**THE CASE FOR SAME-SEX MARRIAGE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS**

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***SUMMARY.*** *For proponents of same-sex marriage,**this essay considers the best strategy for success before the European Court of Human Rights (‘ECtHR’). The privacy aspect of Art 8 ECtHR will never be a successful argument with reference to marriage which involves a public status. The equality argument (Article 14) is useful in addressing this issue with its close connections with citizenship, symbolic value and proven record internationally. Difficulties remain with the equality argument; its conditional status, the width of the margin of appreciation (‘MoA’) required and the need for an equality comparator. The equality argument needs reinforcement by use alongside a developing family law argument under Article 8 and a dynamically interpreted Article 12 (right to marry) argument. Ultimately the success of any argument depends upon the developing consensus among Member States of the Council of Europe (‘Member States’).*

**Key Words:** Same-Sex Marriage, Privacy, Equality, Margin of Appreciation, Family Law, Dynamic Interpretation, Consensus

**INTRODUCTION**

At an ECtHR level there continues to be no right to same-sex marriage.[[2]](#endnote-1) In *Chapin and Charpentier v France* the ECtHR confirmed the position, reiterating their concerns about developing a consensus on the issue before acting.[[3]](#endnote-2) At present, whilst a majority of Member States now provide some level of legal protection for same-sex couples,[[4]](#endnote-3) only 13 Member States out of 47 provide for same-sex marriage.[[5]](#endnote-4) Indeed some Member States constitutionally ban marriage between same-sex couples[[6]](#endnote-5) (Fenwick 2016) and Russia has certain homophobic policies (Fenwick 2016, 270 and Johnson ‘Homosexual Propoganda’ 2015).[[7]](#endnote-6) Whilst same-sex couples now have the right to form a civil union or registered partnership,[[8]](#endnote-7) for many same-sex marriage campaigners this will never be seen as sufficient recognition of their unions.[[9]](#endnote-8) Drafted in the 1950s the text of the ECvHR does not have a ‘general non-discrimination clause’ (Letsas 2006**,** 708). All potential arguments therefore have to rely upon the ‘living instrument’ doctrine which allows the ECtHR to interpret the existing articles in the ECvHR to accord with modern reality. As there are no specific protections in the ECvHR relating to discrimination against gays, any arguments in relation to same-sex marriage have to build upon and develop the existing case law decided by the ECtHR (See Tahmindjis 2016, 10). This article evaluates, for proponents of same-sex marriage, the best arguments for success before the ECtHR.

First, consideration is given to the historical dominance of the privacy aspect of Article 8 on the development of gay rights before the ECtHR [[10]](#endnote-9) Privacy will never be a successful argument when it comes to marriage, a right so clearly connected with an individual’s public status. Concentration on an equality argument can address many of these issues. However, specific difficulties with the use of equality arguments under article 14 are then explained.[[11]](#endnote-10) Article 14 is a conditional right only, meaning litigants always have to bring forward their claim under the ambit of another ECvHR right. Arguments are also made that equality rights often have a wider MoA and therefore lack of protection for gays. Lastly, in seeking to engage in equality arguments comparisons between different groups categorised by sexual orientation are required, thereby further emphasising the concept of the dominant heterosexual norm. The equality argument alone therefore needs to be strengthened by new revitalised arguments. The family life aspect of article 8, which has finally been interpreted to apply to same-sex couples, will play increasing importance. Lastly this article calls for a new interpretation of Article 12 (right to marry).[[12]](#endnote-11) Redundant historical text driven approaches should be abandoned in favour of a dynamic interpretation of the right to marry to include same-sex couples. Ultimately however, any progress in the case for same-sex marriage is likely to depend upon the ECtHR recognising a consensus among Member States on this issue.[[13]](#endnote-12)

**THE DOMINANT INFLUENCE OF THE PRIVACY ARGUMENT BEFORE THE ECtHR IN CASES DEVELOPING GAY RIGHTS**

The right to privacy has traditionally been defined as containing a focus on a right to be ‘let alone.’ It is described by Mill as ‘a circle around every individual human being which no government … ought to be permitted to overstep’ (Mill 1936, 943). Arguments based on privacy result in basic protections for gays, and arguably not same-sex marriage. However traditionally the right to a private life under Article 8 was dominant in relation to the expansion and development of gay rights. Several authors have stated that the large majority of the successful cases concerning the development of the ECtHR’s protection of gays from discrimination have resulted from the use of Article 8 right to privacy (Johnson 2010; Stark 2006, 1574; Caballoro 2004-2005, 166; Danisis 2011, 802 and Walker 2001, 123). The traditional focus on privacy can be seen from the earliest ECtHR cases including *Dudgeon v UK*,[[14]](#endnote-13) whereby the UK was obliged to de-criminalise sodomy in Northern Ireland. Although the case was ground-breaking at the time for finding a violation of Article 8 (See Walker 2001, 125) the ECtHT emphasised the fact that these concerned ‘private’ acts.[[15]](#endnote-14) The traditional focus on privacy before the ECtHR is also reflected in UK domestic legislation which referred to privacy as the main reason for protecting gay rights. (See Bradley 2003, 142 on the Wolfenden Report which was adopted in the Sexual Offences Act 1967).

Although these ECtHR cases and domestic legislation were significant achievements for gay rights campaigners at the time, commentators argue that this has placed a limitation on the evolution of gay rights in Europe (Johnson 2010, 76 and Sedgewick 1990, 71). As a result of the perceived nexus made by the ECtHR between private functions and homosexuality, there has been less chance to develop wider rights beyond that of sexual privacy. Grigolo also comments on the limits of the privacy argument stating that this is just the start and not the end of sexual orientation rights (Grigolo 2003, 1040). If cases concerning sexual orientation are going to continue to stress the private nature of such matters, it will not be as easy to bring forward arguments in relation to same-sex marriage. Marriage is a concept on the public stage. Marriage is celebrated in public in front of witnesses and has to comply with formal rules regarding state registration. Marriage has significant external legal consequences, although these do vary between countries (Waaldijk, 2005). In many jurisdictions this includes tax advantages, inheritance rights, protections in property law, post-divorce rights, right to name change and the right to bring a wrongful death action. Children born during a marriage are presumed to be the children of the husband. Privacy arguments will never be successful in this context. It is argued next that Article 14 (equality) arguments are advantageous in addressing these issues.

**THE ADVANTAGES OF EQUALITY BASED ARGUMENTS FOR PROPONENTS OF SAME-SEX MARRIAGE**

There is far more scope for ‘evolution’ of an equality right. Whilst privacy is a right to be ‘let alone’, in contrast equality is associated with citizenship and its public status. Marriage is seen by many as a key component of citizenship. (Harris 2007-2008; Bamforth 2012; Cott 2000, 1; Cossman 2007, 27; Kochenov 2009, 163 and Richardson 1998, 1495). Exclusion of gays from the status of marriage has been referred to as ‘domestic apartheid’ (Dunlap 1991, 63) and denial of ‘full political standing’ for gays (Kornbluh 2011, 537; Bamforth 2012 and Marshall 1992, 18). Citizenship allows full participation in society. For those countries which are part of the EU, it also allows EU citizens and their family relocate with associated employment rights[[16]](#endnote-15) around the EU territory.[[17]](#endnote-16) Engagement of equality arguments in relation to same-sex marriage is therefore advantageous in achieving the associated benefits of citizenship. This is something which is never going to be achieved from a privacy argument alone.

Equality arguments also have symbolic value which is a key attraction of marriage as opposed to civil partnership (Dorf, 2011, 1275; Aloni, 2010-2011, 150 and Isaak, 2008). Writers have referred to marriage as ‘fundamental’ and ‘deeply rooted in our society’(Lombino II, 2004-2005)and that it is a ‘public tradition’ (Dent, 1999). Others describe marriage as the‘privileged and preferred legal status in Europe and the United States’ (Aloni, 2010-1011, 110 and Equality Network, 2011). Even after achieving civil partnership, which often involves similar legal rights to marriage, proponents of same-sex marriage continued striving for marriage as a goal due to its symbolic status (Dunlap, 1991). Other jurisdictions have also stressed the importance of equality arguments in relation to their judgments on same-sex marriage. In *Minister of Home Affairs and Another v Fourie (‘Fourie’)* the South African Constitutional Court criticised privacy as a ‘negative liberty’[[18]](#endnote-17) in contrast to the strength of the equality argument which meant ‘equal concern and respect across differences.’[[19]](#endnote-18) US courts have also relied heavily on the equality argument (See Barrett, 2006-2008, 695 for discussion).[[20]](#endnote-19) The recent Supreme Court judgment of *Obergefell et al v Hodges, Director, Ohio Department of Health* (‘*Obergefell*’) nowrequires all US states to issue marriage licences to same-sex couples and to recognise same-sex marriages validly performed in other jurisdictions.[[21]](#endnote-20) The main justification of the right to marry was ‘derived from the Fourteenth Amendment’s guarantee of equal protection.’[[22]](#endnote-21) These examples demonstrate that internationally equality has been the most successful argument for those courts finding in favour of same-sex marriage. It is argued that it is advantageous for the ECtHR to engage with this argument in order to recognise same-sex marriage. At present equality is given a subsidiary role in cases concerning gays before the ECtHR.

**ECtHR ENGAGEMENT WITH ARTICLE 14 (EQUALITY)**

Throughout its earlier judgments the ECtHR did not find it necessary to consider the arguments brought forward on the basis of Article 14. In *Dudgeon v UK,* the ECtHR found that ‘there is no call to rule on the merits’ of Article 14 as the same complaint had already been examined under Article 8.’[[23]](#endnote-22) This set a trend for further cases which did not consider Article 14.[[24]](#endnote-23) The traditional focus by the ECtHR on Article 8 privacy therefore remained. Grigolo asserts that in relation to *Dudgeon v UK* a conclusion based on Article 14 would have ‘strengthened the (political) ‘status’ of homosexuality to an excessive extent’ (Grigolo 2003, 1030). Perhaps this was a concern about not proceeding too quickly with the development of gay rights at the time for fear of a backlash of public opinion, causing unnecessary polarization (Marshall 2010, 199-200 and Reinhardt 2005). However, since that date gay rights have advanced significantly. Step by step, or incremental development has allowed recognition of gay rights and public acceptance of same-sex couples. More recently, the ECtHR has been ‘increasingly sensitive to issues of non-discrimination’ (Cartabia 2011, 808. See also Waaldijk 2016, 242). Significant case law emphasising equality includes *Karner v Austria* where it was stated that ‘weighty reasons were needed to justify a difference in treatment.’[[25]](#endnote-24) This dicta was used to great effect in later case law. For example when Greece attempted to reserve same-sex relationships to heterosexual couples only, this was found to violate Article 14 (right to equality) in conjunction with Article 8 (family law aspect).[[26]](#endnote-25) Reliance on non-discrimination principles under Article 14 was also successful in relation to same-sex couples’ right to adopt.[[27]](#endnote-26)

Yet, in *Oliari v Italy* there was a reversal to this developing trend.[[28]](#endnote-27) The ECtHR determined that it was not necessary to consider the argument on the basis of Article 14. Instead the right to civil partnership was deemed to be successful under Article 8, creating a positive obligation on Member States to provide such a status to same-sex couples.[[29]](#endnote-28) Fenwick considers that approach ‘significant’ (Fenwick 2016, 263).[[30]](#endnote-29) If the case had been considered under Article 14, the ECtHR would have had to consider whether Italy was able to provide ‘weighty reasons’ for its difference in treatment of same-sex couples. It is unlikely that Italy would have been able to do this successfully. The ECtHR therefore avoided having to consider whether the reasons given by Italy were discriminatory (see Hayward 2016, 29). Such a precedent would have undoubtedly strengthened the case for same-sex marriage. Indeed if the ‘weighty reasons’ dicta[[31]](#endnote-30) were followed to its logical extent, this could result in the argument that there should be a right to same-sex marriage. The dissenting judges in *Schalk and Kopf v Austria* commented that having identified a ‘relevantly similar situation’ which required ‘particularly serious reasons by way of justification’ the ECtHR should have found a violation of Art 14 taken in conjunction with Art 8.[[32]](#endnote-31)Arguably it is only the concerns about lack of consensus between Member States which have prevented the ECtHR utilising equality arguments to their full extent.

As well as these political concerns, a further difficulty in the use of Article 14 ECvHR is that it is a conditional right which can only be asserted where another alleged violation of the ECvHR is made simultaneously (Letsas 2006, 708). For Member States such as the UK which have not ratified the free standing Protocol 12 equality provisions, this means that Article 14 (equality) points have to be made in tandem with another alleged breach of the ECtHR. Although it does remain possible for the ECvHR in judgment to find a violation of Article 14 alone, this is provided that the applicant framed their case under the alleged breach of another treaty right (for discussion see Letsas 2006, 720). The international examples drawn from South Africa and the US demonstrate the strong influence of equality provisions in those constitutions.[[33]](#endnote-32) In contrast Article 14 ECvHR drafted in the 1950s, only offers a handicapped protection for equality.

An important point to draw from this is that although this article advocates the greater use of the equality argument under Article 14, this has to be done by expanding the ambit of other articles. As explained above cases made under Article 14 in tandem with the privacy branch of Article 8 would not be successful in relation to same-sex marriage. In this respect attention is drawn to the developing notion of ‘family life’ for same-sex couples under Article 8 and a recommended further development of Article 12 (right to marry). Both of these points are addressed in the final sections of this piece. Further difficulties for the ECtHR in seeking to engage with equality arguments are considered next. Firstly, equality arguments have a wide MoA, leading to a vaguer protection of rights. Secondly, equality argument by its nature requires a categorisation of groups into sexual interests to allow a comparison, thereby resulting in a re-emphasis of the heterosexual norm.

**DIFFERING WIDTHS OF MARGIN OF APPRECIATION**

The MoA is the ‘amount of discretion… [Member States are offered] ... in fulfilling their obligations under the ECtHR’ (Butler 2008-2009, 695 and Yourow 1996, 13). The purpose behind this concept is to accommodate diversity between nations ‘while enforcing effective implementation’ of the ECHR (Donoho 2001, 451). At the heart of the debate on MoA lies a deeper question regarding the contrasting arguments concerning universalism and relativism. Human rights need to be ‘sufficiently universal to make them appropriate subjects for meaningful international regulation’ (Dohono 2001, 394). Yet there is no common ‘uniform European conception of morals’ between Member States (Sweeney 2005, 462).[[34]](#endnote-33) The doctrine of MoA tries to reach an acceptable compromise between these two competing aims.

One of the central questions surrounding the MoA concerns the width of the discretion offered to the Member States. The MoA is itself variable and depends upon a number of factors. This includes the fact that domestic institutions can be in a better situation to assess local conditions than that of an international court. Secondly the degree of consensus and lastly ‘the importance of the national interest at stake ought to be balanced against the nature of the individual’s rights…’ (Shany 2005, 927). Debate rages around the importance of each of these factors. Some commentators consider consensus to be the most prominent (Donoho 2001, 452; Letsas 2006 and Wada 2004). Butler also identified this as a factor in determining when national authorities were best placed to make a decision (Butler 2008-2009, 701). There are also other important considerations which are relevant when it comes to determining the width of the MoA. These include the effect which the Member State’s conduct has had on an individual (Donoho 2001, 452) and the aim of the interference (Hutchinson 1999).

How the factors are to be weighed when determining the width of the MoA is unclear. Authors criticise the vagueness and lack of transparency of the MoA concept and its connecting ideas (Wada 2005, 280; Butler 2008-2009, 702; Hutchinson 1999, 641 and Brauch 2004-2005, 121). Hutchinson argues that the ‘doctrine as it stands is not a great deal of help to the [ECtHR] in its decision-making processes’ (Hutchinson 1999, 649). There is also a separate criticism that the MoA opens the door to discrimination against minorities (Hodson 1998-1999; Letsas 2006; Sweeney 2005; Lester 1998 and Hamilton 2013). The specific criticism made here relates to the varying widths given to the MoA in respect of different human rights. It is worth examining how the width of the MoA is determined in relevant cases which have been brought before the ECtHR. In certain circumstances there is a recognised narrow MoA. This is exemplified where matters of personal autonomy and privacy are at stake.[[35]](#endnote-34) In contrast in relation to equality cases the situation is less clear and more likely to lead to a wider MoA.

The ECtHR spelt out in *Dudgeon v UK* that in relation to privacy there is a narrow MoA as it concerned a ‘most intimate aspect of private life’.[[36]](#endnote-35) Subsequent cases brought under the privacy branch of Article 8 were also treated in the same way.[[37]](#endnote-36) This was because of the high level of effect which such laws could have on the life of the individual applicants (Grigolo 2003, 1038) and the fact that private conduct is less likely to cause harm than that done in public (Lewis 2007, 400 and Mill 1859, 13). There was also seen to be a consensus in many Member States meaning that ‘such limitations were not necessary in a democratic society’ (Hutchinson 1999, 648).[[38]](#endnote-37) The certainty about the narrowness of the MoA in relation to the privacy aspect of Article 8, is not replicated in relation to cases brought under Article 14 equality. The width of the MoA in relation to equality cases is often variable. In *Karner v Austria* the ECtHR stated that in cases of sexual orientation discrimination, the Member States in question have to offer particularly convincing and weighty reasons to justify their conduct.[[39]](#endnote-38) Although this would seem to point to a narrow MoA, this has not assisted in the area of same-sex marriage. The ECtHR continues to be influenced by the lack of consensus between Member States.[[40]](#endnote-39) Areas with lack of international consensus are likely to have a wider MoA (Shuibhne, 2009; Lewis 2007, 397; Nigro 2010; Hutchinson 1999 and Wada 2005). A point reiterated by the ECtHR on important cases on same-sex marriage[[41]](#endnote-40) referring to the wide MoA enjoyed.[[42]](#endnote-41) The ECtHR is likely only going to be prepared to move forwards when a lack of consensus can either be explained or starts to emerge. No clear ruling on the width of MoA in relation to equality cases can be deduced and this remains highly circumstance dependent. Such a wide ranging vague MoA has the danger of rendering any equality right ‘meaningless’ (Cartabia 2001, 814). Ultimately the ECtHR is leaving the decision on same-sex marriage to domestic authorities.

In reaching the limits of protection for gays that the right to privacy can offer, the argument has turned to equality as offering more scope for the evolution of rights. One of the disadvantages of the equality argument is that in contrast to privacy the width of the MoA is much more variable and can be wider. In having a varying MoA for different types of rights, Donoho and other commentators have stated that in essence that the ECtHR has created a ‘hierarchy among rights protected’ by the ECtHR (Donoho 2001, 459 and Butler 2008-2009, 703). By moving from privacy to equality the argument in favour of expansion of gay rights to include same-sex marriage has moved down the hierarchy of protected rights, meaning less protection is offered to gays. This is another reason to utilise any equality right arguments alongside an expanded family law argument under Article 8 and a revitalised right to marry under Article 12 argument. The next section considers a further difficulty with the use of the equality argument by the ECtHR.

**THE EQUALITY ARGUMENT REQUIRES CATEGORISATION OF INDIVIDUALS INTO CLASSES OF SEXUAL ORIENTATION**

Throughout its case law the ECtHR refers to gays as ‘homosexuals’, creating a clear categorisation of sexual interests. Evidence of the heteronormative model can be traced to the earliest cases concerning gays. In *Dudgeon v UK* the applicant in question categorised himself as a ‘homosexual’ at the outset of the case by stating that ‘on his own evidence, [he had] been consciously homosexual from the age of 14’.[[43]](#endnote-42) A similar approach was also taken in *Sutherland v UK*.[[44]](#endnote-43) Grigolo argues that the ECtHR traditionally proceeded on the basis of toleration (Grigolo 2003) stating in *Dudgeon* v *UK* that ‘[d]ecriminalisation’ does not imply approval’ (Grigolo 2003, 1030).[[45]](#endnote-44) Interestingly, the typecasting of homosexuals as a group outside of normal society can also be seen from UK policy. Earlier in the judgment of *Dudgeon v UK* the ECtHR quoted the Wolfenden report as demonstrating the need to protect society at large from ‘corruption’ by such individuals.[[46]](#endnote-45) The ECtHR has also commonly given credence to arguments made by defendant governments that they were pursuing legitimate aims in seeking to regulate the sexual activities of gays.[[47]](#endnote-46) More recent ECtHR case law concerning the ‘family life of same-sex couples’ arguably continues to be ‘inherently shaped by heteronormative standards’ (Ammaturo 2014, 178). The very fact that same-sex couples, although now recognised as having a ‘family life’ but are not entitled to access the married state[[48]](#endnote-47) arguably demonstrates a certain ‘privileging of marital families’ (O’Mahony 2012, 34. See also Ammaturo 2014).

The categorisation of individuals into classes of sexual orientation, appears to have been the common practice of the ECtHR. Yet when the equality argument is deployed it becomes a requirement to categorise individuals into classes of sexual orientation, as equality necessitates comparisons to be made between different groups. The categorisation of individuals is harmful as it means that minority groups are asserting their ‘other’ness against the ‘heteronormal’ group (Shwobel 2012, 1129 and Knop 2001). This could lead to an identitarian crisis for those individuals who are forced to identify with a certain group in order to bring legal challenges. This erodes the true variety of identities to which individuals may ascribe (Grigolo 2003, 1027-1028). Queer theorists instead argue that categories of homosexual and heterosexual should not be so ‘fixed and given’ (Grigolo 2003 and Kornbluh 2011). A further difficulty is highlighted by Grigolo who argues that categorisation into different sexual groups is disadvantageous because it ‘reinforces the dichotomy within which the ‘other’ ...is defined’ meaning that the ‘position for the dominant (the heterosexual man) is confirmed and stabilised’ (Grigolo 2003, 1025). Categorisation could mean that the minority groups are dominated by those in majority category (See also Rosenfeld 2012, 344).

Criticism can also be made as to how the ECtHR have used the comparability test in practice. Arguably it is evidence of the heteronormative model applied, that means that the ECtHR is keen to emphasis the entire lack of comparability between non-married and married couples (See Fenwick 2016). Despite the fact that gays cannot access the married state, case law demonstrates that any case brought by gay couples on the basis of discrimination can only be brought by comparison to non-married heterosexual couples.[[49]](#endnote-48) This can be seen for example by the joint adoption case law. Same-sex couples could only bring their case specifically by reference to comparison with non-married couples.[[50]](#endnote-49) The ECtHR is reluctant to allow any comparison with non-married couples (See Johnson ‘Marriage, Heteronormativity’ 2015). Again in the case of *Hamalaninen v Finland* which concerned the ability of a transsexual to remain married following a sex change, any comparison with a heterosexual couple was viewed as ‘insufficiently similar’ (Fenwick 2016, 255).[[51]](#endnote-50) The lack of comparability asserted by the ECtHR is then used as a reason to refuse to consider Article 14 equality points at all. The ECtHR therefore never considers whether there is an ‘objective or reasonable justification for an impugned distinction’ (Johnson ‘Marriage, Heteronormativity’ 2015, 57). This leads Waaldijk to describe the use of the comparability test by the ECtHR as ‘nothing but trouble’ (Waaldijk 2016, 243). The equality argument requires a comparison. Gays therefore have to assert their ‘other’ ness against the heteronormative model. This emphasises the heterosexual norm and potentially creates an identity crisis for those individuals who cannot so easily identify with one of the comparator categories. In addition it appears that the heteronormative model of marriage is so emphasised by the ECtHR that they are not even be able to entertain any comparison with a non-married couple.[[52]](#endnote-51) Categorisation of individuals into groups of sexual interest does not create solutions and can in practice create further problems. Again this exposes a significant weakness in the equality argument. Other arguments are clearly needed to support this. The developing rights of gays to family life under Article 8 is now considered.

**DEVELOPING ‘FAMILY LIFE’ ARGUMENTS FOR SAME-SEX PARTNERS**

As Article 14 is a conditional right it has to be deployed in conjunction with a case being brought forward under another article. One pathway to be utilised is the expanded use of the family life argument under Article 8. Historically, the ECtHR refused to recognise same-sex partners as having a ‘family life’.[[53]](#endnote-52) Instead such relationships were always considered ‘generative of private life rather than family life’ (Cabellero 2004-2005, 152). Critics argued that this was another example of the ECvHR being ‘predicated on the nuclear, married, heterosexual ideal’ (Stalford, 2002, 411). Gradually the ECtHR has become more lenient over time with regards to the definition of family within Article 8. It has adopted a ‘realistic and flexible approach’ (Cabellero, 2004-2005 152). This includes protecting de facto situations, including unmarried couples and wider relations as well as single parents and divorced couples.[[54]](#endnote-53)

This expansion of Article 8 ECHR has gradually been reflected in the more determined stance the ECtHR has taken towards cases involving gays and same-sex couples. In *Karner v Austria* the ECtHR stated that ‘differences based on sexual orientation require particularly serious reasons by way of justification.’[[55]](#endnote-54) The ECtHR avoided having to consider the question under ‘private life’ or ‘family life’ as the applicant had brought his claim under the ‘right to respect for his home.’[[56]](#endnote-55) In *Schalk and Kopf v Austria*, the ECtHR finally recognised that due to a ‘rapid evolution in social attitudes’[[57]](#endnote-56) that it would be ‘artificial to maintain… that… ‘a same-sex couple cannot enjoy ‘family life”.[[58]](#endnote-57) It therefore concluded that a ‘cohabiting same-sex couple living in a stable partnership, fell within the notion of ‘family life’, just as the relationship of different-sex couple in the same situation would.’[[59]](#endnote-58) This has been seen by authors as a breakthrough case due to the shift in finally recognise same-sex partners as being protected under the right to a family life (O’Mahoney 2012, 38; Danisis 2011, 804 and Sutherland 2011).In practice, the ECtHR followed a much more conservative approach with regards to the result of the case. The ECtHR did not recognise same-sex marriage due to a lack of consensus on the issue between Member States,preferring to allow national courts to decide this matter.[[60]](#endnote-59)

Further case law has followed on an expansive approach towards the development of positive obligations placed on Member states under Article 8 (Akandji-Kombe, 2007). Member States have a duty not to interfere with an individual’s private life. They also have a positive obligation under Article 8 to ensure effective respect for private and family life, through law enforcement, legal and regulatory frameworks and the provision of resources.[[61]](#endnote-60) In certain areas, namely the right to sexual self-determination for transsexuals[[62]](#endnote-61) and the right to know ones origins (for example compelling a reluctant putative father to undergo a DNA test)[[63]](#endnote-62) this has led to far reaching judgments by the ECtHR. Most recently the ECtHR has relied upon the positive obligations under Article 8 to recognise same-sex couples’ rights to enter into a registered partnership / civil partnership.[[64]](#endnote-63) Case law recognising single gay individuals right to adopt[[65]](#endnote-64) and same-sex couples right to adopt outside of marriage[[66]](#endnote-65) has also followed. This is an area which promises much for the future and can help assist with some of the deficiencies noted in the equality right argument under Article 14. In relation to same-sex marriage, the recurring issue of lack of consensus between Member States, is likely to be a barrier to progress until sufficient Member States move in this direction. A final possibility which should be explored relates to Article 12 right to Marry.

**ARTICLE 12 RIGHT TO MARRY**

In *Schalk and Kopf v Austria* the ECtHR had a disappointing treatment of the claim made under Article 12.[[67]](#endnote-66) The ECtHR noted that Article 12 only granted the right to marry ‘to men and women’.[[68]](#endnote-67) This was contrasted to other articles which referred to ‘everyone’ or ‘no one’ and cited the ‘historical context’ as being significant.[[69]](#endnote-68) This follows the traditional approach of the ECtHR as seen by the case of *Rees v United Kingdom* where the ECtHR stated that ‘Article 12… is mainly concerned to protect marriage as the basis of the family’.[[70]](#endnote-69) It also follows decisions taken by domestic courts which in same-sex marriage cases relied upon traditional definitions of marriage set in legislation.[[71]](#endnote-70) The grammatical reading by the ECtHR also reflects the approach taken by the HRC in *Joslin v New Zealand*.[[72]](#endnote-71) Even the Yogyakarta Principles which can be regarded as more radical, do not allow a human right for same-sex couples to marry.[[73]](#endnote-72) Once again this decision has been recently reaffirmed by the ECtHR in the decision of *Chapin and Charpentier v France*[[74]](#endnote-73) where it was found that there was no violation of Article 12 taken together with Article 14.

Despite these precedents, the text driven traditional approach by the ECtHR was not in fact necessary. Arguably any argument based on the intention of the drafters of the ECvHR in the 1950s is erroneous. They had no ‘conscious ambition’ to protect heterosexual marriage, as same-sex marriage would have been unthinkable at the time (Johnson ‘The Choice of Wording’ 2015, 220). Fenwick disputes the strict interpretation of the words ‘men and women’ as it could have been intended instead of excluding same-sex couples, to exclude children from the status of marriage (Fenwick 2016, 253). The attitude of the ECtHR also contrasts with the decisions of progressive courts which acknowledge the necessity of law evolving over time as society changes[[75]](#endnote-74) and that the concept of marriage should not be ‘stuck in … permafrost’ (Tobin 2007). Such a definitional argument fails to take account of the social realities of same-sex couples living together in identical fashion to opposite-sex couples (Tobin 2007). It also contrasts with the ‘living instrument’ doctrine which the ECtHR has itself developed, on the basis that human rights should be rendered ‘dynamic and evolutive’.[[76]](#endnote-75) In justifying the use of a dynamic interpretation in many other cases, Letsas explains that over time the ECtHR has ‘settled on the view that lack of a clear intention on the part of the drafters is simply irrelevant when one is considering whether to recognise a right or not’ (Letsas 2010, 518). There are many precedents where the ECtHR has demonstrated that it is prepared to move away from previous case law, where this no longer accords with modern reality. Hodson cites the case of *Christine Goodwin v UK* which shows the ECtHR using a transformative approach to Article 12 and its rigid language, by allowing a ‘transperson (in their own gender) to marry a person of the opposite gender’ (Hodson 2011, 172).[[77]](#endnote-76) The definitional argument does therefore not offer in itself any justification for the ECtHR in refusing to extend marriage to same-sex couples.

A separate justification for the approach taken by the ECtHR, is that marriage should be viewed as a separate category or ‘lex specialis.’[[78]](#endnote-77) The dictionary definition explains this to be a ‘law governing a specific matter.’ This means that the ‘doctrine states that the law governing a specific subject matter overrides a law that only governs general matters’.[[79]](#endnote-78) All other ECtHR case law concerning the equalisation of family rights for gays and same-sex couples under the positive development of Article 8 family life has taken place outside of the consideration of marriage (See Waaldijk 2016). Johnson also comments that the ECtHR has developed a ‘two-track approach’ (Johnson ‘Marriage, Heteronormativity’ 2015, 69). The jurisprudence on sexual orientation discrimination issues is regarded as ‘entirely distinct’ to that of marriage (Johnson ‘Marriage, Heteronormativity’ 2015, 69). Yet it is not explained thoroughly by the ECtHR why this should be the case.

One answer could mean that marriage is viewed by the ECtHR as having a special status, such that it cannot be subject to the usual detailed scrutiny.Hodson argues that marriage is being set apart from the other family rights and being treated as an ‘untouchable, almost sacred, category’ (Hodson 2011, 177 and see also Fenwick 2016). In *Oliari v Italy* the ECtHR refused to consider the case under Article 12 and declared the complaint on this point as ‘manifestly ill-founded’.[[80]](#endnote-79) This can be seen as a ‘retrograde step’ by the ECtHR and a strengthening of its attitude in refusing to consider any right to same-sex marriage (Hayward 2016, 30 and Fenwick 2016). Again in *Chapin and Charpentier v France* no violation of Article 12 was found.[[81]](#endnote-80) The approach of the ECtHR can be greatly criticised. As stated earlier the ECtHR appears to be continuing to promote a heterosexual view of marriage.[[82]](#endnote-81) At present in treating marriage as fundamentally different from the rest of the family law case law involving sexualities, Grigolo notes that a ‘structural problem has been created’ (Grigolo 2003, 2040). In relation to article 8 there is a principle of ‘equality of familial choices’ and yet in relation to Article 12 a ‘specific choice’ is secured (Grigolo 2003, 1040). By not even entertaining any comparisons to non-married couples, the ECtHR does not allow of any immediate hope of a recognition of same-sex marriage under Article 12.

It needs to be explored in further detail as to why marriage is given such a sacred special status by the ECtHR. One explanation could be because marriage is seen by the ECtHR as a moral or religious right, meaning that it should have a minimal role in regulation (Miller 2005, 2186 and Bradley 2003). Brauch notes that ‘particularly in the area of morals’ wide margins are given (Brauch 2004-2005, 119). Even if it were correct to review marriage as primarily a religious right, it is not always easy to pinpoint why the ECtHR need be so deferential in the area of religion (Lewis 2007, 396). There are also specific difficulties with the ECtHR regarding marriage as a religious right. Sachs J in the South African Constitutional Court case of *Fourie* explains that ‘[m]any may see a religious dimension to marriage, but this is not something that the law is concerned with.’[[83]](#endnote-82) Civil marriage is largely about a ‘set of legal protections and benefits’ (Miller 2005, 2186).[[84]](#endnote-83) Civil marriage needs to be differentiated from the religious concept. Bradley also concludes that ‘in a secular society, it becomes increasingly difficult to justify restrictions on marital capacity, founded on Church doctrine’ (Bradley 2003, 130). If we move away from the religious or moral or religious reading of marriage, it becomes much more difficult to justify the wide MoA reserved to marriage.

Yet Article 12 as interpreted by the ECtHR at present seems to be an unpromising line to pursue. However, the developing equality concept[[85]](#endnote-84) and the evolving nature of the family case law concerning same-sex couples under Article 8[[86]](#endnote-85) could lead to a dynamic interpretation of Article 12. In reality, the ECtHR can never divorce its legal jurisprudence from the actual realities of public attitudes across Europe. Ultimately as Johnson states the ‘implicit motivating principle’ in relation to the interpretation of article 12, is that allowing same-sex couples to marry is currently regarded as a ‘step too far’ bearing in mind the cultural conditions across Europe. (Johnson ‘Marriage, Heteronormativity’ 2015, 71). In *Schalk and Kopf v Austria* the ECtHR was careful to refer to the ‘deep-rooted social and cultural connotations’ of marriage, which national authorities are in the best place to assess.[[87]](#endnote-86) The ECTHR continues to emphasise lack of consensus in these cases.[[88]](#endnote-87) Perhaps this is necessary to ensure that the ECtHR retains the respect of all its Member States and ensures that its judgements are enforced. An incremental, or step-by-step approach by the ECtHR is to be welcomed. It is more likely to result in lasting change, without any backlash in public opinion, which could ultimately retard the cause sought to be advanced. Ultimately once a consensus has developed, and there are a majority of Member States supporting same-sex marriage, the ECtHR has the tools in its jurisprudence to move forward on this issue. It is likely that Article 14 (equality) would be utilised together with a reading of the positive obligations under the family law aspect of Article 8 and a new dynamic interpretation of Article 12, right to marry.

**CONCLUSION**

The text of the ECvHR does not include a specific sexual orientation non-discrimination clause. Proponents of same-sex marriage therefore have to adapt the existing provisions and case law to suit their cause. This article has considered the best approach to pursue. The historical reliance on the Article 8 privacy right has difficulties when it comes to same-sex marriage, a right very much on the public stage. An argument on the basis of equality has done much to address this, because of the close connections to citizenship, its symbolic status and the success on the international stage that such arguments have had.[[89]](#endnote-88) However, difficulties with the equality argument remain, not least its conditional status under the ECvHR. There are also difficulties with the vagueness of a wide MoA and the need for categorisation into sexual orientation categories which an equality argument requires. This may not be desirable either because of the strengthening of the heteronormative approach of the ECtHR or because of the difficulties of individuals identifying with certain set categories.

As Article 14 is a conditional right it has to be deployed in conjunction with a case being brought forward under another article. In this respect the developing family law argument under Article 8 is of use. Historically, the ECtHR refused to recognise same-sex partners as having a ‘family life’.[[90]](#endnote-89) Yet over time case law has developed dramatically and Article 8 has been interpreted flexibly (Cabellero 2004-2005) to include a wide range of families, far removed from the traditional model.[[91]](#endnote-90) Finally, in 2010 gays were recognised as having a ‘family life’.[[92]](#endnote-91) In 2015 a reading of the positive obligations under Article 8 family life led to the ECtHR imposing a right for same-sex couples to enter into a registered partnership / civil partnership.[[93]](#endnote-92) Yet again there are currently limits to the extent of Article 8, as this does not entitle same-sex couples to enter into marriage.[[94]](#endnote-93)

Article 12 right to marry, is the one which has had the most disappointing treatment by the ECtHR. Yet this could have the most impact if interpreted dynamically. A textual reading has been made of Article 12 to grant this right only to ‘men and women’.[[95]](#endnote-94) Yet such a limited approach is not necessary, given the ECtHR’s widely developed dynamic interpretation techniques used in other cases involving Article 12.[[96]](#endnote-95) Many progressive courts consider it a necessity that law should change as society changes. [[97]](#endnote-96) There are also many difficulties with attributing a religious status to marriage, when judged by a secular authority such as the ECtHR. The developing equality concept[[98]](#endnote-97) and the evolving nature of the family case law concerning same-sex couples under Article 8[[99]](#endnote-98) could lead to a dynamic interpretation of Article 12. Yet in reality there needs to be a consensus between Member States before the ECtHR is likely to move forward on this issue.[[100]](#endnote-99)

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2. *Schalk and Kopf v Austria* (App. No. 30141/04, 24 June 2010) para 94. [↑](#endnote-ref-1)
3. *Chapin and Charpentier v France* (App. No. 40183/07, 9 June 2016). [↑](#endnote-ref-2)
4. See *Oliari v Italy* (App. Nos. 18766/11 and 36030/11, 31 July 2015) for information. [↑](#endnote-ref-3)
5. The following Member States have enacted same-sex marriage laws: Belgium, Denmark, Finland (effective from 2017), France, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and United Kingdom (apart from Northern Ireland). The following 21 Member States have enacted Civil Partnership laws: Andorra, Austria, Belgium, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Slovenia, Switzerland and the United Kingdom. [↑](#endnote-ref-4)
6. Same-sex marriage is not recognized in several European countries and in addition marriage is defined as a union solely between a man and a woman in the constitutions of Armenia, Bulgaria, Croatia, Latvia, Lithuania, Moldova, Montenegro, Poland, Serbia, Slovakia and Ukraine. See Fenwick 2016 for discussion. [↑](#endnote-ref-5)
7. See Fenwick 2016, 270 who explains that gay propaganda laws are still in force in Russia. See also Johnson ‘Homosexual Propoaganda’ (2015). [↑](#endnote-ref-6)
8. *Oliari v Italy* (n3). [↑](#endnote-ref-7)
9. See Sue Wilkinson’s Witness Statement in *Wilkinson v Kritzinger* [2006] EWHC 835. [↑](#endnote-ref-8)
10. Article 8 of the ECHR provides 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.’

    [↑](#endnote-ref-9)
11. Article 14 of the ECHR provides that ‘The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social association with a national minority, property, birth or other status.’ [↑](#endnote-ref-10)
12. Article 12 provides that ‘[m]en 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’. [↑](#endnote-ref-11)
13. See *Schalk and Kopf v Austria* (n1) para 57, *Hamalaninen v Finland* (App. No. 37359/09, 16 July 2014) para 39 and *Chapin and Charpentier v France* (n2). [↑](#endnote-ref-12)
14. *Dudgeon v United Kingdom* (App. No. 7525/76, 22 October 1981). [↑](#endnote-ref-13)
15. *Ibid.* para. 39. *ADT v UK* (App. No. 35765/97, 31 July 2000). *See also Sutherland v UK*, Admissibility, (App. No. 25186/94, 21 May 1996)**,** *Smith and Grady v UK (*App. Nos 33985/96 and 33986/96, 27 September 1999) para 89 and *Lustig-Prean and Beckett v UK (*App. Nos 31417/96 and 32377/96, 27 September 1999) para 82. [↑](#endnote-ref-14)
16. Treaty on the Functioning of the European Union Art 23. [↑](#endnote-ref-15)
17. *Ibid.* Art 20(2). [↑](#endnote-ref-16)
18. South African Constitutional Court judgment of *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/40) [2005] ZACC 19, [2006] (3) BCLR 355 (CC), [2006] (1) SA 524 (CC) per Sachs J para 46. [↑](#endnote-ref-17)
19. *Ibid.* per Sachs J para 60. [↑](#endnote-ref-18)
20. Barrett, 2006-2008 discusses at 695 the Supreme Court of New Jersey in *Lewis v Harris* 908 A.2d 196, 224 (N.J. 2006) and at the Supreme Court of Hawaii in *Baehr v Lewin* 852 P.2d 44. See also Lombino II, 2004. See also Crane, 2003-20045, 465 referring to *Goodridge v Department of Public Health* 440 Mass. 309, 798 N.E. 2d 941 (2004). [↑](#endnote-ref-19)
21. *Obergefell et al v Hodges, Director, Ohio Department of Health* (2015) (Docket No. 14-556). [↑](#endnote-ref-20)
22. *Ibid.*  10. [↑](#endnote-ref-21)
23. *Dudgeon v United Kingdom* (n13) para 69. Grigolo 2003, 1030 stated that in this case the ‘[c]ourt did not find it necessary to examine the case under Article 14.’ [↑](#endnote-ref-22)
24. *See eg* *ADT v UK* (n14) para 40, *Lustig-Prean and Beckett v UK* (n14) paras 107-109 and *Smith and Grady* *v UK* n14) paras 114 – 116. [↑](#endnote-ref-23)
25. *Karner v Austria* (App. No. 40016/98, 24 July 2003) para 37. These other cases have also stressed the importance of the equality argument under Article 14. *X and Others v Austria* (App. No. 19010/07, 19 February 2013; *Vallianatos v Greece*, App. Nos 29381/09 and 32684/09, 7 November 2013 and *Hamailainen v Finland* (n12). [↑](#endnote-ref-24)
26. *Vallianatos v Greece* (n24). [↑](#endnote-ref-25)
27. *X and Others v. Austria* (n24) [↑](#endnote-ref-26)
28. *Oliari v Italy* (n3). [↑](#endnote-ref-27)
29. *Ibid,*

    [↑](#endnote-ref-28)
30. Fenwick 2016 considering *Ibid,*  [↑](#endnote-ref-29)
31. Formulated in *Karner v Austria* (n24). [↑](#endnote-ref-30)
32. *Schalk and Kopf v Austria* (n1). Dissenting Opinion of Judges Rozakis, Spielmann and Jebens para 8. [↑](#endnote-ref-31)
33. *See eg* the South African Constitutional Court judgment of *Minister of Home Affairs and Another v Fourie and Another* (n17) and *Obergefell et al v Hodges, Director, Ohio Department of Health* (n20). [↑](#endnote-ref-32)
34. Sweeney 2005, 462 referring to *Handyside v UK* (App. No. 5493/72, 7 December 1976). [↑](#endnote-ref-33)
35. *Eg* *Dudgeon v United Kingdom* (n13). [↑](#endnote-ref-34)
36. *Ibid.* para 52. [↑](#endnote-ref-35)
37. *Lustig-Prean and Beckett v UK* (n14), *Smith and Grady v UK* (n14) and *L and V v Austria*, (App. Nos 39392/98 and 39829/98, 9 January 2003. [↑](#endnote-ref-36)
38. *Dudgeon v United Kingdom* (n13) para 49.

    [↑](#endnote-ref-37)
39. *See eg* *Karner v Austria* (n24) and *Kozak v Poland* (App. No. 13102/02, 2 March 2010). [↑](#endnote-ref-38)
40. See for example *Schalk and Kopf v Austria* (n1), *Hamalaninen v Finland* (n12) and *Chapin and Charpentier v France* (n2 ). [↑](#endnote-ref-39)
41. See *Ibid.*  [↑](#endnote-ref-40)
42. See *Schalk and Kopf v Austria* (n1) para 45 and *Hamalaninen v Finland* (n12) para 75. [↑](#endnote-ref-41)
43. *Dudgeon v United Kingdom* (n13) para 32. [↑](#endnote-ref-42)
44. *Sutherland v UK* (n )para 2. [↑](#endnote-ref-43)
45. Grigolo 2003, 1030 referring to *Dudgeon v United Kingdom* (n13) para 49. [↑](#endnote-ref-44)
46. *Dudgeon v United Kingdom* (n13) para 17. [↑](#endnote-ref-45)
47. *Lustig-Prean and Beckett v UK* (n14) para 67 and *Smith and Grady v UK* (n14)para 74. *Salgueiro da Silva Mouta v Portugal* (App. No. 33290/96, 21 December 1999) para 30. [↑](#endnote-ref-46)
48. *Schalk and Kopf v Austria* (n1). [↑](#endnote-ref-47)
49. *Eg* *X and Others v. Austria* (n24) and *Hamalaninen v Finland* (n12). [↑](#endnote-ref-48)
50. *Eg* *X and Others v Austria* (n24). [↑](#endnote-ref-49)
51. Fenwick 2016, 255 discussing *Hamalaninen v Finland* (n12). [↑](#endnote-ref-50)
52. For example see *X and Others v. Austria* (n24) and *Hamalaninen v Finland* (n12). [↑](#endnote-ref-51)
53. *X and Y v UK (A*pp. No. 21830/93, 22 April 1997)*,**Simpson v UK* (App. No. 11716/85, 14 May 1986), *Kerkhoven and Hinke v The Netherlands* (App. No. 15666/89, 19 May 1992) and *Mata Estevez v Spain (*App. No. 56501/00, 10 May 2001. [↑](#endnote-ref-52)
54. See *Berrehab and Koster v The Netherlands (*App. No. 10730/83, 21 June 1988), *Marckx v Belgium* (App. No. 6833/74, 13 June 1979), *Kroon v Netherlands* (App. No. 18535/91, 27 October 1994) and *Boughanemi v France* (App. No. 22070/93, 24 April 1996). [↑](#endnote-ref-53)
55. *Karner v Austria* (n24) para 37. [↑](#endnote-ref-54)
56. *Ibid.* para 33. [↑](#endnote-ref-55)
57. *Schalk and Kopf v Austria* (n1) para 93. [↑](#endnote-ref-56)
58. *Ibid*. para 94. [↑](#endnote-ref-57)
59. *Ibid.*

    [↑](#endnote-ref-58)
60. *Schalk and Kopf v Austria* (n1) para 62. [↑](#endnote-ref-59)
61. In *Marckx v Belgium* (n53) para 31 the ECtHR explained that Article 8 placed ‘positive obligations on the states in addition to the duty of non-interference in private and family life.’ See also Hayward 2016 and O’Mahoney 2012. [↑](#endnote-ref-60)
62. *See* *I v United Kingdom* (App. No. 25680/94, 11 July 2002) and *Christine Goodwin v UK* (App.No. 28957/95, 11 July 2002). [↑](#endnote-ref-61)
63. *See Mikulic v Croatia*, (App. No. 53176/99, 7 February 2002). [↑](#endnote-ref-62)
64. *Oliari v Italy* (n3). See also Hayward 2016. [↑](#endnote-ref-63)
65. *EB v France* (App. No. 43546/02, 22 January 2008). [↑](#endnote-ref-64)
66. *X and Others v Austria* (n24). [↑](#endnote-ref-65)
67. *Schalk and Kopf v Austria* (n1). [↑](#endnote-ref-66)
68. *Ibid.*  para 52. [↑](#endnote-ref-67)
69. *Ibid.*  [↑](#endnote-ref-68)
70. *Rees v UK (*App. No. 9532/81,17 October 1986) para 49. [↑](#endnote-ref-69)
71. *Eg* the English High Court in *Wilkinson v Kritzinger* [2006] EWHC 2022 (Fam) and the Irish High Court in *Zappone and Gilligan v Revenue Commissioners* [2006] IEHC 404. [↑](#endnote-ref-70)
72. *Ms Juliet Joslin et al. v. New Zealand*, (2002) Communication No. 902/1999, U.N. Doc. A/57/40. [↑](#endnote-ref-71)
73. Yogyakarata Principles 24E and 24F on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity available at <http://www.yogyakartaprinciples.org/> [↑](#endnote-ref-72)
74. *Chapin and Charpentier v France*(n2). [↑](#endnote-ref-73)
75. *See eg* the South African Constitutional Court judgment of *Minister of Home Affairs and Another v Fourie and Another* (n17) per Sachs J para 102. [↑](#endnote-ref-74)
76. *Eg* in relation to transsexuals’ rights see *Christine Goodwin v UK* (n61) para 74. See also Tahmindjis 2016 for discussion. [↑](#endnote-ref-75)
77. Hodson 2011 referring to *Christine Goodwin v UK* (n61). [↑](#endnote-ref-76)
78. See *Rees v UK* (n69). [↑](#endnote-ref-77)
79. See US Legal Dictionary Online <http://definitions.uslegal.com/l/lex-specialis/> [↑](#endnote-ref-78)
80. *Oliari v Italy* (n3) para 194. See also Hayward2016. [↑](#endnote-ref-79)
81. *Chapin and Charpentier v France* (n2). [↑](#endnote-ref-80)
82. See section entitled ‘The Equality Argument Requires Categorisation of Individuals into Classes of Sexual Orientation.’ [↑](#endnote-ref-81)
83. The South African Constitutional Court judgment of *Minister of Home Affairs and Another v Fourie and Another* (n17) per Sachs J para 102. [↑](#endnote-ref-82)
84. Miller 2005 referring to Namath, M. (2004) Statement at a Press Conference Concerning the Federal Marriage Amendment on Capitol Hill, Washington, D.C. (3 March 2004) <http://rac.org/news/030304.html>. [↑](#endnote-ref-83)
85. See section entitled ‘ECtHR Engagement with Article 14.’ [↑](#endnote-ref-84)
86. See section entitled ‘Developing ‘Family Life’ Arguments for Same-Sex Partners’. [↑](#endnote-ref-85)
87. *Schalk and Kopf v Austria (n*1) para 62. [↑](#endnote-ref-86)
88. See *eg n1 and n2.* [↑](#endnote-ref-87)
89. See *Minister of Home Affairs and Another v Fourie and Another* (n17) and *Obergefell et al v Hodges, Director, Ohio Department of Health* (n20). [↑](#endnote-ref-88)
90. See n52. [↑](#endnote-ref-89)
91. See n53. [↑](#endnote-ref-90)
92. *Schalk and Kopf v Austria* *(*n1) para 94.   [↑](#endnote-ref-91)
93. *Oliari v Italy* (n3). [↑](#endnote-ref-92)
94. *Ibid.*  [↑](#endnote-ref-93)
95. *Schalk and Kopf v Austria* (n1). [↑](#endnote-ref-94)
96. *Christine Goodwin v UK* (n61). [↑](#endnote-ref-95)
97. *See eg* the South African Constitutional Court judgment of *Minister of Home Affairs and Another v Fourie and Another* (n17) per Sachs J para 102. [↑](#endnote-ref-96)
98. See section entitled ‘ECtHR Engagement with Article 14.’ [↑](#endnote-ref-97)
99. See section entitled ‘Developing ‘Family Life’ Arguments for Same-Sex Partners’. [↑](#endnote-ref-98)
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