The Rights of Same-Sex Couples under the European Convention of Human Rights: Protection of Same-Sex Relationships

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1 Introduction

1.1 General

Recently, several reports on the international and regional levels with regard to discrimination on the basis of sexual orientation have been released. Since 2008 the European Union Agency for Fundamental Rights (FRA) has annually released a report on homophobia.\(^1\) Each report builds on the report preceding it and is a comparative legal analysis of discrimination on the basis of sexual orientation and gender identity. The reports cover a broad range of topics such as: stereotyping, abuse and violence, family life, recognition of civil status and so on.

In June 2011 the Commissioner for Human Rights of the Council of Europe released the report *Discrimination on grounds of sexual orientation and gender identity in Europe*.\(^2\) The report is a study on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the 47 Member States of the Council of Europe.\(^3\) More recently, 17 November 2011, the Human Rights Council of the United Nations released a report entitled: *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*.\(^4\) It deals with *inter alia* violence, killings, discriminatory laws and discriminatory practices based on sexual orientation and gender identity.

The reports touch upon *inter alia* the issue of marriage or other forms of legal recognition of partnerships with regard to same-sex couples as well as other issues concerning the rights of same-sex couples. Neither of the reports call for developments towards requiring States to allow same-sex couples to marry.\(^5\) However, the reports emphasise that when it is not possible for same-sex couples to marry or otherwise contract a form of legal partnership, States are to ensure that same-sex couples are not treated less favourably than opposite-sex couples.\(^6\) Furthermore, in the past decade the European Court of Human Rights (ECtHR) has dealt with an increasing number of applications dealing with the rights claimed by same-sex couples. These applications deal with rights such as the right to respect for private life and family life, the right to marry and the right not to be discriminated against. Future judgments by the Courts will follow, as cases regarding rights of same-sex couples seem to be increasing and currently applications are pending.

Thus, the issue of homophobia and legal aspects of it have been getting substantial attention on the regional as well as the international level. Furthermore, the European Court of Human Rights has ruled on an increasing number of applications regarding the rights of LGBT persons and more specifically the rights of same-sex couples. Although such attention from different levels is interesting and may be informative, the current research must for reasons of feasibility as well as clarity limit itself. Therefore the focus of this thesis will be on the rights of same-sex couples as protected by the European Convention on Human Rights and

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Fundamental Freedoms (ECHR), the main human rights document in Europe.

The limitation of the current research to protection of same-sex couples offered by the ECHR has several reasons. Firstly, the developments the rights of same-sex couples within the framework of the ECHR over the past decade have been rapid and substantial which can be deduced from the quantity of case law on the matter over the past decade. It is the view of the author that such rapid and substantial development requires close scrutiny. An analysis of these developments may be helpful in understanding the rights that same-sex couples can claim in the context of the ECHR. The analysis that will be carried out in the current research will cover the rights of the ECHR which offer protections to same-sex couples.

Secondly, it is likely that the issue will be revisited soon, all the more because currently a case concerning same-sex marriage is pending before the European Court of Human Rights (ECtHR or the Court). It is therefore timely to carry out an analysis of the issue as this may produce useful insights for future (or pending) applications. The analysis to be carried out will be limited to several specific provisions of the Convention which are used to offer protection to same-sex couples. Therefore, of main importance is Article 8 which has traditionally been used to decriminalise same-sex sexual behaviour. In addition, Article 14 combined with Article 8 is an important area of analysis as Article 14, the prohibition of discrimination, has been used to prohibit difference in treatment of same-sex couples regarding Convention rights. Furthermore, recently applications have been lodged regarding right to legally contract a partnership under these provisions. Additionally, same-sex couples relied on Article 12, the right to marry, in their applications with a view to derive from it a right to legally contract a partnership.

In order to carry out this analysis it is necessary to firstly describe the framework of rights the Convention offers to same-sex couples, including all relevant case law of the Court. This analysis will be limited to the aforementioned provisions of the Convention. Furthermore, when relevant, other provisions that have an influence on the mentioned provisions will be elaborated upon.

In order to assess to what extent same-sex couples are treated differently from opposite-sex couples, the situation regarding Convention rights of same-sex couples will be compared to the situation of opposite-sex couples. This will enable one to comprehend the implications of possible differences in treatment. Subsequently, this thesis will explore the grounds on which possible differences in treatment are based. Therefore, the main research question will be: To what extent are same-sex couples treated differently from opposite-sex couples under the Convention, what implications does such difference in treatment have and what are the grounds for such difference in treatment?

1.2 Recent case law

As mentioned, there is an increasing number of applications concerning the rights of same-sex couples. Recently the Court pronounced judgment in the case of Schalk & Kopf v. Austria. In this case the Court gave an interpretation of the Articles on which this thesis will focus: the right to private and family life (Article 8) and the right to marry (Article 12) with regard to same-sex couples. As to the right to private and family life,
the Court had hitherto only recognised that relationships between same-sex couples constitute private life. However, in Schalk and Kopf the Court recognised for the first time that same-sex couples can enjoy family life. The Court found it ‘artificial’ to maintain that same-sex couples could not enjoy the right to family life with reference to the ‘rapid evolution of social attitudes towards same-sex couples’ and the ‘considerable number of member States [that] have afforded legal recognition to same-sex couples’.

In the same case the applicants complained of a violation of Article 12. They argued that marriage has changed considerably and that in today’s society it should be understood as a union of two persons in which procreation and education of children is no longer conclusive of whether marriage can be contracted. Thus, they did not rely on the textual interpretation of Article 12, but on settled ECtHR case law that the Convention is a ‘living instrument’. The Court however was not persuaded by the arguments brought forward by the applicants. It held that Article 12 does not require Member States to give same-sex couples access to marriage. In that regard the Court put forward several arguments. Firstly, merely six out of the forty-seven Member States allowed same-sex marriage, so there is no European common standard. Secondly, the Court undertook a comparative analysis of Article 12 ECHR and Article 9 CFREU. From that comparison it concluded that Article 12 was applicable to same-sex couples, but that it is left to Member States whether or not to allow same-sex marriage. Thus, Member States are not obliged to grant same-sex couples access to marriage. Nor are they required to recognise relationships of same-sex couples by other means.

It seems that same-sex couples are treated differently from opposite-sex couples under the ECHR. The Court offers various arguments to justify this in case of the right to marry. The main reasoning employed by the Court comes down to the ‘clear wording’ of Article 12, the observation that Europe is socially and culturally diverse and the fact that there is no ‘common European standard’ with regard to same-sex marriage yet. In the Schalk and Kopf case Article 14, the prohibition of discrimination, was not addressed with regard to Article 12 however, nor in any other case to date. Article 14 ECHR prohibits any discrimination of the enjoyment of the rights as protected by the ECHR. For the current thesis this provision may be of relevance with regard to Article 12 as heterosexual couples are protected under Article 12 whereas same-sex couples are not. Therefore a difference in treatment may be present which may amount to discrimination under Article 14.

1.3 Rights of same-sex couples under the Convention

From the preceding paragraph and the rising number of cases involving the rights of same-sex couples, there may be reason to believe that rights for same-sex couples are evolving under the ECHR. However, not all rights protected under the Convention are inclusive (yet) of same-sex couples. It is the view of the author that developments in case law regarding the rights of same-sex couples under the Convention call for an extensive analysis, since they may show a change from earlier case law in how same-sex couples are included in Convention rights.

11 Ibid. para. 93.
12 Ibid. para. 44.
13 Ibid. para. 58.
14 Ibid. para. 61.
15 Ibid. para. 93.
In order to analyse possible developments and in order to answer the research question of the current thesis several steps are required. Firstly, it needs to be explored which rights are inclusive of same-sex couples and which rights are not. In that regard this thesis will focus on the rights which are mainly relevant for same-sex couples. Thus, the provisions that are of relevance are most notably Article 8 – the right to respect for private life and family life – and Article 14 – the prohibition of discrimination. The current thesis will mainly focus on these provisions as they are most relied upon by same-sex couples in their applications. Moreover, these provisions have been extensively interpreted by the Court so as to afford rights to same-sex couples.

Furthermore, although the right to marry under Article 12 is not (yet) inclusive of same-sex couples, this Article will be included in the current analysis as it is a right that covers the relationships of couples. Also, applications have been made under this provision by same-sex couples, to no avail however. Since the provision excludes same-sex couples it is valuable to explore this provision as it will indicate rationales used to exclude same-sex couples from Convention rights. Other provisions to be included are those that cover the prohibition of discrimination as this prohibition includes discrimination on the ground of sexual orientation. Thus, Article 14 of the Convention will also be included. In sum, this analysis creates an overview of the protection that same-sex couples can or cannot derive from Convention rights.

Secondly, once it is clear to what extent there is a difference in treatment of same-sex couples compared to opposite-sex couples, the implications thereof can be discussed. Such implications will be discussed in the light of case law and possible future applications regarding rights of same-sex couples under the Convention. This will include an analysis from the perspective of socio-legal theory. This is useful as it may uncover the implications and the the way the Convention operates from a different perspective: i.e. how the Convention affects the daily lives of same-sex couples. Against this background it can be evaluated what possibilities same-sex couples have under the Convention to enjoy their rights under the Convention. Furthermore, it will provide an extensive background to evaluate whether the legal landscape of the Convention provides for the social reality lived by same-sex couples.

Thirdly, by exploring the inclusiveness of the Convention of same-sex couples and its implications, the grounds for inclusion in certain aspects of the Convention and exclusion from other aspects will be uncovered. In order to achieve this an extensive analysis of case law by the Court will be undertaken. The case law to be included will be those cases that deal with the provisions indicated above – Article 8, 12 and 14. This will provide an overview of these grounds and the rationale behind inclusion or exclusion in the context of the Convention.
Chapter I: The Right to Respect for Private and Family Life (Article 8)

2.1 Introduction

Most crucial in the development of rights for same-sex couples, and more generally LGBT persons, under the convention was the element of private life of Article 8. The Court's interpretation of the right to respect for private life lead to the decriminalisation of same-sex sexual conduct as well as to equality as regards to the age of consent. However, for a long time the rights of LGBT persons were covered merely by the concept of private life in the meaning of Article 8, to the exclusion of family life. More recently, the Court considered that same-sex couples also enjoy the protection of family life. Article 8 of the Convention protects the right to respect for family and private life. It states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It protects a panoply of concepts which is clear from the terminology of the provision. The right to private life is rather general in nature and thus far the Court has refused to exhaustively define the concept. However, in the Pretty case the Court saw fit to give an overview of the concept stressing that it is not 'susceptible to exhaustive definition'. According to the Court the concept of private life covers: physical and psychological integrity, individual physical and social identity, gender identification, name, sexual orientation, sexual life, personal development and the right to establish and develop relationships with other human beings. Regarding the development of Article 8 over the past decades, Article 14, which ensures the right not to be discriminated against, has been of crucial importance. It states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The current chapter will consider those aspects under which the rights of same-sex couples have developed under Article 8 and those aspects that are not inclusive (yet) of same-sex couples. Firstly, as a prior

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16 Schalk and Kopf v. Austria, supra note 10.
18 ECtHR 29 April 2002, No. 2346/02 (Pretty/United Kingdom)
19 Ibid., para. 60.
20 Ibid.
requirement to rights for same-sex couples, the rights of homosexual individuals under the convention will be
considered which traditionally falls within the ambit of the concept of private life (paragraph 2.2). Subsequently, the rights that same-sex couples can claim under the concept of private life will be discussed
(paragraph 2.3). Another concept which falls within the ambit of Article 8 of the Convention is the right to respect for family life. This concept, in as far as it covers same-sex couples will be discussed in paragraph
2.4. One element which features in applications under Article 8 is adoption and parental rights. However, it is difficult to classify this issue within either private life or family life. Relationships between parents and children belongs to the concept of family life, whereas when sexual orientation comes into play the concept of private life may be involved. Therefore, the issue of adoption and parental rights with regard to same-sex couples is dealt with in a separate paragraph (2.5). Finally, in paragraph 2.6, this chapter will be summarised. Additionally, a critical review of the issues dealt with in this chapter will be undertaken in the same paragraph.

2.2 Private Life: Rights of the Homosexual Individual

2.2.1 Introduction

Globally, same-sex orientation and same-sex sexual acts are not generally accepted. In 78 countries LGBT persons are liable to criminal prosecution under threat of penalties of imprisonment. Moreover, globally five countries threaten LGBT persons with death penalty.\(^{21}\) This may seem a distant practice in the context of Europe, however criminalisation of LGBT persons in the European context is not something of the distant past.\(^ {22}\) It was not until the 1980s before the ECtHR started taking a stand against criminalisation of LGBT persons. In order to contextualise the rights afforded to LGBT people and more specifically to same-sex couples by the European Convention on Human Rights a short description of the history of this decriminalisation by the European Court of Human Rights will follow. This description of decriminalisation thus concerns the protection of homosexual individuals, which is a prior requirement for any protection offered to same-sex couples. Furthermore, a discussion of the case law will show the reasons why the Court found criminalisation of same-sex sexual behaviour to be in violation of the Convention. This is useful for the discussion about the grounds for inclusion or exclusion in certain rights which will be discussed below.


2.2.2 Case of Dudgeon v. the United Kingdom

The most notorious case with regard to the criminalisation of same-sex sexual acts was the Dudgeon case. This case concerned an applicant who complained that under Northern Irish law he was liable to criminal prosecution as per his homosexual conduct. As a direct result of the existence of these laws he experienced fear, suffering and psychological distress. Furthermore, the criminal liability extended to homosexual behaviour engaged in private with mutual consent. The applicant asserted that he thereby suffered and continued to suffer an unjustified interference with his right to respect for private life. The Court followed the applicants argument considering that the very existence of the impugned law 'continuously and directly' affected his private life. Thus the Court declared that the situation was an interference with the applicant's private life, which includes his sexual life.

After having established such, the Court turned to an assessment of possible grounds for justification under Article 8 (2) of the Convention. The assessment was limited to whether the limitation of the applicant's private life had a 'legitimate aim' and whether it was 'necessary in a democratic society', as there was no doubt about the question whether it was prescribed by law. The respondent government argued that the impugned law was necessary in a democratic society in order to protect morals and the rights and freedoms of others. The Court stressed from the outset that a certain degree of regulation by means of criminal law with regard to sexual conduct was allowed, as is the case with other forms of sexual conduct. Nevertheless, such regulation must be proportionate with regard to the legitimate aim. The Court considered that there was no justification in the present case. It found that the criminal code of Northern Ireland affected the right to respect for private life which protects an 'essentially private manifestation of the human personality'. Furthermore, it referred to the majority of Member States in which it was no longer considered that private homosexual behaviour is a matter for criminal law. In general the Court ruled that keeping the said legislation in force was disproportionate to the aims sought to be achieved.

2.2.3 Case law post-Dudgeon

Similar approaches were taken in other cases concerning the same issue. The Norris case concerned an application with regard to similar legislation in Ireland. The Court considered that the position of the applicant was similar to the applicant in the Dudgeon case. Notwithstanding that there was a practice of non-prosecution, the Court considered there was an interference with the right to respect for private life. In the Modinos case a prohibition of homosexual acts was still part of the criminal law of Cyprus. However, since the Dudgeon judgment this law was not applied. Nevertheless, the mere existence of the law was enough for

23 Dudgeon v. United Kingdom, supra note 9.
24 Ibid. at para. 37.
25 Ibid. at para. 41.
26 Ibid.
27 Ibid. at para. 60.
28 Ibid. at para. 60.; ECHR 26 March 1985, No. 8978/80 (X and Y/the Netherlands), para. 22.
29 Ibid. at para. 61.
30 ECHR 26 October 1988, No. 10581/83 (Norris/Ireland), para. 38.
the Court to establish an interference with the right to respect for private life as protected by Article 8 of the Convention.  

Thus the Court finds the criminalisation of same-sex sexual acts conducted in private to be contrary to right to respect for private life. Nevertheless, the Court reserves some margin of appreciation for Member States when such private same-sex sexual acts may lead to a 'significant degree of injury'. The Laskey case concerned a group of men who engaged in private homosexual sexual acts with a sadomasochistic nature. In such cases State interference may be appropriate with regard to public health considerations. On the other hand, group-sex recorded on video without the sadomasochistic element does not justify interference. It may be noted that in this regard, the same standards apply to heterosexuals as sexual orientation has no bearing on public health considerations.

Another aspect which is related to criminalisation of homosexuality are general bans on the employment of LGBT people in the public services. Such bans were known to be in effect in the armed forces of the United Kingdom. Several cases were brought before the Court with regard to the United Kingdom armed forces policy with regard to gay men. These cases were marked by intrusive investigations into the sexual orientation of the applicants. The Court ruled that such intrusive investigations are an interference with the private life of the subjects of investigation.

Also related to private same-sex sexual conduct and criminal law is the age of consent. Regularly, the age of consent with regard to specifically homosexual conduct differed from the age of consent for heterosexual or lesbian conduct. Several cases were considered by the Court in this regard. In the Dudgeon case the issue was addressed as part of the whole judgment. When the Court considered the possible justifications for criminalising homosexual conduct it considered that national authorities are most competent to decide on the issue of age of consent, with no reference to equal treatment. The issue was addressed again in the Sutherland case in 2001. The applicant successfully challenged the difference in the age of consent, which was 18 years for homosexuals whereas this was 16 years in any other case. It can now be considered settled case law that discrimination in age of consent is no longer accepted by the Court as it is contrary to Article 14 of the Convention which prohibits discrimination. Thus, the age of consent for homosexual conduct must be the same as the age of consent for heterosexual or lesbian conduct.

Over the course of time LGBT people have received more and more protection under the notion of private life protected by Article 8. Starting with decriminalisation of same-sex sexual conduct and subsequently more equality regarding matters of private life. It seems that gradually, the Court has interpreted the notion of private life in a more inclusive manner for LGBT people. This is an important development to take into

31 ECtHR 22 April 1993, No. 15070/89 (Modinos/Cyprus), para. 24.
32 ECtHR 19 February 1997, Nos. 21627/93, 21628/92 & 21974/93 (Laskey and others/United Kingdom), para. 44.
34 ECtHR 27 September 1999, Nos. 31417/96 and 32377/96 (Lustig-Prean and Beckett/United Kingdom), para. 104; ECtHR 27 September 1999, Nos. 33985/96 and 33986 (Smith and Grady/United Kingdom), para. 110; ECtHR 22 October 2002, Nos. 48535/99, 48536/99 and 48537/99 (Beck, Copp and Bazeley/United Kingdom), para. 53; ECtHR 22 October 2002, Nos. 43208/98 and 44875/98 (Perkins and R./United Kingdom), para. 40.
35 Dudgeon, supra note 9, at para. 62.
36 ECtHR 27 March 2001, No. 25186/94 (Sutherland/United Kingdom).
37 Ibid., at para. 59.
38 See inter alia: ECtHR 9 January 2003, Nos. 39392/98 and 39829/98 (L. and V. /Austria); ECtHR 9 January 2003, No. 45330/99 (S.L./Austria), para .42; ECtHR 26 May 2005, No. 5263/03 (Wolfmeyer/Austria), para. 39.
account in the following paragraphs in which private life in relation to same-sex couples will be discussed, so as to analyse whether this move towards inclusiveness has continued.

2.3 Private Life: The Rights of Same-Sex Couples

2.3.1 Introduction

Thus far the protections offered to LGBT individuals under Article 8 have been discussed. This was a necessary exercise as it will provide a useful background to the following paragraphs. After all, the protection of LGBT individuals is a prior requirement for any protection offered to same-sex couples. Therefore, an analysis of protections offered under the Convention to same-sex couples would have been incomplete without touching upon the protection of LGBT individuals. Furthermore, it will become clear in the following paragraphs that the interpretation by the Court of private life in relation to LGBT individuals has been continued in the interpretation of private life in relation to same-sex couples. The present paragraph will inquire into the rights which the Convention offers to same-sex couples under the concept of private life. This will also be considered in conjunction with Article 14 of the Conventions since, as will be discussed, cases that involve private life of same-sex couples often involve discrimination of some sort. In the following paragraphs cases dealing the right to respect to private life as enjoyed by same-sex couples will be discussed.

2.3.2 Private Life: Cohabitation

The very first case which dealt with rights of same-sex couples under Article 8 of the Convention concerned the case of Karner. In this case the applicant, Mr. Karner, was in a relationship with Mr. W with whom he lived together in the latter’s flat of which they shared the expenses. When Mr. W died the lease of tenancy was terminated and consequently Mr. Karner had to move out of the flat. He claimed that by being denied to succeeding to the tenancy he became a victim of discrimination on the ground of his sexual orientation and relied on Articles 14 and 8 of the Convention. The Court considered that in order for Article 14 to be applicable the facts of the case must fall within the scope of one of the rights and freedoms set forth in the Convention. Subsequently the Court held that the current situation did fall within the ambit of Article 8 as ‘in any event, the applicant's complaint relates to the manner in which the alleged difference in treatment adversely affected the enjoyment of his right to respect for his home...’ Furthermore, the Court ruled that Article 14 was also applicable since the only reason for the termination of the lease was the applicant's
sexual orientation.  

On the merits the Court considered as follows. Firstly, it rejected the argument of the respondent government that the difference in treatment had an objective and reasonable justification with the aim to protect the traditional family. Although the Court accepts that protection of the family in the traditional sense is a ‘weighty and legitimate reason’ which may justify a different treatment, when this difference in treatment is based on sex or sexual orientation it must be shown that it is necessary in order to achieve the aim. The respondent government did not advance any arguments for the necessity of the different treatment with the aim to protect traditional family and consequently the Court found a violation of Article 14 read in conjunction with Article 8.

Thus, the Court sees no reasonable justification for a difference in treatment when the succession of a tenancy lease is concerned. A comparable case was recently decided upon by the Court. In 2010 the Court pronounced judgment in the Kozak case against Poland. The case concerned similar facts and the applicant was rejected succession to tenancy on the ground of his sexual orientation. According to Polish law, people who lived in de facto marital cohabitation qualified for succession to tenancy. However, under Polish law such de facto marital cohabitation was reserved for opposite-sex partners. The Polish government argued that the grounds for the difference in treatment were based on the protection of the traditional family and the 'union of a man and woman'. Again the Court noted that the protection of the traditional family may be a weighty and legitimate reason for difference in treatment. However, as the state has a narrow margin of appreciation regarding difference in treatment based on sexual orientation the Court could not accept that exclusion of homosexual couples from succession to tenancy was necessary for the protection of traditional family.

2.3.3 Private Life: Insurance benefits

The case of P.B. and J.S. dealt with insurance benefits for dependent partners. One of the Austrian applicants, who was a civil servant, applied so as to have his insurance cover his dependent same-sex partner. Austria rejected the application as the relevant domestic law only referred to this possibility for opposite-sex partners. The applicants claimed to be victims of discrimination on the ground of sexual orientation and relied on Article 14 in conjunction with Article 8. The Court starts by considering the applicability of Article 14. Again, the facts of the case must fall within the ambit of another substantive provision of the Convention in order to render Article 14 applicable. The Court considered that it is

43 Ibid.
44 Ibid., para.40.
45 Ibid., para. 41.
46 ECHR 2 March 2010, No. 13102/02 (Kozak/Poland).
47 Ibid., para. 98.
48 Ibid.; see also: Karner, supra note 39, para. 40; ECHR 10 May 2001, No. 56501/00 (Mata Estevez/Spain).
49 Kozak, supra note 46, para. 99.
50 ECHR 22 July 2010, No. 18984/02 (P.B. and J.S./Austria).
51 Ibid., para. 21.
undisputed that the relationship of a same-sex couple falls within the notion of private life.\textsuperscript{52} The Court then reiterates that states have a narrow margin of appreciation when difference in treatment is based on sexual orientation and repeats once again that such difference in treatment must be necessary to achieve the aim pursued thereby in order for it to be justified.\textsuperscript{53} The respondent government had not advanced any arguments to justify the difference in treatment, which is hardly surprising as the disputed domestic law had already been changed. Nevertheless, the Court found a violation of Article 14 in conjunction with Article 8 for the period before the legislative change came into effect.

### 2.3.4 Summary of Private Life

The current paragraph described the development of the Convention and its interpretation by the Court concerning the various rights that same-sex couples can derive from the right to respect for private life. Since the 1980s a rapid development can be observed. First by declaring the criminalisation of same-sex sexual conduct incompatible with the Convention. The mere existence of laws criminalising same-sex sexual conduct are contrary to the Convention. Banning homosexuals from the armed forces is also considered to be contrary to the Convention. Furthermore, the age of consent for sexual activity should be the same for opposite-sex sexual activity as for same-sex sexual activity. These rights, which rather concern individuals, are a precondition for same-sex couples to exercise Convention rights. In that regard, same-sex couples cannot be discriminated against in cases involving succession to tenancy, protection of the home, and insurance benefits which fall under Articles 8 and 14.

Thus, the protection of non-heterosexuals under the Convention has long been undertaken via the right to respect for private life, referring to the private sphere. However, this is a problematic approach to the issue as protection via merely private life does not take account for the fact that the private sphere is largely dependent upon the public sphere.\textsuperscript{54} Such an approach does not consider that exclusion and discrimination on the basis of sexual orientation take place on the social level, in the public sphere.\textsuperscript{55} This exclusion may take place at all sorts of levels such as in relation to employment, insurance, healthcare. Furthermore, this approach endorses a distinction between heterosexual and non-heterosexuals: non-heterosexuals are protected in as far as their privacy is concerned, whereas heterosexuals enjoy the full protection of Article 8, which includes family life.\textsuperscript{56} Such logic does not appreciate the fact that other alternative families than families based on marriage require protection.\textsuperscript{57} Consequently there is a split between the private life and ‘public’ life of the homosexual under the ECHR, as Grigolo describes it: ‘there is an obvious split between a

\begin{itemize}
\item \textsuperscript{52} Ibid., para. 26.
\item \textsuperscript{53} Ibid., para. 42.
\item \textsuperscript{55} P. Johnson, supra note 54, at p. 78.
\item \textsuperscript{57} M. Grigolo, ‘Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject’, European Journal of International Law, 2003, Issue 14, pp. 1023-1044, at p. 1038.
\end{itemize}
legitimate 'private' decriminalized homosexual subject and his/her unacceptable 'public' demands to establish relationships and families.\textsuperscript{58} Nevertheless, in recent case law the Court recognised that same-sex couples can have family life as protected by Article 8. Therefore, the following paragraph will focus on the right to respect for family life with regard to same-sex couples.

2.4 Family Life

2.4.1 Introduction

Another aspect covered by Article 8 is the right to respect for family life. This right is an autonomous concept which is to be interpreted independently of the domestic law of Council of Europe Member States.\textsuperscript{59} When family ties are of a biological\textsuperscript{60} nature or when a married couple is concerned, family ties - and thus family life - are assumed to exist.\textsuperscript{61} However, the concept of family life is much broader than biological or marital family life and concerns \textit{de facto} family life rather than \textit{de jure}.\textsuperscript{62} Thus, also the relationship between parents and children born out of wedlock are covered by the concept of family life.\textsuperscript{63} Moreover, the relationship between an adoptive parent and adoptive child are considered to constitute family life.\textsuperscript{64} However, the mere existence of a family relationship is not sufficient to fall within the scope of family life under Article 8. There must be a sufficiently close factual bond.\textsuperscript{65} When a married couple is concerned and children born in such context, family life is assumed to be present.\textsuperscript{66} Whether family life is present in relationships other than marriage is dependent on factual circumstances.\textsuperscript{67}

Traditionally, the concept of family life did not cover same-sex relationships.\textsuperscript{68} Consequently, same-sex couples could not claim to have family life under the Convention and could not derive protection from the concept. Such was the conclusion of the Commission in 1983 in the case of \textit{X. and Y. v. United Kingdom}.\textsuperscript{69} The reasoning behind this conclusion is not clear from the case, whereas the difference between same-sex relationships and heterosexual relationships not having the status of marriage is unclear. Furthermore, there seems to be a similar interest for same-sex couples as for different-sex couples to derive protection from the...
concept of family life as articulated in Article 8.\textsuperscript{70}

However, over a long period of time the Court and the Commission likewise upheld that relationships of same-sex couples could not constitute family life. The Commission famously stated that 'despite the modern evolution of attitudes towards homosexuality, the Commission finds that the applicants' relationship does not fall within the scope of the right to respect for family life ensured by Article 8'\textsuperscript{71}, without further furnishing this decision with reasoning. This Commission decision became settled case law and was repeated in numerous cases.\textsuperscript{72} In all cases the complaints regarding interference with family life were declared inadmissible as they were found to be manifestly ill-founded. As recently as 2001 this was once again repeated in the case of \textit{Mata Estevez}.\textsuperscript{73} The Court considered that 'despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation.'\textsuperscript{74}

\subsection*{2.4.2 Case of Schalk and Kopf v. Austria}

However, more recently the ECtHR ruled that same-sex couples can also have family life and consequently are afforded the rights which are protected by the concept of family life.\textsuperscript{75} In the milestone judgement in the case of \textit{Schalk and Kopf} the European Court ruled that same-sex couples can also enjoy family life as protected by Article 8 of the Convention. The Court held that family life is not confined to marriage-based relationships.\textsuperscript{76} However, in that connection the Court had thus far considered that emotional and sexual relationships between same-sex couples only constitutes private life (not family life).\textsuperscript{77} Still, the Court noticed a rapid development since 2001 and therefore found it appropriate to reconsider its previous position.\textsuperscript{78} It therefore considered 'it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable \textit{de facto} partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.'\textsuperscript{79}

In this ruling the Court found the growing tendency of Member States to include same-sex couples in the notion of 'family' to be decisive to include same-sex couples in the notion of family life as protected by Article 8. It thus relied on its interpretative formula of a common European standard. This comprises that when there are more and more Member States recognising a certain right to be part of a Convention right, that the

\begin{itemize}
  \item \textsuperscript{70} Van Dijk, supra note 17, p. 693.
  \item \textsuperscript{71} \textit{X. and Y. v. United Kingdom}, supra note 68, p. 221.
  \item \textsuperscript{72} ECtHR 14 May 1986, No. 11716/85 (S./United Kingdom); ECtHR 9 October 1989, No. 14753/89 (C. and L.M./United Kingdom); ECtHR 15 May 1996, Appl. No. 28318/95 (Roösli/Germany).
  \item \textsuperscript{73} \textit{Mata Estevez v. Spain}, supra note 48.
  \item \textsuperscript{74} Ibid.
  \item \textsuperscript{75} \textit{Schalk and Kopf}, supra note 10.
  \item \textsuperscript{76} Ibid., para. 91.
  \item \textsuperscript{77} Ibid., para. 92.
  \item \textsuperscript{78} Ibid., para. 93.
  \item \textsuperscript{79} Ibid., para. 94.
\end{itemize}
Convention is inclusive of that right and the margin of appreciation for Member States becomes narrow. However, the Court did not point out how many Member States exactly include same-sex couples in the notion of family. Whereas the fact-sheet of ILGA Europe of 2011 clearly indicated that such is only the case for eleven Member States.

As will be discussed below, same-sex couples do not enjoy the protection of the right to marry under Article 12 of the Convention. One may wonder whether such a right can be inferred from Article 8 read together with Article 14. The applicants in Schalk and Kopf, in their subsidiary claim, argued that if same-sex marriage was not protected by Article 12, then it can be inferred from Article 8 read together with Article 14. The Court ruled that same-sex couples enjoy family life, so now it had to rule whether the inability of applicants to marry was a discriminatory infringement of it. The Court ruled that such was not the case, as the 'Convention is to be read as a whole and its Articles should therefore be construed in harmony.' Therefore, the right to marry cannot not be inferred from Article 8 read together with Article 14 as Article 12 does not impose such an obligation on Member States either.

2.5 Parental Rights and Adoption

2.5.1 Introduction

Another aspect that may fall within the scope of Article 8 is the issue of adoption. However, the right to respect for private life and family life does not include the right to adoption. Furthermore, the right to respect for family life covers the presupposed existence of a family but not the desire to found a family. Although the right to adopt as such is not guaranteed by the Convention, Article 8 may be implicated as the right to private life includes inter alia the right to 'establish and develop relationships with others.' The relevance of parental rights and adoption in the context of same-sex couples may be easily identified. Same-sex couples may have the wish to become parents or may have children from previous relationships. In the former situation same-sex couples may want to use alternative means to become parents such as adoption or surrogacy. However, not all Member States include same-sex couples in the notion of 'family' and moreover, do not allow for legal constructions enabling same-sex couples to become parents.

The first case with with regard to sexual orientation in parent-child relationships was the case of

81 See ILGA Europe fact-sheet, supra note 21.
82 Schalk and Kopf, supra note 10.
85 Fretté v. France, supra note 84, para. 32; ECtHR 13 June 1979, No. 6833/74 (Marckx/Belgium), para. 31; ECtHR 28 May 1985, Nos. 9214/80, 9473/81, 9474/81 (Abdulaziz, Cabales and Balkandali/United Kingdom), para. 62.
86 ECtHR 22 January 2008, No. 43546/02 (E.B./France), para. 43.
This case concerned a dispute about parental responsibility for a child between the applicant, a gay man, and his ex-wife. The applicant was denied the parental responsibility but was granted visitation rights. However, the domestic court noted that the applicant should act in a way so his daughter would not realise that he is gay. Da Silva Mouta complained of a violation of Articles 8 and 14 and argued that the decision not to grant him parental responsibility was based on his sexual orientation. The ECtHR concluded that there was a difference in treatment and continued to investigate whether there was a justification for this difference in treatment. The Court accepted that there was a legitimate aim, namely the protection of the health and rights of the child. However, the Court found that the refusal to award the applicant parental responsibility was based on merely the sexual orientation of the applicant and therefore it was disproportionate.

2.5.2 Case of Fretté v. France

In the case of Fretté the Court was called upon for the first time to give its ruling on the right to adopt for lesbian or gay individuals. The applicant, a gay man, wanted to adopt a child and to that end he made an application for prior authorisation to adopt a child. His application was refused in first instance, which was later confirmed in last instance at the French Conseil d'Etat. Although the applicant's 'choice of lifestyle' should be respected and there was no doubt about his child-rearing capabilities, it was found that the applicant could not offer 'stable maternal role model' and that he had difficulties envisaging the practical implications. Consequently, the applicant alleged violations of Articles 8 and 14 as the decision rejecting his application was based on his sexual orientation.

The Court noted that the Convention does not guarantee a right to adoption as such, nevertheless Articles 8 and 14 were found to be applicable since the decision was based in a decisive fashion on the sexual orientation of the applicant. The Court then continued to assess whether the decision of the French authorities complied with its obligations under Article 14 and 8. As it established there was a difference in treatment, it continued to assess possible grounds for justification. Again, protecting the health and rights of children were found to be a legitimate aim. Then the Court continued to apply its proportionality test. It first noted that the scientific community is divided over 'the possible consequences of a child being adopted by

87 ECtHR 21 December 1999, No. 33290/96 (Salgueiro da Silva Mouta/Portugal).
88 Ibid., paras. 8-18.
89 Ibid., para. 14.
90 Ibid., paras. 27-28.
91 Ibid., para. 30.
92 Ibid., para. 35.
93 Fretté v. France, supra note 84.
94 Ibid., para. 9.
95 Ibid., para. 16.
96 Ibid., para. 10.
97 Ibid., para. 32-33.
98 Ibid., para. 38.
Further to that, the court considered that there are considerable differences in national and international opinion regarding this issue. The Court therefore observed that, States enjoy a wide margin of appreciation in these matters and the need to protect the interests of the child lead to the conclusion that the refusal to authorise adoption did not infringe the principle of proportionality.

### 2.5.3 Case of E.B. v. France

In 2008 the Court again ruled on the issue of lesbian and gay adoptions in France. The case of E.B. concerned similar facts as the Fretté case, albeit the applicant was a lesbian. She was involved in an eight year stable relationship with another woman she filed her application for adoption as a single individual. In a series of administrative and judicial decisions the application was rejected on the grounds that there was a lack of a paternal role model and that the place the partner of the applicant would have in the child’s life was unclear. The applicant complained of infringement of Articles 8 and 14.

The Court first repeated its considerations in the case of Fretté with regard to the applicability of Articles 8 and 14. It noted that France has gone beyond the rights protected by the Convention by offering single individuals a right to adopt and in the application of that right it cannot take discriminatory measures. In the same vein as in Fretté the Court considered that as the decision was based on the sexual orientation of the applicant, Articles 8 and 14 were implicated. It then considered the compatibility of the rejection of the application to adopt. In its assessment the Court found that the French authorities relied too heavily on the sexual orientation of the applicant in reaching their decisions. The focus on her sexual orientation coupled with reliance on her ‘status as a single person’ lead the Court to this conclusion. Thus, a difference in treatment was observed by the Court. Consequently it assessed whether the interference was proportional, assuming that there was a legitimate aim present. The Court considered that, against the background of French law which allowed for single person adoption, the reasons – of a paternal role model and the ambivalence of the partner regarding the adoption – were not proportionate. Consequently a violation of Articles 8 and 14 was found.

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99 Ibid., para. 42.
100 Ibid.
102 Ibid., para. 17.
103 Ibid., para. 49.
104 Ibid., para. 41-52.
105 Ibid., para. 84-85.
106 Ibid., para. 86-87.
107 Ibid., para. 91-98.
108 Ibid., para. 94.
2.5.4 Case of Gas and Dubois v. France

The most recent case concerning adoption by homosexual couples is the case of *Gas and Dubois*. This case concerned the lesbian couple Valérie Gas and Nathalie Dubois. The latter had given birth to her daughter in 2000, who was conceived by artificial insemination with assistance of an anonymous donor. Subsequently, Gas and Dubois concluded a *pacte civil solidarité (PACS)*, a form of civil union. In 2006 Gas applied for adoption of the daughter of her partner Dubois, with her express consent. In a judgment of the *tribunal de grande instance de Nanterre* it was found that the legal requirements for adoption were met, which was clear from the active and joint care the couple took for the child. The application for adoption was rejected on the basis that according to French law this meant that Dubois, the biological and legal mother, would lose parental rights. The applicants lodged an appeal against this decision arguing that such loss of parental rights by the biological mother could be neutralised by total or partial delegation of that authority. The judgment concerning the appeal upheld the previous decision, observing that the proposed adoption was not in the interest of the child. Subsequently, the case was brought before the European Court of Human Rights.

The applicants complained that they had suffered discrimination based on sexual orientation and violation of their right to respect for private life and family life. After stating the general principles applicable in the current case, the Court turns its attention to the application of these principles. It firstly observes that the current case differs from the *E.B.* case as the latter concerned adoption by a single homosexual person whereas in the current case the adoption involves a couple. The Court further observes that French law would allow for one exception. Article 365 of the French Civil Code states that if the adopter is married to the adoptee’s biological parent, the adopter and his or her spouse will share parental authority. Subsequently the Court assesses the legal position of the applicants with regard to this provision of the French Civil Code. It notes that they could not benefit from this provision as French law does not provide for same-sex marriage. It then recalls its ruling of *Schalk and Kopf* that neither Article 12 of the Convention requires Member States to provide for same-sex marriage, nor does Article 8 read in conjunction with Article 14. Furthermore, if Member States decide to offer a different form of legal recognition of same-sex couples

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109 ECHR 5 March 2012, No. 25951/07 (*Gas & Dubois/France*).
114 *Ibid.*, para. 34.
118 Article 365 du code civil: ‘L’adoptant est seul investi à l’égard de l’adopté de tous les droits d’autorité parentale, inclus celui de consentir au mariage de l’adopté, à moins qu’il ne soit le conjoint du père ou de la mère de l’adopté ; dans ce cas, l’adoptant a l’autorité parentale concurremment avec son conjoint, lequel en conserve seul l’exercice, sous réserve d’une déclaration conjointe avec l’adoptant devant le greffier en chef du tribunal de grande instance aux fins d’un exercice en commun de cette autorité. (…)’.
119 *Gas & Dubois v. France*, supra note 109, para. 65.
they have a certain margin of appreciation as to the exact status conferred. The applicants argued that they were in a similar situation as married couples, and therefore should benefit from Article 365 of the French Civil Code. The Court does not follow the applicant's argument and states that marriage confers a special status upon those who engage in it and that the exercise of the right protected by Article 12 has social, personal and legal consequences. Therefore, the Court does not consider that, with regard to the adoption, the applicants are in a similar position as married couples.

Having established such, the Court continues its assessment by considering whether there has been a difference in treatment in the situation of the applicants when compared to that of heterosexual unmarried couples. The Court swiftly tackles this, by simply noting that in cases of heterosexual couples, whether merely living together or having concluded a PACS, the simple adoption would also be refused. Therefore, there is no differential treatment, according to the Court. The applicants further argued that there is an indirect discrimination: heterosexuals can avoid the current situation by being able to get married whereas in the situation of applicants this is not a possibility. They thus complain of indirect discrimination. In reply to this argument the Court simply notes that this issue has already been dealt with in the Schalk and Kopf case, and refers to the preceding paragraphs of the judgment. Finally, the Court observes that the protection of the child is a legitimate aim to refuse the current adoption and subsequently holds that there has been no violation of Article 14 read in conjunction with Article 8.

The cases discussed make clear that a rapid evolution is present on the European level. Therein the focus is on difference in treatment based on sexual orientation. Whereas in the Fretté case the Court accepted the arguments that there is scientific division and no national or international consensus, in E.B. the Court did not consider this in the light of the proportionality test (although such was argued by France). Thereby it effectively overturned the Fretté judgment.

2.6 Article 8: Analysis and Critique

The current chapter described the way in which the framework of Article 8 protects same-sex couples including case law of the Court. The concepts of private life and family life were discussed in this perspective, as well as aspects which fall under these concepts such as cohabitation, insurance benefits, parental rights and adoption by same-sex couples or homosexual individuals. This paragraph contains a short summary of this chapter and, where appropriate, this will be furnished with critique.

120 Ibid., para. 66.
121 Ibid., para. 67.
122 Ibid., para. 68.
123 Ibid., para. 69.
124 Ibid., para. 70.
125 Ibid., para. 71.
126 Ibid., para. 72-73.
127 Ibid., para. 64.
Since the 1980s the Court developed case law which banned criminalisation of same-sex sexual conduct. Furthermore, more equality was guaranteed by the Court under the Convention by declaring differences in age of consent between same-sex sexual activity and opposite-sex sexual activity incompatible with the Convention. The approach of the Court was to guarantee this via the right to respect for private life. Although, it was upheld for several decades that homosexual couples could not have family life as protected by Article 8, this position was recently reconsidered in the \textit{Schalk & Kopf} case and was reaffirmed in the case of \textit{P.B. And J.S.}.\textsuperscript{129} Thus, a same-sex couple living in a stable de facto partnership constitutes family life as protected by Article 8. Nevertheless, Article 8 read in conjunction with Article 14 does not require Member States to recognise same-sex marriage nor to provide for an alternative means of legal recognition of same-sex partnerships. This was reaffirmed in the Court's judgment in the case of \textit{Gas and Dubois}.

Although the Court has now changed its position on family life in relation to same-sex couples, the impact this will have is unclear. Firstly, the judgments that recognise that same-sex couples can have family life are still very recent and therefore the impact of these judgments will have to be awaited. Secondly, the judgments itself lacks clarity as to what same-sex couples can expect from family rights.\textsuperscript{131} This is pointedly illustrated by the dissenting opinion of Judge Rozakis in the \textit{Schalk and Kopf} case. In this dissenting opinion, Judge Rozakis cannot agree with the finding that there has been no violation of Article 14 read in conjunction with Article 8.\textsuperscript{132} He notes that the Court extended the notion of 'family life' to same-sex couples as it identified 'a growing tendency to include same-sex couples in the notion of 'family''.\textsuperscript{133} He then criticises the Court for not drawing inferences from this finding as this leaves same-sex couples with a legal vacuum and does not require Member States to provide for a satisfactory framework. Therefore, he concludes, the Court has left same-sex couples with a framework in which they do not receive the protection every family should enjoy.\textsuperscript{134}

The right to adoption as such is clearly not protected by the Convention. However, if a Member State does provide for such a right it must do so on a non-discriminatory basis. The cases regarding adoption by gay and lesbian individuals predate the case law which recognised that same-sex couples can have family life. Therefore, the issue of adoption was dealt with under the right to respect for private life, more specifically: the right to establish and develop relationships with others which is part of the right to respect for privacy. Thus, in \textit{E.B.} the Court acknowledged that if a Member State provides for single person adoption any decision of domestic authorities regarding such adoption may not be discriminatory on ground of sexual orientation. In allowing single parent adoption a too heavy reliance on sexual orientation and the requirement of a paternal/maternal role model is discriminatory on the ground of sexual orientation.

In the recent case of \textit{Gas and Dubois} the Court gave its ruling on adoption by same-sex couples with a comparison to the situation of same-sex couples. The simple adoption was refused because the biological mother (one of the applicants in the case) would lose her parental rights to the adopter (the other applicant).

\textsuperscript{129}Case of P.B. And J.S. v. Austria, supra note 50, para. 30.

\textsuperscript{130}Gas & Dubois v. France, supra note 109.

\textsuperscript{131}See: L. Hodson, 2011, supra note 56, p. 176.

\textsuperscript{132}See Schalk and Kopf, supra note 9, Dissenting Opinion, para. 1.

\textsuperscript{133}Schalk and Kopf, supra note 9, para. 93, see also: Dissenting Opinion, para. 2.

\textsuperscript{134}See Schalk and Kopf, supra note 9, Dissenting Opinion, para. 4.
However, if the case concerned a heterosexual couple, French law would provide for an exception: marriage, the spouses automatically share parental responsibility. The Court firstly ruled that unmarried same-sex couples, not being able to marry, are not in a situation comparable to that of heterosexual married couples. Secondly, it compared the case of applicants to the situation of unmarried heterosexual couples. Likewise, it found no difference as adoption would also be refused in such cases. The argument that there was a difference in treatment because heterosexual couples have the ability to marry did not convince the Court.

Criticism to be made with regard to the judgments concerning adoption can be found in the Dissenting opinion of Judge Villiger in Gas and Dubois. He cannot agree with the particular emphasis the Court puts on the adults in this case where the interests of the child are at stake. He rather feels that the case should be more focussed on whether the differential treatment is justified from the standpoint of the interests of the child. He considers that children of heterosexual couples enjoy shared parental responsibility if the couple is married, whereas such is not the case when an unmarried homosexual couple is concerned. This is where he sees a difference in treatment: the child of the heterosexual couple enjoys shared parental responsibility whereas the child of the unmarried homosexual couple does not. He is deeply convinced that shared parenting is in the interest of the child and sees no justification for this differential treatment. Furthermore, he is not convinced that this difference in treatment can be justified because marriage has a special status. However, he does not claim that the applicants should be allowed to marry but he simply wishes to stress that the discrimination in the case of Gas and Dubois adversely affects the interests of the child.

Thus, same-sex couples were treated differently compared to heterosexual couples before the Court declared that they could have family life. After all, same-sex couples could only enjoy private life. However, the shift to include same-sex couples in the notion of family life has changed this. Nevertheless, this inclusion does not automatically lead to the conclusion that same-sex couples enjoy equal protection when compared to heterosexual couples. Such is illustrated by the aforementioned dissenting opinion of Judge Rozakis in the Schalk and Kopf case. It left unanswered what the inferences are from including same-sex couples in the notion of family life. Nevertheless, the Council of Europe report on discrimination on grounds of sexual orientation stresses that: ‘States that do not give same-sex couples the opportunity to marry or to enter into a legal partnership arrangement granting the same or similar rights must ensure that they do not treat them less favourably than cohabiting different-sex couples in the same situation (…)’. Furthermore: ‘With regard to differences in treatment between same-sex registered partners and married different-sex couples, the Court has stated that member states enjoy a certain margin of appreciation concerning the exact status given by alternative means of recognition.’

With regard to Article 8 there is thus little direct difference in treatment. The lack of clarity regarding the inclusion of same-sex couples in the notion of family life cannot lead to the conclusion that there is a difference in treatment. It is to be seen how further applications in this regard will be dealt with by the Court. However, such lack of clarity does leave same-sex couples with a legal vacuum of uncertainty. Furthermore, Article 8 does not require Member States to recognise same-sex partnerships or similar arrangements for same-sex couples, nor is such the case with regard to heterosexual couples. Therefore, when differences in

135 Gas and Dubois, see supra note 109.
136 Gas and Dubois, see supra note 109, Dissenting Opinion Judge Villiger.
137 Council of Europe Report, supra note 2, p. 92.
138 Ibid.
treatment between same-sex couples and heterosexual couples are identified by the Court the comparison made is between an unmarried cohabiting heterosexual couple and an unmarried cohabiting same-sex couple, as these situations are similar. In that regard it must be concluded that there is no difference in treatment. However, the situations addressed above can be easily avoided by heterosexual couples as they can get married, which is a right protected by Article 12 of the Convention. Thus, the difference to be noted is an indirect discrimination between same-sex unmarried couples and heterosexual unmarried couples in the fact that the latter have the possibility to get married. In order to come to a better appreciation of this indirect discrimination the following chapter will elaborate upon the right to marry.
Chapter II: The Right to Marry

3.1 Introduction

The right to marry (and to found a family) is protected by Article 12 ECHR and is the only provision of the Convention that is not furnished with *Travaux Préparatoires*. Article 12 states:

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

Many of the Convention rights come with a second paragraph setting the conditions for restrictions to the right. These paragraphs require that restrictions are prescribed by law, have a legitimate aim and a proportionate to the aim pursued by the Member State. Article 12 however, does not include a second paragraph with possibilities for restrictions to the right. Nevertheless, the right to marry is not an unlimited right. The formula included in Article 12 allows for certain restrictions: the right is protected 'according to the national laws governing the exercise of the right.' Thus, Member States are left a considerable 'margin of appreciation' with regard to this right. In short, the very essence of the right may not be impaired by any restrictions. This implies that Member States may not bar people from the right to marry.

Thus, Article 12 does not require Member States to completely refrain from interfering with the exercise of the right to marry. On the contrary, marriage is an institution which is regulated by public authority; the role of national law is to govern the exercise of the right. Generally Article 12 requires Member States to provide for the means enabling persons to marry. That is not to say that Member States are to provide the material means to enable couples to marry – e.g. monetary means. Rather, the right to marry entails a prohibition of sanctioning the marital status, which also means that not being married may not be sanctioned. This in turn implies that Article 12 protects the right not to marry. Overall, Member States must refrain from substantially interfering with the right to marry and restrictions to marriage may not constitute a violation of other rights protected by the Convention.

Article 12 not only protects the right to marry, but also the right to found a family. Moreover, the family is also protected by Article 8 of the Convention. However, the concepts in both provisions are divergent. Article 8 ECHR encompasses a broader concept of family and is not restricted to families based on marriage.

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139 P. van Dijk, *supra* note 17, p. 842.
140 ECHR 17 October 1986, No. 9532/81 (*Rees/United Kingdom*), para. 50; see also: P. van Dijk, *supra* note 17, p. 842.
141 *Ibid*.
143 P. van Dijk, *supra* note 17, p. 842.
144 P. van Dijk, *supra* note 17, p. 843.
146 P. van Dijk, *supra* note 17, p. 844.
147 P. van Dijk, *supra* note 17, p. 843.
It refers to people genuinely constituting a family. Hence interferences in the family life of a married couple are dealt with under Article 8 instead of Article 12.

3.2 The “Traditional Meaning” of the Right to Marry

So far, the obligations of Member States and the possible restrictions under Article 12 ECHR have been described. However, Article 12 also has substantive implications, i.e. what does Article 12 substantively protect and what does it not protect. As Article 12 is the only provision of the Convention that has no Travaux Préparatoires it can be assumed that when the text of this provision was drafted ‘marriage’ referred to the traditional meaning of the notion: institutionalisation of a relationship between two persons of the opposite sex.\(^\text{148}\) The case law of the Commission and the Court have long indicated the same position\(^\text{149}\) with an emphasis on the ‘physical capacity to procreate’ of the couple and marriage as a union between person of the opposite ‘biological sex’.\(^\text{150}\) The Court reiterated this view in the Marckx case when it ruled that Article 12 does not require that ‘all legal effects attaching to marriage should apply equally to situations that are in certain respects comparable to marriage’.\(^\text{151}\) In the Cossey case\(^\text{152}\) the Commission in its report of 1989, reconsidered its position in that it no longer regarded the biological sex as the determining factor with regard to marriage.\(^\text{153}\) However, when the case was referred to the Court the traditional view was upheld, overruling the view of the Commission.\(^\text{154}\) The Court repeated its position in the case of Sheffield and Horsham stating that ‘the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of the opposite biological sex’.\(^\text{155}\)

It was not until 2002 that the Court altered its position on marriage in the Goodwin case.\(^\text{156}\) This case concerned a post-operative transsexual (man to woman) wishing to marry a man. The Court held that it would be artificial to deny the post-operative transsexual legal recognition of her gender reassignment\(^\text{157}\) and such denial would result in a 'conflict between social reality and law'.\(^\text{158}\) Such are the requirements of Article 8 ECHR. Thus, the biological sex of a person wishing to marry is no longer of decisive importance, nor is the capacity to procreate. Nevertheless, the Goodwin judgment upheld that marriage can only be concluded between persons of the opposite (legal) sex.\(^\text{159}\) In the following paragraphs this case and further...
developments in case law will be discussed in more detail. These developments in case law will show the approach by the Court with regard to changing its interpretation of the right to marry and will provide a useful background to the discussion of same-sex marriage.

3.3 Case Law and Recent Developments

3.3.1 Introduction

Case law with regard to Article 12 of the Convention is quite scarce, not to mention when it comes to case law under that provision regarding same-sex couples. To date, the Court has only pronounced judgment in one case concerning the right to marry of same-sex couples: the Schalk & Kopf case of 24 June 2010.\textsuperscript{160} Furthermore, in the case of Gas and Dubois the Court has touched upon the right to marry as a side issue with regard to adoption. Also, currently an application by a same-sex couple claiming the right to marry under Article 12 of the Convention is pending.\textsuperscript{161} The current paragraph will describe the developments the right to marry has undergone by the interpretation of the Court. It will start with a groundbreaking judgment in which it was considered that biological sex is no longer decisive for the right to marry. Subsequently, judgments on applications by same-sex couples will be discussed. Finally, an assessment will be undertaken regarding whether there is a difference in treatment, and if so what the implications of this are.

3.3.2 Case of Goodwin v. the United Kingdom

In the case of Goodwin the Court fundamentally changed its interpretation of the right to marry. This case concerned an applicant who was a post-operative male to female transsexual. The applicant alleged violation of Articles 8 and 14 of the Convention. With regard to Article 8 the applicant mainly contested the domestic legislation which assessed her sex on purely biological criteria without taking account of her being a post-operative male to female transexual.\textsuperscript{162} Thus official documents stated her sex as male as opposed to female. This resulted \textit{inter alia} in the danger that her employer would find out about her past which could result in devastating consequences for her career. Furthermore, as a result of not recognising her gender reassignment she could not claim a retirement pension at the age of 60, the pensionable age of females in the United Kingdom at the time.

The Court considered, with regard to Article 8, that previous case law already established that not recognising gender reassignment was not in violation of that provision.\textsuperscript{163} It followed by considering that it is

\textsuperscript{160}See supra note 10.
\textsuperscript{161}Case of Chapin and Charpentier, supra note 8.
\textsuperscript{162}Goodwin, supra note 156, paras. 60-63.
\textsuperscript{163}Ibid., para. 73.
not formally bound by its previous decisions and that departing from previous case law would require good reasons.\textsuperscript{164} It then considered that the Convention is first and foremost a system of protection of human rights and consequently it has to take into account changing conditions and ‘evolving convergence as to the standards to be achieved.’\textsuperscript{165} Taking these considerations into account, the Court continues to consider the case ‘in the light of present-day conditions’ in order to assess an ‘appropriate interpretation and application’ of the Convention.\textsuperscript{166} The Court then considers the applicant’s situation as a transsexual, medical and scientific considerations, European and international consensus on the issue and finally strikes a balance in the present case having regard to these considerations.\textsuperscript{167}

The balance struck by the Court was based on several important considerations. Firstly, when the applicants situation as a transsexual was considered the Court observed that there was a conflict between social reality and law as a result of not recognising the gender reassignment of the applicant.\textsuperscript{168} As a result of this situation the applicant ‘may experience feelings of vulnerability, humiliation and anxiety.’\textsuperscript{169} The Court subsequently continues to consider countervailing arguments of public interest put forward by the respondent state.\textsuperscript{170} It considers that scientific and medical data do not provide any determining arguments regarding legal recognition of gender reassignment as it is recognised in a vast majority of Member States as a medical condition and treatment – i.e. gender reassignment – is offered.\textsuperscript{171} Then a growing European and international consensus is addressed. The Court considers that there is such a growing trend of legal recognition of gender re-assignment as well as a a trend of social acceptance.\textsuperscript{172} The Court then famously rules that ‘having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, (...) Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.’\textsuperscript{173}

The Court then turns to the alleged violation of Article 12 of the Convention. The applicant complained of a violation of this provision as she and her male partner could not marry because her gender reassignment was not recognised.\textsuperscript{174} The Court recalls the cases in which it ruled that marriage protected by Article 12 referred to traditional marriage between persons of the opposite biological sex.\textsuperscript{175} Article 12 not only protects the right to marry, but also the right to found a family. The Court found that founding a family is not a

\textsuperscript{164} Ibid., para. 74.  
\textsuperscript{165} Ibid.  
\textsuperscript{166} Ibid., para. 75.  
\textsuperscript{167} Ibid., paras. 89-94.  
\textsuperscript{168} Ibid., para. 77.  
\textsuperscript{169} Ibid.  
\textsuperscript{170} Ibid., para. 80.  
\textsuperscript{171} Ibid., para. 81-83.  
\textsuperscript{172} Ibid., para. 84-85.  
\textsuperscript{173} Ibid., para. 93.  
\textsuperscript{174} Ibid., para. 95.  
\textsuperscript{175} Ibid, para. 97.
condition of the right to marry.\textsuperscript{176} Furthermore, the Court is no longer persuaded that it can still be assumed that a person's gender should be determined by purely biological criteria. It considers that there have been major social changes in the institution of marriage and in accordance with its decision regarding Article 8, the legal recognition of gender reassignment requires that the right to marry is equally guaranteed to post-operative transexuals in their reassigned gender. It held that: 'it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.'\textsuperscript{177} The Court concludes that there has therefore been a violation of Article 12.\textsuperscript{178}

### 3.3.3 Case of Schalk and Kopf v. Austria

This case deals with the situation of Mr. Schalk and Mr. Kopf, living in Vienna. It was previously discussed in paragraph 2.4.2. regarding the notion of family life. However, the same case also included an application by the same-sex couple with regard to the right to marry as protected by Article 12. In 2002 the couple requested the competent authority to advance with the formalities enabling them to get married. By decision this request was refused on the ground that marriage could only be contracted by two persons of the opposite sex and as the applicants were two men they 'lacked the capacity for contracting marriage.'\textsuperscript{179} The applicants appealed and eventually lodged a constitutional complaint with the Constitutional Court (Verfassungsgerichtshof). The Constitutional Court upheld the decision that the two men were not able to contract marriage as they lacked the capacity to get married, which lead the applicants to complain to the ECtHR.

As to the admissibility of the complaint, the Austrian government argued that the complaint was inadmissible as per the applicants were two men and therefore the circumstances of the case did not fall within the scope of Article 12.\textsuperscript{180} The argument actually seems quite reasonable, as the ECtHR has consistently held that Article 12 only comprises marriage between two persons of the opposite sex. However, the Court found that the government failed to put forward arguments to substantiate that the complaint was inadmissible \textit{ratione materiae}. Moreover, 'The Court considers (...) that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits.'\textsuperscript{181}

Subsequently, the Court considered the merits of the case. The following parts of its assessment are a representation of the core elements of the Court's judgment. In principle the Court agrees with the applicants that the wording of Article 12, when 'looked at in isolation', does not seem to exclude marriage between persons of the same sex. However, when the Convention is read as a whole it becomes clear that the

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\textsuperscript{176} Ibid, para. 98.
\textsuperscript{177} Ibid., para. 101.
\textsuperscript{178} Ibid., para. 104.
\textsuperscript{179} Schalk and Kopf, supra note 10, para. 9.
\textsuperscript{180} Ibid., para. 40.
\textsuperscript{181} Ibid., para. 41.
meaning must be that Article 12 refers to marriage between persons of the opposite sex as all other provisions of the Convention procure rights to “everyone”.  

Furthermore, the Court observes that in its historical context Article 12 must be understood to refer to marriage between persons of the opposite sex.

The applicants further rely on the Court's settled case law that the Convention is a living instrument. They argued that when understood in present day conditions, Article 12 grants same-sex couples access to marriage. The Court sees no reason to be persuaded by that argument. It observed that, although the institution of marriage has in due course undergone 'major social changes', there is currently no European consensus on the matter. To substantiate this claim the Court refers to the number of Member States allowing same-sex marriage. Furthermore, the Court observes that this case is different from the Goodwin case as the latter concerned marriage between persons of a different gender 'if gender is defined not by purely biological criteria (...)'.

Then the Court engages in a comparative analysis of the Convention, comparing Article 12 ECHR with Article 9 of the Charter of Fundamental Rights of the European Union (hereinafter: 'CFREU' or 'the Charter'). It interprets Article 9 CFREU according to the Commentary to the Charter, in essence meaning that the provision is neither an obstacle to recognising same-sex marriages, nor does it pose a requirement for Member States to 'facilitate such marriages'. Continuing this comparative analysis the Court comes to the following conclusion. Firstly, it observes that with regard to Article 9 of the Charter it no longer considers that 'the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex'. The Court the holds that as a consequence Article 12 cannot be said to be inapplicable to the complaint raised in the case of Schalk & Kopf. Nevertheless, the Court feels that currently 'the question whether or not to allow same-sex marriage is left to regulation by the national law (…)' of the Member States. Thus, although Article 12 is applicable when marriage of persons of the same sex is concerned, whether or not to allow same-sex marriage is not for the Court to decide. Consequently, same-sex marriage is currently not protected by the Convention.

### 3.3.4 Case of Gas & Dubois and beyond

Although the case of Gas and Dubois concerned an application for adoption, the merits of the judgment amply demonstrate the position of the Court regarding the right to marry and discrimination. In the case of Schalk and Kopf the Court already made clear it was not willing to interpret Article 12 or Article 14 read in conjunction with Article 8 so as to require Member States to recognise same-sex marriage. In the Gas and

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182 Ibid., para. 55.
183 Ibid.
184 Ibid., para. 57.
185 At the time merely six; currently seven with thirteen additional Member States allowing for registered partnerships being (nearly) equal to marriage, see: ILGA, State-Sponsored Homophobia Report on Gay and Lesbian Rights, supra note 21.
186 Schalk and Kopf, supra note 10, para. 59.
187 Ibid., para. 60.
188 Ibid., para. 61.
189 Ibid.
Dubois case the Court further elucidated its position on same-sex marriage.

Firstly, marriage confers a special status upon those who engage in that institution and it has social, personal and legal implications.\textsuperscript{190} Therefore, the situation of a married couple is not comparable to that of an unmarried couple, whether heterosexual or homosexual. Hence a difference in treatment does not amount to discrimination as these situations are not comparable. Situations of unmarried heterosexuals and unmarried homosexuals are however comparable,\textsuperscript{191} thus a difference in treatment would amount to discrimination in the terms of the Convention. Finally, the inability of homosexual couples to marry does in the Court's opinion not lead to indirect discrimination and substantiates this by referring to the preceding paragraphs setting out the Schalk and Kopf ruling.

Thus, although the Court has not changed its position with regard to same-sex marriage, in Gas and Dubois it has further clarified its reasoning. Yet, the Court will have another chance to rule on the issue of same-sex marriage in the pending case of Chapin and Charpentier.\textsuperscript{192} The applicants, two men wishing to marry, lodged an application to the mayor of Begles (France) requesting the civil status of marriage. The mayor refused the request, as marriage by same-sex couples was not provided for by law. Despite this, the registrar of the town hall of Begles married the two men and transcribed their status into the registers. Subsequently, the marriage was annulled by a judgment of the High Court of Bordeaux. The applicants appealed against this judgment but to no avail. The applicants subsequently brought the case before the European Court of Human Rights alleging an unjustified interference with their right to respect for private and family life, "which includes (...) to have free choice and access to marriage."\textsuperscript{193} The applicants argue that by excluding same-sex couples from the institution of marriage the French courts have applied a discriminatory difference in treatment based on sexual orientation violating Article 8 read in conjunction with Article 14.\textsuperscript{194} The applicants further argue that the limitation of marriage to persons of a different sex by the French courts infringed their right to marriage in a discriminatory fashion, contrary to Article 12 read in conjunction with Article 14.\textsuperscript{195} Overall, the applicants maintain that the annulment of their marriage is a violation of their right guaranteed by the Convention under Articles 8 and 12 read in conjunction with Article 14.

3.4 Article 12: Analysis and Critique

The right to marry has changed considerably over the past decades. From a traditional view of marriage between two persons of the opposite biological sex in the 1990s to the applicability of Article 12 to same-sex couples in the 2010s. The judgment in the case of Goodwin changed the right to marry significantly by

\textsuperscript{190} Gas and Dubois, supra note 109, para. 68.
\textsuperscript{191} Ibid., para. 69.
\textsuperscript{192} Case of Chapin and Charpentier, supra note 8.
\textsuperscript{193} Ibid., own translation from French, original text: ‘(…) qui inclut (...), d’avoir libre choix et libre accès au mariage.’
\textsuperscript{194} Ibid., original French text: ‘Les requérants soutiennent qu’en excluant les couples de même sexe de l’institution du mariage, et par conséquence en annulant leur acte de mariage, les juridictions françaises ont opéré une différence de traitement discriminatoire fondée sur l’orientation sexuelle en violation des articles 8 et 14 combinés de la Convention.’
\textsuperscript{195} Ibid., original French text: ‘De plus, les requérants allèguent qu’en limitant le mariage aux personnes de sexe différent, et en annulant l’acte de mariage dressé le 5 juin 2004, les juridictions françaises ont porté atteinte de façon discriminatoire à leurs droits garantis par les articles 12 et 14 combinés de la Convention.’
considering that in present day conditions a person's gender for the purposes of Article 12 can no longer be determined by purely biological criteria. Subsequently, in the Schalk and Kopf case, the Court held that Article 12 is 'not in all circumstances inapplicable' to same-sex couples. Notwithstanding such, the Court determined that there is still a considerable margin of appreciation and that Member States are best placed to determine whether same-sex marriage should be allowed. It further elucidated its position in the case of Gas and Dubois, in which it stated that marriage confers a special status upon those who engage in it. Consequently, situations of married couples are not comparable to that of unmarried couples. The fact that heterosexuals have the possibility to marry whereas homosexual couples do not, does not lead to indirect discrimination in the view of the Court. In the near future the Court will undoubtedly be called upon to rule on the same issue again.

Although the Court denies that the inability of same-sex couples to marry amounts to no discrimination, the argument of the applicants in the case of Gas and Dubois certainly strikes at the heart of the debate. The difference in treatment between same-sex couples and heterosexual couples lies in the ability for heterosexual couples to marry. Same-sex couples are not able to marry and are thus treated differently that heterosexual couples. Nevertheless, by the aforementioned reasoning of the Court, it is found not to be discriminatory. Still, the difference in rights awarded has various implications for same-sex couples.

Firstly, the inability of same-sex couples to marry leads to the situation that those couples cannot access the rights and benefits which are conferred upon married couples.196 The point is that since marriage is accessible to heterosexual couples, they are able to have the rights and benefits of marriage by simply getting married. Thus, same-sex couples are deprived the benefits that marriage has to offer and heterosexual couples enjoy more rights than same-sex couples.197 Hence, by not being able to marry same-sex couples cannot enjoy the legal, social and economical benefits198 which are available to heterosexual couples. An important element to bear in mind is that the comparison of the difference in treatment is between same-sex couples and unmarried heterosexual couples. As the Court stated: '(...) marriage confers special status upon those who engage in it. The right to marry (...) has social, personal and legal consequences.'199 Therefore, same-sex couples, unable to marry, cannot be compared with married heterosexual couples.200

Secondly, the inability to marry leads to piecemeal protection of same-sex couples under the Convention. This thus leads to uncertainty for same-sex couples,201 as issues which are often included in marriage are not clearly regulated for same-sex couples. Such issue may include: medical decisions on partner's behalf, bereavement, parental rights and responsibilities, health and employment benefits, tax returns and tax benefits, inheritance, pension benefits.202 This uncertainty is perfectly illustrated in the Schalk and Kopf
case. In that case the Court held that not in all circumstances Article 12 is inapplicable to same-sex couples. However, the Court fails to specify in which circumstances Article 12 is applicable and when a right to marry can be inferred from this.\textsuperscript{203} Thus, a legal vacuum is present in which marriage is declared to be not inevitably limited to heterosexual couples without any explanation as to when marriage is extended to same-sex couples. This legal vacuum is reinforced by the fact that the Court leaves considerable room for discretion to Member States regarding inclusion or exclusion of same-sex couples in the institution of marriage. Thereby, the right to marry can be enjoyed by a particular group (heterosexuals) to the exclusion of the other group (same-sex couples) at the whim of Member States.

Thirdly, the lack of recognition may lead to stigmatisation of same-sex couples. By not being able to get married same-sex couples cannot access the same legal status as heterosexual couples. As a result, same-sex relationships seem to be publicly valued less than heterosexual relationships.\textsuperscript{204} Moreover, civil unions or other forms of relationship recognition, even when legally identical to marriage, may have the same result as it creates a ‘separate but equal’ form of recognition. Such ‘separate but equal’ recognition is recognised to create a stigma of second-class status of same-sex relationships.\textsuperscript{205} This is further reinforced by considering that ‘(…) the Court helps fashion social and cultural landscapes in which legal subjects are situated (…)’.\textsuperscript{206} Thus, indeed by ruling that same-sex marriage is not required by the Convention and consequently treating same-sex couples differently that heterosexual couples, the Court reenforces stigmatisation towards same-sex couples. Furthermore, non-recognition of same-sex marriage may also lead to discrimination by private actors.\textsuperscript{207}

\textsuperscript{203}See also: L. Hodson, \textit{supra} note 56.
\textsuperscript{205}See HRW Briefing Paper, \textit{supra} note 202.
\textsuperscript{206}P. Johnson, \textit{supra} note 196.
\textsuperscript{207}Human Rights Council report, \textit{supra} note 4, p. 22.
4 Chapter IV: Evaluation

4.1 Introduction

In the preceding chapters the framework of the Convention with regard to same-sex couples and their family was discussed. Firstly, the developments as regards decriminalisation of same-sex sexual behaviour were discussed. Subsequently, the rights of same-sex couples under the notions of private life and family life (Article 8) were discussed. With regard to Article 8 it was concluded that the Court does not tolerate a different treatment of same-sex couples when compared to opposite-sex couples unless there serious reasons for justification. Nevertheless, differences are still existent.

Secondly, the right to marry was discussed. Developments from the traditional meaning of marriage to the redefinition of marriage in the Goodwin case and the Schalk and Kopf case were subsequently discussed. When a same-sex couple is compared to an unmarried heterosexual couple it was concluded that there is a difference in treatment: the unmarried heterosexual couple has the ability (the right!) to marry, whereas the same-sex couple does not. The implications this has were then discussed. In the following paragraphs an evaluation will be undertaken of what was set out in the preceding chapters. The framework as set out will be used to analyse what grounds are put forward to include/exclude same-sex couples from certain rights.

4.2 Evolution of Rights for Same-Sex Couples?

4.2.1 Private Life

The developments of rights for same-sex couples undoubtedly started with the decriminalisation of same-sex sexual conduct in the Dudgeon case. In order to include same-sex sexual conduct in the notion of private life the Court established that sexual life is part of one’s private life. Nevertheless, some degree of regulation in the interest of upholding moral standards is allowed. In that regard it considered that sexual orientation is an ‘essentially private manifestation of the human personality’ and criminalising private same-sex sexual conduct does not advance the aim of upholding moral standards. The Court furthermore referred to the fact that the majority of Member States no longer considered that private homosexual behaviour is a matter for criminal law.

The Court thus brought the matter of private same-sex sexual conduct under the notion of private life by considering that it is a private manifestation of human personality and by considering that there was a European trend to decriminalise same-sex sexual conduct. This line of reasoning was coherently upheld in subsequent cases regarding the private life of LGBT people. The development of rights was continued by

208 Dudgeon, supra note 9.
209 Ibid., para. 60.
210 Ibid., para. 61.
including sexual orientation in the notion of private life. Therefore, same-sex couples can claim the same rights as heterosexual couples under article 8 by relying on their sexual orientation. This line of case law has been upheld by the Court in subsequent cases dealing with different matters involving discrimination based on sexual orientation. It is important to note that it is the element of sexual orientation that falls within the notion of private life. Therefore, difference in treatment on such basis requires justification.

It can thus be said that in the current framework of protection of the notion of private life distinctions between same-sex couples and heterosexual couples will not be tolerated by the Court unless there are serious reasons to justify such a distinction. The numerous cases discussed above in this regard show a great degree of consistency in the Court's case law which protects the private lives of same-sex couples via their sexual orientation. As mentioned before, the limitation of protection of same-sex couples via private life is problematic as this does not take account of the fact that the private sphere is largely dependent on the public sphere.211

4.2.2 Family Life

It took the Court a long time to include same-sex couples in the notion of family life. It consistently upheld for decades that 'despite the modern evolution of attitudes towards homosexuality, the Commission finds that the applicants' relationship does not fall within the scope of the right to respect for family life ensured by Article 8.'212 The reason put forward for this conclusion was the little common-ground that existed between Member States. However, since 2001 the Court noticed a rapid development in the attitudes towards same-sex couples and therefore saw fit to include same-sex couples in the notion of family life. It formulated that family life exists when a same-sex couple is cohabiting and in a stable de facto relationship, which is also the case for heterosexual couples.

Regarding the inclusion of same-sex couples it can be said that this is a real development which departs from earlier case law.213 In this case, the Court relied on the argument that social attitudes towards same-sex couples and homosexuality had changed considerably. A consequence of the way in which the Court has included same-sex couples in the notion of family life is that applicants do not need to rely on their sexual orientation in their applications. After all, family life is established when a couple is cohabiting and in a stable de facto relationship. However, there is still a legal vacuum as the Court failed to specify what the exact inferences are of including same-sex couples in the notion of family life. The most logical approach seems that such specification is not necessary as same-sex couples will enjoy family life just the same as heterosexual couples.214 Thus, per definition the inferences are that the framework of family life as it currently stands equally applies to same-sex couples. Difference in treatment in any way therefore requires an objective justification and when sexual orientation is concerned such 'requires particularly serious reasons by way of justification'.215

211 P. Johnson, supra note 54, p. 96.
212X. and Y. v. United Kingdom, supra note 68, p. 221.
213L. Hodson, supra note 56.
215Karner v. Austria, supra note 39, para. 37
With regard to the right to marry, the Court has not been so progressive. Nevertheless, the Court considers that marriage is a flexible institution which has undergone major changes in the past.\textsuperscript{216} It furthermore regarded that biological sex can no longer be decisive in the question as to whether couples are allowed to marry. In that regard the Court feels obliged to take into account changing conditions with regard to acceptance of gender reassignment, especially a trend of social acceptance. Nevertheless, Member States are not required to provide for same-sex marriage. The Court notes that when the Convention is read as a whole Article 12 does not include same-sex marriage as this provision refers to the right of men and women to marry whereas other provisions refer to everybody. Furthermore, the Court notes that the historical context of Article 12 refers to marriage between persons of the opposite sex. Moreover, the Court observes that there is currently no European consensus on the matter. Additionally, the Court considered that marriage has ‘deep-rooted social and cultural connotations which may differ largely from one society to another.’\textsuperscript{217}

One of the arguments used by the Court to refuse to recognise same-sex marriage relates to the interpretation of the Convention as a whole, in other words to the intention of the drafters. In all provisions of the Convention rights are afforded to everyone, whereas in Article 12 the words ‘men and women’ is present. The Court admits that the wording does not seem to exclude the possibility of same-sex marriage.\textsuperscript{218} However, according to the Court the intention of the drafters of the Convention was to limit the right to marry to the traditional institution of marriage of a man and a woman by using this terminology.\textsuperscript{219} This is an interesting line of reasoning since the Court has always held that the Convention is a living instruments which should be interpreted according to present-day conditions.\textsuperscript{220} In comparison, in the \textit{Goodwin} case the Court argued that there was a growing recognition of transexuals in their reassigned gender in Europe. However, it hardly seems likely that such was the intention of the drafters. Although the circumstances of that particular case and the terminology used in Article 8 differ from the situation of same-sex marriage, it could be argued that the Court made an exception to its settled case law of interpreting the Convention in accordance with present-day conditions.\textsuperscript{221} The same could be said about the reasoning the Court uses with regard to the historical context of the right to marry.

In that regard it is interesting to draw yet another parallel with the \textit{Goodwin} case. In that case the Court considered the present day conditions, having regard to a common approach between the Member States with regard to recognition of transsexuals. The development should not have come as a surprise as the Court initially ruled on the matter of transsexuals that Member States should keep their policies under review, having regard to present day conditions.\textsuperscript{222} Thus, when the Court pronounced judgment in the \textit{Goodwin} case

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\item \textsuperscript{216} P. Johnson, \textit{supra} note 54, p. 96.
\item \textsuperscript{217} Schalk and Kopf, \textit{supra} note 10, para. 62.
\item \textsuperscript{218} \textit{Ibid.}, para. 55.
\item \textsuperscript{219} \textit{Ibid.}
\item \textsuperscript{220} See: ECHR 25 April 1978, No. 5856/72 (Tyrer/United Kingdom), para. 16; ECHR 18 December 1996, No. 15318/89 (Loizidou/Turkey); ECHR 28 July 1999, No. 25803/94 (Selmouni/France).
\item \textsuperscript{221} L. Hodson, \textit{supra} note 56, at. p. 173.
\item \textsuperscript{222} Rees, \textit{supra} note 140, para. 47.
\end{itemize}
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the practice and legal standards in the majority of Member States were in favour of recognition of transexuals and consequently not recognising the gender reassignment was a violation of the Convention.\footnote{223See: A. Mowbray, ‘The Creativity of the European Court of Human Rights’, \textit{Human Rights Law Review}, Vol. 5, No. 1, 2005, pp. 57-79, at p. 69.}

If the same approach is taken by the Court with regard to the right to marry, the outcome is that once a majority of Member States provides for same-sex marriage Article 12 will protect the right to marry for same-sex couples. Thus, the Court's main reason for not recognising same-sex marriage to be protected by Article 12 is its historical context. Although the wording of the provision does not exclude same-sex marriage the fact that there is no common European standard results in a wide margin of appreciation for Member States. Therefore, Member States are not required to recognise same-sex marriage.

In sum the Court sees no reason to be inclusive of same-sex couples with regard to the right to marry. Nevertheless, it did find that Article 12 was applicable to the situation of the same-sex couple in the case of \textit{Schalk and Kopf}. However, the Court did not specify the implications of the applicability of the right to marry for same-sex couples. Moreover, the Court was not asked to rule upon the right to marry in the light of Article 14, the prohibition of discrimination. Furthermore, in the case of \textit{Gas and Dubois} the Court did consider whether there was a discrimination. However, it primarily considered the right to marry by comparing a non-married sam-sex couple, unable to get married, with a heterosexual married couple. Indeed, as the Court noted, this is not a similar situation. The Court also addressed the comparison of the same-sex couple with an unmarried heterosexual couple. It did not consider whether there was a discrimination or not but merely referred to its earlier contention that Article 12 does not require Member States to recognise same-sex marriage. Therefore, an application relying on Article 14 in combination with Article 12 could invite the Court to further specify why same-sex couples do not enjoy the right to marry under Article 12 of the Convention.

4.3 The Future of Rights for Same-Sex Couples

Overall it can be said that the Court has interpreted the Convention so as to be more and more inclusive of the rights of same-sex couples. At first via the notion of private life, to be later extended via the notion of family life. The Court achieved this by using different interpretative formulae such as the Convention as a ‘living instrument’ and ‘the margin of appreciation’. Furthermore, Article 14 has proven invaluable in the development of the Convention towards including same-sex couples in the Convention rights.

However, the right to marry still does not cover same-sex couples. It seems that this right has not benefitted from the creative interpretations of the Court.\footnote{224M. Cartabia, ‘The European Court of Human Rights: Judging nondiscrimination’, \textit{International Journal of Constitutional Law}, Vol. 9, Iss. 3-4, pp. 808-814, at p. 810.} On the one hand the Court finds that Article 12 does apply to same-sex couples but on the other hand it does not specify in what circumstances such is the case. However, the Court will soon rule again on the issue of same-sex marriage in the pending case of \textit{Chapin and Charpentier}.\footnote{225\textit{Chapin and Charpentier}, \textit{surpra} note 8.} In that case the applicants for the first time also rely on Article 14 in connection with Article 12. This may be an important element, as previous cases regarding the right to marry did not
complain of a violation of the principle of nondiscrimination as protected by Article 14. Nevertheless, it seems unlikely that the Court will be persuaded by an application relying on Article 14 as its main reason not to include same-sex couples in the right to marry is the fact that there is no common European approach to the issue. However, such is inconsistent with the ruling that same-sex couples have family life. In Schalk and Kopf the Court declared that same-sex couples enjoy family life as protected under Article 8 since ‘there is a growing tendency’ of recognising partnerships between same-sex couples and to include same-sex couples in the notion of ‘family’. This conclusion seems to be in contradiction with the number of Member States including same-sex couples in the notion of family, which currently is merely eleven. Nevertheless, following the reasoning of the Court it seems most likely that it will only include same-sex couples in the right to marry when there is a growing tendency of Member States allowing same-sex couples to marry.

226 See ILGA Europe fact-sheet, supra note 21.
5 Conclusions

The current thesis sought to answer three main questions: 1. To what extent are same-sex couples treated differently from opposite-sex couples under the Convention?; 2. What implications does such difference in treatment have?; and 3. What are the grounds for such difference in treatment? This thesis addressed this issue from the perspective of what protections same-sex couples enjoy under Articles 8, 12 and 14 of the Convention. Article 8 and 12 were dealt with in separate chapters, whereas Article 14 was included in the analysis of both chapters as this provision is only of relevance in connection with another Convention right. Both chapters included an analysis of the frameworks of the provisions with regard to same-sex couples and this analysis was further elaborated upon in a separate chapter transcending both rights.

With regard to the notion of private life certain developments have taken place in the past decades. Since the 1980s the Court interpreted the Convention so as to include same-sex couples under the notion of private life and so as to create equality in this regard between same-sex couples and heterosexual couples. This development towards equality has led to an interpretation of the notion of private life in which same-sex couples are not treated differently when compared to heterosexual couples. Therefore as such, the other research questions do not need to be answered with regard to the notion of private life. However, a difference in treatment till recently was that although same-sex couples did enjoy private life, they did not enjoy family life. The implications this had can be summarised as follows. Mainly, such an approach did not take account of the fact that the private sphere is largely dependent on the public sphere. Protections with regard to the public sphere such as parenting responsibility and benefits that heterosexual partners regularly have were not protected by the Convention for same-sex couples.

However, recently the Court changed its position on whether same-sex couples fall within the notion of family life. In Schalk and Kopf the Court held that there was a changing European trend in this regard and therefore it could no longer uphold that same-sex couples cannot enjoy family life. However, the Court did not identify what the inferences are from the conclusion that same-sex couples enjoy family life. Therefore, same-sex couples are left in a legal vacuum in which they are not sure (yet) of what they can expect from enjoying protection under the notion of family life. Since this judgment was pronounced very recently it will have to be awaited what the implications are of including same-sex couples in the notion of family life.

Lastly, it was discussed whether there is a difference in treatment of same-sex couples with regard to the right to marry as protected by Article 12. Firstly it was discussed how the Court interpreted the right to marry in accordance with present day conditions. Subsequently, it was discussed how the Court found that although Article 12 is applicable to same-sex couples, Member States are not required to provide them access to marriage. This was identified as a difference in treatment, since heterosexual couples have the right to marry whereas same-sex couples do not. The Court may not find that there is a direct difference in treatment, however in Gas and Dubois it omitted ruling on whether there was an indirect difference in treatment. At the very least it can be said that there is a difference in treatment of same-sex couples when compared to heterosexual couples since the latter have the right to get married.

The consequences of the inability to marry were subsequently discussed. Firstly, same-sex couples cannot access the rights and benefits which are conferred upon married couples. Secondly, the inability to marry leads to piecemeal protection of same-sex couples under the Convention which leads to uncertainty of
the legal protections same-sex couples have. Thirdly, the lack of recognition may lead to stigmatisation of same-sex couples since they cannot acquire the same legal status as married couples. This indicates that same-sex relationships are valued less than heterosexual relationships.

Since there is only a clear difference in treatment with regard to the right to marry, the last research question can only be answered in relation to the right to marry. The grounds for upholding the difference in treatment, namely that same-sex couples do not have the right to marry, were various. Firstly, the Court found that the interpretation of the wording of Article 12, the Convention as a whole and its historical context does not include a right for same-sex couples to marry. Since all right refer to everyone, and Article 12 only to 'men and women', it seems that the drafters of the Convention wanted to limit the right to marry to traditional marriage between a man and a woman. However, the Court seems to be willing to attach less value to this argument as it indicates that the wording of the Article does not exclude same-sex marriage. More importantly, the Court seems convinced that there is no European consensus on the matter and therefore it must afford Member States a wide margin of appreciation. Consequently, the Court does not find that Article 12 requires Member States to provide same-sex couples with access to marriage.

Currently, it seems most appropriate to come to the following conclusions. With regard to the notion of private life the Court will not tolerate any difference in treatment based on sexual orientation unless there are very serious reasons for justification. With regard to the notion of family life the Court has been unclear. Although same-sex couples have family life, it is unclear what the implications of this are. Regarding the right to marry it seems that the Court is not willing to include same-sex couples. However, the right to marry has thus far only been considered in isolation. A pending application invites the Court to give its ruling on Article 12 in connection with Article 14: whether not allowing same-sex couples to marry is in violation of the principles of non-discrimination. The reasoning of the Court seems to indicate that it is most likely that it will only require Member States to provide same-sex couples with access to marriage once there is a common European approach. Therefore, it seems that the Court will only require Member States to include same-sex couples in the right to marry once there is a majority of Member States allowing same-sex couples to marry.

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227 Chapin and Charpentier, surpra note 8.
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