Articles

Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights

*By Sarah Lucy Cooper**

A. Introduction

The European Court of Human Rights (ECtHR) has been considering whether same-sex couples should have the rights to marry and to be recognized as a family under the European Convention of Human Rights (ECHR) for over thirty years. In the 1980s the European Commission of Human Rights (the Commission) and the ECtHR respectively rejected the notion that same-sex relationships constituted a "family life"[1] under Article 8 of the ECHR,[2] and that post-operative transgendered persons had the right to marry under Article 12.[3] However, throughout the 1990s and the first decade of the new millennium, the ECtHR handed down a body of judgments that incrementally liberalized these rights (albeit not always smoothly) in favor of LGBT persons.[4] This evolution culminated in part

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[1] X and Y v. United Kingdom, DR 32 Eur. Comm'n H.R. at 220 (1983).

[2] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols 11 and 14, hereinafter "ECHR"), June 2010, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf (last accessed 29th September 2011). Article 8 of the ECHR states that (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."

[3] Rees v. United Kingdom, 106 Eur. Ct. H.R. (ser. A, 1986); ECHR (1959), art. 12, which states that "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."

[4] I use the phrase "LGBT persons" to refer to lesbian, gay, bisexual and transgendered persons.

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on 24 June 2010, when the ECtHR passed judgment in *Schalk and Kopf v. Austria*.[5] In that case the First Section of the ECtHR made a number of major, but seemingly contradictory rulings. For the first time in its history, the ECtHR ruled that same-sex relationships expressly constitute a "family life" under Article 8, and that the right to marry under Article 12 was not confined to opposite-sex couples in "all circumstances."[6] However, the ECtHR simultaneously ruled that Member States are under no obligation to protect that "family life," by providing same-sex couples with access to marriage under Article 12, or an alternative registration system under Articles 8 and 14.[7] The Grand Chamber denied the applicants' subsequent request for a referral.

The decision followed a decade of activism; that is, between 2000 and 2010 the number of Member States providing legal recognition for same-sex couples had grown incrementally. As of June 2011, seven countries within the Council of Europe had legalized same-sex marriage (Netherlands, Belgium, Spain, Portugal, Norway, Iceland and Sweden),[8] and thirteen more had legislated to provide same-sex couples with an alternative system, such as civil/domestic partnerships, to legally recognize their relationship.[9] In addition, Liechtenstein's Parliament recently approved a Registered Partnership Bill,[10] and Croatia has a law that recognizes cohabiting same-sex couples.[11] Thus, twenty-two of the Council of Europe's forty-seven Member States legally recognize same-sex relationships in some way.[12]

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[5] Schalk and Kopf v. Austria, 20120 Eur. Ct. H.R. (2010).

[6] *Id.* at para. 61.

[7] ECHR, art. 14, which states that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[8] *See Schalk*, *supra* note 5, at para. 27. (Note at the time of judgment Slovenia and Iceland only provided for alternative recognition systems.)

[9] *Id.* at para. 28. These Member States are: Andorra, Austria, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Luxembourg, Switzerland and the United Kingdom. (Note at the time of judgment, Iceland and Slovenia provided an alternative registration system, but have now provided for same-sex marriage).

[10] Council of Europe Commissioner for Human Rights, *Report: Discrimination on the grounds of sexual orientation and gender identity in Europe* 91 (2011).

[11] *Id*. Croatian law does not offer cohabiting same-sex couples the possibility of registration.

[12] It should also be noted that between 2000 and 2010 the Parliamentary Assembly of the Council of Europe also made some significant moves. These included (1) announcing that only states that did not criminally sanction homosexual intercourse would be considered for accession to the Council of Europe *(see* the following recommendation: Council of Europe, *The Parliamentary Assembly of the Council of Europe Situation of Lesbians and Gays in Council of Europe member states* [hereinafter "Recommendation 1474"]*,* 1474 COUNCIL OF EUROPE PARLIAMENTARY ASSOCIATION (2000), at para. 4, which contributed to Europe becoming free of all laws illegalizing consensual, same-sex, adult sexual intercourse in 2003); (2) seeking (unsuccessfully) to have Protocol No. 12 to the ECHR amended to forbid discrimination "by any public authority" on grounds of sexual orientation

This paper evaluates the ECtHR's thirty-year legacy in the light of its oxymoronic decision in *Schalk*. Section B (I) explores the provisions of the ECHR that seek to protect the rights of LGBT persons to be safeguarded against discrimination in the spheres of "family life" and marriage, namely Articles 8, 12 and 14. Section B (II) evaluates the development of the ECtHR's interpretation of Articles 8, 12 and 14, in order to suggest whether the future may see the ECtHR interpret Article 12 to provide for same-sex marriage, and/or derive a right of access to an alternative registration system from Articles 8 and 14.

Section C concludes that the last thirty years has seen the ECtHR hand down a legacy of decisions that have steadily evolved the interpretation of Articles 8, 12 and 14 in favor of recognizing the relationships LGBT persons share. At present, this legacy recognizes that (1) to be compliant with Article 14 Member States must show why laws that provide for blanket exclusions on the basis of sexual orientation are "necessary," not merely legitimate in purpose;[13] (2) the right to marry contained in Article 12 is not confined to the traditional union of a man and a woman who were born with their respective genders and are able to procreate;[14] (3) Article 12 is not confined to opposite-sex couples "in all circumstances;"[15] (4) same-sex couples share a 'family life' under Article 8;[16] (5) there is an emerging consensus in favor of the legal recognition of same-sex relationships amongst Member States;[17] and (6) the topic of legal recognition of same-sex relationships is one of "evolving rights."[18] This paper argues that collectively, these express recognitions should cause

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(Recommendation 1474, at para. 7, available at: http://assembly.coe.int//Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta00/eopi216.htm (last accessed: 27 September 2011); and (3) commissioning a report by its Committee on Legal Affairs and Human Rights, which resulted in the Council of Ministers of the Council of Europe adopting a unique recommendation that is aimed solely at combating discrimination on the basis of sexual orientation and gender identity. This recommendation expressly invites Member States to provide same-sex couples with legal means to protect their relationships (*see* Council of Europe, *Recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity* [hereinafter "CM/Rec 5"], COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE (2010), available at: https://wcd.coe.int/wcd/ViewDoc.jsp?id=1606669 (last accessed: 27 September 2011)This recommendation is claimed to be the only instrument of its kind in the world. *See* the following document: Press Release No. 277, Committee of Ministers of the Council of the Europe, Council of Europe to advance human rights for lesbian, gay, bisexual and transgender persons (Apr. 1, 2010), available at: https://wcd.coe.int/wcd/ViewDoc.jsp?id=1607163&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 (last accessed: 27 September 2011).

[13] Karner v. Austria, 2003-IX Eur. Ct. H. R. (2003).

[14] Christine Goodwin v. the United Kingdom, 2002-V1 Eur. Ct. H. R. (2002).

[15] *See Schalk, supra* note 5, at para. 61.

[16] *Id.*

[17] *See Schalk, supra* note 5, at para. 105.

[18] *Id.*

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same-sex couples situated in all Member States to be cautiously optimistic that in due course, the ECHR will be interpreted to provide them with a right to protect their relationships via marriage and/or an alternative registration system.

B. The Relevant Provisions of the European Convention of Human Rights and the Jurisprudence of the European Court of Human Rights

I. The Relevant Provisions of the European Convention of Human Rights

The cases concerning discrimination, marriage and "family life" in relation to LGBT persons in the ECtHR concern Articles 8, 12 and 14 of the ECHR.

It is apparent that none of these provisions were conceived with the specific rights of LGBT persons in mind. For instance, Article 12 provides that "men and women of marriageable age have the right to marry and to found a family…." The reference to "men" and "women" and the connection made between marriage and procreation suggests that marriage, under the ECHR, is a principle based upon heterosexuality, and therefore the foundation of the traditional family.[19] Similarly, Article 8, which provides that "everyone has the right to respect for his private and family life and his home,"[20] was evidently drafted with the intention of protecting the traditional family. For example, the *travaux préparatoires*[21] pertaining to Article 8 reveal that during the drafting process it was considered that the "guaranteed rights and freedoms of the 'family' rights" are represented by, *inter alia*, "the right to marry and found a family."[22] Furthermore, Article 14, which safeguards individuals from discrimination in their enjoyment of the ECHR's rights and freedoms,[23] does not include "sexual orientation" as an expressly prohibited ground of discrimination, and there is no suggestion in the *travaux préparatoires* that it

[19] Note that the *travaux préparatoires* pertaining to Article 12 of the ECHR are not available.

[20] *See* the ECHR. art. 8, *supra* note 2.

[21] The *travaux préparatoires* contain the various documents that were produced during the drafting of the ECHR and its first Protocol, reports of discussions in the Assembly and its Committee on Legal and Administrative Questions and in the Committee of Ministers and a number of its committees of experts.

[22] Council of Europe, *Travaux Préparatoires on Article 8 of the European Convention of Human Rights* 2-3 (1956), available at: http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf (last accessed: 27 September 2011).

[23] *See* the ECHR, art. 14, *supra* note 7. As Article 14 is not "freestanding," it cannot be applied unless a case falls with the ambit of one or more of the other substantive convention rights. The substantive rights invoked by marriage and "family life" are contained in Articles 12 and 8 respectively.

was ever intended to be.[24] Although it must be noted that the *travaux préparatoires* should not be used to "shoehorn" the ambit of the ECHR's provisions, the "special features" of the ECHR mean that they are a useful guide to indicate the general intentions of the parties.[25]

Nonetheless, an evaluation of the last three decades of the ECtHR's jurisprudence in relation to Articles 8, 12 and 14, in the context of LGBT persons, demonstrates that the ECtHR has been actively engaging with the principle that the ECHR is a "living instrument" that must be interpreted in the light of contemporary society and present day conditions.[26] As a result of this engagement, these provisions have been stretched beyond their original boundaries in favor of LGBT persons. Article 12 is no longer confined to the traditional union of men and women who are able to procreate,[27] or confined to opposite sex-couples in "all circumstances."[28] The concept of "family life" under Article 8 is not a fixed idea[29] that recognizes only heterosexual married couples, but is a wider one that embraces unmarried heterosexual[30] and same-sex couples.[31] Furthermore, it is settled law that discrimination on the basis of sexual orientation constitutes discrimination on the grounds of "sex," which is expressly prohibited under Article 14.[32] In addition, such laws are monitored by a heightened scrutiny, in that in order to be compliant with the ECHR, Member States must show why laws that provide for a blanket exclusion of individuals on the basis of sexual orientation are "necessary."[33] Section B (II) will evaluate the decisions of the ECtHR that have lead to this current state of affairs.

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[24] Council of Europe, *Travaux Préparatoires on Article 14 of the European Convention of Human Rights* (1967), available at: http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART14-CDH(67)3-BIL1338901.pdf (last accessed: 27 September 2011).

[25] Banković and Others v. Belgium and Others, 2001-XII Eur. Ct. H.R. (2001).

[26] Tyrer v. United Kingdom, 26 Eur. Ct. H. R. (ser. A), at para 39 (1978).

[27] *See Goodwin*, *supra* note 14.

[28] *See Schalk*, *supra* note 5, at para 61.

[29] Mazurek v. France, 2000-II Eur. Ct. H.R., at para. 52 (2000).

[30] Emonet and Others v. Switzerland, 2007-XIV Eur. Ct. H. R., at para. 34 (2007). In this case, the ECtHR recognized that *de facto* "family ties" exist when unmarried opposite-sex partners live together.

[31] *See* Schalk, *supra* note 5.

[32] *See* the ECHR, art. 14, *supra* note 7.

[33] *See Karner*, *supra* note 13. A distinction will only be discriminatory if it has no objective and reasonable justification *i.e.* if it does not pursue a legitimate aim, or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.

II. The Jurisprudence of the European Court of Human Rights

The cases concerning marriage, "family life" and discrimination in relation to LGBT persons in the ECtHR fall into two categories. The first is based on a breach of Article 12 alone, or in conjunction with Article 14 (category one cases). The second is based on a breach of Article 8 in conjunction with Article 14 (category two cases).

1. Category One Cases: Breaches of Article 12 Alone or in Conjunction with Article 14

In both *Rees v. United Kingdom*[34] and *Cossey v. United Kingdom*,[35] the applicants were post-operative transsexuals who complained that the United Kingdom's (UK) refusal to alter the birth register in order to detail their newly assigned genders was a violation of Article 12. Until their new genders were legally recognized, both applicants could not marry because UK law prohibited marriage between individuals of the same birth sex. The ECtHR held that the UK had not contravened the ECHR in both cases. In the later decision of *Cossey* the ECtHR focused on two points. The first was that

> The right to marry guaranteed by Article 12 referred to the traditional marriage between persons of opposite biological sex.... the wording of the Article makes it clear that its [Article 12] main concern was to protect marriage as the basis of the family.[36]

The second was that there was "little common ground" amongst Member States in relation to transexualism and therefore, a wide margin of appreciation existed to deal with the issue. [37]

In *Rees* the ECtHR unanimously held that Article 12 had not been violated; however a mere three years later in *Cossey* four judges dissented when asked to determine the same question. In his dissenting judgment, Judge Martens, speaking of the link that the *Rees* Court and the *Cossey* majority had made between Article 12 and the preservation of the traditional family, said

[34] *See Rees, supra* note 3.

[35] Cossey v. United Kingdom*,* 184 Eur. Ct. H.R. (ser. A, 1990).

[36] *Id.* at para. 43.

[37] *Id.* at para. 40.

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> [I]t is hardly compatible with the modern, open and pragmatic construction of the concept of "family life" which has developed .... to base the interpretation of Article 12 merely on the traditional view according to which marriage was the pivot of a closed system of family law. On the contrary, that evolution calls for a more functional approach to Article 12 as well, an approach which takes into consideration the factual conditions of modern life.[38]

He further rejected that it could be "maintained that "tradition" implies that "sex" in this context can only mean "the biological sexual constitution of an individual which is fixed at birth."[39] As such, Judge Martens' dissent revealed a number of significant successes for LGBT persons. The first was that the members of the dissent were considerably troubled by the ECtHR's decision in *Rees.* This was significant because the time period between the two judgments was short, and therefore indicated an accelerated need to improve the legal position of LGBT persons under the ECHR. The second success was that it revealed an evolution in some members' understanding of gender identity. For instance, Judge Martens' dissent was (and is) conducive with the idea that an individual's "sex" is not immutable.[40] Although the ECtHR's decisions in *Rees* and *Cossey* reinforced the traditional binary view of Article 12, they still represent important landmarks in the ECtHR's jurisprudence, as together they evidence the first signs of retreat from this strict view. Despite this, by a majority of eighteen votes to two, the ECtHR reaffirmed the *Rees* and *Cossey* judgments eight years later in *Sheffield and Horsham v. United Kingdom*.[41]

The arguments put forward in Judge Martens' dissent were eventually accepted by the majority in *Christine Goodwin v. United Kingdom*,[42] when the ECtHR held that post-operative transsexuals enjoyed the right, under the ECHR, to marry a person of the opposite sex. In so holding, the ECtHR made a number of significant statements. The first was that, in relation to Article 12, it found that "the inability of any couple to conceive or parent a child could not be regarded as, *per se*, removing their right to marry."[43] The second was that it recognized purely biological criteria was no longer appropriate to determine a person's sex for the purposes of marriage, as "major social changes" had

[38] *Id.* at para. 4(4)(3). Dissent of Judge Martens.

[39] *Id.* at para. 4(5)(1). Dissent of Judge Martens.

[40] *See* Terry S, Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 BRIGHAM YOUNG UNIVERSITY JOURNAL OF PUBLIC LAW 371 (2004).

[41] Sheffield and Horsham v. United Kingdom, 1998-V Eur. Ct. H. R. (1998).

[42] *See Goodwin*, *supra* note 14.

[43] *Id*. at para. 98.

taken place since the ECHR had been adopted.[44] The third was that the ECtHR acknowledged that transsexuals "lived in an unsatisfactory situation.... that was no longer sustainable"[45] and that an individual should be able to "live in dignity and worth in accordance with their sexual identity chosen by them…."[46] The fourth was that the ECtHR described Member States' lack of consensus as "hardly surprising" given the "widely diverse legal systems and traditions" operating across the then forty three Member States.[47]

By disconnecting marriage and procreation and loosening the eligibility criteria for marriage beyond biological (birth) sex, the ECtHR demonstrated that it is prepared to associate marriage with units other than the traditional family. Same-sex couples are one such unit. Although the decision in *Goodwin,* at least on a perfunctory level, preserves the traditional union of a man and a woman, it strongly suggests that Article 12 is adaptable beyond its traditional boundaries. An optimistic reading of the case (for same-sex couples at least) therefore suggests that at some point in the future, the ECtHR may depart from the view that marriage is a purely heterosexual institution, and provide the right to marry to same-sex couples who have not, and will not, undergo gender reassignment surgery.

This optimism has arguably been dampened by the ECtHR's recent decision in *Schalk.* In that case the applicants, a male couple, complained that Austrian law denied them access to a legal marriage. The ECtHR held that same-sex couples do not fall within the ambit of Article 12. In so holding, it observed that "[i]n contrast [to Article 12] all other substantive Articles of the ECHR grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate."[48] The ECtHR further stated that because "there is no European consensus regarding same-sex marriage" it was not persuaded by the applicant's argument that Article 12 should, in present-day conditions, be read as granting same-sex couples access to marriage. [49] However, despite all this, the ECtHR also stated that Article

[44] *Id.* at para. 100.

[45] *Id.* at para. 90.

[46] *Id.* at para. 91.

[47] *Id.* at para. 85.

[48] *See Schalk, supra* note 5, at para. 55.

[49] *Id.* at paras. 57-58. The ECtHR also pointed out that although the commentary accompanying Article 9 of the European Union's Charter on Fundamental Human Rights [hereinafter "the Charter"] stated that there was no obstacle to recognizing same-sex relationships in the context of marriage, there was also no explicit requirement that domestic laws should facilitate such marriages (*id.* at para. 60). Nonetheless, it should be noted that the commentary accompanying Article 9 of the Charter also points out that "Article 21 of the Charter, which prohibits discrimination on grounds of sexual orientation, is of special importance with respect to the interpretation of Article 9, and it may be invoked in relation to the exercise of the right to marry. It can be argued that the exclusion of same-sex couples from marriage would constitute discrimination on the basis of sexual orientation in

12 was not confined to opposite–sex couples "in all circumstances."[50]

The decision draws a number of comments. The first is the recurring conservatism of the ECtHR with regards to Article 12, which manifested itself similarly in *Rees*, *Cossey* and *Sheffield*. As such, the decision is arguably another indictment of homosexuality. The second is that Article 12 would not require a textual amendment in order to accommodate same-sex marriage, as it does not expressly provide for marriage "between" a man and a woman, or make use of any such synonymous terms. This is significant, given the judgment suggests that the ECtHR felt constrained by the terms of Article 12. The third is that the decision demonstrates the ECtHR to be engaging in inconsistent interpretative techniques. For example, the decision suggests that a European consensus on "same-sex marriage" will control, to a significant extent, the expansion of Article 12 to include same-sex marriage. Perhaps this is unsurprising, given that when engaging with an evolutive interpretation of the ECHR— which construing Article 12 to provide for same-sex marriage would no doubt be— "as a primary source of reference, the ECtHR usually examines whether a common standard or even consensus has evolved among the European States [which are] parties to the ECHR."[51] However, as clearly demonstrated in *Goodwin,* consensus is not fundamental to determining whether or not Article 12 warrants expansion.[52] This inconsistency contributes to the difficulty in predicting when, why or how the ECtHR's conservatism on this issue will be overcome, if at all.

All told, an evaluation of the ECtHR's jurisprudence hints at a future where Article 12 provides same-sex couples with the right to marry. At present the ECtHR is unwilling to put such a construction on the provision; however there are a number of reasons to think this will situation will not remain static. First, as Loveday Hodson argues, the ECtHR has acknowledged that marriage is not "inevitably an institution for opposite sex couples" and therefore the exclusion of a particular group (namely, same-sex couples) requires explanation.[53] Second, *Schalk* implies that should a European consensus on same-sex marriage emerge, the ECtHR may reconsider the issue. Third, the traditional heterosexist and binary construction of Article 12, which *Schalk* (and *Goodwin*) preserve, is being

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violation of Article 21." See, EU Network of Independent Experts on Fundamental Rights, *Commentary of The Charter of Fundamental Rights of The European Union* 102 (2006), available at: .http://www.feantsa.org/files/housing_rights/Instruments_and_mechanisms_relating_to_the_right_to_housing/EU/network_commentary_eucharter.pdf (last accessed: 27 September 2011).

[50] *See Schalk*, *supra* note 5, at para 61.

[51] Ida Elisabeth Koch & Jens Vedsted-Hansen, *International Human Rights and National Legislature: Conflict or Balance?*, 75 NORDIC JOURNAL OF INTERNATIONAL LAW 3, 11 (2006).

[52] *See Goodwin*, *supra* note 14.

[53] Loveday Hodson, *A Marriage by any other Name? Schalk and Kopf v. Austria*, 11 HUMAN RIGHTS LAW REVIEW (HRLR) 170, 173 (2011).

increasingly challenged.[54] Collectively, these developments suggest, at the very least, the ECtHR will be asked to revisit the issue of same-sex marriage under Article 12 in the future.[55]

2. Category Two Cases: Breaches of Article 8 in Conjunction with Article 14

Notably, the applicants in *Rees*, *Cossey*, *Sheffield* and *Goodwin* also framed their claims in the context of Article 8. They claimed that the UK's legal regime illegitimately interfered with their "private life," because it exposed them to potentially distressing and embarrassing situations where they would have to disclose their birth gender. The ECtHR's view on this claim evolved similarly to its view on Article 12. In *Rees*, the ECtHR held by 12 votes to 3 that Article 8 did not impose a direct obligation on Member States to recognize post-operative transgender persons.[56] The ECtHR reaffirmed this decision in *Cossey*, but by a narrower majority of 10 votes to 8. The majority argued that there had been certain legal developments but no emergence of a "common ground"[57] in Europe on the recognition of gender reassignment. The ECtHR later reaffirmed these decisions in *Sheffield* by a majority of 11 votes to 9. This time the majority argued that (1) there was no common legal approach to the problems created by the recognition of gender reassignment;[58] (2) there had not been sufficient social or legal developments to warrant a departure from its earlier decisions;[59] and (3) the detriment suffered by the applicant was not sufficiently serious to override Member States' margin of appreciation.[60] Members of the *Sheffield* dissent however, argued that there had been a steady "evolution of attitudes" both legally and

[54] *See* for example, Michele Grigolo, *Sexualities and the ECHR: Introducing The Universal Sexual Legal Subject*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1023, 1026, 1027 (2003). ("It is necessary to contest the poles and problematize the binary construction of gender and sexuality. Instead of taking categories such as "sex" or "homosexual" as fixed and given, post-modern "queer" theorists have stressed their artificiality and their role in reproducing a system of domination. Butler has undermined the very naturalness of the category of "sex." In the realm of sexuality, bisexuals have asserted their own specificity. The emergence of transgenderism and transsexualism as identitarian and political phenomena has demonstrated the apparent paradox of building (fixed) identity upon the impossibility of any (fixed) identity. And it has become clear that sexual borders and roles can themselves be perceived and experienced in different ways along other identitarian axes such as class, ethnicity, nationality, age and disability").

[55] See Hodson, *supra* note 53, at 174. (Hodson agrees the ECtHR will revisit the issue again).

[56] *See Rees*, *supra* note 3.

[57] *See Cossey*, *supra* note 35, at para. 40.

[58] *See Sheffield, supra* note 41, at para. 57.

[59] *Id.* at para. 60.

[60] *Id*. at para. 59.

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socially with regards to transexualism and the recognition of gender reassignment.[61] They further argued that the majority's decision endorsed a logically inconsistent system, in that the UK's system provided medical and monetary resources for transsexuals to have gender reassignment surgery, but then refused to legally recognize that new gender when the transition was complete.[62] In *Goodwin*, the contradictory nature of the ECtHR's previous decisions came to a climax and the ECtHR unanimously held that the UK regime violated Article 8. In so holding, the ECtHR noted that there had been a "wide"[63] international trend towards the increased social and legal acceptance of transsexuals, and that a lack of a common approach to gender reassignment was unsurprising, given the number and diversity of Member States.[64]

The right to respect for "private life" is a widely encompassing phrase. In 1976, the Commission defined it as "the right to live as one wishes…it also compromises, to a certain degree, the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfillment of one's own personality."[65] Given the broadness of the phrase, it is perhaps unsurprising that the earliest judgments from Strasbourg show "private life" to be the first prong of Article 8 to be interpreted to recognize same-sex relationships. Getting the ECtHR to recognize that same-sex couples share a "family life" under Article 8 however, has not been as easy.

In *X and Y v. United Kingdom,*[66] the Commission ruled that same-sex relationships did not fall within the ambit of "family life" under Article 8, but within an individual's right to respect for his "private life." The Commission's decision laid the foundations for a long-time inimical approach towards the "family life" of same-sex couples, with the ECtHR mirroring this same approach two decades later in *Mata-Estevez v. Spain.*[67] In that case, the applicant lived in a mutually supportive homosexual relationship with G for ten years. At the time Spanish law did not permit the couple to marry or enter in to a civil partnership. G died and the applicant was refused a survivor's pension since it was a pre-condition of eligibility that the couple be married. The applicant argued this illegitimately interfered with his right to respect for his "private life" and "family life," and that the

[61] *Id*. *See also* the joint, partly dissenting opinions of Judges Bernhardt, Thór Vilhjálmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu.

[62] *Id.* Dissenting opinion of Judge Van Dijk, at para. 3

[63] *See Goodwin*, *supra* note 14, at para. 81.

[64] *Id.* at para. 85.

[65] X v. Ireland*,* 5 DR 86 Eur. Ct. H. R. (1976). *See also* Loukis Loucaides, *Personality and Privacy under the European Convention on Human Rights*, 61 BRITISH *YEARBOOK OF INTERNATIONAL LAW 175 (1990).*

[66] *See X and Y*, *supra* note 1.

[67] Mata Estevez v. Spain*,* 2001-VI Eur. Ct. H. R. (2001)..

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difference of treatment between a same-sex and a married (opposite-sex) couple contravened Articles 8 and 14. The ECtHR rejected the applicant's claim and ruled that his relationship with G did not fall within the ambit of "family life." The ECtHR acknowledged that the applicant's emotional and sexual relationship with G might come within his "private life," but said that any interference was justified because domestic law pursued the legitimate aim of protecting the family based on marriage bonds. [68]

Simpson v. United Kingdom[69] concerned the tenancy rights of a surviving lesbian partner over the common residence. The Commission ruled that any interference was to be considered in the context of the applicant's "home,"[70] and affirmed that discrimination based on the fact the couple was of the same sex was legitimate because the traditional family merited special protection.[71] Thus, the applicant's claim was rejected.

X and Y, *Mata-Estevez* and *Simpson* all illustrate the Commission and subsequently the ECtHR taking a very narrow approach towards "family life." As Paul Johnson points out, a criticism of this is that by confining the protection of a same-sex relationship to the private sphere, there is "limited consideration of the social, structural and institutional processes through which social exclusion and discrimination are maintained on the grounds of sexual orientation."[72]

However, a liberal shift is evident in *Karner v. Austria.*[73] After the death of his male partner the applicant argued that he had the right to succeed to the tenancy of the flat they shared in his partner's name. Under Austrian law a "life companion" could succeed to a tenancy, but this did not include a same-sex partner. The applicant complained that the difference in treatment breached his right to respect for his "home" under Article 8, and was discriminatory on the basis of his sexual orientation.

The ECtHR held that although the protection of the traditional family was a legitimate reason that might justify a difference in treatment, Austria had failed to show why it was

[68] *Id.* The English translation of this decision in the Reports of Judgments and Decisions does not include paragraph numbers. The references in this paragraph can be found in the section headed "The Law" under the sub-heading of "Article 14."

[69] Simpson v. United Kingdom, DR 47 Eur. Comm'n H. R., at 274 (1986) .

[70] *Id.* at para. 3.

[71] *Id.* at para.7.

[72] Paul Johnson, *An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights*, 10 HRLR 67, 78 (2010).

[73] *See Karner, supra* note 13.

"necessary" to exclude same-sex couples from the scope of "life companion."[74] Austria had therefore breached Articles 8 and 14. Two important points can be noted from this decision. The first is the emerging practice of same-sex couples to frame their claims in the context of their "home." It appears applicants in a same-sex relationship simply have a greater chance of success by framing their claim in this way; their home is clearly more tangible to the ECtHR than their claim of a "family life." Notably, this approach is inconsistent with the "home" being defined as a "protected private space essential to the activities which constitute family life." [75] As a result, it is difficult to understand how the ECtHR can legitimately give same-sex couples one right but not the other. This is arguably another manifestation of the ECtHR's conservatism towards homosexuality. That said, Wintemute suggests that the legal recognition of the "home" shared by same-sex couples is part of a progressive movement away from same-sex relationships being limitedly recognized in the sphere of "private life."[76] This analysis supports the argument that *Karner* represents a departure from the more restricted approaches taken in *X and Y*, *Mata-Estevez* and *Simpson*. Furthermore, the implementation of a stricter burden *i.e.,* the demanding of Member States to show why it is "necessary" to exclude same-sex couples from a benefit provided by domestic law, demonstrates that Member States' margin of appreciation to implement laws that are adverse to LGBT persons is being circumscribed under Article 14.

The reasoning in *Karner* was forced to withstand a peculiar challenge in *Burden v. United Kingdom.*[77] In this case the applicants were sisters who had lived in a stable, committed and mutually supportive relationship all their lives. They complained that because the domestic inheritance tax exemption only applied to a surviving spouse and a civil partner, their rights under Article 1 of Protocol 1[78] and Article 14 had been violated. At the time it was settled law that in order for an issue to arise under Article 14, there had to be a difference in the treatment of persons in relatively similar situations. In ruling that there had been no contravention, the ECtHR stated that

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[74] *Id.* at para. 41.

[75] MARK JANIS, RICHARD KAY & ANTHONY BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXTS AND MATERIALS 404 (2008).

[76] Robert Wintemute, *From 'Sex Rights' to 'Love Rights': Partnership Rights as Human Right, in* Sex Rights: THE OXFORD AMNESTY LECTURES 2002 (Nicholas Bamforth, ed. 2005).

[77] Burden v. United Kingdom, Eur. Ct. H. R. (2008), available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=burden%20%7C%20United%20%7C%20Kingdom&sessionid=79332797&skin=hudoc-en (last accessed: 27 September 2011).

[78] ECHR, art. 1, prot. 1, states that : "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." The terms of Article 1 indicate that it only applies to acquired property rights *i.e.,* those an individual already possesses, and does not guarantee a person a right to acquire property.

> [T]he relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners....The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members.... and the fact that the applicants have chosen to live together all their adult lives, as do many married and Civil Partnership Act couples, does not alter this essential difference between the two types of relationship.[79]

This decision was positive for same-sex couples in at least two ways. For the first time, the ECtHR appeared to put civil partnerships on an equal footing with heterosexual marriage. Also, by holding that the relationship shared by cohabiting same-sex siblings was *not* qualitatively the same as that shared by civil partners, the ECtHR did not dilute the significance of same-sex relationships in general. That said the decision was not without its critics. Judges Zupančič and Borrego dissented. The former described the majority's decision as "logically inconsistent."[80] He argued that making consanguinity an impediment to the tax exemption was arbitrary because the only apparent qualitative difference between the relationship shared between the two sisters and those obligated under a civil partnership was a sexual relationship.[81] He questioned "Is it having sex with one another that provides the relationship to a legitimate government interest?"[82] The British media also targeted the decision, and as a result same-sex couples suffered some negative (and inaccurate) press. For example, Joyce Burden was quoted as saying "If we were lesbians we would have all the rights in the world. But we are sisters**,** and it seems we have no rights at all."[83]

In the decisions that immediately followed, it is apparent that the hype surrounding the *Burden* decision unsettled the steady liberalization of Articles 8 and 14, which the ECtHR had initiated in *Karner*. In fact, the ECtHR's subsequent decisions produce a bizarre result. On the one hand the approach in *Burden* was followed in *Korelc v. Slovenia.*[84] In that case the applicant lived with F in a platonic relationship. When F died the applicant

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[79] *See Burden*, *supra* note 77, at para. 62.

[80] *Id.* Dissent of Judge Zupančič.

[81] *Id.*

[82] *Id.*

[83] Richard Savill, *Sisters lose inheritance tax battle - Elderly pair wanted same rights as gay couples,* THE DAILY TELEGRAPH, Apr. 30, 2008, available at: http://www.dailymail.co.uk/news/article-1017502/Elderly-sisters-lose-fight-death-tax-parity-gays.html (last accessed: 27 September 2011).

[84] Korelc v. Slovenia, 28456 Eur. Ct. H. R. 3 (sect. 3, 2009).

unsuccessfully applied to succeed to the tenancy. He claimed *inter alia* that he had been discriminated against in violation of Articles 8 and 14 on the grounds of "sex," in that he had been denied the right to succeed to the tenancy because both he and F were men. He claimed that his situation was analogous to one of a surviving partner of an opposite sex tenant who would qualify under Slovenian law to succeed to a tenancy. The ECtHR said the applicant's situation was not comparable to that of a married couple, nor a couple who were cohabiting, and followed the decision in *Burden*.[85] In so holding, the ECtHR maintained the principle that same-sex couples shared a relationship that was qualitatively akin to heterosexual marriage and *de facto* opposite-sex relationships, not cohabiting same-sex relatives, acquaintances or friends.

On the other hand however, there is *Courten v. United Kingdom.*[86] In that case the applicant's partner died (suddenly) two weeks after civil partnerships became legally available. Without a civil partnership, the applicant was ineligible for an inheritance tax exemption. The applicant's claim was declared inadmissible because of the couple's "negligence" in failing to register. The ECtHR held that where a Member State provides no means of legally recognizing same-sex relationships, same-sex couples cannot use Article 14 to complain of a discriminatory difference in treatment in comparison to heterosexual couples, since same-sex couples are not in an analogous position. This is in conflict with the ECtHR's statements in *Burden* that fostered an idea of parity between same-sex and opposite-sex relationships.

In 2010 the ECtHR's momentum appeared to regain speed in *Kozak v. Poland.*[87] Polish law provided that a person in a "*de facto* marital cohabitation" could succeed to a tenancy, but this did not include same-sex partners. Applying *Karner,* the ECtHR held that Poland's blanket exclusion of same-sex couples was not necessary for the protection of the traditional family, and therefore breached Articles 8 and 14. The ECtHR held, in relation to Article 8, that respect for one's "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 choice in the sphere of leading and living one's family or private life."[88] This reasoning made *Kozak* a very significant decision because it suggested that same-sex relationships might constitute a "family life" under Article 8. Furthermore, the ECtHR chose to engage in that reasoning of its own accord. The applicant had framed his claim in the context of his right to a "private life" and the ECtHR quickly determined the claim came within the applicant's right to respect for his "home," but the ECtHR still chose to reference "family life" in its decision. *Kozak*

[85] *Id.* at paras. 90-92.

[86] Courten v. United Kingdom*,* 4479 Eur. Ct. H. R. 6 (2008).

[87] Kozak v. Poland, 13102 Eur. Ct. H. R. (sect. 4, 2010).

[88] *Id.* at para. 98.

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represented a significant shift in the ECtHR's jurisprudence because it signaled a departure from the ECtHR's previously hostile attitude towards the idea that same-sex couples shared a "family life."

This shift clearly (and quickly) manifested in *Schalk*, where the ECtHR held that it was "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 art [*sic*] 8."[89] The ECtHR also acknowledged that same-sex couples were in a "relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship,"[90] and that there was an "emerging European consensus" towards the recognition of same-sex couples.[91] However, despite all of this, the ECtHR, by a majority, refused to hold that same-sex couples could derive a right from Articles 8 and 14 to have their relationship legally protected. This means that Member States have no obligation, under the ECHR, to provide same-sex couples with any sort of legal recognition or protection for their relationship, despite the fact that such couples now have, by instruction of the ECtHR, a "family" status. In so holding the ECtHR observed that there is no established consensus among Member States with regards to the recognition of same-sex relationships, [92] and therefore Member States enjoy a margin of appreciation in assessing whether, and to what extent, differences in otherwise similar situations justify a difference in treatment.[93]

The level of contradiction in this decision is troubling,[94] and a three-party dissent pointed this out. The dissenting judges argued that the majority should have drawn inferences from its finding that same-sex relationships constitute a "family life." They further argued that that the majority had endorsed "the legal vacuum at stake," by failing to impose on Member States any positive obligation to provide a satisfactory framework that offered same-sex couples the protection "any family should enjoy."[95] The dissent essentially berated the majority for being logically inconsistent. If Article 8 imposes a positive obligation on Member States to establish frameworks enabling "family life" to be enjoyed, surely a part of that framework should be to provide legal safeguards for that "family

[89] *See Schalk*, *supra* note 5, at para. 94.

[90] *Id.* at para 99.

[91] *Id.* at para. 105.

[9292] *Id*. at para. 105.

[93] *Id*. at para. 96.

[94] *Id*. Dissent of Judges Rozakis, Spielmann and Jebens, at para 4.

[95] *Id*.

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life?"[96] To this extent Hodson brands the *Schalk* decision as "hasty and unsatisfactory."[97]

In addition, although a consensus amongst Member States clearly does not currently exist with regard to same-sex marriage, it is arguable that it does do so in relation to the recognition of same-sex relationships via an alternative registration system. Soon, approximately forty-seven percent of the Council of Europe's Member States will legally recognize same-sex relationships in some way. Although this is not a majority, it suggests that the margin of appreciation should now only operate to provide Member States with discretion to determine *how* to recognize same-sex relationships, not if they should be recognized at all.[98]

C. Conclusion

Despite evidence of recurring conservatism, the last thirty years has seen the ECtHR incrementally liberalize the interpretation of Articles 8, 12 and 14 in favor of the recognition of the relationships LGBT persons share. At present the ECtHR has established a framework that has stretched the concepts of marriage[99] and "family life," [100]under the ECHR, beyond their traditional boundaries, and deploys a heightened standard of scrutiny to laws that totally exclude persons on the basis of their sexual orientation. [101] It also acknowledges that there is an emerging consensus in favor of the legal recognition of same sex relationships amongst Member States,[102] and that the topic of such recognition is one of "evolving rights."[103]

Schalk represents another significant milestone in the ECtHR's legacy, but simultaneously represents a frustrating "vacuum" in the ECHR's machinery.[104] However, in conjunction

[96] Arguably this situation is reflective of that which resulted from the ECtHR's decisions in *Rees*, *Cossey* and *Sheffield* with regards to Article 12. Those decisions essentially endorsed a state system that provided medical and momentary resources for transsexuals to transition to their preferred gender, but then refused to legally recognize that new gender when the transition was complete.

[97] *See* Hodson, *supra* note 53, at 175.

[98] *See* George Letsas, *Two concepts of the margin of appreciation,* OXFORD JOURNAL OF LEGAL STUDIES 705, 722 (2006).

[99] *See Schalk*, *supra* note 5, at para 61.

[100] *See Schalk*, *supra* note 5.

[101] *See Karner*, *supra* note 13.

[102] *See Schalk*, *supra* note 5, at para. 105

[103] *Id.*

[104] *See* Hodson, *supra* note 53, at 177.

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with the framework above, this vacuum provides strong reason to believe that the ECtHR will consider the question of the recognition of same-sex relationships again in the future. There are two forms this recognition can take— marriage under Article 12, and/or an alternative registration system as derived from Articles 8 and 14. In the absence of an emerging consensus on same-sex marriage and the more restrictive terminology of Article 12, it appears that same-sex marriage under the ECHR is not yet on the horizon. However, given that same-sex couples now fall within the ambit of "family life" in Article 8, there is an emerging consensus (which is bordering on a majority) towards the recognition of same-sex relationships amongst Member States. The ECtHR has also begun to employ a heightened standard of scrutiny with regards to laws that differentiate on the basis of sexual orientation, and hence, the provision of a right of access to an alternative registration system for same-sex couples is conceivable in the more immediate future. To do this, an applicant(s) will have to successfully claim, using Article 8 in conjunction with Article 14, that being deprived of such a right amounts to an illegitimate and unjustified interference with his right to respect for his "family life" on the basis of his sexual orientation.