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On the ‘Entry Options’ for the ‘Right to Love’:
Federalizing Legal Opportunities for LGBT
Movements in the EU

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IN THE EU**

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Abstract

This paper unfolds litigation opportunities for LGBT plaintiffs embedded in EU law. It explores both established tracks and future prospects for fostering the EU's (at times half-hearted) goodbye to heteronormativity. The paper demonstrates how American federalism theories can pave the way for the "right to love" in the European Union, whose mobile sexual citizens are equally benefiting from the "leave" and "entry options", requiring more heteronormative states to comply with the approaches to sexuality adopted by their more tolerant peers. The relevance of this normative framework based on federal "entry options" for the EU is further exemplified by a recent judgment of the US Supreme Court in *Obergefell v. Hodges* (2015). The strategy of activating EU law in litigation for mobile couples could in the medium- to short-term perspective spill over the recognition of various forms of legal unions for gay and lesbian couples all over the Union, promoting tolerance, equality and respect. The paper reveals that Citizenship Directive 2004/38/EC and *actio popularis* at the national level offer two major federal keys for activating this anticipated sexual emancipation via EU law.

Keywords

LGBT rights, EU law, non-discrimination, federalism, freedom of intimate association, sexual citizenship

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Introduction

EU citizenship is not only a unique space for ‘overcoming’ nationality often imagined in terms of the dominant ethnicity of Member States.¹ EU citizenship equally offers an activist arena for challenging sexual identities and inequalities embedded in those national citizenships, transnationalising discourse on rights and gay emancipation in Central and Eastern Europe as a matter of EU law. *European*, in this context, becomes a language of rights and entitlements, which can be turned, *inter alia*, against their own states of nationality. On the one hand, transnational forms of citizenship facilitate the very dialogue on sexual rights among Member States and problematise the construction of fixed identities.² On the other hand, EU citizenship is equally a realm of disciplining humiliation of the Member States.³ The rhetoric of ‘socially unfruitful’ homosexuality and the prescription of women’s reproductive role have been particularly visible in nationalist projects with ethno-centric views on the group boundaries and longevity.⁴ The Union instead offers value models for anti-discrimination developments beyond the ‘population’ narrative of – largely patriarchal and heteronormative – national citizenships. Although not always legally enforceable due to the limited possibilities for harmonisation and Union action, transnational and national LGBT movements can capitalise on value models as a matter of EU federalism for lobbying just causes.

This contribution will highlight the progress of “gay rights” litigation before the Court of Justice, from the early 1990s. It will show how quasi-federal elements embedded in the ever-evolving EU law,⁵ on the one hand, created mobilizing opportunities for transnational LGBT litigation and, on the other hand, have steadily Europeanized the discourse on gay rights as part and parcel of the Union values.⁶ Citizenship, anti-discrimination and fundamental rights’ developments have all contributed to the minimum “European” standards of LGBT rights’ protection.

To these ends we first revisit the potential of LGBT rights in EU law through the looking glass of the normative discussion about Kreimer’s vision of federalism⁷ and Karst’s analysis of the “freedom of

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A much shortened version of the argument presented here is due to appear in K. Sloopmaeckers et al. (eds.), *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and Prejudice* (Palgrave Macmillan, 2016).

¹ D. Kochenov, ‘Rounding up the Circle: The Mutation of Member States’ Nationalities Under Pressure from EU Citizenship’, *EUI RSCAS Paper* 23 (2010).

² U. Belavusau, ‘EU Sexual Citizenship: Sex Beyond the Internal Market’, in D Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: CUP, 2016, forthcoming). Also available as *EUI Working Paper* 6 (2015).

³ G. Davies, ‘The Humiliation of the State as a Constitutional Tactic’, in F. Amtenbrink and P. A. J. van den Bergh (eds.), *The Constitutional Integrity of the European Union* (The Hague: T. M. C. Asser Press, 2010).

⁴ N. Yuval-Davis, *Gender and Nations* (London: Sage Publications, 1997).

⁵ R Schütze, *From Dual to Cooperative Federalism* (Oxford: OUP, 2009); O. Beaud, *Théorie de la fédération* (PUF, 2007).

⁶ See also D Kochenov, ‘On Options of Citizens and Moral Choices of States: Gays and European Federalism’, *Fordham International Law Journal*, 33, 1, 2009. 256-205 (a part of this paper is based on the argument substantially developed in this earlier article).

⁷ S. F. Kreimer, ‘Federalism and Freedom’, *574 Annals of the American Academy of Political and Social Science* 66 (2001), 72-73.

intimate association”:⁸ the basic idea that any authority should be as cautious as possible in regulating human intimacy and love. The ultimate question is whether we face the nascent “right to love”⁹ translated into the less-fortunate (with a due simplification: intolerant, homophobic, archaic) Member States via the federalizing impact of EU law. While the presence of an exit option is indisputably inherent in the nature of virtually any federal system, the legal specificity of the supranational Union in Europe with its goal-oriented reading of competences and the growing awareness of possible implications of its actions for human rights protection potentially opens a way also to an “entry option” that would oblige member states to recognize less restrictive or simply different moral choices made by other states. Outside of ideologically charged areas of sexuality, gender identity, and family law, such an “entry option” is already a day-to-day reality in the EU: Europeans can thus bring their own law with them, as they move from one Member State to another.

The second part will outline the genesis and evolution of LGBT rights in Europe: from stringent boundaries of sex discrimination to free movement of sex couples via EU citizenship regime. The part will highlight two major periods in the history of LGBT litigation at the Court of Justice: before Amsterdam Treaty, when sexual minorities explored the limits of sex equality clause and after introduction of the special anti-discrimination provision into the Treaty, which is now Article 19 TFEU.

The third part will consequently unpack the necessity and the ways to capitalize on that EU values-discourse along with novel anti-discrimination developments for the emancipation of LGBT rights, especially in the context of the Eastward enlargement. It will highlight the most recent case law of the Court of Justice as supplying a box of litigation opportunities for LGBT movements. That box (albeit not infinite and yet imperfect) is apparently available even in Central and Eastern European parts of the Union where coming-outs remain relatively uncommon and public life is often infected with social homophobia and intolerance.¹⁰

Federal outlook on gay rights in the USA and the EU

Federalism contributes to freedom at least in two ways: by providing a minimal rights denominator at the federal level which is to be followed by all the states and—in the issues where such denominator is either not available, or not sufficient—by providing an exit option for those who are unhappy in their native state.

The Council of Europe can be viewed in this context as the provider of the most general common denominator of rights available in Europe, while the European Union is the guarantor of the exit option, which it granted to its citizens.¹¹ Wherever you move in the EU, you are always covered by important CoE rules,¹² including, especially, the European Convention on Human Rights (“ECHR”)¹³

⁸ K. L. Karst, ‘The Freedom of Intimate Association’, 89 *Yale Law Journal* 624 (1980), at 624–25.

⁹ The right to love is a catchy metaphor along with freedom of intimate association, borrowed from K. L. Karst, ‘The Freedom of Intimate Association’ 89 *Yale Law Journal* 624 (1980).

¹⁰ See *EU LGBT Survey: Poll on Homophobia Sparks Concern*, BBC News, 17 May 2013, available at: <http://www.bbc.com/news/world-europe-22563843>; L Turcescu & L Stan, ‘Religion, Politics and Sexuality in Romania’, 57 *Europe-Asia Studies* 291 (2005), 292–298. For other examples in CEE context, see D. Kochenov, ‘Gay Rights in the EU: A Long Way Forward for the Union of 27’, *Croatian Yearbook of European Law & Policy*, 3 (2007).

¹¹ Arts 20 and 21 TFEU.

¹² All EU Member States are also Members of the Council of Europe. Art. 6 TEU stipulates that the Union is bound by fundamental rights as reflected in the European Convention of Human Rights and undertakes to accede this Convention. This creates a unique symbiosis of the two organizations: EU and CoE.

¹³ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

as interpreted by the European Court of Human Rights.¹⁴ All in all, however, the exit option becomes the most important one in terms of empowering European citizens, since the EU, by its very nature, is not empowered to act in the majority of fields,¹⁵ and given that rules of the Council of Europe are just as basic as they are important.

It is clear that when a federal system is integrated to such an extent that the local differences are negligible, the ability of such a system to enhance liberty is likely to be negligible too. Indeed, "removing borders loses much of its value if what is on the other side is the same."¹⁶ This point can also be proven with a simple use of numbers:

For example, assume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If majorities in each state make a separate decision, 130 will be pleased and only 70 displeased. The level of satisfaction will be still greater if the smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A.¹⁷

Thus when the political or legal regimes across an internal border differ, federalism turns into an asset for the promotion of liberty. Such liberty is not an apodictic ideal of the totalitarian states, but is rooted in the tandem of diversity and mobility. Extreme interpretations of this facet of federalism give the exit option more importance than political participation: "a sufficiently decentralized regime with full mobility could perfectly satisfy each person's preferences even with no voting at all."¹⁸ Practically, individual freedoms of citizens moving freely are potentially amplified since "state-by state variation leaves open the possibility to each individual of choosing to avoid repression by leaving the repressive jurisdiction."¹⁹ This is an effective way to deal with what Madison saw as the greatest potential threat to individual liberty, i.e., the tyranny of the majority.²⁰ Although not a panacea, the exit option provided by federalism should not be underestimated.

The ability of the EU to advance liberty through federalism is extremely rich, as the Member States vary greatly. Only a marginal part of legal regulation has been harmonised, allowing citizens to benefit from the existing variations from one Member State to another. These variations are particularly important with regard to the positions the Member States take on the moral issues, such as abortion, same-sex marriage, divorce, and the like. The citizens thus have infinitely more possibilities to choose the legal regime that suits them best by moving from one Member State to another, compared with unified systems, where by moving one can find little more than a change in weather. The situation of EU citizens thus approaches that of their U.S. counterparts. "Today, the lesbian who finds herself in Utah, like the gun lover who lives in Washington, D.C., and the gambler in Pennsylvania, need only cross the state border to be free of constraining rules."²¹

¹⁴ For an overview of numerous cases on gay rights at the Court in Strasbourg, see P. Johnson, *Homosexuality and the European Court of Human Rights* (London: Routledge, 2014). About the implications of Strasbourg judgements for sexual emancipation in Europe, see L.R. Heffer & E. Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBTQ Persons in Europe' (2014) 68 *International Organizations* 77.

¹⁵ According to Art. 5 TEU, the EU can only act "within the limits of the powers conferred upon it by the Treaties.

¹⁶ G.T. Davies, 'A Time to Mourn – How I Learned to Stop Worrying and Quite Like the European Union', *Inaugural Lecture* (Amsterdam: VU, 2008), at 18.

¹⁷ M. McConnel, 'Federalism: Evaluating the Founders' Design, 54 *University of Chicago Law Review* 1484 (1987), 1494.

¹⁸ *Id.* at 1494 n. 37.

¹⁹ Kreimer, *supra* n. 7, at 71.

²⁰ See *The Federalist* No. 10 (James Madison) (introducing the concept of "tyranny of the majority").

²¹ Kreimer, *supra* n. 7, at 72.

The inter-state situation activated by cause lawyers before the U.S. Supreme Court is, to a vast degree, emblematic for EU law as well.²² Although widely streamlined in media as the judgment about same sex marriages, *de jure* the decision is more about recognition of rights derived from marriage than status, which ironically makes the recognition of status all over the American states only a matter of time. The case was launched after a same sex couple, James Obergefell and John Arthur married in Maryland. Their state of residence though – Ohio – did not recognize their marriage license, which enabled them to file a lawsuit about discrimination. John Arthur was terminally ill and suffering from amyotrophic lateral sclerosis. For this reason, they wanted the other partner, James Obergefell, to be identified as his surviving spouse on his death certificate based on their Marriage in Maryland. Through this paradigm of rights based on the free movement between the states, the Supreme Court delivered a truly landmark judgment establishing that a fundamental right to marry is apparently guaranteed to same-sex couples by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States.

Besides an assumption that the states are self-governing and that there are important differences between them in terms of regulation of some issues of potential moral disagreement, in order to provide citizens with an “exit option” able to have far-reaching effects on their freedom, three features of the federal system that would limit the states themselves are absolutely crucial. Agreeing with Kreimer, these should include the free movement right granted to citizens, equality between newcomers and native citizens in the new state of residence, and territorially-limited state jurisdictions.²³ Only when all the three elements are in place is it possible to talk about the exit option within the federal systems that would provide an opportunity to safeguard liberty for the citizens. All the three are now to be found in the EU.

EU citizenship is a *ius tractum* status building on the nationalities of the Member States,²⁴ which is at the same time ‘autonomous’²⁵ and grounded in EU law, bringing with it a set of rights specific to the EU legal order.²⁶ The most important of these have traditionally been considered non-discrimination on the basis of nationality²⁷ – in the words of Davies, *de facto* “abolishing” the nationalities of the Member States²⁸ – and free movement in the territory of the Union.²⁹ The latter does not only include a right to travel around the EU, but also a right to settle anywhere you like with your family, take up employment and to be treated exactly the same way as the natives of your new Member State of residence are treated.³⁰ Changing the Member State and non-discrimination on the basis of nationality are thus the core rights of EU citizenship stemming from the supranational legal order. Additionally, the Member States are prohibited from creating obstacles to free movement of citizens that would

²² *Obergefell v. Hodges*, 576 US_(2015).

²³ Kreimer, *supra* n. 7, at 73.

²⁴ D. Kochenov, ‘*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights’, 15 *Columbia Journal of European Law* 169 (2009), at 181.

²⁵ AG Maduro in C-135/08 *Rottmann* [2010], para 5.

²⁶ D. Kochenov & R. Plender, ‘EU Citizenship: From an Incipient Form to an Incipient Substance: The Discovery of the Treaty Text’, 37 *European Law Review* 369 (2012).

²⁷ Art. 18 TFEU. See generally G.T. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer, 2003) [highlighting the relationship between the principle of non-discrimination based on nationality and the right to free movement]; Astrid Epiney, ‘The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship’, 13 *European Law Journal* 611, 612 n.4 (2007); P. Boeles, ‘Europese burgers en derdelanders: wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?’ 12 *Sociaal-economische wetgeving* 512 (2005).

²⁸ G.T. Davies, “‘Any Place I Hang My Hat?’ or: Residence Is the New Nationality”, 11 *European Law Journal* 43 (2005), 55.

²⁹ Art. 21 TFEU.

³⁰ See Council Directive No. 2004/38, Art. 24, O.J. L 158/77, at 112 (2004).

discourage their own nationals to move to other Member States.³¹ Besides, the Member States cannot undermine the status of EU citizenship,³² or deprive citizens of the possibility to enjoy the 'substance of rights'³³ stemming from this status,³⁴ including unwritten rights.³⁵

The first two of Kreimer's components of federalism necessary to enable effective exit option are thus in place. The third is part of the EU system too: the Member States are sovereign states also under international law, so their jurisdiction is most often limited to their own territory.³⁶ Applied to the situation of the gay communities in the Member States the "exit option" of European federalism already provides a viable alternative to life in potentially less gay-friendly societies, such as Poland, Greece, or Slovakia, as moving to the Netherlands or Sweden is a protected EU citizenship right.

Having said all this, it is as clear as day that "the exit option is no panacea":³⁷ the majority of people will only consider moving in exceptionally harsh circumstances. Simultaneously, a guarantee of a viable degree of legal unity of the Union is an indispensable consideration. Member States cannot specialize in accepting only citizens adhering to certain ideologies and rules of morality. Should this be the case, it would unquestionably result in the denial of the very idea of the Union, leading to its legal fragmentation.³⁸ Above all, moving between cultures, from one society to another, is difficult. In the EU, where citizenship rights are unquestionably connected with the personal and financial situation of the citizen concerned,³⁹ not merely the status of citizenship, it can even be impossible in some cases.⁴⁰

Given that the "exit option" is unable to solve all the problems and is even not always available in practice, a certain degree of legal convergence with regard to the most important issues, particularly related to human rights, is needed. Such convergence can theoretically come in three ways: via full harmonization, via partial supranational alignment, i.e. through terminology to be applied within the

³¹ See F.G. Jacobs, 'Citizenship of the European Union – A Legal Analysis', 13 *European Law Journal* 591 (2007), at 596–98.

³² Case C-135/08 *Rottmann* [2010]; See also the annotation of the case in, D. Kochenov, 'Case C-135/08 Janko Rottmann v. Freistaat Bayern, Judgement of the Court (Grand Chamber) of 2 March 2010', 47 *Common Market Law Review* 1831 (2010).

³³ Case C-34/09 *Ruiz Zambrano* [2011]; for the annotation of the case, see M. van den Brink in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: CUP, 2016 – forthcoming).

³⁴ D. Kochenov, 'A Real European Citizenship', 18 *Columbia Journal of European Law* 56 (2011); S. Iglesias Sánchez, 'El asunto Ruíz Zambrano: una nueva aproximación del Tribunal de Justicia de la Unión Europea a la ciudadanía de la Unión', 24 *Revista General de Derecho Europeo* 1 (2011).

³⁵ D. Kochenov, 'The Right to Have *What* Rights? EU Citizenship in Need of Clarification', 19 *European Law Journal* 502 (2013).

³⁶ There exist examples to the contrary, which are not easily accepted by the member states. See, e.g., M. Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?', 15 *European Law Journal* 70 (2009); J. Scott, 'The New EU "Extraterritoriality"', 51 *Common Market Law Review* 1343 (2014).

³⁷ S. F. Kreimer, 'Federalism and Freedom', 574 *Annals of the American Academy of Political and Social Science* 66 (2001), at 72.

³⁸ This loosely compares to the U.S. principle that the states are not free to choose their citizens. *Saenz v. Roe*, 526 U.S. 489, 510–11 (1999) ("The States, however, do not have any right to select their citizens."). In a sense, the same does not apply to the instances when the Member States apply EU and their own law in admitting new immigrants, which also affects third country nationals residing in the EU: the Union as a single working-living space does not exist for them: D. Kochenov & M. van den Brink, 'Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU', 5 *EUI Law Working Paper Law* (2015).

³⁹ See, e.g., D. Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights', 15 *Columbia Journal of European Law* 169 (2009), at 234–37 (listing factors determining European citizen benefits).

⁴⁰ D. Schiek, 'Perspectives on Social Citizenship in the EU' in D. Kochenov (ed) *EU Citizenship and Federalism: The Role of Rights* (Cambridge: Cambridge University Press, 2016).

material scope of Union law, or via the federal requirement of recognition of national rules even outside the member states in which such rules were initially adopted:⁴¹ the crucial pillars of EU law. In all these cases, deviations from the rules are to be strictly checked against the principles of EU law.

Yet another way stems directly from the availability of the pan-European human rights minimum introduced by the CoE, reinforcing the overall framework of human rights protection. In this regard, it is remarkable albeit completely unexpected that the European Court of Human Rights has most recently followed the logic of the U.S. Supreme Court in the settings of the Council of Europe, that is – unlike the EU which is the “exclusive club” of liberal democracies – hosting countries as different as Iceland and Azerbaijan. In its judgment in case *Oliary & Others v. Italy* (2015), the Court all of a sudden established that Italy should offer some form of registered partnership or marriage to gay couples.⁴²

It is remarkable that in this case the judgment refers to comparative jurisprudence, giving example of the U.S. Supreme Court that precedes Strasbourg just by a couple of weeks.⁴³ This judgment also captures the growing consensus in the Member States, noting that 11 countries of the Council of Europe recognize same sex marriages, while 18 offer recognition of various forms of same sex partnerships.⁴⁴ In this situation, the Italian Senate had to recognize same sex civil unions in February 2016.⁴⁵

While harmonization is always an option, notwithstanding the fact that applying this tool in a number of fields would imply a Treaty change, mutual recognition enforced by EU institutions – one of the most successfully deployed ways of developing integration – can be more attractive in the European legal setting. This is particularly true in the areas dealing with the issues of deep moral disagreement between the Member States. Consequently, the Treaties currently in force need to be optimally used in order to bring about change without full harmonization. This can be done using two avenues already mentioned: either via the formulation of European legal notions for some ambiguous terms to be used within the scope *ratione materiae* of Union law (i.e. “family”),⁴⁶ or through the formulation of the principle of unconditional recognition of the national understanding of such terms even outside the borders of the Member States where they were formulated. The second could be preferable, since it implies full respect of the national-level solutions and does not require the ECJ to ‘legislate’. Moreover, it is unquestionably in line with the mutual recognition approach.⁴⁷

This being said, the ECJ is clearly in the position to choose either way. Consequently, the EU legal system is likely to offer more than a simple “exit option”, but also what can be characterized as an “entry option”, i.e., a legal possibility to enter a member state other than your own and carry the rules of your old member state with you. The “entry option” thus constitutes a clear deviation from

⁴¹ M. Poiars Maduro, ‘So Close and Yet So Far: The Paradoxes of Mutual Recognition’, 14 *Journal of European Public Policy* 814 (2007).

⁴² *Oliary & Others v. Italy* (21 July 2015), App. nos. 18766/11 & 36030/11.

⁴³ *Ibid.*, para. 65. The US Supreme Court gave its judgement in *Obergefell v. Hodges*, 576 US (2015) on 26 June 2015, i.e. slightly more than a month before *Oliari*. The European Court of Human Rights discusses that American case in impressive detail.

⁴⁴ *Oliari*, para. 54.

⁴⁵ S. Kirchgaessner, Italian Senate Passes Watered-Down Bill Recognizing Same-Sex Unions, *Guardian*, available at: <http://www.theguardian.com/society/2016/feb/25/italy-passes-watered-down-bill-recognising-same-sex-civil-unions> (25 February 2015).

⁴⁶ The ECJ has a rich history of articulating EU legal terminology, e.g., “worker” or “the court or tribunal of the Member States,” much broader than the national definitions available in the legal systems of the Member States.

⁴⁷ The latest addition to the fine-tuning of mutual recognition is the clarity with which the ECJ spelled out the obligation, lying on the Member States not to check the presumption that their peers adhere to fundamental rights: Opinion 2/13, para. 252. For a critical analysis, see, D Kochenov, ‘The Missing EU Rule of Law’, in C Closa & D Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016).

Kreimer's third principle, limiting the territorial jurisdictions of the Member States. This is so, since a number of EU citizens who exercised their rights to move to another Member State can be better off in their new Member State of residence because the law of the first Member State would still apply to them.⁴⁸ Such situations, when mandated by Union law would be outside the realm of private law: the functioning of the "entry option" is a direct consequence of the way that Union law functions vis-à-vis national law of the Member States. Such entry option is the emanation of the specific nature of European federalism.

As will be further exemplified with the Citizenship Directive 2004/38/EC, if a same-sex married couple moves to a Member State where same sex marriage is still unrecognized, that latter Member State will be obliged to anyhow treat them as a married couple. Indeed, the language of the Directive does not contain any references to "one man – one woman".⁴⁹ In line with the recent U.S. Supreme Court pattern of reasoning on the rights recognized in another state,⁵⁰ this strategy of activating EU law in litigation could in a long perspective spill over the recognition of various forms of legal unions for lesbian and gay couples all over the Union.

EU law is then double-empowering: those who escape the sub-standard law of their own Member State, which does not respond to the needs of their life, enjoy additional protection having moved (and also upon return home, following the *Singh* principle).⁵¹ Those who move to the Member States whose political choices do not suit them well, are empowered to bring the law of their Member State of origin with them via mutual recognition, thus escaping the local regulation in the new Member State of residence. In both cases EU law serves as a vehicle to shield citizens from the legitimate democratic outcomes in their jurisdiction of residence, protecting them from the localized majoritarian perceptions of morality and acceptability.⁵² This double empowerment unquestionably implies a subtle (and sometimes not so subtle) pressure on the Member States democracies, thus improving their operation in the interests of all the strata of society through welcoming an additional avenue of Socratic contestation.⁵³

Bumpy road for gay rights in the Union: Genesis, evolution and current state of art

Since the initial Treaty of Rome, the legal constructs of sex have experienced an impressive proliferation, despite the fact that the primary integration process was essentially driven by pure commercial rationales. A tiny and fairly toothless provision in Article 119 EEC (now Article 157 of the Treaty on the Functioning of the European Union (TFEU))⁵⁴ introduced the seminal wording of gender equality between men and women, the equal pay principle. Few scholars could have imagined in the 1950s that this brief provision would pave the way to the far-reaching and evolving set of sexual rights in EU law. All the principal EU institutions (the European Court of Justice (ECJ), the Council, the Commission and the Parliament) have been involved at various times and to varying degrees in the

⁴⁸ Such situations can be criticised as undermining the principle of equality among European citizens. See, e.g., G.T. Davies, 'Services, Citizenship and the Country of Origin Principle', *Europa Institute: Mitchell Working Paper Series 2* (2007); A. Tryfonidou, *Reverse Discrimination in EU Law* (Kluwer, 2009), 43; D. Kochenov, 'Citizenship Without Respect: The EU's Troubled Equality Ideal', 8 *NYU Jean Monnet Working Paper* (2010).

⁴⁹ But see A. Tryfonidou, 'Free Movement Law and the Cross-Border Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition', 21 *Columbia Journal of European Law* (2015) (who argues that the Directive could be reworded to be even clearer on the meaning of the "spouse").

⁵⁰ See the aforementioned case of *Obergefell v. Hodges* (2015), 576_U.S.

⁵¹ Case C-370/90, *Singh* [1992].

⁵² A. Somek, 'Europe: Political, Not Cosmopolitan', 20 *European Law Journal* 142 (2014).

⁵³ M. Kumm, 'The Idea of Socratic Contestation and the Right to Justification', 4 *Law and Ethics of Human Rights* (2010), 142.

⁵⁴ Consolidated version of the Treaty on the Functioning of the European Union, OJ 2012 No. C326/47 (TFEU).

issues of gender mainstreaming, women's labour and social rights, pregnancy and positive discrimination, gay liberation and sexual identity, prostitution, pornography and the fight against paedophilia and sexual trafficking.⁵⁵

Perhaps the culmination of gender rights (drawn out of the tiny gender-equality clause) was the ECJ's rulings on transsexuals. In its 1996 judgement in *P. v. S.*,⁵⁶ the Court interpreted the provision on the equality of men and women to apply to cases of gender reassignment.⁵⁷ The EU has, therefore, broken with the idea of exclusively biologically-born women being the timid and delicate subjects of patriarchal familial relations, whose main purpose is the procreation of community and, ultimately, of the mythical nation.

While early national citizenship systematically shut women out, it was also excluding gays unless they kept their identity hidden.⁵⁸ As nationalist rhetoric on citizenship used to position women as subjects of procreation, non-heterosexual individuals were conceived as 'pathological', 'immoral' and 'foreign' to imagined domestic communities.⁵⁹ Duties parlance was classically used to justify exclusion: not good enough to fight – not good enough to reap the fruits of citizenship.⁶⁰ This particularly cynical way of construing citizenship rights is now passé.⁶¹

Quite characteristically, the homophobic narrative in the new Member States of the Union, for example, is often framed as an 'imposition of hostile Western values' on blissfully prudish and moral 'national citizens'.⁶² The parallel discourse on the imagined pathology of homosexuality (a concept largely shaped by psychiatrists and criminologists)⁶³ gained sustenance from the HIV/AIDS epidemic.⁶⁴ In this respect, there is a gap between the current Union Member States who found

⁵⁵ U. Belavusau, 'Sex in the Union: EU Law, Taxation and the Adult Industry', 4 *European Law Reporter* 144 (2010).

⁵⁶ Case C-13/94, *P. v. S. and Cornwall County Council*, EU:C:1996:170, [1996] ECR I-2143. Another pertinent case in this context is Case C-117/01, *K. B. v. National Health Service Pensions Agency and Secretary of State for Health*, EU:C:2004:7, [2004] ECR I-541.

⁵⁷ Discrimination of transsexuals since then has been treated as an aspect of gender equality, as incorporated into Directive 2006/54/EC on equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ 2006 No. L204/23, Rec. 3 of the Preamble: 'The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person'. In June 2010, the European Parliament adopted a resolution (the 'Figueiredo report') calling for an inclusive EU gender equality strategy, specifically addressing issues linked to gender identity: European Parliament, 'Report on the assessment of the results of the 2006–2010 Roadmap for Equality between women and men, and forward-looking recommendations', 2009/2242(INI) (Committee on Women's Rights and Gender Equality, Rapporteur: Ilda Figueiredo, 12 May 2010).

⁵⁸ Obviously, this statement is subject to a disclaimer about the liquidity of the concept of homosexuality, as introduced not earlier than the 19th century. Ancient Greek citizenship, in contrast, fostered an alternative view on sexuality and the role of man-to-man relations which could hardly be regarded as discriminatory in contemporary terms. See D. Cohen, *Law, Sexuality, and Society: The Enforcement of Morals in Classical Athens* (Cambridge: Cambridge University Press, 2004).

⁵⁹ J. Nagel, *Race, Ethnicity, and Sexuality: Intimate Intersections, Forbidden Frontiers* (Oxford: Oxford University Press, 2003).

⁶⁰ D. Kochenov, 'EU Citizenship without Duties', 20 *European Law Journal* 482 (2014).

⁶¹ But see R. Bellamy, 'A Duty-Free Europe? What's Wrong with Kochenov's Account of EU Citizenship Rights', *European Law Journal* (2015).

⁶² See e.g., K. Kahlina, 'Contested Terrain of Sexual Citizenship: EU Accession and the Changing Position of Sexual Minorities in the Post-Yugoslav Context' (2013) *University of Edinburgh Working Paper* No. 2013/33.

⁶³ See the classic work of Foucault, *Histoire de la sexualité* (Paris: Éditions Gallimard, 1976). See also D. F. Greenberg, *The Construction of Homosexuality* (Chicago, IL: Chicago University Press, 1990).

⁶⁴ In this regard, see the recent ECJ Case on blood donation by men who have sex with men, C-528/13 *Léger* [2015], echoing the most outdated perceptions of homosexuality as a health-threatening issue. For a commentary, see U. Belavusau & I. Isailović, 'Gay Blood: Bad Blood? A Brief Analysis of Léger Case [2015] C-528/13', *European Law Blog* (26 August 2015): www.europeanlawblog.eu.

themselves behind opposite sides of the Berlin Wall. Western countries had brought homosexuality into the vocabulary of active citizenship earlier, during sexual revolution of the 1960s and the AIDS breakout in the 1980s. Dennis Altman predicted that economic growth and development would facilitate the integration of homosexuals into modern society.⁶⁵ Homosexuals do not map to any particular economic class and are therefore not easily reducible to an economically disadvantaged group. Nonetheless, economic development and globalisation are incompatible with exclusion based on sexual orientation.⁶⁶ Likewise, the EU project based on the internal market rationale is hardly compatible with discrimination on the basis of sexuality, as it could exclude large sections of the population from providing and receiving services, consuming goods and fostering economic growth on an inter-state basis.

As has been shown above, the ECJ has stretched the tiny sex equality clause to cover cases on gender reassignment and to protect the rights of transsexuals. However, it was the absolute maximum the Court was able to achieve to foster emancipation causes for LGBT individuals in the 1990s.⁶⁷ Similar cases for gay and lesbian couples based on Article 157 TFEU have all failed.⁶⁸ The heteronormativity of the EU legal order is additionally sustained by the *de jure* exclusion – often wrongly relied upon – of family matters from the scope of EU regulation, although it would have been perhaps more correct to state that currently, national and EU law co-regulate family matters to a certain degree.⁶⁹ The ECJ has not had a chance to demand either absolute mutual recognition or clarify the meaning of a 'spouse' under the Directive 2004/38 – the two options open for changing the current practice of national-level non-compliance in a number of Member States outlined above in detail. The 1996 case on transsexuals was already a huge achievement, considering that back in the 1950s (when the EEC was established), judges all over Europe (including the European Court of Human Rights) employed the language of crime, pathology and deviation when describing homosexuality.⁷⁰ Furthermore, it remained

⁶⁵ D. Altman, *The Homosexualization of America: the Americanization of the Homosexual* (New York, NY: St Martin's Press, 1982).

⁶⁶ R. A. Posner, *Sex and Reason* (Cambridge, MA: Harvard University Press, 1992).

⁶⁷ K. Waaldijk and M. Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive* (The Hague: T. M. C. Asser Press, 2006); G. N. von Toggenburg, "LGBT" Go Luxembourg: On the Stance of Lesbian Gay Bisexual and Transgender Rights Before the European Court of Justice' *European Law Reporter* (2008) 174.

⁶⁸ Case 249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd.*, EU:C:1998:63, [1998] ECR I-621; Case 122/99, *D. and Kingdom of Sweden v. Council of the European Union*, EU:C:2001, [2001] ECR I-4319; Case 117/01, *K.B. v. National Health Service Pensions Agency and Secretary of State for Health*, EU:C:2004, [2004] ECR I-541. About the defeat of the earlier cases, see N. J. Beger, 'Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)potence of Rights Politics at the European Court of Justice' (2000) 9 *Social & Legal Studies* 249. For a convincing argument that there is no logical reason to distinguish sex discrimination from discrimination on the basis of sexual orientation, see A. Koppelman, 'The Miscegenation Analogy in Europe, or, Lisa Grant Meets Adolph Hitler', in R. Wintermute & M. Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford: Hart, 2001)

⁶⁹ As will be demonstrated below in the context of the 'Citizenship Directive' and the case law of the ECJ, it is quite wrong to keep assuming that EU law does not regulate family matters. For a convincing rebuttal of this erroneous claim, see H. Stalford, 'For Better, For Worse: The Relationship between the EU Citizenship and the Development of Cross-Border Family Law', in M. Dougan, N. Nic Shuibhne and E. Spaventa (eds.), *Empowerment and Disempowerment of European Citizens* (Oxford: Hart Publishing, 2012), p. 223. The idea that family matters are completely excluded from EU regulation is often drawn from Rec. 22 of the Preamble to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 No. L303/16, as well as from the ECJ cases, like the recent Case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg*, EU:C:2011:286, [2011] ECR I-3591, para. 38: 'As a preliminary point, it should be observed that, as EU law stands at present, legislation on the marital status of persons falls within the competence of the Member States'.

⁷⁰ M. Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 *European Journal of International Law* 1023.

criminalised in many Member States until the 1970s, with Romania becoming the last EU Member State to decriminalise homosexuality in the 2000s (before its accession to the EU).⁷¹

The perceived limitations on EU action written into primary law (the ECJ simply refused to follow other jurisdictions around the world, including the UN Human Rights Committee,⁷² in refusing to approach sexual orientation discrimination as sex discrimination) prompted the inclusion of a provision on anti-discrimination which would be self-standing and extend the emancipation potential beyond the ever-expanded yet proclaimed finite gender equality clause. Such a provision was negotiated into the Treaty of Amsterdam, which introduced Article 13 into the EC Treaty (today Article 19 TFEU). The new clause stands apart from the gender clause (the latter has acquired a richer harmonisation scope) and lists sexual orientation among the additional grounds of prohibited discrimination (along with race and ethnicity, age, disability and religion). The clause does not straightforwardly impose, for example, the necessity of full legal recognition of same-sex marriages, but it enables EU harmonisation powers to challenge discrimination based on sexual orientation.

Although not without caveats, Article 19 TFEU has already contributed to the rise of EU secondary law protecting LGBT rights in the employment context,⁷³ with important judgments in this field.⁷⁴ Furthermore, Article 19 TFEU was inserted into the second part of the TFEU, entitled ‘Non-Discrimination and Citizenship of the Union’,⁷⁵ thus consolidating the project of EU citizenship with the anti-discrimination ethos. The biggest achievement of the litigation based on secondary law adopted under Art. 19 TFEU so far has been the recognition of equal pay rights in various labour contexts (earlier acknowledged for women and transsexuals) for lesbian and gay couples, as soon as a state introduces a minimum legal status for the homosexual union (be it a partnership or a marriage).⁷⁶

In addition to Article 19 TFEU and a brief non-discrimination provision in the Charter of Fundamental Rights,⁷⁷ the next substantial EU basis for claiming gay rights is based on the so-called Citizenship Directive.⁷⁸ This instrument of secondary EU law employs a gender-neutral language for family

⁷¹ For multiple (including Romanian) examples, see D. Kochenov, ‘Democracy and Human Rights – Not for Gay People?: EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities’ (2007) 13 *Texas Wesleyan Law Review* 459. See also U. Belavusau, ‘A Penalty Card for Homophobia from EU Non-Discrimination Law’ (2015) 21 *Columbia Journal of European Law* 353.

⁷² E.g. *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994); *Young v Australia*, Merits, Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000, (2003) 5 IHRR 747, IHRL 1921 (UNHRC 2003), 6th August 2003, Human Rights Committee [UNHRC].

⁷³ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 No. L303/16.

⁷⁴ Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, EU:C:2008:179, [2008] ECR I-1757.

⁷⁵ Arts 20–24 TFEU.

⁷⁶ See Kochenov, ‘On Options of Citizens’, note 35 above; M. Möschel, ‘Life Partnerships in Germany: Separate and Unequal?’ (2009) 16 *Columbia Journal of European Law* 37; D. Borillo, ‘Pluralisme conjugal ou hiérarchie des sexualités. La reconnaissance juridique des couples homosexuelles dans l’Union européenne’ (2011) 46 *McGill Law Review* 875.

⁷⁷ Art. 21 of the CFR stipulates a general prohibition of discrimination, based on sexual orientation. Its Arts. 7 (respect for private and family life) and 9 (right to marry and right to found a family) both employ gender-neutral language for ‘family’, unlike some outdated national constitutions specifying that family is a union of a man and a woman, e.g. the current interpretation of Art. 6 in the German *Grundgesetz*. For discussion, see A. Sanders, ‘Marriage, Same-Sex Partnership, and the German Constitution’ (2012) 13 *German Law Journal* 911.

⁷⁸ Directive 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 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 No. L158/77.

unions and partners.⁷⁹ The Directive establishes several regimes for married, registered and unregistered partners. If a same-sex couple is married in a home state then EU law unquestionably requires the host state to recognise the marriage, as the wording of the Directive is crystal-clear.⁸⁰ In other words, mutual recognition has to do its job – no ECJ intervention at the level of definitions is required. In practice, host states not recognising same-sex marriages often obstruct the practical enjoyment of the right of a spouse to join their partner – an issue which no doubt needs to be clarified in the case law of the ECJ. Given that if not asked what the law is, the ECJ will not tell – the eternal logic of Article 267 TFEU – activist litigation here is absolutely indispensable.

Two situations are possible in the case of a registered partnership. Should the host Member State treat registered partnerships as equivalent to marriage, an individual then has the right to join their partner as if they were spouses. If the host state does not treat registered partnerships as equal to marriage, then the couple falls into the category of unregistered partners in a 'durable relationship'. However, EU law creates no obligation to recognise registered partnerships. Unregistered partners do not enjoy the same right as a spouse to join their partner. Instead, the Directive obliges Member States to 'facilitate entry and residence' to unregistered partners who are in a 'durable relationship'. This unclear rule applies equally to same-sex couples and to couples of the opposite sex.⁸¹ Such situations cover same-sex couples where one is a EU citizen. In addition, the Family Reunification Directive allows spouses who are third-country nationals to be united with third-country nationals residing lawfully in the territory of a Member State. However, Member States are not explicitly obliged to extend this right to same-sex registered (or unregistered) partnerships.⁸² The evident limitation is that an albeit ever-decreasing number of EU countries continue not to recognise any form of same-sex unions. Furthermore, Poland and the UK negotiated a specific Protocol to the Charter which has been presented as opt-out of these countries from substantial parts of the Charter.⁸³ Yet UK's position – unlike Polish – was not motivated by the concerns about sexual liberalization. In fact, the UK has till now recognized both same sex partnerships and marriages.⁸⁴ Poland, in contrast, has adopted a specific declaration on morality and family law.⁸⁵ In practice, this acclaimed opt-out from the Charter is meaningless: technically non-discrimination matters can always be handled by reference to Article 19 TFEU, the general principle of equality and fundamental rights.⁸⁶

The federal elements embedded in the ever-evolving EU law discussed above, created mobilising opportunities for transnational LGBT litigation and, on the other hand, have steadily Europeanised the

⁷⁹ Art. 2(2) Directive 2004/38 on the right of citizens of the Union, OJ 2004 No. L158/77 states: “‘family member’ means the spouse”. Rec. 3 of the Preamble to the Directive is even more explicit: ‘Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as [...] sexual orientation.’

⁸⁰ Kochenov, ‘On Options of Citizens’, note 35 above.

⁸¹ For a broad discussion of the Directive with regard to same-sex couples, see M. Bell, *EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process* (ILGA-Europe Report, 2005). For a summary, see *Same-Sex Couples, Free Movement of EU Citizens, Migration and Asylum* (European Agency for Fundamental Rights, 2009). For a recent academic study, see A. Tryfonidou, ‘Free Movement Law and the Cross-Border Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition’, 21 *Columbia Journal of European Law* (2015).

⁸² Wider aspects of residence are regulated in Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 No. L251/12.

⁸³ Protocol 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom 2007, OJ 2012 No. C326/313.

⁸⁴ Respectively, same-sex partnership from 2004 and marriages from 2013.

⁸⁵ Declaration No. 61 by the Republic of Poland on the Charter of Fundamental Rights of the European Union, OJ 2012 No. C326/360: ‘The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity’.

⁸⁶ C. Barnard, ‘The “Opt-Out” for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reading’, in S. Griller and J. Ziller (eds.), *Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Vienna: Springer, 2008).

discourse on gay rights as part-and-parcel of Union values. EU citizenship, non-discrimination and fundamental rights' developments have all contributed to the minimum 'European' standards of sexual rights. The ultimate question is whether we face the nascent 'right to love' translated into conservative states through the vertical distribution of EU law. With this overwhelming EU federalisation, the discourse on LGBT rights can no longer be silenced in the moralistic socio-political narratives of the Union's homophobic elites prevalent in some Member States. As has been demonstrated in recent studies, the 'Europeanization of LGBT rights begins primarily as a vertical process in which the EU imposes formal rules on Member States and builds the capacities of civil society [...] to lobby domestic institutions. This engenders new domestic discourses and generates media attention around the LGBT issue, which domestic groups then use to draw attention from outside'.⁸⁷ Yet the borders of the homo-space (an indispensable aspect of EU sexual citizenship)⁸⁸ are continuously being negotiated with the 'public universal' hetero-counterpart. In this respect, fairly progressive EU sexual rights also shape new categories of *homo* and *hetero* that are themselves based on an act of copy-paste from the heterosexual family relations. However, the current scope of protection incorporated into the primary law and the neutral language of family 'partners' in the Citizenship Directive both leave the Union with an open project for sexual rights, which could further accommodate less typical (beyond heteronormative and patriarchal) forms of intimacy – including networks of friends, lovers and partners – as spaces for socialisation.⁸⁹ A relationship is no longer a procreative prerequisite of the 'good citizenship' but an end in itself, developing into *the right to love*.

EU litigation box for Central and Eastern Europe: Example of *ACCEPT*

At the vertical level, EU sexual citizenship distributes sexual rights to Member States through several channels. Before accession, future Member States are obliged to adopt governance of sexual rights through the Copenhagen criteria on the rule of law and fundamental rights (that is, for example, to decriminalise adult same-sex relations). After accession, EU institutions contribute to the minimum level of emancipation of sexual standards across Member States (for example, non-discrimination in employment and asylum). Furthermore, the EU offers a litigation space for active citizens and social movements to advance their sexual causes at the Court of Justice, while remedies belong to the realm of national courts where concerned individuals and organization exercise their legal standing also with regard to EU law. The ECJ has bolstered the proliferation of gender equality and took a moral-neutral position to adjudications on sexual services. Finally, sexual rights find their way vertically to Member States through the federal discourse of EU citizenship. The rhetoric of gender and sexual emancipation is strongly associated with idealistic perceptions of European politics and law. EU federalisation fosters the social imagination of EU citizens and social movements who, in turn, rely on EU sexual standards as a strategy for humiliating Member States. *European* becomes the language of rights and entitlements. EU sexual citizenship, thus, turns into a realm for disciplining embarrassment in the Union. Dictating gender roles, sexual choices and lifestyles is not yet fully precluded. Yet thanks to the EU, it is finally a cause for shame and yields less cash.

⁸⁷ P. M. Ayoub, 'Cooperative Transnationalism in Contemporary Europe: Europeanization and Political Opportunities for LGBT Mobilization in the European Union' (2013) 5 *European Political Science Review* 280.

⁸⁸ U. Belavusau, 'EU Sexual Citizenship: Sex Beyond the Internal Market', in D Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: CUP, 2016, forthcoming). Also available as *EUI Working Paper* 6 (2015).

⁸⁹ The concept of alternative forms of intimacy (especially among gays and lesbians) which is often missing in the heteronormative vision of equality was advanced by A. Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Cambridge: Polity Press, 1992).

One recent case from Luxembourg which stands out from the rest as particularly promising in litigation terms is the judgment in *Asociația ACCEPT*.⁹⁰ This case, which put homophobia under the spotlight of EU law, illustrates the value of pragmatic cause litigation (similar to the *Defrenne* saga in the 1970s) for the benefit of a disempowered minority and the rise of an active form of citizenship mobilising EU sexual rights. A Romanian football club was found to be performing direct discrimination by not distancing itself from the words of its patron. The patron announced that he would never hire a gay player. A non-discrimination organisation managed to bring this case in the absence of a single plaintiff. The *locus standi* for organisations is undoubtedly a huge achievement of EU non-discrimination law in that it encourages the litigious potential of active citizenship.⁹¹ It will be fair to say that Romanian legislation was even broader in empowering organizations to bring cases than what is provided in Art. 9 (2) of the Framework Directive. This tactic, based on civil litigants and social movements, gives a true boost to otherwise 'desperate' cases, which lack individual plaintiffs. The latter factor is particularly emblematic for the LGBT community, especially in Member States with more socially prevalent homophobia and religious obscurantism. In such societies, where coming out is still uncommon, revealing alternative sexuality often leads to social ostracism and numerous employment difficulties. As convincingly demonstrated by Foucault, heteronormativity is not exclusively a matter of repression.⁹² Instead, it is often sustained by keeping the sexual as a most cherished secret of Western society. The 'closet' (that is, the concealment of sexuality) serves as an asylum for many gays and lesbians. Hence, a deafening and embarrassing silence remain the stigma of the queer citizens.

These scenarios for strategic litigation by either a strong and genuinely independent equality body or by an autonomous human rights organization essentially revolutionizes perspectives for future development of non-discrimination law in Europe. They give a veritable boost to otherwise "desperate" cases with no individual plaintiffs available. There are a number of factors in various segments of non-discrimination protection preventing individual plaintiffs from launching a case, including *inter alia*:

- Low awareness about legal possibilities to seek judicial redress, frequently combined with imperfect knowledge of the official language of procedures (very often affecting migrants);
- Serious physical or mental handicaps (in the case of disabled people);
- Age of affected victims (in the cases of both youngsters and elderly people);
- Religious considerations and subordinated status (e.g., women in some traditional Islamic families);
- A fear of public disgrace and considerations of privacy, etc.

Various fact-finding missions initiated by ACCEPT indicate that LGBT persons are commonly intimidated and harassed by police forces. Under the threat of getting outed, victims pay bribes and rarely initiate legal action.⁹³ It is therefore ever important to promote this tool of cause lawyering⁹⁴ by

⁹⁰ Case C-81/12, *Asociația ACCEPT v. Consiliul Național pentru Combaterea Discriminării*, EU:C:2013:275. For an extensive comment on the case, see U. Belavusau, 'A Penalty Card for Homophobia from EU Non-Discrimination Law' (2015) 21 (2) *Columbia Journal of European Law* 353.

⁹¹ Art. 9(2) Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2000 No. L303/16.

⁹² See P. Rabinow (ed.), *The Foucault Reader* (New York, NY: Pantheon Books, 1984), p. 294.

⁹³ For reports of ACCEPT, see <http://accept-romania.ro/publicatii/>.

⁹⁴ In the literature, a vast number of alternative terminology is used to address cause lawyers, including social justice lawyers, public interest lawyers, rebellious lawyers, progressive lawyers, equal justice lawyers, critical lawyers, etc. Driven by altruism, empathy, self-interest, mixed motives, such lawyers advocate for a social cause rather than for a corporate interest or protection of individual concerns. For various accounts, see A. Sarat & S. Scheingold (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford: Oxford University Press, 1990). In the

both the equality bodies (in the sense, of the equality Directives) and independent NGOs, in addition to the traditional focus on individual plaintiffs. This new wave of strategic litigation may yield its precious fruits for the mobilization of social movements representing protected minorities.⁹⁵ The litigation track of ACCEPT (essentially *actio popularis*) creates a new legal opportunity for gay and lesbian organizations in Luxembourg after their substantial defeat in the “gay cases” in the 1990s-2000s.⁹⁶ The initial political opportunity in the Member States and EU level – where gay organizations started their lobbying not earlier than in the 1990s, compared to the feminist organizations effectively exploring both legal and political EU opportunities⁹⁷ – was equally low.⁹⁸ Enabled with sufficient financial and information resources (a task which should be duly understood as an objective of EU investments), this focus on social movements is capable of strengthening equal opportunities in Europe under the double vigilance of EU institutions and civil society.⁹⁹

Right to love as the proper framework for analysis

Given the political climate in some Member States, as well as anti-gay public opinion, it is clear that once the entry option for the gay families coupled with a more effective deployment of Article 19 TFEU principles, begins to function as it should within the European Union, the less-liberal Member States will do their best to block the application of free movement to gay citizens’ family members. Different exceptions are likely to be invoked in order to justify discrimination. A similar situation occurred in the aforementioned American case, with a gay couple legally married in Maryland seeking recognition of rights derived from their marriage in Ohio. Expectedly, Ohian authorities did their best to prevent such a recognition. At which point, the cause lawyers used this legal opportunity to foster equality in the U.S. Supreme Court.¹⁰⁰

As far as potential morality exceptions are concerned, Karst’s logic can be employed in the analysis of their potential reach. In his fundamental essay on the *Freedom of Intimate Association*, Karst defended a point that “freedom does not imply that the state is wholly disabled from promoting majoritarian views of morality. What the freedom does demand is a serious search for justifications by the state for any significant impairment of values of intimate association.”¹⁰¹ In other words, “we must search for a state interest of very great importance.”¹⁰² The states should not only be allowed to hide behind the screen of “morality,” serious justifications for any limitation need to be provided. Once stricter

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context of LGBT activism, see S. L. Cummings & D. NeJaime, ‘Lawyering for Marriage Equality’, 57 *UCLA Law Review*, 1235 (2010).

⁹⁵ See C. Hilson, ‘New Social Movements: The Role of Legal Opportunity’, 9 *Journal of European Public Policy* 238 (2002).

⁹⁶ See Nico J. Beger, ‘Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)potence of Rights Politics at the European Court of Justice’, 9 *Social & Legal Studies* 249 (2000).

⁹⁷ Currently European Women’s Lobby (EWL) is the largest umbrella organization of women’s associations in the EU. EWL membership extends to all 28 Member States.

⁹⁸ About the low legal and political EU-opportunities for gay activists in the 1990s, see C. Hilson, ‘New Social Movements: The Role of Legal Opportunity’, 9 *Journal of European Public Policy* 238 (2002), at 248-249.

⁹⁹ For the concept of double vigilance in EU law in the context of Roma protection, see M. Dawson & E. Muir, ‘Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma’, 48 *Common Market Law Review* (2011); On social movements and legal opportunity, see M. McCann, ‘Law and Social Movements: Contemporary Perspectives’, 2 *Annual Review of Law and Social Science* 17 (2006).

¹⁰⁰ *Obergefell v. Hodges*, 576 US (2015). For a similar position, see A. Tryfonidou, ‘Same-Sex Marriage: the EU is Lagging Behind’ (29 June 2015) *EU Law Analysis: Blog*, available at: <http://eulawanalysis.blogspot.nl/2015/06/same-sex-marriage-eu-is-lagging-behind.html>.

¹⁰¹ Kenneth L. Karst, ‘The Freedom of Intimate Association’, 89 *Yale Law Journal* 624 (1980), at 627. Or, put differently, “[m]easured against the freedom of intimate association, any governmental intrusion on personal choice of living arrangements demands substantial justification, in proportion to its likely influence in forcing people out of one form of intimate association and into another.” *Id.* at 687.

¹⁰² *Id.* at 672.

scrutiny in such a context becomes a dominating standard, the states will start losing overwhelmingly and systematically, as the majority of anti-gay policies are essentially entirely deprived of any sense and largely aim at the perpetuation of prejudice,¹⁰³ being “the product of folklore and fantasy rather than evidence of real risk of harm.”¹⁰⁴ The potential dangers of such new standard for the states' ability to regulate marriage are evident.¹⁰⁵ Restricting marriage and non-marital intimate association will be extremely difficult, which is a good thing, as “where marriage is involved the state does not have a contracting party's choice to accept or reject a compact.”¹⁰⁶

There is no room, in the European legal context, for the imposition of Karst's vision on the Member States willing to suppress certain forms of intimate association at the national level following the perceived interests of the majority of their citizens. However, the Union can apply Karst's reasoning when the law of such a Member State is forming an obstacle for a couple exercising free movement rights in the EU, i.e., once the operability of the entry option is at stake. In a situation when the achievement of the goals of the EU Treaties is threatened, the strictest scrutiny is to be required.

Unlike in the free movement of goods,¹⁰⁷ public morality is not included among the Treaty grounds on which a Member State willing to justify a restriction can rely. While Article 21 (1) allows for “limitations and conditions laid down in the Treaties and by measures adopted to give it effect”¹⁰⁸ the most commonly used *lex specialis* instrument, Article 45 (3) only includes “public policy, public security and public health”¹⁰⁹ among the possible grounds. It seems that deviating using these exceptions in order to justify non-recognition of same-sex partnerships or marriages is virtually impossible, since, in the situation when the usability of health and security arguments can be dismissed right away, public policy cannot possibly consist in discriminating on the basis of sex.¹¹⁰

While it is ultimately up to the Court to establish the possible extent of exceptions from the application of the entry option, the text of the relevant provisions as well as the position usually taken by the Court in the cases involving deviations from the main Treaty rule make it clear that any exceptions are to be interpreted restrictively and do not entitle the Member States to discriminate. This means that Union law is unlikely to be of assistance for any Member State in CEE seeking exceptions from general application of the law of free movement of persons in order to respect the homophobic opinion of the majority.¹¹¹

¹⁰³ The need for the state of Hawaii to justify its policy of exclusion of same sex couples from access to marriage was at the bottom-line the Hawaii Supreme Court case of *Baehr v. Lewin*, 852 P.2d 44, 74 (Haw. 1993). The Hawaii Circuit Court then held that the State failed to meet the strict standard with the policy justifications it provided. See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996). For the analysis of other relevant cases decided by the U.S. state courts, see, for example, ‘Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe’, 116 *Harvard Law Review* 1016 (2003).

¹⁰⁴ K. L. Karst, ‘The Freedom of Intimate Association’, 89 *Yale Law Journal* 624 (1980), at 684-85.

¹⁰⁵ See *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring); see also Karst, *id.*, at 670-71.

¹⁰⁶ Karst, *Id.*, 652.

¹⁰⁷ Article 36 TFEU; see, e.g., Case C-121/85 *Conegate Ltd. v. Her Majesty's Custom and Excise* [1986] E.C.R. 1007, ¶ 3 (interpreting Article 36 strictly). For a detailed analysis, see U. Belavusau, ‘Sex in the Union: EU Law, Taxation and the Adult Industry’, 4 *European Law Reporter* 144 (2010); F. De Witte, ‘Sex, Drugs and EU Law: The Recognition of Moral and Ethical Diversity in EU Law’, 6 *Common Market Law Review* 1545 (2013).

¹⁰⁸ Article 21 (1) TFEU.

¹⁰⁹ Article 45 (3) TFEU.

¹¹⁰ Such public policy would be in manifest disagreement with the principles on which the Union is founded and used to limit free movement of persons, will amount to the violation of the duty of loyalty. Moreover, rather than disqualifying classes of citizens from moving into a particular Member State, public policy exceptions are to be grounded in personal conduct. See, e.g., Council Directive No. 2004/38, art. 27(20), O.J. L 158/77, at 114 (2004).

¹¹¹ The Polish Declaration on family is manifestly useless in this context, since it cannot possibly justify derogations from EU citizenship and internal market provisions in the Treaties and in secondary law.

Conclusions

EU citizenship provides vertical opportunities for claiming sexual rights, in addition to horizontal developments occurring in certain Member States.¹¹² The federal structure of the EU boasting unique exit and entry options unquestionably broadens the horizon of rights enjoyed by minority communities. Moreover, the current multilevel system of fundamental rights protection in Europe (EU, Council of Europe, national states and a relatively vast number of actors such as the media and NGOs) equally boosts political opportunities for advocacy groups to mobilise around the social issues of gender and sexual equality. As studies by political scientists demonstrate, such groups continuously frame their demands as a matter of ‘European’ discourse by making issues of equality and acceptance one of human rights and domestic responsibilities of the EU community.¹¹³

The ultimate question is whether we are observing a nascent ‘right to love’ distributed through the EU citizenship discourse into the less-fortunate states via the federalising impact of EU law. While the presence of an exit option is indisputably inherent to the nature of virtually any federal system, the legal specificity of the supranational community in Europe, with its goal-oriented reading of competences and the growing awareness of the possible implications of its actions for human rights protection potentially opens a way also to an ‘entry option’ that would oblige Member States to recognise less restrictive or simply different moral choices made by other states.

This paper has demonstrated that outside the ideologically charged areas of sexuality, gender identity and family law, such an ‘entry option’ is already a day-to-day reality in the EU. The careful analysis of the EU harmonization developments in primary and secondary law, as well as of the case law of the Court of Justice through the looking glass of Kreimer’s ‘federalism’ and Karst’s ‘freedom of intimate association’, reveal multiple opportunities for mobilising EU law as a strong shield against homophobia, in particular in Central and Eastern Europe. In this regard, the recent judgement of the US Supreme Court in *Obergefell v. Hodges* (2015) supplies a valuable example of a ‘federalist’ litigation track for the EU. In the future, European LGBT movements will have to further capitalize on the available yet not entirely explored paradigm of EU citizenship – with its entry and exist options for mobile couples – as well as on the *actio popularis* litigation schemes innovatively embedded in EU anti-discrimination law.

112 K. Alter and J. Vargas, ‘Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy’ (2000) 33 *Comparative Political Studies* 452. In citizenship studies ‘vertical’ is sometimes understood as relationship between citizen and state, while ‘horizontal’ absorbs relationship among citizens developing a community with shared loyalties and character. For the purposes of this paper, ‘vertical opportunities’ refer to EU claims while ‘horizontal opportunities’ describe cause lawyering based on national legal system(s).

113 R. A. Cichowski, ‘Legal Mobilization, Transnational Activism and Gender Equality in the EU’ (2013) 28 *Canadian Journal of Law & Society* 209; P. M. Ayoub, ‘Cooperative Transnationalism in Contemporary Europe: Europeanization and Political Opportunities for LGBT Mobilization in the European Union’ (2013) 5 *European Political Science Review* 279; K. Zippel, ‘Transnational Advocacy Networks and Policy Cycles in the European Union: The Case of Sexual Harassment’ (2004) 11 *Social Politics* 57; L.R. Heffer & E. Voeten, ‘International Courts as Agents of Legal Change: Evidence from LGBTQ Persons in Europe’ (2014) 68 *International Organizations* 77.

