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The Evolution of an LGBT- Inclusive Notion of Family in the Jurisprudence of the European Court of Human Rights

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The institution of the family is not fixed,
be it historically, sociologically or even legally.

[European Court of Human Rights,
Mazurek v. France,
App. no. 34406/97, 1 February 2000, §52].

Table of Contents

Abstract.....	1
Introduction. The path of human rights in adjudicating LGBT claims.....	11

Part I Context and Methods

Chapter 1. The key role of the European Court of Human Rights in establishing new family paradigms.....	16
1.1. The European Court of Human Rights.....	20
1.2. Evolutive interpretation.....	22
1.3. The Court's decisions spread beyond State borders, creating a possibility for social change through the evolution of the law.....	27
1.4. A gateway for civil society participation in the judicial discourse.....	30
Chapter 2. Elements of understanding of the Court's arguments in shaping the concept of "family" under the Convention.....	35
2.1. Judicial activism.....	37
2.2. The margin of appreciation.....	42
2.3. "European consensus" and how it affects the Court in deciding whether to accord a margin of appreciation.....	48
2.4. A sociological obstacle to the recognition of "new" families: heteronormative dualism.....	53
2.5. The relevant provisions: Articles 8, 12, 14 of the Convention.....	56

Part II Review of the Jurisprudence

Chapter 3. The 1980s and 1990s: missed chances.....	63
3.1. Premise: reconfiguring the notion of family.....	63
3.2. <i>Dudgeon v. U.K.</i> : the decriminalization of homosexual activities.....	69
3.3. <i>Rees v. U.K.</i> and <i>Cossey v. U.K.</i> : States can refuse to recognise the "acquired" gender of transsexuals, but European consensus is evolving.....	71
3.4. <i>B. v. France</i> : a gate towards the obligation to recognise the "acquired" gender of transsexuals.....	74
3.5. <i>X, Y and Z v. the U.K.</i> : sexual transitions can still be not recognised by law, where the systems of registration of births prohibits the correction of birth certificates.....	77
3.6. <i>Salgueiro da Silva Mouta v. Portugal</i> : discrimination on the grounds of sexual orientation is prohibited by the Convention.....	79

Chapter 4. The 2000s: limited activism.....	84
4.1. Mata Estevez v. Spain: homosexual relationships between two men do not fall within the scope of the right to respect for family life.....	85
4.2. Christine Goodwin v. U.K.: lack of recognition of sexual transitions violates Art. 8; the possibility of procreation is not a condition for the enjoyment of the right to marry.....	87
4.3. Fretté v. France: legislation which allows the possibility to adopt for singles can exclude homosexuals from it, if it is pursuing a legitimate aim.....	89
4.4. Karner v. Austria: condemnation of discrimination paves the road towards the recognition of same-sex family life.....	92
4.5. R. and F. v. U.K.; Parry v. U.K.: “Forced divorce” as a condition for the recognition of the “acquired gender” does not violate the Convention.....	94
4.6. E.B. v. France: whether domestic authorities approve an unmarried individual’s application to adopt, the decision may not be based on the applicant’s sexual orientation.....	99
Chapter 5. From 2010 up to today: dynamic approach prevailing.....	103
5.1. Kozak v. Poland: if succession to a tenancy is allowed to “ <i>de facto</i> marital couples”, it cannot be prohibited to same-sex couples.....	104
5.2. Schalk and Kopf v. Austria: same-sex couples constitute “family life”; there is no positive obligation to recognise same-sex marriage, but when member States do so, same-sex marriage is protected under Art. 12.....	107
5.3. Gas and Dubois: permitting step-child adoption only to married couples is not discriminatory, even if this indirectly excludes same-sex couples from such possibility.....	111
5.4. X and Others v. Austria: if access to step-child adoption is allowed to unmarried couples, the State cannot prohibit it to same-sex couples, in light of the best interest of the child.....	116
5.5. Vallianatos v. Greece: if a member State introduces forms of civil union, prohibiting access to it to same-sex couples amounts to discrimination.....	122
5.6. Hämäläinen v. Finland: it is not disproportionate to require, as a precondition to legal recognition of an “acquired” gender, that the applicant’s marriage be converted into a registered partnership	124
5.7. Oliari and Others v. Italy: member States have a positive obligation to assure legal recognition to same-sex couples.....	128
Conclusion.....	134
Bibliography.....	138

Abstract

Questo lavoro ripercorre l'evoluzione di una nozione di famiglia comprensiva dei nuclei familiari LGBT – ovvero composta da persone lesbiche, gay, bisessuali e transessuali – avvenuta nella giurisprudenza della Corte Europea dei Diritti dell'Uomo nel corso degli ultimi trentacinque anni. La Parte I esamina gli strumenti più utilizzati dalla Corte nell'elaborare tale evoluzione, e le caratteristiche che rendono il suo ruolo peculiare e particolarmente determinante, a livello europeo ma anche globale, per il progresso dei diritti familiari delle persone LGBT. La Parte II è costituita da un'analisi delle sentenze più rilevanti e delle argomentazioni fornite dai giudici di Strasburgo, che permette di osservare come i cambiamenti nell'applicazione degli strumenti citati si sono tradotti in una progressiva erosione della discrezionalità accordata agli Stati nel riconoscere i diritti familiari delle persone LGBT, ovvero in un sempre maggiore attivismo giudiziario della Corte in favore di una nuova nozione di modello familiare.

Negli ultimi decenni, i bisogni e le istanze delle persone LGBT – in un primo tempo inserite in una narrazione di liberazione ed emancipazione – hanno subito un *re-framing*, una ricollocazione narrativa all'interno della cornice dei diritti umani. Da quel momento, il loro progresso ha raggiunto traguardi impensabili fino a pochi anni prima. Se guardiamo a questo progresso, l'Europa ha aperto la strada, e può oggi contare sulla più lunga storia di riconoscimento delle realtà familiari LGBT. In questo contesto, proprio la Corte Europea dei Diritti dell'Uomo ha giocato un ruolo predominante, influenzando il progresso sociale europeo ed essendone influenzata a sua volta: un ruolo che ci spinge ad individuare proprio nella sua giurisprudenza un strumento di innovazione degno di attenzione a livello globale. Lo sviluppo della giurisprudenza della Corte sul tema è infatti andato di pari passo con le progressive aperture nelle legislazioni nazionali e sovranazionali, ed è stato strumento di creazione di nuovi paradigmi giuridici grazie sostanzialmente a due ordini di ragioni: il fatto che la portata delle sue decisioni si espande nello spazio e nel tempo, ovvero

oltre i confini del singolo Stato giudicato e oltre il momento storico della singola decisione; le fonti e gli strumenti utilizzati, che si prestano particolarmente alla possibilità di interpretazioni evolutive.

Cominciando dal potenziale della giurisprudenza della Corte di espandersi nello spazio, un'enorme influenza di questa particolare giurisprudenza sul contesto europeo e globale è data dal cosiddetto "effetto *erga omnes*", che – pur non avendo un fondamento giuridico – opera nelle corti internazionali: si tratta di un fenomeno che permette alle decisioni delle corti internazionali di influenzare tramite meccanismi indiretti anche quegli Stati che non sono coinvolti in giudizio, arrivando persino ad avere echi negli ordinamenti di Stati che non hanno accettato la loro giurisdizione tramite l'adesione al trattato di riferimento. Per quanto riguarda l'estensione delle decisioni della Corte nel tempo, questa ha a che fare con il bilanciamento operato dalla Corte tra l'aderenza al precedente e l'interpretazione evolutiva. Nonostante la Corte non sottostia formalmente ad alcuna dottrina di *stare decisis*, raramente si discosta dai precedenti della propria giurisprudenza, e lo fa soltanto se giustificata da validi motivi, in virtù dell'importanza riconosciuta alla certezza legale nella struttura della Convenzione. In questo senso, i precedenti della Corte stabiliscono principi che sopravvivono nel tempo, per poi essere utilizzati nell'elaborazione di decisioni future. Precisamente nel bilanciamento tra certezza legale ed interpretazioni evolutive sta il potenziale della giurisprudenza della Corte per gli attivisti per i diritti umani delle persone LGBT, perché permettono di usare la tecnica del *contenzioso strategico*, o *strategic litigation*. I *repeat players* – di cui i più tipici sono le organizzazioni non governative nazionali o transnazionali – intentano cause pilota con lo scopo di indirizzare la Corte, mettendola davanti a contenziosi che potenzialmente la porteranno a stabilire nuovi principi, il tutto nell'ottica di obiettivi di progresso a lungo termine. Questo meccanismo viene messo in moto quando i *repeat players* avvertono che esistono le condizioni necessarie affinché la Corte si discosti dai suoi precedenti. È qui che entra in gioco il bilanciamento elaborato dalla Corte, e la chiave per capire quali tendenze possiamo formalizzare da quello stesso bilanciamento negli ultimi decenni sta negli strumenti che la Corte applica nel gestire la tensione tra supervisione sovranazionale e sussidiarietà.

Questo lavoro dimostra che, negli ultimi decenni, il bilanciamento della Corte si è progressivamente inclinato in favore di una maggiore portata degli Articoli della Convenzione, a scapito della discrezionalità un tempo accordata agli Stati. In altre parole, il bilanciamento tra valore del precedente e valore dell'innovazione ha sempre più teso verso il secondo, ovvero verso interpretazioni dinamiche che permettono alla Convenzione di coprire, sancire e rispondere a istanze che erano sconosciute nel 1950. Questa tendenza si traduce in un crescente *attivismo giudiziario* da parte dei giudici di Strasburgo.

Il tema dell'attivismo giudiziario si presta a molteplici considerazioni rispetto alle sue conseguenze e alle sue motivazioni, ma ci basti qui sottolineare che l'attivismo ha un ruolo peculiare per la Corte. Mentre tale etichetta è spesso correlata a critiche di un'eccessiva invasione da parte delle corti sovranazionali negli affari delle nazioni, addirittura di erosione della sovranità nazionale, una certa componente di attivismo giudiziario – "inventiva" dicono addirittura alcuni – sembra inevitabile, persino necessaria per un'effettiva applicazione delle disposizioni della Convenzione, in un mondo di realtà e relazioni sociali che il testo non poteva comprendere sessantacinque anni fa. Ciò appare particolarmente convincente se pensiamo che uno degli scopi dell'intero sistema CEDU è precisamente la difesa dei diritti individuali dall'oppressione causata dagli ordinamenti nazionali, qualcosa che accade in special modo quando il gruppo preso in considerazione è una minoranza.

Ma qual è la ragione della tendenza che abbiamo citato? Osservando la giurisprudenza rilevante ai nostri scopi, il maggiore attivismo della Corte sembra essere il risultato dell'uso della dottrina del *margin of appreciation*, e ancor più della dottrina del *Consensus europeo*, che determina la sua applicazione. Si tratta di due degli strumenti predominanti nel lavoro della Corte, e allo stesso tempo dei più controversi, perché non hanno un fondamento giuridico e la loro applicazione non è sempre chiara né coerente.

Il margine di apprezzamento è un costrutto legale elaborato nella giurisprudenza di Strasburgo per "negoziare il suo ruolo sussidiario", alla luce della continua tensione tra universalità dei diritti umani e varietà di posizioni politiche degli Stati Contraenti della CEDU. Nella pratica, è uno strumento analitico che

interviene nel processo di accertamento di uno standard minimo e uniforme di rispetto dei diritti umani, permettendo un certo livello di differenziazione tra le politiche dei singoli Stati del Consiglio d'Europa. Grazie alla dottrina del margine, gli Stati hanno uno "spazio di manovra" nella scelta dei mezzi con cui applicare la Convenzione. Sono i giudici europei ad individuare di volta in volta la possibilità di concedere un margine più o meno ampio agli Stati, a seconda delle circostanze, ed è proprio questo l'aspetto più controverso: le critiche riguardano un supposto uso strategico del margine, e derivano proprio dalla sua natura poco chiara e dalla sua applicazione spesso incoerente.

La stessa incertezza rilevata nell'uso del margine la si riconosce nell'analisi del Consenso europeo, il principale elemento che determina la sua applicazione. Consenso e margine appaiono inversamente correlati: meno consenso su un dato tema la Corte è in grado di identificare, più gli Stati sono considerati nella migliore posizione per decidere su quel tema, più discrezionalità sarà loro concessa nell'applicazione delle disposizioni della CEDU. Anche il consenso non poggia su un chiaro fondamento giuridico; volendo definire la sua manifestazione più comune, potremmo descriverlo come un accordo nella maggioranza degli Stati Contraenti, una percezione diffusa su un dato tema che la Corte ricerca tramite analisi comparative dei diversi contesti legislativi e socio-politici presenti nel Consiglio d'Europa. Vedremo però che la Corte ha spesso utilizzato anche altre nozioni di consenso, un approccio che lo ha ulteriormente messo in dubbio come strumento interpretativo valido. I risultati dell'analisi del consenso europeo sono determinanti nella definizione del margine d'apprezzamento, ma lo sono anche per la definizione di diversi elementi che vanno poi a comporre le argomentazioni della Corte: uno su tutti, la proporzionalità, che vedremo essere decisiva nei meccanismi di interpretazione della Convenzione. Come per il margine, anche riguardo al consenso il ruolo interpretativo della Corte è cruciale quando si ha a che fare con temi socialmente e politicamente controversi, come quelli legati ai diritti familiari delle persone LGBT: è infatti l'identificazione della presenza o mancanza di consenso europeo a innescare con un "effetto domino" determinati risultati sul margine, sulla sussidiarietà, sull'attivismo giudiziario, sull'interpretazione evolutiva.

I due strumenti appaiono non solo utili, ma necessari per un'effettiva ed efficace implementazione della Convenzione; tuttavia, va da sé che, dato il loro funzionamento, lo scarso rigore nella loro definizione e nel loro utilizzo rischiano di minare la credibilità della Corte e la certezza legale a cui essa dà tanto valore. Soprattutto se consideriamo che la struttura di tecniche, strumenti, approcci appena descritta deve convivere con un elemento destabilizzante per i sistemi politici e legali nazionali, ovvero l'abbandono di una visione sociologica che sta alla base delle tipiche categorie giuridiche europee: il dualismo eteronormativo.

L'eteronormatività è l'assunto che le relazioni affettive e sessuali tra persone di sesso diverso costituiscano e debbano costituire la "norma" in una società; il dualismo eteronormativo include anche una nozione di genere binaria e fondata esclusivamente sul dato biologico. La categoria legale di *genere*, in particolare, è tradizionalmente apparsa auto-evidente, al punto che di norma gli ordinamenti nazionali e gli strumenti internazionali spesso non la definiscono; allo stesso modo, ogni paradigma legato alle relazioni di coppia stabili era un riflesso della "norma" eterosessuale. Così, l'interpretazione binaria emersa dal dualismo eteronormativo si è tradotta in categorie legali binarie. Ad un certo punto della storia, però, una più profonda comprensione delle nozioni di identità di genere e di orientamento sessuale hanno posto nuovi quesiti rispetto ai paradigmi familiari esistenti. D'un tratto, ci si è resi conto che le categorie legali tradizionali non erano idonee a formalizzare la complessità delle nozioni di genere e orientamento sessuale, come anche a rispondere alle istanze delle persone LGBT riguardo ai nuclei familiari di cui – di fatto – facevano parte. A quel punto, la maggioranza degli ordinamenti europei – con enormi differenze dovute alle diverse tradizioni culturali, sociali e politiche – ha cominciato una lenta evoluzione verso nozioni di affettività e di genere sempre meno eteronormative. Questo è il contesto in cui la Corte Europea dei Diritti dell'Uomo si è mossa negli ultimi decenni, ed è un contesto – se teniamo conto del grande valore conferito dai meccanismi di Strasburgo ai cambiamenti sociali e legali – contribuisce a spiegare la tendenza dei giudici di Strasburgo ad elaborare una nozione di famiglia sempre più inclusiva delle persone LGBT.

Davanti al variegato panorama di nozioni di "famiglia" presenti ad oggi nei

diversi Stati del Consiglio d'Europa, la Corte opera oggi una graduale armonizzazione. Un'analisi delle sentenze riguardanti coppie e famiglie LGBT permette di osservare come, nella pratica, la Corte riesce a bilanciare precedenti e innovazioni, identità nazionali e universalità dei diritti umani. I giudici di Strasburgo forniscono linee guida per le legislazioni nazionali partendo da circostanze specifiche, e la giurisprudenza ricca e in continua evoluzione permette loro – con un approccio step-by-step – di costruire continuamente nuovi principi, che emergono a corollario di quelli stabiliti in precedenza. Il metodo è quello che prevede di procedere per assimilazione, spesso tramite il principio di non discriminazione, sulla base di considerazioni comparative tra le specifiche situazioni sottoposte alla Corte e le disposizioni CEDU sulla famiglia e il matrimonio. L'efficacia di tale metodo è resa possibile proprio dalla natura degli Articoli a cui i ricorsi sul riconoscimento dei nuclei familiari LGBT si riferiscono: gli Articoli 8, 12, 14. Vedremo come la loro formulazione e la loro funzione "narrativa", combinate con gli strumenti utilizzati dalla Corte, l'hanno portata a modificare enormemente la loro portata negli ultimi decenni, estendo la loro protezione anche a circostanze che un tempo non ne godevano. Procedendo cronologicamente, si possono individuare tre fasi di riconoscimento della famiglie LGBT ai sensi della Convenzione, caratterizzate da un grado crescente di attivismo giudiziario da parte della Corte.

In una prima fase – che si può riconoscere nei casi giudicati nei decenni '80 e '90 – i giudici di Strasburgo hanno iniziato ad interpretare le disposizioni della Convenzione in modo da proteggere la *vita privata* delle persone LGBT da eccessive interferenze da parte dei loro Stati. Si tratta di decisioni che riguardano aspetti puramente privati della vita dei ricorrenti; la loro vita familiare perciò, a questo punto, non veniva riconosciuta. Il margine di apprezzamento degli Stati non arrivava a giustificare l'oppressione della natura dei ricorrenti, ma solo come manifestata nel privato. Il binario privato/pubblico è talmente evidente da spingere i commentatori di oggi a definirla una fase di riproduzione in veste giuridica dell'emarginazione tipica delle relazioni sociali di allora. Nonostante le critiche, tuttavia, queste sentenze pongono le fondamenta per gli sviluppi successivi: sono gli anni della depenalizzazione degli atti omosessuali, dei primi passi verso l'obbligo degli Stati a

riconoscere il genere "acquisito" dei transessuali operati, e del riconoscimento dell'orientamento sessuale tra le cause di discriminazione coperte dall'Art. 14.

La seconda fase include casi giudicati negli anni 2000. Appare chiaro da queste sentenze che i giudici hanno continuato, con elementi di maggiore attivismo giudiziario, ad erodere il margine di apprezzamento degli Stati, sulla base di un maggiore consenso rilevato negli Stati Contraenti sui temi che riguardano la vita familiare delle persone LGBT. Tuttavia, questa è ancora una fase di transizione. L'analisi parte dal rifiuto di riconoscere la vita familiare di una coppia omosessuale; in quel caso, la Corte trovò effettivamente una violazione, ma solo rispetto alla vita privata. Si tratta di una delle ultime manifestazioni dell'esclusione da parte della Corte delle coppie dello stesso genere dalla nozione di vita familiare come intesa dall'Art. 8. Un anno più tardi, venne emessa una sentenza che da allora ha rappresentato un vero e proprio spartiacque per il riconoscimento del genere "acquisito" dei transessuali, ma anche per la nozione di matrimonio. Nel 2002, la Corte dichiarò che la Convenzione prevede un obbligo positivo per gli Stati di riconoscere legalmente la transizione delle persone transessuali, e allo stesso tempo – con un'incisiva re-interpretazione dell'Art. 12 – separò la nozione di procreazione da quella di matrimonio, rigettando l'idea che la prima fosse conseguenza "naturale" e fondamento della seconda. Si tratta invero di un'operazione interpretativa che ha influenzato enormemente la nozione di matrimonio in numerose sentenze successive sul tema. Incontreremo poi una sentenza, percepita da alcuni critici come un'esitazione rispetto alle nuove tendenze della Corte, in cui la protezione della famiglia tradizionale fu considerata uno scopo legittimo che permetteva di giustificare l'esclusione delle coppie dello stesso genere non sposate dalla possibilità di adottare, anche quando tale possibilità fosse aperta alle coppie non sposate eterosessuali. Dopo altri casi che confermano l'esclusione delle coppie omosessuali dalla nozione di vita familiare, ed un caso sul "divorzio forzato" per le persone transessuali che ci darà occasione di fornire alcune considerazioni sull'evoluzione dell'interpretazione dell'Art. 12, arriveremo al 2008 anno che segnò un punto di svolta riguardo all'adozione. Grazie ad una sempre maggiore considerazione del giudizio antidiscriminatorio, per la prima volta, la Corte sancì l'idoneità delle persone omosessuali ad adottare. Il tema dell'adozione ci

fornisce un chiaro esempio di erosione del margine di apprezzamento e di attivismo giudiziario. In virtù di nuovi elementi, infatti, i giudici rovesciarono le precedenti decisioni sul tema: dichiararono che, ai sensi della Convenzione, nessuno scopo legittimo può giustificare un diverso trattamento sulla base dell'orientamento sessuale tra persone che richiedono l'accesso all'adozione.

La terza fase comprende le sentenze emesse tra il 2010 e il 2015, ed è la più densa di innovazioni interpretative. Si tratta della fase in cui l'evoluzione verso un pieno riconoscimento dei legami familiari delle persone LGBT ha raggiunto quello che, per il momento, è il suo culmine. Il 2010 segnò in questo senso un vero e proprio spartiacque, con la sentenza che per la prima volta sancì l'inclusione delle coppie dello stesso sesso nella nozione di vita familiare ai sensi della Convenzione. Per quanto riguarda il matrimonio, la Corte non riteneva ancora che esistesse un obbligo positivo degli Stati ad estenderlo alle coppie dello stesso sesso, in quanto non identificava ancora un consenso europeo tale da giustificare una reinterpretazione dell'Art. 12 in questo senso. Tuttavia, questa è la fase in cui anche la nozione di matrimonio ai sensi della Convenzione subì un'enorme evoluzione. Nonostante l'assenza di un obbligo positivo a introdurre il matrimonio egualitario nelle legislazioni nazionali, la Corte decise in quegli anni che, negli Stati che lo prevedessero, anche il matrimonio tra persone dello stesso sesso sarebbe stato protetto dall'Art. 12. La mancanza di consenso europeo stava anche alla base di un giudizio in cui si ritenne legittimo per uno Stato richiedere il "divorzio forzato" come condizione per il riconoscimento del genere "acquisito". La sentenza ha nel tempo attirato diverse critiche; vedremo però che, in quel caso, l'esame di proporzionalità che portò alla decisione mette in luce una posizione della Corte sostanzialmente in linea con le sue decisioni immediatamente precedenti. Corrisponde ad un allineamento con le posizioni precedenti anche una controversa decisione riguardo al diverso trattamento nell'accesso all'adozione tra coppie sposate e non sposate; l'impossibilità di adottare per le coppie non sposate implicava un divieto di fatto per le coppie omosessuali, che in quello Stato non avevano accesso all'istituzione matrimoniale. La Corte ribadì in quella circostanza un principio consolidato nella sua giurisprudenza, ovvero quello secondo cui il matrimonio gode di uno *status* privilegiato rispetto ad altri tipi di

unione, e concluse che il diverso trattamento fosse legittimo in quanto non era operato sulla base all'orientamento sessuale, bensì in virtù dello *status* privilegiato delle coppie unite in matrimonio. Tuttavia, le argomentazioni della Corte rivelano un'applicazione del giudizio antidiscriminatorio che opera come un fattore d'apertura, seguendo uno schema che è comune a diverse sentenze precedenti, e che lascia quindi intuire la possibilità di un progresso sul tema in futuro. Esamineremo poi un caso del 2014, cruciale per il definitivo abbandono del sistema binario di riconoscimento tra pubblico e privato che abbiamo citato in riferimento agli anni '80 e '90. Per la prima volta, i giudici di Strasburgo ritennero di dichiarare, senza lasciare alcun dubbio al riguardo, che il riconoscimento legale delle coppie stabili dello stesso sesso fosse un veicolo per la dignità sociale che *come coppia* meritavano. Fu con queste premesse che, nel 2015, la nozione di famiglia fece quello che, per ora, è il suo più grande passo verso la totale inclusione delle persone LGBT. Con una sentenza che è stata definita "storica", la Corte ritenne che un nuovo consenso Europeo giustificasse una totale erosione del margine di discrezionalità accordato agli Stati riguardo a eventuali limitazioni nel riconoscimento legale delle coppie dello stesso genere, e dunque nel loro pieno godimento della propria vita familiare. La Corte ritenne che sussisteva un obbligo positivo per gli Stati di prevedere forme di unioni civili nei propri ordinamenti, e condannò di conseguenza l'Italia per non averne introdotta alcuna.

Negli ultimi trentacinque anni la Corte ha identificato un consenso europeo crescente riguardo al bisogno di una risposta giuridica alle istanze di quelle persone per le quali l'orientamento sessuale e il genere, come categorie giuridiche, rappresentavano ostacoli al godimento dei diritti fondamentali. Ciò ha portato il bilanciamento tra certezza legale e interpretazioni evolutive a inclinarsi verso l'innovazione in questo campo. Nel decidere su fattispecie per cui l'omosessualità e la transessualità possono rappresentare un ostacolo – che siano le unioni civili, il matrimonio, la genitorialità, l'adozione, o invero la nozione stessa di famiglia – la Corte sembra aver seguito uno schema. Spesso tramite il veicolo del giudizio antidiscriminatorio, solitamente essa inizia operando sottili "aggiustamenti" alle legislazioni nazionali degli Stati Contraenti – accordando loro un certo margine di apprezzamento – per poi gradualmente erodere tale margine, quando l'analisi del

consenso arriva al punto di giustificare quell'erosione.

Chiedendoci cosa ci possa riservare il futuro della giurisprudenza della Corte EDU in relazione ai diritti LGBT, pare ragionevole immaginare che lo stesso schema continuerà ad essere applicato, portando all'estensione alle persone omosessuali e transessuali anche di quei regimi ai quali non hanno ancora accesso. Ciò che è indubbiamente auspicabile è una più rigorosa costruzione ed applicazione degli strumenti usati dalla Corte nell'innovare le sue interpretazioni della Convenzione. Prima di tutto, la nozione di consenso necessita di essere descritta più rigorosamente nella sua natura e rilevanza, dato che si rivela sempre più determinante per le decisioni della Corte. Lo stesso vale per l'uso peculiare che fa dell'interpretazione evolutiva.

In conclusione, se da un lato l'impegno della Corte ad adattare il testo della Convenzione a fattispecie sconosciute nel 1950 è da accogliere positivamente, dall'altro c'è un evidente bisogno di trasparenza rispetto agli strumenti usati per implementare tale adattamento. Un maggiore rigore eviterebbe la necessità di procedere con un approccio "caso per caso", che rischia di impoverire la coerenza della giurisprudenza della Corte Europea dei Diritti dell'Uomo; tale coerenza è infatti cruciale per garantire il rispetto del principio della certezza legale, cardine dell'intero sistema della Convenzione, come è cruciale affinché la Corte possa mantenere la credibilità e l'autorità di cui gode.

Introduction.

The path of human rights in adjudicating LGBT claims

With the dawn of the new millennium, the topic of the rights of lesbian, gay, bisexual and transgender people – which we will, from now on, refer to as LGBT people - has acquired a global dimension. The debate which is unraveling inside national Parliaments, national and international courts and through the achievements of civil society is one capable of extending beyond State boundaries: the development and spreading of the new mass-media fuel a *global* confrontation of opinions, within which we see the fight for the recognition of more and expanded civil rights for LGBT people facing opposite efforts, aiming to preserve traditional values.

In the past, other social movements fought to put an end to a disparity of treatment towards certain categories – the battle for the rights of women starting between the 70's and 80's is often taken as a comparison¹ - obtaining great successes in the courtrooms as well as in the Parliaments of many countries. However, the new millennium brought us an element which confers a new impact to social and legal reforms: the so-called *judicialization*, an increase of "the power of judges"², often called to solve issues that in the past would be referred to governing bodies. While it is true that an impressive variegation in the global landscape of the regulation and recognition of LGBT rights still exist, the emerging quasi-policy making powers of judiciary actors and their capability to influence national legislations³ have given and are giving striking resonance and effectiveness to the ascendancy of a new path followed to adjudicate LGBT claims: the human rights discourse.

The decades-long framing of LGBT rights as human rights came after attempts to use other and less successful framings, such as liberation and emancipation⁴. It has reached mainstream audiences and involved many actors,

1 M.J. KLARMAN, *From the Closet to the Altar. Courts, Backlash and the Struggle for Same-Sex Marriage*, Oxford University Press, Oxford-New York, 2013, p. 49.

2 For reference, see C. GUARNIERI, *The Power of Judges: a Comparative Study of Court and Democracy*, Oxford University Press, New York, 2002.

3 See respectively §1.4 and §1.3.

4 R. HOLZHACKER, "Gay rights are human rights": the framing of the new interpretations of international human rights norms, paper prepared for the International Political Science Association (IPSA) Conference, Montreal, 19-24 July 2014
[http://www.rug.nl/research/portal/files/16387912/IPSA_paper_Gay_Rights_are_Human_Rights_fi

among which professionals within academia, NGOs such as the International Lesbian and Gay Association (ILGA) and the International Gay and Lesbian Human Rights Commission (IGLHRC), and within mainstream human rights NGOs such as Amnesty International (AI) and Human Rights Watch (HRW)⁵.

The new framing favoured a build up at the transnational level of the effort towards an effective legal protection of human rights in respect of sexual orientation and gender identity, effort promoted both by international organizations and by the civil society. We give here some significant examples of the "institutionalization" of LGBT rights. In July 2011, the United Nations adopted the first resolution on *Human Rights, Sexual Orientation and Gender Identity*, which expressed "grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity"⁶. The resolution committed a study on "discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all all regions of the world, and how international human rights law can be used to end violence and related human rights violations"⁷. The report of the study was published in November 2011 and confirmed "a pattern of human rights violations around the world that demands a response"⁸. It was December 2011 when US Secretary of State Hillary Rodham Clinton claimed at the United Nations in Geneva that "gay rights are human rights"⁹ in a speech perceived as historic, as many saw it as a first manifestation of the US commitment to promote LGBT rights abroad at a time when the political institutions of the Old World were starting as well to promote the framing of LGBT rights as human rights. Indeed, taking Europe into consideration, the Committee of Ministers of the Council of Europe had adopted in March 2010 a set of recommendations, in order to "ensure respect for human rights of lesbian, gay,

nal_32589.pdf], p. 4,5.

5 *Ibid.*, p. 3.

6 United Nations Human Rights Council, *Human Rights, Sexual Orientation and Gender Identity*, A/HRC/RES/17/19, 34th Meeting, 17 June 2011.

7 *Ivi.*

8 United Nations Human Rights Council, *Discriminatory laws and practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity: Report of the United Nations High Commissioner for Human Rights*, A/HRC/19/41, 17 November 2011.

9 Speech delivered by Secienna

retary of State Hillary Clinton in recognition of International Human Rights Day, United Nations, Geneva, 6 December 2011.

bisexual and transgender persons and to promote tolerance towards them"¹⁰. The same year, in June, the Council of the European Union had adopted its *Toolkit to Promote and Protect the Enjoyment of All Human Rights by LGBT People*, aimed at favouring the decriminalization of homosexuality and promote LGBT equality and non-discrimination¹¹.

Moving to civil society, it seems reasonable to see these commitments by two of the most powerful and authoritative political organizations in the world as a response to national and international campaigns, but even more so as a response to international agreements as the Yogyakarta Principles¹², an influential set of principles for the application of international human rights law in relation to sexual orientation and gender identity developed at a meeting of the International Commission of Jurists, the International Service for Human Rights and human rights experts from around the world in 2006. The nexus is patent in documents which openly mention the Principles, such as the issue paper *Human Rights and Gender Identity* by the Council of Europe Commissioner for Human Rights, published in 2009¹³.

Although these global efforts did not work without obstacles¹⁴, they continued and grew stronger in recent years: some argue that the EU is slowly making LGBT rights a pillar of their foreign policies¹⁵; looking at the United Nations, Secretary-General Ban Ki-Moon – the head of an international organization in which 76 of 193 member states criminalize same-sex relationships – repeatedly urged the UN

10 Council of Europe, *Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity*, 1081st Meeting of the Ministers' Deputies, 31 March 2010.

11 Council of the European Union, Note from Working Party on Human Rights to Political and Security Committee, *Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People*, 17 June 2010.

12 *The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity and Gender Identity*, 9 November 2006 [<http://www.yogyakartaprinciples.org/>].

13 Council of Europe Commissioner for Human Rights, *Human Rights and Gender Identity*, CommDH/IssuePaper(2009)2, 29 July 2009.

14 For example, the UN resolution *Human Rights, Sexual Orientation and Gender Identity* of June 2011 was adopted by a narrow and polarized 23-19-3 margin, with countries primarily voting in regional blocs.

15 For reference, K. ROHRICH, "Human Rights Diplomacy Amidst 'World War LGBT': Re-examining Western Promotion of LGBT Rights in Light of the 'Traditional Values' Discourse", in *Transatlantic Perspectives on Diplomacy and Diversity*, Humanity in Action Press, 2015; and C.F. STYCHIN, "Same-Sex Sexualities and the Globalization of Human Rights Discourse", in *McGill Law Journal*, Vol. 49, pp. 953 ff.

community to work towards LGBT human rights recognition¹⁶, while the Officer of the High Commissioner for Human Rights, following the *Discriminatory Laws and Practices* report, put in place efforts aimed at pressuring governments to decriminalize same-sex relationships¹⁷.

This is the landscape in which international advocacy for LGBT rights is working. These acts of recognition and commitment represent proof that the human rights discourse and human rights law are an effective vehicle for mobilizing LGBT claims, and serve as a context to the special importance, widely recognised in the available literature on the topic, of the European Court of Human Rights in shaping new legal paradigms meant to guarantee the protection of LGBT rights.

16 For example, he stated that “The struggle for LGBT rights is one of the great, neglected human rights challenges of our time” in a speech delivered at the International Conference on Human Rights, Sexual Orientation and Gender Identity in Oslo, 15 April 2013 [<http://webtv.un.org/watch/ban-ki-moon-struggle-for-lgbt-right-one-of-the-great-neglected-human-rights-challenges-of-our-time/2303338045001>].

17 Beginning in July 2013, the OHCHR launched the Free and Equal Campaign to combat homophobic and transphobic violence, described and developed on the website <https://www.unfe.org/>.

Part I.

Context and Methods

The first part of this work is meant to provide context for the case-law examined in Part II and thoughts about the methods used by the Court in innovation its interpretations. For this reason, it does not provide a comprehensive description and analysis of the issues dealt with; rather, our purpose in these first chapters is to deliver considerations which are useful for a clear depiction of the development of a "new" notion of family within the European Court of Human Rights' jurisprudence. These considerations are meant to elucidate: (i) the reasons why it is meaningful to consider that very jurisprudence; (ii) what makes the development at issue possible, and in particular critical thoughts about the methods applied by the Court; (iii) the peculiar potential that jurisprudence possesses for LGBT advocates.

Chapter 1.

The key role of the European Court of Human Rights in establishing new family paradigms

CONTENTS: 1. The European Court of Human Rights – 2. Evolutive interpretation – 3. The Court's decisions spread beyond State borders, creating a possibility for social change through the evolution of the law – 4. A gateway for civil society participation in the judicial discourse.

The development of the recognition of LGBT rights worldwide and in Europe is proceeding at different paces. However, independently from these differences, it can be divided into two broad phases: the phase of "sex rights" and the one of "love rights"¹⁸. As we will see in Part II, these phases can also be applied to the ECtHR jurisprudence¹⁹. The first one is the phase of the progressive depenalization of homosexual behaviour, allowed by the acknowledgement that sexual orientation and gender identity belong to a sphere of freedom of each individual and constitute a private manifestation of personality. The second stage of development of SOGI²⁰ human rights has to do with the rights of couples: their recognition and their possibility to see their rights protected as different-gender couples do, but not only this. Today, we can say that relationship rights have evolved in different areas of the world in order to respond to a more complete set of needs and claims, which include family needs. In these areas, politics and courts have started acknowledging that those needs, those rights are in fact family rights, and that they should be protected as such. Therefore, the phase of love rights should now be called, with a more complete definition, a phase of family rights, which has to do with the recognition of L/G/B/T "stable unions"²¹ (or marriage?) and parenting.

Up until very few decades ago, nobody would ever doubt that "family" is the one and only existing atom of society made by a marriage – which could only mean

18 R. WINTEMUTE, "From 'Sex Rights' to 'Love Rights': Partnership Rights as Human Rights", in N. BAMFORTH (edited by), *Sex Rights*, Oxford University Press, Oxford, 2005, pp. 186-224 at 188.

19 G. REPETTO, "Figli irricognoscibili. Le adozioni omoparentali davanti alla Corte europea dei diritti dell'uomo", in A. SCHILLACI (edited by), *Omosessualità, eguaglianza e diritti*, Carocci, Roma, 2014, pp. 150-169 at 151.

20 The acronym is used worldwide and stands for "(based on) sexual orientation and gender identity".

21 A naming used by the ECtHR that we will meet along the analysis in Part II.

different-sex marriage – and fulfilled with the birth of children. From the legal point of view, marriage triggered rights that couldn't be granted, and responsibilities that couldn't be taken in any other way, between the partners and between parents and children. However, in the last 40 years, new family formats have been made available both to different-gender and same-gender couples, with many countries providing couples who couldn't or didn't want to get married with the possibility of a different civil union – registered partnership, civil partnership, *de facto* union, Pacte Civil de Solidarité (PACS) are the most known²². Once these kinds of partnerships were made available, and also thanks to a strong social and legal struggle for a more educated perception of sexual orientation and gender identity, many countries have also opened up marriage to same-gender couples, starting from the Netherlands.

Today, in most states of the European Union, and in a handful of other States of the Council of Europe, same-gender partners can take a commitment to one another through some kind of registered union; nevertheless, the struggle for full equality in the CoE countries, with the rights granted to cisgender and heterosexuals on one side and to LGBT people on the other, is far from being over. The issue of LGBT rights is living a historical moment in Europe: one of fragmentation, accelerations and hesitations, contradictions between the beliefs of nations that we often forget are so different. This is precisely the reason why the development of LGBT rights related to marriage and family seems to have reached its most interesting point this far. Among LGBT issues, family rights for LGBT people is the most discussed in Europe – also between countries with similar legal and social traditions – and the most capable of radically transforming itself, its goals and achievements as well.

But why is it significant to take as paradigmatic and to analyze the development of the notion of family within the jurisprudence of the European Court of Human Rights? In a nutshell, because of the spillover effects that the rulings of the

22 These formats differ extremely under many points of view: some recognise almost the same rights as marriage, some only accord few and little significant rights; some are available exclusively to LGBT persons, while others include different-gender and same-gender couples; the majority are institutions of public law, others are not, as the PACS, which is a private contract.

For reference on civil-union formats across Europe and the differences in the extent to which each of them grants rights to couples, see K. WALDIJK, "Great diversity and some equality: non-marital legal family formats for same-sex couples in Europe", in *Genius*, 1:2, December 2014, pp. 42-56.

Court have, as we will see in the next paragraphs.

In 2008, Lind argues that "compared to the rest of the world, Europe has the the longest formal history of same-sex partnership recognition, and has made more thorough progress in that respect"²³. With respect to the recognition of full marriage equality in particular, Europe has led the way, with the Netherlands being the first country in the world to include gay and lesbian couples in the beneficiaries of the institution of marriage²⁴. Thus far, 13 of the 21 countries where a gay or lesbian couple can get access to marriage are European countries²⁵. Comparing the caseload of the European Court of Human Rights regarding LGBT issues with that of other regional mechanisms for the protection of human rights, we find a similar landscape: the Court decided on approximately a hundred of these cases so far and has more or less other ten currently pending, compared to well less than ten for the Interamerican Court of Human Rights (which decided on its first-ever LGBT-related case in 2012²⁶) and none for the other regional instruments for the protection of human rights.

The development of the Court's case-law has gone hand in hand with progressive overtures in European national and supranational legislations and policies on issues which affect sexual minorities. Yet, these shifts in social and legal standards are inconsistent and fragmented, with governments and peoples remaining skeptical when not openly hostile to the advancement of the protection of LGBT rights. In a Gallup Poll survey in 2014²⁷, member states of the Council of Europe spread along the chart of 124 countries ranked on the base of their social acceptance of LGBT people, with the Netherlands at the top (87%) and Azerbaijan at the bottom (2%). Thus, the landscape is not one of perfect agreement and conformity among state legislatures and acceptance, but here should lay the purpose of the European Convention *and* Court of Human Rights: the purpose laid down by the drafters of the

23 C.LIND, "Queering Marriage: the Legal Recognition os Same-Sex Relationships around the World", in M. JUDGE, A. MANION, S. DE WAAL (edited by), *To Have and To Hold: the Making of Same-Sex Marriage in South Africa*, Auckland Park, Fanele, 2008, pp. 284-299 at 285.

24 For reference, see K. WAALDIJK, "Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands", in R. WINTEMUTE, M. ANDENAES, *Legal Recognition of Same-Sex Partners in Europe*, Hart Publishing, Oxford, 2001, pp. 437-464.

25 As of January 2016: Belgium, Denmark (including Greenland), Finland, France, Ireland, Iceland, Luxembourg, Norway, Netherlands, Portugal, Spain, Sweden, U.K. (excluding Northern Ireland).

26 Inter-Am. Comm. HR, *Atala Riffo and Daughters v. Chile*, 12.502, 24 February 2012.

27 Gallup, 2014 Poll Dataset, [<http://www.gallup.com/services/177797/country-data-set-details.aspx>].

text was to shape a common ground to which countries can conform to. Indeed, as Sir David Maxwell Fyfe said during a speech delivered at the signing of the Convention, the Convention is meant to establish "the rules of the Club" for the Council of Europe, rules that "lay down the minimum standards of human dignity and freedom compatible with membership"²⁸.

The Court has played a key role in the development of new legal paradigms, among which the family paradigm is currently the more turbulent and promising. One of the characteristics which allowed the Court to play such role is certainly represented by the sources it applies – the Convention above all – combined with the evolutive interpretation, which the Court expressively asserts is needed when applying the provisions of the Convention; another one is becoming more and more patent and it is the fact that the Court's decisions have effects that go well beyond the parties involved in a specific trial.

As we will see in §1.3, the Court's jurisprudence resonates beyond the borders of the single state which is party to a cause, and also beyond a specific case which is to be decided, extending the findings of its judgments to future litigations. The Court can formally impose changes in national legislations only on states which it condemns in a judgment, and it lacks a formal *stare decisis* principle; but if, nevertheless, the Court's rulings can influence national legislations and its own decisions in the future, then its jurisprudence on human rights issues in general, and on a notion of family inclusive for LGBT people in particular, acquires great importance. Firstly, because it would mean that the notion of family "constructed"²⁹ by the interpretative choices of the Court has the potential to influence a future worldwide accepted "new" notion of family; secondly, because if the Court can establish principles that transcend one particular case, then advocacy groups in Europe can try and activate the Courtroom to push same-sex family rights forward in the legal order.

28 Human Rights Information Bulletin, *The European Convention on Human Rights at 50*, Council of Europe, Strasbourg, 2000, p. 47.

29 P. JOHNSON, *Homosexuality and the European Court of Human Rights*, Routledge, London, 2013, pp. 8, 89.

1.1. The European Court of Human Rights

The European Court of Human Rights (hereafter "the Court" or "ECtHR") is an international court created in 1959. It is the judicial organ of the Council of Europe, making its jurisdiction coincide with the territories of the 47 states that constitute the Council. The Court uses all applicable international law sources to elaborate its judgments, but its peculiar role is to adjudicate complaints brought under the European Convention of Human Rights (hereafter also "the Convention")³⁰. As stated in its preamble, the Convention borrows from principles of the Universal Declaration of Human Rights of 1948³¹ – with the Convention focusing more narrowly on civil and political rights – and it was signed by 12 member states of the Council of Europe³². It entered into force in 1953 and, since then, has been ratified by all the 47 CoE member states and amended by various protocols. The Court is constituted by 47 judges, each nominated by a member state but sitting independently; they mostly adjudicate cases in panels of seven and, under special circumstances, sit as a Grand Chamber of seventeen judges to decide on appeals from lower chambers.

The Court has judicial review powers: this means that it can evaluate whether a legislation is in conformity with the Convention, a higher-order text of superior values. Its judgments are binding only for the state party to the case; the Court has the power to review national legislation against the European Convention of Human Rights, so, when the national laws of a State violate the Convention, the Court compels the State to change those laws in conformity with the Convention provisions. However, decisions are not self-executing, so complying or not with the ruling is up to the state; most states decide to conform to the decision, but their willingness to do so depends to a large extent on the status of the ECTR in their domestic laws³³.

Until 1998, two part-time institutions existed which controlled the application

30 Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS n.005, 4 November 1950.

31 UN General Assembly, *The Universal Declaration of Human Rights*, 10 December 1948.

32 Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Turkey, and the United Kingdom.

33 S. DALVI, "Homosexuality and the European Court of Human Rights: Recent judgments against the United Kingdom and their Impact on Other Signatories to the European Convention on Human Rights", in *University of Florida Journal of Law and Public Policy*, 15, 2004, pp. 467-514 at 475.

of the Convention: the Court and the Commission of Human Rights. The Commission had the role of determining the admissibility of applications and reach a friendly settlement between the parties, or otherwise transmit a report and advisory comment to the Committee of Ministers, which decided whether to transmit the case to the Court. Then, as Protocol 11 of the Convention entered into force, the Commission was abolished and a full-time Court was established. Applicants to the Court include individuals, groups, NGOs and contracting states, but thus far most applications have come from individuals or groups³⁴; the exhaustion of domestic remedies is a necessary condition. Today, other actors are often involved in the complaints, such as NGOs and advocacy groups, mostly through written submissions – something we will deal with in §1.4. Johnson states that, over time, the "Convention assumed the function of a European bill of rights", which individual applicants "sometimes incorently regard as a court of forth instance"³⁵. The caseload of the Court is therefore huge: in 2014, it received 56.250 new applications and disposed of 86,063³⁶.

In sum, when it comes to the complaints brought before the European Court of Human Rights, we witness a huge level of participation. Johnson points out, citing a definition of "human rights" given by U.Baxi, that because human rights is "an arena of transformative practice that disorients, destabilizes, and at times even helps destroy deeply unjust concentrations of political, social, economic and technological power"³⁷, the Court has become one of the key sites in which the very political practice of human rights is manifested and played out³⁸. The Court seems to have accepted this role in a number of occasions: it was 1978 when it claimed that its

...judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.³⁹

And 2003 when it went on to say that

34 S. GLUCK MEZEY, "The Role of the European Court of Human Rights in Adjudicating LGBT Claims", 3 July 2010, p. 4 [http://paperroom.ipsa.org/papers/paper_30324.pdf].

35 P. JOHNSON, *supra* note 29, p. 5.

36 European Court of Human Rights, *Analysis of Statistics 2014*, January 2015 [http://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf].

37 U.BAXI, *The Future of human Rights*, Oxford University Press, Oxford, 2002, p. 10.

38 P. JOHNSON, *supra* note 29, p. 6.

39 *Ireland v. the United Kingdom*, App. no. 5310/71, 18 January 1978, para. 154.

Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.⁴⁰

To conclude, we must underline that the jurisprudence of the Court is elaborated within a dense network of contributions coming from different actors within the Council of Europe. The Committee of Ministers provides the supervisory mechanism through which the Court's judgments are executed⁴¹, and it is the Committee which produces the human rights policy of the Council at the root of the work of the Court, thus providing a significant steer to the Court's interpretation of the Convention⁴². The Parliamentary Assembly has contributed to the shaping of human rights policy as well; in particular, it passed a number of recommendations and a resolution in support of LGBT people starting from 1981⁴³. Lastly, since it was established in 1999, the Commissioner for Human Rights has presented annual reports about human rights in member states and given recommendations⁴⁴.

1.2. Evolutive interpretation

The European Convention of Human Rights is subject to Articles 31, 32, 33 of the Vienna Convention on the Law of Treaties (VCLT) on the rules of interpretation of treaties. Nevertheless, in its judgments, the European Court of Human Rights does not often refer to the VCLT when explaining its interpretation of the Convention; rather, it often mentions peculiar labels like "living instrument" or "practical and effective rights" for naming its interpretative techniques. According to Letsas⁴⁵, all these methods reject the idea that the Convention has to be interpreted in the light of

40 *Karner v. Austria*, App. no. 40016/98, 24 July 2003, para. 26.

41 A. MARCHESI, *La protezione internazionale dei diritti umani*, Franco Angeli, 2011, p. 133.

42 For example, the Court gave immediate effect to the first official policy recommendations by the Committee on sexual orientation, gender identity and human rights of 2010 the same year, in *Alekseyev v. Russia*, representing a significant change of the Court's judicial policy.

43 For instance, see Parliamentary Assembly of the Council of Europe, *Resolution n. 1728 on Discrimination on the Basis of Sexual orientation and Gender Identity*, 29 April 2010; Parliamentary Assembly of the Council of Europe, *Recommendation n. 1948 on Tackling discrimination on the grounds of Sexual orientation and Gender Identity*, 27 June 2013.

44 The reports are available online at <http://www.coe.int/it/web/commissioner/documents>.

45 G. LETSAS, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, New York, 2007, p. 65.

the social and legal conditions of the 1950s. However, these labels came with time: let us dwell for a moment on three cases from the ECtHR's jurisprudence which are not related to LGBT issues.

*Golder v. the United Kingdom*⁴⁶ was the first major litigation which posed a challenge for the Court as to establish a general rule of interpreting the Convention and, at the same time, what is the relevance of the original intentions of drafters in interpreting it. In *Golder*, a prisoner claimed to have been denied access to Court, in violation of Art.6 ECHR; according to the respondent state, the United Kingdom, the Convention – in this case namely Art.6 – does not guarantee a right to access to court, since such a right is not explicitly mentioned in the text. The Court first examined Art.6, coming to the conclusion that its wording was neutral and thus wasn't sufficient to establish whether a right to access to court was conferred by the Convention⁴⁷.

Then, judges turned to the preamble of the Convention, elaborated on its "object and purpose", and finally came to the conclusion that if the text didn't guarantee such a right, states "could without being in breach of that text, do away with courts, or take away their jurisdiction to determine certain class of civil actions and entrust it to organs dependent on the Government"; such possibility, the Court continues, would have consequences which are "repugnant to the principle of the rule of law"⁴⁸. The Court then warned that the right of access to Court did not arise from an "extensive interpretation (...): it is based on the very terms of the first sentence of Art.6 para.1, read in its context and having regard to the object and purpose of the Convention"⁴⁹. In doing so, the Court stated implicitly that the absence of an explicit provision does not, in itself, prevent the Convention from granting a right.

Three years later, the method of evolutive interpretation appeared. In the case *Tyrer v. U.K.*⁵⁰, the matter at issue was whether judicial corporal punishment to juveniles happened in the Isle of Man was in violation of Art.3 ECHR. In the judgment, it was stated that

...the Convention is a living instrument which, as the Commission rightly

46 *Golder v. the United Kingdom*, App. no. 4451/70, 21 February 1975.

47 *Ibid.*, para. 32.

48 *Ibid.*, para. 35.

49 *Ibid.*, para. 36.

50 *Tyrer v. the United Kingdom*, App. no., 5856/72, 25 April 1978.

stressed, must be interpreted in the light of present-day conditions. In the case now before it, the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.⁵¹

with a formula that would become widely employed by the Court. This piece of legal reasoning focuses on present-day conditions as the priority framework in which the Convention has to be interpreted. According to most scholars⁵², the *Tyrer* case inaugurated the extensive use of the present-day conditions doctrine, of the notion that the Convention is a living instrument, and of an hermeneutic interpretation of the text which takes into account the social, cultural and legal changes in Europe – changes that the drafters of the text could not foresee or conceive. It is useful to recall that the Attorney General of the Isle of Man argued in its submissions that the punishment did not respond to the definition of degrading punishment given in Art.3 because it did not outrage public opinion in the Isle of Man; the Court rejected this argument, stating that the public perception of corporal punishment was not relevant in order to establish whether it was degrading or not. This seems to suggest that the characteristic of being degrading was *inherent* in the nature of the punishment; a more extensive contribution in this sense was given by *Marckx v. Belgium*⁵³.

In this case, an unmarried mother and her child complained that Belgian law – which at the time did not recognise maternal affiliation only by birth when the children were born out of wedlock – violated their right to family life (under Art.8 ECHR) and constituted a discrimination (under Art.14). In the judgment, the Court admitted that a distinction between "legitimate" and "illegitimate" children was acceptable, but stressed that "the domestic law of the great majority of the member states has evolved (...) towards full juridical recognition of the maxim *mater semper certa est*"⁵⁴. However, we witness an evolution from the kind of reasoning given in *Tyrer* if we note that the Court then refers to two international conventions, claiming that their existence shows that there is a clear measure of common ground in this area "amongst modern societies". This statements mark a shift from the attitude displayed in the *Tyrer* judgment, when "present-day conditions" had to be established looking at

51 *Ibid.*, para. 31.

52 For example G. LETSAS, *supra* note 45, p. 61; P. JOHNSON, *supra* note 29, p. 85.

53 *Marckx v. Belgium*, App. no. 6833/74, 13 June 1979.

54 *Ibid.*, para. 41.

the legislation of the majority of CoE states, to a new conception of "present-day conditions", one which takes into account the evolving attitudes and beliefs which are common in European modern societies. The reasoning employed in the *Marckx* judgment implies the idea of a *discovery*: the behaviour taken into consideration is something which in some way has always constituted a violation, even in a time when it was not perceived as such.

This is best represented by a statement by the Court regarding *Dudgeon v. U.K.*, which mainly involved the claim that penalization of homosexuality in Northern Ireland violated the right to respect for family life granted by Art.8 para.1.

As compared with the era when the legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied.⁵⁵

According to Letsas, the statement does confer great importance to the evaluation of what is believed in the majority of member states, but it also entails a value judgment when the Court claims that there is a *better* understanding of homosexual behaviour. Using the word "better" instead of a word without a value connotation, as for example "different", aims at underlining that such understanding tends more towards the *inherent* and *substantive* truth of the protected right⁵⁶. If the author's interpretation is correct, the Court has indeed passed from deducting the "truth" of a right from the attitude of the majority of CoE states, and shaping its judgment accordingly, to recognizing a universal, almost abstract "truth" of the right which is to be protected. Also, the majoritarian approach explicitly employed by the Court in *Dudgeon* seems to be used only *in addition* to the evaluation of the objective substance of the protected rights recognised by the judges – something which seems reasonable, given the fact that the Court rarely engaged in comparative studies or statistics about national legislatures at the time⁵⁷. In this sense, the evolutive interpretation employed

⁵⁵ *Dudgeon v. the United Kingdom*, App. no. 7525/76, 22 October 1981, para. 60.

⁵⁶ G. LETSAS, *supra* note 45, p. 79.

⁵⁷ More recently, the Court has actually engaged in comparative analyses of national legislations when it comes to controversial issues such as those present in LGBT-related cases, also due to the continuous changes on the matter in the legal European landscape. See for example *X and Others*, App. no. 19010/07, 19 February 2013, in which three paragraphs of the judgment – 55, 56, 57 – have been dedicated to the comparative analysis of European national legislations; see also

by the Court seems to aim at accomodating the circumstances of a particular case into a first-order moral reading of the ECHR, more than into a reading based mainly on a similar attitude amongst the majority of national legislations within the Council of Europe; here lays its potential for change.

This detachment from textualism seems perfectly reasonable particularly in the field of human rights – a field which witnesses constant changes in what is perceived as a "minimum standard" or what a society gets to consider "unacceptable" – and even more specifically in the field of equality. When a society experiences an advancement in the fight against discrimination, be it based on race, gender or any other essential human characteristic protected by human rights law, the advancement is not perceived as a change in our preferred values or in our priorities, rather it is often seen as a discovery brought about by progress in human knowledge, a progress which lets us *now* know that our past understandings of the world were blinded by false beliefs.

It is useful to underline that the Court is not completely consistent in its different applications of the living instrument doctrine. Looking for examples in the case-law regarding same-gender family life, we can briefly mention three cases – which will be analyzed in detail in §§ 4.6-5.2 – to clarify this point. *Schalk and Kopf v. Austria*⁵⁸ is seen by some commentators as an example of a conservative use of the doctrine: here, the Court relied on consensus analysis to reject the claim that an interpretation of Art.12 which takes into account the existence of same-gender relationships would grant same-gender couples access to marriage. Johnson calls the case "an example of the Court's reluctance to use the living instrument doctrine to introduce new positive obligations across contracting states in order to challenge the heteronormativity of present-day conditions"⁵⁹.

However, the Court did use the doctrine to challenge a heteronormativity consensus in *E.B. v. France*⁶⁰: here, the Court relied explicitly on the doctrine to claim that a differential treatment based on sexual orientation of someone who seeks authorization to adopt a child constitutes a discrimination under the Convention –

Vallianatos v. Greece, Apps. nos. 29381/09 and 32684/09, 7 November 2013, para. 91.

58 *Schalk and Kopf v. Austria*, App. no. 30141/04, 24 June 2010.

59 P. JOHNSON, *supra* note 29, p. 86.

60 *E.B. v. France*, App. no. 43546/02, 22 January 2008.

though in the absence of a consensus across member states in this sense. Similarly, in *Kozak v. Poland*⁶¹, the living instrument doctrine was used by the Court to oblige a state to change its legislation to accommodate an evolved notion of family, thus – Johnson comments – serving "as a vehicle to advance its own moral judgment"⁶². Independently from inconsistencies, it is a fact that an evolutive approach to the interpretation of the ECHR has been an extensively employed tool for the Court to engage in creative forms of reasoning, and that "a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement"⁶³.

1.3. The Court's decisions spread beyond State borders, creating a possibility for social change through the evolution of the law

The judgments of the ECtHR, as those of any other international court, are binding exclusively for those parts who have ratified the treaty which created the IC; contracting states accept the court's jurisdiction through the ratification and must then comply with specific judgments against them, but they are not bound by rulings resulting from litigations in which they didn't take part. Moreover, technically the Court has no obligation to adhere to precedent. However, is it possible for the decisions taken by the European Court of Human Rights to have resonance beyond the borders of the specifically judged State and to influence future decisions by creating a precedent? If the answer is *yes*, what are the consequences for the potential development of LGBT rights?

Taking Europe into consideration, a potential for the Court to influence the policy of member states exists, as proven by Helfer and Voeten⁶⁴. The phenomenon is known as the *erga omnes* effect and works indirectly with international courts like the ECtHR, without a legal or anyhow formal foundation: having to do with national sovereignty concerns, mechanisms like the *erga omnes* effect are often politically and

61 *Kozak v. Poland*, App. no. 13102/02, 2 March 2010.

62 P. JOHNSON, *supra* note 29, p. 116.

63 *Scoppola v. Italy* (no.2), App. no. 10249/03, 17 September 2009, para. 104.

64 L.R. HELFER E. VOETEN, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe", in *International Organization*, 68:01, 2014, pp. 77-110.

legally contested, since they could increase the agency of international judges and constitute a risk for the autonomy of national policies. We know that, as we will see in Part II, the Court's attitude has become and is becoming increasingly progressive on LGBT-related decisions, with almost every step forward made through the reversion of earlier judgments which rejected challenges to the *status quo*. Some scholars see a great amount of judicial discretion, or agency, in such a phenomenon⁶⁵, yet the study by Helfer and Voeten proves, through the analysis of data related to five specific LGBT issues, that the trend actually matches an equal pattern in national laws and policies of states which are members of the Council of Europe. As the authors state,

We find that an ECtHR judgment against one nation increases the likelihood that all CoE countries will adopt the same pro-LGBT policy. (...) Most notably, ECtHR rulings have the greatest marginal effect in countries where public acceptance of homosexuals is low. This finding is contrary to a prevailing critique of human rights treaties and of international laws and institutions more generally – that they matter most where they are needed least.⁶⁶

Moreover, the authors state that the Court engages in a "majoritarian activism", that is it challenges its own jurisdiction only when the challenge is justified by social developments in at least a majority of CoE member states.

There seem to be three ways through which the jurisprudence of an international court can influence states which are not directly bound to comply with a decision; these phenomenons seem perfectly applicable to the European Court of Human Rights. The first way is represented by the fact that the international courts' jurisprudence can somehow steer the attitude of states as to their policies: following a decision condemning other states, a country could change its behaviour in order to avoid the risk of litigation and of the same outcome against itself in the future. This happens because countries know that, even if international courts are not formally bound to a *stare decisis* doctrine, they normally follow their own jurisprudence⁶⁷. This

65 For reference, see A. BURLEY, W. MATTLI, "Europe Before the Court: A Political Theory of Legal Integration", in *International Organization*, 47:1, 1993, pp. 41-76; K.J. ALTER, S. MEUNIER-AITSAHALIA, "Judicial Politics in the European Community: European Integration and the Pathbreaking *Cassis de Dijon* Decisions", in *Comparative Political Studies*, 26:4, 1994, pp. 535-561.

66 L.R. HELFER E. VOETEN, *supra* note 64, p. 80.

67 L. WILDHABER, "Precedent in the European Court of Human Rights", in P. MAHONEY and others (edited by), *Protection des droits de l'homme: la perspective européenne, mélanges à la mémoire de Rolv Ryssdal*, Carl Heymanns, Cologne, 2000, pp. 1529-1545 at 1542.

is relevant also when we think about the fact that the EU Commission takes the Court's decisions into consideration to define the human rights conditions for EU membership; according to Kochenov⁶⁸, the EU Commission does this because it anticipates the future invalidation of restrictive laws in candidate states by the Court. The second way works through authority: there are examples of international courts citing the legal reasoning or the argumentations delivered by one another in their judgments⁶⁹, or of national courts, even outside the CoE, mentioning them⁷⁰. The last way through which an international court's jurisprudence can have an effect beyond its jurisdiction is through the resonance given to a certain issue inside countries:

It is one thing not to *initiate* policy change on the national level, and quite another not to *respond* once a particular rights is made salient through international negotiations. Silence (...) can easily be interpreted as opposition in the presence of a specific accord.⁷¹

A wider awareness about the criticality of a certain topic can force it on the agenda of national parliaments, given that at that point, ignoring that topic would mean taking a risky stand for executives.

Shifting our focus to the potentiality of a *de facto* influence of the Court's jurisprudence on CoE contracting states, we can state that such phenomenon could be *used* by pressure groups. Given its functioning, the *erga omnes* effect is a mechanism that advocacy groups can take into account when establishing a strategy for the challenging of the social *and* legal *status quo*. Indeed, if advocates for LGBT rights had a gateway to participation in the judicial discourse, the *erga omnes* effect of the Court's rulings would amplify the outcome of such participation. If these groups had a way to "steer" litigations, using their expertise to choose what laws can be effectively challenged in court and what arguments to use in order to defend their position, it could be possible that this would result in the ECtHR progressively abandoning "old" paradigms and adopting "new" ones through evolutive interpretation; at that point,

68 D. KOCHENOV, "Democracy and Human Rights – Not for Gay People?: EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities", in *Texas Wesleyan Law Review*, 13:2, pp. 459-495 at 481.

69 L.R. HELFER E. VOETEN, *supra* note 64, p. 81.

70 M. KHOSLA, "Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision", in *American Journal of Comparative Law*, 59:4, pp. 909-934, cited in L.R. HELFER E. VOETEN, *supra* note 64, p. 82.

71 B. SIMMONS, *Mobilizing for Human Rights*, Cambridge University Press, Cambridge, 2009, p. 128.

thanks to the effects of the Court's jurisprudence we mentioned, these new paradigms could extend to influence the Council of Europe. A way exists and it is to engage in *strategic litigation*, as explained in the next paragraph.

1.4. A gateway for civil society participation in the judicial discourse

Lind⁷² argues that "European legal changes – although influenced by human rights norms – have been waged more powerfully (and successfully) in political and not in legal forums". The predominant role in legislating and elaborating policies on partnership recognition belong without any doubt to parliaments. This is even more true if we refer to states within the Council of Europe, the majority of which have systems of civil law. The author suggests that, because of their civil law traditions, these countries are more likely to experience a political debate about divisive issues. Given that politics are the only decision-making and legislative arena, issues which divide the public and political forces – such as egalitarian marriage and relationship policies – are more likely to be decided on and settled through political means. It is indeed true that, in the countries where it is available, egalitarian marriage has almost always been obtained traditional electoral and legislative politics⁷³. However, most countries' parliaments are still reluctant to establish a full equality of recognition between the rights granted to different-gender and same-gender couples and, in these cases, the LGBT community will likely be compelled to seek judicial intervention by the ECtHR through strategic litigation. We will now clarify how and why it can be a fruitful choice.

Hodson claims that, because of the possibility of application accorded to individuals, the ECtHR provides a stage for political movements seeking to effect legal change⁷⁴. We will now see how in the essence and functioning of the Court lies the possibility of a gateway for civil society, and advocacy groups of LGBT rights in

⁷² C. LIND, *supra* note 23, p. 289.

⁷³ Ireland is the first and only country so far, on 22 May 2015, so far to have chosen egalitarian marriage through a referendum. The Marriage Act 2015 was signed into law on 29 October 2015.

⁷⁴ L. HODSON, *NGOs and the Struggle for Human Rights in Europe*, Hart Publishing, Oxford, 2011, p. 64.

particular. If these elements are effective in adjudicating LGBT claims, then we can try to understand – in Part II – if they have been one of the factors which pushed the Court towards a more and more progressive attitude towards same-sex family rights.

As we have already said, the Court is not formally bound to follow its own jurisprudence, but usually it does. The reasons for doing so are endorsed by the Court itself:

While the Court is not formally bound to follow its previous judgments, it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. (...) However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved.⁷⁵

This means that, while adherence to the precedents exists, judges can also overrule their own case-law. However, the Court is also stating that a convincing reason is needed in order to do so: the superior protection of human rights has to be at issue, and there must be new convergence among contracting states as to the standards to be achieved. The very fact that the Court is claiming that there must be a justification in order to detach from previous rulings proves the value given to legal certainty, with adherence to precedents becoming an aim more than a *de facto* phenomenon. Therefore, if adherence to precedents is an aim for the Court, then, according to this statement, the decisions made by the Court do have the power to establish *principles* that survive beyond the single judgment. This has been confirmed by the Court itself in a number of other judgments, one of which claimed that its "judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention"⁷⁶. However, at the same time, the fact that the Court is open to flexibility at certain conditions represents a possibility for advocates to raise the bar of legal recognition a little higher when they witness changing conditions in contracting states, and to then see every new achievement survive to be relevant for future litigations.

This possibility is best represented when we think about the "lawyering for

⁷⁵ *Christine Goodwin v. the United Kingdom*, App. no. 28957/95, 11 July 2002, para 74.

⁷⁶ *Karner v. Austria*, *supra* note 40, para 26.

social change" movement described by Galanter⁷⁷: according to the author, "repeat players" as advocacy groups or transnational corporations engage in many trials about issues concerning a same social issue over time, acquiring a legal and practical expertise that make them capable of using litigation to pursue long-term objectives, aiming for example to set legal precedents. It is the so-called *strategic litigation*, which originated in common law systems: it is the act of engaging in litigation which one anticipates will establish, through precedent, legal principles that are helpful for social reform⁷⁸. This expertise allow them to carefully choose those litigations which are likely to be effective in challenging a particular element of the *status quo* that has become, at a certain point in time, weak. Even more important is the combination between strategic litigation and a social and political struggle for reform, able to push an issue on the political agenda and in public opinion, so to assure a higher acceptance of the issue brought before the Court. In Galanter's view, this use of litigation to pursue social reform would allow civil society to have a role in an indirect form of policy-making which in the past was reserved for certain elitarian groups⁷⁹. Given that it is a country of common law, all of this is particularly true in the USA, where the lawyering movement originated, because precedents shape law directly in such a system. However, it has relevance also for litigations before the ECtHR since, as we saw, the Court's precedents establish principles for the future jurisprudence of the Court itself, and influence national legislatures directly and indirectly.

The possibility for advocacy groups to use litigation before the Court to pursue long-term goals, allowed practically by the its adherence to precedent, lies more broadly in the active role judges perform when interpreting the provisions of the Convention with the evolutive approach. This role is explicitly endorsed by the Court; for example, it stated that

Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby *raising the general standards* of protection of human

77 M. GALANTER, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change", in *Law and Society Review*, 9, Fall 1974, pp. 95 ff.

78 For reference, see Public Law Strategic Support Project, *Guide to Strategic Litigation* [<http://www.publiclawproject.org.uk/data/resources/153/Guide-to-Strategic-Litigation.pdf>].

79 *Ibid.*, p. 95.

rights and *extending human rights jurisprudence throughout the community of Convention States*.⁸⁰

Also, it is useful here to recall what we already said about the resonance of the Court's jurisprudence beyond borders. Extending general standards of human rights protection throughout the community of member states is one of the aims of the ECtHR, and we know that an interpretative approach to interpretation, combined with the functioning and authority of the Court, accord it the power to indirectly do so. Taking a more radical stance, we can say that the possibility for advocacy groups to use litigation to seek social reform lies in the Court's quasi-legislative power.

While there is wide debate over the *legitimacy* of the Court as policy maker – something which goes beyond the object of this work – the fact that its quasi-legislative activities have increased considerably over the past decades, especially in Europe, is mostly accepted as a fact⁸¹. Such quasi-legislative activities take place when the Court shapes law through the evolutive interpretation of the ECHR: since "there is no pre-exegetic meaning of a text"⁸², interpretation can be used strategically. If we take into account what we said about the evolutive interpretation, the resonance of the Court's rulings and what we will now say about the possibility for civil society to participate in the judicial discourse, then the limited role of precedent in the ECtHR's jurisprudence becomes functional for those who fight for a social and legal reform through strategic litigation. It is a limited possibility which can lead to limited outcomes, but if it is matched with broader and effective political movements and social campaigns which detect when and assure that *present-day conditions* are truly evolving, the two paths can strengthen one another, and potentially lead to historic and sudden steps forward.

The nexus is well drawn by Guerrero⁸³: given the fact that courts can be considered spaces of political decision-making, the author tries to assess the role of

80 *Karner v. Austria*, *supra* note 40, para. 26, emphasis added.

81 For reference, see D. ROBERTSON, *The Judge as Political Theorist. Contemporary Constitutional Review*, Princeton University Press, 2010, p. 16, cited by M. GUERRERO at p. 56.

82 A. BARAK, *Purposive Interpretation in Law*, Princeton University Press, 2005, p. 9.

83 M. GUERRERO, "Activating the Courtroom for same-sex family rights: 'Windows of Opportunity' for strategic litigation before the European Court of Human Rights", in C. CASONATO, A. SCHUSTER (edited by), *Rights on the move: rainbow families in Europe*, Università degli Studi di Trento, 2014, pp. 53-73 at 72

[http://eprints.biblio.unitn.it/4448/1/Casonato-Schuster-ROTM_Proceedings-2014.pdf].

civil society participation. Since, thanks to the functioning of the ECtHR, "the structure of the judicial process itself requires a certain amount of citizen participation"⁸⁴, she takes the Court's same-gender family case-law into consideration and examines in detail three specific "windows of opportunity" which, according to her, leave room for civil society political participation through strategic litigation.

Firstly, the meaning-shifting nature of vague and ambiguous terms regularly used by the Court: the interpretation of terms as "discrimination", "societal consensus" and "family" constitute an opportunity to change the *status quo* about certain issues by arguing for favourable interpretations. Secondly, the inconsistency and hesitation which – according to Guerrero – riddle the ECtHR's case-law regarding marriage equality and LGBT family; these seem to be born from the uncertainty of the Court about the majoritarian societal views, and thus can be challenged by bringing forward evidence as statistics or reports. The last window of opportunity lies precisely in the active role the Court accords to experts, particularly when trying to establish whether any evolving social conditions need to be sanctioned by its jurisprudence; the Court's acknowledgement of the expertise possessed by LGBT rights advocacy groups sometimes goes as far as allowing them intervene actively through written submissions, thus making the activists' arguments part of the judicial discourse. In *Karner*, in particular, the Court's judgment makes explicit reference to and follows the reasoning brought forward by Robert Wintemute, who had submitted comments on behalf of ILGA-Europe, Liberty and Stonewall⁸⁵.

84 *Ibid.*, p. 72.

85 *Karner v. Austria*, *supra* note 40, paras. 36, 37.

Chapter 2.

Elements of understanding of the Court's arguments in shaping the concept of "family" under the Convention

CONTENTS: 1. Judicial activism – 2. The margin of appreciation – 3. "European consensus" and how it affects the Court in deciding whether to accord a margin of appreciation – 4. A sociological obstacle to the recognition of "new" families: heteronormative dualism.

This work will, in Part II, provide an analysis of how the notion of family developed in the ECtHR's jurisprudence consequently to the challenges posed by a new awareness, in social sciences and in the social perception, about the different shapes that human sexuality and gender identity can take. In order to do so, the predominant methods used by the Court in this regard and its strategic motives, if there are any, must be carefully observed.

We already dealt with the necessary interpretation of the Convention performed by the Court; however, some other keypoints must be taken into account if we want a mere collection of judgments to acquire meaning regarding the notion of family, if we want to clarify the legal trends that the Court is following (or fostering?), and to understand what future for the Court's jurisprudence such collection of cases seems to suggest.

Firstly, we have to ask ourselves if there are indeed strategic or political motives behind the rulings of the Court, or if their interpretation choices are solely brought about by legal reasoning and legal certainty. We will not be able to answer this question in this chapter, but we will here point out some considerations on the issue of judicial activism, a behaviour which many commentators attributed to the Strasbourg machinery. Secondly, we will mention two methods frequently used by the ECtHR, through which choices of interpretation of the Convention provisions are taken, resulting in judicial activism or judicial restraint. One is the margin of appreciation, which entails limited freedoms accorded to States regarding certain limitations of rights or the extent to which certain rights must be protected; the other is the "European consensus" analysis, a comparative survey of legislations and social

perceptions which serves as the main condition the Court tries to examine in order to decide whether or not to accord a margin. The use of these two methods is the main source of critics of judicial activism against the Court, together with the inconsistency of their application, which will be clear in Part II. Lastly, we will provide some considerations on the major sociological but also legal obstacle to consensus, and maybe to a more progressive interpretation on the part of the Strasbourg judges, as we will try to understand in Part II: heteronormativity.

2.1. Judicial activism

Traditionally, scholars have described two opposite attitudes which characterize, with different balances over time, the jurisprudence of the European Court of Human Rights. The label "judicial restraint" represents the judicial attitude of who tends to grant a great deal of deference to national practices, policies and perceived interests; "judicial activism", instead, tends to reject justifications based on national interests and local customs when these risk to damage the implementation of the Convention. The choices and tendencies of judicial bodies and single judges can be described as placed a certain point of the continuum that goes from activism to restraint. Ultimately, the difference is really about what degree of deference a judge thinks it is appropriate to grant governments. The result – in the case of the ECtHR – is that an activist judge will tend to rule in favour of the individual, while the judge who values restraint over activism will tend to grant the State more freedom in weighing the protection of certain individual rights against the protection of the public interest, in virtue of the "better position" of the national government in establishing *how* to implement the Convention⁸⁶.

We already pointed out in §1.4 that legal stability is described as of fundamental importance by the ECtHR. Sir Nicolas Bratza, former President of the Court, stated in 2011 that "the Court should show respect for precedent and recognise the vital need for consistency"⁸⁷. We also dealt with the prominence of evolutive interpretation in the jurisprudence of the Court. The relation between legal certainty and dynamic interpretation of the Convention provisions is at the core of the critiques of judicial activism that the Court has received both by the public and by commentators. We will now highlight, selecting from the vast literature on the topic, some particular considerations which clarify the reasons for the Court's choices in shaping the notion of family.

Judicial activism exists when "judges modify the law from what it previously was or was stated to be in the existing legal sources, often thereby substituting their

⁸⁶ See ECHR, Artt. 1 and 13, or Art. 35(1) and 53.

⁸⁷ N. BRATZA, "The relationship Between the U.K. Courts and Strasbourg", in *European Human Rights Law Review*, 5, 2011, pp. 505-512 at 511.

decision for that of elected, representative bodies"⁸⁸. Comments on judicial activism date back to the long-standing debate about whether judges are "active" or "passive". In the case of the Court, however, a certain degree of "creativity" is almost unavoidable⁸⁹; as we mentioned in §1.2, many of the provisions of the Convention are voluntarily vague and general, thus requiring interpretation in order to "add substance to the text"⁹⁰. In other words, complete adherence to "strict legalism"⁹¹ is impossible in the case of the ECHR. One of the, still, most significant papers on the topic dealt with in this paragraph is Paul Mahoney's *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*⁹². Mahoney, who replaced Sir Nicolas Bratza in 2012 as the United Kingdom's judge on the Court, wrote in 1990 that theories of judicial activism and judicial self-restraint were "sometimes presented as if they were conflicting theories as to how judges should go about decision-making", but maintained that such opposition was more apparent than real⁹³. Theories, according to the author, are actually complementary elements of the mechanism of judicial review which is inherent in the text of the ECHR. Lastly, the paper pointed out that none of such elements was predominant over the other in the jurisprudence of the Court. Today, this last view can be said to have changed.

One could note that judicial discretion is not, *per se*, an illegitimate judicial behaviour; some level of inventiveness, in fact, is almost necessary in order to give effectiveness to the European Convention of Human Rights. The level of discretion is what determines the limit between implementing the Convention and performing judicial activism. In this regard, many scholars nowadays think that the Court is more and more opting for a high level of discretion over self-restraint: we will mention some examples. Dragoljub Popovic, former Serbia's judge on the Court, wrote a paper

88 P. MAHONEY, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin", in *Human Rights Law Journal*, 11, 1990, pp. 57-89 at 58.

89 A. MOWBRAY, "The Creativity of the European Court of Human Rights", in *Human Rights Law Review*, 5:1, 2005, pp. 57-79.

90 R.C.A. WHITE, I. BOUSSIAKO, "Separate Opinions in the European Court of Human Rights", in *Human Rights Law Review*, 9:1, 2009, pp. 37-60 at 42.

91 M.D. KIRBY, *Judicial Activism: Authority, Principle, and Policy in the Judicial Method*, Sweet and Maxwell, London, 2004, p. 10.

92 P. MAHONEY, *supra* note 88.

93 *Ibid.*, p. 59-60.

which aimed at rivisiting Mahoney's view almost 20 years later. He notes that Mahoney's idea⁹⁴ that judges should avoid any trasgression from the judge's traditional role of interpreter of the law, "must face the reality of of a judge's day-to-day work"⁹⁵. The author adds that, while the Court strongly favors stability in its case law, "an analysis of the Convention's legal developments under the Court's jurisprudence leads to the conclusion that the Court has the power to interpret, recommend and prescribe the law of the Convention"⁹⁶: judicial activism plays a role in all three domains. After providing evidence from the judgments of the most relevant cases, Popovic proves that, as a method of interpretation, activism has prevailed over self-restraint. However, this is not seen as necessarily detrimental for the rigour of the Court's work, since more "activist" techniques are after all the most helpful for the evolution of the Convention's provision – an aim the Court explicitly pursuits⁹⁷. Moreover, a more activist approach seems justified in the international context, given the inherent limits of legislative ability which restrain its functioning⁹⁸.

Johnson agrees on the fact that there has been an inflation of judicial activism on the part of the Court in the last two decades⁹⁹. He adds that, particularly when dealing with homosexuality, the Court relies greatly on methodology in its reasoning precisely to prove that its judgments are purely the expression of legal principles and thus to avoid any critique of activism. Specifically, the author identifies evolutive interpretation, margin of appreciation and consensus analysis as the three predominant methods used in this sense, and argues that in fact they "are always subservient to the Court's moral interpretation of the Convention"¹⁰⁰. This view can be seen as a response to the common, but maybe too simplicistic, idea that the use of method in justification of a decision proves *per se* the rigour and political neutrality of such decision¹⁰¹; especially, this idea appears quite sloppy when the methodology

94 *Ibid.*, p. 58.

95 D. POPOVIC, "Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights", in *Creighton Law Review*, 42, 2009, pp. 361-396 at 365.

96 *Ibid.*, p. 374-375.

97 See §1.2.

98 *Ibid.*, p. 396.

99 P. JOHNSON, *supra* note 29, p. 67-69.

100 *Ivi.*

101 This is the basis, for example, of Mahoney's contentions in the cited "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin".

used is not as rigorous as it is stated to be – and this is the case with the margin of appreciation and consensus analysis, as the next paragraph and the analysis in Part II will show. Many legal scholars, in fact, are critical of this common view, and highlight that each interpretative method always requires, firstly, to be chosen over equally valid alternatives, and secondly, a choice of approach, a choice about *how* to practically apply them: this makes the outcomes of the use of such methods significantly influenced by the ideological standpoints of judges¹⁰².

If we accept the hypothesis that judges necessarily influence their rulings with their ideological commitments, the next step is to ask ourselves what kinds of bias become relevant in such process. Intuitively, one could imagine that differences in the level of activism of a ECtHR judge stems from differences in the domestic legal systems of Contracting states. The role of judges in civil law systems is totally subordinate to the law, while common law systems regularly ask their judges to interpret legal principles in a broader way. This, the argument goes, means that judges bring their own country's conception of their role with them when accepting to be judges of the European Court of Human Rights. This would make it more likely for a judge from a country of civil law to reject activism, while the judge who comes from a common law country would be more prone to engage in activism. A correlation between observed orientation and legal origin is certainly plausible, since it is also recognised by the Strasbourg court itself; precisely for this reason, however, it cannot have significant reflections on the Court's jurisprudence. Rules 24 and 25 of Chapter V of the Rules of Court¹⁰³ state that judges composing the Grand Chamber and the other Sections of the Courts must be distributed in a manner that maintains the balance between the divergent legal traditions. This prevents the legal origin from explaining the inflation of the activism of the Court seen as a unitary actor. Moreover, scholar mostly agree that there is no evidence of the divergent legal traditions resulting in significant biases¹⁰⁴. Other intuitive explanations could be that the

102A. VOLOKH, "Choosing Interpretative Methods: A Positive Theory of Judges and Everyone Else", in *New York University Law Review*, 83, 2008, pp. 769-846 at 842-843.

103 European Court of Human Rights, *Rules of Court*, Council of Europe, Strasbourg, 1 June 2015, Chapter V, Rule 24, 25, pp. 12, 13.

104 E. VOETEN, "Politics, Judicial Behaviour and Institutional Design", in J. CHRISTOFFERSEN, M.R. MADSEN (edited by), *The European Court of Human Rights Between Law and Politics*, Oxford University Press, 2011, pp. 61-76 at 72: "In accordance with the literature, quantitative analyses of

activism-restraint performed by a judge may be driven by their left-wing or right-wing political preferences; by the level of protection of individual human rights in his or her State; by strategic considerations about the fact that too much activism could bring to the noncompliance of the condemned States, with a consequent erosion of the authority of the Court. However, these possibilities may be overestimated.

Governments have a certain amount of control over the judge that will be nominated as representative of their State by the CoE's Parliamentary Assembly, since they submit three candidates among which the Assembly will choose¹⁰⁵. The people responsible for selecting candidates are generally Ministers of foreign affairs and justice, for whom it is relatively easy to know the political tendencies of the professionals they are selecting; indeed, an independent analysis of the appointment process of the European Court of Human Rights found that "Even in the most established democracies, nomination often rewards political loyalty more than merit"¹⁰⁶. Once the judge is elected, he or she will certainly operate in complete autonomy, but "there seems to be a robust correlation"¹⁰⁷ between the observed legal interpretations they engage in and the political ideology of the government which selected the judge; but what does this correlation consist of?

Voeten, while confirming that we are witnessing an inflation of judicial activism in the jurisprudence of the Court¹⁰⁸, denies the assumption about the judicial ideology of the ECHR judges which, in his opinion, is the most unchallenged: "that judges share an interest in expanding the reach of their court, and that governments seek to prevent such occurrences"¹⁰⁹. Examining aggregate data regarding the

the ECtHR decisions offer (...) no consistent evidence that shared legal culture makes a judge more lenient";

N. AROLD, *The Legal Culture of the European Court of Human Rights*, Martinus Nijhoff Publishers, Leiden/Boston, 2007, p. 75: "The interviews and the study of the Registry confirm the hypothesis that the distinction between civil, common and former Socialist legal systems at the Court does not impact decision-making significantly".

105 Sub-Committee on the election of Judges to the European Court of Human Rights, *Procedure for electing judges to the European Court of Human Rights*, AS/Jur(2010)12rev3, 11 October 2010, pp. 1, 2.

106 J. LIMBACH et al., *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, International Centre for the Legal Protection of Human Rights, London, 2003, p. 4.

107 E. VOETEN, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights", in *International Organization*, 61, Fall 2007, pp. 669-701 at 676.

108 E. VOETEN, *supra* note 104, p. 695.

109 *Ibid.*, p. 670.

jurisprudence of the Court, he finds little if no evidence that judges coming from common law countries are more likely to be "activist" and those coming from civil law countries are more likely to engage in self-restraint¹¹⁰; that states with poor domestic human rights records or ill-functioning legal systems are less likely to select "activist" judges¹¹¹; that judges with a more progressive approach to interpretation are chosen by left-wing governments and those with a more conservative approach are chosen by right-wing governments¹¹². The correlation he does find is one that has been rarely examined in the literature on the topic. The observed behaviour of the Court judges, evidence proves, is correlated with the attitude of the country who appointed the judge towards European integration, and towards the European Union in particular. For those countries which aspire to become EU members, the European Convention of Human Rights represented a chance to signal their commitment to a set of human rights standards which are integral to the European Union¹¹³. Candidate countries, indeed, seem to appoint judges who will actively apply international standards, even going against their own governments' domestic choices; this is particularly sound when we think that such strategy represents the most short-term and the less costly instrument for those governments to show a human rights commitment before the Union. These results show that EU expansion played a significant role in the inflation of judicial activism we witness in the jurisprudence of the European Court of Human Rights. Furthermore, the study disproves the assumption that countries *always* guard their sovereignty jealously and *always* seek to limit the reach of the EctHR.

2.2. The margin of appreciation

The Preamble to the European Convention of Human Rights states that signing governments are

110 *Ibid.*, p. 695.

111 *Ibid.*, p. 691.

112 *Ibid.*, p. 692-693.

113 The so-called "Copenhagen criteria" show that the EU seeks assurances from candidate countries regarding their commitments to a set of human rights standards. Copenhagen European Council, *Presidency Conclusions*, 7, A(iii), 21-22 June 1993: "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities...".

(...) resolved, as the governments of European countries which are likeminded and have a *common heritage* of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration, (...).¹¹⁴

At the same time, being the guarantor body of the Convention, the European Court of Human Rights must interpret the text in a way which aims at safeguarding the "marvellous richness of diversity" within the Council¹¹⁵. The problem at issue is thus to respond to the need of an organic application of the Convention while, at the same time, managing to not sacrifice the variety of social, economic and legal fabrics of the Council of Europe. This difficulty is an example of the continuous tension between the universal essence of fundamental rights and the variety of different context in which CoE member states' citizens live, which is an essential part of international human rights law¹¹⁶. A response elaborated by the ECtHR to decide on complaints without favouring conformity over individuality or the other way around is precisely the margin of appreciation: a legal construct which seems to intervene in the process of ensuring a minimum level of human rights protection in all CoE member states, allowing some scope for differentiation in light of the particularities of each jurisdiction. The margin is one of the most prominent and controversial legal constructs developed by the ECtHR and, since it has fundamental relevance in those judgments which have resonance in the political arena, has been often mentioned by the Court in cases regarding LGBT persons and family rights. Let us see what it consists of.

The label "margin of appreciation" is a calque from the French *marge d'appréciation*, which would be better translated in English as "margin of assessment/appraisal/estimation". Broadly speaking, it is an analytical tool used by the Court in its assessment of those provisions of the ECHR that require balancing with other rights or with how public interests and values are perceived within the States, and it "refers to the room for manoeuvre the Strasbourg institutions are

114 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Preamble.

115 P. MAHONEY, "Marvellous richness of diversity or individious cultural relativism?", in *Human Rights Law Journal*, 19:1, April 1998, pp. 1-36, p. 3.

116 E. BREMS, "The margin of appreciation doctrine of the European Court of Human Rights, accommodating diversity within Europe", in E. BREMS (edited by), *Human Rights and Diversity*, Martinus Nijhoff, The Hague, 2003, p. 104.

prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights"¹¹⁷. In other words, it is an ambit of discretion accorded to governments in assessing standards of protection of the Convention rights, taking into consideration peculiar factors woven into the fabric of local laws and practices. The margin appeared for the first time – though not with this particular naming – in relation with Art. 15 of the Convention, in a Commission's report regarding *Greece v U.K.*¹¹⁸: it was 1958 and, from that moment on, it has been used by the Court as well in deciding on hundreds of cases¹¹⁹. Also, the margin has been applied to other ECHR provisions: in addition to Art. 15, Artt. 8-11, Art. 1 of Protocol No. 1, and Art. 14 combined with the already mentioned; broadly speaking, we can say that the margin is not applicable to each and every provision, but only to those which entail a balance between individual and public rights. Most scholars agree that, as it has been applied, the margin is "casuistic, uneven and largely unpredictable"¹²⁰. However, the debate is open regarding both the nature of the margin and its practical application.

It is a fact that the margin is today broadly acknowledged as a doctrine or at least a principle, though these definitions lie more in the frequency of its use in the jurisprudence of the Court rather than in an indiscussed *ratio*. Indeed, the text of the Convention doesn't mention the margin, nor do the *travaux préparatoires*¹²¹, and no provision in the text regulates its functioning or bandwidth. In fact, some scholars did try to identify at least a valid legal basis for the margin of appreciation. Tanzarella for example indicates two elements: the systematic reading of the Convention, and the wording of those Articles which admit limitations at certain conditions to otherwise absolute rights¹²². Arai-Takahashi notes that the basis of the margin is widely thought

117 S. GREER, "The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights", CoE Publishing, Council of Europe Human Rights File No. 17, 2000, p. 5.

118 European Commission of Human Rights, "Report on the *Greece v U.K.* case", Strasbourg, 8 October 1958, in *Yearbook of the European Convention on Human Rights*, 1958-59, pp. 172-197, p. 176.

119 At the end of the last century, Mahoney counted over 700 judgments. See P. MAHONEY, *supra* note 115, pp. 1-36, p. 5.

120 S. GREER, *supra* note 117, p. 5.

121 H.C. YOUROW, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer Law International, The Hague/Boston/London, 1996, p. 14.

122 P. TANZARELLA, "Il margine di apprezzamento", in M. CARTABIA (edited by), *I diritti in azione*, Il Mulino, Bologna, 2007, pp. 145-181 at 150.

to reside in deference to the legitimacy of democratic governments, but gets to argue that a sustainable and valid rationale lies in the potential that the margin has to facilitate the reconciliation among the competing ideologies and values present in a varied political and legal environment such as the Council of Europe, since it can promote a moral duty to tolerate “others”¹²³. This view in particular looks in the direction of subsidiarity, which we will deal with further in the paragraph and has indeed a prominent role in the debate on the legitimacy of the margin. However, while these two attempts are surely helpful to identify the general principles from which the margin emerged and general objectives it may pursue, they still do not provide a sure and well-defined *ratio*, leaving therefore room for the debate on its legitimacy. Most commentators seem prone to see the margin more as a tool elaborated by the Court than a valid technical method provided by the Convention; this arose many questions about the nature of the construct and about its strategic use on the part of the Court, questions made even more persistent given that the application of the margin is often inconsistent.

Singh states that the margin lacks the minimum theoretical specificity and concrete rules of application needed for it to be called a "doctrine" or "principle"; in its view, it is nothing more than a "conclusory label which only serves to obscure the true basis on which a reviewing court decides whether or not intervention in a particular case is justifiable"¹²⁴. This is indeed one of the main reasons why most scholars are critical of the principle, sometimes totally rejecting it and getting to call it "an invention"¹²⁵ or "a black box magic"¹²⁶. Lord Lester of Herne Hill seems to confirm this view when he points out that "The problem with the Court's invocation of the margin of appreciation is that it removes the need for the Court to discern and explain the more appropriate criteria to solve particular problems"¹²⁷. Greer shares

123 Y. ARAI-TAKAHASHI, "The Margin of Appreciation Doctrine: a theoretical analysis of Strasbourg's variable geometry", in A. FØLLESDAL, B. PETERS, G. ULFSTEIN (edited by), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, Cambridge University Press, 2013, pp. 62-105 at 105.

124 R. SINGH, "Is There a Role for the 'Margin of Appreciation' in National Law After the Human Rights Act?", in *European Human Rights Law Review*, 1:4, 1999, pp. 15-22 at 20-21.

125 E. BENVENISTI, "Margin of appreciation, consensus and universal standards", in *NYUJ International Law and Politics*, 31, Summer 1999, p. 843.

126 J. KRATOCHVÍL, "The Inflation of the Margin of Appreciation by the European Court of Human Rights", in *Netherlands Quarterly of Human Rights*, 29:3, 2011, pp. 324-357, p. 354.

127 LORD LESTER OF HERNE HILL, "Universality Versus Subsidiarity: A Reply", in *European Human*

pretty much all of these critics and adds that the margin is greatly flawed by the inconsistency of its application¹²⁸, which makes it unpredictable – something detrimental for the legal certainty that the rule of law should assure. Nevertheless, the author acknowledges the fact that the margin has a *de facto* predominant role in the jurisprudence of the Court, and recognises that it has become a necessary tool to maintain a balance between discretion and constraint. In particular, his issue paper tries to demonstrate how the exercise of discretion under the ECHR depends critically on the general principles of interpretation which enable the Convention to be implemented. In this sense, the margin is not – according to Greer – *inherently* unpredictable, but in fact that unpredictability stems from the reluctance of the Court to explicit every passage of the reasoning which leads judges from the principles of interpretation to the conclusions they reach about state discretion. With these premises, Greer abandons the quest for the *ratio* of the margin, but manages to identify the general principles which guide the judges's choice of resorting to the margin¹²⁹. The author claims that a clearer, more explicit, application of such principles would put an end to the confusion the margin creates, allow the Court's reputation to not be eroded and provide more legal stability to future applicants.

The principles identified by Greer include legality, proportionality, the principle of the effective protection and more, but a special role is accorded to subsidiarity. Most scholars acknowledge this role, since subsidiarity is the feature of the Convention which actually entails the notion of the margin of appreciation. Johnson for example states that the margin is a method developed by the Court for negotiating its subsidiary role¹³⁰. Relatively to the Convention, the principle of "subsidiarity" works as a juridical foundation for the whole structure of the text: this is particularly clear in Artt. 1, 13, 35(1) and 53. Subsidiarity implies that national authorities have, before any other entity, the responsibility to protect, with their own internal means, the rights contemplated by the Convention. The Strasbourg Court intervenes only further in the process, when it is asked to adjudicate the complaints brought before it, exercising its review power as prescribed by Art. 19 of the

Rights Law Review, 1, 1998, pp. 73-81 at 78.

128 S. GREER, *supra* note 117, p. 14.

129 *Ivi*.

130 P. JOHNSON, *supra* note 29, p. 70.

Convention¹³¹. Therefore, the Court operates as the "active supervisor"¹³² of human rights in the European supranational context, exercising its role of review, but preserving at the same time a certain level of national freedom regarding the means through which to comply with the ECHR. This is endorsed by the Court in *Handyside v. U.K.*¹³³:

the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. (...) By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion [on any restriction of rights]¹³⁴.

Crucially, the Court acknowledged in *Handyside* that national authorities are *better placed* to assess the content of any limitations of rights based on contextual considerations (for instance, public morals) as well as the degree to which the limitations imposed are necessary. Mahoney underlines that submission to democratic governance is inherent in the text of the Convention, since only democratically elected bodies have the degree of legitimacy necessary to establish national policies and enact law: therefore, the Court "must give due recognition to the democratic processes of the many and various countries making up the Convention's legal community"¹³⁵.

Two conditions must be fulfilled in order for any national limitation to the protection of a human right to be allowed – that is for the margin to be accorded. The principle of legality holds that state action should be subject to effective formal legal constraints against arbitrary power, and is contemplated by the Convention in several provisions¹³⁶. Democratic values are contemplated by the Convention as well, particularly in Artt.8(2) and 11(2), which include a "democratic-necessity test": that is they explicitly require any limitation to the rights protected not only to be "prescribed by" or "in accordance with law", but also "necessary in a democratic society". The

131 ECHR, Art. 19: "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis."

132 P. TANZARELLA, *supra* note 122, p. 151.

133 *Handyside v. the United Kingdom*, App. no. 5493/72, 7 December 1976.

134 *Ibid.*, paras. 48, 49.

135 P. MAHONEY, *supra* note 114, p. 2.

136 ECHR, Artt. 2(1), 5, 7, 8 to 11, 12.

peculiar value accorded to democracy is endorsed by the Court itself, since it stated that "democracy appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it"¹³⁷. A third test is prescribed by Art. 19: as we already pointed out, the Court has the power to decide whether the restriction or limitation of a right is or is not compatible with the text of the Convention. Lastly, the accordance of a margin of appreciation is subordinated to the principle of proportionality: the national measures must be appropriate and do not go beyond what is necessary to meet a specific objective.

Since the margin is closely related to the competition between national sovereignty and the review power of a supranational entity as the European Court of Human Rights, understanding its use becomes fundamental when dealing with LGBT-related cases involving family rights. The level of recognition of family rights to LGBT couples and families has to do with strong political stances and with national values and traditions, and vary hugely from one CoE country to another; this makes any interference on the part of the Court problematic, but still fundamental to shape at least some level of conformity. This is why the analysis of how the margin has been applied by the ECtHR over the years, and of the reasonings given for its application is crucial in the unraveling of the jurisprudence dealt with in Part II.

2.3. "European consensus" and how it affects the Court in deciding whether to accord a margin of appreciation

The argument of a European consensus or common ground¹³⁸ has always been scrutinised by commentators in the wider context of the margin of appreciation¹³⁹. The narrow view on European consensus – pretty much its only aspect to be out of doubt – refers to the link between consensus and margin, which are inversely related: the less consensus about a certain issue the Court is able to identify among

¹³⁷ *United Communist Party of Turkey v. Turkey*, App. no. 19392/92, 30 January 1998, para. 45.

¹³⁸ Also called "international consensus amongst the Contracting States of the Council of Europe", "common European standard", "general trend": for a precise dealing of the slight differences between the variations, see K. DZEHTSIAROU, "European Consensus: A Way of Reasoning", University College Dublin Law Research Paper, No. 11/2009, pp. 2, 3.

¹³⁹ i.e. Y. ARAI-TAKAHASHI, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR*, Intersentia, Cambridge, 2002, p. 203; H.C. YOURROW, *supra* note 121, p. 193.

Contracting States, the better placed national authorities are to decide on the matter, the more discretion the Court will allow for the State¹⁴⁰. Unfortunately, the two notions share the same undeterminacy in nature. As Beeson notes, "regrettably, the Court has never been clear about the notion of consensus and about the exact circumstances in which the margin of appreciation applies"¹⁴¹.

As for the margin, the Convention lacks a definition or regulation of "European consensus", nor did the Commission or Court ever provided one. Broadly speaking, when mentioning European consensus the Court indicates a comparative analysis of the legal or social contexts of the Contracting States of the Council of Europe, depending on the issue. Decisions involving consensus analysis vary, since it is employed to determine the scope of a State's margin of appreciation, to define vague terms present in the text of the Convention through evolutive interpretation, and to evaluate the proportionality of a State's interference¹⁴². The contexts analysed by the Court in order to find the presence or lack of a European consensus vary as well: they may be socio-political and/or legally comparative; such contexts constitute the material and procedural components of consensus¹⁴³. The socio-political context includes the values, morality and socio-political perception of the issues object of the litigation; even if the Court does not find consensus in this context, the very lack of consensus can nevertheless influence the final judgment¹⁴⁴. As for the procedural side of consensus recognition, the tool for the Court to know whether there is a common ground in Europe regarding a certain issue is the comparative analysis of the domestic legislation in member states. The notion of European consensus we have just dealt with is not the only one used by the Court when giving reasoning for its decisions. The ECtHR often makes reference to other four kinds of consensus: international

140 E. BENVENISTI, *supra* note 125, p. 851; H.C. YOUROW, *supra* note 121, p. 43-45; L.R. HELFER, "Consensus, Coherence and the European Convention on Human Rights", in *Cornell International Law Journal*, 26, 1993, pp. 133-165 at 133, 141; G. LETSAS, *supra* note 45, p. 91.

141 S. BEESON, "European Human Rights, Supranational Judicial Review and Democracy", in P. POPELIER, C. VAN DE HEYNING, P. VAN NUFFEL (edited by), *Human Rights Protection in the European Legal Order: the Interaction between the European and the National Courts*, Intersentia, Cambridge, 2011, pp. 97-145 at p. 107.

142 K. DZEHTSIAROU, *supra* note 138, p. 1.

143 *Ibid.*, p. 3.

144 An example is the case *Sheffield and Horsham v. the United Kingdom*, Apps. nos. 22985/93 and 23390/94, 30 July 1998, paras. 56-57: the Court claimed the absence of consensus on regarding the recognition of the autodetermined gender of transgender persons, and this was one of the reasons for rejecting the complaint that there had been a violation of Art. 8.

consensus as expressed by international treaties, internal consensus in the State party to a cause, experts consensus, consensus amongst the judges of the Court¹⁴⁵. Moreover, in deciding on complaints, the Court often assesses developments in public opinion¹⁴⁶; this is often the most discussed type of consensus analysis, since the Court does not have, or at least it never revealed, what sources and methods it uses to establish whether such developments are present or absent, sufficient or insufficient.

To sum up, the notion of European consensus as meant by the European Court of Human Rights may be described as an agreement amongst the majority of the member states of the Council of Europe about a certain issue the Court has to rule on. The existence or absence of such consensus is established through a comparative research of the laws and practice of Member States and determines or support decisions of the Court regarding the scope of the margin of appreciation, proportionality, and the implementation of provisions with a vague or ambiguous wording¹⁴⁷.

We now come to what may be the greatest flaw of the European consensus argument. In an ideal situation, consensus should be – as we said – the result of a profound comparative survey; however, the Court rarely collects and aggregates data in comprehensive comparative analyses of national legislation or shared social perceptions, nor is it consistent in the application of the different types of consensus analysis we mentioned¹⁴⁸. These flaws gave rise to many critiques about the rigour consensus possesses, its predictability, and about the fact that its use could have strategic motivations, merely representing the perception of the Court regarding a certain issue¹⁴⁹. As it occurs with the margin of appreciation, some commentators argue that, in spite of doubts on its exact functioning, European consensus argument is still desirable. For example, Wintemute states that consensus is "a defensible result of the Court's role"¹⁵⁰, which is interpreting a voluntary international treaty and does not have the role of a constitutional Court; indeed, the Court does not have the

145 L.R. HELFER, *supra* note 140, p. 139.

146 P. JOHNSON, *supra* note 29, p. 77.

147 K. DZEHTSIAROU, *supra* note 138, p. 8.

148 G. LETSAS, *supra* note 45, p. 79.

149 K. DZEHTSIAROU, *supra* note 138, p. 7.

150 R. WINTEMUTE, *Sexual Orientation and Human Rights: the United States Constitution, the European Convention, and the Canadian Charter*, Clarendon Press, London, 1995, p. 139.

authority to strike the balance between opposite interests in law or public policy¹⁵¹. In this sense, the Court's intervention in order to enforce a "minimum European standard"¹⁵² regarding human rights is not feasible when the existence of such rights is not yet sufficiently clear¹⁵³.

This appears linked to one aspect of the use of consensus which Wintemute, as many of his colleagues, criticises¹⁵⁴: its actual potential for the protection of the human rights of minorities, which seems indeed scarce. The reason is that when the conflict at stake between a majority and a minority involves conflicting moral values, the adjudicating organ has one of two choices: it can either adopt a moral interpretation, or opt for a relativistic approach based on comparative consensus analysis. The European Court of Human Rights chose the latter, developing the method of European consensus. However, national minorities are almost by definition underrepresented in the political space, and often struggle to secure their interests within a judicial process dominated by the majority; when a minority exists and a majoritarian group monopolizes power – which is often the case¹⁵⁵ – the national democratic process is perfectly able to undermine the interests of the minority. In such situation, with the national judicial process failing to protect them, minorities rely upon the international judicial and monitoring bodies as a last resort to see their rights protected. Indeed, one of the core reasons for the need of an international system for the protection of human rights is precisely the protection of the rights of minorities, often against an ill-functioning national system of protection. This external device exist for the purpose of overcoming any flaw of the national democratic systems; but if the methods of the margin and of consensus are not rigorous in their application, the risk is translating the poor national protection of minorities in a similarly poor protection in the international system. Therefore, the

151 See the *Case "relating to certain aspects of the use of languages in education in Belgium" v. Belgium* ("The Belgian Linguistics Case"), Apps. Nos. 1474/62, 1677/62, 1691/92, 1769/63, 1994/63, 2126/64, 23 July 1968, paras. 34-35: "...the Court cannot ignore the subsidiary nature of the Convention".

See also the considerations on subsidiarity in §2.2.

152 See ECHR, Preamble, para. 5: "Fundamental Freedoms...are best maintained...by a common understanding and observance of the human rights upon which they depend".

153 R. WINTEMUTE, *supra* note 150, p. 140.

154 *Ibid.*, p. 138, 139.

155 E. BENVENISTI, *supra* note 125, p. 849.

lack of a clear understanding of the functioning of of the margin and of European consensus can be a major obstacle to their very publicized purpose, that is to promote democracy.

Surely, Letsas notes that a *de facto* need of the Court for consensus, in order for example to reverse its previous judgments, exists¹⁵⁶: the idea seems to be that, when the Court rules something to be a violation due to new evolving standards, rushing to condemn the majority of Contracting States would be counterproductive for its authority; it is preferable to first manifest the willingness to take such evolving standard into account, thus giving States the time to gradually modify their legislations and policies. The risks related to rulings which could be unpopular in the majority of the States of the Council of Europe seem to justify deference: if the Court accepted the chance of being ignored altogether, it would also risk to cause a general attitude of non-compliance towards its judgments. This would lead to an erosion of its reputation and consequently of its only power, ultimately causing suffering to the protection of human rights in Europe. Therefore, the Court seeks a balance between activism and deference, since "surely, it is better to have a gradual improvement of human rights protection than none at all"¹⁵⁷. The fears we have just described seem backed up by a similar view expressed by Mahoney, this time regarding *internal* consensus. He pointed out that

The international machinery of human rights protection under the Convention should not act as an undue brake on social and economic experimentation. Where societal values are still the subject of debate and controversy at national level, they should not easily be converted by the Court into protected Convention values allowing for only one approach¹⁵⁸.

Having said this, the author is nevertheless not a supporter of European consensus as a method. In fact, he stresses that the choice of according a margin of appreciation on the basis of consensus analysis is sometimes justified but should be extremely rare. It seems to who writes that this contention is particularly valid in the case of LGBT family rights; the method of European consensus analysis is certainly a necessary tool for the Court to avoid too high a level of activism and to avoid losing the effectiveness it gained in almost 60 years. However, the determination of the

156 G. LETSAS, *supra* note 45, p. 123.

157 *Ibid.*, p. 124.

158 P. MAHONEY, *supra* note 114, p. 3.

appropriate margin of appreciation on the basis of consensus has to be limited since, after all, "...judges who adjudicate on ECHR rights have a duty to discover and give effect to the morally best understanding of human rights, irrespective of contracting States' current consensus..."¹⁵⁹.

At this point, taking all of these considerations into account, what can we expect from the analysis of the ECtHR's jurisprudence on LGBT families? Johnson is an extreme critic of the Court's methods in this sense. The author analyzes only Court's judgments related to homosexuality, but his analysis is nevertheless extremely useful to assess the trends of the Court's methods and decisions on issues which involve the entire LGBT community. He points out something that we will be able to see through Part II, that is the extremely variability and unpredictability of the use of consensus by the Court; he also argues that such method is a construct developed by the ECtHR to legitimize moral interpretations, this being precisely the reason for its "capricious nature"¹⁶⁰. As for advocates of LGBT rights, consensus certainly represents a difficult hurdle which, with the margin of appreciation doctrine, "determines the extent to which the Court defers to what it perceives as the prevailing views of the CoE member States"¹⁶¹.

2.4. A sociological obstacle to the recognition of "new" families: heteronormative dualism

Heteronormativity is the assumption that affective and sexual relations between a man and a woman are and must constitute the "norm" in a society, and is a consequence of the belief that heterosexual relations are the only "natural" manifestation of affectivity and sexuality. In the words of Berlant and Warner, heteronormativity is reflected by "the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent (...) but also privileged"¹⁶². Heteronormativity includes gender dualism: the idea that gender is exclusively constituted by biological evidence, and may thus be masculine or feminine, without

159 G. LETSAS., *supra* note 45, p. XI.

160 P. JOHNSON, *supra* note 29, p. 83.

161 S. GLUCK MEZEY, *supra* note 34, p. 15.

162 L. BERLANT, M. WARNER, *Sex in Public*, in *Critical Inquiry*, 24:2, 1998, pp. 547-566 at 548.

exceptions. Much has been written on the topic, but let us just point out the influence that this view has on law. Schuster notices that "masculinity and femininity appear such self-evident elements of our natural world that no legal definition of sex is provided, not even in international instruments"¹⁶³. This makes that the binary interpretation led by cultural paradigms is translated into binary legal categories. The problem arises when nature does not fit in such constructed legal categories, as for example happens with intersexuality. The intersex person presents variations in their biological sex characteristics that makes such characteristics not *evidently* male or female. Legal categories based on a binary interpretation of sex are clearly not satisfactory for these people, as for similar reasons it is not satisfactory for transgender people in the process of transitioning from a legally recognised sex to the other; the absence of a definition of sex and gender in law overlooks the situation of some individuals, who are forced to fall into categories that do not match the reality of their being, and "leaves it to administrative registrars and to judges to ultimately decide critical cases"¹⁶⁴.

In a purely heteronormative society, any non-heterosexual kind of affective and sexual relation and any gender identity that does not respond to the binary dualism may be condemned or tolerated to different extents, but the society is structured to make them represent a *deviation* from the moral, social and legal norm¹⁶⁵, it will never accord them the dignity necessary to become *part* of the norm. Today, the extent to which societies are heteronormative differ greatly from country to country, from continent to continent, in ways that cannot be examined in this work. Let us just say that the first developments in the protection of LGBT people from discrimination in national legislations and in human rights law we witnessed in the last decades – pushed by a new awareness of the complexity of gender identity and sexual orientation in social sciences and psychology – produced a series of spillover effects that brought many societies to depart more and more from heteronormativity

163 A. SCHUSTER, "Gender and Beyond: Disaggregating Legal Categories", in A. SCHUSTER (edited by), *Equality and Justice, Sexual Orientation and Gender Identity in the XXI Century*, Forum, Udine, 2011, p. 25.

164 *Ibid.*, p. 26.

165 D. MCGHEE, *Homosexuality, Law and Resistance*, Routledge, London, 2013, p. 3; S. JACKSON, "Interchanges: Gender, Sexuality and Heterosexuality: the Complexity (and limits) of Heteronormativity", in *Feminist Theory*, 7:1, pp. 105-121 at 107.

and gradually evolve towards more inclusive and less discriminatory conceptions of affection and of gender, at different paces¹⁶⁶.

What is meaningful for the purpose of this work is the relation between the ECtHR and heteronormativity: is it part of any moral standpoint which influences its rulings? Does the Court sustain or challenge the "effortless superiority"¹⁶⁷ that heterosexuality enjoys in social life? The Court's interpretation of provisions as Art. 12 combined with Art. 14 has undoubtedly evolved in this sense, becoming less and less heteronormative. In the reasoning of the Court, the right to marry and to found a family appears more and more detached from the heteronormative/dualistic paradigm. Such evolution is a manifestation of an increasing and inevitable convergence¹⁶⁸ of the ECHR with the Charter of Fundamental Rights of the European Union¹⁶⁹; in the Charter, the right to found a family is separated from the right to marry, which doesn't mention gender and can therefore refer to different-gender or same-gender couples¹⁷⁰. Moreover, we can find a new paradigm of parenting, independent from the gender or sexual orientation of parents, in the most recent conventional instruments of the Council of Europe. An example is Art. 7(2) of the European Convention on the Adoption of Children (Revised)¹⁷¹: the Convention contemplates the possibility – subordinated to the choice of contracting states – for same-gender couples to adopt, whether they are married, they are subjects of a registered union, or they are simply live together. Sources from the Council of Europe and from the European Union,

166 For reference, see A. SCHUSTER, "L'abbandono del dualismo eteronormativo della famiglia", in A. SCHUSTER (edited by), *Omogenitorialità: filiazione, orientamento sessuale e diritto*, Mimesis, Udine, 2011, pp. 35-66.

167 C. SMART, "Collusion, Collaboration and Confession: On Moving Beyond the Heterosexuality Debate", in D. RICHARDSON (edited by), *Theorising Heterosexuality*, Open University Press, Buckingham, 1996, p. 173.

168 A. SCHUSTER, *supra* note 163, p. 56.

169 European Union, *Charter of Fundamental Rights of the European Union*, 2000/C 364/01, Nice, 7 December 2000.

170 *Ibid.*, Art. 9: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights".

171 Council of Europe, *European Convention on the Adoption of Children (Revised)*, Council of Europe Treaty Series No. 22 – Strasbourg, 27 November 2008.

Art. 7 states the following: "1. The law shall permit a child to be adopted: *a*) by two persons of different sex *i*) who are married to each other, or *ii*) where such an institution exists, have entered into a registered partnership together; *b*) by one person. 2. States are free to extend the scope of this Convention to same sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different sex couples and same sex couples who are living together in a stable relationship".

thus, converge towards a new, more inclusive paradigm, which departs from older schemes and stereotypes.

Trying to understand the nature of the attitude of the Court towards heteronormativity, we have to bear in mind that many also criticised it: Spackman for example claims that the Court is "conservative" and largely ineffective, since its work is flawed by an "unwillingness to protect gays and lesbians in areas other than private consensual sex"¹⁷². The harshest critiques however have come before 2010, when the Court published the groundbreaking judgment *Schalk and Kopf v. Austria*¹⁷³. Johnson has a more nuanced view: he argues that the effects of the Court's judgments can be considered in terms of the evolution of consciousness they have created around LGBT needs¹⁷⁴, and that the Court's role in the development of a global consciousness about LGBT human rights is evidenced by the reproduction of its jurisprudence in national or international Courts around the world¹⁷⁵.

2.5. The relevant provisions: Articles 8, 12, 14 of the Convention

Before starting with our analysis, let us dwell on a last set of considerations, briefly clarifying aspects of the Articles we will encounter in the collected ECtHR cases, their scope and the modalities of their application.

Article 8 of the European Convention of Human Rights grants to every individual the right to respect for their private and family life. Though very different in their meaning, the two notions were included in one single provision mainly due to their coexistence in Article 12 of the Universal Declaration of Human Rights¹⁷⁶. The element they have in common is represented by the fact that they draw a limit to the possibility of interference by the State¹⁷⁷. According to paragraph 2 of Art. 8, indeed,

172 P.L. SPACKMAN, "*Grant v South-West Trains: Equality for Same-Sex Partners in the European Community*", in *American University Journal of International Law and Policy*, 12, 1997, pp. 1063-1120 at 1078.

173 *Schalk and Kopf v. Austria*, *supra* note 58.

174 P. JOHNSON, *supra* note 29, p. 150.

175 See for instance: International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice: a Comparative Law Casebook*, Geneva, ICJ, 2011.

176 *The Universal Declaration of Human Rights*, *supra* note 31.

177 M. WINKLER, "Le coppie dello stesso sesso tra vita privata e familiare nella giurisprudenza di Strasburgo", in R. TORINO (edited by), *Le coppie dello stesso sesso: la prima volta in Cassazione*,

the State can only exceptionally interfere with the fields of private and family life: only under certain circumstances and for weighty reasons.

ECHR, Article 8 – Right to respect for private and family life

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.

Article 8 is one of the most open-ended provisions contemplated by the Convention¹⁷⁸. It does not merely reflect a negative obligation, that is an obligation to not interfere in a certain sphere of the lives of individuals, but also a positive one, as the Court itself endorsed in 2000 highlighting the obligation for the State to "equip itself with adequate and effective means to ensure compliance with its positive obligations under Article 8 of the Convention"¹⁷⁹.

The State *can* thus, in a way, regulate issues concerning the spheres of private and family life, but it must operate within a certain space and at certain conditions for its interference to be legitimate; moreover it must create concrete guarantees for the protection of the right protected under Art.8, in order not to violate the provision itself. For these reasons, the space within which the State can operate legitimately must necessarily be determined and shaped continuously, through a detailed analysis of the specific circumstances at issue in any complaint¹⁸⁰. Consequently, the notions of private life and of family life can often seem to have blurred contours and such nature make them prone to evolution, development, change. This is the main reason why Article 8 is precious for those who seek to bring about new achievements in the field of LGBT individual and family rights: with changes in the social and legal environment within contracting States, Article 8 can, through an evolutive interpretation, protect individuals' rights with respect to more and wider issues.

Roma Tre-Press, Roma, 2013, pp. 75-93 at 76.

178 B. RAINEY, E. WICKS, C. OVEY, *Jacobs, White & Ovey: The European Convention of Human Rights*, Oxford University Press, Oxford, 2010, p. 334.

179 *Ignaccolo-Zenide v. Romania*, App. no. 31679/96, 25 January 2000, para. 108.

180 L. DE GRAZIA, "Il diritto al rispetto della vita familiare nella giurisprudenza degli organi di Strasburgo: alcune considerazioni", in *Diritto pubblico comparato ed europeo*, 2002, pp. 1069 ff. at 1072.

Given the spheres it protects, Article 8 contemplates the protection of two different aspects of individuals' rights. The respect for private life refers to the individual itself, considered singularly, the life choices he makes and its behaviours in spaces and under circumstances which only belong to and have consequences upon the individual as such. The respect for family life, instead, has to do with the privileged relationship occurring among relatives or between two people with an affective bond and who share life through a stable union¹⁸¹. The notion of family life, thus, requires the existence of a relation, lacking in the notion of private life. Winkler¹⁸² underlines that there is a difference between the two notions which lays in the role of the judge plays when deciding on them: the author argues that the concept of private life tends to bring about an "empathic"¹⁸³ activity on the part of the judge, which is more prone to "pedagogical"¹⁸⁴ attitudes towards the people involved, who need to be protected by multiple interferences by the State. The concept of family life, instead, requires a different approach, almost limited to evaluating whether the right which one claims was violated concerns a qualified relationship. This dichotomy indeed explains the different role of the social consensus detected in contracting States: in the case of private life it is often cited in addition to other instruments which lead to a decision, while in the second case it is often a crucial motivation used in the judgment to justify the Court's ruling.

Article 12 is the provision dedicated to the protection of the right to contract marriage and to found a family.

ECHR, Article 12 – Right to marry.

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

The Court has often reiterated that the provision: grants men and women's right to contract marriage and found a family; recognises that the exercise of the right is

181 M. MEULDERS-KLEIN, "Vie privée, vie familiale et droits de l'homme", in *Revue internationale de droit comparé*, 1992, pp. 767 ff. at 774.

182 M. WINKLER, "Le coppie dello stesso sesso tra vita privata e familiare nella giurisprudenza di Strasburgo", in R. TORINO (edited by), *Le coppie dello stesso sesso: la prima volta in Cassazione*, Roma Tre-Press, Roma, 2013, pp. 75-93 at 77.

183 T. BRUCE, "The Empathy Principle", in *Law and Sexuality: Review of Lesbian & Gay Legal Issues*, 6, 1996, pp. 109 ff. at 112.

184 M. WINKLER, "Le coppie dello stesso sesso tra vita privata e familiare nella giurisprudenza di Strasburgo", in R. TORINO (edited by), *Le coppie dello stesso sesso: la prima volta in Cassazione*, Roma Tre-Press, Roma, 2013, pp. 75-93 at 78.

subject to national legislations, and that it is up to national legislators to regulate the procedures and modalities of marriage; elucidates that the margin of appreciation accorded to States about any limitations posed on its citizens can never include restrictions or reductions of the protected right which impair its very essence¹⁸⁵.

In particular, in the judgment *Frasik v. Poland*¹⁸⁶ the Court stresses that:

In contrast to Article 8 of the Convention, (...) with which the right “to marry and to found a family” has a close affinity, Article 12 does not include any permissible grounds for an interference by the State that can be imposed under paragraph 2 of Article 8 “in accordance with the law” and as being “necessary in a democratic society”, for such purposes as, for instance, “the protection of health or morals” or “the protection of the rights and freedoms of others”. Accordingly, in examining a case under Article 12 the Court would not apply the tests of “necessity” or “pressing social need” which are used in the context of Article 8 but would have to determine whether, regard being had to the State’s margin of appreciation, the impugned interference was arbitrary or disproportionate.

Moreover, it is declared in the judgment that national laws cannot prohibit a category of people with full legal capability to marry a person of their choice¹⁸⁷.

Throughout its jurisprudence, the Court has mostly interpreted the Article in a strict manner. If we think about two crucial aspects of traditional marriage as understood by Art. 12 – the gender of the spouses and procreation as one of its purposes – we can see that while the former has remained unchanged, the latter has indeed been subjected to change in interpretation. It was 1986 when, in the *Rees v. U.K.*¹⁸⁸ judgment, the Strasbourg judges declared that “the wording of the Article (...) makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family”. Then, starting from the *Goodwin*¹⁸⁹ case of 2002, the possibility of procreating was separated from the notion of marriage, thus ceasing to represent a condition of the right to marry: “the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision”¹⁹⁰. Moreover, the same judgment put an end to the recognition of the spouse's gender based exclusively on their biological, sexual identity – what has

185 See *Jaremowicz v. Poland*, App. no. 24023/03, 5 gennaio 2010, paras. 48-50; *Frasik v. Poland*, App. no. 22933/02, 5 January 2010, para. 48.

186 *Frasik v. Poland*, *supra* note 185, para. 90.

187 *Ibid.*, para. 89.

188 *Rees v. the United Kingdom*, App. no. 9532/81, 17 October 1986, para 49.

189 *Goodwin v. the United Kingdom*, *supra* note 75, paras. 98-100.

190 *Ibid.*, para. 98.

opened a gate for a new approach of the Court to transsexuals' right to marriage.

Article 14 reflects the principle of non-discrimination, a key concept in international human rights law.

ECHR Art. 14 – Prohibition of discrimination.

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.

First of all, it is worth stressing that despite the included list of grounds on which a discrimination can occur, that has never been and is not to be interpreted as exhaustive¹⁹¹. While the factors most commonly discriminated on are explicitly mentioned, the Court has found violations of Art. 14 – taken in conjunction with other ECHR Articles – also for discriminations on different grounds; among many other cases, we can remember *Salgueiro da Silva Mouta*¹⁹², in which the Court condemned a discrimination based on sexual orientation for the first time. Moreover, since the Convention is a “living instrument”, it is likely that other factors of discrimination will acquire relevance in the future, and will thus be included in the scope of the protection offered by Article 14.

It is worth underlining that the wording of the provision limits its reach, since it binds a widely recognised principle to the enjoyment of the other rights protected under the ECHR. Indeed, Article 14 can be applied autonomously but, as the Court often reiterates, it “complements the other substantive provisions of the Convention”¹⁹³. This means that, while a violation of Art. 14 does not presuppose a violation of other Articles, it is necessary – but also sufficient – that the facts of the case fall within the ambit of other substantive provisions for Article 14 to be applicable.

As for the scope of Art. 14, different treatment is discriminatory, for the purposes of Article 14, if it “has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realized”¹⁹⁴. In

191 *Engel and Others v. the Netherlands*, App. no. 5100/71 and 5101/71, 23 November 1976, para. 72.

192 *Salgueiro da Silva Mouta v. Portugal*, App. no. 33290/96, 21 December 1999.

193 *Kosteski v. the former Yugoslav Republic of Macedonia*, App. no. 55170/00, 13 April 2006, para. 44.

194 *Ivi*.

this sense, for example, the Court has stated that when a treatment is under evaluation which might reflect a discrimination on the grounds of sexual orientation, gender identity, sex or birth out of wedlock, member States are required to provide weighty reasons and justifications for applying it¹⁹⁵.

The Court's role in assessing whether a discriminatory treatment was applied is therefore crucial and patent. The judges must first of all establish which situations it is appropriate to compare with one another; then, if a different treatment is identified, they need to evaluate whether, in applying the discrimination, the State is pursuing a legitimate aim. Often, the parameters used to assess that include the “general principles of law recognised by civilized nations”¹⁹⁶ - a fairly ambiguous notion. One might wonder, for example, to what extent can a State interfere with someone's private life under Art. 8 to protect the collective interests of its citizens? Or, what differences in treatment can be justified by the protection of the family based on marriage? The interpretation of the Court must take into consideration a range of aspects because of the specific contexts in which the facts of a case occur. Then, it can establish whether the discrimination at issue falls within the margin of appreciation accorded to member States.

Given the cases we will deal with, mostly concerning issues which fall in the ambits protected by Article 8 and 12, often relied on together or combined with Art. 14, it is useful to elucidate an element that the Court has more than once stressed. When a different treatment operates in an intimate and vulnerable sphere of an individual's life, the State must adduce particularly weighty reasons to justify the measure taken – for example, the introduction of a law. In such situations, the margin accorded to the State is narrow and it is not sufficient that the Government proves that the measure at issue was appropriate to pursue the aim sought, it must also show that the circumstances made the measure necessary¹⁹⁷.

195 See for example *Karner v. Austria*, *supra* note 40, para. 37.

196 *Golder v. the United Kingdom*, *supra* note 46, para. 35.

197 See for instance *Kozak v. Poland*, *supra* note 61, para 92.

Part II. Review of the Jurisprudence

The second part of this work draws the evolution performed by the European Court of Human Rights in interpreting the notion of family. The cases are dealt with chronologically and divided into three main phases with different degrees of activism, starting from the early 1980s and ending with 2015. The collected judgments are examined through the lenses of those methods and understandings we discussed in Part I, and taken as a starting point for broader considerations of the tendencies of the Court on the matter at issue. Comparing their outcomes, it becomes clear that the Strasbourg judges have gradually become less prone to accept discriminations against LGBT people, limitations imposed on their private and family lives, or on their right to marry. This led them to shape a more inclusive notion of family, in which the social and legal dignity accorded to the affective or parental relationships among LGBT people progressively becomes identical to that accorded to the familiar relationships among cisgender¹⁹⁸, heterosexual individuals.

¹⁹⁸ Contrarily to transgender people, a person is cisgender if their biological sexual characteristics and their psychological gender coincide.

Chapter 3.

The 1980s and 1990s: missed chances

CONTENTS: 1. Premise: reconfiguring the notion of family – 2. *Dudgeon v. U.K.*: the decriminalization of homosexual activities – 3. *Rees v. U.K.* and *Cossey v. U.K.*: States can refuse to recognise the “acquired” gender of transsexuals, but European consensus is evolving – 4. *B. v. France*: a gate towards the obligation to recognise the “acquired” gender of transsexuals – 5. *X, Y and Z v. the U.K.*: sexual transitions can still be not recognised by law, where the systems of registration of births prohibits the correction of birth certificates – 6. *Salgueiro da Silva Mouta v. Portugal*: discrimination on the grounds of sexual orientation is prohibited by the Convention.

3.1. Premise: reconfiguring the notion of family

Before we begin with the actual analysis, it is worth to zoom in on the ultimate subject of this work: the notion and institution of family in the jurisprudence of the European Court of Human Rights.

Scalisi speaks of the institution of family, as we understand it today in Europe, as of a "Babel"¹⁹⁹. The most common model of European family is still that of a "heterosexual, monogamic family founded on marriage"²⁰⁰: this traditional, heteronormative model of family is an ideal type, which keeps on affecting national and international laws and policies concerning personal relationships. However, many member States of the Council of Europe today contemplate in their legislations the existence and protection of different-sex or same-sex non-marital cohabitation, same-sex marriages, and different regimes of recognition for *de facto*, stable couples, independently from the gender of the partners. Many differences even exist between the various judicial systems within the traditional concept of family: regarding the prerequisites, procedures and effects of marriage – like elements of matrimonial property law – or regarding filiation – like the possibility for singles to adopt a child; moreover, these differences can include on what basis someone's gender is

199 V. SCALISI, "Famiglia e famiglie in Europa", delivered at the conference *Persona e comunità familiare*, Salerno, 28 September 2012.

200 L. TOMASI, "La nozione di famiglia negli atti dell'Unione e della Comunità europea", in S. BARIATTI, C. RICCI, L. TOMASI, *La famiglia nel diritto internazionale privato comunitario*, Giuffrè, Milano, 2007, p. 68.

established, since some States today recognise only post-operative sexual transitions, while for other States the surgical rectification of sex is not a condition.

The European Court of Human Rights has played and is playing, in this sense, a determining role in the gradual harmonization of the differences between legal systems. With a step-by-step approach, the Court provides general guidelines for national legislations starting from very specific circumstances; its rich and evolving case-law allows the Strasbourg judges to continuously build new corollaries from already established principles, often balancing the most typical, fundamental values and undeniable collective interests with the innovation that claims of freedom and equality once unknown require today. While the aim of the European Convention of Human Rights is to be identified first and foremost in the protection of individual and collective, fundamental human rights, the only means for its main mechanism of protection – the Court – to pursue such aim must necessarily be to seek harmonization, to identify (or provide?) a common path of effective human rights protection, characterized by logical coherence and legal certainty: these are of course complex aims and instruments to deal with, especially in a moment when new challenges face the existing legal and social order, as the new claims for protection of LGBT citizens are doing today.

With the lack of a uniformed, European family law, the institution of family today is in a phase of evolution and even reconstruction; some of its pillars have been and are continuously challenged and some have started to fall, with the abandonment of old certainties and the emergence of new, once unthinkable understandings of traditional institutions – a clear example being marriage.

Within the structure of the European Union, the Charter of Nice²⁰¹ responded precisely to the challenges faced by new claims regarding marriage. Going a step beyond the European Convention of Human Rights in this respect, it broke the functional relation, once thought unbreakable, between family and marriage. Article 9²⁰² does not appear very different by Article 12 ECHR, but a difference is indeed substantial: avoiding mentioning the gender of the spouses and making reference to

201 *Charter of Fundamental Rights of the European Union*, *supra* note 169.

202 *Ibid.*, Art.9: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights".

national legislations, its wording was meant to meet the evolution of national judicial systems, in order to expand its scope²⁰³. This way, the provision also regulates those cases in which the national legislation recognises modalities different from marriage to found a family, without imposing nor prohibiting unions, marriage or filiation, between and for LGBT persons²⁰⁴. The notion of family, thus, has been separated from that of marriage, and marriage has abandoned the requirement of the diversity of gender of the spouses, once perceived as "the only really constant prerequisite of marriage"²⁰⁵.

However, it is within the geographical and institutional context of the Council of Europe that the notion of family has evolved with the greatest changes, progressively becoming a more inclusive concept, characterized by more fluid contours. Although with moments of uncertainty and at times with true contradictions, the European Court of Human Rights declared that heterosexual and homosexual registered unions and even stable *de facto* unions are valid alternatives to marriage and, as such, sources of "family life" under Article 8 ECHR. Article 12 itself has been to a certain extent subjected to new interpretations: it has been first extended to transgender partners in 2002 with the decision on *Goodwin v. U.K.*²⁰⁶, through the abandonment of the biological data as the factor determining the gender of the spouses, and then to homosexual couples in 2010 with the judgment on *Schalk and Kopf v. Austria*²⁰⁷, although without any positive obligation regarding its introduction in national legislations. Moreover, a gradually more progressive and scientifically aware understanding of the nature of sexual orientation and gender identity brought about developments in the rights accorded to LGBT people as parents, with steps forward in the possibilities and recognition they can now enjoy with respect to parenting.

This evolution towards a notion of family that today includes LGBT persons – as partners and as parents – occurred through the evaluation of specific cases brought

203 EU Network of Independent Experts on Fundamental Rights, "Commentary of the Charter of Fundamental Rights of the European Union", June 2006, [http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf], pp. 98-105.

204 *Ibid.*, p. 102.

205 A. C. JEMOLO, *Il matrimonio*, Utet, Torino, 1947, p. 3.

206 *Christine Goodwin v. the United Kingdom*, *supra* note 206.

207 *Schalk and Kopf v. Austria*, *supra* note 58.

before the Court. By applying the principle of non-discrimination or an effective protection of the Convention rights, the Court has been asked to reinterpret the Convention provisions in light of the social changes occurred in the last decades, and has established new, generalized principles on which to build its future, surely evolving case-law. We will see how throughout the jurisprudence of the ECtHR, the Strasbourg judges have granted unmarried couples, and *de facto* families, rights and benefits which were traditionally meant to protect the interests of *the* family of the heteronormative imaginary²⁰⁸: it happened in relation with the scope of the right to family life²⁰⁹, in the field of pension or housing benefits²¹⁰, as in the field of parenting and adoption²¹¹.

The method of the Court is one that proceeds by assimilation on the base of comparative considerations on the relation between the specific circumstances evaluated and the provisions of the Convention, but with a peculiar overturning: some argue that the judges often assess the conformity of the Articles recalled by the applicants in their complaints to the situation taken into consideration, rather than evaluating the prior suitability of the considered circumstance to be protected under the invoked provision²¹². This way, the judges have had the opportunity to expand the reach of some Articles of the Convention, Articles 8, 12 and 14 in particular, allowing their protection to cover many more situations than those known under the Convention just two, three decades ago.

We will now see the cases in which the main changes were made to the interpretation of the notion of family, or better – following the overturning we mentioned – the changes in the categorization within the notion of family, inclusive of affective unions and parental relations, of social relationships which the Court did not recognise in the past as suitable to enjoy the protection of the Convention.

The core contention of this work is that the approach of the Court to the legal needs of LGBT people has gradually become more "progressive" in time. From a

208 C. INGRAHAM, "The Heterosexual Imaginary: Feminist Sociology and Theories of Gender", in *Sociological Theory*, 12:2, July 1994, pp. 203-219.

209 *Schalk and Kopf v. Austria*, *supra* note 58.

210 *Karner v. Austria*, *supra* note 40.

211 *E.B. v. France*, *supra* note 60.

212 V. SCALISI, "Famiglia e famiglie in Europa", delivered at the conference *Persona e comunità familiare*, Salerno, 28 September 2012.

legal point of view, the Court has given more and more relevance to the claims of LGBT individuals, couples and families. Detecting the greater social and legal dignity of their relationships through the European consensus analysis, the judges have slowly but surely eroded the margin of appreciation accorded to member States when the essential sphere of family life was at issue. In this sense, the Court has proved more and more "activist" when dealing first with LGBT individuals, and then with their familiar ties. The example of the recognition of homosexual couples is the clearest: the Court was interpreting the same Convention when it affirmed in 2001 that same-sex couples do not constitute family life under Art. 8²¹³, and when it found in 2015 that member States have a *positive obligation* to legally recognise the contrary²¹⁴.

Precisely to show this evolutive tendency, we will deal with the cases chronologically, instead of what may seem a more practical alternative: that of dividing them thematically or by the Articles object of the complaints. We already said that the Court continuously seeks to balance the innovation required by changes in the European consensus with the value given to legal certainty through the adherence to precedent. Therefore, in this case-law, every single step taken by the Court towards the expansion of the scope of a provision is a corollary of principles established in older judgments concerning the same issues. Every decision contributes in one way or another to the reasoning of more recent decisions, therefore following the chronological order is the best way to keep track of every small but decisive step forward.

It would also be inappropriate and little useful for our purposes to deal separately with the complaints related to sexual orientation and those related to gender identity. While certain findings may only regard one of the two – as for example those about the claims for rectification of the birth certificates of transsexuals – others concern both of them – as those concerning marriage. The *Goodwin*²¹⁵ judgment is a perfect example: the outcome of a complaint brought before the Court by a transsexual woman eventually led to modifications to the notion of

213 *Mata Estevez v. Spain*, *supra* note 213.

214 *Oliari and Others v. Italy*, App. no. 18766/11 and 36030/11, 21 July 2015.

215 *Christine Goodwin v. the United Kingdom*, *supra* note 75.

marriage which have affected every complaint relying on Art. 12 ever since. Moreover, not only do the findings of these rulings shape legal principles and institutions which affect homosexuals' and transsexuals' lives through their domestic legislations, such as family life or marriage; they also contribute to the shaping of *social* notions and concepts which then spread in European societies, fuelling a better understanding of the complexity of sexual orientation and gender identity, which then can be detected when trying to assess a European consensus, thus fuelling back the jurisprudential innovations.

Borrowing the expression from Winkler²¹⁶, the Convention provisions protecting private and family life, the right to marry and the principle of non-discrimination have a "narrative function" when the interests of LGBT people are at issue. Their interpretation fuels a narrative, and is influenced in turn by new narratives as metabolized by European societies. In these cases, law meets life; it meets issues and claims once unknown, which have required law to evolve.

We now come to the actual analysis of the jurisprudence of the ECtHR, starting from the very first steps which the Court took towards its innovations in the field of SOGI rights, and which represent the foundation of what has in time become a true redefinition of the institution of family.

The step-by-step developments occurred in the Court's approach towards issues related to sexual orientation and gender identity started from an early phase in which the Strasbourg judges began interpreting the Convention provisions in a way which could protect the privacy of LGBT people from excessive interferences on the part of their States. This first phase undoubtedly flowed from a new awareness, pushed by social movements operating in defense of the civil rights of the LGBT community, that sexual orientation and gender identity could not anymore be perceived as abnormalities to keep hidden or behaviours to condemn.

Starting from the 1980s, the Court deemed admissible and decided on cases which opened new paths to its jurisprudence, as to international law. This first phase,

²¹⁶ The author uses the expression in relation to Art. 8 only. M. WINKLER, "Le coppie dello stesso sesso tra vita privata e familiare nella giurisprudenza di Strasburgo", in R. TORINO (edited by), *Le coppie dello stesso sesso: la prima volta in Cassazione*, Roma Tre-Press, Roma, 2013, pp. 75-93 at 84.

stretching until the early 2000s, includes decisions on purely private aspects of the lives of the applicant, but is crucial since it lays down the principles and interpretations on which the next phases will be "constructed". At this point in this jurisprudence of the Court, the familiar rights of LGBT people are still not recognised at all.

The review starts from the decriminalization of homosexuality in 1981. Then, the Court has decided on a series of claims about the recognition of the gender of post-operative transsexuals: although they were all rejected, gradual openings in the judges' reasoning have paved the road for the so-called revirement we will encounter in §4.2. Lastly, in 1997, the Court for the first time established that sexual orientation as a ground of discrimination is undoubtedly covered by the ECHR.

3.2. *Dudgeon v. U.K.*: the decriminalization of homosexual activities

Before the 1980s, claims of LGBT people about the respect of private life concerned almost exclusively the criminalization of same-sex sexual activities, and claims about the respect of family life were almost unknown of. A European system of moral and legal traditions often perceived transsexuals as mentally ill – due to a poor understanding of their characteristics – and homosexuals or bisexuals as devoted to a behaviour to condemn – reducing their whole affective sphere to the sexual acts they engaged into.

As far as homosexuality and private life are concerned, the turning point was *Dudgeon v. U.K.*²¹⁷, which represented an extraordinary change in the Court's attitude towards the criminalization of homosexual acts. The claims brought before the Court concerning homosexuality, says Johnson²¹⁸, have always been "essentialist", in the sense that they presented sexual orientation as an essential, embodied and authentic part of human nature; but it is from *Dudgeon*²¹⁹ that such claims have gained a central prominence in the reasoning of the Court. The Court started considering

217 *Dudgeon v. the United Kingdom*, *supra* note 55.

218 P. JOHNSON, *supra* note 29, p. 46.

219 *Dudgeon v. the United Kingdom*, *supra* note 55.

homosexuality not anymore as a behaviour²²⁰, but as a *status*, thus completely reversing the evaluation under the Convention of its criminalization. The judgment, brought before the Court by a Northern Ireland citizen, involved legislation prohibiting consensual homosexual acts between adults and its conformity to the respect of private life granted by Art. 8 of the Convention. In the ruling, the Court stated that the nature of the criminalized activities was involved in determining that a margin of appreciation was not to be accorded, since "the present case concerns a most intimate aspect of private life"²²¹. Accordingly, as established in the *Belgium Linguistics* case²²², the European judges reiterated that there must exist particularly serious reasons for interferences on the part of national authorities to be legitimate for the purposes of paragraph 2 of Article 8²²³. The ECHR ruled that the anti-sodomy laws enforced in the United Kingdom did in fact serve the aims protecting public morals, as affirmed by the Government, but maintained that "the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent"²²⁴, mostly because the impugned law were unnecessary to achieve the declared aims in a democratic society. For these reasons, the legislation at issue was found in violation of Art.8.

The *Dudgeon* judgment opened a door to a gradual, still evolving recognition of the value of homosexual unions; however, eight years passed before the Court reiterated that criminal sanctions against homosexuals constitute a violation of their private life²²⁵, and fifteen years before it found – in *Sutherland v. U.K.*²²⁶ – that legislation contemplating different ages of consent for heterosexual and homosexual

220 What led also to fears related to the fact that a homosexual could "spread" his tendencies, something very similar to the assumptions at the base of the infamous anti-propaganda laws we witness in relatively many Countries today, most famously in Russia and Uganda.

221 *Dudgeon v. the United Kingdom*, *supra* note 55, para. 52.

222 *The Belgian Linguistics Case*, *supra* note 152.

223 *Dudgeon v. the United Kingdom*, *supra* note 55, para. 52.

224 *Ibid.*, para. 61.

225 *Norris v. Ireland*, App. no. 10581/83, 26 October 1988. At para. 46, the Court quotes the *Dudgeon* judgment: "As in the *Dudgeon* case, ... not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate for the purposes of paragraph 2 of Article 8".

226 *Sutherland v. the United Kingdom*, App. no. 25186/94, 21 May 1996.

acts was in breach of Art. 14 combined with Art. 8.

3.3. Rees v. U.K. and Cossey v. U.K.: States can refuse to recognise the “acquired” gender of transsexuals, but European consensus is evolving

As far as transsexualism is concerned, complaints about the legal recognition of someone's gender when this was different from their physical sexual characteristics were brought before the ECtHR, without any success for the applicants, starting from the 1970s. The legal problems related to transsexuality developed with achievements in science which, making surgical "adaptation" of one's sexual characteristics a possibility for those people who feel to belong to a different gender than that of their physical appearance, delivered to law issues that had been unknown to it in the past. In the European context, the development of transsexuals' rights has been relevantly steered by the jurisprudence of the European Court of Human Rights, which influenced legal and jurisprudential tendencies of several Countries²²⁷.

In a first set of cases, the Court was reluctant in recognizing that the right to respect for private life applied to the claims of transsexual people and – as we will see – only with the *Goodwin*²²⁸ judgment of 2002 it got to change this approach. More specifically, the Court did not believe that Article 8 ECHR implied a positive obligation for national legislations to regulate and allow changes of one's civil status reflecting the new physical characteristics: according a wide margin of appreciation, the judges gave member States quite some discretionality in deciding to what extent they would meet transsexuals' needs²²⁹. Let us begin with a clear example of the initial approach of the Court: we can see how it still stuck to the traditional characteristics of family in the 1980s looking at the case *Rees v. U.K.*²³⁰. The judges were called to decide on the conformity to the ECHR of a British law which

227 E. CRIVELLI, “I transessuali e il diritto europeo”, in M. CARTABIA, *I diritti in azione*, Il Mulino, Bologna, 2007, pp. 330-347 at 335.

228 *Christine Goodwin v. the United Kingdom*, *supra* note 75.

229 Notice that in at least one case, the lack of legal recognition of a person's “new” gender identity caused problems so weighty that the State was believed to have gone beyond its legitimate margin of appreciation on the matter: *B. v. France*, App. no. 13343/87, 25 March 1992.

230 *Rees v. the United Kingdom*, *supra* note 188.

prevented a transsexual person from obtaining the correction of the information recorded on the register of births and from deciding that such correction could not be revealed to other people. The system of civil registration of births, deaths and marriages in force at the time of the applicant's birth was established by statute in England and Wales in 1837. Such system was fundamentally not modified by the Births and Deaths Registration Act²³¹ entered into force in 1953; in both systems, registers were records of historical facts as they occurred at the time of the event, therefore a birth certificate had not the purpose of reporting current identity, but the identity at the time of the birth²³². In arguing its decision, the Court noted that the simple denial of changes to the register of births could not constitute an illegitimate interference in one's private life. Only if and when a positive obligation would have developed for States to fully recognise the new anagraphic and juridical identity of transsexual persons, such a behaviour could have constituted a violation of Art. 8. Trying to counterbalance the individual and collective interest, the Court decided to let the latter prevail, in virtue of the great costs that a radical change of the entire system of registration of births would have brought about; also, it did so in virtue of the risk of compression of other people's rights, since the information regarding the person before the anagraphic modifications would have been kept secret to third parties.

The Court did not seem to focus instead on a circumstance which will be of great relevance in the so-called revirement of the *Goodwin* case: the fact that the British National Health System had covered the costs of the cures underwent by the applicant. It does not, in fact, seem so logic that a branch of the administration authorized and covered the costs of surgeries which legal effects were not then recognised by another branch of the administration. The Court though justified the little weight given to such circumstance with the risk, would events like this be considered as a formal stance taken by the State, to lead national health systems to be too prudent in according free healthcare to citizens seeking medical assistance²³³. It is

231 The United Kingdom, *Births and Deaths Registration Act 1953*, 14 July 1953.

232 The Court will eventually impose to the U.K. the modification of this system in 2002, with the judgment *Goodwin v. the United Kingdom*, *supra* note 75.

233 In the Court's words: "If such arguments were adopted too widely, the result might be that Government departments would become over-cautious in the exercise of their functions and the helpfulness necessary in their relations with the public could be impaired". *Rees v. the United*

clear that such attitude unveils the Court's belief that sexual transition is an effective need for transsexuals, one which deserves to be protected against a too prudent government; but if it is so, it is not clear whether this attitude, compared to the final decision on the case, can be interpreted as a balancing of different interests, or rather an unjustified contradiction.

As for our purposes and thus as for the construction of the notion of family, the main point of the *Rees* case lies in that the applicant also claimed that there had been limitations imposed on his right to marry, sanctioned by Art. 12 ECHR. The rejection of the applicant's request to have his gender legally changed to male, indeed, was *de facto* prohibiting him to contract marriage with a woman, that is a person of the opposite gender with respect to his "new", correct gender. In the judgment, the judges stressed that "Article 12 concerns traditional marriage between two people of different biological sex", and that the aim of the Article is to "protect marriage as the keystone of family life"²³⁴. The reference to national laws, moreover, makes that the Court is called to only verify that the measures taken by the State and concerning the exercise of the right do not affect its very substance: in this sense, the judges excluded that the prohibition of same-sex marriage at issue could be considered a limitation so weighty to impair the substance of the right to marry, and thus did not find a violation of Art. 12.

Four years later, deciding on similar issues in *Cossey v. U.K.*²³⁵, the Court claimed that "the traditional concept [of marriage] provided sufficient grounds for applying biological criteria so as to determine the sex of a person for marriage purposes"²³⁶, therefore finding that prohibiting Miss Cossey to marry a man did not constitute a violation of Art. 12. This despite acknowledging that there had been developments in national legislations in this sense: the judges indeed admitted that "some Contracting States would now regard as valid a marriage between a person in Miss Cossey's situation and a man"²³⁷, but added that such developments could not be said to evidence any general abandonment of the traditional concept of marriage.

Kingdom, supra note 188, para. 45.

²³⁴ *Ibid.*, para. 49-50.

²³⁵ *Cossey v. the United Kingdom*, App. no. 10843/84, 27 September 1990.

²³⁶ *Ibid.*, para 46.

²³⁷ *Ivi.*

Consensus, therefore, or better the lack of consensus, played a major role in determining the decision. It must be highlighted though that this judgment in particular was published together with relatively many dissenting opinions. As for the figures concerning the judges' votes, the decision about the non-violation of Art. 8 came with a narrow ten-against-eight margin, and the decision about Art. 12 with fourteen judges believing there had been no violation, but four who believed there had been one. Such figures, along with the two partially dissenting and three dissenting opinions published with the judgment, show an unusual disagreement within the Strasbourg Court if compared with similar cases from the past: what has been highlighted by scholars, in particular, was the little consideration of social developments which could have justified a detachment from the earlier approach by the Court. Not only there had been legal developments in domestic legislations²³⁸, but also resolutions coming from the Parliamentary Assembly of the Council of Europe and from the European Parliament inviting States, among other things, to allow the legal change of gender for post-operative transsexuals²³⁹, as reminded by Judges Palm, Foighel and Pekkanen in their joint dissenting opinion.

3.4. B. v. France: a gate towards the obligation to recognise the “acquired” gender of transsexuals

It was 1992 when the Court for the first time stated that lack of recognition of the "sex change" of a transsexual person constituted a violation of Art. 8 with respect to private life. The case at issue was *B. v. France*²⁴⁰, and the complaint referred to the fact that the French legislation did not allow the correction of the civil status registers, nor did it allow the change of first names.

The applicant, Miss B., was a transsexual woman who was born of biological

238 In 1990, 11 States had legislation which provided full legal recognition of surgeries aimed at adapting transsexuals' bodies to their true, inner gender (Sweden, Germany, Italy, Netherlands, Denmark, Finland, Luxembourg, Spain, Turkey), while other three (Belgium, France, Portugal) had achieved the same results through national jurisprudence.

239 *Recommendation n. 1117 on the Condition of Transsexuals*, adopted by the Parliamentary Assembly of the Council of Europe on the 29 September 1989; European Parliament, *Resolution of 12 September 1989 on Discrimination against transsexuals*, OJ no. C 256, 19 October 1989, p. 33.

240 *B. v. France*, *supra* note 229.

male sex, underwent hormone therapy and then surgical rectification of her sexual characteristics at the age of 37. The operation was done abroad, since such surgeries became possible in France five years later. Miss B. then started living with a man, whom she wished to marry. She claimed that her private life was violated when the French national authorities rejected her request of correction of her birth certificate and her documents, because this obliged her to disclose personal information to third parties, and the disclosure of information about her sex-change often caused potential employers to choose not to hire her. Moreover, she argued that her right to marry was also violated because, as a consequence of the denied rectification of sex, she could not marry the man with whom she had a relationship. The complaint related to Art. 12, however, was deemed inadmissible on grounds of the failure to exhaust domestic remedies. As for the application of Art. 8, at the time, the jurisprudence represented by the *Rees* and *Cossey* cases was clear; in order for the Court to detach from such decisions, weighty reasons had to be found, such as new scientific, legal and social elements²⁴¹, or a substantial difference between the British and French laws.

The Court considered that it is "undeniable"²⁴² that developments had occurred in the scientific, legal and social fields. However, it added something which some have found paradoxical²⁴³ given the decision in favour of the applicant, and given that the Court eventually did detach from its previous jurisprudence:

The legal situations which result are moreover extremely complex: anatomical, biological, psychological and moral problems in connection with transsexualism and its definition; consent and other requirements to be complied with before any operation; the conditions under which a change of sexual identity can be authorised (...); international aspects (...); the legal consequences, retrospective or otherwise, of such a change (...); the opportunity to choose a different forename; the confidentiality of documents and information mentioning the change; effects of a family nature (right to marry, fate of an existing marriage, filiation), and so on. *On these various points there is as yet no sufficiently broad consensus between the member States of the Council of Europe to persuade the Court to reach opposite conclusions to those in its Rees and Cossey judgments.*²⁴⁴

241 *Ibid.*, paras. 46-48.

242 *Ibid.*, para. 48.

243 C. HUSSON-ROCHONGAR, "The Protection of Transsexual's Rights by the European Court of Human Rights: a True Breakthrough or a New Risk?", in A. SCHUSTER (edited by), *Equality and Justice*, Forum, Udine, 2011, pp. 177-190 at 181.

244 [Emphasis added]. *Ibid.*, para. 48. In deciding on the cases *Rees* and *Cossey*, the Court did not find a violation of Art. 8.

Having dismissed this first possibility – new developments – the Court tried to assess whether there were substantial differences between the French and British legislation on the matter. The Government, on its part, had declared on the matter that, as far as the rectification of gender on Miss B.'s documents is concerned, the inconveniences she suffered in her everyday life were not serious enough to constitute a breach of the right to respect for private life, adding – as a general consideration – that a margin of appreciation is allowed to the contracting States in the definition of the criteria of the recognition of the "new" gender of transsexual persons and to the choice of "ancillary measures"²⁴⁵ in case of refusal of such recognition.

The Court however was not convinced. It noted that in this specific case, some points had to be taken into consideration with respect to Art.8, points which make this case substantially different from those of the *Rees* and *Cossey* judgments, starting from the difference between the British and French laws. Firstly, the French authorities had legally the possibility of adding an annotation on Miss B.'s birth certificate, not to correct it strictly speaking but rather as a way to update it, something which various French courts had ordered in the past when dealing with similar cases. Secondly, unlikely in the United Kingdom, the choice of a different forename was not a choice of the applicant for the French law, but it had to be justified by a "legitimate interest", which the national authorities denied that existed in this case. Thirdly, the Court was convinced that an increasing number of instruments of identification indicated sex, from the INSEE – the national identification number – to digital identity cards and European Community passports, preventing her from crossing a border, undergo an identity check or carry out any daily life activity or transaction requiring identification without disclosing the discrepancy between her appearance and her documents. For all these reasons, the Court found that the State interference in the life of Miss B. caused her inconveniences which were serious enough to constitute a breach of Art. 8. It was the first time ever that the Court acknowledged the problems and discriminations suffered by transsexuals due to a lack of recognition of their true gender, and this jurisprudence certainly helped open a gate for a whole new awareness of

²⁴⁵ *B. v. France*, supra note 229, para. 50.

transsexualism and to the evolution of the consideration of these problems. The Court will eventually establish that lack of recognition of sexual transitions is in violation of Art. 8 in *Goodwin v. U.K.*²⁴⁶: from that moment on, refusing to acknowledge the gender indicated by autodetermination by the subject has not been anymore acceptable under the Convention.

3.5. X, Y and Z v. the U.K.: sexual transitions can still be not recognised by law, where the systems of registration of births prohibits the correction of birth certificates

After a few years, the Court's reluctance to recognise a wide social and legislative evolution on the matter of the family rights of trans people was revealed again in a case in which transsexuals' rights and medically assisted procreation are intertwined: *X, Y and Z v. U.K.*²⁴⁷. The applicant (X) had surgically modified his sexual characteristics from female to male; after his female partner (Y) gave birth to a child (Z) thanks to artificial insemination – a technique the couple had been authorized to undergo *by the British authorities* – he was denied the right to be registered as the father of the child, child who nevertheless bore his surname. X appealed, but the Registrar General was of the opinion that only biological males could be lawfully registered as father of a child; that space in the register, thus, was left blank. We know that, at the moment of the application, the British law identified a person's gender with the sex at birth, without any possibility to recognize any changes occurred after a transition. Since the denial of registration impaired the formal recognition of the three applicants as a family, the complaint relied on the protection of family life under Art. 8; moreover, since a cisgender²⁴⁸ man would not have faced the same denial, it also relied on Art. 14 taken in conjunction with Art. 8.

The fact that the notion of family does not only apply to families based on marriage has already been established in 1979²⁴⁹ – although at this point of the ECtHR's case-law this vision does not apply to same-sex couples. The request was

246 *Christine Goodwin v. the United Kingdom*, *supra* note 75.

247 *X, Y and Z v. the United Kingdom*, App. no. 21830/93, 22 April 1997.

248 Someone whose “psychological” gender coincides with their biological sex.

249 *Marckx v. Belgium*, *supra* note 53.

different from that of *Rees*²⁵⁰ and *Cossey*²⁵¹: X was not trying to have his birth certificate changed, but only to be registered as the father of Z. In the applicants' view, such a case should be less subject to the margin of appreciation, and a stronger action to assure respect should be required, because of the relevance that should be accorded to the interest of the child to have both parents formally registered. The Court recognised that a familiar tie linked the three applicants, and decided accordingly.

The Court acknowledged the differences with its previous jurisprudence highlighted by the applicants, but adding that when it had found States' positive obligations to enact the protection of family ties in an effective way, it had always done so with respect to biological children. Examining the merits, once more, the Court declared that wide discretionality had to be accorded to States given a European context of great disagreement about the appropriate response to the claims of transsexuals and about the regulation of the rights connected to medically assisted procreation. In other words, the lack of a European consensus required a wide margin of appreciation. Then, in trying to assess if a balance was struck between collective and individual interest, the judges noted that the refusal of changing the law that had been appealed against could be justified by the collective interest of the consistency of law: the law might have been open to criticism if a female-to-man transsexual was able to be registered as the father of a child while still being considered a woman for other legal purposes, for example in the event of contracting marriage. As for the disadvantages suffered by X, Y and Z, the Court claimed that any possible difficulty, like those linked to inheritance rights, could easily be overcome through other means, and that the fact that Z's father was not registered as such – a private information, unlikely to be disclosed to third parties – would not have caused the child any particular stigma. The judges in sum do not identify any foreseeable and serious risk, caused by the national authorities' decision, for the well-being of the child; also, they admitted that in the situation of children born by assisted procreation by donor, "there is uncertainty with regard to how the interests of children in Z's position can best be

250 *Rees v. the United Kingdom*, *supra* note 188.

251 *Cossey v. the United Kingdom*, *supra* note 235.

protected"²⁵². For all these reasons, the State was not found in violation of Art. 8, since it was not established that it had failed to protect family life within the meaning of that provision. For the same reasons, no violation of Art. 14 was found either.

Many have criticised the ruling²⁵³, most of all in its major consequence concerning the right of the child to see legally recognised as father someone who was indeed playing the role of a father, socially, economically, and affectively. The facts are that such possibility was rejected precisely for reasons such as the use of artificial insemination in conceiving the child, and the change of civil status of the father. The U.K. legislation admitted medically assisted procreation for unmarried women, and contemplated the possibility for the cohabiting partner of the biological mother to be registered as the father of the child; therefore, the only reason for refusing to register the transsexual applicant as the father of the child was the fact that he had *become* physically a male through a surgery. On the other hand, the legal consequences of being legally known "as of two genders" at the same time for different purposes would indeed create huge inconveniences. This risk would be prevented only with a complete rearrangement of the U.K. birth registration system, something which in its jurisprudence the Court had never imposed²⁵⁴. It is therefore reasonable to suggest that, not finding weighty reasons to detach from its previous jurisprudence on the matter, the judges chose to make legal certainty prevail over the interests of particular family.

3.6. Salgueiro da Silva Mouta v. Portugal: discrimination on the grounds of sexual orientation is prohibited by the Convention

During the 1990s, the protection of homosexuals was again granted through the right to the respect of private life, with the cases *Smith and Grady v. U.K.*²⁵⁵ and *Lustig-*

252 *X, Y and Z v. the United Kingdom*, *supra* note 247, para. 51.

253 C. HUSSON-ROCHONGAR, "The Protection of Transsexual's Rights by the European Court of Human Rights: a True Breakthrough or a New Risk?", in A. SCHUSTER (edited by), *Equality and Justice*, Forum, Udine, 2011, pp. 177-190 at p. 184.

254 Eventually, it will in 2002, with the sentence *Goodwin v. the United Kingdom*, *supra* note 75.

255 *Smith and Grady v. the United Kingdom*, Apps. nos. 33985/96 and 33986/96, 27 September 1999.

*Prean and Beckett v. U.K.*²⁵⁶: the Court found an illegitimate interference in private life, one that was not "necessary in a democratic society" as Art. 8(2) requires, in the ban of homosexuals from the British armed forces and in the diffusion of private information carried out in order to apply such ban. The same breach was found in the prohibition of acts of sodomy by the Sexual Offences Act²⁵⁷, since it aimed at prohibiting "activities" which were "genuinely private"²⁵⁸. Such early decisions distinguish between the private and public nature manifestations of non-heterosexual orientations, and only grant protection to the former: this attracted the critiques of many scholars, which have argued that such attitude in the courtroom forced the LGBT community into the same "closet" in which they were already encouraged to hide by most societies at the time. Johnson for example highlighted "the Court's failure to adequately address the difference between a right to determine the scope of one's sexual privacy, and the socially enforced secrecy of one's sexual orientation"²⁵⁹.

It was in this context that an innovation came in 1999, with the case *Salgueiro da Silva Mouta v. Portugal*²⁶⁰. While the ruling did not put an end to the private dimension reserved to homosexuals, it indeed added a piece to the puzzle, bringing the jurisprudence of the Court one step closer to according a new social dignity to LGBT people. In 1999, the Court has for the first time stated that sexual orientation as a discriminating factor "is undoubtedly covered by Article 14 of the Convention"²⁶¹. The case regarded the role of father of a homosexual man, and the alleged discrimination against him on the part of national Portuguese courts.

The complexity of the facts of the case require to briefly elucidate them. The applicant was a man, a Portuguese citizen, who had married a woman (identified as C.D.S.) in 1983 and had had a daughter with her in 1987. Then, he had separated from the wife in 1990 and started living with a man (L.G.C.), with whom he had an affective relationship. During the divorce procedure, a series of events and changes in

256 *Lustig-Prean and Beckett v. the United Kingdom*, Apps. no. 31417/96 and 32377/96, 27 September 1999.

257 The United Kingdom, *Sexual Offences Act 1967*, 27 July 1967.

258 *A.D.T. v. the United Kingdom*, App. no. 35765/97, 31 July 2000, para. 37.

259 P. JOHNSON, "An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights", in *Human Rights Law Review*, 10:1, 2010, pp. 67-97 at 76.

260 *Salgueiro da Silva Mouta v. Portugal*, *supra* note 192.

261 *Ibid.*, para. 28.

the awarding of parental responsibility followed, ending with C.D.S. having parental responsibility and Mr. Salgueiro the right to visit. During such events, the man always tried to maintain contact with his daughter, but the mother proved uncooperative, at the point of ignoring court orders, abducting her child when she was under Mr. Salgueiro's responsibility, and even accusing him of exposing the child to sexual abuse on the part of his male partner – accuse proved unfounded during trial. It was 1996 when the Lisbon Court of Appeal reversed the Lisbon Court's judgment and awarded parental responsibility to the mother, with right to visit for Mr. Salgueiro; the child went to live with her mother in her grandparents' house.

The judgment issued by the Lisbon Court of Appeal is particularly relevant to understand the reasons for the decision of the European Court of Human Rights. Reports by the court's psychologists and psychiatrists stated that “both parents are capable of overseeing their daughter’s satisfactory psycho-affective development”²⁶², and all agreed on the fact that the father's homosexuality was not causing the child any psychological harm whatsoever. In the judgment, the national Court accorded the parental responsibility to the mother on bases which did not include Mr. Salgueiro's homosexuality. However, it added that the home Mr. Salgueiro could offer his child was not appropriate for her development, with a passage that became infamous in the literature on the matter, since it does not seem based on scientific facts, and it even echoes some of the most common and ill-founded prejudices about homosexuality [emphasis added]:

The child should live in a family environment, *a traditional Portuguese family*, which is *certainly* not the set-up her father has decided to enter into, since he is living with another man *as if they were man and wife*. It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases *it is an abnormality* and children should not grow up in the shadow of abnormal situations; *such are the dictates of human nature*.

One of the national judges, although voting in favour of the decision, deposited a separate opinion disagreeing with the reasoning of the ruling: he claimed that “I do not consider it constitutionally lawful to assert as a principle that a person can be stripped of his family rights on the basis of his sexual orientation, which –

262 *Ibid.*, para. 22.

accordingly – cannot, as such, in any circumstances be described as abnormal"²⁶³.

Coming now to the case as brought before the European Court of Human Rights, the applicant alleged a violation of Art. 14 taken in conjunction with Art. 8. Mr. Salgueiro claimed that the Lisbon Court of Appeal had awarded the parental responsibility to the mother on the base of his homosexuality, thus interfering without any justification with his private life. The Court, given the modalities of application of Art. 14 that we mentioned, proceeded trying to assess whether there had been a different treatment with respect to a similar situation and, if it was so, whether it was justified or not by weighty reasons. It was recognised that the Portuguese Appeal Court operated on the basis of the best interest of the child, but also stressed that it included the homosexuality of Mr. Salgueiro in the reasons for the ruling; this reflected, indeed, a difference in the treatment of the two parents based on sexual orientation, which was “undoubtedly covered by Article 14”.

In accordance with the case-law of the Strasbourg institutions, a difference of treatment is discriminatory “if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought”²⁶⁴. The Court found that the State's decision undoubtedly pursued a legitimate aim: the best interest of the child. With respect to the proportionality of the means employed to pursue such aim, it had to be assessed whether the homosexuality of Mr. Salgueiro was decisive for the final decision of the Court of Appeal. In this sense, the Strasbourg judges pointed out that the national trial did not take the experts' reports into sufficient consideration, and that the comments on the sexual orientation of the applicant were not simple and unfortunate *obiter dicta* as claimed by the Government, but they were decisive for the final decision, thus making the distinction unacceptable under the Convention. For these reasons, the national decision was in breach of Art. 14 taken in conjunction with Article. 8.

Given the circumstances at issue, particular weight was given to the link between the notion of “necessity” and that of a “democratic society”²⁶⁵, adding that “when the relevant restrictions concern a most intimate part of an individual’s private

263 *Ibid.*, para 15.

264 *Karlheinz Schmidt v. Germany*, App. no. 13580/88, 18 July 1994, para. 24.

265 *Smith and Grady v. the United Kingdom*, *supra* note 255, para. 72.

life, there must exist 'particularly serious reasons' before such interferences can satisfy the requirements of Article 8(2) of the Convention"²⁶⁶.

²⁶⁶ *Ibid.*, para. 89.

Chapter 4.

The 2000s: limited activism

CONTENTS: 1. Mata Estevez v. Spain: homosexual relationships between two men do not fall within the scope of the right to respect for family life – 2. Christine Goodwin v. U.K.: lack of recognition of sexual transitions violates Art. 8; the possibility of procreation is not a condition for the enjoyment of the right to marry – 3. Fretté v. France: legislation which allows the possibility to adopt for singles can exclude homosexuals from it, if it is pursuing a legitimate aim – 4. Karner v. Austria: condemnation of discrimination paves the road towards the recognition of same-sex family life – 5. R. and F. v. U.K.; Parry v. U.K.: “Forced divorce” as a condition for the recognition of the “acquired gender” does not violate the Convention – 6. E.B. v. France: whether domestic authorities approve an unmarried individual’s application to adopt, the decision may not be based on the applicant’s sexual orientation.

This second phase shows slightly more "activist" attitudes on the part of the Court. We will see how the judges have begun to erode the margin of appreciation they had accorded to States for decades when deciding on LGBT family ties, thanks to a greater consensus detected on the matter; however, the greatest innovations still have to come.

The review starts from the 2003 rejection to a complaint relying on the right to respect for the family life of a homosexual couple. The Court did find a violation, but only with respect to private life, stating clearly that same-sex stable couples could not constitute family life under Art. 8; this is the clearest manifestation of the central phase of an evolution in this sense that will reach its peaks first in 2010 and then in 2015, when this interpretation will be reversed. Then, a great revirement has occurred concerning the recognition of sexual transitions, but also marriage: in 2002, the Court found that the Convention imposed a positive obligation on States to recognise the "acquired" gender of transsexuals, and detached procreation from marriage, rejecting the view that one was the "natural" purpose and consequence of the other. This innovation in the notion of marriage will indeed affect many decisions on homosexuals' and transsexuals' claims ever since. Then, we find a hesitation of the Court with respect to discrimination in cases of adoption: it was established that, in virtue of a legitimate aim, homosexuals singles could be excluded from the possibility

to adopt, even if it was not the same for heterosexual singles. After another case confirming the Court's position on family life and same-sex couples, and a case on "forced divorce" which will give us the opportunity to provide some considerations about Art. 12, the review will come to 2008. That year, the Court took a strong stance in relation to adoption, when it fundamentally sanctioned the suitability of homosexual parents to adopt. Indeed, this case is the perfect example of the gradual erosion of the margin of appreciation accorded to States when a limitation of LGBT family rights are at issue, an erosion which occurred through a greater and greater consideration of the anti-discrimination evaluation. This judgment reversed the previous approach of the Court on the matter: under the legal point of view, it was established that basing a different treatment of people seeking to adopt on sexual orientation was unacceptable under the Convention.

4.1. *Mata Estevez v. Spain*: homosexual relationships between two men do not fall within the scope of the right to respect for family life

The judgment *Mata Estevez v. Spain*²⁶⁷ was the result of the first complaint by a homosexual person relying on the right to respect for family life²⁶⁸. It demonstrates the Court's will to distinguish the protection of those unions which are grounded on marriage from the one accorded to cohabiting couples – both subject to the protection sanctioned by Art. 8 – and, among these, the protection accorded to heterosexual and homosexual couples.

The applicant is a man, a Spanish citizen who had lived with his male partner for many years, sharing incomes and expenses. They were not married, since the Spanish law prohibited same-sex marriage at the time. Therefore, when Mata Estevez's partner died in 1997, the National Institute of Social Security refused to accord him a survivor's pension, since national law did not allow such a pension to be provided to a deceased person's partner if the two were not married. The applicant

²⁶⁷ *Mata Estevez v. Spain*, *supra* note 213.

²⁶⁸ Though the Commission had already examined similar complaints, declaring them inadmissible.

We are referring to the Commission decisions *X. and Y. v. the United Kingdom*, App. no. 9369/81, 3 May 1983, and *S. v. the United Kingdom*, App. no. 11716/85, 14 May 1986.

then challenged the decision before national courts, without success.

Before the European Court of Human Rights, the applicant alleged that he was subjected to a difference of treatment which amounted to discrimination. He compared his situation not only with that of married couples, but also with that of heterosexuals in a stable, unmarried couple who – before the divorce laws of 1981 – were eligible for a survivor's pension if they had been unable to marry because of a previous marriage. Therefore, he relied on Articles 8 and 14. The Court did not find reasons to detach from its previous jurisprudence and – recalling *X and Y v. the U.K.*²⁶⁹ – declared that "long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life"²⁷⁰. Although acknowledging that a growing number of member States were accepting homosexual couples socially and legally, the Court believed that States still had to be accorded a wide margin of appreciation on the matter, not differently than as expressed in *Cossey*²⁷¹. Therefore, the right to private life was believed to be incompatible *rationae materiae* with the situation at issue. As far as private life and the protection of Art. 14 are concerned, the Court rejected both, since the first one cannot be applied to claims for a survivor's pension, and the second was not violated, because even if there had been any interference with the applicant's private life, such interference would have had the conditions necessary to be justified under paragraph 2 of Art. 8: the Court believed that the difference of treatment, even if there was one with respect to certain heterosexual, cohabiting couples, was perfectly justified by the pursuit of the legitimate aim of protecting the notion of the family based on marriage, and constituted a proportionate measure, thus falling within the margin of appreciation. For these reasons, the application was declared inadmissible.

269 *X and Y v. the United Kingdom*, App. no. 9369/81, 3 May 1983.

270 *Mata Estevez v. Spain*, *supra* note 213, p. 4.

271 *Cossey v. the United Kingdom*, *supra* note 235, para. 40.

4.2. Christine Goodwin v. U.K.: lack of recognition of sexual transitions violates Art. 8; the possibility of procreation is not a condition for the enjoyment of the right to marry

In 2002, a long awaited jurisprudential change of approach came: the case *Goodwin v. U.K.*²⁷² proved groundbreaking for the Court's interpretation of Article 12 with respect to transsexuality, and represented a watershed for the notion of marriage in general. The judges' early approach towards the right to marry protected under the Convention – exemplified by the decisions *Rees* and *Cossey*²⁷³ – interpreted the provision in the sense of protecting the *traditional* notion of marriage, that is a union between two people of the same biological sex, as the foundation of family. The *Goodwin* judgment was the first manifestation of a radical change in this respect, representing a huge step forward for the recognition not only of transsexuals', but also of homosexual's and bisexual's right to marry. In the decision, it is stated that Art. 12 does not sanction one but two distinct rights: the right to contract marriage, *and* the right to form a family, thus separating two notions which were earlier considered almost as if one was the "natural" consequence of the other: marriage and procreation. In the words of the Court:

Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision.²⁷⁴

This is usually considered the major turning point with respect to the previous ECtHR's jurisprudence regarding transsexuality but really also the concept of marriage *per sé*. Let us clarify the circumstances of the case.

Once again, the complaint concerned the U.K. legislation and the impossibility to have transsexuals' anagraphical identities modified under such law. The applicant was a transsexual woman who had changed her physical sexual characteristics, and brought forward two claims, both referring to the fact that the authorities of her Country did not legally recognise her "change" of gender. The first

²⁷² *Christine Goodwin v. the United Kingdom*, *supra* note 75.

²⁷³ *Rees v. the United Kingdom*, *supra* note 188, para. 50; *Cossey v. the United Kingdom*, *supra* note 235, para. 43. See also *Sheffield Horsam v. the United Kingdom*, *supra* note 144, para. 66.

²⁷⁴ *Christine Goodwin v. the United Kingdom*, *supra* note 75, para. 98.

regarded the fact that she was denied the possibility to retire at the age required to women; the second was that – same-sex marriage not being allowed in the U.K. – she was not able to contract marriage with her male partner. The Court recalled the need for the Convention provisions to be interpreted and applied in order to make the guarantees it provides concrete and effective, rather than theoretical. Reversing its previous approach, it stressed that it was "illogical" for a system to fail to recognise the juridical consequences of surgical modifications which were authorized and paid for by the National Health System in the first place. Then, coming to the reasoning which brought about its decision, it rejected the three main arguments – scientific, legislative and practical – considered relevant in its past jurisprudence²⁷⁵.

Firstly, any scientific argument is now considered not relevant, detaching the achievements of medicine from the juridical recognition of transsexuals' rights. Secondly, from the legislative point of view, the Court does not focus as much as it had done in the past on the lack of an uncontested international tendency towards the recognition of the "new" identity of post-operative transsexuals. Thirdly, the breach is also due to the rejection of the last argument we mentioned, a practical issue, which concerned the bandwidth of the margin of appreciation which it was appropriate to accord the State: although acknowledging the practical complexities of rearranging a totally different system of registration of births, the Court did not believe that the aim of maintaining the existing system allowed the State to invoke a margin of appreciation, since no relevant risk for the public interest conflicted with applicant's interest to be legally recognised for her actual identity. Therefore, the Court found the measures taken incompatible with the right to marry, and the right to respect of private life sanctioned by Article 12 and 8 ECHR.

As far as the notion of marriage is concerned, we can now see the reach of the *Goodwin* judgment. The Court stated that the impossibility for transsexual people to contract marriage accordingly to their "new" gender was incompatible with the Convention, since when a domestic legislation deciding on the validity of a marriage takes into consideration only the biological sex at birth, it is establishing a limitation which is detrimental to the very right to contract marriage, and no margin of

²⁷⁵ *B. v. France*, *supra* note 229, paras. 46-48.

appreciation can justify this²⁷⁶. The requirement of the Court was thus particularly strong regarding Article 12. It was the first time that such an interpretation of the limitations imposed on transsexuals was declared, and the first time that a notion of marriage that is detached from the biological aspect was considered to prevail over the traditional notion of marriage. It is also worth of noting that the Court recalled the wording of Art. 9 of the EU Charter of the Fundamental Rights²⁷⁷ as proof of a European tendency towards an evolution of characteristics of marriage which have long been considered immutable. The Charter, it is stressed, voluntarily does not mention that couples contracting marriage must or must not be of different gender, declaring that "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights".

4.3. Fretté v. France: legislation which allows the possibility to adopt for singles can exclude homosexuals from it, if it is pursuing a legitimate aim

The debate about the legal qualification of LGBT relationships is particularly heated when the situations brought before the public opinion – and before national and supranational courts – concern LGBT parenting. The claims of LGBT people regarding parenting have been and often still are controversial for many European societies and, consequently, the same is true for the regulation of LGBT adoption. When dealing with LGBT adoption, we have to remember that parenting – understood in its most basic terms, as a "system which gives children to parents, and parents to children"²⁷⁸ – cannot avoid to face the fact that, in our existing societies, many different kinds of family coexist, something which can surely influence the creation of adoptive relations in different ways.

Let us start by elucidating that the form of adoption by a homosexual couple

²⁷⁶ *Christine Goodwin v. the United Kingdom*, *supra* note 75, para. 93. The Court only accords a margin of discretionality as for the means of achieving recognition of the protected right: "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, save as regards the appropriate means of achieving recognition of the right protected under the Convention".

²⁷⁷ *Charter of Fundamental Rights of the European Union*, *supra* note 169.

²⁷⁸A. CADORET, *Des parents comme les autres. Homosexualité et parenté*, Odile Jacob, Paris, 2002, p. 9.

which maybe is most perceived as common is *joint adoption*: it is what is often called by the media – with an unfortunate, simplistic label – "gay adoption", and it occurs when two homosexual partners are allowed *as a couple* to adopt a child. This form of adoption is permitted in 12 out of 47 ECHR contracting States (soon to become 14): Andorra, Austria, Belgium, Denmark, France, Iceland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom, with Ireland and Finland soon to join the group, respectively in May 2016 and in 2017. However, the European Court of Human Rights has never dealt with joint adoption since, being possible only in those States where it is contemplated and regulated by law, it is unlikely that it brings to complaints before the Court. Rather, the Court has dealt with cases concerning two other forms of adoption by homosexual individuals: a homosexual individual seeking to adopt a child, or one partner in a homosexual couple seeking to adopt the child of the other – what is called *step-child adoption* or *second-parent adoption*. Step-child adoption, an institution initially meant for heterosexual couples, had become the preferential path towards a response to new claims posed by homosexual couples, now that greater and greater availability of assisted and surrogate procreation has allowed one of two members of a same-sex couple to have children, with the aim to extend the status of parent to the other²⁷⁹.

The first judgments by the Court dealing with same-sex adoption regarded the right of homosexual singles to adopt children. Particularly, two cases had great resonance: *Fretté v. France*²⁸⁰ and *E.B. v. France*²⁸¹ – the latter of which we will examine later on. They both concern the French legislation, which allowed singles to adopt but, due to administrative and jurisprudential custom, for long time had not allowed it to *homosexual* singles. In *Fretté*, the denial had been motivated by the French Government with the fact that, being a gay man, the applicant was unsuitable to adopt because he had “no stable maternal role model” to offer and had “difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child”²⁸². National authorities had added in another occasion that the applicant's

279 See A. LORENZETTI, “Coppie same-sex e fecondazione assistita. La progressiva decostruzione del paradigma familiare”, in M. AZZALINI, *La procreazione assistita dieci anni dopo. Evoluzioni e nuove sfide*, Roma, Aracne, 2015, pp. 103-129.

280 *Fretté v. France*, App. no. 36515/97, 26 February 2002.

281 *E.B. v. France*, *supra* note 60.

282 *Fretté v. France*, *supra* note 280, para. 10.

"choice of lifestyle" did not provide guarantees that he would be able to care for the baby in a suitable home, in a suitable family environment, nor that he would be able to offer a child a suitable "psychological perspective"²⁸³.

The Court recognised that the denial at issue was exclusively due to a negative evaluation of homosexuality by the national authorities involved, since the applicant, indeed, had been declared suitable under any other viewpoint: evaluations provided by the French social services in 1993 for example described him as a man with "an aptitude for bringing up children"²⁸⁴. Despite such recognition, however, the judges concluded that they did not find the French legislation in violation of Articles 8 and 14. After underlining that the decision contested by Mr. Fretté was based "decisively" on his homosexuality²⁸⁵, they observed that there was "no doubt" that the government had with its decisions pursued the legitimate aim of protecting the rights and health of the children waiting for adoption. Trying to discern any justification as to the different of treatment, the Court recalled the principle according to which "by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions"²⁸⁶. Passing on to the consensus-analysis test, the Court added that there was a lack of consensus on the matter of adoption by homosexuals at the time. For all of these reasons, it was ruled that the State's interference in the applicant's right to adopt was motivated by reasonable justifications and that, therefore, it fell under the scope of the margin of appreciation accorded to States – though stressing that such margin was not arbitrary, and that it would continue to be reviewed in future cases on the same matter. A few years later, this decision was overruled in *E.B. v. France*²⁸⁷, with a judgment which lends itself to interesting considerations about certain aspects of the two judgments, since the approach to the issue has changed dramatically in such a relatively brief timespan.

283 *Ibid.*, para. 11.

284 *Ibid.*, para 10.

285 *Ibid.*, para. 37.

286 *Ibid.*, para. 41.

287 *E.B. v. France*, *supra* note 60.

4.4. Karner v. Austria: condemnation of discrimination paves the road towards the recognition of same-sex family life

A year later, the "liberal shift"²⁸⁸ in the interpretation of Art. 8 came about in *Karner v. Austria*²⁸⁹, on the succession of a tenancy agreement to the deceased tenant's partner. It was the first time that the Court found a violation for a different treatment of same-sex couples living in a stable relationship, with respect to different-sex couples in the same situation.

The applicant had shared a flat with his partner for many years, sharing the relative expenses. About 6 years before the application, Mr. Karner's partner had discovered he was infected with the HIV virus; when he had developed Aids, Mr. Karner had nursed him, and he had chosen to design the applicant as his heir. At the death of the partner, Mr. Karner's request to succeed to his partner in the tenancy agreement was rejected under the Austrian Rent Act²⁹⁰ because the couple was of the same sex, and he was not accorded the possibility to do so in any domestic proceeding with which he tried to impugn the decision. Although reiterating that the protection of the traditional notion of family – as established in *Mata Estevez*²⁹¹ – can constitute, in principle, "a weighty and legitimate reason which might justify a difference in treatment"²⁹², the Court underlined that cases in which the difference of treatment is based on sex or sexual orientation belong to the category of circumstances for which the margin of appreciation accorded to States is narrow: in such cases, not only must the different treatment pass the mere proportionality test – what the judgement does not clarify in this case – but the government should also prove that the concrete measures implemented were necessary to fulfill a legitimate aim. Moreover, the reasons for discriminating exclusively on the grounds of sex or sexual orientation must be particularly weighty, as established in *Salgueiro*²⁹³ and

288 E. POLGÁRI, "The Role of Dynamic Interpretation in Advancing the Rights of Same-Sex Couples under Article 8 of the European Convention of Human Rights", in C. CASONATO, A. SCHUSTER (edited by), *Rights on the move: rainbow families in Europe*, Università degli Studi di Trento, 2014, pp. 109 ff. At 115.

289 *Karner v. Austria*, *supra* note 40.

290 Republic of Austria, *Mietrechtsgesetz*.

291 *Mata Estevez v. Spain*, *supra* note 213.

292 *Karner v. Austria*, *supra* note 40, paras. 40, 41.

293 *Salgueiro da Silva Mouta v. Portugal*, *supra* note 192, para. 29.

*Smith and Grady*²⁹⁴. As for the facts object of *Karner*, the Austrian government should have proven that, in order to protect the traditional notion of family, it was necessary to exclude certain categories of people – namely persons living in a homosexual relationship – from the scope of application of section 14 of the Austrian Rent Act²⁹⁵. The Court found that no argument was advanced by the Austrian government that would allow such a conclusion, and thus found a violation of Art. 14 ECHR taken in conjunction with Art. 8²⁹⁶; an innovation indeed. Art. 8, however, was recalled here only with respect to the right to respect of one's home, while the Court explicitly stated that the protection of "family life" was not relevant for the decision²⁹⁷, thus not detaching from its previous jurisprudence in this sense.

It is necessary to underline that the violation of Art. 14 ECHR – as the Court itself has often reiterated²⁹⁸ – does not necessarily imply the violation of one of the fundamental rights contemplated by the Convention. Contrarily to the violation of the principle of non-discrimination as sanctioned by Protocol 12²⁹⁹, it is sufficient for the object of the complaint to fall within the ambit of one or more provisions of the Convention. Consequently, the prohibition of discrimination sanctioned by Art. 14 ECHR can expand beyond the enjoyment of the rights and freedoms contemplated by the Convention, attracting new rights "under the empire of the Convention"³⁰⁰ in circumstances as when a State has decided to regulate additional rights that fall in the sphere protected by one of the Articles of the Convention. As Schuster stressed, this allows the European Court of Human Rights to decide on rights that would otherwise not be knowable, which have a national, not European identity, since their protection

294 *Smith and Grady v. the United Kingdom*, *supra* note 255, para. 94.

295 Republic of Austria, *Mietrechtsgesetz*.

296 *Karner v. Austria*, *supra* note 40, para. 43.

297 *Ibid.*, para. 32, 33.

298 See for example The *Belgian Linguistics Case*, *supra* note 151 para. 9; *E.B. v. Francia*, *supra* note 60, paras. 47-48: "The prohibition of discrimination enshrined in Art. 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law".

299 Council of Europe, *Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination*, 4 November 2000, ETS 177.

300 A. SCHUSTER, "Le unioni fra persone dello stesso genere nel diritto comparato ed europeo", in B. PEZZINI, A. LORENZETTI (edited by), *Unioni e matrimoni same sex dopo la sentenza 138/2010: quali prospettive?*, Napoli, Jovene, 2011, pp. 255-295 at 286.

is not imposed by the Convention, but accorded by the State³⁰¹.

4.5. *R. and F. v. U.K.*; *Parry v. U.K.*: “Forced divorce” as a condition for the recognition of the “acquired gender” does not violate the Convention

In 2006, the cases *R. and F. v. U.K.*³⁰² and *Parry v. U.K.*³⁰³ represented – for the application of the protection sanctioned by Art. 12 – a hesitation in a development trend that the *Goodwin* case seemed to suggest: the complaints were deemed inadmissible by the Court. The facts at issue concerned the Gender Recognition Act³⁰⁴, a legislative response to the *Goodwin*³⁰⁵ judgment, according to which a transsexual person can obtain the recognition of the right to change their sexual characteristics accordingly to their gender identity and thus be able among other things, after such physical changes, to get married to a person of the opposite sex. However, if the person is already married, the mechanism allows such recognition only after a divorce, preventing *de facto* the person from remaining married, since the new civil status would “transform” the already existing different-sex marriage into a same-sex marriage, which would be invalid under the U.K. law. This sort of mechanism is identified by LGBT advocates as *forced divorce*.

The judges declared that the fact that the U.K. legislation only allowed marriage between two people of different sex, excluding same-sex couples from the institution, was not changed in its effects by the Gender Recognition Act; in other words, if marriage is – under a given legislation – allowed only for different-sex partners, the fact that the current sex of the persons involved can reflect their gender at birth or an “acquired” gender cannot modify the notion of marriage contemplated by the law. The Court then added that no violation of Art. 12 was found, since the choice of preventing same-sex couples to contract marriage fell into the margin of appreciation accorded to States in virtue of the fact that “Article 12 of the Convention similarly enshrines the traditional concept of marriage as being between a man

301 *Ivi*.

302 *R. and F. v. the United Kingdom*, App. no. 35748/05, 28 November 2006.

303 *Wena and Anita Parry v. the United Kingdom*, App. no. 42971/05, 28 November 2006.

304 Gender Recognition Act, entered into force on the 4th of April 2005.

305 *Christine Goodwin v. the United Kingdom*, *supra* note 75.

and a woman (*Rees v. the United Kingdom*, cited above, §49)³⁰⁶. The Court eventually stated that the fact that a number of CoE States had introduced marriage equality in their legislation at the time only reflected the notion of marriage as understood within those societies, but did not imply that same-sex marriage "flows from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950"³⁰⁷. It was 2006, and still the Court refused not only to apply an approach of evolutive interpretation to the notion of marriage, but even implied that the only characteristics of marriage possible to accept were those which originated from the Article *as meant* in 1950, something which finds evolutive interpretation not merely inappropriate for the circumstance, but which completely ignores the possibility of applying such approach to the institution at issue. This is where lies the hesitation in the Court's jurisprudential tendency, since in other circumstances it had already modified the interpretation of certain aspects of the notion of marriage – namely in the *Goodwin*³⁰⁸ judgment.

The proportionality principle was crucial in the decision of according a wide margin of appreciation: the judges indeed stated that, although the female applicant had been forced to "sacrifice her gender or her marriage"³⁰⁹, the effect of the national rulings was not disproportionate because they allowed her to pursue her relationship "in all its current essential"³¹⁰. A reference was made in this sense to the Civil Partnership Act³¹¹, a law introducing an institution which established for same couples obligations and rights similar to those of marriage; this, according to the judges, was "of some relevance" with respect to the proportionality of the effects of the gender recognition regime, since it represented an available alternative to marriage for the couples at issue. Moreover, the Court recalled the "protection of children" and the "safety of the family surrounding" as a reason for "not rushing" to substitute its judgment to that of domestic authorities³¹², which are in a better position to decide on such matters; this passage however may seem paradoxical, since the judges

306 *R. and F. v. the United Kingdom*, *supra* note 302, III: B, the Court's Assessment.

307 *Ivi.*

308 *Christine Goodwin v. the United Kingdom*, *supra* note 75.

309 *R. and F. v. the United Kingdom*, *supra* note 302, III: B, the Court's Assessment.

310 *Ivi.*

311 *Civil Partnership Act 2004*, 18 November 2004.

312 *R. and F. v. the United Kingdom*, *supra* note 302, III: B, the Court's Assessment.

themselves decided to specify – only a few lines later in the judgment – that "...nor were there any children or other individuals identified whose interests might arguably conflict with those of the applicants in this case"³¹³.

Another passage in the judgment is particularly relevant for our purposes, and it concerns the very conception of the institution of marriage on the part of the Court. The Court acknowledged that the applicants saw in the historical and social value of marriage, as in its "affective value"³¹⁴, the very reasons why they were seeking to remain married, but added that precisely those values, as described by national law, excluded them from the institution of marriage. Such elucidation seems to show that the crucial issue at stake in this particular piece of reasoning was the *function* of marriage in European society: the Court seems to suggest that responsibility was to be left to the State when it came to define the conditions of validity of a marriage in relation to the *perception* that citizens had of such institution, thus referring to a notion of family which was highly characterized by *moral* views and beliefs. As highlighted by these cases, there seemed to be a setback in the use of the evolutive interpretation on the part of the Court, with the judges even implicitly stating that, to be valid, a particular application of a fundamental right protected under the Convention had to "flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950"³¹⁵.

Some scholars³¹⁶ have found a link between this setback in the jurisprudence of the ECtHR and the decisions *Fraskil v. Poland*³¹⁷ and *Jaremowicz v. Poland*³¹⁸, issued in 2010. These cases, although not related with LGBT issues, allowed the Court to analyse the nature and bandwidth of the margin of appreciation accorded to States in relation with marriage and Art. 12 in particular. Poland was condemned for a violation of Art. 12 after the denial by the authorities to authorize the applicants to get

313 *Ivi.*

314 *Ivi.*

315 *Ivi.*

316 E. CRIVELLI, "Il diritto al matrimonio riconosciuto dall'art.12 CEDU alla luce della recente giurisprudenza della Corte costituzionale e della Corte EDU", in *Proceedings of La "società naturale" e i suoi "nemici": sul paradigma eterosessuale del matrimonio*, G. Giappichelli, Ferrara, 26 February 2010, pp. 91-96 at 94.

317 *Fraskil v. Poland*, *supra* note 185.

318 *Jaremowicz v. Poland*, App. no. 24023/03, 5 January 2010.

married while in prison. The Court declared so underlining that the right to marry cannot be suspended for prisoners: imprisonment deprives someone of certain freedoms and rights, but these do not include the right to get married³¹⁹. In particular, Polish authorities did not justify their decision on order-related or safety-related grounds, but on speculations about the nature and suitability of the relationship between the people who were asking for the authorization to contract the marriage. The Strasbourg institutions had accepted that domestic legislations imposed limitations on certain aspects of marriage, both formal – such as the characteristics that the celebration must conform to in order to be valid, or the publicity – and substantial, if based on public order – such as legal capacity, consensus, prohibitions linked to degree of kinship, bigamy, or marriages of convenience arranged for immigration purposes³²⁰. Apart from these specific cases, however, domestic legislations "are not allowed to interfere with a detainee's decision to establish a marital relationship with a person of his choice, especially on the grounds that the relationship is not acceptable to them or may offend public opinion"³²¹.

Crivelli notes³²² that such statements seem to contradict the outcomes of cases such as *R. and F. v. U.K.*³²³: if the right to marry entails the right to contract marriage with a person of choice, is it acceptable that a category of fully capable people is denied the protection of such right because they choose a person of their same gender? The author tries to construct a possible answer starting from the example of the changes in the understanding of marriage concerning the sex and gender of the people contracting it. Indeed, we witnessed a change from the Court's early notion of marriage as the union of a man and a woman to a notion which is basically distinct from the merely biological aspect³²⁴, and the change occurred up to this point in the ECtHR's jurisprudence had been justified by citing the radically modified social environment: for example, "There have been major social changes in the institution of

319 *Frasik v. Poland*, *supra* note 185, para. 91.

320 *Ibid.*, para. 89.

321 *Ibid.*, para. 95.

322 E. CRIVELLI, "Il diritto al matrimonio riconosciuto dall'art.12 CEDU alla luce della recente giurisprudenza della Corte costituzionale e della Corte EDU", in *Proceedings of La "società naturale" e i suoi "nemici": sul paradigma eterosessuale del matrimonio*, G. Giappichelli, Ferrara, 26 February 2010, pp. 91-96 at 95.

323 *R. and F. v. the United Kingdom*, *supra* note 302.

324 See *Christine Goodwin v. the United Kingdom*, *supra* note 75, para. 98

marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality"³²⁵. This was a typical manifestation of the evolutive approach often used by the Court when dealing with problematic issues, related to interpretations of certain provisions which belong to completely different social and historical contexts. Crivelli continues suggesting that the Court thus should not make do with recalling the traditional meaning of the right to marry as understood by contracting States in 1950 – as done in *R. and F. c. U.K.*³²⁶ and *Parry v. U.K.*³²⁷ – after having already admitted for example that the right to contract marriage is distinct from that of forming a family – as in *Goodwin v. U.K.*³²⁸ – and that national legislation cannot deprive a fully capable person or category of people of the right to get married to a person of their own choice – as in *Frasik v. Poland*³²⁹. This argument seems particularly convincing if one thinks of a piece of reasoning provided by the Court in the *Frasik* judgment. The judges claim that the conclusion that a State cannot prevent a person from getting married to a person of their choice is reinforced by the wording of Art. 12. Differently from Art. 8(2), which is strictly related to the right to contract marriage and form a family, Art. 12 does not permit the State to interfere with the lives of its citizens “in accordance with the law” and with measures which are “necessary in a democratic society” for reasons as “the protection of health or morals” or “the protection of the rights and freedoms of others”³³⁰. The author's point is that – having witnessed the changes we mentioned in the aspect of gender related to marriage – it seems reasonable to think that the substantial changes in national legislations and societies concerning the perception of homosexuality will bring about modifications of the interpretation of the right to contract marriage: the notion of marriage could this way be not only separated from the biological aspect, but also from the difference in the gender of two people who seek to get married. As far as the perception of changes occurring in CoE societies concerning homosexuality is concerned, there is a Court's judgment in particular which seems of some relevance in this sense, published in

325 *Ibid.*, para. 100.

326 *R. and F. v. the United Kingdom*, *supra* note 302.

327 *Parry v. the United Kingdom*, *supra* note 303.

328 *Christine Goodwin v. the United Kingdom*, *supra* note 75, para. 98.

329 *Frasik v. Poland*, *supra* note 185., para. 95.

330 *Ibid.*, para. 90.

1999: it is the case *Lustig-Prean and Beckett v. U.K.*³³¹, where it was stated that the Court cannot ignore the ideas concerning homosexuality which continue to spread and evolve, nor the changes in supranational and national law they entail. It was February 2010 when Crivelli's paper was published, and then things went very differently in June of the same year with the case *Schalk and Kopf v. Austria*³³², when the ECtHR declared without leaving any doubt that Art. 12 does not oblige States to include marriage for homosexual couples in their legislations. Today, even after the groundbreaking *Oliari and Others v. Italy*³³³, no such obligation is imposed on member States.

4.6. E.B. v. France: whether domestic authorities approve an unmarried individual's application to adopt, the decision may not be based on the applicant's sexual orientation

In 2008, the judgment of the *E.B. v. France*³³⁴ was issued. The decision completely reversed the findings of *Fretté v. France*³³⁵: fundamentally, it establishes that, whether domestic authorities approve an unmarried individual's application to adopt, the decision may not be based on the applicant's sexual orientation.

The applicant was a primary school teacher, a lesbian woman living with her female partner, who was denied access to adoption for reasons which didn't explicitly include her sexual orientation, but who claimed – relying on Artt. 8 and 14 – that such reasons were in fact hiding a discrimination. The motivations brought by the national authorities were, first of all, doubts that the lack of a fatherly figure posed risks for a healthy development of the child and, secondly, doubts linked to the behaviour of the woman's cohabiting partner: the latter had agreed with her partner's choice, but had also expressed the will to not be involved in it. The Court deemed the complaint admissible, stressing that the alleged violation did not concern the reasons brought by the French Government, since the very same reasons could have been applied to a heterosexual single woman – precisely because the reasons did not

331 *Lustig-Prean and Beckett v. the United Kingdom*, *supra* note 256.

332 *Schalk and Kopf v. Austria*, *supra* note 58.

333 *Oliari and Others v. Italy*, *supra* note 214.

334 *E.B. v. France*, *supra* note 60.

335 *Fretté v. France*, *supra* note 280.

include sexual orientation. However, the Court then went on evaluating in a particularly incisive way³³⁶ the motivations provided by the French Government to justify the denial, and found that at the base of such considerations lied a prejudice operating against the applicant's interests, which had operated as a – although implicit – determining factor in the assessment of her application for adoption. Considering the importance of sexual orientation as the manifestation of an essential aspect of one's personality, the Court believed that the fact that it was indeed a determining factor of the denial makes the measures taken by the national authorities arbitrary and not proportionate. The reasons provided by the national authorities, most of all the one regarding the lack of a fatherly figure, could – according to the Court – frustrate the effectiveness of the recognition of the right to adopt for singles and thus to determine an indirect discrimination when the person seeking adoption is a homosexual.

Thinking back to the *Fretté*³³⁷ judgment, the change in the attitude of the European Court of Human Rights is patent. If we look at the reasoning offered by the Court, it is clear for example that, in *E.B.*, the weight accorded to the national margin of appreciation is limited compared to that in the *Fretté* case. In *E.B.*, the margin remains in the background of the reasoning and motivating, it does not really determine their nature. Some scholars saw this as a sign of the progressive erosion of national power and authority when it comes to establish the timing and modalities of a non-discriminatory enjoyment of the possibility to adopt³³⁸. From a different point of view, the *E.B.* case reflects also an approach to the protection against discrimination which is different from the one in *Fretté*, but more similar for example to that of the *Salgueiro* case: to abandon the comparative evaluations of situations which are allegedly comparable to those at issue but treated in a different manner, and instead choosing to take substantially into consideration the possible presence of an overall discriminatory attitude of the national authorities, which – if found – constitutes the manifestation of an indirect discrimination³³⁹.

336 G. REPETTO, *supra* note 19, p. 157.

337 *Fretté v. France*, *supra* note 280.

338 See E. LAMARQUE, "Adozione da parte dei single omo e eterosessuali: i paesi del Consiglio d'Europa stanno perdendo il loro margine di apprezzamento?", in *Quaderni costituzionali*, 2008, pp. 906-910.

339 G. LETSAS, "No Human Right to Adopt? Gay and Lesbian Adoption Under the ECHR", in *UCL*

The substantial attitude of using the anti-discrimination test to evaluate a violation which was not a foundation of the behaviour of a State, but worked as an implicit condition of such behaviour, can be seen as a new phase of overture in the Court's approach. This new approach left behind the prejudice deriving from a negative perception of homosexuality, and started to pose questions about the implicit conditions which fueled the reproduction of heterosexuality as the norm; just as happened in *E.B.*³⁴⁰, with the belief systems of the functionaries and judges involved domestically fuelling – although implicitly – a discursive and social norm that sees in heterosexuality the only possible reference for adoption³⁴¹.

However, it seems reasonable to wonder whether this greater sensitivity to social claims could be due to the fact that, in the situation at issue, the claim was purely individual; it did not, even indirectly, affect the possibility that a homosexual *couple* could have the right to access procedures of adoption. This circumstance could make us think of this decision as of a last manifestation of the Court's early approach to homosexuality and non-heteronormative gender identity: the nature of the private and individual life of LGBT people was given particular weight, even when they lived a social, relational experience, such as occurs when they seek to adopt children. If it was so, also the protection against discrimination could consequently be functional to the guarantee of those spaces of individual freedom which every person equally has a right to, independently from its sexual orientation or gender identity³⁴². When such protection let LGBT subjects and claims into the realm of anti-discrimination, at the same time it limited the success of those claims to the only aspect of individual freedom, without it really transforming the perception and notion of couple or family, and the *status* LGBT persons enjoyed³⁴³. In this sense, maybe it was still true that, as Grigolo argued in 2003, "the more a relationship or a family differentiates itself from the traditional sexual and biological requirements of *the*

Human Rights Review, 1, 2008, pp. 18 ff. at 23.

340 *E.B. v. France*, *supra* note 60.

341 See P. JOHNSON, "Adoption, Homosexuality and the European Convention on Human Rights: *Gas and Dubois v. France*", in *The Modern Law Review*, 75:6, 2012, pp. 1136-1149.

342 G. LETSAS, *supra* note 254, p. 17.

343 M. GRIGOLO, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject", in *European Journal of International Law*, 14:5, 2003, pp. 1023-44 at 1039.

family based on marriage, the less likely recognition becomes"³⁴⁴.

³⁴⁴ *Ibid.*, p. 1040.

Chapter 5.

From 2010 up to today: dynamic approach prevailing

CONTENTS: 1. *Kozak v. Poland*: if succession to a tenancy is allowed to “de facto marital couples”, it cannot be prohibited to same-sex couples – 2. *Schalk and Kopf v. Austria*: same-sex couples constitute “family life”; there is no positive obligation to recognise same-sex marriage, but when member States do so, same-sex marriage is protected under Art. 12 – 3. *Gas and Dubois*: permitting step-child adoption only to married couples is not discriminatory, even if this indirectly excludes same-sex couples from such possibility – 4. *X and Others v. Austria*: if access to step-child adoption is allowed to unmarried couples, the State cannot prohibit it to same-sex couples, in light of the best interest of the child – 5. *Vallianatos v. Greece*: if a member State introduces forms of civil union, prohibiting access to it to same-sex couples amounts to discrimination – 6. *Hämäläinen v. Finland*: it is not disproportionate to require, as a precondition to legal recognition of an “acquired” gender, that the applicant’s marriage be converted into a registered partnership – 7. *Oliari and Others v. Italy*: member States have a positive obligation to assure legal recognition to same-sex couples.

Up to this point, we have undoubtedly witnessed an increase in the Court's "sensitivity" to LGBT claims; in terms of legal reasoning, this translates into evolutive interpretations of the Convention which originated from a deeper awareness of the social and legal obstacles that homosexual and transgender people face in their lives. However, the ECtHR's jurisprudence still demonstrated a clear reluctance towards the recognition of LGBT familiar ties as "family" at that point.

Passing on to the cases decided on from 2010, we can see that the tendency towards the extension of the scope of the right to respect for family life for LGBT people has slowly reached its peak. In these 5 years, the anti-discrimination judgment has more than ever served as a vehicle for broad changes. We will examine the final phases of the progression towards the recognition of same-sex couples as families under the Convention, and a great opening towards same-sex marriage, though the Court still does not believe that States have a positive obligation to introduce it in their national legislations, because of the lack of a European consensus on the matter. This is at the base of a judgment allowing a State to require “forced divorce” in order to recognise the sexual transition of a transsexual person; the judgment can be perceived as a hesitation in the tendency of the Court and has attracted critiques for

the allegedly poor consideration of the best interest of the minor involved, but is after all in line with the findings of the Court with respect to marriage. As for adoption, in a similar way, the alignment with the findings on the notion of marriage has led to some hesitations: the Court still believes that the protection of the *status* that marriage enjoys can prevent unmarried couples, meaning that in some States such possibility is out of access for LGBT people. However, the anti-discrimination judgment operates as a factor of opening, with a pattern we already encountered when dealing with other issues.

Lastly, the evolution of the notion of family took its biggest step forward. After having stated the importance of legal recognition of same-sex couples as a vehicle for the social dignity they deserve *as couples*, the Court detected in 2015 a new domestic, European and international consensus on the matter. This translated into a complete erosion of the margin of discretionality accorded to States when it poses limitations for same-gender couples on their enjoyment of family life, and the Court established that member States have a positive obligation to legally recognise such unions.

5.1. *Kozak v. Poland*: if succession to a tenancy is allowed to “*de facto* marital couples”, it cannot be prohibited to same-sex couples

In *Kozak v. Poland*³⁴⁵, the Court dealt again with the prohibition of the succession of a tenancy agreement to the deceased tenant's partner in a same-gender couple; the applicant alleged that he was discriminated against because of his sexual orientation³⁴⁶. The Court found that Poland had violated Art. 14 ECHR taken in conjunction with Art. 8.

At the time, Poland was in a historical phase of strong defence of the traditional family, and had explicitly excluded in its legislation any form of

345 *Kozak v. Poland*, *supra* note 61. See C. DANISI, "Kozak c. Polonia: difesa della famiglia e discriminazioni fondate sull'orientamento sessuale", in *Forum di Quaderni Costituzionali*, 14 marzo 2010 [available at http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/corte_europea_diritti_uomo/0009_danisi.pdf].

346 *Kozak v. Poland*, *supra* note 61, para. 97.

recognition of same-sex couples, as it was contrary to the Constitution³⁴⁷. A bill proposed in 2003 on the matter had led to heated debates, which however did not reach any result, due to the dissolution of the Polish Parliament. The *Kozak* case is of great relevance because it involves a State which had actively opposed the Charter of Nice³⁴⁸, stating in particular that "the Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity"³⁴⁹. In the judgment, indeed, no reference was made to the Charter of Nice and in particular to its Art. 21, which protects sexual orientation as a possible ground of discrimination, as happened in other Strasbourg judgments³⁵⁰. The Convention, still today, remains the only international instrument binding Poland to not discriminate against gays, lesbians and transgender people³⁵¹ – apart from the general principles of EU law which, as a Member State, it should comply with.

Mr. Kozak alleged the violation of Art. 14 taken in conjunction with Art. 8 in relation with his private life, due to the fact that the Polish authorities denied him the possibility of succeeding to his late partner in the tenancy agreement of the house they had shared for many years. The different treatment was found by the applicant comparing his situation with that of heterosexual unmarried stable couples. The applicant had in effect declared before the national judges that he had lived with the deceased tenant and, under the Polish law, *de facto* marital cohabitation was one of the conditions which guaranteed the succession; in particular, under the national jurisprudence, *de facto* marital cohabitation existed when there were verifiable physical, affective and economic bonds. The problem however lies in the word

347 The Constitution of the Republic of Poland, Art. 18: "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."

348 *Charter of Fundamental Rights of the European Union*, *supra* note 169.

349 Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, no. 61, Republic of Poland.

350 C. DANISI, "Kozak c. Polonia: difesa della famiglia e discriminazioni fondate sull'orientamento sessuale", in *Forum di Quaderni Costituzionali*, 14 March 2010, p. 3.

351 Up to this point we have mostly used the noun "transsexual", in order to stick with the language used by the European Court. "Transgender" indicates someone who experiences a discrepancy between their "psychological" gender and their biological sex; the same is true for transsexuals, but a transsexual has already began a transition towards their true sex. This is mainly the reason why the Court always used the term "transsexual": it deals with transgender people only with respect to legal issues which only occur after their transition, such as the recognition of their post-operative sex.

"marital": although it was not equated to marriage, the typical characteristics of the institution of marriage were extended to this form of union in light of the Constitution, which prohibited its application to same-sex couples. Therefore, even if the applicant had proven the existence of such bonds, his relationship would not have been recognised as a *de facto* marital cohabitation, precisely because the couple was a homosexual couple. According to the national judges, in a situation like that of Mr. Kozak, the only meaning of the law to take into consideration was the one generally recognised in the national judicial system: indeed, the only international instrument mentioned by the national judges on the matter was Art. 12 ECHR, which as we saw had to be intended as protecting marriage between a man and a woman, if the national law does not contemplate other forms of marital union. The exclusion of homosexual couples from this benefit, according to the State, was therefore carried out in order to protect the traditional notion of marriage.

The Court was not convinced by the fact that such distinction did not amount to discrimination because it was solely due to the fact that the characteristics of *de facto* marital unions were originated by those of marriage, and acknowledged that the consequence of the provisions of the Polish law was in fact a different treatment between heterosexual and homosexual unmarried couples. In determining whether the discrimination pursued a legitimate aim and maintained "reasonable proportionality between the means employed and the aim sought to be realised"³⁵², the judges found that this was one of those cases in which the margin of appreciation is narrow. Moreover, if the difference of treatment is based on sex or sexual orientation, it must be demonstrated that the implemented measures were necessary in the circumstances; if otherwise the distinction is exclusively based on sexual orientation, then it amounts to discrimination³⁵³. The Court concluded that the declared aim of assuring special protection to the traditional family, founded on marriage between a man and a woman, could not be pursued through "a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy"³⁵⁴, because that blanket exclusion was not necessary, nor proportionate to the aim sought.

352 *Kozak v. Poland*, *supra* note 61, para. 91.

353 *E.B. v. France*, *supra* note 60, paras. 91 e 93.

354 *Kozak v. Poland*, *supra* note 61, para. 99.

This may seem to contradict the claim that the aim to protect the heteronormative notion of family constitutes a weighty and legitimate reason to justify a different treatment, which instead remained valid for the Court; therefore, in order to clarify its standard of review, the Court – in line with what at the time was its recent jurisprudence – underlined that [emphasis added]

The Court accepts that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see *Karner*, cited above, §40, with further references). However, in pursuance of that aim a broad variety of measures might be implemented by the State (*ibid*). Also, given that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see *E.B.* cited above, §92), the State, in its choice of means designed to protect the family and secure, as required by Article 8, respect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, *including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life*³⁵⁵.

For these reasons, the Court eventually condemned Poland for the blanket exclusion appealed against by the applicant, found in breach of Art. 14 taken in conjunction with Art. 8.

That last reported sentence perfectly points out the gate opened by the Court at this point in its jurisprudence. There is not one way of living family life. This is the turning point that will connect the decisions the Court had taken so far with family life as understood after June 2010, when *Schalk and Kopf v. Austria*³⁵⁶ marked a watershed for the development of the notion of family.

5.2. *Schalk and Kopf v. Austria*: same-sex couples constitute “family life”; there is no positive obligation to recognise same-sex marriage, but when member States do so, same-sex marriage is protected under Art. 12

The same year, the Court published the groundbreaking judgment on the case *Schalk and Kopf v. Austria*³⁵⁷. For the first time, the European judges were asked to evaluate whether the denial by national authorities – the Austrian authorities in the

³⁵⁵ *Ibid.*, para. 98.

³⁵⁶ *Schalk and Kopf v. Austria*, *supra* note 58.

³⁵⁷ *Idem*.

case at issue – of a same-gender couple's right to contract marriage constituted a breach of the Convention, in particular of Art. 14 taken in conjunction with Art. 8, and Art. 12. Although not identifying a violation, the outcome indeed established greatly innovative principles.

The judgment starts first of all with a comparative analysis of European legislations on the matter, in order to deduct the presence or lack of a European consensus on marriage equality³⁵⁸. Also, the judgment refers to Charter of Fundamental Rights of the European Union, in particular to its Art. 9, where no reference to the gender of the spouses has been made, hence leaving the decision to recognise or not the right to marry for homosexual couples to the contracting States. The Court continued with the reconstruction of the relevant juridical context recalling two EU directives – about family reunification and about the right of citizens and their families to freely move and reside within the European Union³⁵⁹ – which include same-sex unmarried partners together with spouses in the categories subjected to the directive, when the relevant national legislation equalizes the two figures. The framework was completed by observing that, out of the 47 contracting States of the ECHR, only six granted access to marriage to couples of the same-sex at the time: Belgium, Netherlands, Norway, Portugal, Spain, Sweden; other 13 States, although not allowing same-sex marriage, had introduced different forms of civil partnerships and civil unions, with the consequent recognition of rights and obligations.

It is worth noting that among the third parties intervened with arguments in favour or against the couple's claims, which generally include influential associations and NGOs, was the Government of the United Kingdom. The U.K. Government intervened in favour of the arguments of the Austrian Government, underlining the precedent represented by the case *Sheffield v. U.K.*³⁶⁰ as an example to follow. In *Sheffield*, the Court had affirmed that Art. 12 ECHR exclusively referred to the traditional notion of different-sex marriage³⁶¹. The U.K. Government admitted that the

358 *Ibid.*, para. 58.

359 European Union, Council *Directive on the right to family reunification*, 2003/86/EC, 22 September 2003; European Union, European Parliament and Council *Directive concerning the right of citizens of the Union and their family members to move and reside freely within the territory of the member States*, 2004/38/EC, 29 April 2004.

360 *Sheffield and Horsham v. the United Kingdom*, *supra* note 144.

361 *Ibid.*, para. 66.

Convention is a "living instrument" and that it can sanction social developments, as it happened for example with the *Goodwin*³⁶² case, but precisely the Goodwin judgment would have prohibited the possibility of a revirement on the opportunity to expand marriage to same-sex couples, since a European consensus lacked on the matter³⁶³.

The Strasbourg judges, although recognizing that Art. 12 was originally meant to apply to heterosexual marriage, declared that such provision cannot be further interpreted on the base of purely biological criteria, and conclude that its applicability also to same-sex marriage cannot be *totally* excluded anymore, this evolutive interpretation being supported by a European trend sanctioned by the wording of Art.9 of the Charter of Fundamental Rights, and even more by precedents in the jurisprudence of the Court which declared that the impossibility of a couple to procreate could not *per se* limit a couple's right to contract marriage³⁶⁴. However, the Court decided unanimously that Austria was not violating Art. 12 ECHR for not allowing same-sex marriage³⁶⁵, and European consensus played a crucial role in such decision.

The Court recognised that "the institution of marriage has undergone major social changes since the adoption of the Convention"³⁶⁶, and admitted that a trend existed towards a development of the notion of marriage, but found that this trend was not common to the majority of CoE States, therefore representing no European consensus on the introduction of same-sex marriage. In other words, if the nature of "living instrument" of the Convention led the Court to affirm that same-sex couples *could* be included in the beneficiaries of the institution of marriage, the lack of a common standard required a wide margin of appreciation to be accorded to the States on the matter, meaning that States were *allowed* to introduce same-sex marriage – which would then be protected under Art.12 – but they were not *obliged* to do so under the Convention. Therefore, the Court claimed that Art. 12 ECHR must not

362 *Christine Goodwin v. the United Kingdom*, *supra* note 75.

363 Notice that, at the time of the delivery of the U.K. intervention, in the year 2004, only three States allowed same-sex marriage.

364 *Christine Goodwin v. the United Kingdom*, *supra* note 75, para. 98.

365 Notice that a concurring opinion has been published with the judgment. The opinion however is *concurring* and not *dissenting*, meaning that the judge agrees with the decision but disagrees with part of the argumentation; in this case, the judge believed that less weight had to be recognised to the wording of Art. 9 of the Charter of Fundamental Rights.

366 *Schalk and Kopf v. Austria*, *supra* note 58, para. 58.

necessarily and "in all circumstances" be limited to marriage between two persons of the opposite sex, but concluded that the provision was to be deemed inapplicable to the case at issue because the decision of allowing marriage equality had to be referred to the national legislations of contracting States. In particular, the judges pointed out that marriage had "deep-rooted social and cultural connotations which may differ largely from one society to another", but held that the European judges "must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society"³⁶⁷.

The complaint concerned also the protection of family life, and in this respect the Court established the other great innovation of this case. After reiterating that relationships between persons of the same gender could fall under the notion of "private life", the judges declared that a European consensus had emerged for the recognition of homosexual unions as "family" and, for this reason,

...considers 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 *de facto* partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.³⁶⁸

However, no further, relevant juridical consequences seemed to derive from this inclusion of same-sex stable couples into the notion of "family life"³⁶⁹ – for the moment – since no violation was found. Passing on to evaluating any violation of Art. 14, the Court affirmed that if Art. 12 did not impose onto States an obligation to guarantee access to marriage to same-gender couples, a similar obligation could not be deducted by Art. 14 in conjunction with Art. 8 either, being such provisions of more general purpose and scope³⁷⁰. In the decision, much had to do once again with the margin of appreciation doctrine.

It is useful to underline that, as the *Schalk* case was pending, Austria introduced a law according homosexual and heterosexual couples the possibility to register civil partnerships, which established rights and obligations similar to those of marriage³⁷¹. In evaluating any violation of the Convention for not having done so

367 *Schalk and Kopf v. Austria*, *supra* note 58, paras. 60-62.

368 *Ibid.*, para. 94.

369 M. CARTABIA, *Dieci casi sui diritti in Europa*, Il Mulino, Bologna, 2011, p. 68.

370 *Ibid.*, para. 101.

371 The Court mentions *Parry v. the United Kingdom*, *supra* note 303; *R. and F. v. the United*

earlier, that is for not introducing an institution alternative to marriage, the Court once again relied on the concept of European consensus to affirm that Austria could be reproached for any particular delay with respect to the legislative approaches of other European Countries on the issue, because – once established that same-sex stable couples fell under the protection of "family life" – a margin of appreciation had to be accorded to each State regarding the modalities and timing with which to introduce forms of regulation and institutions alternative to marriage.

In the Court's words, the recognition of homosexual unions had to be regarded "as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes"³⁷². We can thus affirm that, while the Court explicitly excluded that States were subjected to a positive obligation to allow same-sex marriage, it indeed aimed at encouraging the development of national legislations on registered unions; however, it did so cautiously, avoiding to "rush to substitute its own judgment in place of that of the national authorities", and thus according them a margin of appreciation with respect to the timing they consider appropriate, in virtue of their "better position".

It is also true that the Court, in this circumstance, has not clarified whether member States had a positive obligation to accord same-sex couples a formal recognition. This question will remain unanswered in *Vallianatos v. Greece*³⁷³, and the issue will eventually be settled in *Oliari and Others v. Italy*³⁷⁴.

5.3. Gas and Dubois: permitting step-child adoption only to married couples is not discriminatory, even if this indirectly excludes same-sex couples from such possibility

In the case *Gas and Dubois v. France*³⁷⁵ of March 2012, the Court excluded that French legislation concerning the *adoption simple* constituted a violation of Art.

Kingdom, *supra* note 302. In the judgments, the Court affirmed that the opportunity of entering into a civil partnership contributed to the proportionality of the measure complained of, that is requiring divorce to a married, transsexual person as a condition to obtain full gender recognition.

372 *Schalk and Kopf v. Austria*, *supra* note 58, para. 105, 106.

373 *Vallianatos v. Greece*, *supra* note 57.

374 *Oliari and Others v. Italy*, *supra* note 214.

375 *Gas and Dubois v. France*, App. no. 25951/07, 15 March 2012.

14 taken in conjunction with Art. 8. The applicants were a couple of French women who had contracted a *Pacte Civil de Solidarité* (PACS); the first applicant had sought to adopt the biological daughter – who was born thanks to artificial insemination by donor performed in Belgium – of the second applicant, but her request had been rejected by French authorities. Art. 365 of the French Civil Code normally contemplates the complete transfer of parental responsibility to the adopter in case of simple adoption, but also contemplates an exception in the case that the adopted is the child of the spouse. In that case, the law allows a concurring exercise of the parental responsibility on the part of both spouses³⁷⁶. Since same-sex marriage was not allowed in France at the time, the French legislation was *de facto* prohibiting same-sex couples from obtaining a simple adoption order leading to a concurring exercise of the parental responsibility, while that possibility was allowed to married, and thus heterosexual, couples. Indeed, the main argument provided in national courts for denying the possibility of adopting the child was that it would have been detrimental to the best interest of the child: since the women were not married, an *adoption simple* would have implied the complete transfer of the parental responsibility to the adoptive parent, meaning that the biological mother would have lost her parental rights on the child.

This is why the women claimed that they had been subjected to discrimination based on their sexual orientation. The complaint did not therefore concern Art. 12 – we saw that after *Schalk and Kopf* it was out of doubt that not allowing same-sex couple to contract marriage falls without in the margin of appreciation accorded to States – and the couple was not seeking access to marriage in the case at issue; rather, they stressed the discriminating consequences of the legislation concerning simple adoption, considered detrimental to them and to the child. Such discriminating consequences were due to the fact that a marriage is required in order to accord both

³⁷⁶ *Code civil des Français*, Art. 365: “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. Les droits d'autorité parentale sont exercés par le ou les adoptants dans les conditions prévues par le chapitre les du titre IX du présent livre. Les règles de l'administration légale et de la tutelle des mineurs s'appliquent à l'adopté”.

parents, biological and adopter, concurring parental responsibility, marriage they were not able to contract under the law. The applicants pointed out that

This discriminatory difference in treatment also applied between same-sex couples who cohabited or had entered into a civil partnership and heterosexual couples in the same situation, since the latter could circumvent the strict requirements of Article 365 of the Civil Code by marrying, an option that was not available to same-sex couples. The applicants stressed that they were not seeking access to marriage in the instant case, but emphasised that the provisions of the Civil Code merely appeared to be neutral but in fact gave rise to indirect discrimination.³⁷⁷

Lastly – accordingly to the couple's claims – such different treatment did not pursue any legitimate aim, but it went against the minor's interest to see his right to have two parental figures protected³⁷⁸.

Despite the complexity of the case – which concerns the French regulation of adoption, but also of artificially assisted procreation and *de facto* cohabitation, the Court opted for a "minimal" approach in deciding on the case³⁷⁹: the judges focused more – in fact, almost exclusively – on the alleged violation of Art. 14 ECHR, and less on the aim pursued and on the proportionality of the difference in treatment. The Court compared the applicant couple with a heterosexual, married couple, in order to verify any significative difference in treatment and – if differences were found – whether they were legitimate or not. The result was that given the social, legal and personal consequences of marriage, and given the particular status which couples gain with marriage, the Court did not believe that the two situations were comparable³⁸⁰. The Court affirmed that the discretionality accorded to States in providing different regimes for married and cohabiting couples is not limited by Art. 12 of the Convention, which – as affirmed in *Schalk and Kopf* – does not compel contracting States to introduce marriage equality in their legislations: therefore, the option to derogate the rule of the full transfer of paternal authority on the adopter only in the case of adoption of a spouse's child falls into the discretionality of the national legislator. Comparing the couple to a cohabiting or PACSed different-sex couple, the

377 *Gas and Dubois v. France*, *supra* note 375, para. 42.

378 *Ibid.*, para. 46.

379 C. NARDOCCI, "Per la Corte Europea l'impossibilità di adottare la figlia della propria partner omosessuale non costituisce trattamento discriminatorio ai sensi dell'Art. 14 della Convenzione.

Osservazioni a margine di *Gas e Dubois c. Francia*", in *Rivista AIC*, 3:2012, September 2012

380 *Gas and Dubois v. France*, *supra* note 375, para. 49.

judges found the two perfectly comparable, and stressed that such heterosexual couple would also be denied the possibility of simple adoption, thus excluding a difference in treatment based on the sexual orientation of the applicants. Therefore, the Court did not find a violation of Art. 14 ECHR taken in conjunction with Art. 8³⁸¹.

At this point in the jurisprudence of the Court, this last case represents a perfect example of criticalities in the evaluation of the best interest of the child: in the judgment, the Court did not include the best interest of the minor in the aspects which deserved to be balanced against each other, thus "flattening" its decision on the interests of the couple. This left aside the discrimination to which the daughter is subjected to on the grounds of the sexual orientation of her biological mother and her mother's partner³⁸². Many have argued – when dealing with same-sex parents – that the sexual orientation of the parents does not change the fact that the interests of the minor are better fulfilled when they can enjoy the juridical protection of two parents, what grants them double financial support, inheritance and pension rights³⁸³. However, this view must operate within a still delicate field, and compete with an issue often perceived as controversial, like LGBT parenting: so much so that the best interest of the child has been used in favor *and* against adoption by single parents³⁸⁴ or by same-sex couples³⁸⁵. What we know is that the international framework tends to work in favour of homosexual parenting³⁸⁶ through the recognition of minors' right to have a family, independently from the sexual orientation or gender identity of the parents. On this point, it is useful to recall what the European Court of Human Rights stated in the decision *Emonet and Others v. Switzerland*³⁸⁷ of 2007: "As regards, more specifically, the obligations under which Article 8 of the Convention places the Contracting States in respect of adoption, they must be interpreted in the light of the

381 *Ibid.*, para. 73.

382 *Ibid.*, Separate Opinions, Dissenting Opinion of Judge Villinger.

383 R. WINTEMUTE, "Written comments of FIDH, ICJ, ILGA-Europe, BAAF & NELFA", 11 December 2009. Written comments submitted on behalf of FIDH (Fédération Internationale des ligues des Droits de l'Homme), ICJ (International Commission of Jurists), ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), BAAF (British Association for Adoption and Fostering), and NELFA (Network of European LGBT Families Associations), para. 7.

384 *Di Lazzaro v. Italy*, App. no. 31924/96, 10 July 1997.

385 M.F. MOSCATI, "Genitorialità sociale e orientamento sessuale", in A. SCHUSTER (edited by), *Omogenitorialità. Filiazione, orientamentosessuale e diritto*, Mimesis, Udine, 2011, p. 77.

386 *Ivi.*

387 *Emonet and Others v. Switzerland*, App. no. 39051/03, 13 December 2007, para. 65.

United Nations Convention on the Rights of the Child, of 20 November 1989³⁸⁸, and the European Convention on the Adoption of Children, of 24 April 1967³⁸⁹. Moreover, *Salgueiro da Silva Mouta*³⁹⁰ provided us with another example of the tendency to not find any relevance of the sexual orientation of a parent in their relationship with the child: in that occasion, the Court deemed admissible the complaint of a father deprived of his parental responsibility for being homosexual, recognizing that the principle of non-discrimination on the grounds of sexual orientation is applicable not only to the relationship between two people forming a couple, but also to parental adult-child relationships³⁹¹. In that case the affective relation between the father and his daughter was taken into great consideration, so much so that such relation was at the base of the arguments in favour of the finding of a violation; the Court even chose to declare that the best interest of the child prevailed over the lack of a European consensus on the matter³⁹².

Since the *Fretté* case³⁹³, the ECtHR has excluded that a "right to adopt" was protected by the Convention, stressing that the institution of adoption pursues the aim to assure parents to a child and not the other way around³⁹⁴; however, it also formulated the broader principle according to which, when competing interests are at stake, the best interest of the minor must function as the "key" to operate a just balancing³⁹⁵.

For some scholars, the key point of *Gas and Dubois* seems to be the re-categorization of the anti-discrimination judgment: the Court indeed re-categorized the terms of the discourse moving the focus from sexual orientation as a possible factor of discrimination to a difference of status – between married and unmarried couples. This is at the base of the critiques of a "minimal" approach by the Court which, recalling the different treatment and sanctioning it with the margin of

388 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577.

389 Council of Europe, *European Convention on the Adoption of Children (Revised)*, Council of Europe Treaty Series No. 22, Strasbourg, 27 November 2008.

390 *Salgueiro da Silva Mouta v. Portugal*, *supra* note 192.

391 J. LONG, "I giudici di Strasburgo socchiudono le porte all'adozione degli omosessuali", in *La nuova giurisprudenza civile commentata*, 2008, p. 672 ff.

392 *Salgueiro da Silva Mouta v. Portugal*, *supra* note 192, para. 28.

393 *Fretté v. France*, *supra* note 280.

394 *Ibid.*, para. 42.

395 B. RAINEY, E. WICKS, C. OVEY, *supra* note 178, p. 343.

appreciation, weakened the discrimination in the national legislation and avoided evaluating the proportionality of the denial of adoption in virtue of what is "necessary in a democratic society". Repetto³⁹⁶ argues that a better examination of proportionality would have required the Court to go beyond the mere search for similarities and differences between married and unmarried couples, and would have clarified whether the apparent neutrality of the legislation was in fact hiding a choice that was exclusively based on sexual orientation. In *Kozak*,³⁹⁷ for example, the Court had declared that, in cases in which there is the possibility of a difference of treatment based on sexual orientation, its legitimacy had to be examined with a proportionality test, in order to establish if it was necessary, in general and according to the specific circumstances of the case. After all, it was exactly what the Court did in the *E.B.*³⁹⁸ judgment concerning adoption by a lesbian woman, concluding that an apparently non-discriminatory measure taken by a government was in fact hiding an overall discriminatory attitude. This was not done in deciding on *Gas and Dubois v. France*³⁹⁹.

5.4. *X and Others v. Austria*: if access to step-child adoption is allowed to unmarried couples, the State cannot prohibit it to same-sex couples, in light of the best interest of the child

The case *X and Others v. Austria*⁴⁰⁰ concerned a couple of two Austrian women seeking to obtain a second-parent adoption of a child: one of the women was seeking to adopt the child of the other. According to the Austrian Civil Code⁴⁰¹, one of the biological parents can be substituted through adoption only by a person of their same sex, thus excluding same-sex couples from second-parent adoption. Moreover, the law on civil unions⁴⁰² – the *Lebenspartnerschaftsgesetz* – explicitly prohibited that a registered partner adopted the child of the other. The couple did not register their partnership, but the three applicants, the couple and their child, had lived

396 G. REPETTO, *supra* note 19, p. 161.

397 *Kozak v. Poland*, *supra* note 61, para. 92.

398 *E.B. v. France*, *supra* note 60.

399 *Gas and Dubois v. France*, *supra* note 375.

400 *X and Others v. Austria*, *supra* note 57.

401 *ABGB*, Art. 182(2).

402 *LPG*, Art. 8(4), entered into force on the 1st of January 2010.

together as a family for many years, so they were *de facto* living as a family. The child was born outside marriage from a previous relationship and had been cared of jointly by the two women since he was approximately five years old. The Court found that the two mentioned provisions of the Austrian law, which contemplated a different treatment for heterosexual and homosexual couples, constituted a violation of Art. 14 taken in conjunction with Art. 8. Two elements of the judgment are particularly interesting in virtue of the potential they represent for possible legal developments in future litigations: the legal recognition of *de facto* families with same-sex parents and the role that the non-discrimination principle has for them.

As for the first element, the Court recognised full juridical dignity to a family formed by homosexual parents and their child and stressed the "importance of granting legal recognition to *de facto* family life"⁴⁰³, mostly because – even if a juridical relation was already recognised between two of the three applicants – "all three applicants are directly affected by the difference in treatment [due to the denial of the possibility of second-parent adoption] and may therefore claim to be victims of the alleged violation"⁴⁰⁴. The judges, then, explicitly specified that this choice is also the more appropriate with respect to the best interest of the child, a key notion in the relevant international instruments. The position taken by the Court in this respect, moreover, entailed an indirect response to that relatively common social prejudice which sees homosexual – and transgender – persons as unsuitable for parenting⁴⁰⁵. In the judgment, indeed, it was specified that no evidence adduced by the Government showed that it would be "detrimental to the child to be brought up by a same-sex couple or to have two mothers or two fathers for legal purposes"⁴⁰⁶. This is one of the greatest innovations of the judgment, and we will further elucidate it later.

The second element is the principle of non-discrimination operating in cases concerning homosexual parents. Some scholars have criticized the application of such principle in such circumstances by the Court: Fatta and Winkler⁴⁰⁷, for example, point

403 *X and Others v. Austria*, *supra* note 57, para. 145.

404 *Ibid.*, para. 127.

405 See G. OBERTO, "Problemi di coppia, omosessualità e filiazione", in *Diritto di famiglia e delle persone*, 2, 2010, pp. 802 ff.

406 *X and Others v. Austria*, *supra* note 57, para. 146.

407 C. FATTA, M. WINKLER, "Le famiglie omogenitoriali all'esame della Corte di Strasburgo: il caso della *second-parent adoption*", in *La nuova giurisprudenza civile commentata*, 29:6, June 2013.

out that it causes families formed by homosexual parents to only enjoy a negative and conditioned protection despite recognition of it corresponding to the definition of "family life".

As we said, the ruling found a discrimination based on sexual orientation in Art. 182(2), ABGB. First of all, it stressed that national judges deciding on the second-parent adoption never took into consideration the specific aspects linked to the best interest of the child, instead focusing on the mere juridical impossibility⁴⁰⁸ of second-parent adoption; the fact is that, had the couple been formed by different-gender unmarried partners, "the domestic courts would not have been able to refuse the adoption request as a matter of principle"⁴⁰⁹, needing instead to examine the specific circumstances. As far as the different treatment was concerned, then, the couple was not considered to be in the same position as two married people, because an obligation did not exist on States to contemplate marriage equality in their legislation; this is an example of the principle which sees homosexual couples as comparable to *cohabiting* heterosexual couples, but not to married ones⁴¹⁰.

We can, therefore, deduct that any advantages enjoyed by cohabiting heterosexual couples under their domestic law must necessarily be extended to cohabiting homosexual couples, otherwise the different treatment may constitute a violation of the Convention. When advantages are accorded only to married and not also to cohabiting couples, instead, it is not required that such advantages are extended to homosexual, unmarried couples. This judgment surely represented a step forward towards a wider recognition of LGBT family rights, but it is also true that it realized a form of indirect discrimination, since – in this framing – certain rights are protected only for those who can decide to contract a marriage, but not for homosexual couples, which are excluded by the possibility of choosing whether to get married or not.

A last element of *X and Others* seems of great importance for future litigations: the position taken by the Court with respect to the margin of appreciation.

408 *X and Others v. Austria*, *supra* note 57, para. 124.

409 *Ibid.*, para. 125.

410 The Court had already stated this, in negative, in *Gas and Dubois*, excluding the comparison between the couple of women who had contracted a PACS and a married couple, which would have had access to second-parent adoption.

The case at issue is an example of the tension between the margin and the consensus analysis doctrine: while with respect to discrimination on the grounds of sex and sexual orientation the margin is narrow, the situation is different for adoption – in fact, the margin is quite wide in that case⁴¹¹, since there is no correspondence with a specific right in the Convention. The Austrian government had stressed this last issue in its motivations, but the Court did not accept the simplification, adding instead complexity to the analysis of consensus and of the margin of appreciation: it stated that, in analysing the consensus among contracting States, one should not look to the total number of States, but only to those CoE member States – only ten, at the time – which allow second-parent adoption for unmarried couples. "Within that group, six States treat heterosexual couples and same-sex couples in the same manner, while four adopt the same position as Austria"⁴¹²; the Court, thus, introduced a more specific notion of "consensus". While in this particular judgment the numbers are still too little for the Court to identify a specific consensus on the extension of the possibility of second-parent adoption to same-sex couples, such approach to the analysis of consensus constitutes an interesting factor since, adding up to the already existing precedents, it might in the future lead to more progressive attitudes⁴¹³.

At this point of the jurisprudence and coming after the *Gas and Dubois*⁴¹⁴ case, this judgment is revolutionary for the weight it recognises to the best interest of the minor. The Convention keeps on being interpreted in the sense of contemplating a right for children to have parents, and not the contrary – as declared in – whether the couple at issue is heterosexual or homosexual. But here lies what makes this judgment greatly innovative: it focuses on the need to protect not only the life of the couple, but also the life of the family including the minor, which interests cannot be considered damaged by the juridical recognition of two mothers or fathers. This way, the Court demolishes the prejudice of unsuitability of same-sex parents that we already mentioned, and it does so in light of the best interest of the minor⁴¹⁵.

411 *Fretté v. France*, *supra* note 280, para. 40.

412 *X and Others*, *supra* note 57, para 79.

413 Fatta e Winkler, *supra* note 303, p. 528.

414 *Gas and Dubois v. France*, *supra* note 375.

415 See A.M. LECIS COCCO-ORTU, "La Corte europea pone un altro mattone nella costruzione dello statuto delle unioni omosessuali: le coppie di persone dello stesso sesso non possono essere ritenute inidonee a crescere un figlio", in *Forum Costituzionale*, 2013

As we have seen, in the jurisprudence of the European Court of Human Rights, the limits of the anti-discrimination analysis regarding LGBT adoption are bound to the Court's defense of the privileged *status* that marriage enjoys, but they also – maybe, even more – reflect the need for a balance in the tension between the Court and national States. As we said in Part I, many commentators highlight incoherences and criticalities in the methods used by the Court; but, at the same time, to pretend from the Court that it functioned as a means to put into practice a sort of project for the equalization of co-habitation regimes would mean asking the European judges to alter their role. The function of the Court is not to draft a substantive theory of the rights protected by the Convention – what would mean ignoring the principle of subsidiarity and the functioning of democracy at its base – but to guarantee a balance between the value of the rights protected under the Convention and the autonomous ability of democracy to improve its very mechanisms⁴¹⁶.

Therefore, looking at the examined case-law, there seems to be a desirable path to follow in order to dodge the criticalities hidden behind the anti-discrimination tests elaborated by the Court during the years, while at the same time never overlooking the best interest of minors; at the same time, it is a path which could also prevent us from overlooking the prohibitions to which LGBT people are subjected to when it comes to adoption. It is possible that the desirable way to do this is not anymore to try and challenge the various *statuses* that have been elaborated up to today, but rather to highlight those discriminations which, since they concern the minor and its best interest more than the couple seeking to adopt a child, function "horizontally" with respect to *statuses*, institutions, cohabitation regimes⁴¹⁷. Some argued that it is particularly in situations of same-sex adoption that the best interest of the minor seems compressed, because the child often faces the impossibility of having the relation he enjoys with both the parents recognised – what can lead also to legal inconveniences, as in the field of inheritance or in case of a separation between

[<http://docplayer.it/6037785-Di-anna-maria-lecis-cocco-ortu-15-marzo-2013.html>].

416 S. GREER, *The European Convention on Human Rights. Achievements, Problems and Prospects*, Cambridge University Press, 2006, p. 208.

417 G. REPETTO, *supra* note 19, p. 169.

the parents, or of the death of the biological parent⁴¹⁸.

The majority of European legislations, particularly all those which do not guarantee any regime or institution for cohabiting same-sex partners, appear to sanction the prejudice that only when a minor is cared for by a heterosexual couple, preferably married, his or her best interest is protected⁴¹⁹. It seems reasonable to wonder whether such approach is still sustainable, particularly when a legal system is dealing with situations of already existing social bonds and under laws which perpetrate an inherent disadvantage for children growing up in those *de facto* families. Acknowledging such reality should lead to a reshaping of the principles inherent in the notion of "best interest", and to a new, powerful protection of the continuity of familiar social bonds within the anti-discrimination judgement.

Despite the fact that the European Court of Human Rights repeatedly declared that the Convention protects children's right to have parents, but not a parents' right to adopt, some scholars find it surprising that for a long time the Court has not been capable of according proper importance to the best interest of the child when the couple, and thus the family involved, was an LGBT one⁴²⁰. It is however true that some elements of the Court's jurisprudence seem promising – although often overlooked – for a greater consideration of the best interest of the minor in the future: for example, the highlighting of the importance to assure recognition to existing family bonds⁴²¹, or the fact that the Court has declared that it is the State which has the burden of proof that same-sex parents are not suitable to raise children⁴²². Recognizing greater value to this perspective would mean to move the focus of the protection and of the anti-discrimination judgment to a field which has at its very core the interest of minors to have their familiar bounds recognised, and at the same time to weaken the role of the *status* of the couple as the core of the anti-discrimination

418 A.M. LECIS COCCO-ORTU, "La Corte europea pone un altro mattone nella costruzione dello statuto delle unioni omosessuali: le coppie di persone dello stesso sesso non possono essere ritenute inidonee a crescere un figlio", in *Forum Costituzionale*, 2013, p. 6.

419 F. BILOTTA, "Omogenitorialità, adozione e affidamento familiare", in A. SCHUSTER (a cura di), *Omogenitorialità. Filiazione, orientamento sessuale, diritto*, Mimesis, Milano, 2011, 163-230 at 168.

420 L. HODSON, "Ties That Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bi-Sexual and Transgender Families under the ECHR", in *International Journal of Children's Rights*, 2012, pp. 19, 20.

421 *Emonet and Others v. Switzerland*, supra note 286.

422 *X and Others v. Austria*, supra note 57, para. 141; *Vallianatos v. Greece*, supra note 57, para. 85.

judgment⁴²³.

5.5. Vallianatos v. Greece: if a member State introduces forms of civil union, prohibiting access to it to same-sex couples amounts to discrimination

*Vallianatos v. Greece*⁴²⁴ concerned the Greek law 3719⁴²⁵ of 2008, which for the first time introduced the possibility for couples to register civil unions, but prohibiting it to same-sex couples. The applicants, two male partners and other six anonymous same-sex couples, did not complain about the lack of an institution in Greek law regulating homosexual civil unions *per se*, but about the allegedly unjust discrimination originated by the exclusion of homosexual couples from the possibility of registering civil unions under the law. The Government responded by declaring that the law at issue had the aim of responding to social needs of protection of children born out of wedlock, therefore not being relevant for same-sex couples⁴²⁶; as for such couples, according to the Government, the instruments of private law were available and sufficient to regulate their life⁴²⁷. Moreover, it lamented that the applicants did not exhaust all domestic remedies.

As far as the exhaustion of domestic remedies is concerned, the Court agreed with the applicants, declaring that the issue regulated by Art. 35 ECHR must be evaluated taking into consideration its practical feasibility, which lacked in the situation dealt with. Passing on to the suggestion to use private law to regulate the lives of homosexual couples, the Court did not agree with the national authorities either, because such a "solution" would prevent the subjects to enjoy a public recognition as couples, and would also ignore the fact that «same sex couples are just as capable as different sex couplet of entering into stable committed relationships»⁴²⁸. This is indeed a great innovation, since it poses a definitive end to that "reproduction

423 A. LORENZETTI, "Filiazione e omogenitorialità: necessità di trattamento omogeneo o persistenza del paradigma eterosessuale?", in B. PEZZINI, A. LORENZETTI (a cura di), *Unioni e matrimoni same-sex dopo la sentenza 138/2010: quali prospettive*, Napoli, Jovene, 2011, pp. 241-252 at 251.

424 *Vallianatos v. Greece*, *supra* note 57.

425 Hellenic Republic, *Law 3719/2008*.

426 *Vallianatos v. Greece*, *supra* note 57, para. 62.

427 *Ibid.*, para. 66.

428 *Ibid.*, para. 81.

of the closet" for which we said the Court has been criticised⁴²⁹. Lastly, the Court stressed the fact that non-marital unions should not be treated as functional to procreation, as the law 3719⁴³⁰ does.

In conclusion, the judges highlighted the unjust asymmetry between the instruments available to heterosexual and homosexual couples for the regulation of their lives as couples with the introduction of this law, and declared that, introducing such law, Greece had opted for an approach which was completely divergent from that of the majority of the ECHR contracting States. We know that this does not automatically entail that the State's behaviour constitutes a violation of the Convention, but it does imply that weighty reasons must be provided by the Government for such behaviour – the blanket exclusion of an entire category of people from the enjoyment of a right – to be legitimate. Since the Government failed to provide weighty reasons for the discrimination brought about by the new legislation⁴³¹, the Court – with only one vote against – found the legislation in violation of Art. 14 taken in conjunction with Art. 8.

The judgment mentions the cases *Schalk and Kopf v. Austria*⁴³² and *X and Others v. Austria*⁴³³. With those contributes, the Court declared that the national legislator could decide to improve the juridical protection of *de facto* unions but, in doing so, it could not operate a selection and programmatically exclude homosexual couples, since that would amount to a discrimination. In particular, limiting the aims of a law on civil unions to the children of heterosexual, unmarried couples, constituted an illogical and irrational operation according to the Court. In fact, there was a disproportion between the means – a regulation of civil unions – and the allegedly main purpose – the protection of biological children born out of wedlock. The introduced means, the law, constituted a broad protection, not merely applicable to the only protection of those children, not to mention that not all heterosexual unmarried couples have or will have children.

Some authors agree with the partly dissenting opinion of Judge Pinto de

429 See §3.5.

430 Hellenic Republic, *Law 3719/2008*.

431 *Vallianatos v. Greece*, *supra* note 57, para. 92.

432 *Schalk and Kopf v. Austria*, *supra* note 58.

433 *X and Others v. Austria*, *supra* note 57.

Albuquerque⁴³⁴ in noting that, overlooking the fact that domestic remedies were not exhausted, the Court chose to act as a "positive legislator"⁴³⁵; however, the judges agreed with the applicants when they claimed that

...on account of the diffuse and incidental nature of the review of constitutionality, no procedural rules existed in domestic law providing for the amendment of a legislative provision deemed to be unconstitutional and thereby enabling notary to draw up civil union contracts for same sex couples as well⁴³⁶.

The Court is therefore acting as a "negative legislator", finding a specific source of discrimination in the Greek legislation, just as it is supposed to under the Convention⁴³⁷. With *Vallianatos*⁴³⁸, the Strasbourg Court reiterated that the notion of family life which enjoys the protection guaranteed by Art. 8 ECHR "is not confined to marriage-based relationships and may encompass also other *de facto* family ties when the parties are living together out of wedlock"⁴³⁹. The national legislators, as is their duty, will have to provide the proper, homogeneous legal means for heterosexual and homosexual cohabiting couples, in order to avoid any breach of Artt. 14 and 8 ECHR.

5.6. *Hämäläinen v. Finland*: it is not disproportionate to require, as a precondition to legal recognition of an "acquired" gender, that the applicant's marriage be converted into a registered partnership

The case *Hämäläinen v. Finland*⁴⁴⁰ concerned the Finnish regulation of gender reassignment, "forced" divorce and, indirectly, same-sex marriage. The applicant was a transgender, born a biological male, who married a woman in 1996 and had a daughter with her in 2002. In 2005, the applicant decided that she could not cope any longer without seeking medical help in order to change her biological, male sexual characteristics, which she did; she started living as a woman that year, and underwent

434 *Ibid.*, Party Concurring, Partly Dissenting Opinion of Judge Pinto de Albuquerque.

435 V. VALENTI, "Dalla Cedu una tutela 'per direttissima' delle coppie omosessuali", 30 December 2013, [<http://www.confronticostituzionali.eu/?p=833>], p.?

436 *Vallianatos v. Greece*, *supra* note 57, para. 45.

437 L. CONTE, "Nota a Corte EDU, *Vallianatos e altri c. Grecia*", in *Articolo 29*, 5 December 2013, [<http://www.articolo29.it/2013/nota-corte-edu-vallianatos-e-altri-c-grecia/>].

438 *Vallianatos v. Greece*, *supra* note 57.

439 *Schalk and Kopf v. Austria*, *supra* note 58, para. 91.

440 *Hämäläinen v. Finland*, App. no. 37359/09, 16 July 2014.

sexual reassignment surgery in 2009. The complaint concerned the fact that the applicant was not able to have his national identity number changed had she and her spouse not renounced to remain married. In Finland, indeed, it was not possible for partners of the same-sex to get married – it will be, starting from 2017. Under the Finnish Confirmation of Gender Act⁴⁴¹, the confirmation of the change of civil status of a married person from a gender to another was conditional to the spouse's consent to the *ex lege* conversion of the marriage into a civil partnership, or, alternatively, to end the marriage with a divorce.

The problem arose when the wife of the applicant refused to accept that their marriage was transformed into a civil partnership. Once the domestic remedies had been exhausted, Hämäläinen brought the case before the Strasbourg Court. Before the judges, the applicant affirmed that the couple wished to remain married and that they could not accept their marriage to end or change in nature: a divorce would have gone against their religious beliefs, a civil partnership would not have provided the same social and symbolic significance as marriage, and they could not accept that their child would have legally "become" a child born out of wedlock. For these reasons, she complained under Art. 8 that her private life and family life were being violated, under Art. 12 that she could not freely decide to remain married, and under Art. 14 taken in conjunction with Artt. 8 and 12 that she was suffering a discrimination. A first judgment by the Court in 2012 did not find the Finnish law in violation of Art.8 and Art. 14, and excluded that Art. 12 was applicable to the case. The judgement of 2014, issued by the Grand Chamber, confirmed such decision, elucidating certain key aspects of the Court's reasoning.

The applicant claimed that she was being forced to choose between an interference in her private life – had she chosen to remain married and renounce to a new, female national code of identification – and an interference on her family life – had she chosen to divorce, or to allow the conversion of her marriage into partnership. Recalling examples from the jurisprudence of the Court, she stressed the margin of appreciation should be narrower where a particularly important facet of an individual's existence or identity was at stake⁴⁴². However, the Court, following a

441 Republic of Finland, *Gender Confirmation of Transsexual Individuals Act (563/2002)*.

442 *Hämäläinen v. Finland*, *supra* note 440, para. 42.

usual pattern of reasoning, did not agree. Examining the case with regard to the positive aspects of Art. 8, the judges reiterated that Article 12 cannot be interpreted as imposing an obligation to allow same-sex marriage on contracting States⁴⁴³; at that point, the Court noted that there was no European consensus as to how to deal with gender recognition in the case of a pre-existing marriage. Since there was no consensus on the means with which to protect the interests at stake and that the case raised ethical issues⁴⁴⁴, and that the State had had to strike a balance between competing private and public interests⁴⁴⁵, the ECtHR considered that the margin of appreciation to be accorded to the State had to be wide⁴⁴⁶.

The last test, given the previous considerations, was thus the proportionality test. The possibility of transforming the marriage into a civil partnership was believed to be a proportionate measure taken to protect the aim of the impugned law⁴⁴⁷, which was to unify the varying practices applied in different parts of the Country. Recalling the cases *Parry v U.K.*⁴⁴⁸ and *R. and F. v. U.K.*⁴⁴⁹, the judges stated that the rights and obligations offered by a civil partnership are adequate for the couple to live their relationship in all its essentials; moreover, the conversion of the marriage would not have affected the relationship between the parents and the child, nor the *status* of the child in any relevant way.

For all of these reasons, and "while it is regrettable that the applicant faces daily situations in which the incorrect identity number creates inconveniences for her"⁴⁵⁰, the Court considered that the Finnish system "has not been shown to be disproportionate in its effects on the applicant and that a fair balance had been struck between the competing interests"⁴⁵¹, finding no violation of Art. 8. As far as the

443 *Ibid.*, para. 71. The Court recalls the case *Schalk and Kopf v. Austria*, *supra* note 58, para. 101.

444 See *X, Y and Z v. the United Kingdom*, *supra* note 247, para 44; *Fretté v. France*, *supra* note 280, para 41; *Christine Goodwin v. the United Kingdom*, *supra* note 75, para 85.

445 See *Fretté v. France*, *supra* note 280.

446 *Hämäläinen v. Finland*, *supra* note 440, para. 75.

447 The Court seems to even praise the possibilities offered by the Finnish government at para. 80, stressing repeatedly that [emphasis added] "*contrary to the majority of the (...) member States, there exists a legal framework in Finland designed to provide legal recognition for the change of gender*".

448 *Parry v. the United Kingdom*, *supra* note 303.

449 *R. and F. v. the United Kingdom*, *supra* note 302.

450 *Hämäläinen v. Finland*, *supra* note 440, para 87.

451 *Ibid.*, para 88.

complaint about Art. 12 is concerned, it was deemed inapplicable⁴⁵². As for Art. 14, it had not been violated – either combined with Artt. 8 or 12: firstly, because the State's choices fell under the scope of the margin of appreciation since there was no European common ground on the matter, and secondly because the allegedly similar situation subject to a different treatment would have been that of cissexuals, that is people whose sexual characteristics and gender identity coincide; however, that situation was not believed to be comparable⁴⁵³.

The ruling has attracted various critiques. Some scholars have criticised the "abuse" of consensus analysis as an instrument to widen a margin of discretionality that, otherwise, could only be much stricter⁴⁵⁴. Moreover, some scholars pointed out the need for a clarification of the construction of the notion of consensus, and consequently its limits⁴⁵⁵; for instance, it seems not sufficiently clear whether the analysis of national legislations is qualitative or quantitative⁴⁵⁶.

Another critique came from the dissenting opinion and was reproduced by commentators: declaring the claim about Art. 12 inadmissible, the judgment did not consider that aspect. There are facets of the application of Art. 12 which the Court did not deal with, thanks to the preliminary assumption that a different decision would have had open a gate to homosexual couples⁴⁵⁷. The Court avoided to examine the scope of the right to marry, causing the dissenting judges to highlight this and disagree: what has been avoided was the test that should have granted that the limitations to the right to marry did not limit or reduce the right in a way which

452 *Hämäläinen v. Finland*, *supra* note 440, para. 97. See *Schalk and Kopf v. Austria*, *supra* note 58, para 65.

453 *Ibid.*, paras. 112, 113.

454 A. LORENZETTI, A. SCHUSTER, "Corte costituzionale e Corte europea dei Diritti Umani: l'astratto paradigma eterosessuale del matrimonio può prevalere sulla tutela concreta del matrimonio della persona trans", in *La nuova giurisprudenza civile commentata*, 30:12, December 2014, pp. 1139-1161 at 1157.

455 P. PUSTORINO, "Corte europea dei diritti dell'uomo e cambiamento di sesso: il caso *Hämäläinen c. Finlandia*", in *Articolo 29*, 27 July 2014, [<http://www.articolo29.it/2014/corte-europea-dei-diritti-delluomo-cambiamento-sesso-caso-hamalainen-c-finlandia/>].

456 For an example of a qualitative analysis of consensus, see *X and Others v. Austria*, *supra* note 57, para. 79.

For a critique on the analysis of consensus in *Hämäläinen v. Finland*, see the joint dissenting opinion of Judges Sajó, Keller and Lemmens, para. 5.

457 A. LORENZETTI, A. SCHUSTER, "Corte costituzionale e Corte europea dei Diritti Umani: l'astratto paradigma eterosessuale del matrimonio può prevalere sulla tutela concreta del matrimonio della persona trans", in *La nuova giurisprudenza civile commentata*, 30:12, December 2014, pp. 1139-1161 at 1158.

impairs its very essence⁴⁵⁸.

5.7. Oliari and Others v. Italy: member States have a positive obligation to assure legal recognition to same-sex couples

The year 2015 represents the peak of the entire jurisprudence of the European Court of Human Rights on LGBT issues. The slow piling of new elements added one after the other to the notions of family, marriage and parenting, reached with *Oliari and Others v. Italy*⁴⁵⁹ its maximum height, for now. With the judgment on this case, the Court, unanimously, declared for the first time that all contracting States, and thus all the member States of the Council of Europe, have a positive obligation under the Convention to introduce in their legislations, in one form or another, an institution which gives same-gender couples rights and obligations, and which assures them the social dignity they deserve to enjoy.

The resonance, implications and reasoning of the judgment, require a clear explanation of the national situation as it unraveled before the European complaint, since it has been crucial in the outcome of the case.

The case concerned two separate applications, then joined, brought before the Court by six Italian male citizens, constituting three couples. The first couple, constituted by Mr. Oliari and his partner, had declared their will to marry each other in 2008, requesting the issue of the marriage banns to the Civil Status Office, request which was rejected. The couple appealed against the decision first before the Trento-Tribunal, then before the Trento-Court of Appeal, claiming that Art. 29 of the Italian Constitution⁴⁶⁰ does not prohibit same-sex marriage and that, even if it were the case, the provision would be unconstitutional. The Trento-Tribunal rejected the claims, stating that while the wording of Art. 29 of the Constitution does not explicitly prohibit same-sex marriage, the unanimous interpretation of the Article is in the sense

458 As in *Rees v. the United Kingdom*, *supra* note 188, para. 50.

459 *Oliari and Others v. Italy*, *supra* note 214.

460 The Constitution of the Italian Republic, Art. 29: “La Repubblica riconosce i diritti della famiglia come società naturale fondata sul matrimonio.

Il matrimonio è ordinato sull’eguaglianza morale e giuridica dei coniugi, con i limiti stabiliti dalla legge a garanzia dell’unità familiare”.

of not allowing that, because such prohibition is found in the Italian Civil Code⁴⁶¹. The Court of Appeal confirmed that the ordinary law, the Civil Code in particular, prohibited same-sex marriage, but as far as Art. 29 was concerned, a referral was made to the Constitutional Court; the referral led to the judgment no. 138 of 2010⁴⁶², a very well-known decision for Italian advocates of LGBT rights. The Constitutional Court rejected the applicants' claims in full, adding an invitation towards the legislator to introduce a form of recognition of stable, same-sex couples.

The second application was brought before the Court by other two couples, which had both requested the issue of their marriage bans, which was rejected; the first couple did not challenge the rejection, in so far as any domestic remedy could not be considered effective following the judgment 138 of 2010⁴⁶³. The second couple did challenge the rejection before the Milan Tribunal, but then the judgment 138 was published, on such basis their claim was rejected by the Milan Tribunal, and they did not further impugn the decision, again because any other remedy could not be considered effective.

As for the exhaustion of domestic remedies, indeed, the Court agreed with the applicants, stating that at the time of the complaints the Constitutional Court had reiterated its findings in two other decisions; therefore, “the consolidated jurisprudence of the highest court of the land indicated that their claims had no prospect of success”⁴⁶⁴ in those courts to which individuals have direct access to, and which cannot certainly ignore the findings of the Constitutional Court: this made any possible remedy ineffective. As for the ECHR Articles allegedly violated, the applicants referred to Art. 8 taken in conjunction with Article 14, and the first application also alleged a violation of Art. 12. The Court eventually declared both applications admissible, only rejecting the alleged violation of Art. 12: although evoking the nature of “living instrument” of the Convention, the judges did not find elements capable of requiring a detachment from its previous jurisprudence: in particular, no “new” European consensus could be detected on the matter, since only

461 What some may find a tricky reasoning, since the Constitution is obviously superordinate with respect to the Civil Code.

462 Constitutional Court, 138/2010, 4 April 2010.

463 *Idem*.

464 *Oliari and Others v. Italy*, *supra* note 214, para 81.

11 out of 47 member States had introduced marriage equality in their legislations. Therefore, the claim about Art. 12 was believed to be manifestly ill-founded.

Moving to the assessment of the merits, the Court had to establish whether Italy had a positive obligation under Art. 8 to introduce some form of civil union. According to Art.8(2), in order to do so, the Court had to assess first whether the measures taken by the State were necessary to strike a fair balance between the individual interests and any collective interest which was at stake; moreover, in this specific case, the discrepancy between reality and the law, and between the administrative and legal practices within the systems acquire also relevance, as already happened in the *Hämäläinen* case⁴⁶⁵. The Court stressed that in implementing their positive obligations, States enjoy a margin of appreciation, which is narrow when a particularly important aspect of private life is at issue – as we learned from the *Goodwin* judgment⁴⁶⁶ – but which, on the contrary, must be considered widened when there is no European consensus on the matter or on the modalities of its application; when the case raises sensitive moral or ethical questions, or when the State is in the situation of having to weight public and private interests against each other – these last principles were particularly established in *Fretté v. France*⁴⁶⁷.

The Court started by referring to *Schalk and Kopf v. Austria*⁴⁶⁸, and pointed out that, in that circumstance, it was only asked to assess whether Austria could be reproached for not having introduced a form of registered partnership earlier, which the judges believed was not the case, because at the time only 19 States had introduced such institutions, and this allowed the State to retain a margin of appreciation. This passage is indeed interesting, since the Court nevertheless reiterated that the field is one of continuous development, and it almost seemed to suggest that the Court was already approaching to the outcome of *Oliari* in 2010, it was only waiting for a bigger consensus – proving how much consideration is given to it in establishing what is or is not protected under the Convention. Moreover, the Court added that it had to be remembered that sexual orientation does not play a role in a couple's suitability and capacity to live in a committed stable relationship, as it

465 *Hämäläinen v. Finland*, *supra* note 440, para. 66.

466 *Christine Goodwin v. the United Kingdom*, *supra* note 75, para. 90.

467 *Fretté v. France*, *supra* note 280, para. 41, 42.

468 *Schalk and Kopf v. Austria*, *supra* note 58.

does not influence their need for protection *as a couple* further than as two individuals – something which was declared in *Schalk and Kopf*⁴⁶⁹ and in *Vallianatos v. Greece*⁴⁷⁰ – as is expressed in the invitation made by the CoE Committee of Ministers of the in 2010 to adopt legislation on registered partnerships⁴⁷¹.

With regard to the Italian situation, the Court underlined that – since marriage was not allowed in the Country – not only did the applicants not enjoy any protection but neither any recognition whatsoever, with the only possibility for the regulation of their shared lives of using private contracts, which “fail to provide some basic needs which are fundamental to the regulation of a (...) committed relationship”⁴⁷². The alternatives suggested by the Government regard agreements of cohabitation, of no use for these couples according to the Court, because they only recognize the mere act of living together: there is no need to be in a committed and stable relationship, and at the same time they do not protect such relationships unless the two persons live together – which is not a prerequisite for a couple to have familiar rights under the Convention, as declared in *Vallianatos*⁴⁷³. While it was true that the recognition of a same-sex partner could be obtained under the Italian law in some specific circumstances, such recognition needed to be sought judicially, something which “already amounts to a not-insignificant hindrance to the applicants' efforts to obtain respect for their private and family life”.

Then, connecting to the above mentioned general principles, the Court underlined that introducing a form of registered partnership would not cause Italy any burden, be it administrative or legislative. Moreover, no competing collective interest to protect was identified by the Italian Government before the Court; on the contrary, introducing a form of civil union would meet a “social need”, since official statistics show the presence of a million homosexuals and bisexuals in central Italy alone⁴⁷⁴. This passage is particularly important, because it is followed by a consideration which stresses not only the rights that individuals could enjoy if their family lives

469 *Ibid.*, para. 99.

470 *Vallianatos v. Greece*, *supra* note 57, paras. 78, 81.

471 Recommendation CM/Rec(2010)5, *supra* note 10.

472 *Oliari and Others v. Italy*, *supra* note 214, para. 169.

473 *Vallianatos v. Greece*, *supra* note 57, paras. 49, 73.

474 *Oliari and Others v. Italy*, *supra* note 214, para. 173. The Court was referring to the ISTAT survey published on 17 May 2012.

were acknowledged, but also the fact that the possibility to contract a civil union would have an intrinsic value for the applicants, that is legitimacy *as a couple* before the law and before their society. Moreover, the Court – counting again on official surveys – noted that the introduction of civil unions would only accord “core” rights to homosexual couples, and not necessarily “supplementary” rights which might spark fierce controversies domestically, since the determination of those rights would fall into the margin of appreciation.

In addition to these considerations about the domestic situation, the Court pointed out that, at the time of the judgment, 24 out of 47 member States had adopted legislation on civil unions, even citing the world-famous judgment *Obergefell v. Hodges* of the US Supreme Court⁴⁷⁵, to show – with a wording aimed at taking a clear stance on the matter – that “the information available goes to show the continuing international movement towards legal recognition, to which the Court cannot but attach some importance”⁴⁷⁶. Also, the judges reproached the Italian Government for not having followed, or at least considered, the indications provided by the highest judicial authorities, namely the Constitutional Court and the Court of Cassation, which “notably and repeatedly called for a juridical recognition of the relevant rights and duties of homosexual unions”⁴⁷⁷. Despite such invitations and despite some attempts over three decades, “the Italian legislature has been unable to enact the relevant legislation”⁴⁷⁸. This attitude, according to the Court, posed the risk of undermining the credibility and authority of the judiciary, factors which are fundamental to the Convention, and it seems – reading the words of the judges – that it eventually led them to consider that it invalidated the general principle according to which national authorities are better placed to assess community interests; indeed, the Court also pointed out that “the President of the Constitutional Court himself, in the annual report of the Court, regretted the lack of reaction on behalf of the legislator”⁴⁷⁹ to the above mentioned judgment 138/2010⁴⁸⁰. For these reasons, the Court eventually

475 Supreme Court of the United States, *Obergefell v. Hodges, Director, Ohio Department of Health, et Al.*, No. 14-556, 26 June 2015.

476 *Oliari and Others v. Italy*, *supra* note 214, para. 178

477 *Ibid.*, para. 180.

478 *Ibid.*, para. 183.

479 *Ibid.*, para. 184.

480 Constitutional Court, 138/2010, 4 April 2010.

found a violation of the right to respect for family life under Art. 8. As far as Art. 14 taken in conjunction with Art. 8 was concerned, the ECtHR believed that, having regard with its findings under Art. 8, it was not necessary to examine any possible violation of the non-discrimination provision.

No words can express well enough the greatly innovative – although rigorously emerged from the precedents – final findings of the Court in this judgment than the words chosen by the judges themselves.

In conclusion, in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants' momentous interests as identified above, and in the light of domestic courts' conclusions on the matter which remained unheeded, the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.

To find otherwise today, the Court would have to be unwilling to take note of the changing conditions in Italy and be reluctant to apply the Convention in a way which is practical and effective.

There has accordingly been a violation of Article 8 of the Convention.⁴⁸¹

481 *Oliari and Others v. Italy*, *supra* note 214, para. 185.

Conclusion

At the core of the evolution of an LGBT-inclusive notion of family in the jurisprudence of the European Court of Human Rights lies its continuous commitment to find a balance between the value it gives to legal certainty, through the strict adherence to precedents, and the need for a dynamic interpretation of the Convention, when new European social realities emerge. In the last thirtyfive years the Court has detected a new, gradually growing European consensus about the need for a legal response to the claims of those people for which sexual orientation and gender, as juridical categories, represent obstacles to the enjoyment of fundamental rights. This led the mentioned balancing to lean towards innovation in this field.

When dealing with issues for which homosexuality and transsexuality once represented an obstacle, and represent a criticality today – be it civil unions, marriage, parenting, adoption, the very notion of family indeed – the Court seems to have followed a pattern. Often through the vehicle of the anti-discrimination judgment, it usually starts by operating thin "adjustments" on the national legislations of member States – but still according them a quite wide margin of appreciation – and then it gradually erodes that margin, when consensus analysis gets to the point of requiring such erosion. The clearest example is provided by the difference of gender between two people legally constituting a couple. Starting with a heteronormative understanding of *couple*, the Strasbourg judges have got to the point of finding that the European Convention of Human Rights posed a positive obligation to provide legal protection of same-gender couples, with greatly positive consequences on LGBT lives. The central phase of the process was characterized indeed by considerations about the *social* dignity that LGBT familiar relations deserve to enjoy, and has thus represented a passage towards that moment when the protection of the traditional understanding of the family, as social and legal category, could not anymore justify certain limitations of rights in domestic legislations. This central phase represented a great step forward for SOGI⁴⁸² rights, because – through the

482 Sexual orientation and gender identity.

"narrative function"⁴⁸³ we mentioned of certain Convention provisions – it put an end to an era when the Court relied upon "a public/private binary when interpreting the Convention in respect of sexual orientation or/and gender identity complaints", "reinforcing the social relations of the *closet*"⁴⁸⁴.

Wondering about the future of the ECtHR's jurisprudence in relation with LGBT rights, it seems reasonable to imagine that the same pattern will continue to be applied, leading to the extension to homosexuals and transsexuals of those regimes to which they do not yet have access to. In this sense, one of the most interesting debates concerns the possibility of "disaggregating [the] legal categories" of sex and gender⁴⁸⁵. Some scholars have pointed out that the preferable way to reach a higher level of respect for the dignity and human rights of LGBT people is the abandonment of the legal categories of sex and gender; in other words, a gender-neutral legal system. Abandoning sex and gender *as legal categories* would certainly not entail the denial of sexual or gender differences in human beings, but only that such differences should not play a role in the construction of the legal fact or the legal system. After all, "the frame of the law does not coincide with the frame of reality"⁴⁸⁶. In such a system, different legal treatments based on gender would be impossible, but at the same time the law would not be blind to human biology: the protection against discrimination would not be impaired, but issues like parenting, adoption, marriage would be dealt with *per se*, and not as related to the genders involved. In this sense, the tendency of the Court's jurisprudence that we showed could be included in a framework of a general tendency towards the gender-neutrality of law⁴⁸⁷. This is particularly interesting in the case of marriage, if we connect it to another field of discussion, the one which sees gender – and not sexual orientation – at the base of those legal orders which have rejected, or still reject, the possibility of marriage between two people of the same sex⁴⁸⁸. Gender neutrality could indeed overcome the limits faced by LGBT people in this sense.

These are obviously purely theoretical speculations, at least at the moment.

483 M. WINKLER, *supra* note 216, p. 84.

484 P. JOHNSON, *supra* note 29, p. 212.

485 See A. SCHUSTER, *supra* note 163, pp. 21-39.

486 *Ibid.*, p. 28

487 *Ibid.*, p. 32.

488 See A. SCHUSTER, *supra* note 300, p. 258.

What instead, returning more specifically to the European Court, has to be underlined as a practical, desirable development for the future is certainly a more rigorous construction and application of the methods that the Court uses when it innovates its interpretations of the Convention. First of all, the notion of consensus needs to be more rigorously described, in its nature and relevance, since it appears more and more decisive in the Court's rulings, but at the same time has no direct and explicit foundation in the provisions of the Convention. Moreover, a clarification is needed about the methods of detection of such European consensus: as we said, it is not clear whether the consensus is recognized on quantitative or qualitative bases⁴⁸⁹, and it is not clear what influence international tendencies have on it, since the Court more than once cited international consensus to reinforce evaluations of the European consensus⁴⁹⁰. The same is true for the Court's peculiar use of evolutive interpretation: it is not clear whether it is in fact an expression of the interpretative instruments contemplated by the Vienna Convention on the Law of Treaties⁴⁹¹, or rather a special criterion, peculiar to the European Convention on Human Rights.

In sum, if on the one hand we should welcome the commitment of the Court to adapt the text of the Convention to new, legal situations which were unknown of in 1950, on the other hand there is a patent need for transparency about the instruments it has used to do so. This will avoid the need to keep on proceeding with a "case-by-case" approach, impoverishing the coherence of the European Court of Human Rights, which is crucial in order to grant the respect of the principle of legal certainty, as it is crucial for the Court to retain the credibility and authority it still enjoys.

489 See §5.6.

490 See §5.7.

491 United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Artt. 31, 32, 33.

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