Chapter 10 – The Intrinsic Value of Registered Partnerships and Marriage for Same-Sex Couples, their Recognition Domestically and at the Strasbourg Court

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Abstract

Only a minority of jurisdictions currently permit same-sex marriage – among them, England and Wales (from 2013), Scotland (from 2014) and Northern Ireland (from 2020). This chapter explores the drive towards marriage equality from a domestic perspective and through the European Court of Human Rights (ECtHR). On the latter point, the authors explore the ECtHR stance on civil partnerships and same-sex marriage under the European Convention on Human Rights and argue that the court's current approach shows tensions between two conflicting demands: the protection of sexual minorities, but also the safeguarding of its own authority through a doctrine of 'consensus', which avoids determinations that could lead to open conflict with several member states. Where the formalisation of same-sex relationships is concerned, 'East'/'West' divisions appear to exert inhibitory impact on the judgments, accommodated mainly via consensus analysis. This chapter considers ways of reconciling the two apparently conflicting aims. The authors conclude that reliance on consensus analysis means that the ECtHR is showing some willingness to open non-traditional institutions for formalising relationships in the form of registered partnerships to same-sex couples under the right to respect for private and family life. This approach, however, can be contrasted with the court's reluctance to open the traditional institution of marriage to such couples under the right to marry.

1. Introduction

Across the Western world securing the right to marry has become one of the primary goals of for the LGBT+ community and a key focal point for political and legal activism. Granting same-sex couples access to marriage is viewed as not only demonstrating a state's commitment to the principles of equality and non-discrimination, but also as helpful in stimulating beneficial change in societal attitudes towards same-sex relationships.[1]

This drive towards same-sex marriage is often part of a lengthy process that invariably begins with the decriminalisation of homosexual activity between adults, and subsequently involves the conferral of ad hoc legal protections to same-sex couples.[2] Crucially for this chapter a further key stage in this process is the creation of a civil or registered partnership regime that confers upon same-sex couples

[1] See I. Lund-Andersen, 'The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?', in R. Wintemute and M. Andenas (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart Publishing 2001).

[2] See B. Hale, 'Homosexual Rights' [2004] 16 *Child and Family Law Quarterly* 125, 125 and K. Waaldijk, 'Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands' in Wintemute and Andenas, n 1.

the ability to access a formalised relationship status and a framework of legal protections; a final stage in this process may be viewed as creating availability of marriage equality. But such frameworks are often created in states, or receive acceptance by the European Court of Human Rights at Strasbourg, as this chapter documents, at a time when securing marriage equality is not viable on political and/or policy grounds. The value of these registration regimes is highly contested; some critics have viewed them merely as staging posts in the journey to the ultimate destination of marriage,[3] while others have seen them more positively as statuses with an intrinsic value and appeal that endures even in the context of marriage equality.

Whilst only a minority of states globally permit same-sex marriage at present, this pattern of reform is readily discernible, albeit with great variations as to the situation of a given state within this process.[4] The same path can be traced in the jurisprudence of the Strasbourg Court: same-sex registered partnerships have received some degree of acceptance, but in the context so far of a refusal to accept marriage equality, although there are some signs, as will be discussed, that Strasbourg's stance as to same-sex marriage is currently softening.

This chapter will critique that pattern of reform in England and Wales, comparing it with the path currently being traced at Strasbourg. In so doing, this chapter will interrogate the value of civil or registered partnerships as an aspect of the protection of the interests of same-sex couples within England and Wales, and then consider their acceptance within the jurisprudence of the European Court of Human Rights. Noting the divergent views as to the future of same-sex civil partnerships and drawing upon the contribution of Stonewall to these debates, the first Part of this chapter explores the academic discourse surrounding that status in England and Wales. In particular, it challenges the arguments advanced as to their superfluous nature following the Marriage (Same Sex Couples) Act 2013 and analyses the problematic trend of eulogising marriage as the 'gold standard' in the formal expression of an interpersonal relationship,[5] although the authors are fully supportive of same-sex marriage. But it will be argued that since some couples still reject marriage, particularly same-sex couples who have experienced a long history of structural oppression by the Church and state, that necessitates a clearer recognition of the intrinsic value of civil partnerships.[6] Such recognition not only provides support for a well-established method of relationship formalisation for couples with an ideological opposition to marriage, but, as will be argued in the second Part of this chapter, it sends a positive message to certain other Council of Europe states considering the introduction of registered partnerships, although they are not yet prepared to accept marriage equality.

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[3] See P. Tatchell, 'Civil Partnerships are Divorced from Reality', *The Guardian,* 19 December 2005.

[4] See J. M. Scherpe and A. Hayward, *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia 2017).

[5] See Witness Statements referenced in *Wilkinson v Kitzinger* (No 2) [2006] EWHC 2022 (Fam) [6] (Potter P).

[6] K. McK. Norrie, 'Marriage is for heterosexuals – may the rest of us be saved from it' [2000] *Child and Family Law Quarterly* 363.

The second Part of this Chapter turns to considering the current stance of the Strasbourg Court as to the recognition of same-sex registered partnerships, and same-sex marriage, under the European Convention on Human Rights (ECHR) framework.[7] The Court has a long history of defending the interests of sexual minorities under the ECHR, and recently certain claims for same-sex registered partnerships and marriage have come before it, against states offering same-sex couples *no* means of formalising their relationships. It will be found that the Court has shown some recognition of the value of registered partnerships for same-sex couples and is currently showing a willingness to open that non-traditional institution for formalising relationships to such couples under Article 8 (right to respect for private and family life), read alone or with Article 14 (right to non-discrimination within the ambit of another Convention right). But that stance must be contrasted so far with its reluctance to open the traditional institution of marriage to such couples under Article 12 (right to marry), even read with Article 14. The Court may be said to be following slowly behind the path already traced in England and Wales in terms of accepting same-sex registered partnerships, but its reluctance to take the next step – to recognise marriage equality, as those jurisdictions have done – may be said to represent a marked flaw in its sexual minority jurisprudence.

2. The Civil Partnership Act 2004 and the Drive towards Same-Sex Marriage

Civil partnerships were introduced through the Civil Partnership Act 2004 and are an opt-in relationship status created following the act of registration by the parties.[8] The scheme was, until very recently, limited to same-sex couples. The rationale behind this move was that different-sex couples had long been able to access religious and civil forms of marriage and, since same-sex marriage was not permitted in 2004, a mechanism was needed to grant same-sex couples some legal recognition of their relationship.[9] The scheme was conceived of as 'marriage in almost all but name' and, with few exceptions, civil partnership and civil marriage are similar in terms of the formalities for creation, legal consequences upon registration and dissolution.[10] Those wishing to register a civil partnership must not be within the prohibited degrees, must be over the age of 16 and cannot already be married or in a pre-existing civil partnership.[11] With a view to pacifying opponents that believed civil partnerships could undermine the institution of marriage, or was a disguised form of 'gay marriage', the problematic leitmotif of 'separate but equal' was adopted to describe the way the partnership scheme operated, and to signal distinctions.

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[7] See H. Fenwick and A. Hayward, 'Rejecting asymmetry of access to formal relationship statuses for same- and different-sex couples at Strasbourg and domestically' [2017] 6 *European Human Rights Law Review* 544.
[8] See Civil Partnership Act 2004, s. 1(1) and M. Harper, S. Chevlan, M. Downs, K. Landells and G. Wilson, *Same Sex Marriage and Civil Partnerships: The New Law* (Jordan Publishing 2014).
[9] See Department of Trade and Industry, *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (London 2003) 13.
[10] See *Wilkinson*, n 5, [88] (Potter P) and Hale, n 2, 132.
[11] As mandated by the Civil Partnership Act 2004, s. 3(1)(a)–(d).

Following their introduction in December 2005, civil partnerships proved highly popular among the LGBT+ community. In the first three days of the Act coming into force there were 1,227 registrations with 1,857 concluded by the end of that year (1,228 concluded between men and 629 between women). The following year saw 14,943 registrations with 9,003 between men and 5,940 between women. As the regime became more established the total number of civil partnerships entered into each year gradually decreased to around 6,000. This period also saw calls to introduce same-sex marriage and in 2012 a consultation exercise was undertaken,[12] resulting in the Government stating its commitment to introduction of same-sex marriage.[13] Generating the highest ever level of responses to a public consultation exercise, the consultation findings revealed both the contentious nature of same-sex marriage for some individuals but also, and of crucial significance for this chapter, clear support for the retention of civil partnerships. Same-sex marriage was introduced in England and Wales through the Marriage (Same Sex Couples) Act 2013; the first ceremonies took place in March 2014.

Unlike other states that phased out their civil partnership regimes following marriage equality,[14] the Government sought to evade this issue and created section 15 of the Marriage (Same Sex Couples) Act 2013 to compel the Secretary of State to conduct a review of the future of civil partnerships. This review was conducted in 2014 by the Department for Culture, Media and Sport and generated considerably fewer responses than the earlier Equal Civil Marriage consultation.[15] The exercise ran for a relatively short period of time and produced mixed messages as to the continuing need for civil partnerships. 55 per cent of respondents were against the phasing out of civil partnerships while only 22 per cent were in favour of extending them to different-sex couples. Without a 'united call for change',[16] and as Stonewall had urged a cautious approach to reform, the Government chose to take no further action.[17] Since the consultation exercise was concluded only months after the introduction of same-sex marriage it is perhaps unsurprising that the results were inconclusive: more time was needed to analyse the uptake of civil partnerships following the availability of same-sex marriage in March 2014. Stonewall considered that there should be a 'long-term' evaluation of the impact of same-sex marriage and the conversion process on the uptake of civil partnerships.[18]

A related development that placed the spotlight on the issue of civil partnership reform was a concerted campaign to open up the regime to different-sex couples wishing to access an alternative status to marriage. Via the failure to phase out or extend the civil partnership regime to different-sex couples at the time of introducing same-sex marriage, England and Wales had created a system of

[12] Government Equalities Office, *Equal Civil Marriage: A Consultation*, London 2012.
[13] HM Government, *Equal Marriage: The Government's Response*, London 2012.
[14] See Scherpe and Hayward, n 4, Part I.
[15] Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): A Consultation* (London 2014).
[16] Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): Report on Conclusions* (London 2014) 4.
[17] PinkNews, 'Stonewall says it will campaign for gay marriage' <www.pinknews.co.uk/2010/10/27/stonewall-says-it-will-campaign-for-gay-marriage> accessed 19 October 2021.
[18] See Department for Culture, Media and Sport, n 16, para 2.26.

asymmetrical access for couples; that is, same-sex couples were able to access both marriage or civil partnership; different-sex couples could only access marriage.[19] That anomalous position was challenged in the courts, resulting in the Supreme Court decision in *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development*, ruling that the ban on different-sex civil partnerships constituted discrimination under Articles 14 and 8 of the ECHR.[20] Galvanised by the Supreme Court ruling and supported by the Equal Civil Partnerships campaign, multiple Private Members Bills were introduced into Parliament seeking the extension of the regime. Supported through Parliament by Tim Loughton MP, the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 compelled the Secretary of State to amend the Civil Partnership Act 2004, by way of regulations, so as to permit different-sex civil partnerships. This was achieved through the Civil Partnership (Opposite-Sex Couples) Regulations 2019 which came into force at the end of December 2019 and enabled different-sex couples to access civil partnerships in the same manner as same-sex couples.

3. Interrogating the Value of Civil Partnerships in England and Wales

The introduction of same-sex marriage alongside the deliberations as to the future of civil partnerships revealed a divide in public attitudes. Now that marriage was available for same-sex couples, it was questioned why civil partnerships were still needed and it is argued that these critiques can be deconstructed into three key arguments.[21] The first argument, centring on progression in terms of legal development, proceeds on the basis that civil partnerships had what Briggs LJ termed in *Steinfeld* an 'essentially transitional purpose, designed to alleviate the disadvantages which then affected same-sex couples, but do not now'.[22] As the key pursuit for LGBT+ activism was the introduction of same-sex marriage, once that goal was attained there was no need to retain civil partnerships as a status. Indeed, retention of that status could signal that civil partnerships were originally conceived to *segregate* same-sex couples and exclude them from marriage. Support for this progression argument can be seen in the judicial discussion of this area. Writing extrajudicially, Baroness Hale noted that in a country's journey to protect same-sex relationships '[t]he final steps are taken by family law' and include 'providing for registered civil partnerships, and finally...for civil marriage'.[23] The same sentiment can be traced in Parliament and in the debates on the Marriage

[19] See Fenwick and Hayward, n 7.
[20] [2018] UKSC 32. See A. Hayward, 'Taking the Time to Discriminate – *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development*' (2019) 41 JSWFL 92 and 'Equal Civil Partnerships, Discrimination and the Indulgence of Time' (2019) 82(5) *Modern Law Review* 922.
[21] See A. Hayward, 'Relationships with Status – Civil Partnerships in an Era of Same-Sex Marriage' in F. Hamilton and G. Noto La Diega (eds), *Same-Sex Relationships, Law and Social Change* (Routledge 2020) 189.
[22] [2017] EWCA Civ 81 [172].
[23] Hale, n 2, 125.

(Same Sex Couples) Bill, Yvette Cooper MP frequently referred to same-sex marriage as 'the next step for equality'.[24]

The second argument, which will be termed the status argument, involves the contrasting of civil partnership against the more established status of marriage. As marriage possesses a long, rich history and is often positioned within society by politicians and policymakers as the 'gold standard' relationship form, alternatives such as civil partnerships are viewed as second-rate. Without the perceived social imprimatur possessed by marriage, civil partnerships are seen as an administrative 'construct of statute'[25] or, as Kitzinger and Wilkinson opined, a 'painful compromise between genuine equality and no rights at all'.[26] Echoing the comparisons made in Parliament between the two statuses, Harding remarked that civil partnerships were essentially 'marriage-lite: same great taste, half the respect of regular marriage'.[27] The consequence of this argument is to question why same-sex couples might want the inferior carbon-copy of marriage now that the original had become available to them.

The final argument used to evidence the superfluous nature of civil partnerships relates to uptake now that same-sex couples have a choice between two formalised statuses. In England and Wales, following the introduction of same-sex marriage, there has been a notable decrease in civil partnership registrations. This suggests that when couples are faced with a choice there may exist a preference for marriage. Indeed, in 2013 there were 5,646 civil partnership registrations but, after the introduction of same-sex marriage in 2014, this number decreased to only 1,683. Unsurprisingly, those critical of civil partnerships use this data to demonstrate that in England and Wales they have now become a 'legacy relationship' applicable to a dwindling number of couples.[28]

The cumulative effect of these arguments is considered problematic for a variety of reasons, but in particular through its effect of undermining the intrinsic value of civil partnerships. If same-sex marriage is viewed as the 'final stop for "full equality" for lesbian and gay men', alternative methods of expressing an interpersonal relationship are subsequently viewed as inferior.[29] Not only does this buttress, and even eulogise, the institution of marriage, it forces assimilation of the infinitely diverse LGBT+ community within an institution long conceptualised as heteronormative. As Norrie has argued in relation to this move, '[e]quality is granted, but only on heterosexual terms'.[30] It is, however, argued that the more recent introduction of different-sex civil partnerships in England and Wales has made an important contribution to this debate and created an opportunity for a critical reappraisal of the value of civil partnerships domestically.

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[24] HC Deb 5 February 2013, vol 558, col 136.
[25] *R v Bala and others* [2016] EWCA Crim 560 [38] (Davies LJ).
[26] S. Wilkinson and C. Kitzinger, 'In support of equal marriage: Why civil partnership is not enough' (2006) 8 *Psychology of Women Review* 54, 54.
[27] R. Harding, '"Dogs are 'Registered', People Shouldn't Be": Legal Consciousness and Lesbian and Gay Rights' (2006) 15 *Social and Legal Studies* 511, 524.
[28] Department for Culture, Media and Sport, n 15, para. 3.10.
[29] See N. Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2012) 2.
[30] Norrie, n 6, 365.

4. Recognising the Value of Civil Partnerships in England and Wales

Recent developments, it is argued, evince a counter-narrative to the view that civil partnerships should become of historical relevance only. It is apparent that, as a jurisdiction, England and Wales is evidencing greater recognition of the institution of civil partnership and acknowledging that couples value choice in the formal expression of their relationships. This can be seen in a variety of ways. First, the pattern of jurisdictions progressing towards same-sex marriage and, then, abolishing pre-existing civil partnership regimes has started to be offset by countries retaining pre-existing civil partnership regimes. Examples can be found of countries valuing both marriage and civil partnership simultaneously through retaining equal civil partnership regimes upon achieving marriage equality,[31] or extending previously same-sex civil partnership regimes to different-sex couples, thereby creating two statuses open to all couples. For example, Austria introduced marriage equality on 1 January 2019 and simultaneously opened up to different-sex couples the originally same-sex only civil partnership regime, first introduced in 2010. This pattern suggests that the previous model of phasing out civil partnerships following the introduction of same-sex marriage, as exemplified by the Nordic countries, may be giving way to alternative law reform strategies that are underpinned more by offering greater choice and autonomy to couples in terms of the outward expression of their relationships. It also can be viewed as a response to couples wishing to retain their original relationship status following the introduction of same-sex marriage. This narrative was particularly prominent when policymakers in England and Wales were deliberating the future of civil partnerships and one option, canvassed in the *Future of Civil Partnerships Consultation*, was to phase out civil partnerships. Groups such as Stonewall and the Peter Tatchell Foundation were both highly vocal during that process, finding that the phasing out of civil partnerships for same-sex couples would have been met with considerable resistance. Indeed, activist Peter Tatchell believed that such a move would 'provoke an almighty backlash' and 'do catastrophic damage to relations between the Conservative party and LGBT people'.[32] These developments reveal, it is argued, a challenge to the progression argument, to the inevitable marginalisation of civil partnerships, or to viewing them as merely a staging post to the final destination of marriage.

Second, as regards the status argument, attitudes as to the significance of civil partnerships for both different and same-sex couples have clearly changed. For example, the judicial discussion of civil partnerships in reported cases evidences a shift from discussing the regime as a somewhat sterile registration process for same-sex couples[33] to seeing it as instead a status or institution expressing commitment.[34] The Department for Culture, Media and Sport remarked in 2014 that civil partnerships

[31] Examples include France, The Netherlands and Belgium.

[32] See: <http://equalcivilpartnerships.org.uk/2018/02/campaign-responds-reports-government-u-turn-civil-partnerships-opposite-sex-couples/> accessed 19 October 2021.

[33] See *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [96].

[34] See *Bull v Hall* [2013] UKSC 73 [26] and *Radmacher v Granatino* [2010] UKSC 42.

had now become a 'well-understood legal institution' that played 'an important role in the lives of many couples'.[35] This sentiment was further reflected in the consultation responses and empirical research into the lived experiences of couples in civil partnerships.[36] Stonewall's then Interim Chief Executive, Paul Twocock, acknowledged the important value that some couples ascribe to civil partnerships, and indicated that abolition would 'imply that civil partnerships are now less valued than a marriage and somehow irrelevant'.[37] Thus civil partnerships have become part of the fabric of LGBT+ lives, acknowledged as a significant outward expression of a relationship.

Third, whilst it is clear that the availability of same-sex marriage has clearly affected the civil partnership rate, 2016 saw the first annual increase in registrations. In that year 890 civil partnerships were formed in England and Wales, representing an increase of 3.4% compared with the previous year.[38] 994 civil partnerships were registered in 2019 representing an increase of 4.0% from 956 in 2018 and an increase of 9.5% from 908 in 2017.[39] The conversion statistics are perhaps more revealing when rejecting the aforementioned arguments as to the need for civil partnerships. Conversion from civil partnership to marriage is currently permitted by section 9 of the Marriage (Same Sex Couples) Act 2013. It has the effect of back-dating a marriage to the point in which the parties first entered their original civil partnership. At present only 1 in 8 civil partnerships have been converted to marriages[40] and, as noted by Tim Loughton MP, 'more than 80% of same-sex couples who have committed to a civil partnership do not think that they need to or want to convert that into marriage'.[41] The views of Stonewall are yet again informative: they noted that this pattern was attributable to the desire of couples 'to maintain the integrity of the day they made their commitment to each other in a civil partnership'.[42]

At a domestic level, then, it is argued that, despite being a newly created registration regime, civil partnerships clearly serve an important expressive function for couples and are a desired status when parties are wishing to formalise their relationships. Moreover, the rationales motivating a couple to choose a civil partnership over marriage, or vice versa, are varied and personal to the parties concerned. But the pattern of reform of the position of sexual minorities discussed above has now culminated in providing that choice in an era of marriage equality. The position now reached in England and Wales, which is characterised by personal autonomy and choice, must be contrasted with the position in a number of other ECHR Member States, and at Strasbourg. With a view to

[35] Department for Culture, Media and Sport, n 15, para 1.4.
[36] See A. Jowett and E. Peel, '"A Question of Equality and Choice": Same-Sex Couples' Attitudes towards Civil Partnership after the Introduction of Same-Sex Marriage' (2017) 8 *Psychology and Sexuality* 69.
[37] Stonewall, 'Abolishing Civil Partnerships is Not an Option' < https://www.stonewall.org.uk/cy/node/72816> accessed 19 October 2021.
[38] Office for National Statistics, *Civil Partnerships in England and Wales: 2016* (26 September 2017).
[39] Office for National Statistics, *Civil Partnerships in England and Wales: 2019* (22 September 2020).
[40] See J. Haskey, 'Civil Partnerships and same-sex marriages in England and Wales: A Social and Demographic Perspective' (2016) *Family Law* 44 and J. Haskey, 'Perspectives on civil partnerships and marriages in England and Wales: aspects, attitudes and assessments' [2021] *Family Law* 816.
[41] HC Deb, vol 635, col 1142 (2 February 2018).
[42] Stonewall, n 37.

interrogating how far the intrinsic value of registered partnerships has received recognition, and to considering why the pace of Strasbourg-driven reform is so slow, this second Part therefore explores the rationales behind the reluctant, even paradoxical, stance of the Court in this context.

5. The Strasbourg stance as to civil (registered) partnerships and same-sex marriage

This second Part of this chapter considers challenges at the Strasbourg Court from same-sex couples, often supported by activist groups, to the lack of methods of formalising their relationships in a number of Member States. The Court can be credited, as is well-documented, with a number of legal changes recognising various aspects of the interests of sexual minorities.[43] But this Part will argue that the current approach of the Strasbourg Court in this context shows tensions between two conflicting demands: it is seeking both to protect sexual minorities, but also its own authority, by relying on the consensus doctrine (crudely – finding that a majority of Member States protect a certain interest) to avoid determinations likely to lead to open conflict with a number of Member States. In respect of homophobic hate crimes and bans on public manifestations of support for sexual minorities,[44] the Court has recently shown a robust determination to provide protection for such minorities, partly on the basis that there is no consensus among the Member States supporting such practices. But, in strong contrast, in the context of formalisations of same-sex relationships, there are signs that 'East'/'West' divisions between the Member States are having some inhibitory impact on its judgments, accommodated mainly via consensus analysis. It will be found that as a result of reliance on such analysis the Court has demonstrated a lack of willingness to recognise fully the intrinsic value of both registered partnerships and marriage for same-sex couples, and a reluctance to confront homophobia robustly in this context. This Part will therefore consider the basis for its strong reluctance to open marriage to same-sex couples and its restrained stance until 2021 even in respect of same-sex registered partnerships, as well as the probable position as further claims for such relationship formalisations come before it.

5.1 The role of consensus analysis

Discrimination against same-sex couples is manifest in the refusals of a number of the contracting states to allow them to enter a registered partnership or marriage. It might be thought that this was precisely the type of situation that the Court was set up to address, but its reliance on the consensus doctrine has had some inhibiting impact on its response in this context.[45] The term 'consensus' is often taken to denote identifying common ground between the laws of a majority of Member States in

[43] See P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013), chap 2; *Dudgeon v United Kingdom* (1980) 3 E.H.R.R. 40; *Smith and Grady v United Kingdom* (2001) 31 E.H.R.R. 24; *Perkins and R v UK* Applications nos. 43208/98; 44875/98.

[44] See *Alekseyev v Russia* (App. No.4916/07), Judgment of 21 October 2010.

[45] See P. Laverack, 'The indignity of exclusion: LGBT rights, human dignity and the living tree of human rights' (2019) 2 *European Human Rights Law Review* 172, 182.

relation to the domestic protection for particular rights, but it can also refer to a *trend* towards occupying such ground.[46] In general, if discrimination on particular protected grounds, including sexual orientation, is alleged under Article 14 ECHR, the scrutiny accorded to the state's justification will be strict *unless* no consensus on the matter is apparent among the Member States.[47] Further, lack of consensus among the Member States means that the margin of appreciation widens, as an aspect of the subsidiarity principle,[48] so the *scope* of the right in question can be narrowly interpreted.[49] In other words, the existence of a consensus will be taken into account in determining that a state which has not provided domestic protection answering to the potential obligation in question has over-stepped its margin of appreciation.[50] Or, under a lack of consensus the justification put forward for discrimination under Article 14, or for failing to introduce a rights-protecting measure, is not closely scrutinized, so the demands of proportionality are much more readily satisfied.[51]

A majority of the Member States have not introduced same-sex marriage; therefore, since no consensus on such marriage is currently available, the margin conceded to a particular state is very wide. States failing to introduce such marriage are under no ECHR obligation to do so: due to the lack of consensus the Court has not accepted that the right to marry under Article 12 covers same-sex couples.[52] But, conversely, since a consensus on accepting same-sex registered partnerships is currently identifiable, a narrow, or possibly no, margin will be conceded to the state in question which is not aligned with the majority, as discussed further below.

5.2 The rapidly changing picture across contracting states as to state formalizations of same-sex unions

A number of efforts have been made by same-sex couples, often supported by LGBT activist organisations, to achieve formal legal recognition of their relationships via Strasbourg claims under

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[46] See L. Wildhaber, A. Hjartarson and S. Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights' (2013) 33 *Human Rights Law Journal* 248; K. Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] *Public Law* 534.

[47] See *Abdulaziz v United Kingdom* (1985) 7 E.H.R.R. 471 [90]-[91]; *DH and others v Czech Republic* (2008) 47 E.H.R.R. 3 [196]; *EB v France* (2008) 47 E.H.R.R. 21 [93].

[48] See D. McGoldrick, 'A defence of the margin of appreciation and an argument for its application by the Human Rights Committee' (2016) 65(1) *International and Comparative Law Quarterly* 21, 28.

[49] See as to the Court's general stance *Goodwin v United Kingdom* (1996) 22 E.H.R.R. 123 [103]; *Bayatyan v Armenia* (2012) 54 E.H.R.R. 15 [108]. See further: A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012); E. Bates, 'The UK and Strasbourg: A Strained Relationship – The Long View' and .H Fenwick, 'Protocol 15, enhanced subsidiarity and a dialogic approach, or appeasement in recent cases at Strasbourg against the UK', both in Ziegler et al. (eds.), *The UK and European Human Rights – A Strained Relationship* (Hart 2015).

[50] See *Schalk and Kopf v Austria* (2011) 53 E.H.R.R. 20 [58].

[51] See: *Rees v United Kingdom* (1987) 9 E.H.R.R. 56 [37]; *Cossey v United* Kingdom (1991) 13 E.H.R.R. 622 [234]; *Evans v United Kingdom* (2007) 43 E.H.R.R. 21 [77]; *Fretté v France* (2004) 38 E.H.R.R. 21 [41]; *ABC v Ireland* (2011) 53 E.H.R.R. 13 [232]. In the sexual minority context see *Tomás v Spain* (2017) 65 E.H.R.R. 24.

[52] See in particular *Oliari v Italy* (2015) 65 E.H.R.R. 957 and P Johnson, 'Same Sex Marriage and article 12 of the ECHR', in C. Ashford and A. Maine (eds.), *Research Handbook on Gender, Sexuality and the Law* (Edward Elgar Publishing, 2020).

the ECHR for same-sex registered partnerships and same-sex marriage. The position as to state formalizations of same-sex unions has changed with very striking rapidity over the last twenty years among the Member States,[53] but the spread of such formalizations across the states has been uneven: some 'East'/'West' divisions between the Member States have emerged on this matter. At the present time the majority of states, including all the 'Western' ones, have introduced same-sex marriage[54] and/or forms of registered partnership schemes for same-sex couples.[55] But a number of 'Eastern' states have shown no or little inclination to introduce such schemes, in some instances evincing a steadfast refusal to do so,[56] while a number of them have also recently enshrined a ban on same-sex marriage in their Constitutions.[57] While a number of predominantly Western European Member States introduced same-sex registered partnership schemes around 9-30 years ago, usually phasing them out following the subsequent introduction of same-sex marriage, some Western states introduced them much more recently,[58] after certain 'Eastern' states - Slovenia, the Czech Republic and Hungary - had already done so. Certain states on either side of the East/West 'divide', including Estonia and Italy, only introduced registered partnership schemes covering same-sex couples in the last few years,[59] while in some inequality is perpetuated since different-sex couples can access marriage *or* a registered partnership, while same-sex couples can only access a registered partnership.[60] Change in certain 'Eastern' states may be imminent: some have brought forward Bills in the last few years to introduce same-sex registered partnerships, which have not yet passed.

5.3 Claims at Strasbourg for formalisations of their relationships from same-sex couples

The first step towards recognising an ECHR right to formal recognition of their relationships for same-sex couples, taken in *Schalk*,[61] was to recognize same-sex couples as 'families' under Article 8 read with 14 since they 'are just as capable as different-sex couples of entering into stable committed relationships',[62] but that finding did not form the main basis for the determination as to the meaning of 'family'. The Court relied instead on the changing consensus as to the broadening of the concept of

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[53] For a comparative analysis see Scherpe and Hayward, n 4 and K. Boele-Woelki and A. Fuchs, *Same Sex Relations and Beyond – Gender Matters in the EU* (Intersentia 2017).
[54] See *Fedotova and others v Russia* (2021) ECHR 225 [29]. See J. M. Scherpe, 'Formal recognition of adult relationships and legal gender in a comparative perspective', in Ashford and Maine, n 52.
[55] See *Fedotova*, n 54.
[56] No same-sex partnership scheme has been considered at a legislative level in Armenia, Azerbaijan, Moldova, Turkey, Russia.
[57] Such bans exist in the Constitutions of Armenia, Bulgaria, Croatia, Georgia, Hungary, Latvia, Lithuania, Moldova, Montenegro, Poland, Serbia, the Slovak Republic and the Ukraine. See H Fenwick, 'Same sex unions at the Strasbourg Court in a divided Europe: calling the legitimacy of the Court into question?' (2016) 3 E.H.R.L.R. 249.
[58] Italy (2016), San Marino (2018).
[59] Both in 2016. Croatia introduced registered partnerships in 2014.
[60] That is the position in Andorra, Greece, Cyprus, and Estonia. See D Lima, 'Registered Partnerships in Greece and Cyprus', in Scherpe and Hayward, n 4.
[61] *Schalk*, n 50.
[62] *Ibid* [94].

'family' in Member States. Article 9 of the EU Charter of Fundamental Rights was also relevant since its wording potentially offers a non-exclusionary concept of marriage and family.[63]

But while recognizing the applicant couple's need for 'legal recognition and protection of their relationship,'[64] the Court also established that nevertheless they should be debarred from accessing marriage under Article 12[65] due to the lack of a consensus on the matter.[66] The Court also dismissed the claim to access same-sex marriage under Article 8 since the obligation did not arise under the more specific Article.[67] Its reluctant stance on that issue, and its failure to give weight to the value of dignity,[68] can readily be compared with the more robust one taken by the Inter-American Court of Human Rights which has found that the American Convention on Human Rights requires states to recognise 'a specific mechanism to govern relationships between persons of the same sex', encompassing recognition of same-sex marriage.[69] In so finding, the Court observed that the lack of consensus on the matter among relevant states could *not* justify the rejection of such marriage. As Dominic McGoldrick observes, that stance may have arisen since the 'impression that sexual orientation rights is a 'Western' conspiracy against non-Western States'[70] is less apparent in such states, contrasting with the stances of certain 'Eastern' Council of Europe states.

Strasbourg's exclusionary interpretation of Article 12 has been upheld consistently since *Schalk* on the basis of a continuing lack of consensus in the Member States as to the availability of same-sex marriage. At the time when *Schalk* was decided only 8 states of the Council of Europe allowed same-sex marriage,[71] and at the present time there is still no consensus on the matter.[72] However, the Court's reluctance to take the next step, by accepting marriage equality, may be diminishing: in *Orlandi v Italy*[73] the Court left open the possibility that if the consensus strengthens in future, it might be prepared to recognize a right to marry for same-sex couples under Article 12.[74]

But there is already a consensus among the Member States as to the availability of same-sex registered partnership schemes, so the Court has shown more receptivity to recognizing a right to such a partnership under Article 8 read alone or with 14. In *Vallianatos*[75] the applicants, who were in same-sex unions, challenged their exclusion from the registered partnership scheme introduced in Greece

[63] The terms 'men and women' used in Article 12 are absent.
[64] *Schalk*, n 50, [99]. That was confirmed by the Grand Chamber in *X v Austria* (2013) 57 E.H.R.R. 14.
[65] See *Hämäläinen v Finland* (App. No.37359/09), judgment of 16 July 2014 at [74].
[66] *Schalk*, n 50, [58].
[67] *Ibid* [101].
[68] For criticism, see Laverack, n 45, 182.
[69] See Advisory Opinion OC-24/17, IACtHR Series A, 24 (2017).
[70] D. McGoldrick, 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' (2016) 16 *Human Rights Law Review* 613, 660-661.
[71] *Schalk*, n 50, [58].
[72] See *Oliari*, n 52, [192] and *Orlandi v Italy* (App. No.26431/12), judgment of 14 December 2017 [204]-[205]. See further F. Hamilton, 'Same sex marriage, consensus, certainty and the European Court of Human Rights' (2018) 1 E.H.R.L.R. 33; Johnson, n 52; P. Johnson and S. Falcetta, 'Sexual orientation discrimination and Article 3 of the ECHR: developing the protection of sexual minorities' (2018) 43(2) *European Law Review* 167.
[73] *Orlandi*, n 72.
[74] *Ibid* [204] – [205].
[75] *Vallianatos v Greece* (2014) 59 E.H.R.R. 12.

for different-sex couples, under Article 8 read with 14. The Court found that same-sex couples need recognition of their relationship and civic benefits just as different-sex couples do.[76] The government sought under Article 14 to justify the exclusion of same-sex couples from the scheme on the basis of the need to make provision for unmarried different-sex couples with children. In evaluating that justification the Court found that of the nineteen states authorizing some form of registered partnership only Lithuania and Greece reserved it exclusively to different-sex couples; nine Member States provided for same-sex marriage, and seventeen for forms of same-sex civil partnership.[77] Therefore, in assessing the proportionality of the means chosen with the aims pursued, the Court conceded only a narrow margin of appreciation to the state, finding as a result that proportionality demands under Article 14 did not merely require that the measure chosen was in principle suitable to achieve the aim in question: it also had to be shown to be *necessary*, in order to achieve that aim, to exclude same-sex couples from the category of civil unions. Given that the scheme differentiated between same- and different-sex couples who did *not* have children, it was found that the government had failed to justify the difference in treatment since the goals it was seeking to attain did not *necessitate* excluding same-sex couples from the civil union scheme. Accordingly, a breach of Article 14 read with 8 was found.

In *Oliari v Italy*[78] the Court took a further and highly significant step: it was confronted with a situation resembling that in *Vallianatos* but in which *no* registered partnership scheme had been introduced, even for different-sex couples. Three same-sex couples, supported by various activist organisations, complained under Article 8 read alone or with 14, that Italy did not allow them access to a legal framework for formalizing their relationships in the form of either marriage or a registered partnership, so they were being discriminated against as a result of their sexual orientation. The Court decided the matter solely on the basis of the existence and scope of a positive obligation under Article 8(1) to introduce registered partnerships for same-sex couples, affording them a legal framework protecting and recognizing their relationships, since the protection related, it was found, to central, not peripheral, needs of the applicants.[79] The Court, however, did not decide to impose a positive obligation to introduce a new legislative framework largely on a basis of principle, founded on notions of the inherent value of such a framework for same-sex couples. Instead, it viewed the notion of 'respect' for private and family life under Article 8(1) as a flexible one, finding that the requirements denoted by the term would vary considerably from case to case: 'The notion of "respect" is not clear-cut, especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case'.[80] It identified *two* localised factors in

[76] *Ibid* [81].
[77] *Ibid* [91] – [92].
[78] *Oliari*, n 52.
[79] *Ibid* [169].
[80] *Ibid* [161].

particular that influenced its findings as to those requirements. The first comprised the 'conflict between the lived social reality of the applicants, and 'the law, which gives them no official recognition',[81] finding 'there is amongst the Italian population a popular acceptance of homosexual couples…and support for their recognition and protection'.[82] The second factor concerned the 'unheeded' calls of the Italian courts to introduce a legal framework[83] providing same-sex couples with such recognition.[84]

In determining the scope of the positive obligation, the Court considered the balance to be struck between the interests of the applicants and those of the community. The margin of appreciation conceded was not specified with any clarity, although impliedly it was narrowed due to the consensus among the Member States on the matter as regards the importance to be attributed to the ability of the individual to access a registered partnership: the Court noted that a 'thin majority' of Member States (24 out of 47) had by mid-2015 already legislated to introduce forms of same-sex registered partnerships.[85] The Court took account of the absence of a counter-vailing community interest put forward by the Italian Government, while making the significant finding that providing access to a registered partnership related to the 'core protection of the applicants as same-sex couples'.[86] The government merely relied on its margin in arguing that time was needed to achieve general recognition of 'this new form of family'.[87] But the Court found that the margin would not cover that position, given that the Italian Constitutional Court had repeatedly called for a juridical recognition of the relevant rights and duties of same-sex unions, but the government had not responded.[88]

The Court proceeded therefore to find a breach of Article 8, but found the claim for same-sex marriage under Article 12 inadmissible. The couples' claims under Article 12 in respect of access to marriage were found to be manifestly ill-founded,[89] following the Court's established stance on that matter, based mainly on the lack of a consensus among the Member States as to the introduction of same-sex marriage, following the findings in *Hämäläinen v Finland.*[90] It also declined to consider Article 14, leaving the discriminatory dimension unrecognised.[91]

Post-*Oliari* the relevant consensus strengthened somewhat as to acceptance of same-sex registered partnership schemes, and it was expected that eventually Strasbourg would find that the positive

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[81] *Ibid* [173].
[82] *Ibid* [181].
[83] *Ibid* [183] – [185].
[84] *Ibid* , [45].
[85] *Ibid* [178]. The Court also took account of the global trend towards state recognition of same-sex unions. See: H. Fenwick and A. Hayward, n 7; A Hayward, 'Same-sex Registered Partnerships – A Right to be Recognized?' (2016) 75 *Cambridge Law Journal* 27; Fenwick, n 57.
[86] *Ibid* [177] – [178].
[87] *Ibid* [176].
[88] *Ibid* [185].
[89] *Ibid* [194].
[90] *Hämäläinen*, n 65, [74].
[91] *Oliari*, n 52, [188].

obligation recognized under Article 8 in *Oliari*[92] should be extended to Member States even where one or both of the particular local factors present in Italy were absent. That eventually occurred in *Fedotova and Others v Russia:*[93] the Court took a further step, following *Oliari*, in finally finding a clear positive right to a form of formalization of same-sex unions under Article 8(1), where such couples have *no* means of having their relationship recognised by law. Three same-sex couples sought to claim a right to same-sex marriage in Russia, on the basis that only one form of formalization of relationships is available in Russia – marriage – which is not open to same-sex couples. All three couples applied on a number of occasions unsuccessfully to the Register Office locally to have their marriages registered. The requests were dismissed by reference to article 1 of the Russian Family Code, which states that the regulation of family relationships is based on 'the principle of a voluntary marital union between a man and a woman'.

Unsurprisingly, given Strasbourg's current stance on same-sex marriage under article 12, the claims were brought to Strasbourg under articles 8 and 14 only, for a means of formalizing the couples' relationships in Russia via a form of registered partnership. The key stumbling block for the claim, based on the discussion above, appeared to be that the Court in *Oliari* had referred to a discordance between social reality in Italy and the legal position as to formalization of a same-sex union, as determinative of the reach of positive obligations under article 8(1). So it appeared to have accorded to itself the possibility, where such discordance did not exist, or did not exist to the same extent in a Member State, of avoiding a finding that the article had been breached. Such a discordance would clearly be unlikely to be discerned in Russia (and some other Eastern European states) where it would be much harder for a same-sex partnership to live openly as a couple since a much higher percentage of the population is opposed to recognition of same-sex unions than in Italy.[94] As to the second factor from *Oliari*, the Russian courts had dismissed the applicants' challenges to the Register Offices' decisions,[95] and so their stance had affirmed the state's rejection of the introduction of registered partnerships for same-sex couples.

The Court in *Fedotova* did *not*, however, rely on the first or second factors identified in *Oliari* as having a role in determining the scope of the requirement under Article 8 to provide same-sex couples with a means of formalizing their relationships. It focused only on the first, noting that the Russian government had pointed out that the majority of Russians did not approve of same-sex unions,[96] but it refused to allow that factor to influence its judgment. Accordingly, the Court found that 'it would be incompatible with the underlying values of the Convention, as an instrument of the European public order, if the exercise of Convention rights by a minority group were made conditional on its being

[92] *Ibid* [185].
[93] (2021) ECHR 225.
[94] See eg the Pew Research Center study (2018): <http://www.pewforum.org/2018/10/29/eastern-and-western-europeans-differ-on-importance-of-religion-views-of-minorities-and-key-social-issues> p. 12 accessed 19 October 2021.
[95] Under article 1 of the Russian Family Code.
[96] *Fedotova*, n 93, [52].

accepted by the majority', relying on *Alekseyev v. Russia*,[97] *Bayev and Others v. Russia*,[98] and *Beizaras and Levickas v. Lithuania*.[99] Further, the Court found that the respondent Government had a margin of appreciation in terms of choosing 'the most appropriate form of registration of same-sex unions taking into account its specific social and cultural context (for example, civil partnership, civil union, or civil solidarity act)'. But Russia had overstepped that margin, because 'no legal framework capable of protecting the applicants' relationships as same-sex couples has been available under domestic law'.[100]

This decision completes the journey described here, undertaken by the Court, towards finding that same-sex couples have a right to formal recognition of their unions in law. States retain choices as to the nature of the formalization to be adopted, but, impliedly, the choice could not be one that failed to provide the couples with a number of civic and other benefits, although the precise range of such benefits to be accorded will no doubt be the subject of future claims. It is reasonable to conclude that the right in question has finally been accorded clear recognition because the Court found that the two relevant factors to be taken into account were the adverse impact on the applicants of lack of such recognition, and the burden that providing it would impose on the state. It is hard to imagine situations in particular states in which an applicant would fail to demonstrate such an adverse impact or where the respondent state could plausibly claim that the burden of providing such recognition would be too great. Russia's attempts to identify such burdens were summarily dismissed.[101]

5.4 Future Strasbourg claims from same-sex couples

Post-*Fedotova* and *Oliari* same-sex registered partnerships may spread further across the Member States, aside from the most intransigent ones; Russia itself is unlikely to comply with the *Fedotova* ruling in the near future. While a number of 'Eastern' states include bars in their Constitutions to same-sex marriage, their Constitutions usually, not invariably, also include provisions on non-discrimination.[102] Domestic courts or legislatures could therefore find that they require the introduction of same-sex registered partnerships, but not marriage, in an effort to avoid perpetuating discrimination based straightforwardly on sexual orientation. Courts or legislatures in some 'Eastern' states would not, however, be likely to favour formal recognition of same-sex unions,[103] and in such

[97] *Alekseyev*, n 44, [81].
[98] (2017) ECHR 207 [70].
[99] (2020) ECHR 19 [122].
[100] *Fedotova,* n 93, [56].
[101] *Ibid*, [54] and [55].
[102] Eg in 2009 the Slovenian Constitutional Court found that article 22 of the Registration of Same Sex Partnerships Act violated the right to non-discrimination under article 14 of the Constitution on the ground of sexual orientation: see Equal Rights Trust, <http://www.equalrightstrust.org/news/constitutional-court-slovenia-upholds-equal-rights-same-sex-partners> accessed 19 October 2021.
[103] See eg *Position of the 'Iustitia' Association of Polish Judges and 'THEMIS' Association of Judges and the Cooperation Forum of Judges on the new National Council of the Judiciary* (17 November 2018), <https://www.aeaj.org/media/files/2018-11-17-92-Position-Polish%20Judges%20Association.pdf> accessed 19 October 2021.

states popular acceptance of formal same-sex unions would be likely to be much less apparent than in Italy. So, despite *Fedotova*, the struggle to introduce such unions is likely to continue in some states for a number of years.

6. Strasbourg appeasement of majorities, evading confrontation with homophobia

The tendencies towards 'East'/'West' divisions as to acceptance of formalised same-sex unions identified in this Part place the Court in a sensitive position. While the principle has been recently reinforced that the Court's protection for the Convention rights is subsidiary to the protection provided by the state,[104] reliance on the Court is still required to protect vulnerable minorities who fail to receive protection for their Convention rights domestically, including in the domestic courts.[105] As the Court pointed out in *Alekseyev v Russia,* the exercise of Convention rights by a sexual minority in a particular state cannot depend on their acceptance by the majority.[106] But reliance on consensus analysis linked to the width of the margin of appreciation conceded to a state has the capacity to allow popular opinion in a *number* of Member States to affect the protection offered to sexual minorities adversely.[107] As discussed, if a clear majority of states provide legal protection for such minorities, the Court will be emboldened to follow suit, conceding a narrow margin of appreciation to the state and tending to find a violation as in *Fedotova*. But until there is a consensus on same-sex marriage the Court has demonstrated that it will not recognize a right to contract such a marriage under Article 12 read with 14.[108]

The use of consensus analysis sits uncomfortably, especially in this context, with the Court's approach to protecting minorities and especially to the relevance of majority values in a single state: it has found that majoritarian support in a state should not be relied on to narrow down the scope of the substantive protection of a Convention guarantee, whereas it could enable that scope to be broadened.[109] That could be seen as consistent with the findings in *Oliari* since the wider ambit ascribed to Article 8 in that instance was found to encompass acceptance of a positive obligation to introduce same-sex registered partnerships, due to popular support for such an innovation in Italy. But, conversely, as discussed, *lack* of such support in some 'Eastern' states could argue for a more restrained ambit, as accepted via the first factor found relevant to the notion of 'respect' in *Oliari,* but contrary to the findings on that point in *Bayev.* That argument was put on behalf of the applicants in *Oliari*: 'empirical evidence... showed that lack of recognition of same-sex couples in a given state corresponded to a lower degree of social acceptance of homosexuality... by simply deferring

[104] See Protocol 15 that came into force on 1 August 2021 and *Council of Europe Explanatory Report on Protocol 15*, <www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf> accessed 19 October 2021. See further Bates, n 49; Fenwick, in Ziegler et al, n 49 and McGoldrick, n 48.
[105] See eg *L and V v Austria* (2003) 36 E.H.R.R. 55; *Alekseyev,* n 44; *Bączkowski and Others v Poland* (2009) 48 E.H.R.R. 19.
[106] *Alekseyev,* n 44, at [81].
[107] See McGoldrick, n 70, 666.
[108] See *Oliari,* n 52, [192] and *Orlandi,* n 72, [204] – [205]; see further Hamilton, n 72.
[109] See *Bayev,* n 98, [70].

normative choices to the national authorities, the Court would fail to take account of the fact that certain national choices were... based on prevailing discriminatory attitudes against homosexuals'.[110]
The Court has accepted that a lack of state protection and recognition of same-sex relationships relates to an especially intimate aspect of private and family life; it has already found that the availability of same-sex registered partnerships relates to 'core' interests of same-sex couples, and to 'facets of an individual's existence and identity'.[111] So in a state in which there is little discordance between social reality and the law, or no acceptance of the argument for such partnerships by the domestic courts due to the climate of homophobia, the risk of acquiescing to prejudice against sexual minorities was expected to lead the Court eventually to rely on a strengthened European consensus to find that an 'outlier' state had over-stepped its narrowed margin of appreciation. That eventually occurred in *Fedotova*: its findings that the Court should not allow majority homophobia to determine the treatment of minorities in *Alekseyev* were finally applied in the context of formalization of same-sex unions. Further, but – it appears – only on the basis of a strengthening consensus, it seems probable that it will eventually find that Article 12 read with 14 encompasses same-sex marriage.

7. Conclusions

This chapter has found that civil or registered partnerships represent a non-traditional formalised relationship status, but that that in itself does not undermine their value. In one respect it enhances that value. The very fact that such partnerships do not represent traditionalism accords them value due to their non-heteronormative, largely secular, non-patriarchal status. However, this chapter has not sought to argue that therefore such partnerships are more appropriate for same-sex couples than is marriage, or that they should merely be viewed as a 'lighter touch' status, representing a staging post on the way to achieving marital status. Same-sex couples should not be viewed as a homogenous group, just as different-sex couples cannot be. Therefore the traditional status and nature of marriage should not be viewed as providing an argument for excluding same-sex couples from that relationship status. Rather, this chapter has argued for equality of access to *both* formal relationship statuses:[112] registered partnerships should be available to same-sex couples only in the context of the availability *also* of same-sex marriage – otherwise, a ghettoisation of such couples into the non-traditional status only occurs. It is therefore strange to find that a Court set up partly to protect the interests of minorities is so far from accepting that it should protect equality of access to both statuses. Paradoxically, while the Court has had a significant influence in terms of furthering the protection of homosexual individuals in the UK,[113] it has now been entirely outstripped in terms of refusing to countenance homophobia by the Westminster and Scottish Parliaments in the context of ensuring

[110] *Oliari*, n 52, [113].
[111] *Ibid* [177]; *Orlandi*, n 72, [206].
[112] See further Fenwick and Hayward, n 7.
[113] See *Dudgeon*, n 43; *Smith and Grady*, n 43; *Lustig-Prean and Beckett v United Kingdom* (2000) 29 ECHR 548.

equality of formal relationship statuses. But, as further claims for equal marriage arise, the Court should take greater account of its core mission to protect a vulnerable minority, and of the current struggles of LGBT activists to combat homophobic denials of such access in the contracting states.[114]

[114] See L. Hodson, 'Activists and Lawyers in the ECtHR: The Struggle for Gay Rights' in D. Anagnostou (ed.), *Rights in Pursuit of Social Change: Legal Mobilisation in the Multi-level European System* (OUP 2014).