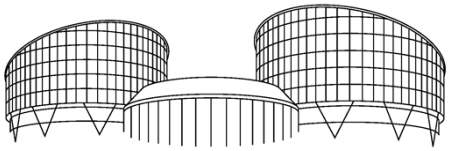

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF HÄMÄLÄINEN v. FINLAND

(Application no. 37359/09)

JUDGMENT

STRASBOURG

16 July 2014

In the case of Hämäläinen v. Finland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President*,
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Isabelle Berro,
Khanlar Hajiyev,
Danutė Jočienė,
Päivi Hirvelä,
András Sajó,
Linos-Alexandre Sicilianos,
Erik Møse,
Helen Keller,
André Potocki,
Paul Lemmens,
Valeriu Griţco,
Faris Vehabović, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 16 October 2013 and 11 June 2014,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 37359/09) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Finnish national, Ms Heli Maarit Hannele Hämäläinen ("the applicant"), on 8 July 2009. Having originally been designated by the initial H., the applicant subsequently agreed to the disclosure of her name.

2. The applicant was represented by Mr C. Cojocariu, a lawyer practising in London. The Finnish Government ("the Government") were represented by their Agent, Mr A. Kosonen, of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, under Articles 8 and 14 of the Convention that her right to private and family life had been violated when the full recognition of her new gender was made conditional on the transformation of her marriage into a registered partnership.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 13 November 2012 a Chamber, composed of Lech Garlicki, President, Päivi Hirvelä, George Nicolaou, Ledi Bianku, Zdravka Kalaydjieva, Nebojša Vučinić and Vincent A. De Gaetano, judges, and Lawrence Early, Section Registrar, delivered its judgment. It decided, unanimously, to declare the complaints concerning Articles 8, 12 and 14 of the Convention admissible and the remainder of the application inadmissible, and held that there had been no violation of Article 8 of the Convention, no violation of Article 14 of the Convention taken in conjunction with Article 8, and that there was no need to examine the case under Article 12 of the Convention.

5. On 13 February 2013 the applicant requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention. A panel of the Grand Chamber accepted the request on 29 April 2013.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. At the final deliberations, Danutė Jočienė continued to sit in the case following the expiry of her term of office (Article 23 § 3 of the Convention and Rule 24 § 4).

7. The applicant and the Government each filed further observations on the merits (Rule 59 § 1). In addition, third-party comments were received from Amnesty International and Transgender Europe, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 October 2013 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr A. KOSONEN, Director, Ministry of Foreign Affairs, *Agent*,
Ms S. SILVOLA, Senior Adviser, Ministry of Justice,
Ms M. FAURIE, Senior Officer, Ministry of Social Affairs and Health,
Ms K. FOKIN, Legal Officer, Ministry of Foreign Affairs, *Advisers*;

(b) *for the applicant*
Mr C. COJOCARIU, Lawyer, Interights, *Counsel*,
Ms V. VANDOVA, Legal Director, Interights, *Adviser*.

The applicant was also present.

The Court heard addresses by Mr Kosonen, Mr Cojocariu and Ms Silvola, as well as their replies to questions put by Judges Hirvelä, Sajó and Lemmens.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1963 and lives in Helsinki.

10. The applicant was born male. She always felt that she was a female in a male body but decided to cope with the situation. In 1996 she married a woman and in 2002 they had a child.

11. The applicant started feeling worse in 2004, and decided in 2005 to seek medical help. In April 2006 she was diagnosed as a transsexual. Since that time, she has lived as a woman. On 29 September 2009 she underwent gender reassignment surgery.

12. On 7 June 2006 the applicant changed her first names and renewed her passport and driver's licence but she could not have her identity number changed. The identity number still indicates that she is male, as does her passport.

A. Proceedings to have her identity number changed

13. On 12 June 2007 the applicant requested the local registry office (*maistraatti, magistraten*) to confirm her status as female and to change her male identity number to a female one as it no longer corresponded to the reality.

14. On 19 June 2007 the local registry office refused the applicant's request. It found that, under sections 1 and 2 of the Transsexuals (Confirmation of Gender) Act (*laki transseksuaalin sukupuolen vahvistamisesta, lagen om fastställande av transsexuella personers könstillhörighet*), confirmation of such status required that the person was not married or that the spouse gave his or her consent (see paragraph 29 below). As the applicant's wife had not given her consent to the transformation of their marriage into a registered partnership (*rekisteröity parisuhde, registrerat partnerskap*), the applicant's new gender could not be recorded in the population register.

15. On 6 July 2007 the applicant instituted proceedings in the Helsinki Administrative Court (*hallinto-oikeus, förvaltningsdomstolen*) complaining, *inter alia*, that her wife's decision not to give her consent, which she was perfectly entitled to withhold as they both preferred to remain married, meant that the applicant could not be registered as female. A divorce would be against their religious convictions. A registered partnership did not provide the same security as marriage and would mean, among other things, that their child would be placed in a different situation from children born in wedlock.

16. On 5 May 2008 the Helsinki Administrative Court dismissed the applicant's complaint on the same grounds as the local registry office.

Moreover, it found, *inter alia*, that the impugned decision of 19 June 2007 was not contrary to Article 6 of the Finnish Constitution as same-sex partners had the possibility, by registering their relationship, to benefit from family-law protection in a manner partially comparable to marriage. Similarly, sections 1 and 2 of the Transsexuals (Confirmation of Gender) Act did not violate the constitutional rights of the applicant's child.

17. On 8 May 2008 the applicant appealed to the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltnings-domstolen)*, reiterating the grounds submitted before the local registry office and the Helsinki Administrative Court. She also asked the court to make a request for a preliminary ruling to the Court of Justice of the European Communities, in particular on the interpretation of Article 8 of the Convention. Referring to Articles 8 and 14 of the Convention, the applicant claimed that the State should not tell her that a registered partnership was appropriate for her, especially when this required that her wife become a lesbian. Their sexual identity was a private matter which could not be a condition for confirmation of gender. Transgenderism was a medical condition falling within the scope of private life. The State was violating her right to privacy every time the male identity number revealed that she was a transsexual. Moreover, she claimed that if her marriage were turned into a registered partnership, it would mean that she could no longer be a legal father to her child and could not be her mother either, as a child could not have two mothers.

18. On 3 February 2009 the Supreme Administrative Court refused the applicant's request to apply for a preliminary ruling to the Court of Justice of the European Communities and dismissed her appeal. It found that by enacting the Transsexuals (Confirmation of Gender) Act the legislature had not intended to change the fact that only a man and a woman could marry and that same-sex partners could have their relationship judicially confirmed by registering it. The European Court of Human Rights had found, under Article 12 of the Convention, that there were no acceptable grounds for denying transsexuals the right to marry but that the margin of appreciation in this respect was wide. It was not possible under Finnish law for persons of the same sex to marry, but in such a case they could enter into a registered partnership. As to its legal and economic consequences, a registered partnership was essentially comparable to marriage. The question of transforming the institution of marriage into a gender-neutral one brought significant ethical and religious values into play and required the enactment of an Act of Parliament. The current state of the law was within the margin of appreciation afforded to the State by the Convention.

B. Extraordinary proceedings

19. On 29 October 2009 the applicant lodged an extraordinary appeal with the Supreme Administrative Court, requesting it to overturn its previous decision of 3 February 2009. She stated that she had undergone gender reassignment surgery on 29 September 2009 and that she could no longer prove that she had been male as indicated by her identity number and passport. Even though, for marriage purposes, she would still be considered as male, the fact remained that she should not be discriminated against on account of her gender.

20. On 18 August 2010 the Supreme Administrative Court dismissed the extraordinary appeal.

C. Other proceedings

21. On an unspecified date the applicant also lodged a complaint with the Ombudsman for Equality (*Tasa-arvovaltuutettu, Jämställdhets-ombudsmannen*), complaining, *inter alia*, that she had the wrong identity number.

22. On 30 September 2008 the Ombudsman for Equality stated that she could not take a stand on the identity number issue as the matter had already been dealt with by the Administrative Court and the Ombudsman was not competent to supervise the courts. Moreover, the matter was pending before the Supreme Administrative Court.

II. RELEVANT DOMESTIC LAW

A. The Finnish Constitution

23. Article 6 of the Finnish Constitution (*Suomen perustuslaki, Finlands grundlag*; Law no. 731/1999) provides as follows.

> "Everyone is equal before the law.
>
> No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person. Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.
>
> Equality of the sexes shall be promoted in society and working life, especially in the determination of pay and other terms of employment, as provided for in more detail by an [implementing] Act."

B. The Marriage Act

24. Section 1 of the Marriage Act (*avioliittolaki, äktenskapslagen*; Law no. 411/1987) provides that marriage is between a woman and a man.

25. Section 115 of the same Act (as amended by Law no. 226/2001) provides as follows:

> "A marriage concluded between a woman and a man in a foreign State before an authority of that State shall be valid in Finland if it is valid in the State in which it was concluded or in a State of which either spouse was a citizen or in which either spouse was habitually resident at the time of conclusion of the marriage."

C. The Registered Partnerships Act

26. Under section 1 of the Registered Partnerships Act (*laki rekisteröidystä parisuhteesta, lagen om registrerat partnerskap*; Law no. 950/2001), a partnership between two persons of the same sex and over 18 years of age may be registered as provided by the Act.

27. Section 8(1) of the same Act provides:

> "The registration of the partnership shall have the same legal effects as the conclusion of marriage, unless otherwise provided."

D. The Transsexuals (Confirmation of Gender) Act

28. Section 1 of the Transsexuals (Confirmation of Gender) Act (*laki transseksuaalin sukupuolen vahvistamisesta, lagen om fastställande av transsexuella personers könstillhörighet*; Law no. 563/2002) provides that it shall be established that a person belongs to the opposite sex to the one noted in the population register if he or she

> "(1) provides medical certification that he or she permanently feels that he or she belongs to the opposite gender and lives in the corresponding gender role and that he or she has been sterilised or is for some other reason incapable of reproducing;
>
> (2) is over 18 years of age;
>
> (3) is not married or in a registered partnership; and
>
> (4) is a Finnish citizen or is resident in Finland."

29. Section 2 of the Act provides for exceptions from the marital-status requirement. A marriage or registered partnership does not prevent the confirmation of gender if the spouse or the partner personally gives his or her consent to it before a local registry office. Where membership of the opposite sex is confirmed, a marriage is turned automatically, without further action, into a registered partnership and a registered partnership into a marriage. This change is noted in the population register.

30. The *travaux préparatoires* of the Transsexuals (Confirmation of Gender) Act (Government Bill HE 56/2001 vp) state, *inter alia*, that

established paternity cannot be annulled solely on the ground that the man has subsequently become a woman. Similarly, a woman who has given birth legally remains the child's mother even if she subsequently becomes a man. The duties of custody, care and maintenance of a child are primarily based on parenthood. The change of gender of a parent does not therefore affect those rights and obligations.

III. COMPARATIVE LAW

31. From the information available to the Court, it would appear that ten member States of the Council of Europe permit same-sex marriage (Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom (England and Wales only)).

32. It would also appear that twenty-four member States (Albania, Andorra, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, Georgia, Greece, Latvia, Liechtenstein, Lithuania, Luxembourg, the Republic of Moldova, Monaco, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Slovenia and the former Yugoslav Republic of Macedonia) have no clear legal framework for legal gender recognition or no legal provisions that specifically deal with the status of married persons who have undergone gender reassignment. The absence of legal regulations in these member States leaves a number of questions unanswered, among which is the fate of a marriage concluded before gender reassignment surgery. In six member States (Italy, Hungary, Ireland, Malta, Turkey and Ukraine) relevant legislation on gender recognition exists. In these States the legislation specifically requires that a person be single or divorced, or there are general provisions in the civil codes or family-law provisions stating that after a change of sex any existing marriage is declared null and void or dissolved. Exceptions allowing a married person to gain legal recognition of his or her acquired gender without having to end a pre-existing marriage exist in only three member States (Austria, Germany and Switzerland).

33. It would thus appear that, where same-sex marriage is not permitted, only three member States permit an exception which would allow a married person to gain legal recognition of his or her acquired gender without having to end his or her existing marriage. In twenty-four member States the position is rather unclear, given the lack of specific legal regulations in place.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

34. The applicant complained under Article 8 of the Convention that her right to private and family life had been violated when the full recognition of her new gender was made conditional on the transformation of her marriage into a registered partnership.

35. Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The Chamber judgment

36. In its judgment of 13 November 2012, the Chamber found that the facts of the case fell within the ambit of Article 8 of the Convention and within the scope of the concept of "private life". There had been an interference with the applicant's right to respect for her private life in that she had not been granted a new female identity number. This interference had a basis in national law, namely, in section 2(1) of the Transsexuals (Confirmation of Gender) Act. The interference was thus "in accordance with the law" and pursued the legitimate aim of protecting "health and morals" and the "rights and freedoms of others".

37. As to whether the impugned measures were necessary in a democratic society, the Chamber noted that the applicant and her spouse were lawfully married under domestic law and that they wished to remain married. In domestic law, marriage was only permitted between persons of opposite sex and same-sex marriages were not permitted. The applicant could obtain a new identity number as a woman only if her spouse consented to their marriage being turned into a registered partnership. If no such consent was obtained, the applicant had a choice between remaining married and tolerating the inconvenience caused by the male identity number, or divorcing her spouse.

38. The Chamber considered that there were two competing rights which needed to be balanced against each other, namely, the applicant's right to respect for her private life by obtaining a new female identity number and the State's interest in maintaining the traditional institution of marriage intact. Obtaining the former while remaining married would imply a same-sex marriage between the applicant and her spouse, which was not allowed

by the current legislation in force in Finland. The Chamber reiterated that, according to the Court's case-law, Article 12 of the Convention did not impose an obligation on Contracting States to grant same-sex couples access to marriage. Nor could Article 8, a provision of more general purpose and scope, be interpreted as imposing such an obligation. The Court had also held that the matter of regulating the effects of the change of gender in the context of marriage fell within the appreciation of the Contracting State.

39. The Chamber noted that consensus on same-sex marriages was evolving in the European context, and that some Council of Europe member States had already included such a possibility in their domestic legislation. In Finland, however, this possibility did not exist, although it was currently being examined by Parliament. On the other hand, the rights of same-sex couples were currently protected by the possibility to register a partnership. While it was true that the applicant faced daily situations in which the incorrect identity number created inconvenience for her, the Chamber considered that the applicant had a genuine possibility to change that state of affairs: her marriage could be turned at any time, *ex lege*, into a registered partnership with the consent of her spouse. If no such consent was obtained, the applicant had the possibility to divorce.

40. For the Chamber, it was not disproportionate to require that her spouse give consent to such a change as her rights were also at stake. Nor was it disproportionate that the applicant's marriage be turned into a registered partnership as the latter was a genuine option which provided legal protection for same-sex couples that was almost identical to that of marriage. Moreover, although there was a child from the marriage, there was no suggestion that this child, or any other individual, would be adversely affected if the applicant's marriage were turned into a registered partnership. The applicant's rights and obligations arising either from paternity or parenthood would not be altered if her marriage were turned into a registered partnership. The Chamber therefore considered that the effects of the Finnish system had not been shown to be disproportionate and that a fair balance had been struck between the competing interests. There had accordingly been no violation of Article 8 of the Convention.

B. The parties' submissions

1. The applicant

41. The applicant argued that, under the domestic law, she was forced to choose between two fundamental rights recognised under the Convention, namely, her right to sexual self-determination and her right to remain married, with the result that she was effectively compelled to forego one of them. Such legislation placed her in a quandary. She referred in that respect to a judgment of the Federal Constitutional Court of Germany of 27 May

2008. The object of her application was not to extend marriage rights to same-sex couples but only to preserve her pre-existing marriage to her spouse. In her case, same-sex marriage was an unintended and accidental outcome of legal gender recognition. She sought protection of a pre-acquired right and not the presumptive right to marry a woman.

42. The applicant claimed that there was an interference with both her private life and family life. Following the Court's line of reasoning in *Parry v. the United Kingdom* ((dec.), no. 42971/05, ECHR 2006-XV) and *Dadouch v. Malta* (no. 38816/07, 20 July 2010), the family-life aspect of the case could not be excluded. The margin of appreciation should be narrower where a particularly important facet of an individual's existence or identity was at stake. In her submission, the Court should narrow it down even further and move towards removing the divorce requirement in the legal gender recognition context. The margin of appreciation could not extend so far as to allow States to terminate a marriage at their discretion.

43. The applicant submitted that the divorce requirement imposed by the Transsexuals (Confirmation of Gender) Act was an unnecessary and disproportionate interference with her Article 8 rights. The balancing act carried out by the Chamber had been fundamentally flawed for several reasons.

44. Firstly, the Chamber had failed to weigh up in the balancing exercise the applicant's and her wife's acquired right to be married. If the applicant had chosen legal gender recognition, this would have terminated her marriage either through divorce or by conversion into a registered partnership. Both scenarios involved termination of the marriage. Conversion into a registered partnership was akin to divorce as the consequences of the conversion only applied for the future. As the spouse's consent was needed, divorce in these circumstances was "forced" by the State. The compulsory termination of the applicant's marriage would have substantially undermined her rights under the Convention as well as the rights of her spouse and daughter. Such dissolution of a valid marriage would have contradicted the underlying commitment to permanence in marriage, distinguishing it from other relationships. Marriage continued to qualify for the highest degree of protection under Article 8 of the Convention. The applicant and her wife had been married for seventeen years, still lived together and had had a child together. The survival of their relationship, despite the gender reassignment of one spouse, demonstrated a high degree of mutual commitment between the spouses. Important distinctions remained between marriage and a registered partnership: when the female partner in a registered partnership gave birth, both parents did not automatically become parents as in the case of marriage. Nor was adoption possible if neither of the parents was a biological parent of the child to be adopted. The applicant and her family would have lost these rights, which were not insignificant, if they had agreed to enter into a

registered partnership. It was also doubtful to what extent the legal parent-child relationship between the applicant and her daughter would have survived as there were no provisions to that effect in the Transsexuals (Confirmation of Gender) Act. The spouses had contracted marriage on the understanding, inspired by their strong religious beliefs, that it would last for life. They were not willing to relinquish their marriage under any circumstances. The applicant's gender reassignment did not necessarily transform the couple into a homosexual couple. The applicant's wife, who had entered into the heterosexual relationship seventeen years ago, continued to be heterosexual. Accordingly, the downgrading of the applicant's relationship to a registered partnership did not reflect the reality of the applicant's wife's position. She was forced to make an impossible choice between supporting the applicant or preserving their marriage. Their child's situation would be similar to that of children born out of wedlock.

45. Secondly, the applicant claimed that the Chamber had not given sufficient weight to her right to sexual self-determination. The lack of legal recognition of the applicant's female gender had had profound implications for her daily life. She had effectively been forced to reveal her transsexual condition to complete strangers in daily situations that most people took for granted. For example, the applicant travelled extensively in connection with her job but her passport still indicated that she was a man. When she travelled on her current passport, she was forced to buy airline tickets with the title "Mr". Her appearance with female characteristics at the airport, carrying a passport which stated her gender as male, had inevitably led to intrusive questioning, delays, embarrassment and distress. As Finland had allowed the applicant to change her first names to correspond to her female identity, it was illogical to deny her legal gender recognition at this juncture, thus leaving her stranded in the territory between two sexes for a potentially indeterminate period. The applicant had not chosen to become transsexual and should therefore not be punished by being deprived of her marriage. The express requirement that legal gender recognition was contingent on the termination of marriage did not allow the Finnish courts to make an individualised assessment taking into account the applicant's circumstances. In *Schlumpf v. Switzerland* (no. 29002/06, 8 January 2009), the Court had found a violation in similar circumstances. The domestic courts had also failed to consider other alternatives that did not require the termination of marriage.

46. Thirdly, the applicant argued that the Chamber's assumption that the State's interest in protecting marriage would be fatally undermined if transsexuals were allowed to marry was inaccurate. The Chamber had wrongly assumed that the only interest of public value involved in the case was protecting the heterosexual character of marriage. The applicant did not specifically challenge the importance of preserving heterosexual marriage but claimed that forcing her to divorce in order to achieve legal gender

recognition was an unnecessary and disproportionate means of achieving the State's objective. Allowing transsexuals to marry would only marginally affect heterosexual marriage as such cases were extremely rare. *De facto* or *de jure* same-sex marriages might already exist in Finland as the marriage of persons in the same situation as the applicant created the appearance of same-sex marriage. Moreover, legal gender recognition obtained in a foreign State was also valid in Finland.

47. Moreover, the applicant claimed that the Chamber had failed to take due account of the recent international trends towards abandonment of the compulsory divorce requirement, legalisation of same-sex marriage and divorce by free consent. Abandoning compulsory divorce requirements was achieved by either explicitly allowing transsexuals to marry or by legalising same-sex marriage. The applicant referred to comparative-law studies concerning legal gender recognition and marital-status requirements.

48. In Finland there had also been a trend towards abolishing the compulsory divorce requirement. The Ombudsman for Equality had suggested in 2012 that equal marriage rights for all could be a solution which would allow the continuation of marriage where one spouse was transgender. The Commissioner for Human Rights of the Council of Europe had also called for abolition of the divorce requirement following his visit to Finland in 2012. In that context, the Finnish Government had committed themselves to establishing a working group to examine the possibility of reforming the impugned legislation. There was also a European and international trend towards allowing same-sex marriages. Ten European States currently allowed same-sex marriage. The situation in Finland was also expected to change in the near future. In February 2013 the Parliamentary Law Committee had voted down a draft bill to that effect by a narrow majority of nine votes to eight. Public support for same-sex marriage had also grown from 45% in 2006 to 58% in March 2013.

2. The Government

49. The Government agreed with the Chamber's reasoning and conclusion to the effect that there had been no violation of Article 8 of the Convention in the present case. They noted that the impugned legislation had been passed in order to prevent inequality caused by varying administrative practices throughout the country and in order to set coherent preconditions for legal gender recognition. The bill had initially required that the person requesting legal gender recognition be unmarried or not in a registered partnership and had not allowed his or her marriage or registered partnership to continue in another legally recognised form. This had been seen as unreasonable during the legislative procedure and therefore the conversion mechanism had been introduced into the provision. Since the entry into force of the Transsexuals (Confirmation of Gender) Act, at least fifteen marriages had been turned into registered partnerships and sixteen

registered partnerships into marriages. In nine cases the spouses had had children together and in none of these cases had the legal parent-child relationship changed.

50. The Government noted that the applicant had on many occasions in her observations erroneously referred to compulsory divorce legislation. However, if the spouse's consent was received, the marriage turned automatically, *ex lege*, into a registered partnership. The expression "turns into" in section 2 of the Transsexuals (Confirmation of Gender) Act had been explicitly used to illustrate the fact that the legal relationship continued with only a change of title and minor changes to the content of the relationship. This continuity preserved certain derived rights, such as a widower's pension, and did not create a right or obligation to divide the property between the spouses. The length of the partnership was calculated from the beginning of the relationship, not from the change of title of it. Moreover, the rights and obligations pertaining to parenthood did not depend on the gender of the parent. Consequently, there was no obligatory divorce in Finland but, on the contrary, the possibility of divorcing was at the applicant's own discretion. Finnish legislation offered the chance to reconcile both the right to sexual self-determination and the right to marry, in the form of a registered partnership.

51. The Government pointed out that the only differences between marriage and registered partnership appeared in two areas: establishment of paternity on the basis of marriage did not apply to registered partnerships, nor did the provisions of the Adoption Act or the Names Act regarding the family name of the spouse. However, a registered partner could adopt the other partner's child. Those exceptions were applicable only to those cases in which parenthood had not been established beforehand. Paternity presumed on the basis of marriage or established paternity could not be annulled on the ground that the man later underwent gender reassignment and became a woman. Nor did the father's gender reassignment have any legal effects on his responsibility for the care, custody or maintenance of a child as such responsibility was based on parenthood, irrespective of sex or form of partnership. The applicant was not even claiming that her legal rights and obligations would be reduced were her marriage turned into a registered partnership, but rather relied on the social and symbolic significance of marriage. The Government stressed that the applicant's legal rights and obligations *vis-à-vis* her child arising either from paternity or parenthood would not be altered and the applicant had not produced any evidence to the contrary. Finnish law did not impose compulsory divorce on the applicant, nor annulment or dissolution of marriage. Nor was there any evidence of possible implications for the applicant's private or family life as she could continue her family life without any interference.

52. The Government noted that, while the Federal Constitutional Court of Germany, in its judgment of 27 May 2008, had found a similar situation

to be unconstitutional, it had left it to the legislature to decide by what means to remedy the situation. According to that court, a marriage could be transformed into a registered civil partnership or a legally secured civil partnership *sui generis* but the rights acquired by the couple and the duties imposed on them by the marriage had to remain intact. The Finnish provisions were thus in line with the said judgment of the Federal Constitutional Court of Germany.

53. The Government concluded that there was still no European consensus on allowing a transsexual's marriage to subsist following post-operative legal gender recognition or on allowing same-sex marriages. Consequently, the State's margin of appreciation should be wide and it should be able to regulate the effects of the change of gender on pre-existing marriages.

3. Third-party observations

(a) Amnesty International

54. Amnesty International noted that all human rights treaties should, as far as possible, be interpreted in harmony in order to give rise to a single set of compatible obligations. It was well-established in international human rights law that the general prohibition of discrimination included a prohibition of discrimination on the ground of sexual orientation. Both gender identity and sexual orientation related to highly subjective notions of self. Often, discrimination based on sexual orientation or gender identity found its expression in relation to family relationships. In the vast majority of those cases, the adjudicating bodies concluded that the States had not put forward reasonable, convincing, objective or weighty arguments to justify discrimination against individuals on the ground of their sexual orientation. Stereotypes constituted a form of discrimination when they resulted in differentiated treatment that nullified or impaired the enjoyment of human rights or fundamental freedoms. Many differences in treatment based on sexual orientation had their roots in stereotypes about gender roles.

55. Same-sex relationships were gaining legal recognition equal to that of different-sex couples in many jurisdictions but the laws in many countries still made many distinctions. If two individuals in a couple identified as women, they were assumed to be lesbian. This conflation affected a person's dignity and rights by forcing a gender definition that might not align with the individual's sense of self. Such conflation was also unnecessary if the law conferred the same status and rights on all couples. States could not impose one particular vision of rights on those who did not share that vision. Traditions and values could not justify a limitation of rights even if these traditions and values were shared by the majority of society.

(b) Transgender Europe

56. Transgender Europe submitted in its observations comparative information regarding the situation in different Council of Europe member States as far as legal recognition of the new gender of transgender persons was concerned. In some Council of Europe member States transgender persons could not obtain any legal recognition of their gender, while in other member States legal gender recognition was dealt with in a variety of different ways. Some of the member States either allowed same-sex couples to marry or offered the option of a registered partnership. Of the States which offered the option of a registered partnership, some States currently required mandatory termination of marriage while some other States did not. Generally, there was a strong tendency among the Council of Europe member States to review their approach as a result of Recommendation Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010. Most of the new laws, revisions and current political discussions showed that member States took greater account of the right to self-determination of transgender individuals when designing legislation.

C. The Court's assessment

1. Applicability of Article 8 of the Convention

57. In the instant case the applicant formulated her complaint under Article 8 of the Convention and the Government did not dispute the applicability of that provision.

58. The Court notes that the applicant sought to have her identity number changed from a male to a female one because, having undergone male-to-female gender reassignment surgery, her old male identity number no longer corresponded to the reality.

59. The Court has held on numerous occasions that a post-operative transsexual may claim to be a victim of a breach of his or her right to respect for private life contrary to Article 8 of the Convention on account of the lack of legal recognition of his or her change of gender (see, for example, *Grant v. the United Kingdom*, no. 32570/03, § 40, ECHR 2006-VII, and *L. v. Lithuania*, no. 27527/03, § 59, ECHR 2007-IV). In the present case it is not disputed that the applicant's situation falls within the notion of "private life" within the meaning of Article 8 of the Convention.

60. The Court notes that the present case also involves issues which may have implications for the applicant's family life. Under the domestic law, the conversion of the applicant's existing marriage into a registered partnership requires the consent of her wife. Moreover, the applicant and her wife have a child together. Accordingly, the Court is of the view that the

applicant's relationship with her wife and child also falls within the notion of "family life" within the meaning of Article 8 of the Convention.

61. Article 8 of the Convention therefore applies to the present case under both its private-life and family-life aspects.

2. Whether the case involves a positive obligation or an interference

62. While the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities, it may also impose on a State certain positive obligations to ensure effective respect for the rights protected by Article 8 (see, among other authorities, *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91, and *Söderman v. Sweden* [GC], no. 5786/08, § 78, ECHR 2013).

63. The Court has previously found that Article 8 imposes on States a positive obligation to secure to their citizens the right to effective respect for their physical and psychological integrity (see, for example, *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002; *Sentges v. the Netherlands* (dec.), no. 27677/02, 8 July 2003; *Odièvre v. France* [GC], no. 42326/98, § 42, ECHR 2003-III; *Glass v. the United Kingdom*, no. 61827/00, §§ 74-83, ECHR 2004-II; and *Pentiacova and Others v. Moldova* (dec.), no. 14462/03, ECHR 2005-I). In addition, this obligation may involve the adoption of specific measures, including the provision of an effective and accessible means of protecting the right to respect for private life (see *Airey v. Ireland*, 9 October 1979, § 33, Series A no. 32; *McGinley and Egan v. the United Kingdom*, 9 June 1998, § 101, *Reports of Judgments and Decisions* 1998-III; and *Roche v. the United Kingdom* [GC], no. 32555/96, § 162, ECHR 2005-X). Such measures may include both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of these measures in different contexts (see *A, B and C v. Ireland* [GC], no. 25579/05, § 245, ECHR 2010).

64. The Court observes that it is common ground between the parties that there has been an interference with the applicant's right to respect for her private life in that she was not granted a new – female – identity number. The Chamber also examined the case from that point of view. The Grand Chamber, however, is of the opinion that the question to be determined by the Court is whether respect for the applicant's private and family life entails a positive obligation on the State to provide an effective and accessible procedure allowing the applicant to have her new gender legally recognised while remaining married. The Grand Chamber therefore considers it more appropriate to analyse the applicant's complaint with regard to the positive aspect of Article 8 of the Convention.

3. General principles applicable to assessing a State's positive obligations

65. The principles applicable to assessing a State's positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance (see *Gaskin v. the United Kingdom*, 7 July 1989, § 42, Series A no. 160, and *Roche*, cited above, § 157).

66. 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 (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 72, ECHR 2002-VI). Nonetheless, certain factors have been considered relevant for the assessment of the content of those positive obligations on States. Some of them relate to the applicant. They concern the importance of the interest at stake and whether "fundamental values" or "essential aspects" of private life are in issue (see *X and Y v. the Netherlands*, cited above, § 27, and *Gaskin*, cited above, § 49), or the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8 (see *B. v. France*, 25 March 1992, § 63, Series A no. 232-C, and *Christine Goodwin*, cited above, §§ 77-78). Other factors relate to the impact of the alleged positive obligation at stake on the State concerned. The question here is whether the alleged obligation is narrow and precise or broad and indeterminate (see *Botta v. Italy*, 24 February 1998, § 35, *Reports* 1998-I), or about the extent of any burden the obligation would impose on the State (see *Rees v. the United Kingdom*, 17 October 1986, §§ 43-44, Series A no. 106, and *Christine Goodwin*, cited above, §§ 86-88).

67. In implementing their positive obligations under Article 8, the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see, for example, *X and Y v. the Netherlands*, cited above, §§ 24 and 27, and *Christine Goodwin*, cited above, § 90; see also *Pretty v. the United Kingdom*, no. 2346/02, § 71, ECHR 2002-III). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, *Reports* 1997-II; *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I;

and *Christine Goodwin*, cited above, § 85). There will also usually be a wide margin of appreciation if the State is required to strike a balance between competing private and public interests or Convention rights (see *Fretté*, cited above, § 42; *Odièvre*, cited above, §§ 44-49; *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I; *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V; and *S.H. and Others v. Austria* [GC], no. 57813/00, § 94, ECHR 2011).

68. The Court has already examined several cases relating to the lack of legal recognition of gender reassignment surgery (see, for example, *Christine Goodwin*, cited above; *Van Kück v. Germany*, no. 35968/97, ECHR 2003-VII; *Grant*, cited above; and *L. v. Lithuania*, cited above, § 56). While affording a certain margin of appreciation to States in this field, it has held that States are required, in accordance with their positive obligations under Article 8, to recognise the change of gender undergone by post-operative transsexuals through, *inter alia*, the possibility to amend the data relating to their civil status, and the ensuing consequences (see, for example, *Christine Goodwin*, cited above, §§ 71-93, and *Grant*, cited above, §§ 39-44).

4. Application of the general principles to the applicant's case

69. The Court notes first of all that the applicant and her spouse were lawfully married under domestic law in 1996 and that they wish to remain married. Under domestic law, marriage is only permitted between persons of opposite sex. Same-sex marriages are not, for the time being, permitted in Finland although that possibility is currently being examined by Parliament. On the other hand, the rights of same-sex couples are currently protected by the possibility of contracting a registered partnership.

70. The Court is mindful of the fact that the applicant is not advocating same-sex marriage in general but merely wants to preserve her own marriage. However, it considers that the applicant's claim, if accepted, would in practice lead to a situation in which two persons of the same sex could be married to each other. As already stated above, no such right currently exists in Finland. Therefore, the Court must first examine whether the recognition of such a right is required in the circumstances by Article 8 of the Convention.

71. The Court reiterates its case-law according to which Article 8 of the Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage (see *Schalk and Kopf v. Austria*, no. 30141/04, § 101, ECHR 2010). The Court has also held that the regulation of the effects of a change of gender in the context of marriage falls to a large extent, though not entirely, within the margin of appreciation of the Contracting State (see *Christine Goodwin*, cited above, § 103). Furthermore, the Convention does not require that any further special arrangements be put in place for situations such as the present one. The

Court found in 2006 in the case in *Parry* (cited above) that, even if same-sex marriage was not allowed at the time in English law, the applicants could continue their relationship in all its essentials and could also give it a legal status akin, if not identical, to marriage, through a civil partnership which carried with it almost all the same legal rights and obligations. The Court thus regarded civil partnerships as an adequate option.

72. The Court observes that the present case involves issues which are subject to constant developments in the Council of Europe member States. It will therefore examine the situation in other Council of Europe member States in respect of the issues at stake in the present case.

73. From the information available to the Court (see paragraph 31 above), it appears that, currently, ten member States allow same-sex marriage. Moreover, in the majority of the member States not allowing same-sex marriage there is either no clear legal framework for legal gender recognition or no legal provisions specifically dealing with the status of married persons who have undergone gender reassignment. Only in six member States which do not allow same-sex marriage does relevant legislation on gender recognition exist. In those States either the legislation specifically requires that a person be single or divorced or there are general provisions stating that after a change of sex any existing marriage is declared null and void or dissolved. Exceptions allowing a married person to gain legal recognition of his or her acquired gender without having to end a pre-existing marriage seem to exist in only three member States (see paragraphs 31-33 above).

74. Thus, it cannot be said that there exists any European consensus on allowing same-sex marriages. Nor is there any consensus in those States which do not allow same-sex marriages as to how to deal with gender recognition in the case of a pre-existing marriage. The majority of the member States do not have any kind of legislation on gender recognition in place. In addition to Finland, such legislation appears to exist in only six other States. The exceptions afforded to married transsexuals are even fewer. Thus, there are no signs that the situation in the Council of Europe member States has changed significantly since the Court delivered its latest rulings on these issues.

75. In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one (see *X, Y and Z v. the United Kingdom*, cited above, § 44). This margin must in principle extend both to the State's decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and, having intervened, to the rules it lays down in order to achieve a balance between the competing public and private interests.

76. Turning now to the domestic system, the Court finds that Finnish domestic law currently provides the applicant with several options. First of all, she can maintain the status quo of her legal situation by remaining married and tolerating the inconvenience caused by the male identity number. The Court finds it established that in the Finnish system a legally contracted marriage between a different-sex couple is not annulled or dissolved on account of the fact that one of the spouses has undergone reassignment surgery and is thus subsequently of the same sex as his or her spouse. Contrary to the situation in some other countries, in Finland a pre-existing marriage cannot be unilaterally annulled or dissolved by the domestic authorities. Accordingly, nothing prevents the applicant from continuing her marriage.

77. Secondly, if the applicant wishes both to obtain legal recognition of her new gender and to have her relationship with her wife legally protected, Finnish legislation provides for the possibility to convert their marriage into a registered partnership, with the consent of the applicant's wife. Under the domestic law, if the spouse's consent to the change of gender is received, a marriage turns automatically, *ex lege*, into a registered partnership and a registered partnership into a marriage, depending on the situation.

78. The third option provided by the domestic law is the option of divorce. As for any other married couple, this option is also open to the applicant if she so wishes. Contrary to the applicant's assertions, the Court considers that there is nothing in the Finnish legal system which can be understood as implying that the applicant must divorce against her will. On the contrary, the Court finds that in the Finnish legal system the possibility of divorcing is at the applicant's own discretion.

79. Leaving aside the options of maintaining the status quo or divorcing, the applicant's complaint is primarily directed at the second option: providing legal recognition of the new gender while at the same time legally protecting an existing relationship. Thus, the key question in the present case is whether the Finnish system currently fulfils the positive obligation on the State in this respect or whether the applicant should be allowed to remain married while at the same time obtaining legal recognition of her new gender, even if that option would imply a same-sex marriage between the applicant and her spouse.

80. The Court notes that, contrary to the majority of the Council of Europe member States, there exists a legal framework in Finland designed to provide legal recognition for the change of gender. The Court observes that the aim of the impugned legislation, as explained by the Government, was to unify the varying practices applied in different parts of the country and to establish coherent requirements for legal gender recognition. If the consent of the spouse is received, the system provides both for legal recognition of the new gender and legal protection of the relationship. The system works both ways, thus providing not only for a marriage to be

converted into a registered partnership, but also for a registered partnership to be converted into a marriage, depending on whether the gender reassignment surgery has the effect of turning the existing relationship into a same-sex or a heterosexual partnership. According to the information received from the Government, thirty-one such conversions have occurred so far concerning both the above-mentioned situations in almost equal measure.

81. In devising this legal framework, the Finnish legislature has opted for reserving marriage to heterosexual couples, this rule being capable of no exceptions. It therefore remains for the Court to determine whether, in the circumstances of the case, the Finnish system currently strikes a fair balance between the competing interests and satisfies the proportionality test.

82. One of the applicant's concerns relates to the requirement of the spouse's consent, which she sees as a "forced" divorce. However, the Court considers that as the conversion is automatic under the Finnish system, the spouse's consent to the registration of a change of gender is an elementary requirement designed to protect each spouse from the effects of unilateral decisions taken by the other. The requirement of consent is thus clearly an important safeguard which protects the spouse who is not seeking gender recognition. In this context, it is worth noting that consent is also needed when a registered partnership is to be converted into a marriage. This requirement thus applies also for the benefit of the institution of marriage.

83. Also of concern to the applicant are the differences between a marriage and a registered partnership. As the Government explained, these differences concern the establishment of paternity, adoption outside of the family and the family name. However, these exceptions are applicable only to the extent that those issues have not been settled beforehand. They are therefore not applicable to the present case. Consequently, the Court considers that the differences between a marriage and a registered partnership are not such as to involve an essential change in the applicant's legal situation. The applicant would thus be able to continue enjoying in essence, and in practice, the same legal protection under a registered partnership as that afforded by marriage (see, *mutatis mutandis*, *Schalk and Kopf*, cited above, § 109).

84. Moreover, the applicant and her wife would not lose any other rights if their marriage were converted into a registered partnership. As convincingly explained by the Government, the expression "turns into" in section 2 of the Transsexuals (Confirmation of Gender) Act is explicitly used to illustrate the fact that the original legal relationship continues with only a change of title and minor changes to the content of the relationship. The length of the partnership is thus calculated from the date on which it was contracted and not from the change of its title. This may be important in situations in which the length of the relationship is relevant in the domestic legislation, for example when calculating a widower's pension. The Court

cannot therefore uphold the applicant's complaint that the conversion of a marriage into a registered partnership would be akin to a divorce.

85. Furthermore, the Court considers that the effects of the conversion of the applicant's marriage into a registered partnership would be minimal or non-existent as far as the applicant's family life is concerned. The Court stresses that Article 8 also protects the family life of same-sex partners and their children (see *Schalk and Kopf*, cited above, §§ 91 and 94). It does not therefore matter, from the point of view of the protection afforded to family life, whether the applicant's relationship with her family is based on marriage or a registered partnership.

86. The family-life aspects are also present in the applicant's relationship with her daughter. As the applicant's paternity of her daughter has already been validly established during the marriage, the Court is satisfied that under current Finnish law the subsequent conversion of the marriage into a registered partnership would not have any effect on the paternity of the applicant's child. She would thus continue to be considered to have been born in wedlock. Moreover, as the Government noted, in the Finnish system paternity presumed on the basis of marriage or established paternity cannot be annulled on the ground that the man later undergoes gender reassignment and becomes a woman. This is confirmed by the fact that, as the Government have observed, in none of the cases in which conversion has already taken place in Finland has the legal parent-child relationship changed. Nor does the father's gender reassignment have any legal effects on the responsibility for the care, custody or maintenance of a child as in Finland that responsibility is based on parenthood, irrespective of sex or form of partnership. The Court therefore finds it established that the conversion of the applicant's marriage into a registered partnership would have no implications for her family life, as protected by Article 8 of the Convention.

87. While it is regrettable that the applicant faces daily situations in which the incorrect identity number creates inconvenience for her, the Court considers that the applicant has a genuine possibility of changing that state of affairs: her marriage can be converted at any time, *ex lege*, into a registered partnership with the consent of her spouse. If no such consent is obtained, the possibility of divorce, as in any marriage, is always open to her. In the Court's view, it is not disproportionate to require, as a precondition to legal recognition of an acquired gender, that the applicant's marriage be converted into a registered partnership as that is a genuine option which provides legal protection for same-sex couples that is almost identical to that of marriage (see *Parry*, cited above). The minor differences between these two legal concepts are not capable of rendering the current Finnish system deficient from the point of view of the State's positive obligation.

88. In conclusion, the Court considers that the current Finnish system as a whole has not been shown to be disproportionate in its effects on the applicant and that a fair balance has been struck between the competing interests in the present case.

89. Accordingly, there has been no violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

90. The applicant did not initially rely on Article 12 of the Convention in her application to the Court. However, on 23 March 2010 the Chamber decided, of its own motion, to give notice of the application under Article 12 of the Convention as well.

91. Article 12 of the Convention reads as follows:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

A. The Chamber judgment

92. In its judgment of 13 November 2012, the Chamber observed that the issue at stake in the present case did not as such involve any issue under Article 12 of the Convention, which guaranteed a right to marry. The applicant had been legally married since 1996. The issue at stake rather concerned the consequences of the applicant's change of gender for the existing marriage between her and her spouse, which had already been examined under Article 8 of the Convention. In view of those findings, the Chamber found it unnecessary to examine the facts of the case separately under Article 12 of the Convention.

B. The parties' submissions

1. The applicant

93. The applicant claimed that the Chamber had adopted a "pick and choose" approach to Article 12 of the Convention. An analysis under Article 12 would have been important as it required a different test from Article 8, namely whether the compulsory termination of marriage affected "the substance of the right to marry" in line with the Court's case-law. It could also have corrected the failure to consider the applicant's family rights under Article 8 of the Convention.

94. The applicant claimed that Article 12 of the Convention should either be interpreted restrictively to cover only the contracting of marriage or more broadly to cover also the continued existence of a marriage. In the former case, Article 12 would not be relevant to the applicant's situation as

her marriage to her wife had been contracted when they were a different-sex couple. In the latter case, however, the test whether the "forced" divorce injured "the very substance of the right to marry" would have to be satisfied. In the applicant's submission, the latter interpretation applied since the Government's ability to interfere with a marriage in a manner such as in the present case would render the right to marry largely ineffective. Thus construed, Article 12 of the Convention would apply to the present case and require an examination under that Article.

2. The Government

95. The Government shared the Chamber's view that it was unnecessary to examine the facts of the case separately under Article 12 of the Convention. The Court's case-law did not protect the applicant's wish to remain married to her female spouse after the confirmation of her new gender, and the matter of how to regulate the effects of the gender change fell within the margin of appreciation of the Contracting State. The Supreme Administrative Court had found in the present case that the domestic legislation did not aim to change the fact that only a man and a woman could marry but rather allowed the relationship to continue as a registered partnership that was legally protected and comparable to marriage. Transformation of the institution of marriage into a gender-neutral one required the enactment of an Act of Parliament.

C. The Court's assessment

1. General principles

96. The Court reiterates that Article 12 of the Convention is a *lex specialis* for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman (see *Rees*, cited above, § 49). While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples (see *Schalk and Kopf*, cited above, § 63).

2. Application of the above-mentioned principles to the present case

97. The issue at stake concerns the consequences of the applicant's change of gender for the existing marriage between her and her spouse. The Grand Chamber finds, as did the Chamber, that this question has already been examined above under Article 8 of the Convention and resulted in the finding of no violation of that Article. In these circumstances, the Court

considers that no separate issue arises under Article 12 of the Convention and accordingly makes no separate finding under that Article.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLES 8 AND 12

98. The applicant complained under Article 14 of the Convention that by refusing to give her a female identity number which corresponded to her actual gender, the State was discriminating against her. The fact that she had been denied a female identity number revealed the confidential information that she was a transsexual because, unlike any other person, she had to explain this difference whenever the identity number was required.

99. Article 14 of the Convention reads as follows:

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

A. The Chamber judgment

100. In its judgment of 13 November 2012, the Chamber noted that Article 14 of the Convention taken in conjunction with Article 8 was applicable.

101. The Chamber noted that the applicant's complaints under Article 14 of the Convention related to the impossibility of obtaining a female identity number. The applicant compared her situation to that of any other person, including cissexuals and unmarried transsexuals. For the Chamber, these situations were not sufficiently similar to be compared with each other. The applicant could not therefore claim to be in the same situation as the other category of persons relied on.

102. Moreover, the Chamber noted that in essence the problem in the present case was caused by the fact that Finnish law did not allow same-sex marriages. According to the Court's case-law, Articles 8 and 12 of the Convention did not impose an obligation on Contracting States to grant same-sex couples access to marriage. Nor could Article 14 of the Convention taken in conjunction with Article 8 be interpreted as imposing an obligation on Contracting States to grant same-sex couples a right to remain married. Therefore, it could not be said that the applicant had been discriminated against *vis-à-vis* other persons when she had been unable to obtain a female identity number, even assuming that she could be considered to be in a similar position to them. The Chamber found that there had been no violation of Article 14 of the Convention taken in conjunction with Article 8.

B. The parties' submissions

1. The applicant

103. The applicant argued under Article 14 of the Convention that she had been discriminated against on two counts.

104. Firstly, she had to comply with an additional requirement of terminating her marriage in order to obtain legal gender recognition. She had therefore been discriminated against *vis-à-vis* cissexuals, who obtained legal gender recognition automatically at birth without any additional requirement. She had been facing daily problems on account of that difference in treatment.

105. Secondly, the applicant, her wife and their child had received less protection than persons in heterosexual marriages owing to stereotypical views associated with the applicant's gender identity. Cissexuals' marriages did not run the risk of "forced" divorce in the way that the applicant's marriage did. However, gender identity was now commonly recognised as a ground that attracted protection for the purposes of prohibiting discrimination.

2. The Government

106. The Government agreed that Article 14 of the Convention was applicable here as the case fell within the scope of Article 8, but argued that there was no separate issue under Article 14. Were the Court to have a different opinion, the Government pointed out that cissexuals were not in a similar situation to the applicant because they were not applying for a change of their gender. In any event, there had been an objective and reasonable justification. The Finnish legal system prohibited discrimination based on transsexualism.

C. The Court's assessment

1. General principles

107. The Court notes that Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions, and to this extent it is autonomous, there can be no room for its application unless the facts in issue fall within the ambit of one or more of the latter (see, for instance, *E.B. v. France* [GC], no. 43546/02, § 47, 22 January 2008, and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 72, ECHR 2013).

108. The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008).

109. On the one hand, the Court has held repeatedly that differences based on gender or sexual orientation require particularly serious reasons by way of justification (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 90, ECHR 1999-VI; *L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 45, ECHR 2003-I; *Karner v. Austria*, no. 40016/98, § 37, ECHR 2003-IX; *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012; *X and Others v. Austria* [GC], no. 19010/07, § 99, ECHR 2013; and *Vallianatos and Others*, cited above, § 77). On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy, for example (see, for instance, *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see *Petrovic v. Austria*, 27 March 1998, § 38, *Reports* 1998-II).

2. Application of the above-mentioned principles to the present case

110. It is undisputed in the present case that the applicant's situation falls within the notion of "private life" and "family life" within the meaning of Article 8 of the Convention as well as within the scope of Article 12. Consequently, Article 14 of the Convention taken in conjunction with Articles 8 and 12 applies.

111. The Court notes that the applicant's complaints under Article 14 of the Convention relate to her request for a female identity number and to the problems she has experienced in that respect. In her complaints, the applicant compared her situation to that of cissexuals, who obtained legal gender recognition automatically at birth and whose marriages, according to the applicant, did not run the risk of "forced" divorce in the way that hers did.

112. The Grand Chamber agrees with the Chamber that the applicant's situation and the situation of cissexuals are not sufficiently similar to be

compared with each other. The applicant cannot therefore claim to be in the same situation as cissexuals.

113. In conclusion, the Court finds that there has been no violation of Article 14 of the Convention taken in conjunction with Articles 8 and 12.

FOR THESE REASONS, THE COURT

1. *Holds*, by fourteen votes to three, that there has been no violation of Article 8 of the Convention;

2. *Holds*, by fourteen votes to three, that there is no need to examine the case under Article 12 of the Convention;

3. *Holds*, by fourteen votes to three, that there has been no violation of Article 14 of the Convention taken in conjunction with Articles 8 and 12.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 July 2014.

Johan Callewaert	Dean Spielmann
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Ziemele;
(b) joint dissenting opinion of Judges Sajó, Keller and Lemmens.

D.S.
J.C.

CONCURRING OPINION OF JUDGE ZIEMELE

1. I voted with the majority in this case. However, I would like to add a few comments on the methodology used in the judgment. I find that in this case in particular the methodological choices were the tricky points. The case concerns an alleged right to remain married and a right to change one's gender. The Chamber approached the case as a right to privacy case and examined it from the point of view of an interference with the right to privacy. It had regard to the absence of a common view in Europe on same-sex marriages when examining the proportionality of this interference. The Grand Chamber took note of the Chamber's approach but decided that the case was one of positive obligations (see paragraph 64 of the present judgment). It is true that the Court has always emphasised that it is difficult to draw a clear line between negative and positive obligations. However, I wonder whether this is indeed difficult or whether it is the choice of the Court to leave the issue rather open. This case shows how the difference might be quite important, because the Grand Chamber chose to take a different approach from that of the Chamber. Recently, in another case, the Grand Chamber decided that the Chamber's approach, which had decided the case as one of interference, should be changed to one of positive obligations (see, for example, *Fernández Martínez v. Spain* [GC], no. 56030/07, ECHR 2014).

2. In the context of Article 8, the Court referred to its case-law according to which there is no obligation to grant same-sex couples access to marriage (see paragraph 71 of the present judgment). Indeed, the Court has repeatedly stated that, in view of the absence of clear practice in Europe and the ongoing debate in many European societies, it cannot interpret Article 8 as imposing such an obligation. For the purposes of this case, the Court once again ventures into an examination of the so-called European consensus. Has anything changed since its last case? This basically means that the Court tries to establish what the domestic law and practice is, if possible, in forty-seven member States and thus attempts to determine whether a subsequent State practice may have emerged leading to a new interpretation, or even an amendment, of a treaty (see Article 31 of the Vienna Convention on the Law of Treaties), or possibly confirming the existence of *opinio juris* (see I. Ziemele, "Customary International Law in the Case-Law of the European Court of Human Rights – The Method", in *The Judge and International Custom* (Council of Europe, 2012), pp. 75-83).

3. However, I wonder to what extent and in what way the above-mentioned analysis was necessary for the present case. This analysis appears to be linked to the Court's choice to examine the case from the perspective of positive obligations. In paragraph 79 of the present judgment, the Court reiterates that "the key question in the present case is whether the Finnish system currently fulfils the positive obligation on the State in this

respect or whether the applicant should be allowed to remain married while at the same time obtaining legal recognition of her new gender, even if that option would imply a same-sex marriage between the applicant and her spouse". The only point at which a reference to the data provided by the comparative-law study appears to be relevant is the observation that in any event Finland already belongs to a minority group of States which recognise the relevant legal consequences of a gender change. This seems to imply that Finland is rather advanced in its internal processes as compared with the other societies and probably does comply with its positive obligations in so far as they can be deduced to exist.

4. In this regard, the fact that Finland is not under a specific Convention obligation to provide for same-sex marriage does not assist the Court in addressing the problem in this case (see paragraph 79 of the present judgment). The applicant cannot maintain that she is entitled to remain married as a matter of Convention law. She does not argue that. Her submission is that the change imposed on her interferes with her right to privacy. However, it is not shown that her family life within the meaning of Article 8 would be somehow affected by her change of gender. The real task of the Court in the present case is the assessment of an interference with privacy matters and, therefore, in terms of methodology I would also have followed the line taken by the dissenting judges while disagreeing with their conclusion. I see a logical flaw in the Court's conclusion that there has been no violation on account of the absence of a specific positive obligation to introduce legislation on same-sex marriages. If the case were about positive obligations, the Court could probably have stopped at paragraph 80 of the present judgment, in which it notes the progress made by Finland among other States. I also note that for the most part the reasoning in fact follows the arguments relevant to an assessment of the proportionality of an interference (see paragraphs 81 and 84 et seq. of the present judgment). Unlike the judges in the minority, I consider that the protection of morals remains a relevant justification for the interference with the applicant's right to privacy in so far as it concerns the status of her marriage and is viewed in the context of the wide margin of appreciation left to the States.

JOINT DISSENTING OPINION OF JUDGES SAJÓ, KELLER AND LEMMENS

1. To our regret, we cannot agree with the majority's finding that there has been no violation of Article 8 of the Convention in the present case. We will concentrate our reasoning on Article 8 of the Convention. However, we believe that the case should also have been dealt with differently with regard to both Article 12 and Article 14 taken in conjunction with Article 8.

I. Preliminary remarks

2. The starting-point for the examination of the applicant's claim under Article 8 of the Convention is that one's gender identity is a particularly important facet of individual existence and that States are required to recognise the change of gender undergone by post-operative transsexual individuals (see paragraphs 67-68 of the present judgment). In this context, the Court held in 2002 that, in the absence of any "concrete or substantial hardship or detriment to the public interest" arising from the legal acknowledgment of the post-transition gender of a transsexual person, "society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost" (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 91, ECHR 2002-VI). On that point we agree with the majority.

3. In our view, however, the majority based its reasoning on three assumptions that we do not share.

4. Firstly, the majority held that the complaint must be analysed from the perspective of a positive obligation (see paragraphs 62-64 of the present judgment). This choice is important because the Court grants States a wider margin of appreciation concerning their positive obligations than their negative ones (see *Fadeyeva v. Russia*, no. 55723/00, § 96, ECHR 2005-IV, and *A, B and C v. Ireland* [GC], no. 25579/05, §§ 248-49 and 266, ECHR 2010). However, the State's refusal to grant the applicant a new identity card reflecting her acquired gender should, in our view, be examined as a potential breach of a negative obligation, for it neither requires any major steps by the State authorities nor entails important social or economic implications. In other words, the majority held that the interference by the State authorities should be understood simply as its refusal to unlink the issue of a new identity card from the civil status of the applicant. On this point, we disagree in doctrinal terms.

5. Secondly, a decisive argument for the majority's finding is the fact that there is no consensus among the member States of the Council of Europe on issues concerning transgender persons (see paragraph 74 of the present judgment). In our view, this is not the correct approach, not least

because it is contrary to the Court's previous case-law. The Court should have recourse to general consensus as one of a set of tools or criteria for determining the width of the State margin of appreciation in a given area (see *X and Others v. Austria* [GC], no. 19010/07, § 148, ECHR 2013). In other words, the existence of a consensus is not the only factor that influences the width of the State's margin of appreciation: that same margin is restricted where "a particularly important facet of an individual's existence or identity is at stake" (see *S.H. and Others v. Austria* [GC], no. 57813/00, § 94, ECHR 2011).[1] As a general rule, where a particularly important aspect of a Convention right is concerned, the Court should therefore examine individual cases with strict scrutiny and, if there has been an interference incompatible with Convention standards, rule accordingly – even if many Contracting States are potentially concerned. This rule applies to the present case: a particularly important facet of the applicant's identity is at stake here, hence the narrower margin of appreciation afforded to the State. Mindful of past criticism of the consensus approach, which has been considered a potential instrument of retrogression and of allowing the "lowest common denominator" among the member States to prevail, we consider that the Court's deference to this approach must have its limits, and find that the absence of a consensus cannot serve to widen the State's narrowed margin of appreciation in the present case.[2] In this context, we note that proof of the existence of a consensus, when adduced, must not depend on the existence of a common approach in a super-majority of States: the Court has some discretion regarding its acknowledgment of trends (compare *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 91, ECHR 2013).[3] We also note that, in the landmark *Christine Goodwin* judgment (cited above), regarding the absence of a consensus on the legal acknowledgment of acquired gender among the member States, the Court held that

> "the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. ... The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of

1. See Luzius Wildhaber, Arnaldur Hjartarson and Stephen Donnelly, "No Consensus on Consensus? The Practice of the European Court of Human Rights", *Human Rights Law Journal* 33 (2013), pp. 248-63, at p. 252.
2. Paul Martens, "Perplexity of the National Judge Faced with the Vagaries of European Consensus", in *Dialogue between Judges* (Council of Europe, 2008), pp. 77-98, at p. 95. See also Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards", *New York University Journal of International Law and Politics* 31(4) (1999), pp. 843-54, at p. 852.
3. In this regard, see the analysis of the Court's case-law by Laurence R. Helfer and Erik Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe", *International Organization* 68(1) (2014), pp. 77-110, at p. 93.

> increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals." (see *Christine Goodwin*, cited above, § 85)

The Court went on to hold that the question of allowing legal recognition of acquired gender no longer fell within the State's margin of appreciation (see *Christine Goodwin*, cited above, § 93). As concerns this "trend", we note that legal recognition of the rights of transsexual and intersex persons is being steadily strengthened worldwide.[4] Regarding the significance of the lack of consensus among the member States, we therefore disagree with the majority from a methodological point of view.

6. Thirdly, the majority's starting-point is the assumption that the applicant had a real choice between maintaining her marriage and obtaining a female identity number (see paragraphs 76-78 of the present judgment). We believe that it is highly problematic to pit two human rights – in this case, the right to recognition of one's gender identity and the right to maintain one's civil status – against each other. Furthermore, it is our view that the majority did not sufficiently take into account the fact that the applicant and her spouse are deeply religious (see paragraph 44 of the present judgment). The couple accordingly believes that their marriage will last for life. Lastly, the applicant's spouse continues to identify as heterosexual. Given their religious background, the applicant and her spouse cannot simply change their marriage into a same-sex partnership, as this would contradict their religious beliefs. In this regard, we believe that the majority did not take important factual information sufficiently into account.

7. At this juncture, we would like to emphasise that the Court should have examined the complaint under Article 8 with regard to the particular importance of gender identity to an individual and the narrow margin of appreciation that States therefore enjoy in this field, as well as to the strong religious convictions of the applicant and her spouse in respect of their marriage.

II. Article 8 of the Convention

8. The applicant has an interest in being granted a female identification number because otherwise she will be required to identify herself as

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4. We note that, within the Council of Europe, the existence of a "third gender" has been acknowledged by the German federal legislature (section 22(3) of the *Personenstandsgesetz* (PStG), in force since 19 February 2007 (BGBl. I p. 122), amended by section 3 of the Law of 28 August 2013 (BGBl. I p. 3458)). Outside the Council of Europe, the Supreme Courts of some countries have come to the same conclusion (Supreme Court of Nepal, *Sunil Babu Pant and Others v. Nepal*, writ no. 917, judgment of 21 December 2007; High Court of Australia, *NSW Registrar of Births, Deaths and Marriages v. Norrie* [2014] HCA 11, judgment of 2 April 2014; and Supreme Court of India, *National Legal Services Authority v. Union of India and Others*, writ petition (civil) no. 400 of 2012, judgment of 15 April 2014).

transgender – and thus reveal an aspect of her personality belonging to her most intimate sphere – every time the discrepancy between her gender presentation and her identity card has to be explained. We believe that this amounts to more than a regrettable "inconvenience" (see paragraph 87 of the present judgment). In this connection we again refer to the judgment in *Christine Goodwin*, in which the Grand Chamber held that

> "[t]he stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety." (see *Christine Goodwin*, cited above, § 77)

Secondly, the alternative offered to the applicant, namely the conversion of her marriage into a same-sex partnership, is – as mentioned above – not an option, because the couple, who have been married since 1996, feels united by a religious conviction which does not allow the transformation of their relationship into a same-sex partnership. The couple's history of seventeen years of marriage, in which the assistance and support provided by the applicant's wife was a crucial element not only for their relationship but also for the applicant's difficult process of transition from male to female, gives us no reason to doubt the deep commitment of the applicant and her heterosexual spouse to the marriage. As the present judgment shows, the applicant is forced to choose between the continuation of her marriage, which falls under "family life" for the purposes of Article 8, and the legal recognition of her acquired gender identity, which falls under "private life" for the purposes of Article 8 (see paragraphs 57-61 of the present judgment). On this basis, we are unable to agree with the majority's finding that the applicant has several acceptable options (see paragraphs 76-77), and must conclude that she will suffer an interference with her rights under Article 8 no matter which of these "options" she chooses.

9. A classic examination of the alleged interference with the applicant's rights under Article 8 would assess whether the interference was in accordance with the law and was necessary in a democratic society for the protection of one or more of the legitimate aims listed in Article 8 § 2. The first of these two requirements is certainly fulfilled. Regarding the pursuit of a legitimate aim, in the context of its case-law under Article 14 of the Convention taken in conjunction with Article 8, the Court has accepted that States have a legitimate interest in protecting marriage in the traditional sense by legally reserving marriage to heterosexual partners, and that this interest can justify a difference in treatment (see *Karner v. Austria*, no. 40016/98, § 40, ECHR 2003-IX; *Parry v. the United Kingdom* (dec.), no. 42971/05, ECHR 2006-XV; *Schalk and Kopf v. Austria*, no. 30141/04,

§§ 61-62, ECHR 2010; and *Vallianatos and Others*, cited above, §§ 83-85). When examining Article 8 separately, however, the Court must examine not whether a justification for a difference in treatment exists, but whether a restriction of rights is permissible in pursuit of one of the aims listed in Article 8 § 2. As the restriction in question is clearly not necessary in order to protect Finnish national security, public safety, or economic well-being, to prevent disorder or crime, or to protect health, the only two possible grounds for restriction are the protection of the rights and freedoms of others or of morals.

10. We submit that the rights and freedoms of others would in no way be affected if the applicant and her wife were permitted to remain married despite the applicant's legal change of gender. Their continued marital relationship would not have detrimental effects for the right of others to marry, or for existing marriages.

11. Secondly, while we acknowledge that the protection of the traditional family may be justified by certain moral concerns, we consider that the protection of morals does not provide sufficient justification for the restriction of the applicant's rights in this case. In order for this aim to justify the present interference with Article 8 in terms of its second paragraph, the interference must be necessary in a democratic society. The Court must accordingly determine whether the interference was justified by the existence of a pressing social need and was proportionate to the legitimate aim pursued. It must thereby determine whether a fair balance was struck between the competing interests in question, an issue which entails a certain margin of appreciation on the part of the State (see *A, B and C v. Ireland*, cited above, § 229).

12. The Government have not argued that there would be significant practical difficulties if married transgender individuals were allowed to obtain legal recognition of their post-transition gender. The only interest in issue is, in plain terms, the public interest in keeping the institution of marriage free of same-sex couples. While we do not purport to deny the legitimacy of the State's interest in protecting the institution of marriage, we do consider that the weight to be afforded to this argument is a different question and one that must be considered separately. In our view, the institution of marriage would not be endangered by a small number of couples who may wish to remain married in a situation such as that of the applicant. In the light of the above, we are not able to conclude that the respondent State can invoke a pressing social need to refuse the applicant the right to remain married after the legal recognition of her acquired gender.

13. With respect, more specifically, to the proportionality of the interference, we note that the State has a certain margin of appreciation regarding whether a fair balance was struck between the competing interests in question. Taking this into consideration, we nevertheless find that the

Government have not shown that the danger to morals is substantial enough to warrant the interference in issue. In this vein, we note that, since the applicant and her wife continue to be married at the time of this judgment, they currently present themselves to the outside world as two individuals with female gender expression who are united in a legally valid marriage. In other words, they continue to live together as a married couple, perfectly in accordance with Finnish law, notwithstanding the fact that in the eyes of many people they are a same-sex couple. The applicant's change in gender identity being a *fait accompli*, it is difficult to comprehend why the legal recognition of her acquired gender will have any significant (additional) impact on public morals. Furthermore, we refer to the recent judgment of the Supreme Court of India, which noted that society ill-treats transgender individuals while "forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mind-set which we have to change".[5] As one author has put it, society's problematic "yuk factor" concerning transgender individuals is not a normative idea that should be supported by the law.[6]

14. In the light of the above considerations, in examining whether the restriction of the applicant's rights under Article 8 is justified in accordance with paragraph 2 of that provision, we cannot but conclude that the interference with these rights is not necessary in a democratic society. We therefore consider that there has been a violation of Article 8.

III. Article 12 of the Convention

15. Since we conclude that there has been a violation of Article 8, we consider that there is no separate issue under Article 12.

16. We would like to note, however, that the question of whether an issue arises under Article 12 becomes more difficult after a finding, such as that of the majority, that there has not been a violation of Article 8. We believe that the majority should have examined the issue of whether Article 12 guarantees not only a right to marry, but also a right to remain married unless compelling reasons justify an interference with the civil status of the spouses. We do not consider the gender reassignment undergone by one spouse to be a compelling reason justifying the dissolution of a marriage where both spouses expressly wish to continue in their pre-existing marital relationship. This argument is supported by Principle 3 of the Yogyakarta Principles[7] and recent judgments of the

5. *National Legal Services Authority*, *supra* note 4.
6. Alex Sharpe, "Transgender Marriage and the Legal Obligation to Disclose Gender History", *The Modern Law Review* 75(1) (2012), pp. 33-53, at p. 39.

Constitutional Courts of Austria, Germany and Italy, which have all three overturned decisions requiring the dissolution of pre-existing marriages as a precondition for the legal acknowledgment of acquired gender.[8]

IV. Article 14 of the Convention taken in conjunction with Article 8

17. Undoubtedly, the issues raised by the present case fall under the notions of both private life and family life within the meaning of Article 8 (see paragraphs 59-60 of the present judgment and paragraph 8 above). Furthermore, the applicant has been subjected to a difference in treatment on the basis of her gender (and not on the basis of her sexual orientation, which is a distinct and separate matter). The majority rightly points out that it is the Court's well-established case-law that differences based on gender require particularly serious reasons by way of justification (see paragraph 109 of the present judgment). In our opinion, there is no need to refer also to the Court's case-law on sexual orientation.

18. The difficult question in this case concerns the identification of the group to which the applicant and her spouse can be compared. The applicant argues that she has been treated differently *vis-à-vis* cissexuals, with regard to the refusal to issue her with a new identity card, and also *vis-à-vis* heterosexuals, with regard to the protection of her marriage to a heterosexual spouse.

19. We regret that the majority rejects these issues simply on the ground that the applicant's situation is not similar enough to that of cissexuals (see paragraph 112 of the present judgment). The majority does not deal with the issue of whether the applicant has been subjected to discriminatory treatment *vis-à-vis* heterosexuals (see paragraph 105). We cannot think of any situation – other than cases of fictitious or unconsummated marriage, which are a different matter – in which a legally married cisgender

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7. International Commission of Jurists, Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2007, available at: http://www.yogyakartaprinciples.org/principles_en.htm. Principle 3, which concerns the right to recognition before the law, states among other things: "No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity."

8. Constitutional Court of Austria, V 4/06-7, 8 June 2006, at IV.2; Federal Constitutional Court of Germany, 1 BvL 10/05, § 49, 27 May 2008; Constitutional Court of Italy, no. 170/2014, 11 June 2014 (the latter decision was delivered after the adoption by the Grand Chamber of the present judgment). We acknowledge, however, that the Austrian Constitutional Court considered only the fact that a legal change of gender was not possible for persons who were married, and did not examine the consequences of this change for the person's civil status. The German and Italian Constitutional Courts considered that the dissolution of marriages in these cases was forbidden because – unlike in the present case – the domestic regulation provided no possibility of continuing the relationship in another form (i.e., as a registered partnership), and the rights and duties of the spouses would therefore be diminished.

heterosexual couple would be required to choose between maintaining their civil status and obtaining identity cards reflecting the gender with which they identify. While States enjoy a certain margin of appreciation in determining whether and to what extent differences in otherwise similar situations justify differential treatment (see *X and Others v. Austria*, cited above, § 98; *Vallianatos and Others*, cited above, § 76; and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 126, ECHR 2012), it is ultimately for the Court to determine whether the requirements of the Convention have been met (see *Konstantin Markin*, cited above, § 126). Therefore, we consider that the Court should have examined this question.

20. Last but not least, we submit that the applicant and her spouse are the victims of discrimination because the authorities fail to differentiate between their situation and that of homosexual couples (see, *mutatis mutandis*, *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV). In fact, the national legal order treats their situation like that of homosexuals. However, at least at the time of their entry into marriage, the applicant and her spouse were not homosexual partners. Even after the applicant's gender reassignment, it is an oversimplification of the situation to treat her relationship as a homosexual one. In our view, the crucial question regarding the discrimination issue is whether the State has failed to differentiate between the applicant's situation and that of a homosexual couple by failing to introduce appropriate exceptions to the rule debarring same-sex couples from the institution of marriage (see, *mutatis mutandis*, *Thlimmenos*, cited above, § 48). We regret that this issue was not raised.

V. Conclusion

21. To conclude, we disagree with the majority's findings on several points. Firstly, we do not agree with the majority regarding the nature of the obligation in question, the methodology regarding the level of scrutiny, and the finding that the applicant had a real choice between continuing her marriage and obtaining legal recognition of her acquired gender. Secondly, regarding the justification of the interference with the applicant's rights under Article 8, we argue that the legitimate aim of protecting the traditional family would not be compromised if individuals in a situation analogous to that of the applicant and her wife were permitted to remain married after the acknowledgment of the acquired gender of one of the parties to the marriage. As there was no pressing social need for the interference in question, which was accordingly not necessary in a democratic society, we consider that the applicant has suffered a violation of her rights under Article 8. Thirdly, we argue that, in the light of the majority's conclusion under Article 8, the issues raised under Article 12 should have been examined. Lastly, we are not convinced that the applicant has not been subjected to discrimination contrary to Article 14 of the Convention taken in

conjunction with Article 8, and consider that the Court's examination should have gone into more depth in this regard.