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Relying on Human Rights Treaties to establish access to Same-sex registered Partnerships and Marriage – Confronting the Question of Cultural Sensitivities

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This piece sets out to compare the stance of the Inter-American Court of Human Rights (IACtHR) under the American Convention on Human Rights (ACHR) with that of the European Court of Human Rights (ECtHR) (known as Strasbourg Court) adjudicating on the European Convention on Human Rights (ECHR) in relation to family rights of same-sex couples. Specifically, it looks at the stances taken by the two Courts towards same-sex relationship formalisations – registered partnerships and marriage – exploring their responses to the stances taken in the states within their jurisdiction towards such formalisations. This article confronts and compares the stances taken by the two Courts, and their underlying bases, when they encounter the varying stances on this controversial issue taken in the states in question, relating to cultural predilections. The article concludes that reliance on finding a consensus among the contracting states in this context has had a detrimental impact on the Strasbourg jurisprudence in terms of upholding the principle of non-discrimination, an impact that can be traced to discriminatory stances taken in a number of the ECHR-contracting states towards same-sex unions. It finds in contrast that the Inter-American Court of Human Rights has not accepted that finding such a consensus should affect its decisions in this context, and therefore it has not allowed cultural acceptance of homophobia to affect its stance.

Keywords: *ACHR; ECHR; ECtHR; IACtHR; Same-sex marriage; Strasbourg Court*

Introduction

This article sets out to compare the stance of the Inter-American Court of Human Rights (IACtHR) under the American Convention on Human Rights (ACHR) with the European Court of Human Rights (ECtHR) - which is known also as the Strasbourg Court - adjudicating on the European Convention on Human Rights (ECHR) in relation to family rights of same-sex couples. Specifically, it looks at the stances taken by the two Courts towards same-sex relationship formalisations – registered partnerships and marriage, exploring their responses to the stances taken

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in the states within their jurisdiction towards such formalisations. The various states in question take a range of stances towards such formalisations which are reflective of the social and cultural attitudes domestically towards same-sex couples. Thus certain states introduced same-sex marriage some time ago,[1] whereas others remain adamantly opposed not only to such marriage,[2] but also to same-sex registered partnerships, due to strong prejudice evinced against gay relationships by government, religious bodies and much of the populace. This article confronts and compares the stances taken by the two Courts, and their underlying bases, when they encounter the varying stances on this controversial issue taken in the states in question. It analyses the way that the jurisprudence of the two on this matter has developed in the face of such stances taken domestically.

It is well established that the Strasbourg Court has had a significant influence in terms of furthering the protection of sexual minorities.[3] Clearly, it was in part set up to ensure the protection of minorities who had suffered in Nazi Germany, and, more generally, to protect them since they would not necessarily receive protection via majoritarian support through the democratic process. But at the same time, the Court views its protection for the Convention rights as subsidiary to the protection offered in the member states. Its use of the margin of appreciation doctrine is obviously linked to that stance, and the width of the margin conceded in particular instances is linked to the role it has conceded to *consensus analysis* in its decisions.[4] The term 'consensus' is often taken to denote identifying common ground between the laws of a majority of member states in relation to the domestic protection for particular rights.[5] *Lack* of consensus among the member states means that the margin of appreciation conceded to the state widens;[6] therefore the likelihood of finding a breach of the relevant Article – in this instance usually Article 8 – diminishes.[7]

In *this* context – the protection of the interests of sexual minorities in relation to formalisation of relationship statuses - consensus analysis has played a particularly prominent role. The problem is, clearly, that the use of this mechanism, influencing

[1]In Europe: Netherlands (2001) and Belgium (2003), the first and second countries in the world to do so, and Denmark (2012) (which was also the first country in the world to legalise civil partnerships in 1989). In the Americas: USA: Massachusetts (2004); Canada (2005), Argentina (2010).

[2]In Europe, definitions of marriage which exclude same-sex marriage exist in the Constitutions of Armenia, Bulgaria, Croatia, Georgia, Hungary, Latvia, Lithuania, Moldova, Montenegro, Poland, Serbia, Slovakia and the Ukraine. In the Americas, despite recent repeals in the Caribbean, there continue to exist states that *penalise* consensual same-sex relations: Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, as well as Guyana in South America.

[3]See Harris, O'Boyle, Warbrick & Bates (2023); Wintemute (2013); *Dudgeon v UK*, no. 7525/76, ECtHR (22 October 1981); *Norris v Ireland*, no.10581/83 ECtHR (26 October 1988), para 47; *Modinos v Cyprus*, no. 15070/89 ECtHR (22 April 1993; *Alekseyev v Russia*, nos. 4916/07, 25924/08, 4599/09 ECtHR (21 October 2010); *HG and GB v Austria*, nos. 11084/02, 15306/02 ECtHR (2 June 2005); *RH v Austria*, no. 7336/03 ECtHR 61 (19 January 2006).

[4]See Dzehtsiarou (2015).

[5]See further Wildhaber, Hjartarson & Donnelly (2013); Arden (2015) at 313-315; Dzehtsiarou (2011).

[6]See McGoldrick (2016) at 28.

[7]See as to the Court's general stance: *Goodwin v United Kingdom* (1996) 22 EHRR 123 at [103]; *Bayatyan v Armenia* (2012) 54 EHRR 15 at [108]; but cf *ABC v Ireland* (2011) 53 EHRR 13 at [237] in the abortion context. For discussion of the margin of appreciation doctrine see: Legg (2012); Bates (2015); Fenwick (2015).

the margin of appreciation conceded to states means that the cultural sensitivities of majorities in member states – influenced by acceptance or non-acceptance of formalisations of gay relationships, in particular including via same-sex marriage – is able to find purchase in Strasbourg Court decisions. That purchase has resulted, as will be discussed, in a reluctance to declare a clear right to same-sex registered partnerships under the ECHR, and a refusal so far to accept marriage equality.

As will be explained in the second half of this article, the same cannot be said of the IACtHR in interpreting the ACHR in this context. The American Convention includes guarantees broadly equivalent to those relevant in this context under the ECHR: equivalents to Articles 12, 8 and 14.[8] Admittedly, the wording of the equivalent of Article 12 of ECHR - right to marry - differs under the American Convention (Article 17(2)), but the wording of Article 12 of ECHR is not in itself determinative of the reluctance at Strasbourg Court to recognise same-sex marriage.

Given that consensus analysis and reliance on the margin of appreciation doctrine has *not* played a part in the IACtHR jurisprudence in this context, that Court has therefore had a strong influence in furthering or potentially furthering the spread of same-sex marriage in South America and a number of Caribbean states. Conversely, the Strasbourg Court's interpretation of the ECHR has had a *retarding* impact on that spread in such states, as will be explained below, largely due to the influence of consensus analysis on the relevant Strasbourg jurisprudence. Thus – paradoxically – the two Conventions are in effect pulling in opposite directions in some of the states in question in relation to marriage equality. In order to illustrate the current and future impact of the Strasbourg stance in ECHR-contracting states, and also in some Caribbean states, this paper will turn below to analysing the relevant Strasbourg jurisprudence. The analysis will reveal the influence of the Strasbourg Court up to 2024 on formalisations of the relationships of same-sex couples in member states.

The Authority and Influence of the Strasbourg Court

Before turning to the jurisprudence in question, some remarks on the general influence and authority of the Strasbourg Court are needed. Findings in the Court command in general a high level of respect in the contracting states, and the influence of the ECHR on human rights as interpreted and applied by the Court in the contracting states is clearly highly significant.[9] Once the ECHR was abolished, that meant that no administrative body was involved in the implementation of the ECHR, meaning that the Court's authority was enhanced. That does not, however, mean that if a state loses a claim it will necessarily act rapidly or effectively to change its law or practice to remedy the breach. But states in general do respond

[8]There are broad equivalences between: Article 8 of ECHR (right to respect for private and family life) and Article 11 of ACHR (right to privacy), Article 12 of ECHR (right to marry) and Article 17(2) of ACHR (rights of the family: right to marry), Article 14 of ECHR (right to freedom from discrimination) and Article 1 of ACHR (obligation to respect rights) and Article 24 of ACHR (equal protection of laws).

[9]E.g. *Sunday Times v UK* (1979) 2 EHRR 245.

eventually to a Strasbourg Court ruling finding them in breach of a particular right or rights, and measures are available seeking to ensure the execution of the judgment[10] although in general the Court seeks to maintain its authority without forms of coercion. Therefore it seeks to avoid taking stances that may alienate certain contracting states due to their particular cultural sensitivities and/or religious positions. That largely explains its reliance on consensus analysis.

In this context the Strasbourg Court obviously cannot itself introduce a legal right to access a same-sex registered partnership in any contracting State: it can only declare that such a right arises under the ECHR, which has been violated. Under Article 46 of the ECHR, the State in question is bound to respond, but in practice it is then up to the legislature to consider when (and if) to respond and in what form. Other States would then have duties under Article 1 of the ECHR to implement any such ruling but some may refuse to do so or be slow and reluctant to do so.[11] For example, the Moldovan Orthodox Church reacted to the *Fedotova* decision discussed below[12] by urging the government not to allow gay couples to register a partnership, thus demanding that it should refuse to comply with the ruling.[13] It appears that the government has failed to state in response that it might comply with it in future as an aspect of its Article 1 duties.[14] Such responses to the Court's rulings go some way to explaining its reluctance to move beyond the stances of the various states under its jurisdiction in the context under discussion, until it finds that a majority of member states have already taken the steps in question – in this instance in introducing same-sex registered partnerships via domestic legislation.

The Spread of Same-sex Marriage and Registered Partnerships in the Member States

The spread of same-sex marriage and registered partnerships has been uneven among the member states: some Western states have been much slower than others to introduce same-sex marriage[15] or registered partnership schemes for same-sex couples.[16] A number of 'Central-Eastern' states – not all – have shown no or little

[10]For discussion of execution of the Court's judgments see Harris, O'Boyle, Warbrick & Bates (2023) at chapter 4.
[11]See e.g. *Hirst v United Kingdom* (2006) 42 EHRR 41 [GC], in the context of prisoner voting rights.
[12]*Fedotova v Russia*, nos. 40792/10, 30538/14 and 43439/14 ECtHR [GC] 17 January 2023.
[13]See Nescutu (2023a).
[14]However, a Moldovan gay couple has begun an action domestically for such registration, based on *Fedotova*. See Nescutu (2023b).
[15]Netherlands and Belgium, for instance, introduced same-sex marriage in 2001 and 2003 respectively, while Greece and Slovenia have only just introduced it in 2024. Same-sex marriage is currently available in Portugal, Spain, Switzerland, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Andorra, Austria, Malta, Netherlands, Norway, Sweden, United Kingdom, Estonia, Switzerland. Liechtenstein will commence same-sex marriages in 2025. See further: Scherpe (2019); Balzarini, Blair & Walter (2024).
[16]Forms of same-sex registered partnership, but not marriage, are available in Croatia, Czech Republic, Cyprus, Hungary, Italy, Liechtenstein, Slovenia, San Marino, Montenegro, Monaco and Latvia.

inclination to introduce such schemes[17] and even more so a reluctance to accept same-sex marriage. So where a state has not introduced any means of formalising their relationships for same-sex couples, claims at Strasbourg Court represent one means of bringing about change. But at the same time the Court is aware of these divergencies within the 47 member states, and their cultural and religious origins. In general, acceptance of same-sex registered partnerships (RPs) may be seen as one step towards introducing marriage equality and in any event they provide the couples in question with recognition of their relationship and with civic benefits. Strasbourg Court has been confronted with claims for both same-sex registered partnerships and marriage; therefore, the discussion below covers both formalisations of relationship status for same-sex couples under the ECHR.

Early Decisions on European Convention Protection for Same-sex Couples

The first step towards recognising a Convention right to formal recognition of their relationships for same-sex couples, taken in *Schalk*,[18] in 2011, was to recognise same-sex couples as 'families' under Article 8 read with Article 14 (the non-discrimination guarantee). That was a highly significant decision, but the Court did *not* reach it purely on the basis of the principle that since same-sex couples are as capable of exhibiting the characteristics of a 'family' as opposite sex ones, they should be treated accordingly. The Court instead relied quite heavily on the changing consensus as to the broadening of the concept of 'family' in member states. It found that a rapid evolution of social attitudes towards same-sex couples, and of the concept of 'family', had occurred. Therefore, it considered that same-sex couples could now be recognised as a form of family unit. But given its reliance on consensus analysis, it also determined in *Schalk* that the same-sex couple applicants should be debarred from accessing marriage under Article 12 of the Convention[19] due to the lack of a consensus on the matter.[20] At that point only a very small minority of member states had introduced same-sex marriage via legislation. The lack of a right to marry of same-sex couples under Article 12 precluded finding such a right under Article 8, which would also have been precluded due to the *lex specialis* status of Article 12. But in any event the same argument as to the consensus would also have applied under Article 8.

A further step towards accepting formal recognition of same-sex unions under the ECHR was taken in *Vallianatos v Greece*[21] in 2014. The applicants, who were in same-sex unions, challenged their exclusion from the registered partnership scheme introduced in Greece for different-sex couples, under Article 8 read with 14.

[17]Neither marriage nor registered partnership is available at present for same-sex couples in Albania, Azerbaijan, Armenia, Bosnia and Herzegovina, Bulgaria, Georgia, Lithuania, Macedonia, Moldova, Poland, Romania, Russia, Serbia, the Slovak Republic, Türkiye, Ukraine.

[18]*Schalk and Kopf v Austria* (2011) 53 EHRR 20. Note that some aspects of this discussion of the cases of *Schalk*, *Vallianatos* and *Oliari* draw on Fenwick (2016).

[19]See the findings on same-sex marriage in *Hämäläinen v Finland*, no. 37359/09 ECtHR [GC], 16 July 2014 at [74].

[20]Ibid, at [58].

[21]*Vallianatos v Greece* (2014) 59 EHRR 12.

The government sought under Article 14 to justify the exclusion of same-sex couples from the scheme on the basis of providing protection for the children of different-sex couples. In evaluating that justification the Court relied on consensus analysis, noting that a trend was currently emerging within the member states, by that point, with regard to the introduction of forms of legal recognition of same-sex relationships. Therefore, the Court conceded only a narrow margin of appreciation to the state. As a result the state's justification was strictly scrutinised: it had to be found to be *necessary* to refuse to introduce a same-sex registered partnership scheme in order to protect children in different-sex unions. That could not be found; as a result the Court determined that the proportionality demands under Article 14 were not satisfied. Accordingly, a breach of Article 14 read with 8 was found.

Establishing a Convention right to a Same-sex Registered Partnership but not Marriage

In *Oliari v Italy*[22] the Strasbourg Court took in 2015 a further and highly significant step towards finding that a right to a same-sex registered partnership arises under Article 8. Indeed, it is arguable that it did finally recognise that right in *Oliari*. It was confronted with a situation resembling that in *Vallianatos* but in which *no* registered partnership scheme had been introduced, even for different-sex couples. Three same-sex couples, who were supported by various activist organisations,[23] complained under Article 8 read alone or with 14, that Italy did not allow them access to a legal framework for formalising their relationships, so they were being discriminated against as a result of their sexual orientation – a protected ground under Article 8. In its judgment the Court did *not* concede a wide margin of appreciation to Italy because a thin majority of member states had by that time introduced same-sex registered partnerships. But the fact that the majority was thin may have encouraged it to view the notion of 'respect' for private and family life under Article 8(1) as a flexible one, finding that the requirements denoted by the term would vary considerably from case to case.

It identified two localised factors that influenced its findings as to those requirements. It found firstly that there was amongst the Italian population a popular acceptance of same-sex couples, as well as popular support for their "recognition and protection".[24] The second factor concerned the 'unheeded' calls of the Italian courts to introduce a legal framework[25] providing same-sex couples with such recognition.[26] Since no legal framework existed in Italy to provide recognition and protection for same-sex couples seeking formalisation of their relationships the

[22](2015) 65 EHRR 957.
[23]They included ILGA-Europe.
[24]*Oliari v Italy* (2015) 65 EHRR 957 at [181].
[25]Ibid, at [183]-[185].
[26]The Italian courts had found that same-sex unions should be protected as a form of social community under article 2 of the Italian Constitution, but that it was the role of the legislature to introduce a form of legal partnership covering such couples, not that of the judiciary: at [45]. An Italian Bill establishing same sex civil unions was approved by the senate's Judiciary Committee on 26 March 2015, but then stalled at the Committee stage.

Court found that a positive obligation arose under Article 8(1) to introduce registered partnerships for same-sex couples. Its decision to find that such an obligation arose was partly based on the strengthening consensus among the member states as to the acceptance of such partnerships by that point since a majority had by that time introduced them. But it implied that the obligation might only arise where those two localised factors were present, especially acceptance of gay relationships by the populace in general. It could be argued that the notion of finding a consensus among the member states, in terms of determining whether a breach of Article 8 had arisen, suffered a partial transformation in *Oliari* into relying on finding a consensus on formalisation of gay partnerships in a single state.

Strasbourg Court's exclusionary interpretation of Article 12 was also upheld in *Oliari* post-*Schalk* on the basis of a continuing lack of consensus in the member states as to the availability of same-sex marriage. So the claim of the applicants for same-sex marriage under Article 12 read alone or read with Article 14 was declared inadmissible. In *Orlandi v Italy*[27] the Court in effect reaffirmed in 2017 the stance taken in *Oliari* as regards same-sex registered partnerships. But, importantly, it left open the possibility that if the consensus on same-sex marriage among the member states did strengthen in future, it might be prepared to recognise a right to marry for same-sex couples under Article 12.[28]

The key decisions were in *Fedotova v Russia* in 2021 and 2023.[29] Although the two key local factors identified in *Oliari* did *not* apply in Russia, the Court and then the Grand Chamber were prepared to confirm that a right to a same-sex registered partnership did arise under Article 8. So they recognised a positive obligation placed on states to introduce such partnerships. That was partly on the basis that by that point a *stronger* consensus on the matter could be found among the contracting states. Therefore the Court and Grand Chamber did not rely on the idea that the right to respect for family life should be interpreted flexibly. Russia had provided no framework at all to provide protection for same-sex couples wishing to formalise their relationship. Therefore a breach of Article 8 was found.

But *Fedotova* had two limitations: firstly, states introducing a same-sex registered partnership scheme as a result of that decision only had to provide an 'adequate' level of protection for the couples in such a partnership,[30] not a level on a par with that provided via marriage for different-sex couples. That was found on the basis that no consensus could be discerned on the level of protection to be accorded under same-sex registered partnerships among the contracting states. Thus, consensus analysis played both a positive and negative role in the decisions in *Fedotova*. Secondly, the Grand Chamber reaffirmed that no right to a same-sex marriage arises under Article 12, even read with Article 14. That was on the basis that there was still no consensus on acceptance of same-sex marriage among the contracting states – again an application of consensus analysis that had a negative

[27]*Orlandi et al. v Italy*, nos. 26431/12, 26742/12, 44057/12 ECtHR (14 December 2017) at [204] and [205].
[28]*Orlandi et al. v Italy*, nos. 26431/12, 26742/12, 44057/12 ECtHR (14 December 2017) at [204] and [205].
[29]*Fedotova v Russia*, nos. 40792/10, 30538/14 and 43439/14 [GC], 17 January 2023.
[30]Ibid, at [190].

impact on same-sex couples in the member states. After *Fedotova* four claims were brought from post-Soviet contracting states claiming a breach of Article 8 since no same-sex registered partnerships were available in the states in question. They were all, unsurprisingly, successful[31] since the states in question had, like Russia, provided no framework for the recognition and protection of same-sex couples, despite some legislative attempt to provide such frameworks.[32]

The reliance on finding a consensus in order to provide a higher level of protection via same-sex registered partnerships is therefore likely to cause problems in relation to future claims from some Eastern states because even if a state does introduce such partnerships, the level of protection they offer may be quite low, creating the obvious risk of acquiescing to prejudice against sexual minorities.

Contrasting Stances of the ECtHR and the IACtHR

Reliance on consensus analysis within the relevant Strasbourg jurisprudence is *also* retarding or potentially retarding the spread of same-sex marriage in some ECHR-contracting states which have overseas territories in the Caribbean. In some instances same-sex registered partnerships also have not been accepted, although that is contrary to the positive obligation recognised in *Fedotova*. Such states (including Bermuda, the Cayman Isles, Anguilla, British Virgin Isles, Montserrat, Turks and Caicos) are not under the jurisdiction of the IACtHR; therefore the interpretation of their own Constitutions is influenced by that jurisprudence – the jurisprudence on protections for same-sex couples discussed above. These territories have varying degrees of autonomy but are ultimately subject to the ECHR obligations of their respective European states. The influence of the Strasbourg Court jurisprudence in certain such states is discussed below, but it gives some acceptance to prejudice against sexual minorities since the Strasbourg Court does not accept a right to same-sex marriage, based on consensus analysis. In contrast, the IACtHR, as will be discussed below, has not accepted that consensus analysis should affect its decisions in this context, and therefore it has not allowed cultural acceptance of homophobia to affect its decisions. So reliance on the Strasbourg Court jurisprudence discussed in a range of Caribbean states – *not* just the contracting states – is on its face unlikely at present to further the spread of same sex marriage globally. The jurisprudence of the IACtHR may be viewed in contrast as nudging states under its jurisdiction towards acceptance of such marriage. As discussed below, reliance on consensus analysis within the relevant Strasbourg court jurisprudence has been found by IACtHR to potentially *retard* the spread of same-sex marriage in some Caribbean territories.

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[31] *Buhuceanu and Others v Romania*, nos. 20081/19 and 20 others, ECtHR (23 May 2023); 2023; *Maymalukhin and Markiv v Ukraine*, no. 75135/02, ECtHR (1 September 2023); *Koilova and Babulkova v Bulgaria*, no. 4020/14, ECtHR (5 September 2023); *Przybyszewska v Poland*, no. 11454/17 ECtHR (12 December 2023).

[32] For example, prior to *Przybyszewska*, Polish legislators had introduced legislation on nine occasions unsuccessfully to allow for same-sex registered partnerships.

The result is that a Caribbean territory subject to the ECHR might be enabled to allow homophobia to influence its legal developments in relation to relationship-recognition and protection for same-sex couples, while legal developments in a state influenced by the American Convention might be affected in the opposing direction. However, as will be discussed below, despite its rejection of consensus analysis as an interpretative tool, the influence of IACtHR in furthering such recognition and protection is not as determinative as it might have been expected.

Family and Marital Rights of Same-sex Couples under the American Convention on Human Rights

IACtHR, while similar to the ECtHR in terms of its jurisprudence and interpretative approach, has a significantly reduced impact on states within its jurisdiction when compared to that of Strasbourg Court.[33] That is, in part, due to the fact that the Court is secondary to the Inter-American Commission and also because the primary regional power, the USA, has not ratified the ACHR, diminishing its influence. Thus applications go before the Commission first and as an administrative body it can reject applications. As indicated above, the ECHR, which had a similar role, was abolished. Additionally, ratification of the ACHR and IACtHR is separate to, and not essential for, membership of the Organisation of American States,[34] meaning that certain states have not ratified the American Convention.[35] As discussed below, the Court has considered, but rejected, the development of a doctrine of a 'margin of appreciation,' whose crucial significance in Europe has seen it incorporated into the Preamble to the ECHR. Related concepts, in particular the consensus doctrine, have similarly been rejected.

The approach of the American Convention on Human Rights (ACHR) to claims of same-sex couples to relationship formalisations, including marital rights, was set out in a significant advisory opinion issued by IACtHR to Costa Rica.[36] This Opinion concerned a request that the American Court should interpret the scope of a number of rights under the ACHR including the right to privacy in Article 11, the right to equal protection of the laws in Article 24 and the right to non-discrimination in the enjoyment of such rights in Article 1 in relation to issues concerning gender identity and the rights of same-sex couples. The request concerned the matter of recognition of patrimonial rights, such as to social security, potentially arising under these rights, which could be accorded to same-sex relationships.

The Court had recognised that sexual orientation was a ground of prohibited discrimination in *Atala Riffo v Chile*[37] and in *Duque v Colombia*[38] – but only in 2013.

[33]That is despite the Organisation of American States having almost double the population of the Council of Europe. In 2020, for instance, the Strasbourg Court decided almost ten times as many cases as the IACtHR: see Report European Court of Human Rights (2020), and Report Inter-American Court of Human Rights (2020).
[34]See generally Pasqualucci (2013).
[35]Such as St Kitts and Nevis and Tobago.
[36]Advisory Opinion OC-24/17 Requested by Costa Rica.
[37]*Atala Riffo and daughters v Chile*, IACtHR, Series C, 239 (2012).
[38]*Duque v Colombia*, IACtHR, Series C, 310 (2016).

The background to the Opinion was the lack of a common approach to same-sex relationships among those states that had ratified the American Convention immediately prior to 2016. In particular, four countries criminalised same-sex sexual activity in the form of archaic "buggery" laws or laws against "unnatural" sexual activity.[39] Also just five states had introduced same-sex marriage prior to 2016.[40] Across the entire Organisation of American States only eight of the thirty five members recognised same-sex unions in some form. As of 2024, twelve states recognise same-sex marriage or registered partnerships.[41] If the Strasbourg Court's approach described above based on consensus analysis in this context had been followed, it might appear, given the regional context, that there was an even stronger case for the Inter-American court to approach the issue of rights of same-sex couples to relationship formalisation with caution. However, in its advisory opinion in relation to the question of economic rights for same-sex couples, the Court not only found that the American Convention required equality in that sphere, the subject of the application by Costa Rica, but determined that it had authority to address broader issues of general equality.[42] It used the opportunity created by the application to issue, in effect, a general declaration that same-sex couples should enjoy equal rights in the family sphere with opposite sex couples under the American Convention.

As regards the interpretation of the scope of rights for same-sex couples, the Court found that the concept of "family" under Article 11 could encompass same-sex relationships, echoing Strasbourg Court.[43] Similarly, the Court found that the ACHR should encompass same-sex relationships in accordance with "the object and purpose of the Convention," adopting an evolutive approach.[44] Quoting the Strasburg Court in *Schalk* and *Vallianatos* it found that it would be "artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life'" provided "there is an intention to enter into a permanent relationship and form a family".[45] The American Court also emphasised the right to autonomy (relevant to the ACHR rights to liberty in Article 7(1) and privacy (11(2)) – finding that "free and autonomous choice forms part of the dignity of each person and is intrinsic to the most intimate and relevant aspects of his or her identity and life project".[46]

Crucially – going beyond the European Court – and the area it was being asked to advise on, the American Court also considered the provision that most directly protects the right to marry, Article 17, the rights of the family. Article 17(2), equivalent to Article 12 ECHR, the right of "men and women of marriageable age" to marry and found a family. The Court considered marital rights under the ACHR to be relevant to the "mechanisms" that States would need to rely on to achieve

[39]Barbados, Dominica, Grenada, and Jamaica.
[40]Those states are Columbia, Argentina, Brazil, Uruguay and Mexico.
[41]Same sex marriage was introduced in Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Ecuador, Mexico, United States and Uruguay. Bolivia introduced registered partnerships only (termed 'free unions').
[42]Advisory Opinion OC-24/17 Requested by Costa Rica, at [198].
[43]Ibid, at [199] and see also [180].
[44]Ibid, at [187].
[45]Ibid, at [192] and see also [225].
[46]Ibid, at [225].

equality in this sphere.[47] The Court took into account a range of international and domestic law. While it referred extensively to Strasbourg, it also took into account national courts, especially progressive judgments in the jurisdictions of the Organisation of American States.[48] The IACtHR placed significant weight upon the American case of *Obergefell*[49] which legalised gay-marriage. It found that "states can adopt diverse types of administrative, judicial and legislative measures to ensure the rights of same-sex couples," but observed that extending already-existing institutions—including marriage—to same-sex couples would be "the most simple and effective way" to ensure the realisation of the protection of economic and other rights of same-sex couples.[50]

Furthermore, the Court found that "there would be no sense in creating an institution that produces the same effects and gives rise to the same rights as marriage but that is not called marriage except to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference […]".[51] Therefore, the recognition of same-sex family/economic rights via registered partnerships only, as accepted by Strasbourg on the basis of consensus analysis, was rejected by the Court.

In coming to this conclusion, the Court explicitly stated that the lack of consensus among the member states did not provide a valid ground for refusing to recognise the equal right to marry under the ACHR.[52] In strong contrast to the stance of the ECtHR it found that the lack of consensus among the states as regards rights of sexual minorities "cannot be considered a valid argument to deny or restrict their human rights, or to reproduce and perpetuate the historical and structural discrimination that these groups or persons have suffered".[53] It held that the controversial status of same-sex marriage in some countries, and the lack of consensus on legal accommodations for same-sex couples could not lead the Court to abstain from taking this decision, since it must only refer to the obligations that States had accepted under the American Convention.[54]

As a result of this judgment, and the subsequent finding of the Costa Rican supreme court which relied upon it, same-sex marriage became legal in Costa Rica in May 2020. The judgment met, however, with significant opposition and even disavowal by the constitutional courts of four ACHR signatories.[55] This important judgment has nevertheless been influential in some states in the Americas[56] – including those that had not signed up to the American Convention, influencing, directly or indirectly, constitutional litigation in certain UK Overseas Territories,

[47]Ibid, at [200].
[48]Ibid, at [213].
[49]*Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.*, 576 US (2015).
[50]Advisory Opinion OC-24/17 Requested by Costa Rica, at [218].
[51]Ibid, at [224].
[52]Ibid, at [83] and [219].
[53]Ibid, at [219].
[54]Ibid.
[55]Peru, Panama, Honduras, Suriname. Honduras: Vallecillo (2022); Panama: Smith (2023); Peru: Dunkelberg (2022); Suriname: Leeuwin (2023).
[56]For example, Ecuador.

themselves connected to the European Human Rights system.[57] This created a conflict between the cautious ECtHR approach set out above, and that of the Inter-American Court.

ECtHR Retarding the Spread of Marital Rights of Same-sex Couples in the Caribbean?

The following litigation illustrates the difference between the approaches of the two Courts in this context. In 2018, two Caymanian applicants challenged the lack of same-sex marriage or recognition of registered partnerships under the Islands' constitutional Bill of Rights.[58] The Bill of Rights is closely based on the ECHR and the applicants relied upon provisions equivalent to Article 8 (section 9(1)), Article 9 (section 10(1)), Article 12 (s14(1)) and Article 14 (section 16(1)).[59]

In the court of first instance the Chief Justice upheld the petitioners' claim. The court found that the refusal to register the marriage engaged the right to respect for private and family life under section 9 and the right to found a family under section 14, on the basis that same-sex couples are capable of enjoying 'family life' and of committing themselves sincerely to a stable, long-term relationship of mutual love and respect.[60] In coming to this conclusion, the court took account of international jurisprudence, placing significant reliance upon the approach of the Inter-American Court of Human Rights in its Advisory opinion to Costa Rica.[61] It also considered a separate issue of particular local significance raised by the applicants: the right to freedom of conscience under section 10 of the Bill of Rights. The petitioners argued that this was engaged by the enactment of a 2008 amendment to the Marriage Law which set out an exclusionary definition of marriage.[62] The court found that this had been enacted on the basis of "the proponents' understanding of the Islands' religious, moral and cultural heritage".[63] It held that the petitioners' inability to marry engaged this right on the basis that the exclusion prevented them from manifesting their belief in the institution of marriage, and that Caymanian law – which identified marriage with opposite-sex couples – amounted to an imposition of religious belief upon them.[64]

Having found these rights to be engaged, the Court considered the question of justification, straightforwardly finding this to be lacking, given the largely procedural defence mounted by the state which did not seek to defend the substantive disparity of treatment between same-sex and opposite-sex couples.[65] In particular, the Court rejected the government's argument, equivalent to that put forward in *Schalk*, that

[57]For example in the Cayman Isles and Bermuda – see discussion below.
[58]*Day v The Governor of the Cayman Islands and others*, Civil Cause nos. 111 & 184 of 2018 (29 March 2019).
[59]The Cayman Islands Constitution Order 2009, SI 2009/1379, Sched 2.
[60]*Day and another v The Governor of the Cayman Islands and another* [2022] UKPC 6 at [226].
[61]Ibid, at [200].
[62]Ibid, at [112]. Marriage Law (2010 Revision), section 2.
[63]*Day and another v The Governor of the Cayman Islands and another* [2022] UKPC 6, at [22].
[64]Ibid, at [131].
[65]Ibid, at [297]-[306].

the right to marry in section 14 of the Bill of Rights, which refers to marriage between men and women of the opposite sex, amounted to a textual commitment to exclusive marriage.[66] The failure of this argument in relation to s14 was similarly fatal to the government's claim that the *lex specialis* doctrine prevented the other enumerated rights in the Cayman Bill of Rights from being engaged where the basis of the claim was access to same-sex marriage.[67] The Chief Justice therefore upheld the petitioners' claim on both counts, finding that formal recognition of the union of same-sex couples was required, and ordered that same-sex marriage should be legalised. This finding was then the subject of an appeal by the deputy registrar and attorney-general.[68]

The Cayman Court of Appeal was influenced by the particular relevance of the ECHR and its associated jurisprudence to the Cayman Isles' constitution.[69] Accepting the government's argument, the Court adopted a more conservative approach to constitutional interpretation than had the Chief Justice, and it criticised the reliance placed in the lower court upon comparative legal material.[70] It found that as a matter of textual analysis, the close relationship between the text of the European Convention and that of the Caymanian constitution, meant that the approach of the Council of Europe institutions, and especially of Strasbourg, must be preferred.[71] It therefore referred at length to the Strasbourg jurisprudence discussed above, and found that neither the right to respect for private and family life nor freedom of religion/conscience could be the basis of introducing an equal right to marry under the Cayman Bill of Rights due to its relationship with the ECHR. It focused instead upon the lack of a right to same-sex marriage under Article 12 of the ECHR, finding support for this position from the lack of European consensus and from the European Court of Human Rights' finding in *Schalk* that the lack of a right to marry in Article 12 precluded finding such a right under Article 8. On this basis the Attorney General's appeal was upheld.

As a result of this finding, the Cayman isles to this day does not recognise gay marriage. The case was appealed to the Privy Council[72] which, in a disappointing judgment, confirmed the approach of the Court of Appeal; thus the cautious approach of the ECtHR rather than that of the bolder IACtHR was taken. The Court of Appeal, however, had declared that the lack of a legislative scheme governing same-sex registered partnerships was unconstitutional and impinged upon the rights of its LGBTQ+ citizens, as in *Oliari*, and called for legislative intervention.[73] Responding to this, the Caymanian government legislated in favour of same-sex civil partnerships

[66]Ibid, at [194] and [272].
[67]Ibid.
[68]*Day and Bodden-Bush v Deputy Registrar of the Cayman Islands and another*, CICA No. 9 of 2019 (7 November 2019).
[69]Ibid, at [41], [98].
[70]Ibid, at [109].
[71]Ibid, at [99].
[72]*Day and another v The Governor of the Cayman Islands and another* [2022] UKPC 6.
[73]*Day and Bodden-Bush v Deputy Registrar of the Cayman Islands and another*, CICA No. 9 of 2019 (7 November 2019) at [116].

in 2020, a development endorsed by the Privy Council.[74] Therefore, while the influence of the EtCHR on *marital* rights was regressive, the incrementalism shown by the jurisprudence discussed above, did contribute to securing respect for same-sex registered unions, an advance that should not be dismissed. Nevertheless, the reliance upon the ECHR jurisprudence, as interpreted by a conservative UK judiciary, to restrict a domestic court advancing equal *marriage* rights can arguably be seen as contrary to the rationale of the Convention to secure *universal* enjoyment of fundamental rights.[75] This is particularly so as regards the issue of respect for freedom of conscience and belief, raised in the litigation, which is of acute import to the Cayman islands, given their history of cultural allegiance to Christianity. In other words, it had been claimed by the applicants – but not accepted by the Court of Appeal – that a belief in equal marriage should have the same status under section 10 of the Cayman Bill of Rights as a belief in different-sex marriage.

A similar situation occurred in Bermuda: same-sex marriage was legalised as a result of a first instance ruling, *Godwin and DeRoche v Registrar-General*,[76] on the basis that the lack of availability of such marriage was contrary to the protection against unlawful discrimination on grounds of sexual orientation and religion or belief in relation to provision of a service contrary to section 2(2)(a) and section 5 of the Human Rights Act 1981. The legislature effectively overturned this decision, passing legislation that enshrined an exclusive conception of marriage – one restricted to different-sex couples – and which disapplied the Human Rights Act 1981.[77] This legislation was, in turn, declared unconstitutional in a decision of the appellate court in *Ferguson v Attorney General*, on the basis that the enactment of the law violated the right to freedom of conscience in the Bermudan Constitution (section 8).[78] As a result, in contrast to the Caymanian litigation, same-sex marriage was legalised by Bermudan courts. The Bermudan constitution, unlike the Caymanian Bill of Rights, or the ECHR, does not contain a right to marry. The Bermudan Court held that in light of the lack of a *lex specialis* provision confining the Bermudan constitution to an exclusionary interpretation of marriage, a right to same-sex marriage could be established under section 8.[79] The Bermudan Court considered itself able to reach that conclusion, in contrast to the findings of the Caymanian Court of Appeal in relation to section 10 of the Cayman Bill of Rights, since that instrument did include a right to marry – deemed to operate as a *lex specialis* provision. Having come to this conclusion, the Bermudan Court found, on a similar basis to the Caymanian first instance decision, that the lack of substantive justification for discrimination offered by the government meant that a violation of the

[74]*Day and another v The Governor of the Cayman Islands and another* [2022] UKPC 6 at [2]. Cayman Islands Civil Partnership Law (2020).
[75]ECHR, Preamble and Article 1.
[76]*Godwin and DeRoche v Registrar General and others* [2017] SC (Bda) Civ (5 May 2017).
[77]*Ferguson et al. v Attorney General (Bermuda)* [2018] SC (Bda) 45 Civ (6 June 2018). Domestic Partnership Act 2018, section 53.
[78]*Ferguson et al. v Attorney General (Bermuda)* [2018] SC (Bda) 45 Civ (6 June 2018). See also: *Attorney General (Bermuda) v Ferguson and others* [2022] UKPC 5 at [24]; Bermuda Constitution Order 1968, SI 1968/182 Schedule 2. The applicants' separate anti-discrimination argument under s12 of the Bermudan Constitution was also accepted by the appellate court.
[79]*Ferguson et al. v Attorney General (Bermuda)* [2018] SC (Bda) 45 Civ (6 June 2018), at [111].

applicants' rights to freedom of conscience was established.[80] It is important to note that the Inter-American Court of Human Rights' interpretation of the American Convention in the advisory opinion issued by the Court to Costa Rica[81] was influential to the Caymanian finding, which was in turn persuasive to the Bermudan Court of Appeal. However, the Bermudan Government was granted permission to appeal to the UK Privy Council.

The Privy Council disagreed with the two Bermudan courts. Echoing the stance of the Caymanian Appellate court discussed above, the Privy Council held that the domestic courts must follow Strasbourg jurisprudence,[82] briefly dismissing the relevance of the Inter-American Court of Human Rights' Advisory Opinion. The Privy Council rejected the Opinion as even persuasive authority for the interpretation of national Constitutions or International treaties concerning fundamental rights, referring to a lack of 'international consensus' on the issue of the right to same sex marriage.[83] The Privy Council was therefore critical of the Bermudan court's acceptance of the petitioner's claim that legally endorsed marriage could be required as a manifestation of belief.[84]

Given that the focus of the Bermudan case was on s8 of the Bermudan constitution – the right to freedom of conscience – the Privy Council found that Strasbourg had not upheld violations of Article 9 ECHR (providing the similar right to freedom of thought, conscience and religion) by applicants complaining about the lack of legal accommodation for religious marriage.[85] It pointed out that the focus of Strasbourg jurisprudence on formalisations of relationships for same-sex couples, as discussed previously, has been on Articles 8, 12 and 14.[86] The petitioners' claim was characterised as being beyond the ambit of section 8 of the Bermudan constitution as an impermissible claim that domestic law should be altered to reflect their belief in lawful same-sex marriage.[87] The Privy Council further held that even if such a belief could fall within section 8 on that basis, the interpretation should follow the Strasbourg jurisprudence.[88] Therefore, the section should be read in light of Article 12, so that even if a right to marriage could be established under section 8, a right to *same-sex* marriage could not be.[89] This was considered to be the corollary argument to the *lex specialis* argument in relation to Article 8 of ECHR, as it was in the Caymanian Court of Appeal, and it was also similar to its findings in the *Bodden-Bush and Day* case.

Lord Sales, in a powerful dissent, found that the right to marry could be found within the right to freedom of conscience in the specific context of the Bermudan constitution, taking into account the particular Bermudan cultural history.[90] His

[80]Ibid, at [93].
[81]Advisory Opinion OC-24/17 Requested by Costa Rica.
[82]*Attorney General (Bermuda) v Ferguson and others* [2022] UKPC 5, at [90].
[83]Ibid, at [93].
[84]Ibid, at [80] and [88].
[85]See *Eweida v United Kingdom* (2013) 57 EHRR 8, para 81.
[86]*Attorney General (Bermuda) v Ferguson and others* [2022] UKPC 5, at [92].
[87]Ibid, at [78] and [80].
[88]Ibid, at [91].
[89]Ibid, at [92].
[90]Ibid, at [99].

Lordship drew a distinction between the Caymanian context in which the Bill of Rights closely followed the ECHR, and the Bermudan context in which the Constitution contained no similar *lex specialis* provision, thereby arguably restricting the former to an exclusively opposite-sex conception of a marital rights derived from the right to freedom of conscience and belief.[91] Freed from that textual restraint, his Lordship agreed with the substance of the Bermudan appellate decision, arguing that support for its stance could be found within the ECtHR jurisprudence, the relevance of which he accepted. Disagreeing with the majority's finding in relation to the issue of manifestation of belief, his Lordship referred to consistent Strasbourg jurisprudence on the issue of conscientious objection, including case-law specifically concerning same sex marriage.[92] Lord Sales found, quoting Strasbourg Court, that "[b]earing witness in words and deed is bound up with the existence of religious convictions"[93] and that, having endorsed the beliefs in religious opposite-sex marriages with legal effect, Bermuda's failure to endorse same-sex marriages in a like manner would amount to an interference with the right under Article 9 (partly echoed in section 8 of the Bermudan constitution).[94]

In relation to the issue of justification, Lord Sales echoed both the Caribbean courts and the IACtHR, in finding that no substantive justification for the difference in treatment had been established by the government; nor was it likely that any could be sustained that would be acceptable to a court.[95] Lord Sales also emphasised, in agreement with the IACtHR, that the historic stigma associated with same-sex attraction increased the severity of the interference with the enjoyment of the right of freedom of conscience revealed by the petitioners' case.[96] In his view, the particular Bermudan constitution, interpreted in light of the Article 9 of ECHR guarantee that it reflects, supported the approach of the Bermudan courts on the issue.

This decision of the Privy Council clearly illustrates the divergence between IACtHR and the ECtHR on the issue of formalisations of relationship status in respect of same-sex unions. As discussed, the American Convention can be found to support the introduction of gay marriage: that cannot be said of the ECHR in light of the Strasbourg Court's findings on gay marriage in *Schalk*,[97] later reaffirmed in *Fedotova*.[98] Thus the findings based on the matter of consensus analysis in *Schalk* have been relied on to deny equal marriage even in the face of a contrary ruling of the appellate Court in Bermuda, based on the advisory opinion issued by the IACtHR to Costa Rica.[99]

[91]Ibid, at [165].
[92]Ibid, at [174]. *Eweida v United Kingdom* (2013) 57 EHRR 8, para 81.
[93]*Attorney General (Bermuda) v Ferguson and others* [2022] UKPC 5, at [177].
[94]Ibid, at [181].
[95]Ibid, at [204]-[207].
[96]Ibid, at [95].
[97]*Shalk and Kopf v Austria* (2011) 53 EHRR 20.
[98]*Fedotova v Russia*, nos. 40792/10, 30538/14 and 43439/14 ECtHR [GC] (17 January 2023).
[99]Advisory Opinion OC-24/17 Requested by Costa Rica.

Conclusions

The contrast drawn here between the stances taken by the ECtHR and IACtHR towards consensus analysis speaks in part to structural differences between the two regional human rights treaties, but also to the unprincipled nature of reliance on such analysis, enabling discrimination on grounds of sexual orientation, as occurred as a result of the Bermudan and Caymanian Privy Council decisions. The matter of introducing a right to have same-sex unions formally recognised is clearly highly divisive in a number of Eastern-Central European states, as it is in the majority of Caribbean states, including many signatories of the IACtHR, due to the cultural, religious and social sensitivities raised by the issue. The Strasbourg Court's finding that there is a right to a same-sex registered partnership under Article 8 is based, as discussed, on eventually finding a consensus on the matter in the contracting states. But equally its refusal to accept that a right to a same-sex marriage arises under Article 12, and its finding that the protections offered by such partnerships need be no more than merely 'adequate', are based on finding a *lack* of consensus on those matters. That stance means that discrimination on grounds of sexual orientation has found a place under the ECHR, on the basis that it is culturally accepted in a number of contracting states, especially those in which socially conservative religious groups are dominant. Although that can readily be said of states under the jurisdiction of the Inter-American Court of Human Rights, it has not allowed such discrimination to influence its findings on this matter, as discussed above. Despite this, Strasbourg Court has significantly contributed to the recognition of the rights of same-sex couples within Europe *and* in the international human rights community in general, including the ACHR. The IACtHR's Advisory Opinion, while securing extremely rapid progress in certain states, such as Costa Rica, has been rejected by other jurisdictions. That outcome might be seen by some as justifying the cautious approach of the ECtHR, which has avoided a possible undermining of its authority which might have occurred had it evinced a commitment to finding a right to same-sex marriage.

The credibility which the Strasbourg Court's institutional structures, breadth of jurisprudence, and almost constitutional court-like status has achieved in many of the member states, have enabled it to achieve significant influence over legal developments aiding the widespread acceptance of same-sex registered partnerships. Nevertheless, while recognising that the two Courts are not in the same position in terms of their authority and influence, this article concludes that reliance on consensus analysis in this context has had a detrimental impact on the Strasbourg jurisprudence in terms of upholding the principle of non-discrimination, an impact that can be traced to discriminatory stances taken in a number of the ECHR-contracting states towards same-sex unions.

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ECHR (European Convention on Human Rights)

Article 1: Obligation to Respect Human Rights
Article 8: Right to Respect for Private and Family Life
Article 9: Freedom of Thought, Conscience and Religion
Article 12: Right to Marry
Article 46: Binding Force and Execution of Judgments

ACHR (American Convention on Human Rights)

Article 1: Obligation to Respect Rights
Article 11: Right to Privacy
Article 24: Right to Equal Protection

Cayman Isles

The Cayman Islands Constitution Order 2009, SI 2009/1379.
Schedule 2: Bill of Rights, Freedoms and Responsibilities
Civil Partnership Law (2020)
Marriage Law (2010 Revision)
Section 2: Definitions

Bermuda

Bermuda Constitution Order 1968, SI 1968/182
Schedule 2: The Constitution of Bermuda
Domestic Partnership Act 2018
Section 53: Clarification of the Law of Marriage

Human Rights Act 1981
Section 2: Interpretation
Section 5: Provision of Goods, Facilities and Services

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Bayatyan v Armenia (2012) 54 EHRR 15
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Eweida v United Kingdom (2013) 57 EHRR 8
Fedotova v Russia, nos. 40792/10, 30538/14 and 43439/14 ECtHR [GC] (17 January 2023)
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Attorney General (Bermuda) v Ferguson and others [2022] UKPC 5
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IACtHR (Inter-American Court of Human Rights)

Atala Riffo and daughters v Chile, IACtHR, Series C, 239 (2012)
Duque v Colombia, IACtHR, Series C, 310 (2016)

Bermuda

Ferguson et al. v Attorney General (Bermuda) [2018] SC (Bda) 45 Civ
Godwin and DeRoche v Registrar General and others [2017] SC (Bda) 75 Civ

Cayman Islands

Day v The Governor of the Cayman Islands and others, Civil Cause nos. 111 & 184 of 2018
Day and Bodden-Bush v Deputy Registrar of the Cayman Islands and another, CICA No. 9 of 2019 (7 November 2019)

USA

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