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SAME-SEX MARRIAGE, CONSENSUS, CERTAINTY AND THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract: *There remains no right to same-sex marriage before the European Court of Human Rights ('European Court.')* Yet it seems likely that at some stage the European Court will recognise same-sex marriage. Recent dicta stresses the movement towards legal recognition across Member States. It is only a lack of consensus, leading to a wide Margin of Appreciation, which prevents the European Court recognising same-sex marriage. This piece proposes that if the European Court continues with this approach, they should at least outline in future judgments how many domestic legislatures need to legislate in favour of same-sex marriage, before they will determine that a consensus will exist. This is due to the constitutional, manifold legal and symbolic implications of marriage. It is essential for a same-sex couple to know when their marriage will be legally recognised. If done in a consistent manner, this would increase the legitimacy of the European Court and has the major advantages of transparency, certainty and predictability.

1. INTRODUCTION

There continues to be no right to same sex-marriage before the European Court.² Following *Oliari v Italy*, Member States are obliged to provide same-sex couples with some form of civil partnership or registered partnership.³ This is a breakthrough for same-sex partners⁴ although in its judgment the European Court concentrated upon the difference between the lack of legal

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² *Schalk and Kopf v Austria*, App No 30141/04 (ECtHR, 24 June 2010), *Hämäläinen v Finland* App No 37359/09 (ECtHR, 16 July 2014) and *Chapin and Charpentier v France*, App No 40183/07 (ECtHR 9 June 2016).

³ *Oliari v Italy* (Apps. Nos. 18766/11 and 36030/11, ECtHR 31 July 2015).

⁴ Zago, G. 'A Victory for Italian Same-Sex Couples, a Victory for European Homosexuals? A Commentary on *Oliari v Italy*' (2015) *Articolo 29* Leiden University.

and protections in Italy and the ‘social reality of the applicants’ who were widely accepted.⁵ Fenwick and Hayward argue that the European Court by doing this ‘sought to relate its scope to circumstances arising locally, in Italy, and most likely to arise in Western European States.’⁶ In addition, although civil partnership is increasingly seen as having an intrinsic value in itself⁷ this will also not satisfy those proponents of same-sex marriage who view marriage as the gold standard.⁸

However, recognition of same-sex marriage by the European Court at some stage now seems likely. Stress was placed by the European Court in *Oliari v Italy* on the ‘movement towards legal recognition’ and the ‘continuing international trend of legal recognition of same-sex couples.’⁹ The European Court justifies the reason for not introducing same-sex marriage on the lack of consensus between Member States¹⁰ This lack of consensus leads to a wide Margin of Appreciation (‘MoA’) otherwise known as area of discretion,¹¹ given to Member States. Today 15 Member States recognise same-sex marriage.¹² This accords with a ‘global

⁵ *Oliari v Italy* (n3) para 73.

⁶ Fenwick, H. and Hayward A. ‘Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically’ [2017] 6 *EHRLR* Forthcoming 12.

⁷ *Vallianatos v Greece* (Apps. Nos. 29381/09 and 32684/09, ECtHR 7 November 2013 and *Oliari v Italy* (n3) and *Fenwick and Hayward* (n6).

⁸ See Sue Wilkinson in her Witness Statement contained in *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) para 6.

⁹ See *Oliari v Italy* (n3). Sutherland, E. ‘A Step Closer to Same-Sex Marriage Throughout Europe’ (2011) 15 *Edin L Rev* 97, 98 states that “[e]ven on the Court’s reasoning, it is arguably only a matter of time (perhaps some time) until the right to marry becomes a reality for same-sex couples throughout Europe.”

¹⁰ See *Schalk and Kopf v Austria* (n2) para 57, *Hämäläinen v Finland* (n2) para 39 and *Chapin and Charpentier v France* (n2).

¹¹ See Butler, P. (2008-2009) ‘Margin of Appreciation - A Note Towards a Solution for the Pacific’ (2008-2009) 39 *Vic U Wellington L Rev* 687 and Yourow, H.C. (1996) *Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Brill, Netherlands, 1996).

¹² Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden and United Kingdom (apart from Northern Ireland).

movement to legalise same-sex marriage.’¹³ Reform is by no means complete as certain Central and Eastern European states continue to ban same-sex marriage and constitutionally define marriage as between a man and a woman.¹⁴ Russia, a Council of Europe Member State seems to be a long way away from considering protections for same-sex couples.¹⁵ A claim is now being brought to the European Court from three same-sex couples in Russia who are claiming a right to same-sex marriage.¹⁶ As Russia has no form of legal protection for same-sex couples, the European Court are considering the matter as a ‘claim for some means of formalising their relationship in Russia, via a form of registered partnership.’¹⁷ It remains to be seen whether the European Court will confine to *Oliari v Italy* to countries where same-sex couples are socially accepted, which is very different from the homophobia present in Russian society. What will be crucial in the European Court’s analysis here is the level of consensus deemed to exist between Member States on this issue.

It remains debateable as to whether the European Court is following the correct approach in considering lack of consensus, leading to a wide MoA, as determinative in relation to same-sex marriage. Commentators argue that placing such emphasis on consensus ignores the interests of the minority group.¹⁸ They also argue that in cases that fall within the MoA doctrine

¹³ Poppelwell-Scevak C.A.R.L. (2016). The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach. *Norwegian Open Research Archives* (NORA).

¹⁴ Same-sex marriage is not recognised 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, H., ‘Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court’s Authority Via Consensus Analysis’ (2016) 3 *EHRLR* 248. See also *Fenwick and Hayward* (n6).

¹⁵ See *Fenwick* (n14) 270 who explains that gay propaganda laws are still in force in Russia. See also Fenwick and Hayward who refer to the ‘state-based and social acceptance of homophobia’ p22. See also Johnson, P. ‘Homosexual Propaganda’ in the Russian Federation: Are They in Violation of the European Convention on Human Rights?’ (2015) 3(2) *Russ. LJ* 37

¹⁶ *Fedetova and Shipitko v Russia* communicated on 2 May 2016.

¹⁷ *Fenwick and Hayward* (n6) 22.

¹⁸ See *Fenwick* (n14) and *Dzehtsiarou*, K. ‘Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights’ (2011) 3 *PL* 534, Hodson, L., ‘A Marriage by Any Other

due to there being no consensus, there is a lack of legal analysis¹⁹ and no high level of scrutiny.²⁰ Instead the consensus standards results in a fact dependent approach, with ‘little, if any constraints on state power.’²¹ This author has written elsewhere that such an approach means that Member States could be relying on erroneous²² or discriminatory reasons in refusing to sanction same-sex marriage, which reasons are not investigated by the European Court.²³ This article sets out a novel approach by suggesting that if the European Court continues to stress the need for consensus in future judgements regarding same-sex marriage, they should at least outline how many domestic legislatures need to legislate in favour of same-sex marriage, before they will determine that a consensus will exist. Certainty is needed. This is due to the constitutional, manifold legal and symbolic implications of marriage. It is essential for a couple to know when their marriage will be legally recognised.²⁴ This is also stressed by

Name? Shalk and Kopf v Austria (2011) *11(1) HRLR* 170; Sweeney, J.A. ‘Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era (2005) 54 *ICLQ* 459; Lord Lester, ‘The European Convention in the New Architecture of Europe’ (1996) 1 *PL* 6 and Benvenisti, E., ‘Margin of Appreciation, Consensus and Universal Standards (1998-1999) 31 *NYUJ of Inter L and Politics* 843.

¹⁹ Lewis, T. ‘What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation’ (2007) 56 *ICLQ* 395.414 comments that the MoA should not be used as an ‘intellectually lazy option of running for cover.’

²⁰ See for discussion Hutchinson, M. ‘The Margin of Appreciation Doctrine in the European Court of Human Rights’ (1999) 48 *ICLQ* 638 and Brauch J. The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law (2004-2005) 11 *Columbia J or Eur L* 113.

²¹ Shany, Y., ‘Toward a General Margin of Appreciation Doctrine in International Law’ (2005) 16(5) *Eur J of Inter L* 907, 912

²² For example Member States could be relying on discredited arguments such as the slippery slope argument (that same-sex marriage would lead to polygamy for example) as well as the definitional argument (that ‘traditions change and dictionaries are not the law’ and the procreation argument (that marriage is for procreative purposes only).

²³ Hamilton, F. ‘Why the Margin of Appreciation is not the Answer to the Gay Marriage Debate’ (2013) 1 *EHRLR* 47.

²⁴ In *Estin v Estin*, 334 US 541, 553 (1948) Robert Jackson J commented that “one thing that people are entitled to know from the law is whether they are formally married”. See also Stark, B. ‘When Globalization Hits Home: International Family Law Comes of Age’ (2006) 36 *Vanderbilt J of Trans L*. 1551 and McClain, L. ‘Deliberative Democracy, Overlapping Consensus and Same-Sex Marriage, (1997-1998) *Fordham L R* 1241.

international case law²⁵ and international human rights covenants.²⁶ Marriage bestows many legal rights²⁷ and is often connected to citizenship.²⁸

The suggested approach will increase the legitimacy of the European Court as it would link any new decision on movement of consensus in relation to same-sex marriage back to a democratic mandate of the legislatures of Member States. This is needed at a time when certain political factions are discussing leaving the Council of Europe.²⁹ The proposed reform also has the major advantages of transparency, certainty and predictability. The next section sets out the conundrum facing the European Court in balancing the competing tensions of universalism and relativism in relation to same-sex marriage. Section 3 then details a critique of the existing interpretation of consensus. Section 4 then sets out case law from the area of sexualities demonstrating the lack of certainty over how consensus is determined. Section 5 then considers the proposed reform in more detail and considers the advantages this would bring.

2. THE COMPROMISE BETWEEN UNIVERSALISM AND RELATIVISM

²⁵ See eg *Goodridge v Department of Public Health*, 798 NE 2d 941 (Mass 2003); *Loving v Virginia*, 388 US 1 (1967) and *Obergefell v Hodges* 576 US (2015).

²⁶ Eg Article 12 Right to Marry European Convention on Human Rights.

²⁷ Eg on intestacy, inheritance and tax purposes

²⁸ See Bamforth, N., 'Sexuality and Citizenship in Contemporary Constitutional Argument' (2012) 10(2) *Inter J Const L* 477; Frimston, R., 'Marriage and Non-Marital Registered Partnerships: Gold, Silver and Bronze in Private International Law' (2006) *Private Client Business* 352 and Aloni, E., 'Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage' (2010–2011) 18 *Duke J of Gender L and Pol'y* 105.

²⁹ Bribosia, E., Rorive, I. and Van den Eynde, L. 'Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience' 2014 32(1) *Berkeley J of Inter L* 1 referring to Wintemute, R. (2010). Consensus is the right approach for the European Court of Human Rights, Guardian, August 12, 2010. <https://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus> (Last checked 13 July 2017).

One of the central challenges for the European Court is to uphold the universal standard of human rights, whilst respecting regional differences. Fenwick and Hayward explain that in the context of rights to legal recognition of same-sex couples, there is much difficulty for the European Court in ‘adjudicating in an increasingly nationalistic context’³⁰ where Eastern European countries take a much more conservative approach in this regard.³¹ Yet this approach by the European Court attracts much criticism. Poppelwell-Scevak argues that given the European Convention of Human Rights (‘European Convention’) Preamble’s promise to ‘protect and enforce human rights... it is perplexing to see the court refrain from legalising same-sex marriage....’³² Some commentators state that the European Court should have a leading, standard setting, aspirational role.³³ Benvenisti for example argues that the European Court has a ‘duty to set universal standards.’³⁴ This would mean in relation to same-sex marriage that the European Court should no longer rely a lack of consensus leading to a wide MoA. Indeed the European Court is well aware that the European Convention cannot be ‘frozen in time.’³⁵ Concepts such as ‘living instrument’ allow the European Court to operate ‘evolutive’ and ‘dynamic’ interpretative techniques so that the European Convention can be interpreted in the light of present-day conditions rather than what the drafters thought back in

³⁰ *Fenwick and Hayward* (n6) 2.

³¹ See *Fenwick and Hayward* (n6) 5 and n14.

³² *Poppelwell-Scevak* (n13) 1.

³³ See *Dzehtsiarou*, (n18) 540. Dzehtsiarou 540 also refers to Ronald Macdonald, ‘The Margin of Appreciation’ in Ronald Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martin Nijhoff Publishers, 1993) 24 who argues that consensus would mean the European Court would ‘forfeit its aspirational role’. Shuibne N., ‘Margins of appreciation; National values, fundamental rights and EC free movement law’ (2009) 34(2) *Eur L. Rev* 230, 256 also argues that when interpreting the role of the EU Charter in an EU context there is a ‘discrete supranational’ purpose in advancing fundamental rights.

³⁴ *Benvenisti* (n18) 843.

³⁵ Tobin, B., ‘Gay Marriage – A Bridge Too Far?’ (2007) 15 *Ire. Stud. L Rev* 175 referring to the Irish Supreme Court decision in *Zappone and Gilligan v Revenue Commissioners* [2008] 2 IR 417

the 1950s.³⁶ Such techniques are used throughout the case law which will be examined in the relevant area of sexualities and family law.³⁷

However, in an area as sensitive as same-sex marriage, the European Court wishes to avoid any charge that it is engaging in ‘judicial politics.’³⁸ Unlike the role of the Supreme Court in the US for instance, the European Court has to constantly adhere to the states’ MoA.³⁹ There needs to be a compromise between the competing interests at stake. The MoA alongside consensus (which latter is one of the key factors in determining the width of the MoA) are the ‘primary tools’⁴⁰ employed by the European Court in its case law on same-sex marriage in ensuring it does not overstep the ‘primary responsibility’⁴¹ given under the European Convention to Member States to secure human rights.⁴² The doctrine of subsidiarity⁴³ has been recently re-emphasised.⁴⁴ The role of the European Court is in fact secondary. Its task is to ‘examine the domestic decision’ and ensure compatibility with the European Convention.⁴⁵ This is all part of securing agreement and social cooperation in the face of moral pluralism,⁴⁶

³⁶ See Letsas, G., ‘Strasbourg’s Interpretative Ethic: Lessons for the International Lawyer’ (2010) 21(3) *EJIL* 509 for further explanation.

³⁷ For example trans gender persons have transformed their position, to allow full recognition of rights in their new sex. See *Christine Goodwin v United Kingdom*, App No 28957/95 (ECtHR 11 July 2002). See section 4.

³⁸ *Benvenuti* (n18) 846.

³⁹ See Teutonico, D. ‘Pajic v Croatia’ (2016-2017) 25 *Tulane J of Inter and Comp L* 461.

⁴⁰ Donoho, D.L. ‘Autonomy, self-governance, and the margin of appreciation: Developing a jurisprudence of diversity within universal human right (2001) 15 *Em Inter L Rev* 391, 451.

⁴¹ McGoldrick, D. (2016) 65(1) ‘A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee’ (2016) 65(1) *ICLQ* 21, 32.

⁴² *Hutchinson* (n20).

⁴³ Art 1 European Convention. *Fenwick* (n14) 250 also emphasises the importance of ‘subsidiarity related devices.’

⁴⁴ Council of Europe, ‘Brighton Declaration High Level Conference on the Future of the ECHR’, available http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf (2012) B 12

⁴⁵ *Hutchinson* (n20) 640.

⁴⁶ *McClain* (n24).

which is particularly important in an area such as same-sex marriage. As set out above it remains debateable, as to whether the European Court is following the correct approach in this regard.⁴⁷ However, as the European Court currently determines that a lack of consensus is decisive in reaching a wide MoA,⁴⁸ this piece argues that at least more clarity and guidance is needed as to when a consensus is deemed to have been reached. As stated above, there are constitutional, manifold legal and symbolic implications of marriage.⁴⁹ Couples are entitled to know when they will be able to enter into a same-sex marriage.

3. THE CONSENSUS STANDARD CRITIQUED

Commentators argue that consensus in relation to many human rights, is often the most important factor in determining the width of the MoA given to a Member State.⁵⁰ When considering same-sex marriage, it is clear that lack of consensus is the critical factor.⁵¹ The MoA varies greatly depending what rights are involved.⁵² It can and frequently does evolve over time. Factors which are commonly cited in determining the width of the MoA include the importance of the right, the Member State interest involved and whether there is a consensus

⁴⁷ See Introduction.

⁴⁸ *Schalk and Kopf v Austria* (n2) para 57, *Hämäläinen v Finland* (n2) para 39 and *Chapin and Charpentier v France* (n2).

⁴⁹ See Section 1 Introduction.

⁵⁰ For example *Lewis* (n19), Wada, E. 'The Margin of Appreciation and the Right to Assisted Suicide' (2005) 27 *Loy. of L.A. Inter. and Comp. L. Rev.* 275, *Butler* (n11), Nigro, R., 'The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil' (2010) 11 *HRLR* 531; *Hutchinson* (n20); *Brauch* (n20) and *McClain* (n24).

⁵¹ *Schalk and Kopf v Austria* (n2) para 57, *Hämäläinen v Finland* (n2) para 39 and *Chapin and Charpentier v France* (n2).

⁵² *Fenwick* (n14) 251 states that in practice 'uncertainty arises in respect of every aspect of it.' See also *Poppelwell-Scevak* (n13).

on an issue.⁵³ Certain rights are given a narrow MoA.⁵⁴ Equally, certain vulnerable groups, including gay people are given extra protection.⁵⁵ Where discrimination concerns gay people for example, the Member State will need to have ‘very weighty reasons for the restriction in question.’⁵⁶ Logically, now that same-sex couples fall under the definition of family under article 8,⁵⁷ the ‘very weighty reasons’ test should lead to a breach of Article 12 (right to marriage) being found in relation to same-sex couples bar from marriage. Such was the view of the minority judges in *Schalk and Kopf v Austria*.⁵⁸ It is only because the European Court determines there to be a wide MoA (due to a lack of consensus) in relation to marriage under Article 12, which prevents the European Court moving forward in this area.⁵⁹

Many of the criticisms surrounding MoA and its key factor of consensus centre around the fact that it is very difficult to understand how it works and that it is lacking in predictability.⁶⁰ Some commentators even argue that it is not ‘consistent with the rule of law.’⁶¹ There is no certainty as to when the European Court will determine that sufficient consensus has been reached to recognise same-sex marriage. *Bribosia et al* reject the consensus argument on the basis that it is ‘fraught with methodological imprecision.’⁶² Confusion reigns with regards to the

⁵³ See *Donoho* (n40) for further explanation.

⁵⁴ For example privacy and personal autonomy. *Dudgeon v United Kingdom*, App No 7525/76 (ECtHR 22 October 1981).

⁵⁵ *Ibid.*. See *McGoldrick* (n41) 25.

⁵⁶ *Karner v Austria* App No 40016/98 (ECtHR 24 July 2003).

⁵⁷ *Schalk and Kopf v Austria* (n2)

⁵⁸ *Ibid.* Dissenting Opinion of Judges Rozakis, Spielmann and Jebens para 8

⁵⁹ See for example *Schalk and Kopf v Austria* (n2).

⁶⁰ *Wada* (n50) 280, *Butler* (n11) 702, *Hutchinson* (n20) 641, *Brauch* (n20) 121, *Shany* (n21) 932, *Benvenuti* (n18) 844, *McGoldrick* (n41) and *Lester* (n18).

⁶¹ *Brauch* (n20) 138.

⁶² *Bribosia et al* (n29) 18.

terminology used, and multiple terms are used including ‘common European standard’, ‘common European approach’, ‘emerging consensus’ or ‘trend.’⁶³ The European Court also demonstrates no consistency in determining what sources are appropriate for establishing a consensus.⁶⁴ For example on occasion emphasis has been placed on scientific reports, and this emphasis is later disregarded in similar cases.⁶⁵ There are also issues arising in relation to the thoroughness of the research on which the European Court makes its decision.⁶⁶

However, the emphasis placed on consensus as the determinative factor for the width of the MoA ensures that the European Court is acting in concert with domestic authorities and within the dictates of subsidiarity.⁶⁷ Debate continues about the appropriateness of stressing consensus in relation to same-sex marriage.⁶⁸ This article suggests that if the European Court in future judgments continues to concentrate on the need for consensus, they should at least outline how many domestic legislatures need to legislate in favour of same-sex marriage, before they will determine that a consensus will exist. This will increase the legitimacy of the European Court, as it will link the European Court’s decision back to the democratic mandate of the Member States’ legislatures. If applied in such a manner, the doctrine of consensus could be an important legitimising tool. This could give the European Court’s judgments in this area extra weight, which is useful at a time when certain political factions are discussing leaving the

⁶³ *Popplewell-Szczak* (n13) 39.

⁶⁴ *Dzhehtsiarou* (n29) 544.

⁶⁵ Look at adoption cases *Frette v France* App No 36515/97 (ECtHR 26 February 2002) which placed emphasis on the division in the scientific community about the effect which individual gay adoption would have on the child. This approach was subsequently regarded as discriminatory. *X and Others v. Austria* App No 19010/07 (ECtHR 19 February 2013)

⁶⁶ *Dzehtsiarou* (n18) 539.

⁶⁷ *McGoldrick* (n41) 28 referring to Nicolas Bratza, Evidence to UK Joint Committee on Human Rights, 13 March 2012, HC 873-iii Q140, former President of the European Court, who saw this as a safeguard ‘to prevent any rapid and arbitrary development of the Convention’. See also *Dzehtsiarou* (n18).

⁶⁸ See Introduction.

Council of Europe.⁶⁹ The next section examines the lack of certainty resulting from how the European Court has applied the doctrine of consensus in its developing line of case law concerning sexualities.

4. CASE LAW DEMONSTRATING THE LACK OF CERTAINTY OVER HOW CONSENSUS IS DETERMINED

In the area of family law and sexualities, the European Court has employed a dynamic interpretative technique. The European Court has not been insistent on demonstrating consensus in order to move case law forwards. Indeed it has been prepared to depart from previous precedents in the areas of decriminalisation of same-sex sexual activity,⁷⁰ equalisation of the age of consent for same-sex couples,⁷¹ same-sex couples' tenancy rights,⁷² employment of gay people in the military,⁷³ definition of family concerning gay people,⁷⁴ gay persons' right to adopt⁷⁵ and most recently same-sex couples' rights to form civil partnerships⁷⁶ all without demonstrating a consistent method as to how consensus is determined. All of this case law has meant a progressive approach to the development of gay rights and has to be applauded as such. Fenwick and Hayward also argue that a further move towards an increasing consensus in relation to legal recognition of same-sex couples rights can be done by removing 'asymmetry

⁶⁹ See n29.

⁷⁰ *Dudgeon v UK* (n54).

⁷¹ *Sutherland v UK* App No 25186/94 (ECtHR 1 July 1997).

⁷² *Simpson v UK* App No 11716/85 (ECtHR 14 May 1986) and *Karner v Austria* (n56).

⁷³ *Smith and Grady v UK* App Nos 33985/96 and 33986/96 (ECtHR 27 September 1999) and *Lustig-Prean and Beckett v UK* App Nos 31417/96 and 32377/96 (ECtHR 27 September 1999).

⁷⁴ *X and Y v UK* App No 21830/93 (ECtHR 22 April 1997), *Kerkhoven and Hinke v Netherlands* App No 15666/89, Judgment (ECtHR 19 May 1992), *JRM v The Netherlands* App No 16944/90 (ECtHR 8 February 2003) and *Schalk and Kopf v Austria* (n2).

⁷⁵ *Frette v France* (n57) and *EB v France* App No 43546/02 (ECtHR 22 January 2008).

⁷⁶ *Oliari v Italy* (n8).

of access' to protected legal partnerships.⁷⁷ They explain asymmetry of access to arise when same-sex and opposite-sex couples are given different legal statuses. Erasing asymmetry of access in the context of Western European countries this would mean removing inequalities where same-sex couples can only access registered partnerships and not marriage.⁷⁸ Such a course of action together with an increasing number of Eastern European countries introducing for the first time some level of registered partnership, would undoubtedly increase the pressure on the European Court to recognise an increasing level of consensus.⁷⁹ In turn this would make the position of Eastern European countries which afford same-sex couples no legal protections as being seen to be 'increasingly anomalous.'⁸⁰ However, there would still remain doubt as to when the European Court would deem there to be a sufficient level of consensus to recognise a right to same-sex marriage. There is an underlying problem in that the European Court has shown no consistent application as to determine when consensus exists. The European Court is insistent on consensus being the decisive factor here,⁸¹ but its case law leaves no clues as to when this will be determined to exist. Key cases are now examined in more detail.

The first in this important line of cases is *Dudgeon v UK*, which concerned criminalisation of sodomy in Northern Ireland. This was subsequently found to contravene article 8 (right to respect for private life) and has been lauded as 'open[ing] the door for LGBTQI rights to be include under the [European] Convention.'⁸² A flaw in the judgment for those seeking to understand when the European Court will advance the case for same-sex marriage, is that the

⁷⁷ They define asymmetry of access to mean

⁷⁸ *Fenwick and Hayward* (n6) 30 -31.

⁷⁹

⁸⁰ *Fenwick and Hayward* (n6).

⁸¹ *Schalk and Kopf v Austria* (n2), *Oliari v Italy* (n3) and *Chapin v Charpentier* (n2).

⁸² *Popplewell-Scezak* (n13) 9.

European Court never thoroughly explained its departure from previous case law. The reversal of precedent was done on the basis of a ‘better understanding, and in consequence an increased tolerance, of homosexual behaviour in the great majority of Member States.’⁸³ Little guidance was given as to what was meant about a ‘better understanding.’⁸⁴ The European Court did consider other domestic laws⁸⁵ but never thoroughly documented how many other Member States’ legislatures were required to have introduced legislation. Letsas criticises this as instance of the European Court making a ‘moral’ decision, rather than determining ‘some commonly accepted standards.’⁸⁶ Confusing terminology such as ‘better understanding’ does little to develop our understanding of when a sufficient consensus will be reached in relation to same-sex marriage.

Brauch also considers that case law demonstrates that the European Court utilises the concept of MoA, with its key factor of consensus, in a manner which results in the standard sometimes changing without warning.⁸⁷ The case he discusses concerned gay peoples’ employment in the military.⁸⁸ Previously national security defences put forward by Member States were given a wide MoA.⁸⁹ In *Smith and Grady v UK*, the European Court determined (despite the argument to the contrary by the UK government)⁹⁰ that no defence could be upheld on the basis of

⁸³ *Dudgeon v UK* (n54) para 60.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Letsas* (n36) 531.

⁸⁷ *Brauch* (n20) 137.

⁸⁸ *Smith and Grady v UK* (n73).

⁸⁹ *Ibid.* para 3 referring to *Leander v Sweden* App No 9248/81(ECtHR 26 March 1987) para 59 and *Engel v Netherlands A/22* (ECtHR 8 June 1976) para 57.

⁹⁰ See *Smith and Grady v UK* (n73) para 61 where the UK Homosexuality Policy Assessment Team indicated a ‘military risk from a policy change...’ See also para 66 where the Parliamentary Select Committee Report dated 24 April 1991 stated that ‘the presence of people known to be homosexual can cause tension in a group of people

national security. This was because ‘particularly serious reasons’ had to exist in relation to restrictions which concerned the ‘most intimate part of an individuals’ private life’.⁹¹ Ultimately, the UK were not successful in their defence which the European Court interpreted as ‘founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation.’⁹² Despite previously national security defences being given a wide MoA,⁹³ suddenly no MoA was given to the UK. Again, although advancing LGBT rights, the sudden shift in position by the European Court was unpredictable. The UK had prepared their defence on the basis of a wide MoA and had no notice from the European Court that this no longer existed, arguably meaning that the UK did not prepare its case to best effect.

The case of *Karner v Austria*⁹⁴ considered the rights of a surviving same-sex partner to inherit a tenancy. The European Court again departed from previous precedent⁹⁵ to find a breach of Article 14 (equality) in conjunction with Article 8 (privacy).⁹⁶ The issue of consensus was avoided. Although third party interveners brought up international examples of equal treatment of unmarried same-sex and opposite-sex couples,⁹⁷ these were not considered in the European Court’s judgment. Instead, the European Court introduced a new dicta that ‘weighty reasons’ were needed in justifying differences in treatment between opposite sex and same-sex

required to live and work sometimes under great stress and physically at very close quarters, and thus damage its cohesion and fighting effectiveness...’

⁹¹ *Smith and Grady v UK* (n73) para 89.

⁹² *Ibid.* para 96.

⁹³ *Ibid.* para 3 referring to *Leander v Sweden* App No 9248/81(ECtHR 26 March 1987) para 59 and *Engel v Netherlands A/22* (ECtHR 8 June 1976) para 57.

⁹⁴ *Karner v Austria* (n56).

⁹⁵ *Simpson v UK* (n72).

⁹⁶ *Karner v Austria* (n56).

⁹⁷ *Ibid.* para 36. The third party interveners were ILGA Europe, Liberty and Stonewall.

partners.⁹⁸ Whilst the case was obviously an advance for GLBT rights by making any Member States' discriminatory law against gay people subject to a heightened test, it did not address the issue concerning consensus. It offers no clues to be able to predict when a consensus will be deemed to exist in relation to same-sex marriage.

Another change from previous case law occurred in the recognition of same-sex relationships under the 'family' aspect of Article 8. The European Court had a long entrenched approach⁹⁹ to not recognising same-sex relationships under the family aspect of Article 8.¹⁰⁰ Instead, such relationships were always considered under the private life aspect.¹⁰¹ It was not until *Schalk and Kopf v Austria* (2010) that same-sex couples were recognised as having family rights.¹⁰² This has been described as 'remarkable'¹⁰³ progress. The European Court justified its extension of case law on the basis of the 'rapid evolution of social attitudes towards same-sex couples.'¹⁰⁴ Again, although this case illustrates the dynamic interpretative techniques of the European Court, there was no explanation as to how the European Court gauged the change in social attitudes. There was consideration of the legislative status of same-sex couples internationally, but the European Court stated this was insufficient to amount to a European consensus in relation to same-sex marriage.¹⁰⁵ Yet despite the lack of consensus in relation to same-sex marriage, the European Court did transform previous case law to recognise same-sex couples

⁹⁸ *Ibid.* para 37.

⁹⁹ Caballero, S., 'Unmarried Cohabiting Couples Before the European Court of Human Rights: Parity with Marriage?' (2004-2005) 11 *Col. J. of Eur. L* 151, 166.

¹⁰⁰ For example see *X and Y v UK* (n74), *Simpson v UK* (n72) and *Kerkhoven and Hinke v The Netherlands* (n74).

¹⁰¹ *Caballero* (n99) 152.

¹⁰² *Schalk and Kopf v Austria* (n2) para 94.

¹⁰³ *Hodson* (n18) 175. See also *Bribosia et al* (n29).

¹⁰⁴ *Schalk and Kopf v Austria* (n2) para 93.

¹⁰⁵ *Schalk and Kopf v Austria* (n2)

having a right to family life under Article 8. This approach of the European Court is confusing. A ‘rapid evolution of social attitudes’ cannot be the same as consensus as no consensus was determined to exist in relation to the right to marry.¹⁰⁶ It appears from *Schalk and Kopf v Austria* (2010) that consensus is not needed for article 8 (right to a private and family life), but is required for article 12 (right to marry.) Yet again however, there is no clue as to when consensus will be reached for the purpose of Article 12. This piece sets out a suggestion that the European Court should clarify in future judgements when consensus will be deemed to have been reached.

The lack of clarity as to the weight given to consensus arguments in this area is further revealed by the most recent line of cases before the European Court concerning civil partnership. In *Vallianatos v Greece* consensus played an important role in determining that there was a breach of Article 14, taken in conjunction with Article 8.¹⁰⁷ Where Greece had reserved civil partnership rights to opposite-sex couples only, an ‘evolving or ‘minority’ consensus’¹⁰⁸ was deemed important as only two states who had introduced such statuses had reserved them specifically to opposite-sex couples. Confusingly this ‘minority’ consensus was seen as more important than the fact that overall (at that stage) only a minority of contracting states had introduced same-sex registered partnerships. This judgement shows that in some cases the European Court looks at consensus within a selected group of Member States, rather than consensus across all Member States.

In *Oliari v Italy* (2015) consensus played an important role.¹⁰⁹ The European Court performed an extensive survey of comparative law and found that for the first time a ‘thin majority’ of

¹⁰⁶ *Ibid.*

¹⁰⁷ *Vallianatos v Greece* (n7).

¹⁰⁸ *Fenwick and Hayward* (n6) 11 referring to paras 91 and 92 .

¹⁰⁹ *Oliari v Italy* (n3).

states recognised a right to some level of civil partnership.¹¹⁰ This was an important reason for the European Court's decision that Article 8 had been breached. Yet in other cases the European Court has taken no regard of consensus. In the recent case of *Ratzenbock and Seydl v Austria*,¹¹¹ which concerned an opposite sex couple wishing to enter into a civil partnership, on the grounds that this was a lighter form of recognition, the European Court did not consider consensus at all. Instead the majority of the European Court considered that different-sex couples were not in a comparable situation to that of same-sex couple. This was because the 'institutions of marriage and registered partnership [were] essentially complementary in Austrian law.'¹¹² As no comparator was found the European Court did not go on to '...assess the difference of treatment or the justification for the difference.'¹¹³ This seems at odds with previous decisions made in *Schalk and Kopf v Austria* and *Vallianatos v Greece* where a comparison was made between same and different sex couples and their access to legal statuses.¹¹⁴ It also meant that the European Court never considered a consensus analysis at all, despite this being seen as decisive in *Oliari v Italy*.¹¹⁵ Interestingly Fenwick and Hayward argue that a consensus could be found in this area but depending on how the question is framed.¹¹⁶ If the European Court had asked if following the introduction of same-sex partnerships, the majority of Member States had confined them to same-sex partners the answer would have been in the affirmative. However, if the European Court had asked instead whether

¹¹⁰ *Ibid.*

¹¹¹ *Ratzenbock and Seydl v Austria* (Apps. No. 28475/12, ECtHR 26 October 2017)

¹¹² *Ibid.* para 40.

¹¹³ Fenwick H and Hayward A. 'Equal Civil Partnerships: Implications of Strasbourg's Latest Ruling for Steinfeld and Keidan' *UK Human Rights Blog* Post 21 November 2017, <https://ukhumanrightsblog.com/2017/11/21/equal-civil-partnerships-implications-of-strasbourgs-latest-ruling-for-steinfeld-and-keidan-helen-fenwick-andy-hayward/>

¹¹⁴ *Schalk and Kopf v Austria* (n2) and *Vallianatos v Greece* (n7).

¹¹⁵ *Oliari v Italy* (n3)

¹¹⁶ *Fenwick and Hayward UK Human Rights Blog* (n113).

the majority of states following introduction of same-sex partners had ‘maintained asymmetry of access’ the answer would have been in the negative, as most Member States following the introduction of registered partnerships, had gone on to introduce same-sex marriage.¹¹⁷ Austria is one of the few countries to have maintained registered partnerships for same-sex couples and marriage for opposite sex couples. This further serves to highlight the confusing treatment of consensus by the European Court.

In a similar manner to the transformation of the legal treatment of gay people before the European Court, the treatment of trans gender persons by the European Court has also undergone a major change.¹¹⁸ Early case law resulted in a denial of trans persons’ rights and a wide MoA, due to a lack of consensus, was deemed necessary.¹¹⁹ Yet 16 years later trans persons’ rights were recognised, including the right to marry in their new sex.¹²⁰ The European Court made a clear commitment to a ‘dynamic and evolutive approach’ in order to ‘render [the European Convention’s] rights practical and effective, not theoretical and illusory.’¹²¹ However, when reviewing the case law before the European Court, no clear explanation was given as to how the European Court justified this change in approach. The first in the line of case law did not deem it appropriate to consider the domestic law in Member States¹²² and merely stated that the matter be kept ‘under review’.¹²³ Further case law did at least take note of international comparisons and established this as a valid methodology towards consensus

¹¹⁷ *Fenwick and Hayward UK Human Rights Blog* (n113).

¹¹⁸ See for comment Grigolo M. ‘Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject’ (2003) 14(5) *Eur J of Inter L* 1023, 1025.

¹¹⁹ *Rees v UK* App No 9532/81 (ECtHR 17 October 1986). See also *Popplewell-Scezak* (n13) for comment.

¹²⁰ *Christine Goodwin v UK* (n37).

¹²¹ *Ibid.* para 74.

¹²² *Rees v UK* (n119) para 42.

¹²³ *Ibid.* para 47.

building.¹²⁴ Eventually, 16 years later, the European Court was swayed by an ‘emerging consensus’¹²⁵ and reference was also made to a ‘continuing international trend.’¹²⁶ The variety of terminology used leads to confusion.¹²⁷ On the facts as well over the 16 year period examined there had been very little progress in the number of European countries recognising trans persons’ rights.¹²⁸ To add to the confusion, the European Court also examined states outside of Europe, including Australia and New Zealand. Brauch concludes that there are no legal standards to be found in such decisions, arguing that the European Court was not ‘engaged in legal analysis, but in policy making.’¹²⁹ It creates difficulties for those wishing to determine when a consensus will be determined to have been reached in relation to same-sex marriage. This leads to a lack of clarity and predictability as to when the European Court will introduce same-sex marriage. The European Court frequently reverses previous cases. Reliance is made upon a consensus standard that is not thoroughly explained. Change is needed here. If the European Court determines that a matter falls within the MoA due to a lack of consensus, as is the case for same-sex marriage, Member States should be able to predict when a sufficient consensus will be deemed to have been reached.

5. PROPOSED REFORM AND THE ADVANTAGES THIS WOULD BRING

This piece suggests that if the European Court continues to stress the need for consensus in future judgements regarding same-sex marriage, they should at least outline how many

¹²⁴ *Cossey v UK* App No 10843/84 (27 September 1990).

¹²⁵ *Christine Goodwin v UK* (n37) para 84. See also *Tobin* (n30).

¹²⁶ *Christine Goodwin v UK* (n37) para 84.

¹²⁷ *Dzehtsiarou* (n18) 541. See also *Brauch* (n20).

¹²⁸ *McGoldrick* (n41).

¹²⁹ *Brauch* (n20)147. See also *Popplewell-Szczak* (n13).

domestic legislatures need to legislate in favour of same-sex marriage, before they will determine that a consensus will exist. This will increase the legitimacy of the European Court and also has major advantages of transparency, certainty and predictability. Legitimacy is a particularly important at present with certain political factions threatening to leave the Council of Europe.¹³⁰ The ‘legitimacy of international law is usually attributed to the States’ [original] consent.¹³¹ This argument surely holds less weight 50 years after the original signatures.¹³² A question mark can also be raised as to how true the original consent argument holds in the face of the fact of the extensive interpretative techniques used by the European Court. As demonstrated above, the case law concerning sexualities has evolved rapidly over the course of the last few years.¹³³ A challenge is therefore faced in Central and European states (whose people largely have a more conservative approach to these matters)¹³⁴ to ensure enforcement of any judgment in this area.

As Wintemute comments forcing minority views on the rest of the countries would ‘risk a political backlash, which could cause some governments [to] threaten to leave the convention system.’¹³⁵ The European Court also faces ‘a substantial structural handicap’¹³⁶ in getting its decisions enforced, as this depends upon the actions of Member States.¹³⁷ Were the European

¹³⁰ See n29

¹³¹ *Dzehtsiarou* (n18) 536 referring to *Macdonald* (n29) 123, a former judge of the European Court, who states the whole system of European human rights protection ‘rests on the fragile foundations of the consent of the Contracting Parties.’

¹³² *Dzehtsiarou* (n18) 536 referring to Letsas, G. ‘The Truth in Autonomous Concepts: How to Interpret the ECHR’ (2004) 15 *Eur J of Inter L* 279, 304

¹³³ See section 4.

¹³⁴ See *Fenwick* (n14).

¹³⁵ See *Wintemute* (n29).

¹³⁶ *Dzehtsiarou* (n18) 534.

¹³⁷ *Fenwick* (n14) 248 who explains that the European Court cannot ‘rely on coercion’. This is in contrast to domestic legislatures who have their decisions enforced immediately. See also *Donoho* (n40) 422

Court to take a leading role, too far in advance of public opinion, this could lead to a lack of enforcement. Examples of Member States failing to enforce decisions of the European Court are easy to find.¹³⁸ Consensus remains an important argument and is ‘a vital force in judicial policy that the European Court uses when it fears that going against consensus will render its rulings ineffectual.’¹³⁹ Several judges in the European Court have also opined that they believe there is a link between consensus and enforcement and acceptance of judgements.¹⁴⁰ As an international court, the European Court is never going to have a democratic mandate. However, if consensus can be linked back to the democratic legislatures of Member States this will increase the legitimacy of the European Court’s role. The proposed reform also has the major advantages of increasing legitimacy, transparency, certainty and predictability. The European Court would be operating within the rule of law and not trespassing into a political role.

6. CONCLUSION

In recent years there has been a transformation in the treatment of GLBT rights. The European Court now requires Member States to offer some form of legal protection to same-sex couples Europe wide (although this could be confined to countries where same-sex couples are accepted socially),¹⁴¹ but there continues to be no right to same-sex marriage.¹⁴² This is because of the

¹³⁸ For example *Hirst v United Kingdom (No 2)* App No 74025/01 (ECtHR 6 October 2005) removing the blanket ban on prisoners’ voting rights has met with delayed enforcement in the UK. Donald A. and Leach, P. *Parliaments and the European Court of Human Rights* (Oxford University Press, 2016) 245 who comment on this as an important example for those who assert the primary of Parliament.

¹³⁹ *Bribosia* (n29) 19.

¹⁴⁰ *Dzhetsiarou* (n18) 544-545 referring to *Dzehtsiarou, K. Interview with Judge of the ECtHR Corneliu Birsan* (European Court of Human Rights, Strasbourg, 2010) and *Dzehtsiarou, K. Interview with Judge of the ECtHR Renate Jaeger* (European Court of Human Rights, Strasbourg, 2010).

¹⁴¹ *Oliari v Italy* (n3).

¹⁴² *Schalk and Kopf v Austria* (n2).

lack of consensus among Member States on the issue.¹⁴³ There remains a divide between the largely liberal Western states and the more conservative states of Central and Eastern Europe.¹⁴⁴ It seems likely, however, that at some stage the European Court will determine that there is a right to same-sex marriage.¹⁴⁵ The difficulty remains that currently proponents of same-sex marriage are left with little to guide them as to when the European Court will determine this moment has arrived. Certainty is needed. This is due to the constitutional, manifold legal and symbolic implications of marriage. It is essential for a couple to know if they can legally marry.¹⁴⁶

The issue of same-sex marriage recognition across Europe illustrates the difficult balance, which the European Court has to make between upholding the universal standard of human rights, whilst respecting regional differences. In relation to same-sex marriage, it remains debateable as to whether the European Court is following the correct approach in considering lack of consensus, leading to a wide MoA, as determinative in relation to same-sex marriage. Critics argue that this ignores minorities¹⁴⁷ and results in a lack of legal analysis¹⁴⁸ and no high level of scrutiny.¹⁴⁹ However, in politically sensitive areas such as same-sex marriage, the European Court wishes to avoid any charge that it is engaging in 'judicial politics.'¹⁵⁰ A wide MoA, due to the emphasis on lack of consensus ensures that the European Court does not

¹⁴³ *Ibid.* para 57.

¹⁴⁴ See *Fenwick* (n14) for discussion.

¹⁴⁵ *Schalk and Kopf v Austria* (n2) para 105 and *Oliari v Italy* (n3) at para 178

¹⁴⁶ See Section 1.

¹⁴⁷ See *Fenwick* (n14), *270 Dzehtsiarou* (n18), *Hodson* (n18), *Sweeney* (n17), *Lester* (n18) and *Benvenisti* (n18).

¹⁴⁸ See *Lewis* (n19) 414.

¹⁴⁹ See for discussion *Hutchinson* (n20) and *Brauch* (n20) 137.

¹⁵⁰ *Benvenisti* (n18) 846.

overstep the 'primary responsibility'¹⁵¹ given under the European Convention to Member States to secure human rights.¹⁵² Despite the emphasis on consensus it is far from clear how the European Court determines whether a consensus exists.¹⁵³ There are also confusions in relation to the terminology used around consensus, where numerous version of the name are used.¹⁵⁴ Again no consistency is demonstrated in determining what sources are appropriate for establishing a consensus.¹⁵⁵ Analysis of case law relating to sexualities and family law reveals very little to aid our understanding. Despite advancing human rights protections for gay people and same-sex couples, case law demonstrates a very inconsistent and confusing approach to the use of consensus.¹⁵⁶ Even worse, it results in the charge that the European Court is not acting in accordance with the rule of law.¹⁵⁷

This article sets out a novel approach by suggesting that if the European Court continues to stress the need for consensus in future judgements regarding same-sex marriage, they should at least outline how many domestic legislatures need to legislate in favour of same-sex marriage, before they will determine that a consensus will exist. This will increase the legitimacy of the European Court as it would link any new decision on movement of consensus in relation to same-sex marriage back to a democratic mandate of the legislatures of the Member States concerned. This is needed at a time when certain political factions are discussing leaving the Council of Europe.¹⁵⁸ Case law concerning sexualities has evolved

¹⁵¹ McGoldrick (n41) 32.

¹⁵² *Hutchinson* (n20).

¹⁵³ *Bribosia* (n29).

¹⁵⁴ *Popplewell-Szczak* (n13).

¹⁵⁵ *Dzhetsiarou* (n13) 544.

¹⁵⁶ See section 3.

¹⁵⁷ See for example *Brauch* (n20).

¹⁵⁸ See n23.

rapidly over the last few years.¹⁵⁹ A challenge is therefore faced in Central and European states (whose people largely have a more conservative approach to these matters)¹⁶⁰ to ensure enforcement of any judgment in this area. The European Court also faces ‘a substantial structural handicap’¹⁶¹ in getting its decisions enforced, as this depends upon the actions of Member States.¹⁶² Forcing minority views on countries who would otherwise be opposed could also result in a political backlash.¹⁶³ Consensus therefore remains an important argument which many European judges opine is linked to enforcement and acceptance of judgements.¹⁶⁴ As an international court, the European Court is never going to have a democratic mandate. However, if consensus can be linked back to the democratic legislatures of the Member States concerned this can increase the legitimacy of the European Court’s role. Consensus could therefore, if applied in the suggested more consistent manner aid the legitimacy of judgements. The proposed reform would also improve transparency, certainty and predictability as proponents of same-sex marriage would be able to judge when the necessary consensus had arrived.

¹⁵⁹ See section 4.

¹⁶⁰ See *Fenwick* (n14).

¹⁶¹ *Dzehtsiarou* (n18) 534.

¹⁶² *Fenwick* (n14) 248 and *Donoho* (n40) 422

¹⁶³ See *Wintemute* (n29). See also Zylan, Y. ‘States of Passion: Law, Identity and Social Construction of Desire’ (Oxford University Press, 2011) 214, and Verchick, R. ‘Same-Sex and the City’ (2005) 37 *Urban L Rev* 191, 191 who discuss backlash following the Massachusetts Supreme Court decision in *Goodridge v Department of Public Health*, (2003) 798 N.E. 2d 941 Mass to introduce same-sex marriage in that state in 2003 was widely linked to a backlash in public opinion across the US

¹⁶⁴ See n140.

