



Equal marriage rights and the European Courts

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Abstract

The legalisation of same-sex marriage has taken off globally in the last thirty years, especially in Europe; thirty-three countries around the world, nineteen of which are in Europe, have opened up civil marriage to same-sex couples. The Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) have also had their share of equal marriage rights cases before them to decide upon. This contribution discusses the role the two European courts have played in this field and how their case law has developed, in somewhat parallel stages, throughout the years.

Keywords Equal marriage rights · Same-sex marriage · LGBTQ+ rights · Court of Justice of the European Union · European Court of Human Rights

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1 Introduction¹

On 16 June 2022, the Constitutional Court of Slovenia ruled that the ban on same-sex marriage in the Family Code violated the Slovenian Constitution.² It furthermore ordered the Parliament to amend the legislation within six months. However, because the two judgments took effect immediately, this resulted in the legalisation of same-sex marriage in Slovenia from that day onwards. Slovenia is now the 14th member state of the European Union (EU) (out of 27) and the 18th (out of 46) of the Council of Europe (CoE) where same-sex marriage is allowed. Furthermore, legislation adopted in Andorra will take effect in February 2023, making it the 19th CoE member state where same-sex couples have the same rights and status in marriage as different-sex couples do.

The possibility for same-sex couples to get married is quite a ‘recent’ one as it was only 2001 when the Netherlands became the first country in the world to open up civil marriage to same-sex couples. In the 21 years that followed, 32 other countries, spanning from Ecuador to Australia and from Norway to South-Africa, joined. In Europe, most countries achieved marriage equality³ through legislative processes, though litigation and referenda also took place. The Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) have also had their share of equal marriage rights⁴ cases. Inevitably, cases were brought before the two courts by applicants claiming that their rights under EU law and the European Convention on Human Rights (ECHR)⁵ were violated. This contribution discusses the role the two courts have played in this field and how their case law has developed, in somewhat parallel stages, throughout the years.

2 The case law of the ECtHR⁶

Both the CoE as well as the predecessors of what is now the European Union (EU), were established in the wake of World War II. Unsurprisingly, neither the ECHR, nor the founding Treaties or the *acquis communautaire* contained any references to the protection of the rights of lesbian, gay, bi, trans or queer (LGBTQ+⁷) individuals, let

¹This contribution results from my presentation at the seminar ‘Current Reflections on EU Anti-Discrimination Law’ organised by ERA and held on 9-10.6.2022. I would like to thank the organisers for extending the invitation to me and am deeply grateful to them and all of the participants for their constructive and valuable comments and suggestions.

²The decision was handed down on 16 June 2022 in two judgments of the Constitutional Court, see case no. U-I-486/20, *Up-572/18, A. B. in C. Č., oba D.*, ECLI:SI:USRS:2022:U.I.486.20 and case no. U-I-91/21, *Up-675/19, A. B. in C. Č., oba D.*, ECLI:SI:USRS:2022:U.I.91.21.

³This contribution speaks of ‘same-sex marriage’ and ‘marriage equality’ interchangeably.

⁴‘Equal marriage rights’ is used to indicate various rights and benefits that are associated with the concept of marriage, the legal recognition of relationships, and their access for same-sex couples.

⁵Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

⁶For more information on the equal marriage case law of the ECtHR, see *Shahid* [9] and *Scherpe* [8].

⁷‘LGBTQ+’ is an abbreviation used to indicate individuals that identify with various kinds of gender, sexual and romantic identities and attractions, also commonly known as the ‘queer’ community. The ‘+’ indicates that the abbreviation is not exhaustive.

alone the recognition of same-sex relationships. In fact, marital status was a competence that was historically left to the jurisdiction of the member states of the EU and the CoE themselves. Hence, states in Europe individually decided who was able to marry, under which conditions, and which types of relationships outside of marriage deserved to also be legally protected.⁸

The earliest, more largescale, forms of LGBTQ+ activism in Europe started to emerge in the 1950's,⁹ which subsequently led the LGBTQ+ community to start to organise itself more professionally.¹⁰ The first big and noteworthy LGBTQ+ rights related case was that of *Dudgeon v. UK* in which the ECtHR decided that a law in Northern Ireland prohibiting and regulating male intimacy amounted to an unjustifiable interference with Art. 8 ECHR and the right to *private* life.¹¹ After the *Dudgeon* case and the decriminalisation of homosexuality in many European countries, LGBTQ+ individuals were now free to live their lives and have same-sex relationships in the open. Applicants subsequently also started more court cases to have further rights protected and enforced.¹² As Robert Wintemute has indicated in his research, the emphasis from 'basic rights' started to shift more towards 'sex rights', and later to 'love rights'.¹³

2.1 The first stage of development; testing the 'private life' waters

Yet, as LGBTQ+ rights were not part of the general human rights discourse in Europe, the outcome of the initial equal marriage rights cases was abysmal for same-sex couples.¹⁴ Consider the case of *X&Y*¹⁵ in which the ECtHR decided that the applicants' same-sex relationship and their deportation did not fall within the scope of the right to respect for family life ensured by Art. 8 ECHR. Moreover, the Commission found that even if the relationship of a same-sex couple would fall within the scope of the right to respect for *private* life, it would not within that of *family* life. In the case of *W.J. & D.P.*,¹⁶ the Commission took it a step further and proclaimed that heterosexuals unmarried couples living together as husband and wife can be assimilated to a family, and that these relationships deserve special protection in society. The differential treatment of same-sex couples in stable relationships in comparison to somebody in the same position whose partner is of the different-sex was there-

⁸Think here for instance of civil unions, registered or domestic partnerships, or co-habitation agreements.

⁹See for example the establishment of the International Committee for Sexual Equality (ICSE), which connected existing gay groups in different European countries with each other, *Rupp* [7], pp. 29-30.

¹⁰*Ayoub & Paternotte* [1].

¹¹*Dudgeon v. The United Kingdom*, ECHR (1981), No. 7525/76. Though Art. 8 ECHR encompassed more than just the right to respect for private life; it also contained the right to respect for family life.

¹²See for a great overview of LGBTQ+ related cases before the ECtHR Johnson's book '*Homosexuality and the European Court of Human Rights*': *Johnson* [3].

¹³*Wintemute* [15].

¹⁴*Fichera* [2], pp. 389-390.

¹⁵*X and Y*, European Commission of Human Rights (1983), No. 9369/81.

¹⁶*W.J. & D.P.*, European Commission of Human Rights (1987), No. 12513/86.

fore allowed.¹⁷ In the case of *S v. United Kingdom*,¹⁸ it was held that the applicant's same-sex relationship with her deceased partner also fell outside the scope of Art. 8 insofar as it protected the right to respect for family life. An eviction thus did not amount to discrimination.¹⁹

2.2 The second stage of development; a reinterpretation of 'family' and 'marriage'

It thus became clear that in order for same-sex couples to obtain the protection they sought after, their relationships would need to be considered falling within the scope of 'family life'. A shift in the reasoning of the concepts of 'family' and 'marriage' was consequently needed. Accordingly, a second stage of equal marriage rights cases was heralded in the years thereafter with cases being decided on the legal recognition of same-sex relationships (be it civil unions, registered partnerships or marriage) or relationships in which one or more trans individuals were involved.²⁰ One line in the reinterpretation was to be seen in the cases of *Karner*²¹ and *Kozak*.²² Both cases concerned the succession to tenancy of a same-sex partner after the passing of the late partner and involved the invocation of Arts. 8 and 14 ECHR (on the prohibition of discrimination of persons in similar situations). The ECtHR was asked to assess *Karner*'s differential treatment in comparison to surviving partners of the different-sex. The Court found that Austria did not offer convincing and weighty reasons justifying the narrow interpretation of the Austrian provision that prevented a surviving same-sex partner from relying on it.²³ In *Kozak*, the Court called a succession of tenancy by a same-sex partner a 'de facto marital cohabitation'²⁴ and established that under Art. 8 ECHR, respect for family life must also consider developments in society and changes in the perception of issues, including the changing way of leading and living one's family or private life. A full exclusion of same-sex partners from tenancy-succession rights by a state would not be proportionate to protecting the traditional family unit,²⁵ especially if there were also no convincing or compelling reasons put forward that would justify the differential treatment. In both cases, the Court established a violation of Art. 14 in conjunction with Art. 8 ECHR.

Another line of cases was to be seen in the Court's case law on Art. 12 ECHR on the right to marry and to found a family. One of the first times the Court elaborated on the concept of marriage was in the case of *Rees*,²⁶ which concerned an individual that

¹⁷*Id.*, para. 5.

¹⁸*S. v. The United Kingdom*, European Commission of Human Rights (1986), No. 11716/85.

¹⁹*Id.*, paras. 3-7.

²⁰*Fichera* [2], pp. 389-391.

²¹*Karner v. Austria*, ECHR (2003), No. 40016/98.

²²*Kozak v. Poland*, ECHR (2010), No. 13102/02.

²³*Karner*, *supra* note 21, paras. 38-42.

²⁴*Kozak*, *supra* note 22 paras. 95-96.

²⁵*Id.*, paras. 98-99.

²⁶*Rees v. The United Kingdom*, ECHR (1986), No. 9532/81. Also see *W. v. The United Kingdom*, European Commission of Human Rights (1989), No. 11095/84.

was born female and later in life transitioned to male. The Court found that the right to marry as understood by (the wording of) Art. 12 ECHR referred to the traditional marriage between persons of the different, biological, sex, and explained that the provision mainly concerned to protect marriage as the basis of the family. Because Rees did not meet this notion, there was no breach of Art. 12 ECHR in the inability.²⁷ In *C. and L.M.*,²⁸ the European Commission of Human Rights repeated the Court's views in *Rees* and found that a same-sex relationship between a female trans individual and their lesbian partner did not give rise to a right to marry and found a family within the meaning of Art. 12 ECHR. A deportation of the partner would therefore not violate the provision.²⁹ In *Cossey*,³⁰ the Court continued with the use of biological criteria for determining a person's sex for the purposes of marriage. Considering *Cossey* was born male and later transitioned to female, there was no violation of Art. 12 ECHR in not being able to marry. This view was repeated in *Sheffield and Horsham*.³¹ The Court's reasoning finally flipped in the *Goodwin* case.³² It found that since the adoption of the ECHR, there had been major social changes in the institution of marriage as well as dramatic changes in medicine and science in the field of transsexuality. For this reason, solely biological factors could not any longer be decisive in denying legal gender recognition of post-operative trans individuals and that other factors (such as the views of medical professions and health authorities) were also important. The Court also noted that the wording of the recently adopted Art. 9 of Charter of Fundamental Rights of the European Union (EU Charter)³³ perhaps for this reason deliberately departed from the wording of Art. 12 ECHR that explicitly speaks of 'men and women'.³⁴

The *Goodwin* case was revolutionary for trans individuals wanting to marry. Ever since, same-sex couples have tried to persuade the Court to change its reasoning on Art. 12 ECHR for them as well, yet to no avail,³⁵ because marriage carries a 'special status' in Strasbourg.³⁶ In 2010, the Court delivered its decision in the *Schalk & Kopf*³⁷ case which concerned an Austrian same-sex couple that wanted to get

²⁷*Id.*, paras. 48-51.

²⁸*C. and L.M. v. The United Kingdom*, European Commission of Human Rights (1989), No. 14753/89.

²⁹*Id.*, para. 3.

³⁰*Cossey v. The United Kingdom*, ECHR (1990), No. 10843/84.

³¹*Sheffield and Horsham v. The United Kingdom*, ECHR (1998), Nos. 22985/93 and 23390/94, paras. 62-70.

³²*Christine Goodwin v. The United Kingdom*, ECHR (2002), No. 28957/95.

³³Charter of Fundamental Rights of the European Union [2012], OJ C 326/02.

³⁴*Goodwin*, *supra* note 32, paras. 58 and 97-100.

³⁵Also see the cases *Parry v. The United Kingdom*, ECHR (2006), No. 42971/05 and *R. and F. v. The United Kingdom*, ECHR (2006), No. 35748/05.

³⁶*Johnson* [3] and *Koffeman* [6]. This was even in the case of tax benefits only available to married couples in jurisdictions where same-sex couples could not marry, nor enter into civil unions in order to obtain similar rights, see '*Courten v. United Kingdom*', ECHR (2008), No. 4479/06. Something similar was decided regarding survivor's pension benefits, see *Manenc v. France*, ECHR (2010), No. 66686/09, and the possibility of second-parent adoption, see *Gas and Dubois v. France*, ECHR (2012), No. 25951/07 and *X and Others v. Austria*, ECHR (2013), No. 19010/07.

³⁷*Schalk and Kopf v. Austria*, ECHR (2010), No. 30141/04.

married. The Court started its analysis of Art. 12 ECHR by establishing that its wording was chosen deliberately, especially considering the 1950's context in which the Convention was adopted and when marriage in the traditional sense was understood to be a union between a man and a woman.³⁸ The applicants, however, argued that the Convention is a living instrument and, as established in the case law of the Court,³⁹ should be interpreted to present-day conditions. The Court nevertheless decided not to side with the applicants and opted to interpret marriage as in the 1950's; mind you, in a decision delivered 60 years after the Convention's adoption. It furthermore held that, at present, there was no consensus in Europe on same-sex marriage (only six European countries had recognized same-sex marriage thus far).⁴⁰ The Court went on to emphasize that the situation differed from that of *Goodwin*, because that concerned the marriage of persons who are of different gender, openly admitting to gender discriminating same-sex couples (alongside the respondent government), yet not doing anything with it.⁴¹ Considering that Art. 9 of the EU Charter had in the meantime been adopted and which contained more gender-neutral wording, the Court considered that Art. 12 ECHR could in the future be interpreted not being limited to different-sex couples.⁴² For the time being, it decided to refer to the member states and their competence to regulate the matter; Art. 12 ECHR was thus not violated by the exclusion of the possibility for same-sex couples to marry in Austria.

The decision in *Schalk & Kopf* was obviously met with mixed reactions. Same-sex marriage opponents were happy. Same-sex proponents were stupefied by the reasoning. Two points were important in this matter. First, at the time the applicants lodged an application, they could not enter into a registered partnership or a marriage as this possibility did not exist for them. Yet, the Court still declined to examine whether the lack of legal recognition would constitute a violation of Art. 14 ECHR in conjunction with Art. 8 ECHR on the ground that entering into a registered partnership was now possible by the applicants.⁴³ Second, because Austria did not provide any justifications as to why there was a differential treatment of same-sex couples on the basis of sexual orientation in comparison to different-sex couples in relevant similar situations, the Court should not have accepted Austria's reliance on its margin of appreciation.⁴⁴ This scope is only opened after a justification is provided by a state.

Though the reasoning in *Schalk & Kopf* was flawed, what the Court had done, is laid down a framework on how the concept of 'marriage' is supposed to be interpreted in the case of same-sex couples. Ever since, it has referred back to this framework in subsequent cases on equal marriage rights. Where the Court could not provide same-sex couples the right to marry under Art. 12 ECHR, it decided to double down on the need for them to obtain some form of legal recognition that would provide similar

³⁸*Id.*, paras. 54-55.

³⁹See *E.B. v. France*, ECHR (2008), No. 43546/02, para. 92, and *Goodwin*, *supra* note 32, paras. 74-75.

⁴⁰*Schalk and Kopf*, *supra* note 37, paras. 27 and 54.

⁴¹*Id.*, para. 59.

⁴²*Id.*, paras. 60-61.

⁴³*Id.*, paras. 102-103.

⁴⁴*Id.*, paras. 80 and 97-100. Also see point 8 of the Joint Dissenting Opinion of Judges Rozakis, Spielmann and Jebens to the *Schalk and Kopf* case.

protection. We see the reference to *Schalk & Kopf* come back in *Vallianatos*,⁴⁵ a case on a Greek law that excluded same-sex couples from entering into civil unions. The Court labelled this practice discriminatory and as already established in *Schalk & Kopf*, stressed that same-sex couples also had the need for legal recognition of their relationship.⁴⁶ In addition, Greece had provided no compelling or weighty reasons to justify the differential treatment. The Court therefore established that Greece had violated Art. 14 ECHR in conjunction with Art. 8 ECHR by not offering same-sex couples the possibility to conclude a civil union. In *Hämäläinen*, on a Finnish law that required marriages of trans individuals to be transformed into registered partnerships if the trans individual wanted their new gender officially registered in governmental documents, the Court repeated its views in *Schalk and Kopf* and added that when there is no consensus on a matter that raises sensitive ethical or moral issues, the breadth of the margin of appreciation for states is considered to be wide.⁴⁷ The Court concluded that there is no obligation for states to allow same-sex couples the possibility to marry.⁴⁸ A year later, the Court delivered its decision in *Oliari*,⁴⁹ on Italy's lack of legal recognition of same-sex relationships.⁵⁰ A month before, the United States Supreme Court (SCOTUS) had delivered its ground-breaking decision in *Obergefell*, instantly legalizing same-sex marriage in all fifty US states.⁵¹ The ECtHR found the decision by its American counterpart to be of interest to the *Oliari* case as well. In contrast to its own decisions earlier, the Court found that there was an emerging consensus in Europe and elsewhere in the legal recognition of same-sex relationships, a 'continuing international trend' as it were, that it suddenly could not ignore anymore.⁵² In addition, the fact that some of the highest judicial courts in the country had called for legal recognition of same-sex relationships and that official surveys showed high amounts of acceptance of same-sex relations by the Italian population, weighed heavy for the Court.⁵³ Nevertheless, the ECtHR still held that Art. 12 ECHR creates no obligation to open up marriage to same-sex couples. It does however find that because the Italian government did not provide any form of legal recognition for same-sex relationships, it overstepped its margin of appreciation. Accordingly, Art. 8 ECHR is violated and Italy is obliged to offer some form of legal recognition to same-sex couples.⁵⁴ As a result, Italy legalizes civil unions for same-sex couples in 2016. In that same year, the Court reiterates its views of *Schalk and Kopf*, *Hämäläinen* and *Oliari* on the inapplicability of Art. 12 ECHR on same-sex marriage in *Chapin and*

⁴⁵ *Vallianatos and Others v. Greece*, ECHR (2013), Nos. 29381/09 and 32684/09.

⁴⁶ *Id.*, paras. 79-81.

⁴⁷ *Hämäläinen v. Finland*, ECHR (2014), No. 37359/09, para. 75.

⁴⁸ *Id.*, para. 96.

⁴⁹ *Oliari and Others v. Italy*, ECHR (2015), Nos. 18766/11 and 36030/11.

⁵⁰ *Tryfonidou* [11].

⁵¹ *Id.*, paras. 64-65. Also see *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁵² *Oliari*, *supra* note 49, paras. 134 and 178.

⁵³ *Id.*, paras. 180-181.

⁵⁴ The Court decides not to look into the violation of Art. 14 in conjunction with Art. 8 ECHR, see para. 188.

*Charpentier*⁵⁵ and states that there are no reasons to conclude differently, considering little time has passed between the previous judgments and the present case.⁵⁶

2.3 The third stage of development; colouring outside the boxes?

The equal marriage rights case law of the Court thereafter seems to indicate the development of a third stage or phase with cases such as *Pajić*,⁵⁷ *Taddeucci and McCall*,⁵⁸ *Orlandi*,⁵⁹ and *Fedetova*.⁶⁰

Pajić concerned the Croatian refusal of a residence permit on the grounds of family reunification with her same-sex partner. The Court explained that gender identification, sexual orientation and sexual life fell within the scope of private life as understood by Art. 8 ECHR. It had long indicated that same-sex relationships did not fall under ‘family life’, but that a rapid evolution of social attitudes towards same-sex couples has taken place in many member states. The relationship of a cohabiting same-sex couple living in a stable *de facto* partnership is now considered to fall within the notion of family life.⁶¹ The Court repeats its views in *Karner* that differential treatment on the basis of sexual orientation warrants particularly convincing and weighty reasons and that the margin of appreciation for the state here is narrow.⁶² By reserving residence permits on the grounds of family reunification to different-sex couples, the state allowed differential treatment on the basis of sexual orientation⁶³ and offered no justifications. This resulted in a violation of Art. 14 ECHR in conjunction with Art. 8 ECHR. *Taddeucci and McCall* also concerned a refusal of a residence permit on grounds of family reasons. Here the Court established that the unmarried same-sex couple was in a different situation than unmarried different-sex couples (because the former had no form of legal recognition of the relationship, while the latter had the opportunity to get married but didn’t), but was treated similarly as regards the refusal.⁶⁴ This similar treatment was in violation of Art. 8 ECHR and of Art. 14 ECHR in conjunction with Art. 8 ECHR. The *Orlandi* case was on the rejection of the registration of a legally concluded same-sex marriage in a different member state. Since civil unions were legalised after *Oliari* in 2016, the case concerned the impossibility of registering foreign concluded same-sex marriages in Italy before this time. The Court’s conclusion in *Orlandi* was that this lacuna without a proper justification put forward violated Art. 8 ECHR. The *Fedetova* case partly resembled the line of

⁵⁵ *Chapin and Charpentier v. France*, ECHR (2016), No. 40183/07.

⁵⁶ *Id.*, para. 36-39.

⁵⁷ *Pajić v. Croatia*, ECHR (2016), No. 68453/13.

⁵⁸ *Taddeucci and McCall v. Italy*, ECHR (2016), No. 51362/09.

⁵⁹ *Orlandi and Others v. Italy*, ECHR (2017), No. 26431/12.

⁶⁰ *Fedetova and Others v. Russia*, ECHR (2021), Nos. 40792/10, 30538/14, and 43439/14. This Third Chamber decision was upheld by the Grand Chamber of the Court, see *Fedetova and Others v. Russia*, ECHR (2023), Nos. 40792/10, 30538/14, and 43439/14.

⁶¹ *Pajić*, *supra* note 57, paras. 61-68.

⁶² *Id.*, para. 59. Also see *Karner*, *supra* note 21, paras. 37 and 42.

⁶³ *Pajić*, *supra* note 57, paras. 69-76.

⁶⁴ *Taddeucci and McCall*, *supra* note 58, paras. 81-85.

reasoning in *Schalk and Kopf*, *Hämäläinen*, *Oliari* and *Chapin and Charpentier*, yet partly diverged due to the emphasis of the Court on the striking of a balance between the social reality of the same-sex applicants on the one hand (the interests of the individuals), and Russian law and society that did not offer any form of legal recognition of their relationships on the other hand (the interests of the public).⁶⁵ In essence, The Court also diverged from the *Oliari* case by not accepting the Russian argument of the public disapproval of LGBTQ+ individuals and same-sex couples in public surveys;⁶⁶ the Court emphasizes that there is a difference between when such data is used to enlarge the scope of the Convention in comparison when it is used to deny fundamental rights. Because there is no valid justification put forward for not legally recognizing the same-sex relationships in the case at hand, there was no fair balance struck between the aforementioned interest. Accordingly, Art. 8 ECHR has been violated. Roughly seven months after, Russia decided to leave the CoE before it was expelled over its invasion in Ukraine in February of 2022.

At present at the beginning of 2023, there are currently 19 members of CoE that have legalized same-sex marriage. It will be interesting to see what will happen with the Court's European consensus and margin of appreciation-reasoning when the next equal marriage rights cases invoking Art. 8 ECHR, 12 ECHR and 14 ECHR take place after the 24th member opens civil marriage up to same-sex couples.

3 The case law of the CJEU

The CJEU has historically always been considered to being a market 'integration' court more than a human rights court, because of its focus on furthering the EU's goals of economic integration between its member states.⁶⁷ The role of the Court has been to overlook the observance of EU law in the interpretation and application of the Treaties.⁶⁸ As the EU has evolved throughout the years with more member states joining and its competences changing with each Treaty amendment, or the adoption of secondary legislation which provide further clarity on the decision-making processes, the Court has evolved along in its reasoning and provided its insights also on fundamental rights of its citizens. The development of the equal marriage rights case law before the CJEU can therefore be considered to being more dynamic than that of the ECtHR, due to the changing nature of the EU and EU law.

3.1 The first stage of development; incomparability

Similar to the ECtHR, the initial case law of the CJEU in the field of LGBTQ+ rights was dreadful.⁶⁹ Prime examples are the *Grant*⁷⁰ and *D and Sweden*⁷¹ cases. *Grant*

⁶⁵ *Fedetova*, *supra* note 60, paras. 49-50.

⁶⁶ *Id.*, para. 52.

⁶⁷ *Van der Vleuten* [13], p. 119.

⁶⁸ See Art. 19 of the Consolidated Version of the Treaty on European Union [2016] OJ C 202/13.

⁶⁹ *Kochenov* [5].

⁷⁰ Case C-249/96 *Grant*, EU:C:1998:63.

⁷¹ Joined Cases C-122/99 P and C-125/99 P, *D and Sweden v. Council of the European Union*, EU:C:2001:304.

concerned an employee of South West Trains that was denied travel concessions for her same-sex partner on the basis that unmarried partners were only eligible for such funds if they were of the different sex. The Southampton Industrial Tribunal asked the Court of Justice (Court) for a preliminary reference on whether Grant was discriminated on the basis of sex, considering sexual orientation was not a protected ground in EU law. The Court answered negative, holding that the grant application was open to both men and women and therefore did not constitute discrimination on the basis of sex prohibited by Art. 119 of the EC Treaty (on equal pay for male and female workers)⁷² or Council Directive 75/117/EEC (on the approximation of the laws of the member states relating to the principle of equal pay).⁷³ The fact that the Human Rights Committee had already established in *Toonen v. Australia* that under Art. 26 of the International Covenant on Civil and Political Rights (ICCPR),⁷⁴ ‘sex’ is to be understood as including ‘sexual orientation’, did not sway the Court to decide otherwise.⁷⁵ *D and Sweden* concerned an employee of the Council of the European Union (Council) that had requested a household allowance on the basis of the relevant Staff Regulations for his same-sex partner with whom he was in a registered partnership with. The Council rejected his application on the basis that a registered partnership was not equivalent to a marriage. In the case before the Court, it affirmed that it considered marriage a union between persons of the different sex.⁷⁶ It furthermore found that D’s situation as regards a household allowance was not comparable to those that were married as a registered partnership is assimilated in certain member states.⁷⁷ Up until then, the Court’s line of reasoning was similar to that of the ECtHR.

3.2 The second stage of development; work for your rights

In 1997, the Treaty of Amsterdam⁷⁸ is adopted; it enters into force in 1999. Art. 13 Treaty on the European Union (TEU)⁷⁹ allowed the adoption of anti-discrimination legislation. It was on this basis that in 2000 the ‘Employment Equality Framework Directive’ (Framework Directive)⁸⁰ was enacted, changing the framework against

⁷²Treaty on European Union, together with the complete text of the Treaty establishing the European Community [1992] OJ C 224/1.

⁷³Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 45/19.

⁷⁴UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁷⁵*Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), Fiftieth Session, Human Rights Committee, para. 8.7.

⁷⁶*D and Sweden*, *supra* note 71, paras. 34–36.

⁷⁷*Id.*, para. 40.

⁷⁸Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997], OJ C 340/1.

⁷⁹Art. 13 of Treaty establishing the European Community (Amsterdam consolidated version) [1997] OJ C 340/173. This provision is now Art. 19 of the Treaty on the Functioning of the European Union (TFEU). See Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47.

⁸⁰Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000], OJ L 303/16.

which some of the cases brought before the Court were to be assessed. Though the Directive was limited to the field of employment and occupation, it led to a string of equal marriage rights cases in which the CJEU found same-sex couples considered to be comparable to different-sex couples not only in their need for protection, but also for certain employment benefits and rights.⁸¹ We see this for instance in the *Maruko*⁸² case, which was on a refusal of a widower's pension for a surviving same-sex life partner. This refusal came after the German legislature had placed life partnership and marriage on an equal footing, by amending the Social Security Code. The Court found that the Framework Directive does not allow a member state to exclude life partners from survivor's benefits equivalent to those granted to surviving spouses, even though national law places both groups in a comparable situation so far as concerns that survivor's benefit.⁸³ In *Römer*,⁸⁴ the Court added that the situations of the two groups (same-sex couples and different-sex couples) do not have to be identical, but they need to be legally and factually comparable in order to fall under the scope of the Framework Directive and be assessed as direct discriminatory.⁸⁵ The analysis focuses on the rights and obligations of the two groups as they result from the applicable domestic provisions. *Römer* concerned the denial of a supplementary retirement pension to a same-sex couple in a registered partnership due to it being reserved exclusively for different-sex married couples. In *Hay*,⁸⁶ the Court confirmed that a collective agreement may not treat same-sex couples in a 'PACS'⁸⁷ as regards days of special leave and salary bonuses for marriage, differently than those that are married.⁸⁸ The same was the case in *Dittrich and others*⁸⁹ with request for assistance for medical expenses incurred by the civil partners of former public servants; these also fell under the scope of the Framework Directive. In *W. v. Commission*,⁹⁰ the EU Civil Service Tribunal decided in the same line as the aforementioned cases and those of the ECtHR that the rules of the Staff Regulations endowing household allowances to officials registered as stable, non-marital partners, including those that are of the same-sex, must be interpreted in such a way as to make those rules as effective as possible, so that the right is not theoretical or illusory, but practical and effective.⁹¹

All of these cases demonstrate that the keyword here is 'legal recognition', because without this, the Court finds there is no comparability between same-sex couples and different-sex couples. The *Parris*⁹² case is a prime example of this. Parris had

⁸¹*Xenidis* [16].

⁸²Case C-267/06 *Maruko*, EU:C:2008:179.

⁸³*Id.*, paras. 72-73.

⁸⁴Case C-147/08 *Römer*, EU:C:2011:286.

⁸⁵*Id.*, paras. 40-42.

⁸⁶Case C-267/12 *Hay*, EU:C:2013:823.

⁸⁷PACS stands for 'pacte civil de solidarité' and is the French equivalent for a registered partnership for same-sex couples wanting to have their relationship legally recognized.

⁸⁸*Id.*, para. 47.

⁸⁹Joined Cases C-124/11, C-125/11 and C-143/11 *Dittrich and Others*, EU:C:2012:771.

⁹⁰Case F-86/09 *W. v. Commission*, EU:F:2010:125.

⁹¹*Id.*, para. 43.

⁹²Case C-443/15 *Parris*, EU:C:2016:897.

requested his employer that, on his death, his same-sex civil partner would receive a survivor's pension. This was denied on the ground that he had not entered into a civil partnership before his 60th birthday, even though this possibility did not exist until after his 60th birthday. The CJEU was asked to assess whether this denial amounted to discrimination on grounds of sexual orientation. The Court answered negative, holding that the distinction is made on the basis of age;⁹³ Parris' inability to obtain legal recognition of his same-sex relationship did not amount to discrimination on the basis of sexual orientation.⁹⁴

3.3 The third stage of development; movement rights and mutual recognition?

In 2004, the EU adopts the 'Citizenship Rights Directive' (CRD),⁹⁵ providing EU citizens with free movement rights for themselves and their family members, irrespective of their sexuality. A few years later in 2009, with the entering into force of the Treaty of Lisbon,⁹⁶ the EU Charter becomes binding for the EU and the member states when they implement EU law.⁹⁷ Furthermore, the mainstreaming provision of Art. 10 TFEU now required the EU institutions to work towards eliminating discrimination with sexual orientation being one of the grounds mentioned in it. These developments raised the standards in LGBTQ+ rights protection in the EU. Around the same time, Adrian Coman, a Romanian national, married his American same-sex partner in Brussels. The couple later moves to Romania and Coman applies for a residence permit for his husband on the basis of the CRD. This request is denied on the basis that Romania does not recognize same-sex marriages. The Romanian Constitutional Court asks the CJEU a preliminary question on the interpretation of 'spouse' in Art. 2(2)(a) CRD and whether this includes a person of the same-sex. The Court starts its analysis in *Coman*⁹⁸ by immediately providing clarity: the term 'spouse' within the meaning of the CRD is gender-neutral and therefore covers the same-sex spouse of the Union citizen concerned;⁹⁹ an interpretation in line with Art. 9 EU Charter which contains the right to marry and is also worded in gender-neutral terms. The Court further clarifies that it cannot be left to member states to refuse or allow entry on the basis of whether they recognize same-sex marriage themselves. This would hamper with the right to move and reside freely as established by Article 21(1) TFEU.¹⁰⁰ The CJEU further emphasizes that in accordance with Art. 52(3) EU Charter, the right to private and family life as encompassed in Art. 7 EU Charter has

⁹³*Id.*, paras. 66-68.

⁹⁴*Id.*, paras. 74-78.

⁹⁵Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 [2004], OJ L 158/77.

⁹⁶Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007], OJ C 306/1.

⁹⁷Art. 51 EU Charter.

⁹⁸Case C-673/16 *Coman*, EU:C:2018:385.

⁹⁹*Id.*, para. 35.

¹⁰⁰*Id.*, paras. 39-40.

the same meaning and scope as guaranteed by Art. 8 ECHR. The Court goes on to explain that refusing the recognition of legally concluded same-sex marriages in other member states could also not be justified on grounds of public policy and national identity, as this requires a genuine and sufficiently serious threat to a fundamental interest of society. According to the Court, recognizing foreign concluded same-sex marriages does not undermine the national identity or pose a threat to the public policy of the Member State concerned.¹⁰¹ Accordingly, a third-country spouse of an EU citizen has a derived right of staying longer than three months in the member state of the nationality of the citizen they are married to and this right may not be made subject to stricter conditions than those laid down in Art. 7 CRD.

The decision of the CJEU in *Coman* is received by the LGBTQ+ community as ground-breaking.¹⁰² It not only clarified that the CRD is also applicable to same-sex spouses when they make use of their movement rights, but it also made it clear that invoking public policy and national identity justifications would not be accepted by the Court if they are not backed up with substantial arguments and a proportionate application. *Coman* subsequently initiated the third stage in the development of the equal marriage case law of the EU as it introduced the mutual recognition¹⁰³ of legally concluded same-sex marriages in other member states. With *Coman*, the CJEU brought its case law in line with that of the ECtHR in *Orlandi*, delivered roughly eight months earlier.¹⁰⁴

4 Conclusion and outlook to the future

Both courts have undergone a quite, somewhat similar, development in their case law on equal marriage rights. From initially providing no protection, to gradually moving to a reinterpretation of the notions of family and marriage to include novel interpretations, and even recognizing legally concluded marriages in other states. This development resembles what Wintemute denoted in his research on the progression of sexual orientation and gender identity discrimination as the evolution from ‘basic rights’ to ‘sex rights’, to eventually ‘love rights’;¹⁰⁵ Waaldijk has proposed to link the evolution of rights to what he calls ‘the right to relate,’ i.e. the right to establish and develop relationships as a common denominator to all main phenomena in the field of sexual orientation law.¹⁰⁶ However way to denominate it, it remains difficult for courts to substantially ‘provide’ far-fetching equal marriage rights to same-sex couples, considering the competences to decide civil marriage matters are in hands of the member states themselves. Still, courts have been able to provide much sought-after relief for same-sex individuals by employing creative ways of interpreting rights and provisions. In order to move forward in the future and to ensure equal protection to

¹⁰¹ *Id.*, paras. 42-46.

¹⁰² *Kochenov & Belavusau* [4].

¹⁰³ Also see *Van den Brink* [12] and *Tryfonidou* [10].

¹⁰⁴ *Orlandi*, *supra* note 59.

¹⁰⁵ *Wintemute* [15].

¹⁰⁶ *Waaldijk* [14].

same-sex couples, courts are urged to continue applying strict scrutiny to the behavior of the member states and request them to provide weighty reasons to justify any discriminatory treatment on the basis of sexual orientation.

Declarations

Competing Interests The author declares no competing interest.

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