married parents to children raised by divorced parents or single mothers tells us very little about the benefits of the institution of marriage compared to other family structures. It indicates that children who live with two parents fare better than children who live with one parent, and/or who have gone through the trauma of separation, but nothing of the usefulness of marriage *per se*. By definition, divorce is not even possible without marriage. Moreover, there is a circularity in this argument: if the State continues to legally and financially favor marriages, it is no surprise that children with married parents fare better. The wellbeing of children with married parents, therefore, is not an argument for the exclusion of couples from the scope of marriage. In order to reach the conclusion that Gallagher wants, she would have to compare families with two married parents to families with two non-married parents, and children of divorced parents with children of separated parents. If anything, her argument could be used to promote measures that would prevent parents from separating. And if marriage is arguably the best way to do this, one would think that access to it would should be expanded then, rather than restricted, to encourage parents or caregivers of all children to enter into such institution.

[78] Although I suspect that, if the argument is at all consistent with the idea of traditional family/marriage, discipline in sexual relations means abstinence from anything but procreative marital sex.
[79] Gallagher (2001).

The second issue is that there are several studies that indicate that children raised by parents in a non-traditional family – notably, by same-sex parents – fare just as well as children raised in traditional families. In some studies, it has even been found that children raised by same-sex parents do *better* than children raised by different-sex parents. For example in a study by Gartrell and Bos, adolescents raised by lesbian parents had better social, academic, and overall competence and less social problems than their peers raised by different-sex parents.[80] Even if findings such as these are questioned, it is clear that there is no scientific consensus that the traditional family is the best place for children to grow up,[81] and that this conclusion is reached by false logic, at least by some proponents of the view.

Moreover, the argument that marriage was created for the purpose of compelling the father to stay with the family seems, to say the least, historically inaccurate. As we have seen, marriage as an institution has evolved, and it used to be a way of creating alliances and economic security between families. Gallagher is correct in the sense that the rights the husband gained over the wife and children through marriage likely made it an attractive choice to men and resulted in fathers staying with the mother and children. But I doubt that this was done in the interests of, or for the protection, of the latter two. Gallagher presents the scenario as if marriage was the solution to the problems of single mothers who needed the presence of the fathers. But a historical look at marriage and family tells us that these problems were, if anything, *created* by traditional marriage: before the rise of the nuclear family, children were raised communally, and it was through the traditional nuclear family model that mothers became dependent on the fathers.[82]

Indeed, it appears that there is considerable doubt surrounding the alleged benefits of preserving the institutions of traditional marriage and traditional family by way of exclusion, whilst there is evidence of the harmfulness of it. In her groundbreaking work of second-wave feminism, Susan Okin argued that the ideology of the traditional gendered family is the "root cause" of gender inequality in the US. According to her "linchpin" theory, gender inequality in the workplace and the family are inseparably linked.[83] Okin's theory has been criticized for its lack of intersectionality. For example, Ackerly argues that traditional family is not *the* linchpin of gender oppression, because there are several oppressive processes, including racist and ableist ones, that reinforce and reproduce each other. Therefore, simply changing the structure of the family would not end gender oppression.[84]

[80] Gartrell and Bos (2010).
[81] For more studies on children raised by same-sex parents, see Rosenthal (2012)., p. 247.
[82] See Sear (2021) above in 4.
[83] Okin (1989).
[84] Ackerly (2016): 638–50.

While I agree with this criticism, Okin's observation about the processes by which the institution of the traditional family contributes to gender oppression is nonetheless correct, and her critics do not question this. According to Okin, whether or not we marry, women make career choices in anticipation of marriage and primary caretaking responsibilities, rendering them economically less powerful than men. Married women are economically dependent on their husbands, especially if they closely follow the traditional model and become stay-at-home mothers. And upon divorce, women are disadvantaged by the distribution of assets and the difficulties of earning a living as a single mother, since laws and employers assume that workers do not have caretaking responsibilities.[85] This central dynamic continues to be true to this day.[86] This supports Johnson's point that the legal and political preference of traditional marriage hurts the people, especially the women, who live in such marriages.

The preference of traditional families not only excludes non-traditional families from the benefits law affords to traditional ones, but also fails to address the real problems of for example single mothers by side-stepping the issue and assuming that if traditional marriage is preferred by law, other types of family structures, especially the ones that are deemed harmful to children, do not exist.[87] Thus, the arguments about the benefits of the preservation of the traditional family rely on the reinforcement of these benefits through legal preference. The promotion of the traditional family/marriage is essentially exclusive, and as Gonzalez Salzberg has argued, granting special rights to marriage-based families while only allowing certain people to marry is a way of hiding a preferential treatment of heterosexuality. Applying a queer theory perspective, he compellingly argues that the promotion of the traditional family should not be considered a legitimate aim *at all*, because it is not really aimed at protecting anybody, but only at treating deviant families detrimentally.[88]

It appears that forgoing the traditional definition of marriage would not harm different-sex couples or their families, but would benefit same-sex couples and their children. Abandoning the traditional definition of marriage beyond heterosexuality does not affect marriage, divorce, or birth rates.[89] Lau and Strohm argue that the recognition of same-sex marriage contributes to the health and well-being of same-sex couples, and more so than other forms of legally recognized relationships (e.g. civil

[85] Okin (1989).
[86] See Abbey (2016) and Ferguson (2016).
[87]Johnson, Jennifer (2004), p. 133–136.
[88] Gonzalez-Salzberg (2018), p. 104–109.
[89] Lau (2013).

unions).[90] Importantly, it would also lessen the stigmatization of queer individuals. We recall that the preference of traditional marriage and the idea of homosexuality as evil are deeply linked (see 2.2. above). Bamforth and Richards argue that laws favoring the traditional marriage and family treat queer people in a hostile and discriminatory manner. The rhetoric of new natural law that traditional marriage is "devalued" if same-sex marriage is legalized clearly implies that same-sex relationships are less worthy than "traditional" ones. According to Bamforth and Richards, this devaluation in the eyes of the law singles queer people out for hostile treatment and works as a justification for hate and discrimination by private individuals.[91]

In light of all of the above, one may legitimately question what then is achieved by the legal preference of the traditional marriage and family. In an interesting psychological study from 2007, it was found that among heterosexuals, opposition towards same-sex marriage was greater than opposition to same-sex civil unions even when the only difference was in the name. In accordance with the theory of social identity, it was held that same-sex marriages constituted a greater threat to the heterosexual identity, which explained the difference. According to the theory, the in-group's status is not determined by the absolute material goods it holds, but rather in relation to an outgroup of a lesser status. Therefore, the heterosexual identity is threatened when homosexuals, the outgroup, gain social value.[92] I submit that what is protected by this preference of the traditional family, therefore, is the patriarchal structure of traditional family and heterosexual individuals' sense of superiority. It should go without saying that in a human rights framework, this should not be accepted as a legitimate aim.

3 Applicable law

3.1 Scope and application of relevant Convention Articles

3.1.1 Article 8

3.1.1.1 Meaning and scope of private and family life

Article 8 of the Convention protects private and family life as well as home and correspondence. This thesis mainly focuses on the first two aspects. Article 8(2) contains a delimitation clause similar to that of Articles 9, 10 and 11. It permits the restriction of the rights prescribed in 8(1) when it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for

[90] Lau and Strohm (2011), p. 144.
[91] Bamforth and Richards (2008), p. 214–215.
[92] Schmitt et al. (2007).

the protection of health or morals, or for the protection of the rights and freedoms of others. In this thesis, I focus on issues relating to private and family life, since there is comparatively little case law on the home and correspondence limbs and consequently the vast majority of the cases analyzed involve private and family life issues.

Private life is "a broad concept, incapable of exhaustive definition".[93] It is wider than the notion of privacy and encompasses a sphere of life where each individual may develop their personality and form relationships with others. It includes for example physical and moral integrity, personal autonomy and self-determination, sexual orientation and gender identity, and the right to a healthy environment.[94] Family life, on the other hand, concerns certain existing relationships. It is an autonomous concept.[95] It is not confined only to families based on marriage, and may encompass also other *de facto* relationships. In considering whether a relationship amounts to family life, it considers such things as the length of the relationship, whether the couple lives together, and whether they have demonstrated commitment to each other for example by having children.[96] Family life exists at least between close relatives.[97] The essential content of family life is the ability of family members to live together.[98]

According to Schabas, although Article 12 (discussed below in 3.1.2) implies that a man and a woman of marriageable age are the starting point of a family, this does not appear to be so since the Court has recognized relationships such as those between grandparents and grandchildren, and a father and his son-in-law, to fall within the scope of family life.[99] However, I argue that the Court's understanding of family is very much based on a heterosexual nuclear family, and only relationships similar enough to it, or stemming from it, fall within the scope of family life. The examples that Schabas gives do not disprove this, since for example an in-law relationship would not exist without there first being a marriage.

It has taken the Court time to accept relationships deviating from the traditional family model to fall within the scope of family life. It was not until 2010 that the Court held that long-term same-sex relationships fall within the scope of family life in the case of *Schalk and Kopf v Austria*, discussed

[93] *Castello-Roberts v UK.*
[94] ECtHR (2021), p. 30–44.
[95] *Marckx v Belgium*, para. 31.
[96] *Kroon and others v the Netherlands.*
[97] *Marckx v Belgium,* para. 45.
[98] *Ibid,* para. 31.
[99] Schabas (2015)., p. 389.

in more detail below. Until then, it had considered same-sex relationships only under the scope of private life, or where relevant, home.[100] This was so even when the couple raised together one of the partner's biological children. The aspects considered under the family life test – cohabitation, length of relationship, and commitment *e.g.* in the form of having children together – were irrelevant if the couple were homosexuals, who simply "[could] not be equated to a man and a woman living together."[101] Relationships stemming from the traditional family dynamics, *e.g*. the relationship between an uncle and his nephew, were recognized as falling under the scope of family life almost two decades earlier.[102]

Relationships that bear a close enough resemblance to the traditional family model, especially the heterosexuality aspect of it, have been easier for the Court to accept. In the case of *X, Y and Z v the United Kingdom,* the applicants were a transgender man (X) and a cisgender woman (Y) who had gone through assisted reproduction and Y had given birth to a child (Z), for whom X cared as the child's father. He asked to be registered as Z's father as a cisgender man in a similar situation would be. The Court found that the case fell within the scope of the family life limb of Article 8, arguing that the applicants' situation was "indistinguishable from the traditional notion of 'family life'".[103] The Government had contested this and argued that the applicants should be treated as two women – who did not fall under the notion of family life at the time – because X was still legally female. Until 2010, the crucial aspect of family life was (the appearance of) heterosexuality of the couple.

3.1.1.2 Negative and positive obligations under Article 8

The Court has repeatedly held that while the essential object of Article 8 is to protect individuals from arbitrary interference by domestic authorities, it may also impose on the States Parties positive obligations to ensure the effective respect for the rights protected by the Article.[104] These obligations include for example a positive obligation to secure to their citizens the right to effective respect for their physical and psychological integrity, may involve the adoption of specific measures,[105] including the provision of an effective and accessible means of protecting the right to respect for

[100] See *Karner v Austria*, discussed below, where the applicant, the surviving partner in a long-term same-sex relationship, was unable to succeed the tenancy that had been under his deceased partner's name. The Court held that it was unnecessary to assess whether the case fell within the scope of private or family life, since it in any case engaged the applicant's right to his home.
[101] *Kerkhoven and Hinke v the Netherlands*, p. 4 of the decision.
[102] See *Boyle v the United Kingdom.*
[103] *X, Y and Z v the United Kingdom,* paras. 35, 37.
[104] eg. *Hämäläinen v Finland,* para. 62
[105] *Nitecki v. Poland* (dec.).

private life.[106] The measures may include both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of these measures in different contexts.[107] However, the Court has held that the notion of "respect" is not clear cut, especially as far as positive obligations are concerned. Having regard to the diversity of the practices followed and the situations in the Contracting States, the notion's requirements will vary considerably from case to case.[108] The breadth of the obligation will vary depending on the importance of the right and the resources required to meet the obligation, and States have a margin of appreciation when it comes to this.[109]

Although the Court has held that the principles applicable to assessing negative and positive obligations are similar,[110] there are some noteworthy differences. Under the negative obligations, the Court performs a 4-tier analysis and assesses whether the issue falls within the scope of Article 8, whether the interference was in accordance with the law, whether it serves a legitimate aim prescribed by Article 8(2), and whether it is necessary in a democratic society. The Court has held that the necessity requirement is not so strict as to be synonymous with 'indispensable', but neither is it as flexible as 'admissible', 'ordinary', 'useful', 'reasonable', or 'desirable'.[111] Rather, it is settled case law that the notion of necessity means that an interference must correspond to a 'pressing social need' and is proportionate to the legitimate aim pursued.[112] In *Dudgeon v the United Kingdom*, the Court also held that tolerance and broad-mindedness are 'hallmarks' of a democratic society, and protected against the intolerance and narrow-mindedness of others.[113]

When it comes to positive obligations, regard must be had to the 'fair balance' that has to be struck between the competing interests of the individual and of the community as a whole.[114] Apart from the obligations under Article 6, the Court has usually only considered whether the State has taken "reasonable measures" to protect the right. The proportionality test is accordingly not as stringent under the positive obligations approach as under the negative obligations one.

---

[106] *Airey v. Ireland*.
[107] *A, B and C v. Ireland.*
[108] *Hämäläinen v Finland*, para. 66
[109] Harris, et al. (2014), p. 505.
[110] *Hämäläinen v Finland*, para. 65.
[111] *Handyside v the United Kingdom*, para. 48.
[112] *Olsson v Sweden (No. 1),* para. 67.
[113] *Dudgeon v the United Kingdom*, para. 53
[114] Eg. *Hämäläinen v Finland,* para. 65.

Moreover, when it comes to the permissible aims under the positive obligations approach, "regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being *of a certain relevance* (emphasis by author)".[115] On the contrary, under a negative obligations approach, only the aims listed in Article 8(2) are accepted. This means that in order for the interest in question to be legitimate, it has to be formulated in a way that falls under one or more of the grounds listed in Article 8(2). In some cases, this has led the Court to some rather creative interpretations of the meaning and scope of legitimate aims.[116]

The Court has no general theory of positive obligations,[117] and it also recognizes that the boundary between negative and positive obligations is not always clear.[118] In some cases, it has not determined which approach is applicable, based on the view that the approaches are similar.[119] This means that even if the case could arguably be decided applying either approach, it is possible that the outcome is different depending on whether the question is assessed from the point of view of negative or positive obligations, since I argue that the standard of review is more relaxed under the latter.

3.1.2 Article 12

Article 12 reads that men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right. Whereas Article 8 protects existing family ties, Article 12 contains the right to found a family. However, it applies even when there is no chance or intent of procreation between the couple.[120] Article 12 is *lex specialis* to Article 8, and the Court has held that because a right of same-sex couples to marry cannot be derived from Article 12, neither can it be derived from Article 8 taken together with Article 14.[121] Article 12 does not contain a limitation clause like some other substantive Articles, but the exercise of the right is still left subject to national laws. However, the national laws "must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired."[122] According to the Court, limiting the right to marry to only different-sex couples does not impair the very essence of the right to marry.

---

[115] see *Gaskin v. the United Kingdom.*
[116] See for example the case of *S.A.S v France*, where the cultural notion of 'living together' included the right to see other people's faces in public spaces and capable of justifying a head scarf ban because it was included in "the protection of the rights and freedoms of others".
[117] Harris et al. (2014), p. 505.
[118] *S.H. and Others v Austria,* para. 87.
[119] Harris et al. (2014), p. 505.
[120] *Christine Goodwin v the United Kingdom,*
[121] Eg. *Schalk and Kopf v Austria*
[122] *Rees v the United Kingdom*, para. 50.

In *Cossey v the United Kingdom,* it implied that a heterosexual transgender woman's inability to marry a man did not have such an effect since in theory she could still marry a woman, as her legal gender was male. A contrary conclusion was found in *B and L v the United Kingdom* where a man's inability to marry his former daughter-in-law unless both his son and former wife were dead was a violation of Article 12.

Unlike other provisions of the Convention, Article 12 grants rights to "men and women" instead of "everyone". It is derived from the right to marry in the Universal Declaration of Human Rights,[123] and the choice of words is deliberate. However, the aim behind the use of the words "men and women" was not to reserve the right to marry to traditional marriages – although that was certainly the drafters' idea of marriage – but rather to address women's inequality in the institution of marriage. Therefore, the intent was to grant the right to marry to men *and women.* The original draft was to grant the right to all persons "the natural rights derived from marriage and paternity and those pertaining to the family".[124] The final wording can be seen as a departure from some of the aspects of traditional marriage despite its referral to men and women. Nonetheless, the Court has interpreted Article 12 to only create obligations towards heterosexual couples, although in *Schalk and Kopf* it recognized that long-term same-sex relationships do fall within the scope of the Article.

Accordingly, Article 12 only imposes an obligation to protect marriage in the traditional sense. The Court's understanding of what constitutes a traditional marriage, where traditional equals heterosexual, has changed considerably. In the 1980s and 1990s, it was set on holding that it fell within the State's margin of appreciation to determine gender for the purposes of marriage on purely biological criteria. Thus, a marriage between a transgender person and someone of their acquired gender (e.g. a transgender woman and a cisgender woman) was considered a different-sex "traditional marriage" because the couple would be biologically different-sex. This position was turned on its head in *Christine Goodwin v the United Kingdom* in 2002, where the Court held that the applicant who was a transgender woman had a right under Article 8 to legal recognition of her gender identity and under Article 12 to marry a man. Currently, it is the social gender of the partners that decides whether the marriage is a same-sex or a different-sex one.

[123] Schabas (2015), p. 528.
[124] *Ibid.*

The essence of the right to marry is forming a "legally binding association between a man and a woman', without any requirement that they be able to or even desire to cohabit".[125] It does not include a right to divorce.[126] Where the State has used its discretion to allow it, the proceedings must be swift enough to enable remarriage.[127] Marriage "confers a special legal status to those who enter into it" and "gives rise to social, personal and legal consequences".[128] On this basis, when deciding cases where a claim of discrimination has been made, the Court has often found that long-term unmarried couples are not in a comparable situation to married couples. In certain cases, it has taken into account the legal inability of same-sex couples to marry when deciding on comparability.[129]

3.1.3 Article 14

Article 14 prohibits discrimination in the enjoyment of Convention rights on the basis of any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Gender identity and sexual orientation have been considered such "other statuses" encompassed by Article 14,[130] and like differences based on gender, the latter requires "particularly serious reasons by way of justification."[131] The prohibition of discrimination is not independent and in order to be applicable, the case must fall within the scope of at least one substantive Convention Article. It does not presuppose a breach of the substantive Article, but even if the Court finds no violation of the substantive Article alone, it must still assess the alleged breach of the substantive Article taken together with Article 14.[132]

Article 14 does not define discrimination, so its meaning has been developed in the Court's case law. There are two categories of discrimination: direct and indirect. Direct discrimination means less favorable treatment on the basis of belonging to a protected group. It requires the existence of a comparator in a relevantly similar situation.[133] Indirect discrimination, on the other hand, refers to a situation where a seemingly neutral rule or practice disadvantages a person or a group. It can also be formulated as failing to treat differently people who are in relevantly different situations.[134] Not all

[125] *Hamer v the United Kingdom,* para, 71.
[126] See *Johnston and Others v Ireland.*
[127] *VK v Croatia.*
[128] *Burden v the United Kingdom,* para. 63
[129] See *Taddeucci and McCall v Italy*, discussed below.
[130] *Identoba and Others v Georgia*
[131] *L and V v Austria,* para. 45.
[132] *Airey v Ireland*, para. 30.
[133] Eg. *Zarb Adami v Malta*, para. 71.
[134] *Thlimmenos v Greece*, para. 44

differential – or disadvantageous – treatment is prohibited discrimination, however. The rule or practice is in accordance with the Convention if there is an objective and reasonable justification. This means that the different treatment pursues a legitimate aim and a reasonable relationship of proportionality between the aims and the means.[135] Unlike Articles 8 to 11, Article 14 does not contain a delimitation clause with a list of legitimate aims. The Court has not limited the acceptable aims to those listed in other Convention Articles, and has tended to accept various different aims presented by the Government.[136] The legitimate aim and proportionality tests are similar to those under the positive obligations approach under Article 8 (see chapter 3.1.1.2 above).

Accordingly, in order to find a violation of Article 14, the Court has to first establish that the case falls into the scope of one of the substantive Convention Articles, that there exists either differential treatment of persons in relevantly similar situation, or a failure to treat differently persons who are in relevantly situations.[137] The burden of proof of establishing differential treatment is on the applicant.[138] In cases of indirect discrimination, the Court has accepted that statistics can show the disparate impact of a policy on a certain group.[139] Once the applicant has established a *prima facie* case of discrimination, it is on the Government to show that there is a legitimate aim capable of justifying the measure and that the means are proportionate to the aims.[140]

Arnardottir has commented on the legitimate aim test that any real assessment of the aims *per se*, as opposed to their potentially disproportionate effects, runs counter to the subsidiary principle and margin of appreciation doctrine explained below. Thus, according to her, the most viable interpretation of the content of the legitimate aim test can include only the examination of whether the aim is to discriminate. Other authors have suggested accepting as legitimate aims only such aims that are inherent in the Convention framework, but according to Arnardottir, this would mean mixing up the legitimate aim test with the proportionality test.[141] The cases analyzed in this thesis show that the Court indeed rarely questions the existence of a legitimate aim. Arnardottir agrees with the criticism that the legitimate aim test under Article 14 has been rendered redundant, as it is extremely difficult for applicants to show discriminatory intent.[142]

[135] *Belgian Linguistics case,* para. 10, p. 34.
[136] Harris et al. (2014), p. 793.
[137] Harris et a. (2014), p. 788–790; see also eg. *Van der Mussele v Belgium,* para.46, and *Thlimmenos v Greece*, para. 44.
[138] FRA (2018), p. 231.
[139] See *D.H. and others v the Czech Republic.*
[140] Harris et al. (2014)., p. 809.
[141] Arnardottir (2001).p. 66–67.
[142] *Ibid,* p. 68–69.

3.2 General principles of interpretation and methodology

The Convention itself only contains one Article addressing its interpretation, namely Article 17 which prohibits an interpretation that would imply destroying any of the Convention rights. Like any international convention, the ECHR must be interpreted in accordance with the Vienna Convention on the Law of Treaties (VCLT). According to Article 31(1),a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The object and purpose of the Convention has been held to be the protection of individual human rights and the promotion of the ideals and values of a democratic society,[143] both implied by the preamble.

Especially the teleological interpretation has been favored by the Court. In the landmark case of *Golder v the United Kingdom,* the Court included a right of access to court in Article 6 despite the text of the Article implying the contrary, since the purpose of the Convention to promote rule of law required this. The Court has developed a doctrine of dynamic and evolutive interpretation, according to which "the Convention is a living instrument that must be interpreted in light of present-day conditions",[144] which allows it to take into account European and international developments in a given field of law and policy. The Convention is intended to protect rights which are "not theoretical and illusory but practical and effective".[145] Moreover, the Convention must be read as a whole and interpreted in a way that promotes its internal consistency.[146]

According to the principle of subsidiarity, the primary responsibility of protecting human right is on the Contracting States. The role of the Court is to monitor and supervise their action.[147] This role division was highlighted in the Council of Europe's Copenhagen Declaration, adopted in 2018, according to which the subsidiarity principle guides the way in which the Court conducts its review, and it leaves a margin of appreciation to the States in how they implement and apply the Convention.[148] The margin of appreciation doctrine has been steadily established in the Court's case law, originating from the case of *Handyside v the United Kingdom.* There, the Court held that national authorities are often better positioned than an international judge to assess the needs of the society

[143] *Soering v the United Kingdom,* para. 87; *Kjeldsen, Busk, Madsen and Pedersen v Denmark,* para. 53.
[144] *Tyrer v the United Kingdom*, para. 31.
[145] *Airey v Ireland*, para. 24
[146] *Stec v the United Kingdom*, para. 48.
[147] Harris et al. (2014), p. 16–17.
[148] Copenhagen Declaration, paras. 27 and 28

and the necessity and proportionality of the measures. However, the Court must still exercise its supervisory function and determine "whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient".[149]

Accordingly, a key part of the proportionality analysis is often the determination of the width of the margin of appreciation. Where 'a particularly important facet of an individual's existence or identity' is at stake, the margin of appreciation is narrow.[150] On the other hand, where there is no European consensus on the issue and the case raises sensitive moral and ethical issues, or issues of social and economic policy, or where the State has to strike a balance between competing Convention rights, the margin of appreciation is wide.[151] When there is no European consensus on the issue, the Court is more likely to give deference to the choice of the Responding State.[152]

Much has been written on the margin of appreciation doctrine and it has even been the subject of heavy criticism. Here, for the purposes of this thesis, three points are of particular relevance. Firstly, the Court doesn't have a uniform method of deciding its width. It is not uncommon that there are aspects in the case that could justify both a wide and a narrow margin of appreciation. Especially the determination of the (non)existence of a European consensus is a tricky and often inconclusive exercise.[153] It should also be noted that the mere fact that a practice or policy is common does not indicate that it is in compliance with human rights, especially in the case of marginalized and stigmatized groups.

Secondly, the argument that national authorities are best suited to assess the situation does not hold true when the case concerns the rights of a stigmatized minority group, such as LGBTI+ people. The intention is to give deference to the democratic processes of the Contracting States, but as Lau convincingly argues, where laws differentiate between people on the basis of a protected ground "often reflect flawed democratic deliberations". A minority usually lacks the political power to remedy discrimination via democratic processes, and human rights are intended to protect them from majoritarian politics which are based on negative stereotypes.[154]

[149] *Handyside v the United Kingdom*, paras. 49–50.
[150] *S.H. and Others v. Austria* [GC], no. 57813/00, § 94, ECHR 2011).
[151] *Hämäläinen v Finland,* para. 67; *Hatton v the United Kingdom,* para. 97; *Evans v the United Kingdom*, para. 77.
[152] Harris et al. (2014), p. 514.
[153] *Ibid,* p. 514–515.
[154] Lau (2013), p. 247–248.

Finally, I argue that the combination of a wide margin of appreciation and the Court's tendency to not question the legitimacy of the State's aim may risk turning the review into a managerialist one. A style of review called constitutional managerialism reduces the nature of fundamental and human rights from proper rights to simply a set of political interests among others, losing their normative nature. Such an approach has been criticized in national contexts.[155] This is especially the case if almost any aim proposed by the Government is accepted as legitimate without scrutiny, and the "fair balance" test is left to the State's discretion on the basis that the national authorities know how to best manage the local situation.

4 Case law analysis

4.1 Introduction to case law

In this chapter, I will analyze how the ECtHR has treated arguments about traditional family and marriage in its case law. Such arguments are either invoked as a justification for the State's policy or as part of the definition of the scope of Articles 8 and 12. I have identified three main groups of cases on the basis of what the central issue is in the case. The Court also approaches cases differently depending on the core issue, meaning that the cases in a given group were treated quite similarly, aside from landmark cases that signaled a shift in case law.

The case groups are discussed in an almost chronological order. The first group is cases about transgender people's right to legal gender recognition and marriage, issues which the Court first dealt with already in the 1980s. This group is divided into two sub-groups depending on whether the right to marry concerned the right to enter into marriage or to remain married. As the discussion below will show, there are noteworthy differences with the Court's approach to these two groups, and they are seminal to the Court's developing understanding of what a traditional heterosexual marriage is. The second group is cases concerning legal protection for same-sex relationships, divided into cases about the right to marry, the right to *some* institution of legal protection, and the adjacent benefits. The third group is a bit of a misfit group, where there's no single unifying topic. The cases concern gender equality, "illegitimate" children, and hate speech against LGBTI+ people. The common factor is that in all of these cases, the Court applies a strict review and a relatively detailed discussion about the legitimacy of the traditional family or its aspect.

[155] See for example Lavapuro (2010).

4.2 Case group 1: transgender persons and the right to marry

4.2.1 Gender recognition and the right to enter into marriage

From the 1980s onwards, the Court has adjudicated cases concerning transgender rights. It was faced with four very similar cases: *Rees v the United Kingdom* (1986), *Cossey v the United Kingdom* (1990), *Sheffield and Horsham v the United Kingdom* (1998) and *Christine Goodwin v the United Kingdom* (2002). In all of these cases, the issue before the Court was the inability of a post-operative transgender person to get legal gender recognition, and the resulting inability to marry. In the case of *Sheffield*, the first applicant had been advised to divorce in order to be allowed to undergo medical gender reconstruction, but the Court did not treat the question as one concerning the right to *remain* married, contrary to the cases of *Parry v the United Kingdom* (2005), *R. and F. v the United Kingdom* (2006) and *Hämäläinen v Finland* (2014), which will be discussed in the following subchapter.

The cases were examined under combinations of Articles 8, 12 and 14. Under Article 8, the Court found in the cases of *Rees, Cossey* and *Sheffield and Horsham* that the cases fell within the private life limb of Article 8, but given the lack of European and scientific consensus, the United Kingdom had a wide margin of appreciation and there was no positive obligation vested upon the state to provide the applicants with legal gender recognition. Even though the issues under Article 8 concerned private life and thus offer no insight on the traditional family, they are relevant because the applicants' complaints were interlinked: they were unable to marry because their acquired gender was not legally recognized, marriage only being allowed between different-sex couples. What the Court found under Article 8 thus predicted its stance under Article 12. The Court applied essentially the same reasonings in all three cases and held that since its judgement in *Rees*, there had been no developments that would require it to judge differently. In *Sheffield and Horsham,* despite finding no violation, it noted that the United Kingdom had not taken any action to remedy the situation since the *Rees* judgement and pointed that this area of law should be held under review,[156] hinting at possible future changes in the Court's position.

Concerning the complaints under Article 12, the Court based its reasoning heavily on the definition of the right to marry. It repeatedly held that the right to marry protected by Article 12 "refers to the traditional marriage between persons of opposite biological sex".[157] It held that it was clearly implied by the wording of the Article that it intended to protect the traditional marriage as the basis of the

[156] *Sheffield and Horsham,* para. 60.
[157] *Rees,* para. 49; *Cossey,* para. 43 (a), *Sheffield and Horsham*, para. 66.

family.[158] This was reason enough for not allowing the applicants to marry someone who was *biologically* of the same gender, although socially of a different gender. It was not necessary to examine any legitimate interest or proportionality issues, since the exclusion of people in the applicants' situation from the scope of Article 12 fell within the State's margin of appreciation.

The argument that the applicants could *de facto* not marry at all, because as heterosexuals they were not interested in marrying someone of the same social gender, were dismissed as not following from the legislation of the United Kingdom.[159] Interestingly, in adopting this position, the Court inadvertently asserted that the applicants could marry someone of the same social gender.[160] Given the Court's stance that issues such as overly long divorce proceedings may impair the very essence of the right to marry, as discussed above in 3.1.2, it is difficult to understand how a prohibition of marrying anyone of one's preferred gender, taken together with the inability to legally change one's own gender, does not impair the right in such a way, and in none of the cases did the Court develop appropriate reasonings in this regard.

In the landmark case of *Christine Goodwin v the United Kingdom* in 2002, the previous case law was overturned. Ms. Goodwin was in a similar situation as the applicants in *Rees, Cossey* and *Sheffield and Horsham*. She was a post-operative transgender woman who was unable to get her gender legally recognized and was prohibited from marrying a man. It is mentioned that she enjoyed a "full physical relationship with a man".[161] The applicant relied on Articles 8 and 14 in her complaint, and the Court examined it also under Article 12 *ex officio*. This time, the Court found that the applicant's right to respect for her private life under Article had been violated. The Court placed considerably more weight on the difficulties that the applicant suffered because of having to reveal her birth gender,[162] even though the situation was materially similar to the cases it had examined before. The difference was based on the growing medical and scientific consensus, as well as an emerging European consensus on accepting transgender people, which rendered the State's margin of appreciation narrow. In determining the existence of consensus, the Court also noted developments outside Europe, in countries such as Australia and New Zealand.[163] It must be pointed out that similar arguments had already been made in the cases previously before the Court. It also noted again that

[158] *Cossey*, para. 43 (a).
[159] *Ibid*, para. 45.
[160] Gonzalez-Salzberg (2018), p. 130.
[161] *Goodwin,* para. 95.
[162] *Ibid,* paras. 86–90.
[163] *Ibid,* para. 84.

since the *Rees* judgement, the United Kingdom had not taken any measures to alleviate the situation of transgender people.

Concerning Article 12, the Government relied on the Court's findings in its previous judgements. It held that the matter of determining sex for the purposes of marriage was pending before the House of Lords, and that any changes in this sensitive area of law should come from the United Kingdom itself. It also pointed out that if changes were made, this would potentially put transgender people in existing marriages in a perilous situation.[164] In essence, therefore, the Government argued that the right to marry continued to extend only to those in traditional marriages, and if this were to be changed, there might be unpleasant and unforeseen consequences.

The Court, on the other hand, was willing to expand, or rather shift, the scope of Article 12. In para. 98, it held that the right to found a family guaranteed by Article 12 was not a precondition of exercising the right to marry. Such an argument had already been presented for example in the dissenting opinion of Judge Martens in the *Cossey* case. This signified a partial break from the original idea of traditional marriage, according to which the purpose of marriage, and the reason for its elevated status, is procreation and the founding of a family (or the one-flesh union, as new natural lawyers would put it). I write 'partial', because the Court's stance remains that marriage is a union between a man and a woman. In its reasonings in paras. 100 and 101, it held that due to societal, medical and scientific developments, gender for the purposes of marriage could no longer be determined on the basis of purely biological criteria. The applicant lived as a woman and only wished to marry a man, and prohibiting her from doing so would infringe the very essence of her right to marry. This position was completely opposite to the Court's stance in *Cossey.*

In summary, the Court's starting point is that Article 12 only protects traditional marriages, and the definition of the right has been the determining issue in the cases assessed in this subchapter. Changes in the Court's position were motivated by the growing scientific, European and international consensus on transgender issues, while in the absence of consensus, the wide margin of appreciation that justified the State's position. In *Goodwin,* the right to marry under Article 12 was extended to cover not only traditional marriages in the original sense, but marriages that socially, if not biologically, look like one. In essence, the Court continued to define marriage under Article 12 as a heterosexual union, but by changing its concept of gender, it changed the definition of who is a

[164] *Goodwin,* para. 12.

heterosexual. Some authors, including Sandland and Gonzalez-Salzberg, argue that the Court needed to do this because the protection of heterosexual transgender people threatens the institution of the traditional marriage less than the previous situation where lesbian and gay transgender people could marry, and the position change merely reaffirms heteronormativity.[165] In support, they point out that the Court highlighted Ms Goodwin's heterosexuality: she felt like she was a woman and she only wished to marry a man, and she enjoyed "a full physical relationship" with a man. Sandland argues that the Court suppressed the diversity and ambiguity of gender identity by simply construing the "proper woman" and "proper man" by using new criteria – social instead of biological – to affirm heterosexuality, and construe homosexuality as "*the* fundamental deviation".[166]

4.2.2 Gender recognition and the right to remain married

As the Government in *Goodwin* had predicted, changing the approach to how gender is determined did indeed put transgender people in existing marriages in an unpleasant situation. Following the *Goodwin* judgement, the United Kingdom had passed the Gender Recognition Act in 2004, which allowed transgender individuals to obtain a certificate of gender recognition, preconditions being, inter alia, that the person was diagnosed with gender dysphoria and was not married. Before the full certificate, a person who fulfilled the criteria but was married was entitled to an interim certificate. A rather similar law had been adopted in Finland in 2002, without the feature of the interim certificate. In *Parry v the United Kingdom* (dec, 2005), *R. and F. v the United Kingdom* (dec., 2006) and *Hämäläinen v Finland* (2014), the cases concerned post-operative transgender persons who had already entered into a different-sex marriage prior to their gender affirmative treatment. In *Parry* and *Hämäläinen,* the couple also had biological children together and were deeply religious. In order to get their gender legally recognized, they had to divorce or transform the marriage into a civil union, because upon legal gender change, the marriage would have been rendered a same-sex one, which neither the United Kingdom nor Finland allowed at the time.[167] For these applicants, the developments in *Goodwin* were detrimental as under previous case law, their marriages would have still been considered a different-sex one. The *Parry* and *R. and F.* cases were unanimously declared inadmissible in rather brief near-identical decisions, while eight years later, the materially similar *Hämäläinen* was decided on the merits by the Grand Chamber.

[165] Gonzalez-Salzberg (2018), p. 44; Sandland (2003).
[166] Sandland (2003), p. 201, 204.
[167] At the time of the *Hämäläinen* judgement, a citizen's initiative to legalize same-sex marriage was pending before the Finnish Parliament, which might explain the Court's self-restraint in the case. The law passed four months after the Grand Chamber gave its judgement.

The Government in both *Parry* and *R. and F.* accepted that the legislation engaged with the applicants' private life under Article 8, but not family life, since marriage was governed by Article 12. Under English and Scots law, marriage referred to a union between persons of different sex and given the religious and cultural sensitivities, it was appropriate that the State had chosen to protect transgender people in existing marriages by enacting the Registered Partnership Act in 2004. The Court held that it would be artificial to deny the application of the family life limb of Article 8, but maintained that Article 12 was *lex specialis* when it comes to marriage. After a brief proportionality analysis where the Court held that the applicants may continue their relationship and get legal protection for it, it declared the applications under Article 8 manifestly ill-founded.

When defining the scope of Article 12, it once again started by stating that it enshrined the traditional marriage between a man and a woman. It fell within the margin of appreciation of the State how to regulate the effects of change of gender in the context of marriage. In *R. and F.*, the Court gave a substantive reason why a situation resulting in same-sex marriage could be prohibited. It held that, while the applicants had forcefully referred to the social and historical value of the institution of marriage, which was the reason they didn't want to enter a registered partnership instead, it was "that value as currently recognized in national law that excludes them".[168] Accordingly, the difference between people who can enter into a marriage and who cannot was one of value. Even a marriage that had already lasted for years lost its special value when, by the changing of one of the spouses' gender marker, they became legally a same-sex couple.

Interestingly, the *R. and F.* and *Parry* cases, while not having an outcome that would fully promote diversity and individual rights, involved quite queer arrangements by the Government. As Gonzalez-Salzberg points out, the concept of gender is understood as a performative one, as the UK legislation had set up a period during which a person needed to have lived as belonging to their acquired gender, thus embracing the idea of gender as a social construct whose boundaries could be crossed by continued performance.[169] Moreover, the interim certificate of gender recognition created a third category of gender, breaking the strict binary between men and women: there were men, women, and people who belonged to these categories only partially or temporarily. As with the situation in *Rees* and *Cossey*, the Court, while intending to uphold the strict heterosexuality of marriage, ended up endorsing a situation that did not fall neatly within the male-female and heterosexual-homosexual binaries. However, although the Court was willing to accept the mutability through performance of

[168] Pages 14-15 of the decision.
[169] Gonzalez-Salzberg (2018), p. 169–170.

the gender and sexuality of a transgender person, it was not willing to accept the mutability of said characteristics of a non-pathologized, "proper" cisgender woman, which lead to the restriction of the rights of both spouses.[170]

While a similar situation in *Hämäläinen* received a Grand Chamber judgement on the merits, the logic of the reasonings did not change much. The applicant argued that she was not advocating for same-sex marriage in general, but only for people in a situation such as hers to be allowed to remain married. She pointed out that her wife continued to identify as a heterosexual and that the applicant's change of gender did not necessarily make the marriage into a homosexual one.[171] Before the Chamber, the Government argued that the aim of the rule was the protection of health and morals and the rights and freedoms of others. The Chamber found that this was legitimate, and that the State had an interest in keeping the institution of the traditional marriage "intact".[172] The Grand Chamber did not revisit this issue and thus did not specify which category the aim fell into. Neither did it discuss how permitting persons in the applicant's situation to continue their marriage would threaten health or morals, or whose rights or freedoms it would jeopardize.

While the Government had agreed that there had been an interference with the applicant's rights and the Chamber approached the situation from the perspective of negative obligations, the Grand Chamber chose to apply the positive obligations approach. The Grand Chamber certainly had a choice in relation to which method to apply. While the Court formulated the question as "whether Article 8 entails a positive obligation on the State to provide an effective and accessible procedure allowing the applicant to have her new gender legally recognized while remaining married",[173] Scheinin points out that it would have been possible to construe the case as a question of whether it was legitimate to interfere in an existing marriage.[174] It is a good example of a case where the line between negative and positive obligations is blurred, and where the choice between these two approaches may affect the outcome.

In its proportionality analysis, the Court held that in the absence of a European consensus and given the moral and ethical sensitivity of the issue, the margin of appreciation should be wide.[175] It did not

[170]Gonzalez-Salzberg (2018), p. 172.
[171] *Hämäläinen,* para. 44
[172] *Ibid,* paras. 36, 38.
[173] *Ibid,* para. 64.
[174] Scheinin (2014)
[175] *Hämäläinen,* paras. 73–75.

explain why this weighed more than the fact that the case concerned a particularly important facet of the applicant's identity, a factor pointing to a narrow margin of appreciation, even though this principle was mentioned. Unlike in *Goodwin*, it paid attention only to European states when establishing whether a consensus existed. Then, like in *Rees*, *Cossey*, and *Sheffield and Horsham*, it balanced the competing interests by focusing on the different options available to the applicant and what their effect would be. Unlike in *Goodwin*, where the Court had put considerable weight to the applicant's plight, in *Hämäläinen* it held that her situation was adequate since she had options. If she wanted to have her gender legally recognized, she could end her marriage. And if she wanted to remain married, she could simply tolerate the non-recognition of her marriage.[176] This line of reasoning, however, side-steps the real issue of the case, *i.e.* the applicant's inability to remain married *and* get her gender legally recognized at the same time. There was no real balancing of the applicant's rights against the Government's interests, since the only discussion on what it would mean for the state if the applicant's marriage was allowed to continue is the statement that this would *de facto* mean the legalization of same-sex marriage, without any discussion as to why this would be detrimental or troublesome to the State.

Concerning Article 12, the Government held that Article 12 did not grant the applicants the right to remain married if the applicant's gender was legally recognized. It argued that the regulation of the effects of legal gender change fell within the State's margin of appreciation.[177] The Court referred to *Rees* in stating that Article 12 protected the traditional marriage between a man and a woman. This is interesting, given that *Rees* had been overturned in *Goodwin* and the Court's understanding of traditional marriage had changed. Referring to *Schalk and Kopf*, discussed below, the Court held that Article 12 could not be construed in a way that would obligate Contracting States to allow same-sex marriage. The matter had already been examined under Article 8 and there was accordingly no violation of Article 12.[178] The Court also examined the case under Articles 8, 12 and 14 taken together, but found that the applicant was not in a comparable situation as cisgender people since they do not want to change their legal gender, and therefore the applicant had not been discriminated against. This is a rather absurd line of reasoning, since cisgender people do *by definition not need to* ask for legal recognition of their gender, since it is automatically correct at birth. In my opinion, the logic is similar to saying that homosexual and heterosexual persons are treated equally when it comes to marriage, since both can marry a person of a different gender.

[176] *Hämäläinen*, paras. 76–78.
[177] *Ibid,* para. 95
[178] *Ibid,* 96–97.

Gonzalez-Salzberg argues that the Court's idea of heterosexuality is not coherent, given not only the development from *Rees* to *Goodwin* to *Hämäläinen*, but also the dissenting judges' opinion in *Hämäläinen*, according to which the applicant's situation – a transgender woman married to a cisgender woman – was different from that of homosexuals. In *Cossey,* the Court's understanding had been that such a situation was heterosexual on the basis of the biological sex of the spouses, but this had been overturned in *Goodwin.* According to Gonzalez-Salzberg, the Court construes marriage as a heterosexual union because it must be so, despite the facts of the case. Accordingly, those who are allowed to marry are always heterosexual.[179]

I argue that the Court avoided properly discussing the capability of the interest to "keep the institution of marriage intact" to justify the catch-22 situation the applicant was in by deliberately choosing its argumentative strategy. As discussed above in section 3.1, the standard of review under the positive obligations approach is more lax than under the negative obligations one. The dissenting judges also pointed out that under a positive obligations approach, the Court was not required to apply the usual four-tier test in full. The legitimacy of keeping the traditional marriage "intact" was clearly a contested issue, and the dissenting judges Sajó, Keller and Lemmens criticized the Court heavily on this matter, holding that society's "yuk factor" should not have normative value.[180] They state that the only interest that the State had at stake was "keeping marriage free of homosexuals", which could hardly justify the situation. Scheinin also questions what legitimate interest the State was pursuing.[181] Moreover, as in *Parry* and *R. and F.*, the question was of a couple who, in all aspects but the gender marker in the applicant's identity documentation, were already a married same-sex couple, making the different-sex nature of their marriages a legal fiction.

I argue that if the Grand Chamber had adopted the negative obligations approach, it would have had to scrutinize the situation more closely and it would have had to enter into a discussion about the legitimacy of "keeping traditional marriage intact", or at least whether this aim could justify the case at hand. After all, the case brought into light the artificiality of differentiating between same-sex and different-sex relationships, and the illusion of the supremacy of the traditional marriage. The stricter review under the necessity test of the negative obligations approach, compared to the "fair balance" approach of the positive obligations approach, and e.g. the Court's position in *Dudgeon* that necessity

[179] Gonzalez-Salzberg (2015).
[180] Paras. 9 – 14 of the dissenting opinion
[181] Scheinin (2014).

in *a democratic society* protected against narrow-mindedness, would have required it to look more closely into what else was being protected than the superior status of heterosexual relationships.

Aside from the way in which the Court has construed heterosexuality in its case law from *Rees* to *Hämäläinen* and the illusion of heterosexual marriage this creates, another aspect of the *Hämäläinen* case can be brought to light by queer theory. In deciding the breadth of the margin of appreciation, the Court referred not only to the lack of European consensus, but also the existence of "sensitive moral and ethical issues".[182] The issue in the case was limited to whether transgender persons can stay married to their (now) same-sex spouses, or more broadly, should the State allow (at least certain instances of) same-sex marriage. To frame this question as one of morals suggests that such a situation can be perceived as immoral. This presupposes the heteronormative assumption that heterosexuality, and thus heterosexual marriages, are natural, normal, and good, while other sexualities and non-heterosexual relationships are deviant and bad. If this assumption is stripped away, it is difficult to see what the sensitive moral issue is; rather, from a queer perspective that does not align with such heteronormative assumptions, the question is not one of morality but of rights: should members of a minority have the same rights as members of the majority. Such a framing would, in my opinion, not call for a wide margin of appreciation.

In summary, the Court's understanding of traditional marriage has shifted to accommodate transgender persons wishing to enter into a different-sex marriage, but at the cost of excluding transgender persons in would-be same-sex marriages. The cases examined in this chapter highlight the nature of heterosexuality and heterosexual marriage as legal fictions. The question of who the State has to allow to marry or to remain married has been assessed as one of positive obligations, even when the case is one of continuing an existing marriage. The existence or lack of consensus has played a significant part in determining the width of the margin of appreciation and the outcome of the case.

4.3 Case group 2: protection of same-sex relationships

4.3.1 Rights of cohabiting couples

The ECtHR has also dealt with cases where the issue of the protection of the traditional marriage arises but that concern other types of legal protection of relationships and the benefits arising from them instead of the right to marry. The cases of *Mata Estevez v Spain* (2001, dec.), *Karner v Austria*

[182] *Hämäläinen,* para. 67.

(2003), *Manenc v France* (2009, dec.) and *Kozak v Poland* (2010) concern the economic and housing protection afforded to (survivors of) same-sex relationships. In these cases, the Court did not yet accept that same-sex relationships could fall into the scope of family life, but nevertheless decided the latter two cases in favor of the applicant by operating under the home limb of Article 8. The *Karner* case is significant because there, the Court developed a line of reasoning that gives the State a narrow margin of appreciation because of differential treatment on the basis of the applicant's sexual orientation and requires it to justify why the policy choice in question, out of a range of possible policies, was necessary to justify the aim. This line of reasoning has been applied in several later cases. The case of *X and Others v Austria* (2013) is the only one in this thesis concerning the right of same-sex couples to adopt, and is different from the other cases in terms of substance and for the fact that it concerned the applicants' family life, but where the Court relied on principles established in the *Karner* and *Kozak* cases.

In the case of *Mata Estevez v Spain* (2001, dec.) the applicant was the surviving partner in a homosexual relationship. He and his partner had lived together for 10 years and had pooled their income and shared their expenses. When the applicant's partner died in an accident, the applicant claimed the social security benefits for the surviving spouse on the basis of their long cohabitation. However, he was denied this because the national authorities held that survivor's pension only applied to surviving spouses in a traditional heterosexual marriage. The applicant invoked Articles 8 and 14 and held that he had been discriminated against on the basis of his sexual orientation when compared to married couples and even some unmarried heterosexual couples. He considered the relationship to fall under the protection of private and family life within the meaning of Article 8.

The Court held that long-term homosexual relationships did not fall under the family life limb of Article 8 and the application was in this respect incompatible with the Convention *rationae materiae*, but the applicant's right to respect for his private life was engaged. The restricted scope of the family life limb derived from the fact that there was little common ground between Contracting States on the acceptance of homosexual relationships. While the applicant could be said to have been treated differently compared to unmarried heterosexual couples, the difference in treatment served a legitimate aim because it was intended for the protection of the family based on marriage bonds. Because the State had a wide margin of appreciation, there had been no discriminatory difference in treatment. The application was unanimously declared inadmissible for being manifestly ill-founded.

Only two years later, the Court had a very different approach. In the case of *Karner v Austria* (2003), the applicant had been in a stable homosexual relationship with his partner who had died of AIDS. The couple had lived together and shared the expenses for a flat that had been rented under the deceased partner's name. The applicant was named the heir of his partner. After his partner's death, the applicant was not allowed to succeed the tenancy as the national authorities interpreted the right of "life partners" to succeed the tenancy of the deceased family member as only concerning heterosexual couples, per the intention of the drafters of the law.[183] The applicant brought proceedings under Articles 8 and 14, arguing that he had been discriminated against because he was treated less favorably than heterosexual surviving partners. The Government denied that the case fell within the scope of private and family life within the meaning of Article 8. It accepted that the applicant had been treated differently on the grounds of his sexual orientation, but this difference of treatment had an objective and reasonable justification because the aim of the relevant provision had been the protection of the traditional family.

The Court held that it was not necessary to assess whether the applicant's situation amounted to private or family life since the situation in any case engaged his right to his home. It examined the case under Article 8 taken together with Article 14, therefore applying the "reasonable relationship of proportionality" test developed under Article 14. This time, the Court had a strict approach to the proportionality test. It pointed out that the Supreme Administrative Court had not put forward any arguments as to why it was important to restrict the right to succeed a tenancy to heterosexual couples, but had only asserted that it had been the intention of the drafters of the provision. The ECtHR accepted that in principle the protection of the traditional family was a legitimate and weighty reason which might justify a difference in treatment.[184] However, it pointed out that this aim was rather abstract and could be achieved through multiple different measures. It held that in cases where the difference in treatment was based on sexual orientation, the margin of appreciation was narrow.[185] In order to pass the proportionality test, the Government had to show that the measure was not only suited to achieve its aim in principle, but also that it was necessary to exclude certain categories of people. Since the Government had not offered any weighty reasons which could have justified the difference in treatment, there had been a violation of the applicant's rights under Article 8 taken

[183] *Karner,* paras. 10–15.
[184] *Ibid,* para.40
[185] *Ibid*, para. 41

together with Article 14.[186] The proportionality test accordingly required the Government to show the relationship of necessity between the means and the legitimate aim.

In the admissibility decision of *Manenc v France* (2009), the Court again reverted to lenient scrutiny. The case concerned the inability of the applicant, the surviving partner of a same-sex civil union (*pacte civil de solidarité, PACS*), to claim survivor's pension because it was only available to survivors of a marriage. The Court examined the case under Article 8 taken together with Article 14. It held that the applicant was not in an analogous situation to a survivor of a marriage since the *PACS* differed from marriage as an institution. Moreover, the difference in treatment had not resulted from the applicant's sexual orientation, since he was treated similarly as survivors in a different-sex *PACS*, and indeed most of the couples living in such an arrangement were different-sex. The Court held that as a consequence, the Government had a legitimate aim of protecting the family based on marriage bonds, and the exclusion of the *PACS* scheme from survivor's pension fell within its wide margin of appreciation.[187] The Court did not take into account that unlike different-sex couples, the applicant had not been able to choose between marrying and entering into a *PACS*, since only the latter was available to him.

A similar logic as in *Karner* was applied in the case of *Kozak v Poland* (2010). The applicant had been in a homosexual relationship and cohabited with his partner who was the tenant of their apartment. After his partner's death, the applicant was not allowed to succeed the tenancy and had instead been subjected to eviction proceedings. He invoked Articles 6, 8 and 14 before the Court. The facts surrounding his cohabitation with his partner were disputed, and the Government held that the applicant had not been subjected to discriminatory treatment since the reason for the eviction had not been the homosexual nature of his relationship with the former tenant, but rather that unlike in the case of *Karner* where this had been the only reason for differential treatment, in this case the applicant had not fulfilled other material conditions for succession of tenancy either.

The Court accepted, as in *Karner*, that the case fell within the respect for home limb of Article 8 and again examined the case under Article 8 taken together with Article 14. It did not accept the Government's argument that the applicant's homosexuality had not been the reason for the difference in treatment, because the reasonings of the national courts had relied on it. According to the reasonings of the Regional Court, because of the protection of marriage, Polish law did not recognize

[186] *Karner,* paras. 42, 43.
[187] *Manenc,* p. 9.

same-sex relationships and *de facto* cohabitation which was a requirement of the succession of tenancy only existed between a man and a woman. Therefore, the national courts had held that it was unnecessary to examine whether the other conditions had been met.[188]

As in *Karner*, the Court held that the protection of the family in the traditional sense was in principle a weighty and legitimate reason. However, it applied the "living instrument" interpretation and held that any measures designed for the protection of the traditional family had to take into account present-day conditions.[189] It accepted that striking a balance between the traditional family and the rights of sexual minorities were "by the nature of things" a delicate exercise "which may require the State to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition".[190] Although the Court in this way indirectly accepted that the traditional family and the rights of sexual minorities could be fundamentally incompatible, it treated both as legitimate *per se* and solved the case at the proportionality test stage. It held that given the State's narrow margin of appreciation in cases where the difference of treatment was based on sexual orientation, the Government had not shown that it was necessary for the protection of the family in the traditional sense to have a blanket exclusion of same-sex couples from tenancy succession. There had therefore been a violation of Article 8 in conjunction with Article 14.

The case of *X and Others v Austria* (2013) concerned the exclusion of same-sex couples from second-parent adoption. The applicants were two women living together in a same-sex relationship and the biological child of one of the partners. The child's father was known and had established contact with the child. The applicants complained under Articles 8 and 14 that they were treated differently than an unmarried different-sex couple for whom second-parent adoption was possible. The Government argued that the applicants were not treated differently, since adoption was not possible for an unmarried different-sex couple either if the biological parent didn't give their consent. However, Austrian law also operated in a way that the legal ties between the biological parent would be severed if the child was adopted by someone of the same gender. Thus, the adoption by the biological mother's partner in this case would've severed the legal ties between the child and the biological mother. The Government's position was that the policy was necessary for the well-being of the child and the recreation of the biological family.[191]

[188] *Kozak*, paras. 95–97.
[189] *Ibid,* para. 98
[190] *Ibid,* para. 99
[191] *X and Others,* para. 76.

Unlike in the other cases assessed in this subchapter, following the precedent in *Schalk and Kopf,* discussed below in 4.3.2, Court accepted that family life existed between the applicants. Referring to the same case, the Court held that the applicants were not in a similar situation as a married different-sex couple, marriage conferring a special status to those entering into it.[192] However, no such special status existed for unmarried different-sex couples and the applicants were in an analogous situation.[193] Like in *Kozak*, the Court was strict in assessing the legal situation the applicants were in and the aim that was being pursued by the policy. The Court observed that even in the case that the child's father was unknown or dead, adoption would have been impossible for them due to the severing of the biological ties between the biological mother and the child. Thus, although the Government had held that the law's intention was not to exclude same-sex couples, it had such an effect. It referred to the reasonings of the national courts and found that they had cited the protection of the traditional family and the need for the child to grow up in a family with different-sex parents.[194]

Having established the protection of the traditional family as the legitimate aim, alongside with the interests of the child, it applied a logic of reasonings similar to that in *Karner* and *Kozak*: the aim of the protection of the traditional family was abstract, the margin of appreciation was narrow due to the difference in treatment on the basis of sexual orientation, and the burden of proof being on the Government that the realization of these aims required the exclusion of same-sex couples.[195] It pointed out the incoherence of the Austrian system: in reality, a same-sex couple could raise a child together, and the Government had admitted that same-sex couples could be as suitable or unsuitable adoptive parents as different-sex couples, and further, adoption by a single homosexual person was possible. Even so, it was impossible to create legal ties between the child and the second parent in a same-sex couple.[196] The Court also assessed the arguments relating to the interests of the other parties involved, which are not of interest for the purposes of this thesis. Finding that as a whole the means were not proportionate to the aims pursued, there had been a violation of Articles 8 and 14 taken together when it came to the applicants' treatment compared to unmarried different-sex couples, but not to married different-sex couples.

[192] *X and Others,* paras. 105–110.
[193] *Ibid,* para. 112.
[194] *Ibid,* para. 137.
[195] *Ibid,* paras. 138–141.
[196] *Ibid,* paras. 142–144.

In the cases assessed in this subchapter, the Court established a line of reasoning that difference in treatment on the basis of sexual orientation requires particularly weighty reasons of justification and that a narrow margin of appreciation results from it, requiring the Government to justify why the policy in question is necessary. This logic has since *Karner* been used as the basis of finding a violation of Convention rights. However, despite the strict review in the proportionality analysis stage, the Court in no way questioned the legitimacy of the protection of the traditional family such, and it was consistently held to be in principle a legitimate and weighty reason. This is even while it recognized that the traditional family, not a value expressly provided for by the Convention, can conflict with the rights of LGBTI+ people. Further, the cases show its rather categorical privileging of marriage over other long-term relationships simply because of the "special status" of marriage, while ignoring that such a status is *granted by the State* only to certain couples, rather than an inherent characteristic of the couples themselves. This allowed it to overlook cases of indirect discrimination in *Mata Estevez* and *Manenc*: if a benefit is only afforded for married couples and marriage is only available to heterosexual couples, the situation disadvantages same-sex couples. Arguing that non-married same-sex couples are not in a similar situation as married different-sex couples is artificial, because the difference of the situation is created by the State.

4.3.2 Legal recognition of relationship status

In this group, I will discuss cases concerning the legal recognition of the relationship status, either as a marriage or a civil union/registered partnership. The group is different from the ones assessed so far because the issue at hand is legal recognition as such and not rights granted to persons in a stable relationship that have not entered into any kind of legally recognized union, and it is a standalone issue, unlike in the transgender cases. In the cases of *Schalk and Kopf v Austria* (2010), *Chapin and Charpentier v France* (2016) and *Ratzenböck and Seydl v Austria* (2018) concern the applicants' inability to enter into their preferred institution of legal protection (marriage in the two former, registered partnership in the latter). The cases of *Vallianatos and Others v Greece* (2013), *Oliari and Others v Italy* (2015), *Taddeucci and McCall v Italy* (2016), *Orlandi and Others v Italy* (2017) and *Fedotova and Others v Russia* concern the lack of any sort of legal protection for same-sex relationships.

The case of *Schalk and Kopf v Austria* (2010) was the first case in which the Court had to consider same sex partners' right to marry as a standalone issue. The applicants, a homosexual couple, complained that their legal impossibility to marry constituted a violation of Article 12. According to them, the concept of marriage had evolved since the entry into force of the Austrian Civil Code in

1812. Moreover, they complained that in the event that one of them died, the surviving partner would be treated less favorably in tax matters when compared to the surviving spouse of a married couple. The applicants and the four NGOs intervening in the case pointed to the Court's case law according to which particularly weighty reasons were needed to justify differential treatment on the basis of sexual orientation. At the time when the application was lodged in 2004, no system of alternative relationship recognition existed in Austria. However, the Registered Partnership Act which granted same-sex couples legal protection resembling that of marriage entered into force in January 2010.

The Government referred to the text of Article 12 and the Court's case law which in their view indicated that the right to marry was "by its very nature" limited to different-sex couples. There was not yet a European consensus on granting same-sex couples the right to marry, and a contrary finding could not be drawn from the different language of the right to marry under Article 9 of the EU Charter of Fundamental Rights that had come into force in 2009, under which the right was worded differently. The Government of the United Kingdom, acting as a third party intervener, argued that Article 12 referred to "the traditional marriage between persons of the opposite biological sex". It held that the case was different than that of *Goodwin*, because it did not concern the right to enter into a different-sex marriage in one's acquired gender, but same-sex marriage about which there was no European consensus, affirming e.g. Sandland's argument that the *Goodwin* judgement upheld the heterosexuality of marriage.

Considering the scope of Article 12, the Court noted that the text referred to men and women. In isolation, it held that it could be interpreted to not mean to exclude marriages between two men or two women. However, considering that every other Convention Article granted rights to "everyone", the Court found that the choice of wording must have been deliberate. It also had regard of the historical period of time when the Article was drafted, when marriage was "clearly understood" to mean traditional marriage between different-sex couples.[197] As discussed above in section 3.1.2, the wording was indeed deliberate, but its purpose was not the exclusion of same-sex couples. Moreover, as Gonzalez-Salzberg points out, the Court resorted to a method of treaty interpretation prohibited by the Vienna Convention on the Law of Treaties. The VCLT allows supplementary means of interpretation only after the textual, teleological and systemic interpretations have been carried out and when the result of such interpretations leaves the definition ambiguous or obscure, or when the supplementary method confirms the result of the primary methods of interpretation. In *Schalk and*

[197] *Schalk and Kopf,* paras. 54–56.

Kopf, the Court used supplementary measures to override the reasonable result of the primary methods of interpretation.[198]

Nonetheless, the Court accepted the logic of the Respondent and the intervening UK Government and concluded that there was no European consensus on the matter of same-sex marriage. While it held that the application was not incompatible with the material scope of Article 12, the Article did not contain an obligation on Member States to allow same-sex couples to marry. In para. 62, it held that "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society."

The Court also examined the case under Article 14 taken in conjunction with Article 8. For the first time, it accepted that the long-term relationship of a same-sex couple fell not only within the sphere of the private life limb of Article 8, but also the family life limb. The Government had not contested this, but rather accepted that there might be good reasons to include same-sex couples in the notion of family life even though the Court had not done so in the past. The Court held that the notion of family life encompassed not only families based on marital ties but also other *de facto* family ties when the persons live together as a family out of wedlock. Given the evolution of the attitudes towards homosexual couples, excluding them from the scope of family life would have been artificial.[199] While this was a positive outcome for same-sex couples, it must be pointed out that this finding was based on the Court's perception of the public opinion in Europe rather than on an independent application of the family life criteria discussed in section 3.1.1.1, *i.e.* the length of the relationship, living together, and the different ways in which the couple could show they were committed to one another.

In its analysis under Article 8 taken together with Article 14, it held that same-sex couples are "just as capable as different-sex couples of entering into stable, committed relationships" and were therefore in an analogous situation with a different-sex couple with regard to their need of legal protection.[200] Then it resorted to observing that since at the time of the judgement the Registered Partnership Act had already come into force, the question it had to answer was whether the Member State had had an obligation to enact such legislation sooner. Although it had referred to the general

[198] Gonzalez-Salzberg (2018), p. 162.
[199] *Schalk and Kopf,* paras. 91–94.
[200] *Ibid,* para. 99

principle of requiring particularly weighty reasons for justifying differential treatment on the basis of sexual orientation, it did not examine if such reasons existed in the case, but rather went on to describe the lack of European consensus on the issue of how to regulate same-sex relationships. Austria could not be blamed for not enacting the Registered Partnership Act sooner, and Member States were not obligated to treat marriage and alternative means of relationship recognition in an absolutely corresponding manner. Rather, it held that as Article 12 did not confer an obligation on Member States to allow same-sex marriage, neither could such an obligation be derived from Articles 8 and 14 taken together, and no Convention right had been violated.

Apart from the lack of consensus, the Court did not provide any reasons for why this differential treatment was allowed. As discussed in section 3.1.3, although the Court often accepts the interest submitted by the State, the existence of a legitimate interest capable of justifying differential treatment, and the width of the margin of the appreciation that is a part of the analysis of whether the measures are proportionate to that aim are still different parts of the 4-tier test. In *Schalk and Kopf*, the Court muddled them into one. This critique was raised by the dissenting judges Rozakis, Spielmann and Jebens, who also pointed out that the Respondent had not offered any legitimate aim as justification.

In his rewritten version of the *Schalk and Kopf* judgement, Lau rightly criticizes some of the Court's methods. Firstly, the requirement of "particularly serious reasons" for justifying differential treatment on the basis of sexual orientation is "toothless" if the Court lacks the power to examine the existence of such reasons. Secondly, due to stigmatization and the lacking political power of minorities referred to above in 3.2, national authorities are not in a better position than the Court to examine whether differential treatment on the basis of sexual minorities is justified.[201] Then he suggests that applying a strict review justified (or even required) by these factors, the Court should have looked at the reasons given for the differential treatment. Since the Government had not provided any reasons by way of justification but had relied solely on the margin of appreciation, Lau then examines reasons relating to healthy families and the well-being of children given in similar cases abroad and finds that these are mere speculation since social science research does not support such positions.[202]

The case of *Vallianatos and others v Greece* (2013) concerned same-sex couples in stable relationships who, invoking Articles 8 and 14, complained over the fact that a new law that introduced

[201] Lau (2013), p. 247–249.
[202] *Ibid,* p. 250–251.

civil unions reserved such unions for different-sex couples only, which introduced a distinction between different-sex and same-sex couples. The law was intended to reflect the reality that an increasing number of children were born to cohabiting couples who were not married and was meant to offer a more flexible framework of legal protection than marriage, but according to the drafters, religious and civil marriages remained the best options for legal, financial and social protection.[203] The applicants were of the view that this amounted to discrimination in their enjoyment of family life on the basis of their sexual orientation.

The Government argued that the intention of the law was to give legal protection to couples who have biological children together without obligating them to marry, and give legal protection to the children. This was meant to protect the institution of marriage and the family in the traditional sense, because in the Government's view the decision to enter into marriage should not be based on the fear of lacking legal protection, but instead on mutual commitment. Same-sex couples, on the other hand, could not have biological children and therefore did not need such protection. Irrespective of whether the view that only families with biological children should be provided protection is acceptable, when compared to some other arguments about protecting the traditional marriage, the Greek Government's position was based on substantive reasons since they gave a definition of what marriage was in their view (a union between different-sex people based on mutual commitment), why the law was needed to protect it (less pressure on couples to enter marriage for reasons other than commitment), and a substantive reason why same-sex couples were not in a similar position.

However, the Court did not accept this line of argumentation. Firstly, it accepted that the claims of all of the applicants, even the couples who did not live together for professional reasons, fell within the scope of the family life limb of Article 8 because their stable and committed relationships (e.g. the sharing of expenses) constituted *de facto* family life. Like in *Schalk and Kopf*, it held that same-sex couples were in a similar situation as different-sex couples in terms of need of legal protection.[204] The Court did not address the argument concerning the inability to have biological children in this context, so I interpret that it was irrelevant for determining whether the applicants were in a comparable situation as different-sex couples who could enter into a civil union.

With regard to proportionality, the Court first dismissed the Government's argument that the applicants could already achieve similar legal and financial protection through other means by stating

[203] *Vallianatos and Others,* paras. 8–10.
[204] *Ibid,* para. 78.

that the legal recognition of a relationship had an intrinsic value that these other measures did not have. The Court found it legitimate to regulate the status of children born out of wedlock, to promote the notion that marriage should be entered into because of mutual commitment, and to protect the family in the traditional sense. However, following the line reasoning established in *Karner*, it gave the State a narrow margin of appreciation and required it to justify why the exclusion of same-sex couples was necessary to achieve the quite abstract aim of protecting the traditional family. It held that from the content of the law, it appeared that its primary purpose was to regulate the life of non-married different-sex couples.[205] The Court held that the Government had failed to justify the different treatment of same-sex couples, and different-sex couples without children, and even went so far as to speculate on the different legislative possibilities to address this issue.[206] The Court also pointed out that same-sex couples had a heightened interest in the protection of civil unions, whereas different-sex couples had the option to marry, and could get legal protection for *de facto* partnerships even without marrying. Finally, even if there was not a clear European consensus on how to treat same-sex relationships, there was a clear trend towards legal recognition and Greece was in an isolated position. Accordingly, there had been a violation of Article 8 taken in conjunction with Article 14.

The cases of *Oliari and others v Italy* (2015) and *Orlandi and others v Italy* (2017) concerned the lack of any legal recognition of same-sex relationships but the issue of the protection of the traditional marriage was not argued for by the Government before the Court. However, the issue was explicitly mentioned in the national courts' reasonings and brought up by other parties, which is why I have included these cases. In *Oliari*, several same-sex couples complained about the lack of civil unions in Italy, which they argued was a violation of their rights under Articles 8 and 14. The Government expressly denied that the legitimate interest was the protection of the traditional family,[207] even though the Constitutional Court had concluded that the constitutional protection of marriage only extended to traditional marriages.[208] Rather, the Government held that while same-sex couples had a right to have their relationship legally recognized, the State enjoyed a wide margin of appreciation given the moral sensitivities surrounding homosexual unions, and there was no obligation on States to provide for same-sex marriage or other forms of legal recognition. Moreover, the Italian Government had been engaged in developing a system of legal recognition for same-sex couples since

[205] *Vallianatos and Others,* para. 86.
[206] *Ibid,* para. 89.
[207] *Oliari and Others,* para. 132.
[208] *Ibid,* para. 19.

1986 and there already existed some forms of protection for same-sex family life even in the absence of civil unions or marriage. The European Centre for Law and Justice (ECLJ), which intervened in favor of the Government, held that the protection of the family in the traditional sense was a legitimate interest.[209]

The *Orlandi* case concerned the inability of same-sex couples who had married abroad to have their marriage registered in Italy, even as a civil union. In the national proceedings, the Italian courts had referred to the definition of marriage as only including traditional marriages between men and women. The ECLJ and ADF, both intervening in favor of the Government, referred to this definition. The applicants contended that the only reason why they were treated differently than different-sex couples who had married abroad was the aim of protecting a concept of marriage as a heterosexual union and the idea of the traditional family. However, the Government did not invoke the protection of the traditional marriage as its legitimate interest, and instead referred to public order.

Oliari was assessed from the perspective of positive obligations under Article 8, while in *Orlandi*, the Court applied Article 8 alone and while it proclaimed that it was unnecessary to differentiate between positive and negative obligations in the case,[210] it reviewed the case under the "fair balance" test applied under the positive obligations approach. On the basis of the conclusions of the assessment under Article 8, it didn't conduct a separate assessment under Articles 8 and 14 taken together. In *Oliari*, it also assessed the case under Article 12 alone and taken together with Article 14. However, this assessment was rather insubstantial, as the Court essentially only repeated what it had held in *Schalk and Kopf,* basing its argumentation solely on the width of the margin of appreciation, and found this part of the application manifestly ill-founded.[211] In *Orlandi*, it theld that an Article 12 assessment was unnecessary.[212]

In both cases, the Court did not engage with the arguments of the applicant or the third party interveners concerning the legitimate interest in question, and solely focused on the Government's submission. In *Oliari*, it held that the Government had "failed to explicitly highlight what, in their view, was the prevailing community interest", given that the data submitted by one of the interveners showed that the majority of Italians accepted same-sex relationships. It noted the inconsistency of the

[209] *Oliari,* para. 155.
[210] *Orlandi,* para. 198.
[211] *Oliari,* paras. 191–194.
[212] *Orlandi*, para. 212.

State's position, since at the national level the courts had developed reasonings related to the issue of whether homosexuals could be encompassed by the traditional family, but the Government had nonetheless not made such a submission.[213] The applicants, on the other hand, had a heightened interest in gaining legal protection for their relationship, which even the highest courts in Italy recognized.[214] This approach is in stark contrast to *Hämäläinen*, where the Government's legitimate interest was not discussed at all by the Grand Chamber.

In *Orlandi*, the Court dismissed the public order interest presented by the State on the basis that it was not provided for in Article 8(2), and further, that this was not in line with the jurisprudence of the domestic courts; the Court of Cassation had explicitly stated that the reason for not registering the applicants' marriages had not been that the situation was contrary to public order, but rather that they could not be recognized as marriages under Italian law.[215] Instead, it held that it could accept the prevention of disorder was a legitimate interest, since Italy may wish to prevent its nationals from having recourse to arrangements which are not legal in Italy.[216] Later in the reasonings, however, it held that the Government had not put forward a prevailing community interest.[217] This inconsistency was noted in the dissenting opinion of judges Pejchal and Wojtyczek.[218] In both cases, the Court held on the basis of the proportionality analysis. It weighed the applicants' situation where there was a significant discrepancy in the social and legal situations against the ambiguity or lack of legitimate aims provided by the Government and held that there had been a violation of the applicants' rights under Article 8.

Same-sex marriage was again the issue in the case of *Chapin and Charpentier v France* (2016), but this time, the applicants' marriage banns had been published and their marriage had already been registered, but had since then been declared null on the basis that the spouses being different-sex was a condition of marriage under French law. The Court repeated its findings in *Schalk and Kopf*: Article 12 was intended for the protection of the traditional marriage and in the absence of a European consensus – despite the gradual evolutions that it had accepted to have taken place in *Oliari* – there was no reason to assess the case differently from *Schalk and Kopf*.[219]

[213] *Oliari,* para. 176.
[214] *Ibid,* paras. 176, 179
[215] *Orlandi,* paras. 62–65, 200.
[216] *Ibid,* paras. 207.
[217] *Ibid,* 209.
[218] *Ibid*, para. 12 of the dissenting opinion.
[219] *Chapin and Charpentier,* paras. 36–39.

The applicants further complained that the situation violated their rights under Article 8 taken in conjunction with Article 14 since, although they could enter into a civil union *(PACS*), the legal protection was weaker than that of marriage. The Court held that following from *Schalk and Kopf*, a right to same-sex marriage could not be derived from Article 8 taken together with Article 14, and the State was free to determine the status conferred by other forms of legal protection. The applicants had the option of entering into a *PACS*, and it was not for the Court to examine all the differences of the two institutions in detail, since the *PACS* was similar to civil union schemes in other Member States and thus fell within France's margin of appreciation.[220] Therefore, none of the applicants' Convention rights had been violated.

The case of *Taddeucci and McCall v Italy* (2016) concerned the inability of the same-sex spouse of an Italian national to get a residence permit on the grounds of family ties. The applicants lived as an unmarried couple in New Zealand, where their relationship status had been legally recognized. They moved to Italy, but the second applicant's application for a continuation of residence permit was denied on the basis of family reasons on the grounds that a same-sex partner was not considered a family member under Italian law. The couple later moved to the Netherlands where they got married. They complained that their rights under Articles 8 and 14 had been violated because the reason for denying the residence permit was their sexual orientation.

The Government argued that the protection of the family was a legitimate reason for treating homosexual relationships differently than heterosexual ones, and that the relationship between two men did not fall into the scope of the family life limb of Article 8. To support this point, the Government referred to case law from the 1980s and 1990s,[221] which had been overturned by *Schalk and Kopf* as far as it comes to the exclusion of same-sex relationships from the scope of family life. It also pointed out that Italian legislation was in accordance with Directive 2004/38/EC, according to which a family member for the purposes of residence is, *inter alia*, the same-sex partner with whom an EEA national has entered into a registered partnership, *if* the Member State treats registered partnerships as equivalent to marriage. The Government argued that it was within the State's margin of appreciation to decide whether same-sex couples could enjoy the same rights as members of the traditional family.

[220] *Chapin and Charpentier,* paras. 49–50.
[221] *Taddeucci and McCall,* para. 42.

In line with more recent case law, the Court accepted that the applicants' relationship fell within the scope of family life within the meaning of Article 8, and examined the case under Article 8 taken together with Article 14. The denial of the residence permit prevented them from living together in Italy, which was an interference of an essential aspect of their family life.[222] It held that while it did not appear that the applicants were treated any differently than unmarried different-sex couples, it had to be taken into account that unlike heterosexual couples, the applicants were not able to marry in Italy. Only homosexual couples faced an "insurmountable obstacle" in acquiring a residence permit, which amounted to a presumption of indirect discrimination.[223] The case was therefore one of alleged indirect discrimination. As we recall, in earlier cases the Court had not recognized discrimination resulting from limiting certain rights to marriage and reserving marriage for different-sex couples only.

The Court again held that differences based on sexual orientation required particularly weighty reasons of justification, and the burden of proof was on the Government.[224] When assessing the existence of such a justification, it departed from previous case law, holding that while the "protection of the traditional family *may, in some circumstances*, amount to a legitimate aim under Article 14 [emphasis by author]", it could not be considered "particularly convincing and weighty" in the circumstances of the present case.[225] In previous cases, the Court had accepted the protection of the traditional family as "in principle" a weighty and legitimate reason, and instead found a violation on the basis that there was no reasonable relationship of proportionality or fair balance between the legitimate aims and the means sought to achieve it. The Government had not put forward any other legitimate aims. The fact that the applicants were treated the same way as heterosexual couples who had not, and did not wish to, regularize their relationship, when no such means were available to the applicants, amounted to a violation of Articles 8 and 14.

The case of *Ratzenböck and Seydl v Austria* (2018) is different from the other cases examined here in the sense that it does not directly concern the rights of sexual or gender minorities. I have included it since it nonetheless concerns the differentiation between different-sex and same-sex relationships, a key issue in this thesis. The applicants were a cisgender heterosexual couple who had lived in a stable relationship and applied for registered partnership. They were denied this on the grounds that

[222] *Taddeucci and McCall,* paras. 58, 60.
[223] *Ibid,* paras. 81–83.
[224] *Ibid,* paras. 89, 90.
[225] *Ibid,* para. 93.

under Austrian law, registered partnerships were reserved only for same-sex couples. The applicants did not wish to enter into a marriage, because in their view it was substantially different than a registered partnership and not suitable for them. According to them, a registered partnership was "lighter" and more modern than marriage. They argued that what the Court had held in *Schalk and Kopf* concerning marriage did not apply to registered partnerships because they were a new kind of legal institution. The applicants also pointed out that, unlike marriage, registered partnership as an institution was not "based on long-standing discriminatory tradition and deep-rooted social connotations, nor aimed at possible procreation".[226] The applicants thus stand out for not viewing marriage as something desirable, and even directly question its hailed quality as an institution. They held that while States had no obligation to introduce registered partnerships in their legal systems, if they chose to do so, it was a violation of Articles 8 and 14 to exclude different-sex couples from its scope.

The Government, on the other hand, held that it was obligated to create only one institution for the legal recognition of stable relationships, and that it was allowed to create separate institutions for same-sex and different-sex relationships. It argued that the exclusion of different-sex couples from registered partnerships and leaving marriage as the only option for them pursued the legitimate aim of supporting and promoting the traditional family model. Moreover, there was no European consensus on whether different-sex couples could enter into a registered partnership.[227]

The Court held that since Article 8 is not confined to only marriage-based families but also other *de facto* families, both Articles 8 and 14 applied. In principle, different-sex and same-sex couples were in a relevantly similar situation in need of legal protection. However, the situation had to be examined in light of the overall framework of legal relationship recognition. In Austria, registered partnerships were introduced as a way of giving legal protection to same-sex couples who were excluded from marriage, and the two institutions are largely complementary. Since the applicants had the option of entering into marriage and they had not cited any specific effects of the differences in law on them, there had been no violation of their Convention rights. The Court came to this conclusion without assessing the legitimacy or proportionality of the aim of protecting the traditional marriage. This is unfortunate, since the strategy of protecting the traditional marriage by forcing different-sex couples to marry if they wish to get any type of legal protection (compare to the *Vallianatos* case discussed above) and the legitimacy of maintaining two "separate but (almost) equal" institutions of relationship

[226] *Ratzenböck and Seydl,* para. 9.
[227] *Ibid,* paras.24–26.

protection would have merited further discussion. In assessing the applicant's reasons for preferring registered partnership, which invited it to assess marriage as an institution, it simply concluded that the applicants have not been specially affected.

In their joint dissenting opinion, judges Tsotsoria and Grozev pointed out that the Court concluded that the applicants have not been discriminated against on the basis that they were not in a comparable situation with same-sex couples since they already had access to marriage. They considered this approach unconvincing, since it muddled the two aspects of the test under Article 14, *i.e.* difference of treatment and justification. They pointed out that the Court did not treat same-sex and different-sex couples as groups on the basis of social reality, but rather as groups created by legislation that could be treated differently simply because the legislator saw this as appropriate. In the final sentence of the dissenting opinion, they pointed out that a justification that is not related to hundreds of years of history and tradition but instead new legislative choices runs the risk of stereotyping the differences of heterosexual and homosexual relationships. While this point is important, the judges do not address the issue that it is also problematic to treat a tradition as a justification simply because it is a tradition, especially if said tradition is also based on hundreds of years of stereotyping.

The case of *Fedotova and Others v Russia* (2021) concerned the applicants' inability to get any form of legal recognition, the facts of the case being similar to those in *Vallianatos, Oliari* and *Orlandi*. The applicants complained under Articles 8 and 14. In this case, the Government aimed to protect "the interests of the traditional family unit" which was granted special protection by the State, arguing also that marriage was a "historically determined union between a person of male and a person of female sex, which regulates relationship between the two sexes and determines a status of a child in society".[228] The Government referred also to the necessity of protecting children from the promotion of homosexuality, which created "a distorted image of the social equivalence of traditional and non-traditional marital relations". It also referred to statistics showing that the majority of the Russian population held negative views of homosexuals.[229]

The Court assessed the situation under Article 8 alone from the perspective of positive obligations and held that the notion of "respect" for family life was not clear cut.[230] However, in determining the width of the margin of appreciation, it gave decisive weight to the fact that the situation concerned a

[228] *Fedotova,* para. 32.
[229] *Ibid,* paras. 34–35.
[230] *Ibid,* paras. 44–45.

particularly important facet of the individual's identity, and repeated its position that same-sex couples were just as capable of entering into committed relationships as different-sex couples and thus in an analogous situation when it comes to the need of legal protection.[231] It proceeded to assess the difficulties that the non-access to legal protection caused and placed weight on the differences of the legal and social realities.[232] It held that it would be contrary to the underlying values of the Convention to allow the opinion of the majority to limit the rights of a minority, and dismissed the argument about protecting minors from the promotion of homosexuality as irrelevant.[233]

When it came to the protection of the traditional marriage, the Court again held that it was in principle a weighty and legitimate reason. However, this time, it pronounced that legalizing same-sex unions didn't pose any risks to traditional marriage because it didn't prevent different-sex couples from entering into a traditional marriage or enjoying its benefits.[234] This can be seen as groundbreaking, since in no other case has the Court questioned why the traditional marriage would need protection from the recognition of same-sex unions. Such a critical approach has been completely absent in cases like *Hämäläinen.*

However, this position was watered down by the Court's reasonings in para. 56, where it held that granting legal protection to the applicants was not in conflict with the Government's aim to protect the traditional family or the views of the majority of the population, since such views were only opposed to marriage and not other forms of legal protection. This suggests that despite the above, The Court is still willing differentiate between same-sex and different-sex relationships when it comes to marriage. Moreover, even though the Court had held that the negative opinions of the majority could not justify the denial of rights to a minority, the wording of para. 56 nonetheless suggests that such views were relevant in the conclusion. Otherwise, it would not have been necessary to assess whether the situation was contrary to the majority's view or not. The Court found a violation of Article 8 and, on the basis of its findings under Article 8 alone, also a violation of Article 14 taken together with Article 8, without separate reasonings under Article 14.[235] The methodology is interesting, given that the Court did refer to the principle of the comparability between same-sex and different-sex couples, but didn't carry out a fully-fledged assessment under Article 14.

[231] *Fedotova,* paras. 47–48.
[232] *Ibid,* para. 51.
[233] *Ibid,* paras. 52–53.
[234] *Ibid,* para. 54.
[235] *Ibid,* para. 57.

The cases examined in this subchapter show that when the case concerns the inability of same-sex couples to get *any* type of legal protection, the Court uses a line of reasonings similar to that in *Karner*, requiring the State to really justify the difference of treatment and even critically examining the proposed aims and holding inconsistencies against the State. On the contrary, when the cases directly challenge the inability of same-sex couples to *marry*, the Court uses the concept of the traditional marriage at the stage of defining the scope of the rights and even goes so far as simply assuming that a legitimate aim exists even when the Government hasn't presented one. Thus, the definition of the traditional marriage as a heterosexual union appears to have a dual function in such cases: since the right to marry under Article 12 is defined in heterosexual terms, it is also assumed as a legitimate aim and this doesn't require a separate assessment in the legitimate aims stage. An unwillingness to discuss why marriage should be reserved to heterosexual unions can be seen even in the cases where the Court did find a violation, for example in *Orlandi*: even though the issue of the case was the non-registration of the applicants' foreign *marriages*, the case was only assessed under Article 8 and not Article 12. This resulted in the Court finding a violation on the basis that the applicants lacked *any* legal protection and not on the basis that they couldn't remain married under Italian law.

4.4 Case group 3: Gender equality and other issues

This group of cases is a collection of "misfit" cases that do not fall into any of the other categories discussed. The cases of *Marckx v Belgium* (1979), *Ünal Tekeli v Turkey* (2005), *Konstantin Markin v Russia* (2012) and *Beizaras and Levickas v Lithuania* (2020) concern issues of gender equality, the position of illegitimate children, and protection from homophobic hate speech. A unifying feature is that while the Government uses (a feature of) the traditional family model as a justification, it also explains that the policy is in *some* manner intended to further gender equality or a related aim. Moreover, all the cases concern rather overt instances of alleged discrimination. In these cases, the Court responds to the invitation to discuss the relationship of the traditional family to other aims in quite a detailed manner, sometimes inadvertently contradicting its own previous case law.

The case of *Marckx v Belgium* (1979) concerned legislation under which no legal bond between an unmarried mother and her biological child was created by virtue of birth, but instead the mother had to recognize her child in order to become their guardian. Even upon the establishment of maternal affiliation, the child did not become a member of the mother's family but only had a legal bond with the mother, and had poorer inheritance and intestacy rights than "legitimate" children. In order to improve the child's status, the mother could adopt them. By contrast, the child of a married couple automatically became a part of the family. The applicants were a single mother and her child, Paula

and Alexandra Marckx, who claimed the situation violated Articles 3, 8, 12 and 14 of the Convention and Article 1 of Protocol no. 1.

I will limit my discussion to the reasonings concerning Articles 8, 12 and 14, since these are the ones directly relevant to the scope of this thesis. *Marckx v Belgium* being an early case, the Court's argumentation does not follow the typical pattern, since many of the judgements where the general principles and methods were established (eg. *Tyrer, Golder, Airey* and *Handyside*) had been adopted only a couple of years before, or even after, the *Marckx* case. It follows that the methodological choices of the Court, e.g. the complete lack of the proportionality test in some parts, are less striking than they would be in a more modern case. Consequently, the more interesting parts of the *Marckx* judgement are the substantive arguments that the Court presents. The judgement is long and the Court deals separately with the issues of maternal affiliation, family relationships and patrimonial rights, under Article 8 alone and taken together with other Articles. However, the main substantive arguments are made in paragraphs 40-41 in the part concerning maternal affiliation, and the Court refers back to these in later parts of the judgement. For the purposes of this thesis, it is therefore most fruitful to focus on this part of the judgement.

Concerning the complaint under Article 8, the Court first clarified that the family life limb of Article 8 makes no distinction between "legitimate" and "illegitimate" families, and that the family of a single mother and her child was a family form no less than others. Given that Paula Marckx had also assumed responsibility for her daughter since the moment of birth, a real family tie existed between them.[236] It reiterated that birth is a protected ground and examined the case under Article 8 alone and taken together with Article 14, assessing the issues of establishing maternal affiliation and other familial relationships separately. With respect to Article 8 taken alone concerning both issues, the Court found a violation of the positive obligations under Article 8 simply on the basis of recounting the legal situation in Belgium and how it hindered the development of normal family life, without looking at the Government's justification or performing a proportionality test.[237]

In the assessment of the alleged violation of Article 8 taken together with Article 14, the Court took account of the Government's justification. On the issue of maternal affiliation, according to the Government, whereas married couples mutually undertook the responsibility of raising a child, it was not certain that unmarried mothers would want to raise the child alone and therefore the legislation

[236] *Marckx,* para. 31.
[237] *Ibid,* para. 36–37; 45–47.

gave them a choice to not recognize the child, thus invoking that the legislation was intended for the benefit of people like the applicant. While it recognized that the law favored the traditional family, its purpose was to ensure that family's full development and thus had an objective and reasonable justification relating to morals and public order. [238]

The Court held that while the promotion of the traditional family was in itself legitimate or even praiseworthy, it could not be achieved by measures whose object or result is prejudicing the "illegitimate family".[239] It applied the "living instrument" interpretation, first used in the *Tyrer* judgement the previous year, in arguing that although at the time of the adoption of the Convention, distinctions between "legitimate" and "illegitimate" families had been normal, the Convention must be interpreted in light of present-day conditions. On the issue of family relationships, the Court observed that the Government had not put forward any other arguments than those it had already relied upon. It held that "[a]dmittedly, the "tranquility" of "legitimate" families may sometimes be disturbed if an "illegitimate" child is included, in the eyes of the law, in his mother's family on the same footing as a child born in wedlock, but this is not a motive that justifies depriving the former child of fundamental rights."[240] It looked at European and international consensus and found that the evolution of the domestic law of a "great majority" of European states towards the principle of *mater semper certa est* and adoption of the Brussels Convention on the Establishment of Maternal Affiliation of Natural Children (1962) and the European Convention on the Legal Status of Children born out of Wedlock (1975), despite being ratified by only a handful of Member States, were evidence of the modern standard of treating "legitimate" and "illegitimate" families equally.[241]

Concerning Article 12, the applicants complained that the legislation did not respect Paula Marckx's choice not to marry, which they asserted was inherent in Article 12. Moreover, the fact that married and unmarried parents did not have the same rights also violated Article 12. The Court dismissed this argument simply by stating that there was no legal obstacle for Paula Marckx to exercise her freedom not to marry, it was not necessary for the Court to examine whether such a right was encompassed by Article 12. It held that it was not required that all the legal effects that are attached to marriage should also apply to situations that in a certain respect are comparable to marriage, and found that the case fell outside of the scope of Article 12.[242]

[238] *Marckx,* paras. 39–40.
[239] *Ibid,* para. 40.
[240] *Ibid,* para. 48.
[241] *Ibid,* para. 41.
[242] *Ibid,* para. 67.

In the *Marckx* case, the Court accordingly found that the promotion of the traditional family could not happen at the expense of "illegitimate" families, and simply the "disturbed tranquility" of traditional families was not reason enough for differential treatment. It is implicated in the reasonings that the Court is able to distinguish between measures that actually benefit traditional families, and measures that simply disadvantage other family forms. Moreover, the moral disapproval of members of a privileged group is not a good enough justification.

The case of *Ünal Tekeli v Turkey* (2005) concerned the inability of a married woman to continue using her maiden name in official documentation after taking her husband's last name as required by Turkish law. The applicant submitted that she had been discriminated against in her enjoyment of her Article 8 rights, since men were allowed to keep their own surname upon marriage. The Government accepted that there had been a difference in treatment, but that it was justified because there was a link between family unity and family name, and Turkey had opted for the traditional arrangement of having the husband's surname as the family name, and moreover, that this was intended to strengthen the wife's position in a family since the majority of women in Turkey had very limited economic freedom.[243] Although the Government did not use the term "traditional family", it is evident that the arrangement stemmed from an aspect of the traditional family, *i.e.* the husband's status as the head of the family,

The Court accepted that the case fell within the scope of Article 8 and examined it taken together with Article 14. It held that there was "undoubtedly" differential treatment of persons in an analogous situation, and the Government's submission concerning economic independence was irrelevant in this respect.[244] In line with its position that gender is a suspect category of protected grounds, it held that there must be "compelling reasons" for treating men and women differently.[245] It pointed out that advancing gender equality was contemporarily a major goal of the Council of Europe Member States and internationally.[246] There was a European consensus on allowing the spouses to choose their surname on an equal footing, and Turkey was the only Member State which compelled women to take their husband's names.

[243] *Ünal Tekeli,* paras. 44–46.
[244] *Ibid,* paras. 55–56.
[245] *Ibid,* para. 58.
[246] *Ibid,* paras. 59–60.

The Court also pointed out that on a general level, Turkey was posited outside of the trend of promoting gender equality. Until legislative changes in 2001, the husband had had a dominant position in the family. The Court held that the tradition of having the husband's surname as the family name derived from the husband's primary and the wife's secondary role in the family.[247] It held that family unity could just as well be reflected by choosing the wife's surname or a joint name as a family name, and concluded that the differential treatment did not have an objective and reasonable justification, thus violating Article 8 taken together with Article 14.

In the case of *Konstantin Markin v Russia* (2012), the applicant served in the military and he and his ex-wife had entered into an agreement that their three children would live with the applicant, and the ex-wife paid maintenance for them. As the father of a newborn baby, the applicant requested for three years of parental leave, but he was granted only three months because three years were available only for women. He argued that he was discriminated against in his enjoyment of his rights under Article 8, since parental leave was necessary to promote his family life and the interests of his children, but he was treated differently than servicewomen as well as civilian men and women.

The Government contested the applicability of Article 8 to parental leave. They cited national security and the need to prevent long absences of servicemen as justification. Servicewomen were granted an exception because there existed a special psychological and biological bond between the newborn and the mother and it was essential for the child that the mother was present in its first years of life. The Government did not explicitly invoke the protection of the traditional family as a legitimate aim, but rather traditional gender roles according to which childrearing is the role of women. I am examining this case since the gendered division of work is a key aspect of the traditional family ideology, and the Court entered into a detailed discussion about it. I will not discuss the arguments concerning national security any more than is immediately linked to the question of gender roles.

In stating the general principles, the Court stated that the advancement of gender equality is a major goal for Member States, and that "[i]n particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex. For example, States are prevented from imposing traditions that derive from the man's primordial role and the woman's secondary role in the family".[248]

[247] *Konstantin Markin,* paras. 62–63.
[248] *Ibid,* paras. 126–127.

The Court found the situation to fall within the scope of Article 8 and examined the issue under Article 8 taken together with Article 14. It held that the purpose of parental leave was to allow the parent to personally take care of the child and, while there were certain differences with the father's and mother's relationship with the child, the applicant was in an analogous situation to servicewomen in his need for parental leave.[249] It referred to the European trend of more equal sharing of childcare responsibilities between mother and fathers. It disagreed with the Government that the longer period of parental leave for servicewomen could be justified as "positive discrimination", as it clearly did not aim at correcting the disadvantaged position of women in society, but instead perpetuated gender stereotypes that were harmful both to women's careers and men's family life.[250] Differential treatment could not be justified by traditions prevailing in a certain country, nor could traditional gender roles be used to exclude servicemen from longer parental leave.[251] The Court was not persuaded by the Government's arguments about the detrimental effect of servicemen's parental leave to fighting power, and found a violation of the applicant's rights under Articles 8 and 14. The position was contrary to what the Court's opinion in eg. *Schalk and Kopf*, where the wide margin of appreciation awarded to the State was in part motivated by the different cultural traditions relating to marriage.

The case of *Beizaras and Levickas v Lithuania* (2020) differs from the other cases examined in that it does not concern the State's family policies directly, but rather lacking protection against hate speech motivated by adherence to "traditional family values". The applicants were a gay couple, and the first applicant had posted on Facebook a photo of the two of them kissing, after a series of posts relating to combating homophobia. The photo went viral online and received numerous hateful, aggressive and threatening comments that called for physical violence against the applicants. The photo was later shared by local LGBTI+ associations showing support for the applicants. No pre-trial investigation was opened because the national authorities found, with reference to traditional family values, that while the comments had been unethical, they were not criminal. The applicants argued that this was a violation of their rights under Article 8 taken together with Article 14 and they had been treated differently because of their sexual orientation, and further that they lacked an effective remedy within the meaning of Article 13. The case concerns the balancing of respect for private life against freedom of expression, and since the latter is not the focus of this thesis, I will not discuss parts of the judgement that concern Article 13 or the principles relating to freedom of expression.

[249] *Konstantin Markin,* para. 132.
[250] *Ibid,* para. 141.
[251] *Ibid,* para. 142.

The Government argued that the intention of posting the photo on Facebook had not been to announce their relationship as the applicants claimed, but to start a discussion on LGBTI+ rights in Lithuania, and they had foreseen the negative reaction. It had been made in the context of heated public discussion, and the photo had been provocative on account of the kiss. According to the Government, traditional family values did not mean that homosexuals were not tolerated in Lithuania, and that the national authorities had simply meant that the applicants themselves had acted in a provocative manner by deliberately making a post that contradicted the values that were constitutionally protected in Lithuania.

In stating the general principles, the Court highlighted the meaning of a "democratic society" as one of broadmindedness and respect for diversity, as well as the importance of fair treatment of minorities even in the face of contrary views of the majority.[252] The case fell within the scope of the applicants' private life because the comments had affected their psychological well-being and dignity, and thus Articles 8 and 14 were applicable.[253] It referred to the national authorities' finding that sharing a photo of two men kissing did not advance social cohesion or tolerance and that it would have been preferable that they had shared such pictures only with "like-minded" people and held that it showed that at least in part, the reason for the domestic authorities not opening criminal proceedings was their disapproval of the applicants' demonstration of their homosexuality.[254]

The Court referred to the position in e.g. *Kozak v Poland* that while the promotion of the traditional family was in principle a weighty and legitimate reason, it could be advanced by a number of measures, and further, the Convention's nature as a living instrument meant that societal changes had to be taken into account when designing such measures. The Court did not define traditional family values, but from the Government's submission it transpires that these included the position that the family should be the basis of society and that marriage is between a man and a woman.[255] The national authorities had alleged incompatibility between "maintaining family values as the foundation of society" and accepting homosexuality, but the Court disagreed and held that it saw no reason to view them as incompatible, given the emerging tendency of viewing same-sex relationships as falling within the concept of family life.[256] This is curious, given that in the *Kozak* case cited by the Court, it had found that it was possible to hold these two aspects as "fundamentally incompatible"; the

[252] *Beizaras and Levickas,* paras. 106–107.
[253] *Ibid,* para. 117.
[254] *Ibid,* para. 121.
[255] *Ibid,* para. 21.
[256] *Ibid,* para. 122.

reference to the living instrument doctrine following the *Kozak* reference likely partly explains this change of opinion, and the Court further argued in support of this position by referring to the Lithuanian Constitutional Court's rather liberal positions on the relationship between family, marriage and homosexuality.[257]

The Court also highlighted that it "for its part, has also held that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights would become merely theoretical rather than practical and effective, as required by the Convention."[258] This is noteworthy, given the Court's own tendency, showcased by the cases discussed above, to refer to the lack of European consensus as the reason for excluding homosexuals from the scope of certain rights, on the one hand, and motivating their inclusion by referral to an emerging consensus on their acceptance, on the other hand.

On the basis of these findings, the Court held that there was a *prima facie* case of differential treatment on the basis of sexual orientation.[259] After discussing the nature of the comments in light of its principles concerning freedom of expression, the Court found that they had constituted incitement to violence, and that the domestic authorities had not discharged their positive obligation to investigate it because of their biased attitude towards the applicants, which resulted in a violation of Article 8 taken together with Article 14.

In the cases discussed in this group, the Court was very critical of the aims the Government had submitted. It was not persuaded by the arguments that the measures were intended for the protection of persons in the applicants' situation. It was able to look 'beyond' and determine when it was trying to justify policies based on stereotypes in the name of traditions, condemning this. While in some other cases the Court has assessed the proportionality of the measures critically and see the inconsistency of the situation, this case group stands out because the Court was willing 'unmask' the Government's proposed aims.

4.5 Alternative reasonings: queering *Ratzenböck and Seydl v Austria*

[257] *Beizaras and Levickas,* para. 123.
[258] *Ibid.*
[259] *Ibid,* para. 124.

Ratzenböck and Seydl v Austria is arguably the queerest case discussed in this thesis. Unlike the applicants in the majority of the cases who asked for extension of relationship related rights to themselves, ie. a legitimatization and normalization of their relationship, the applicants in *Ratzenböck and Seydl* asked to *not* be forced into the privileged model. Instead of only arguing that a registered partnership is more suitable to the couple's individual needs, they also challenged the worth of marriage as an institution. Moreover, in the context of this thesis, the case is queer because the focus is mainly on the interests of sexual and gender minorities, while *Ratzenböck and Seydl* is about the interests of a heterosexual couple. It also shows how the Court's rigid enforcement of the binary (privileged and non-privileged) relationship categories hurts not only those excluded from the privileged category, but those included in them as well.

Since the case has already been discussed in chapter 3.5.2, it is not necessary to review the facts or the applicant's arguments in more detail, but I will go over where the issue lies. The Court accepted the case as falling in the scope of family life in the meaning of Article 8, and held that different-sex relationships and same-sex relationships are in principle in an analogous situation and assessed the case under Articles 8 and 14 taken together. It is evident that there is a difference in treatment between same-sex couples, who can enter into a registered partnerships but not marry, and the applicants, who can marry but not enter into a registered partnership. The difference in the queer version would thus focus on the discrimination assessment, specifically the existence of "an objective and reasonable justification". Rather than inserting an alternative section to the original judgement, I attempt to write an imaginary dissenting opinion below. This way, there is more space to engage with the actual arguments of the judges.

1. The Government argued that the State was only required to provide one institution of legal recognition for stable relationships. It held that the exclusion of the applicants from registered partnership served the legitimate aim of supporting and promoting the traditional family model. There was no European consensus on the issue. Moreover, in light of the Court's case law, it was not required that different institutions of legal recognition completely correspond to each other. In essence, the Government's argument is that it is allowed to (1) have two separate institutions of legal protection of relationships, (2) that the content of legal protection of these institutions can be different, (3) that the institution available to the couple depends on their sexuality, and (4) that it is compatible with the Convention that only sexual minorities have access to the institution of lesser protection.

2. From the perspective of queer legal theory, this argument is wholly unpersuasive. It is true that the Court has held in *Schalk and Kopf v Austria* that the State enjoys a certain margin of appreciation when it comes to the exact status conferred by alternative means of relationship recognition. However, the Court has also held that even when a right does not follow from a Convention Article, even when a right does not derive from the Convention but has been voluntarily provided for by the State, it must be applied in accordance with Article 14 if the right falls inside the scope of one or more substantive Convention rights (see eg. *E.B. v France,* § 48). It follows that the State's margin of appreciation does not extend so far as to allow the rules regulating registered partnership and its scope to be discriminatory. Moreover, the Court has on multiple occasions stated that differences based on sexual orientation require particularly serious reasons by way of justification. In such situations, the margin of appreciation must be narrow.

3. It is true that the Court has held that the promotion of the traditional family can, in some circumstances, if not in principle (as per *Taddeucci and McCall v Italy*) be a legitimate aim. However, the Convention is a living instrument that must be interpreted in light of present-day conditions. This means that practices and values that were normal or even praiseworthy at the time of the drafting of the Convention may not necessarily be that in today's conditions (see, *mutatis mutandis, Marckx v Belgium* § 41). The Court has already held that aspects of the traditional family model, such as the disadvantaged position of "illegitimate" children, the husband's primary position in the family, and a division of work based on gender stereotypes are not compatible with the Convention (see the cases of *Marckx v Belgium, Ünal Tekeli v Turkey*, and *Konstantin Markin v Russia*, respectively). However, so far it has continued to accept the privileging of (heterosexual) marriage over other types of relationships, which is the essential reason why the State has created separate systems of legal protection for relationships, from which the applicants may only choose marriage. The above-mentioned principles require the assessment of the legitimacy of such a policy in this case.

4. Firstly, the State's policy of two strictly separated categories of institutions of relationship protection that one has access to on the basis of sexuality presupposes the existence of at least two separate categories of sexuality. This in itself is a notion that can be challenged by queer legal theory, according to which categories of sexuality are not natural or essential but constantly enforced and recreated through law. To emphasize the point, it is useful to look at the Court's case law on sexuality. As has been shown by Gonzalez-Salzberg, the Court's

conception of heterosexuality is tied to marriage. Through the cases of *Cossey*, *Goodwin* and *Hämäläinen*, the Court arrived at a position that those who are married must be heterosexual, regardless of the genitalia or performed/social gender of the couple. Now, the majority opinion enforces the other side of the coin: those who are heterosexual *must* be married, or fall outside of the law completely. It is clear that sexuality, rather than being just an aspect of human diversity that exists in nature, is actively created through law by the Court itself. The Court's definition of sexuality is coherent only in the sense that heterosexuality and marriage are linked, and the former can be defined and redefined to keep marriage heterosexual. In such a construction, it's impossible to identify sexuality before assigning it to its proper legal institution of protection, since one is defined through the other.

5. Secondly, the policy creates a hierarchy between relationships. In order for the promotion of the traditional family model to be legitimate, especially by way of creating two separate and exclusionary institutions that do not have the same material protection, it must be presupposed that the relationship model being promoted is more valuable or worthy of protection. Indeed, the Court has in its case law enforced the idea that marriage is a special and privileged institution *vis-à-vis* other types of relationships and alternative institutions, that it is appropriate to reserve it for heterosexuals, and that it is precisely the value that excludes non-heterosexual relationships (see *R. and F. v the United Kingdom,* p. 14 - 15) Such a position is in stark conflict with the Court's more recently established principles, according to which same-sex and different-sex couples are equally capable of entering into stable and committed relationships and are in an analogous situation when it comes to their need of legal protection. It begs the question why the legal protection afforded to them should be different, and the onus of proof is on the Government.

6. There is an evident hierarchy not only between sexualities but between the two institutions, the legitimacy of which must be engaged with. The Government's argument in essence that the applicants are excluded from registered partnership because it was created to give some (lesser) protection to same sex couples, appearing as a condolence prize to those who have no access to marriage. The applicants' position frustrates the hierarchy between the privileged and non-privileged institutions because rather than entering into a registered partnership because it's the only option available to them, they genuinely find it more desirable and suitable to their needs. To the applicants, registered partnership is the more valuable

institution, not on the basis of a historical or social value assigned to it but on the basis of their individual needs.

7. It follows that promoting the traditional family creates a hierarchy between relationship types that values people differently on the basis of their sexuality, which is contrary to the notion of equal human dignity. While the aim and the measures used to achieve it must be differentiated between, it must be noted that research[260] shows that the effects of policies promoting the traditional family appear to be harmful to both those who live in families set up according to the traditional heterosexual model, but also those who don't. The central method by which one family type is promoted is by excluding other families from protection, which can' be viewed as legitimate. This is all the more so considering that those categories of families are not "pre-existing" in a sense that they'd have distinctly different needs, but are rather artificially created through law, even as the Court recognizes their similar needs.

8. Having established that the promotion of the traditional family model should not be considered a legitimate aim, it's unnecessary to perform the proportionality analysis; however, for the sake of argument, I will do so nonetheless. Even presupposing that the aim is legitimate, there is still no reasonable relationship of proportionality. The Court has recognized that the aim is rather abstract and can be advanced by ma variety of different measures (*Karner v Austria*, § 41). The principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances (*Kozak v Poland*, § 92). The Government have not put forward reasons why two separate and exclusionary categories are suitable or necessary for the promotion of the traditional family. The only thing this promotes is the superior status in the relationship hierarchy, without any evidence of why exclusionary categories benefit actual families formed in accordance with the traditional model. It appears that the policy protects the traditional family as an institution, rather than the well-being or rights of any group of people. Further, I am inclined to disagree with the Government that the policy would even promote the traditional family institution. Forcing heterosexual couples into marrying by denying them other options, when they otherwise wouldn't wish to marry, does not appear to promote the model in any positive sense. Rather, people in the applicants'

[260] See chapter 2

situation may just as well wish to forego legal protection completely, finding marriage too "heavy" and even repressive.

9. In this case, the applicants have demonstrated the material differences between marriage and registered partnership that cause them to prefer the latter. To say that they can still get legal protection by marrying is to dismiss their individual interests and needs that are not met by marriage. The applicants are not asking for the State to tailor an institution of legal protection for people in their situation. Rather, they are in a position where they must choose an institution that is not suitable to them or forego legal protection completely, despite there already existing a model that is suitable for them. Given the many problems explained above behind the reasons of denying them access to their preferred model of legal protection, there is no objective and reasonable justification behind the policy.

10. The immediate outcome of the case should therefore be that the exclusion of the applicants from registered partnership violates their rights under Article 8 and 14 taken together. However, since it is evident from the Government's arguments that the reason for such an exclusion is the need to have separate relationships for different-sex and same-sex couples, which I have argued against, it must be held that whole policy of exclusionary institutions is incompatible with the Convention. A contrary finding would mean that different-sex couples could choose between two institutions, while same-sex couples would only have access to one, and that one that offers less legal protection. Rather, if there are to be two institutions of legal protection for relationships, a queer reading of human rights law would be that couples can choose between the institutions on the basis of their individual needs, rather than the option being dictated by a hierarchy between sexualities.

5 Conclusions

When it comes to the role that the scope of the relevant rights have in the reasonings, the developments in this area must be taken into account as they partly explain the Court's differing approaches. The family life limb of Article 8 has evolved to include same-sex relationships. This explains some of the differences in the Court's approaches, since before this expansion of the scope, in cases like *Mata Estevez v Spain* the applications could be rather summarily dismissed on the grounds that the protection of the traditional family justified the interference or difference in treatment. The right to private life appears therefore to have been somewhat weaker than the right to

family life, because once same-sex relationships are also recognized as constituting family life, it is necessary to give at least some reasons why the traditional family must still be preferred.

The scope of Article 12 has shifted from its original position of applying only to cisgender heterosexual couples to also apply to heterosexual transgender people per *Goodwin,* in which the Court also decoupled traditional marriage from the element of the necessity of reproduction. In its earlier transgender case law, cases were decided simply on the scope of Article 12. Interestingly, in those early cases, especially in *Cossey*, the Court possibly inadvertently endorsed the right to marry of a transgender homosexual person, but this position was changed in *Parry* and *Hämäläinen*. In the case of *Schalk and Kopf,* the scope of Article 12 was expanded to concern same-sex relationships in so far as the Court recognized that marriage must not in all situations be limited to different-sex couples, meaning that same-sex couples' applications will not be dismissed as incompatible *ratione materiae.* However, the State's obligation under Article 12 only extend to different-sex couples. The definition of the right to marry under Article 12 has in many cases – all in group 1 and in *Schalk and Kopf* and *Chapin and Charpentier* in group 2 – been the decisive factor in the Court's reasonings, so much so that it hasn't in all cases even discussed the existence of a legitimate aim or assessed the proportionality of the measures. This has been so even when the Court has held that Article 12 has been applicable and the lack of further reasonings has not resulted from the application being incompatible with the Convention *rationae materiae.*

The protection and promotion of the traditional family and marriage, despite being materially harmful policies with an oppressive history, continue to be legitimate aims. As per usual, the Court very rarely engages in a discussion about the legitimacy of the aim. Moreover, since most of the cases have been decided under a positive obligations approach or a combined assessment of Articles 8 and 14, it has not been necessary for the Court to try and locate the protection of the traditional family in one of the permitted aims listed in Article 8(2). There has been a slight shift in the Court's position regarding the legitimacy, ranging from "praiseworthy" in *Marckx v Belgium* to being a legitimate aim "in principle" in the majority of the cases, and a slight downgrading in *Taddeucci and McCall* where the aim was legitimate only "in certain circumstances". However, in later cases the Court has again held the promotion of the traditional family to be legitimate "in principle".

When accepting the promotion or protection of the traditional marriage or family, which the Court uses quite interchangeably, it rarely provides a definition, but it is clear that its central aspect is heterosexuality. Not only is this evident in the way in which the Court refers to the words "a man and

a woman" in Article 12, it defines marriage through heterosexuality, as discussed in chapters 4.2 and 4.5: those who are allowed to marry must always be heterosexual, despite the circumstances of the case. Moreover, it has disentangled the traditional family/marriage from, or even outright condemned, many of its other relevant aspects. The traditional marriage is no longer necessarily reproductive, neither does the husband have a primary role. A rigid gendered division of work cannot be justified by tradition, and neither can legally preferring "legitimate" children. The Court is clearly capable of expressly renouncing traditions as oppressive when it sees fit to do so.

A slight and recent shift away from the heterosexuality of the traditional family can be identified in *Beizaras and Levickas v Lithuania.* In *Kozak,* the Court had held that same-sex relationship rights could be seen as "fundamentally incompatible" with promoting the traditional family, meaning that simply being homosexual could be enough to exclude the couple from the traditional family. In the *Beizaras and Levickas* case, however, the Court held that it didn't see why traditional family values would be incompatible with homosexuality, given the trend of recognizing same-sex couples as enjoying family life. This could signal that rather than looking at the sexuality of the partners, the Court is starting to pay more attention to the criteria of the existence of family life (length of relationship, living together, commitment for example by having children). However, it must be noted that these criteria are essentially heteronormative: family life can exist between a couple if their life is similar enough to that of a married heterosexual couple. Saying that a same-sex couple is in a similar to a traditional family does not equal to saying that it is encompassed by the notion of the traditional family. Moreover, equating the criteria of the existence of family life with the (changing) definition of the traditional family signals that the traditional family is the only protected family form to which one must conform to. From a queer perspective, it can be argued that rather than artificially extending the definition of the traditional family, legal protection for family life should recognize the diversity of the meaningful relationships based on intimacy and care that individuals may consider forming their families. In any case, the case is so recent that it's not possible to say if the Court is abandoning the heterosexuality of the traditional marriage, which has so far been its defining aspect.

It appears that the Court does not see all of the discriminatory aspects of the concept of the traditional family, especially those relating to gender equality, as parts of the definition. Apart from the Court's overall tendency to not discuss the legitimacy of the aims, this could also explain the lack of discussion. The Court in a sense views the traditional family, which essential aspect is heterosexuality, as a valuable institution, or at least as a neutral one whose preference is up to the State's discretion, and the oppressive traditions in the field of family law are not connected to the

concept of the traditional family. As the discussion in chapter 2 shows, this view is incorrect, as the subservient position of the wife and the gendered division of labor in the nuclear family are inseparable parts of the traditional family model.

Even in the case that the Court has consciously decided to define the traditional family without a reference to its many oppressive features, thereby making the concept more human rights friendly (albeit without an explanation or discussion on this topic), the issue remains that it continues to define the traditional family and especially marriage through heterosexuality, and doesn't see this as problematic. However, as Gonzalez-Salzberg has shown, the heterosexuality of marriage is illusory and even forced; regardless of the gender of the spouses, those who are allowed to be married are heterosexual. And, as discussed above, in the case *Ratzenböck and Seydl* the Court went so far as to accept that those who are heterosexual can be required to be married to acquire any legal protection for their relationship.

Even as the Parliamentary Assembly of the Council of Europe has condemned the rising hate against LGBTI+ people in Europe, the Court continues to ignore the part that legally preferring heterosexual relationships plays in the justification of hate. As discussed above in chapter 2, according to Bamforth and Richards, "laws that target any social group as deserving of unfavorable treatment could be said to objectify members of that group, for the members are stigmatized as being undeserving of full consideration as humans, in a way that non-members of the group would not be--" and laws that fail to grant appropriate legal protection encourage objectification, which can be "powerfully dehumanizing."[261] It fails to make this connection even when the issues are present in the same case: in *Fedotova and Others*, there was a clear link between the Government's argument about the need to protect the traditional marriage and the negative attitudes towards homosexuals in Russia. It submitted that giving legal recognition to same-sex relationships would promote a view that traditional families and same-sex families are similar, which was something that children needed to be protected from. The Court dismissed the argument about the protection of children as irrelevant, but nonetheless affirmed the legitimacy of protecting the traditional marriage. It does dismiss arguments that clearly invoke the inferiority of homosexuals, but does not see the problem when such an argument is advanced more covertly through the promotion of heterosexuality.

[261] Bamforth and Richards (2008), p. 214.

It follows that the Court has different approaches in the proportionality analysis stage, depending on what type of a case it is deciding. In cases such as*, Karner, Kozak, Vallianatos* , *Taddeucci and McCall* and *Fedotova,* where the issue concerns relationship rights that do not directly challenge the supremacy of heterosexual marriage, the Court applies a strict review. These cases are often decided through an assessment of Article 8 (and 12) taken together with Article 14, thus applying the discrimination test. In such cases, the Court has required particularly serious reasons for the differential treatment on the basis of sexual orientation, which has lead to a narrow margin of appreciation for the State. The Court engages in a discussion about the suitability and proportionality about the chosen measures, looking at the reasonings put forward by the national courts and the purpose of the policy explained in the preparatory works of the relevant laws, sometimes even speculating on alternative policy choices. In *Fedotova and* Others, it went so far as to question why the traditional marriage even needed protection in the situation. Further, in the cases of *Konstantin Markin v Russia* and *Ünal Tekeli v Turkey* where the issue was one of gender equality, the Court was ready to 'look beyond' the Government's arguments and conclude that the policy was motivated by stereotypes. Such an approach was also applied in *Beizaras and Levickas v Lithuania*, which concerned hate speech against LGBTI+ individuals. The Court appears to apply a heightened scrutiny in certain 'suspect' cases, when the discrimination is rather overt.

On the other hand, in cases that directly challenge the heterosexuality of marriage and the relationship hierarchy it creates, such as *Hämäläinen v Finland*, *Schalk and Kopf v Austria*, and *Ratzenböck and Seydl v Austria,* the Court has applied a weak judicial review. In *Hämäläinen*, the Grand Chamber conducted the main assessment of the case from the perspective of positive obligations under Article 8 alone, even though a negative obligations approach would've been arguably more suitable, leading to the application of the "fair balance" test instead of the "necessity in a democratic society" test. In *Schalk and Kopf*, *Ratzenböck and Seydl* and *Chapin and Charpentier*, although the cases were assessed under Article 8 taken together with Article 14 at length, the difference in treatment on the basis of sexual orientation did not in these cases lead to a narrow margin of appreciation. Rather, in all of these cases the lack of European consensus rendered the margin of appreciation wide, and the Court relied considerably on the margin of appreciation. Unlike in the strict approach, it didn't require the Government to show the proportionality of the measures or why the difference in treatment was required. In some cases, the Court could even be criticized for methodological errors or plain misapplication of the law, such as resorting to prohibited methods of interpretation or not requiring the State to provide any justification, thereby omitting a part of the test.

I argue that the difference in the Court's level of scrutiny results from its unwillingness to challenge the heterosexuality of marriage. This becomes apparent through all the principles it has established in cases that *don't* challenge it, but which it, due to a more lenient scrutiny, avoids applying in certain cases. The Court has held that same-sex and different-sex couples are in an analogous situation when it comes to their need of legal protection; that differential treatment on the basis of sexual orientation requires particularly serious reasons by way of justification; that the traditional family can be promoted through a number of different means, and even that it might not in all situations need protection; that the means must not only be proportionate but suitable for achieving the aim; that present-day conditions must be taken into account when designing the suitable measures; and that the rights of the minority cannot depend on the acceptance of the majority. The application of all these principles would require a proper discussion about whether the promotion of the traditional family, even if it is considered a legitimate aim as such – which I don't think it is – can justify the exclusion of same-sex couples from the scope of rights. On the basis of all of the above, I argue that if the Court applied such strict review, it would be very difficult for it to continue to hold that the exclusive heterosexuality of marriage is allowed. It has already asked the explicit question of why the traditional marriage would need protection, since nothing about the proposed change would've led to different-sex couples being unable to enter into a marriage or enjoy its benefits. If such an argument was raised in a case directly concerning same-sex marriage, it is difficult to see how the Court could dismiss it. As a consequence, it appears that is resorting to such methodological choices, sometimes even errors, that allow it to avoid this discussion altogether and leave it up to the State's discretion.

Another pattern that transpires from the cases analyzed is that the width of the margin of appreciation in all cases predicted the outcome: in cases where the margin of appreciation was narrow, the Court found a violation, and when it was wide, the State had acted within its discretion. At least in theory, it would be possible to find that, even though the margin was narrow, the State had not overstepped it, or on the contrary, that even a wide margin of appreciation did not cover such measures as the State had chosen to take. The *Handyside* case, one of the cases where the doctrine originates from, certainly implies this: "The Court must decide, on the basis of the data available to it, whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient--".[262] The margin of appreciation is close to being a be-all, end-all factor of the proportionality analysis where, if the margin is deemed to be broad, the Court does not properly assess the relevance and sufficiency of the justification.

[262] *Handyside,* paras. 49–50.

This leads to the role of the margin of appreciation and especially the existence of a European consensus as the decisive factor in minority rights. As discussed above, the Court refers to the lack of consensus when leaving the issue up to the State's margin of appreciation. However, consensus works both ways: in all of the cases assessed, whenever the Court decided to apply the "living instrument" doctrine and expand the rights of minorities, this was done by referring to the emerging European or international consensus. This is despite the Court itself holding that the rights of a minority cannot depend on the acceptance of the majority. While the expansion of human rights protection is in itself laudable, it is extremely problematic that it appears that this is done only if and when consensus allows it.

Firstly, as Lau has argued, minorities, being few in numbers and often vulnerable, usually lack the political power to affect the existence of a consensus. This means that consensus is in effect the opinion of the majority. And yet one of the very purposes of human rights law, as recognized by the Court itself, is to protect the rights of minorities against majoritarian policies. In its reasonings concerning why the margin of appreciation is narrow, the Court has in many cases referred not only to consensus but the growing tendency to accept LGBTI+ individuals and their relationships, making their rights dependent on how favorably the majority views them. From a queer theory perspective, this issue can be framed as rights being granted only to those who are seen as "normal" from a large enough part of the people in Europe.

This leads to the question if the rights of minorities are truly rights in the proper sense. This problem is heightened by the Court's use of the "fair balance" test between competing "interests". It implies that some rights are not fundamental human rights, but simply political interests among others, to be balanced while assuming that both are as such equally weighty, usually without requiring the State to justify why its interest is indeed legitimate and should be on par with the right, and sometimes without even requiring the State to present a legitimate interest at all. Methodology like this in essence hollows out the content of the right when the subject of the right belongs into a minority.

Secondly, the Court treats the lack or emergence of consensus as something that arises naturally, or inevitably in the course of history, and disregards the fact that it is actively shaped by competing political and ideological forces. This is extremely dangerous when there exists a movement that is strategically pushing for the non-acceptance of minorities – and succeeding, to a degree. The question arises how many, or which, Member States are required for the existence of consensus. Will the Court

allow itself to be "held hostage" by a number of States where the conservative anti-human rights movement has succeeded in stalling the progress of same-sex partnership rights, and how long? There is a danger that the Court will move at the pace of the most regressive Member States.

In conclusion, concerning the danger posed to human rights by the ultra-conservative movement, it is unlikely that the traditional family argument will be successful when the question is of gender equality, as the Court has scrutinized such issues strictly. This is not to say that women's rights don't face a threat at all; a brief look back at Agenda Europe's to-do list reminds us that a variety of rights are under attack, including reproductive healthcare, the right to divorce, and general protection against discrimination. The movement uses different arguments strategically, and on the basis of this thesis it's not possible to say how other arguments such as the freedom of religion or the right to life would be treated by the Court.

When it comes to LGBTI+ rights, the traditional family argument is likely to face strict scrutiny at least when used in a case that concerns overt hate and discrimination against LGBTI+ individuals, as shown by the *Beizaras and Levickas* case. Such an approach is supported also by the PACE explicitly recognizing the danger of rising hate. Also in the case of relationship rights short of marriage, the scrutiny is likely to be strict. However, same-sex marriage continues to be an issue that the Court is willing to let be decided by the States, although the reasonings in the recent cases *Beizaras and Levickas* and *Fedotova and Others* might signal that the Court is paving the way for a new position. However, even in the latter, the Court was still willing to create a difference between allowing same-sex marriages and granting some other form of legal protection. The difference between marriage and other types of protection was also steadily enforced in *Ratzenböck and Seydl.* It remains to be seen how the Court will approach the issue in the future.

The type of policy regarding same-sex marriages might make a difference in the Court's approach. Since the Court pays attention to rising trends, a "new" differentiation between same-sex and different-sex relationships in the form of introducing a constitutional limitation to the definition of marriage such as Agenda Europe has been pushing in Eastern Europe and Balkans might be treated more strictly than the "mere" lack of progress in this area. This is difficult to say for certain, though, since the Court has consistently left the definition of marriage to the States' discretion. The issue remains that so far, the Court has been remarkably lenient in its assessment of the marriage question. Given the uncertainty of the Court's future approach and its heavy reliance on European consensus,

the most effective response against Agenda Europe's initiatives, particularly those concerning same-sex marriage, is mobilization at the national level. Given minorities' limited political power combined with the likely lacking human rights protection from the ECtHR, the role of LGBTI+ allies is crucial.

A different approach is possible, as evidenced by the queered version of the *Ratzenböck and Seydl* judgement. The Court has already established several principles and methodological tools that would allow it to apply strict review. It appears that it is simply unwilling to do this because it refuses to question the supremacy of the heterosexual marriage. One can only speculate on the reasons why, but queer theory provides some tools for challenging this, some of which the Court itself already uses; eg. in *Taddeucci and McCall*, it was able to deconstrue and reveal that it was created through legal categories, and conclude that the case was one of indirect discrimination. What remains to be done is to give the Court a motivation to apply such methodology. I hope that the threat to human rights from ultra-conservative movements highlighted in this thesis will lead the Court to acknowledge its role as a forum for the protection of minority rights, rather than for the entrenchment of discrimination and hatred. If nothing else, a strong appeal to equal human dignity must be made: if one wishes to adhere to it, it is simply not justified to treat a category of people as being of less value, which is what the promotion of the "traditional family" does.

Bibliography

I Academic literature

Abbey (2016)

Abbey, Ruth. "Susan Okin's Justice, Gender, and the Family: Twenty-Five Years Later." *Hypatia* 31, no. 3 (2016): 636–37. https://doi.org/10.1111/hypa.12257.

Ackerly (2016)

Ackerly, Brooke A. "Raising One Eyebrow and Re-Envisioning Justice, Gender, and the Family." *Hypatia* 31, no. 3 (2016): 638–50. https://doi.org/10.1111/hypa.12254.

Ainsworth (2015)

Ainsworth, Claire (2015). "Sex Redefined." News. Nature. Nature Publishing Group, February 18, 2015. https://doi.org/10.1038/518288a.

Arnardottir (2001)

Arnardottir, Oddny Mjöll. *Equality and Non-Discrimination in the European Convention of Human Rights: Towards a Substantive Approach*, 2001.

Bamforth and Richards (2008)

Bamforth, Nicholas C. and Richards, David A.J. *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law*. New York: Cambridge University Press, 2008.

Becker (2001)

Becker, Mary. "Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better Than One." *University of Illinois Law Review* 2001, no. 1 (January 1, 2001): 1–56.

Bordieu (1987)

Bourdieu, Pierre. "The Force of Law: Toward a Sociology of the Juridical Field." *Hastings Law Journal* 38, no. 814 (1987).

Brems (2013)

Brems, Eva. *Diversity and European Human Rights. Rewriting Judgments of the ECHR*. ProQuest Ebook Central; Cambridge Books on Core. Cambridge University Press, 2013.

Buss (1998)

Buss, Doris E. "Robes, Relics and Rights: The Vatican and the Beijing Conference on Women." *Social & Legal Studies* 7, no. 3 (1998): 339–64.

Butler (1990)

Butler, Judith. *Gender Trouble: Feminism and the Subversion of Identity.* New York: Routledge, 1990.

Croce (2019)

Croce, Mariano. "Queer in the Law: Critique and Postcritique." In *Research Handbook on Critical Legal Theory*, 79–94. Edward Elgar Publishing, 2019. https://www-elgaronline-com.ludwig.lub.lu.se/view/edcoll/9781786438881/9781786438881.00012.xml.

Datta (2018)

Datta, Neil. *"Restoring the Natural Order": The Religious Extremists' Vision to Mobilize European Societies against Human Rights on Sexuality and Reproduction*. Brussels: European Parliamentary Forum on Population and Development, 2018.

Delphy (1993)

Delphy, Christine. "Rethinking Sex and Gender." *Women's Studies International Forum* 16, no. 1 (January 1, 1993): 1–9. https://doi.org/10.1016/0277-5395(93)90076-L.

ECtHR (2021)

European Court of Human Rights. *Guide on Article 8 of the European Convention on Human Rights. Right to respect for private and family life, home and correspondence.* Strasbourg, Council of Europe, 31 August 2021

ECtHR (2022)

European Court of Human Rights. *Guide on the case law of the European Convention of Human Rights - LGBTI rights.* Strasbourg. Council of Europe, 30 April 2022.

Ferguson (2016)

Ferguson, Michaele L. "Vulnerability by Marriage: Okin's Radical Feminist Critique of Structural Gender Inequality." *Hypatia* 31, no. 3 (July 1, 2016): 687–703.

FRA (2018)

European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg). *Handbook on European Non-Discrimination Law :2018 Edition.* LU: Publications Office, 2018. https://data.europa.eu/doi/10.2811/58933.

Fineman (2009)

Fineman, Martha Albertson. "The Sexual Family." In *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, 45–63. Surrey, United Kigdom: Ashgate, 2009.

Finnis (1980)

Finnis, John. *Natural Law and Natural Rights*. Oxford: Clarendon Press, 1980.

Gallagher (2001)

Gallagher, Maggie. "What Is Marriage For - The Public Purposes of Marriage Law." *Louisiana Law Review* 62, no. 3 (2002 2001): 773–92.

Gartrell and Bos (2010)

Gartrell, Nanette and Bos, Henry. "US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents." *Pediatrics*, July 7, 2010. https://doi.org/10.1542/peds.2009-3153.

Gonzalez-Salzberg (2014)

Gonzalez-Salzberg, Damian A. "The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights." *American University International Law Review* 29, no. 4 (January 1, 2014): 797–830.

Gonzalez-Salzberg (2015)

Gonzalez-Salzberg, Damian A. "Confirming (the Illusion of) Heterosexual Marriage: Hämäläinen v Finland," *Journal of International and Comparative Law* 2, no. 1 (2015): 173–86.

Gonzalez-Salzberg (2018)

Gonzalez-Salzberg, Damian A. *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law*. Hart Publishing, 2018. https://doi.org/10.5040/9781509914951.

Graham (2004)

Graham, Mark. "Gay Marriage: Whither Sex? Some Thoughts from Europe." *Sexuality Research and Social Policy* 1, no. 3 (2004): 24.

Grisez (1993)

Grisez, Gremain. *The Way of the Lord Jesus: Volume Two, Living a Christian Life*. Quincy, Illinois: Fransiscan press, 1993.

Halley (2008)

Halley, Janet E. *Split Decisions : How and Why to Take a Break from Feminism*. Princeton University Press, 2008.

Harris et al. (2014)

Harris, David, O'Boyle, David, Bates, Ed, and Buckley, Carla. *Law of the European Convention on Human Rights*. 3rd ed. New York: Oxford University Press, 2014.

Hunter (2019)
Hunter, Rosemary. “Critical Legal Feminisms.” In *Research Handbook on Critical Legal Theory*, 45–62. Edward Elgar Publishing, 2019. https://www-elgaronline-com.ludwig.lub.lu.se/view/edcoll/9781786438881/9781786438881.00010.xml.
Johnson, Jennifer (2004)
Johnson, Jennifer R. “Preferred by Law: The Disappearance of the Traditional Family and Law’s Refusal to Let It Go.” *Women’s Rights Law Reporter* 25, no. Issues 2 & 3 (2004 2003): 125–44.
Johnson, Paul (2013)
Johnson, Paul R. *Homosexuality and the European Court of Human Rights*. Routledge, 2013.
Johnson, Stephen and Tamney, Joseph (1996)
Johnson , Stephen D. and Tamney, Joseph B. “The Political Impact of Traditional Family Values.” *Sociological Focus* 29, no. 2 (May 1, 1996): 125–34.
Lau (2013)
Lau, Holning. “Rewriting Schalk and Kopf: Shifting the Locus of Deference.” In *Diversity and European Human Rights - Rewriting Judgements of the ECtHR*, 243–64. Cambridge University Press, 2013.
Lau and Strohm (2011)
Lau, Holning, and Charles Q. Strohm. “The Effects of Legally Recognizing Same-Sex Unions on Health and Well-Being.” *Law and Inequality: A Journal of Theory and Practice* 29, no. 1 (2011): 107–48.
Lavapuro (2010)
Juha Lavapuro. “Valtiosääntöinen managerialismi ja perusoikeudet” (“Constitutional managerialism and fundamental rights”), *Oikeus* 1/2010 p. 6–27.
Nousiainen and Pylkkänen (2001)
Nousiainen, Kevät and Pylkkänen, Anu. *Sukupuoli Ja Oikeuden Yhdenvertaisuus (Gender and the Equality of Law)*. Helsinki: Forum Iuris, publication of the University of Helsinki, 2001.
Oakley (1972)
Oakley, Ann. *Sex, Gender and Society*. New York: Temple Smith, 1972.
Okin (1989)
Okin, Susan Moller. *Justice, Gender, and the Family*. Basic Books, 1989. http://ludwig.lub.lu.se/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.707749&site=eds-live&scope=site.
Romero (2009)
Romero, Adam P. “Methodological Descriptions of ‘Feminist’ and ‘Queer’ Legal Theories.” In *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*. Farnham, United Kingdom: Taylor & Francis Group, 2009. http://ebookcentral.proquest.com/lib/lund/detail.action?docID=476266.
Rosenthal (2012)
Rosenthal, Martha. *Human Sexuality: From Cells to Society*. Cengage Learning, 2012.
Sandland (2003)
Sandland, Ralph. “Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights.” *Feminist Legal Studies* 11, no. 2 (June 2003): 191–209. https://doi.org/10.1023/A:1025031126520.
Schabas (2015)
Schabas, William A. *The European Convention on Human Rights: A Commentary*. *The European Convention on Human Rights*. Oxford University Press, 2015. https://opil.ouplaw.com/view/10.1093/law/9780199594061.001.0001/law-9780199594061.
Schmitt et al (2007)

Schmitt, Michael T., Justin J. Lehmiller, and Allison L. Walsh. “The Role of Heterosexual Identity Threat in Differential Support for Same-Sex `Civil Unions’ versus `Marriages’.” *Group Processes & Intergroup Relations* 10, no. 4 (October 1, 2007): 443–55. https://doi.org/10.1177/1368430207081534.

Sear (2021)

Sear, Rebecca. “The Male Breadwinner Nuclear Family Is Not the ‘Traditional’ Human Family, and Promotion of This Myth May Have Adverse Health Consequences.” *Philosophical Transactions of the Royal Society B: Biological Sciences* 376, no. 1827 (June 21, 2021): rstb.2020.0020, 20200020. https://doi.org/10.1098/rstb.2020.0020.

Sedgwick (1990).

Sedgwick, Eve Kosofsky. *Epistemology of the closet.* Berkeley: University of California Press, 1990.

Smart (1989)

Smart, Carol. *Feminism and the Power of Law*. Routledge, 1989.

Stychin (1995)

Stychin, Carl F. *Law’s Desire : Sexuality and the Limits of Justice*. Routledge, 1995.

Yourow (1995)

Yourow, Howard Charles. *"The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence".* International studies in human rights, vol. 28. Dordrecht: Martin Nijhoff Publishers, 1995.

II Legal instruments

International treaties

Council of Europe

European Convention on the Protection on Human Rights and Fundamental Freedoms (European Convention on Human Rights), Rome, 4 October 1950

Copenhagen Declaration on the reform of the European Convention of the Human Rights system, Copenhagen 13 April 2018

United Nations

Convention on the Elimination of All Forms of Discrimination Against Women, New York, 18 December 1978

Universal Declaration of Human Rights, Paris, 1948

Vienna Convention on the Law of Treaties, Vienna, 23 May 1969

EU instruments

Charter of Fundamental Rights and Freedoms of the European Union, 2012/C 326/02, 26 October 2012

National instruments

Finland

Laki transseksuaalin sukupuolen vahvistamisesta (Transsexuals Confirmation of Gender Act), 28.6.2002/563

Florida, United States

CS/CS/HB 1557: Parental Rights in Education, 7 January 2022

United Kingdom
Gender Recognition Act 2004, c. 7

III Case law

Judgements and decisions of the European Court of Human Rights and European Commission of Human Rights

A, B and C v Ireland, app. no. 25579/05, 16 December 2010 [GC]

Airey v Ireland, app. no. 6289/73, 6 February 1981

B and L v the United Kingdom, app. no. 36536/02, 13 September 2009

Beizaras and Levickas v Lithuania, app. no. 41288/15, 14 January 2020

Belgian Linguistics case (Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, European Commission of Human Rights v Belgium), app. nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23 July 1968

Boyle v the United Kingdom, app. no. 16580/90, 28 February 1994

Burden v the United Kingdom, app. no. 13378/05, 29 April 2008 [GC]

Chapin and Charpentier v France, app. no. 40183/07, 9 September 2016

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

Cossey v the United Kingdom, app. no. 10843/84 , 29 September 1990

Costello-Roberts v the United Kingdom, app. no. 13134/87, 25 March 1993

D. H. and Others, app. no. 57325/00, 13 November 2007 [GC]

Dudgeon v the United Kingdom, app. no. 7525/76, 22 October 1981

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

Evans v the United Kingdom, app. no. 6339/05, 10 April 2007 [GC]

Fedotova and Others v Russia, app. nos. 40792/10 30538/14 43439/14, 13 July 2021

Gaskin v the United Kingdom, app. no. 10454/83, 7 July 1989

Golder v the United Kingdom, app. no. 4451/70, 21 February 1975

Hamer v the United Kingdom, app. no. 7114/75, 13 October 1977

Handyside v the United Kingdom, app. no. 5493/72, 7 December 1976

Hatton and Others v the United Kingdom, app. no. 36022/97, 8 July 2003 [GC]

Hämäläinen v Finland, app. no. 37359/09, 16 July 2014 [GC]

Identoba and Others v Georgia, 73235/12, 12 May 2015

Johnston and Others v Ireland, 9697/82, 18 December 1986

Karner v Austria, app. no. 40016/98, 24 July 2003

Kerkhoven and Hinke v the Netherlands, app. no. 15666/89 , 19 June 1992 (dec.)

Kjeldsen, Busk, Madsen and Pedersen v Denmark, app. nos. 5095/71, 5920/72 and 5926/72, 7 December 1976
Konstantin Markin v Russia, app. no. 30078/06, 22 March 2012 [GC]
Kozak v Poland, app. no. 13102/02, 2 March 2010
Kroon and Others v the Netherlands, app. no. 18535/91, 27 October 1994
L and V v Austria, app. nos. 39392/98 and 39829/98, 9 January 2003
Manenc v France, app. no. 66686/09 , 21 September 2010 (dec.)
Marckx v Belgium, app. no. 6833/74, 13 June 1976
Mata Estevez v Spain, app. no. 56501/00, 10 May 2001 (dec.)
Nitecki v Poland, app. no. 65653/01, 21 March 2003 (dec.)
Oliari and Others v Italy, app. nos. 18766/11 36030/11, 21 July 2015
Olsson v Sweden (no. 1), app. no. 10465/83, 24 March 1988
Orlandi and Others v Italy, app. nos. 26431/12 26742/12 44057/12 60088/12, 14 December 2017
Parry v the United Kingdom, app. no. 42971/05, 23 November 2005 (dec.)
R. and F. v the United Kingdom, app. no. 35748/05, 28 November 2006 (dec.)
Ratzenböck and Seydl v Austria, app. no. 28475/12, 26 October 2017
Rees v the United Kingdom, app. no. 9532/81, 17 October 1986
S.A.S. v France, app. no. 43835/11, 1 July 2014 [GC]
S.H. and Others v Austria, app. no. 57813/00, 3 November 2011 [GC]
Schalk and Kopf v Austria, app. no. 30141/04, 24 June 2010
Sheffield and Horsham v the United Kingdom, app. nos. 22985/93 23390/94, 30 July 1998 [GC]
Soering v the United Kingdom, app. no. 14038/88, 7 July 1989
Stec and Others v the United Kingdom, app. nos. 65731/01 and 65900/01, 12 April 2006 [GC]
Taddeucci and McCall v Italy, app. no. 51362/09, 30 June 2016
Thlimmenos and Others v Greece, app. no. 34369/97, 6 April 2000 [GC]
Tyrer v the United Kingdom, app. no. 5856/72, 25 April 1978
Ünal Tekeli v Turkey, app. no. 29865/96, 16 November 2004
Vallianatos and Others, app. nos. 29381/09 and 32684/09, 7 November 2013
Van der Mussele v Belgium, app. no. 8919/80, 23 November 1983
VK v Croatia, app. no. 38380/08, 27 November 2012
X and Others v Austria, app. no. 19010/07, 19 February 2013 [GC]
X, Y and Z v the United Kingdom, app. no. 21830/93, 22 April 1997 [GC]
Zarb Adami v Malta, app. no. 17209/02, 20 June 2006

Judgements of the United States Supreme Court

Lawrence v Texas, 539 U.S. 558 (2003)

Obergefell v Hodges, 576 U.S. 644 (2015)

Roe v Wade, 410 U.S. 113 (1973)

V Resolutions by International Organizations

Parliamentary Assembly of the Council of Europe Resolution 2417 (2022): Combating rising hate against LGBTI people in Europe, 25 January 2022.

VI National reports

Blancfield (2010)
Blanchfield, Luisa "The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Issues in the U.S. Ratification Debate." CRS Report for Congress. Congressional Research Service, November 12, 2010.

VII Other materials

Opinion pieces and other publications

Ratzinger and Amato (2003)
Ratzinger, Joseph and Amato, Angelo "Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons." the Vatican: Congregation for the Doctrine of the Faith, June 3, 2003. https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html accessed 24 May 2022
Scheinin (2014)
Scheinin, Martin. *Hämäläinen v Suomi – Mitä intressiä EIT suojasi?* Perustuslakiblogi, Suomen valtiosäännöllisen seuran ajankohtaispalsta, 17.7.2014 (*Hämäläinen v Finland – What interest was the ECtHR protecting?* Constitutional Law Blog, blog of the Finnish Association of Constitutional Law, 17 July 2014) https://perustuslakiblogi.wordpress.com/seura-2/ accessed 24 May 2022

Restoring the Natural Order: an Agenda for Europe

Statistics
Eurostat marriage and divorce statistics. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics, accessed January 25, 2022.

Other

First draft of the United States Supreme Court's decision in *Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health et al v. Jackson Women's Health Organization et al,* February 2022, by Justice Samuel Alito, accessible at https://www.documentcloud.org/documents/21835435-scotus-initial-draft accessed 5 May 2022.

Restoring the Natural Order: an Agenda for Europe

ILGA-Europe Glossary beginning with T https://www.ilga-europe.org/resources/glossary/letter_t accessed 20 May 2022.

Trasek: Käsitteitä (Glossary of the Finnish transgender and intersex rights association Trasek), https://trasek.fi/perustietoa/kasitteita/ accessed 20 May 2022.